



# Interagency Contracting: An Overview of Federal Procurement and Appropriations Law

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## Summary

Increased use of interagency contracting, coupled with widely reported incidents of mismanagement and Antideficiency Act violations involving interagency contracts, has made interagency contracting a topic of interest to some members of Congress and commentators. “Interagency contracting” is the term used to describe several procurement relationships between government agencies. The first is one of buyer and seller, where agency A directly purchases goods or services from agency B. Second is that of co-purchasers, where agency A joins with agency B to contract for goods or services to obtain economies of scale or some other benefit. Third, agency A might hire agency B to negotiate and/or manage agency A’s contracts in toto or in a specific area. Interagency contracting is a marked departure from the traditional model of government contracting, wherein agencies have their own contracts with vendors and rely upon the services of their own contracting officers in drafting and managing these contracts.

Interagency contracting can occur under several different statutory authorities, including (1) the Economy Act of 1932; (2) the Information Technology Management Reform Act of 1996, also known as the Clinger-Cohen Act, authorizing government-wide acquisition contracts (GWACs); (3) the Federal Property and Administrative Services Act of 1949, as amended by the Office of Federal Procurement Policy Act of 1974, underlying the Federal Supply Schedules (FSS), also known as the General Services Administration (GSA) Schedules or Multiple Award Schedules (MAS); and (4) the Government Management Reform Act of 1994 and other authorities creating franchise funds and interagency assisting entities. Franchise funds and interagency assisting entities are not themselves contracting vehicles, but they play a prominent role in interagency contracting.

Interagency contracting generally implicates principles of appropriations law, as well as procurement law, because appropriated funds are transferred between federal agencies. Appropriations law specifies the ways in which appropriated funds may be spent, and agencies must comply with the various requirements that are attached to any appropriation. Additionally, appropriations law details how agencies must account for these funds and ensures payment is made to the appropriate accounts.

The Government Accountability Office (GAO) first designated interagency contracting a “high risk” area for the federal government in 2005, and interagency contracting remained on GAO’s “high risk” list for the Department of Defense (DOD) in 2009. More recently, a December 3, 2010, report by the DOD Inspector General found that DOD acquisitions made through the Department of Energy did not comply with defense procurement rules.

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## Introduction

Traditionally, federal agencies procuring goods or services from private-sector entities had their own contracts with these vendors and relied upon the services of their own contracting officers in drafting and managing these contracts. Recently, however, agencies have increasingly resorted to interagency contracting, relying on the contracts or contracting operations of other agencies to acquire goods and services.<sup>1</sup> Increased use of interagency contracting, coupled with widely reported incidents of mismanagement and Antideficiency Act violations involving interagency contracts,<sup>2</sup> has made interagency contracting a topic of interest to some members of Congress and commentators.<sup>3</sup> The Government Accountability Office (GAO) first designated interagency contracting a “high risk” area for the federal government in 2005,<sup>4</sup> and interagency contracting remained on GAO’s “high risk” list for the Department of Defense (DOD) in 2009.<sup>5</sup> More recently, a December 3, 2010, report by the DOD Inspector General found that DOD acquisitions made through the Department of Energy did not comply with defense procurement rules.<sup>6</sup>

This report provides an overview of the federal procurement and appropriations laws governing interagency contracting. It defines key terms used in discussing interagency contracting; surveys the various interagency contracting vehicles; and describes recently enacted and proposed amendments to the laws governing interagency contracting.

## Key Terms in Interagency Contracting<sup>7</sup>

“Interagency contracting” is the term used to describe several procurement relationships between government agencies. The first is one of buyer and seller, where agency A directly purchases goods or services from agency B. Second is that of co-purchasers, where agency A joins with agency B to contract for goods or services to obtain economies of scale or some other benefit.

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<sup>1</sup> See, e.g., *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, at 225 (Jan. 2007) (“Interagency contracting has been recognized as one of the fastest growing fields in federal acquisition.”). Forty percent of the government’s contracting funds were spent under some type of interagency contract in FY2004, and agencies spent \$46 billion under government-wide acquisition or Federal Supply Schedule contracts in FY2006. *Id.* Spending on multi-agency contracts is more difficult to measure because it is unclear how many multi-agency contracts exist. *Id.* at 229.

<sup>2</sup> See, e.g., Abby Bowles, CACI Under Investigation by GSA, DOD, Interior for Role in Iraqi Prisoner Abuse, 81 *Fed. Cont. Rep.* 546 (June 1, 2004) (noting that some interrogators allegedly involved in prisoner abuse at Abu Ghraib worked for DOD under interagency contracts); Dep’t of Def. Inspector General, *Potential Antideficiency Act Violations on DoD Purchases Made Through Non-DoD Agencies*, D-2007-042, at ii (Jan. 2007) (noting 69 potential violations of the Antideficiency Act in DOD’s use of interagency contracts between 2005 and 2006).

<sup>3</sup> See, e.g., *Abusive Practices in Department of Defense Contracting for Services and Interagency Contracting: Hearings before the Subcomm. on Readiness and Mgmt. of the Comm. on Armed Servs., United States Senate*, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Jan. 17 & 31, 2007).

<sup>4</sup> Gov’t Accountability Office (GAO), *GAO’s 2005 High-Risk Update*, GAO-05-207, at 24 (Jan. 2005), available at <http://www.gao.gov/new.items/d05350t.pdf>.

<sup>5</sup> Gov’t Accountability Office, *DOD’s High-Risk Areas: Actions Needed to Reduce Vulnerabilities and Improve Business Outcomes*, GAO-09-460T (Mar. 12, 2009), available at <http://www.gao.gov/new.items/d09460t.pdf>.

<sup>6</sup> Inspector General, Dep’t of Defense, *More DoD Oversight Needed for Purchases Made Through the Department of Energy*, Audit Report No. D-2011-021, Dec. 3, 2010, available at <http://www.dodig.mil/Audit/reports/fy11/11-021.pdf>.

<sup>7</sup> Kate M. Manuel authored the sections of this report dealing with contract law.

This is sometimes known as “direct purchasing” or “unassisted purchasing.”<sup>8</sup> Third, agency A might hire agency B to negotiate and/or manage agency A’s contracts in toto or in a specific area. This is sometimes called “indirect purchasing” or “assisted purchasing.”<sup>9</sup> Regardless of the exact relationship between the agencies, interagency contracting is a marked departure from the traditional model of government contracting, wherein agencies have their own contracts with vendors and rely upon the services of their own contracting officers in drafting and managing these contracts.

The agency seeking to acquire particular goods or services is known as the “requesting agency,” while the agency that uses its contracts or contracting personnel to supply the requested goods or services is known as the “servicing agency.”<sup>10</sup> The phrase “ordering agency” refers to the agency that issues task or delivery orders, or enters blanket purchase agreements, under existing contracts. Depending upon the legal authorities governing a particular acquisition, the ordering agency may be either the requesting agency or the servicing agency.

Interagency contracting often involves an indefinite delivery/indefinite quantity (ID/IQ) contract between the servicing agency and the vendor.<sup>11</sup> In an ID/IQ contract, the vendor agrees to provide some yet-to-be-determined quantity of goods<sup>12</sup> at predetermined prices at some yet-to-be-determined times.<sup>13</sup> Once the ID/IQ contract is in place, the servicing agency, or other agencies, when authorized, may purchase goods or services from the vendor by submitting task or delivery orders to the vendor,<sup>14</sup> or entering into blanket purchase agreements (BPAs) with the vendor. A BPA is a separate agreement, essentially establishing a “charge account” for the agency with a vendor; agency personnel can take delivery of goods or services immediately and pay later.<sup>15</sup> Because of the task or delivery orders issued under them, ID/IQ contracts are sometimes known as task- or delivery-order (TO/DO) contracts.<sup>16</sup> They can also be described as “single-award contracts” or “multiple-award contracts” (MACs), depending upon the number of firms—one or more than one, respectively—eligible to receive orders under the contract.<sup>17</sup> Because ID/IQ

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<sup>8</sup> See, e.g., Gov’t Accountability Office, *Interagency Contracting: Need for Improved Information and Policy Implementation at the Department of State*, GAO-08-578, at 2 (May 8, 2008) (discussing direct and assisted interagency contracting).

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O’Brien-DeBakey, and Vernon J. Edwards, *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 331 (2007).

<sup>11</sup> See, e.g., 48 C.F.R. § 2.101 (defining “governmentwide acquisition contract”).

<sup>12</sup> The amount is above some assured minimum and, sometimes, below an agreed-upon maximum.

<sup>13</sup> See, e.g., Library of Congress: Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite-Quantity Contracts under the FEDLINK Program, B-318046 (Comp. Gen., July 7, 2009) (“[T]o provide adequate consideration for a binding IDIQ contract, an agency must establish a guaranteed minimum that is more than a nominal amount and reflects the amount the agency is fairly certain to order.”).

<sup>14</sup> A task order calls for the performance of services, while a delivery order calls for the delivery of goods.

<sup>15</sup> 48 C.F.R. § 13.303-3 (stating that a BPA must contain the following terms and conditions: (1) a description of the agreement; (2) the extent of obligation; (3) pricing; (4) a purchase limitation; (5) notice of individuals authorized to purchase under the BPA and any dollar limitations on their purchases; (6) delivery tickets; and (7) invoices).

<sup>16</sup> See 48 C.F.R. § 16.501-1.

<sup>17</sup> Some commentators refer to single-award ID/IQ contracts as “monopoly contracts,” but such usage obscures the fact that single-award ID/IQ contracts are themselves competitively awarded, even if task or delivery orders under them are not, and are of limited duration. See, e.g., U.S. House of Representatives, Comm. on Gov’t Reform—Minority Staff, Special Investigations Division, *Dollars, Not Sense: Government Contracting Under the Bush Administration* 13 (2006), available at <http://oversight.house.gov/Documents/20060711103910-86046.pdf>. Federal contracts are normally for one year, but can be extended to five years through agencies’ use of options. 48 C.F.R. § 17.204(e). Multiple-award (continued...)

contracts are involved, agencies engaged in interagency contracting must generally comply with the requirements for competition in the issuance of orders created by Federal Acquisition Streamlining Act (FASA) of 1994<sup>18</sup> and amendments to it, such as the National Defense Authorization Act for FY2002<sup>19</sup> and the National Defense Authorization Act for FY2008.<sup>20</sup> Such requirements are beyond the scope of this report, although they apply to multi-agency and government-wide acquisition contracts.<sup>21</sup>

## Key Concepts in Appropriations Law<sup>22</sup>

Congress is given the power to appropriate funds in the Constitution. This congressional power is commonly called the “power of the purse” and is derived from several specific constitutional provisions. First, in Article I, Section 8, Congress is given the power to “pay the Debts and provide for the common Defence and general Welfare of the United States” and the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.” Later, the Constitution states that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law” in Article I, Section 9, clause 7 (first part). This means that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”<sup>23</sup>

Additionally, Congress can “determine the terms and conditions under which an appropriation can be used” as long as it acts within its Constitutional limits.<sup>24</sup> These requirements may often include “the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements

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contracts are sometimes also called multiple-award task-order contracts (MATOCs).

<sup>18</sup> P.L. 103-355, § 1003, 108 Stat. 3250 (Oct. 13, 1994) (codified at 10 U.S.C. § 2304a(d)(3) (defense agency procurements); P.L. 103-355, § 1054, 108 Stat. 3262 (codified at 41 U.S.C. § 303h(d)(3) (civilian agency procurements). FASA establishes a “preference” for multiple-award contracts by requiring agencies to use them, as opposed to single-award contracts, “to the maximum extent practicable.” FASA also requires agencies using multiple-award contracts to provide a “fair opportunity to be considered” in the issuance of individual task or delivery orders in excess of \$3,000 unless certain conditions are met. 10 U.S.C. § 2304c(b)(1)-(4) & 41 U.S.C. § 303j(b)(1).

<sup>19</sup> See P.L. 107-107, § 803, 115 Stat. 1179 (Dec. 28, 2001) (limiting defense agencies’ ability to award single-award ID/IQ contracts in excess of \$100 million and specifying what constitutes a “fair opportunity to be considered” in competitions for orders in excess of \$5.5 million under multiple-award ID/IQ contracts). Section 803 was later repealed by the Duncan Hunter National Defense Authorization Act for FY2009 because it was “redundant” after Congress imposed identical restrictions on all agencies. See P.L. 110-417, § 863(f), 122 Stat. 4548 (Oct. 14, 2008).

<sup>20</sup> See P.L. 110-181, § 843, 122 Stat. 236-39 (Jan. 28, 2008) (imposing requirements similar to those in P.L. 107-107 on non-defense agencies).

<sup>21</sup> As discussed below, these requirements do not apply to orders placed under the Federal Supply Schedules. 48 C.F.R. § 8.405-6(1).

<sup>22</sup> Brian T. Yeh is the author of the sections of this report dealing with appropriations law.

<sup>23</sup> *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

<sup>24</sup> GAO, Office of the General Counsel, *Principles of Federal Appropriations Law*, Volume I, at 1-5-1-11 (3d ed. 2004), available at <http://www.gao.gov/special.pubs/d04261sp.pdf>. This publication is commonly known as the Red Book.

of a program.”<sup>25</sup> Congress also may impose other requirements on appropriated funds, such as preconditions for the use of an appropriation by an agency.<sup>26</sup>

Following the enactment of an appropriations act by Congress, “[t]he Office of Management and Budget (OMB) apportions or distributes budgeted amounts to the executive branch agencies, thereby making funds in appropriated accounts ... available for obligation.”<sup>27</sup> These appropriated accounts are administered by the Treasury Department.<sup>28</sup> Following OMB’s apportionment of the funds, agencies then make allotments, which are “delegation[s] of authority to agency officials that allow[] them to incur obligations within the scope and terms of the delegation.”<sup>29</sup> These allotments are “pursuant to the OMB apportionments or other statutory authority.”<sup>30</sup>

After allotments have been made, agencies can then begin to incur obligations. Generally, an obligation is “some action that creates a legal liability or definite commitment on the part of the government, or creates a legal duty that could mature into a legal liability by virtue of an action that is beyond the control of the government.”<sup>31</sup> It is permissible to make immediate payment or future payment of an obligation.<sup>32</sup> Obligations are considered “officially charged against the spending agency’s appropriation” at the time they are “recorded.”<sup>33</sup> The requirements for recording obligations are outlined in 31 U.S.C. § 1501(a), which states that “[a]n amount shall be recorded as an obligation to the United States Government only when [it is] supported by documentary evidence” of one of nine specified actions of an agency.<sup>34</sup> A transaction is not a proper obligation (and therefore may not be recorded) if it does not meet one of these nine

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<sup>25</sup> *Id.* at 1-5.

<sup>26</sup> *Id.* at 1-6–1-7.

<sup>27</sup> 31 U.S.C. §§ 1511-1516.

<sup>28</sup> *Principles of Federal Appropriations Law*, Volume I, at 1-31. Funds are distributed “by time periods (usually quarterly) or by activities,” an apportionment system which is intended “to achieve an effective and orderly use of available budget authority, and to reduce the need for supplemental or deficiency appropriations.” *Id.*

<sup>29</sup> 31 U.S.C. §§ 1513(d), 1514; *Principles of Federal Appropriations Law*, Volume I, at 1-31.

<sup>30</sup> *Id.*

<sup>31</sup> *Principles of Federal Appropriations Law*, Volume II, at 7-3–7-4 (3d ed. 2006), available at <http://www.gao.gov/special.pubs/d06382sp.pdf>.

<sup>32</sup> *Id.* at 7-4.

<sup>33</sup> *Id.*

<sup>34</sup> The nine specified actions that result in a recordable obligation for an agency when they are properly documented are:

- (1) [A] binding agreement between an agency and another person (including an agency) that is – (A) in writing, in a way and form, and for a purpose authorized by law; and (B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;
- (2) a loan agreement showing the amount and terms of repayment;
- (3) an order required by law to be placed with an agency;
- (4) an order issued under a law authorizing purchase without advertising – (A) when necessary because of a public exigency; (B) for perishable subsistence supplies; or (C) within specific monetary limits;
- (5) a grant or subsidy payable – (A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law; (B) under an agreement authorized by law; or (C) under plans approved consistent with and authorized by law;
- (6) a liability that may result from pending litigation;
- (7) employment or services of persons or expenses of travel under law;
- (8) services provided by public utilities; or
- (9) other legal liability of the Government against an available appropriation or fund.

31 U.S.C. § 1501. For a more detailed discussion of the various issues surrounding these nine ways to incur a recordable obligation, see *Principles of Federal Appropriations Law*, Volume II, at 7-10–7-55.

criteria.<sup>35</sup> The transaction is required to be recorded as soon as one of the criteria is met, but it is still considered valid if the agency fails to record it, and it will be charged to the fiscal year in which it occurred.<sup>36</sup> In some instances, agencies may need to deobligate funds,<sup>37</sup> and those funds “may be reobligated within the period of availability of the appropriation.”<sup>38</sup>

In making obligations, an agency must comply with the Antideficiency Act. This act states that “[a]n officer or employee of the United States Government or of the District of Columbia government may not ... make or authorize an expenditure or obligation *exceeding* an amount available in an appropriation or fund for an expenditure or obligation; or ... involve either government in a contract or obligation for the payment of money *before* an appropriation is made unless authorized by law.”<sup>39</sup> If the Antideficiency Act is violated, an officer or employee “shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.”<sup>40</sup> Additionally, if the officer or employee “knowingly and willfully” violates the act, he or she “shall be fined not more than \$5,000, imprisoned for more than two years, or both.”<sup>41</sup>

An appropriation account expires “[a]t midnight on the last day of an appropriation’s period of availability” and is “no longer available for incurring new obligations.”<sup>42</sup> However, an expired appropriation “remains available for 5 years for the purpose of paying obligations incurred prior to the account’s expiration and adjusting obligations that were previously unrecorded or under recorded.”<sup>43</sup> Following the five-year period, the account is closed, and “[a]ny remaining balance (whether obligated or unobligated) in the account shall be cancelled and shall thereafter not be available for obligation or expenditure for any purpose.”<sup>44</sup> This means that the funds are “returned to the general fund of the Treasury.”<sup>45</sup> “Collections authorized or required to be credited to ... [the] appropriation account, but not received before closing of the account ... shall be deposited in the Treasury as miscellaneous receipts.”<sup>46</sup> In the event that obligations or adjustments to obligations that should have been charged to an account are discovered after the account is closed, they “may be charged to any current appropriation account of the agency available for the same purpose” as the closed account as long as they are “not chargeable to any current

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<sup>35</sup> *Principles of Federal Appropriations Law*, Volume II, at 7-4.

<sup>36</sup> *Id.*

<sup>37</sup> Agencies may need to deobligate funds for a variety of reasons, including “[l]iquidation in amount less than amount of original obligation,” “[c]ancellation of project or contract,” “[i]nitial obligation determined to be invalid,” “[r]eduction of previously recorded estimate,” “[c]orrection of bookkeeping errors or duplicate obligations,” or even statutory requirements to deobligate funds. *Principles of Federal Appropriations Law*, Volume II, at 7-59–7-60.

<sup>38</sup> *Principles of Federal Appropriations Law*, Volume II, at 7-59.

<sup>39</sup> 31 U.S.C. § 1341(a)(1) (emphasis added). For a more complete discussion of the Antideficiency Act, see *Principles of Federal Appropriations Law*, Volume II, 6-34–6-159 (3d ed. 2006).

<sup>40</sup> 31 U.S.C. §§ 1349(a), 1518. This provision also applies to violations of 31 U.S.C. § 1342 and 31 U.S.C. § 1517(a).

<sup>41</sup> 31 U.S.C. § 1350, 1519. This provision also applies to violations of 31 U.S.C. § 1342 and 31 U.S.C. § 1517(a).

<sup>42</sup> *Principles of Federal Appropriations Law*, Volume I, at 1-37.

<sup>43</sup> *Id.*; 31 U.S.C. § 1553(a).

<sup>44</sup> 31 U.S.C. § 1552(a).

<sup>45</sup> *Principles of Federal Appropriations Law*, Volume I, at 5-73.

<sup>46</sup> 31 U.S.C. § 1552(b). The “miscellaneous receipts” statute requires “an official or agent of the Government receiving money for the Government from any source ... [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). Penalties for violating this statute may include removal from office. 31 U.S.C. § 3302(d). For more information about the “miscellaneous receipts” statute, see *Principles of Federal Appropriations Law*, Volume II, at 6-166–6-222.



appropriation account of the agency.”<sup>47</sup> Congress may exempt appropriations from these rules through specific legislation.<sup>48</sup>

## Interagency Contracting Vehicles

Interagency contracting can occur under several different statutory authorities, including

1. The Economy Act of 1932 and other authorities permitting multi-agency contracts, which are also known as interagency agreements;
2. The Information Technology Management Reform Act of 1996, also known as the Clinger-Cohen Act, authorizing government-wide acquisition contracts (GWACs);
3. The Federal Property and Administrative Services Act of 1949, as amended by the Office of Federal Procurement Policy Act of 1974, underlying the Federal Supply Schedules (FSS), also known as the General Services Administration (GSA) Schedules or Multiple Award Schedules (MAS); and
4. The Government Management Reform Act (GMRA) of 1994 and other authorities creating franchise funds and interagency assisting entities.

Franchise funds and interagency assisting entities are not themselves contracting vehicles. However, they play a prominent role in interagency contracting and are thus included here.<sup>49</sup>

## Multi-Agency Contracts Under the Economy Act of 1932

Certain statutes, such as the Economy Act of 1932, as amended, and the Government Employees Training Act (GETA) of 1958, authorize federal agencies to purchase directly from other agencies, or use the contracts or contracting operations of other agencies when procuring goods or services.<sup>50</sup> The Economy Act governs when there are no specific statutory authorities, such as GETA,<sup>51</sup> and is the focus of discussion here.

Congress enacted the Economy Act during the Great Depression with the hope that agencies might, at times, save money by relying upon existing contracts between other agencies and private companies when procuring goods or services.<sup>52</sup> The act originally applied only to direct or

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<sup>47</sup> 31 U.S.C. § 1553(b)(1).

<sup>48</sup> *Principles of Federal Appropriations Law*, Volume I, at 5-75. For a more complete discussion of expired and closed accounts, see *Principles of Federal Appropriations Law*, Volume I, at 5-71–5-75.

<sup>49</sup> Cf. *Report of the Acquisition Advisory Panel*, *supra* note 1, at 236 (also including franchise funds and interagency assisting entities when discussing interagency contracting).

<sup>50</sup> See, e.g., An Act Making Appropriations for the Legislative Branch of the Government for the Fiscal Year Ending June 30, 1933, and for Other Purposes, P.L. 72-212, 47 Stat. 382 (June 30, 1932) (codified at 31 U.S.C. §§ 1535-1537); GETA, P.L. 85-507, 72 Stat. 327 (July 7, 1958) (codified at 5 U.S.C. § 2303(a)(5)). Another “Economy Act” was enacted in 1933, cutting the salaries of federal workers and reducing veterans’ benefits in response to the Depression. See P.L. 73-2, 48 Stat. 8 (Mar. 20, 1933). It is no longer in effect.

<sup>51</sup> 48 C.F.R. § 17.500(b).

<sup>52</sup> See, e.g., 75 Cong. Rec. 9348 (1932). By relying on an existing contract, agencies could potentially avoid the administrative expenses associated with soliciting bids or proposals, and they might be able to take advantage of lower prices negotiated under other contracts, especially when purchasing too few items to independently qualify for (continued...)

unassisted purchasing, authorizing agency heads to use other agencies' existing contracts to obtain goods or services whenever doing so was more convenient and cheaper than contracting out:

Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government to do so, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render ... *Provided, however,* That if such work or services can be as conveniently or more cheaply performed by private agencies such work shall be let by competitive bids to such private agencies.<sup>53</sup>

The act was amended in 1942 to allow other agencies to perform contracting services—also known as indirect or assisted purchasing—for certain defense-related agencies.<sup>54</sup> A later amendment, in 1982, authorized any agency to perform contracting services for any other agency.<sup>55</sup>

From the earliest days, agencies' ability to use the contracts or contracting services of other agencies under the authority of the Economy Act was subject to the following four conditions:

1. The requesting agency had the funds available;
2. The head of the requesting agency determined that the order was in the best interests of the United States;
3. The servicing agency was able to provide the goods or services requested; and
4. The head of the requesting agency determined that the goods or services could not be provided as conveniently or cheaply under a contract with a commercial enterprise.<sup>56</sup>

More recently, however, regulations promulgated under the authority of Section 1074 of the Federal Acquisition Streamlining Act (FASA) of 1994 further limited agencies' exercise of Economy Act authority.<sup>57</sup> These regulations prohibit agencies from entering into multi-agency contracts to (1) circumvent conditions imposed on the use of appropriated funds; (2) contract out inherently governmental functions; or (3) acquire goods or services contrary to an agency's

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discounts based on sales volume.

<sup>53</sup> P.L. 72-212, § 601, 47 Stat. 418 (codified, as amended, at 31 U.S.C. § 1535(a)).

<sup>54</sup> An Act to Amend Section 7(a) of the Act of May 21, 1920, P.L. 77-670, 56 Stat. 661-62 (July 20, 1942). The defense-related agencies included the War, Navy, and Treasury Departments; Civil Aeronautics Administration; and Maritime Commission. The Economy Act was itself an amendment to the act of May 21, 1920, which is why that statute is referenced here.

<sup>55</sup> An Act to Amend the Economy Act to Provide That All Departments and Agencies May Obtain Materials or Services from Other Agencies by Contract, and for Other Purposes, P.L. 97-332, 96 Stat. 1622 (Oct. 15, 1982).

<sup>56</sup> 15 U.S.C. § 1535(a)(1)-(4).

<sup>57</sup> P.L. 103-355, § 1074, 108 Stat. 3271-72 (Oct. 13, 1994). This section is no longer effective because the regulations required under it have been in effect for over one year. *See id.* at § 1074(d) ("This section shall cease to be effective one year after the date on which final regulations prescribed pursuant to subsection (a) take effect.")

authority or responsibility.<sup>58</sup> Additionally, all orders under multi-agency contracts that require “contracting actions” by the servicing agency must be supported by determinations and findings approved by contracting officers of the requesting agency that state, among other things:

- (1) [t]he acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar goods and services;
- (2) [t]he servicing agency has capabilities or expertise to enter into a contract for such supplies or services which is not available to the requesting agency; or
- (3) [t]he servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.<sup>59</sup>

“Contracting actions” include soliciting bids or proposals for a new contract, as well as issuing task or delivery orders under existing contracts.

## **Transfers of Funds and Accounting for Transfers of Funds**

Unlike other statutes discussed below, the Economy Act provides detailed directions regarding interagency fund transfers under its authority. Under the act, the servicing agency may decide to use one of two types of authorized forms of payment—advance and reimbursement<sup>60</sup>—and the payment may be made in a lump sum or in installments.

### *Authorized Forms of Payment*

#### 1. Advanced Payment

The act authorizes advanced payment to the servicing agency by the requesting agency.<sup>61</sup> Advanced payment is often based on cost estimates. As a result, after the actual cost is known, the amounts should be adjusted accordingly. If the advance exceeds the actual cost, the excess should be returned to the proper account at the requesting agency because retaining the excess amount would constitute an “improper augmentation” of the funds of the servicing agency.<sup>62</sup> When the excess is determined “while the appropriation charged with the advance is still available for obligation,” the servicing agency should attempt to return the funds in time for the requesting agency to use them.<sup>63</sup> In the event that the requesting agency’s account has been closed, the excess should “be deposited in the Treasury as miscellaneous receipts.”<sup>64</sup>

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<sup>58</sup> 48 C.F.R. § 17.502(b)-(d).

<sup>59</sup> 48 C.F.R. § 17.503(b)(1)-(3).

<sup>60</sup> 31 U.S.C. § 1535(b).

<sup>61</sup> *Id.*

<sup>62</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-34 (3d ed. 2008) (referencing 72 Comp. Gen. 120 (1993)).

<sup>63</sup> *Id.* (referencing GAO, *Policy and Procedures Manual for Guidance of Federal Agencies*, tit. 7, § 2.4.C.2d (May 1993)).

<sup>64</sup> *Id.* The “miscellaneous receipts” statute requires “an official or agent of the Government receiving money for the Government from any source ... [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). Penalties for violating this statute may include removal from office. 31 U.S.C. § (continued...)

The act outlines that advanced payments are to be “credited to a special working fund that the Secretary of the Treasury considers necessary to be established.”<sup>65</sup>

## 2. Reimbursement Payment

The act also authorizes payment by reimbursement amounts, which allows the servicing agency to “temporarily use its own funds to do the ... [requesting] agency’s work.”<sup>66</sup> Prompt payment by the requesting agency is required by the act.<sup>67</sup>

Reimbursement payments are to be credited to the servicing agency’s appropriation that incurred charges for performance. As a result, the payment is credited to the fiscal year in which the appropriation incurred charges, not the fiscal year in which the reimbursement is made.<sup>68</sup> If a reimbursement is made while the charged appropriation is still available for obligation, then the servicing agency may use the money for any of the purposes that were authorized for the appropriation.<sup>69</sup> However, if a reimbursement is made when the charged appropriation is no longer available for new obligations, then the servicing agency must credit the money to the expired account. In the event the expired account has already been closed, the servicing agency again must deposit the money in the Treasury as miscellaneous receipts.<sup>70</sup>

With respect to expired accounts, the Department of Defense has been granted a major exception to the above provisions. When the charged appropriation is no longer available for new obligations (and the account is therefore expired), the Department of Defense has the option to credit reimbursements for the expired appropriation to appropriations that are current at the time of the payment rather than crediting the money to the expired account.<sup>71</sup> This means that the money will be available to the agency to obligate to a new expenditure during the period of availability of the current appropriation. If the money were to return to the expired account, then it could only be spent to liquidate the obligations incurred during the period of availability of the appropriation associated with the expired account.

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(...continued)

3302(d). For more information about the “miscellaneous receipts” statute, see *Principles of Federal Appropriations Law*, Volume II, 6-166–6-222 (3d ed. 2006), available at <http://www.gao.gov/special.pubs/d06382sp.pdf>.

<sup>65</sup> 31 U.S.C. § 1536(a). A working fund is “an account established to receive advance payments from other agencies or accounts.” *Principles of Federal Appropriations Law*, Volume III, at 12-35. Congress originally intended this fund to be established by the Treasury upon request of the servicing agency, but the 1982 recodification appears to give Treasury the final decision on the fund’s creation. *Id.*

<sup>66</sup> *Id.* at 12-34.

<sup>67</sup> 31 U.S.C. § 1535(b).

<sup>68</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-35.

<sup>69</sup> 31 U.S.C. § 1536(b); *Principles of Federal Appropriations Law*, Volume III, at 12-35.

<sup>70</sup> 31 U.S.C. § 1552(b); *Principles of Federal Appropriations Law*, Volume III, at 12-35. An agency has the choice to “deposit reimbursements in the Treasury as miscellaneous receipts” but *must* do so in certain circumstances in order to avoid improper augmentation. *Principles of Federal Appropriations Law*, Volume III, at 12-36.

<sup>71</sup> 10 U.S.C. §§ 2205(a), 2210(a); *Principles of Federal Appropriations Law*, Volume III, at 12-36.

### *Payment for Items Provided from Stock*

When a servicing agency provides items from stock on hand, special rules apply. The requesting agency's payment for goods provided from stock typically is credited to replace the goods.<sup>72</sup> However, if the "head of the executive agency filling the order decides that replacement is *not necessary* ... the amount received is deposited in the Treasury as miscellaneous receipts."<sup>73</sup> Replacement items are not required to be identical, but they cannot be "dissimilar" from those authorized by the appropriation language.<sup>74</sup>

### *Definition of Actual Cost*

Agencies that use the Economy Act "must avoid the unauthorized augmentation of anyone's appropriations," which means the servicing agency cannot charge "too much" or "too little."<sup>75</sup> Therefore the determination of "actual cost" is very important in any Economy Act transaction. Payments under the Economy Act are based on the "actual cost of goods or services provided,"<sup>76</sup> but neither the act itself nor its legislative history define the term. However, as noted in a GAO General Comptroller's decision, "actual cost" can be determined in a manner consistent with the objectives of the statute and the legislative history's guidance by considering two categories of cost: required costs and situational costs.<sup>77</sup>

Required costs include direct costs and indirect costs.<sup>78</sup> A direct cost is any expenditure of the servicing agency that can be identified with the performance of the transaction,<sup>79</sup> including salaries of employees,<sup>80</sup> the cost of materials or equipment "furnished to the ... [requesting] agency or consumed in the course of performance" by the servicing agency,<sup>81</sup> and related transportation costs.<sup>82</sup> An indirect cost is overhead for the contract, including "administrative overhead applicable to supervision ... billable time not directly chargeable to any particular customer ... and rent paid to the General Services Administration attributable to space used in the course of performing Economy Act work."<sup>83</sup> In order to be recoverable under the Economy Act,

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<sup>72</sup> 31 U.S.C. § 1536(b). These payments can be credited to another appropriation or fund if authorized by law. 31 U.S.C. § 1536(b)(1).

<sup>73</sup> 31 U.S.C. § 1536(b)(2) (emphasis added).

<sup>74</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-37 (citing 41 Comp. Gen. 671 (1962)).

<sup>75</sup> *Id.* at 12-36–12-37.

<sup>76</sup> 31 U.S.C. § 1535(b).

<sup>77</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-38–12-39 (citing 57 Comp. Gen. 674, at 681-82).

<sup>78</sup> *Id.* at 12-39–12-40.

<sup>79</sup> This does not necessarily include every identifiable direct cost. For example, a judgment for an injury incurred by an employee during the contract's performance is not necessarily reimbursable. *Id.* at 12-39 (citing 39 Comp. Gen. 650 (1960)).

<sup>80</sup> The salaries of employees means gross compensation in this context, including the accrual of annual leave. *Id.* at 12-39 (citing 14 Comp. Gen. 452 (1934); 32 Comp. Gen. 521 (1953)).

<sup>81</sup> *Id.* This means "historical cost and not current replacement or production cost." However, this historical cost does not have to be "the original acquisition cost" and instead may be "the most recent acquisition cost of the specific kind of item provided" to the requesting agency. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 12-40.

an indirect cost must be “funded out of currently available appropriations” and bear a “significant relationship to the service or work performed or the materials furnished.”<sup>84</sup>

Situational costs result from circumstances when “other competing congressional goals, policies or interests might require recoveries beyond that necessary to effectuate the purposes of the Economy Act.”<sup>85</sup> For example, situational costs could be recovered for depreciation and interest based on the project’s specific circumstances.<sup>86</sup> The servicing agency has discretion whether or not to include these costs in its charges.<sup>87</sup> If the servicing agency fails to recover them, it is “not legally objectionable,” although “it could be shown to be an abuse of discretion” in very limited circumstances.<sup>88</sup>

The Economy Act does not require the “actual cost” determination to be “an exact science,” so “a *bona fide* attempt to determine the actual cost ... [that] reasonably approximates the actual cost” is acceptable.<sup>89</sup> GAO has found “billing on the basis of standard costs derived from documented costs of the last acquisition or production” to be reasonable and meet the Economy Act’s requirements.<sup>90</sup> This determination of “actual cost” is limited, however, to a “reasonable approximation.”<sup>91</sup> Additionally, the Economy Act, in attempting to promote interagency cooperation and harmony, does not require “an audit or certification in advance of payment” conducted by the requesting agency or “a detailed breakdown” of costs by the servicing agency.<sup>92</sup>

### ***Obligation of Requesting Agency’s Appropriation***

A requesting agency’s appropriations are obligated by an Economy Act agreement<sup>93</sup> as long as they meet certain requirements to become a recordable obligation.<sup>94</sup> For example, the agreement “must be for a purpose the ... [requesting] agency is authorized to accomplish.”<sup>95</sup> Obligations for an Economy Act agreement must be incurred “within the period of availability of the appropriation being used,”<sup>96</sup> and the funds must then “be deobligated at the end of their period of

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<sup>84</sup> *Id.* (citing 56 Comp. Gen. 275 (1977)).

<sup>85</sup> *Id.* (citing 57 Comp. Gen. 674 at 683 (1978)) (internal quotations omitted).

<sup>86</sup> *Id.* at 12-40–12-41 (citing 57 Comp. Gen. 674 at 685-86 (1978)). An additional example would be instances where “the ... [servicing] activity is funded by a statutorily authorized stock, industrial, or similar fund which provides for ‘full cost’ recovery, that is, beyond what the Economy Act would otherwise require, and the fund’s Economy Act work is an insignificant portion of its overall work.” *Id.* at 12-41 (citing B-250377, Jan. 28, 1993).

<sup>87</sup> *Id.* at 12-41.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 12-42 (citing B-133913, Jan. 21, 1958) (internal quotations omitted).

<sup>90</sup> *Id.* (citing B-250377, Jan. 28, 1993).

<sup>91</sup> *Id.* Cost allocations where “some customers are paying excessive amounts and effective subsidizing others,” for example, or allocations “based on the availability of appropriations” are not allowed. *Id.*

<sup>92</sup> *Id.* at 12-41 (citing 39 Comp. Gen. 548, 549-50 (1960); 32 Comp. Gen. 479 (1953); B-116194, Oct. 5, 1953).

<sup>93</sup> 31 U.S.C. § 1535(d).

<sup>94</sup> 31 U.S.C. § 1501(a)(1).

<sup>95</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-44. The Economy Act “is not intended to permit an agency to avoid legislative restriction on the use of its funds, nor is it intended to permit an agency running short of money to dip into the pocket of another vulnerable and more budgetarily secure agency.” *Id.* at 12-46. For more information about the restrictions on a requesting agency’s appropriations and specific examples of how these restrictions impact certain types of Economy Act transactions, see *id.* at 12-46–12-50.

<sup>96</sup> *Id.* at 12-44.

availability (fiscal year or multiple year period, as applicable) to the extent the ... [servicing] agency has not performed or itself incurred valid obligations as part of its performance.”<sup>97</sup> This is different than an agency’s contract with a private party, in which funds obligated in one fiscal year remain obligated in future fiscal years.<sup>98</sup>

## **GWACs Under the Clinger-Cohen Act**

Congress created the government-wide acquisition contracts (GWACs) in 1996 when it changed the way in which the federal government procures information technology (IT). Between 1965 and 1996, Section 111 of the Federal Property and Administrative Services Act, commonly known as the Brooks Act, governed federal purchases of IT, granting the General Services Administration (GSA) sole authority to acquire IT for federal agencies.<sup>99</sup> This changed in 1996, when Congress enacted the Information Technology Management Reform Act.<sup>100</sup> This act and the Federal Acquisition Reform Act (FARA) of 1996 were later jointly designated as the Clinger-Cohen Act.<sup>101</sup>

The Clinger-Cohen Act repealed the Brooks Act<sup>102</sup> and made the director of the Office of Management and Budget (OMB) “responsible for improving the productivity, efficiency, and effectiveness” of federal IT programs.<sup>103</sup> Among the things that the Director of OMB could do in fulfilling this responsibility was designating “one or more heads of executive agencies as executive agent[s] for Government-wide acquisition of information technology.”<sup>104</sup> These “executive agents” could create GWACs by entering into contracts with vendors of IT goods or services. Once the GWAC was formed, other agencies could then either (1) enter agreements authorizing the executive agents to order items from the GWACs on their behalf or (2) be authorized by the executive agents to place their own orders with GWAC vendors.<sup>105</sup>

Four federal agencies were initially designated as executive agents under the Clinger-Cohen Act, the Department of Commerce, the National Institutes of Health (NIH), the National Aeronautics and Space Administration (NASA), and the Department of Transportation, although the GWAC programs of some of these agencies were later transferred to GSA.<sup>106</sup> Additionally, because the

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<sup>97</sup> 31 U.S.C. § 1535(d); *Principles of Federal Appropriations Law*, Volume III, at 12-45.

<sup>98</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-44.

<sup>99</sup> See An Act to Provide for the Economic and Efficient Purchase, Lease, Maintenance, Operation, and Utilization of Automatic Data Processing Equipment by Federal Departments and Agencies, P.L. 89-306, § 111, 79 Stat. 1127-29 (Oct. 31, 1965) (then codified at 40 U.S.C. § 759). The law was designed to encourage vendors to offer the lowest possible prices and reduce the overhead associated with multiple acquisitions of IT products, especially for smaller agencies, through the aggregation of agency demand for IT products and services. Another “Brooks Act” was enacted in 1972 and governs the procurement of architect-engineer services. See P.L. 92-582, 86 Stat. 1278 (Oct. 27, 1972) (codified, as amended, at 40 U.S.C. § 541 et seq.).

<sup>100</sup> See National Defense Authorization Act for FY1996, P.L. 104-106, §§ 5001-5703, 110 Stat. 679-703 (Feb. 10, 1996). The Information Technology Management Reform Act was the name originally given to Division E of this act.

<sup>101</sup> P.L. 104-208, § 808, 110 Stat. 3009-393 (Sept. 30, 1996). FARA was Division D of the National Defense Authorization Act for FY2006. See P.L. 104-106, §§ 4001-4402.

<sup>102</sup> P.L. 104-104, § 5111, 110 Stat. 680.

<sup>103</sup> P.L. 104-104, § 5112(b), 110 Stat. 680 (codified at 40 U.S.C. § 11302(b)).

<sup>104</sup> P.L. 104-104, § 5112(e), 110 Stat. 681 (codified at 40 U.S.C. § 11302(e)).

<sup>105</sup> See *Report of the Acquisition Advisory Panel*, *supra* note 1, at 230.

<sup>106</sup> For example, the Transportation Department’s Information Technology Omnibus Procurement (ITOP) GWAC program was transferred to GSA in 2004 after the Transportation Department declined to seek re-designation as an (continued...)

Clinger-Cohen Act allowed the Federal Technology Service (FTS) at GSA to continue operating under previously granted authority to make IT purchases on behalf of the federal government,<sup>107</sup> the FTS also had authority to create GWACs.<sup>108</sup> This authority was transferred to the Federal Acquisition Service (FAS) when the FTS was merged into this newly formed component of GSA.<sup>109</sup>

## **Revolving Funds and Reimbursable Accounts under GWACs**

Unlike the Economy Act, the Clinger-Cohen Act did not specify how financial transactions between agencies are to be accounted for, nor did it expressly prohibit agencies from charging fees for use of their contracts or contracting services. Various executive agents thus structured their GWACs differently: GSA and NIH use existing revolving funds, while NASA and the Commerce Department use standalone reimbursable accounts.<sup>110</sup>

### ***Revolving Funds***

A revolving fund is “a fund established by the Congress to finance a cycle of operations through amounts received by the fund.”<sup>111</sup> A revolving fund has two key features: it is “a single combined account to which receipts are credited and from which expenditures are made,” and its “generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further congressional action and without fiscal year limitation.”<sup>112</sup> Revolving funds fall into three broad categories: public enterprise revolving funds,<sup>113</sup> trust revolving funds,<sup>114</sup> and intragovernmental revolving funds.<sup>115</sup>

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executive agent in 2002. *See id.* (transfer of ITOP from Transportation to GSA); Gov’t Accountability Office, *Contract Management: Interagency Contract Program Fees Need More Effective Oversight*, GAO-02-734, at 2 (July 2002), available at <http://www.gao.gov/new.items/d02734.pdf> (Transportation declining to seek re-designation in 2002). The Commerce Department’s Information Technology Solutions NextGen contract was similarly transferred to GSA in 2008. *See, e.g.*, Matthew Weigelt, GSA Recasts Statements on the End of the GWAC Era: No Merger of GWAC and Schedules, Agency Says, *Fed. Computer Week*, July 2, 2009, available at <http://www.fcw.com/Articles/2009/07/06/WEEK-GSA-GWAC-schedules-plans.aspx>.

<sup>107</sup> P.L. 109-313, § 2(c), 120 Stat. 1734-35 (Oct. 6, 2006).

<sup>108</sup> P.L. 104-104, § 5124, 110 Stat. 684 (codified at 40 U.S.C. § 11314(b)).

<sup>109</sup> GSA reportedly does not plan to renew some of its GWACs, including Millennia, Millennia Lite, and Applications ‘N Support for Widely-diverse End-user Requirements (ANSWER), when the existing ID/IQ contracts expire in 2010, although there is some question as to whether this strategy is part of a broader initiative to “phase out” the GWACs or merge them with the Federal Supply Schedules. *Compare* Nick Wakeman, GSA to Phase Out GWAC Program, *Wash. Tech.*, June 24, 2009 (quoting Ed O’Hare, assistant commissioner of the Office of Integrated Technology Services at the FAS, as saying that the only GWACs GSA will continue supporting after 2010 are Alliant, Alliant Small Business, and vehicles targeted to companies in specific socioeconomic categories, such as minority-owned businesses) *with* GSA Recasts Statements, *supra* note 106 (quoting Mary Davie, assistant FAS commissioner for assisted acquisition services as stating, “GSA is not shutting down or ending the GWAC program”).

<sup>110</sup> *See Contract Management, supra* note 106, at 9.

<sup>111</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-86 (3d ed. 2008) (quoting GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 88) (internal quotations omitted).

<sup>112</sup> *Id.* at 12-88.

<sup>113</sup> “A public enterprise revolving fund is a revolving fund which derives most of its receipts from sources outside of the federal government. It usually involves a business-type operation, which generates receipts, that are in turn used to finance a continuing cycle of operations. Although not a legal requirement, like a self-sustaining business operation the (continued...)”



An agency may only establish a revolving fund if it has been given statutory authority to do so. This authority must be explicit and contain at least the following attributes:

- “It must specify the receipts or collections which the agency is authorized to credit to the fund;”
- “It must define the fund’s authorized uses, that is, the purpose or purposes for which the funds may be expended;” and
- “It must authorize the agency to use receipts for those purposes without fiscal year limitation.”<sup>116</sup>

As long as these attributes are met, the statute does not have to use the words “revolving fund” in order to create a revolving fund. This specific statutory authority requirement applies to federal agencies but not “to the use of revolving fund financing by grantees or contractors unless prohibited by the relevant grant agreement or contract.”<sup>117</sup> Unless the statute includes a termination provision for the revolving fund, Congress must pass another statute to terminate a revolving fund.<sup>118</sup>

The legislation authorizing the revolving fund typically furnishes “an initial infusion of working capital” (the “corpus”), which is intended to enable the fund to operate until the ongoing/operational receipts start being received by the fund.<sup>119</sup> The corpus may come to the fund in various forms, such “an initial lump-sum appropriation, a transfer of balances from some existing appropriation or fund, a transfer of property and/or equipment, borrowing authority, or some combination of these,” and the fund may be required to repay the corpus.<sup>120</sup> With respect to ongoing receipts, the statute “will prescribe the types of receipts which may be credited to the fund and, where contextually appropriate, the method of payment.”<sup>121</sup> At the very least, “payment by reimbursement is usually

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fund should be self-sustaining or nearly so.” *Id.* at 12-97. These funds finance most government corporations, and they are “commonly used for credit programs (direct loan, loan guarantee) of agencies such as the Department of Housing and Urban Development and the Small Business Administration.” *Id.*

<sup>114</sup> A trust revolving fund is “a fund permanently established to finance a continuing cycle of business-type operations – except that it is used for specific purposes or programs in accordance with a statute that designates the fund as a trust fund.” *Id.* at 12-98. The Employees’ Life Insurance Fund and the Veterans Special Life Insurance Fund are examples. *Id.*

<sup>115</sup> “An intragovernmental revolving fund ... [is] a revolving fund whose receipts come primarily from other government agencies, programs, or activities. It is designed to carry out a cycle of business-type operations with other federal agencies or separately funded components of the same agency.” *Id.* at 12-98. These funds have common elements: “receipts that the fund has earned through its operations are available without fiscal year limitation;” the authorizing statute “list[s] the services [to be covered] ... , leave[s] it to the agency’s discretion ... , or provide[s] some combination;” payment for “goods or services the fund provides” is required; “some form of budgetary disclosure” may be required; and “a provision limiting the amount the fund may retain and requiring return of amounts exceeding the limitation to the general fund of the Treasury” may exist. *Id.* at 12-99. These funds “include stock funds, industrial funds, supply funds, working capital funds, and franchise funds.” *Id.* at 12-99–12-106.

<sup>116</sup> *Id.* at 12-90.

<sup>117</sup> *Id.* at 12-91.

<sup>118</sup> *Id.* at 12-92. “Legislation terminating a revolving fund should address the payment of existing debts if any remain, and the disposition of the fund’s balance and future receipts.” *Id.*

<sup>119</sup> *Id.* at 12-92.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 12-94.

authorized,” but advanced payment may also be authorized.<sup>122</sup> The statutory language can specify the recovery of indirect costs along with direct costs in the case of receipts “based on the cost of work or services;” however, the statute may be less specific and only require recovery of “actual cost.”<sup>123</sup> Finally, if the fund needs more capital, additional appropriations can always be provided to the fund by Congress, whether explicitly stated in the statute or not, or the fund can borrow money if it has been granted that authority.<sup>124</sup>

Funds in a revolving fund are available for expenditure without further appropriation, but, because they are considered appropriations, they are subject to the rules that apply to appropriated funds.<sup>125</sup> Funds in a revolving fund are to be used for their intended purpose(s).<sup>126</sup> These purposes are determined by looking at the authorized expenditures in the statute that created the fund and by applying the “necessary expense” rule, which allows expenditures that are “directly related to, and which materially contribute to accomplish an authorized purpose of, the fund and which are not otherwise specifically provided for or prohibited.”<sup>127</sup> The purpose of the appropriations “from which the revolving fund is advanced or reimbursed” must also be considered.<sup>128</sup> The amount of the revolving fund expenditure is limited by governmentwide restrictions and specific statutory restrictions for the fund.<sup>129</sup> The most important law restricting the amount of an expenditure by a revolving fund is the Antideficiency Act,<sup>130</sup> which prohibits overobligating the funds.<sup>131</sup> Revolving funds can violate the Antideficiency Act by “creating an obligation in excess of available budgetary resources;” “overspending a specific monetary limitation;” charging “an obligation or expenditure to an appropriation which is not legally available for that item, regardless of how much money is in the account;” and “[o]verobligating or overspending an apportionment” of appropriations.<sup>132</sup> Finally, as with any other appropriation, obligations must be recorded, but the “amount to be recorded [under a multiyear or base-year-plus-options contract] ... depends on the nature and extent of the government’s commitment.”<sup>133</sup>

Special rules and restrictions apply to intragovernmental revolving funds. Although revolving funds, by definition, do not have fiscal year limitations, an intragovernmental revolving fund is subject to the time rules of the appropriations of the requesting agency, and those appropriations must be obligated “for a *bona fide* need within the specific

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 12-95.

<sup>124</sup> *Id.* at 12-96–12-97.

<sup>125</sup> *Id.* at 12-106.

<sup>126</sup> *Id.* at 12-109. This is because the fund is subject to 31 U.S.C. §1301(a), the purpose restriction for appropriated funds. *Id.*

<sup>127</sup> *Id.* at 12-109–12-114.

<sup>128</sup> *Id.* at 12-113.

<sup>129</sup> *Id.* at 12-118–12-119.

<sup>130</sup> For a complete discussion of the Antideficiency Act, see *Principles of Federal Appropriations Law*, Volume II, 6-34–6-159 (3d ed. 2006).

<sup>131</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-119.

<sup>132</sup> *Id.* at 12-119–12-121.

<sup>133</sup> *Id.* at 12-122. “[I]f a multiyear contract does not restrict the government’s obligation to less than the full contract amount, then the full contract amount is the amount of the obligation.” However, “[i]f the contract consists of a basic period plus renewal options, the obligation is the cost of the base period plus any amounts payable for failure to exercise the options (termination costs).” *Id.* Congress can change these requirements by statute. *Id.*

period of availability.”<sup>134</sup> Also, in addition to the above limitations on the amount of the expenditures, intragovernmental revolving funds are subject to the amount restriction on the appropriations themselves.<sup>135</sup> Finally, with an intragovernmental revolving fund, the obligational treatment for the appropriations must be considered. It is generally determined by applying the appropriate recording standard: either a “written, binding agreement” or an “order required by law to be placed with another agency.”<sup>136</sup>

Special rules also govern purchases that are from stock or supply funds.<sup>137</sup> With stock items that are either “on hand or on order and expected to be delivered promptly, placing the order obligates the ... [requesting] agency’s appropriations.”<sup>138</sup> However, for “other orders of items which are part of the stock fund system,” the fund has two options: (1) it can develop a system “under which placing the order ‘accepts’ the offer and creates the recordable obligation” (such as “a list of items which constitutes an offer to sell at the published prices”), or (2) the fund must accept the ... [requesting agency’s] order (the offer) in order for the obligation to become recordable, “unless the order is required by law to be placed with the fund.”<sup>139</sup> In the case of items outside of the stock fund system, the fund must accept the requesting agency’s order “before the obligation can be recorded.”<sup>140</sup>

A revolving fund must not be improperly augmented. Therefore, an agency is not allowed to “[put] something in the fund which Congress has not authorized to be put there” or “[leave] something in the fund, regardless of the propriety of the original deposit, beyond the point Congress has said to take it out.”<sup>141</sup> Because revolving funds are often designed to break even in their long-term operations, Congress will frequently require a revolving fund to make “periodic payment[s] of surplus amounts to the general fund of the Treasury” to avoid improper augmentation of the fund.<sup>142</sup> Because items of property and equipment are considered assets of the revolving fund, various issues related to these assets, such as equipment replacement and asset transfer, also raise concerns about improper augmentation of the revolving fund.<sup>143</sup>

Revolving funds originated within the Department of Defense, and “they now play a highly significant role in financing defense operations.”<sup>144</sup> Congress has passed very specific and extensive statutory authority for these funds over the past several decades.<sup>145</sup>

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<sup>134</sup> *Id.* at 12-115–12-118.

<sup>135</sup> *Id.* at 12-119.

<sup>136</sup> *Id.* at 12-123.

<sup>137</sup> *Id.* at 12-123–12-124.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 12-124.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 12-125. *See id.* at 12-125–12-130 for a more detailed discussion of the improper augmentation of funds in a revolving fund.

<sup>142</sup> *Id.* at 12-128. Examples of funds that have this requirement in statute are the General Services Administration’s Acquisition Services Fund, 40 U.S.C. § 321(f); the Bureau of Engraving and Printing Fund, 31 U.S.C. § 5142(d); and the Office of Personnel Management Revolving Fund, 5 U.S.C. § 1304(e)(4). *Id.* at 12-128–12-129.

<sup>143</sup> *Id.* at 12-130–12-136.

<sup>144</sup> *Id.* at 12-136.

<sup>145</sup> *Id.* at 12-136–12-140.

Still, “the legal issues they raise and the analytical approach used in resolving them are not fundamentally different from other revolving funds.”<sup>146</sup>

### ***Standalone Reimbursable Accounts***

The term “standalone reimbursable account” is used by the Acquisition Advisory Panel in their report.<sup>147</sup> However, it is not a term of art in the budget and appropriations context and is not defined by GAO publications on budget and appropriations.

## **Federal Supply Schedules Under the Federal Property and Administrative Services Act**

The Federal Supply Schedules (FSS), also known as the GSA or Multiple Award Schedules (MAS), list vendors from whom government agencies can<sup>148</sup> purchase “commercial supplies and services at prices associated with volume buying.”<sup>149</sup> The GSA, or another agency exercising authority delegated to it by GSA,<sup>150</sup> has entered into contracts with these vendors under the authority the Federal Property and Administrative Services Act of 1949, as amended by the Office of Federal Procurement Policy Act of 1974.<sup>151</sup> The ID/IQ contracts typically obligate the vendors

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<sup>146</sup> *Id.* at 12-140.

<sup>147</sup> See *Report of the Acquisition Advisory Panel*, *supra* note 1, at 230.

<sup>148</sup> Use of the FSS is generally voluntary for federal agencies, although each Schedule separately identifies agencies that are required to use it as the “primary source[] of supply.” 48 C.F.R. § 38.101(b)-(c); 48 C.F.R. § 8.002(a)(vi)-(vii).

<sup>149</sup> 48 C.F.R. § 8.402(a). For purposes of federal procurements, a “commercial item” means:

[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and (i) [h]as been sold, leased, or licensed to the general public; or (ii) [h]as been offered for sale, lease, or license to the general public ... [including] installation services, maintenance services, repair services, training services, and other services if (i) [s]uch services are procured for support of [a commercial item], regardless of whether such services are provided by the same source or at the same time as the item; and (ii) [t]he source of such services provide similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government; [or] ... [s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and use standard commercial terms and conditions.

48 C.F.R. § 2.101. This definition is itself controversial, in part because it includes the phrase “of a type” when referring to services as well as goods, while the statutory definition of commercial services on which it is based does not. Compare *id.* (regulatory definition of “commercial items”) with 41 U.S.C. § 403(12)(F) (statutory definition of “commercial items”). Some commentators worry that this definition, in part, enabled agencies to procure non-commercial services under the simplified acquisition procedures applicable with commercial items. The Acquisition Advisory Panel also studied commercial item authorities and made ten recommendations for improvements. See *Report of the Acquisition Advisory Panel*, *supra* note 1, at 31-38.

<sup>150</sup> 48 C.F.R. § 8.402(a). GSA has, for example, delegated authority to the Department of Veterans’ Affairs (VA) to contract for medical and nonperishable subsistence items under the VA Federal Supply Schedules Program. See 48 C.F.R. § 38.101(d).

<sup>151</sup> Federal Property and Administrative Services Act, P.L. 81-152, §§ 301-310, 63 Stat. 393-97 (June 30, 1949) (codified at 40 U.S.C. § 471 et seq. and 41 U.S.C. § 251 et seq.); Office of Federal Procurement Policy Act, P.L. 93-400, §§ 2-15, 88 Stat. 796-800 (Aug. 30, 1974). The authority that GSA generally references in relation to the FSS is 40 U.S.C. § 501, which resulted from these acts, as amended. See Gen. Servs. Admin., *Frequently Asked Questions about GSA*, available at [http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=17112&contentId=8106&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=17112&contentId=8106&contentType=GSA_OVERVIEW).

to supply the goods or services listed on a “Schedule” to agencies at the listed prices for the duration of the contract.<sup>152</sup> The listed prices generally represent “most favored customer pricing,” or the best prices that the vendors give to their preferred commercial customers for requirements on a similar scale.<sup>153</sup> Moreover, the contracts between the vendors and GSA, or an agency delegated authority by GSA, contain “price reductions clauses,” requiring that vendors who subsequently offer more favorable prices or discount arrangements to their most favored customer(s) extend the same prices or terms to federal agencies.<sup>154</sup>

Agencies may order items from the Schedules by placing oral or written orders against the contract;<sup>155</sup> using Optional Form 347 or an agency-prescribed order form;<sup>156</sup> using GSA’s online shopping site, GSA Advantage!;<sup>157</sup> or establishing a blanket purchase agreement (BPA) with the vendor.<sup>158</sup> Because of these and other simplified procedures that are discussed below, agencies generally can obtain goods or services under the FSS within 15 days, as opposed to 268 days in standard acquisitions.<sup>159</sup> Agencies may pay for FSS purchases by using “any authorized means,” including government-wide commercial purchase cards.<sup>160</sup> Because FSS contracts are not under the authority of the Economy Act,<sup>161</sup> GSA, or those agencies to whom GSA has delegated authority, may charge a fee for use of the Schedules.<sup>162</sup>

## Ordering Under the FSS

The requirements that agencies must comply with when ordering from the FSS vary depending upon (1) the nature of the items acquired; (2) whether a statement of work is required when ordering services; (3) whether the order involves brand name specifications for goods; and (4) the amount of the order. **Table 1** illustrates these requirements in more detail. A “statement of work” (SOW) is a written description of the work to be performed, location of work, period of performance, deliverable schedule, applicable performance standards, and any special requirements (e.g., security clearances, travel).<sup>163</sup> A SOW is generally part of an invitation for

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<sup>152</sup> 48 C.F.R. § 8.402(a). FSS contracts typically last for five years and may be renewed three times, with each renewal lasting for five years. *See Report of the Acquisition Advisory Panel, supra* note 1, at 234.

<sup>153</sup> 48 C.F.R. § 538.270(a)-(c). This section of the *Code of Federal Regulations* is also known as the *GSA Acquisition Manual* (GSAM).

<sup>154</sup> *See* 48 C.F.R. § 552.238-75.

<sup>155</sup> 48 C.F.R. § 8.403(a)(1); 48 C.F.R. § 8.406-1. Agencies must place written orders if they are ordering services for which a statement of work is required, or if they require name brand items costing more than \$25,000. *Id.*

<sup>156</sup> 48 C.F.R. § 8.406-1.

<sup>157</sup> 48 C.F.R. § 8.402(c)(1). Use of GSA Advantage! is always discretionary, unlike use of e-Buy, discussed below, which is mandatory when agencies issue orders containing brand name specifications. *See* 48 C.F.R. § 8.402(d).

<sup>158</sup> 48 C.F.R. § 8.403(a)(2). *See supra* note 15 and accompanying text for more discussion of BPAs.

<sup>159</sup> *Report of the Acquisition Advisory Panel, supra* note 1, at 234.

<sup>160</sup> 48 C.F.R. § 8.402(c)(2); 48 C.F.R. § 8.405-7. These cards are like commercial credit cards and allow agency officials to obtain goods or services immediately and pay later. These cards have sometimes been misused, leading some members of Congress and commentators to propose reforms. *See, e.g.,* Government Charge Card Abuse Prevention Act, H.R. 2189, 111<sup>th</sup> Cong.; S. 942, 111<sup>th</sup> Cong.

<sup>161</sup> 48 C.F.R. § 17.500(b)(1).

<sup>162</sup> GSA historically charged an “industrial funding fee” of 1% of FSS purchases, resulting in \$210.8 million in “profits” between FY1997 and FY2001. *See Contract Management, supra* note 106, at 11-13. Rather than lower the fee, GAO used the funds to support its stock and fleet programs, uses permitted by the revolving fund within which the FSS program resides. *See id.*, at 3.

<sup>163</sup> 48 C.F.R. § 8.405-2(b).

bids or request for proposals in standard acquisitions, and a SOW must be provided, even when ordering under the FSS, when ordering services priced at hourly rates.<sup>164</sup> A “brand name specification” is one calling for a particular brand name product, or a product or feature of a product unique to one manufacturer.<sup>165</sup> Agencies must comply with more stringent requirements when using brand name specifications because of the limits effectively imposed on competition whenever agencies will accept only the goods of certain manufacturers.<sup>166</sup>

**Table I. Ordering Procedures Under the FSS**

Value of the Order	Nature of the Items Ordered	
	Supplies & Services Not Priced at Hourly Rates	Services Priced at Hourly Rates <sup>a</sup>
At or below the micro-purchase threshold (generally \$3,000) <sup>b</sup>	No need to solicit offers from a specific number of Schedule contractors, but agencies should attempt to distribute orders among eligible contractors.	No need to solicit offers from a specific number of Schedule contractors, but agencies should attempt to distribute orders among eligible contractors.
Above the micro-purchase threshold but below the maximum order threshold <sup>c</sup>	The order must be placed with the contractor that can provide the best value. Before placing the order, the ordering agency must consider reasonably available information about the goods or services by surveying at least three Schedule contractors. When the order includes brand name specifications, the ordering agency must post a Request for Quotations (RFQ), along with the justification required under 48 C.F.R. § 8.405-6. <sup>d</sup>	The ordering agency must develop a statement of work (SOW) and provide a Request for Quotations (RFQ), including this SOW and evaluation criteria, to at least three Schedule contractors offering services meeting the agency’s needs, requesting that these contractors submit firm fixed prices to perform the services in the SOW.
Above the maximum order threshold <sup>c</sup>	Once an order reaches this level, the ordering agency <i>must</i> seek a further price reduction from the vendor. Before doing this, agency must review price lists from additional Schedule contractors; seek price reductions from those considered best value; and place the order with the contractor that provides best value. The agency must also document: the contracts considered; the contractor from whom the purchase was made; the goods or services purchased; and the amount paid.	The ordering agency must provide the RFQ to an “appropriate number” of additional Schedule contractors offering services that could meet the agency needs, with the “appropriate number” being determined by the complexity, scope and value of the requirement, as well as findings from market research. The agency <i>must</i> then seek price reductions from these contractors.

**Source:** Congressional Research Service, based on 48 C.F.R. §§ 8.405-1 and 8.405-2.

- a. In all cases, regardless of the value of the order, agencies must provide copies of their Requests for Quotations (RFQ) to all Schedule contractors that request one; evaluate all responses using the evaluation criteria provided in the RFQ; and document (1) the contracts considered, (2) the contractor from whom the service was purchased; (3) the service purchased; (4) the amount paid; (5) the evaluation methodology; (6) the price reasonableness; and (7) the rationale for using other than a firm-fixed price order or a performance-based order. The agency should also provide timely notification to unsuccessful offerors.

<sup>164</sup> 48 C.F.R. § 8.405-2(a). When services are not priced at hourly rates, they are priced based upon the performance and completion of specific tasks.

<sup>165</sup> 48 C.F.R. § 8.405-6(a)(2).

<sup>166</sup> See, e.g., William S. Cohen, *The Competition in Contracting Act*, 14 *Pub. Cont. L.J.* 20-21 (1983/1984) (noting that agencies can use brand name specifications, among other things, to effectively limit competition).

- b. The micropurchase threshold varies somewhat depending upon the circumstances of the acquisition. It is \$2,000 for acquisitions of construction services subject to the Davis-Bacon Act; \$2,500 for acquisitions of services subject to the Service Contract Act; \$15,000 for acquisitions of supplies or services used in support of contingency operations or to facilitate defense against or recovery from nuclear, chemical, or radiological attacks when the contract is performed inside the United States; and \$30,000 when a contract of the latter sort is performed outside the United States. See 48 C.F.R. § 2.101.
- c. The maximum order threshold depends upon the nature of the goods or services ordered. See 48 C.F.R. § 8.405-1(d).
- d. Agencies must post Requests for Quotations to e-Buy when orders contain brand name specifications. 48 C.F.R. § 8.402(d).

### **Blanket Purchase Agreements under the FSS**

Blanket purchase agreements (BPAs) allow agencies to “fill repetitive needs for supplies or services” by taking delivery of goods or services now and paying later.<sup>167</sup> The number of BPAs issued when purchasing particular goods or services is generally within the ordering agency’s discretion, although the number of BPAs used should be determined based on a strategy “expected to maximize the effectiveness” of the BPA(s),<sup>168</sup> and the rules governing single BPAs differ somewhat from those governing multiple BPAs, as **Table 2** illustrates. Multi-agency BPAs are permissible when the agreements identify the participating agencies and estimate requirements.<sup>169</sup> A BPA generally cannot last for longer than five years,<sup>170</sup> and the ordering agency must review the BPA each year to determine whether (1) the ID/IQ against which the BPA was issued is still in effect; (2) the BPA still represents the best value; (3) the estimated quantities or amounts have been exceeded; and (4) additional price reductions can be sought.<sup>171</sup>

**Table 2. Blanket Purchase Agreements Under the FSS**

Number of BPAs	Requirements
Single BPA	The agency must place the BPA with the vendor that represents the best value and results in the lowest overall costs for the government, as well as inform other vendors of the basis for its selection. Once the BPA is placed, authorized agency personnel who are not contracting officers may place orders directly against the BPA when the need arises.
Multiple BPAs	If the purchase is above the micro-purchase threshold (generally \$3,000), <sup>a</sup> the agency must forward the requirement, or a statement of work and evaluation criteria, to an appropriate number of BPA holders and evaluate responses to make a best value determination prior to making a purchase.

**Source:** Congressional Research Service, based on 48 C.F.R. § 8.405-3(b)(1)-(2).

- a. The micropurchase threshold varies somewhat depending upon the circumstances of the acquisition. It is \$2,000 for acquisitions of construction services subject to the Davis-Bacon Act; \$2,500 for acquisitions of services subject to the Service Contract Act; \$15,000 for acquisitions of supplies or services used in support of contingency operations or to facilitate defense against or recovery from nuclear, chemical, or

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<sup>167</sup> 48 C.F.R. § 8.405-3(a)(1).

<sup>168</sup> *Id.* In making this determination, agencies should consider the scope and complexity of the requirements; whether there is any need to periodically compare multiple technical approaches and prices; administrative costs; and the technical qualifications of the prospective vendors. *Id.*

<sup>169</sup> 48 C.F.R. § 8.405-5(a)(4).

<sup>170</sup> 48 C.F.R. § 8.405-3(c).

<sup>171</sup> 48 C.F.R. § 8.405-3(d)(1)(i)-(iii).

radiological attacks when the contract is performed inside the United States; and \$30,000 when a contract of the latter sort is performed outside the United States. See 48 C.F.R. § 2.101.

## Other Requirements

Agency purchases under FSS contracts are exempt from many of the requirements governing federal procurements generally, or subjected to modified versions of these requirements.<sup>172</sup> Such purchases are not subject to the requirements governing solicitations, awards, and other activities applicable when agencies use sealed bidding, negotiated procurement, or simplified acquisition procedures.<sup>173</sup> They are similarly exempt from the small business requirements,<sup>174</sup> other than those prohibiting “contract bundling,”<sup>175</sup> although purchases from the Schedules can count toward agency goals for the percentage of contract dollars awarded to small businesses and agencies can consider socioeconomic status in selecting vendors.<sup>176</sup> Purchases under the FSS are also generally not subject to the same competition and notice requirements as other federal contracts.<sup>177</sup> This is, in part, because the competition requirements are intended to obtain the lowest priced or best-value items, and items listed on the FSS have already been determined by GSA to be fairly and reasonably priced.<sup>178</sup> However, ordering agencies may seek price reductions at any time,<sup>179</sup> and they are required to seek price reductions when (1) the goods or services are available at a lower price or (2) they establish a BPA.<sup>180</sup> Similarly, when ordering from fewer than the number of schedule contractors required for orders of a specific type or amount, as indicated in **Table 1**, or

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<sup>172</sup> The underlying contract against which the orders are made, or the BPAs are issued, are generally not similarly exempt.

<sup>173</sup> 48 C.F.R. § 8.404(a). The one exception to this rule is that agencies using the FSS must comply with the requirements for issuance of unpriced purchase orders found in 48 C.F.R. § 13.302-2(c)(3).

<sup>174</sup> It remains to be seen whether the regulations governing set-asides under multiple award contracts to be promulgated under Section 1331 of the Small Business Jobs Act of 2010 will apply to FSS contracts. See P.L. 111-240, § 1331, 124 Stat. 2541 (Sept. 27, 2010). FSS contracts have traditionally been treated differently from other multiple-award contracts where small business preferences are involved. See, e.g., 48 C.F.R. § 8.405-5(a) (stating that the “mandatory preference programs of FAR Part 19 do not apply” to GSA orders).

<sup>175</sup> 48 C.F.R. § 8.404(a) (requiring compliance with 48 C.F.R. § 19.202-1(e)(1)(iii)). “Contract bundling” involves consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to—(i) [t]he diversity, size, or specialized nature of the elements of the performance specified; (ii) [t]he aggregate dollar value of the anticipated award; (iii) [t]he geographical dispersion of the contract performance sites; or (iv) [a]ny combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

48 C.F.R. § 2.101.

<sup>176</sup> 48 C.F.R. § 8.404(a). There are goals for the percentage of federal contract dollars awarded to various categories of small businesses by individual agencies and by the federal government as a whole. See 15 U.S.C. § 644(g)(1)-(2). Small businesses are nonetheless arguably well represented in FSS purchases. It is estimated that 81% of all FSS contracts were held by small businesses as of October 2006. *Report of the Acquisition Advisory Panel, supra* note 1, at 234.

<sup>177</sup> 48 C.F.R. § 8.405-6(a). The notice requirements are generally intended to support the competition requirements by ensuring that potential competitors are aware of agencies’ proposed awards or awards and can submit bids or proposals or protest awards. See, e.g., *Competition in Contracting Act, supra* note 166, at 2.

<sup>178</sup> 48 C.F.R. § 8.404(d). An agency’s decision to purchase from the FSS further indicates that it has concluded that the purchase represents the best value and results in the lowest overall cost alternative to meet the government’s needs. Additionally, BPAs and orders placed against FSS contracts are “considered to have been issued using full and open competition.” 48 C.F.R. § 8.404(a).

<sup>179</sup> 48 C.F.R. § 8.404(a).

<sup>180</sup> 48 C.F.R. § 8.405-4.



when using brand name specifications, agencies must provide justifications and approvals like those required for noncompetitive awards.<sup>181</sup> Additionally, with purchases wholly or partially funded under the American Recovery and Reinvestment Act (ARRA), agencies must post (1) pre-award notices of proposed orders or BPAs in excess of \$25,000 and (2) post-award notices.<sup>182</sup> However, FSS purchases are subject to the general requirements concerning acquisition plans and IT acquisition strategies, and they must comply with all statutes and regulations governing the requesting agency's acquisition of goods or services.<sup>183</sup>

“Open market items,” or items that are not on the FSS, may generally be included on orders or BPAs with FSS items only when (1) all applicable regulations governing purchase of non-FSS items have been complied with; (2) the contracting officer of the ordering activity has determined that the price for the items is fair and reasonable; (3) the items are clearly labeled as non-FSS items; and (4) the order includes all contract clauses applicable to non-FSS items.<sup>184</sup>

### **Expansion of the FSS to State and Local Governments**

Congress has recently expanded use of the FSS by authorizing state and local governments to purchase goods or services from it in certain circumstances. The E-Government Act of 2002 first allowed state and local governments to purchase IT items from GSA's “Schedule 70” or the Consolidated Products and Services Schedule.<sup>185</sup> Section 833 of the John Warner National Defense Authorization Act for FY2007 later expanded the range of schedules that state and local governments could use, authorizing them to use any Schedule to purchase goods or services to facilitate recovery from terrorism; nuclear, biological, chemical, or radiological attacks; or major disasters declared by the president.<sup>186</sup> Then, the Local Preparedness Acquisition Act authorized state and local government to purchase:

[a]larm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Federal supply classification code group 84 or any amended or subsequent version of that Federal supply classification group).<sup>187</sup>

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<sup>181</sup> 48 C.F.R. § 8.405-6.

<sup>182</sup> 48 C.F.R. § 8.404(a). Orders under the FSS are otherwise generally exempt from such notice requirements. *See id.* However, the Office of Management and Budget construed Sections 1526(c)(4) and 1554 of the ARRA as imposing these requirements on FSS orders wholly or partially funded under the act. *See* Office of Mgmt. & Budget, Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, Feb. 18, 2009, at § 6.2, *available at* [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-10.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-10.pdf).

<sup>183</sup> 48 C.F.R. § 8.404(c)(1)-(3).

<sup>184</sup> 48 C.F.R. § 8.402(f)(1)-(4). However, the FSS may not be used for requirements that “substantially or to a dominant extent” specify the performance of architect-engineer services. 48 C.F.R. § 8.403(c). When such services are involved, agencies must instead follow the procedures outlined in 48 C.F.R. § 38.101(d).

<sup>185</sup> P.L. 107-347, § 211, 116 Stat. 2939-40 (Dec. 17, 2002). Under GSA regulations implementing the E-Government Act, a vendor's sales to state and local governments under Schedule 70 do not trigger the “price reductions clause.” *See supra* notes 152- 154 and accompanying text; Gen. Servs. Admin., Federal Supply Schedule Contracts: Acquisition of Information Technology by State and Local Governments Through the Federal Supply Schedules, 69 Fed. Reg. 28063 (May 18, 2004).

<sup>186</sup> P.L. 109-364, § 833, 120 Stat. 2332 (Oct. 17, 2006).

<sup>187</sup> P.L. 110-248, § 2, 122 Stat. 2316 (June 26, 2008).

Most recently, the 111<sup>th</sup> Congress authorized certain private entities to use the FSS under certain circumstances.<sup>188</sup>

## **Franchise Funds and Interagency Assisting Entities Under the Government Management Reform Act and Other Authorities**

Section 403 of the Government Management Reform Act (GMRA) of 1994 authorized the Director of the Office of Management and Budget (OMB), in consultation with certain congressional committees, to establish franchise funds in six executive agencies on a pilot basis.<sup>189</sup> A franchise fund is “a type of intragovernmental revolving fund designed to compete with similar funds of other agencies to provide common administrative services ... [such as] accounting, financial management, information resources management, personnel, contracting, payroll, security, and training.”<sup>190</sup> The franchise funds created by GMRA were authorized to provide “administrative support services,” including contracting services, to other agencies, in the hope that centralized provision of these services would result in such services being “provided more efficiently.”<sup>191</sup> Congress envisioned that the funds would compete with one another to provide their services<sup>192</sup> and explicitly authorized them to charge fees for services and retain funds to create an operating reserve.<sup>193</sup> The various agencies that operate franchise funds under the authority of GMRA or other statutes, including the Economy Act, are all known as “interagency assisting entities,” although their operations differ somewhat because of their different statutory bases.<sup>194</sup>

OMB designated the Environmental Protection Agency and the Departments of Commerce, Veterans Affairs, Health and Human Services (HHS), Interior and Treasury as interagency assisting entities for GMRA’s pilot program.<sup>195</sup> This pilot program expired on October 1, 1999,<sup>196</sup> but all funds other than those operated by HHS and Interior have apparently been granted permanent authorization.<sup>197</sup> In 2003, in what appears to be the most recent attempt to identify extant federal revolving funds, the Government Accountability Office identified 25 other interagency revolving funds,<sup>198</sup> seven of which are authorized to charge and retain fees.

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<sup>188</sup> See Consolidated Appropriations Act, 2010, P.L. 111-117, § 516, 123 Stat. 3192 (Dec. 16, 2009) (authorizing “relief and disaster assistance organizations,” as defined in Section 309 of the Stafford Act, to use the FSS to purchase goods or services for use in preparing for, recovering from, or responding to natural disasters or accidental or “man-caused” events); Omnibus Appropriations Act, 2009, P.L. 111-8, Title V, § 517, 123 Stat. 664 (Mar. 11, 2009) (same).

<sup>189</sup> P.L. 103-356, § 403, 108 Stat. 3413-14 (Oct. 13, 1994) (codified at 31 U.S.C. § 3301 note).

<sup>190</sup> *Principles of Federal Appropriations Law*, Volume III, at 12-102 (3d ed. 2008).

<sup>191</sup> P.L. 103-356, at § 403(b).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at § 403(c).

<sup>194</sup> *Report of the Acquisition Advisory Panel*, *supra* note 1, at 236-37.

<sup>195</sup> *Id.* at 237.

<sup>196</sup> P.L. 103-356, § 403(f).

<sup>197</sup> *Cf. Report of the Acquisition Advisory Panel*, *supra* note 1, at 237.

<sup>198</sup> Gov’t Accountability Office, *Budget Issues: Franchise Fund Pilot Review*, GAO-03-1069 (Aug. 2003).

The franchise funds can effectively allow agencies to retain funds beyond their appropriations period in certain circumstances, a fact which has given rise to concern among some members of Congress and commentators.<sup>199</sup>

**Table 3. Comparison of Interagency Contracting Mechanisms**

<b>Contracting Mechanism</b>	<b>Authorizing Statutes</b>	<b>Goods or Services Covered</b>	<b>Who May Enter Underlying ID/IQ Contract</b>	<b>Procedures for Ordering Under ID/IQ Contract</b>	<b>Fee-for Service?</b>
Multi-agency contracts	Economy Act of 1932; specific statutory authorities	Any	Any agency	Ordering and servicing agencies must authorize or approve orders	No
Government-wide acquisition contracts	Clinger-Cohen Act of 1994	Information technology	Only designated “executive agents”	Agencies must obtain a delegation of authority to order, or authorize an executive agent to order for them	Yes
Federal Supply Schedules (GSA Schedules, Multiple Award Schedules)	Federal Property and Administrative Services Act of 1949; Office of Federal Procurement Policy Act of 1974	Commercial items	GSA or an agency delegated authority by GSA	Agencies may place orders or enter BPAs directly with vendors	Yes
Interagency assisting entities; franchise funds	Government Management Reform Act of 1994	Administrative support services, including contracting services	n/a	n/a (procedures would depend upon the contracting vehicles used)	Possibly

**Source:** Congressional Research Service.

## Combining Various Types of Interagency Contracts

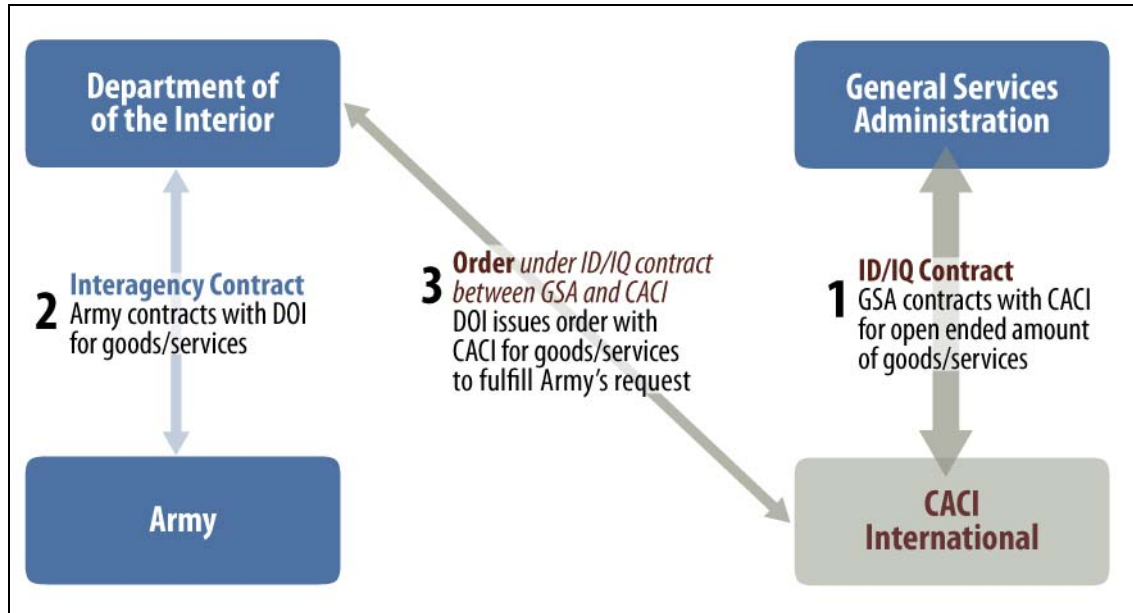
Although the different types of interagency contracts are governed by different statutory authorities, agencies can rely upon multiple types of interagency contracts in specific contracting situations. Perhaps the best illustration of agencies’ ability to do this, and the potential risks of doing so, is CACI International’s work for the Army in Iraq. Although CACI employees worked for the Army as interrogators at Abu Ghraib, where they were allegedly involved in prisoner abuse, the Army did not have a contract with CACI.<sup>200</sup> Rather, the Army had a multi-agency contract with the Department of the Interior, under which Interior agreed to perform contracting services for the Army. The Interior Department fulfilled this contract, in part, by making orders

<sup>199</sup> *Report of the Acquisition Advisory Panel*, *supra* note 1 at 241.

<sup>200</sup> See, e.g., Gov’t Accountability Office, *Problems with DOD’s and Interior’s Orders to Support Military Operations*, GAO-05-201 (Apr. 2005), available at <http://www.gao.gov/new.items/d05201.pdf>.

against a FSS listing of vendors of information technology services. CACI was on this Schedule because it had into an ID/IQ contract with the GSA.

**Figure I. Use of Interagency Contracting in Hiring Interrogators for Abu Ghraib**



**Source:** Congressional Research Service.

Among the other problems in this particular contracting situation,<sup>201</sup> the absence of a contract directly between the Army and CACI effectively limited opportunities for the Army to manage and oversee the work of CACI employees.<sup>202</sup> In this complex situation, as well as in “simpler” interagency contracting situations, the contracting officers generally work in one agency, while the contracting officers’ representatives (CORs) and technical representatives (COTRs), who are charged with overseeing performance of the contract work, work in another.<sup>203</sup> This disjunction between contracting officers and CORs or COTRs is far from the only such disjunction to arise with interagency contracting. In fact, until fairly recently, the various interagency contracting authorities generally allowed units within agencies that required goods or services to work directly with contracting officers at other agencies, without even consulting contracting officers at their own agencies.<sup>204</sup>

<sup>201</sup> See, e.g., *id.* at 7-8 (noting that 10 of the 11 task orders that the Interior Department issued to CACI under the FSS were outside the scope of the underlying ID/IQ contract between CACI and GSA). Out-of-scope orders are in violation of the competition requirements, which require that agencies conduct a new solicitation for work not within the statement of work of an existing ID/IQ contract.

<sup>202</sup> *Id.* at 11-13.

<sup>203</sup> See *Report of the Acquisition Advisory Panel*, *supra* note 1, at 230.

<sup>204</sup> See, e.g., National Defense Authorization Act for FY2002, P.L. 107-107, § 801(b), 115 Stat. 1174-78 (Dec. 28, 2001) (requiring certain approvals from agency contracting officers before DOD components can acquire services through contracts awarded by other agencies).

## Recent Developments

Interagency contracting has recently been “one of the fastest growing fields in federal acquisition,” largely due to its ease and apparent value.<sup>205</sup> Such growth, in itself, would probably have drawn increased attention to interagency contracting. However, this growth has also been coupled with highly publicized problems on particular interagency contracts, such as those resulting in CACI employees working as interrogators at Abu Ghraib, as well as numerous reported contracting or appropriations violations under interagency contracts generally.<sup>206</sup> The Government Accountability Office first listed interagency contracting as a “high risk” area in 2005 because, among other things, it results in a “much more complex [contracting] environment in which accountability has not always been clearly established,”<sup>207</sup> and interagency contracting remained on GAO’s “high risk” list for DOD in 2009.<sup>208</sup> The Acquisition Advisory Panel, created under Section 1423 of the Services Acquisition Reform Act of 2003, similarly included recommendations for improving interagency contracting in its 2007 report to Congress and the Office of Federal Procurement Policy.<sup>209</sup> Commentators have also expressed concerns about whether the proliferation of interagency contracting vehicles offering similar goods or services dilutes the government’s buying power, or imposes excessive demands upon contractors, particularly small business contractors, which must incur the expenses associated with obtaining eligibility for orders under multiple contracts.<sup>210</sup>

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<sup>205</sup> *Report of the Acquisition Advisory Panel*, *supra* note 1, at 225. Questions have, however, been raised about whether agencies do obtain lower priced goods under interagency contracts. *See, e.g.*, Gov’t Accountability Office, *Interagency Contracting: Improved Guidance, Planning, and Oversight Would Enable the Department of Homeland Security to Address Risks*, GAO-06-996 (Sept. 27, 2006).

<sup>206</sup> *See, e.g.*, Gov’t Accountability Office, *Contract Management: Agencies Are Not Maximizing Opportunities for Competition or Savings Under Blanket Purchase Agreements Despite Significance Increases in Usage*, GAO-09-792 (Sept. 2009) (finding that agencies often failed to compete BPAs when establishing them, relied heavily on single-award BPAs, did not compete orders under multiple-award BPAs, did not seek discounts when establishing BPAs or obtain better pricing when placing orders, and failed to conduct required annual reviews of BPAs); Gov’t Accountability Office, *Interagency Contracting: Need for Improved Information and Policy Implementation at the Department of State*, GAO-08-578, at 3-4 (May 8, 2008) (finding that the State Department lacked “reliable information” on the nature and extent of its interagency contracts and did not adequately provide for oversight of contractor performance under interagency contracts); Dep’t of Def. Inspector General, *Potential Antideficiency Act Violations on DoD Purchases Made Through Non-DoD Agencies*, D-2007-042, at ii (Jan. 2007) (noting 69 potential violations of the Antideficiency Act in DOD’s interagency contracts between 2005 and 2006); Dep’t of Def. Inspector General, *DoD Purchases Made Through the General Services Administration*, Report No. D-2205-096 (July 29, 2005) (finding that 91% of the purchases lacked acquisition planning to determine that contracting through GSA was the best alternative available; 98% of the interagency agreements failed to outline the terms and conditions of the purchases; and 38% were inadequately funded).

<sup>207</sup> GAO’s 2005 High-Risk Update, *supra* note 4, at 17.

<sup>208</sup> DOD’s High-Risk Areas, *supra* note 5.

<sup>209</sup> *Report of the Acquisition Advisory Panel*, *supra* note 1, at 251-57. Among other things, the Panel suggested that “some of the most fundamental issues associated with interagency and enterprise-wide vehicles could be best addressed by establishing more formal procedural requirements for initially establishing such vehicles and subsequently for authorizing their continued use.” *Id.* at 222. In April 2008, an independent Multiple Awards Schedule Advisory Committee was formed to examine the FSS. *See* MAS Advisory Panel, *available at* <http://www.acquisition.gov/comp/masap/index.html>. The committee released its final report in February 2010, but the recommendations contained therein have not yet been implemented. *See infra* notes 220-225 and accompanying text.

<sup>210</sup> *Report of the Acquisition Advisory Panel*, *supra* note 1, at 247, 251. Intra-agency contracting vehicles, or internal enterprise-wide purchasing programs for goods or services like those offered under the FSS or through other interagency vehicles, could have similar effects and have also been proliferating. *See Report of the Acquisition Advisory Panel*, *supra* note 1, at 220 (discussing the Naval Sea Command’s SeaPort-e program).

Responding to such concerns and recommendations, Congress and federal agencies have recently enacted or implemented numerous reforms to interagency contracting, as the following **Chronology** illustrates.

### **Chronology of Recent Developments in Interagency Contracting**

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Oct. 2002	DOD promulgates a rule implementing Section 803 of P.L. 107-107 that requires certain approvals for noncompetitive orders exceeding \$100,000 <sup>211</sup> under multiple-award contracts, including FSS contracts. The rule also requires that when DOD places orders for services valued at over \$100,000 on FSS contracts, notice must be provided to all FSS contractors providing the service, or as many as practicable so as to ensure offers from at least three contractors. If written offers are not received from three contractors, contracting officers must make a written determination that no additional contractors could be identified despite reasonable attempts to do so.
July 2003	The Federal Acquisition Regulatory Council amends the Federal Acquisition Regulation to create a “Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies.” All agencies must enter certain information into the database within ten days of the award of a GWAC, multi-agency contract, FSS, or similar procurement instrument.
Oct. 2003	DOD promulgates a rule implementing Section 801(b) of P.L. 107-107 that requires DOD components to obtain certain approvals before acquiring services through a contract or order awarded by an agency other than DOD.
July 2004	The Federal Acquisition Regulation is amended to make clear that a contracting officer placing an order against the FSS on behalf of another agency is responsible for complying with that agency’s procurement statutes and regulations.
Oct. 2004	Section 854 of the Ronald W. Reagan National Defense Authorization Act for FY2005 prohibits DOD from procuring goods or services through a contract or task order valued at more than \$100,000 under an interagency contract unless DOD: (1) determines that an interagency contract is in its best interests given customer requirements, schedule, cost effectiveness, and contract administration; (2) determines that the goods or services to be acquired are within the scope of the contract to be used; (3) ensures that funding complies with appropriation limitations; (4) ensures that the contract complies with all statutes, regulations and other requirements applicable to DOD; and (5) collects data on the use of assisted acquisitions for subsequent analysis.
Nov. 2005	The Office of Federal Procurement Policy establishes the Interagency Acquisition Working Group.
Feb. 2006	The Office of Federal Procurement Policy initiates an effort to identify the number and scope of interagency contracts and collect other information related to interagency acquisitions.
Oct. 2006	DOD implements a policy requiring that all orders in excess of \$500,000 made under interagency contracts that are not under the authority of the Economy Act be reviewed by DOD contracting officials before they are sent to the non-DOD agency. <sup>212</sup>
Jan. 2008	Section 801 of the National Defense Authorization Act for FY2008 generally prohibits DOD from placing an order in excess of \$100,000 through a non-defense agency unless the head of that agency certifies the agency will comply with the defense procurement requirements for that year or other conditions are met. Section 801 also requires DOD to promulgate regulations specifying (1) the circumstances in which it is appropriate for DOD to use direct or assisted acquisitions; (2) the circumstances in which DOD may use interagency contracts to acquire items unique to DOD or items already being provided under a DOD contract; (3) the tools contracting officers should use to determine whether items are already being provided under a DOD contract; and (4) the procedures for ensuring that DOD requirements are adequately identified and communicated to other agencies involved in interagency contracting. <sup>213</sup>

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<sup>211</sup> The values contained in this chronology are those given in the statute as it was enacted. They do not reflect any subsequent adjustments made for inflation.

<sup>212</sup> See Under Sec. of Def., Non-Economy Act Orders: Memorandum for the Secretaries of the Military Departments, Oct. 16, 2006, available at <http://www.aqd.nbc.gov/docs/NonEconomyAct.pdf>.

<sup>213</sup> The final rule implementing Section 801 was promulgated on February 11, 2010. See Dep’t of Defense, Defense (continued...)

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April 2008	Multiple Award Schedules Program Advisory Panel is created to review the FSS's pricing policies, among other things. <sup>214</sup>
June 2008	The Office of Federal Procurement Policy (OFPP) issues guidance requiring agencies to (1) make "best interest determinations" in support of their decisions to use interagency contracting; (2) use model interagency agreements or otherwise ensure that certain elements are present in any interagency agreement; and (3) identify the roles and responsibilities involved in particular interagency acquisitions. <sup>215</sup>
Oct. 2008	Section 865 of the Duncan Hunter National Defense Authorization Act for FY2009 requires that (1) all interagency acquisitions include written agreements between the requesting and servicing agencies assigning responsibility for contract administration and management, determinations that an interagency acquisition is the best procurement alternative, and sufficient information to ensure an adequate audit and (2) all multi-agency contracts be supported by a business case analysis detailing the administration of the contract, including an analysis of all direct and indirect costs of awarding and administering the contract and the impact of the contract on the federal government's ability to leverage its purchasing power. Additionally, the Director of the Office of Management and Budget is to submit a comprehensive report to Congress on interagency acquisitions and issue guidelines addressing procedures for the use of interagency acquisitions; categories of work inappropriate for interagency acquisition; and requirements for training acquisition workforce personnel in the proper use of interagency acquisitions. <sup>216</sup>
July 2009	The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) amend the FAR to require that agencies provide evaluations of past performance for orders exceeding \$100,000 placed against FSS contracts or against multi-agency contracts or GWACs, among other things.

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## Legislative Initiatives

The 111<sup>th</sup> Congress expanded upon some of these initiatives, holding hearings on several issues related to interagency contracting,<sup>217</sup> and enacting or proposing additional legislation that addressed interagency contracting (e.g., P.L. 111-5, P.L. 111-8, P.L. 111-117, P.L. 111-263).<sup>218</sup>

(...continued)

Federal Acquisition Regulation Supplement: Limitation on Procurements on Behalf of DOD, 75 Fed. Reg. 6819 (Feb. 11, 2010). Previously, on May 26, 2009, Defense Procurement and Acquisition Policy Director Shay Assad indicated that the Central Intelligence Agency is not authorized to purchase property or services costing over \$100,000 for DOD in FY2009 because of its inability to certify compliance with DOD procurement requirements as required under Section 801. *See* DOD Bars Procurements Through CIA Valued in Excess of \$100,000, 91 *Fed. Cont. Rep.* 435 (May 26, 2009).

<sup>214</sup> In February 2010, the group issued its final report. *See infra* notes 220-225 and accompanying text.

<sup>215</sup> *See, e.g.,* OFPP Issues New Guidance, Mandates on Interagency Acquisition Use, Management, 89 *Fed. Cont. Rep.* 640 (June 17, 2008).

<sup>216</sup> These requirements do not appear to have been implemented to date.

<sup>217</sup> The House Oversight and Government Reform Committee held a hearing on May 20, 2010, to discuss the transition of telecommunications services from one GWAC contract (FTS 2001) to another (Networx). The Ad Hoc Subcommittee on Contracting Oversight of the Senate Committee on Homeland Security and Governmental Affairs also held two hearings on interagency contracting, one on February 25, 2010, and the other on June 30, 2010. The first of these hearings examined the "benefits and shortcomings" of interagency contracting, as well as the impact of interagency contracting on competition, while the second focused on the "need for increased transparency, oversight, and other potential reforms" in interagency contracting.

<sup>218</sup> Among the legislation proposed, but not enacted, was the following: Department of Veterans Affairs Acquisitions Improvement Act, H.R. 4221 (requiring the Department of Veterans Affairs to acquire certain "health care items" by using particular FSS Schedules or contracts awarded by the National Acquisition Center and approved by the department); Enhanced Oversight of State and Local Economic Recovery Act, H.R. 2182 (authorizing state and local governments to use the FSS when purchasing products or services wholly or partially funded under ARRA); Federal Agency Energy Efficiency Improvement Act, S. 1830 (allowing state and local governments to use the FSS to acquire "environmentally preferable 'green'" products and services); Information Technology Investment Oversight Enhancement and Waste Prevention Act, S. 920 (allowing the E-Gov Administrator, in conjunction with the Administrator of GSA, to establish competitively bid contracts with one or more qualified consultants independent of (continued...))

Members of the 112<sup>th</sup> Congress may take similar actions if concerns about interagency contracting persist.

## **Executive Branch Initiatives**

The executive branch is also considering certain changes in interagency contracting as a result of the February 2010 issuance of the final report of the Multiple Award Schedule Advisory Panel.<sup>219</sup> The panel, which was established during the Bush Administration, has called for significant changes to the terms and usage of FSS contracts, including

- elimination of the price reduction clause from FSS contracts,<sup>220</sup> coupled with a requirement that all agencies “compete” their FSS orders by *either* soliciting all contractors holding the contract and receiving offers or quotes from at least three qualified contractors *or* explaining why they did not solicit the requisite number of contractors and receive the requisite number of offers;<sup>221</sup>
- taking steps to ensure fair and reasonable pricing at the order-level, as opposed to the contract-level, which is the focus of the current clauses regarding price reasonableness;<sup>222</sup>
- disclosure of the basis upon which GSA determined that the prices for certain contracts are “fair and reasonable,” as well as the terms and conditions of FSS contracts, to contracting officers in other agencies placing orders under the contract;<sup>223</sup>
- exploring ordering on a cost-reimbursement basis for service contracts, while ensuring that certain other contracts are firm-fixed-priced and performance-based;<sup>224</sup> and
- reviewing the length of FSS contracts, which can currently last for up to 20 years with the exercise of options, and ensuring that contracts are used in ways that are

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(...continued)

any GSA schedule); Veterans Small Business Opportunities Act, H.R. 2415 (requiring the Department of Veterans Affairs and other federal agencies use FSS purchases to meet the government-wide goal for contracting with service-disabled veteran-owned small businesses).

<sup>219</sup> See Multiple Award Schedule Advisory Panel Final Report, Feb. 2010, available at [https://www.acquisition.gov/comp/masap/documents/MAS\\_Panel\\_Final\\_Report\\_Signatures.pdf](https://www.acquisition.gov/comp/masap/documents/MAS_Panel_Final_Report_Signatures.pdf).

<sup>220</sup> *Id.* at 12. Groups such as the American Bar Association Section of Public Contract Law and the Coalition for Government Procurement have long advocated modifications to or even removal of the “price reductions clause” on the grounds that it is “unworkable,” “unfair,” and not the sort of clause generally found in contracts for commercial items. See, e.g., Bar and Contractor Groups Urge GSA to Change Price Reductions Clause, 85 *Fed. Cont. Rep.* 475 (May 2, 2006).

<sup>221</sup> Multiple Award Schedule Advisory Panel Final Report, *supra* note 219, at 12-13. Section 803 of the National Defense Authorization Act for FY2002 imposed these requirements upon the orders of defense agencies, while Section 863 of the National Defense Authorization Act for FY2008 extended them to civilian agencies. The requirements for defense agencies, in particular, have been interpreted at applying to orders under FSS contracts.

<sup>222</sup> *Id.* at 15-17.

<sup>223</sup> *Id.* at 17-18.

<sup>224</sup> *Id.* at 19.



consistent with the goods or services and pricing that formed the basis for the award.<sup>225</sup>

It remains to be seen whether these recommendations are implemented. The recommendations concerning the “price reductions clause,” in particular, have generated significant opposition from agency inspectors general, who are concerned that removal of the clause could limit their ability

... to review contractor performance and to identify sums that should be returned to the government as a result of: 1) mispricing at the time of initial contract award; or 2) failure to reduce pricing to the government during contract performance when the contractor had reduced its pricings to the basis of award customers.<sup>226</sup>

There have also been reports that GSA is seeking to become the sole provider of GWACs, removing other agencies from this role.<sup>227</sup> It is unclear, however, whether GSA’s reported opposition to reauthorization of the National Institute of Health’s GWAC authority is part of a broader program to remove GWAC authority from other agencies that currently have it.

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<sup>225</sup> *Id.* at 21. For example, the GSA Inspector General recently reported that certain orders for acquisition management support services were outside the scope of the FSS contract under which they were placed. *See* Review of the Use of Multiple Award Schedule Contracts for Acquisition Management Support Services (No. A090018/Q/A/P10009), Aug. 17, 2010, available at [http://www.gsaig.gov/auditreports/reports/A090018\\_1.pdf](http://www.gsaig.gov/auditreports/reports/A090018_1.pdf).

<sup>226</sup> Multiple Award Schedule Advisory Panel Final Report, *supra* note 219, at 12. *See also* Matthew Weigelt, MAS Panel Recommendation Meets IG Resistance, *Wash. Tech.*, May 1, 2009, available at <http://www.washingtontechnology.com/Articles/2009/05/01/web-GSA-IG-MAS-panel.aspx> (describing initial opposition to this proposal from GSA’s inspector general). The Federal Supply Schedules are generally limited to commercial items and services. *See supra* note 149.

<sup>227</sup> *See, e.g.*, Matthew Weigelt, GSA Could be Trying to Kill Rival Agency Contract, *Wash. Tech.*, Apr. 1, 2010, available at <http://washingtontechnology.com/articles/2010/04/01/gsa-nih-gwacs.aspx> (reporting that the GSA’s GWAC director sought to get the Office of Federal Procurement Policy at OMB to strip the National Institutes of Health of GWAC authority); Matthew Weigelt, NIH Prepares to Fight for Contract Authority, *Wash. Tech.*, Apr. 8, 2010, available at <http://washingtontechnology.com/articles/2010/04/08/fraier-talks-nitaac-gwac-renewal.aspx>.