

## **Take the Money...and Keep it!**

These days numerous AMC organizations are studying ways to bring in more dollars, realizing that growth is the only alternative to the death-of-a-thousand-cuts management style that has been forced on us from on high. However, even if you find an organization willing to fund your work, you may find it difficult to keep the money with which it pays you. The intent of this note is to point out some pitfalls as well as some of the ways these pitfalls may be avoided.

### **The Problem**

The difficulty in the use of outside funds stems from the conjunction of two Congressional statutes with a legal doctrine promulgated by the Comptroller General. The **Purpose Statute** (31 USC 1301(a)) prohibits using one appropriation to pay costs associated with the purposes of another appropriation. When this statute is violated, the Comptroller General says that there has been an **Augmentation of Appropriation** with regard to the second appropriation. The reason this is forbidden goes all the way back to the Constitution. Congress' "power of the purse" derives directly from Article I Section 9. The rationale is that Congress gives you exactly the amount of funding it wants you to have and you are not supposed to get more.

Suppose, however, that the money comes, not from another Government agency but from an outside source such as a business or university. Although this avoids the Purpose Statute problem, we still have an Augmentation of Appropriation. As a result, under the **Miscellaneous Receipts Statute** (31 USC 3302(b)) such outside funds must be deposited with the Treasury.

### **A Few Solutions**

Fortunately, there are several exceptions to this general rule. The one in most general use is the **Economy Act** (31 USC 1535) which allows Government agencies to place orders for goods and services with other Government agencies. The restrictions on use of the Economy Act need not concern us here, since they are the responsibility of the ordering agency. However, there are other issues which are our concern. For example, suppose you run a 6.1 R&D activity and you receive an order for the type of research you do backed by OMA funds coded for real property maintenance. It would appear that your use of these funds would violate the Purpose Statute. Ordering organizations may then object that these "are the only funds they have." The proper answer would seem to be that in that case, absent some sort of reprogramming, it would appear that Congress is saying that organization is not supposed to do or fund R&D.

Sometimes it is not obvious whether a given organization is a Government agency which may properly use the Economy Act. The ARL Legal Office has had to make such determinations regarding the Postal Service (we concluded that it was part of the Federal Government) and various DOE labs. Some of the latter cases have been particularly difficult. DOE runs its laboratories as GOCOs, Government Owned, Contractor Operated facilities. This means that Argonne, for example, is not a single entity. It is

owned by the Government, but run by a contractor. However, so much day to day responsibility has been given to contractors that, in my experience, they often forget that they are not the Government. We will often want to cooperate with such entities but we will not be able to accept checks from the contractor; it will be necessary for the ordering agency's contracting officer to have a MIPR or similar document sent to us.

Now consider the case where the funds are to come from what is clearly a non-Government organization. There are a limited number of specific exceptions to the Miscellaneous Receipts Statute that allow us to keep the money in-house.

**Warranties.** Recently, IOC wondered if it could keep refunds paid by Toshiba for defects in laptop computers as part of a class action settlement. The answer, from Matt Reres, "fiscal guru at OTJAG, DA" was that the funds did not have to go to the Treasury "because a refund received under a warranty clause may be considered an adjustment in the contract price, and therefore credited to the appropriation originally charged under the contract."

**Testing Services.** 10 USC 2539b gives DoD organizations the authority to "make available to any person or entity, the services of any government laboratory, center, range, or other testing facility for the testing of materials, equipment, models, computer software, and other items." Fees "not to exceed...the direct and indirect costs involved" are to be established. When collected, they "may be credited to the appropriations or other funds of the activity making such services available."

**Cooperative Research and Development Agreements (CRADAs)** are agreements between a Federal laboratory and a non-Federal party to conduct specified R&D consistent with the lab's mission (15 USC 3710a(d)(1)). The main purpose of the law is to encourage the transfer of commercially useful technologies from Federal labs to the private sector. Resources provided by the lab may be reimbursed by the non-Federal party and credited to the account initially charged for the expenditure.

Under a **Patent License Agreement**, inventions made by Federal employees may be licensed to the private sector for a fee. (See 35 USC 207-209). The money is divided up between the inventor and the lab director according to a specified formula. Recently, \$50,000 was deposited to an ARL account as the result of such a license. By 2004, if the licensed company is as successful as it believes it will be, royalty payments will be in the millions.

**Other Transactions** 10 USC 2371 provides for "transactions (other than contracts, cooperative agreements, and grants)...in carrying out basic, applied, and advanced research projects." Such a transaction may include a clause requiring a private sector partner to pay for receiving support. This payment may then be credited to a support account which may then be used for further support. Note that "other transactions" are to be

used only when it is not appropriate or feasible to use grants, cooperative agreements, or contracts. Use of this authority permits tailoring of certain requirements, as in the area of cost principles or data rights, which have in the past discouraged some firms from dealing with the Government.

This does not claim to be a comprehensive list of all authorities allowing us to retain outside funding. Others exist for various non-AMC organizations. (See for example, 33 USC 2323, with regard to Corps of Engineers labs.) Moreover, I am sure that others exist which *are* applicable to AMC major subordinate commands, but which I have not discovered. Therefore, I invite my readers to send me ([rrchase@arl.mil](mailto:rrchase@arl.mil)) their own list of relevant authorities. If I receive enough, there will be a follow-on article. Given all the improper methods by which our clients attempt to take in outside funds, it is important to be aware of every legal means of doing so.