

MAXIMIZING THE USE OF APPROPRIATIONS AFTER THEIR PERIOD OF AVAILABILITY FOR NEW OBLIGATIONS HAS EXPIRED.

BACKGROUND AND ISSUE. MLRS has \$1 million (plus) in FY 94 PA dollars being deobligated due to partial resolution of a reopener clause. I have informally advised MLRS/Acquisition Center/Resource Management that it is permissible under law to adjust a more recent contract (awarded in FY 96 with FY 96 funds) with those FY 94 funds. The adjustment is essentially an administrative "swap" of FY 94 for FY 96 dollars on an existing obligation. The deobligated FY 96 dollars then may be used for a new obligation prior to 30 Sep 98.

LEGAL THEORY. The reasoning below indicates that there is no statutory restriction on this type of administrative swap, and Resource Management representatives were unaware of any regulatory limitations. The undersigned is unaware of any case directly on this point. However, the GAO's Principles of Federal Appropriations Law (hereafter referred to as "the Redbook"), Second Edition, Volume 1, Chapter 5, Section 7, concerning contract modifications, supports this analysis. The analysis of this issue is somewhat complicated by the involvement of two (and possible three) statutes. Each statute must be separately applied to the facts to assure consistent legal theory and valid analysis. However, the simplest way to look at the situation is to recognize that if we knew at the beginning of each contract the exact amount of funds required to complete it, we could achieve initially the very same end result as that accomplished by the administrative swap of funds later in time. Therefore, unless the process or timing of implementing the swap contains a procedure or step prohibited by law, the result certainly is not prohibited.

1. TYPE OF FUNDS - PURPOSE STATUTE. 31 USC 1301(a) addresses the things (i.e., purposes) for which the appropriation may be obligated. In case analysis one must be careful not to assume that the reference to a specific "appropriation" implies a specific year. For example the phrase "appropriation obligated on the original contract" would refer to the type of appropriation and not the year. One must also be careful not to confuse the conclusion of a case (i.e., application of pure theory to the specific facts or the question asked), which often references a specific year appropriation, with the actual legal theory.

2. YEAR OF FUNDS - BONA FIDE NEEDS RULE. The rule is based in law and summarized by the GAO as follows: "A [time limited] 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 [years] for which the appropriation was made." This rule determines which year or years of the correct appropriation (i.e., type of funds) are available for the bona fide need.

a. Generally, an obligation made in FY 96 with a one-year appropriation must be paid for with only that FY appropriation. Exceptions include: severable services which must be funded in the year of actual service regardless of when awarded; certain discretionary price adjustments under cost contracts; as specifically authorized by law; etc.

b. An obligation made in one FY (e.g., FY 96) with a three year appropriation (e.g., PA funds) may be funded with three years of that type of appropriation (e.g., FY 94, 95 or 96) or any mix of those three years.

c. For completeness, it should be noted that a three year appropriation, e.g. FY 94 PA funds, is available for obligation for FY 94, 95 and 96 requirements. What often is overlooked is that those FY 94 funds can be obligated in FY 94 for the future FY 95 and FY 96 bona fide needs. This is known as making a multi-year contract with multiple-year funds. See the Redbook at page 5-36.

3. AMOUNT OF FUNDS - ANTI-DEFICIENCY ACT. 31 USC 1341(a)(1) prohibits (in relevant part) the making or authorizing of an expenditure or obligation exceeding (or in advance of) an amount available in an appropriation or fund for the expenditure or obligation.

CONCLUSION. By applying, singularly and carefully, the relevant statutes the proposed administrative swap appears to be legally permitted.

1. PURPOSE. If the funds contain the same accounting classification (but for the year), and allowing for any changes to such classifications, then the purpose is the same.

2. YEAR/TIMING. The only other question is whether using the FY 94 appropriation for the contract awarded in FY 96 meets the bona fide needs rule. Here we must distinguish between two uses of the same term: obligation. A contract award creates a new obligation, and such an award must occur during the period of availability for new obligation. A modification swapping funds creates no new obligation, although it does "obligate" funds on the contract. Clearly, the obligation of funds on prior contracts after expiration of their availability for new obligations (e.g., price increases under a change order to a FFP contract) is permitted and establishes that this proposed obligation in FY 98 of FY 94 funds on the FY 96 bona fide need/contract is not prohibited merely due to timing. As previously noted, a FY 94 PA appropriation may be properly obligated for a FY 96 bona fide need.

3. AMOUNT. The present situation does not raise any issues concerning the amount is sufficient.

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