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Office of the General Counsel

Volume 1

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Volume 3

Availability of Appropriations: Time

Page 5-1 – *Replace part of the index for section B.1 as follows:*

B. The *Bona Fide* Needs Rule

1. Background

Page 5-13 – *Replace the first full paragraph with the following:*

While the rule itself is universally applicable, determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. **B-308010, Apr. 20, 2007;** 70 Comp. Gen. 469, 470 (1991); 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. at 159.

Page 5-15 – *Insert the following new section c., including the references to new footnote numbers 8a, 8b, 8c, and 8d, after the first full paragraph:*

(c) "Parking" or "Banking" Funds

"Parking" or "banking" funds are terms used to describe a transfer of funds to a revolving fund through an interagency agreement in an attempt to keep funds available for new work after the period of availability for those funds expires.[8a] Parking usually occurs when an agency transfers fixed-year funds to a revolving or franchise fund in the mistaken belief that, by doing so, the funds lose their fixed-year character and remain available indefinitely. However, an agency may not extend the availability of its appropriations by transferring them to another agency. B-288142, Sept. 6, 2001. Use of these expired parked funds violates the *bona fide* needs rule. An interagency agreement must be based upon a legitimate, specific, and adequately documented requirement representing a *bona fide* need of the year in which the order is made.

GAO has reported on the parking of funds through interagency agreements, and, over a period of several years, Department of Defense (DOD) officials, including the Comptroller, warned against the misuse of interagency agreements to park or bank funds.[8b] In addition, the Inspectors General for DOD and the Department of the Interior (Interior) have faulted their agencies for misusing interagency transactions in this fashion.[8c] In October 2006, the Treasury issued a bulletin instructing ordering agencies to monitor the activity and age of an interagency order and where there has been no activity for more than 180 days, the ordering agency "shall determine the reasons for the lack of activity on the order." I TFM Bulletin No. 2007-03, Attachment I, ¶ III.B.2 (Oct. 1, 2006).

In a 2007 decision, GAO found that DOD improperly parked funds when it transferred fiscal year appropriations to an Interior franchise fund, GovWorks.[8d] B-308944, July 17, 2007. GovWorks was established to provide common administrative services to Interior and other agencies by procuring goods and services from vendors on behalf of federal agencies on a competitive basis. DOD used Military Interdepartmental Purchase Requests (MIPRs) to transfer funds to GovWorks but did not identify the specific items or services that DOD wanted GovWorks to acquire on its behalf until after the funds had expired. GAO concluded that DOD had improperly parked funds with GovWorks by transferring funds from one fiscal year for use by GovWorks for goods and services after the period of availability for those funds had expired. GAO pointed out that, by doing so, "officials of both agencies acted in disregard of . . . the *bona fide* needs rule." *Id.* at 13.

Page 5-15 – *Insert the following as new footnote number 8a:*

[8a] DOD, Undersecretary of Defense, Comptroller, Memorandum for the Assistant Secretary of the Army (Financial Management and Comptroller), *et al.*, *Proper Use of Interagency Agreements for Non-Department of Defense Contracts Under Authorities Other than the Economy Act,* Mar. 24, 2005 (2005 DOD Memorandum).

Page 5-15 – *Insert the following as new footnote number 8b:*

[8b] *See* GAO, *Interagency Contracting: Improved Guidance, Planning, and Oversight Would Enable the Department of Homeland Security to Address Risks,* GAO-06-996 (Washington,

D.C.: Sept. 27, 2006); ***Improper Use of Industrial Funds By Defense Extended the Life of Appropriations Which Otherwise Would Have Expired,*** **GAO/AFMD-84-34 (Washington, D.C.: June 5, 1984); 2005 DOD Memorandum; DOD, Undersecretary of Defense, Memorandum for the Chairman of the Joint Chiefs of Staff,** ***et al., Fiscal Principles and Interagency Agreements,*** **Sept. 25, 2003.**

Page 5-15 – *Insert the following as new footnote number 8c:*

[8c] DOD, Office of Inspector General, ***FY 2005 DOD Purchases Made Through the Department of the Interior,*** **No. D-2007-044 (Jan. 16, 2007); Interior, Office of the Inspector General,** ***FY 2005 Department of the Interior Expenses Made on Behalf of the Department of Defense,*** **No. X-IN-MOA-0018-2005 (Jan. 9, 2007).**

Page 5-15 – *Insert the following as new footnote number 8d:*

[8d] GovWorks is officially known as the Acquisition Services Directorate. ***See*** **www.govworks.gov (last visited Feb. 4, 2009).**

2. Future Years' Needs

Page 5-17 – *Insert the following after the first partial paragraph:*

An interesting situation involving a contract with renewable options arose in B-308026, Sept. 14, 2006. The National Labor Relations Board (NLRB) entered into a contract with Electronic Data Systems for the acquisition of ongoing operational and technical support for its automated Case Activity Tracking System. The contract's initial performance period was October 1, 2001, through September 30, 2002, with options through September 30, 2015. On September 30, 2005, NLRB exercised option four, specifying a performance period of October 1, 2005, through September 30, 2006, and charged the obligation to its fiscal year 2005 appropriation. In a June 2006 report, the NLRB Inspector General concluded that NLRB had improperly obligated its fiscal year 2005 appropriation because obligating the fiscal year 2005 appropriation for the performance of severable services that would occur entirely in fiscal year 2006 was a violation of the ***bona fide*** **needs rule. The Inspector General said that NLRB should charge the obligation against its fiscal year 2006 appropriation. NLRB proposed to remedy its improper obligation by modifying the contract to have the performance period of the contract run from**

September 30, 2005, through September 29, 2006, instead of October 1, 2005, through September 30, 2006. NLRB explained that it had intended a performance period commencing September 30, 2005, but due to an inadvertent ministerial error this was not reflected in the contract. GAO agreed with the Inspector General. GAO said that, given the terms of the contract, NLRB had incurred an obligation against its fiscal year 2006 appropriation and that NLRB should adjust its accounts accordingly. NLRB could not remedy its improper obligation by adjusting its contract's performance period instead of its accounts.

> **"It is one thing for an agency to take full advantage of available appropriations, maximizing the effectiveness of federal funds entrusted to its use; it is quite another thing, however, for an agency to alter executed contracts in order to reach expired funds—funds that Congress appropriated for agency programs and activities of the previous fiscal year. That is what NLRB proposes to do. Were NLRB to adjust the fourth option's performance period, its sole reason for doing so would be to reach fiscal year 2005 appropriations because, in September 2005, that is what NLRB had intended to do. However, NLRB's fiscal year 2005 appropriation has expired.**
>
> **. . . Instead of adjusting its obligations to reflect what actually occurred, NLRB would revise what actually occurred so that it can finance option four with fiscal year 2005 funds. . . . The account adjustment authority of [31 U.S.C. § 1553(a)] is not a palliative for errors of this sort."**

B-308026, Sept. 14, 2006, at 5–6 (footnote omitted).

Page 5-17 – *Insert the following after the first full paragraph:*

In 2007, GAO considered how this related to seven end-of-the-fiscal year subscription renewals. The National Labor Relations Board (NLRB) purchased seven Web site database subscriptions to support the work of its attorneys and other professionals. B-309530, Sept. 17, 2007. In September 2006, NLRB placed orders to renew each of these subscriptions with the respective vendors,

stating that it needed to have the orders placed for the renewal before the existing subscriptions expired in order to ensure uninterrupted delivery. Each order placed was for a period of 1 year beginning on the day following the expiration of the existing subscription and, for each, the agency obligated its fiscal year 2006 annual appropriation. For five subscriptions, the performance period was from October 1, 2006, to September 30, 2007; for two subscriptions, the performance period was from November 1, 2006, to October 31, 2007. *Id.* GAO determined that NLRB did not violate the *bona fide* needs rule for the five Web site database subscription renewals that it needed to have in place on October 1, 2006, the first day of fiscal year 2007. Even though delivery of the renewed subscriptions would occur entirely in fiscal year 2007, NLRB reasonably determined that the renewal orders needed to be placed in fiscal year 2006 to ensure continued receipt of the subscriptions past the expiration of the existing subscriptions on September 30, 2006. *Id.* However, NLRB violated the *bona fide* needs rule when it obligated fiscal year 2006 funds to renew the two Web site database subscriptions that were not due to expire until October 31, 2006. These subscription renewals were a *bona fide* need of fiscal year 2007 for which fiscal year 2007 appropriations should have been used. *Id.*

5. Services Rendered beyond the Fiscal Year

Page 5-24 – *Replace the second paragraph after the quote with the following:*

The rationale of 23 Comp. Gen. 370 was applied in 59 Comp. Gen. 386 (1980) (requisition for printing accompanied by manuscript sufficient for Government Printing Office to proceed with job). *See*, *e.g.*, 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); B-257977, Nov. 15, 1995 (contract for 2-year intern training program since interns are required to complete entire training program to be eligible for noncompetitive Presidential Management Intern appointment). *See also* **B-305484, June 2, 2006 (appointment of an arbitrator to hear a case is in the nature of a nonseverable service and the National Mediation Board should record an obligation of the current appropriation based on the estimated cost of paying the arbitrator to submit an award);** 73 Comp. Gen. 77 (1994) (subsequent modifications to Fish and Wildlife Service research work orders should be charged to the fiscal year current when the work orders were issued since the purpose of the research is to provide a final research report and the services under the contract are nonseverable). The last **two decisions are** noteworthy because they pointed out that **limitation of funds clauses or subject to availability clauses** do not affect the application of the *bona fide* needs rule and the severable test. **B-305484;** 73 Comp. Gen. at 80.

8. Multiyear Contracts

Page 5-41 – *Replace the first full paragraph with the following:*

If an agency is contracting with fiscal year appropriations and does not have multiyear contracting authority, **one** course of action, apart from a series of separate fiscal year contracts, is a fiscal year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). *Leiter v. United States*, 271 U.S. 204 (1926); 66 Comp. Gen. 556 (1987); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, Nov. 10, 1949. The inclusion of a renewal option is key; with a renewal option, the government incurs a financial obligation only for the fiscal year, and incurs no financial obligation for subsequent years unless and until it exercises its right to renew. The government records the amount of its obligation for the first fiscal year against the appropriation current at the time it awards the contract. The government also records amounts of obligations for future fiscal years against appropriations current at the time it exercises its renewal options. The mere inclusion of a contract provision conditioning the government's obligation on future appropriations without also subjecting the multiyear contract to the government's renewal option each year would be insufficient. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999). Thus, in 42 Comp. Gen. 272 (1962), the Comptroller General, while advising the Air Force that under the circumstances it could complete that particular contract, also advised that the proper course of action would be either to use an annual contract with renewal options or to obtain specific multiyear authority from Congress. *Id.* at 278.

Page 5-43 – *Insert the following after the quoted language in the first partial paragraph:*

Another course of action for an agency with fiscal year money to cover possible needs beyond that fiscal year is an indefinite-delivery/indefinite-quantity (IDIQ) contract. An IDIQ contract is a

form of an indefinite-quantity contract, which provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. 48 C.F.R. § 16.504(a). Under an IDIQ contract, actual quantities and delivery dates remain undefined until the agency places a task or delivery order under the contract. When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. At the time of award, the government commits itself to purchase only a minimum amount of supplies or services and has a fixed liability for the amount to which it committed itself. *See* 48 C.F.R. §§ 16.501-2(b)(3) and 16.504(a)(1). The agency has no liability beyond its minimum commitment unless and until it places additional orders. An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution. In B-302358, Dec. 27, 2004, GAO determined that the Bureau of Customs and Border Protection's (Customs) Automated Commercial Environment contract was an IDIQ contract. As such, Customs incurred a legal liability of $25 million for its minimum contractual commitment at the time of contract award. However, Customs failed to record its $25 million obligation until 5 months after contract award. GAO determined that to be consistent with the recording statute, 31 U.S.C. § 1501(a)(1), Customs should have recorded an obligation for the contract minimum of $25 million against a currently available appropriation for the authorized purpose at the time the IDIQ contract was awarded.

9. Specific Statutes Providing for Multiyear and Other Contracting Authorities

Page 5-46 – *Replace the third full paragraph with the following:*

The Federal Acquisition Streamlining Act of 1994 (FASA) and related statutes extended multiyear contracting authority with annual funds to nonmilitary departments.[30] FASA authorizes an executive agency to enter into a multiyear contract for the acquisition of property or services for more than 1, but not more than 5 years, if the agency makes certain administrative determinations. 41 U.S.C. § 254c. Related laws extend this authority to various legislative branch agencies.[31] Through FASA and the related laws, Congress has relaxed the constraints of the *bona fide* needs rule by giving agencies the flexibility to structure contracts to fund the obligations up front, incrementally, or by using the standard *bona fide* needs rule approach. B-277165, Jan. 10, 2000. To the extent an agency elects to obligate a 5-year contract incrementally, it must also obligate termination costs. ***Cf.*** **B-302358, Dec. 27, 2004 (since the contract at issue was an indefinite-delivery/indefinite-quantity contract, it was not subject to the requirements of 41 U.S.C. § 254c and the agency did not need to obligate estimated termination costs at the time of contract award).**

C. Advance Payments

1. The Statutory Prohibition

Page 5-53 – *Insert the following before the first full paragraph:*

Another example of a statutory exception was considered in B-306975, Feb. 27, 2006. The National Archives and Records Administration (NARA) stores temporary and pre-archival records that belong to it and other federal agencies in its Records Center Programs Facilities. Other federal agencies may enter into agreements with NARA to transfer and store records at the NARA records centers. The Treasury and General Appropriations Act, 2000, established the Records Center Revolving Fund to pay for expenses and equipment necessary to provide the storage and authorized agencies to make advance payments to the Revolving Fund. Pub. L. No. 106-58, title IV, 113 Stat. 430, 460–61 (Sept. 29, 1999). GAO had no objection, therefore, to NARA's proposal to bill its customers at the beginning of each month based on its estimate of services it will provide that month and to adjust the next month's bill to reflect actual costs of services rendered. However, if a customer advances fiscal year funds for September's estimated costs, NARA may not credit excess amounts in adjusting October's bill but rather must return the excess to the customers. These funds would not be available for obligation of the next fiscal year commencing October 1. Likewise, if a customer agency owes more than the amount advanced in September, the customer must cover the underpayment from the previous fiscal year's funds. B-306975, Feb. 27, 2006.

D. Disposition of Appropriation Balances

3. Expired Appropriations Accounts

Page 5-72 – *Replace the second full paragraph with the following:*

During the 5-year period, the expired account balance may be used to liquidate obligations properly chargeable to the account prior to its expiration.[50] The expired account balance also remains available to make legitimate obligation adjustments, that is, to record previously unrecorded obligations and to make upward adjustments in previously under recorded obligations. For example, Congress appropriated funds to provide education benefits to veterans under the so-called "GI bill," codified at 38 U.S.C. § 1662. Prior to the expiration of the appropriation, the Veterans Administration (VA) denied the benefits to certain Vietnam era veterans. The denial was appealed to the courts. The court determined that certain veterans may have been improperly denied benefits and ordered VA to entertain new applications and reconsider the eligibility of veterans to benefits. VA appealed the court order. Prior to a final resolution of the issue, the appropriation expired. GAO determined that, consistent with 31 U.S.C. § 1502(b),[51] the unobligated balance of VA's expired appropriation was available to pay benefits to veterans who filed applications prior to the expiration of the appropriation or who VA determined were improperly denied education benefits. 70 Comp. Gen. 225 (1991). **For a further discussion of the availability of funds between expiration and closing of an account, see B-301561, June 14, 2004 and** B-265901, Oct. 14, 1997.

Page 5-72 – *Replace the last partial paragraph with the following:*

Unobligated balances in the expired account cannot be used to satisfy an obligation properly chargeable to current appropriations (**B-308944, July 17, 2007;** 50 Comp. Gen. 863 (1971)), or to any other expired account.[52] ***See*** **Chapter 5, section B.1.c.** The authority of 31 U.S.C. § 1553(a) is intended to permit agencies to adjust their accounts to more accurately reflect obligations and liabilities actually incurred during the period of availability. 63 Comp. Gen. 525, 528 (1984). However, arbitrary deobligation in reliance upon the authority to make subsequent adjustments is not consistent with the statutory purpose. B-179708, July 10, 1975.

4. Closed Appropriation Accounts

Page 5-73 – *Replace the third full paragraph with the following:*

Once an account has been closed:

> "[O]bligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose."

31 U.S.C. § 1553(b)(1)**. *See also* B-301561, June 14, 2004.**

5. Exemptions from the Account Closing Procedures

Page 5-76 – *Replace the second full paragraph with the following:*

To the extent of its applicability, the statutory scheme found at 31 U.S.C. §§ 1551–1558 provides the exclusive method for the payment of obligations chargeable to expired appropriations. B-101860, Dec. 5, 1963. Thus, there is generally no authority to transfer appropriations to some form of trust fund or working fund for the purpose of preserving their availability. *Id.***; B-308944, July 17, 2007 (the Department of Defense transferred fiscal year funds to a franchise fund in an attempt to impermissibly extend the funds' availability). *See* Chapter 5, section B.1.c.** See also 31 U.S.C. § 1532, which prohibits the transfer of appropriations to a working fund without statutory authority. In B-288142, Sept. 6, 2001, customer agencies made advances from their fixed period appropriations to the Library of Congress for deposit to the credit of the no-year FEDLINK revolving fund. The advances were used by the Library of Congress to pay the cost of service provided to the agencies by Library of Congress contractors. Once the service was provided and the cost determined, the Library discovered that some agencies had advanced amounts in excess of the cost of the service ordered. We determined that the Library of Congress lacked authority to apply the excess amount to pay for orders for service placed after the expiration of the fixed period appropriation charged with the advance.

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Principles of Federal Appropriations Law

Third Edition

Volume I

On November 7, 2006, the web versions of the Third Edition of the Principles of Federal Appropriation Law, Volumes I and II, were reposted to include updated active electronic links to GAO decisions. Additionally, the Third Edition's web based Index/Table of Authorities (Index/TOA) was replaced by an Index/TOA that incorporated information from Volume I and II.

These three documents can be used independently or interactively. To use the documents interactively, click on http://www.gao.gov/special.pubs/redbook1.html and you will be directed to brief instructions regarding interactive use.

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Availability of Appropriations: Time

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A. General Principles—Duration of Appropriations

1. Introduction

As we have emphasized in several places in this publication, the concept of the "legal availability" of appropriations is defined in terms of three elements—purpose, time, and amount. Chapter 4 focused on purpose; this chapter addresses the second element, time.

The two basic authorities conferred by an appropriation law are the authority to incur obligations and the authority to make expenditures. An obligation results from some action that creates a liability or definite commitment on the part of the government to make an expenditure. (The concept of "obligation" and the criteria for charging obligations against appropriations are discussed in detail in Chapter 7.) The expenditure is the disbursement of funds to pay the obligation. While an obligation and expenditure may occur simultaneously, ordinarily the obligation precedes the expenditure in time. This chapter discusses the limitations on the use of appropriations relating to time—when they may be obligated and when they may be expended. Many of the rules are statutory and will be found in the provisions of Title 31, United States Code, cited throughout this chapter.

Our starting point is the firmly established proposition that—

> "Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed."

13 Op. Att'y Gen. 288, 292 (1870). The placing of time limits on the availability of appropriations is one of the primary means of congressional control. By imposing a time limit, Congress reserves to itself the prerogative of periodically reviewing a given program or agency's activities.

When an appropriation is by its terms made available for a fixed period of time or until a specified date, the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 37 Comp. Gen. 861, 863 (1958); 23 Comp. Gen. 862 (1944); 18 Comp. Gen. 969 (1939); 16 Comp. Gen. 205 (1936). Thus, a time-limited appropriation is available to incur an obligation only during the period for which it is made. However, it remains available beyond that period, within limits, to make adjustments to the amount of such obligations and to make payments to liquidate such obligations. In this connection, 31 U.S.C. § 1502(a) provides:

> "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."

In addition, there are situations in which appropriations may be "held over" by statute and by judicial decree for obligation beyond their expiration date. The concepts summarized in this paragraph will be explored in depth elsewhere in this chapter.

2. Types of Appropriations

Classified on the basis of duration, appropriations are of three types: annual, multiple year, and no-year appropriations.

a. Annual Appropriations

Annual appropriations (also called fiscal year or 1-year appropriations) are made for a specified fiscal year and are available for obligation only during the fiscal year for which made. The federal government's fiscal year begins on October 1 and ends on September 30 of the following year. 31 U.S.C. § 1102. For example, fiscal year 2005 begins on October 1, 2004, and ends on September 30, 2005.

All appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. There are several reasons for this. First, as required by 1 U.S.C. § 105, the title and enacting clause of all regular and supplemental appropriation acts specify the making of appropriations "for the fiscal year ending September 30, (here insert the calendar year)." Thus, everything in an appropriation act is presumed to be applicable only to the fiscal year covered unless specified to the contrary. Second, 31 U.S.C. § 1301(c) provides that, with specified exceptions:

> "An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—
>
> ….
>
> "(2) expressly provides that it is available after the fiscal year covered by the law in which it appears."

Third, appropriation acts commonly include a general provision similar to the following:

> "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."[1]

Under the plain terms of this provision, the origin of which has previously been discussed in Chapter 2, section C.2.d, the availability of an appropriation to incur a new obligation may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. 71 Comp. Gen. 39 (1991); 58 Comp. Gen. 321 (1979); B-118638, Nov. 4, 1974.

A limitation item included in an appropriation (for example, a lump-sum appropriation with a proviso that not to exceed a specified sum shall be available for a particular object) is subject to the same fiscal year limitation attaching to the parent appropriation unless the limitation is specifically

[1] See, *e.g.*, the following fiscal year 2002 appropriation acts: Pub. L. No. 107-76, § 706, 115 Stat. 704, 732 (Nov. 28, 2001) (Agriculture); Pub. L. No. 107-77, § 602, 115 Stat. 748, 798 (Nov. 28, 2001) (Commerce, Justice, State); Pub. L. No. 107-117, § 8003, 115 Stat. 2230, 2247 (Jan. 10, 2002) (Defense); Pub. L. No. 107-96, § 104, 115 Stat. 923, 946 (Nov. 21, 2001) (District of Columbia); Pub. L. No. 107-115, § 511, 115 Stat. 2118, 2141 (Jan. 10, 2002) (Foreign Operations); Pub. L. No. 107-63, § 303, 115 Stat. 414, 465 (Nov. 5, 2001) (Interior); Pub. L. No.107-116, § 502, 115 Stat. 2177, 2217 (Jan. 10, 2002) (Labor, Health and Human Services, Education); Pub. L. No. 107-68, § 302, 115 Stat. 560, 591 (Nov. 12, 2001) (Legislative); Pub. L. No. 107-87, § 306, 115 Stat. 833, 855 (Dec. 18, 2001) (Transportation); Pub. L. No. 107-67, § 501, 115 Stat. 514, 543 (Nov. 12, 2001) (Treasury).

exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957); B-274576, Jan. 13, 1997.

Annual appropriations are available only to meet *bona fide* needs of the fiscal year for which they were appropriated. The so-called "*bona fide* needs rule" is covered in detail in this chapter in section B.

If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have "expired." This rule—that time-limited budget authority ceases to be available for incurring new obligations after the last day of the specified time period—has been termed an "elementary principle" of federal fiscal law. *City of Houston*, *Texas v. Department of Housing & Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *West Virginia Ass'n of Community Health Centers*, *Inc. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984). *See also* 18 Comp. Gen. 969, 971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to adjust and make payments to liquidate liabilities arising from obligations made within the fiscal year for which the funds were appropriated. 31 U.S.C. § 1553(a), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1676 (Nov. 5, 1990). The principles summarized in this paragraph are discussed in this chapter in section D.

The above principles are illustrated in 56 Comp. Gen. 351 (1977). In that case, the Interior Department proposed to obtain and exercise options on certain land, obligate the full purchase price, and take immediate title to and possession of the property. Payment of the purchase price, however, would be disbursed over a period of up to 4 years. The reason being that, in view of the capital gains tax, the seller would have insisted on a higher purchase price if payment was to be made in a lump sum. The Comptroller General concluded that the proposal was not legally objectionable, provided that (a) a *bona fide* need for the property existed in the fiscal year in which the option was to be exercised and (b) the full purchase price was obligated against appropriations for the fiscal year in which the option was exercised. As long as these conditions were met—obligation within the period of availability for a legitimate need existing within that period—the timing of actual disbursements over a 4-year period was irrelevant.

Just as Congress can by statute expand the obligational availability of an appropriation beyond a fiscal year, it can also reduce the availability to a fixed period less than a full fiscal year. To illustrate, a fiscal year 1980 appropriation for the now defunct Community Services Administration included funds for emergency energy assistance grants. Since the program was intended to provide assistance for increased heating fuel costs, and Congress did not want the funds to be used to buy air conditioners, the appropriation specified that awards could not be made after June 30, 1980.[2] Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Finally, Congress may pass a law to rescind the unobligated balance of a fixed (annual or multiple year) appropriation at any time prior to the accounts closing.[3] The law may be passed at the initiation of the President pursuant to the impoundment procedures (see discussion in Chapter 1, section D.3) or by Congress as part of its regular legislative process.

b. Multiple Year Appropriations

Multiple year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). For example, if a fiscal year 2005 appropriation act includes an appropriation account that specifies that it shall remain available until September 30, 2006, it is a 2-year appropriation. As a more specific illustration, the appropriation accounts for military construction are typically 5-year appropriations.[4]

Apart from the extended period of availability, multiple year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems.

c. No-Year Appropriations

A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is "to remain available until expended." 40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1897); B-279886, Apr. 28, 1998; B-271607, June 3, 1996.

[2] Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (Nov. 27, 1979). Due to a severe heat wave in the summer of 1980, the program was expanded to include fans and the appropriation was subsequently extended to the full fiscal year Pub. L. No. 96-321, 94 Stat. 1001 (Aug. 4, 1980).

[3] *E.g.*, Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 571, 591–593 (Apr. 16, 2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 106, 107 (Feb. 20, 2003).

[4] *See*, *e.g.*, the Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (Nov. 5, 2001).

However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation." 57 Comp. Gen. 865, 869 (1978).

Unless canceled in accordance with 31 U.S.C. § 1555 or rescinded by another law, there are no time limits as to when no-year funds may be obligated and expended and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). This includes earmarks applicable to the use of no-year funds since they are coextensive with, and inseparable from, the period of availability of the no-year appropriation to which they relate. B-274576, Jan. 13, 1997.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior years no-year appropriation. In one case, Congress had made a no-year appropriation to the Federal Aviation Administration for the purchase of aircraft. A question arose as to the continued availability of the appropriation because, in the following year, Congress explicitly denied a budget request for the same purpose. The Comptroller General held that the subsequent denial did not restrict the use of the unexpended balance of the prior no-year appropriation. The availability of the prior appropriation could not be changed by a later act "except in such respects and to such extent as is expressly stated or clearly implied by such act." 40 Comp. Gen. 694, 696 (1961). *See also Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220 (1st Cir. 2003); B-200519, Nov. 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on noncontract services during the fiscal year. Based on the apparent intent of the ceiling, GAO concluded that the specific restriction had the effect of suspending the "available until expended" provision of prior unrestricted no-year appropriations as far as personal services were concerned, for any fiscal year in which the restriction was included. Thus, unobligated balances of prior unrestricted no-year appropriations could not be used to augment the ceiling. 30 Comp. Gen. 500 (1951). A similar issue was considered in 62 Comp. Gen. 692 (1983). The Nuclear Regulatory Commission received a no-year appropriation that included a prohibition on compensating intervenors. The decision held that the unobligated balance of a prior unrestricted no-year appropriation could be used to pay an Equal Access to Justice Act award to an intervenor made in a restricted year, where part of the proceeding giving rise to the award was funded by an unrestricted appropriation. Unlike the situation in 30 Comp. Gen. 500, the restriction in the 1983 case was expressly limited to "proceedings funded in this Act," and thus could have no effect on the availability of prior appropriations.

Similar issues were considered in the context of multiple year appropriations in 31 Comp. Gen. 368 (1952) and 31 Comp. Gen. 543 (1952), overruling 31 Comp. Gen. 275 (1952). In both of these cases, based on a determination of congressional intent, it was held that the current restriction had no effect on the availability of unobligated balances of prior unrestricted appropriations.

No-year appropriations have advantages and disadvantages. The advantages to the spending agency are obvious. From the legislative perspective, a key disadvantage is a loss of congressional control over actual program levels from year to year. GAO has expressed the position that no-year appropriations should not be made in the absence of compelling programmatic or budgetary reasons. *See* U.S. General Accounting Office, *No-Year Appropriations in the Department of Agriculture*, PAD-78-74 (Washington, D.C.: Sept. 19, 1978).

3. Obligation or Expenditure Prior to Start of Fiscal Year

In considering what may and may not be done before the start of a fiscal year, it is necessary to keep in mind the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and apportionments, 31 U.S.C. § 1517(a).[5] By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted and amounts apportioned to the agency, unless specifically authorized by law.[6]

There are some decisions that stand for the proposition that if the appropriation act is passed by both houses of Congress and signed by the President prior to the start of the fiscal year for which the appropriation is being made, contracts may be entered into upon enactment and before the start of the fiscal year, provided that no payments or expenditures may be made under them until the start of the fiscal year. Any such contract should make this limitation clear. 20 Comp. Gen. 868 (1941); 16 Comp. Gen. 1007 (1937); 4 Comp. Gen. 887 (1925); 2 Comp. Gen. 739 (1923); 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883); B-20670, Oct. 18,

[5] See Chapter 6, section C for a discussion of the apportionment process.

[6] *See* Chapter 5, section B.

1941; A-19524, Aug. 26, 1927. GAO did not view the contract as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged had not yet started, the appropriation had already been enacted into law. These decisions addressed these contracts from an Antideficiency Act perspective, and did not address the *bona fide* needs rule.

In other decisions, the Comptroller General has expressed the opinion that, in the absence of any other statutory authority, the awarding o32"conditional contract" prior to the enactment of the appropriation act to be charged with the obligation does not raise Antideficiency Act or *bona fide* needs issues when the government's liability is contingent upon the future availability of appropriations. The contract must expressly provide:

1. that no legal liability on the part of the government arises until the appropriation is made available within the agency to fund the obligation and

2. that notice is to be given by the agency to the contractor before the contractor may proceed.

See B-171798(1), Aug. 18, 1971, at 11–12.[7] Such express provisions are necessary to make explicit what is meant by the term "contingent upon the future availability of appropriations" in order to avoid Antideficiency Act problems,[8] and to permit the agency to maintain effective internal controls over the obligating of appropriations.

Of course, Congress may by statute authorize the actual expenditure of appropriations prior to the beginning of the fiscal year, in which event the above rule does not apply. 4 Comp. Gen. 918 (1925). This result may also follow if an appropriation is made to carry out the provisions of another law that clearly by its terms requires immediate action. *E.g.*, 1 Comp. Dec. 329 (1895).

[7] *See also* 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-239435, Aug. 24, 1990. *See also* the discussion in Chapter 6, section C.2.b.

[8] See Chapter 6, section C.2.b, "Multiyear or continuing contracts," particularly the discussion of *Leiter v. United States*, 271 U.S. 204 (1925). *See also Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332–333 (1999) (discussing *Leiter* and the Antideficiency Act).

B. The *Bona Fide* Needs Rule

1. Background

a. Introduction

Over a century ago, the Comptroller of the Treasury stated, "An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation." 8 Comp. Dec. 346, 348 (1901). The *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Citations to this principle are numerous. *See, e.g.*, 33 Comp. Gen. 57, 61 (1953); 16 Comp. Gen. 37 (1936); B-289801, Dec. 30, 2002; B-282601, Sept. 27, 1999; B-235678, July 30, 1990.

Does the quotation above, from the Comptroller of the Treasury, mean that an agency's obligation of an annual appropriation on the last day of the fiscal year can never constitute a *bona fide* need of that fiscal year? While it certainly should raise a question, the answer is, "it depends." An agency may have perfectly valid reasons for year-end spending. For example, some programs have predictable 4^{th} quarter surges due to cyclical or seasonal requirements. When using time-limited funding, an agency must dissect its ongoing business into discrete units of time in order to determine whether a particular transaction may be obligated against, or charged to, a specific appropriation. The *bona fide* needs rule provides an analytical framework for analyzing an agency's financial transactions to determine the period of time to which a transaction relates.

Bona fide needs questions arise in many forms. Historically, as the discussion that follows will show, *bona fide* needs issues have arisen most frequently in the context of the acquisition of goods or services. An agency may enter into a contract in one fiscal year, but the contractor does not complete performance until the next fiscal year. Which fiscal year should be charged? Or, an agency may modify a contract in the year following the fiscal year in which it originally entered into the contract. Sometimes, as a result of an audit, the question may be whether an obligation already recorded was a proper charge against that fiscal year's appropriation. Or, an agency may have taken certain actions that it should have recorded as an obligation but did not; when the time for payment arrives, the question again is which fiscal year to charge. These are all facets of the same basic question—whether an obligation bears a sufficient relationship to the legitimate needs of the time period of availability of the appropriation charged or sought to be charged.

Although the *bona fide* needs rule remains one of the bedrock principles of appropriations law, its application has changed over the years as Congress enacted statutes redefining in some instances what constitutes a *bona fide* need of a fiscal year appropriation. During a period of ever increasing budget constraints in the 1990s, Congress enacted laws providing civilian agencies more flexibility in their use of fiscal year appropriations, and expanded already existing authorities of defense agencies. Today, there is general authority permitting agencies to use fiscal year funds to acquire goods and services *via* multiyear acquisitions, and to enter into 1-year contracts for severable services that cross fiscal years. These laws have provided agencies with substantial flexibility to allocate the cost of goods and services across fiscal years, or to allocate the costs to the first fiscal year of the contract even though the goods or services may be delivered in future fiscal years.

Notwithstanding the increased flexibilities agencies now have, the *bona fide* needs rule remains an important and often complex consideration for an agency as it executes its budget. In this section, we discuss the basic concept underlying the rule. We then discuss the traditional application of the rule in sections B.2 through B.7, followed by a discussion of the recent statutory developments in the acquisition of goods and services area in sections B.8 and B.9. It is important to know both the traditional application as well as recently enacted flexibilities in order to understand the contracting options now available to agencies as they decide how to use their appropriations. We discuss the application of the rule in the grants and cooperative agreements context in section B.10.

b. The Concept

The *bona fide* needs rule has a statutory basis. As noted in Chapter 1, the first general appropriation act in 1789 made appropriations “for the service of the present year,” and this concept continues to this time. This “one-year” concept is also reflected in 31 U.S.C. § 1502(a), sometimes called the “*bona fide* needs statute.” Originally enacted in 1870 (16 Stat. 251 (July12, 1870)), section 1502(a) provides that the balance of a fixed-term appropriation “is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period. . . .” The key word here is “properly”—expenses “properly incurred” or contracts “properly made” within the period of availability. *See*, *e.g.*, 37 Comp. Gen. 155, 158 (1957). Additional statutory support for the rule is found in the Antideficiency Act, 31 U.S.C. § 1341(a), and the so-called Adequacy of Appropriations Act, 41 U.S.C. § 11. (*Bona fide* needs questions may involve other statutory restrictions as well. It also should be apparent that they are closely related to the subject matter covered in Chapter 7 on obligations.) For an early but still relevant and useful discussion, see 6 Comp. Dec. 815 (1900).

While the rule itself is universally applicable, determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. 70 Comp. Gen. 469, 470 (1991); 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. at 159.

In its most elementary form—where the entire transaction (contract or purchase, delivery or other performance, and payment) takes place during the same fiscal year—the rule means simply that the appropriation is available only for the needs of the current year. A common application of the rule in this context is that an appropriation is not available for the needs of a future year. For example, suppose that, as the end of a fiscal year approaches, an agency purchases a truckload of pencils when it is clear that, based on current usage, it already has in stock enough pencils to last several years into the future. It would seem apparent that the agency was merely trying to use up its appropriation before it expired, and the purchase would violate the *bona fide* needs rule.

We do not mean to suggest that an agency may purchase only those supplies that it will actually use during the fiscal year. Agencies normally maintain inventories of common use items. The *bona fide* needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the “need” being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive. Future years’ needs and year-end spending are covered further in section B.2 of this chapter. Prior years’ needs are covered in section B.3 of this chapter.

Bona fide needs questions also frequently involve transactions that cover more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the following fiscal year. The question is which fiscal year should be charged with the obligation. In this context, the rule is that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a *bona fide* need of the fiscal year to be charged. *E.g.*, 70 Comp. Gen. 664, 667 (1991); 64 Comp. Gen. 359, 362 (1985); 35 Comp. Gen. 692 (1956); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915); 4 Comp. Dec. 553 (1898); B-289801, Dec. 30, 2002; B-257977, Nov. 15, 1995.

The principle that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year applies even though the funds are not to be disbursed and the exact amount owed by the government cannot be determined until the subsequent fiscal year. *E.g.*, 71 Comp. Gen. 502 (1992); 21 Comp. Gen. 574 (1941). Thus, in a case where the United States entered into an agreement with a state to provide assistance for the procurement of civil defense items for the state and to pay a specified percentage of the cost, the Comptroller General found that the need arose in the year the agreement with the state was made. Therefore, appropriations current at that time were to be charged with the cost, notwithstanding the fact that the states or the United States may not have negotiated and executed the actual procurement contracts with suppliers, including the exact price, until a subsequent fiscal year. 31 Comp. Gen. 608 (1952).

Several sections of this chapter, starting with B.4, explore the application of the *bona fide* needs rule in various aspects of government contracting in which transactions cover more than one fiscal year. We have structured these sections in large measure on a comprehensive and well-documented article by Capt. Dale Gallimore entitled *Legal Aspects of Funding Department of the Army Procurements*, 67 Mil. L. Rev. 85 (1975).

The *bona fide* needs rule applies to multiple year as well as fiscal year appropriations. 55 Comp. Gen. 768, 773–74 (1976); B-235678, July 30, 1990. *See also* 64 Comp. Gen. 163, 166 (1984). In other words, an agency may use a multiple year appropriation for needs arising at any time during the period of availability.

An argument can be made, not wholly without logic, that a multiple year appropriation can be obligated at any time during its availability, but only to meet a *bona fide* need of the year in which the funds were appropriated. Suppose, for example, that an agency receives a 2-year appropriation every year. For fiscal year 1989, it receives an appropriation available through fiscal year 1990; for fiscal year 1990, it receives an appropriation available through fiscal year 1991, and so on. It is possible to apply the *bona fide* needs rule to require that the fiscal year 1990 appropriation be used only for needs arising in fiscal year 1990, although obligation may occur any time prior to the end of fiscal year 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170 (1989), holding that the Defense Logistics Agency could use its fiscal year 1987 2-year Research and Development appropriation for a need arising in fiscal year 1988. "There is no requirement that 2-year funds be used only for the needs of the first year of their availability." *Id.* at 172.

It follows that the *bona fide* needs rule does not apply to no-year funds. 43 Comp. Gen. 657, 661 (1964). *See also* B-279886, Apr. 28, 1998. Without a prescribed period of availability, there is no fixed period during which the *bona fide* need must arise, and thus no fixed period in which the funds must be obligated and expended.

2. Future Years' Needs

An appropriation may not be used for the needs of some time period subsequent to the expiration of its period of availability. With respect to annual appropriations, a more common statement of the rule is that an appropriation for a given fiscal year is not available for the needs of a future fiscal year.[9] Determining the year to which a need relates is not always easy. Some illustrative cases are listed below:

- The balance of an appropriation for salaries remaining unexpended at the end of one fiscal year could not be used to pay salaries for services rendered in the following fiscal year. 18 Op. Att'y Gen. 412 (1886).
- The Department of Housing and Urban Development recorded certain obligations for public housing subsidies on an estimated basis. At the end of the fiscal year, obligations were found to be in excess of actual needs. It was held improper to send excess funds to the state agency's operating reserve to offset the subsidy for the following year, since this amounted to using the funds for the needs of a subsequent year. The

[9] The topic of obligating for needs of a future year arises in a variety of contexts and is also involved in several later sections of this chapter on delivery of materials and services beyond the fiscal year (B.4 and B.5), multiyear contracts (B.8 and B.9), and grants and cooperative agreements (B.10).

proper course of action was to deobligate the excess. 64 Comp. Gen. 410 (1985).

- Rent on property leased by the National Park Service from the National Park Foundation could be paid in advance, but the lease could not cross fiscal year lines. The proposal was for the lease to run from May 1 through April 30 and for the full annual rent to be paid in advance on May 1. However, appropriations available as of May 1 could not be used for the period from October 1 through April 30 since rent for these months constituted a need of the following fiscal year. B-207215, Mar. 1, 1983.

Any discussion of obligating for future years' needs inevitably leads to the question of year-end spending. Federal agencies as a fiscal year draws to a close are often likened to sharks on a feeding frenzy, furiously thrashing about to gobble up every appropriated dollar in sight before the ability to obligate those dollars is lost. The Comptroller of the Treasury stated the legal principle very simply in an early decision:

> "An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such appropriation. This would be a plain violation of the law."

8 Comp. Dec. 346, 348 (1901).

Thus, where an obligation is made toward the end of a fiscal year and it is clear from the facts and circumstances that the need relates to the following fiscal year, the *bona fide* needs rule has been violated. The obligation is not a proper charge against the earlier appropriation, but must be charged against the following year's funds. This was the result, for example, in 1 Comp. Gen. 115 (1921), in which an order for gasoline had been placed 3 days before the end of fiscal year 1921, with the gasoline to be delivered in monthly installments in fiscal year 1922. The Comptroller General stated:

> "It is not difficult to understand how the need for an article of equipment, such as a typewriter, might arise during the fiscal year 1921 and its purchase be delayed until the latter part of June [the end of the fiscal year in 1921], but as to supplies that are consumed as used, such as gasoline, it can not be held that they were purchased to supply a need of the

> fiscal year 1921 when the contract is made late in the month of June and expressly precludes the possibility of delivery before July 1, 1921."

Id. at 118 (explanatory information provided). *See also* 4 Comp. Dec. 553 (1898) (cement ordered late in one fiscal year to be delivered several months into the following fiscal year).[10]

Yet, this is only one side of the coin. The other side is illustrated in another passage from 8 Comp. Dec. at 348:

> "An appropriation is just as much available to supply the needs of the [last day] of a particular year as any other day or time in the year."

Thus, a year-end obligation perhaps raises the possibility that the agency is trying to "dump" its remaining funds and warrants a further look, but the timing of the obligation does not, in and of itself, establish anything improper. 38 Comp. Gen. 628, 630 (1959); 6 Comp. Dec. 815, 818 (1900).

GAO has conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year. In one report, GAO suggested that year-end spending surges are really symptomatic of a larger problem—inadequate management of budget execution—and that the apportionment process could be more effectively used to provide the desired management. U.S. General Accounting Office, *Federal Year-End Spending: Symptom of a Larger Problem*, GAO/PAD-81-18 (Oct. 23, 1980), pp. 7–9.[11]

[10] "There is no authority in an appropriation made specifically for the service of a particular fiscal year to enter into contracts for supplies, *etc.*, for the service of a subsequent fiscal year, and therefore as to that appropriation such a contract is not properly made within that year." 4 Comp. Dec. at 556.

[11] Other GAO reports in this area are: U.S. General Accounting Office, *Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed*, GAO/AIMD-98-185 (Washington, D.C.: July 31, 1998); *Federal Year-End Spending Patterns for Fiscal Years 1982, 1983, and 1984*, GAO/AFMD-85-75 (Washington, D.C.: Nov. 4, 1985); *Limitations on Fiscal Year 1981 Fourth Quarter Obligations in Certain Agencies*, GAO/PAD-82-43 (Washington, D.C.: July 16, 1982); *Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending*, GAO/PSAD-80-67 (Washington, D.C.: July 28, 1980).

GAO also noted in its October 1980 report that there are several reasons for year-end spending, some of which are perfectly valid. For example, some programs have predictable 4th quarter surges due to cyclical or seasonal fund requirements. If, for example, you are administering a fire suppression program, you should expect a 4th quarter surge because the 4th quarter of the federal fiscal year is the major fire season in many states. GAO/PAD-81-18 at 3. In other situations, it may be desirable to delay obligations to have funds available for emergencies that may arise during the year. *Id.* at 4.

In evaluating a year-end obligation, it is important to determine exactly what the need is from the agency's perspective. In one case, for example, the Small Business Administration (SBA) awarded cooperative agreements to certain Small Business Development Centers on the last day of a fiscal year. The Centers then provided management and technical assistance to small businesses, all of which would obviously be done in the following year. GAO found no *bona fide* needs violation because the need, from the perspective of implementing SBA's appropriation, was merely to provide assistance to the Centers, and there was no reason this could not be done on the last day of the year. B-229873, Nov. 29, 1988. *See also* B-289801, Dec. 30, 2002; section B.5 of this chapter.

One device Congress has employed to control year-end spending surges is legislation limiting the amount of obligations that may be incurred in the last month or 2-month period or quarter of the fiscal year. For example, the Defense Department's 1990 appropriation contained a provision limiting obligations during the last 2 months of the fiscal year to not more than 20 percent of the total fiscal year appropriations.[12] In comments on legislative proposals of this type, GAO has pointed out that they are difficult to administer, but has supported them as temporary measures pending more fundamental improvements in budget execution management and procurement planning.[13] In addition, there is the risk that limitations of this type may have the effect of simply moving the spending surges back a few months, accomplishing nothing.

3. Prior Years' Needs

There are situations in which it is not only proper but mandatory to use currently available appropriations to satisfy a need that arose in a prior

[12] Pub. L. No. 101-165, § 9007, 103 Stat. 1112, 1130 (Nov. 21, 1989).

[13] *E.g.*, B-198666, May 20, 1980.

year.[14] We refer to this as the "continuing need." If a need arises during a particular fiscal year and the agency chooses not to satisfy it during that year, perhaps because of insufficient funds or higher priority needs, and the need continues to exist in the following year, the obligation to satisfy that need is properly chargeable to the later years funds. "An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next periods appropriation being available for funding." B-197274, Sept. 23, 1983. Thus, an important corollary to the *bona fide* needs rule is that a continuing need is chargeable to funds current for the year in which the obligation is made, regardless of the fact that the need may have originated in a prior year.

An illustration is B-207433, Sept. 16, 1983. The Army contracted for a specific quantity of thermal viewers. The contract provided for a downward adjustment in the contract price in the case of an "underrun," that is, if the contractor was able to perform at less than the contract price. After the appropriation charged with the contract had expired, the contractor incurred an underrun and proposed to use the excess funds to supply an additional quantity of viewers. It was undisputed that the need for additional viewers could be attributed to the year in which the contract was entered into, and that the need continued to exist. GAO agreed with the Army that the proper course of action was to deobligate the excess funds and, if the Army still wished to procure them, to charge the obligation for the additional quantity to current years appropriations. The fact that the need arose in a prior year was immaterial. The decision, at pages 4–5, offered the following explanation:

> "Certainly the Army could have used underrun funds to procure additional viewers at any time during the period those funds remained available for obligation. Also, we are of course aware that an unmet need does not somehow evaporate merely because the period of availability has expired. However, nothing in the *bona fide* needs rule suggests that expired appropriations may be used for an item for which a valid obligation was not incurred prior to expiration merely because there was a need for that item during that period …Once the obligational period has

[14] *See also* 31 U.S.C. §1553(b), which requires that obligations and adjustments properly made to closed accounts may be charged to any current appropriation, and section D.4 of this chapter.

> expired, the procurement of an increased quantity must be charged to new money, and this is not affected by the fact that the need for that increased quantity may in effect be a 'continuing need' that arose during the prior period."

Another illustration is B-226198, July 21, 1987. In late fiscal year 1986, the U.S. Geological Survey ordered certain microcomputer equipment, to be delivered in early fiscal year 1987, charging the purchase to fiscal year 1986 funds. The equipment was delivered and accepted, but was stolen before reaching the ordering office. The decision held that a reorder, placed in fiscal year 1987, had to be charged to fiscal year 1987 funds. As with the thermal viewers in B-207433, the fact that the need for the equipment arose in 1986 was immaterial. *See also* B-286929, Apr. 25, 2001; B-257617, Apr. 18, 1995.

In another case, cost overruns caused the Army to delete certain items from a fiscal year 1979 procurement. The Army repurchased the canceled items in 1981, charging 1981 appropriations. GAO agreed that the repurchase was properly chargeable to 1981, rather than 1979 funds. B-206283-O.M., Feb. 17, 1983.

The essential requirements of the "continuing need" corollary are that (1) the need, unmet in the year in which it arose, must continue to exist in the subsequent obligational period; (2) the incurring of an obligation must have been discretionary with the agency to begin with; and (3) no obligation was in fact incurred during the prior year.

If the agency has no discretion as to the timing of an obligation (for example, in situations where the obligation arises by operation of law), or, even in discretionary situations, if the agency has actually incurred a valid obligation in the prior year (whether recorded or unrecorded), then the "continuing need" concept has no application and the obligation must be charged to the prior year. Absent statutory authority, current appropriations are not available to fund an obligation or liability (as opposed to an unmet and unobligated-for need) of a prior obligational period. If insufficient funds remain in the prior years' appropriation, the agency must seek a supplemental or deficiency appropriation and must further consider the possibility that the Antideficiency Act, 31 U.S.C. § 1341(a), has been violated.

In an early case, for example, an agency had contracted for repairs to a building toward the end of fiscal year 1904. Since it was clear that the repairs were needed at the time they were ordered, they were chargeable to fiscal year 1904 appropriations, and the exhaustion of the 1904 appropriation did not permit use of 1905 funds. 11 Comp. Dec. 454 (1905). *See also* 21 Comp. Dec. 822 (1915).

In B-226801, Mar. 2, 1988, GAO considered various entitlement programs administered by the Department of Veterans Affairs (VA). Under these programs, the obligation arises when VA determines eligibility through its adjudication process and must be recorded at that time. If the obligations would exceed available funds, it is not proper to defer the recording and charge the following year's appropriation. Since the obligations are required by law, overobligation would not violate the Antideficiency Act, but they must still be recognized and recorded when they arise. Congress subsequently began including an administrative provision in VA's appropriation act permitting the use of appropriations for these programs to pay obligations required to be recorded in the last quarter of the preceding fiscal year.[15] *See also* B-287619, July 5, 2001.

For additional cases, see 55 Comp. Gen. 768, 773–74 (1976) (current year's appropriations not available to fund prior year's Antideficiency Act violation); 54 Comp. Gen. 393, 395 (1974) (deficiency appropriation necessary to pay claims against exhausted appropriation); B-133001, Mar. 9, 1979 (fiscal year refugee assistance appropriation not available to pay for services performed in prior year); B-14331, Jan. 24, 1941; A-76081, June 8, 1936 (appropriations not available for past obligations unless clearly indicated by language and intent of appropriation act); B-221204-O.M., Jan. 31, 1986 (meals under child nutrition program served in September of one fiscal year may not be charged to subsequent year's appropriation). Congressional denial of a request for a deficiency appropriation does not make current appropriations available to satisfy the prior year's obligation. B-114874, Sept. 16, 1975 (postage charges under 39 U.S.C. § 3206).

[15] *E.g.*, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, title I, 103 Stat. 839, 843–44 (Nov. 9, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, title I, § 105, 110 Stat. 2874, 2881 (Sept. 26, 1996); and Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002, Pub. L. No.107-73, title I, § 105, 115 Stat. 651, 657 (Nov. 26, 2001).

4. Delivery of Materials beyond the Fiscal Year

When the government purchases goods or materials in one fiscal year and delivery occurs in whole or in part in a subsequent fiscal year, the question is whether the contract meets a *bona fide* need of the fiscal year in which it was made. This was the central legal issue in our discussion of year-end spending in section B.2 of this chapter, but the issue exists regardless of when in the fiscal year the contract is made. In this section we will explore those contracts where the agency intends to meet the needs of the fiscal year in which it entered into the contract. We will discuss multiyear contracts, where an agency intends to meet its needs for more than one fiscal year, in sections B.8 and B.9.

An agency may not obligate funds when it is apparent from the outset that there will be no requirement until the following fiscal year. For example, it was found that annual appropriations obligated to fund an agreement between the General Services Administration (GSA) and the Federal Power Commission (FPC), whereby GSA agreed to renovate space in a federal building incident to relocation of FPC personnel, were not available since the relocation was not required to, and would not, take place by the end of the fiscal year, and because the space in question would not be made "tenantable" until the following fiscal year. B-95136-O.M., Aug. 11, 1972.

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following fiscal year, one could question whether the contract was made in the earlier fiscal year only to obligate funds from an expiring appropriation and that the goods or materials were not intended to meet a *bona fide* need of that year. *See* 38 Comp. Gen. 628, 630 (1959); 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 60–61 (1953); 21 Comp. Gen. 1159 (1941); 1 Comp. Gen. 115 (1921); 27 Comp. Dec. 640 (1921).

However, the timing of delivery, while obviously a relevant factor, is not conclusive. There are perfectly legitimate situations in which an obligation may be incurred in one fiscal year with delivery to occur in a subsequent year. Thus, where materials cannot be obtained in the same fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the *bona fide* needs rule as long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial items readily available from other sources. 38 Comp. Gen. at 630.

Similarly, an agency may contract in one fiscal year for delivery in a subsequent year if the material contracted for will not be obtainable on the open market at the time needed for use, provided the intervening period is necessary for production or fabrication of the material. 37 Comp. Gen. 155, 159 (1957).

If an obligation is proper when made, unforeseen delays that cause delivery or performance to extend into the following fiscal year will not invalidate the obligation. In one case, for example, although work under a construction contract was performed during the fiscal year following its execution, the Comptroller General approved payment to the contractor under the original obligation since the agency had awarded the contract as expeditiously as possible and had made provision for the work to begin within the current fiscal year, but experienced a delay in obtaining certain materials the government had agreed to provide. 1 Comp. Gen. 708 (1922). *See also* 23 Comp. Gen. 82 (1943); 20 Comp. Gen. 436 (1941).

An order or contract for the replacement of stock is viewed as meeting a *bona fide* need of the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. *See* 44 Comp. Gen. 695 (1965). "Stock" in this context refers to "readily available common-use standard items." *Id.* at 697. *See also* 73 Comp. Gen. 259 (1994); 32 Comp. Gen. 436 (1953). Generally, scheduling delivery for the following year would seem irrelevant. There are limits, however. GAO has questioned the propriety, from the *bona fide* needs perspective, of purchases of materials carried in stock for more than a year prior to issuance for use. B-134277, Dec. 18, 1957.

5. Services Rendered beyond the Fiscal Year

Services procured by contract are generally viewed as chargeable to the appropriation current at the time the services are rendered.[16] 38 Comp. Gen. 316 (1958). However, a need may arise in one fiscal year for services that, by their nature, cannot be separated for performance in separate fiscal years. The Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is made, or to charge funds current at the time the services are rendered, depends upon whether the services are "severable" or "entire":

[16] This section does not discuss services rendered by an employee. Services provided by employees are chargeable to the fiscal year in which the services are rendered, regardless of whether the services are severable or nonseverable. *E.g.*, 38 Comp. Gen. 316 (1958) (salaries of government employees).

> "The fact that the contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year."

23 Comp. Gen. 370, 371 (1943). A contract that is viewed as "entire" is chargeable to the fiscal year in which it was made, notwithstanding that performance may have extended into the following fiscal year. The determining factor for whether services are severable or entire is whether they represent a single undertaking. Thus, in 23 Comp. Gen. 370, a contract for the cultivation and protection of a tract of rubber-bearing plants, payable on completion of the services, was chargeable against fiscal year funds for the year in which the contract was made. Because the services necessarily covered the entire growing period, which extended into the following fiscal year, the Comptroller General characterized them as a single undertaking, which "although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into." *Id.* at 371.

The rationale of 23 Comp. Gen. 370 was applied in 59 Comp. Gen. 386 (1980) (requisition for printing accompanied by manuscript sufficient for Government Printing Office to proceed with job). *See*, *e.g.*, 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); B-257977, Nov. 15, 1995 (contract for 2-year intern training program since interns are required to complete entire training program to be eligible for noncompetitive Presidential Management Intern appointment). *See also* 73 Comp. Gen. 77 (1994) (subsequent modifications to Fish and Wildlife Service research work orders should be charged to the fiscal year current when the work orders were issued since the purpose of the research is to provide a final research report and the services under the contract are nonseverable). The last opinion is noteworthy because it pointed out that a limitation of funds clause does not affect the application of the *bona fide* needs rule and the severable test. 73 Comp. Gen. at 80.

However, where the services are continuing and recurring in nature, the contract is severable. Service contracts that are "severable" may not cross fiscal year lines unless authorized by statute. 71 Comp. Gen. 428 (1992); 58 Comp. Gen. 321, 324 (1979); B-192518, Aug. 9, 1979; B-133001, Mar. 9, 1979; B-187881, Oct. 3, 1977. *See also* B-287619, July 5, 2001 (TRICARE contractors provide on-going services such as enrolling beneficiaries, adjudicating claims, *etc.*, that are severable into components that independently provide value). Most federal agencies have authority to enter into a 1-year severable service contract, beginning at any time during the fiscal year and extending into the next fiscal year, and to obligate the total amount of the contract to the appropriation current at the time the agency entered into the contract.[17] 10 U.S.C. § 2410a (defense agencies); 41 U.S.C. § 253*l* (civilian agencies); 41 U.S.C. § 253*l*-1 (Comptroller General); 41 U.S.C. § 253*l*-2 (Library of Congress); 41 U.S.C. § 253*l*-3 (Chief Administrative Officer of the House of Representatives); 41 U.S.C. § 253*l*-4 (Congressional Budget Office). *See also* B-259274, May 22, 1996. Otherwise, the services must be charged to the fiscal year(s) in which they are rendered. 65 Comp. Gen. at 743; 33 Comp. Gen. 90 (1953) (trucking services); 10 Comp. Dec. 284 (1903) (contract for services of various categories of skilled laborers in such quantities and at such times as may be deemed necessary is severable). As stated in 33 Comp. Gen. at 92:

> "The need for current services, such as those covered by the contract here under consideration, arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year."

See also 35 Comp. Gen. 319 (1955), *amplified by* B-125444, Feb. 16, 1956 (gardening and window cleaning services).

In addition to the recurring nature of the services, another factor identified in some of the decisions is whether the contracted-for services are viewed as personal or nonpersonal. Personal services are presumptively severable by their nature and are properly chargeable to the fiscal year in which the services are rendered. B-174226, Mar. 13, 1972 (performance on an evaluation team). Legal services have been viewed as either personal or

[17] For a discussion of contracts for more than 1 year, see later sections in this chapter on multiyear contracts (B.8) and specific statutes providing for multiyear and other contracting authorities (B.9).

nonpersonal, depending on the nature of the work to be done. B-122596, Feb. 18, 1955; B-122228, Dec. 23, 1954.

The distinction appears to have derived from the distinction inherent in 5 U.S.C. § 3109, which authorizes agencies to procure services of experts or consultants by employment (personal) or contract (nonpersonal). B-174226, *supra*. In the context of applying the *bona fide* needs rule, however, the distinction is not particularly useful since it is still necessary to look at the nature of the services involved in the particular case. In other words, characterizing services as personal or nonpersonal does not provide you with an automatic answer. In fact, some of the more recent cases have merely considered the nature of the work without characterizing it as personal or nonpersonal, which would have added nothing to the analysis. *E.g.*, 50 Comp. Gen. 589 (1971) (fees of attorneys contracted for under Criminal Justice Act chargeable to appropriations current at time of appointment); B-224702, Aug. 5, 1987 (contract for legal support services held severable since it consisted primarily of clerical tasks and required no final report or end product).

A 1981 decision applied the above principles to agreements made by the Small Business Administration (SBA) with private organizations to provide technical and management assistance to businesses eligible for assistance under the Small Business Act. The typical agreement covered one calendar year and crossed fiscal year lines. Under the agreement, payment was to be made only for completed tasks and SBA was under no obligation to place any orders, or to place all orders with any given contractor. The question was whether the "contract" was chargeable to the fiscal year in which it was executed. The Comptroller General found that the services involved were clearly severable and that the agreement was not really a contract since it lacked mutuality of obligation. Accordingly, SBA created a contract obligation only when it placed a definite order, and could charge each fiscal year only with obligations incurred during that fiscal year. 60 Comp. Gen. 219 (1981). The principles were reiterated in 61 Comp. Gen. 184 (1981).

In another 1981 case, GAO considered the District of Columbia's recording of obligations for social security disability medical examinations. A person seeking to establish eligibility for disability benefits is given an appointment for a medical examination and a purchase order is issued at that time. However, for a number of reasons beyond the District's control, the examination may not take place until the following fiscal year (for example, a person makes an application at end of fiscal year or does not show up for initial appointment). Nevertheless, the need for the examination arises when the applicant presents his or her claim for disability benefits. The decision concluded that the obligation occurs when the purchase order is issued and is chargeable to that fiscal year. 60 Comp. Gen. 452 (1981).

Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year. B-233243, Aug. 3, 1989; B-213141-O.M., Mar. 29, 1984. In 70 Comp. Gen. 296 (1991), training that began on the first day of fiscal year 1990 was held chargeable to 1989 appropriations where the training had been identified as a need for 1989, scheduling was beyond the agency's control, and the time between procurement and performance was not excessive. If some particular training were severable (it is not entirely clear when this might be the case), the contract could not cross fiscal year lines and payment would have to be apportioned between the fiscal years in which the training is actually conducted. *See* 34 Comp. Gen. 432 (1955).

After a confusing start, we have determined that the type of contract does not affect the severable *versus* nonseverable distinction. For example, "level-of-effort" contracts may be severable or nonseverable. A level-of-effort contract is a type of cost-reimbursement contract in which the scope of work is defined in general terms, with the contractor being obligated to provide a specified level of effort (*e.g.*, a specified number of person-hours) for a stated time period. Federal Acquisition Regulation, 48 C.F.R. § 16.306(d)(2). The *bona fide* needs determination is based not on the contract type but on the nature of the work being performed and is, in the first instance, the responsibility of the contracting agency. B-235678, July 30, 1990. A 1985 case, 65 Comp. Gen. 154, had implied that all level-of-effort contracts were severable by definition (*id.* at 156), and to that extent was modified by B-235678. *See also* B-277165, Jan. 10, 2000 (cost-plus-fixed-fee contracts are presumptively severable unless the actual nature of the work warrants a different conclusion).

The Comptroller General has noted that to some degree an agency can control whether services are severable or nonseverable by selecting the type of contract and crafting the statement of work. B-277165, *supra* ("one might reasonably conclude that the initial agency determination whether the contract is for funding purposes severable or nonseverable takes place roughly contemporaneously with agency selection of contract type").

As a final thought, there is a fairly simple test that is often helpful in determining whether a given service is severable or nonseverable. Suppose that a service contract is to be performed half in one fiscal year and half in the next. Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammis.[18] If the repairs are not completed, certainly some work has been done but you still don't have an operational frammis. The latter two examples are nonseverable.

6. Replacement Contracts

In an early decision, the Comptroller of the Treasury was asked whether fiscal year 1902 funds, originally obligated under a contract but unexpended because of contractor default, could be used in the following year to continue the original object of the contract. The Comptroller stated:

> "A contract was properly made within the fiscal year 1902, and it would seem that any part of the consideration of that contract which failed of use owing to the default of the contractor could still be used in carrying out the object of the original contract within the meaning of [31 U.S.C. § 1502(a)]. Appropriations are made to be used and not to be defeated in their use, and it would be a narrow construction to hold that a default on a properly made contract would prevent the use of the appropriation for the

[18] According to "Harvey the Pooka," the word "frammis" denotes "something that, in reality, one hasn't a clue what it does or what it is for …but one wants to give others the impression that he does." The word was coined by The Three Stooges, and, to some, it is a more literate form of the word "widget." (e-mail to "Newsgroups: it.cultura.linguistica.inglese" dated January 28, 2003, found at http://groups.google.com/groups?q=frammis+word&hl=en&lr=&ie=UTF8&selm=TXrZ9.54710%24YG2.1568240%40twister1.libero.it&rnum=1).

> object for which it was made and for carrying out which the contract was executed."

9 Comp. Dec. 10, 11 (1902). This marked the beginning of the replacement contract theory.

In its traditional form, the rule is well settled that, where it becomes necessary to terminate a contract because of the contractor's default, the funds obligated under the original contract are available, beyond their original period of obligational availability, for the purpose of engaging another contractor to complete the unfinished work. 60 Comp. Gen. 591 (1981); 55 Comp. Gen. 1351 (1976); 44 Comp. Gen. 623 (1965); 40 Comp. Gen. 590 (1961); 32 Comp. Gen. 565 (1953); 2 Comp. Gen. 130 (1922); 21 Comp. Dec. 107 (1914); B-160834, Apr. 7, 1967; B-105555, Sept. 26, 1951; A-22134, Apr. 12, 1928.

Implicit in the rule is the premise that the original contract validly obligated then current funds. *See* 34 Comp. Gen. 239 (1954). In addition, the rule is based on the notion that the default termination does not eliminate the *bona fide* need of the fiscal year in which the original contract was executed. 44 Comp. Gen. 399, 401 (1965). In accordance with 31 U.S.C. § 1502, amounts from the appropriation available at the time the original contract was entered would remain available to fund costs properly chargeable to that appropriation. *See* B-242274, Aug. 27, 1991. Accordingly, the replacement contract seeks only to meet the agency's preexisting and continuing need relying on the budget authority obligated by the original contract.

In order for funds to remain available beyond expiration for a replacement contract, three conditions must be met:

- A *bona fide* need for the work, supplies, or services must have existed when the original contract was executed, and it must continue to exist up to the award of the replacement contract. *E.g.*, 55 Comp. Gen. 1351, 1353 (1976); 34 Comp. Gen. 239, 240 (1954). If a terminated contract is found to have been improperly made to fulfill a need of a fiscal year other than the year against which the obligation was recorded, it would also be improper to charge that same appropriation for obligations incident to a replacement contract. 35 Comp. Gen. 692 (1956). In addition, if contracts made in a subsequent fiscal year do not satisfy a continuing need for the goods and/or services provided under the original contract from a prior fiscal year, then the subsequent fiscal year contracts are not replacements and those contracts are not chargeable to the prior fiscal year appropriation. *See* B-242274, Aug. 27, 1991.

- The replacement contract must not exceed the scope of the original contract. If it does, it is a new obligation and must be charged to funds currently available for obligation at the time the replacement contract is entered into. *E.g.*, 44 Comp. Gen. 399 (1965); B-181176-O.M., June 26, 1974.

- The replacement contract must be awarded within a reasonable time after termination of the original contract. *E.g.*, 60 Comp. Gen. at 593. Excessive delay raises the presumption that the original contract was not intended to meet a then existing *bona fide* need. The same result may follow if there is unwarranted delay in terminating the original contract. 32 Comp. Gen. 565 (1953).

At one time, the replacement contract rule was mostly (but not exclusively) limited to the default situation. *E.g.*, 24 Comp. Gen. 555 (1945), *overruled by* 55 Comp. Gen. 1351. It has, however, been expanded. In 34 Comp. Gen. 239 (1954), a default termination was found to be erroneous and was converted to a termination for convenience by agreement of the parties to permit settlement of the contractor's claim for damages. The decision held that, in view of the original termination, the funds originally obligated were available for the timely execution of a new contract for the performance of the unfinished work.[19] A further question in that case was whether the replacement contract rule was affected by the newly enacted 31 U.S.C. § 1501(a), which requires that contractual obligations be supported by a binding agreement in writing executed prior to expiration of the appropriations availability. The decision held that the original contract met these requirements. 34 Comp. Gen. at 241.

[19] A 1981 case, 60 Comp. Gen. 591, drew a distinction based on whether the awarding of the replacement contract preceded or followed the conversion to a termination for convenience, suggesting that the original obligation was extinguished when the replacement contract followed the conversion to a termination for convenience, the precise sequence involved in 34 Comp. Gen. 239. Although 60 Comp. Gen. 591 cites 34 Comp. Gen. 239 several times, it does not address this point. In view of later decisions where GAO determined that an agency could award a replacement contract following a termination for convenience because of an improper award, the distinction regarding when the replacement contract is awarded would not appear to be relevant. *See* 68 Comp. Gen. 158 (1988).

In a later case, a contract for flooring repairs was awarded in fiscal year 1975, obligating fiscal year 1975 funds, conditioned upon a determination from the Small Business Administration (SBA) that the contractor qualified as a small business. SBA found the contractor not to be a small business. Concluding that the original award was sufficient to support an obligation under 31 U.S.C. § 1501(a), the Comptroller General applied the replacement contract rule and held that the funds obligated for the contract in fiscal year 1975 could be used to resolicit in fiscal year 1976. 55 Comp. Gen. 1351 (1976).

In 66 Comp. Gen. 625 (1987), however, the Comptroller General declined to extend the rule in a situation involving a voluntary modification that reduced the scope of a contract. The Navy had contracted for the construction of 12 ships. The contractor encountered financial difficulties and filed for reorganization under Chapter 11 of the Bankruptcy Act under which the contractor could, with court approval, reject the contract. *See* 11 U.S.C. §§ 365(a) and (d)(2). To avert this possibility, the Navy agreed to a contract modification that, among other things, reduced the number of ships to be provided from 12 to 10. The question was whether the funds originally obligated for the 2 ships deleted by the modification were available after expiration to fund a reprocurement. GAO concluded that they were not because there had been no default, nor was there an actual rejection under the Bankruptcy Code. "[T]he modification was an essentially voluntary act on the part of the Navy, and as such is beyond the scope of the replacement contract rule." *Id.* at 627. Therefore, any replacement contract for the 2 deleted ships would have to be charged to appropriations current at the time it was made.

Cases involving the termination of erroneously or improperly awarded contracts have been less than consistent, although a clear direction now appears evident. The earliest decisions applied the replacement contract rule. Thus, 17 Comp. Gen. 1098 (1938) held, without much discussion, that funds obligated by an award to a bidder subsequently determined not to have been the low bidder could be used for an award to the otherwise low bidder in the following fiscal year. In a 1953 case, a contract had to be partially canceled because the contractor's bid had not conformed to the advertised specifications. GAO noted that "the obligating instrument was legally defective in such a way as to render the contract voidable at the election of the Government," but nevertheless applied the replacement contract rule. B-116131, Oct. 19, 1953. *See also* B-89019, May 31, 1950.

GAO's position seemed to change with the enactment of 31 U.S.C. § 1501(a) in 1954, on the theory that a contract award found to be invalid did not constitute a binding agreement so as to support a recordable obligation. 38 Comp. Gen. 190 (1958); B-118428, Sept. 21, 1954, *overruling* B-116131 and B-89019. However, B-116131 was at least arguably "reinstated" by B-152033, May 27, 1964, which followed both the "voidable at the election of the government" rationale and the result of B-116131, without citing either it or the case that presumably overruled it. *See also* B-173244(2), Aug. 10, 1972; B-158261, Mar. 9, 1966. This latter group of cases was in turn cited with approval in 55 Comp. Gen. 1351, 1353 (1976).

The apparent direction indicated by 55 Comp. Gen. 1351 (1976) and the cases it cited was called into question by statements in 60 Comp. Gen. 591 (1981) to the effect that the replacement contract rule does not apply to terminations for the convenience of the government, whether initiated by the contracting agency or on recommendation of some other body such as GAO. Of course, the typical situation in which a replacement contract is needed following a termination for convenience is where the original contract is found to have been improperly awarded. An important clarification occurred in 68 Comp. Gen. 158 (1988), which modified 60 Comp. Gen. 591 and held the replacement contract rule applicable where a contract must be terminated for convenience, without a prior default termination, pursuant to a determination by competent administrative or judicial authority (court, board of contract appeals, GAO) that the contract award was improper. As noted previously, the *bona fide* need of the original contract must continue, and the replacement contract must be made without undue delay after the original contract is terminated and must be awarded on the same basis as, and be substantially similar in scope and size to, the original contract.

Logically and inevitably, the next question would be why the rule should not be the same regardless of whether the defect leading to termination is determined by an external reviewing body or by the contracting agency itself. It should make no difference, GAO concluded in 70 Comp. Gen. 230 (1991). The essence of the problem—a legal impropriety in the procurement process requiring corrective action—is no different. Thus, the replacement contract rule, with its attendant conditions, applies where the contracting agency determines that a contract award was improper and terminates the contract for the convenience of the government, provided there is clear evidence that the award was erroneous and the agency documents its determination with appropriate findings of fact and law. *Id.*

It is worth noting that with regard to agencies that terminate their contracts based on improper awards, the 1991 GAO decision added a fourth condition to the three articulated earlier in this section that determine whether funds remain available in a subsequent fiscal year for replacement contracts. In addition to the existence of a continuing *bona fide* need, a replacement contract of the same size and scope as the original, and the execution of the replacement without undue delay, the decision added that the original contract had to be made in "good faith" before an agency could use prior year appropriations to fund a replacement contract after terminating the original for convenience due to an improper award; 70 Comp. Gen. 287, 289 (1991).

The issue of whether an agency is required to avail itself of the replacement contract rule arose in a protest submitted to GAO alleging the improper award of a contract. GAO found that the agency properly awarded the contract and that, even when available, the replacement contract rule is not mandatory on an agency. B-270723, Apr. 15, 1996. The 1996 decision stated that since the replacement contract rule "provides a mechanism to allow agencies to administer their contract effectively when there is a reason to terminate a contract, its use is solely at the government's discretion." *Id.* At least one federal district court has adopted the position that the availability of funds for a replacement contract does not require the agency to procure a replacement contract. *LeBoeuf*, *Lamb*, *Greene & MacRae*, *L.L.P. v. Abraham*, 215 F. Supp. 2d 73, 81 (D.D.C. 2002). *See*, *e.g.*, B-276334.2, Oct. 27, 1997.

7. Contract Modifications and Amendments Affecting Price

Contract performance may extend over several years. During this time, the contract may be modified or amended for a variety of reasons at the instigation of either party. An amendment within the general scope of the contract that does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, Aug. 19, 1947. If the modification results in an increase in contract price, the question from the *bona fide* needs perspective is which fiscal year to charge with the modification.

If the modification exceeds the general scope of the original contract, for example, by increasing the quantity of items to be delivered, the modification amounts to a new obligation and is chargeable to funds current at the time the modification is made. 37 Comp. Gen. 861 (1958); B-207433, Sept. 16, 1983. When the Internal Revenue Service (IRS) benefited from a contractual provision that allowed its contractor to pass along cost savings to the agency in a fiscal year subsequent to when it entered the contract, IRS could not use those cost savings to increase the quantity of items that the contract required the contractor to deliver. B-257617, Apr. 18, 1995. Although there was a *bona fide* need for an increased quantity of items that had continued from the fiscal year that IRS entered the contract, it was not within the scope of the contract to increase the quantity of items delivered. If the contractual provision had stated that a cost savings would be passed on to IRS in the form of an increased quantity of items delivered, then increasing the quantity would not have constituted a contract modification creating a new obligation. *Id.*

In the case of a contract for severable services, a modification providing for increased services must be charged to the fiscal year or years in which the services are rendered, applying the principles discussed in this chapter in section B.5.[20] 61 Comp. Gen. 184 (1981), *aff'd upon reconsideration*, B-202222, Aug. 2, 1983; B-224702, Aug. 5, 1987. *See also* B-235086, Apr. 24, 1991. In 61 Comp. Gen. 184, for example, a contract to provide facilities and staff to operate a project camp was modified in the last month of fiscal year 1980. The modification called for work to be performed in fiscal year 1981. Regardless of whether the contract was viewed as a service contract or a contract to provide facilities, the modification did not meet a *bona fide* need of fiscal year 1980. The modification amounted to a separate contract and could be charged only to fiscal year 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to fiscal year 1980 funds.

For modifications within the general scope of the original contract, the situation is a bit more complicated. Most government contracts contain provisions which, under certain conditions, render the government liable to make equitable adjustments in the contract price. Such liability may arise due to changes in specifications, government-caused delay, changed conditions, increased overhead rates, *etc.* These conditions are set out in standard contract clauses such as the "Changes" clause, "Government Property" clause, or "Negotiated Overhead Rates" clause.

[20] Presumably, if an agency, acting under authority to charge a 12-month severable services contract that crosses fiscal years to the appropriation current in the first fiscal year, had charged the original obligation to the first fiscal year, the agency should charge the costs of the modification to that same appropriation. We discuss this authority for civilian agencies and 10 U.S.C. § 2410a for military departments) in section B.9.a of this chapter. We found no case law addressing this point, however. *See generally* B-259274, May 22, 1996 (discussing 10 U.S.C. § 2410a).

Because there is no way to know whether the government will actually incur liability under these provisions, and if so, the amount of such liability, until the occurrence of the specified conditions (*cf.* 50 Comp. Gen. 589, 591 (1971)), the appropriations charged with the cost of the contract are not firmly obligated to cover future price increases, which arise due to the operation of these clauses. Nevertheless, as noted, government contracts frequently contemplate that performance will extend into subsequent fiscal years. When an upward price adjustment is necessitated in a subsequent year, the general approach is to ask whether the adjustment is attributable to an "antecedent liability"—that is, whether the government's liability arises and is enforceable under a provision in the original contract. If the answer to this question is yes, then a within-scope price adjustment, which is requested and approved in a subsequent fiscal year, for example, under the "Changes" clause, will—with one important qualification to be noted later—be charged against the appropriation current at the time the contract was originally executed. Cases supporting this proposition in various contexts are 59 Comp. Gen. 518 (1980); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938); A-15225, Sept. 24, 1926; B-146285-O.M., Sept. 28, 1976.[21] *See also* B-197344, Aug. 21, 1980, where supplemental work was done without issuance of a formal contract modification. This principle is occasionally referred to as the doctrine of "relation back." *E.g.*, 37 Comp. Gen. 861, 863 (1958).

The reasoning is that a change order does not give rise to a new liability, but instead only renders fixed and certain the amount of the government's preexisting liability to adjust the contract price. Since that liability arises at the time the original contract is executed, the subsequent price adjustment is viewed as reflecting a *bona fide* need of the same year in which funds were obligated for payment of the original contract price. The concept was stated as follows in 23 Comp. Gen. 943, 945 (1944) (explanatory information provided):

> "It is true that at the time the contract was executed it was not known that there would, in fact, be any changes ordered …for which the contractor would be entitled to be paid an amount in addition to amounts otherwise payable under the contract. Also, it is true that [the Changes clause] contemplates the execution of amendments to the contract

[21] Similarly, costs incurred under a termination for convenience are chargeable to the appropriation originally obligated for the contract. B-203074, Aug. 6, 1981.

> from time to time covering such changes. However, the fact remains that the obligations and liabilities of the parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government's liability in connection with such changes."

In order to avoid overobligating the original appropriation, the contracting officer must estimate the expected net additional obligations to insure that available appropriations are not committed to other purposes. *E.g.*, 61 Comp. Gen. 609, 612 (1982); B-192036, Sept. 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to ensure that appropriations do not remain encumbered in excess of the amounts that will actually be needed to meet the total liability under the contract.

For contracts spanning lengthy periods of time, funding of within scope modifications involves the use of expired appropriations. As discussed later in this chapter, the balances in expired accounts prior to closing are available without further congressional action.

Not all price adjustments arising from contract modifications or amendments represent a *bona fide* need of the year in which the agreement was made. If, as noted above, the change or amendment exceeds the general scope of the contract, or is not made pursuant to a provision in the original contract, then it is not based on any antecedent liability, in which event it may obligate only appropriations current at the time it is issued. 56 Comp. Gen. 414 (1977). *See also* 25 Comp. Gen. 332 (1945) (purported change order issued after completion of contract, covering work the contractor was not legally bound to do under the original contract, amounted to a new contract).

As noted above, there is an important exception or qualification to the antecedent liability rule. In cost reimbursement contracts, discretionary cost increases (*i.e.*, increases that are not enforceable by the contractor), which exceed funding ceilings established by the contract, may be charged to funds currently available when the discretionary increase is granted by the contracting officer. 61 Comp. Gen. 609 (1982). It would be unreasonable, the decision pointed out, to require the contracting officer to reserve funds in anticipation of increases beyond the contract's ceiling. *Id.* at 612. Changes that do not exceed the stipulated ceiling continue to be chargeable to funds available when the contract was originally made (*id.*

at 611), as do amounts for final overhead in excess of the ceiling where the contractor has an enforceable right to those amounts (*id.* at 612). Since prior decisions such as 59 Comp. Gen. 518 had not drawn the below-ceiling/above-ceiling distinction, 61 Comp. Gen. 609 modified them to that extent. A more recent case applying 61 Comp. Gen. 609 is 65 Comp. Gen. 741 (1986).

Once an appropriation account has closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant for purposes of determining the availability of amounts in the closed accounts since, at that time, appropriation balances cease to be available for expenditure. However, questions of antecedent liability or relation back are used to determine the extent to which current funds are available since, once an appropriation closes, only current funds may be used, up to specified limits, for such obligations. 31 U.S.C. §§ 1552 and 1553.

8. Multiyear Contracts

a. Introduction

Any discussion of multiyear contracting must inevitably combine the *bona fide* needs rule with material from Chapter 6 on the Antideficiency Act and from Chapter 7 on obligations.

The term "multiyear contract" has been used in a variety of situations to describe a variety of contracts touching more than one fiscal year. To prevent confusion, we think it is important to start by establishing a working definition. A multiyear contract, as we use the term in this discussion, is a contract covering the requirements, or needs, of more than one fiscal year.[22] A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract. We discuss contracts such as these, where performance may extend beyond the end of the fiscal year, in sections B.4 and B.5 of this chapter. Thus, a contract to construct a ship that will take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.

[22] This is essentially the same as the definition in the Federal Acquisition Regulation, "a contract for the purchase of supplies or services for more than 1, but not more than 5, program years." 48 C.F.R. § 17.103.

Multiyear contracting, like most things in life, has advantages and disadvantages. Some of the potential benefits are:[23]

- Multiyear contracting can reduce costs by permitting the contractor to amortize nonrecurring “start up” costs over the life of the contract. Without multiyear authority, the contractor may insist on recovering these costs under the 1-year contract (since there is no guarantee of getting future contracts), thus resulting in increased unit prices.

- Multiyear contracting may enhance quality by reducing the uncertainty of continued government business and enabling the contractor to maintain a stable workforce.

- Multiyear contracting may increase competition by enabling small businesses to compete in situations where nonrecurring start-up costs would otherwise limit competition to larger concerns.

However, the situation is not one-sided. Multiyear contracting authority also has potential disadvantages:[24]

- Competition may decrease because there will be fewer opportunities to bid.

- A contractor who is able to amortize start-up costs in a multiyear contract has, in effect, a government-funded competitive price advantage over new contractors in subsequent solicitations. This could evolve into a sole-source posture.

- Being locked into a contract for several years is not always desirable, particularly where the alternative is to incur cancellation charges that could offset initial savings.

[23] S. Rep. No. 98-417, at 4–8 (1984). This is a report by the Senate Committee on Governmental Affairs on a bill (S. 2300) designed to extend limited multiyear contracting authority to civilian agencies. That legislation was not enacted. Ten years later, in 1994, Congress enacted the Federal Acquisition Streamlining Act, permitting civilian agencies to use fiscal year appropriations to enter into contracts for as many as 5 years. Pub. L. No. 103-355, § 1072, 108 Stat. 3243, 3270 (Oct. 13, 1994), codified at 41 U.S.C. § 254c. We discuss the Federal Acquisition Streamlining Act in section B.9.b of this chapter.

[24] H.R. Rep. No. 97-71, pt. 3, at 21 (1981) (report of the House Committee on Government Operations on the 1982 Defense Department authorization bill).

An agency may engage in multiyear contracting only if it has (1) no-year funds or multiple year funds covering the entire term of the contract or (2) specific statutory authority. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999); 67 Comp. Gen. 190, 192 (1988); B-171277, Apr. 2, 1971 (multiyear contract permissible under no-year trust fund). An agency may enter into a multiyear contract with fiscal year appropriations (or for a term exceeding the period of availability of a multiple year appropriation) only if it has specific statutory authority to do so. *See* 71 Comp. Gen. 428, 430 (1992); B-259274, May 22, 1996. Most agencies now have some form of multiyear contracting authority, as we will describe in the next section.

b. Multiple Year and No-Year Appropriations

If an agency does not have specific multiyear contracting authority but enters into a multiyear contract solely under authority of a multiple year or no-year appropriation, the full contract amount must be obligated at the time of contract award.[25] B-195260, July 11, 1979. This is also true for revolving funds, which authorize expenditures without fiscal year limitation. Revolving funds must have sufficient budget authority against which to record the entire amount of long-term contracts at the time of the obligation. 72 Comp. Gen. 59, 61 (1992). A revolving fund may not count anticipated receipts from future customer orders as budget authority. B-288142, Sept. 6, 2001. *See also* U.S. General Accounting Office, *The Air Force Has Incurred Numerous Overobligations In Its Industrial Fund*, AFMD-81-53 (Washington, D.C.: Aug. 14, 1981).

However, there have been some circumstances under which GAO approved the incremental funding of a multiyear contract using no-year funds. For example, 43 Comp. Gen. 657 (1964) involved a scheme in which funds would be made available, and obligated, on a year-by-year basis, together with a “commitment” to cover maximum cancellation costs. The cancellation costs represented amortized start-up costs, which would be adjusted downward each year. Thus, funds would be available to cover the government’s maximum potential liability in each year. *See also* 62 Comp. Gen. 143 (1983) (similar approach for long-term vessel charters under the Navy Industrial Fund); 51 Comp. Gen. 598, 604 (1972) (same); 48 Comp. Gen. 497, 502 (1969) (either obligational approach acceptable under

[25] When an agency uses multiyear or other contracting authorities, such as the Federal Acquisition Streamlining Act, that authority may permit the agency to obligate its appropriations differently. We discuss the Federal Acquisition Streamlining Act and other examples of multiyear contracting authorities in section B.9 of this chapter.

revolving fund).[26] (As we will see later, this type of arrangement under a fiscal year appropriation presents problems.)

If an agency has neither multiple year or no-year funds, nor uses multiyear contracting authority, a multiyear contract violates statutory funding restrictions, including the Antideficiency Act (prohibiting obligations in advance of an appropriation for that fiscal year, 31 U.S.C. § 1341(a))[27] and the *bona fide* needs statute (prohibiting the obligation of an appropriation in advance of need, 31 U.S.C. § 1502(a)). *See Cray Research, Inc. v. United States*, 44 Fed. Cl. 327,332 (1999). *E.g.*, 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 64 Comp. Gen. 359 (1985); 48 Comp. Gen. 497 (1969); 42 Comp. Gen. 272 (1962); 27 Op. Att'y Gen. 584 (1909). Multiyear commitments were found illegal in various contexts in each of these cases, although each case does not necessarily discuss each funding statute.

In 42 Comp. Gen. 272, for example, the Air Force, using fiscal year appropriations, awarded a 3-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island. Because an agency typically incurs an obligation at the time it enters into a contract, and must charge that obligation to an appropriation current at that time,[28] the Air Force contract raised two issues: (1) whether the services to be provided in the second and third years of the contract constituted a *bona fide* need of the Air Force's fiscal year appropriation, and (2) if not, whether the Air Force had incurred an obligation in the first fiscal year for the needs of the second and third years in advance of appropriations for those 2 years. The Air Force contended that no funds were obligated at time of contract award; instead, the Air Force argued that it had a "requirements" contract, and that it incurred no obligation unless and until it issued requisitions, thereby exempting the contract from the statutory funding restrictions. However, the Comptroller General refused to adopt this characterization of the contract. Although the contractor had expressly agreed to perform only services for which he had received the contracting officer's order, GAO found that there was no need for an administrative determination that requirements existed since the contract services were "automatic incidents of the use of the air field." *Id.* at 277. Only a decision

[26] While 43 Comp. Gen. 657 had used the somewhat cryptic term "commitment," the three subsequent decisions require the actual obligation of the cancellation costs.

[27] We discuss the Antideficiency Act in Chapter 6.

[28] We discuss the concept of obligations in Chapter 7.

to close the base would eliminate the requirements. Consequently, the contract was found to be an unauthorized multiyear contract—the Air Force, using fiscal year appropriations, had entered into a contract for its needs of subsequent fiscal years in advance of appropriations for those years.

c. Fiscal Year Appropriations

If an agency is contracting with fiscal year appropriations and does not have multiyear contracting authority, the only authorized course of action, apart from a series of separate fiscal year contracts, is a fiscal year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). *Leiter v. United States*, 271 U.S. 204 (1926); 66 Comp. Gen. 556 (1987); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, Nov. 10, 1949. The inclusion of a renewal option is key; with a renewal option, the government incurs a financial obligation only for the fiscal year, and incurs no financial obligation for subsequent years unless and until it exercises its right to renew. The government records the amount of its obligation for the first fiscal year against the appropriation current at the time it awards the contract. The government also records amounts of obligations for future fiscal years against appropriations current at the time it exercises its renewal options. The mere inclusion of a contract provision conditioning the government's obligation on future appropriations without also subjecting the multiyear contract to the government's renewal option each year would be insufficient. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999). Thus, in 42 Comp. Gen. 272 (1962), the Comptroller General, while advising the Air Force that under the circumstances it could complete that particular contract, also advised that the proper course of action would be either to use an annual contract with renewal options or to obtain specific multiyear authority from Congress. *Id.* at 278.

In a 1-year contract with renewal options, the contractor can never be sure whether the renewal options will be exercised, thereby preventing the contractor from amortizing initial investment costs. To protect against this possibility, contractors occasionally seek a contract termination penalty equal to the unamortized balance of initial investment costs if the government fails to renew the contract for any fiscal year. However, the Comptroller General has held that these provisions contravene the *bona fide* needs rule:

> "The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity.
>
> " …The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need."

36 Comp. Gen. 683, 685 (1957). *See also* 37 Comp. Gen. 155 (1957).

Attempts to impose penalty charges for early termination (sometimes called "separate charges") have occurred in a number of cases involving automated data processing (ADP) procurements. In one case, a competitor for a contract to acquire use of an ADP system for a 65-month period proposed to include a provision under which the government would be assessed a penalty if it failed to exercise its annual renewal options. The Comptroller General noted that the penalty was clearly intended to recapitalize the contractor for its investment based on the full life of the system in the event the government did not continue using the equipment. Accordingly, the Comptroller General concluded that the penalty did not reasonably relate to the value of the equipment's use during the fiscal year in which it would be levied. The penalty charges would, therefore, not be based on a *bona fide* need of the current fiscal year and their payment would violate statutory funding restrictions. 56 Comp. Gen. 142 (1976), *aff'd in part*, 56 Comp. Gen. 505 (1977). *See also* 56 Comp. Gen. 167 (1976); B-190659, Oct. 23, 1978.

One scheme, however, has been found to be legally sufficient to permit the government to realize the cost savings that may accrue through multiyear contracting. The plan approved by the Comptroller General in 48 Comp. Gen. 497, 501–02 (1969) provided for a 1-year rental contract with an option to renew each subsequent year. If the government completed the full rental period by continuing the contract on a year-by-year basis, it would be entitled to have monthly rental credits applied during the final months of the rental period. The Comptroller General noted that:

> "Under this arrangement the Government would not be obligated to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expressly continuing such rental during the following fiscal year. In effect, the company is proposing a 1 year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from [the contractor] for one fiscal year. We have no legal objection to this type of rental plan for ADP equipment."

d. Contracts with No Financial Obligation

Multiyear arrangements may be permissible, even without specific statutory authority, if they are structured in such a way that the agency, at time of contract award, incurs no financial obligation. Without a financial obligation, the agency does not violate the Antideficiency Act or the *bona fide* needs rule. In 63 Comp. Gen. 129 (1983), the Comptroller General considered the General Services Administration proposal to use 3-year "Multiple Award Schedule" (MAS) contracts for Federal Supply Schedule items. There was no commitment to order any specific quantity of items. Rather, the commitment was for an agency with a requirement for a scheduled item to order it from the contractor if the contractor has offered the lowest price. If an agency found the item elsewhere for less than the contract price, it was free to procure the item from that other source without violating the contract. Since entering into the MAS contracts did not require the obligation of funds, there was no violation of statutory funding restrictions. Obligations would occur only when agencies placed specific orders, presumably using funds currently available to them at the time. Another example is a 1935 decision, A-60589, July 12, 1935, which concerned a requirements contract for supplies in which no definite quantity was required to be purchased and under which no financial obligation would be imposed on the government until an order was placed. In order to retain the availability of the vendor and a fixed price, the government agreed not to purchase the items elsewhere. *See also* B-259274, May 22, 1996.

Also, contracts that do not require the expenditure of appropriated funds are not subject to the same fiscal year strictures. *E.g.*, 10 Comp. Gen. 407

(1931) (no legal objection to multiyear leases or contracts for the operation of concessions on federal property).

9. Specific Statutes Providing for Multiyear and Other Contracting Authorities

As we noted at the beginning of our discussion of the *bona fide* needs rule, a fixed-term appropriation is available only "to complete contracts properly made within that period of availability." *See* 31 U.S.C. § 1502(a). For multiyear contracts, "properly made" means that the *bona fide* needs rule is satisfied if an agency has statutory authority to obligate its fiscal year funds for a contract that crosses fiscal years or is for multiple years. While these statutes are sometimes referred to as exceptions to the *bona fide* needs statute, it is clear that by using the phrase "contracts properly made," the *bona fide* needs statute anticipates that Congress may authorize agencies to obligate funds across fiscal years, either generally or for a particular agency or program. In so doing, Congress defines the *bona fide* need in the particular statute.

a. Severable Services Contracts

There are several general authorities to contract across a fiscal year or to enter into multiyear contracts. For example, 41 U.S.C. § 253*l* authorizes the heads of executive agencies to enter into procurement contracts for severable services for periods beginning in one fiscal year and ending in the next fiscal year as long as the contracts do not exceed 1 year. It permits agencies to obligate the total amount of the contract to appropriations of the first fiscal year. Without specific statutory authority such as this, such action would violate the *bona fide* needs rule (*see* section B.5 of this chapter). Section 253*l*, in effect, redefines for an agency that elects to contract under authority of section 253*l* its *bona fide* need for the severable services for which it is contracting. Related statutes extend this authority to various legislative branch entities.[29] Similarly, 10 U.S.C. § 2410a authorizes the military departments to use current fiscal year appropriations to finance severable service contracts into the next fiscal year for a total period not to exceed 1 year. GAO states in B-259274, May 22, 1996, that "[t]he purpose of 10 U.S.C. § 2410a is to overcome the *bona fide* needs rule," which is another way of saying that Congress has provided the military departments with authority to properly enter into a contract not to exceed 1 year that crosses fiscal years. The statute specifically authorizes the departments to obligate "[f]unds made available

[29] For example, the Comptroller General (41 U.S.C. § 253*l*-1), Library of Congress (41 U.S.C. § 253*l*-2), Chief Administrative Officer of the House of Representatives (41 U.S.C. § 253*l*-3), and Congressional Budget Office (41 U.S.C. § 253*l*-4).

for a fiscal year …for the total amount of a contract entered into" under section 2410a(a).

In B-259274, May 22, 1996, the Air Force took full advantage of this authority to maximize efficient use of fiscal year appropriations. The Air Force had intended to award a 12-month severable services contract for vehicle maintenance beginning on September 1, 1994 (fiscal year 1994), and running until August 31, 1995 (fiscal year 1995). Using 10 U.S.C. § 2410a, the Air Force had planned to obligate the contract against its fiscal year 1994 appropriation, until it learned that it did not have sufficient unobligated amounts to cover the contract. To avoid Antideficiency Act problems, but taking advantage of section 2410a, the Air Force entered into a 4-month contract, beginning September 1, 1994, and running until December 31, 1994, and included an option to renew the contract at that time. The option, as in the *Leiter* decision we discussed in section B.8, could be exercised only by the Air Force, not the contractor, by affirmative written notification to the contractor. GAO concluded that the Air Force's obligation was only for 4 months, and under authority of section 2410a, it constituted a *bona fide* need of fiscal year 1994 and was properly chargeable to fiscal year 1994. Also, GAO found no Antideficiency Act violation. GAO said that with the option to renew for 8 months, the Air Force had incurred "a naked contractual obligation that carries with it no financial exposure to the government."

b. 5-year Contract Authority

(1) 10 U.S.C. §§ 2306b, 2306c

In addition to the severable services contracting authority, Congress has provided executive, legislative, and judicial entities substantial authority for multiyear contracting for goods and services using annual funds. The military departments are authorized by 10 U.S.C. §§ 2306b and 2306c to enter into multiyear contracts for goods and services, respectively, for periods of not more than 5 years if certain administrative determinations are made. Section 2306b applies not only to routine supplies, but also to the military departments acquisition of weapon systems and items and services associated with such systems. Section 2306c, enacted in response to the Wake Island decision (*see* 67 Comp. Gen. 190, 193 (1988)), applies to such services as installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. Sections 2306b and 2306c permit the military departments to obligate the entire amount of the 5-year contract to the fiscal year appropriation current at the time of contract award, even though the goods or services procured for the final 4 years of the contract do not constitute needs of that fiscal year. Alternatively, sections 2306b and 2306c permit the military departments to obligate the amount for each of the 5 years against appropriations enacted for each of those years. If funds are not made available for continuation in a subsequent fiscal year, cancellation or termination costs may be paid from appropriations originally available for the contract, appropriations currently available for the same general purpose, or appropriations made specifically for those payments. 10 U.S.C. §§ 2306b(f) and 2306c(e). The authority contained in sections 2306b and 2306c is also available to the Coast Guard and the National Aeronautics and Space Administration. 10 U.S.C. § 2303.

A multiyear contract entered into under authority of 10 U.S.C. §§ 2306b or 2306c is binding on both parties for the full term of the contract unless terminated as provided in the statute. *See Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 n.2 (Fed. Cir. 1988); *Beta Systems, Division of Velcon Filters, Inc. v. United States*, 16 Cl. Ct. 219, 228 (1989).

A contract under sections 2306b or 2306c must relate to the *bona fide* needs of the contract period as opposed to the need only of the first fiscal year of the contract period. The statute does not authorize the advance procurement of materials not needed during the 5-year term of the contract. *See* 64 Comp. Gen. 163 (1984); B-215825-O.M., Nov. 7, 1984. *See also* 35 Comp. Gen. 220 (1955).

(2) 41 U.S.C. § 254c

The Federal Acquisition Streamlining Act of 1994 (FASA) and related statutes extended multiyear contracting authority with annual funds to nonmilitary departments.[30] FASA authorizes an executive agency to enter into a multiyear contract for the acquisition of property or services for more than 1, but not more than 5 years, if the agency makes certain administrative determinations. 41 U.S.C. § 254c. Related laws extend this authority to various legislative branch agencies.[31] Through FASA and the related laws, Congress has relaxed the constraints of the *bona fide* needs rule by giving agencies the flexibility to structure contracts to fund the obligations up front, incrementally, or by using the standard *bona fide*

[30] Pub. L. No. 103-355, § 1072, 108 Stat. 3243, 3270 (Oct. 13, 1994).

[31] For example, the General Accounting Office (41 U.S.C. § 253*l*-1), Library of Congress (41 U.S.C. § 253*l*-2), Chief Administrative Office of the House of Representatives (41 U.S.C. § 253*l*-3, and Congressional Budget Office (41 U.S.C. § 253*l*-4).

needs rule approach. B-277165, Jan. 10, 2000. To the extent an agency elects to obligate a 5-year contract incrementally, it must also obligate termination costs.

The enactment of FASA satisfied the GAO recommendation for the enactment of legislation to authorize all federal agencies to engage in limited multiyear procurement. *See* U.S. General Accounting Office, *Federal Agencies Should Be Given General Multiyear Contracting Authority For Supplies and Services*, PSAD-78-54 (Washington, D.C.: Jan. 10, 1978). *See also* B-214545, Aug. 7, 1985 (comments on proposed legislation).

c. Examples of Agency-Specific Multiyear Contracting Authorities

An example of a specific authority is 41 U.S.C. § 11a, which authorizes the Secretary of the Army "to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year," and to pay from appropriations either for the fiscal year in which the obligation is incurred or for the ensuing fiscal year. *See* 28 Comp. Gen. 614 (1949) (construing the term "fuel" in that statute to include gasoline and other petroleum fuel products).

Another example is 31 U.S.C. § 1308, which permits charges for telephone and other utility services for a time period beginning in one fiscal year and ending in another to be charged against appropriations current at the end of the covered time period. In addition, 42 U.S.C. § 2459a authorizes the National Aeronautics and Space Administration to enter into contracts for certain "services provided during the fiscal year following the fiscal year in which funds are appropriated."

A further example of statutory authority for multiyear contracting is 40 U.S.C. § 481(a)(3), which authorizes contracts for public utility services for periods not exceeding 10 years. The purpose of the statute is to enable the government to take advantage of discounts offered under long-term contracts. 62 Comp. Gen. 569, 572 (1983); 35 Comp. Gen. 220, 222–3 (1955). For purposes of applying this statute, the nature of the product or service and not the nature of the provider is the governing factor. 70 Comp. Gen. 44, 49 (1990). Thus, the statute applies to obtaining utility services from other than a "traditional" form of public utility. 62 Comp. Gen. 569. When entering into a contract under 40 U.S.C. § 481(a)(3), the contracting agency needs to have sufficient budget authority only to obligate the first years costs. 62 Comp. Gen. at 572; 44 Comp. Gen. 683, 687–88 (1965).

Other examples of specific multiyear authority are 40 U.S.C. § 490(h), which authorizes the General Services Administration (GSA) to enter into leases for periods of up to 20 years; 40 U.S.C. § 757(c), which authorizes GSA to use the Information Technology Fund for contracts up to 5 years for information technology hardware, software, or services; and 10 U.S.C. § 2828(d), under which the military departments may lease family housing united in foreign countries for periods up to 10 years, to be paid from annual appropriations.

10. Grants and Cooperative Agreements

The *bona fide* needs rule applies to all federal government activities carried out with appropriated funds, not just contracts, including grants and cooperative agreements. B-289801, Dec. 30, 2002; 73 Comp. Gen. 77, 78–79 (1994). Because of the fundamentally different purposes of contracts and grants, a *bona fide* needs analysis in the context of grants and cooperative agreements is different from an analysis in a contract context. The purpose of a contract is to acquire goods or services; the purpose of a grant is to provide financial assistance. It is for that reason that we do not import into a grant analysis the contract concepts of supplies and services, particularly severable and nonseverable services. In the world of contracts, the analysis focuses, necessarily, on the agency's need for the goods or services for which it has contracted. In that context, these concepts have particular relevance. The agency's "need" in the grant context, however, is to make a grant in furtherance of the goals Congress hoped to achieve when it enacted the grant-making authority. In this context, the agency's "need" is to make a grant, and the grantee's use of grant funds has no relevance in the assessment of agency needs.

For that reason, a *bona fide* needs analysis in the grant context focuses on whether the grant was made during the period of availability of the appropriation charged and furthers the authorized purpose of program legislation. B-289801, Dec. 30, 2002. Thus, where a statute authorizes grants to be made for up to 5 years to support childhood education, an award of a 5-year grant fulfills a *bona fide* need in the year that the grant is awarded even though the 5-year grant is funded with a fiscal year appropriation. *Id.* However, where the "School Improvement Programs" appropriation for fiscal year 2002 authorizes grants only for "academic year 2002–2003," only grants providing funding for the 2002–03 academic year are a *bona fide* need of the fiscal year 2002 appropriation, notwithstanding that the program statute authorizes grants for up to 4 years. *Id.*

The application of contract concepts to grants has not been without doubt. Prior to our 2002 decision, the application of the severability concept to grants and cooperative agreements had evolved over the years. In cases where agencies did not have explicit multiyear award authority, GAO used to treat grants and cooperative agreements in much the same way that it treated service contracts with regard to severability. In 64 Comp. Gen. 359 (1985), GAO held that since the National Institutes of Health (NIH) grant program did not contemplate a required outcome or product but, instead, sought to stimulate research that would be needed year after year, NIH was required to use appropriations available in the year that services were rendered to fund the grants.

However, GAO significantly departed from that reasoning in a 1988 decision involving Small Business Administration (SBA) grants. In that decision, GAO stated that when reviewing grants or cooperative agreements in the context of the *bona fide* needs rule, the principle of severability is irrelevant. B-229873, Nov. 29, 1988. GAO held that SBA did not violate the *bona fide* needs rule when it used its current appropriation on September 30, the last day of the fiscal year, to award cooperative agreements to Small Business Development Centers that would use the money in the next fiscal year. GAO concluded that, unlike a contract, a cooperative agreement satisfies the *bona fide* need of the agency—to financially assist the awardee—at the time SBA makes the award to the Small Business Development Centers. *Id.* Thus, the dates on which the Centers actually used the financial assistance are irrelevant for purposes of assessing SBA's *bona fide* need. *Id.*

Building on the SBA decision, GAO held that the Department of Education could use 1-year appropriations to award multiyear grants where the legislation creating the grant program explicitly stated that the grants could last multiple years and even in instances where the legislation did not address the duration of the grants. B-289801, Dec. 30, 2002. The determining factor is that the grants, at the time of award, further the objective of the grant legislation. Thus, GAO held that Education could use its fiscal year appropriations to fund a 4-year grant when the statute directed the agency to award grants "for periods of not more than 4 years." *See* 20 U.S.C. § 6651(e)(2)(B)(i). Furthermore, GAO determined that Education could use its fiscal year appropriation to provide 5- and 2-year grants even though the statutes creating the grants were silent with regard to grant duration. *See* 20 U.S.C. §§ 1070a-21 *et seq.* and Pub. L. No. 106-554, app. A, 114 Stat. 2763A-33–34 (Dec. 21, 2000). GAO reasoned that, in addition to authorizing awards, the grant statutes conferred broad discretion on Education to help ensure the accomplishment of grant objectives; and it was within that discretion for Education to determine whether the grant objectives would best be accomplished through the use of multiyear grant awards. B-289801, Dec. 30, 2002.

C. Advance Payments

1. The Statutory Prohibition

Advance payments in general are prohibited by 31 U.S.C. § 3324, which provides in part:

> "(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.
>
> "(b) An advance of public money may be made only if it is authorized by—
>
> "(1) a specific appropriation or other law …."

The quoted portion of 31 U.S.C. § 3324 is derived from legislation originally enacted in 1823 (3 Stat. 723).

The primary purpose of 31 U.S.C. § 3324 is to protect the government against the risk of nonperformance—"to preclude the possibility of loss to the Government in the event a contractor—after receipt of payment—should fail to perform his contract or refuse or fail to refund moneys advanced." 25 Comp. Gen. 834, 835 (1946). *See also* 65 Comp. Gen. 806, 809 (1986); B-256692, June 22, 1995; B-249006, Apr. 6, 1993; B-180713, Apr. 10, 1974. Thus, in its simplest terms, the statute prohibits the government from paying for goods before they have been received or for services before they have been rendered. *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 682 (1868); 10 Op. Att'y Gen. 288, 301 (1862). The statute has been described as "so plain that construction of it is unnecessary." 27 Comp. Dec. 885, 886 (1921). While that may be true if section 3324 is viewed in isolation, the situation today is nowhere near that simple. Advance payments are now permissible in a number of situations. What we now have is a basic statutory prohibition with a network of exceptions, both statutory and nonstatutory, some of which are of major importance.

Exceptions to the advance payment prohibition may be found in appropriation acts or in "other law." Examples of specific exceptions are: 10 U.S.C. § 2396 (for compliance with foreign laws, rent in foreign countries, tuition, pay, and supplies of armed forces of friendly countries); 31 U.S.C. §§ 3324(b)(2) and (d)(2) (pay and allowances of members of the armed forces at distant stations and publications); and 19 U.S.C. §§ 2076–2077 and 2080 (Customs Service payments). Numerous other statutory exceptions exist in various contexts. A major exception, discussed in this chapter, section C.2, permits advance and progress payments under procurement contracts in certain situations.

Payments to or on behalf of federal civilian employees and members of the uniformed service constitute another area in which exceptions exist. Advances of travel and transportation allowances for federal civilian employees are authorized by, *e.g.*, 5 U.S.C. §§ 5705 and 5724(f). In addition, advances of allowances for basic housing, travel, and transportation, to members of the uniformed services (for themselves and in specified situations their dependents) are authorized by several statutes, *e.g.*, 37 U.S.C. §§ 403(a), 404(b)(1)(A), 404a(b), 405(a), 405a(a), 406(a)(3), and 409(b).

Prior to late 1990, the advance payment of *salary*, as opposed to the various allowances discussed in the preceding paragraph, remained prohibited, with a limited exception in 5 U.S.C. § 5522 for certain emergency or "national interest" evacuations. This situation caused occasional hardship for new employees resulting from delay in receiving their first regular paycheck. In 58 Comp. Gen. 646 (1979), GAO had concurred in a proposal to minimize this hardship by using imprest funds to make partial salary payments to new federal employees early in the week following the first week of employment, but cautioned that, in view of 31 U.S.C. § 3324, no payments could be made before the work had been performed. Section 107 of the Federal Employees Pay Comparability Act of 1990[32] added a new 5 U.S.C. § 5524a, authorizing agencies to make advance

[32] The Act is contained in section 529 of the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 101-509, 104 Stat. 1427, 1449 (Nov. 5, 1990).

payments of up to two pay periods of basic pay to new employees.[33]

Advance payment of salary remains prohibited in situations not covered by statutory exceptions. Thus, GAO has advised that partial or emergency salary payments can be made if a salary check is lost in the mail or an electronic deposit goes astray, but must be subject to "advance payment" safeguards similar to those discussed in 58 Comp. Gen. 646. B-193867.2, Jan. 12, 1990 (nondecision letter). Similarly, GAO concluded that the Nuclear Regulatory Commission could reschedule its commissioners' pay days that fall on weekends or holidays to the preceding workday, provided that payments made prior to the end of a pay period did not include salary applicable to days remaining in the pay period. B-237963, June 28, 1990.

Tuition payments may be paid in advance. The Government Employees Training Act, 5 U.S.C. § 4109, provides general authority for advance tuition payments for civilian employees. Also, 10 U.S.C. § 2396(a)(3) authorizes advance tuition payments for military personnel. Prior to the enactment of these provisions, the Comptroller General held that certain tuition payments could be made in advance. For example, legislation authorizing the Coast Guard to provide training for its personnel at private or state colleges and universities and to pay certain expenses, including tuition, was viewed as authorization by "other law" within the meaning of 31 U.S.C. § 3324. Tuition could therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). *See also* B-70395, Oct. 30, 1947 (tuition payments by Public Health Service in connection with research fellowships); B-56585, May 1, 1946 (tuition payments by the former Veterans Administration in connection with schooling of veterans).

Exceptions to the advance payment prohibition may appear in appropriation acts as well as other legislation. The extent of the authority conferred and its duration will of course be determined in accordance with rules applicable to construing appropriations language. Some may be limited by duration and some may be limited to a particular agency. Also, the *bona fide* needs rule applies. In one case, a fiscal year 1955 appropriation for an Indian education program included authority for the Bureau of Indian Affairs to make certain payments in advance. The Comptroller General held that the funds could be obligated only for the

[33] Under the Congressional Budget Act of 1974, the authority is effective only to the extent provided for in advance in appropriation acts. *See* Pub. L. No. 101-509, § 301.

bona fide needs of the period for which appropriated. Therefore, the advance payment authority was limited to the portion of the program to be furnished during fiscal year 1955 and could not operate to extend the period of availability of the appropriation, that is, could not be used to pay for portions of the program extending into fiscal year 1956. 34 Comp. Gen. 432 (1955).[34] This principle would be equally applicable to advance payment authority contained in permanent legislation.

If a given situation does not fall within any existing exception, the statutory prohibition will apply. *E.g.*, 65 Comp. Gen. 806 (1986) (advance payment for published advertisement); 64 Comp. Gen. 710 (1985) (advance payments under contract for office equipment maintenance found to violate statute notwithstanding Federal Supply Schedule contract language to the contrary).

The statutory prohibition on the advance payment of public funds, 31 U.S.C. § 3324, does not apply to grants. Since assistance awards are made to assist authorized recipients and are not primarily for the purpose of obtaining goods or services for the government, the policy behind the advance payment prohibition has less force in the case of assistance awards than in the case of procurement contracts. Accordingly, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. Unless restricted by the program legislation of the applicable appropriation, the authority to make grants is sufficient to satisfy the requirements of 31 U.S.C. § 3324. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). As stated in 60 Comp. Gen. 209, "[t]he policy of payment upon receipt of goods or services is simply inconsistent with assistance relationships where the government does not receive anything in the usual sense." These concepts are further explored in Chapter 10.[35]

In 70 Comp. Gen. 701 (1991), the Comptroller General held that payments by the Bureau of Indian Affairs for McDonald's gift certificates and movie

[34] This case is cited for the limited purpose of illustrating that advance payment authority does not negate application of the *bona fide* needs rule. It does not illustrate the general application of the *bona fide* needs rule to training obligations. On the contrary, as noted earlier in this chapter, most training tends to be nonseverable.

[35] Although grantees are not subject to the prohibition against advance payments, under the Cash Management Improvement Act of 1990, they may not draw money out of the treasury in advance of need. Pub. L. No. 101-453, 104 Stat. 1058, (Oct. 24, 1990).

tickets, which would be redeemed at a later date for their full value, would not violate 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets were maintained, the purchase of the certificates was in the government's interest, and the certificates and tickets were readily redeemable for cash.

2. Government Procurement Contracts

a. Background

First, it is important to define a few terms. We take our definitions from the Federal Acquisition Regulation (FAR), 48 C.F.R. § 32.102. In the context of government contracting, "advance payments" are payments to a prime contractor "before, in anticipation of, and for the purpose of complete performance under one or more contracts." Advance payments are not measured by performance. "Progress payments" are payments made to the contractor as work progresses on the contract. They may be based on costs incurred by the contractor or a percentage or stage of completion. "Partial payments" are payments "for accepted supplies and services that are only a part of the contract requirements." Advance payments and progress payments based on costs incurred are regarded as forms of "contract financing." Partial payments and progress payments based on a percentage or stage of completion are viewed simply as payment methods.

The extent to which various forms of contract financing are permissible under the advance payment statute was the subject of many early decisions. In one early case, the advance payment statute was applied to a question regarding the legality of government partial (progress) payments for materials that had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until it has been entirely completed and all deliverables have been provided to the government. The statute "was not intended to prevent a partial payment in any case in which the amount of such payment had been actually earned by the contractor and the United States had received an equivalent therefor." 1 Comp. Gen. 143, 145 (1921). The partial payments proposed in that case were not in excess of the amount actually expended by the contractor in performance of the contract, and because the contract provided that title to all property on which payment was made vested in the government, the government would receive the corresponding benefit. Partial payments in advance of complete delivery were therefore permissible.

In 20 Comp. Gen. 917 (1941), the Comptroller General approved a proposed contract amendment to provide for partial payment of the contract price prior to delivery to the government on the condition that title to the materials would pass to the government at the time of payment.

From these and similar cases, a rule evolved, applied both by the accounting officers and by the Attorney General, that partial payments for equipment or land made in advance of their delivery into the actual possession of the United States would not violate the advance payment statute if title therein had vested in the government at the time of payment, or if the equipment or land was impressed with a valid lien in favor of the United States in an amount at least equal to the payment. 28 Comp. Gen. 468 (1949); 20 Comp. Gen. 917 (1941).[36]

Applying this rule, GAO has approved the payment of "earnest money" under a contract for the sale of real estate to the government. The arrangement was found sufficient to protect the government's interests because the contract (a) vested equitable title in the government prior to the vesting of legal title, which remained in the seller only to secure payment of the purchase price, and (b) obligated the seller to deliver title insurance commitment. 34 Comp. Gen. 659 (1955).

b. Contract Financing

"Contract financing payment" is defined by the Federal Acquisition Regulation (FAR) as an authorized government disbursement of moneys to a contractor prior to acceptance of supplies or services by the government. Such payments include: advance payments; performance-based payments; commercial advance and interim payments; certain cost-based progress payments; certain percentage- or stage-of-completion-based progress payments; and interim payments under certain cost reimbursement contracts. 48 C.F.R. § 32.001. "Advance payments" are payments made to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. Such payments are not measured by performance. 48 C.F.R. § 32.102(a). "Progress payments based on costs" are made on the basis of costs incurred by the contractor as work progresses under the contract. 48 C.F.R. § 32.102(b). Progress payments based on percentage or stage of completion are to be made under agency procedures that ensure that payments are commensurate with the work

[36] Some other cases in this evolution are: 17 Comp. Dec. 894 (1911); 17 Comp. Dec. 231 (1910); 29 Op. Att'y Gen. 46 (1911); 20 Op. Att'y Gen. 746 (1894); 18 Op. Att'y Gen. 105 (1885).

accomplished that meets the quality standards established under the contract. 48 C.F.R. § 32.102(e).

The major laws governing acquisition by most agencies of the executive branch of government have for over a half century included provisions relating to agencies making advance and progress payments under contracts for supplies or services. *See* 10 U.S.C. § 2307 (Department of Defense) and 41 U.S.C. § 255 (most civilian agencies). Both provisions permit agencies to make advance, partial, progress, or other payments under contracts for property or services that do not exceed the unpaid contract price. Within their discretion, the agencies may include in bid solicitations a provision limiting advance or progress payments to small business concerns. 10 U.S.C. § 2307(a)(c); 41 U.S.C. § 255(a)(c). The Comptroller General views the authority conferred by both these provisions to apply to both advertised and negotiated procurements. B-158487, Apr. 4, 1966.

Both provisions provide that whenever practicable, payments are to be made based on (1) performance, using quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls; (2) accomplishment of events defined in a program management plan; or (3) other quantifiable measures of results. 10 U.S.C. § 2307(b); 41 U.S.C. § 255(b). Both provisions establish conditions for progress payments for work in process and limit such payments to 80 percent of the contract price for contracts over $25,000. 10 U.S.C. § 2307(e); 41 U.S.C. § 255(e).

Both provisions provide that advance payments may be made only upon adequate security and a determination by the agency head that such would be in the public interest. Such security interest may be in the form of a lien in favor of the government on the property contracted for, on the balance in an account in which such payments are deposited, and such of the property acquired for performance of the contract as agreed to by the parties. The lien is to be paramount to all other liens and effective immediately upon the first advance of funds without filing, notice, or any other action by the government. 10 U.S.C. § 2307(d); 41 U.S.C. § 255(d). Advance payments for commercial items may not exceed 15 percent of the contract price in advance of any performance of work under the contract. 10 U.S.C. § 2307(f)(2); 41 U.S.C. § 255(f)(2). Section 2307(h) provides that if a contract calls for advance, partial, progress, or other payments and provides for title to property to vest in the United States, the title vests in accordance with the terms of the contract, regardless of any security interest in the property that is asserted before or after entering into the contract.

Section 2307(g) of title 10 of the United States Code contains special provisions relating to Navy contracts, for example, that progress payments under contracts for repair, maintenance, or overhaul of a naval vessel may not be less than 95 percent for small businesses and 90 percent for any other business.

Generally speaking, the government's preference is that the contractor be able to perform using private financing, that is, the contractor's own resources or financing obtained in the private market. 48 C.F.R. § 32.106. The advance payment authority of 10 U.S.C. § 2307 and 41 U.S.C. § 255 is a financing tool to be used sparingly. It is considered the least preferred method of contract financing. 48 C.F.R. §§ 32.106 and 32.402(b); 57 Comp. Gen. 89, 94 (1977). However, the need for government assistance in various situations has long been recognized. In this context, government contracting, while primarily intended to serve the government's needs, is also designed to foster a variety of social and economic objectives.

The FAR prescribes policies and procedures for agencies to apply in using contract financing. 48 C.F.R. pt. 32. For example, subparts 32.1 and 32.2 provide guidance on the use of such authority when purchasing noncommercial and commercial items, respectively. Subpart 32.4 provides guidance on the use of advance payment authority when contracting for noncommercial items. Subpart 32.5 provides guidance on the use of progress payments based on cost, and subpart 32.10 provides guidance on the use of performance-based payments for noncommercial items. Various provisions of the FAR elaborate further on the statutory requirements with respect to adequate security for advance payments. *See, e.g.*, 48 C.F.R. §§ 32.202-4, 32.409-3. Application for advance payments under contracts to acquire noncommercial items may be made before or after the award of the contract under 48 C.F.R. § 32.408.[37]

Security requirements may vary to fit the circumstances of the particular case. 48 C.F.R. § 32.409-3(d). In B-214446, Oct. 29, 1984, GAO considered a proposal to certify payment before the services were rendered. The check

[37] Short of following these procedures, a bid conditioned on receipt of advance payments at variance with the terms of the solicitation may be rejected as nonresponsive. 57 Comp. Gen. 89 (1977); B-205088, Oct. 28, 1981; B-197471.2, Aug. 14, 1981.

would be held in escrow under the government's control until contract obligations were met, at which time it would be released to the contractor. This arrangement was deemed adequate for purposes of 41 U.S.C. § 255. In an earlier case, GAO declined approval of a "purchase order draft" procedure, which called for the government to send a blank check to the supplier upon placing an order. The supplier was to fill in the check for the actual amount due, not to exceed a sum specified on the check, thereby effecting immediate payment and eliminating the need for the supplier to bill the government. GAO concluded that an agency head could not reasonably find that this plan would provide adequate security for the government. B-158873, Apr. 27, 1966. In B-288013, Dec. 11, 2001, a case involving whether the Department of Defense could make payment of membership fees to a private fitness center at the beginning of each option year, GAO found that permitting membership transfers did not provide adequate security to the government to justify an advance payment.

Advance payments are also authorized under Public Law 85-804,[38] 50 U.S.C. §§ 1431–1435. This law permits agencies designated by the President to enter into contracts, or to modify or amend existing contracts, and to make advance payments on those contracts, "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever [the President] deems that such action would facilitate the national defense." 50 U.S.C. § 1431. Agencies authorized to utilize Public Law 85-804 are listed in Executive Order No. 10789, Nov. 14, 1958, as amended (reprinted as note following 50 U.S.C. § 1431). The FAR subpart on advance payments includes provisions addressing Public Law 85-804, which applies only during a declared national emergency. 50 U.S.C. § 1435.[39]

Progress payments, where authorized, are made periodically based on costs incurred, with the total not to exceed 80 percent of the total contract price. 48 C.F.R. §§ 32.5011 and 52.232-16 (required contract clause for fixed-price

[38] Pub. L. No. 85-804, 72 Stat. 972 (Aug. 28, 1958).

[39] The National Emergencies Act, enacted in 1976, provided that powers and authorities resulting from the existence of any national emergency still in effect on September 14, 1976, were to terminate 2 years from that date. 50 U.S.C. § 1601. Specifically, the national emergency declared by President Truman in 1950 for the Korean conflict had never been revoked. However, 50 U.S.C. § 1651 makes the termination inapplicable with respect to certain provisions of law, one of which is Public Law 85-804. Thus, for purposes of Public Law 85-804, the Korean War has never ended. This is discussed in more detail in B-193687, Aug. 22, 1979.

contracts). In an incrementally funded fixed-price contract, GAO has construed "total contract price" as the price for complete performance rather than the amount already allotted to the contract, provided that payment may not exceed the total amount allotted. 59 Comp. Gen. 526 (1980). *See also* 48 C.F.R. § 32.5013.

A key condition where cost-based progress payments are authorized is the vesting in the government of title to work in process and certain other property allocable to the contract. 48 C.F.R. §§ 32.503-14 and 52.232-16. These title provisions are an outgrowth of the case law noted earlier in this section.

The nature of the government's interest under this title-vesting provision has produced disagreement among the courts. One view is that title means full, absolute title, which cannot be defeated by subsequent liens. *In re Reynolds Manufacturing Co.*, 68 B.R. 219 (Bankr. W.D. Penn. 1986); *In re Denalco Corp.*, 51 B.R. 77 (Bankr. N.D. Ill. 1985); *In re Economy Cab and Tool Co.*, 47 B.R. 708 (Bankr. D. Minn. 1985); *In re American Pouch Foods, Inc.*, 30 B.R. 1015 (Bankr. N.D. Ill. 1983), *aff'd*, 769 F.2d 1190 (7th Cir.), *cert. denied*, 475 U.S. 1082 (1985); *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437 (Mo. 1997). *See also In re Wincom Corp.*, 76 B.R. 1 (Bankr. D. Mass. 1987), reaching the same result. Another view is that the title-vesting provision gives the government a security interest in the form of a lien relative to progress payments identified with specific property, paramount to the liens of general creditors. *United States v. Dominicci*, 899 F. Supp. 42 (D.P.R. 1995); *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130 (5th Cir. 1992); *Fairchild Industries, Inc. v. United States*, 71 F.3d 868 (Fed. Cir. 1995); *Marine Midland Bank v. United States*, 687 F.2d 395 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Welco Industries, Inc. v. United States*, 8 Cl. Ct. 303 (1985), *aff'd mem.*, 790 F.2d 90 (Fed. Cir. 1986).[40] The *American Pouch* and *Marine Midland* decisions, while reaching different conclusions, contain detailed discussions of the evolution of contract financing in relation to the advance payment statute.

[40] Under the lien theory, however, it has also been held that the government's interest under the title-vesting provision will not be paramount to perfected security interests of other creditors where the government's progress payments have not been used to put value in the specific property involved. *First National Bank of Geneva v. United States*, 13 Cl. Ct. 385 (1987).

c. Payment

Under a strict interpretation of 31 U.S.C. § 3324 standing alone, payment could not be made until property being acquired was actually received and accepted by the government. Thus, in one early case, a supply contract provided for payment "for articles delivered and accepted" and for the contractor to retain responsibility for the supplies or materials until they were actually in the possession of a government representative at their destination. The Comptroller General held that payments on the basis of vouchers or invoices supported by evidence of shipment only, without evidence of arrival of the supplies at the destination and without assurance of receipt or acceptance by the government, would be unauthorized. 20 Comp. Gen. 230 (1940).

As with the forms of contract financing discussed above, the enactment of 10 U.S.C. § 2307 and 41 U.S.C. § 255 permitted more latitude in payment procedures. In view of this statutory authority, the Comptroller General, in B-158487, Apr. 4, 1966, approved an advance payment procedure under which the General Services Administration (GSA) would make payments on direct delivery vouchers prior to the receipt of "receiving reports" from the consignees. The proposal was designed to effect savings to the government by enabling GSA to take advantage of prompt payment discounts.[41] GAO's approval was conditioned on compliance with the conditions specified in 41 U.S.C. § 255 that advance payment be in the public interest and that adequate security be provided.

GAO has since approved similar accelerated payment or "fast pay" procedures for other agencies in B-155253, Mar. 20, 1968 (Defense Department) and B-155253, Aug. 20, 1969 (Federal Aviation Administration), and reaffirmed them for GSA in 60 Comp. Gen. 602 (1981). *See also* B-279620, Mar. 31, 1998, for an extensive discussion of the background of, and adequate controls required for, fast pay.

The Federal Acquisition Regulation provides guidance in using fast payment procedures in 48 C.F.R. subpt. 13.4. An agency may pay for supplies based on the contractor's submission of an invoice under, among others, the following conditions:

[41] For the method of determining the correct date of payment for prompt payment discount purposes, see *Foster Co. v. United States*, 128 Ct. Cl. 291 (1954); 61 Comp. Gen. 166 (1981); B-214446, Oct. 29, 1984; B-107826, July 29, 1954.

- The individual order does not exceed $25,000. Agencies have discretionary authority to set higher limits for specified items or activities.

- Geographical separation and lack of adequate communications facilities between receiving and disbursing activities make it impractical to make timely payment based on evidence of acceptance.

- Title vests in the government upon delivery to a post office or common carrier or, if shipment is by means other than Postal Service or common carrier, upon receipt by the government.

- The contractor agrees to repair, replace, or otherwise correct any items not received at destination, damaged in transit, or not conforming to purchase requirements.

The invoice is the contractor's representation that the goods have been delivered to a post office, common carrier, or point of first receipt by the government.

Accelerated payment procedures should have adequate internal controls. GAO's recommended controls are outlined in 60 Comp. Gen. 602 (1981) and B-205868, June 14, 1982. Fast pay procedures should be subject to monetary ceilings (now required by the FAR), limited to contractors which have an ongoing relationship with the agency, and reviewed periodically to ensure that benefits outweigh costs. The agency must keep records adequate to determine that the agency is getting what it pays for. The system should permit the timely discovery of discrepancies and require prompt follow-up action. GAO has also recommended that an agency test the procedure before agencywide implementation. B-205868, *supra* at 3.

It has also been held that the use of imprest or petty cash funds to purchase supplies under C.O.D. [cash on delivery] procedures does not violate 31 U.S.C. § 3324, even where payment is made prior to examination of the shipment. 32 Comp. Gen. 563 (1953).[42]

[42] The decision refers to something called "Joint Regulations for Small Purchases Utilizing Imprest Funds." This was a regulation, issued jointly by GAO, GSA, and the Treasury Department, and published at 31 Comp. Gen. 768 (1952). It was rescinded in 1959.

Another fast pay issue was discussed in B-203993-O.M., July 12, 1982, in which GAO's General Counsel advised the GAO finance office that it could pay the invoice amount, without the need for further verification, if goods are shipped "f.o.b. [freight on board] origin" and the difference between the estimated price in the purchase order and the amount shown on the invoice is based solely on transportation costs. Any discrepancy regarding the transportation costs could be determined and adjusted through post-audit procedures under 31 U.S.C. § 3726. This would not apply to goods shipped "f.o.b. destination" because transportation charges are included as part of the purchase price.

As a general proposition, since fast pay procedures permit the agency to dispense with prepayment voucher audits, GAO's approval of fast pay procedures has been based on the assumption that the agency would conduct 100 percent post-payment audits. In 67 Comp. Gen. 194 (1988), GAO approved in concept a GSA proposal to combine fast pay procedures with the use of statistical sampling in post-audit for utility invoices. "We see no reason why these two techniques cannot be combined in appropriate circumstances if they result in economies and adequately protect the interests of the government." *Id.* at 199. However, GAO found that the specific proposal did not provide adequate controls. GSA modified its proposal, and the Comptroller General approved it in 68 Comp. Gen. 618 (1989).

3. Lease and Rental Agreements

The advance payment statute has been consistently construed as applicable to lease or rental agreements as well as purchases, and applies with respect to both real and personal property. 18 Comp. Gen. 839 (1939); 3 Comp. Gen. 542 (1924); B-188166, June 3, 1977. Thus, when the government acquires land by leasing, payments must be made "in arrears" unless the applicable appropriation act or other law provides an exemption from 31 U.S.C. § 3324. 19 Comp. Gen. 758, 760 (1940). The Federal Acquisition Regulation advance payment provisions do not apply to rent. 48 C.F.R. § 32.404(a)(1).

In 57 Comp. Gen. 89 (1977), the Comptroller General held that a leasing arrangement of telephone equipment called "tier pricing," under which the government would be obligated to pay the contractor's entire capital cost at the outset of the lease, would violate 31 U.S.C. § 3324. *See also* 58 Comp. Gen. 29 (1978).

The advance payment of annual rent on property leased from the National Park Foundation, a statutorily created charitable nonprofit organization, was found permissible in B-207215, Mar. 1, 1983, based on the "unique status" of the lessor.

Certain long-term lease/rental agreements may present more complicated problems in that they may involve not only 31 U.S.C. § 3324 but also the Antideficiency Act, 31 U.S.C. § 1341. Since appropriations are made only for the *bona fide* needs of a particular fiscal year, and since a lease purporting to bind the government for more than one fiscal year would necessarily include the needs of future years, such a lease would be contrary to the Antideficiency Act prohibition against contracting for any purpose in advance of appropriations made for such purpose. Thus, a lease agreement for the rental of nitrogen gas cylinders for a 25-year period, the full rental price to be paid in the first year, would violate both statutes. 37 Comp. Gen. 60 (1957). A contractual arrangement on an annual basis with an option in the government to renew from year to year was seen as the only way to accomplish the desired objective. *Id.* at 62. *See also* 19 Comp. Gen. 758 (1940).

4. Publications

Advance payment is authorized for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." 31 U.S.C. § 3324(d)(2).

The original exemption for publications was enacted in 1930 (46 Stat. 580 (June 12, 1930)) and amended in 1961 (Pub. L. No. 87-91, 75 Stat. 211 (July 20, 1961)). It authorized advance payments for "subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use." Prior to 1974, a seemingly endless stream of cases arose over the meaning of the terms "publications" or "other publications" as used either in the general exemption or in specific appropriation acts.[43] Based on judicial precedent, GAO construed the terms to mean publications in the customary and commonly understood sense of the word, that is, books, pamphlets, newspapers, periodicals, or prints. B-125979, June 14, 1957. The exemption was also held to include other types of "visual" material such as microfilm products, (41 Comp. Gen. 211 (1961)); 35-millimeter slides (48 Comp. Gen. 784 (1969)); CD-Rom technical databases, online databases that include technical articles updated daily, and a newsletter (B-256692, June 22, 1995). However, the term "publications" was held not to include items made to be heard rather than read, such as phonograph records (21 Comp. Gen. 524 (1941); B-125979, June 14, 1957) or tape-recorded material (46 Comp. Gen. 394 (1966); B-137516, Oct. 28, 1958). In 35 Comp. Gen. 404 (1956), the use of advance payments for the procurement of books through "book club" facilities was held permissible.[44]

In 1974, Congress resolved the problems over the interpretation of "other publications" by enacting legislation to codify some of the GAO decisions and modify others, by defining "other publications" as including "any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage" (Pub. L. No. 93-534, 88 Stat. 1731 (Dec. 22, 1974)). This was condensed into the present version of 31 U.S.C. § 3324(d)(2) when Title 31 was recodified in 1982.

A 1978 decision considered the question of whether a microfilm library could be acquired under a lease/rental arrangement or whether the advance payments were authorized only where the government actually purchased the library. The Comptroller General concluded that in the

[43] The 1930 version of the exemption authorized advance payment only for "newspapers, magazines, and other periodicals," although a few agencies had broader authority under agency-specific legislation. For agencies subject to the quoted language, the sole issue in several decisions was whether a given publication could also be regarded as a "periodical" and thus within the statute. *E.g.*, 37 Comp. Gen. 720 (1958); 17 Comp. Gen. 455 (1937); A-90102, Sept. 3, 1938. The 1961 amendment expanded the authority to include "other publications," rendering these decisions obsolete. In addition, the 1974 legislation discussed in the text further expanded the definition of "publication." Thus, most pre-1974 decisions in this area are wholly or partly obsolete; their continuing validity must be assessed in light of the present statutory language.

[44] This decision originally applied only to the former Veterans Administration, which had specific authority. It did not apply to agencies subject to the then-existing version of the general exemption since the books were not "periodicals." This part of the decision should now be disregarded (*see* prior footnote), and the holding in 35 Comp. Gen. 404 would now apply to any agency which can justify the need.

absence of statutory language or evidence of legislative intent to the contrary, there is no meaningful difference between the purchase and rental of publications needed by the government, and that the rental or leasing of a microfilm library for official government use fell within the purview of the publications exemption. 57 Comp. Gen. 583 (1978). However, advance payments for items of equipment necessary for use in conjunction with a microfilm library are still prohibited. B-188166, June 3, 1977. (The cited decision, although not clear from the text itself, dealt with reader/printers.)

More recent decisions have construed the publications exemption found in 31 U.S.C. § 3324(d)(2) as permitting advance payment for coupons to be used for the purchase of articles from medical journals and redeemable for cash if unused (67 Comp. Gen. 491 (1988)); verification reports of physicians' board certifications (B-231673, Aug. 8, 1988); and hospital evaluation reports based on data submitted by participating government hospitals and including, as part of the subscription price, a laboratory kit for use in obtaining the data required for the reports, the kit being regarded as "a part of the publication process" (B-210719, Dec. 23, 1983).

In B-256692, June 22, 1995, the Comptroller General held that the Centers for Disease Control and Prevention (CDC) could not, under 31 U.S.C. § 3324(d)(2), make an advance payment for telephonic support services offered as part of a technical support package for computer software products. The telephonic support did not constitute a publication under section 3324(d)(2), and because it had significant value to the CDC independent of the package, it could not be classified as so necessary to the other publications in the package that advance payment authority would be available.

The Federal Acquisition Regulation advance payment provisions do not apply to subscriptions to publications. 48 C.F.R. § 32.404(a)(6).

5. Other Governmental Entities

The Comptroller General has not applied the advance payment prohibition to payments to other federal agencies. As noted previously, the primary purpose of the prohibition is to preclude the possibility of loss in the event a contractor, after receipt of payment, should fail to perform and fail or refuse to refund the money to the United States. The danger of such a loss is minimized when the contractor is another government agency. Thus, 31 U.S.C. § 3324 does not prohibit advance payment of post office box rentals. 25 Comp. Gen. 834 (1946). Also, the Economy Act, 31 U.S.C. § 1535, expressly authorizes advance payments for transactions within its scope.

GAO has applied the same rationale to exempt state and local governments from the advance payment prohibition. *E.g.*, 57 Comp. Gen. 399 (1978) (no objection to advance payment of rent under lease of land from state of Idaho). This exception, however, applies only where the state is furnishing noncommercial services reasonably available only from the state. 39 Comp. Gen. 285 (1959); B-250935, Oct. 12, 1993 (sewer service charge); B-118846, Mar. 29, 1954 (expenses of state water commissioner administering Indian irrigation project pursuant to court order); B-109485, July 22, 1952 (repair, operation, and maintenance of roads in conjunction with permanent transfer of federal roads to county); B-65821, May 29, 1947, and B-34946, June 9, 1943 (state court fees and other items of expense required to litigate in state courts in compliance with the requirements of state law); B-36099, Aug. 14, 1943 (lease of state lands); B-35670, July 19, 1943 (state forest fire prevention and suppression services).

Conversely, where a state provides the federal government with services that are freely and readily available in the commercial market, the statutory advance payment restrictions applicable to private contractors govern. 58 Comp. Gen. 29 (1978) (telephone services).

In B-207215, Mar. 1, 1983, GAO advised the National Park Service that it could make advance payments of annual rent on property leased from the National Park Foundation. The National Park Foundation is a charitable nonprofit organization created by statute to accept and administer gifts to the National Park Service, and its board of directors includes the Secretary of the Interior and the Director of the Park Service. GAO concluded that the Foundation's "unique status virtually assures that there is no threat of loss to the Government." Even though technically the Foundation is neither a state nor a federal agency, it is, in effect, tantamount to one for advance payment purposes.

The exception recognized in the case of state and local governments has not been extended to public utilities. 42 Comp. Gen. 659 (1963) (telephone services). *See also* 27 Comp. Dec. 885 (1921). Thus, a government agency cannot use a utility "budget plan" which would provide for level monthly payments in a predetermined amount throughout the year. B-237127, Dec. 12, 1989 (nondecision letter). In subscribing to a cable service, the National Park Service could only make payment after the service has been rendered. B-254295, Nov. 24, 1993. Similarly, monthly charges under a utility service contract for cable television service to a Naval hospital may not be paid in advance. B-237789, Dec. 10, 1990. The Federal Aviation Administration (FAA) violated 31 U.S.C. § 3324 by making an advance payment to Pacific Gas and Electric Company for connecting electrical utility service to a remote FAA facility because it failed to obtain "adequate security" as required by 41 U.S.C. § 255 or to follow Federal Acquisition Regulation advance payment requirements. B-260063, June 30, 1995.

D. Disposition of Appropriation Balances[45]

1. Terminology

Annual appropriations that are unobligated at the end of the fiscal year for which they were appropriated are said to "expire" for obligational purposes.[46] In other words, they cease to be available for the purposes of incurring and recording new obligations. The same principle applies to multiple year appropriations as of the end of the last fiscal year for which they were provided. For purposes of this discussion, annual and multiple year appropriations are referred to cumulatively as "fixed appropriations." 31 U.S.C. § 1551(a)(3).

The portion of an appropriation that has not actually been spent at the end of the fiscal year (or other definite period of availability) is called the

[45] While the discussion in this section includes the time period preceding 1990, except as otherwise specified, references to 31 U.S.C. §§ 1551 through 1558 are to the procedures first established in 1990 by Pub. L. No. 101-510, 104 Stat. 1485, 1675 (Nov. 5, 1990), and include any subsequent amendments thereto.

[46] The term "lapse" was sometimes mistakenly used in this context although there was an important distinction. Generally, under prior law an appropriation "lapsed" when it ceased to be available to the agency to pay obligations that were in the first instance incurred and properly charged against the appropriation prior to its lapse. Today we refer to this as a "closed" appropriation account.

"unexpended balance."[47] It consists of two components—the obligated balance and the unobligated balance.

The obligated balance is defined as "the amount of unliquidated obligations applicable to the appropriation less amounts collectible as repayments to the appropriation." 31 U.S.C. § 551(a)(1). Restated, obligated balance means the amount of undisbursed funds remaining in an appropriation against which definite obligations have been recorded.

The unobligated balance is "the difference between the obligated balance and the total unexpended balance." *Id.* at § 1551(a)(2). It represents that portion of the unexpended balance unencumbered by obligations recorded under 31 U.S.C. § 1501.

2. Evolution of the Law

Congressional treatment of unexpended balances has changed a number of times over the years, most recently in November 1990. Some knowledge of the past is useful in understanding the pre-1991 decisions and in determining which portions of them remain applicable.

Prior to 1949, unexpended balances of annual appropriations retained their fiscal year identity for two full fiscal years following expiration, after which time the remaining undisbursed balance had to be covered into the surplus fund of the Treasury. The agency involved no longer had access to the balance for any purpose, and subsequent claims against the appropriation had to be settled by GAO. *E.g.*, B-24565, Apr. 2, 1942; B-18740, July 23, 1941. The appropriation was said to "lapse" when it was covered into the surplus fund of the Treasury. *See* 24 Comp. Gen. 942, 945 (1945); 21 Comp. Gen. 46 (1941).

The problem with this arrangement was that, in view of article I, section 9 of the United States Constitution, once the money was covered into the Treasury, another appropriation was needed to get it back out. *E.g.*, 23 Comp. Gen. 689, 694 (1944). This was true even for simple, undisputed claims. Congress tried various devices to pay claims against lapsed appropriations—reappropriation of lapsed funds, definite and indefinite

[47] Depending on the specific context in which the term is used, "unexpended balance" may refer to the entire undisbursed balance or to the unobligated balance only. 22 Comp. Gen. 59 (1942). We use it here in the broader sense.

appropriations for the payment of claims under $500, and appropriations for specific claims—but none proved entirely satisfactory.

In 1949, Congress enacted the Surplus Fund-Certified Claims Act (ch. 299, 63 Stat. 407 (July 6, 1949)), intended to permit payment of claims against lapsed appropriations without the need for specific appropriations or reappropriations. The statute provided for the transfer of unexpended balances remaining after 2 years to a Treasury account designated "Payment of Certified Claims." Funds in this account remained available until expended for the payment of claims certified by the Comptroller General to be lawfully due and chargeable to the respective balances in the account. *See* B-61937, Sept. 17, 1952. Like the pre-1949 system, this arrangement too proved unsatisfactory in that all claims payable from the certified claims account, undisputed invoices included, still had to come through GAO.

The system changed again in 1956 (Pub. L. No. 84-798, 70 Stat. 647 (July 25, 1956)), on the recommendation of the second Hoover Commission.[48] One of the significant changes made by the 1956 law was to pass the direct responsibility for making payments from lapsed appropriations from GAO to the cognizant agencies. For the first time, agencies could dispose of clearly valid claims against prior year appropriations without the need for any action by either Congress or GAO. The statutory evolution is discussed in more detail in B-179708, Nov. 20, 1973.

The 1956 law, which was to remain in effect until late 1990, prescribed different procedures for obligated and unobligated balances. The obligated balance retained its fiscal year identity for two full fiscal years following the expiration date, at which time any remaining obligated but unexpended balance was transferred to a consolidated successor account, where it was merged with the obligated balances of all other appropriation accounts of that department or agency for the same general purpose. These successor accounts were known as "M" accounts. Funds in an "M" account were available indefinitely to liquidate obligations properly incurred against any of the appropriations from which the account was derived. Upon merger in the "M" account, the obligated but unexpended balances of all annual and multiple year appropriations of the agency lost their fiscal year identity for expenditure purposes.

[48] Second Commission on Organization of the Executive Branch of the Government, created by Pub. L. No. 83-108, ch. 184, 67 Stat. 142 (July 10, 1953).

With fiscal year identity no longer a concern, there was no need to relate a payment from the "M" account to the specific balance that had been transferred from the particular year in which the obligation had occurred. Thus, as a practical matter, once an appropriation balance reached the "M" account, the potential for violations of the Antideficiency Act became highly remote. B-179708, June 24, 1975. An Antideficiency Act violation could occur only if identifiable obligations exceeded the entire "M" account balance plus the aggregate of all funds potentially restorable from withdrawn unobligated balances.

The unobligated balances of fixed-year appropriations were "withdrawn" upon expiration of the period of obligational availability and were returned to the general fund of the Treasury. A withdrawn unobligated balance retained its fiscal year identity on the books of the Treasury for two fiscal years, during which time it was called "surplus authority." At the end of the 2-year period, the balances were transferred to "merged surplus" accounts, at which point they lost their fiscal year identity.

Withdrawn unobligated balances could be restored to adjust previously recorded obligations where the amount originally recorded proved to be less than the actual obligation, or to liquidate obligations that arose but were not formally recorded prior to the appropriations expiration, provided that the obligations met one of the criteria specified in 31 U.S.C. § 1501(a) and were otherwise valid. Some cases discussing this restoration authority are 68 Comp. Gen. 600 (1989); 63 Comp. Gen. 525 (1984); B-236940, Oct. 17, 1989; B-232010, Mar. 23, 1989; B-164031(3).150, Sept. 5, 1979.

From the perspective of congressional control, one weakness of the system described above was that it permitted the accumulation of large amounts in "M" accounts. While agencies were supposed to review their "M" accounts annually and return any excess to the Treasury, this was not always done. This situation, in conjunction with the previously discussed rules on the funding of contract modifications, created the potential for large transactions with minimal congressional oversight. For example, a 1989 GAO report discussed an Air Force proposal, completely legal under existing legislation, to use over $1 billion from expired accounts to fund B-1B contract modifications. U.S. General Accounting Office, *Strategic Bombers: B-1B Programs Use of Expired Appropriations*, GAO/NSIAD-89-209 (Washington, D.C.: Oct. 5, 1989).

Congressional concern mounted during 1990, and the treatment of expired appropriations was changed once again by section 1405 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1675 (Nov. 5, 1990). Section 1405 applies to both military and civilian agencies, and includes transition provisions that dealt with the then-existing merged surplus and "M" accounts. Unrestored merged surplus authority was canceled as of December 5, 1990, with no further restorations authorized after that date. The "M" accounts were phased out over a 3-year period, with any remaining "M" account balances canceled on September 30, 1993.

3. Expired Appropriation Accounts

The current account closing procedures are set forth in 31 U.S.C. §§ 1551–1558.[49] Two of the key provisions provide:

> "On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose."

31 U.S.C. § 1552(a).

> "After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account."

31 U.S.C. § 1553(a).

Just as under the prior system, a 1-year or multiple year appropriation expires on the last day of its period of availability and is no longer available

[49] Guidance relating to account closing is also set forth in OMB Cir. No. A-11, *Preparation, Submission and Execution of the Budget*, §§ 20.4(c), 130.3–130.11 (July 25, 2003). *See also* 1 TFM 2-4200.

to incur and record new obligations. However, the unobligated balance no longer reverts immediately to the general fund of the Treasury.

Upon expiration of a fixed appropriation, the obligated and unobligated balances retain their fiscal year identity in an "expired account" for that appropriation for an additional five fiscal years. As a practical matter, agencies must maintain separate obligated and unobligated balances within the expired account as part of their internal financial management systems in order to insure compliance with the Antideficiency Act. Also relevant in this connection is 31 U.S.C. §1554(a), under which applicable audit requirements, limitations on obligations, and reporting requirements remain applicable to the expired account.

During the 5-year period, the expired account balance may be used to liquidate obligations properly chargeable to the account prior to its expiration.[50] The expired account balance also remains available to make legitimate obligation adjustments, that is, to record previously unrecorded obligations and to make upward adjustments in previously under recorded obligations. For example, Congress appropriated funds to provide education benefits to veterans under the so-called "GI bill," codified at 38 U.S.C. § 1662. Prior to the expiration of the appropriation, the Veterans Administration (VA) denied the benefits to certain Vietnam era veterans. The denial was appealed to the courts. The court determined that certain veterans may have been improperly denied benefits and ordered VA to entertain new applications and reconsider the eligibility of veterans to benefits. VA appealed the court order. Prior to a final resolution of the issue, the appropriation expired. GAO determined that, consistent with 31 U.S.C. § 1502(b),[51] the unobligated balance of VA's expired appropriation was available to pay benefits to veterans who filed applications prior to the expiration of the appropriation or who VA determined were improperly denied education benefits. 70 Comp. Gen. 225 (1991). *See also* B-265901, Oct. 14, 1997.

Unobligated balances in the expired account cannot be used to satisfy an obligation properly chargeable to current appropriations (50 Comp.

[50] This is similar to the treatment of the balances during the first two post-expiration fiscal years under the 1956 legislation.

[51] 31 U.S.C. § 1502(b) provides that the expirations of a fixed period appropriation does not "affect the status of lawsuits or rights of action involving the right to an amount payable from the balance" of such appropriation that are instituted prior to its expiration.

Gen. 863 (1971)), or to any other expired account.[52] The authority of 31 U.S.C. § 1553(a) is intended to permit agencies to adjust their accounts to more accurately reflect obligations and liabilities actually incurred during the period of availability. 63 Comp. Gen. 525, 528 (1984). However, arbitrary deobligation in reliance upon the authority to make subsequent adjustments is not consistent with the statutory purpose. B-179708, July 10, 1975.

During the 5-year period, the potential for an Antideficiency Act violation exists if the amount of adjustments to obligations chargeable to the expired account during a year exceeds the adjusted balance available in the expired account against which to charge such adjustments. Should this happen, the excess can be liquidated only pursuant to a supplemental or deficiency appropriation or other congressional action. 73 Comp. Gen. 338, 342 (1994); 71 Comp. Gen. 502 (1992).[53]

4. Closed Appropriation Accounts

At the end of the 5-year period, the account is closed. Any remaining unexpended balances, both obligated and unobligated, are canceled, returned to the general fund of the Treasury,[54] and are thereafter no longer available for any purpose.

Once an account has been closed:

> "[O]bligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account

[52] This authority to make obligation adjustments is analogous to the restoration authority of the law prior to 1990, with the exception that there is no longer a point at which balances merge and lose their fiscal year identity.

[53] *Compare* B-179708, June 24, 1975 (applying same principle during first two post-expiration years under prior law).

[54] We commonly talk about "returning" appropriation balances to the Treasury. In point of fact, for the most part, they never leave the Treasury to begin with. An appropriation does not represent cash actually set aside in the Treasury. Government obligations are liquidated as needed through revenues and borrowing. Thus, the reversion of funds to the Treasury is not a movement of actual cash, but a bookkeeping adjustment that in the various ways discussed in the text, affects the government's legal authority to incur obligations and make expenditures.

> of the agency may be charged to any current appropriation account of the agency available for the same purpose."

31 U.S.C. § 1553(b)(1).

This is a major exception to the rule previously discussed that current appropriations are not available to satisfy obligations properly chargeable to a prior year. For example, the Office of Surface Mining (OSM) entered into an Economy Act agreement with the Department of Energy (DOE) for services that DOE provided through a contractor. DOE funded the service from no-year accounts. The final audit of the contractor that was performed after the OSM account obligated by the Economy Act agreement closed revealed that DOE owed the contractor an additional amount for performing services for OSM. DOE asked whether OSM was liable to reimburse it for the additional amount under the Economy Act. GAO replied that the account closing law required OSM to reimburse DOE the additional amounts using current appropriations available for the same general purpose as the closed account. B-260993, June 26, 1996. *Compare* B-257825, Mar. 15, 1995 (Treasury properly refused to restore amount of canceled "M" account to Federal Aviation Administration (FAA) appropriation in order for FAA to reimburse the Federal Highway Administration (FHWA) for services provided that were properly chargeable to the canceled account. This was true notwithstanding the fact that FHWA inadvertently neglected to bill for the services at the time they were rendered. GAO pointed out that the law provided that FAA reimbursement to FHWA was chargeable to current appropriations).

The authority to use current year appropriations to pay obligations chargeable to closed accounts is not unlimited, however. The cumulative total of old obligations payable from current appropriations may not exceed the lesser of 1 percent of the current appropriation or the remaining balance (whether obligated or unobligated) canceled when the appropriation account is closed. 31 U.S.C. § 1553(b). In view of the limitations on the amount of current appropriations that may be used to pay obligations properly charged to closed accounts, agencies must maintain records of the appropriation balances canceled beyond the end of the 5-year period and adjust these balances as subsequently presented obligations are liquidated. 73 Comp. Gen. 338, 341–342 (1994). Otherwise, there is no way for agencies to ensure that payments do not exceed the original appropriation.

Because of the need to keep accurate records, agencies may, in limited circumstances, adjust their records pertaining to closed appropriation accounts. For example, if an agency determines that the balances reflected in the records of a closed account are erroneous because of reporting and clerical errors, it may adjust its records if it discovers that a disbursement actually made before the appropriation account closed and properly chargeable to an obligation incurred during the appropriations period of availability was either not recorded at all or was charged to the wrong appropriation.

Neither of these types of adjustments constitutes charging obligations against or disbursing funds from closed appropriation accounts. They represent corrections of the accounting records. Since the appropriations, in effect, no longer exist, these adjustments affect only the agency's records. They have no effect on the availability or use of obligated or unobligated balances formerly contained in those appropriation accounts. U.S. General Accounting Office, *Canceled DOD Appropriations: $615 Million of Illegal or Otherwise Improper Adjustments*, GAO-01-697 (Washington, D.C.: July 26, 2001) at 7. However, adjustments may not be made to the records of the balances of closed accounts when the initial disbursements:

1. occurred after the appropriation being charged has already been closed,

2. occurred before the appropriation being charged was enacted, or

3. were charged to the correct appropriation in the first place and no adjustment is necessary.

Id. at 9–13.

5. Exemptions from the Account Closing Procedures

Congress may, by specific legislation, exempt an appropriation from the above rules and may otherwise fix the period of its availability for expenditure. 31 U.S.C. §§ 1551(b), 1557. An agency should consider seeking an exemption if it administers a program that by its nature requires disbursements beyond the 5-year period. One form of exemption simply preserves the availability for disbursement of obligated funds. For example, section 511 of the Foreign Operations Appropriation Act, 2001, authorized that the 2-year appropriation made for "Assistance for Eastern Europe and the Baltic States" would remain available until expended if properly obligated before the appropriation would otherwise have expired on September 30, 2002.[55]

Section 1558(a) of Title 31 of the United States Code provides an automatic stay to the closing of an appropriation account under section 1552 when a protest is filed against the solicitation for, proposed award of, or award of a contract. The appropriation that would have funded the contract remains available for obligation for 100 days after a final ruling on the protest.

To the extent of its applicability, the statutory scheme found at 31 U.S.C. §§ 1551–1558 provides the exclusive method for the payment of obligations chargeable to expired appropriations. B-101860, Dec. 5, 1963. Thus, there is generally no authority to transfer appropriations to some form of trust fund or working fund for the purpose of preserving their availability. *Id. See also* 31 U.S.C. §1532, which prohibits the transfer of appropriations to a working fund without statutory authority. In B-288142, Sept. 6, 2001, customer agencies made advances from their fixed period appropriations to the Library of Congress for deposit to the credit of the no-year FEDLINK revolving fund. The advances were used by the Library of Congress to pay the cost of service provided to the agencies by Library of Congress contractors. Once the service was provided and the cost determined, the Library discovered that some agencies had advanced amounts in excess of the cost of the service ordered. We determined that the Library of Congress lacked authority to apply the excess amount to pay for orders for service placed after the expiration of the fixed period appropriation charged with the advance.

The rules for certain legislative branch appropriations are a bit different. The provisions of 31 U.S.C. §§ 1551–1558 do not apply to appropriations to be disbursed by the Secretary of the Senate, the Clerk of the House of Representatives, and the District of Columbia. 31 U.S.C. § 1551(c). For appropriations of the House and Senate, unobligated balances more than 2 years old cannot be used short of an act of Congress. Instead, obligations chargeable to appropriations that have been expired for more than 2 years "shall be liquidated from any appropriations for the same general purpose, which, at the time of payment, are available for disbursement." 2 U.S.C.

[55] Pub. L. 106-429, app. A, 114 Stat. 1900A-3, 1900A-11 and 1900A-24 (Nov.6, 2001). *See also* Pub. L. No.107-115, § 511, 115 Stat. 2118, 2141 (Jan. 10, 2002). This type of exemption does not create new budget authority. B-243744, Apr. 24, 1991. *See also* U.S. General Accounting Office, *Foreign Assistance: Funds Obligated Remain Unspent for Years*, GAO/NSIAD-91-123 (Washington, D.C.: Apr. 9, 1991), at 21.

§ 102a. *See* B-213771.3, Sept. 17, 1986. There is no comparable account closing procedure currently in effect for the appropriations made to the District of Columbia from its local revenues.

6. No-Year Appropriations

There is one important statutory restriction on the availability of no-year funds. Under 31 U.S.C. § 1555, a no-year account is to be closed if (a) the agency head or the President determines that the purposes for which theappropriation was made have been fulfilled and (b) no disbursement has been made against the appropriation for two consecutive fiscal years.[56] The purpose of section 1555 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-271607, June 3, 1996; B-182101, Oct. 16, 1974.

Any attempt by an agency to close a no-year account that does not satisfy the requirements of section 1555 is without legal effect and the funds remain available for obligation. B-256765, Jan. 19, 1995. An interesting example of a misplaced attempt to close a permanent appropriation involved the check forgery insurance fund. The check forgery insurance fund was established in 1941 to authorize the Treasury to issue and pay a replacement check to payees whose original check was lost or stolen through no fault of their own and paid on a forged endorsement. 31 U.S.C. § 3343 (1994). In the absence of the fund, the payee would have had to wait for the government to recover the amount paid on the forged endorsement in order to issue a replacement check to the payee. The fund was financed by appropriations made to the fund and recoveries of amounts paid on forged endorsements (reclamations). 31 U.S.C. §§ 3343(a) and (d) (1994). In 1992, the Treasury's Financial Management Service (FMS) closed the fund asserting that it was authorized to do so by 31 U.S.C. § 1555. FMS claimed that the fund was inadequate and obsolete and had been impliedly repealed by the Competitive Equality Banking Act.

In response to a request for an advance decision from the Department of the Navy, GAO determined that Treasury lacked the authority to close the

[56] Prior to the 1990 amendment to section 1555, no-year appropriations were closed when the head of the agency determined that the purpose of the appropriation had been carried out or when no disbursement had been made against the appropriation for two consecutive fiscal years. Thus the law in effect prior to 1990 prevented no-year appropriations from remaining available indefinitely in some circumstances even in the absence of a determination that the purpose of the appropriation had been carried out. B-159687, Oct. 25, 1979.

fund. 72 Comp. Gen. 295 (1993). First, GAO determined that nothing in the language of the Competitive Equality Banking Act or its legislative history reflected the intent by Congress to eliminate the fund. Next, GAO determined that the fund was the only appropriation available to pay forged check claims. While the volume of forged check claims may have become large and exceeded the amount recovered by reclamation that was available to cover issuance of the replacement check, the remedy was for Treasury to request increased funding, not to cancel the only appropriation that was available to make such payments. Finally, GAO determined that the purpose for which the fund was established continued to exist and that Treasury lacked sufficient justification to close the fund under 31 U.S.C. § 1555. Thus, GAO determined that Treasury should restore the balance to the fund and charge all check forgery claims to the fund. Once the fund balance was restored GAO recommended that Treasury request sufficient appropriations or a permanent indefinite appropriation to pay claims. The law was amended in 1995 to make a permanent indefinite appropriation to the fund of amounts necessary to issue and pay replacement checks to payees whose original check was paid on a forged endorsement. 31 U.S.C. § 3343(a).

As with fixed appropriations, obligations attributable to the canceled balance of a no-year account may be paid from current appropriations for the same purpose, and subject to the same 1 percent limitation. 31 U.S.C. § 1553(b).

Like a no-year appropriation, a permanent indefinite appropriation (*e.g.*, 31 U.S.C. §1304) is not subject to fiscal year limitations. However, 31 U.S.C. § 1555 does not apply to permanent indefinite appropriations since the "remaining balance" by definition is the general fund of the Treasury. *Cf.* 11 Comp. Dec. 400 (1905) (applying a prior version of the account closing law to a permanent indefinite appropriation).

7. Repayments and Deobligations

a. Repayments

To prevent the overstatement of obligated balances, the term "obligated balance" is defined in 31 U.S.C. § 1551(a)(1), for purposes of 31 U.S.C. §§ 1551–1557, as the amount of unliquidated obligations applicable to the appropriation, "less amounts collectible as repayments to the appropriation." Once an account has been closed pursuant to either

31 U.S.C. § 1552(a) or 31 U.S.C. § 1555, collections received after closing, which could have been credited to the appropriation account if received prior to closing, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b).

The term "repayment" is a general term referring to moneys received by a federal agency that are authorized to be credited to the receiving agency's appropriation and are not required to be deposited in the Treasury as miscellaneous receipts. Treasury Department-General Accounting Office Joint Regulation No. 1, Sept. 22, 1950, reprinted at 30 Comp. Gen. 595 (1950). Section 2 of Joint Regulation No. 1 divides repayments into two subcategories: (1) reimbursements for services or items provided outside parties that the agency is authorized by independent statutory authority to retain and disburse for an authorized purpose[57] and (2) refunds of overpayments and erroneous payments that the agency is authorized to retain and use even in the absence of independent statutory authority.[58]

Generally, in the absence of some other authority, when the appropriation to be credited has expired, reimbursements must be credited to the expired account and not to the current account. For example, reimbursements for items or services provided another agency under the Economy Act[59] are credited to the fiscal year appropriation that earned them regardless of when the reimbursements are collected. If the appropriation that earned the reimbursement remains available for obligation at the time of collection, there is no distinction between a credit to the year earned or to the year collected. If, however, the appropriation that earned the reimbursement has expired for obligation purposes at the time of collection, then reimbursement can be credited only to the expired account. B-194711, June 23, 1980; B-179708, Dec. 1, 1975. After closing, the reimbursement would have to go to miscellaneous receipts.

The same treatment is accorded to refunds.[60] For example, recoveries of amounts paid under a fraudulent contract constitute refunds that may be

[57] These are referred to as "offsetting collections." OMB Cir. No. A-11, *Preparation, Submission and Execution of the Budget*, §§ 20.3, 20.7(c) (July 25, 2003).

[58] *See* Chapter 6, section E.

[59] 31 U.S.C. §§ 1535, 1536.

[60] OMB Cir. No. A-11, §§ 20.10, 20.12(c) provides additional guidance on the availability of, and accounting for, refunds.

deposited to the credit of the appropriations charged with the payments until the appropriation account is closed. Once the account is closed, recoveries should be deposited to the general fund of the Treasury to the credit of the appropriate receipt account. B-257905, Dec. 26, 1995; B-217913.2, Feb. 19, 1993. Certain exceptions to these rules have been recognized in the treatment of *de minimis* amounts. For example, we did not object to an agency accepting a credit of less than $100 from a vendor against the amount owed on a current year obligation to offset an overpayment made to the vendor on a prior year obligation without adjusting the accounts. 72 Comp. Gen. 63 (1992). *See also* B-217913.3, June 24, 1994.

b. Deobligations

The amount of an obligation that is recorded against appropriations in excess of the amount necessary to pay the obligation is accounted for as follows: If the agency deobligated the appropriation before the expiration of the period of availability, the deobligated amount is available to incur new obligations. If an agency deobligates the appropriation after the expiration of the period of availability, the deobligated amount is not available to incur a new obligation, but is available to cover appropriate adjustments to obligations in the expired account. B-286929, Apr. 25, 2001. *See also* 52 Comp. Gen. 179 (1972).

Deobligated no-year funds, as well as no-year funds recovered as a result of cost reductions, are available for obligation on the same basis as if they had never been obligated, subject to the restrictions of 31 U.S.C. § 1555. 40 Comp. Gen. 694, 697 (1961); B-211323, Jan. 3, 1984; B-200519, Nov. 28, 1980. One early decision concerned the disposition of liquidated damage penalties deducted from payments made to a contractor. The Comptroller General concluded that, if the contractor had not objected to the deduction within 2 years, the funds could be treated as unobligated balances available for expenditure in the same manner as other funds in the account, assuming the no-year account contained a sufficient balance for the discharge of unanticipated claims. 23 Comp. Gen. 365 (1943). There was nothing magic about the suggested 2-year period. It was simply GAO's estimate of a point beyond which the likelihood of a claim by the contractor would be sufficiently remote. *Id.* at 367.

Legislation on rare occasion has authorized an agency to reobligate amounts that are deobligated *after the appropriation has expired*. This has been referred to as deobligation-reobligation ("deob-reob") authority. We mention this only to emphasize that deob-reob authority should not be confused with the general authority conferred on agencies by the account closing law to use amounts freed up as a result of the downward adjustment of obligations occurring prior to closing that are now generally referred to as deobligated amounts.[61]

E. Effect of Litigation on Period of Availability

If the entitlement to unobligated funds is tied up in litigation, the statutory expiration and closing procedures could come into conflict with a claimants right to pursue a claim with the courts.

Suppose, for example, Congress made an appropriation directing the Comptroller General to pay a huge bonus to the editors of this manual. Suppose further that the agency refused to make payment because it thought the idea economically unsound or just plain ridiculous. Maybe the agency would rather use the money for other purposes or simply let it revert to the Treasury. The editors of course could sue and would presumably be entitled to pursue the suit through the appellate process if necessary. But this could take years. If the obligational availability of the appropriation were to expire at the end of the fiscal year, the suit might very well have to be dismissed as moot. *See, e.g.*, *Township of River Vale v. Harris*, 444 F. Supp. 90, 93 (D.D.C. 1978). What, then, can be done to prevent what one court has termed (presumably with tongue in judicial cheek) "the nightmare of reversion to the federal treasury"?[62]

The answer is two-fold: the equitable power of the federal judiciary and a statute, 31 U.S.C. § 1502(b). While the cases discussed in this section predate the 1990 revision of 31 U.S.C. §§ 1551–1557 and thus use language that is in some respects obsolete, the concepts would appear applicable either directly or by analogy to the new procedures. For example, if a court could enjoin reversion to the Treasury under the old law, it can presumably equally enjoin expiration under the new law.

The cases establishing the equitable power of the courts involve two distinct situations—the normal expiration of annual appropriations at the end of the fiscal year and the expiration of budget authority in accordance with the terms of the applicable authorizing legislation. For purposes of the principles to be discussed, the distinction is not material. *See* B-115398.48,

[61] See, *e.g.*, B-218762, Sept. 18, 1985 and B-200519, Nov. 28, 1980, for discussions of examples of "deob-reob" authority.

[62] *Burton v. Thornburgh*, 541 F. Supp. 168, 174 (E.D. Pa. 1982).

Dec. 29, 1975 (nondecision letter). Thus, we have generally not specified which of the two each case involves.

The concept of applying the courts' equity powers to stave off the expiration of budget authority seems to have first arisen, at least to any significant extent, in a group of impoundment cases in the early 1970s. A number of potential recipients under various grant and entitlement programs filed suits to challenge the legality of executive branch impoundments. The device the courts commonly used was a preliminary injunction for the express purpose of preventing expiration of the funds. For example, in *National Council of Community Mental Health Centers, Inc.v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973), plaintiffs challenged the impoundment of grant funds under the Community Mental Health Centers Act. Pending the ultimate resolution on the merits, the court issued a preliminary injunction to prevent expiration of unobligated funds for the grant programs in question. *Id.* at 900.

Other cases employing similar devices to preserve the availability of funds are: *Maine v. Fri*, 486 F.2d 713 (1st Cir. 1973); *Bennettv. Butz*, 386 F. Supp. 1059 (D. Minn. 1974); *Guadamuz v. Ash*, 368 F. Supp. 1233 (D.D.C. 1973); *Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash*, 365 F. Supp. 1355 (D.N.J. 1973); *Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973).

In several of the cases *(e.g., National Council of Community Mental Health Centers v. Weinberger, Community Action Programs Executive Directors Ass'n v. Ash, Bennett v. Butz*), the court not only enjoined expiration of the funds but directed the agency to record an obligation under 31 U.S.C. § 1501(a). One of these cases, *Bennett v. Butz*, spawned a decision of the Comptroller General, 54 Comp. Gen. 962 (1975), in which GAO confirmed that such an order would constitute a valid obligation under 31 U.S.C. § 1501(a)(6), which says that no amount shall be recorded as an obligation unless it is supported by documentary evidence of a liability that may result from pending litigation.

The concept has also been applied in nonimpoundment cases. An example is *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 established a formula for the apportionment of airport development grant funds. The statute also established minimum aggregate amounts for the grants, but subsequent appropriation acts imposed monetary ceilings lower than the authorized amounts. The court held that the appropriation ceilings controlled, but that the money still had to be apportioned in accordance with the formula in the enabling legislation. To preserve the availability of the additional grant funds the plaintiff was seeking, the district court had ordered the Federal Aviation Administration to obligate the amount in question prior to the statutory deadline, and the court of appeals confirmed this as proper. *Id.* at 51.[63]

Thus, what we may view as the "first wave" of cases firmly established the proposition that a federal court can enjoin the statutory expiration of budget authority. Inevitably, the next group of cases to arise would involve the power of the courts to act after the funds have expired for obligational purposes—in other words, the power of the courts to "revive" expired budget authority.

The "leading case" in this area appears to be *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583 (D.C. Cir. 1977). The plaintiff sued to force the Environmental Protection Agency to make available unobligated contract authority under the Federal Water Pollution Control Act Amendments of 1972. The court first noted that contract authority is a form of budget authority, and when made available for a definite period, terminates at the end of that period the same as direct appropriations.[64] The court then reaffirmed the proposition that courts may "order that funds be held available beyond their statutory lapse date if equity so requires." *Id.* at 588. However, the court found the rule inapplicable because the suit had not been filed prior to the relevant expiration date, and the court therefore did not acquire jurisdiction of the case prior to expiration. The essence of the *Costle* decision is the following excerpt:

> "Decisions that a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed are completely consistent with the accepted principle that the equity powers of the courts allow them to take action to preserve the status quo of a dispute and to protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation

[63] The court also noted that the district court could "obtain assistance from the Comptroller Generals expertise in matters of expenditures, reductions by appropriations, and impoundments." *City of Los Angeles*, 556 F.2d at 51.

[64] GAO had previously expressed the same view. 32 Comp. Gen. 29, 31 (1952), cited in *Costle*, 564 F.2d at 587 n.10.

> of a lapse provision and extend the term of already existing budget authority. If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress. [Footnote omitted.] Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities."

Id. at 588–89.

Costle is also significant in that it explained and clarified several prior cases that had purported to establish a similar, and in one instance even broader, principle. Specifically:

- *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976). This was a suit challenging the administration of the Hill-Burton Act. The court found that certain funds had been improperly used, and directed their recovery and reallocation. The court further noted that the district court could order that the funds be held available if necessary to prevent their expiration upon recovery. However, the *Costle* court pointed out that the funds in *Mathews* had already been obligated and thus had not expired before suit was filed. *Costle*, 564 F.2d at 588.

- *Jacksonville Port Authority v. Adams*, 556 F.2d 52 (D.C. Cir. 1977). The plaintiff, in a suit to obtain additional funds under the Airport and Airway Development Program, had sought a temporary restraining order (TRO) to prevent expiration of the funds, which the district court denied. The court of appeals found denial of the TRO to be an abuse of discretion and held that, in the words of the *Costle* court, "relief was still available because it would have been available if the district court had initially done what should have been done," that is, grant the preservation remedy. *Costle*, 564 F.2d at 588. A similar case is *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983) (reversing the district court's denial of preliminary injunction and directing preservation of funds as necessary).

- *Pennsylvania v. Weinberger*, 367 F. Supp. 1378 (D.D.C. 1973). This was an impoundment suit involving the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (Apr. 11, 1965). Noting the then-existing authority of agencies to restore expired unobligated balances, the court concluded that it had even broader equitable power to order the restoration of expired appropriations. The *Costle* court expressly rejected the broad view that "once it is shown that Congress has authorized the restoration of lapsed authority under some circumstances then the courts may order the restoration and obligation of lapsed authority whenever they deem it appropriate." *Costle*, 564 F.2d at 589. The Pennsylvania decision was nevertheless correct, however, in that a separate statutory provision had extended the availability of the funds in question. *Costle*, 564 F.2d at 589 n.12. A case similar to *Pennsylvania* is *Louisiana v. Weinberger*, 369 F. Supp. 856 (E.D. La. 1973). The analog under current legislation would be obligation adjustments under 31 U.S.C. § 1553(a).

Thus, under *Costle*, the crucial test is not whether the court actually acted before the budget authority expired, but whether it had jurisdiction to act. As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to "revive" expired budget authority, even where preservation is first directed at the appellate level.

The principles set forth in *Costle* have been followed and applied in several later cases. *Connecticut v. Schweiker*, 684 F.2d 979 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *United States v. Michigan*, 781 F. Supp. 492 (E.D. Mich. 1991); *Burton v. Thornburgh*, 541 F. Supp. 168 (E.D. Pa. 1982); *Grueschow v. Harris*, 492 F. Supp. 419 (D.S.D.), *aff'd*, 633 F.2d 1264 (8th Cir. 1980); *Sodus Central School District v. Kreps*, 468 F. Supp. 884 (W.D. N.Y. 1978); *Township of River Vale v. Harris*, 444 F. Supp. 90 (D.D.C. 1978). *See also Dotson v. Department of Housing& Urban Development*, 731 F.2d 313, 317 n.2 (6th Cir. 1984).

The application of the *Costle* doctrine "assumes that funds remain after the statutory lapse date." *West Virginia Ass'n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1577 (D.C. Cir. 1984). *See Heleba v. Allbee*, 628 A.2d 1237, 1240 (Vt. 1992). Consequently, where all funds have properly been disbursed (the key word here is "properly"), the *Costle* doctrine no longer applies. *Id.* To an extent, this gives agencies the potential to circumvent the *Costle* doctrine simply by spending the money, as long as the obligations and disbursements are "proper." Recognizing this, the West Virginia Association court cautioned that "we do not mean to suggest our approval, in every case, of government decisions to expend funds over which a legal controversy exists." 734 F.2d at 1577 n.8. In addition, to prevent this potential loophole from swallowing up the rule, there is a logical corollary to the *Costle* doctrine to the effect that courts may enjoin the obligation of funds or even the disbursement of funds already obligated where disbursement would have the effect of precluding effective relief and thereby rendering the case moot. *See City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421, 1426–27 (D.C. Cir. 1994); *Population Institute v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986).[65] Similarly, the district court's injunction in *Bennett v. Butz*, quoted in 54 Comp. Gen. 962, *supra*, included a provision mandating retention of the obligated balances until further order of the court.

When Congress acts to rescind an appropriation, those amounts are no longer available to the court for award. *City of Houston*, 24 F.3d at 1426. It does not matter that the court has issued a temporary restraining order requiring the agency to set aside funds pending the resolution of the plaintiff's timely filed claim. *Rochester Pure Waters District v. EPA*, 960 F.2d 180, 183–84 (D.C. Cir. 1992). A temporary restraining order is not binding on Congress, which has "absolute control of the moneys of the United States." *Id.* at 185. *See Harrington v. Bush*, 553 F.2d 190, 194 n.7 (D.C. Cir. 1977). Thus, after Congress has rescinded an appropriation, a court may not order a permanent injunction awarding the rescinded funds to the plaintiff, as the court cannot order the obligation of funds for which there is no appropriation. *Rochester*, 960 F.2d at 184.

In addition to the judicial authority in *Costle* and the cases that follow, there is a statute that seems to point in the same direction, 31 U.S.C. § 1502(b), which provides:

> "A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance."

[65] The premise underlying all of these cases is that any monetary relief ultimately granted to the plaintiff is payable only from, and to the extent of, the preserved balances. See Chapter 14 of Volume III of the second edition of *Principles of Federal Appropriations Law*, section entitled "Impoundment/Assistance Funds" for case citations.

The statute was enacted as part of a continuing resolution in 1973. Pub. L. No. 93-52, § 111, 87 Stat. 134 (July 1, 1973). Its legislative history, which is extremely scant, is found at 119 Cong. Rec. 22326 (June 29, 1973), and indicates that it was generated by certain impoundment litigation then in process.

For the most part, the courts have relied on their equitable powers and have made little use of 31 U.S.C. § 1502(b). *Connecticut v. Schweiker* cited the statute in passing in a footnote. 684 F.2d 979, at 996 n.29. The court in *Township of River Vale v. Harris*, 444 F. Supp. at 94, noted the statute but found it inapplicable because the funds in that case would have reverted to a revolving fund rather than to the general fund of the Treasury. In *Population Institute v. McPherson*, 797 F.2d at 1081, and *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Donovan*, 570 F. Supp. 210,220 (D.D.C. 1983), the court cited section 1502(b) essentially as additional support for the rule that courts have the equitable power to prevent the expiration of budget authority in appropriate cases.

Note that the statute uses the words "lawsuits or rights of action." One court has relied on this language to reach a result perhaps one step beyond *Costle*. In *Missouri v. Heckler*, 579 F. Supp. 1452 (W.D. Mo. 1984), the plaintiff state sued the Department of Health and Human Services (HHS) for reimbursement of expenditures under the Medicaid program. Based on *Connecticut v. Schweiker*, *supra*, the court concluded that the plaintiff was clearly entitled to be paid. The court then reviewed a provision of the Department's fiscal year 1983 continuing resolution and directed that the claims be paid in fiscal years 1984 through 1986. Alternatively, the court applied 31 U.S.C. § 1502(b) and held that the claims were payable from and to the extent of the unobligated balance of fiscal year 1981 funds. Although Missouri had not filed its lawsuit prior to the end of fiscal year 1981, it had filed its claims for reimbursement with HHS before then. The court found that "Missouri's right to reimbursement arose when it filed its claims in a timely fashion …and otherwise complied with the law and regulations then in effect. With this right to reimbursement came the concomitant right of action to enforce the claim for reimbursement." *Missouri*, 579 F. Supp. at 1456.

The *Missouri* court further noted that if section 1502(b) is to meaningfully preserve the "status" of rights of action, it should also be construed as preserving the availability of funds. *Id.* at 1456 n.4.

The Comptroller General followed a similar approach in 62 Comp. Gen. 527 (1983). A labor union had filed an unfair labor practice charge with the statutorily created Foreign Service Labor Relations Board, based on a refusal by the United States Information Agency to implement a decision of the Foreign Service Impasse Disputes Panel. The dispute concerned fiscal year 1982 performance pay awards for members of the Senior Foreign Service. The question presented to GAO was the availability of fiscal year 1982 funds to pay the awards after the end of the fiscal year. GAO first found 31 U.S.C. § 1501(a)(6) (which provides that an obligation may be recorded when supported by documentary evidence of a liability that may result from pending litigation) inapplicable, then concluded that, by virtue of 31 U.S.C. § 1502(b), the unobligated balance of fiscal year 1982 funds remained available for the awards. The unfair labor practice proceeding was a "right of action," and the statute therefore operated to preserve the availability of the funds.

Under 31 U.S.C. §§ 1551–1557, funds are "returned to the general fund of the Treasury" only when the account is closed, raising the question whether section 1502(b) continues to apply to expiration in addition to closing. If section 1502(b) is to be construed in light of its purpose, then the answer is that expired appropriations will continue to be available to liquidate obligations that arise from injunctive relief ordered by a court or agreed to by an agency in settlement of a legal dispute. *See* 70 Comp. Gen. 225, 229–30 (1991). In general, section 1553(a) "provides that an expired account retains its fiscal year identity and remains available for recording, adjusting, and liquidating obligations *properly chargeable* to that account." (Emphasis in original.) 71 Comp. Gen. 502, 505 (1992).

However, pursuant to section 1552(a), an appropriation may only be used to pay properly chargeable obligations during the period of the appropriation's availability and during the five fiscal years immediately following the period of availability. After that, the appropriation account is closed and the remaining balance is canceled. 73 Comp. Gen. 338, 342 (1994). If a valid obligation arises after the appropriation account is closed, section 1553(b) authorizes payment of the obligation from current appropriations if account records show that sufficient funds remained available to cover the obligation when the account was closed by operation of law. *Id.;* 71 Comp. Gen. at 505–506.

Similar problems exist in the case of bid protests. If a protest is filed near the end of a fiscal year and the contract cannot be awarded until the protest is resolved, the contracting agency risks expiration of the funds.

Congress addressed this situation in late 1989 by enacting a new 31 U.S.C. § 1558(a),[66] which currently reads as follows:

> "(a) …[F]unds available to an agency for obligation for a contract at the time a protest …is filed in connection with a solicitation for, proposed award of, or award of such contract shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest…. 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."

This provision applies to protests filed with GAO, the contracting agency, or a court under 31 U.S.C. §§ 3552 and 3556, and to protests filed with the General Services Board of Contract Appeals, the contracting agency, or a court under 40 U.S.C. § 759(f). 31 U.S.C. § 1558(b).

[66] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 813, 103 Stat. 1352, 1494 (Nov. 29, 1989). The provision applies governmentwide.