



Chapter 3: Availability of Appropriations as to Time



CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

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CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- I. INTRODUCTION.** Following this instruction, the student will understand:
- A. The various time limits on availability of appropriated funds;
 - B. The Bona Fide Needs Rule and some common exceptions to that rule;
 - C. The rules concerning availability of funds for funding replacement contracts; and
 - D. The general rules concerning use of expired appropriations.
- II. KEY DEFINITIONS.**
- A. **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.
 - B. **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.
 - C. **Authorization Act.** 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.

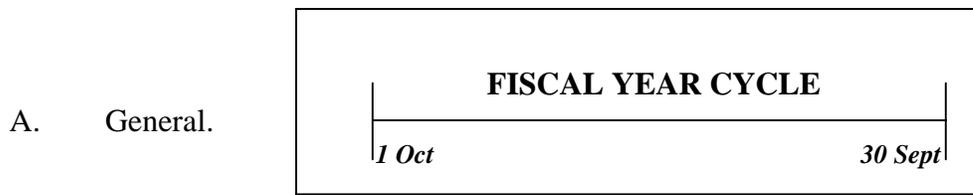
- D. **Period of Availability.** The period of time for which appropriations are available for obligation. If funds are not obligated during their period of availability, then the funds expire and are generally unavailable for further obligation.

- E. **Bona Fide Needs.** 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).

- F. **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).

- G. **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.



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 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.

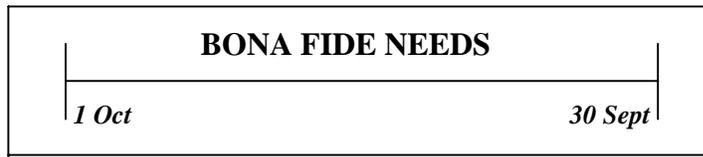
1. Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated. 31 U.S.C. § 1502; DFAS-IN Reg. 37-1, para. 080302.
2. The annual DOD Appropriations Act typically contains the following provision:

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 2002, Pub. L. No. 107-117, 115 Stat. 2284 (2002).
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-34, Instructions on Budget Execution, § 21.1 (August 1985). See Section VII, infra.

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. Research, Development, Test and Evaluation (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.

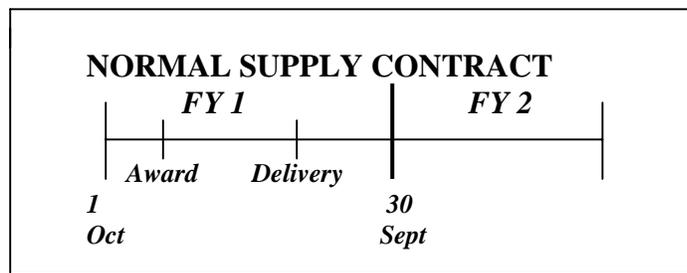
1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. That is, the requirement must represent bona fide needs of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. 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 Needs 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 (needs).

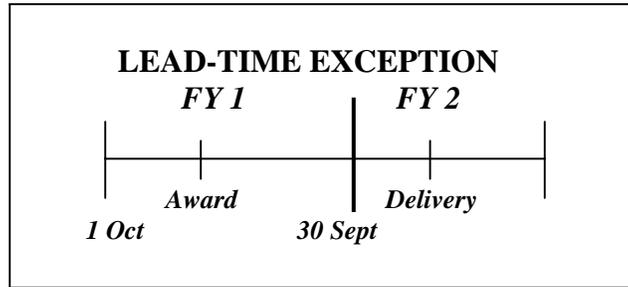
2. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. DFAS-IN Reg. 37-1, para. 070501.
3. The government must intend that the contractor start work promptly and perform in accordance with the contract terms. 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.

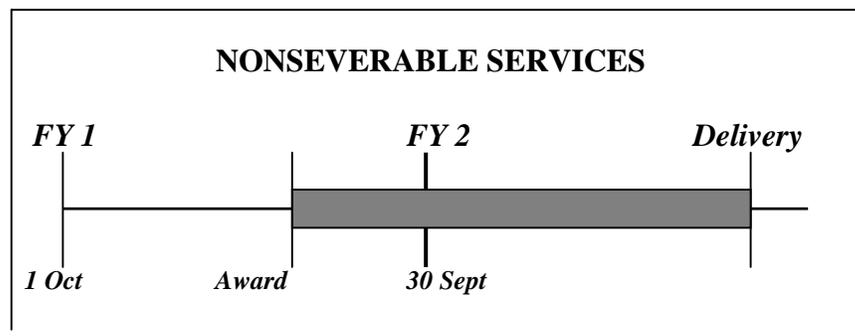
4. *Lead-Time Exception to the Bona Fide Needs Rule.* There are two variants that comprise the lead time exception.



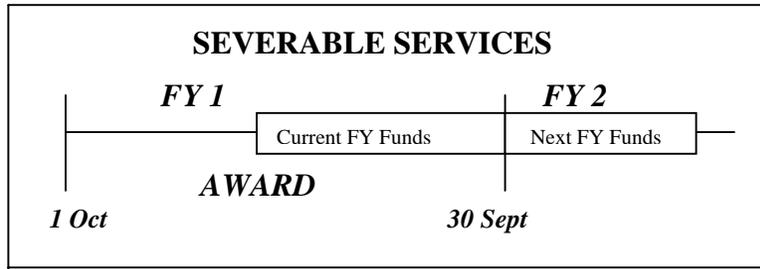
- a. Delivery Time. This aspect of the exception recognizes that the agency has a need for, but cannot obtain the item, in the current FY. In this situation, if an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the Bona Fide Needs Rule. However, the time between contracting and delivery must not be excessive and 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 2003 funds is appropriate for a delivery on or before a required delivery date of 14 November 2003. (Remember 1 October 2003 is the beginning of FY 2004). This represents the bona fide needs of FY 2003. However, if the government directs the contractor to withhold delivery until after 14 November 2003, there is not a bona fide need for the item in FY 2003 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2004.

- a. Nonseverable service contracts; and
- b. Severable service contracts.

Nonseverable Services: 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. Thus, 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); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986); Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 (1943).



- 3. *Severable Services:* 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, 65 Comp. Gen. 154 (1985). Thus, 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.



4. *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. § 253l. In essence, 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 (the “Kelly Air Force Base” case).

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 the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. 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-277886.2, 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. When 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 2003 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 2004 and the contract should be awarded in FY 2004. Accordingly, use of FY 2003 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.
3. 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. The General Accounting Officer has recently issued an opinion and a report to Congress that may limit agencies’ ability to bank funds in the future. Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund, Comp. Gen. B-288142, Sep. 6, 2001, (available at: <http://www.gao.gov/decisions/appro/288142.htm>); Matter of: Continued Availability of Expired Appropriation for Additional Project Phases,

Comp. Gen. B-286929, Apr. 25, 2001, (available at http://www.access.gpo.gov/su_docs/aces/aces170.shtml).

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 General Accounting Office (GAO), or in a federal court. 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080608.
- 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. DFAS-IN 37-1, para. 080607; 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. DFAS-IN 37-1, para. 080606.
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. DFAS-IN 37-1, para. 080606, tbl. 8-7; 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; DFAS-IN 37-1, para. 080606.
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. DFAS-IN 37-1, para. 080606, tbl. 8-7.

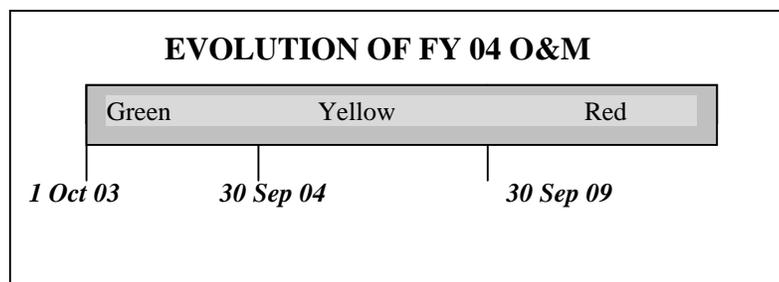
E. Contract Modifications Affecting Price.

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).

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.

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. The head of the agency must approve all changes in excess of \$4 million.
 - a. For all changes exceeding \$25 million, the head of the agency 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); DOD 7000.14-R, vol. 3, paras. 100204-05.
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(d); 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).

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. OMB Circular A-34, Instructions on Budget Execution (Aug. 1985).
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 2003 RDT&E Army Appropriation, which is available for obligation until 30 September 2004, may be obligated for the needs of FY 2003 and 2004; it is not available for the needs of FY 2005.
 - 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. FULL FUNDING POLICY AND MULTIYEAR CONTRACTS.

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 Research, Development, Test, and Evaluation Programs.

1. The government executes the Research, Development, Test, and Evaluation Program through the incremental funding of contracts and other obligations. DOD Reg. 7000.14-R, vol. 2A, para. 010211.
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, pursuant to a DFARS interim rule. See DFARS Part 232.7 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.

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 ¶ 19,450; 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.