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 "uses" of appropriations are obligations and expenditures, An obligation is a binding commitment against an appropriation which will require an expenditure at some later time. An expenditure is the actual disbursement of funds. This chapter will discuss the limitations on the use of appropriations relating to time—when they may be obligated and when they maybe 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 y 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 for obligation only during the period for which it is made, but remains available beyond that period, within limits, for expenditures to liquidate properly made 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 maybe "held over" for obligation beyond their expiration date by judicial decree. 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.

Annual appropriations (also called fiscal year or one-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. Thus, fiscal year 1991 begins on October 1, 1990, and ends on September 30, 1991. Routine activities of the federal government are, for the most part, financed by annual appropriations.

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, 19XX." 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:

"(c) 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 the following general provision:

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

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 may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. See 58 Comp. Gen. 321 (1979); B-118638, November 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 exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957).

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 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 obligation and are said to have "expired" for obligational purposes, This rule-that time-limited budget authority

[1] See, for example, the following fiscal year 1990 appropriation acts: Pub. L. No. 101-101, § 501, 103 Stat. 641,666 (energy/water development); Pub. L. No. 101-121,5305, 103 Stat.. 701, 742 (Interior); Pub. L, No. 101-136, § 504, 103 Stat. 783,812 (Treasury/General Government); Pub. L. No. 101-144,$504, 103 Stat. 839, 869 (Housing and Urban Development/Veterans Affairs); Pub. L. No. 101-161, § 609, 103 Stat. 951,982 (Agriculture); Pub. L. No. 101-162,$602, 103 Stat. 988, 1031 (State/Justice/Commerce); Pub. L. No. 101-163, § 302, 103 Stat. 1041, 1063 (legislative branch); Pub. L. No. 101-164, § 307, 103 Stat. 1069, 1092 (Transportation); Pub. L. No. 101-165, § 9005, 103 Stat. 1112, 1129 (Defense); Pub. L. No. 101-166,5508, 103 Stat. 1159, 1190 (Labor/Health and Human Services); Pub. L. No. 101-167,5517, 103 Stat. 1195, 1220 (foreign operations); Pub. L. No. 101-168, § 108, 103 Stat. 1267, 1276 (District of Columbia government).

ceases to be available for obligation after the last day of the specified time period-has been termed an "elementary principle" of federal fiscal law. West Virginia Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1576 (D.C. Cir. 1984); Population Institute v. McPherson, 797 F.2d 1062, 1071 (D.C. Cir. 1986). See also 18 Comp. Gen. 969,971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to 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. at 1676 (1990). The principles summarized in this paragraph are discussed 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 for this was 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]

[2] Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954,978 (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 (1980).

Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

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 1990 appropriation act includes an appropriation which specifies that it shall remain available until September 30, 1991, it is a 2-year appropriation. As a more specific illustration, the Navy's "Shipbuilding and Conversion" appropriation, found in the annual Defense Department appropriation acts, is typically a 5-year appropriation.[3]

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.

A no-year appropriation is available for obligation without fiscal year limitation. In order for an appropriation to be 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). However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation. " See 57 Comp. Gen. 865, 869 (1978).

The rules relating to no-year appropriations are simple, Apart from one important restriction (31 U.S.C. 81555, discussed later in connection with the closing of accounts), all statutory time limits as to when the funds may be obligated and expended are removed, and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). Thus, there has been little occasion for the Comptroller General to render decisions on the availability of no-year appropriations, at least from the time perspective.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior year's 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

[3] E.g., Pub. L. No. 101-165,103 Stat. 1112, 1121 (1989) (FY 1990)

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 (1961). See also B-200519, November 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on non-contract 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 which included a prohibition on compensating interveners. 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 intervener 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.

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. 91555.40 Comp. Gen. 694, 697 (1961); B-211323, January 3, 1984; B-200519, November 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 two 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 two-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,

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 GAO report entitled No-Year Appropriations in the Department of Agriculture, PAD-78-74 (September 19, 1978).

3. Permissible Actions 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, 31 U.S.C. § 1341(a), which prohibits obligations or expenditures in advance of appropriations. By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted, unless specifically authorized by law.

If the appropriation act is enacted 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 maybe 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); B-20670, October 18, 1941; A-19524, August 26, 1927; B-213141-O. M., March 29, 1984; 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883). The contract is not regarded as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged has not yet started, the appropriation has already been enacted into law.

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 which clearly by its terms requires immediate action. E.g., 1 Comp. Dee, 329 (1895). However, the general rule remains that (a) expenditures prior to the beginning of the fiscal year(s) covered by the appropriation are unauthorized; and (b) obligations prior to the start of the fiscal year are permissible only if the relevant appropriation act has already been enacted and only where actual disbursements are deferred until after the start of the new fiscal year.

The Comptroller General has also held that the awarding of a "conditional contract" prior to the enactment of the relevant appropriation act does not violate statutory funding restrictions. A "conditional contract" must expressly provide that the government's liability is contingent upon the future availability of appropriations. Under this arrangement, performance cannot begin prior to the date of enactment of the appropriation, although it may begin after the enactment of the appropriation but before the start of the fiscal year. The contract must also provide that the government is under no obligation to make any contract payments until the start of the fiscal year. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-171798(1), August 18, 1971, at 11-12.

B. The Bona Fide Needs Rule

1. The Concept

One of the fundamental principles of appropriations law is the so-called bona fide needs rule: 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., 68 Comp. Gen. 170, 171 (1989); 58 Comp. Gen. 471,473 (1979); 54 Comp. Gen. 962,966 (1975); 33 Comp. Gen. 57,61 (1953); B-183184, May 30, 1975.

Bona fide need questions arise in many forms. An agency may wish to enter into or modify a contract or make some other obligation or expenditure, the question being which fiscal year to charge. The question may be whether an obligation previously recorded was a proper charge against that. fiscal year's appropriation. An agency may have taken certain actions which 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, proposed or made, recorded or unrecorded, voluntarily incurred or imposed by operation of law, bears a sufficient relationship to the legitimate needs of the period of obligational availability of the appropriation charged or sought to be charged.

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), 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 (1957). Additional statutory support for the rule may be 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 need 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. 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. 155, 159 (1957).

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 which 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.

What about the needs of a prior year? The rules here are not quite so simple. There are situations in which current appropriations may (and even must) be used to satisfy unmet needs arising in a prior year, and situations in which current appropriations are not available for that purpose, Prior years' needs are covered in Section B.3.

Bona fide need questions also frequently involve transactions which 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., 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57,61 (1953); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915). More detailed discussion of the rule and its rationale is contained in 4 Comp. Dec. 553 (1898) and 37 Comp. Gen. 155 (1957).

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., 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 actual procurement contracts with suppliers, including the exact price, were not negotiated and executed 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 entitled Legal Aspects of Funding Department of the Army Procurements by Capt. Dale Gallimore, 67 Mil. L. Rev. 85 (1975).

The bona fide needs rule applies to multiple-year as well as fiscal-year appropriations, 68 Comp. Gen. 170 (1989); 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 two-year appropriation every year. For FY 1989, it receives an appropriation available through FY 1990; for FY 1990, it receives an appropriation available through FY 1991, and so on. It is possible to apply the bona fide needs rule to require that the FY 1990 appropriation be used only for needs arising in FY 1990, although obligation may occur any time prior to the end of FY 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170, holding that the Defense Logistics Agency could use its FY 1987 2-year Research and Development appropriation for a need arising in FY 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).

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. As most appropriations are 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.[4] Determining the year to which a need relates is not always easy. Some illustrative cases are listed below:

- Rent on property leased by National Park Service from National Park Foundation could be paid in advance, but lease could not cross fiscal year lines. Proposal was for 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 period of October 1 through April 30 since rent for these months constituted a need of the following fiscal year. B-207215, March 1, 1983.
- Envelopes ordered near the end of one fiscal year, which were delivered in and were intended for use in the following fiscal year, could be charged only to appropriations for the latter year. 5 Comp. Dec. 486 (1899). (Maintaining an inventory level was not a factor in this case.)
- 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).
- Department of Housing and Urban Development recorded certain obligations for public housing subsidies on estimated basis. At end of fiscal year, obligations were found to be in excess of actual needs. It was held improper to send excess funds to state agency's operating reserve to offset subsidy for following year, since this amounted to using the funds for the needs of a subsequent year.

[4] 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 (e.g., B.4, B.5, B.8).

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

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. While there can be no doubt that this happens, the issue is far from one-sided.

The legal issue was stated very simply in an early decision of the Comptroller of the Treasury:

> "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 three days before the end of FY 1921, with the gasoline to be delivered in monthly installments in FY 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, 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, 19.21."

Id. at 118. See also 4 Comp. Dec. 553 (1898) (cement ordered late in one fiscal year to be delivered several months into the following fiscal year).[5]

[5] "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.

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. Federal Year-End Spending: Symptom of a Larger Problem, PAD-81-18 (October 23, 1980), pp. 7–9.[6]

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 fourth quarter surges due to cyclical or seasonal fund requirements. If, for example, you are administering a fire suppression program, you should expect a fourth quarter surge because the fourth quarter of the federal fiscal year is the major fire season in many states. 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 awarded cooperative agreements to certain Small Business Development Centers on

[6]Other GAO reports in this area are: Federal Year-End Spending Patterns for Fiscal Years 1982, 1983, and 1984, GAO/AFMD-85-75 (November 4, 1985); Limitations on Fiscal Year 1981 Fourth Quarter Obligations in Certain Agencies, GAO/PAD-82-43 (July 16, 1982); Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending, PSAD-80-67 (July 28, 1980).

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 need 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, November 29, 1988.

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 two-month period or quarter of the fiscal year. For example, the Defense Department's 1990 appropriation contained a provision limiting obligations during the last two months of the fiscal year to not more than 20 percent of the total fiscal-year appropriations.[7] 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.[8] 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 which arose in a prior year. 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 year's funds. "An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next period's appropriation being available for funding, " B-197274, September 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.

[7] Pub. L, No. 101.165,89007, 103 Stat. 1112, 1130 (1989)

[8] E g., B-198666, June 29, 1981; B-198666, May 20.1980

An illustration is B-207433, September 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 to charge the obligation for the additional quantity, if the Army still wished to procure them, to current year's appropriations. The fact that the need arose in a prior year was immaterial. The decision, at pages 4-5, offered the following explanation:

> "The essence of the [bona fide needs] rule is simply that an appropriation may be validly obligated only to meet a legitimate need existing during the period of availability. Under this concept, payments are chargeable to the year in which the obligation took place, even though not actually disbursed until a later year, as long as the need existed when the funds were obligated. . . .
>
> "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 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 FY 1986, the U.S. Geological Survey ordered certain microcomputer equipment, to be delivered in early FY 1987, charging the purchase to FY 1986 funds. The equipment was delivered and accepted, but was stolen before reaching the ordering office. The decision held that a reorder, placed in FY 1987, had to be charged to FY 1987 funds. As with the thermal viewers in B-207433, the fact that the need for the equipment arose in 1986 was immaterial.

In another case, cost overruns caused the Army to delete certain items from a FY 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., February 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 year's appropriation, the agency must seek a supplemental or deficiency appropriation and must further consider the possibility that the Antideficiency Act 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 FY 1904 appropriations, and the exhaustion of the 1904 appropriation did not permit use of 1905 funds. 11 Comp. Dec. 454 (1905). (The contract constituted a valid obligation against the 1904 appropriation.) See also 21 Comp. Dec. 822 (1915).

Similarly, an obligation occurs under 5 U.S.C. § 504, the administrative portion of the Equal Access to Justice Act, when the agency renders its decision approving a fee application, The obligation is against funds current as of the time of the award. If funds are not currently available to satisfy the award, the agency may not use the following year's appropriation. 62 Comp. Gen. 692,698-700 (1983).

In B-226801, March 2, 1988, GAO considered various entitlement programs administered by the Department of Veterans Affairs. Under these programs, the obligation arises when the 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 the 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.[9]

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, March 9, 1979 (fiscal-year refugee assistance appropriation not available to pay for services performed in prior year); B-14331, January 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., January 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, September 16, 1975 (postage charges under 39 U.S.C. § 3206).

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, but the issue exists regardless of when in the fiscal year the contract is made. This section will explore the topic in more general terms.

[9] 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 (1989).

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 and the Federal Power Commission 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., August 11, 1972,

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 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. 628,630 (1959).

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 which 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).

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following fiscal year, it will be presumed that 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) (circular letter); 1 Comp. Gen. 115 (1921); 27 Comp. Dec. 640 (1921).

In 44 Comp. Gen. 695 (1965), where an agency had requisitioned the printing of sales promotion material near the end of a fiscal year, the Comptroller General determined that the material did not meet a bona fide need of the fiscal year in which the order was placed. Because the items were especially created for a particular purpose and required a lengthy period for creation, the printing requisitions could not be viewed as "replacement of stock" and did not lawfully obligate the current annual appropriation. Further, since the manuscript copy did not accompany the original order and was not furnished to the Government Printing Office until seven months after the end of the fiscal year, the printing could not have fulfilled a need of the fiscal year in which the requisition was issued.

As suggested in 44 Comp. Gen. 695, 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. This being the case, scheduling delivery for the following year would seem irrelevant. "Stock" in this context refers to "readily available common-use standard items." Id. at 697. See also 32 Comp. Gen. 436 (1953). 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, December 18, 1957.

A 1935 decision, A-60589, July 12, 1935, concerned a "requirements contract" for supplies in which no definite quantity was required to be purchased and under which no legal obligation would be imposed on the government until an order was placed, other than the requirement not to purchase the items elsewhere. The decision held that such a contract could extend into the following fiscal year, i.e., could cross fiscal year lines, as long as the contract term was not for more than one year.[10] However, in 42 Comp. Gen. 272 (1962), the type of requirements contract involved in A-60589 was distinguished from a three-year "requirements" contract for equipment and services to maintain an Air Force base at Wake Island, to be funded from an annual appropriation of the first contract year, on the grounds that, under the Wake Island contract, the need for the equipment and services was certain to arise as long as the base remained open. The Wake Island contract was held to violate not only the bona fide needs rule but the Antideficiency Act as well.

Both decisions—42 Comp. Gen. 272 and A-60589—were discussed several years later in 48 Comp. Gen. 497 (1969), in which the Comptroller General stated:

"For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A-60589, permitting requirements contracts under fiscal year appropriations to cover l-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935, decision, no objection will be made to its continuance. " Id. at 500,

If, however, a variable quantity contract does not include the requirement not to purchase the items elsewhere and does not guarantee a minimum purchase, then there is really no "contract" and obligations arise only as orders are actually placed. A given payment must be charged to the fiscal year in which the order creating the obligation was definitely placed. See 60 Comp. Gen. 219 (1981).

5. Services Rendered Beyond the Fiscal Year

Services are generally viewed as chargeable to the appropriation current at the time the services are rendered. E.g., 38 Comp. Gen. 316 (1958) (salaries of government employees). However, a need may arise in one fiscal year for services which, 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,

[10] A-60589 was also based in part on 41 U.S.C. § 13, which prohibits the making of contracts for "stationery or other supplies'" for terms in excess of one year. See, e.g., 37 Comp. Gen. 155, 159 (1957), stating that "[w]hen a continuing supply of materials is needed over a period of time, the contract term may not exceed one year, and only the needs of the first fiscal year may be considered a bona fide need of the year in which the contract is made. " Most agencies are now exempt from 41 U.S.C. § 13. See 63 Comp. Gen. 129, 135 (1983).

or to charge funds current at the time the services are rendered, depends upon whether the services are "severable" or "entire."

"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. Gem 370,371 (1943). A contract which 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 appears to be 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 upon the 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 also 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); 10 Comp. Dec. 284 (1903).

However, where the services are continuing and recurring in nature, the contract is severable and 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). 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), modified by B-125444, February 16, 1956 (gardening and window cleaning services). Service contracts which are "severable" may not cross fiscal year lines unless authorized by statute. 58 Comp. Gen. 321,324 (1979); B-192518, August 9, 1979; B-133001, March 9, 1979; B-187881, October 3, 1977.

Another factor identified in some of the decisions is whether the 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-187881, October 3, 1977 (overseas school teachers with employment contracts); B-174226, March 13, 1972 (performance on an evaluation team). Legal services have been viewed as either personal or nonpersonal, depending on the nature of the work to be done. B-122596, February 18, 1955; B-122228, December 23, 1954.

The distinction appears to have derived from the distinction between services performed under an employer-employee relationship (personal) and those performed under an independent contractor relationship (nonpersonal). 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 appointed under Criminal Justice Act chargeable to appropriations current at time of appointment); B-224702, August 5, 1987 (contract for legal support services held severable since it consisted primarily of clerical tasks and required no final report or end product).

Research may also be severable or nonseverable, depending on the particular facts. See B-235678, July 30, 1990, A contract for cancer research services viewed as an "entire job" was found nonseverable in B-141839-O. M., May 2, 1960. In 64 Comp. Gen. 359 (1985), biomedical research grants awarded by the National Institutes of Health were held severable because they represented continuous, ongoing work and did not contemplate a required outcome or end product.

A 1981 decision applied the above principles to agreements made by the Small Business Administration 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 each fiscal year could be charged 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, person makes 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, August 3, 1989; B-213141 -O. M., March 29, 1984. In 70 Comp. Gen. (B-238940, February 25, 1991), training which began on the first day of N 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).

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). Level-of-effort contracts may be severable or nonseverable. The 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.

As a final thought, there is a fairly simple test which 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 which 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 one 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. 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. SC. §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 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.

The rule in its traditional form 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, April 7, 1967; B-105555, September 26, 1951; A-22134, April 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). Accordingly, the replacement contract seeks only to meet the pre-existing and continuing need.

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),

- 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-181176-0. 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. 591,593 (1981). 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 (1976)). It has, however, been expanded. Thus, 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.[11] 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 appropriation's availability. No problem, the decision noted, since the original contract met these requirements. Id. at 241.

More recently, a contract for flooring repairs was awarded in FY 1975 obligating FY 1975 funds, conditioned upon a determination from the Small Business Administration that the contractor qualified as a small business. The 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

[11] A 1981 case, 60 Comp. Gen. 591, drew a distinction based on whether the awarding of the replacement contract preceded or followed the conversion, suggesting that the original obligation was extinguished in the latter situation, 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. Especially in view of later decisions, the distinction would not appear relevant. See 68 Comp. Gem 158 (1988).

funds obligated for the contract in FY 1975 could be used to resolicit in FY 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 reducing 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. To avert this possibility, the Navy agreed to a contract modification which, 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 two ships deleted by the modification were available post-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 two 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, October 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, September 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 which presumably overruled it. See also B-173244(2), August 10, 1972; B-158261, March 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 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 shouldn't 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. (B-238548, February 5, 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.

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 which does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, August 19, 1947. If the modification results in an increase in contract price and the appropriation charged with the original contract has expired for obligation purposes, 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, September 16, 1983.

In the case of a contract for services which are severable, 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 Section B.5. 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, August 2, 1983; B-224702, August 5, 1987. 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 FY 1980. The modification called for work to be performed in FY 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 FY 1980. The modification amounted to a separate contract and could be charged only to FY 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to FY 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.

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 "antecedent liability"—that is, whether it 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, September 24, 1926; B-146285-O. M., September 28, 1976,[12] See also B-197344, August 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 pre-existing 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):

> "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 from time to time covering such changes. How-ever, the fact remains that the obligations and liabilities of the

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

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 over-obligating 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, September 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to insure that appropriations do not remain encumbered in excess of the amounts which 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. Thus, within-scope modifications can result in significant cost escalation with minimal congressional oversight.

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 contractor was not legally bound to do under original contract, amounted to 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 which 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 which do not exceed the stipulated ceiling continue to be chargeable to funds available when the contract was originally made (id. at 61 1), 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 account has been closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant since account balances upon closing cease to be available for any purpose and only current funds may be used, up to specified limits, for such obligations, 31 U.S.C. §§ 1552 and 1553, as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1676 (1990).

For contract changes which would require the contractor to perform additional work, as opposed to increases under an escalation clause or to pay claims, the use of expired fixed-year appropriations is subject to two approval requirements. If a proposed contract change chargeable to an expired account would cause a cumulative increase of more than $4 million during a fiscal year for contract changes for the relevant program, project, or activity, the obligation must be approved by the agency head or by an official within the agency head's immediate office to whom the authority has been delegated. If the cumulative increase would exceed $25 million, the agency head must report the proposed obligation to the relevant authorizing committees and the appropriations committees of the Senate and House of Representatives, and must defer making the obligation for 30 days after submitting the report. 31 U.S.C. § 1553(c), as amended by Pub. L. No. 101-510,5 1405(a), 104 Stat. at 1677 (1990).

8. Multi-Year Contracts

Any discussion of multi-year 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 "multi-year 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 multi-year contract, as we will use the term in this discussion, is a contract covering the requirements of more than one fiscal year.[13] A contract for the needs of the current year, even though performance may extend over several years, is not a "multi-year contract. " Thus, a contract to construct a ship which will take 3 years to complete is not a multi-year contract; a contract to begin constructing one ship a year for the next 3 years is.

Multi-year contracting, like most things in life, has advantages and disadvantages. Some of the potential benefits are:[14]

- Multi-year contracting can reduce costs by permitting the contractor to amortize nonrecurring "start up" costs over the life of the contract. Without multi-year authority, the contractor may insist on recovering these costs under the one-year contract (since there is no guarantee of getting future contracts), thus resulting in increased unit prices.
- Multi-year contracting may enhance quality by reducing the uncertainty of continued government business and enabling the contractor to maintain a stable work force.
- Multi-year 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. Multi-year contracting authority also has potential disadvantages:[15]

- Competition may decrease because there will be fewer opportunities to bid.
- A contractor who is able to amortize start-up costs in a multi-year contract has, in effect, a government-funded competitive price advantage over new contractors in subsequent solicitations. This could evolve into a sole-source posture.

[13]This is essentially the same as the definition in the Federal Acquisition Regulation, "contracts covering more than l-year's but not in excess of 5-year's [sic] requirements, unless otherwise authorized by statute. " 48 C.F.R. § 17.101.

[14]S. Rep, No, 98.417, 98th Cong., 2d Sess. 4-8 (1984). This is a report by the Senate committee on Governmental Affairs on a bill (S. 2300) designed to extend limited multi-year contracting authority to civilian agencies. The legislation was not enacted.

[15]H.R. Rep. No. 97-71, Part 3, 97th Cong., 1st Sess. 21 (1981) (report of the House Commit@ on Government Operations on the 1982 Defense Department authorization bill).

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

An agency may use multi-year contracting only (1) if it has no-year funds or multiple-year funds covering the entire term of the contract, or (2) under specific statutory authority. 67 Comp. Gen. 190, 192 (1988); B-171277, April 2, 1971 (multi-year contract permissible under no-year trust fund); Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.102-1(a). To restate this, an agency may enter into a multi-year 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. Thus far, Congress has seen fit to grant this authority sparingly.

If neither of the above situations applies, a multi-year contract violates several statutory funding restrictions, including the Antideficiency Act and the bona fide need statute (31 U.S.C. § 1502(a)). 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). Multi-year commitments were found illegal in various contexts in each of these cases, although each case does not necessarily discuss each funding statute. See also FAR, 48 C.F.R. § 17.102-1(a).

In 42 Comp. Gen. 272, for example, the Air Force had awarded a three-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island. The Air Force contended that no funds were obligated under 31 U.S.C. § 1501 until requisitions were issued, thereby exempting the contract from the statutory funding restrictions. However, the Comptroller General refused to adopt this characterization of the contract as, in effect, a requirements 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 to close the base would eliminate the requirements. Consequently, the contract was found to be an unauthorized multi-year contract.

If an agency is contracting with fiscal year appropriations and does not have multi-year 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); 67 Comp. Gen. 190 (1988); 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, November 10,1949. Thus, in 42 Comp. Gen. 272, 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 multi-year authority from Congress. Id. at 278.

Statutory authority for multi-year contracting with annual funds does exist in certain situations. For example, the military departments are authorized by 10 U.S.C. §§ 2306(g) and (h) to enter into multi-year contracts for periods of not more than five years if certain administrative determinations are made. Subsection (g), enacted in response to the Wake Island decision (see 67 Comp. Gen. 190, 193 (1988)), applies to such things as installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. Subsection (h) extends the concept to the acquisition of weapon systems and associated items and services. 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. §§ 2306(g)(3), (h)(5). Subsection (g) is also available to the Coast Guard and the National Aeronautics and Space Administration. 10 U.S.C. § 2303(a).

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

A contract under section 2306 must relate to the bona fide needs of the contract period. The statute does not authorize the advance procurement of materials not needed during the 5-year term of the contract. 64 Comp. Gen. 163 (1984); B-215825-O. M., November 7, 1984. Cf. 35 Comp. Gen. 220 (1955).

Another example of statutory authority for multi-year contracting is 40 U.S.C. § 481(a)(3), which authorizes contracts for public utility services for periods not exceeding ten 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, 222-23 (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. 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 need have sufficient budget authority only to obligate the first year's costs. 62 Comp. Gen. at 572; 44 Comp. Gen. 683, 687-88 (1965).

In contrast, if an agency does not have specific multi-year contracting authority but is using a multi-year contract solely under authority of a multiple-year or no-year appropriation, it has been held that the full contract amount must be obligated. B-195260, July 11, 1979. However, GAO approved the incremental funding of a multi-year contract using no-year funds in 43 Comp. Gen. 657 (1964). Under the scheme involved in that case, 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 Navy Industrial Fund); 51 Comp. Gen. 598, 604 (1972) (same); 48 Comp. Gen. 497, 502 (1960) (either obligational approach acceptable under revolving fund).[16] (As we will see later, this type of arrangement under a fiscal-year appropriation presents problems,)

Other examples of specific multi-year authority are 40 U.S.C. § 490(h), which authorizes the General Services Administration to enter into leases for periods of up to 20 years; 40 U.S.C. § 757(c),

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

which authorizes GSA to use the Information Technology Fund for contracts of up to five years for information technology hardware, software, or services; and 10 U.S.C. § 2828(d), under which the military departments may lease family housing units in foreign countries for periods of up to 10 years, to be paid from annual appropriations.

Multi-year arrangements may be permissible without specific statutory authority if they are structured in such a way as not to violate the Antideficiency Actor the bona fide needs rule. An example was discussed in 63 Comp. Gen. 129 (1983). The General Services Administration proposed using 3-year "Multiple Award Schedule" 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 that time. [17]

Also, contracts which 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 multi-year leases or contracts for the operation of concessions on federal property).

In a one-year contract with renewal options, the contractor can never be sure whether the renewal options will be exercised, thereby enabling the contractor to amortize initial investment costs. To protect against this possibility, contractors occasionally seek to provide for 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:

[17] Although the MAS proposal was similar to the proposal considered in A-60589, July 12, 1935, discussed above in Section B.4, GSA had since been exempted from the one-year requirement of 41 U.S.C. § 13. See 63 Comp. Gen. at 135.

"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 upon the full life of the system in the event the government did not continue using the equipment, Accordingly, he 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, 56 Comp. Gen. 505 (1977). See also 56 Comp. Gen. 167 (1976); B-190659, October 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 multi-year contracting. The plan approved by the Comptroller General in 48 Comp. Gen. 497, 501-02 (1969) provided for a one-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 one-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."

GAO has recommended the enactment of legislation to authorize all federal agencies to engage in limited multi-year procurement. See GAO report Federal Agencies Should Be Given General Multiyear Contracting Authority for Supplies and services, PSAD-78-54 (January 10, 1978). However, its use should be based on case-by-case assessments of the benefits and drawbacks noted previously. B-214545, August 7, 1985 (comments on proposed legislation).

9. Exceptions to the Bona Fide Needs Rule

Congress may, of course, grant exceptions from the bona fide needs requirement, either in general or for a particular agency or program, and may do so either in permanent legislation or in appropriation acts.

An example is 41 U.S.C. § ha, 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. 51308, 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.

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 maybe 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 non-performance—"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-180713, April 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 maybe 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 non-statutory, some of which are of major importance.

The advance payment statute permits exceptions, which may be found in appropriation acts or in "other law." Examples of specific exemptions are: 10 U.S.C. § 2396, 31 U.S.C. §§ 3324(b)(2) and (d), 19

U.S.C. §§ 2076 2078 and 2080. Numerous other statutory exemptions exist in various contexts. A major exception, discussed in Section C.2, permits advance and progress payments under procurement contracts in certain situations.

Another major exception exists in the case of grants, Since many grants by their nature anticipate payment in advance, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). There are, however, limitations on the advance funding of grants. For example, the grantee must establish or demonstrate the willingness and ability to establish procedures to minimize the time elapsing between the advance of funds and their disbursement by the grantee. These concepts are further explored in Chapter 10.

Advance payment problems may nevertheless arise in grant-related cases. Under the College Work-Study Program, a student is placed with an employer, which may be a federal agency. The student's salary is paid from two sources: 80 percent is paid by the college under a Department of Education grant, and the remaining 20 percent is paid by the employer. In one case, a proposal for the employing federal agency to pay 100 percent of the student's salary and to collect 80 percent from the college at a later date was found to violate 31 U.S.C. § 3324. B-159715, August 18, 1972. Several years later, a proposal for the agency/employer to advance its 20 percent share to the college which would in turn place the funds in an escrow account for payment to the student after the work was performed was similarly found to contravene 31 U.S.C. 83324. 56 Comp. Gen. 567 (1977). In the latter decision, the Comptroller General rejected a suggestion that the proposed arrangement might be authorized by 41 U.S.C. § 255.

Payments to or on behalf of federal civilian employees and military personnel constitute another area in which exceptions exist. For example, section 303 of the Career Compensation Act of 1949, 37 U.S.C. § 404, authorizes advance payments of certain travel and transportation allowances to military personnel. The authority does not, however, extend to station housing allowances, 56 Comp. Gen. 180 (1976), nor does it authorize the advance payment of trailer allowances, 39 Comp. Gen. 659 (1960), or rental vehicle expenses, 54 Comp. Gen. 764 (1975). The advance payment statute has also been held to prohibit. advances to a military member for the travel of dependents incident to the member's release from active duty. 40 Comp. Gen. 77 (1960). Advances of travel and transportation allowances for federal civilian employees are authorized by 5 U.S.C. §§ 5705 and 5724(f).

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 (FEPCA), section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1449, added a new 5 U.S.C. § 5524a, authorizing agencies to make advance payments of up to two pay periods of basic pay to new employees.[18]

Advance payment of salary remains prohibited in situations not covered by the statutes noted above. 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, January 12, 1990 (non-decision letter), Similarly, the Nuclear Regulatory Commission can reschedule its commissioners' pay days that fall on weekends or holidays to the preceding work day, provided that payments made prior to the end of a pay period may not include salary applicable to days remaining in the pay period. B-237963, June 28, 1990.

Certain tuition payments may be paid 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

[18] The authority is effective only to the extent provided for in advance in appropriation acts FEPCA § 301, 104 Stat. at 1461.

therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). See also B-70395, October 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 are also provided in the Government Employees Training Act, 5 U.S.C. § 4109, and in 10 U.S.C. § 2396(a)(3) for the Defense Department. (Military personnel are not covered by the Training Act.)

Exceptions to the advance payment prohibition may appear in appropriation acts as well as permanent legislation. An exception in an appropriation act will, of course, be limited to the appropriation(s) in the act to which it applies, unless it can be construed as permanent legislation. Also, the bona fide needs rule would apply. In one case, a FY 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 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 FY 1955 and could not operate to extend the period of availability of the appropriation, i.e., could not be used to pay for portions of the program extending into FY 1956. 34 Comp. Gen. 432 (1955).[19] 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).

[19] 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 obligations. On the contrary, as noted earlier in this chapter, most training tends to be non-severable

2. Government Procurement Contracts

a. Contract Financing

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 maybe 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.

Generally speaking, the government's preference is that the contractor be able to perform using private financing, i.e., the contractor's own resources or financing obtained in the private market. FAR, 48 C.F.R. § 32.106. However, the need for government assistance in various situations has long been recognized. In this context, it must be remembered that government contracting, while primarily intended to serve the government's needs, is also designed to foster a variety of social and economic objectives.

The extent to which various forms of what we now call "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 which had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until the entire subject has been completed and delivered to the government. The statute "was not intended to prevent a partial payment in any case in which the amount of such payment had actually been 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 upon 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).[20]

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).

Authority to make advance payments under certain contracts is now recognized by statute, and this is one of the major exceptions to 31 U.S.C. 83324. The Federal Property and Administrative Services Act (41 U.S.C. § 255) and the Armed Services Procurement Act (10 U.S.C. § 2307) authorize advance, partial, progress or other payments, not to exceed the unpaid contract price, under contracts for property or services. Within their discretion, agencies may include in bid solicitations a provision limiting advance or progress payments to small business concerns. Under both statutes, advance

[20]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).

payments may be made only if (a) the agency head determines that advance payments are in the public interest, and (b) adequate security is provided, The authority under both of these statutes applies to both advertised and negotiated procurements. See B-158487, April 4, 1966.

Detailed guidance on the use of the authority granted by 41 U.S.C. § 255 and 10 U.S.C. § 2307 is contained in the Federal Acquisition Regulation. Advance payments are covered by 48 C.F.R. Subpart 32.4. Application for advance payments may be made, before or after the award of a contract, in accordance with the procedures set forth in the FAR, 48 C.F.R. § 32.408. Short of following these procedures, a bid conditioned upon the receipt of advance payments at variance with the terms of the solicitation may be rejected as nonresponsive. 57 Comp. Gen. 89 (1977); B-205088, October 28, 1981; B-197471.2, August 14, 1981.

"Adequate security" will normally include a lien in favor of the government, paramount to all other liens, covering property being acquired, balances in the bank account in which the advance payments are deposited, and property acquired by the contractor for performance of the contract. 41 U.S.C. s 255(c); 10 U.S.C. § 2307(c); 48 C.F.R. § 32.409-3(c). Other forms of security which may be required are outlined in the FAR.

Security requirements may vary to fit the circumstances of the particular case. 48 C.F.R. § 32.409-3(d). In B-214446, October 29, 1984, GAO considered a proposal to certify payment before the services were rendered. The check 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, April 27, 1966.

The advance payment authority of 41 U.S.C. § 255 and 10 U.S.C. § 2307 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).

Advance payments are also authorized under Public Law 85-804, 50 U.S.C. §§ 1431-35. 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, November 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.[21]

Progress payments based on costs incurred, as opposed to advance payments (see definitions at beginning of this section), are covered in the FAR at 48 C.F.R. Subpart 32.5.

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. §§ 32.501-1 and 52.232-16 (required contract clause for fixed-price 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. § 32.501-3.

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.

[21] 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 two 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. SC. § 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, August 22, 1979.

The nature of the government's interest under this title-vesting provision has produced disagreement among the courts. The majority view is that title means full, absolute title, which cannot be defeated by subsequent liens. In re American Pouch Foods, Inc., 30 Bankr. 1015 (N.D. Ill. 1983), aff'd, 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082; In re Reynolds Manufacturing Co., 68 Bankr. 219 (Bankr. W.D. Penn, 1986); In re Denalco Corp., 51 Bankr. 77 (Bankr. N.D. Ill. 1985); In re Economy Cab and Tool Co., 47 Bankr. 708 (Bankr. D. Minn. 1985). The minority 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. Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), cert. denied, 460 U.S. 1037; Welco Industries, Inc. v. United States, 8 Cl. Ct. 303 (1985), aff'd mem., 790 F.2d 90 (Fed. Cir. 1986).[22] 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.

b. 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 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 41 U.S.C. § 255 and 10 U.S.C. § 2307 permitted more latitude in payment procedures, In view of this statutory authority, the Comptroller General, in B-158487, April 4, 1966, approved an advance payment procedure under which the General Services Administration would make payments on direct delivery vouchers prior to the receipt of "receiving reports" from the consignees, The

[22] 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 Nat'l Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

proposal was designed to effect savings to the government by enabling GSA to take advantage of prompt payment discounts.[23] GAO's approval was conditioned upon 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, March 20, 1968 (Defense Department) and B-155253, August 20, 1969 (Federal Aviation Administration), and reaffirmed them for GSA in 60 Comp. Gen. 602 (1981).

The Federal Acquisition Regulation provides for fast payment procedures in 48 C.F.R. Subpart 13.3. An agency may pay for supplies based on the contractor's submission of an invoice under, among others, the following conditions:

- 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),

[23] 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, October 29, 1984; B-107826, July 29, 1954.

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 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. s 3324, even where payment is made prior to examination of the shipment. 32 Comp. Gen. 563 (1953).[24]

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. 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 pre-payment 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 General Services Administration 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).

[24]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.

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 FAR 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 non-profit organization, was found permissible in B-207215, March 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) and amended in 1961 (75 Stat. 211). 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.[25] 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), and 35-millimeter slides, 48 Comp. Gen. 784 (1969). 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, October 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.[26]

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" (88 Stat. 1731). This was condensed into the present version of 31 U.S.C. § 3324(d)(2) when Title 31 was remodified in 1982.

[25] 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, September 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.

[26] 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 supra note 25), and the holding in 35 Comp. Gen. 404 would now apply to any agency which can justify the need.

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 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, August 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, December 23, 1983).

The FAR 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. 31535, 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). This exception, however, applies only where the state is furnishing noncommercial services reasonably available only from the state. 39 Comp. Gen. 285 (1959) (sewer service charge); B- I 18846, March 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-34946, June 9, 1943, and B-65821, May 29, 1947 (state court fees and other items of expense required to litigate in state courts in compliance with the requirements of state law); B-36099, August 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, March 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, December 12, 1989 (non-decision letter) Similarly, monthly charges under a utility service contract for cable television service to a Naval hospital may not be paid in advance. B-237789, December 10, 1990.

D. Disposition of Appropriation Balances

1. Terminology

Annual funds which remain unobligated at the end of the fiscal year for which they were appropriated are said to "expire" for obligational purposes.[27] In other words, they cease to be available for 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).[28]

The portion of an appropriation which has not actually been spent at the end of the fiscal year (or other definite period of availability) is called the "unexpended balance. "[29] 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. § 1551(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. § 1551(a)(2). It represents that portion of the unexpended balance unencumbered by obligations recorded under 31 U.S.C. s 1501.

[27] The term "lapse" is also sometimes used in this context although there is a technical distinction. Traditionally, an appropriation was said to "lapse" when it ceased to be available to the spending agency to liquidate prior obligations.

[28] Throughout this section, except as otherwise specified, references to 31 USC.* 1551 through 1557 reflect amendments made by Pub. L. No. 101-510, $ 1405(a), 104 Stat. 1485, 1675 (1990).

[29] 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.

Unexpended balances are both necessary and unavoidable, There are, however, potential adverse implications if those balances should become too large. GAO studied the area in a report entitled Budget Issues: Governmentwide Analysis of the Growth in Unexpended Balances, GAO/AFMD-86-24BR (January 17, 1986), GAO discovered a trend reflecting increased growth in unexpended balances during the first half of the 1980's. Since much of-these balances represent actual or potential liabilities which will eventually have to be liquidated through future revenues or borrowing, GAO cautioned that a high growth rate in unexpended balances could adversely affect deficit. reduction efforts.

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, April 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 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 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 (63 Stat, 407), 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 two 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, September 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), upon the recommendation of the second Hoover Commission.[30] The most significant change 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-O. M., November 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.

With fiscal-year identity no longer a concern, there was no need to relate a payment from the "M" account to the specific balance which had been transferred from the particular year in which the

[30]Second Commission on organization of the Executive Branch of the Government, created by Pub. L. No. 83-108, 67 Stat. 142 (1953).

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-O, M., 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 two-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 which arose but were not formally recorded prior to the appropriation's 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, October 17, 1989; B-232010, March 23, 1989; B-164031(3).150, September 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. Strategic Bombers: B-1B Program's Use of Expired Appropriations, GAO/NSIAD-89-209 (September 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 (November 5, 1990), 104 Stat. 1485, 1675. Section 1405 applies to both military and civilian agencies, and includes transition provisions to deal with 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. "M" accounts are to be phased out over a three-year period, with any remaining "M" account balances canceled on September 30, 1993.

3. Expired Appropriations and Closing of Accounts[31]

Section 1405(a) of Pub. L. No. 101-510 amended 31 U.S.C. §§ 1551-1557. Two of the key provisions are quoted below:

"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 one-year or multiple-year appropriation expires on the last day of its period of availability and is no longer available for new obligations, although unobligated balances no longer revert 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.

[31] This section summarizes the provisions enacted in November 1990. Decisions and opinions cited in the text predating the 1990 legislation reflect principles which should still remain valid. Requirements and procedures under the 1990 law are set forth in OMB Circular No. A-34, Part XI (January 1991).

requirements, limitations on obligations, and reporting requirements remain applicable to the expired account.

During this five-year period, treatment of the balances is similar to the first two post-expiration fiscal years under the 1956 legislation. Obligated balances for any of those five years maybe used to liquidate obligations properly chargeable to that fiscal year. The unobligated balance remains available to make legitimate obligation adjustments, i.e., to record previously unrecorded obligations and to make upward adjustments in previously underrecorded obligations.

The authority to use unobligated balances to make obligation adjustments is analogous to the restoration authority of the law prior to the 1990 revision, again with the exception that there is no longer a point at which balances merge and lose their fiscal-year identity. The authority is available only to satisfy an unrecorded or underrecorded obligation properly chargeable to the funds of that particular year, and cannot be used to satisfy an obligation properly chargeable to current appropriations (see 50 Comp. Gen. 863 (1971)), or to any other year of the five-year period. 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. See 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. See B-179708-O. M., July 10, 1975.

During the five-year period, the potential for an Antideficiency Act violation exists if identifiable obligations chargeable to one of those five years exceed the sum of the obligated balance for that year plus the amount available for adjustment from the unobligated balance for the same year. Should this happen, the excess can be liquidated only pursuant to a supplemental or deficiency appropriation or other congressional action. See B-179708-O. M., June 24, 1975 (applying same principle during first two post-expiration years under prior law),

At the end of the five-year period, the account is closed. Any remaining unexpended balances, both obligated and unobligated, are canceled, returned to the general fund of the Treasury,[32] 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 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. The authority is limited, however. The cumulative total of old obligations payable from current appropriations under 31 U.S.C. § 1553(b)(1) may not exceed one percent of the current appropriation. 31 U.S.C. § 1553(b)(2). The authority to use current appropriations to pay obligations attributable to canceled balances may not be used to exceed the original appropriation.[33]

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 which by its nature requires disbursements beyond the five-year period. One form of exemption simply preserves the availability for disbursement of previously obligated funds. An example is discussed in B-243744, April 24, 1991 (concluding that the exemption does not create new budget authority). Another form is a provision applicable to certain Agency for International Development one-year appropriations which effectively converts them to no-year funds upon proper obligation (thereby permitting reobligation for authorized purposes should the funds be deobligated after the end of the

[32] We commonly talk about "returning" appropriation balances to the Treasury. In point of fact., for the most part, they never left 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 which, in the various ways discussed in the text, affects the government's legal authority to make obligations and expenditures.

[33] In view of this requirement, it will be necessary to maintain records of the balances returned to the Treasury upon cancellation beyond the end of the five-year period, and to adjust these balances as subsequently presented obligations are liquidated, as there is no other way to ensure that pay-merits do not exceed the original appropriation.

fiscal year). Although not originally conceived as an exemption from the account closing requirement, the AID provision amounts to one because the account closing requirement applies only to fixed appropriations. Foreign Assistance: Funds Obligated Remain Unspent for Years, GAO/NSIAD-91-123 (April 1991), at 21.

To the extent of its applicability, the statutory scheme found at 31 U.S.C. § 1551–1557 provides the exclusive method for the payment of obligations chargeable to expired appropriations. See B-101860, December 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.)

The rules for certain legislative branch appropriations are a bit different, The provisions of 31 U.S.C. §§ 1551–1557 do not apply to appropriations to be disbursed by the Secretary of the Senate or the Clerk of the House of Representatives. 31 U.S.C. § 1551(c)(2). For these appropriations, unobligated balances more than two years' old cannot be used short of an act of Congress. Instead, obligations chargeable to appropriations which have been expired for more than two 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. § 102a. See B-213771.3, September 17, 1986.

4. 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 the appropriation was made have been fulfilled, and (b) no disbursement has been made against the appropriation for two consecutive fiscal years. Upon closing, any remaining balance' in the account, obligated or unobligated, is canceled and is no longer available for obligation or expenditure for any purpose. The purpose of section 1555 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-182101, October 16, 1974,

This principle also applies to revenues earned by a government agency where Congress has authorized the agency to retain such revenues without any fiscal year limitations. For example, in section 1 n(h) of the Energy Reorganization Act of 1974,42 U.S.C. § 5821(h), Congress authorized the Department of Energy, when so specified in appropriation acts, to retain revenues from uranium enrichment services and use them to offset the costs of providing such services, the funds to remain available until expended. In light of 31 U.S.C. § 1555, however, the Department of Energy could not retain or set aside the revenues indefinitely. B-159687 -O. M., October 25, 1979.

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 one-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).

5. Repayments and Deobligations

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. 91555, 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 which 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, September 22, 1950,52, published at 30 Comp. Gen. 595, divides repayments into two subcategories, reimbursements (statutory authority for agency to retain receipts) and refunds (certain nonstatutory situations such as recovery of overpayments and erroneous payments).

Reimbursements are considered a budgetary resource subject to apportionment by the Office of Management and Budget, whereas refunds are treated as reductions of expenditures and obligations. Reimbursements operate to augment the original amount appropriated by Congress. Refunds are reductions of, and must be directly related to, previous disbursements. See 30 Comp. Gen. 614 (1950).[34]

As a general proposition, where the appropriation to be credited has expired, reimbursements must be credited to the expired account and not to the current account. See "Augmentation of Appropriations" in Chapter 6 for case citations. A prominent example is the Economy Act, 31 U.S.C. § 1535. Where a transaction between government agencies is governed solely by the Economy Act, reimbursements for work, services, or other materials must be credited to the fiscal year appropriations which earned them, regardless of when the reimbursements are collected. If the appropriation which 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 which 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-O. M., January 15, 1980; B-179708-O. M., December 1, 1975. After closing, the reimbursement would have to go to miscellaneous receipts.

Excess obligations which are later deobligated are accounted for in the same manner as repayments. The difference, of course, is that the excess obligations are already in the expired account. Deobligated amounts which are not needed to liquidate recorded obligations should be accounted for under the "unobligated balance" portion of the expired account. See 52 Comp. Gen. 179 (1972).

If an agency deobligates funds after the expiration of the period of availability, the funds are not available for any new obligation. To avoid this result, Congress may, by statute, authorize an agency to reobligate any such deobligated sums. This is called deobligation-reobligation ("deob-reob") authority. The reobligation will usually be for the same general purpose as the original obligation, although the precise purposes will depend on the terms of the legislation. See

[34]The citation refers to an "Accounting Systems Memorandum," an obsolete form of GAO guidance. They used to be published as appendices in the annual "Comp. Gen." volumes. Although obsolete as GAO documents, they often, as in this case, contain useful background and explanatory discussion.

B-218762 -O. M., September 18, 1985, for an illustration. Deobligation-reobligation authority is not necessary for no-year funds, and this is true even though Congress may have eliminated such authority with respect to certain fiscal year appropriations of the same agency. B-200519, November 28, 1980.

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 claimant's 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 book. 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"?[35]

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, December 29, 1975

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

(non-decision 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 1970's. 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); Bennett v. 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).

The concept has also been applied in non-impoundment 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.[36]

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 Association 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.[37] The court then reaffirmed the proposition that courts may "order that funds be held available beyond their statutory lapse date if equity so requires." 564 F.2d 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 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

[36] The court also noted that the district court could "obtain assistance from the Comptroller General's expertise in matters of expenditures, reductions by appropriations, and impoundments." 556 F.2d at 51.

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

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. " 564 F.2d at 588-89

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

- National Association 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. 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 to prevent expiration of the funds, which the district court denied. The court of appeals found denial of the TRO to bean 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. 564 F.2d at 588. A similar case is Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983) (reversing 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. 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." 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. 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 testis 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 more recent cases. Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207 (1983); International Union, UAW v. Donovan, 570 F. Supp. 210 (D.D.C. 1983); Burton v. Thornburgh, 541 F. Supp. 168 (E.D. Pa. 1982); Grueschow v. Harris, 492 F. Supp. 419 (D.S.D. 1980), 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 and 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 Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1577 (D.C. Cir. 1984). 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 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 disbursement of funds already obligated where disbursement would have the effect of precluding effective relief and thereby rendering the case moot. Population Institute v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986).[38] Similarly, the district court's injunction in Bennett v. Butz, quoted in 54 Comp. Gen. 962, included a provision mandating retention of the obligated balances until further order of the court.

In addition to the judicial authority noted above, 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.'"

The statute was enacted as part of a continuing resolution in 1973 (87 Stat. 134). 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 noted the statute, 444 F. Supp. at 94, but found it inapplicable because the funds in that case would have reverted to a revolving fund rather than the general fund of the Treasury. In Population Institute v. McPherson, 797 F.2d at 1081, and International Union v. Donovan, 570 F. Supp. at 220, 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 for reimbursement of expenditures under the Medicaid program. Based on Connecticut v. Schweiker, the court

[38] 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, section entitled "Impoundment/Assistance Funds" for case citations.

concluded that the plaintiff was clearly entitled to be paid. The court then reviewed a provision of the Department's FY 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 FY 1981 funds. Although Missouri had not filed its lawsuit prior to the end of FY 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." 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. 579 F. Supp. 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 FY 1982 funds to pay the awards after the end of the fiscal year. GAO first found 31 U.S.C. § 1501(a)(6) inapplicable, and then concluded that, by virtue of 31 U.S.C. § 1502(b), the unobligated balance of FY 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 the 1990 revision of 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, the answer would appear to be yes. See 70 Comp. Gen. (B-238615, February 4, 1991).

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) as follows:[39]

> "(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 90 working 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).

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

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