

## The Bona Fide Needs Rule

The Anti-Deficiency Act, 31 United States Code (USC) § 1341(a), provides that the Government shall not enter into a contract or create an obligation for the payment of money in advance of the appropriation of funds for such purpose, or in excess of the amount available in the appropriation. The Bona Fide Needs Rule has its origins in a funding statute which first appeared in 1789, now codified at 31 USC §1502(a), which states:

... 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.

A fiscal year appropriation must be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. The statute has been interpreted to require that the contractor will “start work promptly and perform under the terms and conditions of the contract without unnecessary delay.” DFAS-IN 37-1 para.9.5c(3)(n).

In the case of maintenance and repair contracts, current year appropriations may be used for contract actions:

... awarded near the end of the FY even though contractor performance may not begin until the next FY. However, ... [c]ontracts awarded near the end of the FY must contain a specific requirement that work begin before January 1 of the following calendar year.

DFAS-IN 37-1, Table 9-1, footnote 6.

Guidelines for determining whether work has commenced by 1 January on a contract are 1) actual performance of work as determined by an on-site inspection, or 2) documentary evidence that costs have been incurred. DFAS-IN 37-1, Table 9-1, footnote 6. The requirement to commence work by 1 January of the following fiscal year has been termed the “90 Day Rule.”

Further interpretation of the Bona Fide Needs Rule has been provided by the General Accounting Office. For example, in *United States Department of Agriculture Forest Service*, B-235086, April 24, 1991, the Forest Service contracted to have two (2) bridges painted at the end of FY 1984, and because of environmental concerns, chose not to issue a “Notice to Proceed” to the contractor until May 1985. In that case, it was determined that the agency did not have a bona fide need for the services until FY 1985. Therefore, the General Accounting Office determined that FY 1984 appropriations should not have been used to fund the action.

The Army’s Judge Advocate General’s School, in its yearly fiscal law course, specifically recommends taking into consideration weather conditions in determining the existence of a bona fide need. The example used is that of a paving contract slated to commence on 15 October in Fairbanks, Alaska . In that situation, it was recommended that prior fiscal year appropriations not be used because of the likelihood that work would not commence before 1 January. *Fiscal Law Deskbook*, Chapter 4, para.IV.H., The Judge Advocate General’s School, Charlottesville, VA.

Acquisition personnel must ensure that the requirements of the Bona Fide Needs Rule are met. The failure of an agency to comply with the terms of the Bona Fide Needs Rule can result in a violation of the Anti-Deficiency Act and the imposition of civil and/or criminal penalties, to include disciplinary action under the Army Table of Penalties, AR 690-700.