



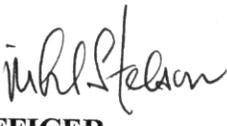
## Department of Energy

Washington, DC 20585

February 24, 1998

**MEMORANDUM FOR: FIELD CHIEF FINANCIAL OFFICERS AND PROGRAM LIAISONS**

**FROM:**

**MICHAEL L. TELSON**   
**CHIEF FINANCIAL OFFICER**

**SUBJECT:**

**GENERAL GUIDANCE ON ONE-YEAR APPROPRIATIONS**

The FY 1998 Energy and Water Development Appropriations Act (Public Law 105-62) provides funding for the Energy Supply Appropriation account (8980224) on a one-year basis; i.e., new FY 1998 funds are available for incurring obligations for the period which began October 1, 1997, and ends September 30, 1998. Previously, funding for Departmental programs, projects, and activities in the Energy Supply R&D account (89X0224) were provided on a no-year basis; i.e., funds remained available for incurring obligations without fiscal year limitation.

Since this Department has not had one-year funds for a number of years, the Office of Chief Financial Officer thought it appropriate to provide general guidance on this subject. The attached concept paper provides some basic guidance, concepts, and related reference materials pertaining to conducting mission operations utilizing one-year appropriations. This guidance is for your use pending incorporation into a future revision of the DOE Accounting Handbook. However, in the event you encounter specific issues or situations that are not addressed by this guidance, and that warrant special attention, we recommend you submit them to the Office of Financial Policy for coordination.

Many of the citations contained in the paper are from chapters 5 and 7 of the GAO "Red Book" (Principles of Federal Appropriations Law, Volumes I and II, Second Edition, July 1991 and December 1992, respectively) which is accessible at Internet address: <http://www.gao.gov/special.pubs/publist.htm>. Citations for the United States Code are also available on the Internet and may be accessed at Internet address: <http://www.law.cornell.edu/uscode>. Since we have not been able to identify an Internet address for retrieval of the three Comptroller General decisions cited in the paper, we have attached a copy of each for your convenience.

If you have questions related to this matter, please contact either Paul Kelley, Office of Budget, on 301-903-5327 or Mary Rosicky, Office of Financial Policy, on 202-586-9354.

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## CONCEPT PAPER

### TIME LIMITED (ONE-YEAR) APPROPRIATIONS

#### 1. General

- a. Purpose. The purpose of this paper is to provide some basic guidance, concepts, and related reference materials pertaining to conducting mission operations utilizing one-year appropriations.
- b. Background. The FY 1998 Energy and Water Development Appropriations Act (Public Law 105-62) provides funding for the Energy Supply appropriation account on a one-year basis (8980224); i.e., new FY 1998 funds are available for incurring new obligations for the period which began October 1, 1997, and ends September 30, 1998. Previously, funding for Departmental programs, projects, and activities in the Energy Supply R&D appropriation account had been provided on a no-year basis (89X0224); i.e., funds remained available for incurring obligations without fiscal year limitation. Providing funds on a one-year basis is a congressional mechanism deemed to strengthen fiscal oversight and control over programs and activities administered by Executive Branch agencies.
- c. Energy Supply funding transition. In administering the transition from no-year to one-year funds for the Energy Supply appropriation account, the Department has elected to retain the no-year integrity of the FY 1997 unobligated carryover balances associated with those programs, projects, and activities remaining in the Energy Supply appropriation account. As such, these no-year unobligated carryover balances will maintain the 89X0224 no-year Treasury symbol and related (YA) fund type designations. Due to their no-year nature, these funds remain available for incurring new obligations indefinitely and must be used for the same programs, projects, activities, and purpose as originally appropriated. Conversely, the FY 1998 one-year Energy Supply appropriation account is assigned Treasury symbol 8980224 and related (Y8) fund type, and is available for incurring new obligations for the period which began October 1, 1997, and ends September 30, 1998.

#### 2. Time limited appropriations - phases

- a. Placing time limits on obligational availability is one of the primary means of congressional control of appropriations. Time-limited appropriations (one-year or multi-year) are available for obligation only during the fiscal years for which made (GAO "Red Book," Principles of Federal Appropriations Law, Volume I, Second Edition, July 1991, Chapter 5, page 5-2).

There are three distinct phases associated with time-limited appropriations: current phase, expired phase, and closed phase. (Red Book, Chapter 5, pages 5-61 - 5-63; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.4-5).

- b. Current phase (period of availability for obligation). Time-limited appropriations are available for incurring valid, new obligations only during the fiscal years for which made, but remain available for authorized adjustment to obligations and for expenditures to liquidate valid obligations for an additional five fiscal years after the end of the period of availability for obligation (Red Book, Chapter 5, pages 5-2 and 5-3; 31 U.S.C. 1553).

Note: Obligations can be recorded only if they meet the requirements for recording obligations as specified in 31 U.S.C. 1501(a), "Documentary Evidence Requirement for Government Obligations" (Red Book, Chapter 7, page 7-5).

- c. Expired phase (5 Years). If time-limited funds are not obligated by the end of the fiscal year for which they were appropriated, they are no longer available for incurring new obligations and are said to have "expired." Expired accounts maintain their fiscal year identity for five years after the end of the period of availability for obligation and remain available during this period for recording, adjusting, and liquidating obligations properly chargeable to those appropriation accounts. (Red Book, Chapter 5, page 5-61; 31 U.S.C. 1553(a)).
- d. Closed phase. Time-limited appropriation accounts are closed at the end of the fifth fiscal year after they expire. (Red Book, Chapter 5, page 5-61; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.4-1, paragraph 4.2.A; 31 U.S.C. 1552(a)). Closed appropriations are not available for obligation or expenditure for any purpose. At the end of the five-year period described above, all unliquidated obligations and unobligated balances shall be canceled and the account shall be closed. Any subsequent obligation or payment associated with a closed account that comes due shall be paid from an unexpired (current) appropriation made for the same general purpose. (Red Book, Chapter 5, page 5-63; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.4-3, paragraph 4.4).
- e. 1% set aside. Payments that arise pertaining to all previously closed appropriation accounts shall not exceed 1 percent of the unexpired (current) appropriation made for the same general purpose. For a one-year account, the limitation is 1 percent of the current one-year appropriation--not total budgetary resources (Red Book, Chapter 5, page 5-63; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.4-3, paragraph 4.4). This is a major exception to the rule that current year appropriations cannot be used to satisfy obligations properly chargeable to a prior year. The authority to use up to 1 percent of the applicable current year appropriations to pay obligations attributable to canceled balances may not be used to exceed the original appropriation. In view of this requirement, it will be necessary to maintain, for each fiscal year, general ledger controls of the amount of unobligated and unliquidated obligations that were canceled and returned to the Treasury and adjustments to these balances as obligations are liquidated. (Red Book, Chapter 5, page 5-63.)

Application of the 1-percent limitation. The 1-percent limitation is a single, cumulative annual limit and all aspects of the Antideficiency Act apply; that is, this amount represents a firm limitation which cannot be exceeded during the fiscal year. In no case may more than 1 percent of new budget authority for a current appropriation be used to pay any combination of obligations attributable to all related closed accounts. A payment liquidating obligations properly chargeable to a closed account must pass two separate and distinct critical "availability of funds" tests prior to disbursement. First, the payment must not exceed the amount remaining from the unobligated and unliquidated obligations originally canceled, after deducting amounts for subsequent payments; and second, the subject payment must not exceed the amount remaining from the 1 percent set aside after deducting authorized payments. If a payment violates either one of these tests, a reportable violation of the Antideficiency Act has occurred (see subparagraph f. below).

Following is an illustrative example: A payment of \$100 arises in FY 1998 related to an obligation properly chargeable to the FY 1990 XYZ one-year appropriation account:

**First Test:**

FY 1990 XYZ Closed Account - status at end of FY 1997:

Original FY 1990 unobligated/unliquidated obligations canceled at end of FY 1995	\$1,000.
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Cumulative payments that came due in FYs 1996 & 1997 properly attributable to FY 1990 XYZ Closed Account	<u>-200.</u>
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Amount of FY 1990 XYZ Closed Account unobligated/unliquidated obligations remaining at end of FY 1997 for making payments in FY 1998 and beyond properly attributable to FY 1990 XYZ Closed Account	<u>800.</u>
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FY 1998 payment of \$100 properly attributable to FY 1990 XYZ Closed Account	<u>-100.</u>
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Amount of FY 1990 XYZ Closed Account unobligated/unliquidated obligations remaining for making additional payments properly attributable to FY 1990 XYZ Closed Account	<u>\$700.</u>
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Note: Payment of \$100 properly attributable to FY 1990 XYZ Closed Account does not exceed original canceled FY 1990 unobligated/unliquidated obligations after deducting for subsequent authorized payments (i. e., \$800).

**Second Test:**

FY 1998 XYZ Successor Appropriation Account:

New Budget Authority:	\$100,000.
XYZ Successor Appropriation Account one percent set aside - beginning of FY 1998	1,000.
Valid payments previously made in FY 1998 related to all XYZ Closed Accounts (i.e., FYs 91 & 92)	<u>-300.</u>
Balance remaining for making additional payments in FY 1998	<u>\$700.</u>
Additional FY 1998 payment related to FY 1990 XYZ Closed Account	<u>-100.</u>
Revised balance remaining in FY 1998 for making additional payments in FY 1998 related to FYs 1990, 1991, and 1992 XYZ Closed One-year Appropriation Accounts	<u>\$600.</u>

Note: The subject payment of \$100 related to FY 1990 XYZ Closed Account does not exceed the one percent set aside of the FY 1998 XYZ successor appropriation account as adjusted for authorized payments applicable to all related XYZ Closed Accounts.

- f. Treatment of overobligations/overexpenditures in expired and closed accounts. A prominent purpose of the account closing provisions in 31 U.S.C. 1551-1558 is to apply the discipline of the Antideficiency Act, 31 U.S.C. 1341, and the Bona Fide Needs statute, 31 U.S.C. 1502, to expired accounts. The Antideficiency Act and the Bona Fide Needs statute are intended to ensure that agencies discipline themselves to stay within congressionally authorized funding limitations and to control the level of obligations and outlays. As a consequence of these statutes, agencies generally are not authorized to pay overobligations of expired or closed accounts from current appropriations. Instead overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations. However, until and unless Congress takes one of these actions, a deficiency exists in the appropriation account. [Comptroller General Decision B-245856.7, August 11, 1992]

### 3. Upward/downward adjustments to obligations

- a. Adjustments to obligations represent increases or decreases (deobligations) to existing obligations or recording of previously unrecorded obligations.
- b. During first year. Amounts deobligated within the original period of obligational availability of a time-limited appropriation remain available for incurring new obligations and/or for upward adjustments of existing obligations (Red Book, Chapter 7, page 7-52 or GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.3-6, paragraph 3.5.E).
- c. During expired phase. Amounts deobligated after the expiration of a time-limited appropriation may increase the unobligated balance of the expired appropriation and remain available for liquidating obligations and/or for authorized obligational adjustments; i.e., recording unrecorded or underrecorded obligations properly entered into prior to the expiration of the appropriation. However, during the expired phase, unobligated balances are not available for incurring new obligations. Any unrecorded or underrecorded obligations charged against an expired appropriation that exceed the unobligated balance of that appropriation may result in a violation of the Antideficiency Act (Red Book, Chapter 7, page 7-52 or GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.3-6, paragraph 3.5.E).
- d. Canceled Phase. At the end of the fifth year after an appropriation expires, the account is closed, all balances are canceled, and no further obligational adjustments or payments are possible.

### 4. Bona-fide needs rule

- a. Concept. Obligations must be incurred for the purpose for which the appropriation is intended and within the time limits applicable to the appropriation (DOE Accounting Handbook, Chapter 5, "Accounting for Obligations," paragraph 1c(1)). Unless specified otherwise by law, the bona fide needs rule (applicable only for one-year or multiple-year appropriation accounts) means that obligations may be incurred only to meet valid needs of the specific fiscal year(s) (DOE Accounting Handbook, Chapter 5, page 5-1, paragraph 1c(2)). Determination of what constitutes a bona fide need for a particular one-year appropriation depends largely on the facts and circumstances of each case.
- b. Application of concept. The following are illustrations of the bona fide needs test related to one-year appropriations:
  - (1) Valid needs of current fiscal year: An obligation cannot be legally made against current-year funds for future-year needs. For example, as the end of a fiscal year approaches, a program purchases a truckload of stores inventory when it is clear,

based on current usage, that it already has in stock enough stores inventory to last several years into the future. It would appear that the program is merely trying to obligate its appropriation before it expires, and the purchase would violate the Bona Fide Needs rule.

- (2) Delivery of materials beyond the fiscal year. An obligation can be made against current-year funds for materials to be delivered and paid for in the next fiscal year if delivery is not possible within the current fiscal year and if the goods are not standard commercial items that are readily available from other sources.

## 5. **Severability - Rendering services beyond the fiscal year**

- a. Concept. Services are generally charged to the appropriation current at the time the services are provided. This basic concept follows from the Bona Fide Needs rule, described above, that specifies funds are to be obligated/expended only for valid needs of the current fiscal year. However, there are a number of circumstances that would allow recording obligations in one year and related services provided and payments made in the following year. The primary governing factor in such a determination is whether the contract for service is considered severable or non-severable (entire).

Typically, service contracts that entail routine, on-going services that are readily defined and arise from day-to-day operational needs are considered severable. Examples of these contracts include facility or equipment maintenance contracts. In these instances, payments must be charged to the appropriations available in the fiscal year in which services are rendered.

Conversely, a service contract is deemed to be non-severable ( i.e., represents a single undertaking) if performance cannot be segregated by fiscal year without adversely affecting the product, deliverable, or other end results being sought. Thus, a non-severable type contract is chargeable in its entirety to the appropriation current at the time the contract is executed, regardless of when actually performed (Red Book, Chapter 5, page 5-22).

An example of a non-severable type contract would be for training services. For instance, an urgent need arose late in FY 1997 for specialized security training in anti-terrorism that required three continuous weeks of field training. A contract was executed for a course under which performance would extend into the second week of FY 1998. In this example, it would be impractical to separate performance under the contract along fiscal year lines since this disruption would result in an incomplete final product/service and fail to meet the original objective. Accordingly, this type of service contract, which was entered into in one fiscal year, but performance thereunder extended into the ensuing fiscal year, represents a single undertaking and would be non-severable in nature. Therefore, the entire cost of the three week training contract would be chargeable to the applicable FY 1997 appropriation.

- b. Application of concept. Application of the concept of severability to specific contracts necessitates an assessment on a case-by-case basis, with a determination dependent largely on the facts, circumstances, and nature of the work to be performed. For instance, Research and Development (R&D) work performed by the Department's contractors typically results from tasks or work authorizations describing in general terms the research to be performed with the associated funding obligated into the contract. These activities may be considered either: ongoing research with no specific outcome, product, report, or other deliverable contemplated (severable in nature); or ongoing research with specific performance objectives, reports, or other meaningful deliverables which are non-severable in nature. The determining element in this assessment, again, is the nature of work to be performed. In this regard, additional detail can be found in Comptroller General Decisions: B-214597 of December 24, 1985, and B-235678 of July 30, 1990.

## 6. **Practical considerations**

- a. Programs with both no-year and one-year funding: To the extent that Energy Supply related programs have both no-year and one-year funding available in FY 1998, all things being equal, prudence dictates that the one-year funds should be utilized first in conducting operations. The no-year funding portion can be used at any time during the year and may prove instrumental in avoiding deficiency situations at fiscal year-end.
- b. Availability of funding. Headquarters program organizations administering Energy Supply funding should ensure that full-year funding is made available to Departmental Elements as soon as possible in the fiscal year. Under the one-year funding concept, early receipt of full funding will help ensure proper planning and orderly program operations with minimal disruptions.
- c. Year end monitoring of obligations. As the end of the fiscal year approaches, program and financial managers should closely coordinate all program release documents with procurement and accounting offices to help ensure accurate recording of all valid obligations, prevent over obligations, prevent under recording of obligations, etc. Failure to closely monitor these activities could result in ending the fiscal year with either an excessive level of unobligated balances or an Anti-deficiency Act violation.
- d. FY 1998 unobligated balances. In light of the one-year funding availability, prudence dictates that some level of unobligated balances remains at year end; i.e., all one-year funds should not be obligated. Limited balances should be maintained to accommodate potential upward adjustments of previously recorded obligations and/or recording valid unrecorded obligations that may be realized after the end of the fiscal year. Failure to provide for these situations could result in an Anti-Deficiency Act violation. Conversely, excessive unobligated balances remaining at year-end could result in budgetary reductions. It should be further noted, that any unobligated balances remaining at year-end are not

legally available for incurring new obligations, only for authorized adjustments as noted above (Red Book, Chapter 7, page 7-52; GAO Policies and Procedures Manual for Guidance of Federal Agencies, Title 7, page 7.4-1, paragraph 4.2, "Availability of Appropriations for Obligation").

### **INTERNET ADDRESSES FOR REFERENCE MATERIALS**

Following are Internet addresses to access additional information on specific areas referenced in the Concept Paper.

- United States General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law, Volumes I and II, July 1991 and December 1992, respectively, (GAO "Red Book"):

<http://www.gao.gov/special.pubs/publist.htm>

- United States Code:

<http://www.law.cornell.edu/uscode>

9TH CASE of Level 1 printed in FULL format.

Decision of Socolar

B-245856.7

Comptroller General of the United States

71 Comp. Gen. 502; 1992 U.S. Comp. Gen. LEXIS 995

August 11, 1992

HEADNOTES:

[\*1]

Agencies generally are not authorized to pay overobligations of expired or closed accounts from current appropriations. 31 U.S.C. @@ 1341(a), 1502(a). Instead, overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations. However, until and unless Congress takes one of these actions, a deficiency exists in the account.

Knowing and willful failure to record overobligations in an account or recording overobligations in an improper account in order to conceal a criminal violation of the Antideficiency Act is a criminal offense under provisions of Title 18, U.S.C.

OPINION:

The Honorable Andy Ireland  
House of Representatives

Dear Mr. Ireland:

This responds to your letter of May 20, 1992, raising two issues for our consideration. The first issue stems from a Bureau of National Affairs (BNA) article that suggests that our Office would approve the use of current funds to pay overobligations in expired accounts, a proposition which you understandably find disturbing. The second issue involves your request for our comments [\*2] on certain proposals made by the Deputy Inspector General, Department of Defense, intended to enhance enforcement of the Antideficiency Act.

With respect to the first issue, a prominent purpose of the 1990 reforms to the account closing provisions in 31 U.S.C. @@ 1551-1558 was to apply the discipline of the Antideficiency Act, 31 U.S.C. @ 1341, and the Bona Fide Needs statute, 31 U.S.C. @ 1502, to expired accounts. The Antideficiency Act and the Bona Fide Needs statute are intended to ensure that agencies discipline themselves to stay within congressionally authorized funding limitations and to control the level of obligations and outlays. Indeed, as a consequence of these statutes, and contrary to the suggestion contained in the BNA article, agencies generally are not authorized to pay overobligations of expired or closed accounts from current appropriations. Instead overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations. However, until and unless Congress takes one of these

71 Comp. Gen. 502; 1992 U.S. Comp. Gen. LEXIS 995, \*2

actions, a deficiency exists [\*3] in the account. Hence, the process of agency reporting overobligations to the Congress and requesting funds to pay the obligations is vital to congressional oversight of how agencies manage their financial resources and necessary to accomplish the objectives of the Antideficiency Act.

With respect to the second issue, you suggest that there are large number of overobligated DoD accounts and that the "M" accounts remain an insurance policy against violation of the Antideficiency Act. Noting that the "M" accounts will cease to exist after September 1993, you suggest that DoD will be confronted with massive violations of the Antideficiency Act that it might not report immediately as required by law.

Accordingly, you ask for comments on a recommendation made by the Deputy Inspector General for the Department of Defense to improve enforcement of the Antideficiency Act by

--making it a crime for a person to knowingly fail to report a violation of the Antideficiency Act within 30 days of obtaining such knowledge, and

--subjecting a person to administrative discipline for failing to report a violation of the Antideficiency Act within 30 days of gaining such knowledge.

We have [\*4] no basis for concluding that enactment of these recommendations will improve compliance with the Antideficiency Act. The failure to disclose known violations of the Antideficiency Act is already a felony and can be the object of disciplinary actions. Also, the elimination of the merged surplus authority on December 5, 1990 has eliminated one method for agencies to legally avoid disclosure of overobligations of appropriation accounts with the result that disclosure of overobligations should be more likely in the future.

The enclosed analysis discusses these matters in detail and we trust it responds to your concerns.

#### ANALYSIS OF AGENCY AUTHORITY TO PAY OVEROBLIGATIONS IN EXPIRED ACCOUNTS AND COMMENTS ON DOD DEPUTY IG'S PROPOSAL TO AMEND THE ANTIDEFICIENCY ACT

This enclosure provides our analysis of an agency's authority to charge overobligations in expired and closed accounts to current appropriations. It also discusses a proposal to amend the Antideficiency Act to authorize criminal and administrative penalties for failure to report violations of the Antideficiency Act.

#### PAYMENT OF OVEROBLIGATIONS IN UNCANCELED EXPIRED ACCOUNTS

##### Background

A recent article in the Daily [\*5] Report for Executives (BNA), A-4 - A-6 (April 28, 1992), suggests that this Office would authorize payment of overobligations in expired accounts from current appropriations. The article points out that on June 13, 1991, DoD issued guidance to implement the new account closing procedure contained in section 1405 of Pub. L. No. 101-510, 104 Stat. 1675 (1990). The guidance authorized the charging of all within-scope contract changes to current year funds. However, following an inquiry from this Office regarding the legality of such guidance, DoD rescinded the June 13

guidance on April 20, 1992, and returned to the practice, in effect prior to the 1990 amendments, of charging within-scope contract changes to the appropriation initially obligated by the contract. The article points out that following DoD's reinstatement of its prior practice, one issue remained unresolved, namely, the funding of overobligations in uncanceled expired appropriation accounts.

The article suggests two possible solutions to the problem: (1) obtain from Congress a deficiency appropriation for the expired account, or (2) charge current year appropriations, as the 1990 amendments authorize for canceled accounts. [\*6] The article relies on sources who suggest that although the account closing legislation is silent on this matter, the Comptroller General would approve the second solution:

The Comptroller General has long recognized the responsibility of the government to pay its bills, and has generally authorized the use of available appropriations so long as there is no prohibition against such use . . . The reasoning is that the government owes the money, and when the expired account is bankrupt the need to pay thus becomes a current year need. (Emphasis added.)

The BNA article correctly points out that available appropriations may be used to pay bills unless otherwise prohibited by law. However, the article fails to mention the two statutory provisions that would prohibit using current funds to pay overobligations in prior year accounts. First, the Antideficiency Act prohibits an officer or employee of the government from (1) making or authorizing an expenditure or obligation in excess of the amount available in an appropriation or fund for the expenditure or obligation or (2) involving the government in a contract or obligation for payment of money before an appropriation is made [\*7] unless otherwise authorized by law. 31 U.S.C. @ 1341(a). See also 41 U.S.C. @ 11. Second, and complementing the Antideficiency Act, is the Bona Fide Needs statute, 31 U.S.C. @ 1502(a). This statute provides that the balance of a fixed period appropriation or fund is available only for the payment of expenses properly incurred during the fixed period or to complete contracts properly made within the fixed period and obligated consistent with the 31 U.S.C. @ 1501.

The purpose of 31 U.S.C. @ 1502(a) is to restrict the use of fixed period appropriations to expenditures required for the service of the particular period for which they are made. Consistent with section 1502(a), a claim against a fixed period appropriation, when otherwise proper, is chargeable to the appropriation for the fiscal year in which the liability was incurred. The same rule requires that all liabilities and expenditures attributable to contracts made within the period of availability of a fixed period appropriation remain chargeable to that appropriation. 55 Comp. Gen. 768, at 773 (1976). n1

n1 Our Office has applied these statutory requirements to resolve whether agencies should obligate current or expired appropriations for contract changes occurring after the appropriation initially obligated by the contract expires and therefore is no longer available for incurring new obligations. A contract change which exceeds the general scope of the original contract, commonly referred to as an outside-the-scope change, like any new obligation, is chargeable to funds current at the time the change is made. 37 Comp. Gen. 861 (1958); B-207433, Sept. 16, 1983. See also, 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, Aug. 2, 1983; B-224702, Aug. 5, 1987.

In contrast, a contract change authorized by and enforceable under the

provisions of the original contract, commonly referred to as a within-the-scope change, is considered an antecedent liability. In other words, the original contract makes the government liable for a price increase under specified conditions and the subsequent contract change makes that liability fixed and certain. Therefore, the liability relates back to the original contract and the price increase to pay the liability is chargeable to the appropriation initially obligated by the contract. 59 Comp. Gen. 518 (1980). 44 Comp. Gen. 399 (1965); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938). [\*8]

When a contract is obligated against a fixed period appropriation and costs chargeable to that appropriation exceed the amount available, 31 U.S.C. @ 1502(a), in the absence of any other legal authority, precludes the use of current appropriations to fund the prior year contracts since such transactions constitute neither the payment of expenses properly incurred nor the completion of contracts properly made within the current year. 55 Comp. Gen. at 774. Significantly, the cited decision reflects one instance where the Congress specifically rejected a request by the Army to use current appropriations to fund prior year overobligations because of the Army's failure to comply with the Antideficiency Act's reporting requirement. 55 Comp. Gen. at 770-771.

Thus an overobligation of a prior year appropriation is a reportable violation of the Antideficiency Act. In addition, the Bona Fide Needs statute precludes an agency from charging an overobligation to current appropriations unless the Congress so authorizes. Alternatively, Congress could make a deficiency appropriation to the prior year account to cover the overobligation.

#### Effect of the 1990 Account Closing Amendments

The [\*9] 1990 amendments to the account closing law, 31 U.S.C. @@ 1551-1558, as amended by Pub. L. No. 101-510, @ 1405(a), 104 Stat. 1675 (1990), did not alter the requirements discussed above. Rather they revitalized the application of the Antideficiency Act and the Bona Fide Needs statute to expired accounts. For example, 31 U.S.C. @ 1553(a) provides that an expired account retains its fiscal year identity and remains available for recording, adjusting, and liquidating obligations properly chargeable to that account. In addition, 31 U.S.C. @ 1554(a) provides that any audit requirement, limitation on obligations, or reporting requirement that is applicable to an appropriation account shall remain applicable to that account after the end of the period of availability for obligation of that account. Finally, 31 U.S.C. @ 1553(b) authorizes payment of valid obligations properly chargeable to closed accounts from current appropriations subject to certain limitations.

The account closing amendments of 1990 originated in a Senate amendment to the National Defense Act for fiscal year 1991. On the same day that the House of Representatives began consideration of the Conference Report containing [\*10] the Senate amendments, the House of Representatives adopted H.R. 5645, the Expired Funds Control Act of 1990, containing, insofar as relevant here, almost identical language to the Senate account closing amendments. n2 The House agreed to the Conference Report on the following day. n3

n2 136 Cong. Rec. H11904-H11906 (daily ed. October 23, 1990).

n3 136 Cong. Rec. H13534 (daily ed. October 24, 1990).

The report of the House Government Operations Committee accompanying the Expired Funds Control Act of 1990 makes clear that the amendments were intended to be implemented in compliance with the Antideficiency Act and the Bona Fide Needs statute. The Committee Report explains the amendments as follows:

Section 1553(a) clarifies the availability of expired funds to pay obligations. It restates current law, which permits the use of funds in expired accounts only for obligations properly chargeable to those accounts. Obligations are "properly chargeable" to an expired account when they reflect "bona fide needs" of the period of availability of the expired account (31 U.S.C. @ 1502) and meet other requirements set forth in statutes and Comptroller General and court decisions [\*11] for obligations of appropriated funds, including the Antideficiency Act (31 U.S.C. @ 1341 et seq.), requirements for proper recording of obligations, (31 U.S.C. @ 1501), and the requirements that appropriated funds be used only for the purposes for which they are appropriated (31 U.S.C. @ 1301) . . . .

In order for an obligation to be eligible for liquidation with current funds under amended section 1553(b), it must have been "properly chargeable" to the closed account, both as to purpose and in amount. Subsection 1553(b) is not intended to provide an exception to the Antideficiency Act or to permit an agency to cure an incipient Antideficiency Act violation by charging an overobligation to current funds. This section is meant to provide a mechanism for the liquidation only of obligations that would not have caused a violation of the Antideficiency Act had they been charged to the account to which they would have been chargeable had available balances not been rescinded.

Section 1554(a) makes clear that, unless otherwise specifically provided by statute, audit requirements, limitations on obligations, and reporting requirements that are applicable to any current account also [\*12] are applicable to that account after the end of its period of availability. In other words, the expiration of an account shall not be deemed to terminate, discontinue, or otherwise diminish any legal restrictions on the use of funds in that account. Unless otherwise provided, the Antideficiency Act (31 U.S.C. @@ 1341 et seq.), the "bona fide needs" rule (31 U.S.C. @ 1502), requirements for proper recording of obligations (31 U.S.C. @ 1501), and other limitations on the use of appropriated funds set forth in statutes and in Comptroller General and court decisions apply to expired accounts to the same extent they apply to current accounts. n4

n4 H.R. Rep. 101-898, 7-8 (1990).

Clearly, the 1990 amendments left unchanged the rule that if adjustments to obligations properly chargeable to an expired account result in overobligating the expired account, the overobligation constitutes a reportable violation of the Antideficiency Act. Further, the law makes no provision for paying overobligations of expired accounts, and our decisions make clear that absent congressional authorization, the overobligations may not be charged to current appropriations. To now hold otherwise would [\*13] be inconsistent with the legal rationale underlying the Committee's statement that section 1553(b) does not authorize agencies to charge overobligations of closed accounts against current appropriations.

Consequently, agencies must report overobligations of expired accounts to the Congress and, when necessary, request additional funding to cover the overobligation or obtain authority to charge the overobligation to the

71 Comp. Gen. 502; 1992 U.S. Comp. Gen. LEXIS 995, \*13

agencies' current appropriations. In our opinion, this approach provides an incentive to agencies to discipline themselves to stay within funding limitations and to assure the integrity of government financing and accounting.

However, absent congressional authorization, there is no authority for agencies to charge overobligations of expired or closed accounts to current appropriations. Consequently, even though the overobligation may reflect a liability of the government, payment may not be made until the agency receives the requisite authorization from the Congress. Since this may result in a payment delay on which interest penalties may be accruing, n5 the agency should report any violations immediately to Congress for its consideration and action as described [\*14] above.

n5 See, 31 U.S.C. @ 3902(d) which provides that:

The temporary unavailability of funds to make timely payment due for property or services does not relieve the head of the agency from the obligation to pay interest penalties under this section.

The report of the Committee on Government Operations accompanying section 3902(d) states that it was proposed to explicitly codify our opinion (B-223857, Feb. 27, 1987), holding that where an agency was authorized to pay contracts from borrowed funds and the statutory ceiling on the agency's borrowing authority precluded the agency from borrowing the funds necessary to pay the contractors, interest accrued on the debt and a reportable violation of the Antideficiency Act occurred. H.R. 100-784, 20 (1988).

#### DOD DEPUTY IG'S PROPOSAL TO AMEND THE ANTIDEFICIENCY ACT

##### Background

The Antideficiency Act requires that the head of an agency report Antideficiency Act violations (regardless of whether they are knowing and willful or inadvertent) immediately to the President and Congress and include in its report on such violations all relevant facts and a statement of actions taken. 31 U.S.C. @@ 1351 and 1517(b). The [\*15] law is silent as to what are "relevant facts" and whether the actions taken by the agency must be completed before the report is submitted. The Office of Management and Budget Cir. No. A-34, Revised August 25, 1985, Part III, 32.3, 32.4, specifies what information Executive branch agencies are to provide in Antideficiency Act reports.

Your letter states that the Deputy Inspector General for the Department of Defense has recommended that Congress amend the Antideficiency Act to subject an officer or employee of the United States Government or the District of Columbia Government having knowledge of violations of the Antideficiency Act:

--to administrative discipline for failing to report such violations within 30 days of obtaining such knowledge; and,

--to criminal penalties for knowingly and willfully failing to report such violations within 30 days of obtaining such knowledge.

Your letter further states that the Deputy IG's recommendation is a result of findings contained in a report by the Assistant Inspector General for Audit Policy and Oversight n6 that focuses on DoD's processing of potential/apparent

Antideficiency Act violations. The IG report is based on identified [\*16] potential/apparent violations of the Antideficiency Act that are required to be reported to the Assistant Secretary of Defense (Comptroller) by DoD Directive, 7200.1, enclosure 5 (May 7, 1984). The report discloses that some overobligations had not been reported to the ASD(C) as required by the Directive, although the reasons for this are not given.

n6 Inspector General, Department of Defense, Survey Report on the Review of Processing of Violations of the Antideficiency Act, Rep. No. APO 91-015 (July 31, 1991).

The report indicates that it has taken anywhere from two months to seven years to process Antideficiency Act reports and to submit them to the President and Congress. The report indicates (1) that decentralization of the responsibility for processing (controlling, administering and reporting) the Antideficiency Act violations within DoD resulted in inexperienced personnel regularly handling matters relating to the violations, and (2) that multilayered administrative, legal and investigative processing of violations, were the primary causes of the processing delays. The report recommends centralized processing of Antideficiency Act violations by trained personnel [\*17] as a solution to DoD's problem. It also recommends developing guidelines for imposing administrative penalties on responsible oversight or management personnel who do not timely report Antideficiency Act violation that they are aware have occurred and to use the guidelines to assure consistent application of administrative penalties.

However, the report does not disclose any instances of undisclosed potential violations (i.e., potential violations that had not been identified by internal audit controls although they may not have been reported to the ASD(C)). As to the failure to report to the ASD(C), the report does not attribute this to deliberate efforts to conceal violations. Additionally, the report does not disclose whether any potential violations were avoided altogether under the old account closing process. n7 Also, the report does not disclose whether any violations resulted in DoD requesting either additional funding or authority to use current appropriations to cover the overobligations. Finally, we have no information on whether other agencies are experiencing similar problems in processing Antideficiency Act violations or the length of time other agencies take [\*18] to report a violation to the Congress and the President once they determine a violation has occurred.

n7 However, the report discloses one instance where a violation of the Antideficiency Act occurred in October 1983, was discovered in May 1986, was covered in June 1988 by using funds from the "M" account, and was reported to the President and the Congress in December 1989.

While the IG's report does indicate that DoD has experienced problems in processing Antideficiency Act violations, it does not persuade us that enactment of the governmentwide criminal or administrative sanctions suggested by the Deputy IG will improve compliance with the act. Criminal and administrative sanctions already are available for the knowing and willful failure to disclose Antideficiency Act violations under statutes already enacted. Further, the 1990 amendments to the account closing law reduces the likelihood that Antideficiency Act violations will go undisclosed.

Current Criminal Penalties for Nondisclosure

Knowing and willful violations of the Antideficiency Act prohibitions are Class E felonies by virtue of 18 U.S.C. @ 3359(a)(1)(E) which provides that any offense punishable by [\*19] a maximum term of imprisonment of less than 5 years but more than 1 year is a Class E felony. 31 U.S.C. @@ 1350, 1519, provide for imprisonment of up to 2 years for knowing and willful violation of the Antideficiency Act. By virtue of 18 U.S.C. @ 4, concealment of the commission of a felony is itself a felony, punishable by a fine of not more than \$ 500 or imprisonment of not more than 3 years, or both. See also: 18 U.S.C. @ 2 making it an offense to aid another in the commission of a criminal offense; 18 U.S.C. @ 3 making it an offense to assist an offender or to hinder his apprehension, trial or punishment; and 18 U.S.C. @ 371 making it an offense to conspire to commit an offense. Finally, in this regard, 18 U.S.C. @ 1001 provides that:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$ [\*20] 10,000 or imprisoned not more than five years, or both.

We have held that where agencies are authorized to incur obligations in excess of appropriations available to pay the obligations, i.e., where the agency has contract authority, the obligations should be recorded against the account even though payment may not take place until Congress provides supplemental or liquidating appropriations. 65 Comp. Gen. 4 (1985). In such circumstances the overobligation is not a violation of the Antideficiency Act. However, in our opinion, the distinction between an authorized and an unauthorized overobligation does not warrant a different treatment regarding the recording of obligations constituting violations of the Antideficiency Act. As we noted in our decision, it is the incurring of the obligation in excess of available appropriations and not the recording of the obligation that constitutes the violation of the Antideficiency Act. 65 Comp. Gen. at 9. In fact, we consider the failure to record an obligation for the purpose of concealing a violation of the Antideficiency Act a violation of 31 U.S.C. @ 1501. Thus such overobligations should be recorded in the accounts. n8 However, merely [\*21] recording the overobligation does not authorize its payment until budget authority is provided by Congress.

n8 Furthermore, this information is required to be contained in the President's budget. 31 U.S.C. @ 1108(c).

Applying the rationale of the above cited decision to the provisions of Title 18, U.S.C., discussed above, the knowing and willful failure to record an overobligation in an account in order to conceal a violation of the Antideficiency Act would be an offense under existing law. B-132900-O.M., Nov. 3, 1977. Further, the knowing and willful charging of an obligation to an improper account in order to conceal a violation of the Antideficiency Act would likewise be an offense under existing law. However, in order to make this explicit and resolve all doubts on this matter, consideration may be given to amending the obligation recording statute, 31 U.S.C. @ 1501, by adding the following subsection:

(c) All obligations as defined in subsection (a) of this section shall be

promptly recorded against the proper appropriation account.

#### Avoiding Antideficiency Act Violations Under Former Account Closing Law

Under the former account closing law, Antideficiency [\*22] Act violations could be avoided altogether by delaying recognition of the overobligation until the obligations had reached the "M" accounts and the merged surplus authority was available to cover the overobligation. Once obligations were transferred to the "M" accounts and the unobligated balances were transferred to the merged surplus authority, they lost their fiscal year identity. Adjustments to obligations that would have violated the Antideficiency Act if recorded in the expired account prior to transfer would not be violations if recorded in the "M" account unless they exceeded the merged surplus authority, or exceeded some independent legal limitation on costs. n9

n9 See, GAO, Strategic Bombers: B-1B Program's Use of Expired Appropriations (NSIAD-89-209, B-235114, September 5, 1989).

The reforms instituted by the 1990 amendments to the account closing law have eliminated this avenue for avoiding Antideficiency Act violations. Similarly, the agencies' ability to avoid the disclosure of overobligations by delaying the recognition of obligations is greatly diminished since at some point they must be paid. At that point they would be subject to disclosure through [\*23] agency action or internal or external audits. Further, the 1990 amendments subject expired accounts to the same audit scrutiny that is given current appropriations. 31 U.S.C. @ 1554(a). Thus, we do not think it is necessary to amend the law to require Antideficiency Act reports under the threat of criminal or administrative penalties since (1) the merged surplus is no longer available to cure overobligations in accounts and (2) agencies are required by law to provide the same degree of oversight to expired accounts that they provide to current accounts.

MATTER OF: EPA Level of Effort Contracts - Appropriation  
Availability

B-214597

Comptroller General of the United States

65 Comp. Gen. 154; 1985 U.S. Comp. Gen. LEXIS 27; 86-1 Comp.

Gen. Proc. Dec. P216

December 24, 1985

HEADNOTES:

[\*1]

1. The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule.

2. The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification.

OPINION:

This is in response to a request from C. Morgan Kinghorn, Comptroller of the Environmental Protection Agency (EPA), for a decision regarding the propriety [\*2] of issuing a hypothetical nonseverable work assignment under a cost-reimbursement, level of effort, term contract, in which the effort furnished will extend beyond the contract's initial period of performance. EPA has also asked informally whether it may modify an existing level of effort contract to accommodate a work assignment extending beyond the term of the original contract to be funded with appropriations available during the initial contract period. Although the contract described in EPA's hypothetical also contains options to extend the contract for additional periods of performance,

EPA recognizes that performance under any options would be funded with appropriations available during the fiscal year covered by the option period. EPA's second question, however, is whether a modification, prior to option exercise, extending performance beyond the end of the fiscal year during which the original period of performance takes place, may encumber the funds of the expiring fiscal year.

For the reasons set forth below, we conclude that EPA may not issue a work assignment extending beyond the term of a level of effort contract, nor may it modify the term of an existing level of [\*3] effort contract to accommodate such a work assignment.

Background: EPA uses level of effort, term contracts to perform service-intensive type work, including, for example, economic cost and benefit analyses and technical analyses of hazardous waste regulations. Typically, EPA, through its level of effort term contracts, purchases, on a cost-reimbursement basis, a specified quantity of person-hours (the level of effort) for the contract's base period and each option period. The contract's estimated cost is established, based upon a maximum number of hours set forth in the contract. EPA is obligated to order and the contractor is obligated to furnish the specified level of effort within the time period set forth in the contract. The contract provides for a downward adjustment in the contractor's fees if the contractor provides less than 90 percent of the specified level of effort. The contract's scope of work merely sets forth the broad outlines of the type of work to be performed. During the term of the contract, EPA issues work assignments which draw on the contract's specified quantity of person-hours and require the contractor to work on a specific task.

EPA raises the [\*4] following hypothetical situation:

"Assume a level of effort, work assignment contract is awarded October 1, 1982, with a period of performance through September 30, 1983. The contract has an option for one additional year running from October 1, 1983, through September 30, 1984. Both the basic period of performance and the option year are for 10,000 professional hours for each period. Assume that the contractor has provided 9,000 hours as of September 25, 1983 and EPA issues a work assignment on September 26, 1983, for 1,000 hours. The contractor will provide the bulk of hours in FY 1984. The work assignment, when viewed alone, is for nonseverable services."

For purposes of our analysis of this hypothetical situation, we have assumed what EPA has implied but not stated, that the contract is being funded under an appropriation that is available for obligation only through the end of the contract term. n1

n1 Our assumption is based on statements in EPA's inquiry letter such as "so long as a nonseverable work assignment was issued during the period of availability of a particular appropriation \* \* \*." P.4. We are aware that EPA generally receives appropriations which are available for 2 fiscal years, but the principles remain the same. [\*5]

EPA asks two questions regarding this hypothetical situation. The first question is whether it properly may issue the 1,000 hour work assignment on September 26, 1983, recognizing that the contractor will provide the bulk of hours in fiscal year 1984. The second question is whether it could modify the terms of a level of effort contract to accommodate a work assignment extending beyond the term of the contract.

Analysis: We conclude that in the hypothetical situation posed by EPA, the issuance of a work assignment which could not be completed within the contract's initial term of performance, i.e., by September 30, 1983, would have violated both the Federal Procurement Regulations (FPR) n2 and the "bona fide need" rule, 31 U.S.C. @ 1502(a). As EPA concedes, EPA's level of effort contracts fall squarely within the FPR definition of "term contracts." Section 1-3.405(e)(2) of the FPR provide:

"The Term form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time for the conduct of research and development."

The FPR further provide in section 1-3.405(e)(5): [\*6]

"In no event should the term form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time." (Emphasis added.)

Accordingly, to permit a contractor to provide a portion of the required 10,000 professional hours beyond the basic period of performance, i.e., after September 30, 1983, would be contrary to the FPR requirement that such term contracts "provide a specific level of effort within a definite period of time."

n2 The FPR, rather than the Federal Acquisition Regulation (FAR), governed procurements by civilian agencies during the time period specified in EPA's hypothetical questions. However, the FAR has nearly identical provisions. See FAR 16.306(d)(2) and (4).

Further, the issuance of a work assignment which could not be completed within the contract's initial term of performance would also violate the bona fide need rule. The bona fide need rule requires that appropriations made available for obligation during a given fiscal year or years may be obligated

only to meet a legitimate need arising in that fiscal year (or years). 31 U.S.C. @ 1502(a) (1982). See, e.g., [\*7] 38 Comp. Gen. 628 (1959).

As a general rule, service contracts can extend beyond the duration of an appropriation period only when the portion of the contract to be performed after the expiration of the appropriation period is not severable from the portion performed during the prior period. See 60 Comp. Gen. 219 (1981). In the EPA case, the level of effort contract is, by definition, a severable services contract. It requires the performance of a certain number of hours of work within a specified time period rather than requiring the completion of a series of work objectives. Because the original contract in EPA's hypothetical is for 10,000 hours of work to be performed in fiscal year 1983, funds obligated under the contract may not be expended for work performed within fiscal year 1984. See B-183184, May 30, 1975. The fact that a work assignment issued under the contract late in the fiscal year might, by its nature, be considered nonseverable if this were what the FPR (as well as the FAR) call a "completion" form of term contract, does not change the result in this case. A completion contract would require the contractor to complete and deliver a specified end product-- [\*8] e.g., a final report. As long as the end product is a bona fide need of the year in which it was ordered, the funds could remain obligated until the end product was delivered. See FPR 1-3.405(e)(1) and FAR 16.302(d)(1). In contrast, the EPA hypothetical contract calls for 10,000 work hours before the end of the fiscal year. Performance of those hours in the next fiscal year would not be consistent with the requirements of the contract.

The second question raised informally by EPA is whether it may modify the original contract to accommodate the completion of a work assignment, performance of which will extend beyond the end of the contract period of performance. In raising this question, EPA says it recognizes that a modification cannot be issued which extends the term of the contract beyond the period of availability of the fiscal year appropriation to be charged. Essentially, EPA is asking whether it may amend a level of effort contract near the end of the fiscal year to provide for the performance of a nonseverable task, performance of which will extend beyond the end of the fiscal year. As noted, EPA's modification would be for the purpose of funding the modification [\*9] with expiring appropriations. Any options exercised, of course, would be funded with currently available appropriations.

The determination of whether a particular modification should be treated as a new procurement is generally decided on a case-by-case basis. For example, we have held that if the contract as changed is materially different from the contract for which the original competition was held, the new requirement should be procured competitively, unless a noncompetitive procurement is justifiable. 57 Comp. Gen. 285, 286 (1976).

The essential characteristics of a level of effort contract are the stated level of work and the term in which that work is to be performed. Therefore, any change in that structure -- particularly a change from a specified level of effort for a fixed term to the performance of specified, non-severable tasks -- would "substantially" change the contract such that "the contract for which competition was held and the contract to be performed are essentially different." Accordingly, we conclude that a modification of the sort suggested by EPA to a level of effort contract could not be done by contract modification, but rather would require the execution [\*10] of a new contract. This is because EPA's suggested modification would turn a level of effort contract into a contract for one or more nonseverable tasks.

In a memorandum prepared by the EPA Office of General Counsel on this issue before it was submitted to us, the suggestion was made that use of indefinite quantity or requirements contracts would eliminate the end of year problems encountered with level of effort term contracts. We would agree that the kind of services explained in EPA's hypothetical question could be acquired under such an arrangement, provided that the nature of the services themselves is nonseverable. It appears that the most satisfactory form of contract, for EPA's purposes, may be the completion contract, described earlier as requiring a specific end product as a condition for payment of the full fee and costs. As a nonseverable contract, performance could extend into a subsequent year but be payable from funds obligated at the time the contract was executed. See FAR 16.306(d)(1), (2), and (3).

1ST CASE of Level 1 printed in FULL format.

Decision of Comptroller General Socolar

B-235678

Comptroller General of the United States

1990 U.S. Comp. Gen. LEXIS 1376

July 30, 1990

OPINION:

[\*1]

The Honorable Beverly R. Byron  
House of Representatives

Dear Ms. Byron:

This responds to your May 19, 1989, letter requesting our opinion on the use of 2-year research and development appropriations to pay for various tasks under a cost-reimbursement contract between the Navy Space and Naval Warfare Systems Command (SPAWAR) and the Applied Physics Laboratory (APL) at Johns Hopkins University. Specifically, you ask whether the SPAWAR Deputy Commander properly has concluded that the appropriations may not be used to pay for certain work performed after the term of the appropriation has expired. Your concern with that conclusion is that it generally is impractical for a researcher to stop an ongoing project at the term's end to await further funding.

Background

Under the contract between SPAWAR and APL, SPAWAR acts as the contracting agent for numerous military and civilian agency sponsors. Many of the tasks are financed by several appropriations, including 2-year research and development appropriations. Historically, the SPAWAR/APL agreement has been a level-of-effort contract covering the calendar year. At the time the contract is issued the precise work to be performed is not [\*2] known. All work is performed under the contract pursuant to letters issued by the Navy from time to time describing specific tasks to be performed.

On December 8, 1988, the SPAWAR Deputy Commander issued a memorandum concluding that payments under level-of-effort contracts could not be made from multiyear appropriations for work performed after the date on which the funds no longer are available for obligation. This meant, for example, that under the SPAWAR/APL contract 2-year research and development appropriations obligated to support various level-of-effort contract tasks could only be used for work done during the 2 fiscal years--they could not fund work performed after September 30 of the second year, even though there would be 3 months left to the contract's term (the last 3 months of the calendar year).

The Deputy Commander's memorandum was prompted by our decision in EPA Level of Effort Contracts - Appropriation Availability, 65 Comp. Gen. 154 (1985), where we considered the propriety of issuing a hypothetical 1,000-hour assignment under a cost-reimbursement, level-of-effort (also called a term) contract that covered a period coinciding with the fiscal year, where [\*3] the assignment would not be finished in the contract's period. A level-of-effort contract is

a type of cost-plus-fixed-fee agreement where the scope of work is described in general terms and the contractor is obligated to devote a specified level of effort for a stated time period. Federal Acquisition Regulation (FAR) @ 16.306(d)(2). The contract involved in the EPA decision provided for payment for up to 10,000 hours of work (the level of effort) actually performed during the contract's term (the fiscal year). We concluded that both the contract itself and the "bona fide need" rule would preclude EPA from issuing the work assignment, because it would have carried a portion of the 10,000 allowable hours past the contract's term, to be paid for with money available only within the term. The bona fide need rule, found at 31 U.S.C. @ 1502 (1988), precludes an agency from obligating, without express statutory authority, an appropriation made for a specified period for the needs of subsequent periods.

In your letter to us you question the soundness of the Deputy Commander's view, and you include a legal memorandum prepared for APL which supports this position. You suggest that the [\*4] bona fide need rule should not preclude the Navy from using a properly obligated multiyear appropriation to pay research and development contractors for a period of performance extending beyond the period in which the appropriation could be obligated.

To better understand the Navy's position, we requested its views. The Navy General Counsel's office informed us that it believes the Deputy Commander's determination restricting continued use of expired research and development funds on level-of-effort task orders is consistent with General Accounting Office (GAO) decisions.

The Navy General Counsel, however, questioned our Office's recent decisions applying the bona fide need rule to multiyear appropriations, maintaining that the bona fide need prohibition should only apply to annual appropriations. The Navy General Counsel suggests that the bona fide need concept makes sense when applied to 1-year operations and maintenance or military personnel funds since they are expense appropriations and describe what is needed for a particular fiscal year. On the other hand, "investment" accounts, such as research and development appropriations, have nothing to do with the requirements or [\*5] needs of a particular period of time. Instead, they involve expenditure of funds for investment items needed for many years. According to the Navy General Counsel, until recent GAO decisions it had been a Department of Defense practice to apply bona fide needs analyses only to annually funded contracts. The Navy General Counsel states that this practice was changed consistent with GAO's decisions.

#### Discussion

We continue to believe that the bona fide need rule applies to multiyear appropriations as well as to single-year appropriations. See 68 Comp. Gen. 170, 171 (1989); 55 Comp. Gen. 768, 773 (1976). As we discussed in 64 Comp. Gen. 359 (1985), n1 the bona fide need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of the Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year's operations to be returned to the Treasury so that it could be reappropriated the following year in accordance with the Congress's current priorities. Of even more importance to the Congress today, a limited [\*6] period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how

much is needed to carry on the program at the same or a different level.

n1 The decision concerned application of the bona fide need rule to 3-year National Institutes of Health research grants.

Similar congressional concerns have been voiced specifically with regard to congressional oversight of multiyear appropriations. In 1974 a subcommittee of the Senate Committee on Appropriations complained that unauthorized multiyear funding inhibited the Congress's ability to increase or decrease the levels of funding for specific programs because the agency did not have to return each year to justify the need of continued support for grants made in the previous year. See 64 Comp. Gen. 359 at 362-3, discussing S. Rep. No. 814, 93d Cong., 2d Sess., 65-66.

In our decision in 64 Comp. Gen. 163 (1984), we rejected an argument by the Army that the bona fide needs rule has no application to "investment" accounts, as opposed to "operating" or "expense" accounts, essentially the same argument now made by the Navy General Counsel. As we [\*7] pointed out in that decision, the Comptroller General and his predecessor, the Comptroller of the Treasury, have issued a great many decisions on this topic, applying the rule to all types of activities n2 for which the Congress has seen fit to limit the period of availability of the funds it appropriates to support them. We declined then to reconsider those decisions in view of the lack of evidence in legislative history or otherwise to support the distinction the Army sought to have us draw.

n2 We have held that the bona fide need rule applies to all federal government funding activities carried out with appropriated funds, regardless of whether the funding mechanism is a contract, grant, or cooperative agreement. B-229873, Nov. 29, 1988.

The Navy General Counsel now would have us draw the same distinction, and we again decline to do so. In view of the purpose underlying the bona fide need rule, and frequently stated congressional concerns about the need to retain some control over funding decisions, we see no legal basis to alter our view that the bona fide need rule applies to multiyear appropriations as well as to single-year ones.

Your inquiry, however, has caused us [\*8] to reconsider the sweeping nature of the suggestion in our EPA decision that level-of-effort contracts are by definition severable, 65 Comp. Gen. at 156, particularly as it applies to research and development contracts like those awarded to APL.

In EPA, we objected to the work assignment in issue essentially for two reasons. First, performance past the contract period clearly would have violated the contract requirement that work be done within the period expressly covered; that was clear from the record furnished by the requester. Second, we said that the bona fide need rule precluded ordering any level-of-effort work that would be performed in the next fiscal period based on our conclusion that the hypothetical level-of-effort contract was "by definition" severable. 65 Comp. Gen. at 156.

The concept of severability is at the heart of the bona fide need rule. A task is severable if it can be separated into components, each of which can be independently performed to meet a separate need of the government. See 60 Comp. Gen. 219 (1981). As we have already said, the bona fide need rule generally

precludes an agency from obligating a time-limited appropriation to meet [\*9] the needs of a subsequent period. If a task is severable, therefore, the separate components that comprise it must be funded by the appropriation for the period in which the need for each component arises.

A non-severable task, on the other hand, involves work which cannot be separated into components, but instead must be performed as a single task to meet a need of the government. See 60 Comp. Gen., supra. It follows, then, that the bona fide need rule does not preclude using time-limited funds for work performed in the next fiscal period in connection with a non-severable task, since the later effort is viewed as an inseparable continuation of work to fulfill a need that arose during the appropriation's period of availability.

The level-of-effort contracting approach is founded on considerations other than severability. An agency generally has two choices of contract form in entering into a cost-plus-fixed-fee arrangement like the Navy's agreement with APL. The preferred form is the completion one, in which the contract describes the scope of work by stating a definite goal or target and specifying an end product. The completion form normally requires the contractor to [\*10] complete and deliver the specified end product within the estimated cost, if possible, as a condition for payment of the entire fixed fee. FAR @ 16.306(d)(1),(3).

The level-of-effort form, in contrast, is used if the agency can describe the scope of work only in general terms, and requires a specified level of effort for a stated time period. FAR @ 16.306(d)(2). The contractor is paid for allowable costs incurred, and the fixed fee is payable at the end of the period if performance is deemed satisfactory. In both cases, there is work to be completed and, often, a reported result; the essential difference involves the specificity with which the work can be defined.

Thus, a level-of-effort contract is not defined by severability, as our EPA decision suggests. Instead, it represents a contracting arrangement dependent on the government's inability to define the needed work in advance. The arrangement provides a basis for measuring performance and the right to payment when the work to be performed cannot otherwise be defined in sufficient detail. Severability, and the bona fide need rule, are appropriations concepts that concern the extent to which the needed work can be divided [\*11] into independent components meeting separate needs.

This does not mean that level-of-effort work is not in many instances severable. It is often the case that the work an agency is unable to define precisely enough for a completion contract involves the kind of recurring tasks that meet an independent need of the government each time they are performed. In that event, the concept of severability applies and the bona fide need rule precludes funding such work in the next fiscal year with appropriations that expire within the current year. The hypothetical economic research contract involved in our EPA decision falls in this category.

On the other hand, we believe there can be level-of-effort work, as that term is used in the FAR, which is non-severable. As APL suggests, research and development contracts in particular may well give rise to non-severable level-of-effort tasks in some circumstances.

Under APL's contract, no performance takes place until a proposal for specific work under the contract has been approved and the contract modified to provide

for the performance of tasks to carry out that work. APL argues that in some cases these task orders, while properly issued [\*12] on a level-of-effort basis under the requirements of the FAR because the work can be described in only general terms, are nonetheless not severable. Some tasks, for example, require the commitment of facilities and other resources the full value of which may be realized only if all work called for in the task order is completed.

In sum, the fact that a task under the APL contract is executed on a cost-reimbursement, level-of-effort basis does not mandate a determination that the work is severable for purposes of the bona fide need rule. Rather, it is the nature of the work being performed, not the contract type, that must be taken into account in reaching a judgment on that issue. That judgment is to be based on all the facts and is, in the first instance, the responsibility of the Navy. To the extent that our decision at 65 Comp. Gen. 154, supra, suggests otherwise, it is modified accordingly.