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THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

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CHAPTER 1

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants Congress the power to ". . . lay and collect Taxes, Duties, Imports, 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 "[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law."

B. The Supreme Court's Fiscal Philosophy: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317 (1976).

C. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly:

a. Obligated funds in advance of appropriations;

b. Commingled funds and used funds for purposes other than those for which they were appropriated; and

c. Obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.

2. Congress passed the Antideficiency Act (ADA) to curb the fiscal abuses that frequently created "coercive deficiencies" that required supplemental appropriations. The Act consists of several statutes that mandate administrative and criminal sanctions for the unlawful use of appropriated funds. See 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519.

II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter. DOD Financial Management Regulation 7000.14, Vol. 1, p. xix [hereinafter DoD FMR].

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts 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 FMR, Vol. 1, p. xxi.

D. Budget Authority.

1. Congress finances federal programs and activities by granting budget authority. Budget authority is also called obligational authority.

2. Budget authority means "the authority provided by Federal law to incur financial obligations . . ." 2 U.S.C. § 622(2).

a. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-11, Preparation, Submission and Execution of the Budget (June 2002), § 20.4 [hereinafter OMB Cir. A-11], available at http://www.whitehouse.gov/omb/circulars/a11/02toc.html.

b. "Contract Authority," as noted above, is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to pay or disburse those funds absent some additional appropriations authority. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).

3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act. DFAS-IN Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000), ch. 3, para. 0304 [hereinafter DFAS-IN 37-1], available at https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

1. An authorization act is a statute, passed annually by Congress, which authorizes the appropriation of funds for programs and activities.

2. An authorization act does not provide budget authority. That authority stems from the appropriations act.

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

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.

2. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." The Army receives the bulk of its funds from two annual appropriations acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act. DFAS-IN Reg. 37-1, ch. 3, para. 030701.

3. 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, p. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and Government Accountability Office (GAO).

1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. Until 6 July 2004, "GAO" stood for General Accounting Office.

2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.

3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions: Appropriations are subdivided by the executive branch departments and agencies.

a. These formal limits are referred to as apportionments, allocations, and allotments.

b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C. § 1517(a)(2). See DFAS-IN Reg. 37-1, ch. 3, para. 031403.

2. Informal subdivisions: Agencies may subdivide funds at lower levels, *e.g.*, within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are **not** formal subdivisions of funds.

a. Targets are referred to as "allowances."

b. Incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, and the person responsible for

exceeding the target may be held liable for the violation. DFAS-IN Reg. 37-1, ch. 3, para. 031402. For this reason, Army policy requires reporting such overobligations. DFAS-IN Reg. 37-1, ch. 4, para. 040204.L.

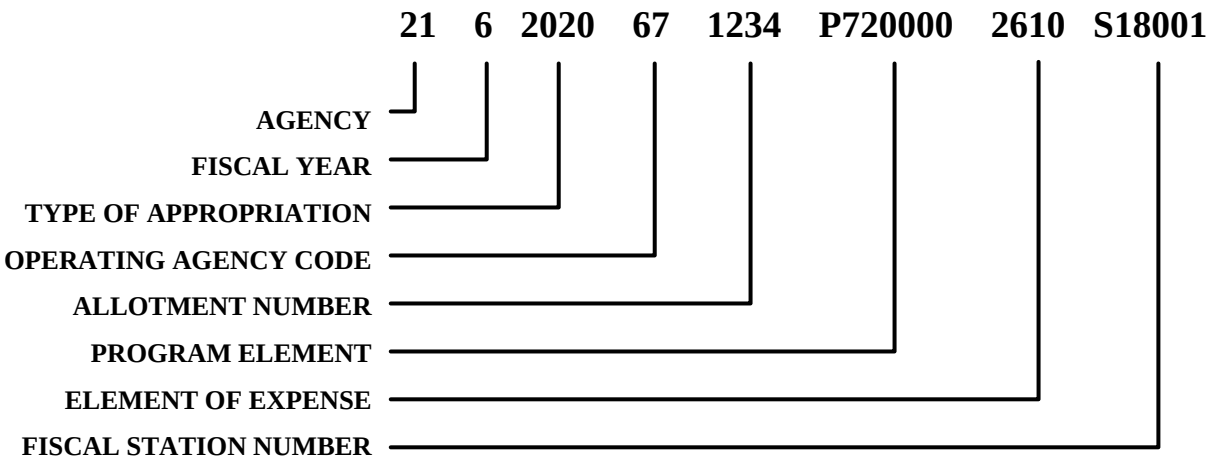
B. Accounting Classifications. See DFAS-IN Reg. 37-100-XX, The Army Mgmt. Structure.

1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to help ensure funds are used correctly.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN Reg. 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN Reg. 37-100-XX, stands for the last two digits of the fiscal year, *e.g.*, DFAS-IN Reg. 37-100-02 is the source for accounting classification data for FY 2002 for the Department of the Army. DFAS-IN 37-100-XX is published annually. Go to https://dfas4dod.dfas.mil/library/.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:



a. The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

b. Other Department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the Fiscal Year/Availability of the appropriation. The "5" in the example shown indicates Fiscal Year (FY) 2005 funds.

(1) Annual appropriations are used frequently in installation contracting.

(2) Other fiscal year designators encountered in installation contracting, less frequently, include:

(a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

(b) Third Digit = 8/2 = Multi-Year appropriation, in this example, funds appropriated in FY 1998 and available for obligation until FY 2002.

d. 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**	**97*0300**
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**

Table 2-1

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year (i.e. Operations & Maintenance, Army funds for FY2004 would be depicted as 2142020).

** Source for the codes found in Table 2-1: DOD FMR, vol. 6B, App. A (Nov. 2001) (found at: http://www.dod.mil/comptroller/fmr/06b/06BApxA.pdf).

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations on Authority.

1. The authority of executive agencies to spend appropriated funds is limited.

2. An agency may obligate and expend appropriations only for a proper **purpose**.

3. 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).

4. An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations -- Purpose.

1. The "Purpose Statute" requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. See 31 U.S.C. § 1301; see also DFAS-IN Reg. 37-1, ch. 8, para. 0803.

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

a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation;

b. The expenditure must not be prohibited by law; and

c. The expenditure must not be otherwise provided for, *i.e.*, it must not fall within the scope of another appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.

a. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.). The major DOD appropriations provided in the annual appropriations act are:

(1) Operation & Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

(2) Personnel -- used for military 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."

b. DOD also receives smaller appropriations for other specific purposes (*e.g.*, Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), Chemical Agents and Munitions Destruction, etc.).

c. Congress appropriates funds separately for military construction.

4. Authorization Acts.

a. Annual authorization acts generally precede DOD's appropriations acts.

b. The authorization act may clarify the intended purposes of a specific appropriation or contain restrictions on the use of the appropriated funds.

C. Limitations -- Time.

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.

a. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations or to liquidate prior valid obligations. Again, however, expired funds are not available for new obligations.

b. There are exceptions to this general prohibition against obligating funds for new work following the period of availability.

2. Appropriations are available only for the bona fide need of an appropriation's period of availability. 31 U.S.C. § 1502(a). See Magnavox -- Use of Contract Underrun Funds, B-207433, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953).

D. Limitations -- Amount.

1. The Antideficiency Act, 31 U.S.C. §§ 1341-42, 1511-19, prohibits any government officer or employee from:

a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).

b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). See 31 U.S.C. § 1517(a)(2).

c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).

d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.

2. Investigating violations. If an apparent violation is discovered, the agency must report and investigate. Violations could result in administrative and/or criminal sanctions. See DOD FMR, vol. 14 (March 2001); DFAS-IN Reg. 37-1, ch. 4, para. 040204; AFI 65-608, Antideficiency Act Violations (1 May 1998), ch. 3, para. 3.1, available at http://www.e-publishing.af.mil/pubfiles/af/65/afi65-608/afi65-608.pdf.

a. The commander must issue a flash report within 15 working days of discovery of the violation. Air Force commanders must submit flash reports within 10 working days.

b. The MACOM commander must appoint a "team of experts," including members from the financial management and legal communities, to conduct a preliminary investigation.

c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. For the Army, investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers (30 Sep 1996).

d. The head of the agency (e.g., SECDEF, for the DOD) must report to the President and Congress whenever a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-11, sect. 145; DOD Directive 7200.1, Administrative Control of Appropriations (4 May 1995), Encl. 5, para. R [hereinafter DODD 7200.1].

3. Individuals responsible for Antideficiency Act violations shall receive disciplinary action commensurate with the circumstances and the severity of the violation. DODD 7200.1, para. D.5. See 31 U.S.C. §§ 1349(a), 1518.

V. FISCAL LAW RESEARCH MATERIALS.

A. Legislation.

1. Titles 10 and 31, United States Code.

2. Annual authorization and appropriations acts.

B. Legislative History.

1. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

2. The legislative history is not binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legal restrictions. See SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203.

C. Decisions.

1. The Comptroller General issues opinions concerning the propriety of appropriated fund obligations or expenditures, except for those described in paragraph 3, below. See 31 U.S.C. § 3529. Activities must request these opinions through finance officer channels in advance of an obligation or expenditure. See DOD FMR, vol. 5, ch. 1 para. 010403.B.2 (May 2001).

2. The fiscal law decisions of the Comptroller General appear in the Decisions of the Comptroller General of the United States, published by the Government Printing Office. Comptroller General opinions also are available at the Government Accountability Office (GAO) website (http://www.gao.gov), through commercial legal research services (*e.g.*, LEXIS, WESTLAW), and in the Comptroller General Procurement Decisions (CPD) reporter.

3. Agency Advance Decisions. See DOD FMR, vol. 5, ch. 1, para. 010403.B.2 and vol. 5, app. E (May 2001). Per the General Accounting Office Act of 1996 (Pub. L. 104-316, § 204, 110 Stat. 3826 (1996) (codified at 31 U.S.C. § 3529)) and, as delegated by the Director, Office of Management and Budget (OMB), the following issue advance decisions for designated categories:

   a. DOD: uniformed service member pay, allowances, travel, transportation, and survivor benefits.

   b. Office of Personnel Management (OPM): civilian pay and leave.

   c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation.

D. Regulations.

1. DOD: DOD 7000.14-R (DOD Financial Management Regulation - 15 Volumes), found at: http://www.dod.mil/comptroller/fmr/

2. Army:

   a. DFAS-IN 37-1, Finance and Accounting Policy Implementation. found at: https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm

   b. DFAS Manual 37-100-XX, The Army Management Structure Fiscal Year 20XX (published annually and provides the accounting classification and structure codes), the FY 2004 version (DFAS Manual 37-100-04, The Army Management Structure Fiscal Year 2004) is found at: https://dfas4dod.dfas.mil/centers/dfasin/library/3710004/. If you are looking for a prior year, replace the final two digits above ("04") with the last two digits of the fiscal year you are searching for.

   c. To locate Army (and DOD) regulations dealing with a particular issue:

(1) Go to the Consolidated Publications Webpage within JAGCNET, found at: https://www.jagcnet.army.mil/LaawsXXI/cds.nsf (note: you will need to enter a user name and password for access to this site);

(2) Scroll down the left-hand side of the webpage until you reach the link "Search," then click on this link;

(3) This search function will allow you to look for keywords within all publications found in JAGCNET. You can also perform electronic searches at the U.S. Army Publishing Agency's electronic publications webpage, found at http://www.usapa.army.mil/, but the search function at that site only searches the titles of the regulation not the actual text within the regulation.

3. Air Force:

a. AFI 65-601, vol. 1, Budget Guidance and Procedures (17 Nov. 2000), found at: http://www.e-publishing.af.mil/pubfiles/af/65/afi65-601v1/afi65-601v1.pdf;

b. AFI 65-608, Antideficiency Act Violations (1 May 1998), found at: http://www.e-publishing.af.mil/pubfiles/af/65/afi65-608/afi65-608.pdf;

c. DFAS-DE Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Air Force (formerly DFAS-DE 7200.1-R and AFR 177-16), found at: https://dfas4dod.dfas.mil/library/pubs/7000.4-R.pdf;

d. DFAS-DE Interim Guidance on Accounting for Obligations (formerly DFAS-DE 7000.4-R and AFR 170-8), found at: https://dfas4dod.dfas.mil/library/pubs/7000.4-R.pdf;

e. DFAS-DE Interim Guidance on Accounting for Commitments (formerly DFAS-DE 7000.5-R and AFR 170-13), found at: https://dfas4dod.dfas.mil/library/pubs/7000.5-R.pdf;

f. DFAS-DE 7010.1-R General Accounting and Finance Systems at Base Level (15 Feb. 1991), found at: https://dfas4dod.dfas.mil/library/pubs/70101R/7010frnt.htm;

g. DFAS-DE 7010.2-R Commercial Transactions at Base Level (31 Jan. 1996); found at: https://dfas4dod.dfas.mil/library/pubs/70102R/70102frt.htm;

h. DFAS-DE Interim Guidance on Procedures for Travel Accounting Operations (formerly DFAS-DE 7010.3-R), found at: https://dfas4dod.dfas.mil/library/pubs/70103R/7010-3-R.pdf.

E. Government Accountability Office Treatises.

1. The Government Accountability Office has published a four-volume treatise entitled Principles of Federal Appropriations Law (commonly referred to as the "Red Book"). The individual volumes are as follows:

a. Volume 1, 2d ed., GAO/OGC 91-5 (July 1991), found at: http://www.gao.gov/special.pubs/og91005.pdf;

b. Volume 2, 2d ed., GAO/OGC 92-13 (Dec. 1992), found at: http://www.gao.gov/special.pubs/og92013.pdf;

c. Volume 3, 2d ed., GAO/OGC 94-33 (Nov. 1994), found at: http://www.gao.gov/special.pubs/og94033.pdf;

d. Volume 4, 2d ed., GAO-01-179SP (Mar. 2001), found at: http://www.gao.gov/special.pubs/PFALVolumeIV.pdf.

2. General Accounting Office, Accounting Guide, GAO/AFMD--PPM-2.1 (September 1990); Policies and Procedures Manual For Guidance of Federal Agencies, Title 7 (February 1990).

3. General Accounting Office, A Glossary of Terms Used in the Budget Process, GAO/AFMD-2.1.1 (July 1993), found at: http://161.203.16.4/t2pbat6/148403.pdf.

F. Internet Services.

1. Defense Finance and Accounting Service (http://dfas4dod.dfas.mil).

2. Miscellaneous Agency Home Pages, *e.g.*, The Assistant Secretary of the Army for Financial Management and Comptroller (http://www.asafm.army.mil/).

VI. CONTINUING EDUCATION FOR CONTRACT AND FISCAL LAW PROFESSIONALS

A. Basic Courses.

1. Contract Attorneys Course (CAC). Two weeks of basic instruction for attorneys new to the practice of contract law; offered once per year in late July to early August. (If you have substantial contract law experience and take this as a refresher, please keep the purpose of this course in mind.)

2. Operational Contracting. A one-week "mini-CAC" emphasizing contract issues likely to be faced by deployed contract attorneys. (Not suitable for attorneys who have recently taken the CAC or have contract law experience.)

3. Fiscal Law / Comptroller Accreditation Course.

a. Instruction on the statutory and regulatory limitations governing the obligation and expenditure of appropriated funds, and an insight into current fiscal law issues within DOD and other federal agencies.

b. Offered numerous times a year -- three times at TJAGLCS, up to 150 students; once by satellite from the Air Force Judge Advocate General's School, Maxwell AFB, AL, 1500-2000 students; 3-5 times at various locations throughout the world; 3.5-4.5 days.

B. Advanced Courses.

1. Advanced Contract Law Course. Next Course, March 06.

a. Covers specialized acquisition topics. Intended for attorneys with more than one year of contract law experience. The course addresses a wide variety of topics, possibly including: a survey of recent developments in the field of procurement law; competition; competitive sourcing; commercial item acquisitions; contract litigation; environmental contracting; costs and cost accounting standards; deployment contracting; and fiscal law.

b. Offered in alternate years opposite the Contract Litigation Course; up to 150 students per course; 4 ½ days.

2. Contract Litigation Course. Next Course, March 07.

a. Instruction on various aspects of federal litigation before the Government Accountability Office, federal courts, and the boards of contract appeals. Scope of instruction includes the analysis of claims, bid protests, contract disputes, and litigation techniques.

b. Offered in alternate years with the Advanced Contract Law Course; up to 150 students per course; 4 ½ days.

3. Procurement Fraud Course.

a. Instruction on criminal, civil, administrative, and contractual remedies used to combat procurement fraud.

b. Offered every other year (next course June 2006); up to 150 students per course; 2 ½ days.

C. Annual Updates.

1. Government Contract and Fiscal Law Symposium.

a. Annual survey of developments in legislation, case law, administrative decisions, and DOD policy for experienced contract law attorneys.

b. Offered in December at The Judge Advocate General's School; up to 250 students per course; 3 ½ or 4 ½ days.

2. USAREUR Contract/Fiscal Law Course.

a. To provide USAREUR attorneys instruction on a variety of contract law and/or fiscal law topics, including an annual survey of developments in legislation, case law, administrative decisions, and DOD and USAREUR policy.

b. Offered annually in Germany; 50 students per course; 4 ½ days.

VII. CONCLUSION.

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. REFERENCES.

A. U.S. Constitution, Art. I, § 9.

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

C. Department of Defense Appropriations Acts and National Defense Authorization Acts (annual legislation found at: http://thomas.loc.gov/).

D. DOD 7000.14-R, Financial Management Regulations (hereinafter "DOD FMR," found at: http://www.dod.mil/comptroller/fmr/).

E. Department of Air Force, Instr. 65-601, Budget Guidance and Procedures (3 March 2005) , available at http://www.e-publishing.af.mil/pubfiles/af/65/afi65-601v1/afi65-601v1.pdf.

F. Principles of Fed. Appropriations Law, (commonly referred to as the "Red Book") 3d ed., vol. I, chs. 2-4, GAO-04-261SP (January 2004), found at: http://www.gao.gov/special.pubs/3rdeditionvol1.pdf.

G. A Glossary of Terms Used in the Federal Budget Process, GAO/AFMD-2.1.1 (Jan. 1993) (found at: http://archive.gao.gov/t2pbat6/148403.pdf).

H. OMB Cir. A-11, Preparing, Submitting, and Executing the Budget (Jun. 2002), § 51 available at: http://www.whitehouse.gov/omb/circulars/a11/02toc.html.

II. CONSTITUTIONAL, STATUTORY, & OTHER BACKGROUND.

A. U.S. Constitution, Art. I, § 9 provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As a result, Congress must annually pass and the President must sign Appropriations Acts before agencies can expend any money.

B. The Purpose Statute.

1. 31 U.S.C. § 1301(a) provides: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

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

C. Three-Part Test for a Proper Purpose. The Comptroller General has determined the following three conditions must be met in order to expend appropriated funds:

1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.

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

See e.g., Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

III. THE APPROPRIATION ACTS (WHAT ARE THE OBJECTS FOR WHICH THE APPROPRIATIONS WERE MADE?)

A. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." See A Glossary of Terms Used in the Federal Budget Process, p.16, GAO/AFMD-2.1.1 (Jan. 1993).

B. In recent years Congress has, on an annual basis, passed thirteen appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. See generally, Principles of Fed. Appropriations Law, 3d ed., vol. I, ch. 1, 1-26 – 1-27, GAO-04-261SP (Jan. 2004). These annual appropriation acts are typically broken down as follows:

1. Department of Defense.

2. Military Construction.

3. Agriculture, Rural Development, Food and Drug Administration and Related Agencies.

4. Commerce, Justice, and State, the Judiciary and Related Agencies.

5. District of Columbia.

6. Energy and Water Development.

7. Foreign Operations and Export Financing and Related Programs.

8. Interior and Related Agencies.

9. Labor, Health and Human Services, and Education, and Related Agencies.

10. Legislative Branch.

11. Transportation and Related Agencies.

12. Treasury and General Government Appropriations.

13. Veterans Affairs and Housing and Urban Development, and Independent Agencies.

C. Optimally, each appropriation act is signed into law prior to the end of the preceding fiscal year. If that does not occur, consult Chapter 10 (Continuing Resolution Authority and Funding Gaps), *infra*, to determine the impact.

D. Researching Appropriation Acts. In addition to LEXIS™- and Westlaw™ -based research, one can use the Thomas website (http://thomas.loc.gov/) of the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.

E. Defense Appropriations.

1. In each of the two annual appropriations acts devoted to DOD, Congress grants multiple appropriations. See e.g., Department of Defense Appropriation Act for Fiscal Year 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004) (providing 59 separate appropriations to DOD and 3 other appropriations to non-DOD entities); Military Construction Appropriations Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374 (2003) (providing an additional 20 appropriations to DOD).

2. Overview of the Major Defense Appropriations. The following is a list of the larger and more important defense appropriations followed by a general description, extracted from the appropriations acts themselves, of the purposes to which these appropriations may be applied.

a. Military Personnel. Used for "pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations . . . ."

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

c. Other Procurement. There are several other procurement appropriations given to the various services, including one for each of the following: aircraft, missiles, Weapons & Tracked Vehicles, and Shipbuilding and Conversion (Navy only). The language utilized in each of these appropriations is similar to that utilized in the Ammunition Procurement Appropriation above. There is also a residual catch-all procurement appropriation entitled "Other Procurement" which is used for "construction, procurement, production, and modification of vehicles; . . . communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and training devices . . . ."

d. Research, Development, Test and Evaluation. Used for "expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment . . . ."

e. Military Construction. Used for "acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property . . . ."

f. Family Housing Construction. Used for "expenses of family housing for the [Service] for construction, including acquisition, replacement, addition, expansion, extension and alteration, as authorized by law . . . ."

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	97*0300
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Shipbuilding & Conversion	N/A	17*1611		N/A	N/A
Research, Development, Test, & Evaluation	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

Table 2-1

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year (i.e. Operations & Maintenance, Army funds for FY2006 would be depicted as 2162020).

** Source for the codes found in Table 2-1: DOD FMR, vol. 6B, App. A (Nov. 2001).

g. Operations and Maintenance. Used for "expenses, not otherwise provided for, necessary for the operation and maintenance of the [Service], as authorized by law . . . ."

3. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. See GAO, A Glossary of Terms Used in the Federal Budget Process, p.37, GAO/AFMD-2.1.1 (Jan. 1993).

Example: In the FY 2005 O&M, Defense-Wide appropriation, Congress gave the DOD $17,449,619,000 for non-department O&M activities. It also told the DOD that out of that amount, "not to exceed $32,000,000 can be used for emergencies and extraordinary expenses" and "not less than $27,000,000 shall be made available only for the Procurement Technical Assistance Cooperative Agreement Program." Both of these provisions are examples of earmarks. The first is a "ceiling" earmark meaning the DOD may decide to spend less than $32,000,000 for the designated purpose (emergencies and extraordinary expenses) whereas the second is a "floor" earmark meaning the DOD must spend at least that amount on the designated purpose but may decide to spend more.

IV. LEGISLATION IMPACTING THE USAGE OF AN APPROPRIATION.

A. Impacts Found Within the Actual Appropriation.

1. Within the actual appropriation, Congress often provides specific direction on the uses to be made of that appropriation. For example, the language utilized in the "Ammunition Procurement, Army" appropriation, quoted on page 2-5 *supra*, narrowly defines the uses the agency can make of that appropriation. Clearly, we cannot use it to pay the salaries of military service members, even those who carry out the ammunition procurement. Likewise, we could not use those funds to buy engines for attack helicopters.

2. By contrast, the language utilized in the "Operation And Maintenance, Defense-Wide" appropriation, quoted at the top of this page, only broadly prescribes the uses the agency can make of that particular appropriation. Thus, we can use it to pay any expense not covered by a more specific appropriation so long as we determine that expense is necessary and authorized by law.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency. Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-40, GAO-04-261SP (3d ed. 2004). While organic legislation provides the agency with authority to conduct a program, function, or mission and to utilize appropriated funds to do so, it rarely provides any money for the agency, program, or activity it establishes.

1. Organic legislation may be found in appropriation acts, authorization acts, or "stand-alone" legislation. It may also be codified or uncodified..

2. Example: 10 U.S.C. § 111 establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. See e.g., 10 U.S.C. § 1090 (giving the Secretary of Defense the mission to "identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol").

C. Authorization Act.

1. An authorization act is a statute, passed annually by Congress, that authorizes the appropriation of funds for programs and activities. See GAO, A Glossary of Terms Used in the Federal Budget Process, p.17, GAO/AFMD-2.1.1 (Jan. 1993).

2. There is no general requirement to have an authorization in order for an appropriation to occur. By statute, Congress has 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/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law." However, there are no practical consequences if Congress appropriates funds without 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)

3. An authorization act does not provide budget authority. That authority stems from the appropriations act.

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

   b. In the alternative, Congress may also authorize the appropriation of "such sums as may be necessary" for a particular program or function.

      Example: In Section 1063 of the National Defense Authorization Act for Fiscal Year 2002, Congress provided as follows:

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

4. Resolving Conflicts Between an Appropriation Act and an Authorization Act. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-42 to 2-50, GAO-04-261SP (3d ed. 2004).

   a. The general rule regarding statutory construction is "that statutes should be construed harmoniously so as to give maximum effect to both whenever possible." Reduction of District of Columbia Superior Court's Appropriations, B-258163, 1994 U.S. Comp. Gen. LEXIS 746 (Sept. 29, 1994).

   b. If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The "intention of the legislature to repeal must be clear and manifest" in either case, however. Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

c. Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

Example 1: For FY 2002, Congress authorized the appropriation of $1,187,233,000 to the Army for the procurement of ammunition, but later actually appropriated $1,200,465,000 to the Army. The Army may spend the entire $1,200,465,000 for ammunition procurement.

Example 2: For FY 2002, Congress authorized the appropriation of $2,075,372,000 to the Army for the procurement of aircraft, but later actually only appropriated $1,984,391,000 for aircraft procurement. The Army may only spend the lower amount that was appropriated.

d. Differences in Purpose. An authorization act provision will not expand the scope of availability of a particular appropriation beyond what is permitted by the terms of the appropriation act. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-51, GAO-04-261SP (3d ed. 2004). An authorization act may decrease the scope of availability of an appropriation by placing further restrictions on the use of those funds, however.

D. Miscellaneous Statutory Provisions.

1. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds.

Example of Prohibition: 10 U.S.C. § 2246 prohibits DOD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

Example of Authorization: 10 U.S.C. § 520b permits DOD to use its appropriated funds "for the issue of authorized articles to applicants for enlistment."

2. These permissions and restrictions may be either codified or uncodified.

3. The permissions and restrictions may also be either temporary or permanent. If the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. See Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (indicating that a restriction applicable to "this Act or any other Act" does not indicate futurity).

4. Locating Pertinent Statutes.

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

      Example: Statutes pertaining to DOD are typically found in Title 10, so if you want to find a statute dealing only with restrictions on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

   b. You can run a general search on either a specialized legal database, such as LEXIS™ or Westlaw™, on the U.S. Code website (located at http://uscode.house.gov/), or on Cornell University Law School's Legal Information Institute (located at http://www4.law.cornell.edu/uscode/).

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

E. Legislative History.

1. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.

2. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress.

3. 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); 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-14 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).

4. Legislative history may also not be used to justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.) (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).

V. OTHER DOCUMENTS IMPACTING THE USAGE OF AN APPROPRIATION.

A. Budget Request Documentation.

1. Agencies are required to justify their budget requests. OMB Cir. A-11, Preparing, Submitting, and Executing the Budget (July 2003), § 51.

2. Within DOD, Volumes 2A and 2B of the DOD FMR provides guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 2A and 2B:

a. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations (also known as "M documents").

b. Chapter 3 deals with justification documents supporting the Operations Appropriations (also known as "O documents").

c. Chapter 4 deals with justification documents supporting the Procurement Appropriations (also known as "P documents").

d. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (also known as "R documents").

e. Chapter 6 deals with justification documents supporting the Military Construction Appropriations (also known as "C documents").

3. The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.

4. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.

5. Agencies generally place their past and current year budget submissions onto the web.

   a. The President's overall budget materials can be found at: http://www.whitehouse.gov/omb/budget/fy2006/.

   b. The Defense-wide budget materials can be found at: http://www.defenselink.mil/comptroller/defbudget/fy2006/.

   c. The Army's budget materials can be found at: http://www.asafm.army.mil/budget/fybm/fybm.asp.

   d. The Air Force's budget materials can be found at: http://www.saffm.hq.af.mil/FMB/pb/afpb.html.

   e. The Navy's budget materials can be found at: http://164.224.25.30/FY06.nsf.

   f. The National Aeronautic and Space Administration's budget materials can be found at: http://www.nasa.gov/about/budget/index.html.

   g. The Federal Aviation Administration's budget can be fount at: http://www.faa.gov/aba/html_budget/.

   h. The Environmental Protection Agency's budget materials can be found at: http://www.epa.gov/ocfo/budget/index.htm

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

B. Agency Regulations. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 3, GAO-04-261SP (January 2004).

1. Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

2. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

3. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: Although the GAO has determined that all federal agencies may purchase commercially-prepared business cards using appropriated funds, all of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially-prepared business cards (everyone else within DOD must produce their business cards in-house, using their own card stock and printers). See AR 25-30, The Army Publishing Program, para. 7-11 (June 2004); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; and Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999).

4. By regulation, the DOD has assigned most types of expenditures to a specific appropriation. See e.g. DFAS-IN Manual 37-100-XXXX, The Army Management Structure (July XXXX). The manual is reissued every FY. Note: XXXX= appropriate FY.

5. Researching Defense Regulations.

a. The DOD and each service has a website containing electronic copies of most of their regulations. Unfortunately, only the Air Force and Marine Corps websites allow you to perform a search of the text of the regulations; the others only permit a search of the titles to the regulations.

(1) DOD Regulations: http://www.dtic.mil/whs/directives/.

(2) Army Regulations : http://www.usapa.army.mil/.

(3) Air Force Regulations: http://www.e-publishing.af.mil/.

(4) Navy Regulations: http://neds.daps.dla.mil/.

(5) Marine Corps Regulations: https://www.doctrine.quantico.usmc.mil/.

b. JAGCNET. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (found at: https://www.jagcnet.army.mil/LaawsXXI/cds.nsf).

c. There is also a very user-friendly, key word-searchable website dedicated to the DOD Financial Management Regulation, DOD 7000.14-R (found at: http://www.dod.mil/comptroller/fmr/).

C. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative.

VI. NECESSARY EXPENSE.

A. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, B-285066, May 19, 2000 (unpub.). See also Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, 71 Comp. Gen. 402 (1992); Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1983).

B. 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).

C. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. See e.g., 10 U.S.C. § 2241(b) (authorizing DOD to use its appropriated funds for "all necessary expenses, at the seat of the Government and elsewhere, in connection with communication and other services and supplies that may be necessary for the national defense); 10 U.S.C. § 1124 (authorizing the Secretary of Defense to "incur necessary expense for the honorary recognition of a member of the armed forces" who increases the efficiency or improves operations); 5 U.S.C. §§ 4503-4504 (authorizing same for civilian employees).

D. Necessary Expense Defined.

1. "[A]n expenditure is permissible if it is **reasonably necessary** in carrying out an authorized function or will **contribute materially** to the effective accomplishment of that function . . . ." Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (emphasis added).

2. 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).

3. 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).

VII. TYPICAL QUESTIONABLE EXPENSES.

A. Agencies may have specific guidance about "questionable" expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1, ch. 4, §§ K-O (3 March 2005).

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 government benefit, which protects against hazards); 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 (unpub.); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (both providing an excellent overview of each of these 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. 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 all right for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably 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, Dec. 1, 1999 (unpub.).

2. Regulatory-based "Light Refreshments" Exception. Through 27 January 2003, federal agencies commonly paid for "light refreshments" at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: http://www.dtic.mil/perdiem/trvlregs.html. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 (unpub.).

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. Formal Meetings and Conferences. Under the Government Employees Training Act, 5 U.S.C. § 4110, the government may 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." Meals for attendees 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).

(1) For purposes of this exception, a "formal" conference or meeting must have sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and **must involve topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants**. National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005); Corps of Engineers – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993). **Thus, this exception does not apply to purely internal government business meetings/conferences**.

(2) Because this exception 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 limits of the PDS.

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 Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.). 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.

(1) 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, May 12, 1993 (unpub.) (determining that quarterly managers meetings of the Corps did not constitute "training.

(2) 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); AFI 65-601, vol. 1, para. 4.26.1.2.

d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4504 (civilian 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 DoD 1400.25-M, subchapter 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). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1June 2000). See also AFI 65-601, vol. 1, para. 4.31.

(3) **NOTE**: 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.

4. Food as an Expense of Hosting Government-Sponsored Conferences. GAO-sanctioned exception which permits an agency hosting a formal conference to provide food to attendees at the conference. See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

a. Meals and refreshments for attendees can be considered legitimate expenses of hosting the formal conference if their attendance is administratively determined necessary to achieve the conference objectives, and:

(1) the meals and refreshments are incidental to the formal conference;

(2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference; and

(3) the meals and refreshments are part of a formal conference that includes not just the discussions, speeches, lectures, or other business that take place when the meals/refreshments are served, but also includes substantial functions occurring separately from when the food is served.

b. As with the "Formal Meetings and Conferences" Exception, the conference must have sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants.

c. Unlike the "Formal Meetings and Conferences" exception, which permits an agency to pay the cost of meals for their civilian employees who attend formal conferences as an expense of their attendance, this exception permits an agency hosting a formal conference to pay the cost of meals/refreshments for all attendees administratively determined to be necessary to achieve the conference objectives – including non-agency attendees and even private citizen attendees – as an expense of hosting the conference.

5. 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 X 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. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.45 (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).

3. 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 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 the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency's mission performance. As a result, these items were generally considered to be a personal expense. As an exception, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment when the purchase was "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees." This situation generally arose only when there were no commercial eating facilities available for the employees. 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. In June, 2004 the GAO revisited the issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that these items reasonably related to workplace safety in that employees were not allowed to have personal coffee makers in their workspaces due to fire safety concerns. However, the opinion also noted that such equipment results in other benefits for the agency, "including 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."

3. Bottom line: Food preparation and storage equipment may now 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. 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 (fireworks unauthorized entertainment).

1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. See Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club); 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).

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 discussion *infra* Part X of this chapter for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (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 Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, 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. That case "overturned" a long history of Comptroller General's 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. More Restrictive Agency Level Regulations. The military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, para. 7-11 (2 June 2004); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999); but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).

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 allowed). 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 Communications 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 phones 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, Oct. 22, 2001 (unpub.) (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, March 6, 2003 (unpub.).

4. Exception for teleworking. In 1996, 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. 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, para 4.24.6.

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.

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, 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 on 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, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also AFI 65-601, vol. 1, para. 4.47

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, Oct. 28, 1994 (unpub.) (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, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

2. Legislative Exception. Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), added 5 U.S.C. § 5757, permitting agencies to reimburse the following expenses that their civilian competitive service employees incur:

a. professional accreditation;

b. state-imposed professional licenses;

c. professional certification; and

d. the costs of any examinations required to obtain such credentials.

3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. This memorandum is available at: http://www.asmccertification.com/documents/Army-Reimbursement-Policy-20030620.pdf. See also: http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf (Corps of Engineers implementing guidance); Scope of Professional Credentials Statute, B-302548, Aug. 20, 2004 (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). 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 (25 Feb. 1995). 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 and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition."

c. These awards must "be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness." See AR 600-8-22, para. 11-2.

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 MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded. 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, (1 Aug. 1997); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.

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, permitting

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, 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). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1June 2000).

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. Curiously, 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, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). 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. 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. See discussion *infra* Part X of this chapter for an overview.

N. Use of Office Equipment. Use of Office Equip. in Support of Reserves and Nat'l Guard, B-277678, 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 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 may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. 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).

VIII. IS THE EXPENDITURE OTHERWISE PROVIDED FOR IN A SEPARATE APPROPRIATION?

A. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. The Honorable Lane Evans, B-289209, 2002 U.S. Comp. Gen. LEXIS 145 (May 31, 2002); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds available).

Example: The Air Force is planning to buy air-to-air missiles. Arguably, these missiles are a form of "ammunition" enabling it to purchase the missiles with its "Procurement, Ammunition, Air Force" appropriation. There is, however, a more specific appropriation that the Air Force receives called "Procurement, Missiles, Air Force" that should be used instead.

1. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

2. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940).

3. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).

B. If there are two appropriations equally available:

1. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Ret. Board's Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989). Agency discretion is not questioned generally. Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (1938).

2. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

3. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. See Funding for Army Repair Projects, *supra*; See also 10 U.S.C. § 166a (CINC Initiative Funds are in addition to amounts otherwise available for an activity).

C. 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:

a. Civilian employee labor;

b. Rental charges for equipment and facilities;

c. Food, clothing, and fuel;

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

e. Utilities.

2. Investments are "costs to acquire capital assets," DOD FMR, vol. 2A, ch. 1, para. 010201.D.2., or assets which will benefit both current and future periods and generally have a long life span. 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 Operation and Maintenance appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., Department of Defense Appropriation Act for Fiscal Year 2005, Pub. L. No. 108-287, § 8040, 118 Stat. 951 (Aug. 5, 2004) (current threshold is $250,000). Previous appropriation acts established that threshold at $100,000 or less. See, e.g., The Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8040 (Oct. 23, 2002) (establishing the threshold at $100,000); See also DOD FMR, vol. 2A, ch. 1, para. 010201.D.1 (implementing the $250,000 threshold); as well as DFAS-IN Manual 37-100-03, Appendix A, Expense/Investment Criteria (indicating all Army purchases made prior to 20 February 2003 should utilize the old $100,000 threshold and all purchases after 20 February 2003 should use the new $250,000 threshold to determine the proper source of funding).

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 "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. Do 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 computers are being purchased primarily to operate as independent workstations. The agency should use O&M funds for this acquisition. If one of the primary reasons for purchasing the computers is so that their users could tie into a network and communicate with one another via email, the computers should be purchased with Procurement funds.

IX. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

a. U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

b. 31 U.S.C. § 1301(a) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

c. 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): "Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim."

3. Types of Augmentation.

a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). 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).

Example: If the Air Force were to buy air-to-air missiles using its "Procurement, Ammunition, Air Force" appropriation instead of its more specific "Procurement, Missiles, Air Force" appropriation, this would enable it to purchase a greater overall quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

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).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

1. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." See also 41 U.S.C. § 23 (providing similar intra-DOD project order authority.

2. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. 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).

4. 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).

5. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

6. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service has taken 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.

8. 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.

9. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 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.

11. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

C. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

1. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

a. This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.

b. The replacement contract must be coextensive with the original contract, i.e., the agency may reprocure only those goods and services that would have been provided under the original contract.

c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

2. Refunds.

a. Refunds for erroneous payments, overpayments, or 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).

b. 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).

c. 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).

d. 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); To The Sec'y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-111, GAO/OGC 92-13 (2d ed. 1992), 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).

3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments 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).

5. Nonreimbursable Details.

a. 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).

b. Exceptions.

(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, 1988 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).

(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 (Apr. 11, 1988).

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

X. EMERGENCY AND EXTRAORDINARY EXPENSE 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.

Example: In FY 2005, Congress provided the following Operation and Maintenance appropriation to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and **not to exceed $11,144,000 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**, $25,764,634,000 . . .." (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 Directive 7250.13, Official Representation Funds (17 Feb. 2004, w/ change January 12, 2005); DOD FMR, vol. 10, ch. 12, para. 120222.B.

b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (12 March 2004).

c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (17 Feb. 2004).

d. Navy Regulation: SECNAV 7042.7, Guidelines for Use of Official Representation Funds (5 Nov. 1998).

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 (15 Apr. 1983).

b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (1 Dec. 1999) (governing counterintelligence and investigative contingency funds, also known as C-funds).

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, para. 1.18 (1 Dec. 1999) (governing counterintelligence and investigative contingency funds, also known as C-funds).

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.

5. Procedures for Use of Official Representation Funds.

a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. DOD Directive 7250.13, para. 3.1; AR 37-47, para. 2-1; AFI 65-603, para. 1; SECNAVINST 7042.7J, para. 6. Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Directive 7250.13, para. E2.4.3; AR 37-47, paras. 2-1b and 2-5. Official courtesies are defined as:

(1) Hosting of authorized guests to maintain the standing and prestige of the United States;

(2) Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;

(3) Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;

(4) Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;

(5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;

(6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and

(7) Dedication of facilities.

b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

(1) Gifts to non-DOD authorized guests may cost no more than $285.00. See DOD Directive 7250.13, para. E.2.4.1.8 (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 once every three years to take inflation into account and at 67 Fed. Reg. 56,495 was most recently raised to $285) See also AR 37-47, para. 2-4c; AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

(2) If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DOD Directive 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) **NOTE:** While the DoD Directive cited above permits the command to give specified DOD distinguished guests mementos costing less than $40.00, Army Regulation, in quite clear language, precludes giving any gift or memento to DOD personnel: "ORFs will not be used to purchase gifts or mementos of any kind for presentation to, or acceptance by, DOD personnel. Under no circumstances may gifts or mementos for DOD personnel be purchased with ORFs." AR 37-47, para. 2-9d.

c. Levels of expenditures. Levels of expenditures are to be "modest." DOD Directive 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.

d. Prohibitions on Using Representational Funds. DOD Directive 7250.13, para. E2.4.2; AR 37-47, para. 2-10; AFI 65-603, para. 7.2; SECNAVINST 7042.7J, para. 6d.

(1) 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. 12.

(2) Exceptions will not be granted for the following:

(a) Classified projects and intelligence projects;

(b) Entertainment of DOD personnel, except as specifically authorized by regulation;

(c) Membership fees and dues;

(d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

(e) Gifts and mementos an authorized guest wishes to present to another;

(f) Personal items (clothing, cigarettes, souvenirs);

(g) Guest telephone bills;

(h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and

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

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

(3) Use for retirements and change of command ceremonies is generally prohibited, but can be permitted as an exception if approved in advance by the Service Secretary. DOD Directive 7250.13, para. E2.4.2.5; AR 37-47, para. 2-3c; SECNAVINST 7042.7J, para. 6d(10); United States Army School of the Americas – Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).

e. Approval and accounting procedures. AR 37-47, Chapter 3; AFI 65-603, para 8; SECNAVINST 7042.7J, para 8.

(1) Fiscal year letters of authority.

(2) Written appointment of certifying and approving officer.

(3) Written appointment of representation fund custodian.

(4) Requests to expend ORFs must be submitted to the representation funds custodian in advance of an event. Any requests for an event that did receive prior approval must be submitted to the Secretary of the Army or his or her designee for retroactive approval. AR 37-47, para. 3-1e(1).

(5) Legal review.

6. 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.

XI. ANALYZING A PURPOSE ISSUE.

A. Use the Attached Flowchart in Conjunction With the Narrative in Paragraphs B through E below to Conduct a Step-By-Step Analysis.

B. Determine Whether Congress Has Enacted any Statute on Point.

1. Your primary concern should be whether there is a statute or legislation that addresses your intended purchase.

2. Locating Codified Statutory Authority.

a. The U.S. Code is broken down into titles which typically cover a given subject matter area. You may be able to scan through appropriate volumes/chapters to see if there is something on point.

Example: Statutes pertaining to DOD are typically found in Title 10, so if you want to find a statute dealing only with a restriction on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

b. You can run a general search on either a specialized legal database, such as LEXIS™ or Westlaw™, or on the U.S. Code website. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc).

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

Example: I need to know whether I can use appropriated funds to operate golf courses. I would go to the latest index of the U.S. Code Annotated and look under the key word "Golf Courses" to find the cross-reference to 10 U.S.C. § 2246. Note: once again you may have to run alternate searches utilizing synonyms for your topic.

d. Agency Regulations. Agencies will often (but not always) list the statutory authority(ies) upon which the regulation is based. If you can find a regulation dealing with your issue (*see* Part XI.D. *infra*.), you may be able to then locate the underlying statutory authority.

Example: I need to know when I can use appropriated funds to support my post chaplain. AR 165-1, Chaplain Activities in the United States Army (26 May 2000) contains cross-references to 10 U.S.C. §§ 3073, 3547, and 3581. 10 U.S.C. § 3547 contains some minimal guidance on resourcing chaplains.

e. GAO Opinions. You could go onto a legal database such as Lexis-Nexis™ or Westlaw™ to find GAO Opinions related to a given topic and hope that they cross-reference the underlying statutory authority. If the opinion was issued after October 1, 1995, it may also be found at the Government Printing Office (GPO) *GPO Access* website found at: http://www.gpoaccess.gov/gaodecisions/index.html.

f. GAO Redbooks. The GAO has issued a 5-volume treatise on fiscal issues called "Principles of Federal Appropriations Law." It often contains cross-references to underlying statutory authority throughout each of the topical discussions. Volume V also contains a set of comprehensive indexes, including indexes for: 1) U.S. Code cites; 2) statutes at large; 3) public and private laws; and 4) by topic. The treatise can be found at: http://www.gao.gov /legal.htm (near the bottom, right-hand side of the page).

g. Administrative Law Topic/Reference Index. OTJAG Admin Law Division has developed a quick cross-reference guide to many of the more routine issues you may run across. The index cross-references statutes and DOD and Army regulations associated with a given topic. The most recent guide can be found on the LAAWS XXI Forms and Publications Site, by clicking on the "Administrative Law" link under "JAG Publications," at: https://www.jagcnet.army.mil/laawsxxi/cds.nsf.

3. Locating Legislation/Uncodified Authority.

a. Appropriation Acts. Congress typically passes thirteen (13) appropriations acts each year. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. In addition to Lexis-Nexis™ and Westlaw™ -based research, one can utilize the Thomas website within the Library of Congress (http://thomas.loc.gov/) to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.

b. Authorization Acts. Although there is no general requirement to have an authorization act, Congress has enacted a statutory requirement for DOD to have an authorization act each year. As with appropriations acts above, one can use Lexis-Nexis™, Westlaw™, and/or the Thomas website to conduct research.

c. Other Legislation. Outside of the appropriation/authorization process, Congress will often place statutory restrictions on our actions.

d. Issues in Researching Legislation. If Congress does not subsequently codify the legislation, it is often difficult to locate any legislation that restricts our ability to spend appropriated funds. Hopefully, at the head of the agency level, there has been some sort of regulatory or other policy guidance that has been promulgated covering the uncodified restriction.

4. Even assuming you find statutory / legislative authority to conduct your intended acquisition, you must still determine whether there is a regulatory prohibition or other restriction covering that purchase. To do so, *see* Part XI.D. *infra*.

Example: Congress has given us express authorities to carry out procurements of various weapons programs, construction projects, and research projects. We still have various regulations that give us guidance on how we will carry out those programs and projects. For example, Army regulation and policy permits the installation commander to approve repair and/or maintenance projects amounting to no more than $3 million. Congress permits us to carry out projects above this threshold, but by regulation, the agency has withheld the approval authority on such projects.

C. Necessary Expense Test.

1. If there is no statute that authorizes your intended purchase, you will have to apply the necessary expense test to determine if you have authority to carry out your intended purchase. See Part VI *supra* for an overview of this test.

2. If your research uncovers an agency level regulation that addresses your intended purchase (*see* Part XI.D. *infra*), the proponents of that regulation are likely to have used a necessary expense analysis in drafting the regulation. In such a circumstance, you are probably safe relying upon the regulation to make the intended purchase. If after reviewing a regulation, you feel there is a disconnect between what the regulation permits and what should be permitted under a necessary expense analysis, you should consult your next higher legal counsel).

Example: For several years, AR 165-1 has permitted the use of appropriated funds to conduct religious retreats and workshops. These events would include lodging and food and would also be open to service members as well as their families. Prior to enactment of the 2003 DOD Appropriations Act, there had been no express authority given to DOD to carry out these sorts of programs for family members (Note: § 8116 only contained authority to use FY2003 appropriations to carry out such programs so we are also once again without express authority). Using a necessary expense analysis, it would be hard to come up with justification for using appropriated funds to pay for lodging and food for participants, especially for the non-service member participants. Various installations eventually raised their concerns – that the regulation did not mesh with the fiscal rules – to DA-level. This high-level attention resulted in a solution (albeit temporary) being worked out (express authorization from Congress in the form of legislation).

3. It is probably a good idea to have a written document that you retain in your files that addresses the underlying facts as well as your analysis that led to your conclusion that the purchase satisfied the necessary expense test. It would also probably be advisable to have a written document from the requester of the intended items/services that indicates what the underlying facts are.

4. Even assuming you conduct a necessary expense test which leads you to believe you should have the authority to purchase the intended items or services, you still need to determine whether there is a regulatory prohibition or restriction covering that purchase. To do so, *see* Part XI.D. immediately *infra*.

Example: I need to know whether I can buy bottled water for distribution to troops at remote locations in Southwest Asia. I determine there is no statute dealing specifically with this issue. I perform a "necessary expense" analysis and determine that having bottled water for these remotely located troops will definitely contribute materially towards their mission accomplishment (they need water to survive and if the troops are not located near a potable water supply, such as a water buffalo, then bottled water is probably going to be the most effective way to get their water needs replenished). Unfortunately, there are a variety of Army Regulations that place restrictions on the purchase of bottled water, including the approval authority. As a result, looking at just the statutes and doing a necessary expense analysis will not be sufficient.

D. Determine Whether the Agency Has Promulgated any Regulation on Point.

1. Agency Publication Websites. The DOD as well as many of the civilian agencies has a website containing electronic copies of most of their regulations. Most agency publication websites allow you to perform a boolean search of the text of the regulations. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc. If you know the underlying statutory authority, you can also use it as your keyword (i.e. plug in "10 U.S.C. § 2246" or "10 U.S.C. 2246" or "10 USC 2246" as your search term).

a. DOD Regulations (http://www.dtic.mil/whs/directives/).

b. Army Regulations (http://www.usapa.army.mil/). Unfortunately, the Army website only permits a search of the titles (not the text) of the regulations. To search the text of Army regulations, you must use the JAGCNET website.

c. Air Force Regulations (http://www.e-publishing.af.mil/orgs.asp?type=pubs).

d. Navy Regulations (http://neds.daps.dla.mil/).

e. Marine Corps Regulations (http://www.usmc.mil/marinelink/ind.nsf/publications).

f. Joint Publications (http://www.dtic.mil/doctrine/).

2. Use JAGCNET (https://www.jagcnet.army.mil/laawsxxi/cds.nsf) to Search for Publications. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD-level and DA-level regulations plus TJAGSA deskbooks).

3. Specialized Websites. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations specific to the fiscal arena. These include:

a. DOD Financial Management Regulation (http://www.dod.mil/comptroller/fmr/). The DOD Financial Management Regulation, DOD 7000.14-R establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15 volume set of regulations contains a very user-friendly, key word-searchable function.

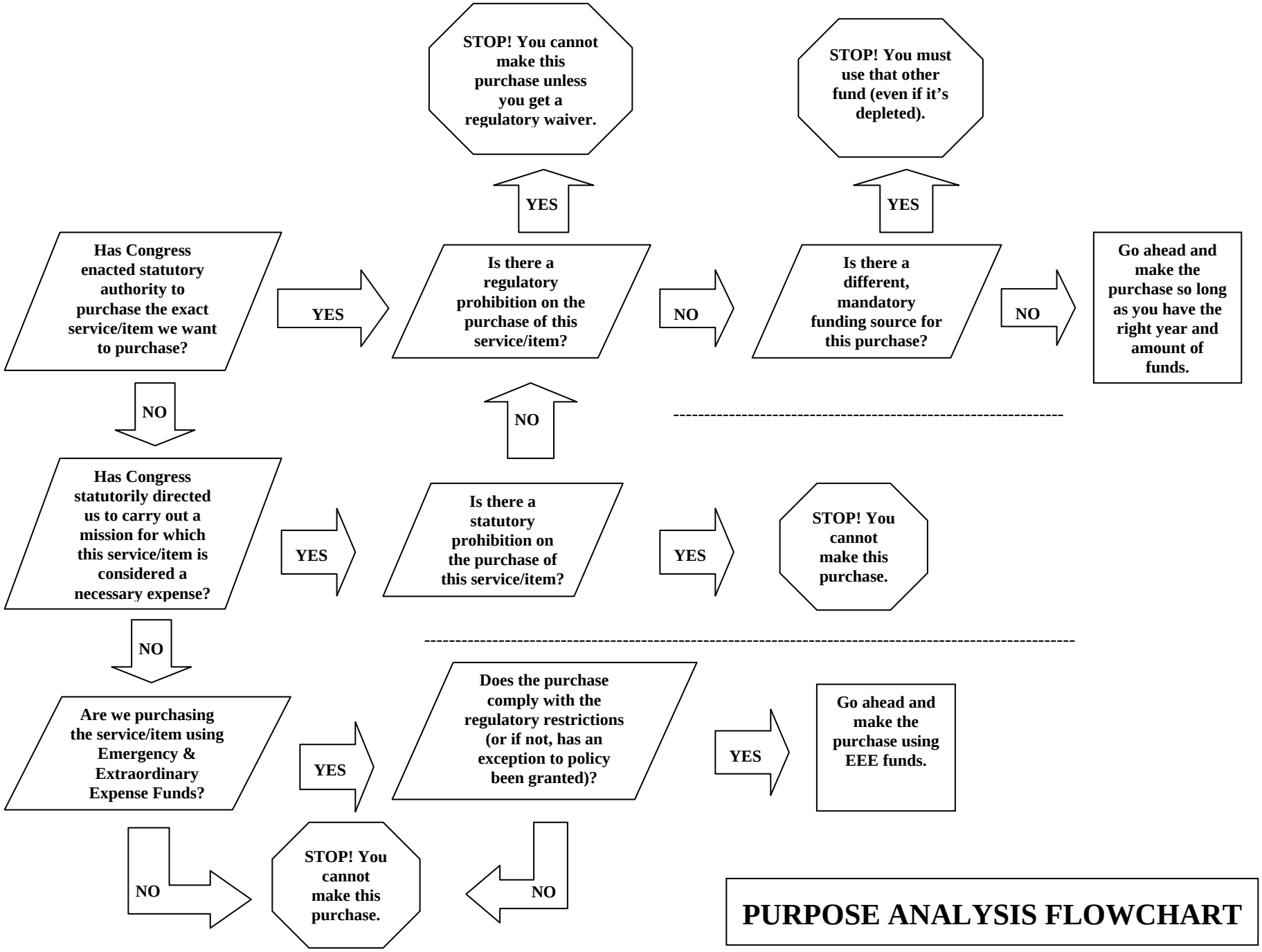
b. Defense Finance and Accounting Service (DFAS) Regulations. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army. You can conduct a search of the overall DFAS library (http://www.dod.mil/dfas/search.htm) only.

E. Emergency & Extraordinary (E&E) Expenses.

1. As a matter of last resort, if you cannot find a statute or legislation that permits your intended purchase AND you do not believe the item / service is necessary, you could request to use E&E funds to make the purchase.

2. The service regulations already contain guidance on the items / services for which the service secretaries have issued "blanket approvals." Your purchase probably will not fit into this category, but each of the regulations permit an exception or waiver provided there is adequate justification.

XII. CONCLUSION.


Has Congress enacted statutory authority to purchase the exact service/item we want to purchase?
YES
Is there a regulatory prohibition on the purchase of this service/item?
YES
STOP! You cannot make this purchase unless you get a regulatory waiver.
NO
Is there a different, mandatory funding source for this purchase?
YES
STOP! You must use that other fund (even if it's depleted).
NO
Go ahead and make the purchase so long as you have the right year and amount of funds.
NO
Has Congress statutorily directed us to carry out a mission for which this service/item is considered a necessary expense?
YES
Is there a statutory prohibition on the purchase of this service/item?
NO
YES
STOP! You cannot make this purchase.
NO
Are we purchasing the service/item using Emergency & Extraordinary Expense Funds?
YES
Does the purchase comply with the regulatory restrictions (or if not, has an exception to policy been granted)?
YES
Go ahead and make the purchase using EEE funds.
NO
STOP! You cannot make this purchase.
NO
PURPOSE ANALYSIS FLOWCHART

CHAPTER 3

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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. **Commitment.** An administrative reservation of allotted funds in anticipation of obligation. Government Accountability Office (GAO), A Glossary of Terms Used in the Budget Process, GAO-05-734SP 32 (Sept. 2005) [hereinafter GAO Glossary].

B. **Obligation**. A definite commitment that creates a legal liability 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.

C. **Appropriations Act**. An appropriations act is the most common form of budget authority. It is a statutory authorization by an Act of Congress to incur

obligations and make payments out of the U.S. Treasury for specified purposes. GAO Glossary, at 13.

D. **Authorization Legislation**. An authorization act is a statute, passed by Congress, which authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems only from the appropriations act. GAO Glossary, at 15.

E. **Period of Availability.** The period of time for which appropriations are available for obligation. If funds are not obligated during their period of availability, then the funds expire and are generally unavailable for further obligation. GAO Glossary, at 22.

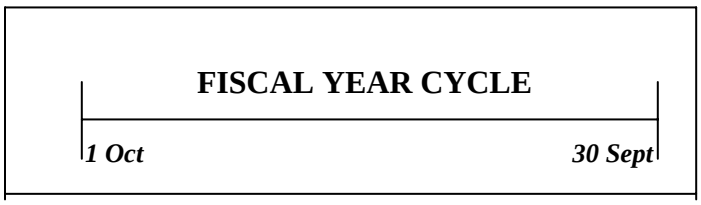
F. **Bona Fide Needs Rule.** The balance of an appropriation is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made during the period of availability. 31 U.S.C. § 1502(a).

G. **Expired Appropriations.** Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

H. **Closed Appropriations.** Appropriations that are 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).

III. LIMITATIONS BASED UPON THE TYPE OF APPROPRIATION.

A. General.



1. The Time Rule: An appropriation is available for obligation for a definite period of time. Agencies must obligate appropriations during this period of availability, or the authority to obligate expires. 31 U.S.C. § 1552.

2. 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. 31 U.S.C. § 1341(a)(1)(B). 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 option exercised after Presidential signature of appropriations act but before OMB apportionment was proper.) Agencies must avoid situations that require "coercive deficiency" appropriations. Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980).

3. 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).

4. Absent express statutory authority in the appropriations act itself, agencies may not obligate funds after their period of availability expires. 31 U.S.C. §1502; National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991).

B. Period of Availability for Various Appropriations.

1. Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated. 31 U.S.C. § 1502; DFAS-IN Reg. 37-1, para. 080302.

2. The annual DOD Appropriations Act typically contains the following provision:

> No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein. See National Defense Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, § 8003, 118 Stat. 951, 953 (Aug. 5, 2004).

3. The appropriations act language controls 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).

4. 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, § 120.9 (May 2003). See Section VII, infra.

5. Service regulations may limit the use of funds. *See* 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 request exception).

C. Types of Appropriations Described by Period of Availability.

1. The largest annual DOD appropriations are:

a. Operations & Maintenance (O&M); and

b. Personnel.

2. The major multiple year appropriations usually provided to the Department of Defense, and their periods of availability, are:

a. RDT&E Appropriations - 2 years;

b. Procurement Appropriations - 3 years;

c. Shipbuilding and Conversion, Navy - 5 years, except that the Navy may incur certain obligations over longer periods;

d. Military Construction Appropriations - 5 years;

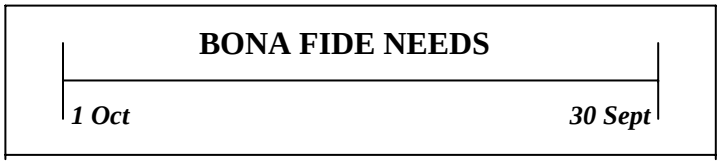
e. Chemical Agents and Munitions Destruction, Defense - various periods.

f. Multiple Year - Varies up to five years depending on the program. DOD receives a variety of special purpose appropriations, some of which are available for more than one year. For example, DOD has a two-year appropriation for overseas humanitarian, disaster, and civic aid.

g. Stock and Industrial Funds (Working Capital Funds) - indefinite (No Year).

3. The language typically used by the Congress is "[T]o remain available for obligation until September 30, XXXX." Defense Technical Information Center--Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).

IV. LIMITATIONS BASED UPON THE BONA FIDE NEEDS RULE.



A. Statutory Basis. The Bona Fide Needs Rules states:

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

B. General.

1. The requirement must represent bona fide needs 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); Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DFAS-IN 37-1, para. 080302.

2. The Bona Fide Need Rule applies only to appropriations with limited periods of availability for obligation.

C. Practical Considerations.

1. 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.

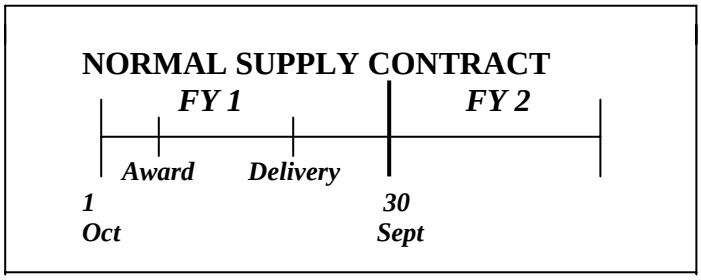
2. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. DFAS-IN Reg. 37-1, para. 070501.

3. The government must intend that the contractor start work promptly and perform in accordance with the contract terms. DOD Reg. 7000.14-R, Financial Management Regulation, vol. 3, para. 080303.

4. The requirements of the government and the nature of a product or service determine when bona fide needs arise.

5. Determining the bona fide needs for an acquisition requires the exercise of judgment.

D. Bona Fide Needs Rule Applied to Supply Contracts.



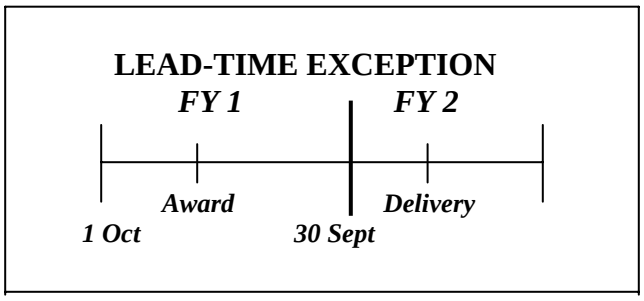
1. Generally, bona fide needs are determined by when the government actually requires (will be able to use or consume) the supplies being acquired.

2. Accordingly, agencies generally must obligate for 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).

3. 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 Reg. 7000.14-R, vol. 3, para. 080303.

4. *Lead-Time Exception to the Bona Fide Needs Rule*. There are two variants that comprise the lead time exception.



a. Delivery Time. This aspect of the exception recognizes that the agency has a need for, but cannot obtain the item, in the current FY. 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 purchase meets the following:

1) the time between contracting and delivery must not be excessive, and

2) 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).

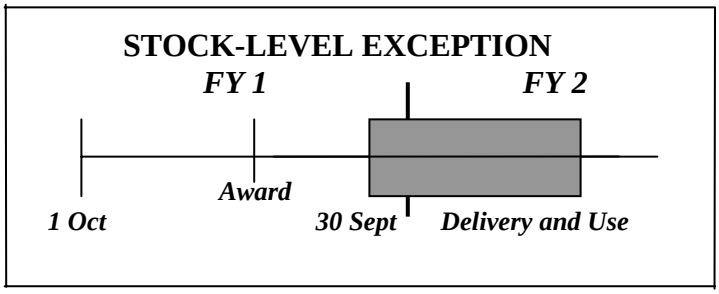
b. Production Lead-Time. This aspect of the exception permits the agency to consider the normal production lead-time in determining the bona fide needs for an acquisition. Thus, an agency may contract in one FY for delivery in the second FY if the material contracted for will not be obtained on the open 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) For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of FY 2005 funds is appropriate for a delivery on

or before a required delivery date of 14 November 2005. (Remember 1 October 2005 is the beginning of FY 2006). This represents the bona fide needs of FY 2005. However, if the government directs the contractor to withhold delivery until after 14 November 2005, there is not a bona fide need for the item in FY 2005 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2006.

2) If the government establishes a delivery date for an item that is beyond the normal lead-time and in the next fiscal year, then the government must use funds for the next fiscal year. In the example above, if the government does not require the item until after 14 November 2005, then the government must use FY 2006 funds.

5. *Stock-Level Exception to the Bona Fide Needs Rule*. The stock level exception permits agencies to purchase sufficient supplies to maintain adequate and normal stock levels.



a. 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.

b. For example, the government may award a contract to maintain the normal, authorized stock levels of repair parts in August 2005 and may require delivery in September 2005, using FY 2005 funds, even if the government knows that the government will not use the repair parts until early October 2006 (i.e., FY 2006).

c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited. Mr. H. V. Higley, B-134277, Dec. 18, 1957 (unpub.).

E. Bona Fide Needs Rule Applied to Service Contracts.

1. *General Rule*: Bona fide needs for services do 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).

2. *Types:* For purposes of the Bona Fide Needs Rule, services fall into two broad categories:

   a. Nonseverable service contracts; and

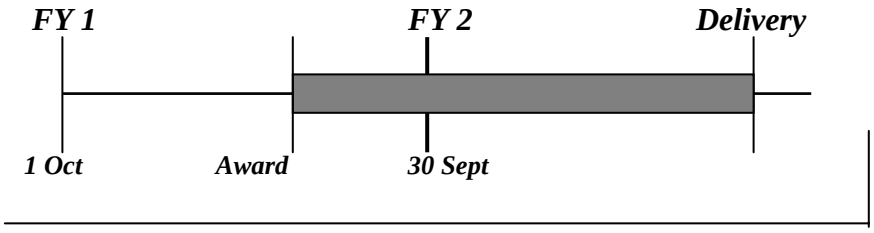
   b. Severable service contracts.

3. *Nonseverable Services*:

   a. A service is nonseverable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years.

   b. For nonseverable contracts, the government must fund the entire effort with dollars available for obligation at the time the contract is executed, and the 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 Appropriation t Training Course, B-238940, 70 Comp. Gen. 296 (1991) ("Leadership for a Democratic Society" 4-week course); 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).

NONSEVERABLE SERVICES

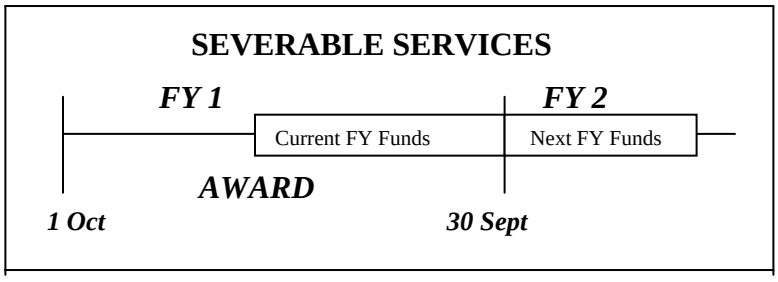


4. *Severable Services*:

   a. A service is severable if it can be separated into components that independently meet a separate need of the government. As a general rule, severable services are the bona fide needs 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).

   b. 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. CY funds for FY1 from date of award to 30 Sept; next FY funds from 1 Oct until the end of contract.



5. *Statutory Exception*. DOD agencies (and the Coast Guard) may obligate funds current at the time of contract award to finance any 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. § 253*l*. 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 94 through 31 Aug 94 and for the first four months of the next option period from 1 Sep through 31 Dec 94).

F. Bona Fide Needs Rule Applied to Training Contracts. Training courses that begin on or about 1 October may constitute a bona fide need of the prior year if:

1. The scheduling of the course is beyond the control of the agency, and

2. The time between award of the contract and performance is not excessive.

DFAS-IN 37-1. tbl. 8-1; Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-233243, Aug. 3, 1989 (unpub.).

G. Bona Fide Needs Rule Applied to Construction Contracts.

1. Contracts for construction must fulfill a bona fide need arising within the funds' period of availability. A determination of what constitutes a bona fide need of a particular year depends upon the facts and circumstances of a particular year. Associate General Counsel Kepplinger, B-235086, Apr. 24, 1991 (unpub). 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.

2. 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. For example, suppose a barracks will not be available for renovation until 27 December 2005 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 2006 and the contract should be awarded in FY 2006. Accordingly, use of FY 2005 funds under these facts violates the Bona Fide Needs Rule.

H. Bona Fide Needs Rule Applied to Multiple Year Appropriations.

1. The Bona Fide Needs Rule applies to multiple year appropriations. Defense Technical Information Center-Availability of Two-Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, B-132900, 55 Comp. Gen. 768 (1976).

2. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See, e.g., DOD Reg. 7000.14-R, Financial Management Regulation, vol. 2A, Budget Formulation and Presentation; AR 70-6.

I. Bona Fide Needs Rule Applied to Revolving Funds. See Chapter 8 for more details.

1. As a general rule, revolving funds are "no-year" funds that do not depend on annual appropriations. 10 U.S.C. § 2210(b) (2000). Because of this, agencies with leftover money at the end of a fiscal year would often "bank" funds in revolving funds rather than let those funds expire.

a. The GAO has ruled that the Bona Fide Needs Rule applies to funds placed by an agency into a revolving fund and an agency may not "bank" funds based on an 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.

b. 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).

1) 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).

2) 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. 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.[1]

J. Bona Fide Needs Rule Applied to Intra-Governmental Acquisitions. See Chapter 7 for more details.

1. The Economy Act (31 U.S.C. § 1535) provides general authority to transfer funds to another agency to enter into a contract under certain conditions.

2. If the other 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 deobligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations in a subsequent fiscal year. 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).

3. When an authority other than the Economy Act is used for an interagency agreement, the deobligation 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

[1] 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.

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)).

V. 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. Bid Protests;

2. Terminations for Default;

3. Terminations for Convenience; and

4. Contract Modifications.

B. 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 a federal court. 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080606.

C. Terminations for Default.

1. If a contract or order is terminated for default, and bona fide needs still exist for the supplies or services, then the originally-obligated funds remain available for obligation for a reprocurement, even if they otherwise would have expired. The agency must award the reprocurement contract for substantially the same item or service without undue delay. Department of Defense Financial Management Regulation, Vol. 3, paragraphs 080303.D, DoD 7000.14-R; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

2. If additional funds are required for the replacement contract, and the funds have otherwise expired, then the original year's funds may be used to fund

the additional cost (and if insufficient or unavailable, then current funds may be used). See DFAS-IN 37-1, tbl. 8-7.

D. Terminations for Convenience of the Government.

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. Department of Defense Financial Management Regulation, DoD 7000.14-R, Vol. 3, 080512 (Aug. 31, 2004).

2. *Exceptions.*

a. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract is terminated for convenience pursuant to a court order or to a determination by the GAO or other competent authority that the award was improper. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).

b. This exception includes terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117.

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 continuing bona fide needs for the goods or services involved;

c. The replacement contract is of the same size and scope as the original contract; and

d. The contracting officer executes the replacement contract without undue delay after the original contract is terminated for convenience. Funding of Replacement Contracts, at 162. DFAS-IN 37-1, tbl. 8-7.

E. Contract Modifications Affecting Price.

1. General. 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.

2. 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. When a price adjustment is attributable to an "antecedent liability," then original funds are available for obligation for the modification. Recording Obligations Under EPA cost-plus-fixed-fee Contract, B-195732, 59 Comp. Gen. 518 (1980); Obligations and Charges Under Small Business Administration Service Contracts, B-198574, 60 Comp. Gen. 219 (1981).

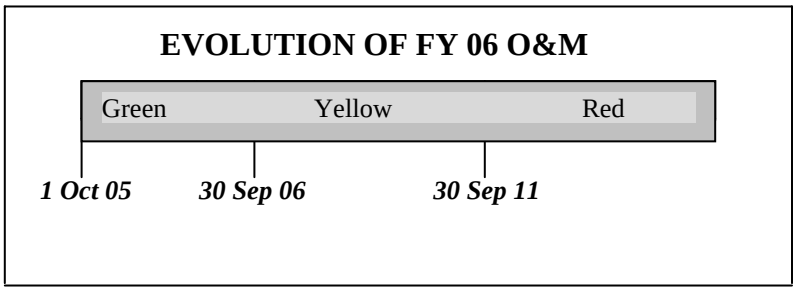
   a. For a closed, fixed appropriations account, obligations for contract changes to a program, project, or activity, may not exceed $4 million in one FY without the approval of the head of the agency. 31 U.S.C. § 1553 (c)(1).

   b. Obligations for contract changes to a program, project, or activity, may not exceed $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).

3. If a contract modification adds capability, expands performance, or increases quantities in response to new or amended requirements, then the original funds may not be available for obligation even if such modification comes within the Changes clause. An obligation resulting from this type of modification may amount to a new obligation that is chargeable to funds current at the time the modification is made. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207433, 83-2 CPD ¶ 401 (1983).

VI. USE OF EXPIRED/CLOSED APPROPRIATIONS.

A. Definitions.



1. **Current Appropriations**. Appropriations whose availability for new obligations has not expired under the terms of the applicable appropriations act. 31 U.S.C. § 1502.

2. **Expired Appropriations**. Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

3. **Closed Appropriations**. Appropriations that are 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.

1. Some adjustments are possible after the end of the period of availability, but before an account closes. 31 U.S.C. § 1553(a); AFI 65-601, vol. 1, para. 6.4.

   a. Appropriations retain their complete accounting classification identifiers throughout the entire five-year period.

   b. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. 31 U.S.C. § 1553(a).

2. 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:

   a. 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). DOD 7000.14-R, vol. 3, paras. 100204.

   b. 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); DOD 7000.14-R, vol. 3, paras. 100205.

3. 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).

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

5. For DOD, there are additional restrictions on using pre-FY 1992 expired appropriations. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1004, 106 Stat. 2481 (1992).

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 obligated and unobligated balances in the account 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.

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.

3. 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).

4. Charges shall be limited to the lesser of:

   (1) the unobligated expired balance of the original appropriation available for the same purpose; or

   (2) one percent (1%) of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2).

5. 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).

VII. MULTIPLE YEAR FUNDS

A. Introduction. There is a clear distinction between multiple year appropriations and multiyear contracts. Proper analysis requires consideration of fiscal law issues independently from the type of contract used.

B. Multiple Year Appropriations.

1. 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, § 120.9 (May 2003)

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

a. Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.

b. Procurement: 3 years.

c. Shipbuilding and Conversion, Navy: 5 years, except that certain obligations may be incurred for longer periods.

d. Research, Development, Test, and Evaluation (RDT&E): 2 years.

e. Military Construction: 5 years.

3. Statutory and Administrative Controls.

a. The Bona Fide Needs Rule applies to multiple year appropriations. Defense Technical Information Center-Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989). A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2004 RDT&E Army Appropriation, which is available for obligation until 30 September 2005, may be obligated for the needs of FY 2004 and 2005; it is not available for the needs of FY 2006.

b. The exceptions to the Bona Fide Needs Rule relating to acquisitions to maintain stock levels and lead-time for special goods also apply.

c. Program managers using procurement appropriations usually want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of the funds helps to ensure stable production runs and lower costs. This policy is referred to as "full funding." DOD Reg. 7000.14-R, vol. 2A, para. 010202.

VIII. MULTIYEAR CONTRACTS AND FULL FUNDING POLICY.

A. Full Funding Policy.

1. It is the policy of the Department of Defense to fully fund procurements that are covered within the procurement title of the annual DOD Appropriations Act. DOD Reg. 7000.14-R, vol. 2A, para. 010202.A.

2. A procurement is fully funded only when funds are budgeted, programmed, and available to cover the total estimated costs of the procurement at the time the procurement action is begun. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.5.

3. There are two basic policy rationales concerning full funding:

   a. When full funding is provided at the outset of a program, Congress and the public can be fully aware of the dimensions and costs of a program. DOD Reg. 7000.14-R, vol. 2A, para. 010202.A.1.

   b. An end item or service budgeted in one fiscal year cannot depend upon a future year's funding to complete the procurement. Full funding of a program eliminates the risk that future funds will not be available. DOD Reg. 7000.14-R, vol. 2A, para. 010202.A.2.

3. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Antideficiency 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 Reg. 7000.14-R, vol. 2A, para. 010202.B; DFARS 217.173.

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 Reg. 7000.14-R, vol. 2A, para. 010202.B.3; DFARS 217.173.

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 Reg. 7000.14-R, vol. 2A, para. 010202.B.4; DFARS 217.174.

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 Reg. 7000.14-R, vol. 2A, 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. AR 70-6, para. 2-2c.(4).

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. Relationship Between Full Funding Policy and Contracting.

1. A procurement is fully funded only when funds are budgeted, programmed, and available to cover the total estimated costs of the procurement at the time the procurement action is begun. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.5.

2. From a budgeting perspective, contracting is a part of the execution phase or acquisition process within the framework of a program. The number of contracts required to procure a defense system, the type of contracts awarded, and the timing of the awards have no bearing upon whether or not an item is fully funded. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.5.

E. Multiyear Contracts

1. Multiyear 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 usually provide that performance during the subsequent years of the contract is contingent upon the appropriation of funds, and provides for a cancellation of payments to be made to the contractor if such

appropriations are not made. Multiyear procurements are budgeted and funded annually. DOD Reg. 7000.14-R, vol. 2A, para. 010203.A.

2. Title 10, U.S.C. § 2306b provides that the head of a contracting agency may enter into a multiyear 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.

3. Similar authority at 10 U.S.C. § 2306c provides that the head of a contracting agency may enter into a multiyear 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 multiyear 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).

VIII. CONTRACT FORMATION AND TIME LIMITATIONS

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; Holly Corp., ASBCA No. 24795, 83-1 BCA ¶ 16,327.

2. There are restrictions on the use and exercise of options. FAR Subpart 17.2.

a. The government must have synopsized the contract with the option(s) in the Government-wide Point of Entry (GPE) and must have priced and evaluated the option at the time of contract award. FAR 5.003, FAR 17.206. If the government did not evaluate the option at the time of the award, or if the option is unpriced, then the government must justify the exercise of the option IAW FAR

Part 6 (the contracting activity must obtain approval for other than full and open competition through the justification and approval (J&A) process).

b. The government cannot exercise the option automatically.

c. The government must determine that the option is the most advantageous means of filling a requirement.

d. The government must have funds available.

e. 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).

f. 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, e.g., 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).

g. 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. Requirement 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.

C. Contracts on the Fiscal Year Cycle.

1. The government may award contracts with terms that coincide with the fiscal year, i.e., from 1 October to 30 September.

2. This technique burdens contracting offices and invites fiscal problems when Congress delays passing appropriations acts and when CR periods or funding gaps occur.

3. Within DOD, consider using the authority of 10 U.S.C. § 2410a to award severable service contracts that cross fiscal years. Civilian agencies should consider using 41 U.S.C. § 253*l* for the same purpose. The Coast Guard, of course, may rely on 10 U.S.C. § 2410a(b).

IX. CONCLUSION

A. Basic Rules Relating to Time.

1. Agencies may not obligate funds before they are appropriated.

2. Agencies may not incur new obligations after the period of availability ends.

3. Appropriations are presumed to be one-year funds, unless expressly stated otherwise.

4. Different appropriations have different periods of availability.

B. Bona Fide Needs Rule.

1. Agencies may obligate funds only for the bona fide needs of the period of availability of the appropriation.

2. "Supply" exceptions to the Bona Fide Needs Rule (lead time and stock level) authorize obligation during the period of availability and delivery of the supplies in a subsequent fiscal year.

3. Severable services are the bona fide need of the year in which performed (though 10 U.S.C. § 2410a permits the award of contracts for such services across fiscal years). Contracts for nonseverable services may

obligate current funds for performance to be completed in a subsequent fiscal year.

C. Multiple-Year Funds.

1. Appropriations are presumed to be annual. Multiple-year appropriations are identified specifically as such in appropriations acts.

2. The Bona Fide Needs Rule applies to multiple-year appropriations.

3. Administrative regulations may impose strict controls on the use of multiple year appropriations in the "out years." These restrictions may be more stringent than those imposed by statute.

D. Rules Governing Expired and Closed Appropriations.

1. Agencies may use expired funds only to liquidate or adjust prior obligations.

2. Fixed appropriations are canceled for all purposes five years after the period of availability ends.

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CHAPTER 4

THE ANTIDEFICIENCY ACT

I. INTRODUCTION.

II. REFERENCES.

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

B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).

C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).

D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).

E. OMB Circular A-11, Preparation, Submission, and Execution of the Budget (June 2005) [hereinafter OMB Cir. A-11], available at http://www.whitehouse.gov/omb/circulars.

F. DOD Directive 7200.1, Administrative Control of Appropriations (May 1995).

G. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 (March 2001) [hereinafter DOD FMR] available at http://www.dtic.mil/comptroller/fmr.

H. Defense Finance and Accounting Service - Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000 w/ changes through Mar. 2005) [hereinafter DFAS-IN 37-1], available at https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

I. Air Force Instruction 65-608, Antideficiency Act Violations (18 Mar. 2005) [hereinafter AFI 65-508] available at http://www.e-publishing.af.mil.

J. Defense Finance and Accounting Service - Denver, Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter AF Procedures for Administrative Control of Appropriations] available at https://dfas4dod.dfas.mil/library/pubs/7200-1.pdf.

K. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (Dec. 2002) [hereinafter DON FMPM], available at http://www.fmo.navy.mil/policies/regulations.htm.

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

III. THE ANTIDEFICIENCY ACT'S FISCAL CONTROLS.

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

1. In Excess of. An officer or employee may not make or authorize an obligation or expenditure that exceeds an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan, B-286661, Jan. 19, 2001; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992).

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

b. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981).

2. In Advance of. An officer or employee may not involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

3. Sequestered Funds. An officer or employee may not make or authorize an expenditure or obligation, or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) and (D). See also OMB Cir. A-11, §§ 20.3 and 20.9.

4. Exceptions. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.

   a. The statute must specifically authorize entering into a contract in advance of or in excess of an appropriation. The Army Corps of Eng'rs' Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

      (1) Example: 41 U.S.C. § 11 permits the DOD and the Coast Guard to contract in advance/excess of an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies but cannot exceed the needs for the current fiscal year (FY). See DOD FMR, vol. 3, ch. 12, para. 1201. Report use of this authority to the next higher level of command. See DOD FMR, vol. 3, ch. 12, para. 120207 (Jan. 2001); DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).

      (2) The authority conferred by 41 U.S.C. § 11 is "contract" authority, and does not authorize disbursements. See AF Procedures for Administrative Control of Appropriations, § 4, para. E.

b. Certain statutes authorize the execution of multiyear contracts. See, e.g., 10 U.S.C. §§ 2306b, 2306c, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

5. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).

a. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract include the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA).

b. The government may not accept supplies or services under these contracts until the contracting officer has given written notice to the contractor that funds are available.

6. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).

B. APPORTIONMENT – THE SECOND LEVEL. 31 U.S.C. §§ 1512 – 1513, 1517(a)(1).

1. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated this authority to the Office of Management and Budget (OMB).

2. Definition. An apportionment is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs. OMB Cir. A-11, § 20.3. It is OMB's plan to spend resources provided by law. OMB Cir. A-11, § 120.1.

3. Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. OMB Cir. A-11, § 120.2. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. See 31 U.S.C. § 1512.

a. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

(1) Military and civilian pay increases;

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

(3) Emergencies involving life or property.

b. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).

4. Prohibitions.

a. An officer or employee of the United States may not make or authorize an obligation or expenditure that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).

b. Technically, the statute does not prohibit obligating **in advance of** an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997). However, service regulations prohibit the practice. See e.g., AF Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are apportioned).

C. ADMINISTRATIVE SUBDIVISIONS – THE THIRD LEVEL. 31 U.S.C. § 1514.

1. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:

a. OMB Cir. A-11, § 150.7. This circular applies to all Executive agencies and requires OMB approval of fund control systems.

b. DOD Directive 7200.1; DOD FMR, vol. 14, app. A.

c. DFAS-IN 37-1, ch. 4; AF Procedures for Administrative Control of Appropriations § 5; DON FMPM, ch. 3.

2. Administrative Subdivision of Funds. OMB Cir. A-11, § 150.7; DOD FMR, vol. 14, app. A.

a. Allocations and Allotments. DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal administrative subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).

b. Allowance/Target/Advisory Guide. DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6, para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. Prohibition. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal administrative subdivision established by regulations. See 31 U.S.C. §1517(a)(2).

Discussion Problem: On 30 August, Fort Tiefort had $170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for $170,000 using these funds, but the Defense Accounting Office recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had $50,000 left in the O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating $50,000 in O&M. Is there an ADA violation?

IV. P-T-A VIOLATIONS AND THE ANTIDEFICIENCY ACT.

A. Purpose. A violation of the Purpose Statute (31 U.S.C. § 1301(a)) may also lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517). Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141; To the Hon. Bill Alexander,
B-213137, 63 Comp. Gen. 422 (1984). See also AF Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation).

1. ADA Analysis. Officials **may** be able to avoid an Antideficiency Act violation if:

a. Proper funds were available at the time of the erroneous obligation;

b. Proper funds were available continuously from the time of the erroneous obligation; and

c. Proper funds were available for the agency to correct the erroneous obligation.

See To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); DOD FMR, vol. 14, ch. 2, para. C.5(b).

2. Common "Purpose" Issues - Operation and Maintenance (O&M) Funds.

a. There is a limitation of $750,000 on the use of O&M funds for construction. This is a "per project" limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable); DOD FMR, vol. 14, ch. 10, para. B.5.a (stating an ADA violation may occur if this limitation is exceeded); cf. AF Procedures for Administrative Control of Appropriations, § 6, para. C.6(a) ("Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation").

b. DOD activities may use O&M funds for purchase of investment items costing not more than $250,000. See National Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8040, 118 Stat. 979 (2004). Use of O&M in excess of this threshold is a "Purpose" violation and may trigger an Antideficiency Act violation. See DOD FMR, vol. 14, ch. 10, para. B.7.d.

B. Time ("Bona Fide Needs Rule").

1. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; AF Procedures for Administrative Control of Appropriations, § 10, para. G.

2. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process on page 6-7 used in determining whether a "Purpose" violation is correctable.

C. Amount. As previously discussed (pages 6-2 through 6-7), making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517. To determine whether similar actions in excess of funds available in an informal subdivision result in an Antideficiency Act violation, follow the same analytical process on page 6-7 used in determining whether a "Purpose" violation violates the Antideficiency Act.

Discussion Problem: The Chief of Staff at Fort Tiefort has decided that the post needs a memento for presentation to all of the local officials, foreign dignitaries, and senior US Government personnel that routinely visit the Fort. Determined to make sure that the memento is as unique as Fort Tiefort, the Chief commissions a world-renowned military artist to create a painting that captures the spirit of Fort Tiefort and the highlights of its service to the nation. The artist charges $50,000 for the painting, which will be hung in the main corridor of the headquarters building. The post also purchases 500 prints of the painting (the Chief wants to make sure they don't run out) to use as mementos for presentation for the visitors. Each print costs $200. Fort Tiefort uses O&M funds to cover the entire $150,000 cost of this venture. Any fiscal problems here?

Discussion Problem: On 1 July 2005, the Fort Tiefort contracting officer awarded a $690,000 contract for the construction of a storage facility. The contract was funded with FY 2005 O&M funds. Things went smoothly until 8 October 2005 when the contracting officer issued what she thought was an in-scope contract modification increasing the contract price by $50,000. The contracting officer cited FY 2005 O&M funds on the modification. On 28 October, the Army Audit Agency (AAA) conducted a random audit of Fort Tiefort's contracting process and determined that the 8 October modification was outside the scope of the original contract. Any fiscal issues here?

Discussion Problem: On 3 August 2005, the Fort Tiefort contracting officer awarded a contract for 100 off-the-shelf computers for a total of $260,000 using FY 2005 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2005. Any fiscal issues here?

D. Additional Antideficiency Act Related Issues.

1. Indemnification Provisions. Generally, the GAO and courts have ruled that "open-ended" indemnification provisions in contracts violate 31 U.S.C. § 1341. See e.g., Union Pacific Railroad Corp. v. United States, 52 Fed. Cl. 730 (2002); United States Park Police Indemnification Agreement, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991; Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov't of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 2; cf. E.I. DuPont De Nemours v. United States, 365 F.3d 1367 (2004) (holding that the Contract Settlement Act of 1944 exempted certain contracts with indemnification provisions from operation of the Antideficiency Act). There are statutory exceptions to this general rule:

   a. Public Law 85-804 (codified at 50 U.S.C. §§ 1431- 1435 and implemented by E.O. 10,789 and FAR Subpart 50.4) allows the Secretary of Defense and Service Secretaries to approve the use of contract provisions which provide that the U.S. will indemnify a contractor against risks that are "unusually hazardous" or "nuclear" in nature.

   b. 10 U.S.C. § 2354 authorizes indemnity provisions for unusually hazardous risks associated with research or development contracts.

   c. 42 U.S.C. § 2210(j) permits the Nuclear Regulatory Commission and Department of Energy to initiate indemnification agreements that would otherwise violate the Antideficiency Act.

2. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. Such judgment is not an Antideficiency Act violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

3. Augmentation. An Antideficiency Act violation may arise if an agency retains and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 US Comp. Gen. LEXIS 163, Feb. 24, 2000 (unpub.).

4. Unauthorized Commitments. Because there is no legal obligation, there is no Antideficiency Act violation. Subsequent ratification could trigger an Antideficiency Act violation. See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E; see also FAR 1.602-3(a).

Discussion Problem: SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

V. THE ANTIDEFICIENCY ACT'S LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342.

A. 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. 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. Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982.

2. 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, 1990 US Comp. Gen. LEXIS 735, July 30, 1990; Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

B. Examples of Voluntary Services Authorized by Law.

1. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

2. 5 U.S.C. § 3111 (student intern programs).

3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

4. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).

5. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

6. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

C. 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.

D. Gratuitous Services Distinguished.

1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982; To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. 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).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, 1987 US Comp. Gen. LEXIS 1815, Jan. 2, 1987 (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

Discussion Problem: For the last year, Ft. Tiefort's MACOM (Major Command) has been pushing subordinate commands to implement the MACOM Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefort that the CG there decided to expand the program. Under Ft. Tiefort's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

VI. VOLUNTARY CREDITOR RULE.

A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.

B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, 1999 US Comp. Gen. LEXIS 211, July 21, 1999 (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, 1989 US Comp. Gen. LEXIS 1305, Aug. 14, 1989; Claim of Bradley G. Baxter, B-232686, 1988 US Comp. Gen. LEXIS 1511, Dec. 7, 1988; Irving M. Miller, B-210986, 1984 US Comp. Gen. LEXIS 1127, May 21, 1984; Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, 1991 US Comp. Gen. LEXIS, July 22, 1991. See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;

2. The claimant shows a public necessity;

3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

VII. PASSENGER CARRIER USE. 31 U.S.C. § 1344.

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not ADA violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).

b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, 1983 US Comp. Gen. LEXIS 115, Dec. 8, 1983.

C. Penalties.

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a $10,000 fine).

VIII. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS.

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518.

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office. DOD FMR, vol. 14, ch. 9, para. 0901.

2. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. See DOD FMR, vol. 14, ch. 9, para. 0902.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A knowing and willful violation of the Antideficiency Act is a Class E felony. Punishment may include a $5,000 fine, confinement for up to two years, or both. See also DOD FMR, vol. 14, ch. 9, para. 903.

IX. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3, 4; DON FMPM, pt. E. See also U.S. DEP'T OF ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (Jan. 1998) available at http://www.asafm.army.mil/fo/fod/ada/ada.asp#manual.

A. Reporting Suspected Violations. An individual learning of or detecting a potential ADA violation must report within 10 working days the possible violation to their chain of command. DOD FMR, vol. 14, ch. 3, para. 030101.

1. Army –the Army shall inform the Director of Resource Management (DRM) at the service activity of any potential violations and the DRM shall immediately notify the commander of the allowance/allotment involved. DOD FMR, vol. 14, ch. 3, para. 030102.

   a. The commander must prepare a "flash report" and send it through the chain of command (MACOM) to the ASA (FM&C) within 15 business days of the discovery. DFAS-IN 37-1, ch. 4, para. 040204.B.1.

   b. The commander will appoint an investigating officer, legal representative, and subject matter expert to the investigating team. DFAS-IN 37-1, ch. 4, para. 040204.B.2.

2. Navy/Marines – Department of Navy commands and activities report potential ADA violations through the chain of command to the Assistant Secretary of the Navy (Financial Management and Comptroller). DOD FMR, vol. 14, ch. 3, para. 030103.

3. Air Force – the Air Force reports potential violations to the Financial Management organization of the Major Command (MAJCOM), Field Operating Activity (FOA), or Direct Reporting Unit (DRU). AFI 65-608, para. 3.3.

B. Investigations.

1. The first step is a preliminary review to gather basic facts and determine whether an Antideficiency Act violation has apparently occurred. DOD FMR, vol. 14, ch. 3, para. 302. Completion of the review is usually required within 90 days. DOD FMR, vol. 14, ch. 3, para. 030201. For Army activities, the preliminary review must be completed within 90 days after discovery of the potential violation. DFAS-IN 37-1, ch. 4, para. 040204. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date. AFI 65-608, para. 3.3.

2. If the preliminary review determines that a violation occurred, a formal investigation must be initiated within 15 business days of the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030204. The purpose of the formal investigation is to determine the relevant facts and circumstances of the potential violation – if a violation has occurred, what caused the violation what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. Typically, the MACOM/MAJCOM commander approves/appoints the IO, who must be adequately trained and qualified to serve as an IO or as an investigative team member. DOD FMR, vol. 14, ch. 4, para. 040401; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DOD FMR, vol. 14, ch. 6, paras. 050201 and 603. Status reports on the investigation are due monthly to the OUSD (Comptroller) office. DOD FMR, vol. 14, ch. 6, para. 603.

3. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050301(E).

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.

2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. "However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action." DOD FMR, vol. 14, ch. 5, para. 050301.

3. Generally, the responsible party will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were 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.

4. Prior to taking disciplinary action, the Department/Agency must submit a preliminary summary report of violation, with legal counsel coordination, to the OSD (Comptroller) and to DFAS. The OSD (Comptroller) will forward the report to the OSD Deputy General Counsel (Fiscal) for a final determination concerning the occurrence of the ADA violation. Following that review, the report will be returned for final Department/Agency action. Memorandum, Under Secretary of Defense (Comptroller), to Department and Agency Comptrollers; subject: Processing of Antideficiency Act (ADA) Violation Cases (19 November 2003).

D. Reports to the President and Congress.

1. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, Ch. 7, para. E. As of 8 December 2004, the report must also be transmitted to the Comptroller General. See Transmission of Antideficiency Act Reports to the Comptroller General of the United States, B-304335, Mar. 8, 2005 (citing 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (2004)).

2. Contents of the report.

a. Administrative information;

b. Nature of the violation;

c. Identification of the responsible individual;

d. Cause and circumstances of the violation;

e. Administrative discipline imposed;

f. Actions taken to correct the violation; and

g. Statement of the responsible individual.

X. CONTRACTOR RECOVERY WHEN THE ADA IS VIOLATED.

A. Recovery Under the Contract.

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).

3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the "invalid" option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

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

Final Discussion Problem: For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the MACOM Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that $70,000 O&M was available for the project. Two months later, the contracting officer awarded an $82,000 contract to Constructors, Limited. To date, the contractor has received $40,000 in progress payments. Yesterday, the Engineer learned that the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any fiscal problems here?

XI. CONCLUSION.

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CHAPTER 5

REVOLVING FUNDS

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students will:

1. Understand the statutes and regulations governing revolving funds.

2. Understand how cash flows into and out of revolving funds.

B. Background. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090102.

1. Revolving funds satisfy the DOD's recurring requirements using a business-like buyer-and-seller approach.

a. The revolving fund structure creates a customer-provider relationship between military operating units and their support organizations.

b. The intent of this structure is to make decision-makers at all levels more aware of the costs of goods and services by making military operating units pay for the support they receive.

2. Revolving funds are not profit-oriented entities.

a. The goal of a revolving fund is to break even over the long term.

b. Revolving funds stabilize or fix their selling prices to protect customers from unforeseen fluctuations.

3. In the past, there were two distinct types of revolving funds.

a. The DOD used stock funds to procure material in bulk from commercial sources, hold it in inventory, and sell it to authorized customers.

b. The DOD used industrial funds to provide industrial and commercial goods and services (e.g., depot maintenance, transportation, and research and development) to authorized customers.

4. In 1991, Congress established the Defense Business Operations Fund (DBOF) and authorized its indefinite continuation in 1994. National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 311, 108 Stat. 2662, 2708-09 (1994). The DBOF combined the DOD's existing nine stock and industrial funds and five defense business functions into a single revolving fund.

5. In 1996, the DOD Comptroller reorganized the DBOF and created several working capital funds including an Army Working Capital Fund, a Navy Working Capital Fund, an Air Force Working Capital Fund, and a Defense-Wide Working Capital Fund.[1]

6. In 1998, Congress repealed the statutory authority (10 U.S.C. § 2216a) for the DBOF. See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, § 1008(b), 112 Stat. 1921, 2114 (1998).

C. General Concepts.

1. Definition. "Accounts authorized by specific provisions of law to finance a continuing cycle of business-type operations, and which are authorized to incur obligations and expenditures that generate receipts." DoD Financial Management Reg., DoD Reg. 7000.14-R, Definitions. Go to http://www.dtic.mil/comptroller/fmr

[1] In 1997, the DOD Comptroller established a separate working-capital fund for the Defense Commissary Agency. This working-capital fund took effect in FY 1999.

2. Revolving funds are designed to give management personnel the financial authority and flexibility necessary to adjust their operations.

   a. Funding is not tied to a particular fiscal year.

   b. Revolving funds operate under a buyer/seller or provider/customer relationship concept.

   c. Revolving funds derive their name from the cyclic nature of their cash flow. See DOD Reg. 7000.14-R, vol 3, ch 19, para. 1902; see also DOD Reg. 7000.14-R, vol. 2B, ch. 0, para.090102.

3. Congress normally provides appropriations to start, increase, or restore a revolving fund.

   a. The working capital resources are referred to as "the corpus" of the fund.

   b. Working capital and assets may also be transferred from existing appropriations and fund accounts.

4. Customer orders provide the budgetary resources necessary to finance the revolving fund's continued operations.

   a. The fund sells inventory and/or services to authorized customer.

   b. The fund then deposits the proceeds of the sales back into the fund to pay for the resources required to operate the fund.

D. Other Federal Agency Revolving Funds. Most agencies have at least one working capital fund covering common agency services and/or supplies. The following is a partial listing of the various authorities applicable to civilian agencies: 33 U.S.C. § 576 (Corps of Engineers); 15 U.S.C. § 1521 (Commerce); 7 U.S.C. § 2235 (Agriculture); 15 U.S.C. §278b (National Institute of Standards and Technology); 20 U.S.C. § 3483 (Education); 22 U.S.C. § 2684 (State); 28 U.S.C. § 527 (Justice); 29 U.S.C. §§ 563, 563a (Labor); 31 U.S.C. § 322 (Treasury); 40 U.S.C. §293 General Services Administration; 42 U.S.C. §3513 (Health and Human Services); 42 U.S.C. §3535(f) (Housing and Urban Development); 43 U.S.C. 1467 (Interior); 43 U.S.C. § 1472 (Bureau of Reclamation); and 49 U.S.C. § 327 (Transportation).

II. STATUTORY BASIS AND REQUIREMENTS.

A. Working-Capital Funds. 10 U.S.C. §§ 2208(a)-(b). The Secretary of Defense may request the Secretary of the Treasury to establish working-capital funds.

1. Purpose. 10 U.S.C. § 2208(a). The DOD uses working-capital funds to:

a. Finance inventories of supplies;

b. Provide working capital for industrial-type activities; and

c. Provide working capital for commercial-type activities that provide common services within or among the DOD's various departments and agencies.

2. Goal. 10 U.S.C. §§ 2208(a), (e). The DOD's goal is to account for and control program costs and work as economically and efficiently as possible.

3. The Charter. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090102.B.

a. The Secretary or Assistant Secretary of the Military Department (or the Director of the Defense Agency) must prepare and sign charter that details the scope of the potential activity group.

b. The Military Department (or Defense Agency) must submit the charter to the DOD Comptroller for approval.

c. The DOD Comptroller will evaluate the potential activity group based on the following criteria:

(1) The products or services the potential activity group will provide to its customers;

(2) The potential activity group's ability to establish a cost accounting system to collect its costs;

(3) The potential customer base;[2] and

(4) Any buyer-seller advantages and disadvantages (e.g., the customers' ability to influence cost by changing demand).

4. Policy. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para 090103.

a. Operating Expenses. 10 U.S.C. §§ 2208(c)-(d), (g)-(h). Working-capital funds pay for their own operations.

1. Congress normally appropriates funds to capitalize working-capital funds initially; however, the Secretary of Defense may also provide capitalizing inventories.

2. Working-capital funds pay the cost of:

a. Supplies acquired, manufactured, repaired, issued, or used;

b. Services or work performed; and

c. Applicable administrative expenses.

[2] The DOD Comptroller's goal is to align resources with requirements.

3. Customers then reimburse working-capital funds from:

a. Available appropriations; or

b. Funds otherwise credited for those costs.[3]

b. Cash Management. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103A. See Memorandum, DOD Comptroller, subject: Working Capital Funds Cash Management Responsibility (5 Jan. 95).

(1) Military Departments (and Defense Agencies) are responsible for the cash management of their working capital funds.

(2) Working capital funds should maintain the minimum cash balance necessary to meet their operational (7-10 days) and disbursement (6 months) requirements.

(3) Working capital funds should strive to eliminate the need to use advance billings to maintain their cash solvency.

c. Contracting in Advance of the Availability of Funds. 10 U.S.C. § 2208(k). Working-capital funds may contract in advance of the availability of funds for:

(1) Unspecified minor military construction projects costing more than $100,000;

(2) Automatic data processing equipment or software costing more than $100,000;

(3) Other equipment costing more than $100,000; and

(4) Other capital improvements costing more than $100,000.

[3] Requisitioning agencies may not incur costs for goods or services that exceed the amount of their appropriations or other available funds. 10 U.S.C. § 2208(f).

d. Advance Billing. 10 U.S.C. § 2208(l). The Secretary of a military department may bill a customer before it delivers the goods or services.[4]

(1) The Secretary concerned must notify Congress of the advanced billing within 30 days of the end of the month in which it made the advanced billing.[5]

(2) The notification must include:

(a) The reason(s) for the advance billing;

(b) An analysis of the effects of the advance billing on military readiness; and

(c) An analysis of the effects of the advance billing on the customer.

e. Limits on Advance Billings. 10 U.S.C. § 2208(l). Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §§ 1007-1008, 112 Stat. 1921, 2114 (1998).

(1) The DOD may not impose advance billings totaling more than $1 billion per year.

(2) The Secretary of Defense must account for, report, and audit the funds and activities managed through working-capital funds separately.

(3) Charges for the goods and services provided through a working-capital fund must include amounts necessary to recover:

[4] But see National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses, B-243710, 71 Comp. Gen. 224, 226 (1992) (concluding that NTIS had no authority to use customer advances that were not directly related to a firm order to pay its operating expenses).

[5] The Secretary of Defense may waive the notification requirement during a war, national emergency, or contingency operation. 10 U.S.C. 2208(l)(2).

(a) The full costs of the goods and services provided; and

(b) The depreciation of the fund's capital assets.

(4) Charges for the goods and services provided through a working-capital fund may not include amounts necessary to recover:

(a) The costs of military construction projects other than minor military construction projects financed under 10 U.S.C. § 2805(c)(1);

(b) The costs incurred to close or realign military installations; or

(c) The costs associated with mission critical functions.

(5) The Secretary of Defense and the Secretaries of the military departments must establish billing procedures to ensure that the balance in their working-capital fund does not exceed the amount necessary to operate the fund.

f. Capital Investments. DOD Reg. 7000.14-R, vol. 2B, Ch9, para.090103C.

(1) Working capital funds must finance the acquisition of most of their capital assets through the fund.[6]

(2) Capital assets include depreciable property, plant, equipment, and software that:

(a) Costs $100,000 or more; and

(b) Has a useful life of 2 years or more.

[6] This requirement does not apply to construction or the capital assets listed in DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103D (e.g., major Range and Test Facility Activities items). DOD Reg. 7000.14-R, vol. 2B, ch9, para 090103C.

g. Construction. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E.

(1) Working-capital funds must finance minor construction projects costing more than $750,000 through the annual Military Construction Appropriations Act.[7]

(2) Working-capital funds may finance project planning and design costs through the fund.

h. The Full Recovery of Costs and Setting of Prices. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103. See DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090104A.

(1) Managers of activity groups must set their prices to recover their full costs over the long run (i.e., they must set their prices to recoup actual/projected losses or return actual/projected gains in the budget year).

(a) Supply management activity groups establish customer rates by applying a surcharge to the commodity costs.

(b) Non-supply management activity groups establish unit cost rates based on identified output measures or representative outputs (e.g., cost per direct labor hour, cost per product, cost per item received, cost per item shipped, etc.).

(2) Prices normally remain fixed during the budget year.[8]

(a) This is known as the stabilized rate policy.[9]

[7] Projects costing more than $500,000 (not $750,000) must be approved by the DOD Comptroller and identified on the annual operating budget (AOB) prior to execution to avoid an Antideficiency Act violation. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E.

[8] This provision does not apply to depot maintenance activity groups. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103H.2. A depot maintenance activity group must recoup operating losses or return operating gains of $10 million or more in the current fiscal year (or the 1st quarter of the next fiscal year in the case of 4th quarter gains or losses). DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103H.4.

(b) This policy protects customers from unforeseen inflationary increases and other cost uncertainties.

i. Revenue Recognition. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103O.

(1) Working-capital funds must recognize revenue and associated costs in the same accounting period.

(2) Beginning in FY 2000, non-supply management activity groups must use the "Percentage of Completion Method" of recognizing revenue.

(3) Working-capital funds may not recognize an amount of revenue that exceeds the amount specified in the order.

j. Apportionments and Budgetary Resources.[10] DOD Reg. 7000.14-R, vol. 3, ch. 19, paras. 1902 and 1903.

(1) The Office of Management and Budget (OMB) apportions appropriations and contract authority to working-capital funds by means of a DD Form 1105.

(2) Working-capital funds may not incur obligations in excess of its apportioned budgetary resources or total approved operating costs.

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[9] The "stabilized rate" is defined as "the cost per direct labor hour (or other output measure) customers are charged for the products and services provided by the depot or activity group . . . [It] is determined by taking the approved Direct Labor Hour rate (or other cost per output measure) for the budget year and adjusting it for both inter-Fund transactions (adjustments to reflect changes in the costs of purchases between activity groups within the Fund), and for the impact of prior year gains or losses as reflected by the [Accumulating Operating Result]." DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090104B.

[10] The following budgetary resources are available for apportionment: (1) appropriations; (2) unobligated balances available at the beginning of the FY; (3) reimbursements and other income; (4) recoveries of prior year obligations; (5) restorations; and (6) anticipated contract authority. Other assets (e.g., inventories and capital assets) are not budgetary resources. DOD Reg. 7000.14-R, vol. 3, ch. 19, paras. 190203 and 190205.

(3) Working-capital funds may not obligate the difference between the fund's total budgetary resources and the amount of contract authority the OMB has apportioned to it.

(4) Working-capital funds must maintain a positive budgetary balance.

III. DEFENSE WORKING CAPITAL FUNDS.

A. Types of Funds. DOD Reg. 7000.14-R, vol. 2B, ch. 9.

1. Supply Management Activity Groups.[11]

a. Supply management activity groups provide a means of accounting for and financing the purchase, storage, and sale of common use items and depot level repair assemblies.

b. Each supply management activity group acquires materials and supplies with its appropriations and other cash accounts. These transactions increase the activity group's inventory and decrease its cash.

(1) The materials and supplies are held in inventory until the activity group issues (sells) them to authorized customers.

(2) Examples of the types of materials and supplies that supply management activity groups typically acquire include:

(a) Nonstandard end items of equipment that are not centrally managed and have a standard unit price of less than $25,000;

[11] These types of funds were previously known as Supply Management Business Areas or Stock Funds.

(b) Assemblies, spares, and repair parts that are reparable at the depot level or below;

(c) Spares and repair parts which are not reparable; and

(d) Food, clothing, and petroleum products.

c. When the supply management activity group issues (sells) supplies to authorized customers, the activity group charges the supplies to the customers' account. These transactions increase the activity group's cash and decrease its inventory.

2. Non-Supply Management Activity Groups.[12]

a. Non-supply management activity groups finance the operating costs of major service units, such as arsenals, depots, and shipyards.

b. Non-supply management activity groups provide services on a reimbursable basis to authorized customers.

(1) Non-supply management activity groups do not maintain inventories of finished products.

(2) Non-supply management activity groups generate work by accepting customer orders.

3. Management Funds. 10 U.S.C. § 2209.

a. The DOD uses management funds to conduct operations:

(1) Financed by at least two appropriations;

(2) Whose costs may not be distributed and charged to those appropriations immediately.

[12] These types of funds were previously known as Depot Maintenance Business Areas or Industrial Funds.

(a) There is an Army Management Fund, a Navy Management Fund, and an Air Force Management Fund.

(b) Each fund consists of:

(1) A corpus of $1 million; and

(2) Any additional funds appropriated to the fund.

b. A military department may use a management fund to procure goods and services; however, the military department responsible for the procurement must have appropriations available to reimburse the fund immediately.

IV. OTHER REVOLVING FUND AUTHORITIES

A. The Clinger-Cohen Act of 1996.

1. General. Section 5112(e) of the FY 1996 National Defense authorization Act (Pub. L. No. 104-106)(permanently codified at 40 U.S.C. § 14129e)) instructed the Director, Office of Management and Budget (OMB), to designate as considered appropriate, one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

2. Implementation.

a. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT).

b. The scope of the designation is limited to programs that are funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 757. These programs include the Federal Systems Integration and Management Center (FEDSIM) and Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs.

1. Information on FEDSIM can be found at: http://www.gsa.gov/Portal/content/offerings_contentJsp?channelId=-13985&programId=8061&contentOID=118132&contentType=1004&cid=

2. Information on FEDCAC can be found at: http://www.gsa.gov/Portal/content/offerings_content.jsp?contentOID+119556&contentType=1004.

c. The OMB designation, in combination with 40 U.S.C. § 757 provides separate authority for acquisition from these GSA programs.

d. If the Clinger-Cohen Act applies, the Economy Act is inapplicable.

e. Obligation. Orders placed pursuant to the Clinger-Cohen Act shall be treated for obligational purposes s if they were placed with commercial activities. In other words, obligation occurs upon the formation of a binding agreement between the ordering agency and the GSA and deobligation is required to take place merely because the ordering agency's appropriation has expired. See DFAS-IN Reg. 37-1, para. 080609. That does not imply, however, that those funds may be used for other purposes in addition to or in lieu of what was included in the interagency agreement. See Continued Availability of Expired Appropriation for Additional Project Phases, B-286929m April 25, 2001 *available at*: http://www.access.gpo.gov/su_docs/aces/aces170.shtml.

f. As with Economy Act orders, agencies may not circumvent the competition requirements by placing an order against a contract under one of these programs which falls outside the scope of that contract. See e.g., Floro & Associates, B-285451.3; B-285451.4, 2000 CPD ¶172 (GAO concluded GSA's task order for "management services" was materially different from that of the underlying contract, which required "commercially off-the shelf hardware and software resulting in turnkey systems for GSA's client agencies").

B. Franchise Funds.

1. Background. Congress has decided that competition between agencies on services that were common between the various agencies would result in increased efficiency and lower cost. As a result, Section 403 of the Government Management Reform Act of 1994, Pub. L. no. 103-356, 108 Stat. 3410, 3413 (found at 31 U.S.C. § 501 note) established a pilot "franchise fund" program. These franchise funds are a special version of working capital funds which permit other agencies (not just the franchise fund's sponsor) to place orders.

2. The Pilot Program. The Office of Management and Budget (OMB) selected six agencies to run pilot programs covering capital equipment, automated data processing systems, and financial management/management information systems. The following agencies have authority to establish franchise funds:

a. Department of Veterans Affairs. See Pub. L. No. 104-201, 110 Stat. 2874, 2880 (1996);

b. Environmental Protection Agency. See Pub. L. No. 104-204, 110 Stat. 2874, 2912-13 (1996);

c. Federal Aviation Administration. See Pub. L. No. 104-205, 110 Stat. 2951, 2957-58 (1996);

d. Department of Interior. See Pub. L. No. 104-208, §113, 110 Stat. 3009, 3009-200 (1996); and

e. Department of Treasury. See Pub. L. No. 104-208, 110 Stat. 3009, 3009-316, -317 (1996).

3. Obligation. The obligation rules of the franchise funds work similarly to the other non-Economy Act authorities. Upon entering into a binding interagency agreement, the ordering agency obligates funds and need not deobligate upon expiration of the ordering agency's appropriation. The interagency agreement establishes the boundaries on the amount to be obligated, however. In addition, if the work is accomplished at a lower rate than initially anticipated, the remaining obligated fund may not be used to pay for other work not covered by the initial interagency agreement.

V. GENERAL FISCAL PRINCIPLES RELATED TO REVOLVING FUNDS.

A. The Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). The statute requires an official or agent of the Government to deposit money received from any source in the Treasury without deduction for any charge or claim.

1. General Rule.

a. Income generated by a revolving fund represents money collected for the use of the United States.

b. A revolving fund may only withdraw or expend this income in consequence of an appropriation made by law.

c. Retention of customer funds by Working Capital Fund. See 10 U.S.C. §§ 2208, 2210; see also 31 U.S.C. § 322(d). Congress has expressly created an exception to the Miscellaneous Receipts Statute permitting working capital funds to retain customer funds ("The fund shall be reimbursed . . . from amounts available to the Department or from other sources, for supplies and services at rates that will equal [its] expenses of operation . . . Amounts the Secretary decides are in excess of the needs of the fund shall be deposited . . . in the Treasury as miscellaneous receipts."). Once the customer funds are transferred into the revolving fund, however, the ordering agency must comply with the normal fiscal rules concerning obligation and bona fide needs. Agencies, therefore, may not "bank" or "park" their money in a revolving fund to prolong its life. See Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Matter of: Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001 *available at*: http://www.access.gpo.gov/su_docs/aces/aces170.shtml.

B. The Purpose Statute. 31 U.S.C. § 1301. The statute requires federal agencies to apply appropriations only to the objects for which Congress made the appropriations.

1. Restrictions on the Use of Revolving Funds.

a. Federal agencies may only use revolving funds for expenditures that are reasonably connected to the authorized activities of the fund. See The Honorable Robert W. Kastenmeier, B-230304, 1988 WL 27283 (C.G. Mar. 18, 1988) (unpub.) (concluding that Federal Prison Industries, Inc., could use its revolving fund to construct industrial facilities and secure camps to house prisoners engaged in public works, but not general penal facilities or places of confinement); see also GSA – Working Capital Fund, B-208697, 1983 WL 27433 (C.G. Sep. 28, 1983) (unpub.) (concluding that GSA could not use its working-capital fund for its mail room, library, and travel services because these items were not specifically authorized); To the Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356, 358 (1960) (concluding that a proposal to finance and operate a centralized silver reclamation program was not the type of operation the VA's supply fund authorized).

b. A revolving fund must deposit any money generated by using the fund for an unauthorized purpose in the Treasury as a miscellaneous receipt. See To the Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356, 358 (1960) (stating that the VA must deposit collections from the sale of reclaimed silver and scrap gold must be deposited in the Treasury).

2. Restrictions on the Use of Customer Appropriations. DOD Reg. 7000.14-R, vol. 11B, ch. 50.

a. A revolving fund customer may not use its appropriated funds to do indirectly what it may not do directly.

b. Appropriated funds cited on reimbursable orders:

(1) Are only available for purposes permissible under the source appropriation; and

(2) Remain subject to restrictions applicable to the source appropriation.

C. The Bona Fide Needs Rule. 31 U.S.C. § 1502(a). The statute states that an appropriation limited to a definite period is only available for the payment of expenses properly incurred during that period.

1. Restrictions on the Use of Revolving Funds.

a. 10 U.S.C. § 2210 states that: "Obligations may, without regard to fiscal year limitations, be incurred against anticipated reimbursements to stock funds in such amounts and for such period as the Secretary of Defense . . . may determine to be necessary to maintain stock levels consistently with planned operations for the next fiscal year."

(1) Revolving funds are "no year" funds. See, e.g., Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999). However, the GAO believes that it is improper to "bank" an agency's annual funds with a GSA account to cover future year needs. Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Matter of: Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001.

(2) Revolving funds are not dependent upon annual appropriations.

b. The Bona Fide Needs Rule does not normally apply to the use of revolving funds. But see 10 U.S.C. § 2213(a) (limiting the acquisition of any supply item to 2 years of operating stock); U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESS, DEFENSE WORKING CAPITAL FUND: IMPROVEMENTS NEEDED FOR MANAGING THE BACKLOG OF FUNDED WORK (2001).

2. Restrictions on the Use of Customer Appropriations. DOD Reg. 7000.14-R, vol. 11B, ch. 50.

a. A revolving fund customer may not use its appropriated funds to do indirectly what it may not do directly.

b. The Bona Fide Needs Rule does apply to the use of customer appropriations.

VI. REVOLVING FUNDS AND THE RULES OF OBLIGATION.

A. Customer Orders.

1. Supply Management Activity Groups. DOD Reg. 7000.14-R, vol. 3.

a. If the obligation is for a project order under 41 U.S.C. § 23, an Economy Act order under 31 U.S.C. § 1535, or a reimbursable procurement order to another military department, obligate the amount of the order using funds current when the revolving fund accepts the order.

b. If the obligation is for a direct citation procurement order to another military department, obligate the amount of the order using funds current when the parties sign the contract (or other obligating document).

c. If the obligation is for an order issued to another government agency as required or authorized by law, obligate the amount of the order using funds current when the customer places the order.

2. Non-Supply Management Activity Groups. DOD Reg. 7000.14-R, vol. 3.

a. If the obligation is for an order placed with an industrially funded activity, obligate the amount of the order using funds current when the revolving fund accepts the order.

b. An order may not be accepted <u>unless</u> the revolving fund may:

(1) Begin work within 90 days; and

(2) Complete work within the projected period.

c. Start of work is defined as:

(1) Cost incurred; or

(2) Other action that the revolving fund may not legally perform without an accepted order.

d. These steps do not qualify as a valid start of work if the revolving fund takes them earlier than necessary to support the completion of the work.

B. Obligations of Revolving Funds.

1. The requirements of 31 U.S.C. § 1501 apply to revolving funds. U.S. Army, Corps of Engineers Civil Works Revolving Fund, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. 59, 61 (concluding that the legislative mandate to operate a revolving fund "within its own resources" does not relieve the Corps of Engineers of requirement to recognize and record obligations IAW 31 U.S.C. § 1501).

2. Revolving funds should generally recognize and record obligations at the time the parties sign the contract (or other obligating document).

VII. VIOLATIONS OF THE ANTIDEFICIENCY ACT.

A. Types of Violations. 10 U.S.C. §§ 1341-1342; DOD Reg. 7000.14-R, vol. 3B, ch. 19. An Antideficiency Act violation occurs when a revolving fund:

1. Obligates funds in excess of an appropriation or apportionment. 31 U.S.C. § 1341(a)(1)(A). See U.S. Army, Corps of Engineers Civil Works Revolving Fund, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. 59, 61 (stating that the Antideficiency Act prohibits the Corps of Engineers from overobligating the available budget authority in its Civil Works Revolving Fund); National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses, B-243710, 71 Comp. Gen. 224, 227 (1992) (concluding that NTIS violated the Antideficiency Act to the extent it used monies that were not available to it to pay its operating expenses and no other funds were available to cover the obligations).

2. Obligates funds in advance of an appropriation required to support that obligation, absent a specific exception. 31 U.S.C. § 1341(a)(1)(B).

3. Has an appropriation level deficit cash balance with the U.S. Treasury. 31 U.S.C. § 1341(a)(1)(A).

4. Accepts voluntary services. 31 U.S.C. § 1342.

B. Application of the Antideficiency Act to Reimbursable Orders.

1. A reimbursable order is an agreement to provide goods or services to certain activities, tenant activities, or individuals where the support is:

a. Initially provided using mission funds; and

b. Reimbursed through a billing procedure.

2. Reimbursable orders will not be administered or accounted for as separate subdivisions of funds like allotments.

a. The ordering activity will perform appropriation-type accounting for the order as if it were a contract.

b. A revolving fund will not necessarily violate 31 U.S.C. § 1517 if it incurs obligations, costs, or expenditures that exceed the amount of a single reimbursable order.

c. However, the revolving fund may not exceed its own total obligation authority, or the total obligation authority of the ordering activity.

3. Reimbursable orders for work or services done on a cost-reimbursable basis will contain a cost ceiling for billing purposes. This limits an ordering activity's liability if a revolving fund incurs costs that exceed the ceiling.

C. Other Possible Antideficiency Act Violations.

1. Construction. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E. Activities financed by working capital funds may only use $750,000 of these funds to finance construction projects.

2. Specific Statutory Limitations. See, e.g., National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 314, 108 Stat. 2663 (1994) (imposing a limit of 65% of sales on the obligational authority of stock funds during FY 1995 to further the drawdown of defense stocks).[13]

VIII. CONCLUSION.

[13] This is merely an illustrative example. This limitation no longer applies. See, e.g., Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, 112 Stat. 1920 (1998). Practitioners dealing with working capital funds should review the yearly DoD authorization and appropriation acts to determine whether Congress has imposed any such limitations.

CHAPTER 6

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CHAPTER 6

OBLIGATING APPROPRIATED FUNDS

I. INTRODUCTION. Following this block of instruction, students will understand:

A. The importance of accounting for commitments and obligations;

B. Amounts to commit and obligate for various types of contract actions.

C. Obligation rules for bid protests, contract changes, contract terminations, litigation, and miscellaneous other circumstances.

II. REFERENCES.

A. 31 U.S.C. § 1501, Documentary evidence requirement for Government obligations.

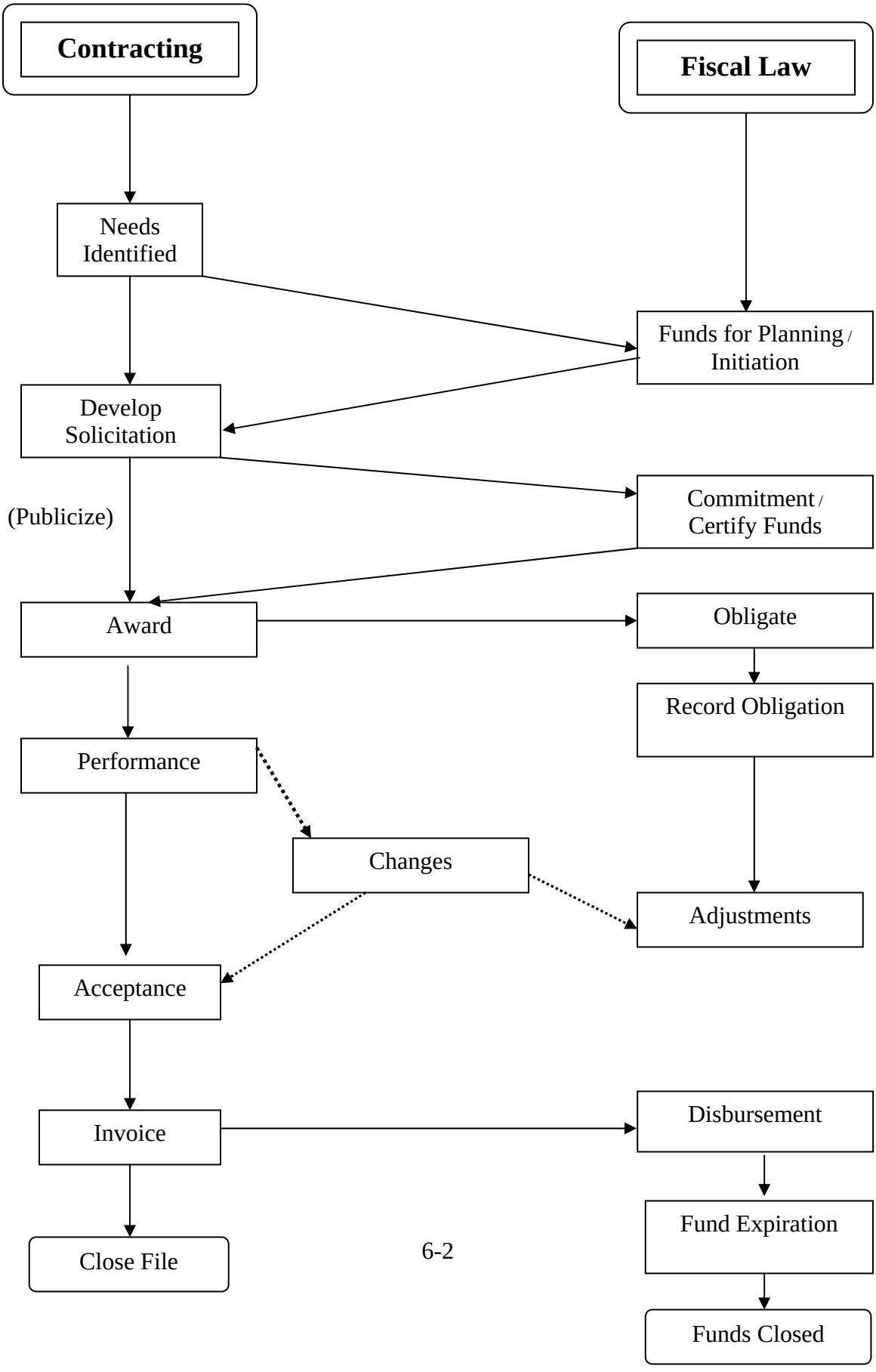
B. Office of Management and Budget Circular A-11, Section 20.5, (2002) [hereinafter OMB Cir. A-11].

C. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 7, Obligation of Appropriations (2d ed. 1992).

D. DOD Directive 7200.1, Administrative Control of Appropriations (May 1995); DOD Instruction 7000.14, DOD Financial Management Policy and Procedures (Nov. 1992); DOD 7000.14-R, DOD Financial Management Regulation, Vol. 3, Budget Execution – Availability and Use of Budgetary Resources (Jun. 2005) [hereinafter DOD FMR].

E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, ch. 7 (Commitments) (Oct. 2001) & ch. 8 (Obligation Management) (Mar. 2004) [hereinafter DFAS-IN 37-1] (*available at* https://dfas4dod.dfas.mil/library).

CONTRACTING PROCESS AND FISCAL PROCESS



F. Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Procedures For Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter DFAS-DE, Procedures for Administrative Control]; Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Commitments (Oct. 2003) [hereinafter DFAS-DE, Commitments]; and Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Obligations (Nov. 2004) [hereinafter DFAS-DE, Obligations]. All three can be accessed at https://dfas4dod.dfas.mil/library.

III. ACCOUNTING FOR COMMITMENTS.

A. Definitions.

1. Certifying Officer. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment. DFAS-IN 37-1, Glossary.

2. Fund Managers. Individuals who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility. DFAS-IN 37-1, Glossary.

3. Certification of Fund Availability. A certification by a funds-certifying official that funds are available in the proper subdivision of funds to cover the obligation to be incurred. This certification authorizes the obligating official to make the desired obligation. DFAS-DE, Procedures for Administrative Control, Definitions, p. X.

4. Commitment. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying official. DOD FMR, vol. 3, ch. 15, para. 150202A.

5. Initiation. An administrative reservation of funds based on procurement directives, requests, or equivalent instruments that authorize preliminary negotiations, but require that funds be certified by the official responsible for the administrative control of funds before incurrence of the obligation. Initiations help keep precommitment actions, such as approved procurement programs and procurement directives, within the available subdivision of funds. Synonyms may be used for this term. DOD FMR, vol. 1, Definitions.

B. Rules Governing Commitments.

1. When used. DOD activities must use commitment accounting procedures for military construction; research, development, test, and evaluation; and procurement appropriations. Commitments need not be recorded for small purchases if, in the aggregate, they are insignificant in the management of funds. Commitment accounting is not required for other accounts, but may be used if cost effective. DOD FMR, vol. 3, ch. 15, para. 150202A5.

a. Army. The Army requires certification of fund availability for unexpired and expired appropriations. DFAS-IN 37-1, ch. 3, para. 031701.

b. Air Force. Commitment accounting is prescribed for all Air Force appropriations, apportioned stock fund divisions, management funds, contract authorizations, administrative and direct cite foreign military sales (FMS) trust fund, and special fund appropriations. DFAS-DE, Accounting for Commitments, p. 3-1.

2. Who. The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document.[1] DOD FMR, vol. 3, ch. 15, para. 150202A1.

a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing,

[1] A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitments in the Army may be accomplished using DA Form 3953 (Purchase Request and Commitment) 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. See Appendices C and D to view these forms. A number of organizations are using *PRweb*, a paperless Purchase Request and Commitment process that is part of the AcquiLine suite of acquisition software. Information about AcquiLine can be found at American Management System's (AMS) (the commercial vendor's) website: http://acquiline.ams.com/.

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 in Chapter 7. DFAS-IN 37-1, paras. 0703, 030209.

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, p. 1-7.

3. Why. Commitment accounting helps ensure that the subsequent entry of an undelivered order or accrued expenditure will not exceed available funds. DOD FMR, vol. 3, ch. 15, para. 150202A1. Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in an antideficiency violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517.

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. DFAS-IN 37-1, para. 070501.

5. Agencies cancel outstanding commitments when the committed funds expire for obligation. DOD FMR, vol. 3, ch. 15, para. 150202A6.

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

1. General. Record as a commitment the cost estimate set forth in the commitment document. DOD FMR, vol. 3, ch. 8, para. 080201.

2. Contingent liabilities. As a budgetary term, a contingent liability represents a variable that cannot be recorded as a valid obligation. DOD FMR, vol. 1, Definitions. Commit an amount that is conservatively estimated to be sufficient to cover the additional obligations that probably will materialize, based upon judgment and experience. Allowances may be made for the possibilities of downward price revisions and quantity underruns. The contingent liability shall be supported by sufficient detail

to facilitate audit. DOD FMR, vol. 3, ch. 8, para. 080202A. Examples of contract actions requiring a contingent liability commitment include:

a. Fixed-price contracts with price escalation, price redetermination, or incentive clauses.

b. Contracts authorizing variations in quantities to be delivered.

c. Contracts where allowable interest may become payable on a contractor claim supported by a written appeal pursuant to the "Disputes" clause of the contract.

d. Cost-reimbursable and time-and-material contracts.

(1) Commitment amounts relating to cost-plus-fixed-fee, cost-sharing, cost-plus-incentive-fee, time-and-material, and labor-hour contracts should include the fixed-fee in the cost-plus-fixed-fee and the target fee in the cost-plus-incentive-fee. DFAS-DE Accounting for Commitments, p. 4-4.

(2) Cost-plus-award-fee contracts. Commit the estimated cost, the base fee, and an estimated amount based on judgment and experience for the award fee. DFAS-DE Accounting for Commitments, p. 4-4.

3. Letter contracts and letters of intent. Commit funds to cover the difference between the maximum legal liability of the government under the interim agreement and the maximum estimated cost of the definitized contract. An exception is a letter providing that award of the definitive contract is dependent upon a congressional appropriation, in which case no funds are available for commitment. DOD FMR, vol. 3, ch. 8, para. 080202B.

4. Open-end contracts and option agreements. Commit funds only when the amount estimated is reasonably firm. DOD FMR, vol. 3, ch.8, para. 080202C.

5. Contract Amendments or Engineering Changes. Commit an amount based on a stated cost limitation. DOD FMR, vol. 3, ch. 8, para. 080202D.

6. Intra-Governmental Requisitions and Orders (such as a DD Form 448, "Military Interdepartmental Purchase Request"). Commit the amount of the order until validly obligated under the guidelines of the DOD FMR. DOD FMR, vol. 3, ch. 8, para. 080202E.

7. Imprest Funds.[2] Record as a commitment before funds are advanced to the imprest fund cashier. DFAS-DE, Accounting For Commitments, p. 4-2; see also Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, 70 Comp. Gen. 481, (May 8, 1991).

8. Commit no funds for--

   a. Potential termination charges on multi-year contracts that provide for cancellation charges if the government must cancel the contract for reasons other than contractor liability. DOD FMR, para. 080202F.

   b. Blanket Purchase Agreements. DFAS-DE, Accounting For Commitments, p. 4-2.

D. Advanced Acquisition Planning for the Next FY Funding. In some instances, qualified statements are used to provide authority to contracting officers to proceed with advance contracting actions before actual receipt of funds. DFAS-DE, Accounting For Commitments, p. 3-4.

1. Air Force. Instead of a certification of fund availability, the following statement must be placed upon the request for purchase and signed by budget office personnel at the time approval is obtained: "This requirement is included or provided for in the installation or major command financial plan for FY___. The accounting classification shall be ___." See DFAS-DE 7010.2-R, para. 9-18e.

[2] An imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001. For DOD activities, imprest funds may be used **only** for classified operations or contingency, humanitarian or peacekeeping operations overseas. DOD 7000.14-R, vol. 5, ch. 2, para. 020902 and DFAR 213.305(d).

2. Army. The comptroller or designee shall sign the following statement on the purchase request: "This requirement is included or provided for in the financial plan for FY___. The accounting classification will be ___. This statement is not a commitment of funds." See AFARS 1.602-2.

IV. OBLIGATION OF FUNDS.

A. Definitions.

1. Obligation. An act which creates a legal liability on the part of the Government for the payment of appropriated funds for goods and services ordered or received. GAO Redbook, Vol. II, page 7-3 to 7-4.

a. Examples: Amounts of orders placed, contracts awarded, services received, and similar transactions that will require payments during the same or a future period. The legal requirement for recording obligations is 31 U.S.C. § 1501. OMB Cir. No. A-11, para. 20.5. All obligations require a standard document number (SDN). DFAS-IN 37-1, para. 080102. SDN formats are in DFAS Manual 37-100-FY.

b. The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. GAO Redbook, Vol. II, page 7-4.

2. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act.

3. Expired Appropriation. An appropriation whose availability for new obligations has expired, but which retains its fiscal identity and is available for recording, adjusting, and liquidating obligations properly chargeable to that appropriation. 31 U.S.C. § 1553(a).

4. 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. General Rules.

1. An obligation must be definite and certain. GAO Redbook, Vol. II, page 7-3.

2. Obligate funds only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a).

3. 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.

4. 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.

5. 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 this 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).

6. 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.

7. Subject to the Availability of Funds. Execute contracts "subject to the availability of funds" (SAF) if administrative lead-time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a SAF clause 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.

   a. 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).

b. 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).

V. AMOUNTS TO OBLIGATE.

A. General.

1. Recording obligations.

a. Obtain documentary evidence of the transaction before recording an obligation. 31 U.S.C. § 1501; DOD FMR, vol. 3, ch.8, para. 080302; DFAS-DE 7000-4, para. 3; DFAS-IN 37-1, chapter 8.

b. Contracts, purchase orders, rental agreements, travel orders, bills of lading, civilian payrolls, and interdepartmental requisitions are common contractual documents supporting obligations. DFAS-IN 37-1, chapter 8.

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

B. Contract Types.

1. Firm-Fixed Price Contracts. FAR 16.202.

a. Description. Provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.

b. Amount to Obligate. Record total amount stated in the contract. DOD FMR, vol. 3, ch. 8, para. 080501.

2. Fixed-Price contracts with escalation, price redeterminations, and incentive provisions. DOD FMR, vol. 3, ch.8, para. 080502.

a. Fixed-Price Contract with Economic Price Adjustment (FP w/EPA). FAR 16.203.

(1) The EPA clause, FAR 52.216-2, provides that the government assumes a portion of the cost risk of certain unforeseeable price fluctuations, such as material or wage increases. The EPA provision permits contractors to eliminate contingencies for these potential costs.

(2) The contract price will be adjusted later if the contingencies occur.

b. Fixed-Price Contracts with Price Redetermination (FP-R). FAR 16.205 and 16.206.

(1) Prospective. Price is fixed for initial quantities, but is adjusted periodically for future quantities based upon the contractor's cost experience. This type is useful on initial production contracts.

(2) Retroactive. Price for work already performed is subject to redetermination based upon the contractor's actual cost experience. This type of contract is useful on small R&D contracts and other contracts where unresolved disagreements over cost accounting issues may affect price significantly.

c. Fixed-Price-Incentive Contract (FPI). FAR 16.403.

(1) A FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of the total final negotiated cost to the total target cost. The final price is subject to a price ceiling, negotiated at the outset.

(2) The contractor bears all costs above the fixed ceiling price.

d. Fixed-Price-Award-Fee Contracts. FAR 16.404.

(1) Contractor receives a negotiated fixed price (which includes normal profit), with an opportunity to receive additional award fee based upon the quality of its performance.

(2) Award-fee provisions may be used when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively.

e. Amount to Obligate. Obligate the fixed price stated in the contract, or the target or billing price in the case of a contract with an incentive clause. Subsequently, adjust to a "best-cost estimate" whenever it is determined that the actual cost of the contract will differ from the original target. DOD FMR, vol. 3, ch.8, para. 080502.

3. Cost-Reimbursement Contracts. FAR Subpart 16.3.

a. Description. These contract types provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed–except at its own risk—without the approval of the contracting officer. FAR 16.301-1.

b. Cost ceilings. Ceilings are imposed through the Limitation of Cost clause, FAR 52.232-20, or the Limitation of Funds clause, FAR 52.232-22. The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986).

c. Fee. In Government contracting, fee is a term of art for the profit the Government agrees to pay on some cost-reimbursement contracts.

d. Types of Cost-Reimbursement Contracts.

(1) Cost-Plus-Fixed-Fee (CPFF) Contract. FAR 16.306.

(a) The contract price is the contractor's allowable costs, plus a fixed fee, which is negotiated and set prior to award.

(b) Obligate the full amount of the contract (i.e. total estimated costs), including the fixed fee. DFAS-IN 37-1, Table 8-1.

(2) Cost-Plus-Incentive-Fee Contract (CPIF). FAR 16.304, FAR 16.405-1.

(a) This type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula.

(b) Obligate the total estimated payment, including the target fee. DOD FMR, vol. 3, ch. 8, para. 080503.

(3) Cost-Plus-Award-Fee (CPAF) Contract. FAR 16.305 and 16.405-2.

(a) The contractor receives its costs; a base fee[3] that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance.

(b) Award fee is determined unilaterally by the contracting officer or Award Fee Determining Official.

[3] For DOD contracts, base fees are limited to 3% of the estimated cost at time of award. DFARS 216.405-2(c)(ii)(2)(b).

(c) Obligate the total estimated payment, including the base fee. Do not include the award amount. Obligate award fee when determined that award will be paid. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(4) Cost Contract. FAR 16.302.

(a) The contractor receives its allowable costs but no fee.

(b) Obligate total estimated payment of the contract. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

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

(a) T&M contracts and LH contracts are used when it is impossible at the outset to estimate accurately the extent or duration of the work. The work being acquired is defined as a specified number of hours effort by an individual of a certain skill level.

(b) The contract is priced at a specified firm-fixed-price per labor hour for each skill level. In a T&M contract, materials are priced at cost plus material overhead.

(c) Amount to obligate. Obligate the minimum liability exclusive of permitted variations. Obligate additional funds for each delivery order when the order is placed. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, tbl. 8-1.

4. Indefinite Delivery Contracts.

a. Variable Quantity Contracts.

(1) Indefinite-Quantity/Indefinite-Delivery Contracts (also called Minimum Quantity). FAR 16.504.

(a) The government must buy the minimum quantity, but may purchase up to the maximum quantity. The government issues delivery orders as needs arise.

(b) Amount to obligate. Obligate the amount of the stated minimum quantity at the time of contract award. Once the stated minimum is ordered, obligate funds for each additional order at the time the order is issued. DOD FMR, vol. 3, ch. 8, para. 080504; DFAS-IN 37-1, tbl. 8-1;

(2) Indefinite delivery-definite quantity contracts. FAR 16.502.

(a) The quantity and price are fixed. The government issues delivery orders to specify the delivery date and location.

(b) Amount to obligate. Obligate the full amount of the definite quantity (for the quantity required in the current year) at the time of contract award. DFAS-IN 37-1, tbl. 8-1.

(3) Requirements Contracts. FAR 16.503.

(a) The government fills all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.

(b) Amount to obligate. Obligate no funds at contract award. Record each order, when issued, as a separate obligation. DFAS-IN 37-1, tbl. 8-1.

5. Letter Contracts or Letters of Intent.

a. Defined. Letter contracts are used to expedite performance in exigent or emergency circumstances.

b. Definitization. The parties must reduce the contract terms to writing within 180 days after issuance. FAR 16.603-2c; DFARS 217.7404-3. Until the contract terms are definitized, the government may not pay the contractor more than 50% of the NTE price. 10 U.S.C. § 2326; FAR 16.603-2(d).

c. Amount to obligate. Obligate current funds in the amount of the maximum liability authorized. When the contract is definitized, adjust the obligation to equal the final amount. In adjusting the balance, use funds currently available for obligation. DOD FMR, vol. 3, ch. 8, para. 080507; DFAS-IN 37-1, tbl. 8-1; Obligating Letter Contracts, B-197274, Sept. 23, 1983, 84-1 CPD ¶ 90.

6. Purchase Orders.

a. A purchase order creates an obligation when issued in the amount stated, if the purchase order represents acceptance of a binding written offer of a vendor to sell specific goods or furnish specific services at a specific price, or the purchase order was prepared and issued in accordance with small purchase or other simplified acquisition procedures. DOD FMR, vol. 3, ch. 8, para. 080510A.

b. A purchase order requiring acceptance by the vendor before a firm commitment is reached must be recorded as an obligation in the amount specified in the order at the time of acceptance. If written acceptance is not received, delivery under the purchase order is evidence of acceptance to the extent of delivery. DOD FMR, vol. 3, ch. 8, para. 080510B.

7. Service Contracts.

a. Severable Services. Absent a statutory exception, severable services are the *bona fide* need of the fiscal year in which performed. Thus, agencies must fund service contracts with dollars

available for obligation on the date the contractor performs the services. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216; Matter of Funding of Air Force Cost Plus Fixed Fee Level of Effort Contract, B-277165 (2000).

b. Statutory exception to severable service bona fide needs rule: DOD agencies may obligate funds current at the time of award to finance any severable service contract with a period of performance that does not exceed one year. See 10 U.S.C. § 2410a (this authority also covers the Coast Guard). Similar authority exists for non-DOD agencies. See 41 U.S.C. § 253*l*. According to DFAS, "Fund holders may obligate funds current when a severable service contract is signed for the amount of the contract provided the contract does not exceed 12 months. Fund holders may also split the obligation between fiscal years that the contract covers provided the contract does not exceed 12 months. Severable service contracts that exceed 12 months will be funded by appropriations of the fiscal years in which the services are rendered." DFAS-IN Reg. 37-1, para. 080603(A).

c. Nonseverable services. If the services produce a single or unified outcome, product, or report, the services are nonseverable. If so, the government must fund the entire effort with dollars available for obligation at the time the contract is awarded, and the 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); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contracts and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986).

8. Options.

a. Defined. An option is an offer that is irrevocable for a fixed period. An option gives the government the unilateral right, for a specified time, to order additional supplies or services, or to extend the term of the contract, at a specified price. FAR 2.101.

b. Amount to Obligate. Obligate funds for each option period after funds become available. Obligations must be consistent with all normal limitations on the obligation of appropriated funds, e.g., bona fide needs rule, period of availability, and type of funds.

c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, obligate funds for the basic period and any penalty charges for failure to exercise options. DFAS-IN 37-1, ch. 8, para. 080603(B).

9. Rental Agreements and Leases of Real or Personal Property. Generally, obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD FMR, vol. 3, ch. 8, para. 0806.

a. If the government may terminate a rental agreement without notice and without obligation for any termination costs, obligate the monthly amount of the rent on a monthly basis. DOD FMR, vol. 3, ch. 8, para. 080602.

b. If the government may terminate a rental agreement without cost upon giving a specified number of days notice, obligate the monthly amount of the rent. Additionally, obligate for the number of days notice the government is required to give. DOD FMR, vol. 3, ch. 8, para. 080603.

c. If the rental agreement provides for a specified payment in the event of termination, obligate the monthly rental amount plus the amount of the termination payment. DOD FMR, vol. 3, ch. 8, para. 080604.

d. If a domestic or foreign rental agreement has no termination provision and is financed with an annual appropriation, obligate the full amount of the rental agreement (up to 12 months), even if the rental agreement extends into the next fiscal year. DOD FMR, vol. 3, ch. 8, para. 080605.

e. The government may enter into leases of structures and real property in foreign countries for periods up to 5 years (10 years for military family housing). 10 U.S.C. § 2675. Obligations for such leases may not exceed the period of availability of the funds with which the lease is financed. A lease for more than 12 months, or one which crosses fiscal years, requires obligation of funds in the full amount of the lease, limited by the period of availability of the funds being used, i.e., obligation of funds for the total number of months remaining in the period of availability is required. Obligate for the months after the end of the period of availability in subsequent fiscal years. DOD FMR, vol. 3, ch. 8, para. 080605.

10. Reimbursable Orders Placed With DOD Components or Other U.S. Government Agencies.

a. Reimbursable orders. The requiring agency records an obligation when the procuring agency accepts the order in writing. DOD FMR, vol. 3, ch. 8, para. 080701; DFAS-IN 37-1, tbl. 8-2.

b. Direct citation method. Record the obligation when the requiring agency is notified, in writing, that the acquiring agency's contract, project order, purchase order, etc., has been executed, or when the requiring agency receives copies of the obligating documents (contract, delivery order, etc.) from the procuring agency. DOD FMR, vol. 3, ch. 8, para. 080702. For the Army, DFAS-IN 37-1, tbl. 8-2, provides that the requiring agency may record the obligation only upon receipt of the obligating documents from the acquiring agency.

c. DFAS guidance regarding reimbursable orders and direct fund cite orders: When a direct fund cite is used, the performing activity will provide a copy of the contract or other obligating document to the ordering activity. This will provide the documentation required to record the obligation. If not using direct fund cite, the ordering activity will obligate upon receipt of the accepted DD Form 448-2. DFAS-IN 37-1, para. 081207(A)7.

d. Orders placed with DOD components under the Project Order Law (41 U.S.C. § 23), or with other U.S. governmental agencies under the Economy Act (31 U.S.C. § 1535). DOD FMR, vol. 3, ch. 8, para. 080703.

(1) Project orders. When the performing activity accepts the order in writing, obligate funds in the amount stated in the order. DOD FMR, vol. 3, ch. 8, para. 080603A; DFAS-IN 37-1, tbl. 8-2.

(2) Economy Act orders. Obligate funds when the performing activity accepts the order in writing. Adjust undelivered Economy Act orders issued against annual or multiple year appropriations downward at the end of the period of availability of the funds. DOD FMR, vol. 3, ch. 8, para. 080703B; DFAS-IN 37-1, tbl. 8-2.

e. Orders required by law to be placed with another U.S. governmental agency, such as the Federal Prison Industries (18 U.S.C. § 4124), or the Government Printing Office (44 U.S.C. § 111). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued. DOD FMR, vol. 3, ch. 8, para. 080704; DFAS-IN 37-1, tbl. 8-2.

f. Improper to "bank" an agency's annual funds with a GSA account to cover future year needs. Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001. In accordance with (IAW) 40 U.S.C. 1412(e), Department of Defense (DoD) activities may obtain information technology resources from GSA programs without relying on the Economy Act. The obligation is recorded at the time the activity enters into a binding written interagency agreement with GSA. New needs may not be added to an existing order and funded with expired funds unless deemed to be a within scope change to the original order. DFAS-IN 37-1, para. 080607.

11. Stock Fund Orders. Record as an obligation when the order is placed. If the item does not have a stock number, record at the time the stock fund accepts the order. DOD FMR, vol. 3, ch. 8, para. 080801.

a. Adjust obligations for undelivered stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD FMR, vol. 3, ch. 8, para. 080802A.

b. Cancel a stock fund obligation when notice is received of: (a) unacceptable substitution; (b) transfer of a stock-funded item to funding by a centrally managed procurement appropriation within a DOD component; or (c) advice that the stock fund is unable to perform under the terms of the order. DOD FMR, vol. 3, ch. 8, para. 080802A.

c. When the customer's financing appropriation expires, an undelivered order for a nonstock-numbered item for which the stock fund has not executed a procurement action (incurred an obligation) also expires. DOD FMR, vol. 3, ch. 8, para. 080803.

VI. ADJUSTING OBLIGATIONS.

A. Adjusting Obligation Records. For five years after the time an appropriation expires for incurring new obligations, both the obligated and unobligated balances of that appropriation shall be available for recording, adjusting, and liquidating obligations properly chargeable to that account. 31 U.S.C. §1553(a); DOD FMR, vol. 3, ch. 10, para. 100201A.

B. Contract Changes. A contract change is one that requires the contractor to perform additional work. Identity of the appropriate fund for obligation purposes is dependent on whether the change is "in-scope" or "out-of-scope." The contracting officer is primarily responsible for determining whether a change is within the scope of a contract. DOD FMR, vol. 3, ch. 8, para. 080304, Specific Guidelines for Determining Scope of Work Changes.

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

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

> [A] contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, is considered an antecedent liability. In other words, the original contract makes the government liable for a price increase under specified conditions and the subsequent contract change makes that liability fixed and certain. Therefore, the liability relates back to the original contract and the price increase to pay the liability is charged to the appropriation initially obligated by the contract.

b. Increase of ceiling price under Cost-reimbursement contract. For an increase in ceiling price with no antecedent liability (i.e., discretionary increase), obligate funds from fiscal year cited in original contract if available, then current funds. DFAS-IN 37-1, table 8-7, note 4. See also Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986) (finding proper the use of current funds to fund increase to CPFF contract).

2. Change outside the scope of the contract. Treat as a new obligation and use funds current when the contracting officer approves the change. Environmental Protection Agency-Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶ 491.

C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD FMR, vol. 3, chs. 8 and 10; DFAS-IN 37-1, para. 0815.

1. Expired Accounts.

a. Upward obligation adjustments in excess of $1 Million. No upward obligation adjustment in excess of $1 Million that involves any individual action or contract shall be accomplished to expired appropriation accounts without prior submission to, and approval by, the Head of the DOD Component. The prior approval

authority may be delegated, but a report must be provided annually to the Component Head. DOD FMR, vol. 3, ch. 8, para. 0813.

b. Contract change in Excess of $4 Million. Approval by the Under Secretary of Defense (Comptroller) is required when the amount of an obligation would cause the total amount of charges in any fiscal year for a single program, project, or activity to exceed $4 million and the account being used to fund the obligations is no longer available for new obligation. DOD FMR, vol. 3, ch. 10, para. 100204.

c. Contract change of $25 Million or More. The Under Secretary of Defense (Comptroller) must submit a notice of intention to make the obligation, along with the legal basis and policy reasons for obligation, to the Armed Services and Appropriations Committees of the Senate and the House. DOD FMR, vol. 3, ch. 10, para. 100205.

(1) After 30 days have elapsed following submission of the notice, the proposed obligation may be recorded unless any congressional committee notifies the USD(C) of its disapproval.

(2) DOD components are required to submit to DOD documentation that explains the circumstances, contingencies, or management practices that caused the need for the adjustment, to include letters to the appropriate congressional committees for the signature of the USD(C).

2. Current Funds otherwise chargeable to Cancelled Account. DOD FMR, vol. 3, ch. 10, para. 100201F. When a currently available appropriation is used to pay an obligation, which otherwise would have been properly chargeable both as to purpose and amount to a canceled appropriation, the total of all such payments by that current appropriation may not exceed the lesser of:

a. The unexpended balance of the canceled appropriation; or

b. The unexpired unobligated balance of the currently available appropriation; or

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

(1) For annual accounts, the 1 percent limitation is of the annual appropriation for the applicable account—not total budgetary resources (e.g. reimbursable authority).

(2) For multi-year accounts, the 1 percent limitation applies to the total amount of the appropriation.

(3) For contract changes, charges made to currently available appropriations will have no impact on the 1 percent limitation rule. The 1 percent amount will not be decreased by the charges made to current appropriations for contract changes.

VII. RULES OF OBLIGATION FOR TERMINATED CONTRACTS.

A. Termination for Convenience.

1. When a contract is terminated for the convenience of the government, the contractor is entitled to a settlement that typically includes payment for costs incurred, a reasonable profit (unless the contractor is in a loss status at time of termination), and reasonable costs of settlement of the terminated work. See e.g., FAR 52.249-1, Termination for the Convenience of the Government (Fixed-Price).

2. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD FMR, vol. 3, ch. 8, para. 080512.

3. If a contract is terminated for convenience pursuant to a court order or determination by other competent authority (board of contract appeals, Government Accountability Office, or contracting officer) that the original award was improper, the appropriation originally cited may be used in a subsequent fiscal year to fund a replacement contract if the following criteria are met:

(a) the original contract is made in good faith;

(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. See Navy, Replacement Contract, B-238548, Feb. 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117 (holding that funds are available after contracting officer's determination that original award was improper); DFAS-IN 37-1, para. 080606.

B. Termination for Default. After a contract is terminated for default, the government may still have a bona fide need for the supply or service. In such a case, the originally obligated funds remain available for obligation for a reprocurement contract, notwithstanding the expiration of the normal period of availability, if:

1. The replacement contract is awarded without undue delay after the original contract is terminated for default;

2. its purpose is to fulfill a bona fide need that has continued from the original contract; and

3. the replacement contract is awarded on the same basis and is similar substantially in scope and size as the original contract. See Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DFAS-IN 37-1, para. 080607.

VIII. MISCELLANEOUS RULES OF OBLIGATION.

A. Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608.

1. Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action.

2. A protest or other action consists of a protest filed with the Government Accountability Office, or an action commenced under administrative procedures or for a judicial remedy if:

   a. The action involves a challenge to—

      (1) a solicitation for a contract;

      (2) a proposed award for a contract;

      (3) an award of a contract; or

      (4) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract; and

   b. commencement of the action delays or prevents an executive agency from making an award of a contract or proceeding with a procurement. 31 U.S.C. § 1558.

3. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.

   a. A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).

   b. The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

c. See also, DFAS-IN Reg. 37-1, para. 080606.

B. Ratification of Unauthorized Commitments. Charge against the funds that would have been charged had the obligation been valid from its inception. FAR 1.602-3; DFAS-IN 37-1, tbl. 8-6, para. 12; Fish & Wildlife Serv.-Fiscal Year Chargeable on Ratification of Contract, B-208730, Jan. 6, 1983, 83-1 CPD ¶ 75 (ratification relates back to the time of the initial agreement, which is when the services were needed and the work was performed).

C. Liquidated Damages. Recover the amount of liquidated damages deducted and withheld from the contractor. If the contractor objects to the assessment of liquidated damages, treat the amount as a contingent liability. Reestablish an obligation only when a formal contractor claim is "approved," i.e., sustained by government admission or by a judgment. DFAS-IN 37-1, tbl. 8-7.

D. Litigation.

1. General. As a general rule, the amount of liability expected to result from pending litigation shall be recorded as an obligation in cases where the government definitely is liable for the payment of money from available appropriations, and the pending litigation is for determining the amount of the government's liability. In other cases, an obligation shall not be recorded until the litigation has been concluded or the government's liability finally is determined. DOD FMR, vol. 3, ch. 8, para. 081203.

2. Settlement of a claim. Obligate funds using the same obligation rules that would be used for normal contracts. DOD FMR, vol. 3, ch. 8, para. 080304E; DFAS-IN 37-1, tbl. 8-6, para. 14.

3. Judgments or monetary awards. Initially, the government may pay judgments from a permanent appropriation called the Permanent Judgment Appropriation (Judgment Fund). 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). Agencies make reimbursements from funds available for obligation when the judgment is entered. Expired funds that were current at the time of the judgment may also be used. DOD FMR, vol. 3, ch. 8, para. 080304F1; DFAS-IN 37-1, tbl. 8-6, para. 15; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, 63 Comp. Gen. 308 (1984).

4. Attorney fees and other expenses. These costs are not payable by the Judgment Fund. Record obligations against current funds at the time the awards are made by the deciding official or by the court. DFAS-IN 37-1, tbl. 8-6.

IX. CONCLUSION.

APPENDIX A

DISCUSSION PROBLEM NO. 1

You are the Contracts attorney at Fort Spackler, which is conducting a procurement for the maintenance of government vehicles. The contract will require the contractor to service and maintain approximately 250 government sedans, vans, and pickup trucks for one base year with four option years. Because of the volatility of oil and lubricant prices, the contracting officer plans to use a fixed price contract with economic price adjustment (EPA) clause. The EPA clause will cover increases (or decreases) in the cost of these items up to 10% of the contract price. The budget analyst in the Directorate of Resource Management, or DRM (the person responsible for certifying fund availability) calls you with the following questions:

1. What type of funds should be used for this procurement?

2. How much money should be committed for the base year for this procurement? Specifically, what kind of liability does the EPA clause represent? How much money should be committed to cover this liability?

3. What about the option periods?

DISCUSSION PROBLEM NO. 2

Having answered the DRM budget analyst's questions, you next field a call from the contracting officer. She is concerned because the DOL wants the contract to run from August 2005 through July 2006. Because FY 2005 O&M, Army funds will be used to fund the contract, the contracting officer is concerned that the contract will extend through ten months of FY 2006. What do you advise? Is there a Bona Fide Needs?

DISCUSSION PROBLEM NO. 3

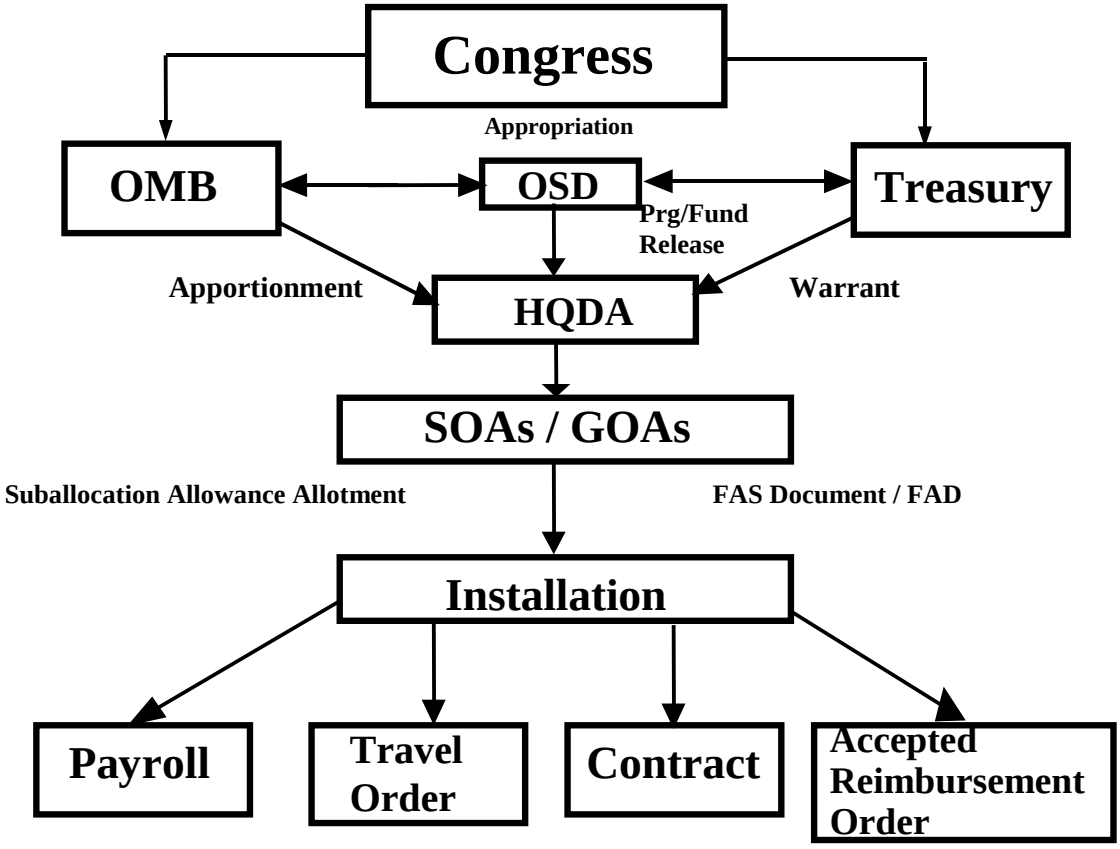
Since you steered everyone in the right direction, efforts to compete and award the vehicle maintenance contract proceeded smoothly. Fort Spackler received four proposals that were evaluated for award, and the contracting officer has decided to eliminate Smails & Son, Inc. from the competitive range of offerors still eligible for contract award. On 15 July, Smails & Son, Inc. filed a protest with the GAO concerning its elimination from the competitive range. The GAO has 100 days to issue a decision. It is now 20 September and the contracting officer and budget analyst ask you whether they should de-commit the funds and use them elsewhere before they expire. What do you advise?

DISCUSSION PROBLEM NO. 4

Fort Spackler won the protest, and completed the evaluation and selection of a contractor for award. You now have the contract file for review prior to issuing notice of award. The file contains a PR&C citing $600,000 of FY 2006 O&M, Army funds. However, the proposed awardee's price is $650,000. What do you advise?

APPENDIX B

FUND DISTRIBUTION PROCESS



CHAPTER 7

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CHAPTER 7

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

I. INTRODUCTION.

II. REFERENCES.

A. Office of Management and Budget Circular A-11, Section 123, Apportionments Under a Continuing Resolution (2002) [hereinafter OMB Cir. A-11].

B. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 8, Continuing Resolutions (2d ed. 1992) (often referred to as the "GAO Red Book").

C. Continuing Resolution General Guidance, (OASA-FMC, August 1998) available at http://www.asafm.army.mil/pubs/cra/cra0898.doc (Appendix C of this outline).

III. DEFINITIONS.

A. Continuing Resolution.

1. The Congressional resolution, in the absence of an appropriation act, providing authority for Agencies to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations DOD 7000.14-R, DOD Financial Management Regulation, vol. 1, Definitions.

2. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous CRA. A CRA has a fixed life. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000), para. 080401. [hereinafter DFAS-IN 37-1] (*available at* https://dfas4dod.dfas.mil/library).

B. Funding Gap. A funding gap occurs when previous budget authority expires and there exists no regular appropriations act or continuing resolution. DFAS-IN 37-1, para. 0805.

IV. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

A. Continued Operations - Potential Antideficiency Act Violations.

1. The Comptroller General has opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a Continuing Resolution violates the Antideficiency Act (ADA). Representative Gladys Noon Spellman, B-197841, March 3, 1980 (unpub.).

2. The Attorney General has opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. Opinion of the Attorney General, Apr. 25, 1980 (Appendix A).

3. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice issued what is known as the "Dellinger Memo," which reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 (Appendix B).

B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.

a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.

b. During a funding gap, agencies may continue:

(1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;

(2) Activities authorized through extraordinary contract authority. See, e.g., 41 U.S.C. § 11 (Food and Forage Act).

(3) Activities that protect life and property. See, e.g., 31 U.S.C. § 1342.

(4) Activities necessary to begin phase-down of other activities. See Attorney General Opinion, Apr. 25, 1980 (Appendix A).

2. In 1990 Congress amended 31 U.S.C. § 1342, to restrict the authority of agencies to cite the safety of life or the protection of property as the basis for continuing operations. Congress excluded "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property" from the scope of permissible activities that may be continued during a funding gap. See Appendix C.

3. DFAS Guidance.

a. DFAS-IN 37-1, para. 0805, provides the following guidance concerning operations during a funding gap:

(1) Obligations may continue in the new fiscal year for minimum mission essential business.

(2) Neither prior year unexpired funds of multi-year appropriations nor revolving funds are impacted by the absence of a new appropriation or a CRA.

b. DFAS-IN 37-1, para. 1604, provides additional details concerning disbursements permitted during funding gaps. Such disbursements may be made:

(1) To liquidate prior-year obligations;

(2) To liquidate new obligations for unexpired multi-year appropriations;

(3) To liquidate obligations for revolving funds and trust funds (no year) while cash balances exist; and,

(4) To liquidate obligations made during a previous CRA.

4. In September 1995, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (i.e., a funding gap). This information as well as additional guidance can be found in Continuing Resolution Authority General Guidance (OASA-FMC, August 1998, found at http://www.asafm.army.mil/pubs/cra/cra0898.doc (See Appendix D)).

a. Activities that could continue during the funding gap:

(1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;

(2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;

(3) Units and personnel preparing for or participating in operational exercises;

(4) Functions or activities necessary to protect life and property or to respond to emergencies;[1]

(5) Educational activities deemed necessary for immediate support of permissible activities;

(6) Educational activities not otherwise allowed if undertaken by active duty military personnel for other active military personnel only;

(7) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;[2]

(8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;

(9) Legal support for any permitted activities;

(10) MWR activities to the extent operated by NAF personnel; and

(11) Childcare activities, including Department of Defense Dependents Schools.

b. Activities required to be suspended during the funding gap:

(1) Basic, skill, and qualification training which will obligate current FY funds;

[1] Among the activities exempted from the "shut-down" include: fire protection, physical security, law enforcement, air traffic control and harbor control, utilities, housing and food services for military personnel, trash removal, and veterinary services in support of exempt functions (i.e., food supply and service inspections).

[2] For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. § 11 for obligations covered by the Food and Forage Act , and (3) 31 U.S.C. § 1342 for obligations for protection of life and property against imminent danger.

(2) Military Personnel Selection Boards and Administrative Boards;

(3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;

(4) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.

5. Funding Gap Issues.

a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.

b. Efficient operation of government is clearly compromised. See General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, B-241730, June 6, 1991; General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, Mar. 3, 1981.

c. What if we incur unauthorized obligations? See, e.g., Department of Defense Appropriations Act, 1993, § 9049, Pub. L. No. 102-396, 106 Stat. 1876 ("All obligations incurred in anticipation of this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

V. CONTINUING RESOLUTIONS.

A. General Legal Implications of Continuing Resolutions.

1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a Continuing Resolution. It is a statute that has the force and effect of law. See Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

2. Comparison of Continuing Resolutions with Appropriation Acts.

a. Appropriation acts appropriate specified sums of money.

b. Continuing Resolutions are temporary appropriation acts that normally appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations."

3. The Continuing Resolution for FY 2006 provided:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 2006, and for other purposes, namely:
>
> Sec. 101. . . . a. Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2005 for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2005, and for which appropriations, funds, or other authority would be available in the following appropriations Acts:
>
> (2) the Department of Defense Appropriations Act, 2006
>
> * * *
>
> H.J. Res. 68 (hereinafter referred to as the FY 2006 Continuing Resolution) (emphasis added).

B. Availability of Appropriations as to Purpose under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities conducted in the prior fiscal year. To determine whether a given program or activity is covered by the CR, the Comptroller General will look to prior year legislation and its history. Special Defense Acquisition Fund, B-214236, 66 Comp. Gen. 484 (1987). Generally, the scope of a Continuing Resolution's applicability is quite broad:

> Sec. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

FY 2006 Continuing Resolution.

2. New Starts. Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. For example, the FY 2006 Continuing Resolution provided, in part:

> Sec. 102(a). No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2005 or prior years; (2) the increase in production rates above those sustained with fiscal year 2005 funds, or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during the fiscal year 2005. . . .

3. To determine if a program is a new "project or activity," the Comptroller General has looked at whether the agency had prior authority to carry out activities specifically identified in newly enacted legislation. Chairman, Nat'l Advisory Council on Extension and Continuing Educ., B-169472, 52 Comp. Gen. 270 (1972) (National Advisory Council's review of certain programs not a new project or activity).

4. The Assistant Secretary of the Army (Financial Management & Comptroller) provided guidance in Continuing Resolution General Guidance, (OASA-FMC, August 1998) at pages 4-6, available at http://www.asafm.army.mil/pubs/cra/cra0898.doc regarding "new starts":

   a. Military Personnel Appropriations. New starts for Military Personnel include new entitlements and new recruitment bonuses, which were not approved in previous legislation, and are not permitted. An example of a new start is the payment of adoption expenses approved for the first time in FY89.

   b. Operation and Maintenance (O&M). Continuation of normal operations is authorized. Obligations may be incurred for essential operating expenses, including expenses to cover annual contracts which are regularly awarded and obligated in full at the beginning of the fiscal year.

   c. Modifications to O&M programs are generally permitted; they are not considered new starts or scope increases as they do not change the overall purpose of the program. O&M-funded minor construction is not considered a new start and is permitted. An example of an increase in scope of an ongoing program which would not be permitted under CRA is the inception of the National Training Center, which was initiated as a new phase of the Army's training program.

   d. Procurement and Research, Development, Test and Evaluation (RDTE) Appropriations. Generally, a CRA allows previously approved programs to be released at rates sustained during the previous fiscal year. New start restrictions apply to the execution of new investment items not funded for production in the previous fiscal year. Items for which funding was provided in the previous year, or for which funding was provided in prior years and is still available for obligation (e.g., procurement items funded one or two years ago) are not considered new starts.

e. Military Construction Appropriations. Any project or activity for which an appropriation, fund, or other authority was not provided during the previous fiscal year is considered a new start and will not be initiated under CRA. Minor construction funded with Military Construction funds is considered a new start and may not be initiated under CRA. Planning and design is not considered a new start. Therefore, in general, only planning and design funds may be executed under CRA.

5. When the applicable appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the appropriations act:

> Sec. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law. FY 2006 Continuing Resolution.

C. Availability of Appropriations as to Time under a Continuing Resolution. A Continuing Resolution provides budget authority:

1. Until a fixed cut-off date specified in the Continuing Resolution;

2. Until an appropriations act replaces it; or

3. For an entire fiscal year, if no appropriations act is passed

4. The FY 2006 Continuing Resolution provided:

a. Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(2) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or

(c) November 18, 2005.

FY 2006 Continuing Resolution.

D. Availability of Appropriations as to Amount under a Continuing Resolution.

1. Current rate. Continuing Resolutions frequently authorize operations at the "current rate." "Current rate" is usually "the total amount of money which was available for obligation for an activity during the fiscal year immediately prior to the one for which the continuing resolution is enacted." This amount indicates "the level of spending which Congress desires for a program." General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 8, Continuing Resolutions at p. 8-8 (2d ed. 1992) (hereinafter GAO, Principles).

a. Continuing Resolutions use the "current rate" to establish the upper limit at which agencies may continue to fund a project or activity. For example, the FY 2006 Continuing Resolution contained the following language:

(1) Sec. 101(b) Whenever the amount that would be made available or the authority that would be granted for a project or activity under an Act listed in subsection (a) as passed by the House of Representatives as of October 1, 2005, is the same as the amount or authority that would be available or granted under the same or other pertinent Act as passed by the Senate as of October 1, 2005--(1) the project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the actions of the House and the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or (2) if no amount or authority is made available or granted for the project or activity by the actions of the House and the Senate, the project or activity shall not be continued

(2) (2) if the project or activity is included in the pertinent Act of only one of the Houses, the project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the **current rate** or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005. FY 2006 Continuing Resolution (emphasis added).

b. Comptroller General Interpretations.

(1) One-year appropriation. When the program in question was funded by a one-year appropriation in the prior year, the current rate equaled the total funds appropriated for the program for the previous fiscal year. To the Hon. Don Edwards, House of Representatives, B-214633, 64 Comp. Gen. 21 (1984); In the Matter of CETA Appropriations Under 1979 Continuing Resolution Authority, B-194063, 58 Comp. Gen. 530 (1979).

(2) Multi-year appropriations. When the unobligated balance can be carried over from the prior fiscal year (e.g., under a multi-year appropriation), the amount available under the Continuing Resolution equaled the amount available for obligation in the prior fiscal year (i.e., the "current rate") less any unobligated balance carried over into the present year. National Comm. for Student Financial Assistance-

Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).

2. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512. Congress often includes language in a Continuing Resolution, such as that used in the FY 2002 CR, to ease the normal apportionment requirements:

> Sec. 108. Appropriations and funds made available by or authority granted pursuant to this joint resolution *may be used without regard to the time limitations for submission and approval of apportionments* set forth in section 1513 of title 31, United States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds. FY 2006 Continuing Resolution (emphasis added).

3. High Initial Rates of Operation. Congress often prohibits agencies with high rates of operation early in the fiscal year from engaging in similar conduct during the life of the Continuing Resolution.

> Sec. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that had high initial rates of operation or complete distribution of fiscal year 2005 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, *similar distributions of funds for fiscal year 2006 shall not be made* and no grants shall be awarded for such programs funded by this joint resolution that *would impinge on final funding prerogatives*. FY 2006 Continuing Resolution (emphasis added).

4. Obligations incurred under Continuing Resolutions remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the Continuing Resolution. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, B-200923, 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D.

Carr, USMC-Transferred Service Member-Dislocation Allowance, B-226452, 67 Comp. Gen. 474 (1988).

E. What Happens When Congress Decides to Reduce Government Operations -- The FY 1996 Continuing Resolution.

1. More Austere Conditions. In FY 1996 Congress required agencies to operate under more austere budgetary constraints during the Continuing Resolution period.

2. The Average of the Two Rates. The FY 1996 Continuing Resolution addressed the situation where the House version of an Act funded a project or activity at a different rate than the Senate version:

> [Sec. 101](b) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1995, *is different* from that which would be available or granted under such Act as passed by the Senate as of October 1, 1995, the pertinent project or activity shall be continued at a rate for operations *not exceeding the average of the rates permitted by the action of the House or the Senate* under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 . . . . FY 1996 Continuing Resolution (emphasis added).

3. The Average Rate Less Five Percent. During the life of the 1996 Continuing Resolution, agencies were required to reduce the rate of some operations by five percent.

> Sec. 115. Notwithstanding any other provision of this joint resolution, except section 106, the rates for operation for any continuing project or activity provided by section 101 that have not been increased by the provisions of section 111 or section 112 *shall be reduced by 5 percent but shall not be reduced below the minimal level defined in section 111 or below the level that would result in a furlough.* FY 1996 Continuing Resolution (emphasis added).

4. Only One Version. Congress also provided fiscally restrictive language when addressing those situations where only one House of Congress had passed its version of an appropriations act as of 1 October 1995.

> [Sec. 101](c) Whenever an Act listed in this section has been passed by only the House or only the Senate as of October 1, 1995, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House *at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower*, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1995. FY 1996 Continuing Resolution (emphasis added).

5. Minimal Level. The 104th Congress provided agencies funding so that they could continue certain FY 1995 activities at a "minimal level," that is, at 90% of the "current rate" for FY 1995.

> Sec. 111. Notwithstanding any other provision of this joint resolution, except section 106, whenever an Act listed in section 101 as *passed by both the House and Senate as of October 1, 1995, does not include funding* for an ongoing project or activity for which there is a budget request, or whenever an Act listed in section 101 has been passed by only the House or only the Senate as of October 1, 1995, and an item funded in fiscal year 1995 is not included in the version passed by the one House, . . . the pertinent project or activity may be continued under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 by increasing the rate for operations provided by section 101 to *a rate for operations not to exceed one that provides the minimal level* that would enable existing activities to continue. . . . For the purposes of the Act, the *minimal level means a rate for operations that is reduced from the current rate by 10 percent*.[3] FY 1996 Continuing Resolution

[3] The second Continuing Resolution passed by the 104th Congress increased this decrement to 25 percent.

6. Furloughs. The initial 1996 Continuing Resolution offered agencies some relief from the "minimal level" rule. An agency could sustain operations at that rate of operations necessary to avoid furloughing Government employees, even if that rate exceeded the minimum level or rate otherwise required by the Continuing Resolution.

> Sec. 112. *Notwithstanding any other provision of this joint resolution*, except section 106, whenever the rate for operations for any continuing project or activity provided by section 101 or section 111 for which there is a budget request would result in a furlough of Government employees, that *rate for operations may be increased to a level that would enable the furlough to be avoided*. . . . FY 1996 Continuing Resolution (emphasis added).

F. Relationship of a Continuing Resolution to Other Legislation.

1. A Continuing Resolution appropriates funds that are "not otherwise appropriated." See e.g. Appendix E. The CRA does not apply to an agency program funded under another appropriation.

2. Specific inclusion of a program in a Continuing Resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1975).

VI. CONCLUSION.

APPENDIX A
OPINION OF THE UNITED STATES ATTORNEY GENERAL

APPLICABILITY OF THE ANTIDEFICIENCY ACT UPON A LAPSE IN AN AGENCY'S APPROPRIATION

(43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16)

APRIL 25, 1980

MY DEAR MR. PRESIDENT:

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

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

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

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

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although though Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments

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

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

administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[3]

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

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[7] Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal

---

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

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

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

[6]In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor. In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, ə 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954). In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[7]Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grant-making, nonemergency travel, and other nonessential obligations.

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

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

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

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandates. It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventually appropriations.[9] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so

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

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

elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

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

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

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,
BENJAMIN R. CIVILETTI

[10]See 21 Op. A.G. 288.

APPENDIX B

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

31 U.S.C. § 1342. Limitations on Voluntary Services.

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

APPENDIX C

Continuing Resolution Authority General Guidance
Office of the Assistant Secretary of the Army (Financial Management & Comptroller)
SAFM-BUC-E
August 1998
(found at http://www.asafm.army.mil/pubs/cra/cra0898.doc)

Chapter 3 – Rules for Operation in the Absence of CRA

8. DoD Exempt and Non-Exempt Activities.

a. National security.

(1) Exempt activities.

(a) Units identified in and administrative, logistics and maintenance functions required to support Joint Staff contingency program major regional contingency tasking.

(b) Units and personnel tasked in direct support of the Single Integrated Operations Plan (SIOP).

(c) Activities and functions of the Combatant Commander's, Subordinate Component Commander's and Supporting Commander's headquarters and OSD, Joint Staff, Service and DoD Agency staffs necessary to ensure operations and maintenance integrity of essential C4I systems.

(d) Units and activities required to operate, maintain, assess and disseminate the collection of intelligence data necessary to support tactical and strategic indications, warning and supporting force enhancement roles.

(e) Forward based combat, combat support and combat service support units.

(f) Forward deployed units executing CJCS or CINC operations/deployment orders, those units in operational work-up status to execute those orders and those units and activities required in direct support of those tasks.

(g) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations.

(h) Units and personnel preparing for or participating in operational exercises.

(i) Essential operational training necessary to execute operational, contingency and wartime tasking.

(2) Non-exempt activities.

(a) Forces identified as available T+91 and beyond.

(b) All other units not in direct support of exempted units, functions or activities.

(c) Technical intelligence information collection, analysis and dissemination functions not in direct support of exempted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation,

intelligence policy security promulgation and development, systems development and standards, policy and architecture).

(d) Training exercises not essential to the execution of wartime, contingency or OPLAN tasking.

(e) Basic, skill, and qualification training which will obligate current year funds.

(3) Explanatory notes.

(a) Post deployment units will minimize all operations which will obligate current year funds required to prepare for follow-on operational or OPLAN tasking.

(b) Operational exercises are those exercises required to prepare units for operational, contingency or wartime taskings.

(c) Training exercises are those exercises designed to improve skill and task proficiency but not necessarily oriented towards specific operational, contingency or wartime taskings.

b. Military and Civilian Personnel.

(1) Exempt activities.

(a) All active duty military personnel and all reservists on active duty. Duty assignments may be changed by local commanders to supplement exempt activities.

(b) Reserve Components personnel in direct support of exempted activities.

(c) National Guard and Reserve military technicians in units identified as available T+90 or less.

(d) Senate-confirmed officials appointed by the President and their immediate office personnel.

(e) Civilian personnel in direct support of exempted activities, and additional civilian personnel designated by the Secretary of Defense.

(f) Minimum number of personnelists to support exempt personnel once orderly shutdown has occurred.

(g) Civilians paid through prior appropriations, revolving, trust or nonappropriated funds.

(h) Support to international special events or commitments, as authorized by the Secretary of Defense.

(i) Host nation funded foreign national employees whose functions support exempt activities.

(j) Foreign national employees governed by country-to-country agreements that prohibit furloughs.

(2) Non-exempt activities.

(a) Civilian personnel (including host nation funded foreign national employees) not in direct support of exempted activities.

(b) Military Personnel Selection Boards and Administrative Boards.

(c) Civilian personnel whose salaries are paid with annual appropriations and later reimbursed from another source (e.g., the Foreign Military Sales Trust Fund).

(3) Explanatory notes.

(a) Active duty military personnel and active duty reservists shall report for duty pursuant to Title 37, U.S. Code. Civilian personnel shall also report for duty unless specifically directed to do otherwise.

(b) Following a lapse in appropriations, a minimum number of essential civilian personnel will be retained to execute an orderly shutdown within a reasonable timeframe and may continue to work until the shutdown is completed.

(c) Civilian personnel paid from prior year appropriations may continue to work until prior year balances are exhausted.

(d) Foreign national employees paid by the host nation are subject to the same criteria for furlough as United States employees, depending on whether their functions support exempt activities. However, the host nation may elect to continue to pay the employees, even if they are furloughed.

(e) Foreign national employees paid with U.S. funds are also subject to the same furlough criteria as United States employees. However, their terms of employment may be governed by a Status of Forces agreement between the United States and the host nation, which means that their pay may not be controlled by U.S. laws. Depending on the terms of the agreement, it may be necessary to pay those employees, even if they are furloughed.

c. Protection of Life and Property.

(1) Exempt activities.

(a) Functions or activities to the extent necessary to protect life and property and for response to emergencies, including fire protection, physical security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, subsafe program, nuclear reactor safety and security, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal.

(b) Emergency repair and non-deferrable maintenance to utilities, power distribution system buildings or other real property including BEQ, BOQ and housing for military personnel.

(c) Repair of equipment needed to support exempted services, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles.

(d) Voice and data communications that support exempt activities.

(e) Civilian personnel directly involved in the exempted activities, including security guards, individuals to monitor and maintain alarms and control systems, utilities, and emergency services. This category includes the National Communications System personnel who staff the National Coordinating Center for Telecommunications and civilian personnel at the White House Communications Center.

(f) Minimum number of personnel for receipt and safekeeping of material delivered during shutdown.

(g) Minimum number of personnel to control hazardous material and monitor existing environmental remediations.

(h) Minimum number of personnel required to perform statutory responsibilities of the Defense Mapping Agency for marine and aeronautical navigation.

(i) Security maintenance and ADP operators associated with protecting property at the Defense Clearance and Investigations Index facility that supports DoD law enforcement efforts.

(j) Oil spill and hazardous waste cleanup, environmental remediation, and pest control, only to the extent necessary to prevent imminent danger to life or property.

(k) Civilian Army Corps of Engineer personnel with responsibilities to local and state governments that involve imminent threats to life or property.

(l) Civilian specialists responsible for safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photographic processing operations.

(m) USD(A&T) personnel responsible for providing emergency reporting response and input to the National Response Team and coordinating with EPA and other agencies on fire, safety, occupational health, environmental, explosive safety for vector borne disease management.

(2) Non-exempt activities. Environmental activities which are not necessary to prevent imminent threat to life or property.

(3) Explanatory notes.

(a) No new remediation activities, except those exempted above, may be started.

(b) Unit commanders may, on their authority, require return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

d. ADP and Communications.

(1) Exempt activities.

(a) ADP centers, including megacenters, supporting exempt functions with a minimum number of civilian personnel.

(b) Operation and maintenance of command, control and communications systems.

(c) Telecommunications centers and phone switches on installations.

(d) Secure conference capability at military command centers.

(2) Non-exempt activities. Personnel and activities associated with planning and acquisition of future ADP, telecommunications, and command and control systems.

e. DOD Medical and Dental Care.

(1) Exempt activities.

(a) Direct patient care personnel in DoD facilities (including Uniformed Service Treatment Facilities) including doctors, nurses, medical technicians, dentists, pharmacists, and essential support personnel (cooks, custodians, etc.).

(b) Contingency planning in major medical command headquarters.

(c) All inpatient care in Medical Treatment Facilities.

(d) All acute and emergency outpatient care in DoD medical and dental facilities.

(e) DoD health care contracts for inpatient care/acute outpatient care, including medical supplies.

(f) Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and TRICARE contracts.

(g) Veterinary services that support exempted activities (e.g., food supply and service inspections).

(h) Minimum civilian personnel necessary to provide certification of eligibility for health care benefits.

(2) Non-exempt activities.

(a) Civilian administrative staff in Medical Treatment Facilities and dental facilities not involved in exempted patient care.

(b) Civilian personnel in major medical command headquarters who are not involved in contingency planning.

(c) Elective surgery in DoD Medical Treatment Facilities for non-active duty personnel (both CONUS and OCONUS).

(d) Routine physicals, preventive dental procedures, or other routine medical procedures (including vaccinations) in DoD Medical Treatment Facilities for non-active duty personnel (both CONUS and OCONUS).

(e) Persian Gulf Illness Hotlines.

e. Training and Education.

(1) Exempt activities.

(a) Educational activities deemed necessary for immediate support of exempted activities.

(b) Educational activities not otherwise exempted if undertaken by active duty military personnel for other active duty military personnel only.

(c) Installation education centers may continue to operate using borrowed military manpower so that private agencies such as colleges and universities may provide courses purchased with previously available funding.

(d) Department of Defense Dependents Schools and Section 6 Schools.

(2) Non-exempt activities.

(a) At installation education centers, new registrations which require current year funding will not be conducted.

(b) Education other than for exempted activities.

(c) Training exercises not essential to the execution of wartime, contingency or OPLAN tasking.

(d) Basic, skill, and qualification training which will obligate current year funds.

(3) Explanatory notes.

(a) Training and education of active duty military personnel, reserve component personnel, and military technicians is governed by the National Security exemption. Both active duty and National Guard or Reserve personnel will cease training unless their unit is providing direct support to ongoing exempt activities. All military personnel performing non-exempt training in a TDY status should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available.

(b) Training and education of civilian personnel in support of exempt activities is permitted. All other civilian training will be terminated. Civilians participating in non-exempt training or education will be furloughed and civilian personnel on TDY for such purposes should be returned to their home stations as part of the orderly shutdown of operations.

(c) Civilian instructors at military schools, training centers, and military academies will be subject to the same furlough criteria as other employees. In other words, if the activity has not been identified as part of the National Security exemption, or as a protection of life and property exemption, the instructors will be furloughed. However, the schools may continue to operate, if feasible, using military instructors and borrowed military personnel.

f. Recruiting.

(1) Exempt activities.

(a) Military recruiters may continue to staff recruiting offices and may contact prospective recruits if administrative office expenses have been paid with prior year funding.

(b) Military staff of Military Enlistment Processing Stations (MEPS) will report for duty.

(c) Recruiting advertising purchased with prior year funds will continue to be utilized.

(2) Non-exempt activities.

(a) Official vehicles cannot be used to transport recruiters or prospective recruits.

(b) New enlistment contracts cannot be executed.

(c) New recruits are not permitted to report to MEPS, or to report for induction.

(d) Civilian administrative staff and contract physicians assigned to MEPS will not report for duty.

(e) Recruiting advertising using current year funding will not be utilized.

(3) Explanatory notes. The Secretary of Defense reserves the right to reverse the above guidance and resume normal recruiting activities after a lapse of 5 working days to avoid longer term disruption that would impair readiness. Resumption of recruiting activity is not automatic after 5 days and may be implemented only by direction of the Secretary of Defense.

g. Permanent Change of Station (PCS) and Temporary Duty (TDY).

(1) Exempt activities.

(a) PCS moves funded with prior year funds for active duty, reserve, and civilian personnel may continue till completion and will be paid.

(b) TDY travel for active duty, reserve, and civilian personnel funded and completed in the previous fiscal year will be paid.

(c) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in exempted activities may be authorized during a lapse in appropriations, but payment cannot be made until appropriations become available.

(d) PCS moves of military personnel terminating their service and returning to their home of record will continue to be processed as part of the orderly shutdown of operations.

(e) Travel funded from .0015 contingency limitation (for USACIDC mission travel) or .0017 extraordinary military expenses limitation.

(f) Government transportation tickets funded with prior year appropriations will remain valid.

(g) Travel advances may be paid only if the travel order was approved during the previous fiscal year or a previous CRA period.

(2) Non-exempt activities. PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in non-exempt activities during a lapse in appropriations will not be authorized. Non-exempt personnel on TDY will return to home station as part of shutdown procedures.

(3) Explanatory notes. All personnel performing official travel that does not support exempt activities should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available. Obligations are permitted for both TDY and PCS requirements in support of exempt activities; however, no disbursements are authorized. Under this policy, payment of travel advances or reimbursement of expenses for submitted travel vouchers will not be disbursed. While government charge cards may be used to incur obligations in support of exempt activities, the traveler is responsible for payment of the charge card bill when it is presented. Personnel should also be aware that government charge card privileges may be suspended in the event of a shutdown.

h. Army Working Capital Fund (AWCF) and Other Revolving Funds.

(1) Exempt activities.

(a) AWCF/revolving fund activities may continue to operate until cash reserves are exhausted.

(b) When cash reserves are exhausted, AWCF/other revolving fund activities in direct support of exempted activities must continue.

(c) AWCF activities may continue to accept orders financed with previously available funds, or unfunded orders from exempt organizations. Unfunded orders will be posted to accounts receivable, but will not actually be billed until appropriations are enacted.

(d) BRAC activities may continue to operate until unobligated balances are exhausted.

(2) Non-exempt activities. AWCF/revolving fund activities which provide support to non-exempt activities.

(3) Explanatory notes.

(a) Revolving funds may continue to operate utilizing prior year unobligated balances.

(b) Prudent management actions should be taken to sustain operations and minimize operational impact, including: delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives.

(c) Inter-AWCF billings will be suspended.

(d) Current year ledger transactions to military personnel accounts will be suspended.

(e) Managers may perform advance billing.

i. Contracting Activities.

(1) Exempt activities.

(a) Contracts for functions that would otherwise be exempt if performed by government employees.

(b) New contracts for exempted activities.

(c) Administration of contracts for exempt activities, including combat support and combat service support.

(d) Receipt, recordation and safe storage of material shipped and/or delivered under existing contracts.

(e) Contract payment, so long as DFAS remains operational pursuant to AWCF instructions and a valid invoice or bill, properly certified for payment, is presented.

(2) Non-exempt activities.

(a) Administration of existing contracts for non-exempt activities.

(b) Negotiation, preparation and execution of new contracts for non-exempt activities.

(c) Supervision and inspection of ongoing construction contracts, unless the civilian salaries are paid from prior year appropriations.

(d) Contract reconciliation and closeout procedures.

(3) Explanatory notes.

(a) Contracts funded with current year funds, that do not support exempt activities, will be terminated when available funding has been exhausted. Contract terms should be structured to allow for orderly termination of the contract in the event of a funding gap, and for reinstatement of the contract when funds become available. Contracting officers should work with contractors to minimize the impact of a lapse in funding. It should be understood that termination of a contract due to a funding gap is beyond the control of the contracting officer or contracting activity, and that contractor protests of such a termination are not generally considered to be justified.

(b) For contract actions, options, and modifications, not within the scope of the original contract, in direct support of exempt activities, the contracting officer will cite one of three authorities for these obligations: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. 11 for obligations covered by the Feed and Forage Act, and (3) 31 U.S.C. 1342 for obligations for protection of life and property against imminent danger.

j. Legal Activities.

(1) Exempt activities.

(a) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session after a lapse in appropriations.

(b) Legal support for exempted activities.

(2) Non-exempt activities. All other legal activities.

k. Audit and Investigation Community.

(1) Exempt activities.

(a) Personnel participating in an ongoing criminal investigation or working undercover.

(b) Personnel required to support an emergent criminal investigation if authorized by the Secretary of Defense.

(2) Non-exempt activities. All other members of the audit and investigation community.

l. Trust Funds.

(1) Exempt activities.

(a) Trust funds conducting exempted activities (for example, retirement homes).

(b) Trust funds with management activities routinely paid from trust fund resources.

(c) Trust funds managed by Defense Finance and Accounting Service (DFAS) so long as DFAS operates.

(d) Trust funds managed by borrowed military personnel.

(2) Non-exempt activities. All other trust fund activities.

m. Morale Welfare & Recreation/Non-Appropriated Funds.

(1) Exempt activities.

(a) Activities funded entirely through NAF sources.

(b) Child care activities.

(c) MWR activities operated by NAF personnel, or those using borrowed military personnel to replace civilian employees paid by appropriated funds.

(2) Non-exempt activities. All MWR activities staffed by civilian employees paid from appropriated funds who are not replaced using borrowed military manpower.

n. Financial Management.

(1) Exempt activities.

(a) Minimum essential personnel needed to record new obligations incurred in the performance of exempt functions/operations, and to manage AWCF cash.

(b) Obligation adjustment and reallocation of prior year unobligated funds in support of exempt functions/operations.

(2) Non-exempt activities.

(a) Preparation of budget submission data.

(b) Closing of accounts that expired in the previous fiscal year.

(c) Preparation of year-end closing statements and financial reports for the previous fiscal year.

(d) Investigation of Anti-deficiency Act violations.

(e) Research and correction of problem disbursements.

(f) Adjustments to prior year funds related to programs and contracts that do not support exempt functions/operations.

APPENDIX D

FY 2002 CONTINUING RESOLUTION TEXT AND
OMB APPORTIONMENT BULLETIN

[DOCID: f:publ044.107]
[[Page 115 STAT. 253]]
Public Law 107-44
107th Congress

Joint Resolution

Making continuing appropriations for the fiscal year 2002, and for other purposes. <<NOTE: Sept. 28, 2001 - [H.J. Res. 65]>>

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2002, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(A) the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002;

(B) the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, notwithstanding section 15 of the State Department Basic Authorities Act of 1956, section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1));

(C) the Energy and Water Development Appropriations Act, 2002;

(D) the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, notwithstanding section 10 of Public Law 91-672 and section 15 of the State Department Basic Authorities Act of 1956;

(E) the Department of the Interior and Related Agencies Appropriations Act, 2002;

(F) the Legislative Branch Appropriations Act, 2002;

(G) the Military Construction Appropriations Act, 2002;

(H) the Department of Transportation and Related Agencies Appropriations Act, 2002;

(I) the Treasury and General Government Appropriations Act, 2002; and

(J) the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002:

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Provided, That whenever the amount which would be made available or the authority which would be granted in these Acts as passed by the House and Senate as of October 1, 2001, is different than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate: Provided further, That whenever there is no amount made available under any of these appropriations Acts as passed by the House and Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(2) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of October 1, 2001, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 2001, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(3) Whenever an Act listed in this subsection has been passed by only the House or only the Senate as of October 1, 2001, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House at a rate for operations not exceeding the current rate and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001: Provided, That whenever there is no amount made available under any of these appropriations Acts as passed by the House or the Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(b) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year

2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001, at a rate for operations not exceeding the current rate, and for which appropriations, funds, or other authority was made available in the following appropriations Acts:

(1) the Department of Defense Appropriations Act, 2001, notwithstanding section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1)); and

(2) the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001; and

(3) the District of Columbia Appropriations Act, 2001.

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for production in fiscal year 2001 or prior years, for the increase in production rates above those sustained with fiscal year 2001 funds, or to initiate, resume, or continue any project, activity, operation, or

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organization which are defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element and for investment items are further defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item which includes a program element and subprogram element within an appropriation account, for which appropriations, funds, or other authority were not available during fiscal year 2001: Provided, That no appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

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

Sec. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2001.

Sec. 105. No provision which is included in an appropriations Act listed in section 101(a) but which was not included in the applicable appropriations Act for fiscal year 2001 and which by its terms is applicable to more than one appropriation, fund, or authority shall be applicable to any appropriation, fund, or authority provided in this joint resolution.

Sec. 106. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred

for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 107. <<NOTE: Expiration date.>> Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 16, 2001, whichever first occurs.

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

Sec. 109. No provision in any appropriations Act for fiscal year 2002 listed in section 101(a) that makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation shall be effective before the date set forth in section 107(c) of this joint resolution.

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

Sec. 111. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

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Sec. 112. Notwithstanding any other provision of this joint resolution, except section 107, for those programs that had high initial rates of operation or complete distribution of fiscal year 2001 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, similar distributions of funds for fiscal year 2002 shall not be made and no grants shall be awarded for such programs funded by this resolution that would impinge on final funding prerogatives.

Sec. 113. Activities authorized by sections 1319 and 1336(a) of the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.) may continue through the date specified in section 107(c) of this joint resolution.

Sec. 114. Activities authorized by title V of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, may continue through the date

specified in section 107(c) of this joint resolution.

Sec. 115. Activities authorized by section 7 of the Export-Import Bank Act of 1945 (12 U.S.C. 635f) and section 1(c) of Public Law 103-428, may continue through the date specified in section 107(c) of this joint resolution.

Sec. 116. Activities authorized by chapter 2 of title II of the Trade Act of 1974 shall continue through the date specified in section 107(c) of this joint resolution.

Sec. 117. Activities authorized by subsection (f) of section 403 of Public Law 103-356 may continue through the date specified in section 107(c) of this joint resolution.

Sec. 118. Notwithstanding any other provision of this joint resolution, except section 107, the Library of Congress may temporarily transfer to the revolving fund established under section 103 of Public Law 106-481 amounts to continue program operations at a rate not exceeding the rate under authority applicable prior to October 1, 2001.

Sec. 119. Of amounts provided by section 101 of this joint resolution, for projects and activities that would be funded under the heading ``International Organizations and Conferences, Contributions to International Organizations'' in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, $100,000,000 may be made available only pursuant to a certification by the Secretary of State that the United Nations has taken no action in calendar year 2001 prior to the date of enactment of this Act to increase funding for any United Nations program without identifying an offsetting decrease elsewhere in the United Nations budget and cause the United Nations to exceed the budget for the biennium 2000-2001 of $2,535,700,000.

Sec. 120. Notwithstanding any other provision of this joint resolution, in the event that H.R. 1088, the Investor and Capital Markets Fee Relief Act, or other legislation to amend section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), and sections 13(e), 14(g), and 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78m(e), 78n(g), and 78ee), is enacted into law during the period covered by this joint resolution, the fees, charges, and assessments authorized by such sections, as amended, shall be deposited and credited as offsetting collections to the account that provides appropriations to the Securities and Exchange Commission.

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Sec. 121. Collection and use of maintenance fees as authorized by section 4(i) and 4(k) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i) and (k)) may continue through the date specified in section 107(c) of this joint resolution. Prohibitions against collecting ``other fees'' as described in section 4(i)(6) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i)(6)) shall continue in effect through the date

specified in section 107(c) of this joint resolution.

Sec. 122. Notwithstanding section 106 of this joint resolution, funds made available in Public Law 107-38 are not limited by the terms and conditions of this joint resolution.

Approved September 28, 2001.

LEGISLATIVE HISTORY--H.J. Res. 65:

CONGRESSIONAL RECORD, Vol. 147 (2001):

Sept. 24, considered and passed House.

Sept. 25, considered and passed Senate.

<all>

Office of Management and Budget (Text Only)

OMB Home

September 27, 2001

BULLETIN NO. 01-10

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2002

1. **Purpose and Background**. H. J. Res 65 will provide continuing appropriations for the period October 1 through October 16, 2001. I am providing an automatic apportionment for amounts provided by this continuing resolution (CR), and any extensions of this CR, as specified in section 2. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-34.

Further, I am providing an automatic apportionment of any unobligated balances available on October 1, 2001, from the amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001.**

2. **Automatic Apportionments**. Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the rate (amount) provided by the CR by the lower of:

- the percentage of the year covered by the CR, or
- the historical seasonal rate of obligations for the period of the year covered by the CR.

See the Attachment to this Bulletin for more detailed instructions on calculating the amount automatically apportioned.

Under an automatic apportionment, all of the footnotes and conditions placed on the prior year apportionment remain in effect.

The CR expires at midnight on Tuesday, October 16, 2001.

3. **Written Apportionments**. If a program requires an amount different from the total amount automatically apportioned, you must request a written apportionment

/s/

Mitchell E. Daniels, Jr.

Director

Attachment

Calculating the Automatic Apportionment

Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the **rate (amount) provided by the CR** by the lower of:

- the **percentage of the year** covered by the CR (rounded to the nearest tenth), or
- the **historical seasonal rate** of obligations for the period of the year covered by the CR.

1. **What is the rate (amount) provided by the CR?** The rate (amount) provided by the CR could be one of the following *annual* amounts:

- the *current rate*, calculated as follows:
    - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions; and
    - add the unobligated balance carried forward to FY 2001 (if any); or
- the rate of operations *not exceeding the current rate*, calculated as follows:
    - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions;
    - add the unobligated balance carried forward to FY 2001 (if any), and
    - subtract the unobligated balance at the end of FY 2001 (if any).

2. **Which of the annual amounts do I use?**

If	**Then use**
The project or activity meets all the following criteria: • zero funded in the Act passed by both houses by October 1 or is zero funded in the Act passed by the one house by October 1; • included in the President's budget request; • was conducted in FY 2001; and • is included in an act other than the Department of Defense Appropriations Act, 2001, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001, or the District of Columbia Appropriations Act, 2001.	FY 2001 (the *current rate*)
All other cases	The rate of operations *not exceeding the current rate.*

3. **Does the continuing resolution affect the availability of funds that would be available if H. J. Res. 65 had not been enacted?**

No. The availability of any part of the budgetary resources for an account that is not determined by current action of the Congress (such as permanent appropriations, public

enterprise and other revolving funds, reimbursements and other income, and balances of prior year budget authority) are not affected by H. J. Res. 65.

Most of these budgetary resources must be apportioned by OMB before obligation. This Bulletin does not apportion those budgetary resources, except unobligated balances on October 1, 2001, from amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001.**

APPENDIX E: THE DELLINGER MEMO

APPENDIX E: The 2006 Continuing Resolution

One Hundred Ninth Congress
of the
United States of America
AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday,

the fourth day of January, two thousand and five

Joint Resolution

Making continuing appropriations for the fiscal year 2006, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2006, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2005 for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2005, and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006.

(2) The Department of Defense Appropriations Act, 2006.

(3) The Energy and Water Development Appropriations Act, 2006.

(4) The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (in the House of Representatives), or the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2006 (in the Senate).

(5) The Department of Homeland Security Appropriations Act, 2006.

(6) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006.

(7) The Military Quality of Life and Veterans Affairs Appropriations Act, 2006 (in the House of Representatives), or the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2006 (in the Senate).

(8) The Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (in the House of Representatives), or the Departments of Commerce and Justice, Science, and Related Agencies Appropriations Act, 2006 (in the Senate).

(9) The Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations

Act, 2006 (in the House of Representatives), or the Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies Appropriations Act, 2006 (in the Senate) and the District of Columbia Appropriations Act, 2006 (in the Senate).

(b) Whenever the amount that would be made available or the authority that would be granted for a project or activity under an Act listed in subsection (a) as passed by the House of Representatives as of October 1, 2005, is the same as the amount or authority that would be available or granted under the same or other pertinent Act as passed by the Senate as of October 1, 2005--

(1) the project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the actions of the House and the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or

(2) if no amount or authority is made available or granted for the project or activity by the actions of the House and the Senate, the project or activity shall not be continued.

(c) Whenever the amount that would be made available or the authority that would be granted for a project or activity under an Act listed in subsection (a) as passed by the House of Representatives as of October 1, 2005, is different from the amount or authority that would be available or granted under the same or other pertinent Act as passed by the Senate as of October 1, 2005--

(1) the project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the action of the House or the Senate, whichever is lowest, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or

(2) if the project or activity is included in the pertinent Act of only one of the Houses, the project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005.

(d) Whenever the pertinent Act covering a project or activity has been passed by only the House of Representatives as of October 1, 2005--

(1) the project or activity shall be continued under the appropriation, fund, or authority granted by the House, at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or

(2) if the project or activity is funded in applicable appropriations Acts for fiscal year 2005 and not included in the pertinent Act of the House as of October 1, 2005, the project or activity shall be continued under the appropriation, fund, or authority granted by applicable appropriations Acts for fiscal year 2005 at a rate for operations not exceeding the current rate and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of

items not funded for production in fiscal year 2005 or prior years; (2) the increase in production rates above those sustained with fiscal year 2005 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2005.
(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.
(c) Notwithstanding this section, the Secretary of Defense may, following notification of the congressional defense committees, initiate projects or activities required to be undertaken for force protection purposes using funds made available from the Iraq Freedom Fund.
SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.
SEC. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2005.
SEC. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.
SEC. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution; (2) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or (3) November 18, 2005.
SEC. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.
SEC. 108. Appropriations and funds made available by or authority granted pursuant to this joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds.
SEC. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that had high initial rates of operation or complete distribution of fiscal year 2005 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, similar distributions of funds for fiscal year 2006 shall not be made and no grants shall be

awarded for such programs funded by this joint resolution that would impinge on final funding prerogatives.
SEC. 110. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.
SEC. 111. No provision that is included in an appropriations Act listed in section 101(a), but that was not included in the applicable appropriations Act for fiscal year 2005 and by its terms is applicable to more than one appropriation, fund, or authority, shall be applicable to any appropriation, fund, or authority provided in this joint resolution.
SEC. 112. No provision that is included in an appropriations Act listed in section 101(a), and that makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation, shall be effective before the date set forth in section 106(3).
SEC. 113. Funds appropriated by this joint resolution may be obligated and expended notwithstanding section 10 of Public Law 91-672 (22 U.S.C. 2412), section 15 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2680), section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (22 U.S.C. 6212), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1)).
SEC. 114. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2005, and for activities under the Food Stamp Act of 1977, activities shall be continued at the rate to maintain program levels under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2005, to be continued through the date specified in section 106(3) of this joint resolution.
(b) Notwithstanding section 106 of this joint resolution, funds shall be available and obligations for mandatory payments due on or about November 1, 2005, and December 1, 2005, may continue to be made.
SEC. 115. The provisions of, and amendments made by, sections 1011, 1012, 1013, 1023, and 1026 of Public Law 109-13 shall continue in effect, notwithstanding the fiscal year limitation in section 1011 and the provisions of sections 1012(i), 1013(e), 1023(c), and 1026(e) of that Public Law, through the earlier of: (1) the date specified in section 106(3) of this joint resolution; or (2) with respect to any such section of Public Law 109-13, the date of the enactment into law of legislation that supersedes the provisions of, or the amendments made by, that section.
SEC. 116. The authorities provided by section 1306 of Public Law 107-314 shall continue in effect through the date specified in section 106(3) of this joint resolution or the date of the enactment into law of a defense authorization Act for fiscal year 2006, whichever is earlier.
SEC. 117. Section 6 of Public Law 107-57, as amended, shall be applied by substituting the date specified in section 106 of this joint resolution for `October 1, 2005', and sections 508 and 512 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (Public Law 108-447, division D), as made applicable to fiscal year 2006 by the provisions of this joint resolution, shall not apply with respect to Pakistan through the date specified in section 106(3) of this joint resolution.
SEC. 118. (a) Funds provided in section 101 of this joint resolution for `Social Security Administration, Limitation on Administrative Expenses' may be used to complete the

processing of appeals received prior to July 1, 2005, under sections 1852 and 1869 of the Social Security Act, notwithstanding section 931(b) of Public Law 108-173.
(b) The Commissioner of Social Security may enter into a reimbursable agreement with the Secretary of Health and Human Services to process, during fiscal year 2006, appeals received after June 30, 2005, and prior to October 1, 2005.
SEC. 119. For the purposes of section 101 of this joint resolution, amounts obligated in fiscal year 2005 from funding provided in section 1015 of Public Law 108-173 shall be deemed to have been provided in an applicable appropriations Act for fiscal year 2005.
SEC. 120. Notwithstanding section 101 of this joint resolution, amounts are provided for `Department of Health and Human Services, Office of the Secretary, Medicare Appeals' at a rate for operations not exceeding the rate set forth for such account in title II of H.R. 3010 of the 109th Congress, as passed by the House of Representatives.
SEC. 121. Section 1015(b) of Public Law 108-173 is amended by striking `2005' and inserting `2006'.
SEC. 122. The authority provided by section 2011 of title 38, United States Code, shall continue in effect through the date specified in section 106(3) of this joint resolution.
SEC. 123. The authority provided by section 2808 of Public Law 108-136, as amended by section 2810 of Public Law 108-375, shall continue in effect through the date specified in section 106(3) of this joint resolution.
SEC. 124. The amendment made by section 1022 of Public Law 109-13 shall continue in effect through the date specified in section 106(3) of this joint resolution.
SEC. 125. Funds appropriated by section 101 of this joint resolution for the National Aeronautics and Space Administration may be obligated in the account and budget structure set forth in the pertinent Acts specified in section 101(a)(8).
SEC. 126. Funds appropriated by section 101 of this joint resolution for `National Science Foundation, Research and Related Activities' may be used for Arctic and Antarctic icebreaking maintenance and operations.
SEC. 127. (a) Notwithstanding any other provision of this joint resolution, except section 106, the District of Columbia may expend local funds for programs and activities under the heading `District of Columbia Funds' at the rate set forth for such programs and activities under title V of H.R. 3058, One Hundred Ninth Congress, as passed by the House of Representatives, and in addition, funds under `District of Columbia Funds, Enterprise and Other Funds, Capital Outlay' as included in the Fiscal Year 2006 Proposed Budget and Financial Plan submitted to the Congress by the District of Columbia on June 6, 2005.
(b) Section 2302 of Public Law 108-11, as amended by section 336 of Public Law 108-335 shall be applied by substituting the date specified in section 106(3) of this joint resolution for `September 30, 2005'.
SEC. 128. The provisions of title II of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11311 et seq.) shall continue in effect, notwithstanding section 209 of such Act, through the earlier of: (1) the date specified in section 106(3) of this joint resolution; or (2) the date of the enactment into law of an authorization Act relating to the McKinney-Vento Homeless Assistance Act.
SEC. 129. Notwithstanding section 101 of this joint resolution, amounts are provided for `Department of Transportation, Federal Transit Administration, Administrative Expenses'

at a rate for operations not exceeding the total of budgetary resources made available for obligation for fiscal year 2005.

SEC. 130. Section 403(f) of Public Law 103-356 (31 U.S.C. 501 note) shall be applied by substituting the date specified in section 106(3) of this joint resolution for `October 1, 2005'.

SEC. 131. Amounts made available by this joint resolution for the Department of Defense that are related to amounts provided in title IX of the Department of Defense Appropriations Act, 2006, as passed by the House, or related to amounts designated as emergency requirements in previous defense appropriations Acts or supplemental appropriations Acts, are designated as appropriations for contingency operations related to the global war on terrorism pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006, except that amounts so designated under this section shall not exceed $50,000,000,000.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

(Extended until December 17th, 2005 by H.J.Res.72, passed 17 November 2005.)

CHAPTER 8

REPROGRAMMING

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CHAPTER 8

REPROGRAMMING

I. INTRODUCTION. Upon completing this instruction, the student will understand:

A. The difference between reprogramming and transferring funds.

B. The procedural rules involved in reprogramming funds.

C. The special rules involved in reprogramming for military construction purposes.

II. REFERENCES.

A. Department of Defense Appropriations Act (Annually).

B. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 3, chs. 3, 6, and 7 [hereinafter DOD FMR] available at http://www.dtic.mil/comptroller/fmr/.

C. Defense Financial and Accounting Service - Indianapolis 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (Jan. 2000 w/ changes through March 2005) available at https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

D. Air Force Instruction 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (3 March 2005) available at http://www.e-publishing.af.mil.

E. Department of Navy, NAVSO P-1000, Financial Management Policy Manual, ch. 1, pt. D (12 December 2002) available at http://www.fma.hq.navy.mil/policies/regulations.htm.

F. U.S. Government Accountability Office, Principles of Federal Appropriations Law, 2-24 to 2-31 (3d ed., vol. I, 2004) [hereinafter GAO Principles of Fed. Appropriations Law] available at www.gao.gov/special.pubs/og92013.pdf.

III. DEFINITIONS.

A. Reprogramming. Reprogramming is the use of funds in an appropriations account for purposes other than those contemplated by the agency at the time of the appropriation. DOD FMR, vol. 2A, ch. 1, para. 010107 (June 2004).

B. Transfer Authority. Annual authority provided by Congress to transfer budget authority from one appropriation or fund account to another. DOD FMR, vol. 2A, ch. 1, para. 010107 (June 2004).

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING.

A. Transfers. GAO, Principles of Fed. Appropriations Law, p. 2-24.

1. Transfers shift money between appropriations accounts.

2. There are three types of transfers.

a. Transfers between accounts within the same agency, e.g., Operation and Maintenance account to Military Personnel account.

b. Transfers between agencies, e.g., Department of Defense to Department of State.

c. Transfers to/from "earmarks," e.g., where Congress includes an "earmark" for a specific purpose within a general appropriation. Matter of John D. Webster, B-278121, 98-1 CPD ¶ 19.

3. Transfers require statutory authority. 31 U.S.C. § 1532; The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (C.G.).

a. 31 U.S.C. § 1532 prohibits transfers without statutory authority.

b. There are generally two types of transfer authority: general and specific.

(1) General Transfer Authority. General Transfer Authority is provided in either appropriations acts or in permanent legislation.

(a) Congress provides general transfer authority to DOD in each of its appropriations acts. See, e.g., Department of Defense Appropriations Act FY 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002).

(b) Permanent Legislation. See, e.g., 7 U.S.C. § 2257 (authorizing transfers between Department of Agriculture appropriations in an amount not to exceed seven percent of the "donor" appropriation).

(2) Specific Transfer Authority. Congress authorizes or directs the movement of funds between specific programs. See, e.g., Overseas Contingency Operations Transfer Fund, Department of Defense Appropriations Act FY 2003, Pub. L. No. 107-248, Title II, 116 Stat. 1519, 1524 (2002).

c. The statutory prohibition applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

d. An unauthorized transfer violates the purpose statute, 31 U.S.C. § 1301(a), and constitutes an unauthorized augmentation of the receiving appropriation.

e. Exception. 31 U.S.C. § 1534 authorizes an agency to charge one appropriation for expenditure benefiting another appropriation of the same agency. See Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network, 70 Comp. Gen. 592 (1991).

B. Reprogramming. See generally, GAO, Principles of Fed. Appropriations Law, p. 2-29.

1. Reprogramming shifts money within an appropriations account.

a. There is no change in the total amount available in the appropriations account.

b. Reprogramming is not a request for additional funds; rather, it is a reapplication of funds.

2. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on the expenditure of the funds. LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

3. Subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriations act itself. Newport News Shipbldg. and Dry Dock Co., B-184830, 55 Comp. Gen. 812 (1976).

4. Reprogramming is based on minimal congressional and legislative guidance.

a. Agencies must comply with the requirements of 31 U.S.C. § 1301.

b. Agencies must check appropriations acts for statutory prohibitions to proposed reprogramming.

5. Items eligible for reprogramming. Agencies may submit actions only for higher priority items, based on unforeseen military requirements, than those for which the funds were originally appropriated. See Department of Defense Appropriations Act FY 2005, Pub. L. No. 108-287, § 8005, 118 Stat. 969 (2004).

6. Items ineligible for reprogramming. Agencies may not submit actions on items for which funds have previously been requested from Congress but denied. See Department of Defense Appropriations Act FY 2005, Pub. L. No. 108-287, § 8005, 118 Stat. 969 (2004).

V. REPROGRAMMING TYPES.

A. Reprogramming Actions Requiring Prior Approval of Congressional Committees. DOD FMR vol. 3, ch. 6, para. 060401.A-F.

1. Most fund shifting/movements that make use of general transfer authority. See DOD FMR, vol. 3, ch. 6, para. 060401.C., for exceptions.

2. Any reprogramming that involves an item designated as a Congressional interest item.

3. Any increase in the procurement quantity of a major end item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment.

4. Any reprogramming action that involves the application of funds which exceed thresholds agreed upon by the congressional committees and DOD:

   a. Military Personnel: cumulative increases in a budget activity[1] of $10 million or more.

   b. Operation and Maintenance: cumulative increases in a budget activity of $15 million or more.

[1] Budget activities are defined as categories within each appropriation and fund accounts that identify the purposes, projects, or types of activities financed by the appropriation or fund. DOD FMR, vol. 3, ch. 6 (December 1996).

c. Procurement: cumulative increases for any program year of $20 million or more; cumulative decreases for any program year of $20 million or more, or 20 percent of the apportioned amount, whichever is greater.[2]

d. Research, Development, Test, and Evaluation (RDT&E): cumulative increases for any program year of $10 million or more in an existing program element; cumulative decreases for any program year of $10 million or more, or 20 percent of the appropriated amount, whichever is greater.[3]

5. New Starts: a program, subprogram, modification, project or subproject not previously justified by DOD and funded by Congress is considered a "new start." Congressional committees discourage the use of reprogramming to initiate new starts. For specific notification and approval procedures, see DOD FMR, vol. 3, ch. 6, paras. 060401.

6. Termination of programs that result in elimination of certain procurement programs and subprograms and RDT&E elements, projects, and subprojects.

B. "Internal" Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 060402.

1. Internal reprogrammings fall into three general categories:

a. actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements;

b. reprogramming to or from transfer accounts (e.g., Overseas Contingency Operations Transfer Account, Department of Defense Appropriations Act FY 2005, Pub. L. No. 108-287, Title II, 118 Stat. 956 (2004)); and

[2] In the conference report accompanying the FY 2003 Omnibus Appropriations Act, Congress raised the threshold from $10 million to $20 million for 2003/2005 appropriations for Procurement programs. H.R. Conf. Rep. No. 108-10, at 1499 (2003).

[3] Congress also raised the threshold from $4 million to $10 million for 2003/2004 appropriations for Research, Development, Test and Evaluation programs. *Id*.

c. approval to increase quantities, when congressional approval is not otherwise required.

2. Technically, funding changes within program elements are not regarded as "reprogramming." The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).

3. Internal reprogrammings are not subject to dollar thresholds.

4. Internal reprogrammings do not require prior congressional approval or notification. Such actions are audit-trail type actions processed within DOD Secretary of Defense, Comptroller.

C. Below Threshold Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0608.

1. Below threshold reprogrammings are those reprogramming actions that do not exceed the thresholds identified above, in paragraph V.A.4, individually or when combined with other below-threshold reprogramming actions.

2. Congress performs oversight through the DOD's semiannual submission of its DD 1416, Report of Programs.

D. Letter Notifications. DOD FMR, vol. 3, ch. 6, para. 060403.

1. Letter notifications apply to below threshold reprogramming for new programs or line items not otherwise requiring prior approval or notification.

2. Notification to the appropriate committees requires a 30-day automatic hold on funds.

E. Intelligence Related Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0606.

1. Generally, the same rules apply to reprogramming intelligence resources as provided for other reprogramming actions under DOD FRM, vol. 3, ch. 6, para. 060602.

2. Some special rules do apply:

a. Actions reprogramming DOD appropriations that impact the National Foreign Intelligence Program are subject to additional guidelines.

b. The Office of Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) has responsibility for determining applicability of the reprogramming rules to above or below threshold reprogramming actions that may affect certain intelligence and related activities.

VI. MILITARY CONSTRUCTION REPROGRAMMING. DOD FMR, vol. 3, ch. 7.

A. General. The congressional subcommittees concerned with the appropriation and authorization of military construction and family housing funds have agreed that, in executing approved programs, some flexibility is required in adjusting approved funding levels to comply with new conditions and to effectively plan programs to support assigned missions. Departmental adjustments or reprogrammings may be required for a number of reasons including:

1. Responding to emergencies;

2. Restoring or replacing damaged or destroyed facilities;

3. Accommodating unexpected price increases; and

4. Implementing specific program provisions provided for by congressional committees.

B. Authority.

1. 10 U.S.C. § 2853. Authorizes a reprogramming request when the Secretary of a military department determines that a cost increase is required solely to meet unusual variations in construction costs that the agency could not have reasonably anticipated at the time Congress originally approved the project. The Secretary concerned may increase the cost of a "specified" military construction project by the lesser of:

    a. 25% of the appropriated amount; or

    b. 200% of the UMMC ceiling (i.e., $3 million).

2. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to $45 million annually for emergency construction if a project is:

    a. Not otherwise authorized by law;

    b. Vital to national security; and

    c. So urgent that waiting until the next budget submission would be inconsistent with national security.

3. 10 U.S.C. § 2854. Provides permanent authorization for the restoration or replacement of facilities damaged/destroyed due to natural disasters. If the estimated cost of the project exceeds the UMMC threshold (i.e., $1.5 million), the Secretary concerned must notify the appropriate committees of Congress.

4. 10 U.S.C. § 2672a. Provides permanent authority to acquire interest in land that:

    a. Is needed in the interest of national defense;

    b. Is required to maintain the operational integrity of military installations; and

c. Urgency does not permit the time necessary to include the required acquisition in an annual Military Construction Authorization Act.

C. Restrictions on Reprogrammings.

1. DOD will not submit a request for reprogramming:

a. For any project or effort that has not been authorized;

b. For any project or effort that has been denied specifically by Congress; or

c. To initiate programs of major scope or base realignment actions, when Congress has not authorized such efforts.

2. MILCON reprogrammings are sent to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees for approval.

a. Generally, committee review process is non-statutory.

b. An agency generally will observe committee review and approval procedures as part of its informal arrangements with the various committees, although they are not legally binding. GAO, Principles of Fed. Appropriations Law, p. 2-25.

VII. CONCLUSION.

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CHAPTER 9

CONSTRUCTION FUNDING

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students will:

1. Understand the statutes and regulations governing the fiscal aspects of military construction.

2. Understand how to apply construction funding rules to routine problems.

B. Practitioners must stay current since new developments frequently occur in this area of the law.

II. REFERENCES.

A. Military Construction Codification Act, Pub. L. No. 97-214, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. §§ 2801-2885).

B. 41 U.S.C. § 12.

C. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.

D. DOD Dir. 4270.5, Military Construction (12 February 2005) [hereinafter DOD Dir. 4270.5].

E. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (June 2000) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].

F. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Real Property Maintenance/Minor Construction (June 2000) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].

G. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 3, Budget Execution – Availability and Use of Budgetary Resources, ch. 17, Accounting Requirements for Military Construction projects (Dec. 1996) [hereinafter DOD Reg. 7000.14-R, vol. 3, ch. 17].

H. DFAS-IN Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000) [hereinafter DFAS-IN 37-1].

I. AR 415-15, Army Military Construction Program Development and Execution (4 Sep. 1998) [hereinafter AR 415-15].

J. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 Apr. 1998) [hereinafter AR 415-32].

K. AR 420-10, Management of Installation Directorates of Public Works (15 Apr. 1997) [hereinafter AR 420-10].

L. AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992, including Interim Policy replacing Cahpter 5, Relocatable Buildings, pursuant to DAIM Memorandum, Subject: Interim Policy for Relocatable Buildings, 21 October 2004).

M. DA Pam 415-15, Army Military Construction Program Development and Execution (25 Oct. 1999) [hereinafter DA Pam 415-15].

N. DA Pam 420-11, Project Definition and Work Classification (7 October 1994) [hereinafter DA Pam 420-11].

O. AFI 32-1021, Planning and Programming of Facility Construction Projects (24 Jan 2003) [hereinafter AFI 32-1021].

P. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (15 Oct 2003) [hereinafter AFI 32-1032].

Q. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (3 Mar 2005) [hereinafter AFI 65-601, vol. 1, ch. 9].

R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (3 Mar 2005) [hereinafter AFI 65-601, vol. 1, ch. 21].

S. OPNAVINST 11010.20F, Facilities Projects Manual (7 June 1996) [hereinafter OPNAVINST 11010.20F].

T. OPNAVINST 11010.33B, Procurement, Lease and Use of Relocatable Buildings (14 July 1988) [hereinafter OPNAVINST 11010.33B].

U. OPNAVINST 11101.19E, Management of Flag and General Officer Quarters (F&GOQS) (7 Aug. 1996) [hereinafter OPNAVINST 11101.19E].

V. OPNAVINST 11011.10F, Utilization of Navy Real Property (17 June 1994) [hereinafter OPNAVINST 11011.10F].

W. SECNAV Instruction 11010.5F, Facilities Projects for Minor Construction, Repair, and Maintenance of Real Property (25 Aug. 1983), [hereinafter SECNAVINST 11010.5F].

X. SECNAV Instruction 11013.1E, Unspecified Minor Construction, Emergency Construction, and Restoration or Replacement of Facilities Damaged or Destroyed Program (14 Oct. 1983), [hereinafter SECNAVINST 11013.13E].

Y. SECNAV Instruction 11013.28A, Secretary of Defense Military Construction Contingency Authorities (20 July 1983) [hereinafter SECNAVINST 11013.28A].

Z. Major Earle D. Munns, An Analysis of the Military Construction Codification Act, ARMY LAW., Nov. 1987, at 19.

AA. M. Warner Meadows, *Has DOD "Repaired" a Component of the Construction Funding Analysis?* ARMY LAW., Mar. 1998, at 15.

BB. M. Warner Meadows, *Military Construction Funding, Variation in Cost Rules*, ARMY LAW, Aug. 1998, at 20.

CC. Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, ARMY LAW., Aug. 2005, at 1.

III. BACKGROUND.

A. Congressional Oversight of the Military Construction Program.

1. Congressional oversight is pervasive and extensive.

2. Military departments may only accomplish minor military construction projects (i.e., projects with an approved cost of $1.5 million or less) without prior Congressional approval, and military departments must still notify Congress of minor military construction projects with an approved cost of $750,000 or more.

B. The Military Construction Codification Act (MCCA). The purpose of the MCCA was to revise and codify recurring provisions of annual legislation relating to military construction and family housing. H.R. REP. NO. 97-612 (1982).

IV. DEFINITIONS.

A. Military Construction. 10 U.S.C. § 2801(a). The term "military construction" includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation."

B. Military Construction Project. 10 U.S.C. § 2801(b). The term "military construction project" includes "all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . . ."

C. Facility. 10 U.S.C. § 2801(c)(1). The term "facility" means "a building, structure, or other improvement to real property."

D. Military Installation. 10 U.S.C. § 2801(c)(2). The term "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, *without regard to the duration of operational control*."

E. Appropriate Committees of Congress. 10 U.S.C. § 2801(c)(4). The term "appropriate committees of Congress" means "the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on Armed Services and the Committee on Appropriations of the House of Representatives."

V. SOURCES OF MILITARY CONSTRUCTION FUNDING.

A. Military Construction Appropriations Act. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004).

1. Provides funds (MILCON) for both DOD's specified *and* unspecified military construction programs (UMC).

2. Funds are generally available for 5 years.

B. Department of Defense Appropriations Act (O&M). See, e.g., Department of Defense Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004).

1. Provides some miscellaneous "pots" of money for military construction projects.

2. General O&M can be used for unspecified minor military construction projects costing less than $750,000.

3. Funds are generally available for 1 year.

VI. SOURCES OF MILITARY CONSTRUCTION FUNDING AUTHORITY.

A. "Specified" Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.

1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004). Congress provides annual funding and approval for "specified" military construction projects in the Military Construction Appropriations Act.

a. Congress funds the entire military construction program with lump sum appropriations. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.[1]

b. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by project.

2. Authorized Use.

a. Congress normally "specifies" military construction projects expected to exceed $1.5 million.[2]

b. A military department may not carry out military construction projects expected to exceed $1.5 million without specific Congressional authorization and approval.

B. "Unspecified" Minor Military Construction (UMMC) Projects. 10 U.S.C. § 2805(a).

[1] The statutory requirements for the construction and improvement of military family housing are at 10 U.S.C. §§ 2821-2837.

[2] Congress may also specify projects under $1.5 million. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004).

1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004). Congress provides annual funding and approval for UMMC projects in the Military Construction Appropriations Act.

   a. Congress appropriates "Unspecified Minor Construction" funds to each military department in the conference report that accompanies the Military Construction Appropriations Act; however, the conference report does not break down these appropriations any further (e.g., by project).[3]

   b. The Army refers to its "unspecified" appropriation as "Unspecified Minor Military Construction, Army" (UMMCA). See AR 415-15, para. 1-1a(1); Glossary, sec. I.[4]

2. Authorized Use. 10 U.S.C. § 2805(a). See AR 415-15, para. 1-6b(1) and app. B; AFI 32-1021, ch. 4; AFI 32-1032, para. 3.3.3; AFI 65-601, vol. 1, para. 9.12.6; OPNAVINST 11010.20F, para. 6.4.4. The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law.

   a. An UMMC project is defined as a military construction project with an approved cost of $1.5 million or less.

   b. However, an UMMC project can have an approved cost up to $3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

3. Requirements for Use. 10 U.S.C. § 2805(b)(2).

   a. Before beginning an UMMC project with an approved cost greater than $750,000, the Secretary concerned must approve the project.

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[3] For FY2005, for example, Congress appropriated UMC funds in the amounts of $20.8M for the Army; $12M for the Navy, and $13.2M for the Air Force. *See* Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004).

[4] Note that throughout this outline the terms unspecified military construction (UMC) and unspecified minor military construction (UMMC) are used interchangeably. UMC can refer to specific MILCON funding or simply to the concept of all unspecified minor construction paid for with either UMMC or O&M funds.

b. In addition, the Secretary concerned must:

(1) Notify the appropriate committees of Congress;[5] and

(2) Wait 21 days.[6]

C. UMMC Projects Financed by Operation & Maintenance (O&M) Funds.

1. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12.

a. Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 12 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.

b. In The Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422, 433 (1984), the General Accounting Office (GAO) interpreted 41 U.S.C § 12 to:

(1) Require specific Congressional authorization for military construction projects; and

(2) Prohibit the use of other, more general appropriations for military construction projects.

[5] The Secretary concerned must notify the appropriate committees of Congress of the justification and current cost estimate for the project. 10 U.S.C. § 2805(b)(2). See AFI 32-1021, para. 4.2 (detailing the information MAJCOMS must submit to HQ, USAF/CEC); see also DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

[6] The Air Force imposes a 30-day waiting period. AFI 32-1021, para. 4.5.

2. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 415-15, para. 1-6c(1); AR 420-10, para. 4-1c; AFI 32-1021, para. 4.2; OPNAVINST 11010.20F, para. 6.1.1.f. The Secretary of a military department may use O&M funds to finance UMMC projects costing less than:[7]

a. $1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.[8]

b. $750,000 if the project is intended for any other purpose.[9]

D. Exercise-Related UMMC Projects.

1. All Exercise-Related Projects. See Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); see also AR 415-32, para. 3-11d. For procedural guidance for executing ERC, see JOINT CHIEFS OF STAFF, INSTR. 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 Jun. 2001).

a. If a military department expects to spend more than $100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise.

[7] The thresholds for O&M funded projects were raised from $500,000 to $750,00, and from $1 million to $1.5 million under the expanded life health and safety authority by the DOD Authorization Act for FY 2002. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, Section 2801. The Statutory change was effective on 28 December 2001. Projects approved prior to that date continue to carry the $500,000 or $1 Million limitation. The service regulations will require revision to comport with the statutory change. To the extent that regulatory cites in this outline specify a $500,000 threshold, those cites pre-date the increase in the statutory threshold and may or may not be controlling at the time you review your project.

[8] There is no specific guidance as to what constitutes a "deficiency that threatens life, health, or safety." The legislative history contains no guidance. Neither the DoD Regulations, nor the Service regulations are of assistance. At least one Army MACOM has issued limited guidance. *See*, Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, subject: Funding and Approval Authority, 6 March 2000. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed $750,000 (but not more than $1,500,000). AFI 32-1032, para 5.1.2.1 and AFI 65-601, Vol. 1., para. 9-10.

[9] AR 420-10, para. 4-1c, requires Army activities to use O&M funds for construction projects that cost less than the statutory thresholds. In fact, AR 420-10, para. 4-1c, requires Army activities to obtain prior approval from HQDA if they want to use UMMCA funds for construction projects costing $750,000 or less.

b. The SECDEF must provide this notice 30 days before the start of the exercise.

2. Exercise-Related UMMC Projects Coordinated[10] or Directed[11] by the Joint Chiefs of Staff (JCS) Outside the U.S.[12]

a. O&M Funds. 10 U.S.C. § 2805(c)(2). See AR 415-32, para. 3-5.

(1) General Rule. The Secretary of a military department may not use O&M funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S. [NOTE: Congress passed 10 U.S.C. § 2805(c)(2) in response to The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984)].

(2) Exception. The Secretary of a military department may arguably use O&M funds to finance minor and/or temporary structures (e.g., tent platforms, field latrines, shelters, range targets, installed relocatable structures)[13] or any structures which are completely removed at the end of an exercise. See The Hon. Bill Alexander, supra (noting that the "temporary structure" exception is extremely limited in scope). But cf. AR 415-32, para. 3-5c. (stating that "the Army may use [O&M] funds, except when the exercise-related construction is JCS directed or coordinated outside the United States").

b. UMMC Funds. 10 U.S.C. § 2805(a)(2). See AR 415-32, para. 3-5d.

[10] JCS-coordinated exercises are minor exercises that require JCS coordination because they involve the units or forces of more than one military department. AR 415-32, para. 3-3, and Glossary, sec. II.

[11] JCS-directed exercises are exercises that are of interest to the Joint Chiefs of Staff, but directed by a strategic mobility or major commander-in-chief. AR 415-32, para. 3-3.

[12] JCS coordinated or directed exercises include: (1) joint training exercises such as Atlantic Resolve, AHUAS TARA, and BRIGHT/STAR; and (2) combined training exercises such as FUERTES CAMINOS. AR 415-32, para. 3-3, and Glossary, Sec. II.

[13] To determine whether a facility is "temporary," focus on the duration and purpose of the facility's use rather than the materials used. AR 415-32, para. 3-5c.

(1) The statute states that the Secretary of a military department may not use more than $5 million of its UMMC funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S. during any fiscal year.

(2) In practice, exercise related construction is funded with funds specifically identified by Congress for this purpose. These funds are administered by the Joint Staff.[14]

E. Combat and Contingency Related O&M Funded Construction. Within the last few years, significant changes have taken place in the funding of combat and contingency related construction. In order to understand the current state of the law it is necessary to examine these changes as they have taken place.

1. Prior to April 2003, per Army policy, use of O&M funds in excess of the $750,000 threshold discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this opinion was that O&M funds were the primary funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

2. On 27 February 2003, DOD issued similar guidance. See Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DOD memorandum, in effect, adopted the Army's policy as articulated in the 22 February 2000 memorandum at the DOD level.

[14] For FY 03 there was $6,430,000 available for these projects. In FY 02, there was $6,305,000 available for these projects. In FY 01 this amount was $6,196,000.

3. On 16 April 2003 the President signed the Emergency Wartime Supplemental Appropriation for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act's accompanying conference report stated, in rather harsh language, the conferees' legal objections to the Under Secretary of Defense (Comptroller)'s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.

4. On 6 November 2003 the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No.108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines:

   a. the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forcers in support of Operation Iraqi Freedom or the Global War on Terrorism;

   b. the construction is not carried out at a military installation where the United States is reasonably expected to have a long-tern presence;

   c. the United States has no intention of using the construction after the operational requirements have been satisfied; and,

   d. the level of construction is the minimum necessary to meet the temporary operational requirements.

   Pursuant to the act, this temporary funding authority was limited to $150 million.

5. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds DOD could spend on contingency and combat related construction in FY 04 to $200 million, and adopted, unchanged, the determination requirements of the 04 Emergency Supplemental Appropriation .

6. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. See Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004).

   a. Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding $750,000 to the Under Secretary of Defense (Comptroller).

   b. The request will include a description and the estimated cost of the project, and include a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act.

   c. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project.

   d. The memorandum provides a draft format to be used for project requests, and is available at: http://www.acq.osd.mil/dpap/Docs policy/use%20of%20Operation%20and%20maintenance%20appro priations%20for%20 construction%2 0during%20fy2004.pdf

7. Section 2810 of the Ronald W. Reagan National Defense **Authorization** Act for 2005 extended DOD's funding authority to use O&M funds for such projects into FY 2005, limited to $200 million for the fiscal year. See Pub. L. 108-767, 118 Stat. 1811. So for the current fiscal year at least, the temporary statutory authority continues.

8. Bottom Line. As a result of recent congressional developments, DOD can no longer fund combat and contingency related construction projects costing in excess of $750,000 without first identifying clear, affirmative legislative authority. Section 2810 of the FY 05 Defense Authorization Act provides such authority. However, this authority is of limited in scope, funding and duration. Where this will leave the DOD in future years, or when the $200 million limit is spent is an open question. Judge Advocates are advised to keep abreast of the latest developments in this field before giving advice on proposed construction projects.

F. Contingency Construction Projects. 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 415-15, para. 1-6b(6); AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20F, para. 6.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.[15]

2. Requirements for Use.

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

(1) National security; or

(2) National interest.

b. In addition, the SECDEF must:

[15] The Secretary of a military department must forward contingency construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3.

(1) Notify the appropriate committees of Congress;[16] and

(2) Wait 21 days.[17]

3. Source of Funding. The SECDEF must use funds specifically appropriated for contingency construction to finance these projects.[18]

4. Limitations.

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

(1) 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.

(2) 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.

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[16] The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2804(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.2 (detailing the requirements for reprogramming requests). But see DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects).

[17] DOD Reg. 7000.14-R, para. 170102.F.1, indicates that the Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

[18] In 2003 Congress dramatically increased the amount of funding potentially available to DOD under this authority. See Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that had previously been funded under the authority the DOD Deputy General Counsel (Fiscal) 27 February 2003 memorandum be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DOD to spend up to $200 million of O&M per fiscal year on such construction projects, DOD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. See Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to $10 million for fiscal year 2005).

b. DOD Limitations.

(1) 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.

(2) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.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 415-15, para. 1-6b(6).

(1) The Army generally reserves this authority for projects that support multi-service requirements.

(2) 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.

(1) The use of this authority is rare.

(2) The Air Force must consider using its 10 U.S.C. § 2803 authority first.

G. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.5; AR 415-15, paras. 1-6b(2) and 5-19, app. C; AFI 32-1021, para. 5.2.1; AFI 65-601, vol. 1, para. 9.12.3; OPNAVINST 11010.20F, para. 6.4.2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The Secretary of a military department may use this authority to carry out emergency construction projects not otherwise authorized by law.

2. Requirements for Use.

a. Before using this authority, the Secretary concerned must determine that:

(1) The project is vital to:

(a) National security; or

(b) The protection of health, safety, or the quality of the environment; and

(2) The project is so urgent that deferral until the next Military Construction Appropriations Act would be inconsistent with:

(a) National security; or

(b) The protection of health, safety, or the quality of the environment.

b. In addition, the Secretary concerned must:

(1) Notify the appropriate committees of Congress;[19] and

(2) Wait 21 days.

3. Source of Funding.

a. The Secretary concerned must use unobligated military construction funds to finance these projects.[20]

[19] The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2803(b).

[20] According to the legislative history of the MCCA: "[t]he use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or

(1) Congress must normally approve a reprogramming request for the project.[21]

(2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

b. The Secretary concerned may not obligate more than $30 million per fiscal year for emergency construction.

4. Limitations.

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

(1) The legislative history of the MCCA indicates that the Secretaries of the military departments should rarely use this authority.[22]

(2) 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.; AR 415-15, app. C, para. C-2a.

b. DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.E.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]." See AR 415-15, para. 5-19.

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canceling other military construction projects." H.R. REP. NO. 97-612 (1982). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

[21] The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests); see also DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.5 (requiring prior congressional notification and approval for reprogramming action); AR 415-15, app. C., para. C-4 (noting that Congress will probably not approve a reprogramming request unless there is truly a dire need for the project).

[22] In 1985, the House Appropriations Committee stated that: "This authority was provided to give the Department and Congress flexibility in dire situations. A true emergency project should be confined to facilities without which a critical weapon system or mission could not function." H.R. REP. NO. 99-275, at 23 (1985).

c. Army Limitations. AR 415-15, app. C, para. C-3.

(1) Although 10 U.S.C. § 2803, technically covers both military construction and family housing projects, the Army only uses this authority for military construction projects.

(2) AR 415-15, app. C, para. C-3, indicates that the Army should execute emergency construction projects under its UMMC program, if possible.

H. Reserve Component Construction Authorities.

1. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.

a. Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such facilities as necessary to meet the missions of the reserve components.

b. Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, rehabilitation of facilities for specified purposes. 10 U.S.C. § 18233(a) (2) through (6).

c. Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).

2. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233a. AR 140-483, Ch. 7.

a. Unspecified Minor Military Construction. 10 U.S.C. § 18233a(a)(1). Unlike Active Duty, RC UMMC projects are funded with O&M appropriations. Similar funding limits apply.

(1) Expenditure or contributions in excess of $1.5 million may not be made until the SECDEF has notified the appropriate committees of Congress of the location, nature, and estimated cost of the project, and waited 21 days after notification.

(2) This limitation does not apply to facilities acquired by lease, or to projects specifically approved by Congress. 10 U.S.C. § 18233a(a)(2)(A) & (B).

(3) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $3 million. 10 U.S.C. § 18233a(a)(2)(C).

b. Minor construction projects. 10 U.S.C. § 18233a(b).

(1) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $1.5 million. 10 U.S.C. § 18233a(b)(1).

(2) For any other project, the limit is $750,000. 10 U.S.C. § 18233a(b)(2).

I. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.5; AR 415-15, para. 1-6b(7) and app. D, para. D-2; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5; OPNAVINST 11010.20F; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects that are necessary to support the use of the armed forces in the event of:

a. A declaration of war; or

b. A Presidential declaration of a national emergency.[23]

2. Requirements for Use. The SECDEF must notify the appropriate committees of Congress;[24] however, there is **no waiting period** associated with the use of this authority.

3. Source of Funding. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.

4. On November 14, 1990, President Bush invoked this authority to support Operation Desert Shield. See Executive Order No. 12734, 55 Fed. Reg. 48,099 (1990), reprinted in 10 U.S.C. § 2808. President George W. Bush invoked this authority on 16 November 2001. See Executive Order No. 13235, 66 Fed. Reg.58,343 (2001).

J. Environmental Response Actions. 10 U.S.C. § 2810. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects for environmental response actions.

2. Requirements for Use.

a. Before using this authority, the SECDEF must determine that the project is necessary to carry out an environmental response action under:

(1) The Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708; or

[23] The Secretary of a military department must forward construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.H.

[24] The SECDEF must notify the appropriate committees of Congress of: (1) the decision to use this authority; and (2) the estimated cost of the construction projects. 10 U.S.C. § 2808(b).

(2) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675.

b. In addition, the SECDEF must:

(1) Notify the appropriate committees of Congress;[25] and

(2) Wait 21 days.[26]

3. Source of Funding. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.[27]

K. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.5; AR 415-15, para. 1-6b(3) and app. D, para. D-1; AFI 32-1021, para. 5.2.2; AFI 65-601, vol. 1, para. 9.12.7; OPNAVINST 11010.20F, para. 6.4.3; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.[28]

2. Requirements for Use. If the estimated cost of the project exceeds the UMMC threshold (i.e., $1.5 million), the Secretary concerned must:

a. Notify the appropriate committees of Congress;[29] and

[25] The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2810(b).

[26] DOD Reg. 7000.14-R, para. 170102.G.1, indicates that Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

[27] Congress provides annual appropriations for environmental restoration projects. See, e.g., Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). See DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects). But see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

[28] The intent of this section is to permit military departments and defense agencies to respond to natural disasters, acts of arson, and acts of terrorism promptly to restore mission effectiveness and preclude further deterioration of the damaged facility. H.R. REP. NO. 97-612.

b. Wait 21 days.

3. Source of Funding.

a. O&M Funds. See H.R. REP. NO. 97-612 (1982); see also AR 415-15, app. D, para. D-1c(3) and fig. D-1; AFI 32-1021, para. 5.2.2.2.

(1) The Secretary concerned may use O&M funds if the cost of the project is $750,000 or less.[30]

(2) The Secretary concerned may also use O&M funds to repair or restore a facility temporarily to:

(a) Prevent additional significant deterioration;

(b) Mitigate a serious life or safety hazard; or

(c) Avoid severe degradation of a critical mission.

b. Military Construction (MILCON) Funds.[31] See H.R. REP. NO. 97-612 (1982).

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[29] The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2854(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.2 (detailing the requirements for reprogramming requests); AR 420-10, para. 4-8 (providing for expedited project approval and execution procedures).

[30] The expanded thresholds for Life, Health, and Safety threatening situation should be considered for use in these situations.

[31] MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both "specified" funds and UMMC funds.

(1) The Secretary concerned may use MILCON funds to construct a replacement facility if an economic analysis of life-cycle costs shows that replacement is more cost effective than repair.[32]

(a) Congress must normally approve a reprogramming request for the project.[33]

(b) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

(2) If the Secretary concerned intends to use UMMC funds to construct a replacement facility, the Secretary concerned must comply with 10 U.S.C. § 2805 and any applicable regulations.

4. Limitations.

a. DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.J.5, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

b. Army Limitations. AR 415-15, app. D, para. D-1c(2) restricts the use of this authority for family housing projects.

c. Air Force Limitations. AFI 32-1021, para. 5.2.2.1, provides additional criteria for repairing damaged Air Force facilities.

[32] The Secretary concerned may use current design and material criteria for the replacement facility. In addition, the Secretary concerned may increase the size of the replacement facility to meet current mission and functional requirements. See H.R. REP. NO. 97-612 (1982); see also AR 415-15, app. D, para. D-1c(4).

[33] The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2; AR 415-15, app. D, para. D-1d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.6 (requiring prior congressional notification and approval for reprogramming action).

(1) The damaged or destroyed facility must have been in use (or planned for use) at the time it was damaged or destroyed.

(2) The new or repaired facility must normally be the same size as the damaged or destroyed facility; however, the MAJCOM may approve limited increases to achieve economy of design or compliance with new criteria. But see H.R. Rep. No. 97-612 (1982) (stating that "any replacement facility [may] use current design and material criteria and may be increased in size to meet current mission and functional requirements").

(3) A MAJCOM may not use this authority to correct space deficiencies.

d. Navy Limitations. Unless a shore activity must restore or replace a facility immediately to prevent an undue impact on mission accomplishment, the shore activity should include the restoration or replacement project in its annual budget program. OPNAVINST 11010.20F, para. 6.4.3 (noting that "[t]he Secretary of Defense has restricted the use of this authority to complete replacement or 'major restoration' of a facility which is urgently required").[34]

VII. METHODOLOGY FOR REVIEWING CONSTRUCTION ACQUISITIONS.

A. Define the Scope of the Project.

B. Classify the Work.

C. Determine the Funded and Unfunded Costs of the Project.

D. Select the Proper Appropriation.

[34] OPNAVINST 11010.20F, para. 6.4.3, defines "major restoration" as "a restoration costing in excess of 50 percent of the cost of completely replacing the facility."

E. Verify the Identity of the Proper Approval Authority for the Project.

VIII. DEFINING THE SCOPE OF THE PROJECT.

A. Project splitting and/or incrementation[35] is prohibited!! See AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1b; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20F, para. 6.2.1.

1. A "military construction project" includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L; AR 415-15, para. 2-3a; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1c; AFI 32-1021, para. 3.2.1; OPNAVINST 11010.20F, para. 6.1.1.f; see also The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (concluding that the Air Force improperly incremented a project involving 12 related trailers into 12 separate projects).

2. An agency may not treat "clearly interrelated"[36] construction activities as separate projects. The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991); The Hon. Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub). **NOTE**: The GAO used the term "clearly interrelated" in the Donley case in the same manner that DOD and the military departments use the term "interdependent."

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[35] AR 415-32, Glossary, sec. II, defines "incrementation" as: "The splitting of a project into separate parts where:

a. It is done solely to reduce costs below an approved threshold or minor construction ceiling.

b. Each part is in itself complete and usable.

c. The total project is not complete until all parts are complete.

d. In order to determine what constitutes a stand alone project, i.e., a complete and usable facility, a comparison of interdependence as opposed to facility interrelations should be made . . . ."

See DA Pam 420-11, Glossary, sec. II; see also AR 415-15, Glossary, sec. II (distinguishing between the phasing of construction and incremental construction).

[36] AR 415-32, Glossary, sec. II, defines "interrelated facilities" differently (i.e., as "facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities"). In contrast, AR 415-32,

B. Guidance and Restrictions.

1. Legislative History. H.R. REP. NO. 97-612 (1982).

a. The conference report that accompanied the MCCA specifically prohibited:

(1) Splitting a project into increments to avoid:

(a) An approval threshold; or

(b) The UMMC cost ceiling;

(2) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction; and

(3) Engaging in concurrent work to reduce the cost of a construction project below a cost variation notification level.

b. However, the conference report indicated that a military department could carry out an UMMC construction project before or after another military construction project under certain circumstances.[37]

(1) A military department could carry out an UMMC construction project before another military construction project if:

Glossary, sec. II, defines "interdependent facilities" like the GAO did in the Donley case (i.e., as "facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction project"). See also; *Illegal Actions in the Construction of the Airfield at Fort Lee, Virginia: Hearings Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov't Operations*, 87th Cong. (1962); Hon. Sam Rayburn, Comp. Gen., B-133316 (Jan. 24, 1961); and Hon. Sam Rayburn, Comp. Gen., B-133316 (Mar. 12, 1962).

[37] The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

(a) The UMMC construction project satisfied a new mission requirement; and

(b) The UMMC construction project would provide a complete and usable facility that would meet a specific need during a specific period of time.

(2) A military department could carry out an UMMC construction project after another military construction project to satisfy a new mission requirement that arose after the completion of the other project.

2. DOD Guidance and Restrictions. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170102.I and 170102.L.

a. As a general rule, DOD Components may not engage in incremental construction (i.e., the planned acquisition or improvement of a facility through a series of minor construction projects).

b. DOD Components must:

(1) Identify the required end result of a minor construction project and its correlation with the installation master plan; and

(2) **Comply with the intent** of 10 U.S.C. § 2805 (UMC).

c. Multi-use Facilities.

(1) DOD Components may divide construction work in a multi-use facility into separate projects if each project is:

(a) Clearly defined; and

(b) Results in a complete and usable facility.

(2) DOD Components must nevertheless treat the following construction work in a multi-use facility as one project:

(a) All construction work for the same or related functional purposes;

(b) All concurrent construction work in contiguous (e.g., touching) areas; and

(c) All construction work in common areas.

3. Army Guidance and Restrictions. AR 420-10, para. 4-4; DA Pam 420-11, para. 1-7n.

a. AR 420-10, para. 4-4a, specifically prohibits the following practices:

(1) The acquisition or improvement of a facility through a series of minor military construction projects;

(2) The subdivision, splitting, or incrementing of a project to avoid:

(a) A statutory cost limitation; or

(b) An approval or contracting threshold; and

(3) The development of a minor military construction project solely to avoid the need to report a cost variation on an active military construction project to Congress.

b. In addition, AR 420-10, para. 4-4b, prohibits the Army from using its UMMC funds to begin or complete a “specified” military construction project.

4. Air Force Guidance and Restrictions.

a. AFI 32-1021, para. 4.2, specifically prohibits:

(1) Undertaking an UMMC project at the same time as a "specified" military construction project.

(2) Splitting a project into increments to avoid:

(a) An approval threshold; or

(b) The UMMC cost ceiling; and

(3) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction.

b. However, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project before a "specified" military construction project to satisfy a new mission requirement if the UMMC project will provide a complete and usable facility that meets a specific need during a specific period of time.

c. In addition, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project after a "specified" military construction project to satisfy a new mission requirement that arises after the completion of the "specified" project.

d. AFI 32-1032, para. 3.4.2, generally prohibits:

(1) Modifying a newly constructed facility within 12 months of the beneficial occupancy date (BOD) unless an unforeseeable mission or equipment change causes the modification(s); and

(2) Using O&M funds to correct deficiencies in projects funded by MILCON funds.

e. AFI 32-1032, para. 5.3.1, requires the Air Force to include all of the known UMMC work required in a facility during the next 24 months in a single project.

f. AFI 32-1032, para. 5.3.2, only permits multiple minor construction projects in a single building within a 24 month period if:

(1) The Air Force could not have reasonably anticipated the requirement for the additional project when it initiated the previous project;

(2) The requirement for the additional project is for a distinctly different purpose or function; and

(3) Each project results in a complete and usable facility or improvement.

5. Navy Guidance and Restrictions.

a. OPNAVINST 11010.20F, para. 2.2.5, generally requires shore activities to incorporate all work required to meet a requirement in a single facility in a single project.

b. OPNAVINST 11010.20F, para. 6.2.1., specifically prohibits:

(1) Acquiring a facility—or an improvement to a facility—through a series of minor construction projects;

(2) Splitting a project solely to:

(a) Avoid an approval requirement; or

(b) Circumvent a statutory funding limitation;

(3) Splitting a project if the resulting sacrifice of economy of scale increases the cost of the construction (e.g., building several small buildings instead of one large building); and

(4) Undertaking concurrent work to avoid the MILCON reprogramming approval procedures (e.g., using O&M funds to augment a construction project).

c. However, OPNAVINST 11010.20F, para. 6.2.1.b, permits a shore activity to undertake an UMMC project before a "specified" military construction project to satisfy an urgent requirement if the UMMC project will provide a complete and usable facility during a specific period of time.

d. In addition, OPNAVINST 11010.20F, para. 6.2.1.b, permits a shore activity to undertake an UMMC project after a "specified" military construction project to satisfy a new mission requirement that develops after the BOD of the "specified" project.

e. OPNAVINST 11010.20F, para. 6.2.3, only permits multiple minor construction projects in a single facility if:[38]

(1) They satisfy unrelated/dissimilar purposes;

(2) They are not dependent on each other;

(3) They are not contiguous; and

(4) Each project will result in a complete and usable improvement to the facility.

IX. CLASSIFYING THE WORK.

A. Construction.

[38] Cf. OPNAVINST 11010.20F, para. 6.2.1.a (imposing similar requirements for construction work involving multiple facilities).

1. Statutory Definition. 10 U.S.C. § 2801(a). Military construction includes any construction, development, conversion, or extension carried out with respect to a military installation.

2. Regulatory Definition. See AR 415-15, para. 2-3a, and Glossary, sec. II; AR 415-32, Glossary, sec. II; AR 420-10, Glossary, sec. II; DA Pam 420-11, para. 1-6c; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20F, ch. 6, para. 6.1.1. Construction includes:

   a. The erection, installation, or assembly of a new facility.

   b. The addition, expansion, extension, alteration, conversion, or replacement of an existing facility.

      (1) An addition, expansion, or extension is a change that increases the overall physical dimensions of the facility.

      (2) An alteration is a change to the interior or exterior arrangements of a facility that improves its use for its current purpose. But see "New" DOD Definition, para. IX.B.2.b.(2), below.

      (3) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.

      (4) A replacement is the complete reconstruction of a facility that has been damaged or destroyed beyond economical repair.

   c. The relocation of a facility from one site to another.[39]

[39] The Secretary of a military department must notify the appropriate committees of Congress before using UMMC funds to transfer or relocate any activity from one base or installation to another. Military Construction Appropriations Act, 2003, Pub. L. No. 107-249 § 107, 116 Stat. 1578 (2002).

(1) A facility may be moved intact, or disassembled and later reassembled.

(2) Work includes the connection of new utility lines, but excludes the relocation of roads, pavements, or airstrips.

(3) Relocation of two or more facilities into a single facility is a single project.

d. Installed equipment made part of the facility. Examples include built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats.

e. Related site preparation, excavation, filling, landscaping, or other land improvements.[40]

f. Construction may include relocatable buildings in some circumstances. See, DA Memorandum (DAIM), Interim Army Policy for Relocatable Buildings (21 October 2004); DODI 4165.56, Relocatable Buildings, (13 Apr. 1988); AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVINST 11010.33B, Procurement, Lease and Use of Relocatable Buildings (14 July 1988).

(1) Relocatable buildings. As a general rule, a "relocatable building" must be funded as construction IF the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components), and nonrecoverable building components, including typical foundations, exceed 20% of the acquisition cost of the relocatable building.

[40] This includes the foundation, site work, and utility work associated with the setup of a relocatable building. DA Pam 420-11, para. 1-6c(6).

(a) If the costs above exceed 20% of the acquisition cost of the relocatable building, the building will be considered real property and will be approved, funded, and provided as construction, according to AR 415-15 and AR 420-10.

(b) If the costs do not exceed 20%, account for the buildings as personal property.

(2) Written legal opinion required prior to approval of relocatable building purchase or lease (AR 420-18, Chapter 5.

(3) Approval Authorities. Generally, DASA (I&H) for all purchases and leases exceeding 1 year or costing more than $100,000. Director, IMA, for short term leases or leases costing less than $100,000.

B. Maintenance and Repair.

1. **Maintenance and repair projects are <u>not</u> construction**. AR 420-10, 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 <u>not</u> subject to the $750,000 O&M limitation on construction.[41] <u>See</u> 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").

2. Definitions.

a. Maintenance.

[41] <u>But see</u> 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).

(1) AR 420-10, 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 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, attch 1.

(3) 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."

(a) 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).

(b) 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) "New" DOD Definition. DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. See 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.[42]

(b) The term "repair" includes:

(i) Interior rearrangements that do not affect load-bearing walls; and

[42] DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105, and AR 415-15, para. 2-3b, 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 that 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).

(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).

(3) Army Definition. AR 415-15, para. 2-3b; AR 420-10, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 1-7. See Memorandum, Assistant Chief of Staff for Installation Management, 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.

(a) 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").

(b) 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;[43]

(iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;[44]

(iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if 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;[45] and (b) incorporating the additional components makes the replacement system safer and more efficient.

(c) The term **"repair" does <u>not</u> include**:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

[43] 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.

[44] A major repair project would include gutting the interior of a building.

[45] Under certain circumstances, the Army may classify a utility system or component as "failing" if it is energy inefficient or technologically obsolete. <u>See</u> AR 420-10, Glossary, sec. II.

(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.

(4) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, attch 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;

(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);[46]

[46] Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

(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 <u>not</u> 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;

(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;[47] or

(xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.[48]

c. Navy Definition. OPNAVINST 11010.20F, para. 3.1.1.[49] 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."

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

[48] 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.

[49] This regulatory provision pre-dates the DOD's new definition of repair. See DOD Repair Memorandum.

(1) The term “repair” includes:[50]

(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 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 <u>not</u> include:

(a) Additions, expansions, alterations, or modifications required solely to meet new purposes or missions;

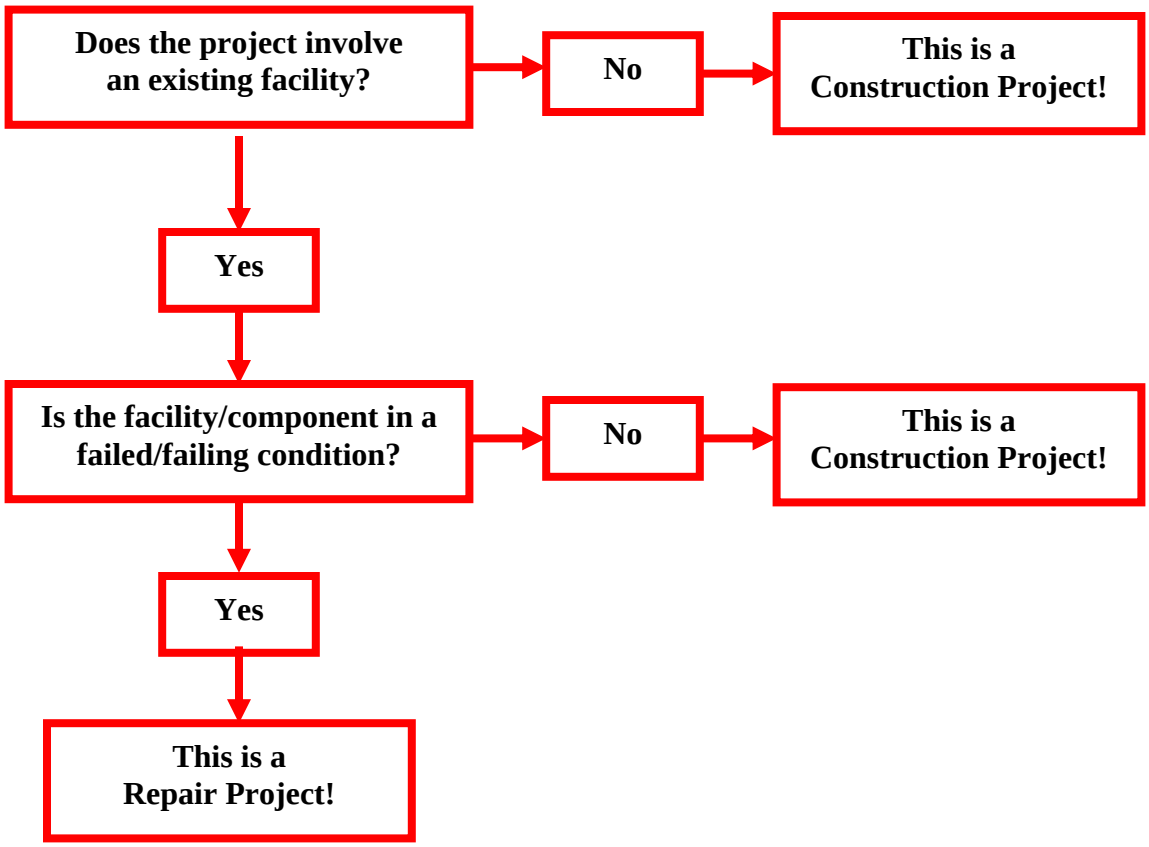
[50] OPNAVINST 11010.20F, para. 3.1.3, contains several additional examples of repair projects.

(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.

3. Analysis (simplified).



4. Concurrent Work. AR 420-10, para. 4-6a; AFI 32-1032, paras. 3.4.3 and 4.1.2.2.5.

a. A military department or agency can normally do construction, maintenance, and repair projects simultaneously as long as each project is complete and usable.

b. A military department must treat all the work as a single construction project if:

(1) The work is so integrated that the department or agency may not separate the construction work from the maintenance and repair work; or

(2) The work is so integrated that each project is not complete and useable by itself.

X. DETERMINING THE FUNDED/UNFUNDED COSTS OF THE PROJECT.

A. Applicability of Project Limits. AR 420-10, Glossary, sec. II; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20F, ch. 2, para. 2.1.1. Project limits only apply to funded costs.

B. Funded Costs. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170203; AR 415-32, para. 2-5a; AR 420-10, para. 4-6c, and Glossary, sec. II; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20F, para. 2.1.1.e.

1. Funded costs are costs chargeable to the appropriation designated to pay for the project.

2. Funded costs include, but are not necessarily limited to:

a. Materials, supplies, and services applicable to the project;[51]

[51] AR 420-10, para. 4-6c, specifically includes government-owned materials, supplies, and services as funded costs. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 070102.I.6 (prohibiting DOD components from using materials, supplies, or items of installed equipment on their own minor construction projects on a non-reimbursable basis); AR 415-32, para. 2-5a(1) (including materials, supplies, and services furnished on a non-reimbursable basis by other military departments and defense agencies); DA Pam 420-11, Glossary, sec. II (stating that "Army owned materials, supplies, or items of installed capital-type equipment must be charged to construction projects as funded … costs").

b. Installed capital equipment;[52]

c. Transportation costs for materials, supplies, and unit equipment;[53]

d. Civilian labor costs;

e. Overhead and support costs (e.g., leasing and storing equipment);

f. Supervision, inspection, and overhead costs charged when the Corps of Engineers, the Naval Facilities Engineering Command, or the Air Force serves as the design or construction agent;

g. Travel and per diem costs for military and civilian personnel;[54]

h. Operation and maintenance costs for government-owned equipment (e.g., fuel and repair parts); and

i. Demolition and site preparation costs.

C. Unfunded Costs. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170301; AR 415-32, para. 2-5b; AR 420-10, para. 4-6f, and Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.14; OPNAVINST 11010.20F, para. 2.1.1.f.

1. Unfunded costs are costs that:

a. Contribute to the military construction project;

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[52] Items of equipment that are "movable in nature and not affixed as an integral part of a facility" or "detachable without damage to the building or equipment" are unfunded costs because they are funded from O&M, RDT&E, or procurement appropriations. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170304 and 170305.

[53] The cost of transporting unit equipment is a funded cost if the equipment is being transported solely for the construction project; otherwise, it is an unfunded cost (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(9) and b(1).

[54] Travel and per diem costs for military personnel are funded costs if these costs are incurred solely for the construction project; otherwise, they are unfunded costs (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(10) and b(2).

b. Are chargeable to appropriations other than those available to fund the project; and

c. Are not reimbursed by appropriations available to fund the project.

2. Unfunded costs include, but are not necessarily limited to:

a. Military and civilian prisoner labor;

b. Depreciation of government-owned equipment;[55]

c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.[56]

d. Licenses, permits, and other fees chargeable under:

(1) A State or local statute; or

(2) A status of forces agreement (SOFA);

e. Unfunded civilian fringe benefits;

f. Contract or in-house planning and design costs;[57]

g. Gifts from private parties;[58] and

[55] Equipment maintenance and operation costs are funded costs.

[56] Transportation costs are funded costs.

[57] See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 070102.I.4 (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. § 2805). But see OPNAVINST 11010.20F, para. 2.1.1.f. (stating that planning and design costs are funded costs in design-build contracts).

[58] The acceptance of monetary gifts may violate the Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). "Fisher Houses" at major military and VA medical centers are a prime example of donated construction funding. The

h. Donated labor and material.[59]

3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

XI. SELECTING THE PROPER APPROPRIATION.

A. Statutory Thresholds.

1. If the approved cost of the project is $750,000 or less ($1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use O&M funds.

2. If the approved cost of the project is between $750,000 and $1.5 million ($3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use UMMC funds.

3. If the approved cost of the project is greater than $1.5 million, use "specified" MILCON funds.

B. Exceeding a Statutory Threshold. AR 415-15, app. B, para. B-4a; AFI 32-1021, para. 4.7.

1. Exceeding a statutory threshold violates the Purpose Statute and may result in a violation of the Antideficiency Act. See AR 415-15, app. B., para. B-4a.

2. When a project exceeds—or is expected to exceed a statutory threshold—the department or agency must:

a. Stop all work immediately;

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houses, donated by Zachary and Elizabeth Fisher, provide comfortable places for families to stay while attending to sick or injured family members. To date, the Fishers have completed, or are in the process of completing 32 Fisher Houses. See, http://www.fisherhouse.org/.

[59] The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

b. Review the scope of the project and verify the work classification; and

c. Consider deleting unnecessary work.[60]

3. If the project still exceeds the statutory threshold, the department or agency must correct the Purpose violation by deobligating the improper funds and obligating the proper funds.

4. In addition, the department or agency should attempt to avoid a final Antideficiency Act report by obtaining proper funds that were available:

a. When the violation occurred;

b. When the violation was discovered and corrected; and

c. Continuously between the date of the violation and the date of correction.[61]

C. Authorized Variations.[62] 10 U.S.C. § 2853; AR 415-15, paras. 5-16 and 5-17; AFI 65-601, vol. 1, para. 9.4.3; AFI 32-1021, para. 4.6.5; OPNAVINST 11010.20F.

[60] The department or agency must avoid project splitting. Therefore, the department or agency should only delete truly unnecessary work. AR 415-15, app. B, para. B-4b(3).

[61] Obtaining the proper funds (i.e., funds that meet the 3-part test) does not obviate the commander's obligation to investigate and report the alleged Antideficiency Act violation. See 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD Reg. 7000.14-R, vol. 14, chs. 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995); DFAS-IN 37-1, ch. 4, para. 040204.

[62] These authorized variations apply only to "specified" military construction projects. 10 U.S.C. § 2853. They do not generally apply to UMMC projects. However, 10 U.S.C. § 2805(a)(1) permits the Secretaries of the military departments to carry out UMMC projects "within an amount equal to 125 percent of the amount authorized by law for such purpose." In addition, 10 U.S.C. § 2863 permits the SECDEF and the Secretaries of the military departments to use unobligated funds appropriated to the department and available for military construction or family housing construction to pay meritorious contractor claims arising under military construction contracts or family housing contracts "[n]otwithstanding any other provision of law."

1. Cost Increases.

a. There are no cost increases authorized for O&M funded projects under 10 U.S.C. § 2805.

b. For MILCON funded projects, The Secretary of a military department may increase the cost of a "specified" military construction project by the lesser of:

(1) 25% of the appropriated amount; or

(2) 200% of the UMMC ceiling (i.e., $3 million).

c. However, the Secretary concerned must first determine that:

(1) The increase is required solely to meet unusual variations in cost; and

(2) The military department could not have reasonably anticipated the cost variation at the time Congress originally approved the project.

2. Scope Decreases. The Secretary of a military department may also reduce the scope of a "specified" military construction project by not more than 25% of the amount approved for the project.

3. Notification Requirements. The Secretary concerned must notify the appropriate committees of Congress of any cost increases or scope reductions that exceed the authorized variations.

XII. VERIFYING THE IDENTITY OF THE PROPER APPROVAL AUTHORITY.

A. Approval of Construction Projects.

1. Army. AR 415-15, app. B; AR 420-10, para. 4-3a.

a. MACOM commanders and/or the Director, Installation Management Agency (IMA) may approve – or delegate approval authority for – UMMC projects costing $750,000 or less ($1.5 million or less if the project is intended solely to correct a deficiency that threatens life, health, or safety).[63]

b. The Deputy Assistant Secretary of the Army for Installation and Housing (DASA(IH)) approves UMMC projects costing between $750,000 and $1.5 million. AR 415-15, app. B.

2. Air Force. AFI32-1032, 5.1.[64]

a. The Deputy Assistant Secretary of the Air Force (Installations) (SAF/MII) has delegated approval authority for UMMC projects costing $500,000 or less to the Civil Engineer (AF/ILE).[65]

b. The SAF/MII approves UMMC projects costing between $500,000 and $1.5 million.

3. Navy. OPNAVINST 11010.20F, app. B, tbl 1.

a. The Commanding Officer (C.O.) or Major Claimant approves projects costing $300,000 or less ($1 million or less if the project is intended solely to correct a deficiency that threatens life, health, or safety).

[63] As of this date, the Army regulation governing this issue has not been updated to reflect the new statutory dollar limits, or to reflect the role of IMA in the construction funding process. *See* U.S. DEP'T OF ARMY, REG. 420-10. MANAGEMENT OF INSTALLATION DIRECTORATES OF PUBLIC WORKS, 15 April 1997. However, pursuant to a memorandum issued 18 January 2002 by the Army Assistant Chief of Staff for Installation Management, MACOM Commanders may approve projects at the new statutory limit. See Memorandum, Army Assistant Chief of Staff for Installation Management, Subject: MACOM Maintenance and Repair Project Approval Authority, 18 January 2002. Further, the Director, IMA will review and approve OMA-funded maintenance, repair, and construction projects within the IMA Region boundaries. This authority may be delegated at the discretion of the Director. See Memorandum, Army Assistant Chief of Staff for Installation Management, Subject: Public Works Sustainment, Restoration, and Modernization (SRM) Project and Relocatable Building Approval Authority, 14 December 2002.

[64] This regulation predates the legislation that increased the statutory threshold for O&M projects to $750,000.

[65] The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

b. The Chief of Naval Operations (CNO) approves projects costing between $300,000 and $500,000.

c. The Assistant Secretary of the Navy (Installations & Environment) (ASN(I&E)) approves projects costing between $500,000 and $1.5 million ($3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety).

4. Congressional notification and approval is required for projects expected to exceed $1.5 million. AR 415-15, app. B, para. B-2f; AFI 32-1032, para. 3.5.4; OPNAVINST 11010.20F, tbl 1.

B. Approval of Maintenance and Repair Projects.

1. Army. AR 420-10, para. 4-5.

a. MACOM commanders and/or the Director, IMA may normally approve – or delegate approval authority – for maintenance and repair projects costing $3 million or less.[66]

b. HQDA approves maintenance and repair projects costing $3 million or more.[67]

2. Air Force. AFI 32-1032, paras. 3.7 and 4.4.1.

a. Installation commanders have unlimited approval authority for maintenance projects.

b. The AF/ILE may approve – or delegate approval authority for – repair projects costing $5 million or less.

[66] MACOM commanders and the Director, IMA may delegate this authority at their discretion. See Memorandum, Army Assistant Chief of Staff for Installation Management, Subject: Public Works Sustainment, Restoration, and Modernization (SRM) Project and Relocatable Building Approval Authority, 14 December 2002; AR 420-10, para. 4-3a.

[67] Before a military department can carry out a repair project that costs more than $7.5 million, the Secretary concerned must approve the project. 10 U.S.C. § 2811(b). In addition, if the project costs more than $7.5 million, the Secretary concerned must notify the appropriate committees of Congress in writing. 10 U.S.C. § 2811(d).

c. The SAF/MII approves repair projects costing more than $5 million.

3. Navy. OPNAVINST 11010.20F, app. B, tbl. 1.

a. The C.O. approves recurring maintenance projects, specific maintenance projects costing $1 million or less, and general repair projects costing $1 million or less.

b. The Major Claimant approves specific maintenance projects costing $1 million or more and general repair projects costing between $1 million and $5 million.

c. The ASN(I&E) approves general repair projects costing $5 million or more.

XIII. CONCLUSION.

A. Use a structured methodology to analyze construction funding issues.

B. Document rationale for funding decisions.

C. Additional rules may apply during overseas exercises and contingency operations.

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108TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
108–773

MAKING APPROPRIATIONS FOR MILITARY CONSTRUCTION, FAMILY HOUSING, AND BASE REALIGNMENT AND CLOSURE FOR THE DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2005, AND FOR OTHER PURPOSES

OCTOBER 9, 2004.—Ordered to be printed

Mr. KNOLLENBERG, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 4837]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4837) "making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 2005, and for other purposes," having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment, insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005".

SEC. 2. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

DIVISION A—MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2005

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated for military construction, family housing, and base realignment and closure functions adminis-

96–310

tered by the Department of Defense, for the fiscal year ending September 30, 2005, and for other purposes, namely:

MILITARY CONSTRUCTION, ARMY

(INCLUDING RESCISSIONS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Army as currently authorized by law, including personnel in the Army Corps of Engineers and other personal services necessary for the purposes of this appropriation, and for construction and operation of facilities in support of the functions of the Commander in Chief, $1,981,084,000, to remain available until September 30, 2009: Provided, That of this amount, not to exceed $156,999,000 shall be available for study, planning, design, architect and engineer services, and host nation support, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 107–249, $7,276,000 are rescinded: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 107–64; $3,924,000 are rescinded: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 106–246, $7,776,000 are rescinded.

MILITARY CONSTRUCTION, NAVY AND MARINE CORPS

(INCLUDING RESCISSION)

For acquisition, construction, installation, and equipment of temporary or permanent public works, naval installations, facilities, and real property for the Navy and Marine Corps as currently authorized by law, including personnel in the Naval Facilities Engineering Command and other personal services necessary for the purposes of this appropriation, $1,069,947,000, to remain available until September 30, 2009: Provided, That of this amount, not to exceed $90,830,000 shall be available for study, planning, design, and architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Navy" under Public Law 108–132, $24,000,000 are rescinded.

MILITARY CONSTRUCTION, AIR FORCE

(INCLUDING RESCISSION)

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Air Force as currently authorized by law, $866,331,000, to remain available until September 30, 2009: Provided, That of this amount, not to exceed $130,711,000 shall be available for study, planning, design, and architect and engineer

MILITARY CONSTRUCTION
(AMOUNTS IN THOUSANDS)

	BUDGET REQUEST	CONFERENCE AGREEMENT
ALABAMA		
ARMY		
ANNISTON ARMY DEPOT		
POWERTRAIN COMPONENT REBUILDING FACILITY	23,690	23,690
FORT RUCKER		
AIRCRAFT MAINTENANCE HANGAR	---	16,000
DEFENSE-WIDE		
HUNTSVILLE		
MISSILE DEFENSE AGENCY CENTER, VON BRAUN COMPLEX (PHASE II)	19,560	19,560
ARMY NATIONAL GUARD		
CENTREVILLE		
ADDITION/ALTERATION READINESS CENTER (ADRS)	5,537	5,537
CLANTON		
ADDITION/ALTERATION READINESS CENTER (ADRS)	3,649	3,649
HALEYVILLE		
JOINT ARMED FORCES RESERVE CENTER	---	13,849
ONEONTA		
ADDITION/ALTERATION READINESS CENTER (ADRS)	4,527	4,527
TOTAL, ALABAMA	58,963	86,812
ALASKA		
ARMY		
FORT RICHARDSON		
BARRACKS COMPLEX	7,600	7,600
DIGITAL MULTIPURPOSE TRAINING RANGE	13,600	13,600
SNIPER FIELD FIRE RANGE	3,100	3,100
FORT WAINWRIGHT		
BARRACKS COMPLEX - LORRAINE ROAD	39,815	39,815
BARRACKS COMPLEX RENEWAL - SANTIAGO ROAD	30,912	30,912
COMBINED ARMS COLLECTIVE TRAINING FACILITY	21,732	21,732
AIR FORCE		
ELMENDORF AIR FORCE BASE		
C-17 SUPPORT UTILITIES	6,400	6,400
ELMENDORF C-17 FLIGHT SIMULATOR FACILITY	7,700	7,700
FITNESS CENTER	11,957	11,957
LARGE AIRFRAME MAINTENANCE HANGAR	---	26,000
DEFENSE-WIDE		
FORT WAINWRIGHT		
HOSPITAL REPLACEMENT (PHASE VI)	9,900	9,900
TOTAL, ALASKA	152,716	178,716
ARIZONA		
ARMY		
FORT HUACHUCA		
ARMY GLOBAL INFORMATION FACILITY	---	18,000
NAVY		
YUMA		
BACHELOR ENLISTED QUARTERS	18,740	18,740
STATION ORDNANCE AREA	7,930	7,930
AIR FORCE		
DAVIS-MONTHAN AIR FORCE BASE		
AIRFIELD OBSTRUCTION-HAZARDOUS CARGO PAD	4,243	4,243
COMBAT SEARCH AND RESCUE C-130 SQUADRON OPERATIONS	5,786	5,786
EC-130 SQUAD OPERATIONS FACILITY	---	7,000
LUKE AIR FORCE BASE		
AIFP LITCHFIELD ROAD UNDERPASS AND ENTRY POINT REPLACEMENT	---	7,900
DORMITORY (120 ROOM)	10,000	10,000
ARMY NATIONAL GUARD		
CAMP NAVAJO		
QUALIFICATION TRAINING RANGE		

MILITARY CONSTRUCTION
(AMOUNTS IN THOUSANDS)

	BUDGET REQUEST	CONFERENCE AGREEMENT
ARKANSAS		
AIR FORCE		
LITTLE ROCK AIR FORCE BASE		
C-130J ADDITION/ALTERATION SIMULATOR FACILITY	5,031	5,031
CHILD DEVELOPMENT CENTER	---	3,900
ARMY NATIONAL GUARD		
CAMP ROBINSON		
ARMY AVIATION SUPPORT FACILITY	33,020	33,020
FORT CHAFFEE		
AMMUNITION SUPPLY POINT	13,798	13,798
AIR NATIONAL GUARD		
FORT SMITH		
VEHICLE MAINTENANCE AND AEROSPACE COMPLEX	---	6,000
TOTAL, ARKANSAS	51,849	61,749
CALIFORNIA		
ARMY		
FORT IRWIN		
CRIMINAL INVESTIGATION COMMAND FIELD OPERATIONS BUILDING	2,600	2,600
COMMAND AND CONTROL FACILITY	21,000	21,000
LAND ACQUISITION (PHASE II)	14,500	14,500
SIERRA ARMY DEPOT		
RUNWAY EXTENSION	---	12,600
NAVY		
BARSTOW		
BLASTING FACILITY	---	4,930
CAMP PENDLETON		
BACHELOR ENLISTED QUARTERS	19,975	19,975
CLOSE COMBAT PISTOL COURSE	6,940	6,940
CONSOLIDATED OPERATIONS CENTER	4,910	4,910
TERTIARY SEWAGE TREATMENT (PHASE II)	25,690	25,690
WEIGHT HANDLING SHOP	8,630	8,630
CORONA		
WARFARE ASSESSMENT LABORATORY ADDITION	---	9,850
EL CENTRO		
APRON AND HANGAR RECAPITALIZATION (PHASE I)	33,331	33,331
MARINE CORPS RECRUIT DEPOT		
INITIAL ISSUE SUPPLY WAREHOUSE	---	8,110
NORTH ISLAND		
BASE MAIN GATE AND ENTRANCE STREET	---	10,180
TWENTYNINE PALMS		
OPERATIONAL TRAINING CENTER	---	15,700
AIR FORCE		
BEALE AIR FORCE BASE		
GLOBAL HAWK ADDITION TO AEROSPACE GROUND EQUIPMENT FACILITY	1,866	1,866
GLOBAL HAWK UPGRADE DOCK 2	8,320	8,320
EDWARDS AIR FORCE BASE		
ADDITION/RENOVATE JOINT STRIKE FIGHTER COMPLEX (PHASE II)	9,965	9,965
TRAVIS AIR FORCE BASE		
C-17 ADDITION ENGINE STORAGE FACILITY	2,400	2,400
C-17 UTILITIES/ROAD	12,844	12,844
SECURITY FORCES ARMORY/COMBAT ARMS CAMPUS	---	3,650
DEFENSE-WIDE		
CORONA		
SPECIAL OPERATIONS FORCES MILITARY OPERATIONS IN URBAN TERRAIN TRAINING COMPLEX	13,600	13,600
MILAND		
SPECIAL OPERATIONS FORCES GROUND MOBILITY SUPPORT BUILDING	1,000	1,000
PRESIDIO		
DENTAL CLINIC	---	6,700

MILITARY CONSTRUCTION
(AMOUNTS IN THOUSANDS)

	BUDGET REQUEST	CONFERENCE AGREEMENT
BASE OPERATIONS SUPPORT (PHASE II)	15,120	15,120
AIR FORCE		
AVIANO AIR BASE		
ADDITION/ALTERATION WEAPONS LOAD/MAINTENANCE TRAINING FACILITY	2,300	2,300
AIRFIELD OBSTRUCTION - EXPAND NORTH RAMP (PHASE I)	1,626	1,626
FLIGHT SIMULATOR	2,834	2,834
TOTAL, ITALY	55,310	55,310
JAPAN		
AIR FORCE		
MISAWA AIR BASE		
EXPAND STRATEGIC AIRLIFT RAMP	6,700	---
DEFENSE-WIDE		
MISAWA AIR BASE		
HYDRANT FUEL SYSTEM	19,900	---
TOTAL, JAPAN	26,600	---
KOREA		
ARMY		
CAMP HUMPHREYS		
SANITARY SEWER SYSTEM	12,000	12,000
AIR FORCE		
KUNSAN AIR BASE		
DORMITORY (144 ROOM)	18,550	18,550
DORMITORY (144 ROOM)	18,550	18,550
OSAN AIR BASE		
DORMITORY (156 ROOM)	18,600	18,600
TOTAL, KOREA	67,700	67,700
MARIANA ISLANDS		
NAVY		
GUAM		
KILO WHARF IMPROVEMENTS	12,500	12,500
WATER TREATMENT PLANT UPGRADE	20,700	20,700
DEFENSE-WIDE		
GUAM		
SPECIAL OPERATIONS FORCES GROUND MOBILITY SUPPORT BUILDING	2,200	2,200
TOTAL, MARIANA ISLANDS	35,400	35,400
PORTUGAL		
AIR FORCE		
LAJES FIELD		
ADDITION/ALTERATION FITNESS CENTER (PHASE II)	5,689	5,689
DEFENSE-WIDE		
LAJES FIELD		
REPLACE HYDRANT FUEL SYSTEM	19,113	19,113
TOTAL, PORTUGAL	24,802	24,802
PUERTO RICO		
ARMY RESERVE		
AGUADILLA		
ARMY RESERVE CENTER	21,523	---
SPAIN		
NAVY		
ROTA		
COMMAND OPERATIONS CONSOLIDATION	32,700	21,700

MILITARY CONSTRUCTION
(AMOUNTS IN THOUSANDS)

	BUDGET REQUEST	CONFERENCE AGREEMENT
AIR FORCE		
ROTA		
AIRCRAFT PARKING APRON (PHASE II)	14,153	4,325
TOTAL, SPAIN	46,853	26,025
UNITED KINGDOM		
AIR FORCE		
ROYAL AIR FORCE LAKENHEATH		
4-BAY MISSION TRAINING CENTER	5,500	5,500
DEFENSE-WIDE		
ROYAL AIR FORCE STATION MILDENHALL		
SPECIAL OPERATIONS FORCES OPERATIONS/INTELLIGENCE FACILITY	10,200	---
TOTAL, UNITED KINGDOM	15,700	5,500
NORTH ATLANTIC TREATY ORGANIZATION (NATO)		
NATO SECURITY INVESTMENT PROGRAM	165,800	165,800
RESCISSION (P.L. 108-132)	---	-5,000
TOTAL, NATO	165,800	160,800
WORLDWIDE CLASSIFIED		
AIR FORCE		
CLASSIFIED LOCATION		
CLASSIFIED	28,090	28,090
SPECIAL TACTICAL UNIT DETACHMENT FACILITY	704	704
DEFENSE-WIDE		
CLASSIFIED LOCATION		
SPECIAL OPERATIONS FORCES BUILDING ADDITION	2,600	2,600
SPECIAL OPERATIONS FORCES INFORMATION OPERATIONS FACILITY ADDITION	4,800	4,800
TOTAL, WORLDWIDE CLASSIFIED	36,194	36,194
WORLDWIDE UNSPECIFIED		
ARMY		
UNSPECIFIED WORLDWIDE LOCATIONS		
HOST NATION SUPPORT	21,000	21,000
PLANNING AND DESIGN	130,335	135,999
UNSPECIFIED MINOR CONSTRUCTION	20,000	20,885
RESCISSION (P.L. 108-246)	---	-7,776
RESCISSION (P.L. 107-64)	---	-3,924
RESCISSION (P.L. 107-249)	---	-7,276
NAVY		
UNSPECIFIED WORLDWIDE LOCATIONS		
PLANNING AND DESIGN	87,067	90,830
UNSPECIFIED MINOR CONSTRUCTION	12,000	12,000
PRESIDENTIAL HELICOPTER PROGRAMS SUPPORT FACILITY	80,000	10,000
WHITE SIDE COMPLEX	18,560	18,560
RESCISSION (P.L. 108-132)	---	-24,000
AIR FORCE		
UNSPECIFIED WORLDWIDE LOCATIONS		
PLANNING AND DESIGN	140,786	138,711
UNSPECIFIED MINOR CONSTRUCTION	13,000	13,280
PREDATOR B BEDDOWN	26,121	26,121
RESCISSION (P.L. 108-106)	---	-21,809
DEFENSE-WIDE		
UNSPECIFIED WORLDWIDE LOCATIONS		
CONTINGENCY CONSTRUCTION	10,000	10,000
ENERGY CONSERVATION IMPROVEMENT PROGRAM	60,000	50,000
SPECIAL OPERATIONS COMMAND	2,900	2,900
RESCISSION (P.L. 107-64)	---	-6,000
RESCISSION (P.L. 107-249)	---	-16,737

$46 M

Construction Funding Checklist[68]

1. Define the Scope of the Project.

   a. A military construction project includes all construction work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Critical is whether the project, standing alone, meets this requirement.

   b. Avoid project splitting and/or incrementation of projects.

   c. Downscoping is permissible, provided it results in a complete and usable facility.

2. Classify the Work

   a. Construction: Erection, installation, or assembly of a new facility, or the addition, expansion, or relocation of an existing facility.

   b. Maintenance: Work required to preserve or maintain a facility.

   c. Repair: Project to restore a facility to its designated purpose. Remember "failed or failing."

3. Determine the Funded and Unfunded Costs[69]

   a. Common funded costs: materials, supplies, services, installed capital equipment, transport of materials, civilian labor, supervision and inspection (Corps of Engineers).

   b. Common unfunded costs: military personnel labor, excess distributions (DRMO).

4. Select the Proper Appropriation (Construction Projects)[70]

   a. Less than $750,000, O&M Funds (Life Health Safety (LHS), up to $1.5 Million).

   b. $750,000 -- $1.5M, UMMC Funds (LHS, up to $3 Million).

   c. Over $1.5 Million, Specified MILCON Funds (Congress).

5. Identify the Proper Approval Authority (Construction Projects)[71]

   a. Less than $750,000, MACOM Commander/IMA (LHS, < $1.5M).

   b. $750,000 -- $1.5 M, DASA (IH), (LHS, < $3M).

   c. More than $1.5M, Congress.

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[68] This checklist was developed as a training aid only. When examining construction funding issues, it is recommended you consult the TJAGSA Contract and Fiscal Law Department Fiscal Law Deskbook or another detailed authority.

[69] Only funded costs are counted towards the funding thresholds.

[70] Maintenance and Repair Projects are generally funded with O&M funds.

[71] Maintenance and repair projects have different approval thresholds from construction. The MACOM commander/IMA Director may approve maintenance and repair projects costing less than $3 million. Maintenance and repair projects costing between $3 million and $10 million must be approved by HQDA. Projects exceeding $10 million require Congressional approval.

CHAPTER 10

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APPENDIX E: Proper Use of Non-DOD Contracts Memo, dtd 29 OCT 2004 (DoD Policy)

APPENDIX F: Proper Use of Non-DOD Contracts Memo, dtd 12 JUL 2005 (Army Policy)

APPENDIX G: Proper Use of Non-DOD Contracts, dtd 6 DEC 2004 (Air Force Policy)

CHAPTER 10

INTRAGOVERNMENTAL ACQUISITIONS AND REQUIRED SOURCES

I. INTRODUCTION. Following this block of instruction, students will understand:

A. The various statutory authorities that permit federal agencies to purchase goods and services from each other.

B. The obligation requirements associated with various intragovernmental acquisitions.

C. The authority for intragovernmental employee training.

D. The required sources for certain government acquisitions.

II. ECONOMY ACT.

A. General. The Economy Act provides authority for federal agencies to order goods and services from other federal agencies, and to pay the actual costs of those goods and services. Congress passed the Act in 1932 to obtain economies of scale and eliminate overlapping activities of the federal government.

B. Statutory Provisions. 31 U.S.C. § 1535.

1. The Act permits the head of an agency to place an order for goods or services with another agency, or with a major organizational unit within the same agency, if

a. Funds are available;

b. The head of the agency decides the order is in the best interests of the government;

c. The agency or unit filling the order can provide or get by contract the goods or services; and

d. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise. 31 U.S.C. §1535(a). See USA Info. Sys., Inc., and Dataware Techs., Inc. v. Government Printing Office, GSBCA Nos. 13535-P, 13560-P, 96-2 BCA ¶ 28,315; Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380.

2. Applicability.

a. Economy Act acquisitions include orders placed between military departments. See FAR 2.101 (defining executive agencies to include military departments); DFAS-IN Reg. 37-1, para. 120701; AFI 65-601, vol. I, para. 7.23; Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51; Obligation of Funds under Military Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980).

b. The Economy Act applies only in the absence of a more specific interagency acquisition authority. FAR 17.500(b); An Interagency Agreement--Admin. Office of the U.S. Courts, B-186535, 55 Comp. Gen. 1497 (1976).

c. The Economy Act does not apply to orders using the Developmental Fund for Iraq.

3. Actual Costs.

a. The ordering agency must pay the performing agency the actual costs of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991). Cf. DOD 7000.14-R (DOD Financial Management Regulation), Vol. 11A, Chap. 4; AFI 65-601, vol. I, paras. 7.17, 7.23.

b. Actual costs include:

(1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978). See GSA Recovery of SLUC Costs for Storage of IRS Records, B-211953, Dec. 7, 1984 (unpub.) (standard storage costs); David P. Holmes, B-250377, Jan. 28, 1993 (unpub.) (standard inventory, transportation, and labor costs); Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD ¶ 287 (ordering activity required to use current funds to pay ten-year old obligation).

(2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. See Washington Nat'l Airport, supra (depreciation and interest); Obligation of Funds Under Mil. Interdep'tal Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

c. DOD activities not funded by working capital funds normally do not charge indirect costs to other DOD activities. DOD 7000.14-R, Vol. 11A, para. 030601. Similarly, such activities generally do not charge indirect costs under interservice and intragovernmental support agreements. See DOD Instruction 4000.19, Interservice and Intragovernmental Support, para. D.6 (Aug. 9, 1995) (hereinafter DODI 4000.19).

d. When "contracting out" for goods or services, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract. FAR 17.505(d); DOD 7000.14-R, Vol. 11A, para. 030601.

4. Obligation of Funds.

a. The ordering agency obligates funds current when the performing activity accepts the reimbursable order and records the obligation upon receipt of written acceptance. 31 U.S.C. §§ 1501(a)(1), 1535(d); DFARS 208.7004-2(c); DOD 7000.14-R, Vol. 11A, para. 030404; DFAS-IN Reg. 37-1, table 8-2.

b. If the performing activity has not incurred obligations to fill an order before the end of the period of fund availability, then the ordering activity must deobligate (recover) the funds. 31 U.S.C. § 1535(d); DOD 7000.14-R, Vol. 11A, para. 030404; The Honorable William F. Ford, B-223833, Nov. 5, 1987 (unpub.).

5. Compliance with CICA. The ordering agency may not procure from a performing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5)(B); 41 U.S.C. § 253(f)(5)(B); Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51.

C. FAR Requirements. FAR Subpart 17.5; Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1074, 108 Stat. 3243, 3271.

1. Determination & Finding (D&F) Requirement.

a. Interagency Economy Act orders must be supported by a D&F stating that:

(1) Use of an interagency acquisition is in the best interest of the government; and

(2) The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.503(a).

b. Economy Act orders requiring contract action (to include placing an order against an existing IDIQ contract) by the performing agency also must include a statement on the D&F that:

(1) The acquisition will appropriately be made under an existing contract of the performing agency, entered into before placement of the order, to meet the requirements of the performing agency for the same or similar supplies or services;

(2) The performing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

(3) The performing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.503(b).

c. Do DOD Intra-Agency Economy Act orders (e.g., Army order off Air Force IDIQ supply contract or Navy requesting Army to contract for services) require a FAR Part 17.503 D&F?

(1) Issue is currently in flux and differs between services. Because intragovernmental acquisitions are currently a very high profile issue, check with your service's current policies. When in doubt, document with D&F.

(2) Army.

(a) Old Policy: A 1996 Policy Memo stated that, a D&F is not required for intra-DoD Economy Act orders. Memorandum for Acquisition Community, Subject: Contract Offloading Clarification, Kenneth Oscar, DASA, Procurement, 18 March 1996.

(b) Current Policy[1]: The 1996 policy memo is not reflected in the DFARS (217.503) or the AFARS. Current policy guidance out of the Office of the Deputy Assistant Secretary of the Army, Procurement Policy (POC Barbara Binney) is that unless an intraservice support agreement (DD Form 1144) is in place pursuant to DOD Instruction 4000.19, Interservice and Intragovernmental Support Agreements, then any intra-DOD purchase over the micropurchase threshold requires D&F in accordance with FAR 17.503 (see para. C.1. above for requirements).

(c) Air Force. Guidance is that intra-DOD Economy Act orders do <u>not</u> require a FAR 17.503 D&F. (See AFFARS IG5317.5) (Jan 2005).

(d) Navy. Apparently consistent with current Army policy, in that no D&F required if interservice support agreement satisfies requirements of DOD Instruction 4000.19. Presumably, if the MIPR does not satisfy the DODI, then a FAR 17.503 D&F would be required. NMCARS Part 5217-503.

2. Approval Authorities for D&F. FAR 17.503(c); DFAS-IN Reg. 37-1, para. 120702(A & B). **(*but see* additional DOD requirements discussed below).**

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[1] "In the early 90s, the interpretation of the FAR was that within DOD was intraagency. However, in the late 90s, probably when the DODI 4000.19 was revised, the interpretation became that intraagency was Army only. (My colleagues and I have discussed issue this over the years.)

The DODI 4000.19 addresses having a formal support agreement (ISSA, MOA, MOU) with another organization to include DOD organizations beyond Army which would require GO/SES approval to accomplish actions that are offloaded. When a support agreement exists, it satisfies the requirement for a D&F because the procurement file would document that this agreement exists. The Head of Agency signs the support agreement not the MIPR or a D&F. The agreement signifes the determination and no written determination is required for agreements between DOD Activities. So, if there is not a support agreement then a D&F is needed."

Email message from Barbara Binney to MAJ Michael Devine, Contract and Fiscal Law Department, TJAGLCS, 10 January 2006.

a. The requesting agency's contracting officer with authority to contract for the supplies or services to be ordered (or other person designated by the agency head) must approve the D&F.

b. The Senior Procurement Executive of the ordering agency must approve the D&F if the performing agency is not covered by the FAR.

D. **DOD Requirements.** (Note, for orders going OUTSIDE of DoD, these requirements *heighten the approval levels for the D&F* above what the FAR requires in Subpart 17.503, as discussed above, and these requirements *make the findings more stringent because the findings required when outside agency contracting is required (subpara C.1.b above) are conjunctive rather than disjunctive as they are in the FAR)*).

1. SECDEF Memo. Memorandum, Secretary of Defense, to Secretaries of the Military Departments, Subject: Use of Orders Under the Economy Act (8 Feb 94)(Appendix C). As a result of DOD abuses of Economy Act transactions, the Secretary of Defense has ordered that, before issuing an Economy Act order for <u>contract action outside of DOD</u>, the head of the agency or designee shall determine that:

a. The ordered supplies or services cannot be provided as conveniently <u>and</u> cheaply by contracting directly with a private source;

b. The servicing agency has unique expertise or ability not available within DOD; <u>and</u>

c. The supplies or services are clearly within the scope of activities of the servicing agency <u>and</u> that agency normally contracts for those supplies or services for itself.

2. Implementation of the SECDEF Memo. Both the Army and Air Force have directed that before Economy Act orders are released <u>outside of DOD</u> for contract action, the requiring activity must prepare a D&F addressing the elements in the SECDEF memo.

a. Within the Army, if requested, the contracting officer who normally would contract for the requesting agency should advise in the determination process. DFARS 217.503

b. The Air Force requires review of the D&F by a contracting officer as a "business advisor" to the approval authority.

3. Delegation of Authority. Pursuant to the SECDEF memo, the Army and Air Force have delegated their authority to approve Economy Act determinations for orders to non-DOD agencies.

a. A SES or General Officer commander/director of the requesting activity must approve the written determination if the performing agency is required to comply with the FAR.

b. The Senior Procurement Executive of the requesting activity must approve the written determination if the performing agency is not required to comply with the FAR.

4. Scope of Applicability. The procedures of FAR Subpart 17.5, DFARS Subpart 217.5, and DODI 4000.19 apply to all purchases, except micro-purchases, made for DOD by another agency (unless more specific statutory authority exists). This includes orders under a task or delivery order contract entered into by the other agency. DFARS 217.500. See also Pub. L. No. 105-261 § 814, 112 Stat. 1920, 2087-88 (1998).

E. **Additional DoD Regulatory Guidance (applicable to orders over the SAT going outside of DoD)**. FAR Subpart 17.5; DOD 7000.14-R, Vol. 11A, para. 0304; DODI 4000.19; DFAS-IN Reg. 37-1, paras. 120501-120703; AFI 65-601, vol. I, paras. 7.19 to 7.25.

1. Office of the Secretary of Defense Memo: Proper Use of Non-DOD Contracts (29 Oct 2004). Army implementation thru USD (AL&T) Memo: Proper Use of Non-DOD Contracts (12 July 2005). **(See Outline Appendices).**

a. Non-DOD contract vehicles (orders placed by DOD and contracts awarded or orders placed by non-DOD entities on behalf of DOD, including franchise funds) that exceed the simplified acquisition threshold must meet reviewing and approval requirements by January 1, 2005.

b. The reviewing and approval requirement must include:

(1) evaluating whether using a non-DOD contract is in the best interest of DOD;

(2) determining the requirement is within the scope of the contract to be used;

(3) ensuring the funding is in accordance with appropriation limitations;

(4) including all DOD unique requirements (statutes, regulations, directives . ..) in the order or contract; and

(5) collecting data on the use of assisted acquisitions for analysis.

c. Extensive data collection and reporting requirements for such acquisitions imposed by these memoranda.

2. The Office of Management and Budget (OMB) has issued guidance requiring agencies engaged in intragovernmental exchanges to obtain and use Dun & Bradstreet Universal Numbering System (DUNS) numbers as unique business location identifiers. Since October 1, 2003, certain purchases for goods and services that equal or exceed $100,000 per order must be transmitted via the intragovernmental electronic commerce portal. See OMB Memorandum M-03-01 (Oct. 4, 2002), *available at* http://www.whitehouse.gov/omb/memoranda/m03-01.html.

3. Ordering Procedures.

a. Orders must include all supporting data necessary to prepare the required contract documentation, including a description of the requirement, delivery terms, fund citation, payment provisions, and required determinations.

b. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself.

c. Economy Act orders citing an annual or multiyear appropriations must serve a bona fide need arising, or existing, in the fiscal year(s) for which the appropriation is available for obligation.

d. As the work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing activity, the requesting activity should ensure in advance of placing an order that such capability exists.

e. Normally, DOD ordering activities issue Economy Act orders using DD Form 448, Military Interdepartmental Purchase Request (MIPR) (Appendix A).

4. Acceptance.

a. The accepting officer must be a duly authorized employee of the performing activity.

b. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR (Appendix B). Otherwise, the terms of the interagency agreement will determine the method of acceptance.

c. If the activity issues a MIPR on a reimbursable basis, acceptance establishes fund obligation authority in the performing activity account, and the activity may incur costs in accordance with the terms of the order.

d. Acceptance must indicate whether reimbursement will be on a "fixed-price" or "cost-incurred" basis. Acceptance on a fixed-price basis is required if:

(1) Billable unfunded costs will be included on the accepted price of the order;

(2) Each item or service ordered is priced separately;

(3) The price does not include substantial contingencies;

(4) The cost estimate included consideration of expected variances;

(5) Neither activity expects many change orders; and

(6) The requirement is of the type for which a fixed-price basis is practicable.

5. Payment and Billing.

a. The performing activity may require advance payment for all or part of the estimated cost of the supplies or services. See AFI 65-601, vol. I, para. 7.25.3 (list of agencies requiring advance payment).

b. Bills or requests for advance payment are not subject to audit before payment.

c. The performing activity cannot exceed the amount of the order or direct fund cite. It must curtail or cease performance to avoid exceeding the estimated cost, and notify the ordering activity immediately.

6. Disputes.

a. No formal method for dispute resolution exists for Economy Act transactions.

b. The ordering and performing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including the use of a third party forum. FAR 17.504(c).

F. Problem Areas. See DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992). See also, DOD Inspector General Audit Report No. D-2002-109 (Jun. 19, 2002), (discussing the United States Army Claims Service's (USACS) potential Anti-Deficiency Act violations related to USACS' transactions with the General Administration Service Information Technology Fund), *available at,* http://www.dodig.osd.mil/audit/reports/fy02/02-109.pdf.

1. Failing to obtain proper approval. See FAR 17.503(c) (requiring contracting officer, or another person designated by the agency head, to approve Economy Act determination)

2. Issuing orders to the Department of Energy (DOE) Tennessee Valley Authority (TVA) for common supplies and services, the acquisition of which do not require the special expertise of DOE/TVA management and operating contractors.

3. Using the intragovernmental purchase process to avoid competition requirements, or to "dump" year-end funds.

4. Failing to determine whether an intragovernmental acquisition is the most economical and efficient method to obtain goods and services.

5. Citing Operations and Maintenance (O&M) funds on an order for investment/capital end items.

6. Improperly classifying an Economy Act order as a project order to avoid the deobligation (recovery) requirements.

7. Paying more than the "actual cost" of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, June 28, 1991, 70 Comp. Gen. 592 (1991).

8. Ordering in excess of the maximum quantities specified in a performing activity's requirements contract. Liebert Corp., B-232234, Apr. 29, 1991, 91-1 CPD ¶ 413.

9. Ordering improperly from nonappropriated fund instrumentalities. Compare 10 U.S.C. § 2482a (authorizing contracts or other agreements between service exchanges/MWR activities and federal departments) and 10 U.S.C. § 2424 (authorizing contracts using noncompetitive procedures between DOD and service exchange stores outside the United States for supplies and services up to $50,000) with Dep't. of Agriculture Graduate Sch.--Interagency Orders for Training, B-214810, 64 Comp. Gen. 110 (1984) and Obtaining Goods and Servs. from Nonappropriated Fund Activities through Intra-Departmental Procedures, B-148581, 58 Comp. Gen. 94 (1978).

G. Other Economy Act Applications.

1. Interagency details.

a. The Economy Act authorizes interagency details of employees. The Honorable Robert W. Houk, B-247348, June 22, 1992 (unpub.) (unauthorized detail caused Antideficiency Act violation); Nonreimbursable Transfer of Admin. Law Judges, B-221585,
65 Comp. Gen. 635 (1986). See Federal Personnel Manual, ch. 300, subch. 8. See also 5 U.S.C. § 3341 (authority for intra-agency details). Cf. 10 U.S.C. § 374 (military personnel support to law enforcement agencies).

b. Details must be on a reimbursable basis unless: a law specifically authorizes nonreimbursable details; the detail involves a matter similar or related to matters ordinarily handled by the detailing agency, and will aid the detailing agency's mission; or the detail is for a brief period and entails minimal cost. See Department of Health & Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985); The Honorable William D. Ford, B-224033, Jan. 30, 1987 (unpub.); Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.).

2. Interservice Support Agreements. From a fiscal standpoint, the Economy Act may form the basis for interservice agreements that involve recurring support between military departments, or between a military department and another federal agency. See DOD Instruction (DODI) 4000.19, Interservice and Intragovernmental Support (9 Aug. 1995); AFI 65-601, vol. I, ch. 7 (Oct. 94).

a. Memorialize support agreements with DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. See DODI 4000.19, para. D.5.

b. Support is reimbursable to the extent that it increases the support supplier's direct costs. Costs associated with common use infrastructure are non-reimbursable, unless provided solely for the use of one or more tenants. DODI 4000.19, para. D.6.

III. PROJECT ORDERS.

A. General. The Project Order Statute provides DOD with interdepartmental authority to order goods and services, separate and distinct from the Economy Act.

B. Statutory Provisions. 41 U.S.C. § 23 (DOD); 14 U.S.C. § 151 (Coast Guard).

1. The statute applies to transactions between military departments and DOD government-owned, government-operated (GOGO) establishments for work related to military projects. Matter of John J. Kominski, B-246773, (May 5, 1993), 72 Comp. Gen. 172 (the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies).

2. Orders placed with government-owned establishments shall be treated as if placed with commercial activities.

3. Appropriations shall remain available for the payment of the obligations, as if the obligations arose under a contract with a commercial activity.

4. The statute does not require special determinations, as with Economy Act orders.

C. General Regulatory Guidance. DOD 7000.14-R (Department of Defense Financial Management Regulation) Vol. 11A, Ch. 2; AFI 65-601, vol. I, para. 7.16.5; DFAS-IN Reg. 37-1, para. 1208.

1. A project order is an order for specific types of goods or services. A project order may remain open until the work is done.

2. Activities may issue project orders only to Government-Owned/Government-Operated (GOGO) facilities within DOD. GOGO facilities include shipyards, arsenals, ordnance plants, manufacturing or processing plants or shops, equipment overhaul or maintenance shops, research and development laboratories, testing facilities, and proving grounds which are owned and operated within DOD. DOD 7000.14-R, Vol. 11A, Ch. 2, para. 020303. See Matter of John J. Kominski, supra.

3. Activities may issue project orders only for the following types of goods and services:

   a. Production, maintenance, or overhaul of:

      (1) Missiles and other weapons;

      (2) Vehicles;

      (3) Ammunition, clothing, and machinery;

      (4) Other military supplies or equipment; and

      (5) Component and spare parts for the above.

   b. Research, development, test, and evaluation.

   c. Minor construction or maintenance of real property.

4. Activities shall not issue project orders for:

a. Major construction;

b. Education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications; or

c. Any requirement where a contractual relationship cannot exist.

D. Ordering Procedures.

1. Project orders require no specific form, but DOD activities often use MIPRs. The order must be specific, definite, and certain. But see DFAS-IN Reg. 37-1, para. 120803 (requiring use of MIPRs for project orders).

2. Activities issue only reimbursable orders.

3. The order must indicate whether it will be performed on a cost basis or fixed-price basis. Follow the guidance set forth above for Economy Act orders to determine whether a fixed-price basis is required. See Sec. II.E.4.d, supra.

E. Acceptance and Performance.

1. Acceptance must be in writing. If the ordering activity issues a MIPR, the performing activity accepts on a MIPR.

2. At the time of acceptance, there must be evidence that the work will commence within a reasonable time. DOD adopted the Army's standard of 90 days. DOD 7000.14-R, Vol. 11A, ch. 2, para. 020510; DFAS-IN Reg. 37-1, para. 120803.

a. Project orders must serve a bona fide need existing in the fiscal year in which issued; otherwise, a valid obligation is not accomplished.

b. Agencies may not issue project orders for the primary purpose of continuing the availability of appropriations.

3. A GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Regulations require that the project order recipient incur costs "of not less than 51 percent of the total costs attributable to rendering the work or services ordered." DOD 7000.14-R, Vol. 11A,
ch. 2, para. 020515.

F. GAO Review. Generally, the GAO does not review agency decisions to perform in-house, rather than contract out, as they regard such decisions as matters of executive branch policy. SRM Mfg. Co., B-277416, Aug. 4, 1997, 97-2 CPD ¶ 40; Boulder Scientific Co., B-225644, Mar. 20, 1987, 87-1 CPD ¶ 323.

IV. GOVERNMENT EMPLOYEES TRAINING ACT (GETA).

A. General. GETA provides guidance and specific authority for intragovernmental training of employees.

B. Statutory Provisions. 5 U.S.C. § 4104.

1. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

2. When internal training is not possible, GETA authorizes interagency training on either a reimbursable or non-reimbursable basis. As GETA provides independent fund transfer authority, the requirements and restrictions of the Economy Act are inapplicable. Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses, B-271894, July 24, 1997 (unpub.);
To Walter L. Jordan, B-241269, Feb. 28, 1991 (unpub.).

C. Regulatory Guidance. Federal Personnel Manual (FPM), Chap. 410, Subch. 4-3 (Oct. 22, 1981) (cancelled by the Office of Personnel Management (OPM) as of 31 December 1994, but still relied upon as federal personnel guidance).

1. An agency that operates an interagency training facility may accept funds from other agencies for part or all of the costs of training their employees through reimbursements or other cost-sharing arrangements.

2. An agency may not obtain reimbursement for training if funds are already provided for interagency training in its appropriation.

V. THE CLINGER-COHEN ACT OF 1996.

A. General. Section 5112(e) of the FY 1996 National Defense Authorization Act (Pub. L. No. 104-106) (permanently codified at 40 U.S.C. § 1412(e)) instructed the Director, Office of Management and Budget (OMB), to designate as considered appropriate, one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

B. Implementation.

1. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT).

2. The scope of the designation is limited to programs that are funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 757. These programs include the Federal Systems Integration and Management Center (FEDSIM) and Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs.

3. The OMB designation, in combination with 40 U.S.C. § 757, provides separate authority for acquisition from these GSA programs. Current issues with FEDSIM and other GSA programs involve the expense of the programs and the requirement that DOD orders represent bona fide needs of the underlying DOD appropriation. DFAS-IN Reg. 37-1, para. 080609. See e.g., Floro & Associates, B-285.481.4, B-285.481.4, Oct. 25, 2000, 2000 CPD ¶ 172 (GAO concludes that GSA's task order for "management services" was materially different from that of the underlying contract, which required "commercially off-the-shelf hardware and software resulting in turnkey systems for GSA's client agencies.")

VI. REQUIRED SOURCES.

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

1. Supplies.

a. Agency inventory;

b. Excess from other agencies;

c. Federal Prison Industries, Inc.;

d. Committee for Purchase from People Who are Blind or Severely Disabled;

e. Wholesale supply sources;

f. Federal supply schedules; and

g. Commercial sources.

2. Services.

a. Committee for Purchase from People Who are Blind or Severely Disabled;

b. Federal supply schedules; and

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

B. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; 28 C.F.R. §§ 301-345; FAR Subpart 8.6; <www.unicor.gov>. Federal agencies and institutions were required to purchase FPI products that met their requirements and were available. 18 U.S.C. § 4124. See Battery Assemblers, Inc., B-260043, May 23, 1995, 95-1 CPD ¶ 254 (agency reasonably determined UNICOR's price did not exceed "current market price"); Hiltronics Corp., B-238142, Apr. 11, 1990, 90-1 CPD ¶ 384; Forest Serv.--Requirement to Procure from Fed. Prison Indus., Inc., A-67190, 62 Comp. Gen. 617 (1983); Minx Prods., Inc., B-175249, Apr. 11, 1972 (unpub.). However, the National Defense Authorization Act of 2002 qualified FPI's mandatory source status and now DoD agencies are required to compare the price, quality, and time of delivery of FPI products to private industry products. If the FPI product is not comparable, the contracting officer may conduct a competitive procurement. FPI is authorized to compete in the competitive procurement. See 67 Fed. Reg. 20687 (April 26, 2002). The contracting officer has unilateral authority to make comparability determinations. See 68 Fed. Reg. 26,265 (May 15 2003). DoD agencies are also required to rate FPI's performance, compare it to the private sector, and provide FPI feedback on previously awarded contracts. See 68 Fed. Reg. 28,905 (May 22, 2003).

1. FPI lists its products and services in the "Schedule of Products made in Federal Penal and Correctional Institutions" (Schedule).

2. An activity must obtain clearance from FPI to acquire Schedule supplies from other sources, except when:

   a. The contracting officer determines the FPI product is not comparable in price, quality or delivery;

   b. Public exigency requires immediate delivery or performance;

   c. Used or excess supplies are available;

   d. Goods are acquired and used outside the United States;

   e. Orders totaling $2500 or less or acquiring services. FAR 8.605.).

3. Disputes regarding price, quality, and suitability of supplies, excluding comparability determinations made by contracting officers, are subject to arbitration. FAR 8.602(f).

C. Committee for Purchase From People Who Are Blind Or Severely Disabled (Committee). 41 U.S.C. §§ 46-48c; 41 C.F.R. Part 51; FAR Subpart 8.7.

1. Like FPI, the Committee publishes a "Procurement List" of supplies and services. These products and services are available from nonprofit agencies for the blind or severely disabled. The Committee may request that a contracting activity assist in determining whether a workshop has the capability to perform a requirement. See FAR 9.107. An agency must consider acquiring services from a workshop only if the agency otherwise intends to contract for them. See Rappahannock Rehab. Facility, Inc., B-222961, Sept. 10, 1986, 86-2 CPD ¶ 280; Kings Point Mfg. Co., B-185802, Mar. 11, 1977, 77-1 CPD ¶ 184.

2. Activities must purchase listed supply requirements from applicable nonprofit agencies (workshops) at prices established by the Committee, unless the supply is available from FPI. The Committee, however, has priority over FPI for listed services. See Western States Mgmt. Servs., Inc., B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; Abel Converting Inc., B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233.

3. Agencies may obtain requirements from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee. The central nonprofit agency must grant an exception if:

   a. The workshops cannot perform timely, and the commercial sources can; or

   b. The workshops cannot produce the quantities required economically.

4. Activities place orders for supplies with the GSA, Defense Logistics Agency (DLA), or the Department of Veterans Affairs (VA). In some cases, an activity may order directly from a nonprofit agency/workshop. The governing central nonprofit agency must authorize a direct purchase.

5. Activities may address complaints about the quality of supplies distributed by GSA or DLA to the pertinent agency. For supplies or services obtained directly from a workshop, activities may address complaints to the workshop, with a copy to the central nonprofit agency.

6. Workshops may compete against commercial sources on acquisitions for supplies or services not included in the Procurement List.

7. The GAO will not review an agency's decision to purchase goods or services from workshops. Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460.

D. DOD Coordinated Acquisition. 10 U.S.C. § 2309; DFARS Subpart 208.70; DOD Dir. 4140.26, Integrated Materiel Management of Consumable Items.

1. DOD agencies may obligate funds for the acquisition of supplies only under regulations prescribed by the Secretary of Defense. 10 U.S.C. § 2202(a).

2. Under coordinated acquisition procedures, a DOD component ("requiring activity") may be required to obtain commodities through another DOD component or GSA ("acquiring activity"). DFARS 208.7003-2. See Tracor, Inc., B-195736, Jan. 24, 1980, 80-1 CPD ¶ 69.

3. Assignments under the Integrated Materiel Management (IMM) Program. DFARS 208.7003-1; DOD 4140.26M. Activities must obtain assigned items from the IMM manager unless:

a. There is an unusual and compelling urgency;

b. The IMM manager codes an item for local purchase;

c. Purchase by the requiring activity is in the best interest of the government. This exception does not apply to:

(1) Items critical to the safe operation of a weapon system;

(2) Items with special security characteristics;

(3) Dangerous items (e.g., explosives, munitions).

4. Assignments under the Coordinated Acquisition Program. DFARS 208.7003-2. Activities must submit all contracting requirements for assigned items to the acquiring activity, unless:

a. The activity must obtain the item from a FAR 8.001 required source;

b. The activity obtains the item from the IMM manager;

c. The requirement does not exceed the simplified acquisition threshold, and direct contracting is in the activity's interest;

d. The activity needs the item in an emergency;

e. The acquiring activity delegates authority to the requiring activity;

f. The item is part of a research and development stage (generally, this exception applies only when RDT&E funds are used);

g. National security requires limitation of sources;

h. The supplies are available only from the original source for a follow-on contract;

i. The item is directly related to a major system and is design-controlled by and acquired by the manufacturer;

j. The item is subject to rapid design changes which require continual contact between industry and the requiring activity to ensure the item meets requirements; or

k. The item is noncataloged and represents a nonrecurring requirement (i.e., a "one-time buy").

5. Normally, under the Coordinated Acquisition Program, requiring activities use MIPRs to place orders. DFARS 208.7004-1.

a. The acquiring activity determines whether the order will be on a reimbursable (category I) or direct citation (category II) basis. DFARS 208.7004-2(b).

b. The acquiring activity may use a reimbursable order if delivery is from existing inventories or by diversion from existing contracts of the acquiring activity; production or assembly is at government-owned plants; the requirement involves assembly of end items by the acquiring department; or the acquiring activity will make contract payments without reference to deliveries of end items. DFARS 208.7004-2(b).

c. If a direct citation MIPR cites funds that will expire after 30 September, the acquiring activity must receive the MIPR by 31 May. DFARS 208.7004-4(a).

d. The acquiring activity must accept MIPRs within 30 days. DFARS 208.7004-2(a).

VII. CONCLUSION.

CHAPTER 11

NONAPPROPRIATED FUNDS

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CHAPTER 11

NONAPPROPRIATED FUNDS

I. INTRODUCTION.

A. What are Nonappropriated funds (NAFs)? NAFs are monies which are not appropriated by the Congress of the United States. These funds are separate and apart from funds that are recorded in the books of the U.S. Treasury. Within the Department of Defense (DOD), NAFs come primarily from the sale of goods and services to military and civilian personnel and their family members, and are used to support Morale, Welfare, and Recreation (MWR), billeting, and certain religious and educational programs. NAFs are government funds used for the collective benefit of military personnel, their family members, and authorized civilians. DOD 7000.14-R, Financial Management Regulation, Volume 13, Chapter 1, para. 010101.

B. NAFs are Government funds subject to controlled use. All DOD personnel have a fiduciary responsibility to use NAFs properly and prevent waste, loss, mismanagement, or unauthorized use. Violators are subject to administrative and criminal sanctions. See 10 U.S.C. § 2783. (Appendix A to this outline).

C. NAFs are audited.

1. Comptroller General. The Comptroller General has statutory authority to audit the operations and accounts of each nonappropriated fund and related activities authorized or operated by the head of an executive agency to sell goods or services to United States government personnel and their dependents. 31 U.S.C. § 3525. For example, see Nonappropriated Funds, Opportunities to Improve DOD's Concessions Committee, GAO/NSIADF/AIMD-98-119, April 30, 1998.

2. Agency Inspector Generals. The DOD IG has issued reports on Navy Ship Stores Operations (Report No. 96-123, May 17, 1996), and the Armed Forces Recreation Center - Orlando (Report No. 95-308, September 21, 1995).

II. REFERENCES.

A. 10 U.S.C. § 2783, Nonappropriated fund instrumentalities: financial management and use of nonappropriated funds.

B. DOD Directive (DODD) 1015.2, Military Morale, Welfare and Recreation (MWR), June 14, 1995.

C. DODD 1015.14, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, July 16, 2003.

D. DODD 1015.11, Lodging Resource Policy, December 9, 1996.

E. DODD 1330.9, Armed Services Exchange Regulations, November 27, 2002.

F. DOD 7000.14-R, DOD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy and Procedures.

G. DODI 1000.15, Private Organizations on DOD Installations, October 23, 1997.

H. DODI 1015.10, Programs for Military Morale, Welfare and Recreation (MWR), November 3, 1995.

I. DODI 1015.12, Lodging Program Resource Management, October 30, 1996.

J. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR) Category C Revenue-Generating Activities, March 11, 2004.

K. DODI 1015.15, Procedures for Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, May 25, 2005.

L. DODI 7000.12, Financial Management of Morale, Welfare and Recreational Activities, May 27, 1987.

M. Assistant Secretary of Defense (Force Management Policy) Memorandum, Subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability (DOD MWR USA) Practice, July 23, 1997.

N. Army Regulation (AR) 165-1, Chaplain Activities in the United States Army, March 25, 2004.

O. AR 215-1, Morale, Welfare and Recreation Activities and Nonappropriated Fund Instrumentalities, 15 August 2005.

P. AR 215-4, Nonappropriated Fund Contracting, 11 March 2005.

Q. AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare and Recreation Activities, 26 January 2001.

R. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies, 17 June 1988.

S. AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies, 15 December 1992.

T. Air Force Instruction (AFI) 34-201, Use of Nonappropriated Funds, 25 July 1994.

U. AFI 34-262, Services Programs and Use Eligibility, 27 June 2002.

V. AFI 65-106, Appropriated Fund Support of MWR and Nonappropriated Fund Instrumentalities, 1 October 2002.

W. SECNAVINST 1700.12, Operation of Morale, Welfare and Recreation Activities, 18 September 1997.

III. DEFINITIONS.

A. Nonappropriated Fund Instrumentality (NAFI). [1]

1. A U.S. Government organization and fiscal entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations in providing MWR programs for military personnel, their families, and authorized civilians. It is established and maintained individually or jointly by two or more DOD components. As a fiscal entity, it maintains custody and control over its NAFs, equipment, facilities, land, and other assets. It enjoys the legal status of an instrumentality of the United States. DODD 1015.1, Enclosure 2, Definitions; AR 215-1, Glossary.

2. In Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942), the Supreme Court concluded that post exchanges were an integral part of the War Department and enjoyed whatever immunities the Constitution and federal statutes provided the Federal Government.

B. Installation Management Agency (IMA). A field operating agency of the ACSIM, established with seven IMA Regions. The IMA manages Army installations worldwide to support mission readiness and execution; funds garrisons; enables the well-being of soldiers, civilians, and fairly members; improves infrastructure and preserves the environment; and serves and Executive Secretary for the Installation Management Board of Directors.

C. Morale, Welfare and Recreation Program (MWR). A plan or conceptual framework at any level within which one or more MWR activities are established, operated, and maintained. AR 215-1, Glossary.

D. MWR activities. Activities (exclusive of private organizations) on military installations or on property controlled (by lease or other means) by a MILDEP or furnished by a DOD contractor that provide for esprit de corps, comfort, pleasure, contentment, as well as mental and physical productivity of authorized DOD personnel. They include recreational and leisure-time programs, self-development programs, resale merchandise and services, or general welfare programs outlined in AR 215-1. AR 215-1, Glossary.

[1] The Department of Defense is not the only agency which has NAFIs. For example, the Department of Agriculture's Graduate School receives no APF support. The school's only source of income is the tuition and fees it charges its students. Congress authorizes the Graduate School to function as a NAFI under 7 U.S.C. § 2279b.

E. Army MWR Fund (AMWRF). Army central NAF managed by the U.S. Army Community and Family Support Center (USACFSC) that provides up to 90% of funds for approved NAF major construction and supports other Army-wide MWR programs. Successor-in-interest to all IMA Regional Single MWR Funds.

F. Regional MWR Fund ("One-Fund"). A separate Region MWR NAFI which consolidates all cash generated from garrison MWR operating entities. Administration of the Region single MWR funds is determined by IMA HQ and IMA Region guidance in accordance with policies in AR 215-1.

G. Installation MWR Fund (IMWRF). A garrison operating entity of the IMA Region single MWR fund, which provides installation MWR programs, including food and beverage, retail, recreation, lodging, and community support services.

H. Chaplain's Fund. Every Chaplain's Fund is legally constituted as an instrumentality of the United States. The funds are NAFs that provide supplemental support for the religious practices and requirements of DOD personnel and family members. AR 165-1, para. 14-2.

I. Unit Funds. Generally, separate unit funds are not authorized for installation units. The IMA region may, however, authorize units to receive monetary support through the IMWRF. Separate funds may be established, managed, and administered at the unit level for isolated active duty units or reserve component units or personnel performing annual training. NAF support is provided by the coordinating installation, usually the one nearest the supported unit. AR 215-1, Chapter 5, section IV; DOD 7000.14-R, Volume 13, Chapter 9.

IV. CASH MANAGEMENT, BUDGETING, AND SOURCES OF NAFI REVENUE.

A. NAFI Cash Management. AR 215-1, para. 11-5.

1. All NAFIs are required to generate sufficient cash and a positive net income before depreciation which, when coupled with existing funds, will permit the NAFI to fund all of its operating and capital requirements, with the exception of major construction, which is funded by the AMWRF.

2. Each NAFI must produce adequate revenues to cover operating and capital requirements while maintaining a cash to debt ratio between 1:1 and 2:1 (total cash divided by current liabilities).[2]

B. NAFI Budgeting.

1. Each budget is submitted with the 5-year MWR plan to the applicable IMA Region. The commander's narrative will:

a. a description of current operations, including goals and objectives reflected in the budget;

b. significant changes from previous years approved budget;

c. identification and discussion of significant trends;

d. explanation of anticipated cost savings;

e. justification for using NAFs where APFs are authorized.

2. IMA Regions will review and approve installation and community budgets unless authority is deferred to USACFSC. If authority is deferred to USACFSC, submit budgets to CFSC by 1 July. If authority is not deferred to USACFSC, submit consolidated IMA Region budgets to USACFSC by 1 September.

C. NAFI Revenue Sources.

1. Funding of IMWRFs.

[2] Navy regulations require that NAFIs "break even," achieved when net income equals net expenses, including depreciation expense. SECNAVINST 1700.12, para. 5.

a. The IMWRF is an entity of the IMA Region single MWR fund. This term refers to a group of MWR programs offered at the installation and that fall within the garrison commander's responsibility. Installation level NAFs are generated primarily by local sales of goods and services and user fees and charged. NAFs generated by each MWR program are pooled into the IMA Region single MWR fund and allocated to MWR programs based on installation priorities and provisions of AR 215-1.[3]

b. Some MWR activities, such as exchange activities, Civilian Welfare Funds, the Chaplains NAFs, and the Emergency Relief funds support the installation, but their management structure is not within the purview of the Installation Morale, Welfare, and Recreation Fund (IMWRF). AR 215-1, para. 1-6; AFI 34-201, para. 1.5.

c. IMWRFs are sustained with locally generated NAFs and authorized APF support. The revenue comes from local sales of goods and services and user fees and charges. For example, the IMWRF receives locally generated income from AAFES package stores and telephone contract profits as earned, plus a percentage of AAFES revenue generated on the installation. AR 215-1, para. 11-6.[4]

2. Funding of the AMWRF. AR 215-1, para. 11-8.

a. Resources for the AMWRF are primarily derived from:

(1) dividends paid from the AAFES and from interest earned from the temporary investment of funds that have been programmed but not yet spent; and

[3] AR 215-1, para. 5-2, requires the consolidation of separate NAFIs into the IMWRF unless there is no IMWRF or when impractical or prohibited. Consolidation minimizes the number of NAFIs and reduces overhead expenses.
[4] 10 U.S.C. § 2219 limits the amount of NAFs that an IMWRF can retain to that which is necessary to meet installation cash requirements. Amounts in excess of that amount shall be transferred to a single nonappropriated MWR account.

(2) monthly capital reinvestment assessment at a percentage of total revenue from the installation and the IMA Region NAFIs.[5]

b. All capital purchases and minor construction (CPMC) will be financed from local installation resources. An amount not to exceed 5 percent of the net annual AAFES dividend to the AMWRF may be used for CPMC support to installations unable to totally fund CPMC requirements.

c. AMWRF resources are devoted primarily to funding NAF major construction and other program investments. AR 215-1, para. 11-11.

V. MANAGEMENT OF MWR ACTIVITIES.

A. Army. AR 215-1, Chapter 2.

1. The Secretary of the Army establishes, maintains and disestablishes joint NAFIs, and coordinates joint Service matters with the Under Secretary of Defense for Personnel and Readiness. An example is the joint Army and Air Force regulation covering the Army and Air Force Exchange Service (AAFES) (see AR 60-20 / AFR 147-14.

2. The Assistant Chief of Staff for Installation Management (ACSIM) is the Army staff proponent and focal point for all MWRs and NAFIs. The ACSIM exercises supervision over the IMA and the U.S. Army Community and Family Support Center (USACFSC), a field operating agency of the Army.

3. The Assistant Secretary of the Army for Financial Management and Comptroller (ASA(FM&C)) provides financial oversight of appropriated funds (APFs) and nonappropriated funds (NAFs).

4. The Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA(M&RA)) is responsible for MWR, NAFIs, and affiliated personnel.

[5] The MWR BOD determines the percentage. AR 215-1,para. 11-8.

5. MACOMS have no residual Base Operations MWR functions except MACOM deploying units and the U.S.Army Accessions command.

6. The Director, IMA, acts as the single integrator and synchronizer with regions, the AFSTAF/ACSIM, USACFSC functional proponents, and MACOMs and in coordination with USACFSC, assists in the development, integration, and reporting of Army MWR Baseline Standards.

7. Garrison Commanders ensure adherence to applicable law and DOD/HQDA policies and regulations; plan, manage, fund and operate MWR programs and services based on Army Baseline standards[6]; and develop annual NAF budgets and manage APF Management Decision Evaluation Packages and NAF resources.

8. The Commander, U.S. Army Community and Family Support Center (USACFSC):

   a. Develops program guidance, standards and procedures to implement approved Army policies and recommends MWR and NAF policy to the ACSIM;

   b. Manages all aspects of the MWR BOD process including planning, in-process reviews, notifications, execution, and follow up of MWR NAF budget guidance, provides input to APF budget guidance, provides NAF financial oversight, and prescribes and uses effective management controls; and

   c. Develops plans, strategies, programs, policies, and operating guidance for the management and administration of MWR programs; creates and coordinates the MWR strategic plans and disseminate guidance through the IMA for synchronization, integration, and implementation.

   d. Acts as the Army proponent for all aspects of NAF financial management to include the Armed Forces Recreation Centers and the Army Recreation Machine Program.

9. NAFI Councils are a governing body of active duty soldiers or civilian employees appointed or elected to assist in the management of the NAFI and represent MWR activity patron interests. The governing council is a decision-making body that exercises general supervision for the commander and directs specific actions in the management of the NAFI. The nongoverning council is a review body that recommends and reports to the commander on general or specific matters concerning the management of the NAFI.[7]

10. The Director of Personnel and Community Activities (DPCA or DCA):

a. serves as the installation fund manager;

b. advises the command on MWR activities;

c. plans, develops and implements through subordinates all aspects of the MWR; and

d. ensures program operations maintain the fiscal integrity of the fund.

B. Air Force. AFI 34-201, Chapter 2.

1. The Secretary of the Air Force gives the authority to administer NAFs and NAFIs to the Air Force Chief of Staff.

2. Major Commander (MAJCOM):

a. Approves the establishment of base and isolated unit NAFIs;

b. Supervises all NAFIs within the command and administers command-level NAFIs; and

[7] Nongoverning councils may also include military retirees and family members.

c. Appoints a NAF council and finance and audit committee to help administer and supervise command-level NAFs.

3. Installation Commander (wing commander or equivalent):

a. Requests MAJCOM approval to establish base-level NAFIs; and

b. Appoints a custodian for each NAFI and appoints a NAF council.

4. At base level, the resource management flight chief (RMFC) acts as single custodian of all NAFIs serviced by the NAF accounting office.

C. Navy.

1. The Navy has a Morale, Welfare and Recreation Division (PERS-65), composed of nine branches, located in Millington, TN.

2. Chaired by the Vice Chief of Naval Operations, a MWR/Navy Exchange (NEX) Board of Directors (BOD) makes major policy and business decisions for both programs.

3. The Navy MWR NAF activities are regionalized.

D. Marine Corps.

1. The Personal and Family Readiness Division, under the staff cognizance of the Deputy Chief of Staff for Manpower and Reserve Affairs, is responsible for providing Service policy and resources to support commanders in executing quality Personal and Family programs.

2. The MWR Policy Review Board makes recommendations on major MWR policy matters to the Assistant Commandant of the Marine Corps. Marine Corps Order 1700.26C.

VI. FUNDING SUPPORT OF MWR ACTIVITIES.

A. Funding Standards. MWR programs are dual funded and rely on a mix of appropriated (APF) and nonappropriated (NAF) funds. The DOD basic standard, regardless of category, is to use APFs to fund 100 percent of costs for which MWR activities are authorized.[8] AR 215-1, para. 11-4a. NAFs are used to supplement APF shortfalls or fund activities not authorized APF support. See generally AR 215-1, para. 4-11.

1. NAFs are generated primarily by sales, fees, and charges to authorized patrons.

2. APFs are provided primarily through operations and maintenance and military construction appropriations.

B. APF Support of MWR. Appendix D to AR 215-1 contains the specific areas of support that Army commanders may fund with APFs. Attachment 1 to AFI 65-106 contains similar guidance for Air Force Management and Funding.

1. APF support can be direct, indirect, or common.

a. Direct APF Support. Generally limited to Category A and B MWR activities. Includes support or expenses incurred in the management, administration, and operation of MWR activities or common support functions. It includes those costs that directly relate to, or are incurred by, the operation of the MWR facilities.

b. Indirect APF Support. All MWR activities receive and are authorized indirect APF support which is historically provided to all installation facilities and functions. Such support mutually benefits MWR and non-MWR. E.g., health, safety (police and fire), security, grounds and facility maintenance and repair.

[8] The DOD goal is to obtain 100% APF for Category A and 65% for Category B activities.

c. Common MWR Support. APF support to fund the management, administration, and operation of more than one MWR program or category, where such support is not easily or readily identifiable to a specific MWR program or to solely Category C MWR activities. E.g., central accounting office, civilian personnel office, central procurement.

d. Support Agreements. NAFIs and installation support elements will enter into agreements on the type of support required and resources to be expended. When the service is not authorized APFs, but the support element provides the service, the NAFI reimburses the Government for the service based upon the support agreement. AR 215-1, para. 4-2e.

2. MWR Categories. Fund support for MWR activities depends on the funding category of the activity, which is based on the relationship of the activity to readiness factors and the ability of the activity to generate revenue. There are three primary funding categories of MWR activities. They are:

a. Category A - Mission Sustaining Activities. Commanders fund these activities almost entirely with APFs. The use of NAFs is limited to:

(1) Specific expenses for which APFs are not authorized; or

(2) When such use is not otherwise prohibited and it has been certified in writing that APF support is not available. AR 215-1, para. 4-1a; See also AFI 65-106, para. 2.1.1.

(3) Examples of Category A activities:

(a) Libraries and Information Services;

(b) Recreation Centers;

(c) Gymnasiums, fieldhouses, pools for aquatic training, and other physical fitness facilities; and

(d) Armed Forces Professional Entertainment Program Overseas.

b. Category B - Community Support Activities. These activities provide community support systems that help to make military bases temporary hometowns for a mobile military population. They receive a substantial amount of APF support, but can generate NAF revenue. AR 215-1, para. 4-1b; AFI 65-106, para. 2.1.2.

(1) Examples:

(a) Arts and Crafts;

(b) Bowling centers (12 lanes or less);

(c) Child development services;

(d) Information, ticketing, and registration services;

(e) Outdoor recreation programs, such as archery ranges, beach facilities, garden plots, hunting/fishing areas, marinas without retail sales or private boat berthing, outdoor recreation checkout centers; and

(f) Stars and Stripes newspaper.

c. Category C - Revenue-Generating Activities. These activities have less impact on readiness, and are capable of generating enough income to cover most of their operating expenses. They receive very limited APF support. AR 215-1, para. 4-1c; AFI 65-106, para. 2.1.3.

(1) Remote or isolated sites approved by Congress.

(a) Category C MWR activities at sites designated as remote or isolated receive APFs on the same basis as Category B MWR activities. APFs are also authorized for use to equip, operate, or maintain golf courses at remote/isolated sites and at sites located OCONUS. AR 215-1, para. 4-4.

(b) AF regulations generally authorize Category B-level APF support for Category C activities at approved remote and isolated locations, except for AAFES equipment and supplies, or equipment used for generating revenue, or for providing a paid service (such as point of sales systems, bowling center pinsetters, golf carts, slot machines). AFI 65-106, para. 3.1.

(2) Examples of Category C Revenue-Generating Activities:

(a) Armed Forces Recreation Centers;

(b) Bingo;

(c) Bowling centers (over 12 lanes);

(d) Outdoor recreation, including cabin/cottage operations, rod and gun activities, skiing operations, stables, flying activities; and

(e) Military clubs.

d. Supplemental Mission NAF Accounts do not support and are not part of the MWR program, but are established to provide a NAF adjunct to APF mission activities. AR 215-1, para. 4-7 and 4-8; AFI 65-106, para. 2.2. Examples include:

(1) Army Community Services (ACS);

(2) Veterinary services;

(3) Fisher House funds;

(4) Vehicle registration funds;

(5) Fort Leavenworth U.S. Disciplinary Barracks funds; and

(6) USMA funds.

VII. USE OF NONAPPROPRIATED FUNDS.

A. The use of NAFs is limited. AR 215-1, para. 4-12.

1. In all cases, NAFs are used judiciously and not as a matter of convenience.

2. NAFs are returned to authorized patrons by providing needed MWR services and capital improvements. AR 215-1, para. 1-8; AFI 34-201, para. 4.1.

3. Prices, user fees, and charges are structured to meet cash management goals for sustainment of a NAFI and its operations, to cover capital requirements and overhead expenses, and to satisfy budget requirements for support of other MWR activities dependent upon the NAFI. AR 215-1, para. 7-5.

4. Funds from supplemental NAFIs support only the requirements for which they were established. Aaron v. United States, 27 Fed. Cl. 295 (1992) (class action suit challenging excess vehicle registration fees used to fund MWR activities); GAO Report to the Chairman, Subcommittee on Defense, Committee on Appropriations, House of Representatives, B-238071, Army Housing Overcharges and Inefficient Use of On-Base Lodging Divert Training Funds, Sep. 1990 (finding improper the Army's use of profits from housing TDY soldiers for the benefit of MWR activities).

B. NAFs may not be used to :

1. Accomplish any purpose that cannot withstand the test of public scrutiny or which could be considered a waste of soldier's dollars. AR 215-1, para. 4-13a.

2. Pay costs of items or services authorized to be paid from APFs when APFs are available. AR 215-1, para. 4-13b. Exceptions to this policy include:

   a. when the appropriate official certifies in writing that APFs cannot satisfy the requirement;

   b. when functions, programs, and activities to be funded with NAFs are integral to the functions for which the NAFI was established; and

   c. when the DOD MWR Utilization, Support and Accountability (USA) policy applies.

3. Support private organizations. AR 215-1, para. 4-13c; AFI 34-201, para. 4.2.22.

4. Contract with Government personnel, military or civilian, except as authorized in AR 215-4. (Para. 1-26 of that regulation states that, "Contracts are authorized with government employees and military personnel so long as such contracts are non-personal services contracts funded entirely with NAFs. Examples include sports officials and arts and crafts instructors."). AR 215-1, para. 4-13n.

5. Support non-MWR functions. Army regulations specifically prohibit use of NAFs for any expense for a retirement ceremony, command representation, or other specific benefit for select individuals or groups. AR 215-1, para. 4-13i. However, the Air Force allows the use of NAFs to fund change of command ceremonies on a "modest" basis, as established by MAJCOM commanders. AFI 34-201, para. 12.4.8.

6. Purchase personal items such as memo pads or greeting cards, including personalized memo pads to be used at work. AR 215-1, para. 4-13k. See also AFI 34-201, para. 4.2.17.

VIII. FUNDING PROGRAMS FOR CONSTRUCTION.

A. APF support for construction of MWR facilities is generally determined by the category of the MWR activity. AR 215-1, para. 10-4b.

B. Some MWR construction projects are jointly funded by APFs and NAFs. AR 215-1, para. 10-4c.

IX. NAF FISCAL ISSUES.

A. DOD MWR Funding Policy. DOD has several funding policies designed to give MWR managers funding flexibility.

1. The URD was created by the FY 1996 Defense Authorization Act. Pub. L. No. 104-106, § 335, 110 Stat. 186, 262 (1996).

a. The URD concept was tested at six installations. Fort Campbell and White Sands Missile Range represented the Army.

b. Participating installations used NAF laws and regulations to spend APFs authorized for MWR programs.

c. The URD has expired. The Army proposed legislation making the program (Uniform Resource Expanded Program, or UREP) permanent, but it did not pass.

2. DOD established the MWR USA Practice in 1997 through a directive-type memorandum. Memorandum from Assistant Secretary of Defense (Force Management and Policy), dated 23 July 1997, subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability Practice. The DOD MWR USA practice is delegated to the IMA Regions, which may further delegate to garrison commanders.

   a. The senior APF resource manager and the IMWRF fund manager sign a Memorandum of Agreement (MOA) to use NAFs to provide APF authorized services in support of MWR programs. The garrison commander must approve the MOA

   b. Authorized services include personnel services, supplies, furniture, fixtures and equipment, routine maintenance, and other operating expenses for specified MWR programs.

   c. The NAFI receives APF payment for these services from operating accounts that support the installation's base operations.

   d. NAFIs must keep an accounting of the funds. The MWR USA program will not be used to extend the availability of APFs. If the NAFI will not obligate the funds before they expire, the NAFI must return the funds for obligation elsewhere.

3. Section 323 of the Bob Stump National Defense Authorization Act for FY 2003 amended Title 10 of United States Code 147, creating the Uniform Funding and Management Program (UFM). Under the program, APFs are expended using NAF rules for MWR programs authorized APF support to promote efficiencies. The purpose is to facilitate procurement of property and services for MWR, management of employees used to carry out the programs, and financial reporting and management.

B. Use of NAF employees to perform APF functions. An example is using a NAF contracting officer to perform APF contract actions. This constitutes augmentation of appropriations and violates the Antideficiency Act.

C. Use of APF employees to perform NAF functions beyond those which are authorized. This violates the Purpose Statute and the Antideficiency Act.

D. Contracting with NAFIs. 10 U.S.C. § 2482a. This statute states that a DOD agency or instrumentality that supports the operation of the DOD exchange or MWR system may enter into a contract or other agreement with another element of DOD or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the exchange or MWR system. See Appendix B: Air Force Memo, Use of MOA with NAFIs for Goods and Services, dtd March 25, 2004.

E. 10 U.S.C. § 2424. The DOD can contract noncompetitively with overseas exchanges in an amount not exceeding $50,000.

F. No COFC jurisdiction over self-funding entities. Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001). COFC does have jurisdiction over exchanges. 28 U.S.C. § 1491(a)(1). Boards have jurisdiction over CDA disputes with Commissary baggers. Enrique (Hank) Hernandez, ASBCA No. 53011, 01-2 BCA ¶ 31,220.

G. Golf Courses. Unless the DOD golf course is located outside the United States or designated as a remote and isolated location, APFs may not be used to equip, operate, or maintain it. 10 U.S.C. § 2246. See also Prohibition on Use of APF for Defense Golf Courses, B-277905, Mar. 17, 1998 (APFs cannot be used to install or maintain "greywater" pipelines on an Army golf course).

H. MWR patronage eligibility. See DODI 1015.10, Encl. 3. Programs are established primarily for active duty, but 26 categories of authorized patrons are listed in Table 6-1 of AR 215-1, Chapter 6. Before expanding the patron base for MWR usage, consider such things as congressional and regulatory requirements, and affect on customer service. With ASA(MRA) approval, Category C activities can be opened up to the general public.

I. Billeting Operations. Effective 1 October 1999, the Army consolidated its Temporary Duty and Guest house billeting operations under the Billeting fund.

1. The AMWRF will reimburse the IMWRFs for un-depreciated value of guest houses.

2. IMWRFs will no longer receive the revenues from its guest house (MWR Category C) operations.

J. MWR during mobilization, contingency, and wartime operations. AR 215-1, Chapter 8, Section III.

K. Public Private Ventures (PPV). See DODI 1015.13, Jun. 17, 1998, and AR 215-1, para. 10-12. Private sector built/operated facilities or services on installations in exchange for discounted fees and a return to the installation MWR fund. USACFSC is the sole Army agency authorized to award MWR PPV contracts.

L. Advertising. DOD INSTR. 1015.10, ENCL. 10; AR 215-1, para. 7-44. NAFIs (excluding exchanges) may advertise in civilian media, and may also sell space for advertising by civilian companies in their MWR media.

M. Commercial Sponsorship. DOD INSTR. 1015.10, ENCL. 9; AR 215-1, para. 7-47. Commercial sponsorship is a contractual agreement between the military and the sponsor. The military provides access to its advertising market, and the sponsor provides support to an event.

N. Army 10 Miler. Installations may not use APFs to fund travel to the Army 10 Miler. They may, however, use NAFs when the installation fund manager approves such funds, and if the opportunity to use such funds is open to everyone. Memorandum, Army Deputy General Counsel (Ethics and Fiscal), to Command Judge Advocate, Army Community and Family Support Center, subject: Use of Appropriated Funds for Travel to Army 10-Miler Race (20 Mar. 2000) and Memorandum, DA(IMA), Army 10-Miler, dtd. 25 May 2005.

O. Navy Running and Triathlon Teams. For sailors chosen to represent the Navy in certain competitions, regional MWR coordinators will supply the sailors uniforms, entry fees, ground transportation, and lodging expenses. *Navy Regional Running and Triathlon Teams Program Guidelines, at* http://www.navy.mil/mwrprgms/runguide00.rtf.

X. MWR INFORMATION RESOURCES.

A. Army.

1. Newsletter, ***MWR Feedback***, publishes information about Army MWR programs, funding, and other miscellaneous issues.

2. Website at <www.armymwr.com> contains a wealth of user-friendly Army MWR information, including official information such as MWR annual reports, AR 215-1 on-line, and NAF construction, and "unofficial" information about MWR sports, youth, and other programs.

B. Air Force.

1. Newsletter, ***USAF Services News & Views***, publishes information about Air Force MWR programs.

2. Website at <http://www.afsv.af.mil> contains information about Air Force MWR programs such as NAF purchasing, marketing and sponsorship, as well as information on child development centers, youth programs, outdoor recreation, food services, sports and fitness, lodging, and a wealth of other MWR services.

C. Navy.

1. Newsletter, ***Undercurrents***, includes information about MWR business activities and programs.

2. Website at <http://www.mwr.navy.mil> includes information about Navy MWR programs and policies, as well as a Headquarters Phone Book and a link to employment opportunities.

3. Navy Guidebook, ***APF Helpful Hints***, is published to assist in evaluating appropriate APF support for specific elements within an MWR operation. It is available at <http://www.mwr.navy.mil/subpages/mwrnews.htm.>

D. Marine Corps.

1. The Marine Corps Community Service (MCCS) website at <www.usmc-mccs.org> includes information regarding USMC MWR programs, personnel, and policy.

2. The MCCS Headquarters has begun publishing a quarterly newsletter called *MCCS Vision.* It is available at the MCCS website.

10 U.S.C. §2783

Nonappropriated fund instrumentalities: financial management and use of nonappropriated funds

(a) Regulation of management and use of nonappropriated funds. The Secretary of Defense shall prescribe regulations governing--

(1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and

(2) the financial management of such funds to prevent waste, loss, or unauthorized use.

(b) Penalties for violations.

(1) A civilian employee of the Department of Defense who is paid from nonappropriated funds and who commits a substantial violation of the regulations prescribed under subsection (a) shall be subject to the same penalties as are provided by law for misuse of appropriations by a civilian employee of the Department of Defense paid from appropriated funds. The Secretary of Defense shall prescribe regulations to carry out this paragraph.

(2) The Secretary shall provide in regulations that a violation of the regulations prescribed under subsection (a) by a person subject to chapter 47 of this title [10 USC § 801 et seq.] (the Uniform Code of Military Justice) is punishable as a violation of section 892 of this title (article 92 of the Uniform Code of Military Justice).

(c) Notification of violations.

(1) A civilian employee of the Department of Defense (whether paid from nonappropriated funds or from appropriated funds), and a member of the armed forces, whose duties include the obligation of nonappropriated funds, shall notify the Secretary of Defense of information which the person reasonably believes evidences--

(A) a violation by another person of any law, rule, or regulation regarding the management of such funds; or

(B) other mismanagement or gross waste of such funds.

(2) The Secretary of Defense shall designate civilian employees of the Department of Defense or members of the armed forces to receive a notification described in paragraph (1) and ensure the prompt investigation of the validity of information provided in the notification.

(3) The Secretary shall prescribe regulations to protect the confidentiality of a person making a notification under paragraph (1).

APPENDIX A

CHAPTER 12

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

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CHAPTER 12

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

I. INTRODUCTION.

A. Different rules apply to the funding of settlements, awards, and judgments.

B. Those involved in contract administration and contract litigation need to understand these rules in order to serve their clients.

II. REFERENCES.

A. 31 U.S.C. § 1304 (providing a permanent appropriation from which to make payments for certain settlements, awards, and judgments).

B. 41 U.S.C. § 612 (permitting payment of claim under the Contract Disputes Act).

C. Treasury Financial Manual (TFM) 6-3100, vol I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund (Sep. 2000) [hereinafter "TFM 6-3100"]. Go to http://www.fms.treas.gov/tfm/vol1/v1p6c310.pdf.

D. General Accounting Office, Principles of Fed. Appropriations Law, vol. III, ch. 14, GAO/OGC 94-33 (2d ed. 1994).

E. DOD Regulation 7000.14-R, Financial Management Regulation, vols. 3 (Jan. 2001) and 10 (Dec. 2001) [hereinafter "DOD 7000.14-R"]. Go to http://www.dtic.mil/comptroller/fmr.

F. Defense Finance and Accounting Service--Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000) [hereinafter "DFAS-IN 37-1"]. Go to https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

G. Defense Finance and Accounting Service--Denver Reg. 7010.2-R, Commercial Transactions at Base Level (Jan. 1996) [hereinafter "DFAS-DE 7010.2-R"].

H. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (Nov. 2000) [hereinafter "AFI 65-601"].

III. DEFINITIONS.

A. Judgment. A judgment is a "decision issued by a court . . . that resolves, as far as the court is concerned, by ruling on the issue in that case." See Ralph C. Nash et al., The Government Contracts Reference Book, p. 316 (2d ed., 1998).

B. Consent Judgment. A consent judgment is a judgment issued by a court in which the court sanctions an agreement reached by the parties.

C. Settlement. A settlement is an administrative determination that disposes of a claim. See e.g., 10 U.S.C. § 2731 (defining the verb to "Settle" as to "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance").

D. Compromise Settlement. A compromise settlement is an "agreement reached by the parties involving mutual concessions." General Accounting Office, Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-8, GAO/OGC 94-33 (2d ed. 1994) (citing 38 Op. Att'y Gen. 94, 95-96 (1933)).

E. Award. An award is a decision issued by an administrative board such as the agency-level Boards of Contract Appeals.

F. Unexpired Appropriations (current funds). An appropriation account available for obligation during the current fiscal year. DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 328.

G. Expired Appropriations. Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a); DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 331.

H. Closed (or Canceled) Appropriations. Appropriations that are no longer available for any purpose. An appropriation is closed/canceled five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a); DFAS-IN 37-1, Glossary, p.11; AFI 65-601, vol I, Glossary, p. 324.

IV. RULES FOR OBLIGATION OF FUNDS FOLLOWING SETTLEMENT OF A CLAIM.

Obligate funds using the same obligation rules that are used for normal contracts. DFAS-IN 37-1, Table 8-6, para. 14.

A. If the settlement relates to an in-scope contract change (the "relation-back theory"), fund it from the appropriation cited on the original contract. DOD 7000.14-R, vol. 3, ch. 8, para. 080304.C–E; DFAS-IN 37-1, Table 8-7, para. 1; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1; The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992) ("the liability relates back to the original contract and the price increase to pay the liability is charged to the appropriation initially obligated by the contract").

1. If the appropriation that was used to fund the original contract has expired, it may still be used to obligate against the settlement, subject to agency restrictions. See DOD 7000.14-R, vol. 10, ch. 12, para. 120106.B; DFAS-IN 37-1, Table 8-7, note 1 (requiring submission of written documentation); AFI 65-601, vol. I, para. 6.4.2 and Figure 6.1 (limiting local level approval authority to adjustments under $100,000); AFARS 5133.212.90-9(b) and (c)(2).

2. If the appropriation that was used to fund the original contract has expired (and is not yet closed) but is exhausted, a consent judgment is required with payment of that judgment from the Judgment Fund and reimbursement using current funds. See DOD 7000.14-R, vol. 10, ch. 12, para. 120106.A; AFARS 5133.212.90-9(b) and (c)(2)(ii) (indicating the contracting officer must contact ASA(FM&C) for authorization prior to entering into a consent judgment); Message, 201432Z FEB 01, DFAS-IN, Subject: Contract Disputes Act Settlements and the Judgment Fund, para 6.

3. If the appropriation that was used to fund the original contract has closed / canceled, current funds must be obligated. See AFI 65-601, vol. I, para. 6.3.7, para. 6.4.1.1, and Figure 6.1; AFARS 5133.212.90-9(b) and (c)(2)(iv). No more than 1% of the current appropriations account may be utilized to fund such adjustment, however. 31 U.S.C. § 1553(b)(2); see also AFI 65-601, vol. I, para. 6.5.2.

B. If the settlement relates to an out-of-scope change, fund it from appropriations available for current obligation. See DOD 7000.14-R, vol. 3, ch. 8, para. 080304.C – E; AFI 65-601, vol. I, para. 6.3.8 and Figure 6.1.

V. RULES FOR OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD.

A. If the agency has current funds available, pay the judgment/award using these funds. See AFARS 5133.212.90-9(d)(i).

B. If insufficient current funds are available, the Judgment Fund must be used to pay the judgment/award. See AFARS 5133.212.90-9(d)(ii). The Contract Disputes Act requires the agency to reimburse the Judgment Fund. See 41 U.S.C. § 612(c); see also DOD 7000.14-R, vol. 3, ch. 8, para. 080304.F; AFI 65-601, vol. I, para. 6.3.6.7.1; DFAS-IN 37-1, Table 8-6, para. 15.

VI. BACKGROUND BEHIND THE NEED FOR AND CREATION OF THE JUDGMENT FUND.

A. The Appropriations Clause (Article I, § 9, cl. 7) prohibits the withdrawal of money from the Treasury absent an appropriation. This Constitutional requirement applies to both the executive branch and the judiciary. See Collins v. United States, 15 Ct. C1. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities - through issuance of a judgment - but likewise does not authorize the withdrawal of money to satisfy that judgment).

B. Judgments can be satisfied through one of the following methods:

1. A specific appropriation covering a specific judgment;

2. A general appropriation covering multiple or a class of judgments; or

3. An authorization from Congress to use existing appropriations.

C. How Much Paid Historically. No one knows, but the largest single source of judgment payments is the Judgment Fund. Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-4, GAO/OGC 94-33 (2d ed. 1994).

D. The Judgment Fund was established in 1956 to alleviate the need for specific legislation following each successful claim against the United States thereby reducing or eliminating the amount of interest successful claimants would receive. See H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

E. Initially, the Judgment Fund applied only to federal court judgments that did not exceed $100,000. See Supplemental Appropriation Act of 1957, ch. 748, § 1302, 70 Stat. 678, 694 (1956). In 1977, Congress removed this ceiling. See Pub. L. No. 95-26, §101, 91 Stat. 61, 96 (1977).

VII. THE JUDGMENT FUND. 31 U.S.C. §1304.

A. General Concept of the Fund. The primary purpose behind the Judgment Fund is to establish a permanent appropriation, which would allow the prompt payment of judgments and compromise settlements, thereby reducing any costs of interest. See United States v. Varner, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

B. Characteristics.

1. Permanent and Indefinite. The Judgment Fund is "standing authority" to access and disburse appropriations from the Treasury. The Judgment Fund has no fiscal year limitations, nor are there any limits with respect to the amount of funds available. Consequently, there is no requirement that Congress appropriate or "replenish" the Fund either annually or at any other time. 31 U.S.C. §1304(a).

2. Applicability. Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund. 31 U.S.C. § 1304(a)(3), (b), and (c); see also Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-12, fn. 12, GAO/OGC 94-33 (2d ed. 1994). These statutorily specified judgments, awards, and compromise settlements consist of the following:

a. Judgments:

i. A United States District Court judgment made pursuant to 28 U.S.C. § 2414;

ii. A Court of Federal Claims judgment made pursuant to 28 U.S.C. § 2517 or 41 U.S.C. § 612(a); and

iii. A state or foreign court judgment made pursuant to 28 U.S.C. § 2414 if the Attorney General certifies that payment is in the best interests of the United States.

b. Awards (administrative adjudications) made pursuant to:

i. The Federal Tort Claims Act (28 U.S.C. § 2672);

ii. The Small Claims Act (31 U.S.C. § 3723);

iii. The Military Claims Act (10 U.S.C. § 2733);

iv. The Foreign Claims Act (10 U.S.C. 2734);

v. The National Guard Claims Act (32 U.S.C. § 715);

vi. The National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473); and

vii. The Contract Disputes Act of 1978 by a Board of Contract Appeals (41 U.S.C § 612(b)).

c. Compromise Settlements. When Congress created the Judgment Fund in 1961, it initially did not permit payment out of the fund for compromise settlements. In the late 1950's, many people resorted to reducing compromise settlements to consent judgments for the sole purpose of taking advantage of the Judgment Fund. In 1961, Congress cured this situation by making the Judgment Fund available for compromise settlements to the same extent that it was already available for judgments in similar cases. See P.L. 87-187, 75 Stat. 416 (1961). Payment from the Judgment Fund is now statutorily authorized for the following compromise settlements:

i. A compromise settlements negotiated by the Department of Justice (DOJ) to dispose of actual or imminent litigation (28 U.S.C. § 2414); and

ii. A compromise settlement pursuant to the Federal Tort Claims Act (28 U.S.C. § 2677).

3. Finality. The Judgment Fund is only available for judgments, awards, and compromise settlements that are final. 31 U.S.C. § 1304(a). For payments under the Judgment Fund, finality attaches to those judgments which "have become conclusive by reason of loss of the right to appeal." B-129227, Dec. 22, 1960 (unpub.) Judgments become final under the following circumstances:

a. The court of last resort renders a decision or elects not to hear an appeal;

b. The parties elect to not seek further review; or

c. The time allowed for appeal expires. The Judgment Fund and Litigative Awards under the Comprehensive Environmental Response, Compensation and Liability Act, B-253179, 73 Comp. Gen. 46 (1993); see also Herman I. Kamp, B-198029, 1980 U.S. Comp. Gen. LEXIS 3133 (May 19, 1980) (unpub.) (noting that the rationale for this requirement is to protect "the United States against loss by premature payment of a judgment which might later through appeal be amended or reversed").

4. Money Damages Only. The Judgment Fund addresses only those judgments where the court directs the government to pay money, as opposed to performing or refraining from performing some specific act (i.e., injunctive relief). Availability of Expired Funds for Non-Monetary Judicial Awards, B-238615, 70 Comp. Gen. 225, 228 (1971) (finding that a court order to implement extended GI Bill benefits should be paid for out of unobligated but expired VA appropriations rather than the Judgment Fund); see also United States v. Garney White - Funding of Judgment, B-193323, 1980 U.S. Comp Gen LEXIS 3730 (Jan. 31, 1980) (unpub.) (finding that a court order to take all steps necessary to correct structural defects in house of rural home loan borrowers should be paid from funds appropriated to Department of Agriculture for administrative expenses of programs).

5. Payment Must Not Otherwise Be Provided For. One of the keystones for access to the authority under the Judgment Fund is that no other appropriation or funding vehicle exists for payment of the judgment, award, or settlement. 31 U.S.C. § 1304(a)(1). See, e.g., Lieutenant Colonel Hervey A. Hotchkiss, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993) (unpub.) (finding that since 10 U.S.C. §§ 2733(d) and 2734(d) otherwise provide funding source for the first $100,000 on a Military Claims Act administrative settlement, the Judgment Fund may only be used to pay that portion of any settlement in excess of $100,000); The Honorable Strom Thurmond, B-224653, 66 Comp. Gen. 157, 160 (1986); S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment, B-202083, 62 Comp. Gen. 12, 14 (1982) (finding that since the HUD's Special Risk Insurance Fund - a revolving fund - was available to pay a housing contractor's judgment, the Judgment Fund was unavailable). See also S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961) (stating the Judgment Fund can pay settlements only to extent that agency appropriations are not otherwise available); 31 U.S.C. § l304(a)(3)(D) (specifying that the Judgment Fund may be utilized to make payment only on that portion of any claim settlements in excess of the amount the agency is capable of paying from its appropriations when the claim arises under the Military Claims Act, the Foreign Claims Act, the National Guard Claims Act, or the National Aeronautics and Space Act of 1958).

a. The issue of whether funds are "otherwise provided for" centers on whether, as a matter of law, a specific appropriation exists to cover the judgment and not on whether the there are sufficient funds in the account to cover payment of the judgment. The Honorable Strom Thurmond, B-224653, 66 Comp. Gen. 157, 160 (1986); Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, Dec. 18, 1989. See also Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-26, GAO/OGC 94-33 (2d ed. 1994) (indicating that where another more specific appropriation exists but contains insufficient funds to pay the judgment, the agency's recourse is to seek funds from Congress).

b. Source-of-Funds Determination. In every case, only one funding source will be available to make payment; an agency will never have an opportunity to elect between which funds to utilize. If a judgment is payable from agency funds, the Judgment Fund may not be used. 31 U.S.C. § 1304(a)(1). Similarly, if a judgment is payable from the Judgment Fund, agency funds may not be utilized to make payment. See 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made); see also In the matter of Payment of judgments under Back Pay Act and Title VII of Civil Rights Act, B-178551, 58 Comp. Gen. 311 (1976) (indicating the Air Force erred by charging agency appropriations rather than Judgment Fund in paying a court judgment resulting from the Back Pay Act).

VIII. ACCESS TO THE JUDGMENT FUND UNDER THE CONTRACT DISPUTES ACT.

A. The Contract Disputes Act (CDA) of 1978. Prior to 1978, monetary awards by the boards of contract appeals were payable from agency appropriations only. The CDA requires that awards by the boards of contract appeals be treated in a manner similar to federal court judgments. 41 U.S.C. § 612.

1. Any monetary judgment against the United States must be paid in accordance with the procedures applicable under the Judgment Fund statute. See DOD 7000.14-R, vol. 10, ch. 12, para. 120107.

2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Fund. See 41 U.S.C. § 612(c); DOD 7000.14-R, vol. 3, ch. 8, para. 080304.F; AFI 65-601, vol. I, para. 6.3.6.7.1; DFAS-IN 37-1, Table 8-6, para. 15.

B. Consent Judgments. The Judgment Fund is generally not available to pay agency settlements (i.e., settlements between the contracting officer and the contractor). One way to work around this restriction is for the agency and the contractor to stipulate or consent to entry of award based upon the terms of the settlement. Principles of Fed. Appropriations Law, vol. III, ch. 12, 12-78, GAO/OGC 94-33 (2d ed. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010; DoD 7000.14-R, vol. 10, ch. 12, paras. 120106 and 120108. The Army policy, however, is that personnel must provide prior notification to DA of their intent to enter into a consent judgment and must also determine whether sufficient non-closed funds are available. See Message, 201432Z FEB 01, DFAS-IN, Subject: Contract Disputes Act Settlements and the Judgment Fund, para 6.

C. Compromise Settlements. The Judgment Fund will provide necessary appropriations for compromise settlements reached by the DOJ. See 31 U.S.C. § 1304(a); 28 U.S.C. § 2677; 28 U.S.C. § 2414 (Compromise settlements "shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.").

D. Reimbursement of the Judgment Fund.

1. The CDA requires the agency to reimburse the Judgment Fund. 41 U.S.C. § 612(c); DoD 7000.14-R, vol. 10, ch. 12, para. 120108. The President recently signed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Pub. L. No. 107-174, 116 Stat. 566) into law. This Act requires agencies to reimburse the judgment fund for payments arising out of discrimination or whistleblower causes of action.

2. Prior to passage of the CDA in 1978, there was no requirement to reimburse the judgment fund. See S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978). This, combined with the fact that agency funds were used to pay off pre-CDA adjudications by the boards of contract appeals, resulted in a natural incentive on the part of agencies "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds." Id.

3. Reimbursement must be made with funds current at the time of judgment against the agency. Id.; see also DOD 7000.14-R, vol. 3, para. 080304.F (indicating that if the funds were current at the time of judgment, they may be used even if they are expired by the time reimbursement is made); Bureau of Land Management--Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308, 312 (1984); and S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978) (indicating that forcing "agencies to shoulder the responsibility for interest and payment of judgment brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution.").

4. While reimbursement is mandatory, neither the CDA nor any other guidance establishes a specified time during which payment by the agency must occur. Indeed, sensitive to the potential for disruption of "ongoing programs or activities in order to find the money," the GAO has opined that the earliest an agency may be in violation of the CDA requirement to reimburse the Judgment Fund "is the beginning of the second fiscal year following the fiscal year in which the award is paid." Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., Oct. 30, 1987 (unpub.).

5. For reimbursements greater than $ 1 million, DOD agencies must first obtain approval from their respective comptroller. See DoD 7000.14-R, vol. 3, para. 080304.F 5.

E. Payment of Interest. Unless otherwise allowed by statute or contract, interest associated with disputes is generally not recoverable from the United States. See, e.g., Monroe M. Tapper & Assocs. v. United States, 611 F.2d 354, 357 (Ct.Cl. 1979). The Contract Disputes Act of 1978 (CDA) is one of the statutes that allow the payment of interest - it requires agencies to pay interest on all meritorious CDA claims from the date received by the contracting officer to the date of payment. 41 U.S.C. § 611; Servidone Constr. Corp. v. United States, 931 F.2d 860, 862-63 (Fed. Cir. 1991).

1. Interest on CDA claims is calculated as simple interest according to rates established by the Department of Treasury pursuant to the Renegotiation Act. FAR 33.208(b); ACS Constr. Co. v. United States, 230 Ct. C1. 845 (1982). See also A.T. Kearney. Inc., 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing claim).

2. Claims that exceed $100,000 must be accompanied by a CDA certification to be considered a valid claim. FAR 33.201; FAR 52.233-1.

3. Claims accompanied by defective CDA certifications accrue interest from the date of receipt by the contracting officer or 29 October 1992, whichever is later. FAR 33.208(c); DoD 7000.14-R, vol. 10, ch. 12, para. 120109.B.

F. Payment of Attorney Fees. The general rule is that each party pays its own legal expenses. The Equal Access to Justice Act (EAJA) is a statutory exception to this general rule which permits a prevailing party to recover legal fees from the Government when the position of the Government was not substantially justified. 5 U.S.C. § 504(a)(1). Attorneys fees awarded under the EAJA are not payable from the Judgment Fund. Instead, the agency must use funds current at the time of the award. See 5 U.S.C. § 504(d); DoD 7000.14-R, vol. 10, ch. 12, para. 120103.C; DFAS-IN 37-1, Table 8-6, para. 16.

IX. CERTIFICATION.

A. Requirement for Certification. As discussed above, in order to qualify for payment an award or judgment must be final, require payment of specific sums of money, and may not be legally payable from another source of funds. Before payment may be made from the Judgment Fund, judgments and administrative awards must be "certified" as having met these prerequisites. Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)); see also 31 U.S.C. § 1304(a)(2).

B. Who Performs the Certification. When the Judgment Fund was initially established, Congress gave this "certification" responsibility to GAO, but then later decided to transfer the responsibility to OMB effective June 30, 1996. See Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)). Shortly thereafter, certification responsibility was given to the Secretary of the Treasury. See General Accounting Office Act of 1996, Pub. L. No. 104-316, tit. II, § 202(m), 110 Stat. 3826, 3843 (codified at 31 U.S.C. § 1304(a)(2) (2000)). The Secretary of the Treasury has delegated this responsibility to the Department of the Treasury's Financial Management Service (FMS).

C. Mechanics of the Certification Process.

1. The "responsible agency" must submit a request for payment to the FMS which certifies that the request complies with all prerequisites for qualifying for payment under the Judgment Fund statute. A "responsible agency" is:

   a. The agency responsible for defending the United States in federal courts, typically the DOJ; or

   b. The agency authorized to settle the claim (e.g., the contracting officer may settle appeals before the board of contract appeals). See Treasury Financial Manual 6-3100, § 3120.

2. Prescribed forms. See TFM 6-3100, § 3125.

   a. For litigative awards, the FMS requires use of FMS Form 194 to submit this request. This form specifically provides that the United States will seek no further judicial review of the award.

   b. For administrative awards, the FMS requires use of FMS Form 195 to submit this request.

   c. All payment requests also require submission of a data sheet (FMS Forms 196) and pay voucher (FMS Form 197 or 197A).

   d. Some payment requests require submission of additional information as well (e.g., payment requests for awards under the Federal Tort Claims Act require submission of a copy of the Standard Form 95: Claim for Damage, Injury, or Death). See TFM 6-3100, § 3130.40.

3. Upon review of the request, the Judgment Fund Section will certify for payment those awards that meet the Fund criteria. See TFM 6-3100, § 3145.20. If the request does not meet the Fund criteria, the Judgment Fund Section will provide the responsible agency with an explanation for any request denials. See TFM 6-3100, § 3145.30.

4. The Judgment Fund Section is also available to provide "responsible parties" with advice regarding the submission, review, and certification criteria. See TFM 6-3100, § 3145.10.

X. FUNDS RECEIVED FROM THE CONTRACTOR.

A. General Rule. Funds received from an outside source (e.g. other than through the appropriations process) must be deposited in the General Fund of the United States Treasury. See 31 U.S.C. § 3302(b) (also known as the Miscellaneous Receipts Statute).

B. Exceptions. Congress has given federal agencies several exceptions to the Miscellaneous Receipts Statute (MRS), but unfortunately these exceptions are scattered throughout the United States Code and public law. In addition, GAO has recognized a limited number of non-statutory exceptions. For a comprehensive overview of the MRS and its exceptions, see Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sep. 1997, at 31. Some of the more common exceptions in the contracting arena are:

1. Replacement Contracts. One of the GAO recognized exceptions to the MRS allows an agency "to retain recovered excess reprocurement costs to fund replacement contracts." See Bureau of Prisons -- Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678, (1983). Thus, if an agency obtains funds from an original contractor through a judgment, award, or settlement based upon defective workmanship or due to a default termination, the agency may "retain the amount of funds necessary to reprocure the goods or services that would have been provided under the original contract" but any "excess money will be considered miscellaneous receipts and must be deposited into the Treasury." Id.

2. Refunds. If an agency is entitled to a refund from a contractor due to a payment made in error, an overpayment, or an adjustment for previous amounts disbursed, the general rule is that agency must credit such refund to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. See Secretary of War, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).

3. False Claims Act (FCA) Recoveries. If an agency obtains a damage award or settlement pursuant to the FCA, it may "retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses." See Federal Emergency Management Agency -- Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260, 264 (1990). If "treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts." Id.

XI. CONCLUSION.

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CHAPTER 13

PAYMENT AND COLLECTION

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students should understand these concepts:

1. The various methods used by the Government to pay contractors.

2. The methods, and order of preference, for financing Government contracts.

3. The application of "The Prompt Payment Act."

4. The Government's policies and procedures for identifying and collecting contract debts.

B. Perspective. "The Department [of Defense] continues to experience an unacceptable number of contract payment problems. These problems are caused by a number of factors including systems deficiencies and contract structure."[1]

II. REFERENCES.

A. 10 U.S.C. § 2307, Contract Financing.

B. 31 U.S.C. § 3901, Prompt Payment.

C. 31 U.S.C. § 3701, Claims.

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1. Memorandum, The Under Secretary of Defense, Acquisition and Technology, to Assistant Secretaries of the Military Departments, subject: Reducing Contract Fund Citations (30 Apr. 1999).

D. 31 U.S.C. § 3727 and 41 U.S.C. § 15, Assignment of Claims Act of 1940.

E. 41 U.S.C. § 255, Advance or other payments.

F. Federal Acquisition Regulation, Part 32, Contract Financing.

G. DoD Financial Management Regulation (DoD 7000.14-R), vol. 10, Contract Payment Policy and Procedures.

H. 5 CFR Part 1315, "Prompt Payment."

III. POLICIES AND PROCEDURES.

A. FAR Part 32. This Part prescribes policies and procedures for contract financing and other payment matters.

B. Disbursing Authority.

1. The Financial Management Service (FMS), a bureau of the U.S. Department of the Treasury, is the principle disbursing agent of the Federal government, accounting for approximately 85% of all Federal payments. The FMS website is at: http://www.fms.treas.gov/.

2. The Department of Defense, the United States Marshal's Office, and the Department of Transportation (with respect to public money available for the Coast Guard's expenditure when it is not operating as a service in the Navy) have statutory authority to disburse public money. 31 U.S.C. § 3321. The Defense Finance and Accounting Service (DFAS) website is at: http://www.dod.mil/dfas/.

C. Contract Payments. All solicitations and contracts shall specify the payment procedures, payment due dates, and interest penalties for late invoice payment. FAR 32.903(a). There are two major types of government contract payments:

1. Payment of the contract price for completed work.

2. Payment in advance of work performance.

D. Advances. An advance of public money may be made only if authorized by Congress or the President. 31 U.S.C. § 3324(b). Chapter 4 of Volume 10, DoD Financial Management Regulation, DoD 7000.14-R covers all aspects of the various types of advance payments for DoD.

E. Invoice Payments vs. Financing Payments. FAR Subpart 32.9.

1. Invoice payments are payments made upon delivery of goods or performance of services and acceptance by the government. Invoice payments include: *See* ¶ 010108, Vol. 10 of DoD 7000.14-R (DoD FMR).

a. Final payments of the contract price, costs, or fee in accordance with the contract or as settled by the government and the contractor.

b. Payments for partial deliveries or partial performance under fixed-price contracts.

c. Progress payments:

(1) Construction contracts.

(2) Architect/Engineer contracts.

2. Financing payments are made to a contractor before acceptance of goods or services by the government. Such payments include: *See* ¶ 010107, Vol. 10 of DoD 7000.14-R (DoD FMR).

a. Advance payments.

b. Performance-Based Payments.

c. Progress payments based on costs.

d. Progress payments based on a percentage or stage of completion.[2]

e. Interim payments on cost-type contracts. *But see* FAR 32.908(c)(3) (allowing interim payments for cost-type service contracts).

F. Order of Preference. FAR 32.106 provides the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's interest in a specific case:

1. Private financing without Government guarantee (note, however, that the intent is not to require private financing at unreasonable terms or from other agencies);

2. Customary contract financing (*see* FAR 32.113);

3. Loan guarantees;

4. Unusual contract financing (*see* FAR 32.114); and

5. Advance payments (*see* exceptions at FAR 32.402(b)).

G. Payment Requirements. Payments are based on receipt of a proper invoice or contract financing request, and satisfactory contract performance. FAR 32.905(a).

H. Invoice Payment Due Date. The due date for making an invoice payment is prescribed in FAR 32.905. Government acceptance of supplies or services or receipt by the designated billing office of a proper invoice, whichever is later, triggers the time period for calculation of prompt payment. Failure of the Government to pay the contractor by the due date results in payment of interest.

2. Progress payments under fixed-price construction and fixed-price architect-engineer contracts are treated as invoice payments under the Prompt Payment Act.

I. Financing Payment Due Date. The due date for making a contract financing payment is prescribed in FAR 32.007. Generally, the due date for contract financing payments is 30 days from date of receipt by the designated billing office of a proper payment request. Failure of the Government to make a contract financing payment by the due date does not normally entitle the contractor to interest.[3] However, late payment can be a defense to a default termination. *But see* Jones Oil Company, ASBCA No. 42651, 98-1 BCA ¶ 29,691 (contractor will succeed in appealing a default termination of a contract only if the late payment rendered appellant financially incapable of continuing performance, was the primary or controlling cause of the default, or was a material rather than insubstantial or immaterial breach).

IV. CONTRACT PAYMENT METHODS. 41 U.S.C. § 255; 10 U.S.C. § 2307; FAR Part 32. FAR Part 32 draws a distinction between contract payments for commercial items and noncommercial items.

A. Definitions.

1. Commercial items are defined at FAR 2.101. For example, a computer qualifies as a commercial item because it is sold to the general public.

2. A non-commercial item is a supply or service that is not available for sale to the public, such as a major weapon system.

B. Non-Commercial Contract Payments. Payment methods for non-commercial item supplies or services include partial payments, advance payments, progress payments, loan guarantees, provisional delivery payments, and performance-based payments.

1. Partial Payments.

a. Partial payments are payments made under fixed-price contracts for supplies or services that are accepted by the government but are only part of the contract requirements. FAR 32.102(d).

3. FAR 32.904(e) establishes a due date for interim payments on cost-reimbursement contracts for services 30 days after the date of receipt of a proper invoice.

b. Although partial payments are generally treated as a method of payment and not as a method of contract financing, using partial payments can help contractors participate in government contracts without, or with minimal, contract financing. When appropriate, agencies shall use this payment method. FAR 32.102(d).

c. FAR 52.232-1 provides that unless otherwise specified in the contract, the government must make payment under fixed-price contracts when it accepts partial deliveries if:

(1) The amount due on the deliveries warrants it; or

(2) The contractor requests payment and the amount due on partial deliveries is at least $1,000 or 50% of the total contract price.

2. Advance Payments. FAR Subpart 32.4; FAR 52.232-12, Advance Payments.

a. Advance payments are advances of money by the government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contract. Advance payments may be made to a prime contractor for the purpose of making advances to subcontractors.

b. This is the least preferred method of contract financing.

c. Requirements. FAR 32.402(c).

(1) The contractor must give adequate security.

(2) Advance payments cannot exceed the unpaid contract price.

(3) The agency head or designee must determine that advance payment is in the public interest or facilitates the national defense.

d. According to FAR 32.402(c)(2), the agency head or designee[4] must make written findings that:

(1) Advance payment will not exceed the contractor's interim cash needs.

(2) Advance payment is necessary to supplement other funds or credit available to a contractor.

(3) The recipient is otherwise qualified as a responsible contractor.

(4) The government will benefit.

(5) The case fits one or more of the categories described in FAR 32.403.

e. Advance payments can be authorized in addition to progress or partial payments on the same contract. (FAR 32.402(d)).

f. Advance payments may be appropriate for the following (FAR 32.403):

(1) Contracts for experimental, research or development projects with nonprofit education or research institutions.

(2) Contracts solely for management and operation of Government-owned plants.

(3) Contracts of such highly classified nature that assignment of claim is undesirable for national security reasons.

4. For the Army, the designee is the Assistant Secretary of the Army (Financial Management), *see* AFARS 5132.402. The Air Force designee is the Assistant for Accounting and Banking, Office of the Assistant Secretary of the Air Force (Financial Management and Comptroller) (SAF/FMPB), *see* AFFARS 5332.409.

(4) Contracts with financially weak contractors with essential technical ability. In such a case, contractor performance shall be closely monitored to reduce Government's financial risk.

(5) Contracts for which a loan by a private financial institution is not practicable.

(6) Contracts with small business concerns.

(7) Contracts where exceptional circumstances make advance payments the most advantageous contract financing method for both the contractor and the Government.

3. Progress Payments. There are two types of progress payments: those based on costs incurred and those based on the stage of completion of the contracted work.

a. Costs Incurred. Progress payments can be made on the basis of costs incurred by the contractor as work progresses under the contract. FAR Subpart 32.5; FAR 52.232-16, Progress Payments.

(1) Unless otherwise provided for in agency regulations, the contracting officer shall not provide for progress payments to a large business if the contract amount is less than $2 million or to a small business if the contract amount is less than the simplified acquisition threshold (currently $100,000). FAR 32.104(d)(2)-(3).

(2) Subject to the dollar thresholds, a contracting officer may provide for progress payments if the contractor must expend money during the predelivery period that will have a "significant impact" on its working capital, and there is a substantial time from contract inception to delivery (six months for a large business and four months for a small business). FAR 32.104(d)(1).

(3) As part of a request for progress payments, a contractor may include the full amount of payments due to subcontractors as progress payments under the contract and subcontracts. FAR 32.504(b).

(4) Progress payments made under indefinite-delivery contracts should be administered under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. FAR 32.503-5(c) (as amended by FAC 97-16). *But see* Aydin Corp. v. Widnall, 61 F.3d 1571 (Fed. Cir. 1995) (contractor entitled to administrative and production costs incurred to implement cost segregation requirements imposed by the contracting officer, where DFARS clause provided for progress payments based on cumulative total costs of the contract).

(5) Progress payments can be added to the contract after award by contract modification, but the contractor must provide adequate consideration. FAR 32.005.

(6) Customary progress payments. FAR 32.501-1 and FAR 32.502-1.

(a) The FAR provides that the customary amount is 80% for large businesses and 85% for small businesses. FAR 32.501-1(a).

(b) DFARS provides for a customary uniform progress payment rate of 80% for large business, 90% for small business, and 95% for small, disadvantaged businesses. DFARS 232.501-1(a)(i).

(7) Unusual progress payments. Unusual contract financing is financing with additional approval requirements. FAR 32.001.

(a) Contracting officer may provide unusual progress payments only if (FAR 32.501-2):

(i) Contract necessitates predelivery expenditures that are large in relation to the contractor's working capital and credit;

(ii) Contractor fully documents an actual need to supplement private financing available;

(iii) Contractor's request is approved by the head of the contracting activity or designee.

(b) DoD requires advance approval of the Director of Defense Procurement & Acquisition Policy (OUSD(AT&L)DPAP) for any "unusual" progress payment requests. DFARS 232.501-2.

b. Percentage or Stage of Contract Completion. Progress payments also can be based on a percentage or stage of contract completion, if authorized by agency procedures. Use of this type of progress payment is subject to the following restrictions:

(1) DFARS 232.102 provides that these types of progress payments are only authorized for construction contracts, shipbuilding, and ship conversion, alteration or repair.

(2) The agency must ensure that payments are commensurate with the work accomplished. Greenhut Constr. Co., ASBCA No. 41777, 93-1 BCA ¶ 25,374 (after hurricane damaged previously completed construction work, Navy was entitled to review the work and pay only the amount representing satisfactorily completed work).

(3) Under undefinitized contract actions, such payments cannot exceed 80% of the eligible costs of work accomplished.

4. Loan Guarantees.

a. FAR Subpart 32.3 prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense.

b. The use of guaranteed loans requires the availability of certain congressional authority. DoD has not requested authority in recent years, and none is now available. DFARS 232.302.

5. Provisional Delivery Payments. DFARS 232.102-70.

a. The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the government under the following contract actions, if undefinitized:

(1) Letter contracts contemplating a fixed-price contract,

(2) Orders under basic ordering agreements,

(3) Unpriced equitable adjustments on fixed-price contracts, and

(4) Orders under indefinite delivery contracts.

b. Provisional delivery payments shall be used sparingly, priced conservatively, and reduced by liquidating previous progress payments in accordance with the Progress Payments Clause.

c. Provisional delivery payments shall not include profit, exceed funds obligated for the undefinitized contract action, or influence the definitized contract price.

6. Performance-Based Payments.[5] Performance-based payments are the preferred financing method when the contracting officer finds its use practical and the contractor agrees to its use. FAR 32.1001(a). However, in a recent report the DoD IG reported that DoD failed to adequately administer performance-based payments on 43 of 67 reviewed contracts. Additionally, the DoD IG found that "$4.1 billion of the $5.5 billion in performance-based payments lacked adequate documentation to ensure the payments were for demonstrated performance."[6]

a. Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. FAR 32.1004.

(1) Financing payments made on a whole contract basis apply to the entire contract.

(2) Financing payments made on a deliverable item basis apply to a specific deliverable item.

b. Performance-based payments may not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis. FAR 32.1004(b)(2).

c. The payments may be made on any of the following bases (FAR 32.1002):

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

5. The Defense Contract Management Agency website at http://guidebook.dcma.mil/7/guidebook_process.htm provides guidance on the use and administration of performance-based payments (PBPs).

6. OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE, REP. NO. D-2003-106, *Administration of Performance-Based Payments Made to Defense Contractors* (June 2003).

d. The contracting officer may use performance-based payments only when the contracting officer and the offeror agree on the performance-based payment terms, the contract is a definitized fixed-price type contract, and the contract does not provide for other methods of contract financing, except for advance payments or loan guarantees. FAR 32.1003.

e. FAR 32.1000 provides that performance-based payments are not used in the following instances:

(1) Payments under cost-reimbursement contracts.

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

C. Commercial Item Purchase Payments. 10 U.S.C.§ 2307(f); 41 U.S.C.§ 255(f); FAR 32.2.

1. General Rule. Although financing of the contract is normally the contractor's responsibility, in some markets, the provision of financing by the buyer is a commercial practice. The contracting officer may include appropriate financing terms in contracts for commercial purchases when it is in the best interests of the government.

2. Types of Payments. FAR 32.202-2:

a. Commercial advance payment.

(1) Payments made before any performance of work.

(2) Limited to 15% of contract price.

(3) Not subject to Prompt Payment Act interest.

(4) Payment is made on contract specified date, or 30 days after receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(i).

b. Commercial interim payment. FAR 32.001 (Similar to Progress Payments)

(1) Not commercial advance payment or delivery payment.

(2) Payments made after some work has been done.

(3) Late payment is not subject to Prompt Payment Act interest penalty.

(4) Payment is made on entitlement date specified in the contract, or 14 days from the receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(ii).

c. Delivery payment. FAR 32.001

(1) Payment for accepted supplies or services.

(2) Includes partial deliveries.

(3) Considered an invoice payment subject to Prompt Payment Act interest.

(4) The prompt payment standards for commercial delivery payments are the same as specified in FAR Subpart 32.9.

d. Installment payment financing for commercial items shall not be used for defense contracts unless market research has established that this form of contract financing is both appropriate and customary in the marketplace. DFARS 232.206(g).

3. Prerequisites. FAR 32.202-1. Commercial item purchase financing, consisting of either interim payments or advance payments, may be made under the following circumstances:

a. The item financed is a commercial supply or service.

b. The contract price exceeds the simplified acquisition threshold.

c. The contracting officer determines that it is appropriate/customary in the commercial marketplace to make financing payments for the item.

d. This form of contract financing is in the best interest of the government. To help make this determination, the FAR authorizes agencies to establish standards, such as type of procurement, type of item, or dollar level. FAR 32.202-1(e).

e. Adequate security is obtained from the contractor. FAR 32.202-4.

(1) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security provided the offeror agrees to provide additional security should that financial condition become inadequate as security. DFARS 232.202-4 states that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but not be adequate security for commercial contract financing.

(2) Types of Security.

(a) Paramount lien.

(b) Irrevocable letters of credit.

(c) Surety bond.

(d) Guarantee of repayment from a person or corporation of demonstrated liquid net worth connected by significant ownership to the contractor.

(e) Title to identified contractor assets of adequate worth.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted during contract performance as long as it is always equal to or greater than the amount of unliquidated financing. FAR 32.202-4(a)(3).

D. Progress Payments on Construction Contracts. FAR 32.103; FAR 52.232-5, Payments Under Fixed-Price Construction Contracts.

1. When a construction contract provides for progress payments and the contractor fails to achieve satisfactory performance for a period for which a progress payment is to be paid, the government may retain a percentage of the progress payment. The retainage shall not exceed 10 percent of the progress payment.

2. Entitlement to progress payments requires compliance with the contract and relevant regulations. The Davis Group, Inc., ASBCA No. 48431, 95-2 BCA ¶ 27,702.

V. THE PROMPT PAYMENT ACT. 31 U.S.C. § 3901-3907; 5 C.F.R. 1315;[7] FAR Subpart 32.9.

A. Applicability of the Prompt Payment Act (PPA).

1. Background.

7. OMB Circular A-125 was rescinded in 1999 and replaced by the Prompt Pay regulations at 5 CFR Part 1315.

a. Prior to enactment of the Prompt Payment Act of 1982 (Pub. Law No. 97-177), the Federal government did not have uniform criteria for establishing due dates for payments to contractors.

b. Many invoices were paid too early or too late. The General Accounting Office (GAO) estimated that contractors were losing at least $150 million annually due to late payments, and the Federal Government could save at least $900 million annually if payments that had been paid early had instead been paid when due.[8]

c. To address these concerns, the PPA and implementing guidance and regulations issued by the Office of Management and Budget (OMB) provided for payment due dates and interest penalties for late payments.

d. The PPA provides that interest begins when the government fails to make timely payments to the contractor after receipt of a proper invoice from the contractor.

2. Coverage.

a. The PPA applies to all government contracts except for contracts where payment terms and late payment penalties have been established by other governmental authority (e.g., tariffs). FAR 32.901. *See* Prompt Payment Act Interest on Utility Bills, B-214479, Sept. 22, 1986, 1986 U.S. Comp. Gen. LEXIS 497. *See also* National Park Service—Late Payment Charges for Utility Services, B-222944, Oct. 23, 1987, 1987 U.S. Comp. Gen. LEXIS 316 (holding that elements of implied contract governed payment terms with private, unregulated utility company)

b. The PPA applies to all government agencies.

c. There are no geographical limitations to applicability of the PPA's procedural requirements. FAR 32.901. Ingenieurgesellschaft Fuer Technische Dienste, ASBCA No. 42029, 42030, 94-1 BCA ¶ 26,569.

8. Actions to Improve Timeliness of Bill Paying by the Federal Government Could Save Hundreds of Millions of Dollars, (AFMD-82-1, Oct. 1, 1981).

3. In analyzing whether the contractor is entitled to PPA interest, the government must determine that:

   a. the PPA applies to the payment,

   b. the invoice is proper,

   c. the government has accepted the supplies or services, and

   d. the government has paid the invoice late.

4. Applicability to Types of Payments. The PPA applies to invoice payments i.e., payments made for supplies or services accepted by the government. For purposes of applying the PPA, invoice payments include (FAR 32.901(b)):

   a. Payment for supplies or services accepted by the Government.

   b. Payments for partial deliveries accepted by the Government under fixed-price contracts.

   c. Final cost or fee payments where the Government and the contractor have settled the amounts owed.

   d. Progress payments under fixed-price architect-engineer contracts.

   e. Progress payments under fixed-price construction contracts.

   f. Interim payments on cost-reimbursement service contracts.[9]

9. FAR 32.907 imposes an interest penalty on interim payments on cost-reimbursement contracts for services, when such payment is made more than 30 days after the designated billing office receives a proper invoice. 66 Fed. Reg. 65,359 (Dec. 18. 2001). Section 1007 of the National Defense Appropriations Act for FY 02 also requires payment of Prompt Payment Act interest for these late payments.

5. The PPA does not apply to contract financing payments made prior to acceptance of supplies or services. FAR 32.901(b). For purposes of applying the PPA, contract financing payments include (FAR 32.001):

a. Advance payments.

b. Progress payments based on cost.

c. Progress payments based on percentage or stage of completion (except for those made under the fixed-price construction and fixed-price architect-engineer payments clauses noted above).

6. The PPA does not require payment of interest when payment is not made because of a dispute over the amount of payment due or compliance with the contract. Active Fire Sprinkler Corp. v General Servs. Admin., 2001 GSBCA LEXIS 172 (July 11, 2001).

B. Invoice Payment Procedures.

1. Proper invoice required. The contractor must submit a proper invoice to trigger the PPA. FAR 32.904(b)(1)(i). Invoice means a contractor's bill or written request for payment under the contract for supplies delivered or services performed. FAR 2.101.

a. Under FAR 32.905(b), a proper invoice must include:

(1) Name and address of contractor.

(2) Invoice date.

(3) Contract number or other authorization.

(4) Description, quantity, unit of measure, and cost of supplies delivered or services performed.

(5) Shipping and payment terms.

(6) Name and address (EFT banking information & TIN if required) of contractor official to whom payment is to be sent.

(7) Name, telephone number, and mailing address of person to notify if the invoice is defective.

(8) Any other information or documentation required by the contract, such as evidence of shipment.

(9) Though not required, contractors are strongly encouraged to assign an identification number to each invoice.

b. Notice of defective invoice. The government must notify the contractor of any defective invoice within 7 days (3 days for meat, meat food products, and fish; 5 days for perishable agricultural commodities, dairy, and edible fats or oils) after receipt of the invoice at the designated payment office. The notice should include a statement identifying the defect in the invoice. FAR 32.905(b)(3).

(1) If such notice is not timely, an adjusted due date for purposes of determining an interest penalty will be established in accordance with FAR 32.907-1(b).

(2) FAR 52.232-25(a)(3) provides that the due date on the corrected invoice will be adjusted by subtracting from it the number of days taken beyond the prescribed notification of defects period.

(3) The contractor will not be entitled to PPA interest for late payment, despite the agency's failure to notify the contractor of a defective invoice, if the contractor knew that its invoice was defective. Masco, Inc., HUDBCA No. 95-G-147-C16, 96-2 BCA ¶ 28364 (contractor knew that invoiced work had not yet been completed).

c. Supporting documentation is required. FAR 32.905(f).

(1) A receiving report or some other government document authorizing payment must support all invoice payments. A receiving report is evidence that the government accepted the supplies delivered or services performed by the contractor.

(2) The agency receiving official must forward supporting documentation by the 5th working day after government acceptance or approval, unless the parties have made other arrangements. This period of time does not extend the payment due date.

2. Payment due date. FAR 32.904(a) provides the payment due date for invoice payments, not including architect-engineer, construction, or food and specified item contracts, is the later of:

a. The 30th day after the designated billing office receives a proper invoice; or

b. The 30th day after government acceptance of supplies delivered or services performed by the contractor.

(1) On a final invoice where the payment amount is subject to contract settlement actions, acceptance occurs on the effective date of the settlement.

(2) For the sole purpose of computing an interest penalty, government acceptance occurs constructively on the seventh day after the contractor has delivered the supplies or performed the services, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement.

(3) Except for commercial items as defined in FAR 2.101, the contracting officer may specify a longer period for constructive acceptance. This is normally to afford the government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, but cannot be used as a routine agency practice. The contract file must indicate the justification for extending the constructive acceptance period beyond 7 days.

c. Special payment periods. The payment due date on contracts for perishable agricultural commodities is shorter. (meat, 7 days; fish, 7 days; perishable agricultural commodities, 10 days; dairy, 10 days; etc.) FAR 32.904(f).

d. It is DOD policy to assist small disadvantaged businesses by paying them as quickly as possible after receipt of a proper invoice, and before normal payment due dates in the contract. This policy does not alter the payment due date for purposes of the Prompt Payment Act. DFARS 232.903.

3. Interest penalty for late payment. The government incurs an interest penalty for late invoice payment, including late payment of progress payments under fixed-price architect-engineering contracts and fixed-price construction contracts. FAR 32.907. Under the new interim final rule, interest penalties also accrue for late payment of interim payments on cost-reimbursement service contracts.[10]

a. Accrual. The interest penalty accrues when the government pays the contractor after the contract payment due date. Interest penalties will not accrue for more than one year. *See* FAR 32.907 and 5 CFR §1315.10(a)(3).

b. Automatic payment. The interest penalty accrues automatically and must be paid by the government without request by the contractor. The government must pay any interest penalty of $1 or more.[11] FAR 32.907.

[10] *See* 66 Fed. Reg. 53,485 (Sep. 22, 2001) for final rule. *See also* FAR 32.908(c)(3).

[11] The Defense Finance and Accounting Service (DFAS) has expressed concern that the costs of making such small payments may not justify the payments. In FY 1996, DFAS Columbus made 10,789 interest payments—about one

c. The interest penalty is not excused by temporary unavailability of funds. FAR 32.907(f).

d. Late payment penalty upon interest penalty.

(1) The contractor is entitled to a penalty payment if the contractor is owed an interest penalty of $1 or more, the agency fails to make a required interest penalty payment within 10 days after the date the invoice amount is paid, and the contractor makes a written demand for the penalty within 40 days after the payment. FAR 32.907(c).

(2) The penalty upon penalty amount is 100% of the interest penalty owed the contractor, not to exceed $5,000, nor be less than $25. 5 CFR §1315.11(b)&(c).

4. Contract Disputes Act Interest Distinguished from Prompt Payment Act Interest.

a. Under the CDA, the government pays interest on amounts found to be due to a contractor on claims submitted to the contracting officer. Such CDA interest accrues from the date the contracting officer receives a proper claim until payment of the amount due on the claim. FAR 33.208. 41 U.S.C.§ 611. *See* Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349 (payment of CDA claim presumed to include interest).

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quarter of all interest payments--totaling $28,701. DFAS regulations require documentation of the reason for the late payment, and in one case a $1.05 payment was supported with nine pages of documentation. Financial Management: The Prompt Payment Act and DOD Problem Disbursements (GAO/AIMD-97-71, May 23, 1997).

b. PPA and CDA interest is based on the rate established by the Secretary of the Treasury and published in the Federal Register. 31 U.S.C. § 3902 and 41 U.S.C.§ 611.[12] Under the CDA, the government pays simple interest and adjusts the rate every six months in accordance with the current Treasury rate. In contrast, PPA interest is compounded and is not adjusted during the one year accrual period.

c. If a contractor files a claim under the CDA for PPA interest, interest will run under the PPA until government receipt of the claim, after which CDA interest will apply. Technocratica, ASBCA No. 44444, 94-1 BCA ¶ 26,584.

C. Fixed-Price Construction Contracts.

1. The government must pay interest on approved construction contract progress payments that remain unpaid for more than 14 days after the designated billing office receives a proper payment request. FAR 32.904(d).

2. Similarly, the contractor must pay interest on unearned progress payments, e.g., when the contractor's performance for which progress payments are made does not conform to contract terms. FAR 32.904(d)(4)(i). FAR 52.232-5(d), Payments under Fixed-Price Construction Contracts. The government must demand payment of the underlying debt in a sum certain. Electronic & Space Corp., ASBCA No. 47539, 95-2 BCA ¶ 27,768 (the government's letter which simply stated "it appears" progress payments were overpaid was ruled to be an improper demand letter).

3. The government must pay interest on any retained amount that is approved for release if the government does not pay the retained amount to the contractor by the 30th day (unless specified otherwise in contract) after release. FAR 32.904(d)(1)(ii).

[12] Information concerning the interest rate can be obtained through the Federal Register or from the Department of the Treasury, Financial Management Service (FMS), Washington, DC 20227 (202) 874-6995. The rate applicable from 1 January 2005 to 30 June 2005 is 4.25%. This rate is published semi-annually in the Federal Register. *See* 69 Fed. Reg. 78,522 (Dec. 30, 2004). The FMS website is <www.fms.treas.gov>. The current and prior PPA interest rates are at www.publicdebt.treas.gov/opd/opdprmt2.htm.

4. Interest penalties are not required on payment delays due to disagreement between the parties over the payment amount or other issues involving contract compliance. Claims involving disputes and any interest thereon will be resolved in accordance with the Disputes clause. FAR 52.232-27 (a)(4)(ii). FAR 32.907(d).

D. Fixed-Price Architect-Engineer Contracts. The government must pay interest penalties on approved contract progress payments that remain unpaid for more than 30 days after government approval of contractor estimates of work or services accomplished. FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts; FAR 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts. FAR 32.904(c).

E. Prompt Payment Discounts.

1. Discount for prompt payment means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at FAR 52.232-8, Discounts for Prompt Payment, if payment is made by the government prior to the due date. The due date is calculated from the date of the contractor's invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when federal government offices are closed and government business is not expected to be conducted, payment may be made on the following business day and a discount may be taken. FAR 32.906(e).

2. The government may take prompt payment discounts offered by a contractor only when it makes payment within the specified discount period.[13]

3. The PPA imposes an interest penalty on improperly taken discounts, and the agency must pay the penalty without request by the contractor. FAR 32.907(b).

[13] For a discussion on the propriety of taking a prompt payment discount for progress payments made in the normal course of contract administration, See Prompt Payment Discounts Based on Progress Payments, ARMY LAW., Aug. 1994, at 54.

4. The government policy provisions at FAR 32.906(a) state that the government shall not make invoice and contract financing payments earlier than 7 days prior to the dates specified in the contract unless the agency head, or designee, determines to make earlier payment on a case-by-case basis.

F. Waiver. A contractor may waive an interest penalty payment issued to it under the PPA either by an express written statement or by acts and conduct which indicate an intent to waive. Central Intelligence Agency - Waiver of Interest Under Prompt Payment Act, 62 Comp. Gen. 673 (1983) (contractor refused to accept interest check prepared by agency).

VI. ELECTRONIC FUNDS TRANSFERS (EFT). FAR Subpart 32.11.

A. Mandatory Use. Payment by EFT is the mandatory method of contract payment[14] in normal contracting situations except for the following situations listed in FAR 32.1103:

1. The office making payment under a contract requiring EFT loses the ability to release payment by EFT. In such a case, the paying office shall make all the necessary payments by check or some other mutually acceptable method of payment. FAR 32.1103(a).

2. The payment will be received by or on behalf of a contractor outside the United States and Puerto Rico. FAR 32.1103(b). However the agency head may authorize EFT for a non-domestic transaction if the political, financial, and communications infrastructure in the foreign country supports EFT payment. FAR 32.1106(b)(1).

3. The payment will be paid in other than US currency. FAR 32.1103(c). However, the agency head may authorize EFT is such a transaction may be made safely. FAR 32.1106(b)(2).

[14] 31 USC §3332 requires use of EFT in all situations except when recipients certify in writing that they do not have an account with a financial institution.

4. Classified contracts, where EFT payments could compromise the safeguarding of classified information or national security, or where arrangements for appropriate EFT payments would be impractical due to security considerations. FAR 32.1103(d).

5. Contracts executed by deployed contracting officers in the course of military operations, including but not limited to, contingency operations as defined in 10 U.S.C. § 101(a)(13), or a contract awarded during emergency operations, such as natural disasters or national or civil emergencies.

6. The agency does not expect to make more than one payment to the same recipient within a one year period. FAR 32.1103(f).

7. The agency's need for supplies and services is of such unusual and compelling urgency that the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(g).

8. There is only one source for supplies and services and the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(h).

9. Payment by a method other than EFT is otherwise authorized by the Department of Treasury Regulations at 31 CFR 208. FAR 32.1103(i).

B. Specified Payment Date. FAR 32.902. *See also* FAR 52.232-33 & 34.

1. The date on which the funds are to be transferred to the contractor's account by the financial agent according to agency's EFT payment transaction instruction given to the Federal Reserve System.

2. If no date has been specified in the instruction, the specified payment date is 3 business days after the payment office releases the EFT payment transaction instruction.

C. Assignment of Claims. Using EFT payment methods is not a substitute for a properly executed assignment of claims. EFT information showing the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information. FAR 32.1105.

D. Central Contractor Registration (CCR). FAR Subpart 4.11. FAR 52.204-7.

1. Contractors provide EFT data to DOD by registering in the CCR. Registration is mandatory prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement. The contractor identifies itself through a Data Universal Numbering System number or DUNS assigned by Dun and Bradstreet Information Services. *See* FAR 52.204-6.

2. Exceptions to this policy: FAR 4.1102.

a. Purchases made with the Government-wide commercial purchase card or other micro-purchase methods,

b. Awards made to foreign vendors for work performed outside the United States,

c. Classified contracts or purchases,

d. Contracts executed by deployed contracting officers in the course of military operations, including but not limited to, contingency operations as defined in 10 U.S.C. § 101(a)(13), or a contract awarded during emergency operations, such as natural disasters or national or civil emergencies.

e. Contracts to support unusual or compelling needs.

E. Incorrect EFT Information. If the contractor's EFT information is incorrect, the Government need not make payment until the contractor supplies the correct information. Any invoice submitted under the contract is deemed not to be a proper invoice for purposes of prompt payment. FAR 52.232-33(d); FAR 52.232-34(d); FAR 32.905(b)(ix)(B).

F. Payment by Government Purchase Card.[15] The financial institution that issued the government credit card may make immediate payment to the contractor. The government will reimburse the financial institution. FAR 32.1108. [16]

G. FAR Clauses: Unless payment will be made exclusively through the government purchase card, other third party arrangement, or pursuant to an exception in FAR 32.1103, the contracting officer shall insert the clause at FAR 52.232-33, Payment by Electronic Funds Transfer-Central Contractor Registration, in all solicitations where the paying office uses the Central Contractor Registration database as its source of EFT information. In contracts where clause 52.232-33 is not inserted, the contracting officer will insert the clause at FAR 52.232-34, Payment by Electronic Funds Transfer-Other than Central Contractor Information.

H. Liability for Erroneous Transfer

1. If an uncompleted or erroneous transfer occurs because the government failed to use the contractor provided EFT information in the correct manner, the government remains responsible for making a correct payment, paying any prompt penalty due, and recovering any erroneously directed funds. FAR 52.232-33(e)(1).

2. If an uncompleted or erroneous transfer occurs because the contractor provided incorrect EFT information, and if the funds are no longer in the control of the payment office, the government is deemed to have made payment and the contractor is solely responsible for recovery of any of the erroneously directed funds. If the funds remain under the control of the payment office, the government retains the right to either make payment by mail or suspend the payment. FAR 52.232-33(e)(2).

[15] DOD requires use of the purchase card as payment for any purchase at or below the micro-purchase threshold ($2,500). A written determination by a Senior Executive Service member, Flag Officer, or General Officer is required in certain instances where the card is not used. DFARS 232.1108 and 213.270.

[16] Written contracts to be paid by purchase card should include the clause at 52.232-36, Payment by Third Party, as prescribed by FAR 32.1110(d). However, payment by a purchase card also may be made under a contract that does not contain the clause if the contractor agrees to accept the card as a method of payment. FAR 32.1108(b).

3. Prompt Payment Act. A payment shall be deemed to have been made in a timely manner if the EFT payment transaction instructions given to the Federal Reserve System specifies the date for settlement of the payment on or before the prompt payment due date, whether or not the Federal Reserve System actually makes the payment by that date. FAR 52.232-33(f) & -34(f).

VII. ASSIGNMENT OF CLAIMS.

A. General Rule. A contractor may assign its right to be paid by the government for contract performance. FAR 32.802.

1. Under the Assignment of Claims Act (31 U.S.C. § 3727) and Assignment of Contracts Act (41 U.S.C. § 15), a contractor may assign monies due or to become due under a contract if all of the following conditions are met:

a. The contract specifies payments aggregating $1,000 or more.

b. The contractor makes the assignment to a bank, trust company, or other financing institution, including any federal lending agency.

c. The contract does not prohibit the assignment.

d. Unless the contract expressly permits otherwise, the assignment:

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party; and

(3) Is not subject to further assignment.

e. The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the:

(1) Contracting officer or agency head,

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

2. The provisions of the Assignment of Claims Act are construed strictly. *See* Summerfield Housing Limited Partnership v. United States, 42 Fed. Cl. 160 (1998).

B. Protection for the Assignee. 41 U.S.C. § 15; FAR 32.804.

1. Once the assignee notifies the government of the assignment, the government must pay the assignee. Payment to the contractor will not discharge the government's obligation to pay the assignee. Tuftco Corp. v. United States, 222 Ct. Cl. 277 (1980).

2. The government cannot recover payments made to the assignee based on the contractor's liability to the government. FAR 32.804.

3. DOD may include a "no-setoff" provision in its contracts upon a determination of need by the President published in the Federal Register. 41 U.S.C. § 15(e). Formerly, agencies could only use a "no-setoff" provision upon a Presidential proclamation of war or national emergency. This authority has been delegated to the Head of the Agency after such determination has been published in the Federal Register. Use of the "no-setoff" provision may be appropriate to facilitate the national defense, in the event of a national emergency or natural disaster, or when the use of a "no-setoff" provision may facilitate private financing of contract performance. If the offeror is significantly indebted to the Government, this information should be used in the determination. FAR 32.803(d).

4. If the contract contains a no-setoff commitment clause (FAR 52.232-23, Alt I), the assignee will receive contract payments free of reduction or setoff for:

a. Any liability of the contractor arising independent of the contract. FAR 32.804(b)(1). *See* Bank of Amer. Nat. Trust and Sav. Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994) (SBA loans to fund contract performance are "independent" of the contract and not subject to set-off). *See also* Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (discussing use of no-setoff provision by assignor).

b. Certain liabilities arising under the same contract, such as fines, penalties, and withheld taxes (FAR 32.804(b)(2)).

VIII. DEBT DETERMINATION AND COLLECTION PROCEDURES. FAR Subpart 32.6

A. Debts Covered by Contract Collection Procedures. FAR 32.602.

1. Damages or excess costs arising from a contractor's default in performance.

2. Breaches of contract obligations by the contractor concerning progress payments, advance payments, or government-furnished property or material.

3. Expenses incurred by the government in correcting defects.

4. Government overpayment to contractors due to billing errors, such as stating an incorrect quantity, or deficiencies in quality or erroneous payments made through EFT.[17]

[17] The General Accounting Office (GAO) has issued numerous reports highlighting DOD's problems concerning overpayments to contractors. In fiscal years 1994 through 1998, defense contractors returned $4.6 billion to the Defense Finance and Accounting Center in Columbus, Ohio, due to overpayments resulting from contract administration actions and payment processing errors. See DOD Procurement: Funds Returned by Defense Contractors (GAO/NSIAD-98-46R, Oct. 28, 1997), and DOD Procurement: Millions in Overpayments Returned by

5. Retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive-type contracts.

6. Delinquency in contractor payments due to the government under agreements for deferral or postponement of collections.

7. Reimbursement of costs as provided in FAR 33.102(b) and 33.104(h)(1), paid by the Government where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

B. Determination of Contractor Debt.

1. Overpayment problem. Contractor reconciliation of its billings to government accounting and payment data is a key procedure for identifying government overpayments.[18] In 2002, Congress enacted the Improper Payments Information Act of 2002 that requires agencies to annually identify programs and activities susceptible to significant improper payments and report an annual estimate of improper payments to Congress.[19]

2. Cooperation among government officials. The FAR requires contracting officers, contract financing offices, disbursing officials, and auditors to cooperate fully with each other to properly identify and promptly collect contract debts. FAR 32.605(a).

DOD Contractors (GAO/NSIAD-94-106, Mar. 14, 1994). For FY 01, DFAS Columbus records revealed that DoD made approximately $488 million in overpayments. *See* GEN. ACCT. OFF. REP. NO. GAO-02-635, *DOD Contract Management: Overpayments Continue and Management and Accounting Issues Remain* (May 30, 2002).

[18] See DOD Contract Management: Greater Attention Needed to Identify and Recover Overpayments (GAO/NSIAD-99-131, July 19, 1997). In the FY 02 National Defense Authorization Act, section 831 amended Title 31 of the U.S. Code to require that the head of each executive agency establish a cost effective program for identifying payment errors and for the recovery of overpayments. Pub. L. No. 107-107, §831, 115 Stat. 1012, 1186 (2001).

19. Pub. L. No. 107-300, 116 Stat. 2350 (2002).

3. Responsibility.

a. Normally, the contracting officer has primary responsibility for determining the amount of a debt and for collecting it. FAR 32.605(b).

b. For DOD agencies, the disbursing officer is responsible for determining the amount and collecting contract debts whenever the government makes overpayment or erroneous payments. DFARS 232.605(b).

4. Procedures.

a. The responsible official determines the substantive basis for the government's entitlement. FAR 32.606.

(1) Contractual. Identify the specific contract provision(s) upon which the government's claim is based. Common bases include:

(a) Defective Pricing. *See* FAR 15.407-1, Defective Cost or Pricing Data.

(b) Excess Costs of Reprocurement. *See* FAR 49.402-6, Repurchase Against Contractor's Account.

(c) Recovery of Unliquidated Progress Payments. *See* FAR 52.232-16(h).

(d) Recovery of Unliquidated Advance Payments. *See* FAR 52.232-12; Do-Well Machine Shop Inc., ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320 (SBA entitled to unliquidated advance payment following default termination of 8(a) contractor); Johnson Mgmt. Group CFC Inc., HUDBCA Nos. 96-C-132-C15, 97-C-109-C2, 1999 HUD BCA LEXIS 7 (HUD had paramount lien on start-up equipment purchased with advance payments).

(2) Other bases for government entitlement include common law (e.g., breach of contract, consequential damages) and debts from other contracts.

b. The responsible official must issue a demand letter notifying the contractor of the debt as soon as the responsible official has computed the amount of refund due. FAR 32.610.

C. Enforcing Government Claims-Collecting the Debt.

1. Collection methods.

a. Voluntary Payment by the Contractor. After receiving the demand letter, the contractor may pay, arrange to defer payment, or arrange to make installment payments.

b. Administrative Set-Off. If the disbursing officer is responsible for collection of a contract debt or is notified of the debt by the responsible official, and if the disbursing officer has contractor invoices on hand for payment by the government, the disbursing official shall make an appropriate set-off in the payment to the contractor. FAR 32.611.

c. Withholding. If the contractor fails to make payment within 30 days of a demand, and has failed to request deferment, the government shall immediately initiate withholding of principal and interest. FAR 32.612.

d. Tax Refund Offsets. 31 U.S.C. § 3720A authorizes the Internal Revenue Service (IRS) to collect certain past due and legally enforceable debts by offset against tax refunds. The DFAS-Denver Center is the single DOD manager and contact point for the IRS-DOD agreement for implementing and administering tax refund offsets. DOD Dir. 7000.14-R (Financial Management Regulation), vol. 10, para. 180602B2.

2. Deferment of Collection. FAR 32.613.

a. If the contractor is not appealing the debt, the government and the contractor may agree to a debt deferment or installment payments if the contractor is unable to pay in full at once or if the contractor's operations under national defense contracts would be seriously impaired. FAR 32.613(f).

b. If the contractor is appealing the debt, suspension or delay of the collection action is not required. However, the responsible official shall consider whether deferment of the debt is advisable to avoid possible overcollection. FAR 32.613(d).

c. Deferment pending disposition of appeal may be granted when the contractor is a small business concern or is financially weak. FAR 32.613(e).

d. The government grants deferments pursuant to a written agreement. FAR 32.613(h) specifies the necessary terms. According to FAR 32.613(i), if the contractor's appeal of the debt determination is pending when it requests deferment, any deferment/installment agreement must provide that the contractor will:

(1) prosecute the appeal diligently; and

(2) pay the debt in full when the appeal is decided or the parties agree on the debt amount.

e. The filing of an action under the contract's Disputes clause shall not suspend or delay collection of government claims. To obtain deferment of a debt determination that has been appealed under the Disputes clause, the contractor must present a bond or other collateral in the amount of the claim to the government. FAR 32.613(l).

D. Compromise Actions. DoD Directive 7000.14-R (FMR), Vol. 5, Ch. 31

1. For debts under $100,000 (excluding interest), if further collection is not practicable or would cost more than the amount of the recovery, the agency may compromise the debt or terminate or suspend further collection action. FAR 32.616.

2. For debts over $100,000, DFAS must forward the debt to the Department of Justice (DOJ) for further action. If DOJ determines that the debt is uncollectible, it must notify DFAS that the debt should be written off. DOD Dir. 7000.14-R (Financial Management Regulation), vol. 10, para. 180603.

E. Funds Received from the Contractor.

1. Miscellaneous Receipts Statute (MRS). 31 U.S.C. § 3302(b). Most funds received from a source outside the appropriations process must be deposited in the general fund of the United States Treasury.

2. Exceptions. Exceptions to the MRS are scattered throughout the United States Code and public law.

3. For more on the MRS and its exceptions, *see* General Accounting Office, Principles of Federal Appropriations Law, vol. II, ch. 6, § E (2d Ed. 1992); Major Timothy D. Matheny, Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions, ARMY LAW., Sep. 1997, at 31.

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B. Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander's Emergency Response Program (CERP) Guidance (27 July 2005).

C. Chapter 11, Fiscal Law, Operational Law Handboook, 2006.

FUNDING U.S. MILITARY OPERATIONS

I. INTRODUCTION.

II. CONSTITUTIONAL PREDICATE.

A. President's Power.

1. "The President shall be the Commander in Chief of the Army and Navy of the United States…." U.S. Const. Art. II, § 2, cl. 1.

2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls…." U.S. Const. Art. II, § 2, cl. 2.

3. "[H]e shall receive Ambassadors and other public Ministers…." U.S. Const. Art. II, § 3.

B. Congress' Power.

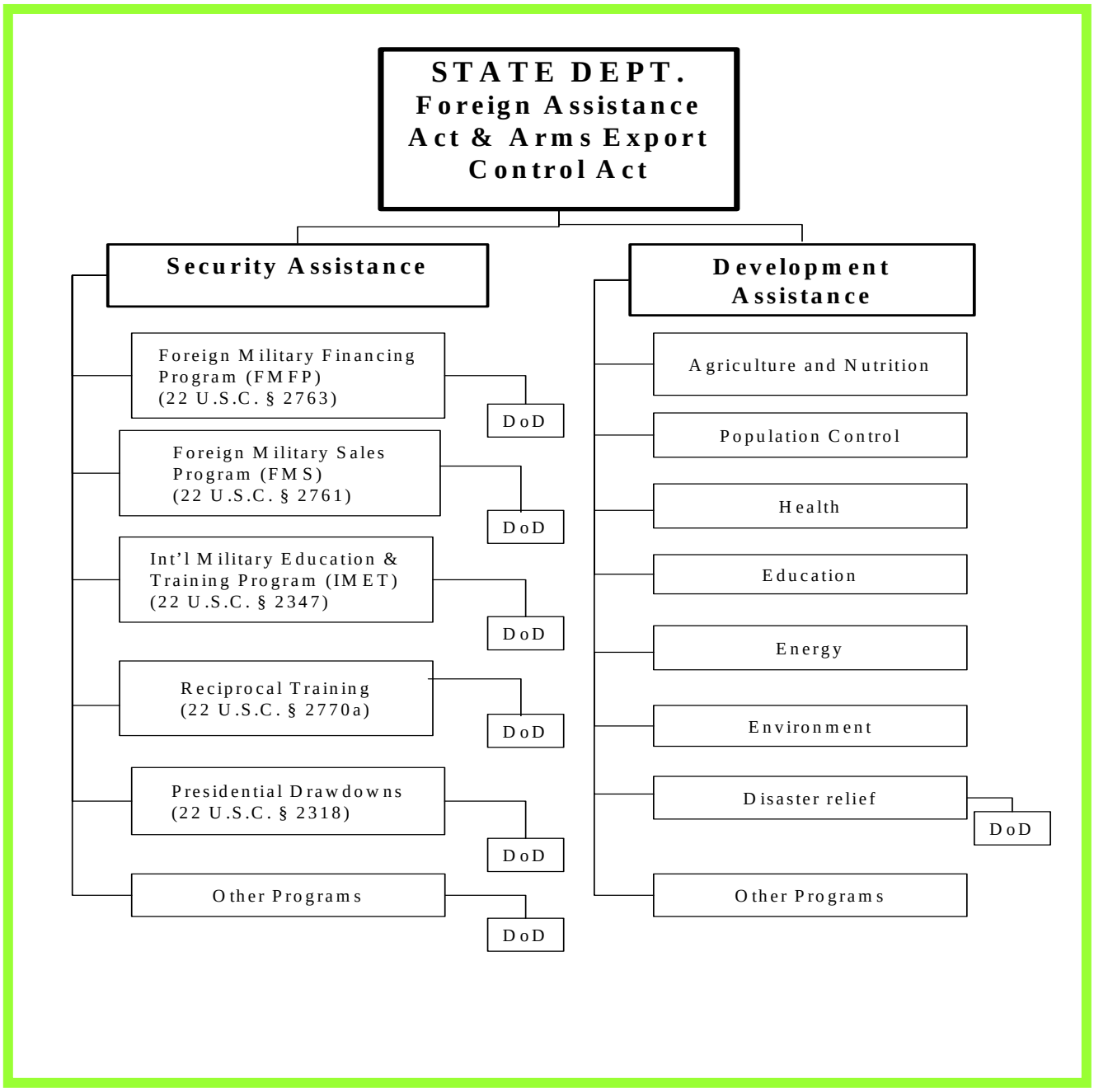
1. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law…." U.S. Const. Art. I, § 9, cl. 7.

2. "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…." U.S. Const. Art. IV, § 3, cl 2.

> "An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development

assistance, security support programs and U.S. participation in international organizations…. Hardly any important executive branch decision is taken without consideration of the reaction in Congress."

Trimble, The President's Foreign Affairs Power, 83 AM. J. INT'L. LAW 750 (1989).



C. Legislative Controls: Of the three general limitations - Purpose, Time, and Amount; the Purpose Statute is the fiscal control that has the primary focus for the fiscal law practitioner in a military operation setting.

1. 31 U.S.C. § 1301(a) provides:

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

2. Three-Part Test for a Proper Purpose. In 1984, the Comptroller General specifically addressed numerous funding issues within the Ahuas Tara military exercises conducted in Honduras. Accordingly, the Comptroller General reiterated the three factors that determine whether to expend a specific appropriated fund. In this case, the Comptroller General was reviewing the use of Army O&M funds or whether other appropriated fund sources should have been used, such as funding through the Department of State. The three factors are the following:

   a. The expenditure must be reasonably related to the purposes for which the appropriation was made. (In other words more commonly cited, the expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.)

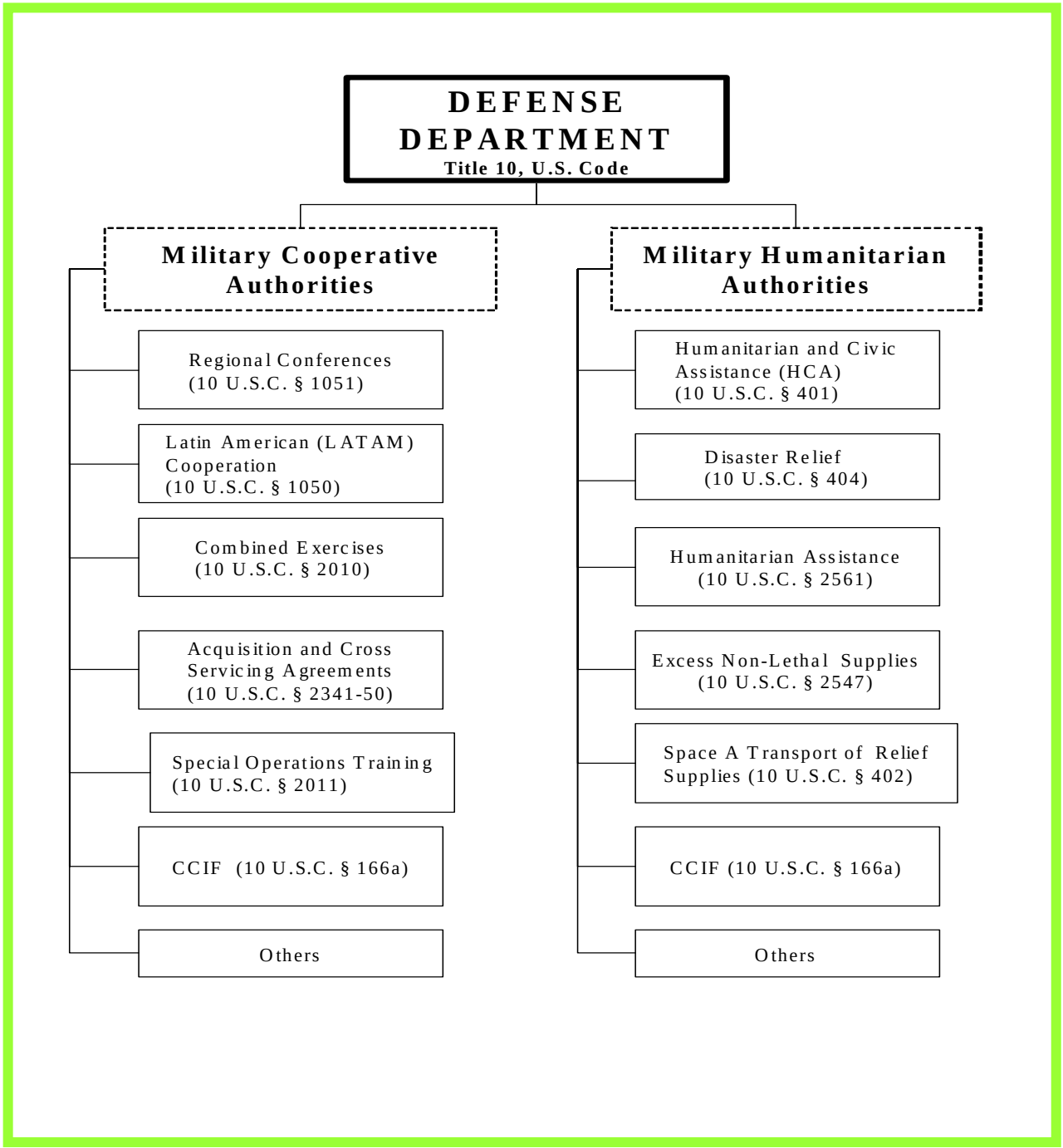
   b. The expenditure must not be prohibited by law.

   c. The expenditure must not fall specifically within the scope of some other category of appropriations. This last requirement applies even if the more appropriate funding source is exhausted and therefore unavailable.

See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Appendix A).

III. THE NEED FOR EXPRESS LEGAL AUTHORITY.

A. General. "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).



B. Article II Operations: Inherent Authority? *See, e.g.*, R. Rosen, Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1 (1998); W. Banks & P. Raven-Hansen, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 166 (1994).

IV. ASSISTANCE TO ALLIES: SUPPORTING COALITION OPERATIONS.

A. Supporting Multilateral Peace Operations: Policy - Presidential Decision Directive (PDD) 25 (May 3, 1994).

1. General. PDD 25 addresses the following areas:

a. Choosing which operations to support.

b. Defining U.S. policy regarding command and control (C2). *See also* H.R. 1530, § 1301, 104th Cong., 1st Sess. (1995); 31 Pres. Doc. 2234 (Dec. 28, 1995) (Presidential veto of Defense Authorization Bill prevented additional Congressional restrictions on C2 policy in UN operations).

c. Reducing U.S. costs for UN peace operations.

d. Reforming/improving UN management of peace operations.

e. Improving U.S. management and funding of peace operations.

f. Creating better cooperation between the Executive & Legislative branches.

2. Funding Provisions.

a. *Reimbursement.* U.S. will generally seek either direct reimbursement for provision of goods and services or credit against UN assessment. In rare circumstances, U.S. may contribute goods, services, and funds on a voluntary basis. *But see*, paragraph B.1.b., *infra.*

b. *Oversight & Management.*

(1) Department of State has responsibility for oversight and management of Chapter VI peace operations in which U.S. combat units are not participating.

(2) Department of Defense has responsibility for oversight and management of Chapter VI operations in which U.S. forces are participating and for all Chapter VII operations.

c. *UN Assessments.* No DoD funds may be expended, directly or indirectly, to make a financial contribution to the UN for the cost of a UN peacekeeping activity or for payment of U.S. arrearages to the UN. 10 U.S.C. § 405.

B. Authority: UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

1. *Scope.* Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of the armed forces under Chapter VII of the UN Charter --

a. *Details of Personnel.* Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.

b. *Supplies, Services, & Equipment.* Furnishing of facilities, services, or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.

2. *Reimbursement.* Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. **This requirement to receive reimbursement <u>is not</u> limited to assistance provided under the UNPA, but applies to <u>any</u> authority under which assistance may be provided to an assessed peacekeeping operation.**

a. *Delegation of Authority.* The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206, ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

C. Drawdowns.

1. *Foreign Assistance Act* (FAA), § 506(a)(1), 22 U.S.C. § 2318(a)(1) - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).

2. FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2) - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance. (The Security Assistance Act of 2000 increased the amount from $150M to $200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than $75M may come from DoD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. See, e.g., Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY01 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

3. FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2) - Authorizes the President to direct the drawdown of up to $25,000,000 in any fiscal year of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.

4. *Iraq Liberation Act of 1998*, P.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998) – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed $97 million and requires 15 days notice to Congress. President Bush subsequently directed $92 million in drawdown assistance in 2002. *See*, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002). Unique to drawdowns, Congress subsequently appropriated $63.5M reimbursement for IFSA drawdown support. *See* Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.

5. *Afghanistan Freedom Support Act of 2002*, Pub. L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002)(codified at 22 USC §7532) – Authorizes the President to direct the drawdown of up to $300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act. The assistance may also be provided by contract. Section 9008 of the *FY05 Defense Appropriations Act*, Pub. L. No. 108-287 (2004*)* increased this Afghan drawdown authority to $550 million. Oddly enough lightning has struck the same point twice, Congress provided $165M reimbursement for the AFSA Drawdown. *See* Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

D. Special Logistical Support Funding Authority for Cooperating Nations in OIF and OEF.

1. *Emergency Supplemental Appropriations Act (ESAA) for Defense and for Reconstruction of Iraq and Afghanistan, 2004*, Pub. L. No. 108-106 (2003) (hereinafter FY04 ESAA). Authorized $1,150,000,000 of Defense-Wide O&M to remain available until expended ($4.3 billion total Defense-Wide O&M) to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and the global war on terrorism. This authority requires the Secretary of State concurrence, 15 day prior notification to Congress, and quarterly reports to Congress.

2. Section 1106 of the FY04 ESAA- authorized Defense Wide O&M Funded Support to Coalition Partners. Defense O&M may be used to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability ops in Iraq. Section 9009 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 (2004) continued this "Lift & Sustain Authority" for FY05 and also included operations in Afghanistan.

E. Special Train and Equip (T&E) Funding Authority for the New Iraqi Army and the Afghan National Army (DoD O&M funded "Security Assistance").

1. Section 1107of the FY04 ESAA authorized that $150 million of Defense-Wide O&M may be used to provide assistance to the New Iraqi Army and the Afghan National Army to enhance their capability to combat terrorism and to support U.S. military operations in Iraq and Afghanistan. This authority requires Secretary of State concurrence and 15 days prior notification to Congress. The assistance may include: equipment, supplies, services, training and funding that would normally be security assistance funded through the Department of State.

2. Section 9006 of the *FY05 Defense Appropriations Act*, Pub. L. No. 108-287 (2004) continued this authority for FY05 with increased authority to use $500 million of Defense-Wide O&M.

F. Details of Personnel.

1. FAA § 627, 22 U.S.C. § 2387. When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

2. FAA § 628, 22 U.S.C. § 2388. When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

3. 22 U.S.C. § 1451. Authorizes the Director, USIA, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

4. 10 U.S.C. § 712. Authorizes President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Details may be on a reimbursable or nonreimbursable basis.

G. *Excess Defense Articles (EDA).* Defense articles no longer needed by the U.S. may be made available on a grant basis.

1. FAA § 516, 22 U.S.C. § 2321j. Authorizes both lethal and nonlethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO, non-NATO Southern-flank allies, and the Philippines, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518- 520); Security Assistance Act of 1999, Pub. L. 106-113,
§ 1211(b) (1999).

2. *Amount* - An aggregate ceiling of $425M per year. Cost is determined using the depreciated value of the article.

3. *Transportation:* No-cost space available transportation is authorized for developing countries receiving less than $10M FMF or IMET in any FY if a determination is made that it is in the national interest of the United States to do so.

H. Reimbursable Support. Check the details of these specific statutory authorities, many allow retention of the reimbursements for credit to the originally funding appropriation as an exception to the Miscellaneous Receipts Statute.

1. *FAA § 607,* 22 U.S.C. § 2357 - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.

2. *FAA § 632,* 22 U.S.C. 2392 - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.

3. *Economy Act*, 31 U.S.C. § 1535 - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.,* Department of State).

4. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA)* §§ 21-22, 22 U.S.C. 2761-62 - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.

5. *Leases - AECA* §§ 61-62, 22 U.S.C. § 2796-2796a - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.

6. *Acquisition & Cross-Servicing Agreements (ACSA)* -
10 U.S.C. §§ 2341-2350 (DoD Directive 2010.9, 28 APR 03; Chairman of The Joint Chiefs of Staff, Instruction (CJCSI) 2120.01, 27 April 2004) – ACSAs are bilateral agreements for the reimbursable mutual exchange of logistics support, supplies, and services (LSSS). DoD's authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the Arms Export Control Act (AECA). Under the statutes, after consulting with the State Department, DoD (i.e. the affected Combatant Commander) may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of LSSS. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Pricing is based on reciprocal pricing principles.

a. Two different ACSA authorities/methods exist:

(1) Cross-servicing agreements – 10 U.S.C. §2342 (full ACSA authority) as described above.

(2) Acquisition Only Authority – 10 U.S.C. §2341. This is a limited authority allowing DoD to acquire LSSS for our deployed forces use from that host country if it has a defense alliance with the U.S., allows stationing of U.S. Forces, prepositioning of U.S. materiel, or allows U.S. military exercises or operations in the country. No specific formal agreement is required.

b. LSSS definition 10 U.S.C. §2350 – The statute lists: food, billeting, transportation, POL, clothing, communication services, medical services, ammunition, base ops support (including incidental construction), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, , calibration services, and port services. Prohibited items are those designated as significant military equipment on the U.S. Munitions List promulgated under the AECA.

V. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS.

A. Immediate Response Authority

1. Immediate Foreign Disaster Relief: DoD Directive 5100.46 outlines various responsibilities for DoD components in undertaking foreign disaster relief operations in response to a Department of State request. However, paragraph 4.3 provides that the Directive does not prevent "a military commander at the immediate scene of a foreign disaster from undertaking prompt relief operations when time is of the essence and when humanitarian considerations make it advisable to do so." *See* DoD Directive 5100.46, Foreign Disaster Relief (Dec. 4, 1975).

2. Immediate Response Authority for Domestic Emergencies: DoD Directive 3025.1 outlines various responsibilities for DoD components in undertaking domestic disasters or emergencies in accordance with the Stafford Act, 42 USC §5121. Similar to the foreign disaster immediate response authority, "[i]mminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by [DoD Directive 3025.1], … to take necessary action to respond to requests of civil authorities. All such necessary action is referred to … as 'Immediate Response.'" *See* DoD Directive 3025.1, Military Support to Civil Authorities (MSCA) (Jan. 15, 1993). *See also* AR 500-60, OPNAVINST 3440.16C, and MCO 3440.7A.

3. Emergency Medical Care: AR 40-400 authorizes the commander to provide medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶3-55 (12 Mar 2001).

B. Need for Express Authority.

1. *The Honorable Bill Alexander,* B-213137, 63 Comp. Gen. 422 (1984): "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)."

2. Generally, humanitarian assistance is "ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq." *See The Honorable Bill Alexander,* B-213137, 63 Comp. Gen. 422 (June 22, 1984).

C. DoD Appropriations and other Policy Guidance for Humanitarian Assistance Activities.

1. Department of Defense Appropriations

a. OHDACA - $59M in FY05 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under §§401 [only for humanitarian demining], 402, 404, 2557, and 2561 of Title 10 (increase of approx. $9M from FY02; $600K from FY03; and no increase from FY04).

b. Budgeted or Fenced O&M for 10 USC §401 HCA. Funding for activities other than demining under §401 of Title 10 is provided through the general service O&M appropriations. *See*, section 8009 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287, (Aug. 4, 2004).

2. Policy and Program Guidance – Each fiscal year the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issue a joint message entitled: *Policy and Program Guidance for FY05 Overseas Humanitarian , Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA).* [1]

1 Message, R251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA)[hereinafter FY05 OHDACA and HCA Message].

a. Compared to the FY04 guidance,[2] the recent FY05 guidance provides a much clearer distinction between OHDACA funded humanitarian assistance and the O&M funded HCA program.

b. The FY05 guidance clearly sets out separate HCA guidance that primarily reiterates the 10 U.S.C. § 401 requirements and distinguishes it from other humanitarian assistance activities. Additionally, the FY05 guidance provides a supplemental checklist (in addition to the general checklist) for HCA project submissions to the DOD. Generally, the supplemental checklist contains items necessary for compliance with 10 U.S.C. § 401 as follows:

(1) Project is provided in conjunction with military operation/exercise

(2) Promotes specific operational readiness skills of U.S. military forces participating in project

(3) Labor will be performed by U.S. military forces

(4) Project falls into one of the [10 USC §401 HCA activities]

c. The general checklist within the FY05 guidance provides points that have to be addressed for all OHDACA funded and O&M funded HCA projects. Selected general checklist requirements include whether the project supports the Global War on Terror (GWOT) objectives, contributes to DOD coalition building, strengthens the host nation's security and stability, enhances DOD's image and "ability to shape the regional security environment," and whether appropriate partnering with host nation militaries is accomplished to further goals of interoperability and coalition-building. In addition to the HCA supplemental checklist at paragraph 13, the FY05 guidance includes supplemental checklists for humanitarian assistance (HA) under 10 U.S.C. § 2561, foreign disaster relief under 10 U.S.C. § 404, and humanitarian mine action under 10 U.S.C. § 401.

2 Message, 100935Z Mar 2003, Secretary of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities [hereinafter FY04 OHDACA Message].

d. The FY05 guidance provides strongly emphasized military participation requirements as follows: "Participation of U.S. military forces: All HA projects … should maximize visible U.S. military participation to ensure that the projects are effective security cooperation tools. Active DOD participation improves the prospects for developing channels of influence and access, potentially provides operational readiness benefits, and generates unique training opportunities. DOD's role must not be reduced to simply providing resources or writing checks."

D. Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401 *See also* DOD Dir. 2205.2, 6 OCT 94; DoD Instr. 2205.3, 27 JAN 95.

1. *Scope of Authority.* Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote -

a. the security interests of the U.S. and the country where the activities will be carried out; and

b. the specific operational readiness skills of the servicemembers who will participate in the activities.

2. Limits.

a. May not duplicate other forms of U.S. economic assistance.

b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

c. SecState must specifically approve assistance.

d. Must be paid out of funds budgeted for HCA as part of the service O&M appropriations.

e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces.

f. Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations," 6 October 1994, para. D.9.

3. *Definition.* HCA under 10 USC §401 means --

a. medical, dental, veterinary care in rural or underserved areas;

b. construction of rudimentary surface transportation systems;

c. well drilling and construction of rudimentary sanitation facilities;

d. rudimentary construction and repair of public facilities; and

e. detection and clearance of landmines, including education, training, and technical assistance.

4. *De minimis* HCA. 10 U.S.C. § 401(c)(4) and DOD Dir. 2205.2, para. E1.1.1.

a. Provides authority for commanders to react to HCA "targets of opportunity" during the course of a military operation. Such activities must be modest in scope and involve only "minimal expenditures for incidental costs."

b. All material and supply costs incurred in executing a *de minimis* HCA action are funded from the unit's O&M account because the unit uses its resources currently on-hand.

c. Rule of Thumb: A few Soldiers, a few dollars, for a few hours. Combatant commanders or theater commanders may have promulgated specific guidance regarding the level of effort/funding that falls under the definition of *de minimis* HCA in their AORs.

d. *Examples:*

(1) A unit's doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.

(2) The opening of an access road through the trees and underbrush for several hundred yards, but not the asphalting of a roadway.

e. *Appropriations. De minimis* HCA is funded primarily from the unit's O&M account and also uses available personnel resources and other equipment/supplies that are available.

5. *Exercise-Related Construction (ERC)* distinguished. 10 U.S.C. § 2805(a)(2).

a. Construction that is necessary for the U.S. military forces use (e.g. base camp construction, a bridge to the base camp, or other construction necessary for operations) during a Joint Chiefs of Staff directed exercise are funded with military construction (MILCON) appropriations and not through 10 USC § 401 HCA funding or other humanitarian assistance appropriations. 10 USC § 2805 also forbids funding ERC under $750,000 as O&M funded construction.

b. "[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program*." S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

6. *Funding Sources or Appropriations.* Specifically fenced or budgeted O&M for HCA. Demining, however, uses OHDACA. De minimis HCA is funded from the unit's O&M account.

E. Humanitarian Assistance - 10 U.S.C. § 2561.

1. Scope.

a. *General.* To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and **other humanitarian purposes worldwide**.

b. *Availability of Funds.* To the extent provided in the appropriations acts, OHDACA funds usually remain available for two years.

2. *Reports.* Statute contains detailed annual reporting requirements.

3. *Appropriations.* Funded from the OHDACA appropriation.

4. *§2561/401* Distinguished. If it fits 401 in each and every particular, it's 401 HCA. If not (but humanitarian purpose) it's 2561 HA.

F. The Commander's Emergency Response Program (CERP).[3]

1. Originally Funded with Seized Iraqi Assets[4] - CJTF-7 FRAGO 89.[5]

3 *See,* Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan,* ARMY LAW., Feb. 2004 and Major Kevin Huyser et al, *Contract and Fiscal Law Developments of 2004 – The Year in Review,* ARMY LAW., Jan. 2005.

4 *See,* Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

a. The Coalitional Provisional Authority (CPA) accounted for the seized Iraqi funds, administered and distributed the funds to U.S. Commanders in Iraq for "reconstruction assistance" to the Iraqi people.

b. Reconstruction assistance was defined as the "building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq." *See*, FRAGO 89. Approximately $78.6M was provided for over 11,000 Projects. Examples of reconstruction assistance noted in FRAGO 89 included financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

2. Appropriated Funding[6]

a. Sec. 9007, FY05 Defense Appropriations Act (Pub. L. 208-287) provided $300,000,000 of appropriated funds for CERP, an increase from Sec. 1110, FY04 Emergency Supplemental Appropriations Act, which provided $180,000,000 of appropriated funds. The FY04 Emergency Supplemental dictated that the program's purpose was, "notwithstanding any other provision of law … [to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people."

b. In Sec, 1201, Ronald W. Reagan National Defense Authorization Act, (Pub. L. 108-375), Congress deleted the "notwithstanding any other provision of law" requirement and replaced it with what Congress termed, "waiver authority". The language in the Authorization Act states that, "[f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders' Emergency

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5 Numerous additional FRAGOs have been published to implement the use of appropriated funds and to establish the CERP in Afghanistan. Lists of the current FRAGOs are available on www.jagcnet.army.mil in the CLAMO section.

6 All Congressional Authorization and Appropriations Acts are available at www.thomas.loc.gov. Thomas is fully searchable.

Response Program... the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority."

c. Division J, Section 102, Title I, Consolidated Appropriations Act, FY05 (Pub. L. 108-447), amended the FY05 Appropriations Act and increased the amount available for CERP to $500,000,000.

d. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief for Fiscal Year 2005 (Pub. L. 109-13) increased the amount available for CERP from $500,000,000 to $854,000,000.

e. The draft FY06 Appropriations Act appropriates $500,000,000 for CERP. These funds "may not be used to provide goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces." There are separate appropriations for operations in Iraq and Afghanistan called the "Iraqi Security Forces Fund" and the "Afghanistan Security Forces Fund," respectively (*See*, Pub. L. 109-13).

f. Battle Damage Claims - CERP appropriated funds may be used to repair collateral damage to individual homes and businesses caused by combat operations that are not otherwise compensable because of combat exclusions under the Foreign Claims Act. *See*, ¶3.B.1.B.2 of MNF-I FRAGO 318.

g. "Solatia-Like" or "condolence" payments – CERP appropriated funds may be used for condolence payments as a means of expressing sympathy and are not considered as an admission of fault by the U.S. Government. Maximum payments are $2500 for a death, $1000 for a serious injury, and $500 for property loss or damage. *See* ¶3.B.1.B.3 of MNF-I FRAGO 318.

h. Reward/microrewards s and Weapons Buy-Back Programs – CERP appropriated funds **may not** be used to pay rewards or fund any type of weapon buy-back program. *See* ¶3.C.8.D. and 3.C.8.G. of MNF-I FRAGO 087. However, reward payments are authorized under 10 USC §127b and implemented in Iraq.

i. New DoD Guidance for CERP – *See* Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander's Emergency Response Program (CERP) Guidance (27 JUL 05)(App. B).

(1) This guidance will be incorporated into the Financial Management Regulation DoD 7000.14-R.

(2) The new guidance primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures. Specific CERP projects were not changed in any great detail from prior guidance established through FRAGOs.

G. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402.

1. *Scope of Authority.* SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

2. *Preconditions.* Before transporting supplies, SecDef must determine --

a. the transportation of the supplies is consistent with U.S. foreign policy;

b. the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

c. a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

d. the supplies will, in fact, be used for humanitarian purposes; and

e. adequate arrangements have been made for the distribution of the supplies in the destination country.

3. *Limits.* Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

H. Foreign Disaster Assistance - 10 U.S.C. § 404.

1. *Scope of Authority.*

a. *General.* President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

b. *Delegation of Authority*. President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).

2. *Types of Assistance.* Transportation, supplies, services, and equipment.

3. *Notice to Congress.* Within 48 hours of commencing relief activities, President must transmit a report to Congress.

4. *Appropriations.* Funded from the OHDACA appropriation.

I. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2557.

1. *Scope of Authority.* SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.

2. *Limits.* Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.

3. *Definition.* "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.

VI. MILITARY COOPERATIVE AUTHORITIES - CONTACTS AND EXERCISES WITH FOREIGN MILITARIES.

A. Bilateral & Multilateral Conferences, Seminars, & Meetings.

1. *The Need for Express Authority.*

a. 31 U.S.C. § 1345: "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting."

b. 62 Comp. Gen. 531 (1983): "[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word 'specifically' Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated." *See also* B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).

2. General Authorities.

a. *U.S. Civilian Employees & Military Personnel. See, e.g.,* 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412.

b. *Individuals Performing Direct Services for the Government.* GAO, I Principals of Federal Appropriations Law 4-44 to 4-51 (3d ed. 2004); *see also* B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

3. Specific Military Cooperative Authorities for Conferences or other Meetings

a. *Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050.* Authorizes the service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

b. *Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051.*

(1) Scope.

(a) *Travel Expenses.* SecDef may pay travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences, seminars, or similar meetings if SecDef deems attendance in U.S. national security interest.

(b) *Other Expenses.* SecDef may pay such other expenses in connection with the conference, seminar, or meeting as he considers in the national interest.

(c) *Additional Funding Authority.* The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. *See* DoD Authorization Act for FY97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(d) *Asia-Pacific Center for Security Studies.* SecDef may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. *See* § 8081 of the DoD Appropriations Act for FY02, Pub. L. 107-117 (2001). *See* § 1306 of the FY95 NDAA for similar authority to waive costs for participation of personnel from PfP and EAPC countries in activities of the George C. Marshall European Center for Security Studies.

(2) *Limits*. Payments under section 1051 are limited to travel within the combatant commander's AOR in which the developing country is located or in connection with travel to Canada or Mexico, but when the combatant command headquarters is in the U.S., expenses may be paid for travel to the U.S.

B. Bilateral & Multilateral Exercise Programs.

1. *Developing Countries Combined Exercise Program (DCCEP)* - 10 U.S.C. § 2010.

a. *Scope.* After consulting with SecState, SecDef may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SecDef determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . ."

b. *Definition.* "Incremental expenses" are reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

2. Special Operations Forces (SOF) Training as Joint Combined Exchange Training (JCET) - 10 U.S.C. § 2011.

a. *Scope.* The Commander of SOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command --

(1) Expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country.

(2) Expenses of deploying SOF for the training.

(3) The incremental expenses incurred by the friendly <u>developing</u> foreign country incurred as the result of the training.

b. Definitions**.**

(1) <u>SOF</u>. Includes civil affairs and psychological operations forces.

(2) Incremental Expenses. The reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

C. Regional Cooperation Programs.

1. *Partnership for Peace (PFP)* - DoD Authorization Act for FY95, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994). *See also* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994). $30 million appropriated in FY95 to Joint Staff to "use existing authorities to the greatest extent possible" to provide assistance to and cooperate with PFP countries. $40 million in FY96 and again in FY97. $44 million appropriated in FY98, but to OSD, not Joint Staff.

2. *Cooperative Threat Reduction (CTR) with States of Former Soviet Union (FSU) ("Nunn-Lugar")* - DoD Authorization Act for FY02, Pub. L. No. 107-107 §§ 1301-1309 (2001). *See also* DoD Authorization Act for FY97, Pub. L. No. 104-201, 110 Stat. 2731 (1996) (50 U.S.C. § 2362 note) (specifies activities that make up the CTR program). $400 million of "no-year" money provided for FY94 and FY95 for various programs to dismantle FSU's arsenal of weapons of mass destruction. $300 million appropriated in FY96. $327.9M appropriated in FY97. $440.4M for FY99, $460.5M for FY00, $443.4M for FY01, and $403M for FY02; all "three-year" money. §§ 1303-1309 of the DoD Authorization Act for FY02 retains various limitations including reporting requirements and prohibitions against the use of the funds.

D. Military-to-Military Contact Program - 10 U.S.C. § 168. Authorizes SecDef to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

E. International Military Education & Training (IMET) - FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

VII. SPECIAL AUTHORITIES.

A. Combatant Commander Initiative Funds (CCIF) - 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY05, Pub. L. 108-287 (2004) ($25M for CCIF in FY05 in Defense-wide O&M); DoD Directive 7280.4, 26 OCT 93; Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01B, "Combatant Commander Initiatives Fund," 15 AUG 03.

1. *Scope.* CJCS may provide to Unified Commanders (including NORAD) sums appropriated for the following activities --

a. Force training.

b. Contingencies.

c. Selected operations.

d. Command and control.

e. Joint exercises (including the participating expenses of foreign countries).

f. Humanitarian and Civil Assistance.

g. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).

h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.

i. Force protection.

2. *Priorities.* CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a Combatant Commander's AOR that would reduce threats to, or enhance, U.S. national security.

3. *Relationship to Other Funding.* Any amount provided as CCIF for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

4. *Limits.* 10 U.S.C. § 166a(e) Of funds made available --

   a. No more than $10 million may be used to buy end items with a cost greater than $15,000;

   b. No more than $10 million may be used to pay the expenses of foreign countries participating in joint exercises;

   c. No more than $5 million may be used for education and training to military and related civilian personnel of foreign countries; and

   d. No funds may be used for any activity for which Congress has denied authorization.

B. Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127.

1. *General.* Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated).

2. *Congressional Notification.* DoD Authorization Act for FY96 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million and five days advance notice for expenditures or obligations between $500,000 and $1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

3. *Appropriations.* $11M for Army; $4.5M for Navy and Marine Corps; $7.7M for Air Force; and $32M for SecDef. DoD Appropriations Act for FY05, Pub. L. No. 108-287 (2004).

C. Contingency Operations Funding Authority. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY96, Pub. L. No. 104-106, § 1003, 110 Stat. 415 (1996)).

1. *Applicability.* Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed $50 million, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100 million. Does *not* apply to operations with incremental costs not expected to exceed $10 million.

2. *Consequences.*

a. *Waiver of Working Capital Fund (WCF) Reimbursement.* Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if an activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)

b. *Transfer Authority.* Authorizes SecDef to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

3. Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.

D. Overseas Contingency Operations Transfer Account ("ConOps" Funds). DoD Appropriations Act for FY05, Pub. L. No. 108-287 (2004). Appropriates $10M of "no-year" funds "for expenses directly relating to Overseas Contingency Operations by United States military forces." These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. See DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency operations (Feb. 2001). See also Sec. 8114, FY05 DoD Appropriations Act for Congressional reporting requirements within 30 days after the end of the fiscal quarter that the transfer takes place.

E. Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001.

a. Section 1512 of the FY02 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.

b. Funds may be used for the following activities:

(1) Procurement and Maintenance of physical security equipment;

(2) Improvement of physical security sites;

(3) Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces ands security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.

c. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

VIII. SECTION 8064 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY05, PUB. L. NO. 108-287, § 8064 (2004).

A. General**.** Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation.

B. Notice Requirement. The notice required includes:

1. A description of the articles or services to be transferred;

2. The value of the equipment, supplies, or services; and

3. With respect to a proposed transfer of supplies and equipment, a statement of

a. whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and

b. whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.

C. Practicality and Reality meet with a Yearly DoD Notice provided at the beginning of each Fiscal Year. The typical yearly "prophylactic" notice is as follows:

> This constitutes notice to Congress, consistent with section *xxxx*, of the Department of Defense Appropriations Act, *xxxx*, and any successor provision for Fiscal Year (FY) 20*xx*, should such a provision be enacted, that the Department plans to transfer defense articles and services to another nation or an international organization for use in international peacekeeping, peace enforcement, or humanitarian assistance operations during FY 20xx as set out in the five sections below.

I. Defense articles and services to be transferred to the United Nations and to nations and organizations participating in United Nations and other peace operations in the former Yugoslavia and elsewhere, including operations related to or stemming from the war against, terrorism, as set forth below.

Transfers of defense articles and services in connection with peace operations are conducted under several authorities, including acquisition and cross-servicing agreements (10 U.S.C. sections 2341-2350), agreements concluded pursuant to section 607 of the Foreign Assistance Act of 1961 (22 U.S.C. section 2357), section 7 of the United Nations Participation Act of 1945 (28 U.S.C. section 287d-1), the CINC Initiative Fund (10 U.S.C. 166a), drawdown authorities under the Foreign Assistance Act of 1961 (sections 506 and 552), and purchases or leases under the Arms Export Control Act (22 U.S.C. section 2751 et seq.).

The Department of Defense will receive reimbursement for transfers conducted under reimbursable authorities in cash or in-kind, or on an advance-of-funds basis, depending on the authorities used. . . .

D. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY96 was originally part of the House DoD Appropriations Bill (H.R. 2126), which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about *the diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).

E. President's Interpretation. In "acquiescing" in Appropriations Act, President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995). The President's signing statement for the yearly notice as described above is typically as follows:

Section 8064 of the Act provides that, notwithstanding any other provision of law, no funds available to the Department of Defense for FY 2005 may be used to transfer defense articles or services, other than intelligence services, to another nation or an international organization for international peacekeeping, peace enforcement, or humanitarian assistance operations, until 15 days after the executive branch notifies 6 committees of the Congress of the planned transfer. To the extent that protection of the U.S. Armed Forces deployed for international peacekeeping, peace enforcement, or humanitarian assistance operations might require action of a kind covered by section 8064 sooner than 15 days after notification, the executive branch shall construe section 8064 in a manner consistent with the President's constitutional authority as Commander in Chief.

F. Scope.

1. *Included Activities.* Section 8064 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include --

a. *Acquisition & cross-servicing agreements* during peace and humanitarian assistance operations (10 U.S.C. §§ 2341-2350).

b. *Drawdowns* for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).

c. *Humanitarian & Civic Assistance* (HCA) (10 U.S.C. §§ 166a(b)(6), 401).

d. H*umanitarian Assistance* to the extent the assistance is provided to another nation or an international organization (10 U.S.C. § 2561).

e. *Excess nonlethal supplies* for humanitarian relief (10 U.S.C. § 2557).

f. *Reimbursable support* to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent that the transfer results in DoD transferring articles or services to another nation or international organization (31 U.S.C. § 1535; FAA § 632).

g. Landmine clearance activities (FY95 DoD Authorization Act, Pub. L. 103-337, §1413 (1994)).

2. *Excluded Activities.* Section 8064 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include --

a. *Exercises* in which the DoD pays the incremental expenses of participating developing countries -- including Partnership for Peace (PFP) exercises (10 U.S.C. § 2010).

b. *SOF training* (10 U.S.C. § 2011).

c. *Bilateral/regional conferences* and seminars unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1051).

d. *LATAM Coop* unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1050).

e. *Military-to-military contacts* (10 U.S.C. § 168).

f. *EDA authorities* (FAA §§ 516), which already have congressional notice requirements equal to or in excess of 15 days.

g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (*e.g.*, coalition operations in time of war).

G. Compliance. DoD complies with section 8064 by --

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or

2. Transferring supplies and services in such operations without congressional notification when --

   a. Providing disaster relief;

   b. Providing support *without* using funds appropriated to DoD (*e.g.*, "advance-of-funds" basis); or

   c. Providing support under an FMS case.

IX. DOMESTIC OPERATIONS.

A. Stafford Disaster Relief & Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5204c.

1. Federal Emergency Management Agency (FEMA) has lead. Executive Order 12673, 54 Fed. Reg. 12573 (March 23, 1989).

2. State Governor must request assistance to trigger Act.

3. 42 U.S.C. § 5191.

4. DoD *may* receive reimbursement for assistance provided. 42 U.S.C. §§ 5147-5192(a)(1).

5. DoD may give emergency aid to preserve life and property. 42 U.S.C. § 5170b(c). *See also* ¶ 4.5, DoD Directive 3025.1.

B. DoD Directive 3025.1.

1. Currently, Secretary of the Army is SecDef's executive agent for managing and executing DoD's response. *Id.* ¶ D.3.a.

2. The Secretary of Defense must approve the deployment and employment of any combatant command forces. DoD Directive 3025.15, February 1997.

3. The Secretary of the Army, acting through the Directorate of Military Support (DOMS), manages responses. *Id.* ¶ E.7.b.

4. USJFCOM and PACOM are the "DoD Planning Agents." *Id.* ¶ D.3.c.(3).

5. Responsibilities are currently under review and modification.

X. CONCLUSION.

APPENDIX A

LEXSEE 1984 U.S. COMP. GEN. LEXIS 972

The Honorable Bill Alexander, U.S. House of Representatives

B-213137

Comptroller General of the United States

63 Comp. Gen. 422; 1984 U.S. Comp. Gen. LEXIS 972

June 22, 1984

OPINION:
[*1]

Dear Mr. Alexander:

By letter dated January 25, 1984, you requested that we provide you with a formal legal decision regarding the propriety of funding methods used by the Department of Defense (DOD) in its recent joint combined exercises in Honduras. This letter responds to your request. We would emphasize that the sole concern of our legal review relates to DOD's use of appropriations in carrying out its activities in Honduras, and not to the policy implications of those activities.

On the question of DOD's use of exercise operation and maintenance (O&M) funds, we found the following:

DOD may use O&M appropriations, under authority of *10 U.S.C. § 2805*(c), to finance minor military construction projects under $200,000. Thus, to the extent that DOD's construction activities in Honduras fell within this $200,000 limit, use of O&M funding was proper. Apart from this specific authority, however, DOD's construction expenses may not be charged to O&M as operational costs, but must be charged to funds available for military construction (or, in some cases, security assistance). Consequently, O&M funding of construction activities in Honduras in excess of that permitted under *10* **[*2]** *U.S.C. § 2805*(c) was improper.

Site preparation and installation costs of establishing radar facilities in Honduras, if under $200,000 per project, may also be charged to O&M as minor military construction under *10 U.S.C. § 2805*(c).Again, however, O&M funding of such activities in excess of that permitted under *10 U.S.C. § 2805*(c) was improper. Costs of operating these facilities were properly chargeable to O&M.

Costs pertaining to training of Honduran armed forces during, or in preparation for, the Ahuas Tara II exercise should have been financed as security assistance to Honduras. Use of O&M funds for such activities was unauthorized.

DOD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as AID) through the Economy Act, *31 U.S.C. § 1535*, or (for minor projects) as incidental to the provision of security assistance. Such activities conducted in Honduras during the course of Ahuas Tara II were improperly charged to DOD's O&M appropriations.

The grounds for our conclusions as to proper funding sources are set out in detail in the classified appendix.

Regarding your further questions as to **[*3]** possible violations of the funding purposes restrictions of *31 U.S.C. § 1301*(a) and the Antideficiency Act, *31 U.S.C. § 1341*(a), it is our conclusion that expenses for training Honduran forces, and for the provision of civic and humanitarian assistance, have been charged to DOD's O&M funds in violation of *31 U.S.C. § 1301*(a). We cannot make a similar determination with regard to DOD's use of O&M funds to finance exercise construction activities, as such funds may properly have been used under authority of *10 U.S.C. § 2805*(c) (minor military construction projects under $200,000).By letter of today's date, however, we are requesting DOD to reexamine its accounting for construction expenses to verify that the conditions of *10 U.S.C. 2805*(c) have been met.

To the extent that that authority was exceeded, use of O&M funds for construction activities violated *31 U.S.C. § 1301*(a). n1

n1 Costs of several construction projects in Honduras have been reported elsewhere as being in excess of $200,000. See, e.g., our report GAO/C-NSIAD-84-8, March 6, 1984, App. II, p. 57. The accounting method used to calculate such costs, however, may differ from that used under *10 U.S.C. § 2805*(c). See, e.g., DOD Directive 7040.2, January 18, 1961, as amended March 5, 1964, at p. 6 (funded project costs exclude military labor). **[*4]**

Although *31 U.S.C. § 1301*(a) does not specify the consequences (or remedies) for its violation, it is clear that such an expenditure is subject to disallowance by this Office. See *32 Comp. Gen. 71 (1952).* In actual practice, GAO's treatment of such violations has varied. See *36 Comp. Gen. 386 (1956), 17 Comp. Gen. 1020 (1938)* (admonishing agency to discontinue the improper practice); *14 Comp. Gen. 103 (1934)* (adjustment of accounts); *17 Comp. Gen. 748 (1938)* (taking exception to applicable account). In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (i.e., security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities, and, to the extent that O&M funds were not available under *10 U.S.C. § 2805*(c), military construction funds for exercise-related construction).

Where adjustment of accounts is not possible (i.e. because alternate funding sources are already obligated), expenditures improperly charged by DOD to O&M appropriations were made in violation **[*5]** of the Antideficiency Act, *31 U.S.C. § 1341*(a). Not every violation of *31 U.S.C. § 1301*(a) also constitutes a violation of the Antideficiency Act. See B-208697, September 28, 1983. Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both *31 U.S.C. § 1301*(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible.

As the above indicates, a final determination as to whether DOD's activities in Honduras violated the Antideficiency Act depends upon the availability of alternate funding sources. After-the-fact determinations as to available alternate funding, however, are more properly the responsibility **[*6]** of DOD. We are therefore transmitting to DOD our attached analysis of the funding of combined exercises in Honduras, with a request that DOD make funding adjustments, where feasible, and, where not feasible, report Antideficiency Act violations and take appropriate administrative action under *31 U.S.C. § 1349.*

Funding adjustments made by DOD in light of our conclusions here must, of course, be consistent with the ordinary rules governing the use of appropriated funds, including fiscal year limitations. The latter requirement is particularly important with respect to adjustments in the present case because some of the exercise activities that we have addressed took place in the previous fiscal year. Unless funds remain available from that previous fiscal year (most likely, unexpended multiple-year authority), adjustment of accounts may be impossible. Security assistance funds, for example, are generally available only for one fiscal year. See, e.g., Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Thus, new security assistance agreements, which must be funded with current-year appropriations, could not be **[*7]** used to "cure" funding violations with respect to obligations incurred in the previous fiscal year.

We are also recommending to DOD that it examine its funding of current activities in Honduras under the present exercises (Grenadero I) in light of this decision, and make funding adjustments as required. Finally, as we have under similar circumstances where DOD has incurred obligations in excess of its authority, we are recommending to DOD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M-funded exercise. Compare *62 Comp. Gen. 323 (1983).*

We hope that the above, and our analysis under separate cover, is of assistance to you.

(This unclassified appendix is provided in lieu of an appendix containing classified national security information.)

Appendix to Comptroller General Decision B-213137, June 22, 1984

Funding of Joint Combined Military Exercises in Honduras

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I. BACKGROUND

On August 3, 1983, the Defense Department commenced Ahuas Tara (Big Pine) II, the second in a recent series of joint combined military exercises in Honduras. n1 During the exercise, which lasted until February 8, 1984, some 12,000 American troops participated in joint maneuvers with members of the Honduran military. In addition, over the 6 month course of the exercise, participating American units constructed one 3500-foot dirt assault (or "hasty") airstrip, expended one 4300-foot dirt airstrip to 8000 feet, expanded a 3000-foot asphalt airstrip to 3500 feet, installed or constructed nearly 300 wooden huts to serve as barracks, dining, and administrative facilities, deployed two radar systems, provided medical assistance to nearly 50,000 Honduran civilian patients, provided veterinary services to approximately 40,000 animals, built a school, and provided artillery, infantry, and medical training to hundreds of Honduran military personnel. These numerous activities, all carried out as a part of Ahuas Tara II, have raised questions, both within DOD and in the Congress, as to the scope of the authority under which such activities take place. This decision is intended **[*9]** to resolve some of these questions.

n1 The first exercise, Ahuas Tara I, took place during three weeks in January and February of 1983 and involved activities by some 1,600 U.S. troops. The current exercise, Grenadero I, began on April 1, 1984, will continue through the summer, and will involve the deployment of over 3,500 U.S. troops.

In connection with our investigation of DOD's activities in Honduras, we requested, on November 28, 1983, that DOD provide us with an explanation of funding sources used for each of 7 categories of Ahuas Tara II activities, authority for such use of funds, permanency of facilities, and, where appropriate, existence of reimbursement agreements. A related letter, sent on December 1, 1983, asked DOD to explain its authority to conduct humanitarian/civic activities in Central America.

DOD's detailed response, dated March 8, 1984, identified the O&M appropriations of the participating military departments as the funding source of most of the activities about which we had inquired. n2 The Department justified all "engineering work," civic action, radar installations, etc., as incidental to the exercise program. According to DOD, no formal training **[*10]** of Honduran troops took place, and any support services provided to Honduran soldiars would have been incurred in the absence of Honduran participation. DOD also described all exercise construction projects as temporary in nature. Finally, DOD stated that reimbursement agreements for any of its exercise activities were unnecessary as "all O&M funds usage is considered correct and proper." In its separate response to our question concerning its authority to carry out humanitarian assistance, however, DOD's General Counsel stated that "DOD has no separate statutory authority to perform humanitarian or civic action programs [except] under the authority of the Economy Act or other similar authority * * *." The apparent conflict between these statements was not explained.

n2 According to DOD, it is standard practice in joint exercise programs for the costs of exercise activities for each military service to be funded from the O&M appropriation of that service (other than airlift, sealift, inland transportation and port handling costs, paid from O&M funds available to the Joint Chiefs of Staff (JCS)). Thus, airstrip construction by Seabees is charged to Navy O&M, and that by Army engineers is charged to Army O&M. DOD has stated that O&M appropriations of the Army, Air Force, Navy, and Marine Corps were each used to finance activities of Ahuas Tara II. **[*11]**

In addition to DOD's formal comments to us, we have also reviewed an Army Judge Advocate General (JAG) staff analysis of exercise activities in Honduras, prepared during the planning stage of Ahuas Tara II. That analysis, transmitted to the U.S. Southern Command (SOUTHCOM, the command responsible for planning and carrying out the exercises), as the U.S. Army position,

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DOD's formal comments and the Army JAG's analysis will be addressed at further length where relevant to the discussion that follows.

II. DISCUSSION

Operations and maintenance appropriations are typically provided for "expenses, not otherwise provided for, necessary for the operation and maintenance of" the applicable service or agency. See, e.g., Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, 97 Stat. 1421, 1423 (1983). This particular category of appropriations has been described as a "murky world which does not easily lend itself to clearcut conclusions." Hearings on TAKX Pre-Positioning Ship Program, before the Subcommittee on Readiness, House Committee on Armed Services, 97th Cong., 2d Sess. 2 (1982) (statement of Chairman Daniel). Because they are used for such a wide **[*12]** variety of activities in support of the operation of each military department, and because they are not subject to the same line-item scrutiny as are other types of appropriations, DOD's O&M funds are considered by many to be more discretionary than other types of defense appropriations. See id. The Department of Defense, however, clearly does not have unlimited discretion in determining which activities may be financed with O&M funds.

This Office has identified three factors to be considered in determining whether a certain expense is necessary or incidental to the proper execution of the object of an appropriation (here, those expenses necessary for the operation and maintenance of the various military departments). First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made. See *42 Comp. Gen. 226, 228 (1962).* Second, the expenditure must not be prohibited by law. *38 Comp. Gen. 782, 785 (1959).* Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. Id. This last requirement applies even if the more appropriate funding source is exhausted and therefore **[*13]** unavailable. B-139510, May 13, 1959.

Case-by-case decisions as to which appropriation may be used for a particular expenditure are left to the agency involved and, so long as such determinations are made in general conformity with the above three rules, they have not been generally questioned by this Office. See *18 Comp. Gen. 298, 292 (1938).* In certain cases, either of two appropriations may reasonably be construed as available for an expenditure not specifically mentioned under either appropriation. In such cases, it is within the discretion of the agency to determine which appropriation is to be used for the activity in question, although once the determination has been made, it cannot later be changed. See, e.g., *59 Comp. Gen. 518 (1980).*

The following discussion constitutes a review, in light of the factors discussed above, of each category of O&M-funded activities carried out by DOD in Honduras under the Ahuas Tara II joint combined exercise.

A. Ahuas Tara II Construction Activities

1. Facts: As described in our February 8, 1984 briefing to Representative Alexander, Ahuas Tara II construction activities centered around the establishment of four base **[*14]** camps, designed to house and/or support approximately 3,000 U.S. troops. Base camps were constructed at the following locations:

Palmerola/Comayagua. Exercise O&M funds were used to construct Joint Task Force-11 (JTF) headquarters at Palmerola Air Base near the central Honduran town of Comayagua. The camp was also the site of a mobile field hospital, aviation battalion, and support group. Army engineers and line troops constructed 132 "Central American Tropical" (CAT) huts n3 (or their equivalent) to serve as barracks, offices, a post exchange, mess halls, and latrines. Part of the camp was tied into public electrical and sewage systems. Army engineers also constructed an unpaved road network, unspecified vertical security structures, and fuel storage berms.

n3 CAT huts are 16 foot by 32 foot wooden structures with corregated tin roofs, built from locally-purchased materials.

According to DOD's March 8, 1984, comments to us, the Palmerola camp was specifically intended to be used after completion of the Ahuas Tara II exercises. It has in fact continued in use as command headquarters for later combined exercises,

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The exercise-constructed camp at Palmerola **[*15]** has become an integral part of the air base at the same location. The air base at Palmerola is a separate $13 million military construction project approved by the Congress in 1982. The completed facility, as currently proposed by DOD, will include a 8000-foot jet-capable airfield and parking apron, and (as separately-funded projects) air munitions storage facilities, and a "semipermanent" operations facility (including living quarters for 100 men). A similar project ($8 million in military construction funds) was approved for La Cieba Air Base in northern Honduras, although in 1983 the Congress prohibited DOD from obligating funds for that project pending the provision of an overall military construction plan for the region. See: Pub. L. No. 98-116, 97 Stat. 795, 796 (1983).

Trujillo/Puerto Castilla: The second base camp was constructed near Trujillo, several miles south of the northern Honduran port of Puerto Castilla, and about 10 miles west of the Regional Military Training Camp (RMTC), a security assistance-funded project presently used for formal training of Honduran and Salvadoran troops. Near Trujillo, Navy Seabees constructed "Camp Sea Eagle," a complex of barracks, **[*16]** offices and messhalls built from 40 "South East Asia" (SEA) huts. n4 Camp Sea Eagle was used to house the 3/319 Infantry Battalion, which participated in filed artillery exercises in the area. Seabees also constructed a 16-hut encampment nearby for their own use. n5

n4 SEA huts are 16 foot by 48 foot wooden structures, built from pre-cut materials brought from the U.S.

n5 Camp Sea Eagle was inadvertently built in a swamp, which flooded during the exercise period, causing some huts to be damaged. At one time the Honduran government was considering purchasing the facility for 10 percent of the cost of materials; we understand AID is currently considering acquiring the structures for use in other parts of Honduras.

About a mile from Camp Sea Eagle, Seabees helped to extend an existing asphalt airstrip from C-47 to C-130-capable length (from 3000 feet to 3500 feet). Seabee engineers performed grading and filling, and supervised paving operations performed by a Honduran firm. The paving contract cost about $120,000, charged to exercise O&M funds. According to DOD, C-130 use of the airstrip has left the surface "rutted and cracked," to an extent that it will soon be unusable. **[*17]** Honduras has sought compensation from DOD for repair of the damage.

In addition to camp and airstrip facilities at Trujillo, Navy Seabees constructed a "soil-cement" helicopter pad and concrete port off-loading ramp at Puerto Castilla, and built more than 5 miles of roads in the vicinity.

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At or near the RMTC security assistance project, Seabees constructed guard towers and roads, dug wells, repaired culverts, and constructed 10 CAT huts. An additional 17 CAT huts, also financed with exercise O&M funds, were constructed at the RMTC by Honduran troops, who had received instruction from Navy Seabees. According to DOD's March 8, 1984 comments, the CAT huts at the RMTC were constructed to house members of the 3/319 Artillery Battalion moved due to flooding at Camp Sea Eagle. Our own investigation showed, however, that huts were not used by members of that battalion, but were used to house Honduran RMTC security guards immediately upon construction.

Although improvements constructed in the Trujillo/Puerto Castilla area were used extensively during Ahuas Tara II, it is clear that a more extended use was also contemplated by DOD. For example, the exercise plan for Ahuas **[*18]** Tara II proposed the expansion of the Trujillo airfield

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U.S. Southern Command, Joint Task Force-11, Ahuas Tara II Exercise Plan (draft), August 3, 1983, p.3 (emphasis added). In addition, Army officials have stated that the Trujillo airfield was extended specifically to support the nearby RMTC.

As of April 1984, the airstrip at Trujillo, although damaged, was still C-130 capable.

Aguacate: A third base camp was constructed by engineers of the 46th Army Engineering Battalion at Aguacate in eastern Honduras. The camp included an airfield facility/and 8 CAT huts (or their equivalent), used as dining, and administrative buildings. Engineers also installed a piped water system for the camp, consisting of over 13,000 feet of 3 inch pipe.

The airfield at Aguacate was 4300 feet in length prior to the commencement of Ahuas Tara II, and was thus already capable of handling the largest aircraft used in-country during the exercise, the C-130 transport (which requires a 3500-foot runway). Army engineers, however, expanded the runway to 8000-feet and upgraded it with 30,000 cubic yards of local gravel. Construction also involved installation of cement drainage culverts, **[*19]** which, according to DOD, have been paid for by the Honduran government. Once paved, as apparently is planned by Honduras, the facility will be able to accommodate

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The airfield at Aguacate was used as a take-off point for two exercise events during Ahuas Tara II. According to DOD's March 8, 1984 comments, expansion of the airfield was necessary to accomodate parking for "transient aircraft" during the exercise, and was done in lieu of constructing a parking apron. DOD states that the airfield expansion was thus intended to fulfill exercise requirements. In addition, DOD notes that construction activities at Aguacate corresponded to DOD-established training requirements for participating combat engineers. While its justification for airfield construction at Aguacate is founded on these exercise and training benefits, DOD does acknowledge that its construction activities contributed to a "longstanding" plan by the Honduran Armed Forces to make the Aguacate airfield usable for forward-basing of Honduran

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aircraft.

Ahuas Tara II planning documents show construction at Aguacate to have been conducted as part of an exercise activity to

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See **[*20]** Cable from JCS, Washington, to U.S. Commanders-in-Chief, July 19, 1983. According to an August 10, 1983, cable from the U.S. Southern Command,

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As of April 1984, the airfield at Aguacate was still C-130 capable. Buildings were occupied by Honduran military personnel.

San Lorenzo/Choluteca: The fourth base camp constructed during Ahuas Tara II was at the southern port town of San Lorenzo. San Lorenzo was the headquarters of the 46th Army Engineering Battalion, as well as base for about 120 Special Forces personnel. The camp consisted of a C-130-capable dirt airstrip (expanded from an existing facility), and 94 CAT huts used for barracks, administrative facilities and mess halls. Other construction in the area included road-building and ammunition shelters. In addition, as part of anti-armor exercises, the 46th Engineers constructed 11 miles of earthen tank traps near Choluteca, just east of San Lorenzo. The Southern Command had initially planned to construct concrete tank traps in the Choluteca region, but amended its plans after Army JAG lawyers indicated that concrete structures would have to be military construction- or security assistance-funded.

Although **[*21]** facilities constructed at San Lorenzo were given substantial use during Ahuas Tara II, exercise planning documents show that the fulfillment of exercise requirements was not the only purpose for such construction. The original exercise plan for Ahuas Tara II contained the following background information:

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Ahuas Tara II Exercise Plan (draft), supra, p. 2 (emphasis added).

The exercise plan further explains that

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Id. The exercise plan specifically included, in support of an anti-armor field training exercise in the Choluteca area, the construction of a 3500-foot C-130 capable airstrip at nearby San Lorenzo, thus fulfilling the need specified by the Honduran General Staff.

The airfield facility at San Lorenzo was also used by U.S. troops during post-Ahuas Tara II exercises in March and has been used to support the current Grenadero I exercises.

As of April 1984, the airfield at San Lorenzo was still C-130 capable, and had been regraded by Honduran forces. We have been informed that the camp, although unoccupied, is in good condition. According to a Defense Property Disposal Office official in Panama, huts at San Lorenzo will be sold to the Honduran **[*22]** government for 20 percent of cost. Some huts, in the meantime, have been used by U.S. Army Engineers during the current (Grenadero I) exercise.

2. Analysis: Construction activities during the course of Ahuas Tara II were charged to O&M appropriations as operational expenses of the exercise. Although *10 U.S.C. § 2805*(c) (1982) provides separate authority for financing a minor military construction project with up to $200,000 of O&M funds, this authority was apparently not the basis for DOD's use of O&M funds for its construction activities in Honduras. Consequently, the principal question to be addressed here is whether DOD has authority apart from *10 U.S.C. § 2805*(c) to use O&M funds for its construction activities in Honduras.

It is a basic premise in appropriations law that expenses which are not necessary to carry out the purposes of a particular appropriation may not be funded from that source. As indicated previously, there are three factors to consider in applying the necessary expense rule: whether the expenditure reasonably relates to the object of the appropriation, whether it is otherwise prohibited by law, and whether it falls within the scope of another appropriation. **[*23]** See p. 3 supra.

Because military construction activities are generally performed in furtherance of specific operational requirements of the various military departments, we do not question whether expenditures for such activities are "reasonably related" to the purposes of O&M appropriations, the first of the three factors discussed above.Nonetheless, it is clear, based upon the two remaining factors, that O&M funds are not generally available for military construction activities, first because of a specific statutory prohibition contained in *41 U.S.C. § 12* (1982), and second because specific appropriations are made by the Congress for such purposes.

Section 3733 of the Revised Statutes, codified to *41 U.S.C. § 12*, provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

This provision in applicable to all executive departments, including the Department of Defense. *Sutton v. United States, 256 U.S. 575, 579 (1921).* It has been interpreted by this Office **[*24]** to require that funding for DOD construction projects be specifically authorized by the Congress; other, more general, appropriations are not ordinarily available for such projects. See *42 Comp. Gen. 212, 214-15 (1962);* B-165289-O.M., October 22, 1968.

In addition to the restrictive statutory language of *41 U.S.C. § 12*, such activities fall clearly within the scope of appropriations provided by the Congress for those purposes. Where construction is carried out for the use of a military department or defense agency, funding is provided under annual military construction appropriation acts, which typically provide funds to each military department or agency for:

"acquisition, construction, installation and equipment of temporary or permanent public works, military installations, facilities and real property * * *." See Military Construction Appropriation Act, 1984, Pub. L. No. 98-116, 97 Stat. 795 (1983).

Where such activities are conducted for the benefit of a foreign nation, funding is ordinarily provided under annual security assistance appropriations, such as those "for necessary expenses to carry out section 23 and 24 of the Arms Export Control Act." See Further **[*25]** Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Sections 23 and 24 of the Arms Export Control Act authorize the President to finance the procurement by foreign countries of, inter alia, military "design and construction services." *22 U.S.C. § § 2763*-64 (1982). See also *22 U.S.C. § 2769* (1982), relating to Foreign Military Construction Sales.

Based, therefore, on the statutory prohibition of *41 U.S.C. § 12*, as well as on the existence of other more specific appropriation categories, we conclude that military construction activities, except as specifically permitted under *10 U.S.C. § 2805*(c), may not be financed from general appropriation categories such as O&M. This Office has reached the same conclusion in previous cases. For example, in a 1961 report on DOD's misuse of O&M funds for military construction activities, we stated:

"Ordinarily, because of the restrictions in section 3678, Revised Statutes *(31 U.S.C. § 628)* [now codified to *31 U.S.C. § 1301*(a)], and section 3733, Revised Statutes *(41 U.S.C. § 12)*, use of operation and maintenance funds to finance construction or construction-type projects, constituting **[*26]** public improvements under section 3733, would have to be specifically authorized unless [under the predecessor to *10 U.S.C. § 2805*(c)] the projects were urgently needed and did not exceed $25,000." B-133316, January 24, 1961 (airfield construction at Ft. Lee, Virginia, and other unauthorized construction).

Having stated our opinion that military construction activities, as a general rule, must be financed from funds specifically appropriated therefor, it is necessary to determine whether that rule applies to the present case. In its March 8, 1984 response to our request for comments, DOD justified its use of O&M funding of exercise construction activities on three grounds: the temporary nature of the facilities constructed, the fact that facilities constructed were used to fulfill various exercise needs, and the training benefit to engineers involved in the construction. The last two factors relate to whether the activities in question have a readiness or operational benefit, an aspect of construction that we have already acknowledged, but which does not eliminate ordinary military construction funding requirements. n6 The first factor, however, is one that may in fact be determinative **[*27]** in the present case. Although military construction appropriations are provided for both "temporary and permanent" facilities (see Military Construction Appropriation Act, 1984, supra, p. 10), both DOD regulations and the decisions of this Office recognize that certain types of temporary structures or facilities need not be considered to be public works for purposes of determining proper funding sources for construction activities.

n6 For example, in its March 8, 1984 comments to us, DOD justified engineer construction activities at the Aguacate airfield on grounds that the project "enabled engineers to train on 84 Army Training Evaluation Program Tasks" by undergoing "training in construction management and equipment maintenance in [a] remote area for small field engineer elements." The Army Training and Evaluation Program (ARTEP) is a battalion-specific "reference document" for trainers and training managers, specifying training objectives and guidance. As DOD stated, the Engineer Combat Battalion (Heavy) ARTEP specifically includes as an assigned battalion task (at the company level) the construction of forward tactical landing strips. Nonetheless, in our view, the fact that an engineering unit performs tasks listed in the ARTEP does not mean that the performance of such activities may automatically be charged to O&M training or exercise funds. If DOD were to use Army engineering units to construct a new Honduran port complex, including administrative and storage buildings, piers, fuel storage tanks and pipelines, together with an associated all-weather airfield (all corresponding to ARTEP tasks), it is clear that military construction or security assistance funds would have to be used, no matter how beneficial the work would be from a training viewpoint. Compare Army Regulation (AR) 415-32, June 23, 1967, which provides guidelines covering the proficiency training of Army Engineer construction units through assignment to established military construction-funded projects. **[*28]**

Defense Department regulations define three categories of permanency of construction: "permanent" (expected to last more than 25 years), "semi-permanent" (to last from 5 to 25 years), and "temporary" (to last less than 5 years). See DOD Instruction 4164.14, December 21, 1966. Army regulations governing the conduct of joint exercises provide guidance as to which activities are properly chargeable to O&M exercise funds. See Army Regulation (AR) 350-28, App. J, December 15, 1983 (replacing AR 220-55, P23, July 1, 1978). These regulations provide the following example of obligations not properly chargeable to Army exercise O&M funds:

"Permanent or semipermanent construction. Costs of certain minor and temporary construction required for an exercise may be charged under special circumstances when authorized by the exercise directive. (An example is temporary latrines.)" AR 350-28, App. J-2(k), December 15, 1983.

The regulation clearly does not specify that all temporary construction may be charged to exercise O&M funds, although this appears to be the interpretation made by those officials responsible for carrying out Ahuas Tara II. The sole reference to "temporary **[*29]** latrines" in AR 350-28 is in sharp contrast to barracks and support structures for

3000 troops, construction or expansion of three airfields, and other miscellaneous construction activities carried out under Ahuas Tara II and funded with exercise O&M appropriations.

The decisions of this Office also indicate that the "temporary structure" exception to ordinary military construction funding requirements is extremely limited in scope. In *42 Comp. Gen. 212 (1962),* the Comptroller General addressed the question of whether funds appropriated to the Department of Defense (from property-disposal proceeds) for the operation of DOD's property-disposal program could be used to pay for minor temporary construction ("transitory shelters, concrete segregation bins and other work") in connection with that program. The Comptroller General held that construction of the facilities in question could not be funded as operational expenses of the program, based upon the requirement of *41 U.S.C. § 12* that construction of public improvements be authorized by specific appropriations. *42 Comp. Gen. 215.*

In interpreting *41 U.S.C. § 12*, the Comptroller General stated:

"The terms 'public building' and **[*30]** 'public improvements' as used in the foregoing statute likewise have been the subject of numerous decisions of the accounting officers over a long period of time. The decisions uniformly have been to the effect that any structure in the form of a building not clearly of a temporary character is such a public building or public improvement, the expenditures for which must be authorized by specific appropriations. Also, such structures as temporary sheds for the shelter of farm animals; portable houses for temporary use of employees; temporary portable buildings for use in the detention and treatment of aliens; barns, sheds, cottages, etc., of frame construction of a temporary nature with dirt floors and contemplated to be destroyed; hangars, shops and storehouses; and quonset huts, have been considered as being such public buildings or public improvements. Minor structures clearly of a temporary nature and intended to be used for only a temporary period have been held not to be public buildings or public improvements *(26 Comp. Dec. 829),* but the structures and improvements involved generally in your disposal program are clearly not of this nature. The mere fact that the **[*31]** buildings are prefabricated, movable, and accounted for as personal property, in itself, is immaterial as to whether they are public buildings or public improvements within the contemplation of section 3733, Revised Statutes. It is common practice today to construct both temporary and permanent structures with prefabricated material which may be dismounted and moved, but the structures are nevertheless public buildings or public improvements." *42 Comp. Gen. at 214-215.* (Citations omitted and emphasis added.)

See also *30 Comp. Gen. 487 (1951)* (Quonset huts); *6 Comp. Gen. 619 (1927)* (frame shed). Although these and other cases involve only the construction of vertical structures, we believe that the same principles may be considered to apply to other types of public improvements as well, including roads and airstrips. Those principles, applied to the present case, prohibit the funding of exercise-related construction not "clearly of a temporary nature" as operational expenses of the exercise program. Such expenses must be financed separately as construction.

DOD has stated its view that all facilities constructed during Ahuas Tara II were temporary in nature, and, as **[*32]** evidence of this, has cited deterioration of Camp Sea Eagle, near Trujillo. As we noted previously, however, that facility was inadvertently constructed in a swamp and we do not consider it to be at all typical of those facilities built during the exercises. On the contrary, our own investigations (as recently as late April 1984) show that the majority of these facilities remain in good condition, and in fact continue to be used, both by U.S. and Honduran personnel. Although DOD's March 8, 1984 comments to us state that airfields and facilities "will deteriorate if not maintained" and that "Hondurans do not have resources to maintain," U.S. Army engineers in Honduras informed GAO auditors that airfields could be used indefinitely with a minor amount of maintenance. Favilities remaining in U.S. custody continue to be maintained by the U.S. military; those under Honduran control, we have observed, are being maintained by the Hondurans. In addition, as described previously, planning documents for the exercise clearly indicate DOD's intention that

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It is apparent to us that the majority of facilities constructed during Ahuas Tara II are substantially less "temporary" than **[*33]** many of those which we described in *42 Comp. Gen. 212* as requiring specific funding as public improvements. See *42 Comp. Gen. 212, 214 (1962).* Consequently, it is our view that the majority of construction activities could not be funded out of O&M as ordinary operational expenses of the joint exercises.

This conclusion does not resolve the question of what appropriation sources could properly ahve been used for exercise construction activites. In our view, DOD could have chosen from one of several funding sources. We stated previously that two principal categories of appropriations are specifically provided by the Congress for military

construction activities. When construction relates to facilities intended for use by a defense agency or military department, funds are ordinarily provided in the annual military construction acts; when facilities are provided for the benefit of a foreign government, construction is ordinarily provided though security assistance programs (such as the Foreign Military Construction Sales Program).

The 4 base camps and associated facilities constructed during Ahuas Tara II were used by U.S. forces during those exercises and, to a large degree, **[*34]** after their conclusion.

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In light of the

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Ahuas Tara II construction, it is our conclusion that most construction activities could properly have been financed by DOD as either military construction or security assistance: this Office would not have objected to DOD's selection of either category for any particular project. See *59 Comp. Gen. 518 (1980).*

As indicated earlier, our discussion here has concerned DOD's authority to charge construction costs to O&M appropriations apart from the authority provided under *10 U.S.C. § 2805*(c). Where DOD has charged construction expenses in Honduras to O&M as operational costs of Ahuas Tara II, we would not object to those obligations (so long as they did not exceed $200,000 per project) because they could properly have been charged to O&M as minor military construction costs under *10 U.S.C. § 2805*(c). To the extent, however, that DOD has charged its O&M appropriations with the costs of any individual construction project in Honduras in excess of $200,000, the excess charge was made in violation of the purposes-restriction of *31 U.S.C. § 1301*(a). When adjusting its accounts to remedy any overcharge, O&M appropriations **[*35]** may be reimbursed from any military construction funds available for such readjustment (and which were available at the time of the original obligation).Alternatively,

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in adjusting its accounts, charge the entire construction cost component of any particular project to security assistance funds (again, subject to ordinary availability requirements). n7 If neither of these two adjustment alternatives are available, DOD should report excess charges to O&M as having been made in violation of the Antideficiency Act, *31 U.S.C. § 1341*(a).

n7 DOD does not, however, have the option of charging project costs up to $200,000 to O&M under *10 U.S.C. § 2805*(c) and charging costs in excess of $200,000 to security assistance funds, as it must elect between financing a project as security assistance or as military construction. See *59 Comp. Gen. 518 (1980).*

3. Conclusion: Apart from the specific statutory authority of *10 U.S.C. § 2805*(c), DOD has no general authority to charge costs of construction activities to O&M appropriations. To the extent, therefore, that O&M funding was not available under *10 U.S.C. § 2805*(c), exercise construction expenses charged to O&M were **[*36]** made in violation of *31 U.S.C. § 1301*(a), which prohibits the application of appropriations to objects other than those for which they were made. In addition, to the extent that § 2805(c) funding was unavailable and alternate funding (either military construction or security assistance) was also unavailable, exercise construction projects charged to O&M were in violation of the Antideficiency Act, *31 U.S.C. § 1341*(a), which prohibits the incurring of obligations in excess of or advance of available appropriations.

DOD, in light of our conclusions here, should make adjustments, where feasible, to those appropriation accounts to which construction activities during Ahuas Tara II were charged; where adjustments are not feasible, DOD should report such obligations as being in violation of the Antideficiency Act.

B. Radar Facilities

The Defense Department has established two radar installations in Honduras, each originally deployed as part of joint combined exercises, but used extensively (both during and after exercises) for general support to both U.S. and Honduran military

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activities. All costs pertaining to these two radar systems have been paid from O&M funds. **[*37]**

In August of 1982, in response to a Honduran government request for U.S. assistance, the Secretary of Defense directed the Joint Chiefs of Staff to assess Honduran radar requirements. In October of the same year, a JCS staff study concluded that

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The TPS-43 radar system was initially installed at La Mesa Air Base, in western Honduras, during the Ahuas Tara I exercise in February 1983. After that exercise, the system was placed in storage (in Honduras) until May 1983, at which time it was installed in a facility at Cerro la Mole, in southern central Honduras. The system, manned by 65 U.S. Air Force personnel, provides tracking data to a Honduras Air Force Operations Center at Tegucigalpa. The site at Cerro la Mole was prepared by the Honduran military with some assistance from U.S. Troops. American units also installed trailers for living quarters.

A second radar system, a Marine Corps AN-TPS-63/65, was installed during August 1983 on Tiger Island, in the Bay of Fondeca. The Bay of Fonseca is located between El Salvador, Honduras, and Nicaragua, and has been cited as a major arms route between Nicaragua and Salvadoran insurgents. The installation, which supplements **[*38]** the one at Cerro la Mole, was manned and secured by about 100 U.S. Marines. Site preparation including construction of a small (C-7 capable) dirt airstrip, well-digging, and earthwork construction was performed by U.S. military personnel as part of the Ahuas Tara II exercise. Flight tracking data from Tiger Island were relayed to U.S. personnel at the Honduran Air Force Operations Center at Tegucigalpa. The Tiger Island installation finally closed down in May 1984.

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There are two principal cost components relating to the two radar facilities in question: installation costs and operational costs. Installation costs for both radar systems were relatively minimal, generally because extensive facilities are not necessary for such installations, and because some construction services (particularly at Cerro la Mole and including clearing, roadbuilding, installation of power lines) were provided by the Honduran government (although with some U.S. assistance). Nonetheless, as with other facilities constructed or installed in Honduras either as part of joint exercises or for other purposes, construction costs incurred by DOD cannot be regarded as mere operational expenses unless **[*39]** the facilities involved are clearly of a temporary nature. See discussion supra, p. 13.

As with base camp construction in Honduras (including airstrips) it is not apparent to us that radar installations, when established by DOD, were "minor structures clearly of a temporary character" as that phrase is used in *42 Comp. Gen. 212 (1962).* The Tiger Island facility, although in actuality only operational for eight months, had no specific removal date when originally deployed; it was used to provide tracking data well after completion of Ahuas Tara II. The Cerro la Mole facility, although deployed for only a two-year period (thus falling within the "temporary" facility category defined in DOD regulations) is certainly capable, if deployment is extended, of being used for a much longer period of time. Additionally, in our view neither of these facilities is a "minor" improvement comparable to those considered in our previous decisions. It is therefore our opinion that installation costs should either have been funded as military construction or security assistance. n8 At the same time, however, it is unlikely that installation and site preparation costs at either facility **[*40]** exceeded $200,000, and it is probable that DOD could properly ave financed installation costs with O&M funds as minor military construction under *10 U.S.C. § 2805*(c). On this basis, we would not object to DOD's use of O&M funds for radar site preparation and installation expenses, although DOD whould verify that conditions of *10 U.S.C. § 2805*(c) have been met.

n8 Like other facilities,

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Because of this dual benefit, we would not object to DOD's choice of either funding method.

The second cost component associated with radar installations in Honduras relates to operational costs. These types of expenses make up the bulk of costs associated with the two radar installations. Because such costs clearly fall within the scope of O&M appropriations, use of such funds by DOD was proper.

One additional issue that has been raised, particularly in connection with radar installations, is the use of exercise personnel and funding for non-exercise projects. "Exercise" personnel were used for support of radar facilities in Honduras, including installation and operation of the TPS-43 during Ahuas Tara I, installation/operation of the TPS-63/65 at Tiger Island during and after **[*41]** Ahuas Tara II, and other general support (transportation, medical assistance) as needed at each facility. Through this assistance, "exercise" O&M funds were used to support radar facilities, even though such facilities were primarily used for non-exercise requirements.

No separate appropriation is made for "exercise" expenses; rather, such expenses are paid from lump-sum O&M appropriations made to each military department or defense agency. See footnote 2, supra, p. 2. Consequently, once the availability of O&M appropriations has been established for a particular purpose or activity, it is not legally significant (from a funding standpoint) whether the activity is performed by exercise personnel or by other DOD units. Thus, it is our view that, so long as O&M funding for radar facilities was authorized (both for operational expenses, and for installation expenses under *10 U.S.C. § 2805*(c)), the use of exercise personnel and "exercise" O&M funding was permissible.

C. Training Activities

Accordingly to DOD's March 8, 1984 comments to us,

"[t]here was no formal training of Honduran troops as part of the exercise, however, the U.S. and Honduran forces participated **[*42]** in integrated exercises which included familitarization and safety orientation at no additional cost to the U.S."

This view differs significantly from our own observations, as described in our audit report GAO/C-NSIAD-84-8, March 6, 1984, and as discussed below.

During October 1983, a GAO field team in Honduras identified 3 types of training being conducted by U.S. forces as a part of the Ahuas Tara II joint combined exercises:

1. U.S. military personnel assigned to the 41st Combat Support Hospital at Comayagua/Palmerola provided three 5-week combat medic training courses for approximately 100 Hondurans. DOD later acknowledged that such classes took place, but stated that they were performed by off-cuty U.S. volunteers, provided "humanitarian" medical instruction to Hondurans, and contributed to U.S. readiness by exposing U.S. personnel to "indigenous methods of operation and culture."

2. In Puerto Castilla, members of the 3/319th Field Artillery Battalion provided 3-4 weeks of instruction on 105 mm artillery to two Honduran artillery battalions prior to combined field training exercises. DOD describes the activity as a "22 day combined operations period" for interoperability **[*43]** and safety development, and states that each gun section had a U.S. and a Honduran section chief and integrated crew. Our personnel, however, observed gun crews of 8-12 Hondurans being supervised and instructed by teams of 2-4 U.S. servicemen, half of whom spoke Spanish. We were told that, about the time that these events took place, Honduras took delivery (under the Foreign Military Sales Program) of 105mm artillery, the first guns of this type in Honduras' arsenal. We were informed by personnel of the Military Assistance Group that, without training provided under the exercise, Honduras would had to purchase the services of U.S. Military training teams at a cost of from $250,000 to $500,000.

3. U.S. Special Forces personnel in San Lorenzo provided basic and/or advanced classroom and field training to four Honduran battalions, on mortars, fire-direction, and counterinsurgency tactics. This training was similar to that provided by security assistance-funded military training teams at the Regional Military Training Camp in Trujillo. DOD describes these activities as: joint review and practicing of tactics and techniques for interoperability, including some "minor individual **[*44]** remedial preparation" for safety and standarization.

Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e. to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department, some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure "interoperability" of the two forces.

At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall

within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress. Where such extensive "interoperability" training is in fact necessary, **[*45]** combined exercises should not be conducted without the formal training needed to equalize the participating forces.

A view similar to that expressed above was put forth in an Army Judge Advocate General (JAG) staff review of the Ahuas Tara II exercise proposal. The JAG analysis emphasized that

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In addition, previous guidance in this area was set out in a February 24, 1977 memorandum from the Department of Defense General Counsel. That memorandum stated that

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Based upon our own observations of formal training provided to Honduras soldiers "in preparation for" exercise participation (and otherwise), the previous DOD guidance was disregarded by the U.S. Southern Command in its executed of Ahuas Tara II. Training provided to Honduran troops during the exercise, although certainly related to exercise activities, was essentially the same as that ordinarily provided through security assistance, and consequently should have been funded as such: security assistance funds are specifically provided by the Congress to be used to train the military forces of friendly foreign governments, including formal or informal instruction provided as part of training exercises. **[*46]** See, e.g., Further Continuing appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983), providing funds for fiscal year 1984 to carry out credit sales and guaranties for procurement of defense services by foreign countries, under sections 23 and 24 of the Arms Export Control Act, *22 U.S.C. § 2263*-64; section 47 of that Act *(22 U.S.C. § 2794)* defines "defense services" to include all types of military training.

The Defense Department, in its March 8, 1984 letter, has put forward several justifications for its training of Honduran soldiers as part of exercise operations, in addition to the contribution to "interoperability." DOD emphasizes that training of Honduran troops contributes to the readiness of U.S. forces, by exercising the U.S. role of "force multiplier," by permitting U.S. troops to improve their professional skills in a bilingual environment, and by exposing U.S. forces to indigenous cultures. As we stated in connection with our examination of construction activities under Ahuas Tara II, however, the mere fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be **[*47]** financed with O&M appropriations. We previously acknowledged that facilities constructed during the Honduran exercises contributed significantly to U.S. military readiness in the region, but concluded that they must be financed as military construction or security assistance. See p. 11, supra. The same is true in the case of training of foreign troops. The fact that such training has a concurrent benefit to the readiness of U.S. forces does not remove it from the scope of security assistance.

Regarding the provision of combat medic training to Honduran troops, DOD's March 8, 1984 comments to us imply that there are no funding problems in connection with these activities because they were "humanitarian" services performed by "off-duty" U.S. troops on a voluntary basis. We cannot agree. The activities that we observed constituted combat medical training of foreign troops, activities which we categorize as military training rather than civic or humanitarian assistance. We would also note that active duty military personnel, unless in an approved leave status, are considered as being "on-duty" at all times. See B-203251, December 15, 1981. Although an active-duty **[*48]** member may, when not scheduled to perform official duties, engage in activities that are not inconsistent with his military status, it is our view that the provision of military training to foreign troops constitutes a military function that should properly be considered as part of the official duties of that member, even if performed on a "voluntary" basis. DOD cannot discharge its responsibility to ensure proper funding of its activities by saying that they are performed by "off-duty volunteers."

We do not dispute the fact that the level of training provided to Honduran forces was generally necessary to prepare them for the exercise events in which they participated. It should, however, have been apparent to DOD at the time the exercises were planned that substantial training would be required for adequate Honduran participation: for example, DOD scheduled combined field artillery exercises using 105mm guns with Honduran soldiers who had never been trained on such weapons. In our opinion, DOD should have carried out exercise activities in coordination with a security assistance-funded training program, rather than treating training as an integral part of the exercise operation. **[*49]**

Based upon the foregoing, it is our opinion that the Department of Defense engaged in the training of foreign military forces during the course of the Ahuas Tara II exercises in Honduras, and should have financed such training as security assistance. To the extent that these activities were financed from O&M appropriations as exercised operational expenses, the Department violated *31 U.S.C. § 1301*(a), which requires that funds be applied solely to the purposes for which they were appropriated.It is also possible that such activities were performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based on the availability of alternate funding sources to make the improperly used account whole.

D. Civic and Humanitarian Assistance

The Defense Department has long carried out a wide variety of humanitarian assistance and civic action programs in Central America, both as a part of, and independent from, combined exercises such as Ahuas Tara II. In some cases, assistance has been provided through written agreements with the Agency for International Development (AID) under authority of the Economy Act, *31 U.S.C. § 1535.* In other cases, **[*50]** however, U.S. forces have carried out humanitarian and civic action activities without reimbursement from AID or the host-country.

During Ahuas Tara II, civic action and humanitarian assistance activities took place on an almost-daily basis. According to DOD, personnel of the 41st Combat Support Hospital conducted MEDCAP's (Medical Civil Action Programs) throughout Honduras over the course of the exercises, resulting in the treatment of over 46,000 Honduran civilian medical patients, 7,000 dental patients, 100,000 immunizations, and the treatment, under a veterinary program, of more than 37,000 animals. Medicines utilized for these activities were taken from U.S. government supplies nearing the end of their shelf-life, or were donated (by the Honduran government or charitable organizations). In addition to this comprehensive medical aid, U.S. forces transported U.S.-donated medical supplies, clothing, and food to various locations in Honduras. In one case, a team of 15-20 Navy Seabees constructed a 20 foot-by-80 foot school-house at the village of Punta Piedra, using AID-supplied materials.

Notwithstanding the broad range and scope of humanitarian and civic action activities **[*51]** recently carried out by DOD in Central America, there appears to be some question within DOD itself as to the authority for such activities. At the time that the Ahuas Tara II exercise was being planned, the Army JAG staff review of the exercise proposal

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The JAG view also appears to reflect that of DOD's General Counsel. On December 1, 1983, we requested DOD to provide us with an explanation of its authority to conduct humanitarian or civic action programs in Central America. The response, from DOD's General Counsel, was that DOD has no separate statutory authority to carry out such activities, but could so on a reimbursable basis on behalf of the Department of State or AID "under the authority of the Economy Act or other similar authority." In response, however, to our separate request to DOD for a description of reimbursement agreements or arrangements covering any or all of the wide range of Ahuas Tara II exercise civic/humanitarian activities, we were informed by the Assistant Secretary of Defense for International Security Affairs (in DOD's March 8, 1984 comments) that no such agreements existed. Although exercise personnel consulted with AID officials (and occasionally **[*52]** utilized AID-supplied provisions or materials, such as for the schoolhouse built at Punta Piedra), costs of carrying out civic/humanitarian activities were, on the whole, borne by DOD, and charged to exercise O&M funds.

The Department of Defense has recently started to reexamine in detail its conduct of civic/humanitarian activities. On January 12, 1984, Secretary Weinberger established a DOD "Task Force on Humanitarian Issues," to explore DOD's current authority in the area, to identify DOD requirements, and to determine if legislative or regulatory changes are necessary. In particular, the task force was to consider "[r]evising USC Title 10 to include 'humanitarian' missions within the definition of military missions * * * [to] enable DOD to use 'exercise' and Operations and Maintenance (O&M) funds for civic action and humanitarian efforts."

The task force was due to report on April 30, 1984, although we have not yet been provided details of its work.

We agree with DOD's General Counsel that the Department's authority to carry out civic/humanitarian activities is limited in scope. The principal authority, as noted by DOD, is through Economy Act transactions, i.e., under **[*53]** an order placed by another Federal agency (such as AID) ordinarily responsible for carrying out such activities. See *31 U.S.C. § 1535.* Economy Act orders are placed on a reimbursable basis, and, when made, constitute an obligation of the ordering agency (charged to funds appropriated by the Congress to that agency--in this case, for example, AID).

Apart from the authority of the Economy Act, DOD may carry out civic action activities on a limited basis through its security assistance programs. Under section 502 of the Foreign Assistance Act of 1961, defense articles and services may be provided to a foreign country for, among other purposes:

"the purpose of assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the United States in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability **[*54]** of the military forces to perform their military missions and be coordinated with and form part of the total economic and social development effort." *22 U.S.C. § 2302* (1982).

Based upon this authority, DOD may, through the provision of defense articles and services to Honduras under security assistance programs, assist the Honduran government with civic projects and programs. The legislative history of this provision provides that:

"any civic action activity should be incidental to the performance of the usual duties of a military unit or a byproduct of the presence of such unit in a particular locality. The construction of a schoolhouse might qualify as well as a village access road, a small community sanitation project, or other activities that improve the relationship of the military to the local civilian population. The primary purposes of military assistance should be to meet military requirements. * * * The committee wants to make clear that civic action programs are to be neither extensive nor expensive." H.R. Rep. No. 321, 89th Cong. 1st, Sess. 26-27 (1965).

Similar authority is provided under section 4 of the Arms Export Control Act, *22 U.S.C. § 2754* (1982), in **[*55]** connection with Foreign Military Sales.

Based upon DOD's March 8, 1984 comments to us, it does not appear that civic/humanitarian activities under Ahuas Tara II were performed either under authority of the economy Act or as incidental to DOD's security assistance programs. Instead, DOD has justified such activities on the basis (1) that they were "ancillary" to exercise events, (2) that in some cases, they provided training to participating U.S. units, and (3) that they contributed to U.S. regional readiness by improving relations with friendly foreign nations and by creating a positive image of the U.S. Military among the indigenous population.

As was the case with exercise-related construction of facilities and training of Honduran forces, we do not dispute DOD's assertion that civic and humanitarian activities conducted during the course of Ahuas Tara II had distinct operational benefits (i.e. training experience of U.S. medical units) and contributed to U.S. regional readiness. Again, however, the fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be financed with O&M appropriations: that factor is but one **[*56]** of three that must be considered in making a determination as to proper funding source. Another source may be required if the activity is otherwise prohibited by law or falls within the scope of another category of appropriations. See p. 3 supra.

In this case, it is our view that civic/humanitarian assistance activities by DOD fall clearly within the scope of other appropriation categories and thus may not be financed with O&M funds. The types of civic and humanitarian assistance provided during the exercises are similar to those ordinarily carred out through health, education, and development programs under the Foreign Assistance Act of 1961, *22 U.S.C. § 2151* et seq., administered by the U.S. International Development Cooperation Agency (of which AID is a part). See Executive Order 12163, September 29, 1977, as amended. Funds for such foreign assistance activities are specifically provided by the Congress in annual appropriations acts. See e.g., Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Alternatively, as noted above, minor assistance projects may be carried out where incidental **[*57]** to activities performed under authority of section 502 of the Foreign Assistance Act of 1961, *22 U.S.C. § 2302*, or section 4 of the Arms Export Control Act, *22 U.S.C. § 2754*. In either case, it is our opinion that DOD's operation and maintenance funds may not be used to finance such activities in light of the availability of other appropriations specifically provided therefor.

Based on the above, it is our conclusion that DOD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of *31 U.S.C. § 1301*(a). As with DOD's use of O&M funds for training of foreign forces (and military construction in excess of that permitted under *10 U.S.C. § 2805*(c)), such activities may

also have been performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based upon the availability of alternate funding sources to reimburse the improperly used account.

III. SUMMARY

We have attempted, in the foregoing analysis, to address separately a number of different categories of activities carried out **[*58]** by DOD during the course of the Ahuas Tara II joint combined exercises in Honduras, to determine the propriety of DOD's financing of such activities as incidental operational expenses of these exercises. Although we recognize that most, if not all, of the activities examined in some way contributed to exercise requirements and to regional readiness goals, our analysis has focused upon other factors relevant to a determination of funding availability, particularly whether the activities in question fall more properly within the scope of another appropriation category.

Based upon this analysis, we conclude:

Exercise-related construction should not have been charged to O&M appropriations, except under authority of *10 U.S.C. § 2805*(c), which permits the use of up to $200,000 of O&M funds for minor military construction projects.

Operational expenses of radar installations in Honduras were properly charged to O&M funds. Site preparation and installation costs, however, should only have been funded with O&M if less than $200,000 per project, pursuant to *10 U.S.C. § 2805*(c).

In at least 3 instances, DOD provided training to Honduran armed forces in connection with the Ahuas Tara II **[*59]** exercises. Such training, comparable to that ordinarily provided through security assistance, should have been funded with security assitance appropriations.

Civic action and humanitarian assistance activities carried out by DOD during Ahuas Tara II were improperly charged to O&M funds as operational expenses of the exercises. Such activities should have been carried out under a reimbursable order under the Economy Act, *31 U.S.C. § 1585.*

APPENDIX B

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

JUL 27 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
UNDER SECRETARY OF DEFENSE (POLICY)
COMMANDER, UNITED STATES CENTRAL COMMAND
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION

SUBJECT: Commanders' Emergency Response Program (CERP) Guidance

Attached is revised financial management guidance and internal control and reporting requirements for the CERP.

Responsible Department of Defense officials should ensure that this guidance is applied consistently in administering the CERP in order to maintain the transparency and accountability of the program. Questions regarding the application of the guidance may be directed to my point of contact, Ms. Audrey Clark. She may be reached by telephone at (703) 695-9437 or by email at audrey.clark@osd.mil.

Tina W. Jonas

Attachment:
As stated

cc:
Chairman, Joint Chief of Staff
Defense Finance and Accounting Service

COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP)

I. References.

A. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law No. 108-375, section 1201.
B. Department of Defense Financial Management Regulation (DoDFMR).
C. Under Secretary of Defense (Comptroller) (USD(C)) Memorandum, subject: "Guidance on the Use of Appropriated Funds for the Commander's Emergency Response Program," dated February 18, 2005 (hereby rescinded).
D. DoD Directive 5101.1, "DoD Executive Agents," September 23, 2002, certified current as of November 21, 2003.

II. Purpose and Applicability.

A. This guidance implements Reference A by assigning responsibilities for administering the Commander's Emergency Response Program (CERP); defining the purposes for which U.S. appropriations provided for the CERP may be expended, and specifying the procedures for executing, managing, recording and reporting such expenditures.

B. The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the indigenous population. The CERP may be used to assist the Iraqi and Afghan people in the following representative areas:

(1) Water and sanitation;
(2) Food production and distribution;
(3) Agriculture;
(4) Electricity;
(5) Healthcare;
(6) Education;
(7) Telecommunications;
(8) Economic, financial and management improvements;
(9) Transportation;
(10) Rule of law and governance;
(11) Irrigation;
(12) Civic cleanup activities;
(13) Civic support vehicles;
(14) Repair of civic and cultural facilities;
(15) Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act;
(16) Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations;

(17) Payments to individuals upon release from detention;
(18) Protective measures, such as fencing, lights, barrier materials, berming over pipelines, guard towers, temporary civilian guards, etc. to enhance the durability and survivability of a critical infrastructure site (oil pipelines, electric lines, etc.), and
(19) Other urgent humanitarian or reconstruction projects.

C. This guidance applies to all organizational entities within DoD. A requirement to comply with this guidance shall be incorporated into contracts, as appropriate. It covers the execution, management, recording and reporting of expenditures of U.S. appropriations and other funds made available for the CERP.

III. Responsibilities.

A. Under Secretary of Defense (Comptroller) (USD(C)). The USD(C) shall establish and supervise the execution of principles, policies and procedures to be followed in connection with the CERP, and ensure that congressional oversight committees are timely informed of CERP activities through the quarterly reports required under subsection (b) of Reference A.

B. Secretary of the Army. Pursuant to Reference D, the Secretary of the Army shall serve as executive agent for the CERP, and in that capacity shall promulgate detailed procedures as necessary to ensure that unit commanders carry out the CERP in a manner consistent with applicable laws, regulations, and this guidance. These procedures shall include rules for expending CERP funds through contracts and grants, in accordance with subsection IV.H. of this guidance.

C. Commander, U.S. Central Command (USCENTCOM). The Commander, USCENTCOM shall determine the appropriate allocation of CERP funds between commands and advocate for appropriate resources and authorities in support of the theater's military global war on terrorism mission.

IV. Procedures.

A. Proper Usage of Funds. Appropriated funds made available for the CERP shall Not Be Used for the following purposes:

(1) Direct or indirect benefit to U.S., coalition, or other supporting personnel;
(2) Providing goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces;
(3) Except as authorized by law and separate implementing guidance, weapons buy-back programs, or other purchases of firearms or ammunition;
(4) Entertainment;

(5) Reward programs;
(6) Removal of unexploded ordnance;
(7) Duplication of services available through municipal governments;
(8) Salaries, bonuses, or pensions of Iraqi or Afghan military or civilian government personnel;
(9) Training, equipping, or operating costs of Iraqi or Afghan security forces, and
(10) Conducting psychological operations, information operations, or other U.S., coalition, or Iraqi/Afghanistan Security Force operations.

B. Amount. The CERP is intended for small-scale, urgent, humanitarian relief and reconstruction projects for the benefit of the Iraqi and Afghan people. Army shall separately notify USD(C) and CENTCOM J8 of all individual CERP projects of $500,000 or greater during the normal monthly reporting process. Such separate notification shall include a description of the project, an estimated length of completion, and a justification of how the project supports the purpose of the CERP.

C. Commingling of Funds. Consistent with Reference B, Volume 5, Chapter 2, U.S. appropriations made available for the CERP shall not be commingled with non-appropriated funds, and shall be separately executed, managed, recorded and reported.

D. Allocation of Funds. The USD(C) shall ensure that DoD appropriations and other funds available for the CERP are properly allocated to Army for funds control and execution. Commander, USCENTCOM will notify Army of the appropriate inter-theater allocation.

E. Delivery, Transporting and Safeguarding of Funds. Any funds made available for the CERP shall be delivered, transported and safeguarded consistent with Reference B, Volume 5, Chapter 3, "Keeping and Safeguarding Public Funds."

F. Appointment of Pay Agents. Pay agents responsible for making disbursements of funds under the CERP shall be appointed consistent with Reference B, Volume 5, Chapter 2, "Disbursing Offices, Officers and Agents."

G. Documentation of Payments. Payments under the CERP shall be made and documented consistent with Reference B, Volume 5, Chapter 11, "Disbursements," and Volume 10, Chapter 9, "Supporting Documents to Payment Vouchers."

H. Contracts and Grants. U.S. appropriations and other funds made available for the CERP may be expended through contracts and grants that are prepared and executed in accordance with regulations designed to ensure transparency, fairness and accountability. To the maximum extent practicable, these regulations shall be consistent with Coalition Provisional Authority Memorandum Number 4, Contract

and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq, dated August 19, 2003.

I. Circumventing Limits. Monetary limits and approval requirements may not be circumvented by "splitting" a single project through the submission of multiple purchase requests, or similar documents, or otherwise.

J. Clearance of Accounts. Accounts maintained under the CERP shall be cleared consistent with Reference B, Volume 5, Chapter 2.

K. Certification of Payments. Payments made under the CERP shall be certified in a manner consistent with Reference B, Volume 5, Chapter 33, "Accountable Officials and Certifying Officers."

L. Audits and Program Reviews. The administration of the CERP will be subject to periodic audits by DoD's internal review and audit organizations, including the DoD Inspector General and the Army Audit Agency, as well as external organizations such as the Government Accountability Office and congressional oversight committees. All officials responsible for administering the CERP shall cooperate fully with any review, audit or investigation conducted by such organizations.

V. Reports and Notifications.

A. Not later than the fifteenth day of each month, Army shall submit to the USD(C), a CERP Project Status Report as of the last day of the preceding month. The Army will provide a copy of the report to USCENTCOM J8 and the Joint Staff, J8. The CERP Project Status Report shall contain the following information by Project Category:

(1) Unit;
(2) Project Number;
(3) Payment Date;
(4) Description and location of project, and
(5) The amount committed, obligated and disbursed for the project.

This reporting requirement applies only to appropriation-funded CERP for Iraq and Afghanistan under the scope of this guidance, and is in addition to the separate monthly requirement to report cumulative totals allocated, committed, obligated, and disbursed for all types of CERP funds in Iraq.

B. Army, with the support of USD(C), shall be responsible for submitting to Congress the quarterly reports required under Reference A.

C. Army, in coordination with Commander, USCENTCOM, shall promptly notify the USD(C) and the DoD General Counsel of any provisions of law that (if not waived) would prohibit, restrict, limit, or otherwise constrain the exercise of the authority provided by Reference A.

VI. Effective Period and Waivers.

A. This guidance shall become effective immediately.

B. Requests for waivers or exceptions to any provision of law that would (but for the waiver) prohibit, restrict, limit or otherwise constrain the execution of the CERP must be submitted through the USD(C) and DoD General Counsel to the Secretary of Defense for approval.

C. Requests for waivers or exceptions to this guidance must be submitted to the USD(C) for approval.

APPENDIX C

CHAPTER 11, 2006 OPERATIONAL LAW HANDBOOK

FISCAL LAW

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12. 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA).
13. 10 U.S.C. § 402, Transportation of Humanitarian Relief Supplies to Foreign Countries.
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15. 10 U.S.C. § 1050, Latin American (LATAM) Cooperation.
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I. INTRODUCTION

A. The application of fiscal principles often appears counterintuitive. Because Congress provides appropriations for military programs, and military departments in turn allocate funds to commands, commanders may wonder why legal advisors scrutinize the fiscal aspects of mission execution so closely, even though expenditures or tasks are not prohibited specifically. Similarly, JTF staff members managing a peacekeeping operation may not appreciate readily the subtle differences between operational necessity and "mission creep;" nation building and humanitarian and civic assistance; or construction, maintenance and repair. Deployed judge advocates (JA) often find themselves immersed in such issues. When this occurs, they must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid legal advisors in this endeavor, this chapter affords a basic, quick reference to common authorities. Because fiscal matters are so highly legislated, regulated, audited and disputed, however, it is not a substitute for thorough research and sound application of the law to specific facts. One possible source for an example of previous application of the law to specific facts is the compilation of AARs that CLAMO has put together on various past operations.

B. The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are few "contingency" exceptions to the fiscal principles discussed throughout this chapter. The statutes, regulations, case law and policy applicable at Fort Drum, for example, likely will control operations in Bosnia, Nicaragua, Hungary, Afghanistan and Iraq. Fiscal issues arise frequently during drug interdiction, humanitarian and civic assistance, security assistance, disaster relief, and peacekeeping operations. Failure to understand fiscal nuances may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous JA involvement in mission planning and execution is essential. JAs who participate actively will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need.

C. Under the Constitution, Congress raises revenue and appropriates funds for Federal agency operations and programs. *See* U.S. Const., Art. I, § 8. Courts interpret this constitutional authority to mean that Executive Branch officials, *e.g.*, commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.[1] *See, e.g.*, U.S. v. MacCollom, 426 U.S. 317, at 321 (1976) ("The established rule is that the

[1] An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, services or construction. For example, a contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.") Likewise, in many cases, Congress has limited the ability of the Executive to obligate and expend funds through annual authorization or appropriations acts or in permanent legislation.

D. Legal advisors should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) Department of Defense (DoD) authorization acts; (5) DoD appropriations acts; (6) agency regulations; and (7) Comptroller General decisions. Without a clear statement of positive legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority.

E. Road map for this Chapter. This Chapter is divided into several sections. Sections II through V provide an overview of Basic Fiscal Controls – Purpose, Time and Amount. Section VI highlights a method of analysis that JAs might apply to resolving fiscal law questions. Section VII highlights various DoD appropriations and their purposes. Section VIII addresses Foreign Assistance, including Security Assistance and Development Assistance, with particular focus on DoD's role in each of these areas. Section IX details DoD's Title 10 and other authorities to conduct Military Cooperative Programs and Humanitarian Operations, to include the Commanders' Emergency Response Program (CERP). Section X provides a discussion of DoD support to Multilateral Peace and Humanitarian Operations, particularly U.S. participation in UN operations. Sections XI and XII highlight current funding authorities in relation to combating terrorism and funding reconstruction operations in Iraq and Afghanistan. Because DoD frequently finds itself involved in construction during its deployments, Section XIII provides a discussion of the relevant authority and funding sources. Finally, Section XIV notes the requirement that DoD notify Congress before transferring any defense articles or services to another nation or international organization.

II. BASIC FISCAL CONTROLS[2]

A. Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly, and scrutinizes compliance with the fund control statutes and regulations. The three basic fiscal controls are as follows:

1. Obligations and expenditures must be for a proper purpose;

2. Obligations must occur within the time limits applicable to the appropriation (*e.g.*, operation and maintenance (O&M) funds are available for obligation for one fiscal year); and

3. Obligations must be within the amounts authorized by Congress.

III. THE PURPOSE STATUTE—GENERALLY

A. Although each fiscal control is key, the "purpose" control is most likely to become an issue during military operations. The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be reasonably related to the purpose of an appropriation. JAs should ensure, therefore, that:

1. An expenditure fits an appropriation (or permanent statutory provision), or is for a purpose that is necessary and incident to the general purpose of an appropriation;

2. The expenditure is not prohibited by law;

[2] For a more in-depth review of fiscal law issues, *See*, CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition. Available at: http://jagcnet.army.mil/ContractLaw, (registration & password required) and http://www.jagcnet.army.mil/tjagsa. (No password or registration required.)

3. The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of some other appropriation. *See, e.g.*, The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II] (concluding that the Purpose Statute applies to OCONUS military exercises); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954).

B. Augmentation of Appropriations and Miscellaneous Receipts.

1. A corollary to the Purpose control is the prohibition against augmentation. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See* Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

2. If an agency retains funds from a source outside the normal fund distribution process, an augmentation has occurred and the Miscellaneous Receipts Statute is violated. *See* 31 U.S.C. § 3302(b); s*ee also* Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. *See* Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988).

3. **Exceptions**. There are, however, statutory exceptions to the augmentation prohibition.

a. There are intra- and intergovernmental acquisition authorities that allow augmentation or retention of funds from other sources. *See, e.g.*, Economy Act, 31 U.S.C. § 1535; Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); 22 U.S.C. § 2318 (emergency Presidential drawdown authority). The Economy Act authorizes a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services. *See* Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); Obligation of Funds Under Mil. Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); s*ee also* DoD 7000.14-R, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DoD). Consult agency regulations for order approval requirements. *See, e.g.*, Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; Army Federal Acquisition Regulation Supplement Subpart 17.5.

b. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEA) in counterdrug operations. *See* the Domestic Operations chapter for a more complete review. Support to CLEAs is reimbursable unless it occurs during normal training and results in DoD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 U.S.C. § 377. Another statutory provision authorizes operations or training to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* §1004 of the 1991 Defense Authorization Act, codified at 10 U.S.C. § 374. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

C. Purpose Statute Violations.

1. As noted at the beginning of this chapter, the Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. § 1301(a). Thus, if the command uses funds for an improper purpose, it must adjust the accounts by deobligating the funds used erroneously and seek the proper appropriation. For example, if the command constructs

an $850,000 (funded costs) building with O&M funds, it has violated the Purpose Statute. (Remember, O&M is normally proper only for projects with funded costs up to $750,000.)

2. To correct this violation, the command must deobligate the O&M funds and substitute (obligate) Unspecified Minor Military Construction (UMMC) funds, which are available for projects between $750,000 and $1.5 million. This account adjustment is typically an internal adjustment of the agency's accounting records and does not normally require a recovery of the actual payment disbursed to the contractor or other payee. While this is a matter of adjusting agency accounts, if proper funds (UMMC) were unavailable both at the time of the original obligation, *e.g.*, contract award, and when the adjustment is made, the command must report a potential Anti-Deficiency Act (ADA) violation. *See* discussion of the ADA, below. The same analysis applies if the command uses O&M funds to purchase what are considered to be investment items, *e.g.*, equipment or systems that are either centrally managed or cost $250,000 or more. Finally, if a command uses funds for a purpose for which there is no appropriation, this is an uncorrectable Purpose Statute violation, and officials must report a potential ADA violation.

IV. AVAILABILITY OF FUNDS AS TO TIME

A. The "Time" control includes two major elements:

1. Appropriations have a definite life span; and

2. Appropriations normally must be used for the needs that arise during their period of availability.

B. **Period of availability**. Most appropriations are available for a finite period. For example, O&M funds (the appropriation most prevalent in an operational setting) are available for one year; Procurement appropriations are available for three years; and Construction funds have a five-year period of availability. If funds are not obligated during their period of availability, they expire and are unavailable for new obligations (*e.g.*, new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (*e.g.*, to pay for a price increase following an in-scope change to an existing contract).

C. **The** "**bona fide needs rule**." This rule provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services. *See* 31 U.S.C. § 1502(a).

1. Supplies. The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for office supplies that are not needed until the next fiscal year. Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a current need is documented. Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. The lead-time exception allows the purchase of supplies with current funds at the end of a fiscal year even though the time period required for manufacturing or delivery of the supplies may extend over into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8; or DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303. In any event, "stockpiling" items is prohibited. *See* Mr. H.V. Higley, B-134277, Dec. 18, 1957 (unpub.).

2. Services. Normally, severable services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services and vehicle/equipment maintenance are examples of severable services because of the recurring "day-to-day" need. Use current year funds for recurring services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits DoD agencies to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services. Conversely, nonseverable services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, *e.g.*, studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with

appropriations current when the contract (or agreement) is executed, even if performance extends into a subsequent fiscal year. *See* DFAS-IN 37-1, ch. 8.

V. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. The Anti-Deficiency Act (31 U.S.C. §§ 1341(a), 1342, & 1517(a)) prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation in advance of or in excess of an appropriation. (31 U.S.C. § 1341)

2. Making or authorizing an expenditure or incurring an obligation in excess of a formal subdivision of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). (31 U.S.C. § 1517)

3. Accepting voluntary services, unless authorized by law. (31 U.S.C. § 1342)

B. Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally may lead to a breach of a formal O&M subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DFAS-IN 37-1, ch. 4. Similarly, as described in the Purpose section, above, over-obligation of a statutory limit, *e.g.*, the $750,000 O&M threshold for construction, may lead to an ADA violation.

C. Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through OSD and the President to Congress also is required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful, 31 U.S.C. §1349, §1350. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include the following:

1. Without statutory authority, obligating (*e.g.*, awarding a contract) current year funds for the bona fide needs of a subsequent fiscal year. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels.

2. Exceeding a statutory limit (*e.g.*, funding a construction project in excess of $750,000 with O&M; acquiring investment items with O&M funds).

3. Obligating funds for purposes prohibited by annual or permanent legislation.

4. Obligating funds for a purpose for which Congress has not appropriated funds, e.g., personal expenses where there is no regulatory or case law support for the purchase).

VI. THE PURPOSE STATUTE—SPECIFIC MILITARY OPERATIONAL ISSUES

A. **Method of Analysis.** JAs enhance mission success by guiding the staff and commander to the appropriate fiscal authority. The following method of analysis will help the attorney, operator, comptroller and logistician formulate a course of action for the commander:

1. Determine the commander's intent;

2. Define the mission (both the organization's assigned mission and the specific tasks to be performed);

3. Divide it into discrete parts (specified and implied tasks);

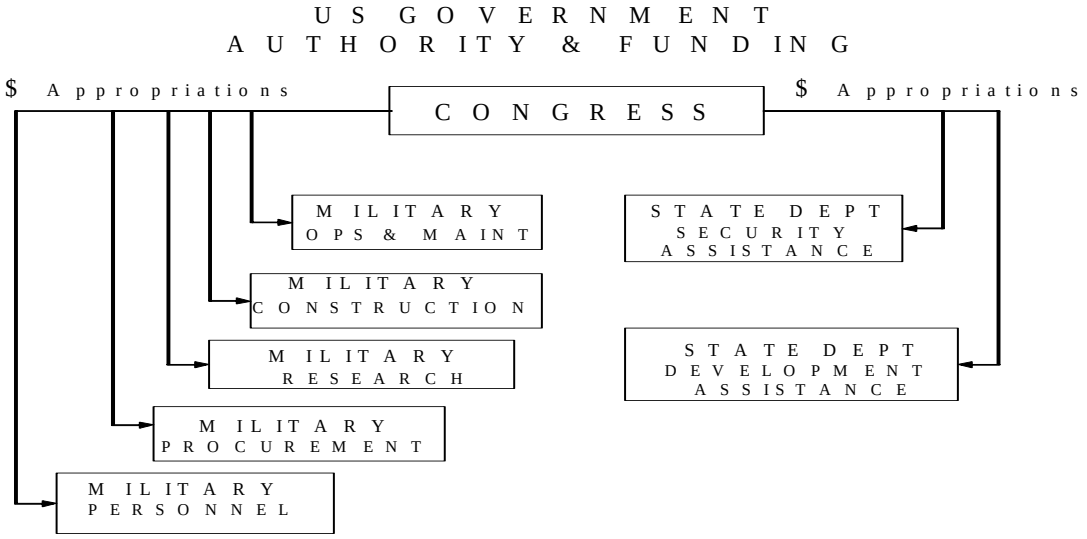
4. Find legislative or regulatory authority and determine the proper fund type;

5. Articulate a sound rationale for the specific expenditures; and

6. Seek approval/guidance/funds from higher headquarters, if necessary.

B. It may be necessary to review an appropriation or permanent statutory provision to determine Congressional intent. For proposed expenditures that are non-routine or unique in nature, a clear, written rationale explaining why the use of funds is proper is essential. Again, if the issues are particularly problematic, seek assistance from higher headquarters.

VII. DOD APPROPRIATIONS AND THEIR PURPOSES



A. **O&M Appropriations**. These appropriations are for day-to-day expenses of DoD components in garrison and during exercises, deployments, and military operations. Commands may use O&M appropriations for all "necessary and incident" operational expenses. However, they are subject to specific statutory limitations. For example, end items costing $250,000 or more, or which are centrally managed, may not be purchased with these funds. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 0102; and DFAS-IN Manual 37-100-XX (XX= current FY). Additionally, exercise-related construction for U.S. forces' use (*e.g.* base camps, etc.; not for humanitarian assistance construction) during exercises coordinated or directed by the Joint Chiefs of Staff outside the United States, or any construction in excess of $750,000, may not be funded with O&M appropriations. *See* 10 U.S.C. § 2805; *but see* Military Construction (MILCON) -- A Special Problem Area, *infra*, (discussing use of O&M for construction necessary to meet temporary operational needs during combat or declared contingencies).

B. **O&M Appropriations—Use During Deployments and Contingency Operations**.

1. "**Contingency Operations (ConOps) Funds**" **(aka OEF/OIF Funds)**. Technically, there is not a separate appropriation for the incremental expenses of a contingency operation or other specific operations such as Operation Iraqi Freedom(OIF). These incremental expenses (that are above and beyond the planned day-to-day expenses of DoD such as typical exercises and other training activities) are funded with existing appropriations, through various supplemental appropriations acts, and various transfer authorities. An example of a supplemental appropriation using a transfer authority is the **Iraq Freedom Fund (IFF)**. *See* Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11 (Apr. 16, 2003) (initial funding of the IFF); DoD Appropriations Act for FY 2005, Pub. L. No. 108-127 (2004) (additional $3.8B to remain available until 30 September 2006). The IFF consists of appropriated funds that can be transferred into various other appropriations accounts (O&M, military personnel, procurement, RDT&E, etc.) for ongoing operations in Iraq or Afghanistan. DoD provides regulatory control over these funds and other "ConOps funds" to provide accountability and ensure the funds are used to support the incremental expenses of these contingency operations. *See* DoD Reg. 7000.14-R, DoD Financial Management Regulation, vol. 12, ch. 23.

2. **Emergency and Extraordinary (E&E) Expenses Funds**. These are special funds within the O&M appropriation under 10 U.S.C. § 127. The secretaries of the military departments and the Secretary of Defense (SECDEF) may expend these funds without regard to other provisions of law. These funds are very limited in amount, however, and regulatory controls apply to prevent abuse, including congressional notification requirements for expenditures over $500,000. Recently, E&E expense funds were used in conjunction with Presidential Drawdown authority, and Combatant Commander Initiative funds, both discussed below, to cover the costs of training and equipping the new Afghan National Army. Additionally, a commander would not use generic O&M to purchase a memento or gift for the mayor of Tuzla. Official representation funds (authorized under 10 U.S.C. § 127), however, would be available for this purpose. *See* DoD Dir. 7250.13, OFFICIAL REPRESENTATIONAL FUNDS (17 Feb. 2004); DEPT OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, (12 March 2004); and, DEPT OF ARMY, REG. 195-4, USE OF CONTINGENCY LIMITATION .0015 FUNDS FOR CRIMINAL INVESTIGATIVE ACTIVITIES (15 Apr. 1983).

3. **Contingency Operations Funding Authority**. This authority, under 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain deployments as outlined below.

a. This authority applies to deployments, other than for training, and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which:

(1) Funds have not been provided;

(2) Operations are expected to exceed $50 million; or

(3) The incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of **$100 million.**

b. This authority does *not* apply to operations with incremental costs not expected to exceed **$10 million.** The authority provides for the waiver of Working Capital Fund (WCF) reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. This statute restricts SECDEF authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an ADA violation, reimbursement is required.) The statute authorizes SECDEF to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred. Due to provisions requiring both Congressional notification and GAO compliance reviews, this statute is rarely used. Similar to the Iraq Freedom Fund, this transfer authority funding is regulated by volume 12, chapter 23 of the DoD Financial Management Regulation, DoD 7000.14-R.

4. **Combatant Commander (formerly CINC) Initiative Funds (CCIF)** (10 U.S.C. § 166a) are O&M funds available for special training, humanitarian and civic assistance, incremental costs of third country participation in a combined exercise, and operations that are unforeseen contingency requirements critical to combatant commander joint warfighting readiness and national security interests. *See* CJCSI 7401.01B (15 Aug.

2003) (detailing procedures for CJCS approval of these expenditures). Recently, the statute has been amended to provide an increase in the current spending limits for different purchases within the fund. The limits have changed as follows: for equipment, from $7 million to $10 million; for joint exercises, from $1 million to $10 million; and for military education and training from $2 million to $5 million.

5. "**Traditional CINC Activities" Funding (TCA)**. The combatant commanders also receive O&M funding through the service component commands for TCA, like military-to-military contacts, combined training, and regional conferences.

C. **Military Construction (MILCON) Appropriations**. Congress scrutinizes military construction closely. In fact, 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements of public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Thus, construction projects in excess of $1.5 million require specific approval by Congress. While not requiring specific "line-item" approval, projects between $750,000 and $1.5 million are limited to amounts provided in the Unspecified Minor Military Construction (UMMC) appropriations within the MILCON appropriation. *See* 10 U.S.C. §2805.

D. **Procurement Appropriations**. These appropriations fund purchases of investment end items (or systems) that cost $250,000 or more and items that are centrally managed, regardless of cost. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 010201.

E. **Additional Appropriations and/or Authorities**. DoD has available to it other appropriations and support authorities. These include funds and/or authority to use an existing funding source under the Foreign Assistance Act (FAA)(Title 22), the Acquisition and Cross-Servicing statute (10 U.S.C. §2341-50), and the Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) appropriations (Title 10). Congress appropriates funds to be used only for specific purposes. For example, the O&M title of the appropriations act includes funding for humanitarian assistance authorized under various Title 10 provisions. (10 U.S.C. §401 – Demining and 10 U.S.C. §2561 – Humanitarian Assistance) *See, e.g.*, Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, (2004) (providing $59 million for OHDACA available during FYs 2005-2006). Such earmarked appropriations require separate fiscal accounting. Generally, DoD may not use generic O&M appropriations for the same purposes as funds earmarked for specific purposes within an appropriations act.

VIII. FOREIGN ASSISTANCE AND SECURITY ASSISTANCE

A. Introduction.

1. As noted in Part VII, O&M appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Deploying units normally use "generic" O&M funds to support their operations. Examples of O&M expenses include force protection measures, sustainment costs, and repair of main supply routes. Included also are those expenses that are "necessary and incident" to an assigned military mission (*e.g.*, costs of maintaining public order and emergency health and safety requirements of the populace in Haiti during the Presidentially-directed mission of establishing a secure and stable environment). Beware of "mission creep," however, where the military mission departs from security, combat, or combat-related activity, and begins to intersect other agencies' authority/appropriations. Such expenditures bear close scrutiny by the JA. For example, commanders must have special authorization before engaging in "nation-building" activities or recurring refugee assistance. These activities normally fall within the category of foreign assistance functions administered by the Department of State (DoS) or U.S. Agency for International Development (USAID).

2. **General Rule**: DoS has the primary responsibility, authority and funding to conduct foreign assistance on behalf of the United States government.

3. The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a relatively confusing mesh of statutes, annual appropriations, regulations, directives, messages and policy statements. The key issue is deciding whether DoS authority (under Title 22 of the U.S. Code) and money, or DoD authority (under Title 10 of the U.S. Code) and money should be used to accomplish a particular objective. This sophisticated task often

consumes a great amount of time and effort on the part of operational lawyers at all levels of command. Understanding the individual components of DoS's and DoD's foreign assistance programs is very important. The real challenge is to learn how the various programs interrelate with each other. This is where the JA earns credibility with the commander. By understanding the complex relationships between the various authorities and funding sources, the JA is better equipped to provide the commander with advice that can mean the difference between accomplishing the desired objective legally, accomplishing it with unnecessary legal and political risk, or not accomplishing it at all.

B. Legal Framework for Foreign Assistance.

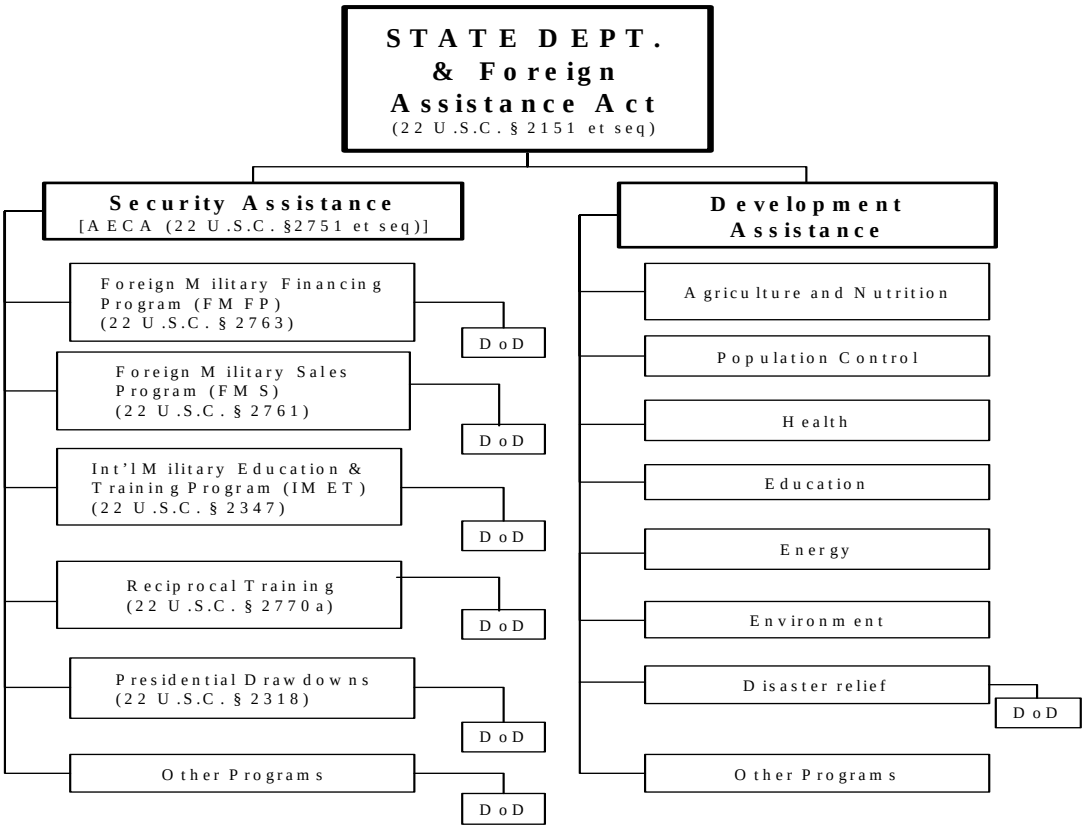
1. **The Foreign Assistance Act.**

a. The Foreign Assistance Act of 1961 (FAA)[3] constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. The FAA intended to support friendly foreign nations against communism on twin pillars:

(1) Provide supplies, training, and equipment to friendly foreign militaries; and

(2) Provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by the masses of many developing nations.

(3) The first pillar is commonly referred to as "security assistance" and is embodied in Subchapter II of the FAA. The second pillar is generally known as "development assistance" and it is found in Subchapter I of the FAA.



[3] 22

b. The FAA charged DoS with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year Congress appropriates a specific amount of money to be used by agencies subordinate to the DoS to execute the FAA programs.[4]

c. As noted earlier, the FAA has two principal parts. Subchapter I provides for foreign assistance to developing nations; and Subchapter II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security. *See* 22 U.S.C. § 2301. The purposes served by the provision of defenses articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2751), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

d. Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Subchapter I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

e. Even though Congress charged DoS with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The small DoD boxes attached to the primary Security Assistance programs in the above diagram represent this relationship. The U.S. military provides most of the training, education, supplies and equipment to friendly foreign militaries under Security Assistance authority. DoS retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military. It should be noted that Congress requires by statute that both DoD and DoS conduct human rights vetting of any foreign recipient of any kind of training. *See e.g.* Sec. 8077, DoD Appropriations Act for FY 2005, Pub. L. No. 108-287 (2004).

f. With regard to the second pillar of the FAA, Development Assistance, USAID, the Office for Foreign Disaster Assistance (OFDA) within DoS, and embassies often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs emanates from the FAA, the funding flows from DoS's annual Foreign Operations Appropriations, and the policy supervision also rests DoS. But as represented by the above diagram, the U.S. military plays a relatively small role in DoS Development Assistance programs.

C. DoD Agencies that Participate in Providing Security Assistance:

1. Defense Security Cooperation Agency (DSCA). DSCA was created by DoD Directive 5105.65 as a separate defense agency under the direction, authority and control of the Assistant Secretary of Defense (International Security Affairs). Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

2. Defense Institute of Security Assistance Management (DISAM). DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. According to DoD Directive 2140.5, the mission of DISAM is as follows: "The DISAM shall be a centralized DoD activity for the education and training of authorized U.S. and foreign personnel engaged in security assistance activities." In addition to resident courses, DISAM prepares a valuable publication entitled "The Management of Security Assistance," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, Ohio.

3. The Military Departments.

[4] Annual Foreign Operations Appropriations Acts.

a. Secretaries of the Military Departments. Advise the Secretary of Defense on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

b. Department of the Army. Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Materiel Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SATFA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTT) to conduct the requested training commonly referred to as a "train and equip" mission.

c. Department of the Navy. The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

d. Department of the Air Force. Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

e. Security Assistance Organizations (SAO). The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Unified Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

D. Security Assistance.

1. **DoS's Security Assistance Programs Under the Foreign Assistance Act (FAA) and Arms Export Control Act (AECA).**

a. The DoD Dictionary of Military and Related Terms, Joint Publication 1-02, defines Security Assistance as: "Groups of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act (AECA) of 1976,[5] as amended, and other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, loan, credit or cash sales in furtherance of national policies and objectives." The Policy of the program is threefold:

(1) Promote peace and security through effective self-help and mutual aid;

(2) Improve the ability of friendly countries and international organizations to deter, and defeat, aggression; and

(3) Create an environment of security and stability in developing countries.

b. Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Except as authorized under the acquisition and cross-servicing authority, the Arms Export Control Act regulates transfers of defense items and services to foreign countries. 22 U.S.C. §§ 2751-96. *See also* DoD 7000.14-R (Financial Management Regulation), vol. 15, Security Assistance Policy and Procedures (Aug. 9, 2004). Providing

[5] 22 U.S.C. §§ 2751 et seq.. The purpose of the AECA was to consolidate and revise foreign relations legislation related to reimbursable military support. It is the statutory basis for the conduct of Foreign Military Sales and Foreign Military Construction Sales, and establishes certain export licensing controls on Direct Commercial Sales of defense articles and services.

weapons, training, supplies, and other services to foreign countries must be done under the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws.

c. **The Arms Export Control Act**.

(1) The Arms Export Control Act permits DoD and commercial sources to provide defense articles and defense services to foreign countries to enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. DoS appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DoD appropriations) to foreign countries, DoS first obtains them from the DoD. The Defense Security Cooperation Agency (DSCA) manages the process of procuring and transferring defense articles and services to foreign countries for the DoS. This process provides for reimbursement of applicable DoD accounts from DoS funds or from funds received from sales agreements directly with the foreign countries.

(2) The reimbursement standards for defense articles and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are: not less than [the] actual value [of the article], or the estimated cost of replacement of the article, including the contract or production costs less any depreciation in the value of such article.

(3) For defense services the reimbursement standards are: [f]ull cost to the U.S. government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] additional costs incurred by the U.S. Government in furnishing such assistance.

(4) Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DoD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

2. For the sake of discussion, the **DoS's Security Assistance programs are organized into three categories: appropriated programs, non-appropriated programs, and special programs**.

a. **Appropriated Programs.** These are programs for which Congress appropriates money in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. *See* FY 05 Foreign Operations Appropriations Act (FOAA).[6]

(1) **Foreign Military Financing Program (FMFP)**. Concept. Eligible governments or international organizations receive Congressionally-appropriated grants and loans to help them purchase U.S. defense articles, services, or training (or design and construction services) through Foreign Military Sales (FMS)/Foreign Military Construction (FMC) or Direct Commercial Sales (DCS) channels. Statutory Authority. AECA §§ 23-24 (22 U.S.C. §§ 2763-64). Governing Regulations. Security Assistance Management Manual (SAMM) (DoD 5105.38-M). Administering Agency. DoD, with provisions for consultation with DoS and Department of Treasury.

(2) **International Military Education and Training (IMET) Program**. Concept. Provide training to foreign military personnel in the United States, in overseas U.S. military facilities, and in participating countries on a grant basis. The "Expanded IMET Program" focuses on civilian control of the military, military justice systems, codes of conduct, and protection of human rights, and permits training of influential non-Ministry of Defense civilian personnel. Statutory Authority. FAA §§ 541-45 (22 U.S.C. §§ 2347-47d). Governing Regulations. AR 12-15; SAMM, at ch. 10. Administering Agency. DoD. The Defense Security Cooperation Agency (DSCA)

[6] Consolidated Appropriations Act, 2005, div. D, Pub. L. No. 108-447, (2005). (hereinafter, 2005 FOAA). The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (HR 4818) was consolidated as Division D of the final enacted Consolidated Appropriations Act for FY 05.

has overall responsibility within DoD for implementing IMET. The Defense Institute for International Studies (DIILS), located at the Naval Justice School, coordinates all IMETs involving legal education or training.

(3) **Economic Support Fund (ESF)**. Concept. In special economic, political or security circumstances, make loans or grants to eligible foreign countries for a variety of economic purposes, including balance of payments support, infrastructure and other capital and technical assistance development projects, and health, education, agriculture, and family planning. Statutory Authority. FAA §§ 531-35 (22 U.S.C. §§ 2346-46d). Administering Agency. DoS, to be exercised in cooperation with the Director of the United States International Development Cooperation Agency and USAID.

(4) **Peacekeeping Operations (PKO)**. Concept. Provide funds for the Multinational Force and Observers (MFO) implementing the 1979 Egyptian-Israeli peace treaty, for the U.S. contribution to the United Nations Force in Cyprus (UNFICYP), and for other international peace enforcement and peacekeeping operations. Statutory Authority. FAA §§ 551-53 (22 U.S.C. §§ 2348-48c). Administering Agency: DoS.

(5) **Non-proliferation, Antiterrorism, De-Mining, and Related Programs (NADR)**. Concept. Captures several related programs in a single account, including non-proliferation and disarmament fund, which is designed to halt the proliferation of nuclear, biological, and chemical weapons; destroy or neutralize existing weapons of mass destruction; and limit the spread of advanced conventional weapons. 22 U.S.C. §§ 5851-61, codifying the Freedom for Russia and Emerging Eurasian Democracies and Open Markets [FREEDOM] Support Act of 1992, Pub. L. No. 102-511, §§ 501-511, 106 Stat. 3320 (1992).

(6) **International Atomic Energy Agency support**. The IAEA is primarily responsible for overseeing safeguard agreements concluded under the Non-Proliferation Treaty of 1968. FAA § 301 (22 U.S.C. § 2221).

(7) **Korean Peninsula Energy Development Organization (KEDO)**. Established in 1994 to arrange for financing and construction of light water nuclear reactors for North Korea, with the shipment of fuel oil in the interim, in exchange for North Korea's dismantling of its nuclear weapons program. FAA § 301 (22 U.S.C. § 2221).

(8) **Anti-Terrorism Assistance**, which provides specialized training to foreign governments to help increase their capability and readiness to deal with terrorists and terrorist incidents. FAA § 571-(22 U.S.C. § 2349aa).

(9) **Global Humanitarian De-Mining**, which provides funds that are devoted to identifying and clearing land mines. AECA § 23 (22 U.S.C. § 2763).

(10) **Refugee Assistance (22 U.S.C. 2601c)**. DoS is responsible for refugee support in the Migration and Refugee Assistance Act of 1962. *See* FY05 FOAA ($770 million appropriated to DoS to support refugee operations, the International Organization for Migration (IOM), the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR); as well as $30 million of no-year money to support the Emergency Refugee and Migration Assistance Fund). (*See also* provisions of the Refugee Assistance Act of 1980, § 501 (8 U.S.C. § 1522 note), authorizing the President to direct other agencies to support Cuban and Haitian Refugees on a reimbursable or non-reimbursable basis).

b. **Non-Appropriated Programs**. These programs authorize certain activities. Because they do not require Congressional funding, there is no annual appropriation for their implementation.

(1) **Foreign Military Sales (FMS) Program and Foreign Military Construction (FMC) Program**. Concept. Eligible recipient governments or international organizations purchase defense articles, services, or training (or design and construction services), often using grants provided under the Foreign Military Financing program discussed above, from the United States government on the basis of formal contracts or agreements (normally documented on a Letter of Offer and Acceptance (LOA) and managed by DoD as "cases") with contractors who are part of DoD's network of defense industry contractors. The articles or services come either

from DoD stocks or new procurements under DoD-managed contracts. FMS cases must be managed at no cost to the U.S. Government. Recipient countries are charged an administrative surcharge to pay for the costs of administering the program, including most personnel costs. Statutory Authority. AECA §§ 2122 (22 U.S.C. §§ 2761-62) (authorizing FMS); AECA § 29 (22 U.S.C. § 2769) (authorizing FMC). Governing Regulations. SAMM. Administering Agency. DoD.

(2) **Direct Commercial Sales (DCS)**. Concept. Eligible governments or international organizations purchase defense articles or services under a DoS-issued license directly from U.S. industry, often using grants provided under the Foreign Military Financing program discussed above. No management of the sale by DoD occurs (unlike FMS). Statutory Authority. AECA § 38 (22 U.S.C. § 2778). Governing Regulations. 22 C.F.R. §§ 120-30 (comprising chapter entitled "International Traffic in Arms Regulations (ITAR)). The SAMM, at 202-6 - 202-14, includes a reprint of the United States Munitions List (USML). The USML is a list containing items considered "defense articles" and "defense services" pursuant to AECA §§ 38 and 47(7) that are therefore strictly controlled. Administering Agency. DoS, Department of Commerce, Department of Treasury.

(3) **Reciprocal Training, 22 U.S.C. § 2770a**. When conducted in accordance with a bilateral international agreement, U.S. military units may train and support foreign units (*e.g.*, at combat training centers) provided that the foreign country reciprocates with equivalent value training within one year.[7] If the foreign country has not reciprocated, they are expected to pay for the value of the training received. Because Congress does not appropriate funds specifically for reciprocal training, the U.S. military unit conducting the training will incur the cost or it may want to seek funding from other sources such as the Combatant Commander Initiative Funds.

c. **Special Programs**.

(1) **Excess Defense Articles (EDA) Provisions.** Concept. EDA are essentially defense articles no longer needed by the U.S. armed forces.[8] There is a general preference to provide EDA to friendly countries whenever possible rather than having them procure new items. Only countries that are justified in the annual Congressional Presentation Document (CPD) by the DoS or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires 15 days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA is transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items original value. The sale/grant of EDA must include an agreement for the recipient country to pay the costs of packing, crating, handling, and transportation (PCH&T). On an exceptional basis, the President may provide transportation (on a space available basis), in accordance with FAA § 516(e) (22 U.S.C. § 2321j(e)). Finally, the annual value of EDA is limited to $425 million of the articles' current value. FAA § 516(g)(1) (22 U.S.C. § 2321j(g)(1)). Governing Regulations. SAMM, chapter 11. Administering Agency. DSCA.

(2) **Emergency Presidential Drawdown Authorities**.

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[7] The bilateral international agreement must be negotiated and concluded by an element of DoD with appropriate authority as outlined in DoD Directive 5530.3, International Agreements, 11 June 1987, Ch1, 18 Feb 1991, and AR 550-51, International Agreements, 15 April 1998. The bilateral international agreement is not merely a handshake and a promise between two commanders, one U.S. and one foreign military, neither of whom may have the requisite authority legally to bind their respective governments.

[8] Section 644(g), FAA, defines Excess Defense Articles:

"Excess defense articles means the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors) owned by the United States government, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act [Section 9(b), P.L. 102-583]

The National Defense Authorization Act of FY 1993 amended Title 10, U.S.C. by adding a new Section 2562 which restricts the sale or transfer of excess construction or fire equipment. Such transfers or military sales may only occur if either of the following conditions apply: 1) no department/agency of the U.S. government (excluding DoD), and no State, and no other person or entity eligible to receive excess or surplus property submits a request for such equipment from the Defense Reutilization and Marketing Service (DRMS) during the period for which such a request may be accepted by the DRMS; or 2) the President determines that such a transfer is necessary in order to respond to an emergency for which the equipment is especially suited [Section 4304(a), P.L. 102-484].

(i) **What it is**. The emergency presidential drawdown authority of 22 U.S.C. § 2318 authorizes the President to direct DoD support for various DoS efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)).[9] In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k). The DoS writes the appropriate presidential determination. After signature by the President, DoD, specifically DSCA, administers the drawdown, up to the specified dollar value. The Presidential drawdown authority merely provides authority to spend previously appropriated money, Service O&M, to provide training, services, packing, crating, and handling services, transportation services, repair/refurbishment services, and the provision of spare parts or support services from the Working Capital Fund operated by the Defense Logistics Agency activities. There is no specific appropriation tied to the initiation of a Presidential drawdown, although a dollar figure is always given. Because the drawdown is not a planned or budgeted activity, there is an immediate impact on the Service's O&M budget when executing a drawdown. Bottom line: a drawdown is only useful to a military unit if it is already established and provides a possible authority, not funding, if no other more specific authority exists, for a unit to conduct a particular mission with its own funds.[10]

• Since 1992, over 50 drawdowns have been executed at a value of $1.5 billion. Drawdowns appear to be an easy solution to achieve a DoS mission with DoD articles and services, but drawdowns often take time to establish and execute, anywhere from two to four months or ten to twelve depending on the mission.

• A drawdown of DoD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. Recently, DoD has been reimbursed twice under the Emergency Wartime Supplemental Appropriation Act, 2003, 16 April 03, for an Iraq Drawdown of $97 million (DoD has been reimbursed $63.5 million) and an Afghanistan drawdown of $300 million (to provide defense articles and services, counternarcotics, crime control and police training services, military education and training and other support through 30 Sep 2006) (thus far, DoD has been reimbursed $165million).[11] When no subsequent appropriation is forthcoming, a Presidential drawdown is another example of an authorized augmentation of accounts (DoD appropriations are used to achieve an objective ordinarily funded from DoS appropriations).

(ii) **What is it NOT**. A drawdown is not authority to give away excess defense articles and services. As noted above, there are no funds appropriated specifically for a drawdown unless appropriated after the fact and tied to reimbursement. In 1995, the DoD General Counsel issued an opinion that DoD may not enter into any new contracts under the drawdown authority for either defense articles or services. The one exception is that contracts for commercial airlift and sealift transportation may be entered into if the cost is less than the cost of military transport.[12] This exception was formalized in Section 576, P.L. 105-118 that amended the FAA to provide

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[9] The Defense Security Cooperation Agency has proponency for Drawdowns. *See* http://www.dsca.osd.mil/. For a good "nuts & bolts" guide to drawdowns see, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA) Drawdown of Defense Articles and Services, (June 2004), available at: http://www.dsca.mil/programs/biz-ops/drawdown_handbook_2004b.pdf.

[10] For example, the Foreign Operations Appropriations Act, 2003, authorizes the drawdown of commodities and services up to $30 million for the U.N. War Crimes Tribunal with regard to the former Yugoslavia or such other tribunals (ICTR) as the U.N. Security Council may establish or authorize to deal with violations of the law of war. In Bosnia and Kosovo when the Chief Prosecutor for ICTY, Mrs. Carla Della Ponte, comes into the area of operations and requires support, this drawdown would authorize such support. Frequently, units have provided her with special protection as part of their training because she falls into a category of personnel authorized such special protection, a person of special interest. JAs need to be aware that any costs accrued beyond the costs of normal training could be accounted for under this drawdown and reimbursement might subsequently be forthcoming . As yet, DoS has not received an appropriation from Congress to reimburse such costs even though the drawdown authority has been renewed annually for a number of years.

[11] Under this authority, DoD is able to reimburse the Services for a drawdown of $165M under the Afghanistan Freedom Support Act (AFSA) of 2002 (4 Dec. 2002). This drawdown was necessary to cover the requirements for training and equipping the Afghan National Army (ANA)($150M); to build a bridge between Tajikistan and Afghanistan ($8M); and to assist Jordan in its operations in Afghanistan ($7M). Under AFSA, the military services reduced their training and exercise accounts as a means for DoD to complete these missions. The $165M are used to restore funds drawn down from the Services' FY2003 Operation and Maintenance appropriations in the amount of $35M from the Army, $75M from the Navy, and $55M from the Air Force. Similarly, this Supplemental also authorized the reimbursement funding from DoD to the Services for $63.5M under the Iraq Liberation Act of 1998. This support was necessary to meet the requirements to train and equip the Free Iraqi Forces (FIF). The $63.5M is used to restore funds drawn from the Services' FY2003 O&M in the amount of $29M from the Army, $11M from the Navy, $23.4M from the Air Force, and $0.1M from the FY2003 Operation and Maintenance, Defense-Wide appropriations (required for the Special Operations Command).

[12] Memorandum, Office of the General Counsel, Department of Defense, Subject: Contracting for Commercial Airlift and Sealift Pursuant to a Presidential Drawdown of Transportation Services, 4 Dec. 1995.

the authority for the use of commercial transportation and related services acquired by contract for the drawdown if the contracted services cost less than the cost of using U.S. government transportation assets. As of November 2002, DoD General Counsel modified its earlier opinion to allow for the contracting of services as well as commercial transport, but not articles, under the drawdown authority.[13]

(iii) **Types of Presidential Emergency Drawdown Authorities**.

• Military Emergencies: FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1)). The President may draw down defense articles, defense services, and military education and training if an unforeseen emergency arises that requires immediate military assistance that cannot be met under any other section. The authority is limited to $100 million per fiscal year.

• Other Emergencies: FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2)). If the President determines that it is in the United States' national interest to drawdown to support counternarcotics, disaster relief, refugee and migration assistance, antiterrorism, and non-proliferation assistance, he may draw down articles and services from the inventory and resources of any agency of the U.S. and military education and training from DoD. Certain restrictions apply. The aggregate value of articles, services, and military education and training cannot exceed $200 million in any fiscal year. Not more than $75M may be provided from the inventory and resources of DoD. Not more than $75 million may be provided for international narcotics control assistance. Not more than $15M may be provided to support DoD-sponsored humanitarian projects associated with POW/MIA recovery operations in Vietnam, Cambodia, and Laos.

• Peacekeeping Emergencies: FAA § 552(c) (22 U.S.C. § 2348a(c)). With respect to peacekeeping operations, the President has emergency authority to transfer funds if he determines that, as the result of an unforeseen emergency, it is in our national interests to provide assistance. He may also direct the drawdown of commodities and services from the inventory and resources of any U.S. Government agency of an aggregate value not to exceed $25 million in any fiscal year.

NOTE: Recipients for all three types of drawdown can be either a foreign country or an international organization.

3. **Prohibitions and Potential Legal Issues**.

a. **General**. Congress appropriates funds for Security Assistance in its annual Foreign Operations, Export Financing, and Related Programs Appropriations Act. Security Assistance funds are often referred to as "Title 22 money" after the authorizing U.S. Code provisions. DoD receives its money under a separate appropriation ("Title 10 money"). General principles of fiscal law restrict the expenditure of funds to the purpose for which those funds were appropriated. **Critical for JAs to remember: activities, programs and operations which are essentially Security Assistance, and which should therefore be funded with DoS Title 22 money, may not be funded with DoD Title 10 money.**

b. **Unauthorized Training of Foreign Personnel.** Congressional Purpose. Training of foreign military forces should occur through the IMET, an FMS case, or some other specifically authorized program. Security Assistance programs that furnish training must not be supported by appropriations intended to be used for the operation and maintenance of United States forces. (Remember the 1984 and 1986 GAO Honduras opinions.) The law defines "training" very broadly: "[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces." AECA § 47(5) (22 U.S.C. § 2794(5). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though "training exercises" is omitted.

[13] Memorandum, Office of the General Counsel, Department of Defense, Subject: Implementation of "Drawdown" Authority Under Iraq Liberation Act, 21 Nov. 2002. Although the subject line appears to focus on drawdown authority under one act, the language of the memorandum makes it clear that contracting for services applies to all Presidential Drawdowns not just those relating to Iraq.

(1) **Not all activity that appears to be training of foreign personnel is considered to be security assistance training**.

(i) Providing foreign armed forces with **interoperability, safety, and familiarization information** is not security assistance training. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations." *The Honorable Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpublished GAO opinion).

(ii) Additionally, if **the primary purpose of the exercise or activity is to train U.S. troops**, then the activity is not considered to be security assistance training of foreign forces. "In our view, a U.S. military training exercise does not constitute "security assistance: as long as (1) the benefit to the host government is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the exercise is to train U.S. troops*." Gen. Fred F. Woerner,* B-230214, Oct. 27, 1988.

(2) The FAA also contains **special prohibitions concerning the training of foreign police**. No FAA funds "shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad." FAA § 660(a) (22 U.S.C. § 2420(a)). **Exemptions**. FAA § 660(b) exempts from the general prohibition "assistance, including training, relating to sanction monitoring and enforcement," and "assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy."

(3) The general prohibition also does not apply to longtime democracies with no standing armed forces and with good human rights records.

c. **Unauthorized Defense Services of a Combatant Nature. "**Personnel performing defense services sold under this chapter may not perform any duties of a combatant nature, including any duties related to training and advising that may engage United States personnel in combat activities, outside the United States in connection with the performance of those defense services." AECA § 21(c)(1) (22 U.S.C. §2761(c)(1)).

d. **Eligibility Problems With the Foreign Country.**

(1) Consistently violate internationally-recognized human rights. FAA § 502(B) and FY 05 FOAA, § 551.

(2) Expropriation of Property Owned by U.S. Citizens. FAA § 620(e)(1) (22 U.S.C. § 2370(e)(1)).

(3) Involvement in Nuclear Transactions. FAA § 669-70 (22 U.S.C. § 2429-29a).

(4) In Arrears on Debts. FAA § 620(q) (22 U.S.C. § 2370(q)).

(5) Support to Prevent International Terrorism. FAA § 620A (22 U.S.C. § 2371) and AECA § 40 (22 U.S.C. § 2780).

(6) Transfer, Failing to Secure, or Use of Defense Articles, Services, or Training for Unintended Purposes. FAA § 505 (22 U.S.C. § 2314). (End Use Agreement)

(7) Has by military coup or decree deposed its duly elected Head of Government. FY 05 FOAA, § 508. Pursuant to Section 1(b)(1) of the Pakistan Waiver Act, P.L. 107-57, 27 Oct. 2001, Presidential Determination 2003-16, dated 14 March 2003, waives this prohibition for furnishing assistance to Pakistan.

(8) Congress requires special notification to Congress before obligating funds for Liberia, Zimbabwe, Serbia, Sudan, Pakistan, or Cambodia. FY 05 FOAA, § 520.

e. **Restriction on providing Military Assistance to States who have signed and ratified the Rome Statute of the International Criminal Court (ICC)**. The American Service Members Protection Act, 2002, § 2007, prohibits "military assistance" to states that are a party to the Rome Statute.[14] This provision became effective July 2003. The ASPA defines "military assistance" exclusively in terms of Title 22 authorities such as foreign military financing (FMF), IMET, and EDA. It does not apply to Title 10 authorities such as Combatant Commander Initiative Funds, Humanitarian and Civic Assistance funds, and Latin American Cooperation funds. Applicability. This prohibition does not apply to the government of a NATO member country; a non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, Bahrain, and New Zealand); and Taiwan. All others who are a party to the Rome Statute must either enter into an Article 98 agreement[15] or be given a National Interest Waiver by the President.

f. **Weapons-Specific Prohibitions**.

(1) Tank Ammunition. Sales of depleted uranium tank rounds are limited to countries that are NATO members, Taiwan, and countries designated as a major non-NATO ally. FAA, § 620G (22 U.S.C. § 2378a).

(2) Stingers. Congress continued the annual provision prohibiting making available Stingers to any country bordering the Persian Gulf (Iraq, Iran, Kuwait, Saudi Arabia, Qatar, United Arab Emirates, and Oman), except Bahrain. Bahrain may buy Stingers on a one-for-one replacement basis. FOAA 2000 § 705.

(3) For the restrictions on certain transfers see the SAMM, in particular for white phosphorus munitions, *see* para. C.4.3.7, for napalm, *see* para. C.4.4.4, and for RCA *see* para. C.4.4.5.

4. **Interagency Funding Issues**.

a. The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below)). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

b. By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

c. DoS reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential drawdown authority (22 U.S.C. § 2318), reimbursement to any government agency supporting DoS objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

[a]n amount equal to the value [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, plus expenses arising from or incident to operations under [Part II] [salaries of military personnel and certain other costs excepted].

[14] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Title II, § 2001-2015, P.L. 107-206, 2 August 2002 [Hereinafter American Service Members Protection Act].

[15] An Article 98 agreement is an agreement entered into pursuant to Article 98 of the Rome Statute of the ICC. Article 98 provides that the ICC may not proceed with a request for surrender [of an individual(s)], which would require the requested state to act inconsistently with its obligations under international agreements.

d. This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act. Pursuant to FAA § 632 (22 U.S.C. § 2392) DoS may provide funds to other executive departments to assist DoS in accomplishing its assigned missions (usually implemented through "632 Agreements" between DoD and DoS). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

e. In addition to the above, Congress has authorized another form of DoD contribution to the DoS's counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its "additional costs" in providing the services (*i.e.*, its costs over and above its normal operating costs), not its full costs.

f. The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other Federal agency supports DoS foreign assistance (not military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

g. Note the specific reference to DoD services in support of DoS counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 2120 (1998) (section 1021 of the Defense Authorization Act for FY 04, Pub. L. No. 108-136, extends DoD's counterdrug authority through 30 September 2006).

h. The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General), ch. 7 (International Narcotics Control Program). When DoD provides services in support of DoS counterdrug activities, the regulation permits "no cost" recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

i. Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. *See, e.g.,* 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

5. **Summary of Security Assistance**. The key point to remember about Security Assistance is that the DoS provides the overall policy guidance even though U.S. military agencies administer many of the individual programs. Security assistance is a foreign policy tool employed by the Administration and Congress, and thus programs, funding, and eligible recipients will frequently change as political realities change. Security Assistance must be funded with DoS's Annual Foreign Operations Appropriations commonly referred to as Title 22 money. Finally, as is evident from the discussion above, the U.S. military plays a role in administering the various security assistance programs. The baseline rule is that although DoD may be authorized to conduct an activity under Title 22, it may not use Title 10 money to fund its role in these programs. If, however, it does expend Title 10 funds or resources, then it should seek reimbursement from DoS under the appropriate authority in the form of Title 22 money or the annual Foreign Operations Appropriations Act (FOAA).

E. **Development Assistance Programs.**

1. This section will provide a very brief description of the DoS's Developmental Assistance programs, as depicted in the second pillar of the diagram at Section VIII.B.1.a.3. Although the U.S. military has a relatively minor and infrequent role in most of these programs, it plays a key role in the provision of Foreign Disaster Relief. Again, the legal authority to conduct these programs emanates from the FAA, funding flows from the DoS's annual Foreign Operations Appropriations, and the policy supervision also rests with DoS.

2. **General.** The DoS supervises and conducts a large number of activities authorized by Part I of the FAA designed to strengthen the socio-economic well being of the civilian population. There are too many activities to list them all, but a partial list of the primary programs will provide the reader with a flavor for the wide range of objectives envisioned by this legislation. The activities under the Development Assistance program include, but are not limited to:

Agriculture	Trade credit	Overseas Private Investment Corp.
Rural development	Endangered species	Disadvantaged children in Asia
Nutrition	Shale development	Famine prevention
Population control & health	Tropical forests	Disaster Assistance
Education	Human rights	International Narcotics Control
Energy	Housing guarantees	Loan guarantees
Cooperatives	Central America Democracy, Peace & Development	
Integration of women into the economy	Protection of the environment & natural resources	
Economic & Democratic Development for the Independent States of the Former Soviet Union		

3. **Military Role**. The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the **Office for Foreign Disaster Assistance (OFDA)**. OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other Federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

4. **Foreign Disaster Relief In Support of OFDA**.

a. The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster relief.[16] The current statutory authority continuing this tradition is located in the Foreign Assistance Act.[17] For foreign disaster assistance, Congress granted the President fiscal authority to furnish relief aid to any country "on such terms

[16] This appropriation was for $50,000 to aid Venezuelan earthquake victims in 1812. Over 25,000 people died in that tragedy. Act of 8 May 1812, 12th Cong., 1st Sess., ch. 79, 2 Stat. 730.

[17] FAA § 492 (10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See* Foreign Operations Appropriations Act for FY 03, Pub. L. 108-7, (2003) ($230M appropriated to DoS for international disaster assistance under this authority).

Additionally, Congressional policy is espoused in 22 U.S.C. § 2292(a) as follows:

> The Congress, recognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade disasters is an important expression of the humanitarian concern and tradition of the people of the United States, affirms the willingness of the United States to provide assistance for the relief, and rehabilitation of people and countries affected by such disasters.

and conditions as he may determine."[18] The President's primary implementing tool in carrying out this mandate is USAID.

b. The USAID is the primary response agency for the U.S. government to any international disaster.[19] Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.[20] The Administrator of the USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.[21] In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.[22] Normally these funds support NGO and PVO efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military possesses unique skills and equipment to accomplish the needed assistance. In these situations, DoS, through OFDA, may ask for DoD assistance. Funding in these cases comes from the International Disaster Assistance fund controlled by OFDA. DoD is supposed to receive full reimbursement from OFDA when they make such a request. DoD access to these funds to perform Disaster Assistance missions occurs pursuant to § 632 FAA.

c. Natural or manmade disasters have increasingly become the basis for military operations. The object of foreign disaster relief operations is to provide sufficient food, water, clothing, shelter, medical care, and other life support to victims of natural and man-made disasters. To accomplish this objective, the military may be tasked to establish a secure operational environment and begin to support PVO/NGO supply, medical, and transportation systems. Recent examples of such operations include SEA ANGEL in Bangladesh, SUPPORT HOPE in Rwanda, RESTORE HOPE in Somalia, PROVIDE COMFORT in Northern Iraq, and STRONG SUPPORT in response to Hurricane Mitch in Central America.[23] OPERATION STRONG SUPPORT was funded not only with International Disaster Assistance fund dollars (Title 22) but also with Overseas Humanitarian, Disaster, and Civic Aid appropriations (OHDACA) dollars (FY99 DoD expended $50 million in OHDACA on this operation. Title 22 funds are often used conjunctively with Title 10 funds. The specific nature and limitations of Title 10 authorities and funds will be discussed below. In addition, foreign disaster relief operations may coexist with other operations, and arise in unexpected contexts. For example, in September 1994, the U.S. Ambassador to Haiti declared that the "corruption and repression in the *de facto* regime" had caused a man-made state of disaster in that country. The declaration opened the door for additional relief, rehabilitation, and reconstruction assistance (and funds) for Haiti.

5. **Summary**. As reflected in the foregoing discussion, DoD's role is one of support to DoS in accomplishing its foreign assistance goals. There are however, specific Title 10 authorities that allow DoD to execute certain programs and operations independently, though still complementing and supplementing DoS's global humanitarian assistance efforts. These specific authorities are detailed in the next sections.

IX. DOD'S MILITARY COOPERATIVE PROGRAMS AND HUMANITARIAN OPERATIONS

A. In addition to its substantial support role in the administration of Security Assistance programs, the U.S. military executes several cooperative programs and humanitarian operations funded with Title 10 DoD O&M money. The majority of these cooperative programs and humanitarian operations are statutorily based. The cooperative programs are organized into three categories: training foreign forces, logistic support to foreign forces, and contacts and cooperation with foreign militaries. The humanitarian operations include Humanitarian and Civic Assistance (HCA), Humanitarian DeMining (HD), Transportation of Relief Supplies, Provision of Excess Defense Equipment, and Humanitarian Assistance (HA). Both types of authorities are depicted on the diagram below.

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[18] 22 U.S.C. § 2292(b).

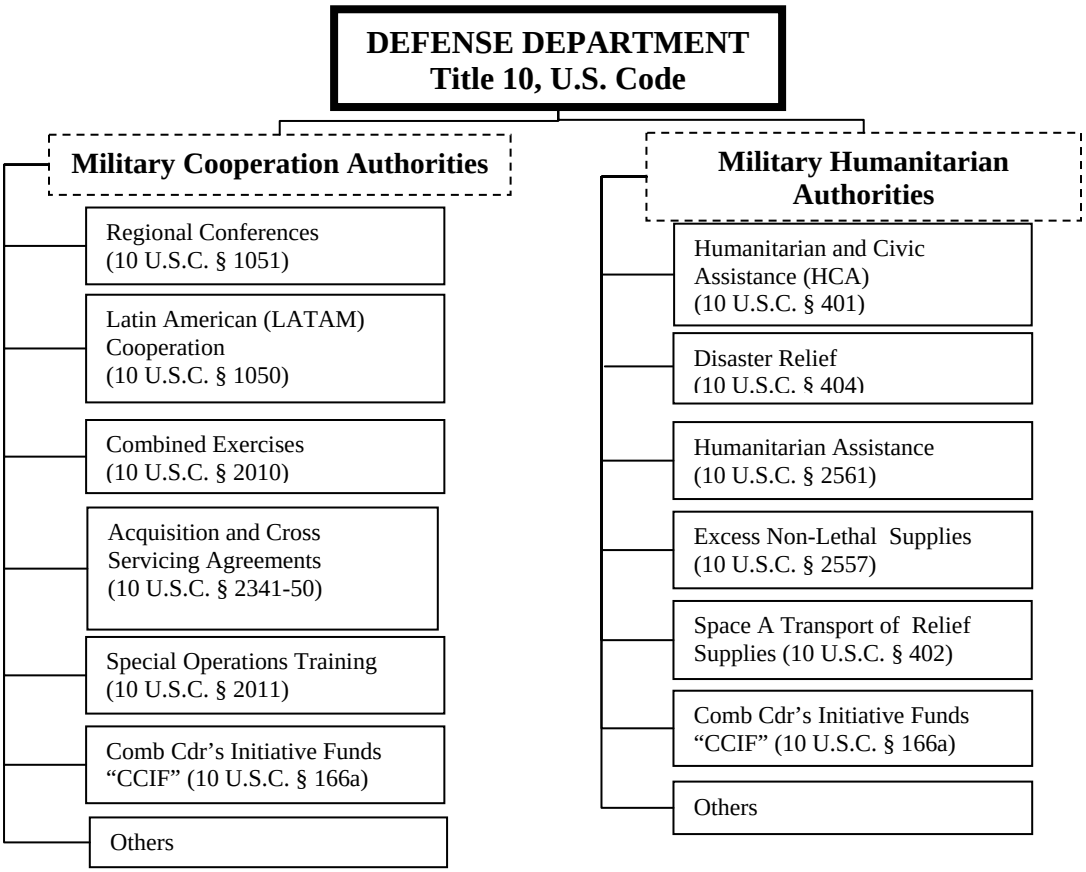
[19] E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[20] FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

[21] *See* FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 F.R. 36949 (July 14, 1995). *See also* E.O. 12163, section 1-102(a)(1), 44 F.R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).

[22] *See generally*, E.O. 12966, 60 F.R. 36949 (July 14, 1995).

[23] Operations Sea Angel and Strong Support were traditional Foreign Disaster Relief Operations where the effected Governments requested U.S. assistance. Operations Support Hope, Restore Hope, Provide Comfort presented additional challenges because they were largely non-permissive in nature. In the cases of the last three examples, the United Nations essentially conducted a humanitarian intervention.



B. **Military Cooperative Programs**.

1. **Training Foreign Forces**.

a. As noted in Part VIII, the primary authority for training foreign forces is Title 22 as part of Security Assistance. There exist, however, additional statutory authorities under Title 10 and GAO interpretations allowing for training to be authorized and funded using O&M rather than using DoS appropriations. The two GAO interpretation exceptions are interoperability, safety, and familiarization training and training that primarily benefits the U.S. and provides foreign forces only an incidental benefit. These have been addressed previously in Section VIII.D. 3.b.1) of this Chapter.

b. The specific Title 10 provisions authorizing **training of foreign forces** are:

(1) Special Operations Forces, 10 U.S.C. § 2011 Provided that the training primarily benefits U.S. special operations forces, SOF may train, and train with, friendly foreign forces. U.S. forces may pay incremental expenses incurred by friendly developing countries as the direct result of such training. U.S. Special Operations Command has interpreted this authority to mean that the training must occur overseas.

(2) Combatant Commander Initiative Funds, 10 U.S.C. § 166a. The Chairman, JCS, provides funds to Combatant Commanders for a wide variety of purposes, including military education and training of foreign forces. No more than $10 million may be expended for this training per fiscal year worldwide. This fund, referred to as CCIF money, operates essentially as a contingency fund that permits the Combatant Commander to pay for initiatives. The CCIF money provides the Combatant Commander with flexibility to cover expenses that, for one reason or another, cannot be covered by the designated pot of money.

(3) Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §2341-2350. Training services may be provided using an ACSA. *See* 10 U.S.C. § 2350 for the definition of logistical support, supplies, and services, and paragraph 2 below for additional information on ACSAs.

(4) Emergency and Extraordinary Expense (EEE) Funds, 10 U.S.C. § 127. *See* Part VII.B.2 above for additional information on the use of EEE funds for training foreign forces.

c. **"Train & Equip" authority**. In section 1107 of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003), Congress authorized SECDEF, with the concurrence of SECSTATE, to use $150 million O&M to train and equip the new Iraqi Armed Force and the Afghan National Army. This authority is in addition to any other authority to provide assistance to foreign nations. Section 9006 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 continued this authority for FY 05 with increased authority to use $500 million of Defense-Wide O&M.

2. **Logistics Support for Foreign Militaries**.

a. **Acquisition and Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341–2350**. DoD has authority to acquire logistic support without resort to commercial contracting procedures and to transfer support to foreign militaries outside of the AECA. Under the statutes, after consulting with DoS, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. Foreign militaries often prefer this method of obtaining logistical support because they do not have to pay the administrative fees associated with sales under the Foreign Military Sales program, and it is quicker and often more flexible.

(1) The present ACSA authorities have their origins in the North Atlantic Treaty Organization (NATO) Mutual Support Act of 1979 (NMSA), which was originally enacted on 4 August 1980 (P.L. 96-323). Before passage of this legislation, U.S. forces acquired and transferred logistic support through highly formalized means. Logistic support, supplies and services were acquired from foreign governments through commercial contracting methods and application of U.S. domestic procurement laws and regulations (*i.e.*, offshore procurement agreements). Allied requests for logistic support from U.S. forces could only be processed as Foreign Military Sales (FMS) cases under the Arms Export Control Act (AECA). Reductions in the numbers of U.S. logistics forces stationed in the European theater caused greater reliance on host nation support. Allied government sovereignty concerns resulted in refusal to accept U.S. commercial contracting methods. Application of FMS procedures to allied requests for routine logistic support caused additional friction. Finally, DoD turned to Congress for legislative relief.

(2) Through passage of the NMSA, Congress granted DoD a special, simplified authority to acquire logistic support, supplies, and services without the need to resort to traditional commercial contracting procedures. In addition, the NMSA also authorized DoD, after consultation with the DoS, to enter into cross-servicing agreements with our NATO allies and with NATO subsidiary body organizations for the reciprocal provision of logistic support. In so doing, Congress granted DoD a second acquisition authority as well as the authority to transfer logistic support outside of AECA channels.

b. **"Lift & Sustain" Authority**. In section 1106 of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003), Congress gives DoD authority to use the O&M appropriated for FY 2004 to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq. As a result, DoD need not rely on an ACSA to provide assistance to its allies, but has great flexibility in mission accomplishment to use its O&M funds. Section 9009 of the FY05 Defense Appropriations Act, Pub. L. No. 108-287 (2004) continued this authority for FY 05 and also included operations in Afghanistan.

c. **"Key Cooperating Nations" Authority**. Through the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. 108-106 (6 November 2003),

Congress provided $1.15 billion of Defense-Wide O&M to remain available until expended to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and the global war on terrorism.

3. **Military Contact and Cooperative Authorities**.

a. Congress has provided ample authority for bilateral and multilateral contacts with foreign militaries. These authorities are the heart of the current Partnership for Peace (PFP) program, as well as many other joint training, military-to-military contact, and exercise programs. These authorities fund U.S. costs of preparing and conducting combined training, as well as paying selected incremental costs for our training partners. All of these activities are funded with O&M funds.

b. **Bilateral and Multilateral Contacts**.

(1) **10 U.S.C. § 1050 (Latin American Cooperation - LATAM COOP)** authorizes service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

(2) **10 U.S.C. § 1051 (Bilateral or Regional Cooperation Programs)** provides similar authority to pay travel expenses and other costs associated with attendance at bilateral or regional conferences, seminars, or similar meetings if the SECDEF deems attendance in the U.S. national security interest. The National Defense Authorization Act, 2003, § 1212, amends this provision by adding authority to pay the travel expenses of defense personnel, from a developing country that is participating in the PFP program of the North Atlantic Treaty Organization (NATO), to the territory of any country participating in the PFP program or the territory of any NATO member country. *See also* DoD Authorization Act for FY 97, Pub. L. No. 104-201 (110 Stat. 3009), § 1065 and §8121 (1996), authorizing support for participation in Marshall Center activities for European and Eurasian nations, and attendance by foreign military officers and civilians at seminars and similar studies at the Asia-Pacific Center for Security Studies, respectively.

(3) **10 U.S.C. § 168 (Military-to-Military Contacts)** authorizes the SECDEF to engage in military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

(4) **10 U.S.C. § 1051a (Administrative support and services for coalition liaison officers)** provides DoD authority to provide administrative services and support for the performance of duties by a foreign liaison officer involved in a coalition while the liaison officer is assigned temporarily to the headquarters of a combatant command, component command, or subordinate operational command of the United States in connection with the planning for or conduct of a coalition operation.[24] Under this authority DoD may also pay the travel, subsistence, and personal expenses directly necessary to carry out the duties of a liaison officer of a developing country in connection with assignment to the headquarters of a combatant command, if the assignment is requested by the combatant commander. Based on a determination of SECDEF, these services and support may be provided either with or without reimbursement.

(5) **5 U.S.C. § 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412 (Travel)**. Travel to conferences and site visits is supported with a variety of statutory authorities.[25] U.S. civilian employees and military personnel are authorized to expend U.S. funds under the Joint Travel Regulations (JTR), para. C.6000.3; individuals performing services for the government may also be funded.

c. **Bilateral and Multilateral Exercise Programs**.

[24] Section 1211 of The National Defense Authorization Act, 2003, adding § 169, defines "administrative services and support" as "base or installation support services, office space, utilities, copying services, fire and police protection, and computer support." It also defines "coalition" as "an adhoc arrangement between or among the United States and one or more other nations for common action."

[25] 31 U.S.C. § 1345 requires a specific appropriation for travel, transportation, and subsistence expenses for meetings. *See also* National Highway Traffic Safety Admin.—Travel and Lodging Expenses, 62 Comp. Gen. 531 (1983).

(1) **10 U.S.C. § 2010 (Developing Country Exercise Program - DCCEP)** authorizes payment of incremental expenses of a developing country incurred during bilateral or multilateral exercises if it enhances U.S. security interests and is essential to achieving the fundamental objectives of the exercise.

(2) **10 U.S.C. § 2011 (Special Operations Force - SOF Training)** permits the SOCOM Commander or Combatant Commander to fund the expenses of training all Special Operations Forces [Civil Affairs, PSYOP, Special Forces, SEALs, Rangers, Special Boat Units, AFSOC, etc.] training with the armed forces or security forces of a friendly developing foreign country, including incremental expenses.

(3) **Incremental expenses** incurred as the result of these training authorities include rations, fuel, training aids, ammunition, and transportation; they do not include pay, allowances, and other normal costs for the country's personnel.

d. **Regional Cooperation Programs, Education and Training**.

(1) **Partnership for Peace** activities are authorized by existing authorities, outlined above.[26]

(2) **Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU).** This legislation funds various programs to dismantle the FSU's arsenal of weapons of mass destruction;[27] Congress appropriated $450.8 million for the CTR program in FY 2004.[28] These are three-year funds available until 30 September 2006.

C. **DoD's Military Humanitarian Operations**.

1. **Predicate: The 1984 and 1986 GAO Honduras Opinions and their impact on the evolution of Military Humanitarian Operations**.

a. Historically, DoD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority.[29] In 1984, the Comptroller General opined that DoD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. § 1301(a)) and other well-established fiscal principles. *See* To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras I). The Comptroller General concluded that DoD had used its O&M accounts improperly to fund foreign aid and security assistance. The Honduras I opinion applied a three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

> First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made . . . . Second, the expenditure must not be prohibited by law . . . . Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. Honduras I at 427-28.

b. This test is used to analyze fiscal law problems. Applying it to the military construction, training, and HCA operations conducted in Honduras in 1983, the Comptroller General disapproved certain O&M expenditures that were reasonably related to DoD purposes (that is, expenditures which achieved "readiness and operational benefit" for DoD), but which failed the other tests. The Comptroller General determined that certain O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives that were within the scope of more specific appropriations, such as

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[26] *See* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

[27] National Defense Authorization Act for FY 99, Pub. L. No. 105-261, 112 Stat. 2161, § 1301 (1998). *But see* Defense Authorization Act, § 1303 (prohibiting use of funds for peacekeeping or peacekeeping-related activity, housing, environmental restoration, or job training).

[28] Defense Appropriations Act for FY 2004, Pub. L. No. 108-87, 117 Stat. 1054 (2003).

[29] In the early 1980's, the U.S. government tasked DoD to provide military assistance to the Nicaraguan "contra" rebels who were committed to overthrow the Sandanistas (then ruling Communist party of Nicaragua). The U.S. military conducted operations out of Soto Cano Airbase in Honduras. As part of its mission, U.S. forces conducted joint and combined exercises with the Honduran Army. During these exercises the U.S. military conducted a wide range of construction, and humanitarian and civic assistance programs using O&M funds.

appropriations to DoS for foreign aid under the FAA or the Arms Export Control Act (violating the third prong). *See* The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) (Honduras II) at 27-30. The Comptroller General did recognize, however, that limited HCA was permissible with O&M funds. *See* Honduras II at 38. *See also* 10 U.S.C. § 401c(4) and DoD Dir. 2205.2, Humanitarian and Civic Assistance. This controversy spurred the development of separate legislative authority (discussed below) for the conduct of humanitarian activities by the military.

c. GAO concluded its opinion by "recommending to DoD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M funded exercise." DoD wasted no time in acting on GAO's recommendation. Within a few years following the 1984 Honduras Opinion, DoD sought and obtained several legislative authorizations permitting the use of DoD O&M funds to conduct limited operations and activities that benefit foreign nations. These operations and activities are very similar to those conducted by DoS agencies pursuant to the FAA. The key to these DoD authorized activities is that they must complement, supplement, and support the primary FAA programs, but should not, duplicate, or frustrate the FAA programs. The right column of the diagram at the beginning of Section IX lists some of the principal DoD legislative authorities that permit the U.S. military to conduct operations that complement DoS's Security Assistance and Development Assistance programs.

d. To ensure that the DoD operations and activities complement but do not duplicate or frustrate DoS foreign assistance and development assistance programs, the DoD authorizing legislation usually:

(1) Limits the funding levels to relatively small amounts;

(2) Requires coordination and approval by the DoS and U.S. embassy in the target nation; and

(3) Requires reporting of activities to Congress.

e. Before discussing the military programs, however, we should understand the policy underlying these programs, and possible trade-offs involved. Why is DoD involved in what looks like DoS business that is not directly related to national security? Many civilian policy makers and military commanders argue that there exists a nexus between providing basic human needs and national security. They believe that: (1) nations that fail to provide basic human needs often fail to maintain the support of their citizens; (2) insurgencies thrive in areas where the government can not or will not provide basic services; and (3) the provision of humanitarian assistance by the U.S. forces helps teach the proper role of the military in a democracy to developing countries. U.S. forces providing humanitarian services to the civilian population demonstrate to host nation forces that the military serves the civilian population.

f. The U.S. military also benefits from its participation in humanitarian activities. Such activities include: (1) provide a method for introducing U.S. forces in areas where they may not otherwise have access; (2) reduce the number of permanent forward deployed troops; and (3) provide training opportunities that are impossible to duplicate in the U.S.

2. **Title 10 U.S. Code, Legislative Authorities: Military Humanitarian Operations**.

a. **Humanitarian and Civic Assistance (HCA), 10 U.S.C. § 401**. The enactment of HCA legislation is a direct Congressional response to the 1984 GAO Honduras Opinion. Congress recognized the benefits of permitting U.S. armed forces to conduct limited HCA projects.

(1) The typical sequence for the initiation and execution of HCA projects is as follows. The embassy country teams and the service components of the regional Combatant Commanders nominate HCA projects for their respective countries to the Combatant Commander having responsibility for that country. That commander, usually at an annual HCA conference, then develops an order of merit list. Proposed HCA projects that fall below the funding "cut line" may not be completed because the funds were unavailable. HCA funding comes directly from the Services to the Combatant Commanders. The money is Service O&M funds that are fenced off by the Services

specifically for HCA. Each service is responsible for funding a particular Combatant Command (*e.g.*, Army: SOUTHCOM & EUCOM).

(2) Congress imposed certain restrictions on the conduct of HCA by the U.S. military. The DoS must approve all HCA projects. The security interests of both the U.S. and the receiving nation must be promoted. The mission must serve the basic economic and social needs of the people involved. HCA must complement but not duplicate any other form of social or economic assistance. The aid may not be provided to any individual, group or organization engaged in military or paramilitary activity. HCA must be conducted in conjunction with an exercise to include CJCS-directed, or a deployment for training (DFT), or an ongoing military operation. The HCA activity being conducted must promote specific operational readiness skills of the individual soldier.

(3) HCA funds are used to pay for expenses incurred as a "direct result" of the HCA activity. These expenses include the following: consumable materials, equipment leasing, supplies, and necessary services. Pursuant to DoDD 2205.2, *Humanitarian and Civic Assistance*, expenses as a "direct result" do not include costs associated with the military operations, *which likely would have been incurred whether or not the HCA was provided*, such as: transportation, military personnel, petroleum oil and lubricants, and repair of U.S. government equipment. HCA expenditures are reported each year to Congress by country, type and amount.

(4) The statute lists four kinds of activities that may be performed as traditional HCA:

(i) Medical, dental, and veterinary care provided in rural or underserved areas of a country.

(ii) Construction of rudimentary surface transportation systems.

(iii) Well drilling and construction of basic sanitation facilities.

(iv) Rudimentary construction and repair of public facilities.

(5) Legal issues that typically arise during the conduct of HCA projects include the following:

(i) Furnishing and equipping newly constructed buildings. Engineer units that complete a construction project desire to leave behind a "turn-key" facility that is ready to be used. Blackboards, in practice, have been considered a fixture and therefore would be authorized under this authority. HCA authority, however, does not authorize the purchase of medical equipment for installing in a new building designed to be a clinic, nor does it authorize the purchase of school desks, or other movable personal property, and books to be placed in a building designed to be a schoolhouse. The JA could suggest alternative funding sources for the desired equipment. For example, USAID may have funds available to equip the new building. DoD may have excess non-lethal equipment it can transfer through USAID to the host nation. Private and non-governmental organizations often have funds or equipment available that could be used to furnish the building. Finally, U.S. military personnel, on a truly volunteer basis and on their personal time, could use scrap pieces of lumber to build desks, blackboards, etc., to furnish a building.

(ii) Donation of unused materials, supplies and minor equipment. Sometime the U.S. military unit may wish to leave behind small tools or excess construction materials or medical supplies that were not consumed during the HCA project. As a general rule, the U.S. military cannot leave tools, supplies or materials behind with the local authorities. The problem with leaving these items behind with the local authorities is that once the unit leaves, there is no longer a nexus to training. Leaving these items behind (in significant quantities) amounts to foreign aid that should be funded with DoS Title 22 funds under the FAA. If there were no way to economically or practically save the items for a follow-on HCA exercise, then they could be declared excess and disposed of through the normal procedures. Ultimately, USAID would take possession of the items and distribute them to the local authorities. Remember: USAID is authorized to provide Developmental Assistance to foreign governments; military units are not and thus cannot provide the items directly to the local authorities.

(iii) Promotion of operational readiness skills. The issue that arises more frequently than any other is whether or not the specific operational readiness skills of the members of the unit participating are being

promoted by the HCA project. The promotion of these skills is a statutory requirement. The JA should ask: are the skills being utilized during the HCA project within the unit's METL? What is the ratio of U.S. participation relative to foreign military participation? Are they relying too heavily on foreign civilian contractor participation? DoDD 2205.2 provides additional guidance in this regard.

(6) ***De minimis* HCA**. Sometimes, during the course of a combined exercise in a foreign country, an unexpected opportunity to perform minor humanitarian and civic assistance arises. For example, during the conduct of an infantry platoon level combined exercise, a young girl in the local village near the exercise site may require minor medical attention to set a broken bone. 10 U.S.C. § 401(c)(2) authorizes the military commander to permit the treatment of the child by the platoon's assigned doctor or medic. The costs associated with this treatment would likely be minimal and would be paid for from the unit's O&M funds. This kind of activity is referred to as *de minimis* HCA. Only HCA amounting to "minimal expenditures" may be provided. Although minimal expenditures are not defined in the statutes, DoD Directive 2205.2 provides guidance in determining what minimal means.[30] Remember that *de minimis* HCA activities must be one of the four activities statutorily allowed as an HCA activity. (*e.g.* medical/dental care or rudimentary construction). Additionally, all of the other restrictions for the conduct of HCA mentioned above apply to *de minimis* HCA as well.

b. **De-Mining. Title 10 U.S. Code § 401(e)(5)**.

(1) The HCA statute also provides for activities relating to the furnishing of education, training, and technical assistance with respect to the detection and clearance of landmines. This activity is contained within the HCA statute, but it is not restricted by the rules pertaining to traditional HCA. In fact, many of the rules pertaining to de-mining are completely contrary to those pertaining to traditional HCA. Thus, for purposes of our discussion, it is more logically consistent to categorize § 401 de-mining as a separate kind of activity rather than associating it with traditional HCA. Additionally, § 401 de-mining is funded differently than HCA. It is funded with OHDACA, not fenced or budgeted O&M.

(2) Rules. U.S. forces are not to engage in the physical detection, lifting, or destroying of landmines (unless it is part of a concurrent military operation other than HCA). Unlike traditional HCA activities, assistance with regard to de-mining must be provided to military or armed forces. Unlike HCA, equipment, services and supplies acquired for de-mining, including non-lethal, individual, or small-team landmine clearing equipment or supplies may be transferred to the foreign country (limit of $5M value worldwide annually). Additionally, U.S. forces training de-mining can enter into contracts for interpreters, supplies and other items necessary to execute this mission.

c. **Humanitarian Assistance, 10 U.S.C. § 2561**. Authorizes use of funds for transportation of humanitarian relief and for other humanitarian purposes worldwide. This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations, *see* below.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the more specific HCA authority should be used. 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters, natural or man-made and it allows contracts if necessary for mission execution. HCA generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants. Section 2561 does not require the promotion of operational readiness skills of the U.S. military participants. Also, unlike HCA, which must be conducted in conjunction with an exercise or on-going military operation, humanitarian assistance (HA) can be conducted as a stand-alone project. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 2561 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment (such as an oil spill) if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport such supplies. JAs must obtain and review for

[30] See "Definitions" where DoD explains that a commander is to use reasonable judgment in light of the overall cost of the operation in which the expenditure is incurred, taking into account the amount of time involved and considering congressional intent. DoD then gives two examples of De Minimis. (1) A unit's doctor examining villagers for a few hours, administering several shots and issuing some medicine but not a deployment of a medical team providing mass inoculations. (2) Opening an access road through trees and underbrush for several hundred yards, but not asphalting a roadway.

implementation purposes the DoD message on current guidance for Humanitarian Assistance Activities. Each fiscal year the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) issue a joint message providing policy guidance for humanitarian assistance activities. *See* Message, R251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA)Activities and Humanitarian and Civic Assistance (HCA).

d. **Excess non-lethal supplies: humanitarian relief, 10 U.S.C. § 2557**. Sometimes the provision of troops and transportation alone is not enough. This statute allows DoD to provide excess non-lethal supplies for humanitarian relief. Excess property may include any property except: real property, weapons, ammunition, and any other equipment or material that is designed to inflict bodily harm or death. Excess property is that property which is in the Defense Reutilization and Marketing Office (DRMO) channels. If the required property is in the excess property inventory, it is transferred to USAID, as agent for the DoS, for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2561, above.

e. **Transportation of humanitarian relief supplies to foreign countries, 10 U.S.C. § 402**. This statute authorizes the transportation of non-governmental, privately donated relief supplies. It is administered by DoS and DSCA. The relief supplies are transported on a space-available basis under certain conditions: (1) supplies must be in useable condition; (2) supplies must be suitable for humanitarian purposes, and (3) adequate arrangements must have been made for their distribution in country. Once in-country, the supplies may be distributed by any U.S. government agency, a foreign government agency, an international organization, or a private nonprofit organization. DoD may not use this authority to supply a military or paramilitary group. In light of the fact that the supplies are transported on a space-available basis, no separate funding is necessary. However, reports must be submitted to Congress. Administrative details for the use of the § 402 authority may be found at: *http://www.dentonfunded.com/*. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 402 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport supplies for such purposes.

f. **Foreign Disaster Assistance, 10 U.S.C. § 404**. In consultation with the Secretary of State, USAID is the lead agency for foreign disaster relief, with the primary source of funding being the International Disaster Assistance Funds, 22 U.S.C. § 2292-2292k. DoD has limited authority to engage in disaster assistance. The President may direct DoD through the Secretary of Defense to respond to manmade or natural disasters. The President delegated disaster relief authority to SECDEF with concurrence of DoS (except in emergency situations). *See* EO 12966, 60 Fed. Reg. 36949 (15 July 1995). DoD's participation must be necessary to "save lives." Assistance may include: transportation, supplies, services, and equipment. The President must notify Congress within 48 hours after the commencement of the assistance. The notice must include: The manmade or natural disaster involved, the threat to human lives presented, the U.S. military personnel and material resources involved or expected to be involved, disaster relief being provided by other nations or organizations, and the expected duration of the assistance activities. Section 312 of the FY 2004 National Defense Authorization Act amends 10 U.S.C. § 404 to allow SECDEF to use this authority to provide transportation services in response to man-made or natural disasters to prevent serious harm to the environment even when human lives are not at risk, so long as other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport supplies for such purposes. 10 U.S.C. § 404 is rarely used because there is no implementing guidance. As a result, DoD relies on the broad authority of 10 U.S.C. § 2561 to conduct the foreign disaster assistance contemplated under 10 U.S.C. § 404.

g. **Combatant Commander (formerly CINC) Initiative Funds, 10 U.S.C. § 166a**. This authority provides the combatant commanders with a great deal of legal flexibility to conduct humanitarian operations and activities. The statute specifically lists "Humanitarian and civil assistance" as an authorized activity.

3. **Funding sources for Military Humanitarian Operations**:

a. **Fenced or Budgeted O&M** used to pay for 10 U.S.C. §401 HCA activities other than de-mining. *De minimus* HCA activities are funded generally with the unit's O&M funds. Specifically, the unit will use resources that it has available (*i.e.* use of the military personnel; supplies and other materials).

b. **Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA)**. In an attempt to bring some order to the scattered authorities and funding sources for military humanitarian programs, Congress began appropriating funds into an account labeled "Overseas Humanitarian, Disaster, and Civic Assistance" (OHDACA) account. OHDACA funds are generally used to pay for operations and activities which are authorized by Title 10 § 2561, Humanitarian Assistance, and De-Mining under 10 U.S.C. § 401. Even though the law specifically lists HCA and Disaster Relief as appropriate uses for the fund, the actual practice is that OHDACA funds are used to pay for § 2561 authorized activities.

4. **New Paradigm in Humanitarian Assistance – The Commander's Emergency Response Program (CERP).**

a. **Background.** The CERP was developed in June 2003 by the Coalition Provisional Authority in Iraq to enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility.[31] The CERP was originally funded exclusively with seized assets. The CERP was also funded with Iraqi oil sales proceeds and donor nation contributions referred to as the Development Fund for Iraq or DFI. Approval authority for CERP expenditures was pushed down to the division and brigade-level commanders, who were given specific spending ceilings. Thousands of projects were undertaken in the first few months of the program, and the streamlined payment procedures of the CERP made such humanitarian projects swift and efficient. *See* CJTF-7 FRAGO 89.

b. **Reconstruction assistance** is the "building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq." *See* FRAGO 89. Examples of reconstruction assistance noted in FRAGO 89 are: financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

c. **Appropriated Funds for CERP.** Because of the turnover of governing functions to the interim Iraqi government and the disestablishment of the CPA in June 2004, coalition forces no longer have access to seized Iraqi assets nor the Development Fund for Iraq (DFI). Continuing the reported benefits of the CERP projects, Congress has recently provided appropriated funds for the CERP.

(1) Sec. 1110, FY04 Emergency Supplemental Appropriations Act (ESAA) provided $180 million of appropriated funds.

(2) Sec. 9007, FY05 DoD Appropriations Act provides $300 million of appropriated funds.

d. **CERP Appropriated Funds Purpose**. "[Enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people." Congress also exempted the CERP from normal statutory fiscal and contracting controls by allowing the appropriated funds to "be used, notwithstanding any other provision of law." *See*, FY04 ESAA and the FY05 DoD Appropriations Act. *See also*, MNF-I FRAGO 087, 291401DJUN04 for command guidance on the use of appropriated funded CERP.

e. **MNF-I FRAGO 087.** To regulate this fairly liberal appropriation from Congress, the U.S. military commands within Iraq and Afghanistan have provided controls and other procedures to ensure proper use of CERP funds. Multi-National Force – Iraq (MNF-I) is currently the military command over all U.S. and coalition forces within Iraq and has issued a series of orders concerning proper use and accountability of CERP funds. Fragmentary Order 087 (FRAGO 087) is the most recent primary order issued by MNF-I that regulates the CERP "to allow

[31] *See* Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., February 2004 (advocating continued disciplined use of appropriated CERP funds by commanders to pursue urgent humanitarian relief and reconstruction efforts in Iraq and Afghanistan).

commanders to respond to urgent humanitarian relief and reconstruction assistance by executing programs that will assist the Iraqi people."

(1) CERP Projects - Paragraph 3.B. of FRAGO 087 lists fairly broad examples of projects, to include: "water and sanitation infrastructure; food production and distribution; agriculture; electrical power generation and distribution; healthcare; education; telecommunications; economic, financial, management improvements; transportation; rule of law and governance; irrigation; civic clean-up activities; civic support vehicles; [and] repair to civic or cultural facilities."

(2) Battle Damage Claims - CERP appropriated funds may be used to repair collateral damage to individual homes and businesses caused by combat operations that are not otherwise compensable because of combat exclusions under the Foreign Claims Act. *See* 3.B.1.B.2 of MNF-I FRAGO 318.

(3) Solatia Like Payments – CERP appropriated funds may be used for condolence payments as a means of expressing sympathy and are not considered as an admission of fault by the U.S. Government. Maximum payments are $2500 for a death, $1000 for a serious injury, and $500 for property loss or damage. *See* 3.B.1.B.3 of MNF-I FRAGO 318.

(4) Rewards and Weapons Buy-Back Programs – CERP appropriated funds may not be used to pay rewards or fund any type of weapon buy-back program. *See* 3.C.8.D. and 3.C.8.G. of MNF-I FRAGO 087. However, reward payments are authorized under 10 USC §127b and implemented in Iraq through CJTF-7 FRAGO 368 to CJTF-7 OPORD 03-036.

f. **MNF-I FRAGO 087 Accountability Controls**. To provide accountability for CERP funded projects, FRAGO 087 establishes certain controls. For example, FRAGO 087 provides:

(1) Commanders are not authorized to deliberately over-pay for projects.

(2) Document every effort to verify reasonableness of project costs.

(3) For projects over $10,000, the brigade or division commander should ensure that three bids are obtained from vendors. If you are precluded from obtaining three quotes or bids based on compelling circumstances, this must be documented.

(4) Project limits are $200,000 for Brigade/O-6 Commanders and $500,000 for Division Commanders. However, subsequent revisions have deleted the $200,000 Brigade Commander limit and allow Division Commanders discretion in establishing Brigade Commander limits within the Division Commander overall limits.

g. **New DoD Guidance for CERP**. The new guidance primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures. Specific CERP projects were not changed in any great detail from prior guidance established through FRAGOs. *See* Memorandum, Tina W. Jonas, Under Secretary of Defense Comptroller, to Secretaries of the Military Departments, et al, subject: Commander's Emergency Response Program (CERP) Guidance (18 Feb 2005). This guidance will be incorporated into the Financial Management Regulation DoD 7000.14-R.

h. **JA Focus**. The CERPs in Iraq and Afghanistan are administered using detailed accounting and reporting procedures that are distinct from normal financial management and government acquisition regulation. JAs should proactively review FRAGOs and DoD guidance for proper CERP uses and controls.

X. SUPPORTING MULTILATERAL PEACE AND HUMANITARIAN OPERATIONS

A. U.S. support to other nations or international organizations during multilateral operations is authorized by a number of provisions of the Foreign Assistance Act, Title 10 U.S.C., the Arms Export Control Act, and other statutes. With respect to UN support, Presidential Decision Directive (PDD)-25 emphasizes the necessity for

reducing costs for UN peace operations, reforming UN management of peace operations, and improving U.S. management and funding of peace operations (including increased cooperation between the Legislative and Executive branches). The United States generally will seek either direct reimbursement for the provision of goods and services to other nations or international organizations, or credit against a UN assessment. In rare circumstances, the United States may contribute goods, services, and funds on a nonreimbursable basis. DoS is responsible for oversight and management of Chapter VI operations where U.S. combat units are not participating, as well as Chapter VI operations in which U.S. forces are participating and all Chapter VII operations.

B. **Authorities**. Much like Disaster Relief and Refugee Support, DoS has the lead in supporting other nations engaged in Peacekeeping Operations (PKO). *See* FAA § 551 (22 U.S.C. § 2348). *See also* Foreign Operations Appropriations Act for FY 2003 (additional appropriations), P.L. 108-7, (2003) (DoS provided $114.25M to support PKO). Other than the authorities mentioned below, DoD is prohibited from providing direct or indirect contributions to the UN for peacekeeping operations or to pay UN arrearages under 10 U.S.C. § 405. In addition, under § 8064 of the Defense Appropriations Act for FY 2005, P. L. 108-287 (2004), DoD also must notify Congress 15 days before transferring to another nation or international organization any defense articles or services in connection with peace operations under Chapter VI or VII of the UN Charter or any other international peacekeeping, peace enforcement, or humanitarian assistance operation. This requirement affects all of the authorities described in this section, or the preceding section, unless they already require congressional notification. In practice, DoD provides blanket notification for all PKO or Humanitarian operations where goods or services are being transferred to other nations or international organizations.

C. **UN Participation Act (UNPA) § 7 (22 U.S.C. § 287d-1)** authorizes support to the UN, upon its request, to assist in the peaceful settlement of disputes (not involving the employment of armed forces under Chapter VII). Includes detail of up to 1000 military personnel as observers, guards, or any other non-combatant capacity, and furnishing of facilities, services, or other assistance and loan of U.S. supplies and equipment. The statute generally requires reimbursement, except when it has been waived in the national interest (authority delegated to DoS by EO 10206, 16 Fed. Reg. 529 (1951)).

D. **FAA § 506(a)(1&2) (22 U.S.C. § 2318(a)(1&2)) (Emergency Drawdown)**. With the limitations discussed above, these drawdowns also may be used to support multilateral peace and humanitarian operations.

E. **FAA § 552(c)(2) (22 U.S.C. § 2348(c)(2)) (PKO Drawdown)**. A FAA § 552 drawdown, of up to $25 million per year from any Federal agency, may be used to support peace operations in "unforeseen emergencies, when deemed important to the national interest."

F. **Detailing of Personnel**. FAA § 627 (22 U.S.C. § 2387) authorizes detailing of officers or employees to foreign governments, when the President determines it furthers the purposes of the FAA. FAA § 628 (22 U.S.C. § 2388) allows similar details to international organizations, to serve on their staff or to provide technical, scientific, or professional advice or services. Per § 630 of the FAA (22 U.S.C. § 2390), detailed individuals may not take an oath of allegiance or accept compensation. 22 U.S.C. § 1451 authorizes the Director of the U.S. Information Agency (USIA) to assign U.S. employees to provide scientific, technical, or professional advice to other countries. This does not authorize details related to the organization, training, operations, development, or combat equipment of a country's armed forces. 10 U.S.C. § 712 authorizes the President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America. All of this detailing of personnel may be on a reimbursable or a non-reimbursable basis.

G. **FAA § 516 (22 U.S.C. § 2321j) (Excess Defense Articles)**. Defense articles no longer needed may be made available to support any country for which receipt of grant aid was authorized in the Congressional Presentations Document (CPD). Priority is still accorded to NATO and southern-flank allies. There is an aggregate ceiling of $425 million per year, beginning in FY 96; cost is determined using the depreciated value of the article. No space available transportation is authorized, normally; but DoD may pay packing, crating, handling and transportation costs to PFP eligible nations under the Support to Eastern European Democracy (SEED) Act of 1989. *See* Defense Security Assistance and Improvements Act, § 105, Pub. L. No. 104-164 (1996).

H. **Reimbursable Support**. The primary authority for reimbursable support is FAA § 607 (22 U.S.C. § 2357), which authorizes any Federal agency to provide commodities and services to friendly countries and international

organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under the terms of a "607 Agreement" with the nation or organization, detailing the procedures for obtaining such support. DoS must authorize DoD to negotiate these agreements. FAA § 632, authorizing transfer of funds from DoS and the Economy Act are also means of providing reimbursable DoD support. Finally, Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 21-22 & 61-62 (22 U.S.C. §§ 2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations. Reimbursement usually includes administrative overhead under Defense Security Cooperation Agency (DSCA) procedures.

I. **10 U.S.C. §§ 2341-2350 (Acquisition and Cross-Servicing Agreements (ACSAs))**. As noted previously, these statutory provisions allow DoD to acquire logistic support without resort to commercial contracting or FMS procedures and to transfer support outside of the AECA. After consultation with DoS, DoD may execute agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international or regional organizations for the reciprocal provision of logistic support, supplies, and services. Acquisition and transfers are on a cash reimbursement, replacement-in-kind, or exchange-of-equal-value basis. Many ACSAs already exist. Check CLAMO website for latest list or consult your MACOM or Combatant Command legal advisors for details.

J. **Restriction on U.S. participation in U.N. Peacekeeping Operations**. The American Servicemembers Protection Act (ASPA), 2002, § 2005, requires that the President certify to Congress that the U.N. Security Council has permanently exempted U.S. forces from the jurisdiction of the International Criminal Court (ICC) or that each of the other Participating States has provided adequate assurances that U.S. personnel would not be subject to the jurisdiction of the ICC, prior to the deployment of U.S. forces on such operations. Article 16 of the Rome Statute of the ICC authorizes the U.N. Security Council acting under Chapter VII of the U.N. Charter to defer any investigation or prosecution by the ICC in a particular case for a twelve-month period. This deferral may be renewed every twelve months. On 12 June 2003, pursuant to a request by the United States, the U.N. Security Council issued UNSCR 1487 exempting personnel of states, such as the U.S., who are not a party to the Rome Statute from jurisdiction of the ICC. As a result, U.S. personnel participating in U.N. Peacekeeping Operations had been exempt from the ICC's jurisdiction. However, in 2004, the deferral was not renewed. For additional information, *see* Chapter 16 regarding Article 98 agreements and the ICC.

XI. COMBATING TERRORISM

A. **Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001**.

1. Section 1512 of the FY 2002 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.

2. Funds may be used for the following activities:

a. Procurement and Maintenance of physical security equipment;

b. Improvement of physical security sites;

c. Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces ands security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.

3. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

B. **Authority to offer and pay rewards to individuals assisting in combating terrorism. 10 USC § 127b**. The National Defense Authorization Act of 2003, § 1065, amended Title 10 U.S.C. to add § 127b. This statute

provides that the SECDEF may pay a monetary amount, or provide a payment-in-kind, to a person as a reward for providing the U.S. Government with information or nonlethal assistance that is beneficial to: 1) an operation or activity of the armed forces conducted outside the United States against international terrorism; or 2) force protection of the armed forces. The amount of the award may not exceed $200,000. The authority of the SECDEF may be delegated only: 1) to the Deputy Secretary of Defense and an Under Secretary of Defense, without further redelegation; and 2) to a combatant commander, but only for a reward in an amount or with a value not to exceed $50,000. The combatant commander who has been delegated this authority may further delegate that authority, but only for a reward in an amount or with a value not in excess of $2,500.[32] Persons not eligible to receive such a reward under this authority are: (1) a citizen of the United States; (2) an officer or employee of the United States; or (3) an employee of a contractor of the United States.

XII. FUNDING OPERATIONS IN IRAQ

A. **Historical Use of Iraqi Funds as an Occupying Power**.

1. Operations in Iraq are authorized and funded under several different and evolving authorities. Unlike other operations that would rely primarily on the statutory provisions outlined throughout the Chapter above, operations in Iraq are unique and are authorized under international law (treaty law, supreme law of the land) that had previously allowed for the use of vested and seized properties (discussed below) to fund the reconstruction and humanitarian assistance. Under the Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 1907, [hereinafter Hague Regulations], Article 42, territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. Thus, the commencement of a military occupation is de facto standard – invasion + firm control. In the current situation depending on which documents one refers to, different dates have been offered as to the commencement of the occupation by coalition forces in Iraq. On 16 April 03, the CENTCOM Commander issued Instructions to the Citizens of Iraq. These clearly spelled out the controls that he was implementing, as the Coalition Force Commander, to include notice of sanction if these controls were violated. In the EO 13315 issued by President Bush on 28 August 03, Section 4(d), defines the "former Iraqi regime" to mean the Saddam Hussein regime that governed Iraq until on or about 1 May 03. The key is that at some point in time, arguably 16 April 03, the coalition forces representing the Occupying Powers began to have certain obligations, to wit authority, under the Hague Regulations and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) [hereinafter GCIV]. Initially, to meet these international obligations units had the authority to use their O&M. As the situation quickly evolved, other more specific authorities such as the Commanders' Emergency Response Program were developed. *See* section XIII below.

2. The Hague Regulations, Article 55, and GCIV, Article 53, require that the Occupying Power administer immovable public property of the state and the proceeds or products derived from it. In order to implement this obligation, among others, the President, as Commander-in-Chief, in a White House memorandum, dated 30 April 03, confirmed SECDEF's authority to exercise all powers, consistent with the Law of War, related to the seizure, sale, administration, or use of state- or regime-owned assets, funds, or realizable securities in Iraq. Property seized, sold, or administered under this Presidential delegation of authority are to be used only to assist the Iraqi people and support the reconstruction.

3. On 29 May 03, SECDEF further delegated this authority to the Coalition Provisional Authority (CPA). This memorandum of delegation also addressed vested property authority of which was to pass from the Department of Treasury to the CPA. Vested property is Iraqi assets confiscated by the President under the International Emergency Economic Powers Act (50 U.S.C. § 1601 *et seq.*) within the United States. By 20 May 03, $1.7 billion had been confiscated under this authority and $91.6M had been delegated to the SECDEF to assist the Iraqi people and assist in the reconstruction. Additionally, on 29 May 03, the SECDEF approved the initial Procedures for Administering, Using and Accounting for Vested and Seized Iraqi Property. Pursuant to these Procedures the Secretary of the Army was given the responsibility, as the Executive Agent, for receiving, transporting, safeguarding, disbursing, and accounting for the vested and seized property. Seized property is defined in the

[32] Note: The combatant commander to whom this authority has been delegated may further delegate that authority to this Deputy Commander for a reward in an amount or with a value not to exceed $50,000.

memorandum as state- or regime-owned property in Iraq to be held and administered on behalf of, and for the benefit of, the Iraqi people, to assist the Iraqi people and to support the reconstruction of Iraq.

4. On 16 May 03, the CPA issued CPA Regulation #1[33] detailing his authority. Subsequently, on 10 June 03, the CPA issued CPA Regulation #2 establishing the Development Fund for Iraq (DFI). This fund is held by the Central Bank of Iraq but administered by the CPA. The DFI is comprised of 95% of proceeds from export sales of petroleum, petroleum products, natural gas from Iraq, and any returned Iraqi assets provided by U.N. member states. The DFI is to be used for the humanitarian needs of the Iraqi people; for the economic reconstruction and repair of Iraq's infrastructure; for the continued disarmament of Iraq; for the costs of Iraqi's civil administration and for other purposes the Administrator, the CPA, determines to be for the benefit of the people of Iraq.

B. **Unique Statutory Reconstruction Authorities for Iraq**.

1. **Natural Resources Risk Remediation Fund**. Through the Emergency Wartime Supplemental Appropriations Act , 2003, Pub. L. No. 108-11 (Apr. 16, 2003), Congress authorized $489.3 million to be transferred into the Natural Resources Risk Remediation Fund from the newly established Iraq Freedom Fund. These funds were made available to be used in and around Iraq for emergency fire fighting, repair of damage to oil facilities and related infrastructure, and preserve distribution capability. These transferred funds remain available until expended.

2. **Iraq Relief and Reconstruction Fund**. Through the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004, Pub. L. No. 108-106 (2003), Congress appropriated $18.65B for the Iraq Relief and Reconstruction Fund (IRRF). Congress specifically directed for what purpose the money is to be used, giving the President some authority to reallocate funds. The IRRF dollars are apportioned between the Coalition Provisional Authority (CPA) (until it dissolved 30 June 2004 and now is the resp[onsibility of the Project Contract Office), DoS, Department of Health and Human Services, DoD, Department of Treasury, and USAID. These funds remain available until 30 September 2006.

XIII. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA[34]

A. **Definitions.** "Military Construction," as defined in 10 U.S.C. § 2801 and AR 415-15, includes any construction, development, conversion, or extension carried out with respect to a military installation. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. Pursuant to the Emergency Wartime Supplemental Appropriations Act for the Fiscal Year 2003, P.L. 108-11, 117 Stat. 587 (2003), this definition has been further expanded to include "any building, structure, or other improvement to real property to be used by the Armed Forces, *regardless of whether such use is anticipated to be temporary or of longer duration*." "Military Construction Project" includes all work "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility." *See* The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds). As defined further in AR 415-15, Glossary, sec. II, Terms, construction includes the following:

1. The erection, installation, or assembly of a new facility;

2. Change to a real property facility, such as addition, expansion, or extension of the facility, which adds to its overall external dimensions;

3. Acquisition of an "existing facility," or work on an existing facility that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility and includes installation of equipment made a part of the existing facility;

[33] All of the current CPA Regulations, Orders, and Memoranda are located at http://www.cpa-iraq.org.

[34] *See* James Dorn, *Combat and Contingency Related Construction: "Upon this Point a Page of History is Worth a Volume of Logic,"* ARMY LAW., January 2005, at 178.

4. Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility;

5. Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair;

6. Relocation of a facility from one installation to another and from one site to another;

7. Costs of installed equipment made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements; and

8. Relocatable buildings in some circumstances. Specifically, if the estimated funded and unfunded costs of building disassembly, repacking, and nonrecoverable building components (including foundation) exceed 20 percent of the acquisition costs of the relocatable building, it must be approved and funded as "military construction." *See* Memorandum, Assistant Chief of Staff for Installation Management, Subject: Interim Army Policy for Relocatable Buildings (21 Oct. 2004); DoDI 4165.56, Relocatable Buildings, (13 Apr. 1988). *See also* AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVIST 11010.33 B, Procurement, Lease and Use of Relocatable Buildings (14 July 1988).

B. **Maintenance and Repair Are Not Construction.**

1. Maintenance is recurring work to prevent deterioration, *i.e.*, work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Public Works, Glossary, Sec. II, Terms (15 April 1997).

2. Repair is restoration of a facility so that it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. When repairing a facility, its components may be repaired by replacement, and the replacement can be up to current standards or codes. *See* DoD Reg. 7000.14-R, vol. 2B ch. 8 para. 080105. The Army requires that a facility or component of a facility be in a "failed or failing" condition to qualify as a repair project. *See* Memorandum, Assistant Chief of Staff for Installation Management, Subject: New Definition of "Repair" (4 Aug. 1997) and AR 415-15, para. 2-3b.

3. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction. AR 420-10, Glossary, Sec. II, Terms.

C. **Construction Using O&M Funds.**

1. Deployed commands normally receive only O&M-type funds. In this context, the O&M may be from humanitarian or foreign disaster assistance appropriation, but is used as a generic O&M fund would be, *i.e.*, to conduct the specified operation.

a. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $750,000 per project. The statute increases this threshold to $1.5 million if the project is "solely to correct a deficiency that threatens life, health, or safety."

(1) There is no statutory guidance as to what constitutes "a deficiency that threatens life, health, or safety." Further, DoD and Army Regulations do not assist in defining this criteria. At least one Army MACOM has issued limited guidance. *See* Appendix B: Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, Subject: Funding and Approval Authority, 6 March 2000. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed $500,000. AFI 32-1032, para 5.1.2.1.

(2) As a matter of DoD policy, commanders must use O&M for these projects. *See* AR 415-15 (4 Sep. 1998); DA Pam 420-11 (7 Oct 1994). However, an exception to this rule is that commanders must use Unspecified Minor Military Construction (UMMC) funds, not O&M, for all permanent construction during OCONUS CJCS exercises. *See* 10 U.S.C. § 2805(c)(2). DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise, and the cost of the construction is expected to exceed $100,000. *See* Military Construction Appropriation Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374, (2003) § 113.

b. A "Military Construction Project" includes all work necessary to produce a "complete and usable facility, or a complete and usable improvement to an existing facility." 10 U.S.C. § 2801(b). Splitting projects into separate parts so as to stay under the $750,000 O&M threshold is strictly prohibited. *See* AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1b; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20F, para. 6.2.1.

c. Only <u>funded costs</u> count against the $750,000 O&M threshold. <u>Funded costs</u> are the "out-of-pocket" expenses of a project, such as contract costs, TDY costs, materials, etc. It does not include the salaries of military personnel, equipment depreciation, and similar "sunk" costs. The cost of fuel used to operate equipment is a funded cost. Segregable maintenance and repair costs are not funded costs. *See* DA Pam 420-11, Glossary.

2. Methodology for analyzing construction funding issues:

a. Define the scope of the project (*i.e.*, what is the complete and usable facility?);

b. Classify the work as construction, repair, or maintenance;

c. Determine the funded cost of the project;

d. Select the proper appropriation; and

e. Verify the identity of the proper approval authority.

D. **Construction Using O&M Funds During Combat or Declared Contingency Operations.**

1. Within the last two years, significant changes have taken place in the funding of combat- and contingency-related construction. In order to understand the current state of the law, it is necessary to examine these changes as they have taken place.

2. Prior to April 2003, per Army policy, use of O&M funds <u>in excess of the $750,000 threshold</u> discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). *See* Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this opinion was that O&M funds were the <u>primary</u> funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

3. On 27 February 2003, DoD issued similar guidance. *See* Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DoD memorandum, in effect, adopted the Army's policy as articulated in the 22 February 2000 memorandum at the DoD level.

4. On 16 April 2003, the President signed the Emergency Wartime Supplemental Appropriation for Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act's accompanying conference report stated, in rather harsh language, the conferees' legal objections to the Under Secretary of Defense (Comptroller)'s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated

in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.

5. On 6 November 2003, the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No.108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines: (a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism; (b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence; (c) the United States has no intention of using the construction after the operational requirements have been satisfied; and, (d) the level of construction is the minimum necessary to meet the temporary operational requirements. Pursuant to this act, temporary funding authority was limited to $150 million.

6. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds that DoD could spend on contingency and combat related construction in FY 04 to $200 million, and adopted, virtually unchanged, the determination requirements of the FY 2004 Emergency Supplemental Appropriation. Further, Section 2810 of the Ronald W. Reagan National Defense Authorization Act for 2005, Pub. L. No. 108-767, 118 Stat. 1811 (2004) extended the funding authority to use O&M funds for such projects into FY 05, limited to $200 million for the fiscal year.

7. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. *See* Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 April 2004). Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding $750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, as well as a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project. The memorandum provides a draft format to be used for project requests, and is available at: http://www.acq.osd.mil/dpap/Docs/policy/use%20of%20operation%20and%20maintenance%20appropriations%20for%20construction%20during%20fy2004.pdf.

8. Bottom Line. As a result of recent congressional developments, DoD can no longer fund combat and contingency related construction projects costing in excess of $750,000 (or $1.5 million, if solely to correct a deficiency that threatens life, health, or safety) without first identifying clear, affirmative legislative authority. Section 2810 of the FY 05 Defense Authorization Act provides such authority. However, this authority is of limited scope, funding, and duration. Where this will leave the DoD in future years, or when the $200 million limit is exhausted, is an open question. Further, there is no guarantee Congress will extend this authority into FY 06. Judge Advocates are advised to keep abreast of the latest developments in this field before giving advice on proposed construction projects.

E. **The Unspecified Minor MILCON (UMMC) Program.**

1. Normal construction funding rules apply when the aforementioned conditions are not met, including the funding of construction for which the United States would have a follow-on or contingency use after the termination of military operations necessitating the construction. Thus, assuming the funded costs of a construction project exceed $750,000, commanders must seek special funding and approval to proceed. One alternative is to obtain Unspecified Minor Military Construction (UMMC) funds. Under this program, Congress funds minor military construction projects with estimated costs between $750,000 and $1.5 million (up to $3 million if the project is intended to correct a deficiency that threatens life, health, or safety).

2. Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. *See* 10 U.S.C. § 2805(c)(2). The authority for exercise-related construction is limited to no more than $5 million per military department per fiscal year. *See* 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. Units may use O&M funds for these temporary requirements. Again, however, congressional notification is required for any construction in excess of $100,000. *See* Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999).

F. **Application of the Rules.**

1. An Army unit deploys to central Asia in direct support of the Global War on Terrorism. A large warehouse facility is proposed for conversion to an administration facility. The Division Engineer advises the work will include: (a) replacing the roof, the flooring, several interior walls, and the heating system ($1.1 million); (b) repairing numerous other failing components of the building ($450,000); (c) installing new air-conditioning ($150,000); and (d) constructing new walls to accommodate the new configuration ($100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be $1.8 million. Because the air-conditioner and new walls will cost only $250,000, the Division Engineer contends that the entire project can be approved locally and funded with O&M. Is the Division Engineer right? No. By definition, a conversion is construction. All work is required for the conversion of this building to a complete and usable administrative facility, so it must all be funded as construction (use MILCON money because the cost exceeds $1.5 million, or seek approval for the project pursuant to Section 2810 of the FY 05 Defense Authorization Act).

2. The road to the same unit's fuel supply point needs immediate repair. The division's OPTEMPO increased substantially in the past few weeks, so the road has been used more and by vehicles heavier than it was designed to handle. Delivery trucks used by the fuel supplier have been breaking up the road. The Division Engineer believes that, in addition to filling potholes, two inches of asphalt must be added to support the increased and heavier traffic. The sustainment contractor estimates costs of $780,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds may be used. Is the Engineer correct? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than $750,000 (if the potholes cost more than $30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction. Bottom line: if the funded costs of the construction portion of the work exceed $750,000, the command should seek UMMC funding, or alternatively seek approval for the project pursuant to Section 2810 of the FY 05 Defense Authorization Act.

G. **Other Construction Authorities.** The following additional authorities are available to DoD to fund combat and contingency related construction projects. However, such authorities are rarely used because their requirements include Congressional notification, and in the case of 10 U.S.C. § 2808 and 10 U.S.C. § 2803, the reprogramming of unobligated military construction funds.

1. **Projects Resulting from a Declaration of War or National Emergency.** Upon a presidential declaration of war or national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the Secretary of Defense must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16 November 2001 President Bush invoked this authority in support of the Global War on Terrorism. *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.

a. **Emergency Construction, 10 U.S.C. § 2803**. Limitations: (a) a determination by the Service Secretary concerned that the project is vital to national defense; (b) a 21-day congressional notice and wait period; (c) a $45 million cap per fiscal year; and (d) a requirement that the funds come from reprogrammed, unobligated military construction appropriations.

b. **Contingency Construction, 10 U.S.C. § 2804**. Limitations similar to those under 10 U.S.C. § 2803 apply; however, Congress specifically appropriates funds for this authority. In 2003, Congress dramatically increased the amount of funding potentially available to DoD under this authority. *See* Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that previously had been funded under the authority of the DoD Deputy General Counsel (Fiscal) 27 February 2003 memorandum, must be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DoD to spend up to $200 million per fiscal year on such construction projects, DoD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. *See* Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to $10 million for fiscal year 2005).

XIV. CONGRESSIONAL NOTIFICATION AND HUMAN RIGHTS VETTING REQUIREMENTS

A. **Section 8064 Notification – Limitation on Transfer of Defense Articles and Services**. Continuing similar requirements from prior years' appropriations acts, Congress requires DoD to notify the Congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (1) peace operations under chapters VI or VII of the UN charter or (2) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See* DoD Appropriations Act for FY 05, Pub. L. No. 108-287 § 8064 (2004). The notice required includes the following: a description of the articles or services to be transferred; the value of the articles or services; and, with respect to a proposed transfer of supplies and equipment, a statement of whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and whether the items to be provided will have to be replaced, and how the President proposes to pay for such replacement. Initially, this notification requirement was enacted through Section 8117 of the DoD Appropriations Act for FY 1996, Pub. L. No. 104-61 (1995). Leading up to the original House DoD Appropriations Bill (H.R. 2126) enactment, the House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995). In "acquiescing" in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

B. **Section 8076 Prohibition on Funding for Training of Foreign Units that Commit Gross Violations of Human Rights – Human Rights Vetting**. DoD Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8076. Continuing similar prohibitions from prior years' appropriations Acts, Congress prohibited any funding for support of any training program involving a unit of the security forces of a foreign country if the [SECDEF] has received credible information from the [DoS] that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.

XV. CONCLUSION

A. Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on JAs for fiscal advice. Active participation by JAs in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly. Those found responsible for funding violations will face adverse personnel actions and possibly criminal sanctions.

B. JAs must ensure that the military's participation in a Title 22 foreign assistance activity or in a Title 10 military cooperation or humanitarian operation accomplishes the commander's intent and complies with U.S. fiscal law, regulations and policy.

C. **Necessity for the JA to Get It Right.**

1. Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises and activities overseas. Not only do foreign allies participate in these activities, but so too do other U.S. government agencies, international non-governmental organizations, and U.S. Guard and Reserve components. Not surprisingly, these operations, exercises and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of the legal basis for the conduct of the operation, exercise or activity that benefits a foreign nation.

2. JAs bear the primary responsibility for ensuring that all players involved, but especially the U.S. commander and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible commanders and officials.

D. **How the JA Can Get It Right—Early JA Involvement.**

1. JAs must be part of the planning team from the inception of the concept, through all planning meetings, through execution of the operation or activity. It is too late for the JA to review the operations plan the week, or even the month, before the scheduled event. Funding, manpower, logistics, transportation and diplomatic decisions have long been made, and actions based on those decisions have already been executed weeks in advance of the activity.

2. In short, the JA must understand the statutory, regulatory and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the JA must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The JA must then ensure that the commander complies with such authorities.

CHAPTER 15

LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 15

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

A. 10 U.S.C. § 2773a (authorizing DOD to hold accountable officials liable).

B. 31 U.S.C. § 3325 (requiring certifying officers within DOD).

C. 31 U.S.C. § 3528 (specifying when the Comptroller General may relieve certifying officers from liability).

D. 31 U.S.C. § 3527 (specifying when the Comptroller General may relieve other accountable officers from liability).

E. Dep't of Defense Reg. 7000.14-R, Financial Management Regulation, Volume 5, Disbursing Policies and Procedures [hereinafter DOD 7000.14-R, vol. 5]. Available at http://www.dtic.mil/comptroller/fmr.

F. DFAS-IN (Defense Finance and Accounting Service-Indianapolis) Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000).

G. DFAS-DE (Defense Finance and Accounting Service-Denver) 7010.1-R, General Accounting and Finance Systems at Base Level (15 Feb. 1991), ch. 11.

II. TYPES OF ACCOUNTABLE OFFICERS.

A. Definitions.

1. An accountable officer is any government employee who is responsible for or has custody of government funds. See Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.); Mr. Charles R. Hartgraves, B-234242, Feb. 6, 1990 (unpub.).

2. The DOD refers to this broad universe of persons as "accountable individuals." This includes "all personnel, whether military or civilian, who are certifying officers, accountable officials as defined in [DOD 7000.14-R, vol. 5, ch. 33], and disbursing officers. The term also includes deputy disbursing officers, agents, cashiers, and other employees who by virtue of their employment are responsible for or have custody of government funds." DOD 7000.14-R, vol. 5, Definitions, para. 2. See also, DOD 7000.14-R, vol. 5, ch. 1, para. 010802.B. (defining "Accountable official" as including "DOs, certifying officers, cashiers, procurement officers, departmental accountable officials, and other employees who by virtue of their employment are responsible for the obligation, custody, and payment of government funds.")

3. "Departmental Accountable Officials" are "[i]ndividuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment." DOD 7000.14-R, vol. 5, ch. 33, para. 330812.

4. Any government officer or employee, military or civilian, who handles government funds physically, even if only once or occasionally, is "accountable" for those funds while they are in his custody. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (1992); Finality of Immigration and Naturalization Service's Decision on Responsibility of Accountable Officer for Physical Losses of Funds, B-195227, 59 Comp. Gen. 113 (1979).

5. Absent statutory authority, agency officials who are not designated "certifying official" are not personally liable for illegal, improper, or incorrect payments. Veteran Affairs – Liability of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005); Department of Defense – Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

B. Certifying Officers and Other Accountable Officers Distinguished.

1. Certifying Officer.

a. Within DOD, a certifying officer is defined as a "DoD military member or civilian employee of the Department appointed in writing to certify a voucher for payment," DOD 7000.14-R, vol. 5, Chapter 33, para. 330806. A DOD certifying officer is also defined as "an individual designated to attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, or other documents." DOD 7000.14-R, vol. 5, Definitions, para. 15.

b. Certification is "the act of attesting to the legality, propriety and correctness of a voucher for payment." DOD 7000.14-R, vol. 5, Chapter 33, para. 330805.

2. Other Accountable Officers. Any other officer or employee, including one not involved directly in government fiscal operations, who has custody or control of federal funds.

a. Disbursing Officer. One who disburses funds and renders accounts in accordance with laws and regulations governing disbursement of public funds. DOD 7000.14-R, vol. 5, Definitions, p. xxxi. See generally 31 U.S.C. § 3325; DOD 7000.14-R, vol. 5, ch. 2.

b. Cashier. One appointed to perform limited cash-disbursing functions or other cash-handling operations to assist a finance officer or other subordinate/assistant of the finance officer. DOD 7000.14-R, vol. 5, ch. 2, para. 020603.B. See Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997) (disbursing officer and his subordinate cashiers are jointly and severally liable for loss of funds and must separately petition for relief).

c. Other agents and custodians.

(1) Paying agents are appointed only when adequate payment, currency conversion, or check cashing services cannot otherwise be provided. Paying agents cannot act as purchasing officers. DOD 7000.14-R, vol. 5, ch.2, para. 020604.

(2) Collection agents receive funds generated from activities such as hospitalization fees and other medical facility charges, rentals, and other charges associated with housing, reproduction fees, and other similar functions. DOD 7000.14-R, vol. 5, ch. 2, para. 020701.

(3) Imprest fund cashiers make authorized cash payments for purchases of materials and non-personal services, maintain custody of funds, and account for and replenish the imprest fund as necessary. DOD 7000.14-R, vol. 5, ch. 2, para. 020905.A.

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Certifying Officers. 31 U.S.C. § 3528; DOD 7000.14-R, vol. 5, ch. 33.

1. A certifying officer:

a. Is responsible for the correctness of the facts recited in the certificate, or otherwise stated on the voucher or supporting papers;

b. Is responsible for the legality of the proposed payment under the appropriation or fund involved; and

c. Is accountable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certification.

2. Certifying officers must ensure vouchers are computed correctly.

3. Liability attaches when an official makes an erroneous payment based on an improperly certified voucher. Responsibilities and Liabilities of Certifying Officers, B-184145, 55 Comp. Gen. 297 (1975).

B. Disbursing Officers. 31 U.S.C. § 3325; DOD 7000.14-R, vol. 5, ch. 1, para. 0104.

1. Disbursing officers are:

a. Responsible for examining vouchers as necessary to ensure that they are in the proper form, duly certified and approved, and computed correctly on the basis of the facts certified.

b. Responsible for disbursing funds only upon, and in strict accordance with, duly certified vouchers.

c. Not liable for losses due to improperly calculated vouchers.

2. Generally, disbursing officers are accountable for illegal, improper, or incorrect payments, as well as account errors, even though they relied on other persons, and those persons actually caused the error. Mr. David L. Gagermeier, B-274364, 1997 U.S. Comp. Gen. LEXIS 157 (Apr. 23, 1997). See DOD 7000.14-R, vol. 5, ch. 1, para. 010503.A.

3. Note: An older version of DOD 7000.14-R specifically provided that DOD disbursing officers were not liable for payments made in reliance upon properly certified vouchers. DOD 7000.14-R, vol. 5, ch. 1, para. 010501.C (August 1999). The latest version (April 2005) removed that language.

C. DOD Accountable Officials.

1. Previously, DOD 7000.14-R, ch. 33 purported to impose pecuniary liability on "accountable officials" as a matter of policy. "Accountable officials" were defined as personnel "who are designated in writing and are not otherwise accountable under applicable law, who provide source information, data or service (such as a receiving official, a cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process." The rational was (and is) that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and that therefore certifying officers and disbursing officers as a practical matter must rely upon information provided by others in performing this difficult task.

2. However, the GAO held that this regulatory imposition of financial liability against such persons was improper because, unlike certifying officers and disbursing officers, there was no statutory basis for imposing liability against "accountable officials," and agencies may impose pecuniary liability against someone only if there is a statutory basis for doing so. See, Department of Defense – Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159.

3. The 2003 Defense Authorization Act, codified at 10 U.S.C. § 2773a, has since provided that statutory authority. Title 10 § 2773a states that departmental accountable officers may be held financially liable for illegal or erroneous payments resulting from their negligence. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1005, 116 STAT 2458, 2631 (2002).

4. Implementing the new law, the new DOD 7000.14-R, ch. 33 (April 2005), para. 3307 provides: "Departmental accountable officials shall be pecuniarily liable for illegal, improper or incorrect payments that result from information, data or services they negligently provide to a certifying officer, and upon which, the certifying officer directly relies in accordance with the provisions of 10 U.S.C. 2773a."

5. "Departmental Accountable Officials" are defined as "Individuals who are responsible in the performance of their duties for providing a certifying officer information, data, or services that the certifying officers directly relies upon in the certification of vouchers for payment. They are pecuniarily liable for erroneous payments resulting from their negligent actions in accordance with section 2773a of title 10, United States Code." DOD 7000.14-R, vol. 5, ch. 33, para. 330812.

6. "Departmental Accountable Officials" include, but are not limited to personnel with certain responsibilities relating to the Government Purchase Card program, temporary duty travel, contract and vendor pay, civilian and military pay, permanent change of station, and Centrally Billed Accounts. DOD 7000.14-R, vol. 5, ch. 33, para. 330302. These include persons such as Agency Program Coordinators (APCs), approving officials, authorizing officials, cardholders, resource managers, fund holders, Automated Information System administrators, contracting officers, receiving officials, personnel officers, employees' supervisors, and supervisors of time and attendance clerks.

7. Departmental Accountable Officials are designated by DD Form 577 and are notified in writing of the designation and of their pecuniary liability for all illegal, improper or incorrect payments that result from negligent performance of their duties. DOD 7000.14-R, vol. 5, ch. 33, para. 330505.

D. "Possessory" Accountable Officers. Those entrusted with funds are liable for any and all losses. There is no liability limitation for these accountable officers. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990).

E. The Nature of Accountable Officer Liability.

1. Accountable officers (with the exception of departmental accountable officials – see paragraph 3 below) are strictly liable for losses or erroneous payments of public funds. They are "insurers" of public funds in their custody, or for which they are otherwise responsible. Liability does not attach for losses due to acts of God or acts of the public enemy. See United States v. Prescott, 44 U.S. 578 (1845); Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974).

2. Lack of fault or negligence, however, may provide a basis for relief from the obligation to repay the loss. See Mr. David J. Bechtol, B-271608, 1996 U.S. Comp. Gen. LEXIS 333 (June 21, 1996); Captain John J. Geer, Jr., B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991); Mr. Anthony Dudley, B-238898, 70 Comp. Gen. 389 (Apr. 1, 1991); Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974).

3. Until April 2005, DOD 7000.14-R, vol. 5, ch. 33, para. 3309 and appendix C, para. G provided that DOD "accountable officials" were not strictly liable, and that no presumption of negligence applied to those personnel. In April 2005, para. 3309 and the entire appendix C were deleted. The statute on which the changes were based clearly provides for a negligence standard, permitting the Secretary of Defense to subject a departmental accountable official to financial liability if the improper payment "was the result of fault or negligence on the part of that departmental accountable official," 10 U.S.C. § 2773a(c)(1)(B). The current DOD 7000.14-R is far less clear on that point, and is completely silent as to whether there is any presumption of negligence.

IV. PROTECTION AND RELIEF FROM LIABILITY.

A. Advance Decisions from the Comptroller General.

1. A certifying officer, disbursing officer, or head of an agency may request an opinion concerning the propriety of a certification or disbursement. 31 U.S.C. § 3529; DOD 7000.14-R, vol. 5, para. 250302; DFAS-DE 7010.1-R, ch. 11, para. 11-9.

2. Upon request, the Comptroller General will decide any question involving:

a. A payment the disbursing official or the head of the agency proposes to make; or

b. A voucher presented to a certifying official for certification.

3. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield an DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. DOD 7000.14-R, vol. 5, ch. 1, para. 010801.

a. DOD 7000.14-R, vol. 5, ch. 1, para. 010802.E. explains:

> While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official . . . . The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (i.e., 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.

See, Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (15 Nov. 1995).

b. The 1995 DOJ memorandum was based on a 1991 DOJ Office of Legal Counsel opinion which concluded that the statutes were unconstitutional insofar as they purport to empower the Comptroller General to relieve Executive Branch officials from liability. See, Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability (Aug. 5, 1991).

c. The belated (April 2005) DOD action in changing DOD 7000.14-R consistent with the DOJ opinion follows similar action initiated by the Department of Treasury in 2004. See, Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject: Response to Department of Treasury (28 Jan. 2004).

B. Advance Agency Decisions. See DOD 7000.14-R, vol. 5, ch. 1, para. 0108, and Appendix E.

1. Per the General Accounting Office Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826, 3845-46, the following are authorized to issue advance decisions for designated claims categories.

a. DOD (DOD General Counsel): military member pay, allowances, travel, transportation costs; survivor benefits; and retired pay.

b. Office of Personnel Management (OPM): civilian compensation and leave.

c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation allowances.

2. For DOD, as of April 2005, employees may seek an advance decision from the General Counsel concerning the propriety and legality of any obligation or claim presented to them for approval, certification, or payment. DOD 7000.14-R, vol. 5, ch. 1, para. 0108.

a. Such advance decisions will "shield" the employee from liability in that DOD will not seek to recover a payment from the employee if the General Counsel issued an opinion advising that the payment could legally be made. DOD 7000.14-R, vol. 5, ch. 1, para. 010802.D.

b. DOD 7000.14-R, vol. 5, Appendix E, directs employees to the following responsible offices for advance decisions:

(1) Use of appropriated funds: Office of the Secretary of Defense, Office of the Deputy General Counsel (Fiscal).

(2) Military members' pay, allowances, travel, transportation, retired pay, and survivor benefits: Office of the Secretary of Defense, Office of the Deputy General Counsel (P&HP).

(3) Federal civilian employees' compensation and leave: Office of Personnel Management.

(4) Federal Civilian employees' travel, transportation and relocation expenses and allowances: General Services Administration, Board of Contract Appeals.

b. For advance decisions regarding the propriety or legality of certifying or paying a questionable voucher or claim, DOD 7000.14-R, vol. 5, ch. 25, para. 2503.B. provides that "All requests for advance decisions shall be forwarded through the General Counsel of the DoD Component or the Defense Finance and Accounting Service (DFAS) to the Deputy General Counsel (Fiscal), Department of Defense (DCG(F)) before referral to any authorized official outside of the Department of Defense (for example, the General Services Administration or the General Accounting Office)." As to the reference to GAO, one should keep in mind that the most recent vol. 5, ch. 25 is dated October 2002; that reference will likely be deleted when chapter 25 is updated in the future.

C. Relief of Non-DOD Certifying Officers. 31 U.S.C. § 3528(b).

1. The Comptroller General may relieve a certifying officer from liability if:

a. The officer based the improper certification on official records and the officer did not know, or reasonably could not have known, that the information was incorrect; 31 U.S.C. 3528(b)(1)(A). See Relief of Accountable Officer Sally V. Slocum – American Embassy, Brazzaville, Republic of the Congo, B-288284.2, 2003 U.S. Comp. Gen. LEXIS 223 (Mar. 7, 2003); **or**

b. The obligation was in good faith, no law specifically prohibited the payment, and the government received some benefit. 31 U.S.C. § 3528(b)(1)(B). See Environmental Protection Agency, B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131 (certifying officials not required to second-guess discretionary decisions of senior agency officials); Ms. Trudy Huskamp Peterson, B-257893, 1995 U.S. Comp. Gen. LEXIS 337 (June 1, 1995).

2. The Comptroller General will deny relief if the agency did not attempt diligently to collect an erroneous payment.

D. Relief of Non-DOD Disbursing Officers for Illegal, Improper, or Incorrect Payments. 31 U.S.C. 3527(c).

1. The Comptroller General may, on his own initiative, or on the written recommendation of the head of an agency, relieve a disbursing official responsible for a deficiency in an account because of an illegal, improper, or incorrect payment when the Comptroller General decides that the payment was not made as a result of bad faith or lack of reasonable care by the official.

2. The Comptroller General may deny relief if the agency did not pursue collection action diligently.

E. Relief of Other Non-DOD Accountable Officers. 31 U.S.C. § 3527(a).

1. Applicability. The Comptroller General may relieve an accountable officer from liability for the physical loss or deficiency of public money, vouchers, checks, securities, or records when:

a. The agency head finds that:

(1) The officer or agent was carrying out official duties when the loss or deficiency occurred or the loss or deficiency occurred because of an act or failure to act by a subordinate of the officer or agent; and

(2) The loss or deficiency was not the result of fault or negligence of the officer or agent. See Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992).

b. The loss or deficiency was not the result of an illegal or incorrect payment; and

c. The Comptroller General agrees with the decision of the head of the agency.

2. The Comptroller General has delegated to agency heads the authority to resolve irregularities when a loss is less than $3,000. See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.9.C; Mr. Frank Palmer, B-252809, 1993 U.S. Comp. Gen. 485 (Apr. 7, 1993); Mr. Thomas M. Vapniarek, B-249796, 1993 U.S. Comp. Gen. LEXIS 248 (Feb. 9, 1993); Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992).

3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.

F. Relief of DOD Certifying Officers for Illegal, Incorrect, or Improper Payments. 31 U.S.C. § 3528; DOD 7000.14-R, vol. 5, ch. 6, para. 060903.B.

1. The Secretary of Defense has delegated authority to the Director, DFAS, to make the required determinations and grant or deny relief. DOD 7000.14-R, vol. 5, ch. 6, para. 060903.

2. The standard for relief of certifying officers under 31 U.S.C. § 3528 (and DOD 7000.14-R, vol. 5, ch. 6, para. 060903.B.):

   a. The certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or

   b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment.

3. The statute also says that the Comptroller General may deny relief when the Comptroller General decides that the head of the agency did not diligently carry out efforts to recover the payment. 31 U.S.C. § 3528(c). Because DOD 7000.14-R, vol. 5, ch. 6, para. 060903 (January 2004) echoes the statute, it recites as part of the statutory standards "diligent collection efforts were made to recover the payment." In light of the new (April 2005) changes to DOD 7000.14-R, vol. 5, the practical effect of this portion of the standard is not yet known.

G. Relief of DOD Disbursing Officers for Illegal, Incorrect, or Improper Payments. 31 U.S.C. § 3527(b)(1)(B); 31 U.S.C. § 3528(b)(1); DOD 7000.14-R, vol. 5, ch. 6, para. 060903.A. See generally Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997).

1. The statute provides that the Comptroller General shall relieve an accountable officer of the armed forces who makes an improper, illegal, or incorrect payment, if, after taking a diligent collection action, the Secretary of Defense finds that:

   a. The payment was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or

   b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment.

2. DOD 7000.14-R, vol. 5, ch. 6, para. 060903.A. provides only this two-prong standard for relief of a disbursing official:

   a. The payment was not the result of bad faith or lack of reasonable care; and

   b. Diligent collection efforts by the disbursing officials and the agency were made.

3. Apparently, the reason DOD 7000.14-R doesn't include the first prong of the statutory standard is because a previous version of DOD 7000.14-R had specifically stated that disbursing officers are not liable for payments properly certified by certifying officers even if the payments turn out to be illegal, improper, or incorrect. See DOD 7000.14-R, vol. 5, ch. 1, para. 010501.C (August 1999 version). That specific language no longer exists in the current version of DOD 7000.14-R, vol. 5, ch. 1.

4. The Secretary of Defense has delegated authority to the Director, DFAS, to make the required determinations and grant or deny relief. DOD 7000.14-R, vol. 5, ch. 6, para. 060903.

H. Relief of DOD Disbursing Officers for Physical Losses. 31 U.S.C. § 3527(b)(1)(A); DOD 7000.14-R, vol. 5, ch. 6, para. 060902.

1. The statute provides that the Comptroller General shall relieve a disbursing official of the armed forces who is responsible for the physical loss or deficiency of public money, vouchers, or records when:

   a. The Secretary of Defense determines that the officer was carrying out official duties when the loss or deficiency occurred;

   b. The loss or deficiency was not the result of fault or negligence by the official; and

   c. The loss or deficiency was not the result of an illegal or incorrect payment.

2. Under the statute, the SECDEF's finding binds the Comptroller General. For this reason, the Comptroller General does not require military departments to forward these relief determinations for approval. GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.10; Mr. William Duff, B-271859, 1996 U.S. Comp. Gen. 490 (Sep. 26, 1996). Thus, because the Comptroller General did not make the relief decision in cases of physical losses anyway, the April 2005 changes to DOD 7000.14-R, vol. 5 which eliminates DOD's recognition of the Comptroller General's statutory authority to relieve DOD accountable officers, makes no practical difference in cases of physical losses.

3. The SECDEF has delegated authority to the Director, DFAS, to make the required determinations and grant or deny relief. DOD 7000.14-R, vol. 5, ch. 6, para. 060902.

4. The term "disbursing official" applies to all DoD personnel to whom public funds are entrusted for the purpose of making disbursements. Besides disbursing officers, the term includes deputy disbursing officers, disbursing agents, cashiers, agent cashiers, collection agents, paying agents, imprest fund cashiers, and change fund custodians. DOD 7000.14-R, ch. 6, para. 060902.

I. Relief of DOD Departmental Accountable Officials for Illegal, Incorrect, or Improper Payments. DOD 7000.14-R, vol. 5, ch. 6, para. 060903.C.

1. DOD 7000.14-R, vol. 5 doesn't actually state any standards for relief of departmental accountable officials. Chapter 6, para. 060903.C. merely states that "Accountable individuals appointed [as departmental accountable officials] are responsible for providing accurate information, data or service to a certifying officer to support payment certifications."

2. However, because 10 U.S.C. § 2773a requires fault or negligence on the part of a departmental accountable official in order to subject that person to financial liability to being with, it follows that a lack of negligence, at a minimum, will result in relief of liability.

J. Judicial Relief – U.S. Court of Federal Claims.

1. Disbursing officers. Under 28 U.S.C. § 1496, the court has jurisdiction to review disbursing officer cases. If the court finds that a loss occurred without the fault or negligence of the disbursing officer, 10 U.S.C. § 2512 requires that the disbursing officer be relieved from liability for that amount, providing: "Whenever the court finds that a loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts."

2. Any individual. If an agency withholds the pay of any individual, that person may request that the Government Accountability Office report the balance due to the Attorney General, who shall then initiate a suit against the individual. See 5 U.S.C. § 5512(b). By doing this, the individual can get his matter heard in federal court.

K. Legislative Relief. Private and collective relief legislation.

V. ESTABLISHING LIABILITY.

A. DOD Required Action.

1. Before initiating collection for a loss, the appropriate agency must establish the accountable officer's liability "permanently." Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616, 622 (July 8, 1991). Permanently establish means that the officer has agreed to repay the loss or the appropriate authority has denied relief.

2. DOD 7000.14-R requires a formal investigation for physical losses of $750 or more or erroneous payments induced by fraud. The commander may investigate other losses formally as well. See DOD 7000.14-R, vol. 5, ch. 6, para. 060301 and 060503. See also DOD 7000.14-R, vol. 5, ch. 6, sec. 0607 (investigation requirements and procedures).

B. Statute of Limitations. 31 U.S.C. § 3526(c)(1).

1. The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. See Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616 (July 8, 1991); Lieutenant Colonel S.C. Shoemake, Jr., B-239483, 70 Comp. Gen. 420 (Apr. 15, 1991). After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for the loss in question. Mr. John S. Nabil, B-258735, 1994 U.S. Comp. Gen. LEXIS 950 (Dec. 15, 1994).

2. "Substantially complete" means the time when, absent fraud by the officer, the agency can audit the paperwork upon which the officer based his action. Relief of Anna L. Pescod, B-251994, 1993 U.S. Comp. Gen. LEXIS 991 (Sept. 24, 1993). DOD 7000.14-R includes detailed examples of when the three-year period begins. See DOD 7000.14-R, vol. 5, ch. 6, para. 060802.

3. If the loss is due to embezzlement, fraud, or other criminal activity, the three-year statute of limitations is not triggered until the loss has been discovered and reported. Steve E. Turner, B-270442.2, 1996 U.S. Comp. Gen. LEXIS 75 (Feb. 12, 1996); DOD 7000.14-R, vol. 5, ch. 6, para. 060801.

4. The statute of limitations does not apply if a loss is due to fraud or other criminal acts of an accountable officer. 31 U.S.C. § 3526(c)(2).

VI. MATTERS OF PROOF.

A. Evidentiary Showing. To qualify for relief from liability for a loss or deficiency under the statutes, an accountable officer generally must prove that he was acting in an official capacity and was either not negligent or that his negligence did not cause the loss. 31 U.S.C. § 3527. Mr. S.M. Helmrich, B-265856, 1995 U.S. Comp. Gen. LEXIS 717 (Nov. 9. 1995).

B. The "Reasonable Care" Standard.

1. In determining whether an officer was negligent, the Comptroller General applies a "reasonable care" standard. In the Matter of Personal Accountability of Accountable Officers, B-161457, Aug. 1, 1969 (unpub.).

a. Liability results when an accountable officer's conduct constitutes simple or ordinary negligence. Gross negligence is not required.

b. The standard is whether the accountable officer did what a reasonably prudent and careful person would have done to safeguard his/her own property under similar circumstances.

c. This is an "objective" standard. It does not vary with such factors as the level of experience or the age of the particular accountable officer concerned. Mr. Frank D. Derville, B-241478, 1991 U.S. Comp. Gen. LEXIS 1488 (Apr. 5, 1991).

d. Failure to follow laws/regulations is negligence. Hence, accountable officers must familiarize themselves with applicable laws/regulations. See DOD 7000.14-R, vol. 5, ch.1, para. 010502.

2. That a loss or deficiency has occurred creates a rebuttable presumption of negligence on the part of the accountable officer. This presumption arises from the accountable officer's strict liability for any loss or deficiency. The accountable officer can rebut this presumption of negligence by presenting affirmative evidence that he exercised due care. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Darold D. Foxworthy, B-258357, Jan. 3, 1996 (unpub.) (loss of vouchers and receipts by imprest fund cashier); Mr. Gerald Murphy, B-249742.2, 1993 U.S. Comp. Gen. LEXIS 1149 (Nov. 24, 1993); Melvin L. Hines, B-243685, 1991 U.S. Comp. Gen. LEXIS 985 (July 1, 1991); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969).

3. As noted previously, the previous version of DOD 7000.14-R, vol. 5, ch. 33, para. 3309 and appendix C provided that a presumption of negligence does not apply to acts of DOD "accountable officials." Those portions of volume 5 were deleted in April 2005. The current DOD 7000.14-R is silent as to whether there is any presumption of negligence for departmental accountable officials.

C. Proximate Cause. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency.

1. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may not grant relief from liability. 31 U.S.C. § 3527(a).

2. If an accountable officer was negligent, but the negligence was not the proximate cause of the loss or deficiency, the Comptroller General may grant relief under the statute. See Captain John J. Geer, B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991).

VII. DEBT COLLECTION.

A. Collection is pursuant to 31 U.S.C. §§ 3701-11 (Debt Collection Act) and 5 U.S.C. § 5512(a) (allowing offset against government employee or retiree pay). See 5 U.S.C. § 5514 (allowing payment by installment and limiting amount per period to 15%); see also 37 U.S.C. § 1007(a) (governing withholding of military officer pay); 10 U.S.C. § 9837(d) (remission of indebtedness); 10 U.S.C. § 1552 (correction of records).

B. DOD has published detailed collection procedures. See DOD 7000.14-R, vol. 5, chs. 28-32.

VIII. CONCLUSION.

CHAPTER 16

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Chapter 16

FISCAL LAW RESEARCH

I. LEGISLATION & STATUTES.

A. Appropriation Acts.

1. In recent years Congress has, on an annual basis, passed thirteen (13) appropriations acts.

2. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. Researching Appropriation Acts.

3. In addition to LEXIS™- and Westlaw ™ -based research, one can utilize the Thomas website within the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.

B. 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. Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-33, GAO/OGC 91-5 (2d ed. 1991). This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so.

C. Authorization Act. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities. See GAO, A Glossary of Terms Used in the Federal Budget Process, p.17, GAO/AFMD-2.1.1 (Jan. 1993).

1. There is no general requirement to have an authorization in order for an appropriation to occur.

2. Congress has, by statute, created certain situations in which it must authorize an appropriation, however.

Example: 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law" (emphasis added).

3. An authorization act does not provide budget authority. That authority stems from the appropriations act. Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.

D. Locating Pertinent Statutes.

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

Example: Statutes pertaining to DOD are typically found in Title 10, so if I want to find a statute dealing only with restriction on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if I want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, I would probably start with Title 5.

2. You can run a general boolean search on either a specialized legal database, such as LEXIS™ or Westlaw™, or on the U.S. Code website.

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

II. THE GENERAL ACCOUNTING OFFICE (GAO).

A. The Budget and Accounting Act of 1921 established the GAO as an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. 31 U.S.C. § 702. The Comptroller General heads the GAO and issues legal opinions and reports to agencies concerning the availability and use of appropriated funds.

B. Disbursing officials, certifying officials, and agency heads are entitled to advance decisions. 31 U.S.C. § 3529. GAO also has discretionary authority to render opinions to other individuals or organizations.

C. Decisions of the Comptroller General of the United States (Comp. Gen.).

1. The Government Printing Office (GPO) prints decisions of the Comptroller General. Prior to September 30, 1994, the GPO distributed written copies of selected decision.

a. Hardbound volumes 1-73; volume No. 73 covers 1993-1994.

(1) Separate topical indices & digests from 1894 to the present.

(2) Contains only about 10% of total decisions issued each year.

(3) No legal distinction between published and unpublished decisions.

b. Example of citation:

Department of the Army - - Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 48 (1983).

2. The *GPO Access* website contains electronic copies of decisions from October, 1995 to the present. GPO indicates that it places new decisions onto this database within two business days after the decision has been released. Documents are available as ASCII text and Adobe Acrobat Portable Document Format (PDF) files.

3. The GAO website also contains electronic copies of opinions issued within the past 60 days. You can also subscribe to a GAO electronic alert that will issues daily notifications of the reports, decisions, and opinions that GAO has issued.

4. Comptroller General's Procurement Decisions (CPD).

a. Published by West Publishing Group.

b. Contains every decision.

c. Loose-leaf reporter updated monthly.

d. A separate index volume with three indices.

(1) B-Number Index.

(2) Government Volume Index.

(3) Subject-Matter Index.

e. Example of citation:

Matter of Prohibition on Use of Appropriated Funds for Defense Golf Courses, B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135

D. Principles of Federal Appropriations Law (a.k.a. "The Red Book").

1. Second edition was published beginning in 1991 by the General Accounting Office, Office of General Counsel.

2. Volume I, 2d ed., GAO/OGC 91-5 (July 1991);

3. Volume II, 2d ed., GAO/OGC 92-13 (Dec. 1992);

4. Volume III, 2d ed., GAO/OGC 94-33 (Nov. 1994);

5. Volume IV, 2d ed., GAO-01-179SP (Mar. 2001);

6. Volume V, 2d ed., GAO-02-271SP(Apr. 2002) (it contains a comprehensive index of the material contained in the prior four volumes).

7. There are no periodic updates to a volume once it has been published (no slipsheets).

8. Example of citation:

Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, 2-33, GAO/OGC 91-5 (July 1995).

E. General Accounting Office, Policies and Procedures Manual For Guidance of Federal Agencies, GAO/AFMD--PPM-2.1, Title 7 (Feb. 1990).

1. A substantial portion of the general guidance issued by GAO to executive agencies was first codified into the GAO Policy and Procedures Manual for Guidance of Federal Agencies in 1957. The manual has 8 major parts called titles.

2. Title 7 is entitled "Fiscal Procedures" and it contains requirements related to collections, disbursements, appropriations, and accountable officers' accounts. The GAO point of contact for Title 7 is a Mr. Tom Armstrong, (202) 512-8257.

F. General Accounting Office, A Glossary of Terms Used in the Budget Process, GAO/AFMD-2.1.1 (July 1993).

1. The Glossary fulfills part of GAO's statutory responsibility to publish standard termjnology, definitions, classifications, and codes for federal fiscal, budgetary, and program-related information. 31 U.S.C. § 1112.

2. It is a basic reference document for the Congress, federal agencies, and others interested in the federal budget-making process.

III. BUDGET REQUESTS.

A. Agencies are required to justify their budget requests. OMB Cir. A-11, Preparing, Submitting, and Executing the Budget (Jun. 2002), § 51.

B. Within DOD, Volumes 2A and 2B of the DOD FMR provides guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 2A and 2B:

1. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations (also known as "M documents").

2. Chapter 3 deals with justification documents supporting the Operations Appropriations (also known as "O documents").

3. Chapter 4 deals with justification documents supporting the Procurement Appropriations (also known as "P documents").

4. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (also known as "R documents").

5. Chapter 6 deals with justification documents supporting the Military Construction Appropriations (also known as "C documents").

C. The budget request is originated by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.

D. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.

E. Agencies generally place their past and current year budget submissions onto the web.

1. The President's overall budget materials can be found at: http://w3.access.gpo.gov/usbudget/index.html.

2. The Defense-wide budget materials can be found at: http://www.dod.mil/comptroller/budgetindex.html.

3. The Army's budget materials can be found at: http://www.asafm.army.mil/budget/fybm/fybm.asp.

4. The Air Force's budget materials can be found at: http://www.saffm.hq.af.mil/FMB/pb/afpb.html.

5. The Navy's budget materials can be found at: http://navweb.secnav.navy.mil/pubbud/04pres/postedlist.htm.

6. The National Aeronautic and Space Administration's budget materials can be found at: http://ifmp.nasa.gov/codeb/budget2003/.

7. The Federal Aviation Administration's budget can be fount at: http://www2.faa.gov/aba/html_budget/index.html.

8. The Environmental Protection Agency's budget materials can be found at: http://www.epa.gov/ocfo/budget/budget.htm.

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

IV. AGENCY REGULATIONS.

A. Background. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 3, GAO/OGC 91-5 (2d ed. 1991). When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

B. Deference. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

C. Additional Restrictions. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: The GAO has determined that all federal agencies may purchase commercially-prepared business cards using appropriated funds. Each of the defense services has determined it will only buy commercially prepared business cards for its recruiters and criminal investigators. Everyone else within DOD must buy card stock and prepare their own cards in-house. See AR 25-30, The Army Publishing and Printing Program, para. 11-11 (21 June 1999); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; and Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999).

D. Researching Regulations.

1. Agency Publication Websites. The DOD as well as many of the civilian agencies has a website containing electronic copies of most of their regulations. Unfortunately, not all agency publication websites allow you to perform a boolean search of the text of the regulations. For example, the Army website below only permits a search of the titles (not the text) of the regulations.

a. DOD Regulations.

b. Army Regulations.

c. Air Force Regulations.

d. Navy Regulations.

e. Marine Corps Regulations.

f. Joint Publications.

g. Coast Guard Regulations.

h. Department of the Interior Regulations.

i. JAGCNET. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD regulations and TJAGSA deskbooks.

2. Specialized Websites. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations specific to the fiscal arena. These include:

a. DOD Financial Management Regulation. The DOD Financial Management Regulation, DOD 7000.14-R establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15 volume set of regulations contains a very user-friendly, key word-searchable function. Much of this regulation deals with accounting practices, but there is also some fiscal policies embedded within it as well, including:

(1) Volume 10, Contract Payment Policy and Procedures.

(2) Volume 11B, Reimbursable Operations, Policy and Procedures -- Defense Business Operations Fund.

(3) Volume 13, Nonappropriated Funds Policy and Procedures.

(4) Volume 14, Administrative Control of Funds and Antideficiency Act Violations.

(5) Volume 15, Security Assistance Policy and Procedures.

b. Defense Finance and Accounting Service (DFAS) Regulations. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army. Examples of specific DFAS regulations:

(1) DFAS-IN Manual 37-100-20XX, The Army Management Structure (July 20XX). This regulation assigns most types of expenditures to a specific appropriation. The manual is reissued every FY (XX in the title = the appropriate FY).

(2) DFAS-IN 37-1, Finance and Accounting Policy Implementation (formerly AR 37-1).

(3) DFAS-DE Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Air Force (formerly DFAS-DE 7200.1-R and AFR 177-16).

(4) DFAS-DE Interim Guidance on Accounting for Obligations (formerly DFAS-DE 7000.4-R and AFR 170-8).

(5) DFAS-DE Interim Guidance on Accounting for Commitments (formerly DFAS-DE 7000.5-R and AFR 170-13).

(6) DFAS-DE 7010.1-R, General Accounting and Finance Systems at Base Level (15 Feb. 1991).

(7) DFAS-DE Interim Guidance on Procedures for Travel Accounting Operations (formerly DFAS-DE 7010.3-R).

c. Defense Financial Management and Comptroller Websites. The DOD and each of the Services have a website which provide a wealth of information related to fiscal and other financial issues:

(1) DOD Comptroller.

(2) Army Financial Management and Comptroller.

(3) Air Force Financial Management and Comptroller.

(4) Navy Financial Management and Comptroller.

3. Administrative Law Topic/Reference Index. JAGCNET contains a listing organized by subject matter which cross-references pertinent statutes and/or regulations (the most recent version is found at: http://134.11.61.26/cd1/Publications/JA/AL/AL%20Ad%20Law%20Index%2020030601.pdf).

4. AFI 65-601, vol. 1, Budget Guidance and Procedures (24 Dec. 2002). Volume 1 of this Air Force regulation contains a consolidated listing of rules and procedures for using Air Force appropriated funds.

APPENDIX

GOVERNMENT CONTRACT AND FISCAL LAW WEBSITES AND ELECTRONIC NEWSLETTERS

The first table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an electronic format, you should be able to just click on the web address in the second column resulting in your computer's web browser automatically opening and taking you to the requested website.

The second table below contains links to websites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are very convenient methods of keeping informed about recent and/or upcoming changes in the field of law.

Website Name	Web Address
A	
ABA Lawlink Legal Research Jumpstation:	http://www.abanet.org/lawlink/home.html
ABA Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Journal (PCLJ)	http://www.abanet.org/contract/operations/lawjournal/journal.html
ABA Public Contract Law Section	http://www.abanet.org/contract/admin/home.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network (& library)	http://www.arnet.gov
Acquisition Review Quarterly	http://www.dau.mil/pubs/arqtoc.asp
Acquisition Sharing Knowledge System (formerly the Defense Acquisition Deskbook)	http://deskbook.dau.mil/jsp/default.jsp
ACQ Web- Office of the Undersecretary Of Defense for Acquisition & Tech	http://www.acq.osd.mil/
Agency for International Development	http://www.info.usaid.gov/
Air Force Acquisition	www.safaq.hq.af.mil/index-2.html
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mill
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Contract Augmentation	AFCAP Information

Program	
Air Force Electronic Commerce Mall	www.safaq.hq.af.mil/contracting/electronic/e-mall.cfm
Air force FAR Site	FARSite (Federal Acquisition Regulation Site)
Air force FAR Supplement	www.safaq.hq.af.mil/contracting/affars/whats-new.html
Air Force Contracting Home Page	www.safaq.hq.af.mil/contracting/mission.cfm
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Site , FAR, DFARS, Fed Reg	http://farsite.hill.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	http://www.aflma.hq.af.mil/
Air Force Materiel Command Web Page	http://www.afmc.wpafb.af.mil/
Air Force Materiel Command Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://www.e-publishing.af.mil/
Armed Services Board of Contract Appeals	http://www.law.gwu.edu/asbca/
Armed Services Board of Contract Appeals Rules, EAJA and ADR procedures	http://docs.law.gwu.edu/asbca/rule.htm
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/
Army Acquisition Corps	
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.hq.usace.army.mil/cecc/maincc.htm
AFARS – Army Federal Acquisition Regulation Supplement	http://farsite.hill.af.mil/vfafara.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Materiel Command Command Counsel	http://www.amc.army.mil/amc/command_counsel/
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Publications	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page	www.peostri.army.mil

Assistant Secretary of the Army (Financial Management and Comptroller)	www.asafm.army.mil/

B

Bid Protest, GAO Decisions	www.gao.gov/decisions/bidpro/bidpro.htm
Bid Protest GAO Procedures	www.gao.gov/decisions/bidpro/bid/bibreg.html
Bid Protests Webpage from the American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Buisness.GOV Database of Government Websites	http://www.business.gov/
Boards of Contract Appeals Bar Association	http://www.bcabar.org/
Budget of the United States	http://w3.access.gpo.gov/usbudget/index.html

C

CASCOM Home Page	U.S. Army Combined Arms Support Command (CASCOM)
CECOM	U.S. Army CECOM
Central Contractor Registration (CCR)	http://www.ccr.gov/
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	
Comptroller General Decisions	www/gap/gpv/decisions/decision.htm
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Legal Products	http://www.access.gpo.gov/su_docs/aces/aces170.shtml
Congress on the Net-Legislative Info	http://thomas.loc.gov/
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
Congressional Documents via Thomas	http://thomas.loc.gov/
Congressional Record	http://www.gpoaccess.gov/crecord/index.html
Contract Pricing References Guides	www.acq.osd.mil/dap/contractpricing/chap-index.htm
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards	http://www.arnet.gov/far/current/html/FARTOCP30.html
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
Court of Federal Claims	www.uscfc.uscourts.gov

D

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
DCAA - Electronic Audit Reports	www.dcaa.mil/readingroom.htm

DCAA Web page	Defense Contract Audit Agency (DCAA)
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Deskbook (now known as the Acquisition Knowledge Sharing System)	http://deskbook.dau.mil/jsp/default.jsp
Defense Acquisition Regulations Directorate (the DAR Council)	http://www.acq.osd.mil/dpap/dars/index.htm
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Competitive Sourcing & Privatization	
Defense Comptroller	http://www.dtic.mil/comptroller/
Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
DCAA Contract Audit Manual	www.dcaa.mil/cam.htm
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Finance and Accounting Service (DFAS)	http://www.dod.mil.dfas/
Defense Finance and Accounting Service (DFAS) IN Mannual 37-100	http://www.asafm.army.mil/secretariat/document/dfas37-100/dfas37-100.asp
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Standardization Program	http://dsp.dla.mil/
Defense Tech Info. Ctr home page	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	
Department of Energy Acquisition Guide	
Department of the Interior Acquisition Regulation	
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Veterans Affairs	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals	
DFARS Web Page (Searchable)	www.acq.osd.mil/dpap/dars/dfars/index.html
Directorate of Information Operations and Reports Home Page - Procurement	http://web1.whs.osd.mil/diorhome.htm
DOD Busopps	http://www.dodbusopps.com/
DOD E-Mall	https://emall.prod.dodonline.net/scripts/emLogon.asp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DoD Single Stock Point for Military	

Specifications, Standards and Related Publications	
DOD Pubs & Regs	http://www.dtic.mil/whs/directives/corres/pub1.html
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/corres/ins1.html
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

E

Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.access.gpo.gov/nara/nara003.html

F

FAC	
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/login.asp?kc_ident=kc0001
Federal Acquisition Regulation (FAR) (GSA)	http://www.arnet.gov/far/
FAR Site (Air Force) (searchable; contains other procurement regulations)	http://farsite.hill.af.mil/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/flite/home.html
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	http://www.fpdc.gov/
Federal Register	http://www.access.gpo.gov/nara/index.html
Federal Register via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces140.html
FRDC- Federally Funded R & D Ctr	http://web1.whs.osd.mil/diorhome.htm
Financial Operations (Jumpsites)	http://www.asafm.army.mil
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
FindLaw	http://www.findlaw.com
FirstGov	http://www.firstgov.gov/

G

General Accounting Office (GAO) Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
General Accounting Office (GAO) Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
General Accounting Office (GAO) Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
General Accounting Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
GAO Home Page	http://www.gao.gov/

General Services Administration Board of Contract Appeals (GSABCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO)	http://www.gpo.gov
GSA Advantage	www.fss.gsa.gov

J

JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
JAGCNET (The Army JAG School Homepage)	http://www.jagcnet.army.mil/TJAGSA
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/jel/jointpub.htm

L

Library of Congress	http://lcweb.loc.gov
Logistics Joint Administrative Management Support Services (LOGJAMMS)	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm

M

Marine Corps Home Page	http://www.usmc.mil
MEGALAW	http://www.megalaw.com
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Aquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Industries for the Blind	www.nib.org
National Industries for the Severely Handicapped (NISH)	www.nish.org
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Forms online	http://forms.daps.dla.mil/
Navy Electonic Directives (NEDS)	http://neds.daps.dla.mil/
NAVY JAG Corps	http://neds.daps.dla.mil/jag/jag.htm

Navy Research, Development and Acquisition	http://www.hq.navy.mil/RDA/
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html

O

Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.acqnet.gov/Library/OFPP/BestPractices/
Office of Government Ethics (OGE)	http://www.usoge.gov
OGE Ethics Advisory Opinions	http://usoge.gov/pages/advisor_opinions/advisory_opins.html
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

P

Per Diem Rates (CONUS)	
Per Diem Rates Travel and transportion allowance committee	https://secureapp2.hqda.pentagon.mil/perdiem/
Per Diem Rates (OCONUS)	http://www.state.gov/m/a/als/prdm/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.law.gwu.edu/pclj/
Public Papers of the President of the United States	http://www.gpoaccess.gov/pubpapers/search.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm

R

Rand Reports and Publications	http://www.rand.org/publications/
Regulations / DA pams Army Publishing Agency	http://www.usapa.army.mil/
Redbook	GAO: Legal Products

S

SearchMil (search engine for .mil websites)	http://www.searchmil.com/
Service Contract Act Directory of Occupations	http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm
Share A-76 (DOD site)	http://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html

Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/default.htm

T

Thomas website	http://thomas.loc.gov/

U

UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov
U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/

W

Where in Federal Contracting?	http://www.wifcon.com/

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CHAPTER 17

CONTINGENCY AND DEPLOYMENT CONTRACTING

I. REFERENCES.

A. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997.

B. Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003.

C. NAVSUP Instruction 4230.37A, 9 April 1996.

D. Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual

E. Joint Pub. 1-06. Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 Dec 99.

F. Joint Pub. 4-0. Doctrine for Logistics Support of Joint Operations, 6 April 2000. (Chapter V, Contractors in Theater)

G. Joint Pub. 4-07, Joint Tactics, Techniques, and Procedures for Common-User Logistics During Joint Operations, 11 June 2001.

H. Joint Pub. 4-08, Joint Doctrine for Logistic Support to Multinational Operations, 25 Sep 2002.

I. Field Manual (FM) 27-100, Legal Support of Operations, 1 March 2000.

J. LOGCAP Related Resources.

1. AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 Dec. 85.

2. AMC PAM 700-30, Logistics Civil Augmentation Program (LOGCAP), 31 Jan. 00.

3. AMC PAM 715-18, AMC Contracts and Contractors Supporting Military Operations, June 2000.

4. AMC LOGCAP Battle Book, 31 Jan. 00.

5. AMC LOGCAP Homepage: http://www.amc.army.mil/LOGCAP/.

6. DA PAM 700-31, Commander's Handbook for Peacekeeping Operations (A Logistics Perspective), 1 July 94.

7. DA PAM 700-15, Logistics Support of United Nations Peacekeeping Forces, 1 May 86.

8. DA PAM 690-80/NAVSO P-1910/AFM 40-8/MCO P12910.1, Use and Administration of Local Civilians in Foreign Areas During Hostilities, 12 Feb. 71.

K. FM 3-100.21 (supercedes FM 100-21), Contractors on the Battlefield, 3 Jan. 03.

L. FM 100-10-2 (aka 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.

M. CLAMO CD-ROM: Deployed Judge Advocate Resource Library, Seventh Edition.

N. Air Force Contract Augmentation Program (AFCAP) homepage: http://www.afcap.com/

O. Defense Acquisition Deskbook, Contractor Support in the Theater of Operations, Deskbook Supplement, 28 March 2001. Available at: http://www.dscp.dla.mil/contract/doc/contractor.doc.

P. AT&L Knowledge Sharing System (AKSS) Acquisition Deskbook CD-ROM. Subscription available from: http://deskbook.dau.mil/jsp/default.jsp.

Q. AR 715-30, Secure Environment Contracting (20 Nov. 2002).

R. AR 715-9, Contractors Accompanying the Force, 29 Oct. 99 (currently being revised).

S. DA PAM 715-16, Contractor Deployment Guide, 27 Feb. 98 (will be combined with the new AR 715-9, which is currently being revised).

T. The Army Lawyer, January issue, annual Contract & Fiscal Law Year-in-Review article. Article contains updates on deployment contracting, Foreign Military Sales, Construction Contracting & Funding, and Operational Funding.

U. References on JAGCNET: http://www.jagcnet.army.mil/. (Also available on the TJAGSA homepage: http://www.jagcnet.army.mil/TJAGSA. Once you reach the school's homepage, toggle on "Publications." No password or registration is required.)

II. INTRODUCTION.

A. Objectives. Following this block of instruction, students should:

1. Understand the importance of planning for contracting operations during deployments.

2. Understand the typical contracting, finance, and resource management personnel support for contingency contracting.

3. Understand the more frequently used methods of acquiring supplies and services during deployments.

4. Understand the ratification process used to correct irregular procurements.

B. Background.

C. Applicable Law During a Deployment.

1. International Law.

a. The Law of War – Combat.

b. The Law of War – Occupation. This body of law may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope.

c. International Agreements. A variety of international agreements may impact contracting operations in OCONUS locations.

(1) Status of Forces Agreements (SOFA) or other status agreements may contain provisions impacting upon contracting activities.

(2) Specific treaties or agreements may also impact contracting activities.

2. U.S. Contract and Fiscal Law.

a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. § 2301-31.

b. Federal Acquisition Regulation (FAR) and Agency Supplements.

(1) FAR Part 25 and DFARS Part 225 govern foreign acquisitions.

(2) Various service specific supplementary manuals provide a basic guide to contingency contracting and are highly recommended for a general overview of government acquisition. *See, e.g.* Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997; Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003; NAVSUP Instruction 4230.37A, 9 April 1996; Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual.

c. Fiscal Law. Title 31, U.S. Code; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS Manual 37-100-XX (XX= current FY).

D. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit.

E. Wartime Contract Law. Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. 50 U.S.C. § 1431-35; Executive Order 10,789 (Nov. 14, 1958); FAR Part 50.

II. PREPARATION FOR DEPLOYMENT CONTRACTING.

A. General Considerations. *See* Chapter 3, FM 100-10-2 (aka FM 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.

1. Plan early for contracting during a deployment.

2. Identify and train personnel necessary for effective contracting in an overseas theater.

3. Plan to deploy contracting personnel/teams with units to hit the ground first.

4. Allocate assets necessary to support contracting efforts from current unit resources.

B. Contracting Officer (KO)/ Field Ordering Officer (FOO) Support. *See* Section III, FM 100-10-2 (aka 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.

1. Identify KO/FOO support requirements.

2. Ensure proper appointment and training of KOs and FOOs.

a. Only contracting officers and their authorized representatives may obligate government funds.

b. Contracting officers (KO) receive their appointments from a Head of a Contracting Activity (HCA) or certain officials in the Army Secretariat. FAR 1.603; AFARS 5101.603-1.

c. Contingency Contracting Officers (CCO) are special contracting officers that should be trained to operate in austere deployed environments and to work with contractors that may have limited knowledge of U.S. Government contracting practices.

d. Field Ordering Officers (FOO) normally receive their appointments from a chief of a contracting office. AFARS 5101.602-2-90. A sample appointment letter is found at AFARS 5153.9002.

(1) Responsibilities. AFARS Manual No. 2, Appendix E.

(2) "Class A" paying agents may not be ordering officers. AFARS Manual No. 2, para. 1-2.i.

e. Contracting officers and ordering officers are subject to limitations in appointment letters, regulations, and statutes.

f. Training for contracting personnel must include procurement integrity and standards of conduct training. FAR 3.104; DOD Dir. 5500.7-R, Joint Ethics Regulation.

g. Appointing authorities may limit contracting authority by dollar amount, subject matter, purpose, time, etc., or they may provide unlimited authority. Typical limitations are restrictions on the types of items that may be purchased, and on per purchase dollar amounts. FAR 1.603-3.

h. Contracting officers execute, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

C. Administrative Needs.

1. Deployable units should assemble contracting support kits. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs. *See* Appendix F, AFARS Manual No. 2.

2. CCOs should consider deploying with "bulk funding" in order to have readily available certified funds to establish the contingency contracting office without needing to seek specific certified funds for each separate acquisition. *See* p. 3-19, FM 100-10-2 (aka FM 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99

3. Legal references.

   a. Statutes: Titles 10, 31, and 41 of the U.S. Code.

   b. Regulations: FAR; DFARS; AFARS/AFFARS/NAPS; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS-IN Manual 37-100-XX (XX = current FY); and command supplements to these publications.

   c. CD-ROM contract references and LEXIS/WESTLAW software.

   d. Access to Internet.

4. Contract forms.

   a. DD Form 1155, Purchase Order. See, DFARS 213.307.

   b. Standard Form 44, Purchase Order-Invoice-Voucher. See, DFARS 213.306.

   c. Standard Forms 26, Award/Contract; 30, Amendment; 33, Solicitation, Offer & Award; 1442, Construction SO&A; and 1449, Commercial Items.

   d. Form specifications for common items.

      (1) Subsistence items, such as bottled water, fruit, etc.

      (2) Labor and other services.

      (3) Fuel.

(4) Billeting.

(5) Construction materials: plywood, gravel.

(6) Common items, such as fans, heaters, air-conditioners, etc.

e. Translations of contracting forms and provisions.

5. Portable office equipment and office supplies.

6. Personnel, including clerical support and translators. Host nation contracted support personnel may also have specific knowledge of the local vendor base, and business practices.

D. Finance and Funding Support. *See* page 3-10 Funding Contracted Support, FM 100-10-2.

1. Certified funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The Finance Officer should provide a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit. (USAF: AF Form 9, USN: NAVCOMPT Form 2276/2275.)

2. Imprest funds. FAR Subpart 13.305; DFARS Subpart 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901-020908. See also AFARS Manual No. 2, Appendix B.

a. The installation commander may establish imprest funds of up to $10,000.

b. Cashiers must receive adequate training.

c. The fund operates like a petty cash fund, and is replenished as payments are made.

d. Authorized individuals make purchases and provide receipts to cashier.

e. The fund should include local currency.

3. "Class A" paying agents. Units must ensure personnel are properly appointed and trained. See DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, para. 020604.

III. CONTRACTING DURING A DEPLOYMENT.

A. Training and Appointing Contracting Personnel.

1. Units should ensure that contracting personnel have received necessary training. If time permits, provide centralized refresher training.

2. Review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority.

B. Contracting Support Kit. Review contents of the kit. Ensure that references include latest changes.

C. Requirements Generation.

1. Verification. Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, paras. 2-3. Verification of requirements is now primarily accomplished by an "acquisition review board," or "ARB," or a "Joint Acquisition Review Board" or "JARB," in the joint environment. *See,* AMC LOGCAP Battle Book, at 53 and page 2-13, FM 100-10-2.

2. The Joint Force Contracting Office(s) or the JARB will ensure that acquisitions are coordinated to preclude inter-service and inter-component competition for scarce resources in the theater. JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001), at III-21.

3. Statement of Work development. See AFARS Manual No. 2, para. 7-6.

D. Competition Requirements.

1. The government must seek competition for its requirements; normally full and open competition, affording all responsible sources an opportunity to compete, is required. 10 U.S.C. § 2304; FAR Part 6, FAR 2.101. There is no automatic deployment contracting exception.

   a. The statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead-time (PALT).

   b. The 45-day PALT results from a requirement to publish notice of proposed acquisitions for 15 days (synopsizing the contract actions), and then to provide a minimum of 30 days for offerors to submit bids or proposals.

   c. Two additional time periods extend the minimum 45-day PALT:

      (1) time needed for requirement definition and solicitation preparation;

      (2) time needed for evaluation of offers and award of the contract; and time needed for delivery of supplies.

2. Exceptions to the rule.

   a. Unusual and compelling urgency. 10 U.S.C. § 2304 (c)(2); 41 U.S.C. § 253 (c)(2); FAR 6.302-2.

      (1) This exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2.

      (2) This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be injured seriously by this delay. It also allows preparation of written justifications after contract award. FAR 6.302-2(c)(1).

b. National security may provide a basis for limiting competition. It may apply if contingency plans are classified. FAR 6.302-6.

c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.

d. Use of the unusual and compelling urgency, and national security exceptions requires a Justification and Approval (J&A). FAR 6.303. Approval levels for justifications are (FAR 6.304):

(1) Actions under $500,000: the contracting officer.

(2) Actions from $500,000 to $10 million: the competition advocate.

(3) Actions from $10 million to $50 million: the HCA or designee.

(4) Actions above $50 million: the agency senior procurement executive. DFARS 202.101.

e. Contract actions made and performed outside the United States, its possessions, or Puerto Rico, for which only local sources are solicited, are exempt from compliance with the minimum 45-day PALT time period, but not from the requirement for competition. See FAR 5.202 (a)(12); FAR 5.203; see also FAR 14.202-1(a) (thirty-day bid preparation period only required if solicitation is synopsized). Use bid boards and local advertisements to obtain competition under these circumstances. AFARS Manual No. 2, para. 4-3.e and FAR 5.101(a)(2) & (b).

E. Contract Type. Although the contracting officer may select from a variety of contract types, firm-fixed-price contracts are used most often during deployments. See FAR Part 16; AFARS Manual No. 2, para. 8-4d(4). However, LOGCAP and Force "Sustainment" contracts are cost-plus-award-fee contracts.

1. Letter contracts and oral solicitations can expedite the contracting process in contingency operations.

a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 8-4.d(5).

b. Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements. See AFARS Manual No. 2, para. 8-2.b.

2. For an example of the types of procedures that will likely be employed to support contingency operations, *see* Memorandum, Office of the Assistant Secretary of the Air Force, Deputy Assistant Secretary (Contracting), subject: Rapid, Agile Contracting Support During Operation Iraqi Freedom, (21 March 2003) (listing undefinitized contract actions, urgent and compelling Justification and Authorizations, options for increased quantities, and accelerated delivery options as methods to be explored and utilized to support combat operations) *available at*: http://www.safaq.hq.af.mil/contracting/policy/ AQC/info-2003/op-iraqi-freedom-21mar03.pdf. *See also* Memorandum, Office of the Under Secretary of Defense, Director Defense Procurement and Acquisition Policy, subject: Emergency Procurement Flexibilities (20 May 2004) *available at* http://www.acq.osd.mil/dpap/policy/policydocs.htm

F. Methods of Acquisition.

1. Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. FAR Part 14.

2. Negotiation: award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the low-cost, technically acceptable solution to the government's requirement, or the one representing the best cost – technical tradeoff, even if it is not lowest in cost. FAR Part 15.

3. Simplified acquisition procedures: used for the acquisition of supplies, nonpersonal services, and construction in amounts below the simplified acquisition threshold. FAR Part 13.

G. Sealed Bidding as a Method of Acquisition.

1. Contracting officers must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act are present. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

    a. Time permits the solicitation, submission, and evaluation of sealed bids;

    b. Award will be based only on price and other price-related factors;

    c. It is not necessary to conduct discussions with responding sources about their bids; and

    d. There is a reasonable expectation of receiving more than one sealed bid.

2. Use of sealed bidding allows little discretion in the selection of a source. A clear description or understanding of the requirement is necessary to avoid discussions.

3. Sealed bidding normally is not used in deployment contracting, at least until the tactical situation stabilizes. It requires more sophisticated contractors, because minor errors in preparing bids will prevent government acceptance.

H. Negotiations as a Method of Acquisition.

1. Contracting Officers use negotiations, which are sometimes called competitive proposal procedures, when sealed bidding is not appropriate. 10 U.S.C. § 2304(a)(2)(B).

2. Negotiations permit greater discretion in the selection of a source.

    a. Because the government evaluates other criteria in addition to price in a negotiated procurement, substantial time may be required to obtain and evaluate all required information before making an award decision.

b. Negotiations procedures permit the government to use a "best value" basis for awarding a contract, and pay more to obtain a better product.

c. Offers are solicited by use of a Request for Proposals (RFP) and can allow discussions with offerors before submitting their best and final offer to permit better understanding of needs and capabilities.

I. Simplified Acquisition Procedures. Simplified Acquisition is used almost exclusively. Neither sealed bidding or contracting by negotiation are needed with the availability of a $1,000,000 threshold for simplified acquisitions.

1. Activities may use simplified acquisition procedures to acquire supplies and services that are not estimated to exceed the simplified acquisition limitation. FAR 13.103(b); All Star Carpet & Bedding, Inc., B-242490.3, Apr. 4, 1991, 91-1 CPD ¶ 352.

a. A simplified acquisition is a procurement of supplies, services, and construction not exceeding the simplified acquisition threshold using simplified acquisition procedures. 41 U.S.C. § 403, FAR 13.003.

b. **Increased thresholds for contingency operations. 41 U.S.C. § 428a.** On October 28, 2004, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 428a, Special Emergency Procurement Authority, to increase the thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) .

(1) Simplified Acquisition Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the simplified acquisition threshold is $250,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the simplified acquisition threshold is $1,000,000. 41 U.S.C. § 428a(b)(2); FAR 2.101.

(2) Micro-purchase Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is $15,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the micro-purchase threshold is $25,000. 41 U.S.C. § 428a(b)(1); FAR 2.101.

(3) Commercial Items Test Program. For purchases supporting a contingency operation, simplified acquisition methods may be used to purchase commercial item supplies and services up to $10,000,000. 41 U.S.C. § 428a(c); FAR 13.500(e).

2. Choice of method. Contracting officers shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.

a. Purchase orders. FAR 13.302; DFARS 213.302; AFARS Subpart 5113.302 & 5113.306 (for use of the SF 44).

(1) A purchase order is an **offer** to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.

(2) DD Form 1155 or SF 1449. This is a multi-purpose form that can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. It contains some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307. AFARS Manual No. 2, Appendix J. *See* clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

(3) Standard Form (SF) 44. *See* Appendices A & B. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for "cash and carry" type purchases. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306, DFARS 213.306, AFARS 5113.306, AFARS Manual No. 2, Appendix G. Conditions for use:

(a) As limited by appointment letter.

(b) Away from the contracting activity.

(c) Goods or services are immediately available.

(d) One delivery, one payment.

(4) Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. A KO may make purchases up to the simplified acquisition threshold ($100K normally, or $1,000,000 if overseas in the theater where the SECDEF has declared a contingency). *See* DFARS 213.306(a)(1)(B).

b. Government-wide purchase card. Authorized card holders may acquire goods and services up to the micro-purchase threshold. FAR 13.301; DFARS Subpart 213.301, AFARS Subpart 5113.2.

(1) Authorized government purchase card holders, including a KO, may use the cards to purchase goods and services up to the micro-purchase threshold. Even if not in a designated contingency operation, authorized purchase card holders outside the U.S. may make purchases up to $25,000 for commercial items/services for use outside the U.S. if it is not for work to be performed by workers recruited within the U.S. DFARS 213.301. Cardholders may be authorized to utilize the card as a payment instrument for orders exceeding the micro-purchase threshold made against Federal Supply Schedule contracts, calls written against a Blanket Purchase Agreement (BPA) or orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. AFARS 5113.202(c) and FAR 13.301(c)(2). A KO may use the card as a method of payment for purchases up to the simplified acquisition threshold when used in conjunction with a simplified acquisition method. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS 5113.202. Issuance of these cards to deploying units must be coordinated prior to deployment, because there is insufficient time to request and receive the cards once the unit receives notice of deployment.

(2) Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment may utilize accommodation checks and/or government purchase card convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. See DoD 7000.14-R, vol. 5, ch. 2, para. 0210; see also DFARS 213.270(c)(6) and 213.305-1(3). Government purchase card convenience checks may not be issued for purchases exceeding the mirco-purchase threshold. See DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.1.

c. Blanket purchase agreements (BPA). FAR 13.303; DFARS 213.303-5, AFARS 5113.303.

(1) A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing "charge account" relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier, as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

(2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source acquisitions/procurements. Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

(3) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

(A) Description of agreement.

(B) Extent of obligation.

(C) Pricing.

(D) Purchase limitations.

(E) Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.

(F) Delivery ticket requirements.

(G) Invoicing requirements.

d. Imprest funds. FAR 13.305; DFARS 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908; AR 37-103.

(1) An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Funds are advanced without charge to an appropriation, but purchases are made with notation on the receipts returned to the imprest fund cashier of the appropriation, which will be used to reimburse the imprest fund for the amount of the purchase. See DoD 7000.14-R, vol. 5, ch. 2, para. 0209; DFARS 213.305-1. The maximum amount in a fund at any time is $10,000, but can be increased to $100,000 during a contingency operation. DoD 7000.14-R, vol. 5, ch. 2, para. 020903. During an overseas contingency operation as defined in 10 U.S.C. 101 (a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8), imprest funds may be used for transactions at or below the micro-purchase threshold. DFARS 213.305-3.

(2) Ordering officers, as well as KOs, may use the imprest fund procedures. Imprest fund cashiers, however, cannot be ordering officers and cannot make purchases using imprest funds. DoD 7000.14-R, vol. 5, ch.2, para. 020905.

(3) Each purchase using imprest funds must be based upon an authorized purchase requisition. If materials or services are deemed acceptable by the receiving activity, the receiver annotates the supplier's sales document and passes it to the imprest fund cashier for payment. Alternatively, the imprest fund cashier may advance cash to an authorized individual to pick up and pay for the material at the vendor's location. See DoD 7000.14-R, vol. 5, ch. 2, para. 020906 B.

3. Competition requirements.

a. Micro-purchases: Only one oral quotation is required, if the contracting officer finds the price to be fair and reasonable. FAR 13.202; N. Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Such purchases must be distributed equitably among qualified sources. FAR 13.202(a)(1). Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, solicit quotes from other than the previous supplier before placing a repeat order.

b. Above micro-purchase threshold up to the simplified acquisition threshold: Contracting Officers shall solicit quotations orally to the maximum extent practicable. FAR 13.106-1; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Normally soliciting three sources is reasonable. FAR 13.104(b). Do not omit incumbent contractors without good reason. See J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Do not split requirements aggregating more than the applicable threshold into several purchases merely to permit the use of simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003.

d. Publication of notices. Subject to the following exceptions, the contracting officer is not required to publicize contract actions that do not exceed the simplified acquisition threshold.

(1) Public posting of a request for quotations for 10 days is required if the order is estimated to be between $10,000 and $25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101(a)(2).

(2) For a CONUS contract action, the contracting officer must publish a synopsis of all contract awards exceeding $25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); FAR 5.101(a)(1).

(3) There is no requirement to publish a synopsis for a defense agency contract that will be made and performed outside the United States, its possessions or Puerto Rico, and for which only local sources will be solicited. FAR 5.202(a)(12).

J. Other contracting considerations:

1. Choice of Law/Choice of Forum. When executing contracts overseas, consider using the Choice of Law clause. DFARS 233.215-70 and 252.233-7001.

2. Trade Agreements Act may apply if the contract is for the purchase of a good exceeding $169,000 or construction exceeding $6,481,000. See FAR 25.403 and DFARS subpart 225.4

K. Using Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may already be available to meet recurring requirements, such as fuel and subsistence items.

1. Investigate existing contracts with contracting offices of activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombassa, Kenya. This contract was used to provide services to aircraft crews during Operation Provide Relief.

2. Determine whether warranty requirements for major end items require the contractor to provide repair and maintenance service in the deployment region.

3. Fuel. The Defense Energy Support Center (DESC) may be able to assist in the procurement of fuels in a contingency operation. More information is available at: http://www.desc.dla.mil/main/deschome.htm. The DESC emergency phone number is 1-800-2TOP OFF (1-800-286-7633).

L. Contract Administration, Changes, Quality Assurance, and Terminations. FAR Parts 42, 43, 46, and 49.

1. Awarding contracts is only half the battle in deployment contracting operations. Contracting personnel must monitor performance closely to ensure the desired goods or services are actually delivered in a timely fashion.

a. Requiring units should provide personnel, such as contracting officer's representatives, to assist in monitoring contractor performance to the extent necessary. AFARS Manual No. 2, para. 7-6.b.

b. For larger or more complex requirements, Defense Contract Management Agency has trained inspectors and administrative contracting officers to assist with contract administration. FAR Part 42. More information on DCMA may be found at: http://home.dcma.mil/.

c. For most contracts, the government relies on the contractor to perform detailed inspections and tests necessary to ensure conformance with contract quality requirements. FAR 46.202-2.

2. Under the Changes clause (see, e.g., FAR 52.243-1, Changes-Fixed-Price), the government has authority to require contractors to perform work necessary to achieve the overall purpose of the contract, even if the work actually needed differs somewhat from that specified in the original contract. The contract price is adjusted (a fair increase or decrease in price for the cost of the changed work, plus a reasonable adjustment to profit), if the government directs a change under the Changes clause. See AFARS Manual No. 2, para. 8-14c-e.

3. Government terminations.

a. Termination for Convenience clauses (FAR 52.249-1 through 52.249-6) give the government the right to terminate contracts without cause when doing so is in the government's interest. The contractor recovers its costs plus a reasonable profit on those costs in a convenience termination, but no anticipatory profits.

b. Termination for Default clauses (see, e.g., FAR 52.249-8, Default (Fixed-Price Supply and Service)) provide the government with the right to terminate a contract for cause.

(1) The three general bases for default termination are:

(a) Failure to deliver or perform on time;

(b) Failure to make progress which endangers performance; or

(c) Failure to perform any other material provision of the contract.

(2) Contractors may raise defenses to terminations for default (e.g., excusable delay, unreasonable inspections). If a contractor prevails on a defense, then its remedy is normally conversion of the default termination action to a termination for convenience.

(3) If the government terminates a contract for default successfully, the contractor generally receives payment only for goods actually delivered, and is subject to a later assessment of reprocurement costs (i.e., the cost of cover).

4. Practical problems in awarding and obtaining performance under government contracts in overseas theaters. AFARS Manual No. 2, paras. 3-3 (oral agreements) and 3-7 (multi-national programs).

M. Alternative Methods for Fulfilling Requirements.

1. LOGCAP Contract. In December 2001, the Army Material Command (OSC) awarded the third iteration of the cost-plus-award-fee LOGCAP (Logistics Civil Augmentation Program) contract to Halliburton KBR Government Operations Division. LOGCAP contract provides for comprehensive logistics and construction support to a deployed force anywhere in the world. Use of this contract to provide logistics support to a deployed force permits a commander to perform a mission with a smaller force than otherwise needed. See AR 700-137. The LOGCAP Homepage (Army AMC) is: http://www.amc.army.mil/LOGCAP/ .

a. Civilian contractor.

b. Provides logistics/engineering services to deployed forces, in such places as Somalia, Haiti, Rwanda, East Timor, and Iraq.

c. Balkans Support Contract (BSC). In an effort to maintain continuity, the first LOGCAP contractor, Brown & Root Services Corporation (BRSC), continued to provide logistics support for US forces in the Balkan theater of operations through a sole source award. Subsequently, on 19 February 1999 the BSC was competitively awarded to the incumbent BRSC. The BSC is a cost-plus-award-fee IDIQ. All requirements for new or expanded recurring services are staffed for approval through USAREUR DCSLOG.

2. AFCAP. Air Force Contract Augmentation Program. Similar to LOGCAP, AFCAP is primarily a civil engineering support contract, and can also provide limited services. The AFCAP homepage is: https://wwwmil.afcesa.af.mil/Directorate/CEX/CEXX/AFCAP/afcap.html .

3. LOGJAMMS contract (Logistics Joint Administrative Management Support Services). It is a task-order driven multiple award contract. This contract is administered by Forces Command (FORSCOM) and is geared to provide support to FORSCOM, U.S. Army Reserve Command, Third Army, and TRADOC, and others upon request. LOGJAMMS is intended to augment existing base support services such as the LOGCAP contract. It provides similar services as the LOGCAP and other Force Sustainment contracts, but focuses more on equipment repair and maintenance support and other logistical support services. Unlike the LOGCAP contract, LOGJAMMS does not provide minor construction support. The LOGJAMSS homepage is: http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm.

4. Economy Act. 31 U.S.C. § 1535.

   a. Executive agencies may transfer funds to other executive agencies, and obtain goods and services provided from existing stocks or by contract. For example, the Air Force may have construction performed by the Army Corps of Engineers, and the Army may have Department of Energy facilities fabricate special devices.

   b. Procedural requirements for Economy Act orders are set forth in FAR Subpart 17.5, DFARS Subpart 217.5, and DFAS-IN 37-1.

   c. General officer approval is required before placing Economy Act orders outside of DOD. See DFAS-IN 37-1, para. 1207.

5. Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350, DoD Dir. 2010.9, and AR 12-1.

   a. These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. The usefulness of these arrangements may be limited when the host nation has not invited U.S. intervention, or when the U.S. deploys forces unilaterally.

b. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services.

c. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. However, except during periods of active hostilities, reimbursable transactions (i.e., those where repayment in kind is not possible) are limited to a total of $150M (credit) / $200M (liability) per year for NATO and $75M (credit) / $60M (liability) per year for non-NATO allies.

6. Extraordinary Contractual Actions. Pub. L. No. 85-804; 50 U.S.C. § 1431-35; FAR Part 50.

a. The Secretary of the Army has broad residual powers to initiate extraordinary contractual actions to facilitate national defense.

b. Procedures for requesting use of these powers are set forth in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 5150.1.

N. Leases of Real Property. 10 U.S.C. § 2675

1. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b.

2. The Corps of Engineers using Contingency Real Estate Support Teams (CREST) negotiates most leases.

3. Billeting services are acquired by contract, not by lease.

IV. POLICING THE CONTRACT BATTLEFIELD.

A. Ratification. FAR 1.602-3, AFARS 5101.602-3.

1. Only certain officials (e.g., the chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), or Head of a Contracting Activity (HCA)) may ratify agreements made by unauthorized persons.

1. There are dollar limits to the authority to ratify unauthorized commitments. AFARS 5101.602-3(b). The three approval levels are:

a. $10,000 or less -- Chief of Contracting Office.

b. $100,000 or less -- PARC.

c. Greater than $100,000 -- HCA.

3. A ratifying official may ratify only when:

a. The government has received the goods or services.

b. The ratifying official has authority to obligate the United States now, and could have obligated the United States at the time of the unauthorized commitment.

c. The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, etc.

d. The price is fair and reasonable.

B. Extraordinary Contractual Actions. FAR Part 50.

1. If ratification is not appropriate (e.g., no price agreement with supplier), informal commitment procedures may allow compensation. FAR 50.302-3.

2. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services; also, normal contracting procedures must have been impracticable at the time of the commitment to use extraordinary procedures. FAR 50.203(d).

3. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dep't of Army Memorandum, 4 Aug. 1966); Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Office of the Gen. Counsel, Dep't of Army Memorandum, Jan. 1990).

C. Government Accountability Office (GAO) Claims.

1. The GAO has broad authority to settle claims against the United States. 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30 and in GAO Policies and Procedures Manual for the Guidance of Federal Agencies, Title 4. *See also* DFAS-IN 37-1, para. 090902.

2. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. See 31 U.S.C. § 1342; see also Voluntary Payments-Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule applies to urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property; Meals-Furnishing-Gen. Rule, B-177900, 53 Comp. Gen. 71 (1973); and, unforeseen impediments to completion of an urgent agency mission; Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, supra.

3. If the GAO believes that it cannot pay a meritorious claim because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This report may form the basis for congressional private relief legislation.

D. Claims Under the Contract Disputes Act. FAR Subpart 33.2.

1. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, provides a statutory framework for resolution of claims arising under, or relating to, a government contract.

2. General procedures under the CDA.

a. Contractor or the government asserts a claim, which the contracting officer reviews and evaluates for a decision;

b. The contracting officer renders a final decision on the claim; and

c. The contractor may appeal the final decision to either the U.S. Court of Federal Claims or the agency board of contract appeals.

d. Claims for losses due to combat action must arise under the contract to be compensable. T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147.

E. Redeployment. Ensure payments are finalized and recorded before redeployment. Coordinate for transfer of files to parent contracting organization for holding and resolution of issues that arise after redeployment.

V. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS.

A. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action.

B. Acquisition of Enemy Property in Combat.

1. Confiscation. The permanent taking or destruction of enemy public property found on the battlefield. HR (Hague Convention Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, para. 59, 393-424 (July 1956) (hereinafter FM 27-10).

a. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings also may be used for military purposes.

b. If ownership is not known, a commander may treat property as public property until ownership is determined. FM 27-10, para. 394. Privately-owned military equipment, i.e., weapons, radios, etc., may be treated as public property and taken without compensation. HR, art. 53; FM 27-10, para. 403.

2. Seizure. The temporary taking of private property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. For example, a deployed force might seize civilian construction equipment to augment its organic capability to dig into fighting positions. Private personal property, if taken, must be returned when no longer required, or the user must compensate the owner. HR, art. 53; FM 27-10, para. 406.

C. Acquisition of Enemy Property in Occupied Territories.

1. An occupation is the control of territory by an invading army. HR, art. 42; FM 27-10, para. 351. If a lawful government invites U.S. forces, the territory is not occupied, and U.S. forces have no right to take property.

2. Public personal property that has some military use may be confiscated without compensation. FM 27-10, para. 403.

3. The occupying military force may use public real property. FM 27-10, para. 401.

4. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. FM 27-10, para. 403.

5. Requisition. The taking of private property needed to support an occupying military force is known as requisition. Users must compensate owners as soon as possible. FM 27-10, para. 417. The command may levy the occupied populace to support its force, i.e., pay for the requisition.

D. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services. The law of land warfare also regulates the use of prisoners of war and the local populace as a source of services for military forces. Prisoners of war and civilians may not be compelled to perform services of a military character or purpose.

E. Use of Prisoners of War as a Source for Services During War.

1. Prisoners of war may be used as a source of labor; however, the work which prisoners of war may perform is very limited. Geneva Convention for the Protection of Prisoners of War (GPW), art. 49; FM 27-10, para. 125-133.

2. Prisoners of war may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para. 126.

F. Use of Civilian Persons as a Source for Services during War.

1. Commanders may not compel civilian persons to work unless they are over eighteen years of age, and then only on work necessary for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied area. Geneva Convention Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424.

2. Protected persons may not be compelled to take part in military operations against their own country. GC, art. 51; FM 27-10, para. 418.

3. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, and military airfields or transportation of supplies or ammunition in the zone of operations. There is no prohibition against their being employed voluntarily and paid for this work. FM 27-10, para. 420.

G. Practical Considerations Concerning the Use of International Law Principles for Acquisition of Supplies and Services.

1. The uncertainty of these principles (confiscation, seizure, and requisition) to provide reliable sources for the acquisition of supplies and services makes them of little use except in emergency situations.

2. The impact that taking of private property or forced labor inevitably has on the populace may be detrimental to mission accomplishment.

3. The difficulty in accurately computing compensation owed without accurate records may lead to extensive claims work during the latter stages of an operation.

4. Providing speedy compensation under U.S. law is difficult.

VI. CONTRACTORS ON THE BATTLEFIELD.

A. Civilian contractors may be employed in an Area of Operations (AO) to support U.S. Army force structures and/or weapon systems.[1]

B. Three categories of contractors can be used in a deployed environment: theater support contractors,[2] external support contractors,[3] and systems contractors.[4] Utilization of each category of contractor must be considered in operational planning.

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1. See generally U.S. Dep't of Army, Army Regulation 715-9, Contractors Accompanying the Force (29 Oct. 1999). U.S. Dep't of Army, Pam 715-16, Contractor Deployment Guide (27 Feb. 1998), U.S. Dep't of Army, Army Material Command Pam 715-18, AMC Contracts and Contractors Supporting Military Operations (June 2000), U.S. Dep't of Army, Field Manual 3-100.21, Contractors on the Battlefield (3 Jan. 2003), and U.S. Dep't of Army, Field Manual 100-10-2, Contracting Support on the Battlefield (4 Aug. 1999). See also Memorandum, Acting Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb 2001).

2 U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, para. 2-15 (3 Jan. 2003); THE JOINT CHIEFS OF STAFF, JOINT PUB. 4.0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 TO V-3 (6 Apr. 2000) [hereinafter JOINT PUB 4.0]. Theater support contractors support deployed forces through preexisting contracts or contracts awarded from the theater of operations. They provide goods, services and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. FM 100-10-2 at 2-15.

3 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. External support contractors provide support separate from theater support or systems contractors. External support contractors may be distinguished from the other types in that the contracting officers who award the contracts retain distinct authority separate from the theater PARC or systems offices. An example of this type of contract is the LOGCAP contract. FM 100-10-2, at 2-15.

4 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. Systems contractors provide support, during peacetime and conflict, for a particular end item or system such as a weapon system. These contractors commonly provided life cycle

C. Contractor status in foreign country. Contractors may have status defined by an agreement (SOFA or SOMA) or may have no official status.

D. Discipline.

1. Discipline is the responsibility of the Contractor. However, the KO must ensure all necessary standards (GO #1, theater directives, policies, etc.) are incorporated into the contract.

2. Criminal Jurisdiction is controlled by The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-67. The Commander must use the KO to exercise control over the actions of the contractor in non-criminal areas. For an excellent overview of the MEJA and implications on contractor activities, including draft contract language, see, Major Joseph R. Perlak, The Military Extraterritorial Justice Act of 2000: Implications for Contractor Personnel, 169 Mil. L. R. 92 (2001).

3. The commander can utilize administrative sanctions (suspension of exchange or MWR privileges) or can effect the removal of a contractor employee (pursuant to the contract and with the KO's authority.)

E. Compensation: (Insurance for contractor employees).

1. Several programs are available to ensure "workers comp" type insurance programs cover contractor employees while deployed and working on USG contracts. See generally, FAR 28.305.

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management for the systems they produce. Examples include support for vehicles, weapon systems and aircraft. FM 100-10-2 at 2-15.

a. Defense Base Act (DBA) 42 USC §§ 1651-54, FAR 28.309 and 52.228-3; DFARS 228.305 and 228.370(a). See, Royal Indem. Co. v. Puerto Rico Cement Co., 142 F.2d 237, 239 (1st Cir. 1944), *cert. denied*, 323 U.S. 756 (1944) (holding that a construction employee working on a military base in Puerto Rico was covered by the DBA because the purpose of the DBA was to extend the benefits of the LHWCA to areas overseas and to obtain insurance at reasonable rates); Berven v. Fluor Co., 171 F. Supp. 89 (S.D.N.Y. 1959) (explaining that the statute covers individuals employed at any military, air, or naval base or contracts for the purpose of engaging in a public work); S*ee also*, University of Rochester v. Hartman, 618 F.2d 170, 173 (2d Cir. 1980) (holding that a service contract lacking a nexus with overseas construction project or work connected with national defense does not constitute "public work" within the meaning of 42 U.S.C. § 1651(a)(4)); O'Keeffe v. Pan American World Airways Inc., 338 F.2d 319 (5th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965) (holding that the frolic and detour rule for scope of employment analysis must be applied more broadly in the context of DBA claims because the statute was intended to avoid harsh results); Republic Aviation Co. v. Lowe, 164 F.2d 18 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948)

b. Longshore and Harbor Worker's Compensation 33 USC §§ 901-950, DA PAM. 715-16, para. 10-5c to 10-5d. Applicable by operation of the DBA.

c. War Hazards Compensation Act (WHCA) 42 USC §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). Huskisson v. Hawaiian Dredging Co., 212 F.2d 219, 220-21 (7th Cir. 1954); T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147 (ASBCA, 2000).

d. Federal Tort Claims Act (FTCA) 28 USC §§ 1346, 2671-80 (may provide an avenue for recovery.)

2. Capture & Detention. DA Pam 715-19, para. 11-1; DFARS 252.228-7003. Provides for government reimbursement for wages/salary paid to a detained, captured, or missing.

F. Work Hours.

1. The KO must consider the work hours/duty day for a given contractor in a deployed setting.

2. DFARS 252.222-7002 requires contractors to comply with local laws, regulations, and labor union agreements governing work hours.

3. The "Eight-Hour Law" (40 USC §§ 321-26) does not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law.

4. SOFAs or other status agreements may impact workhours/workweek issues.

H. Continued Performance During a Crisis.

1. Commanders are rightly concerned about the continuation of contractor support in the face of combat/hostile operations.

2. U.S. DEP'T OF DEFENSE, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING A CRISIS (6 Nov. 1990) (administrative reissuance incorporating Change 1, 26 Jan. 1996). The Instruction requires contractors to use all means available to continue to provide services deemed essential by DOD. The DODI is guidance for commanders; it does not bind contractors in any way.

3. There is no "desertion" offense for contractor personnel. Commanders should plan for interruptions in services, if the contractor appears to be unable to continue support.

4. Anecdotally, this has not been a problem.

I. Security/Force Protection.

1. Security for contractor personnel continues to cause concerns.

2. Doctrinally, DOS has the responsibility to protect non-DOD US citizens in the host nation/country of operations.

3. Contractors have responsibility to provide force protection ands counter-terrorism awareness training to their employees similar to that provided to US Government employees. DFARS 225.74 and 252.225-7043

4. Contractor personnel may be armed for self-defense purposes. Contractor personnel generally cannot be required to accept weapons.

5. Arming contractors presents a host of status & other international law questions for the advising contract attorney.

VII. CONCLUSION.

A. Identification and Proper Training of Contracting Personnel.

B. Contract Funding and Methods of Acquisition: every deploying attorney should know the basics.

C. Ratifications and Unauthorized Commitments.

ATTACHMENT A

INSTRUCTIONS FOR THE USE OF THE SF 44:

Instructions are located on the inside cover of the form booklet.

1. Filling out the Form

(a) All copies of the form must be legible. To insure legibility, indelible pencil or ball-point pen should be used. SELLER'S NAME AND ADDRESS MUST BE PRINTED.

(b) Items ordered will be individually listed. General descriptions such as "hardware" are not acceptable. Show discount terms.

(c) Enter project reference or other identifying description in the space captioned "PURPOSE." Also, enter proper accounting information, if known.

2. Distributing Copies

Copy No. 1 (Seller's Invoice)- Give to seller for use as the invoice or as an attachment to his commercial invoice.

Copy No. 2 (Seller's Copy of the Order)- Give to seller for use as a record of the order.

Copy No. 3 (Receiving Report-Accounting Copy)-

(1) On over-the-counter transactions where the delivery has been made, complete receiving report section and forward this copy to the proper administrative office.

(2) On other than over-the-counter transactions, forward this copy to location specified for delivery. (Upon delivery, receiving report section is to be completed and this copy then forwarded to the proper administrative office.

Copy No. 4 (Memorandum Copy)- Retain in the book, unless otherwise instructed.

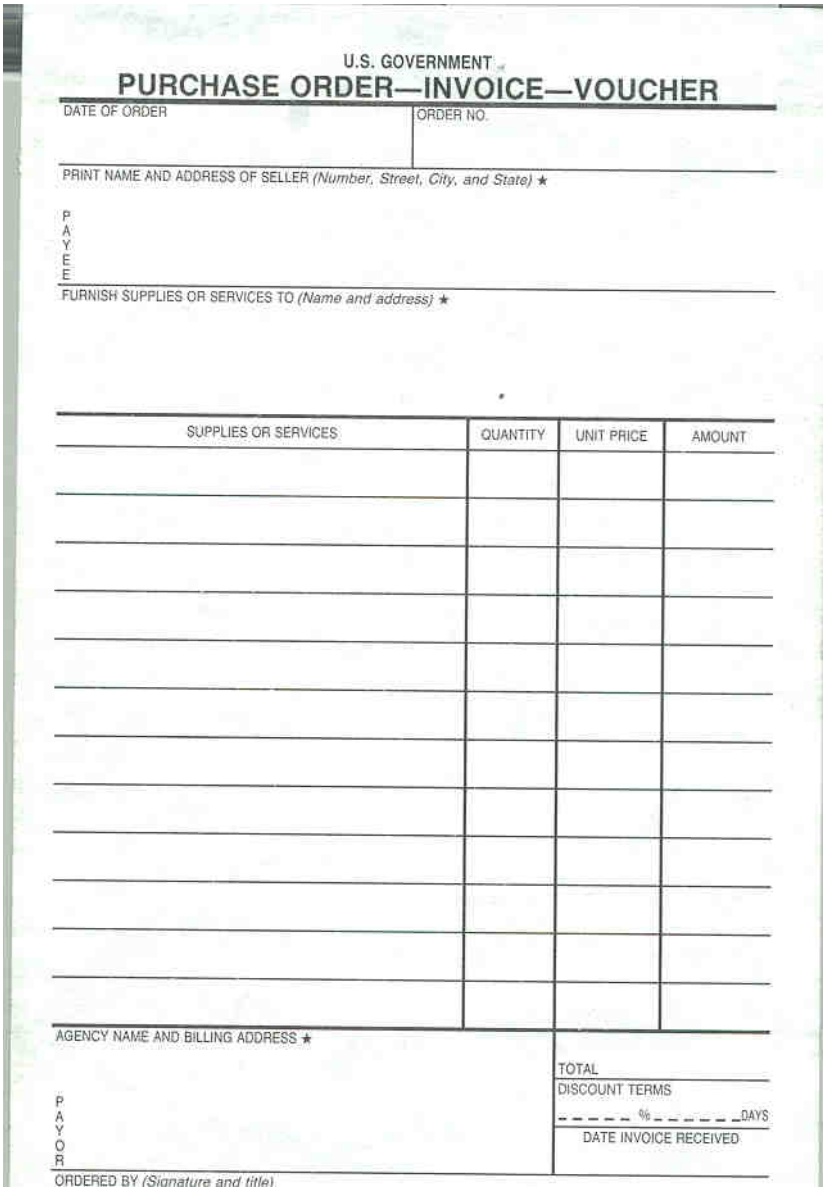
3. When Paying Cash at Time of Purchase

(a) Enter the amount of cash paid and obtain seller's signature in the space provided in the seller section of Copy No. 1. If seller prefers to provide a commercial cash receipt, attach it to Copy No. 1 and check the "paid in cash" block at the bottom of the form.

(b) Distribution of copies when payment is by cash is the same as described above, except that Copy No.1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instruction pertaining to handling receipts for cash payments.

SF 44

TOP HALF



U.S. GOVERNMENT

PURCHASE ORDER—INVOICE—VOUCHER

DATE OF ORDER | ORDER NO.

PRINT NAME AND ADDRESS OF SELLER *(Number, Street, City, and State)* ★

P
A
Y
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E

FURNISH SUPPLIES OR SERVICES TO *(Name and address)* ★

SUPPLIES OR SERVICES	QUANTITY	UNIT PRICE	AMOUNT

AGENCY NAME AND BILLING ADDRESS ★

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TOTAL

DISCOUNT TERMS

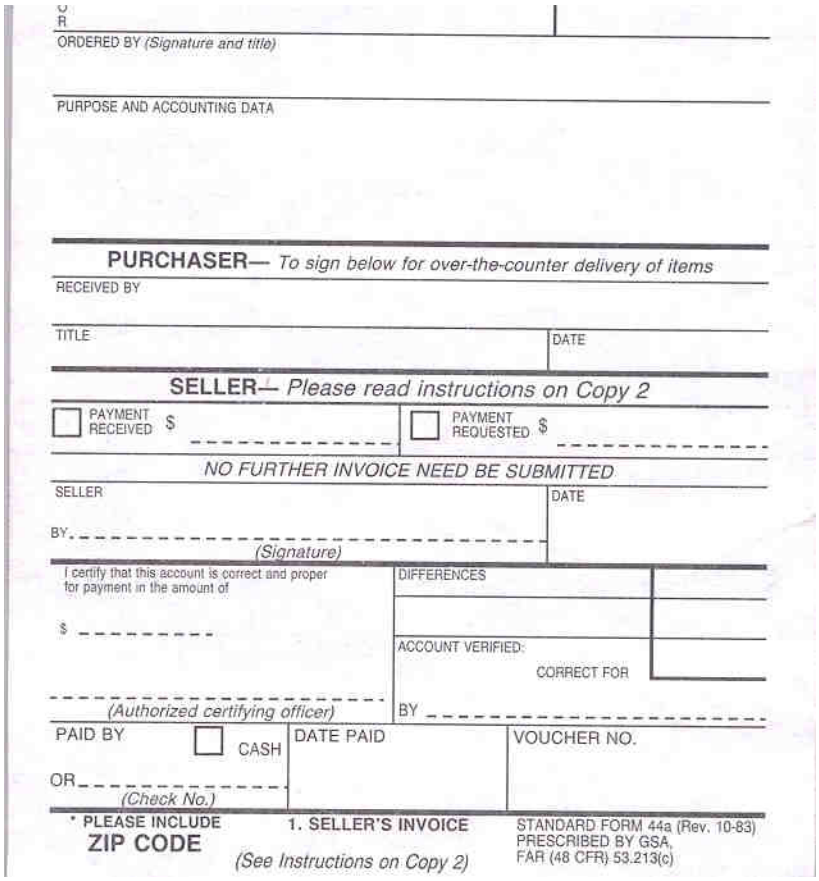
_____ % _____ DAYS

DATE INVOICE RECEIVED

ORDERED BY *(Signature and title)*

SF 44

BOTTOM HALF



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ORDERED BY *(Signature and title)*

PURPOSE AND ACCOUNTING DATA

PURCHASER— *To sign below for over-the-counter delivery of items*

RECEIVED BY

TITLE | DATE

SELLER— *Please read instructions on Copy 2*

☐ PAYMENT RECEIVED $ _____ | ☐ PAYMENT REQUESTED $ _____

NO FURTHER INVOICE NEED BE SUBMITTED

SELLER | DATE

BY _____
(Signature)

I certify that this account is correct and proper for payment in the amount of

$ _____

_____
(Authorized certifying officer)

DIFFERENCES

ACCOUNT VERIFIED:
CORRECT FOR

BY _____

PAID BY ☐ CASH

OR _____
(Check No.)

DATE PAID

VOUCHER NO.

* PLEASE INCLUDE **ZIP CODE**

1. SELLER'S INVOICE
(See Instructions on Copy 2)

STANDARD FORM 44a (Rev. 10-83)
PRESCRIBED BY GSA,
FAR (48 CFR) 53.213(c)