

Non-Economy Act Authorities: The Other White Meat of Interagency Acquisitions—Their Uses, Mechanics, and Limitations

By Major Bruce L. Mayeaux*

“It is critical that the Federal Government, in its procurement activity, leverage its buying power to the maximum extent as well as achieve administrative efficiencies and cost savings. Too often, however, agencies establish new overlapping and duplicative contracts for supplies or services, because the agencies have not adequately considered the suitability of . . . interagency contract vehicles This failure to make maximum appropriate use of interagency vehicles and agency-specific contracts results in higher prices and unnecessary administrative costs.”¹

I. Introduction

You are a general attorney working in the Office of the Staff Judge Advocate (OSJA) for Orange Sands Missile Range (OSMR). The Chief of Staff (CoS) walks into your office and in a concerned tone says, “Judge, we have a problem.” The CoS starts to walk you through an all too familiar story; while the individual facts always differ, an action occurred without coming through the OSJA for advice and it is not playing out as the command envisioned.

The commander of the High Velocity Nuclear Systems Test Facility (HVNSTF) convinced the OSMR command to request that the responsible contracting activity² release a requirement³ and now the HVNSTF finds itself without a contracting activity to handle the quickly upcoming re-compete.⁴ Rubbing your forehead and bracing yourself for the answer, you regrettably ask, “Why was the requirement released?” The CoS explains that the HVNSTF commander wanted an incumbent contractor to *do more stuff* in the re-compete and wanted the responsible contracting activity to expand the requirement. Specifically, the commander wanted the facility maintenance incumbent contractor to perform training services on commercial items previously purchased by the command. The responsible contracting activity pushed

back, insisting the re-compete would require full and open competition and that the incumbent contractor does not have experience providing the services.

Unhappy with that response, the HVNSTF commander spoke to the U.S. Army Corps of Engineers (USACE) and asked if they would be willing to service the requirement. Before any agreement was entered into, the HVNSTF commander convinced the OSMR command to ask the responsible contracting activity to release the requirement so that the USACE could service it. The contracting activity agreed, but the USACE did not pick up the requirement, citing work load limitations. Now, the USACE does not want the requirement, the responsible contracting activity is refusing to pick the requirement back up, the re-compete was due out for solicitation⁵ a while back, and the command’s remaining operations funds that are set aside for the re-compete are about to expire. The good news is that the value of the requirement seems to fall under the Simplified Acquisition Threshold (SAT).⁶ Visibly frustrated, the CoS asks you, “What can we do, Judge?” You seem to recall reading about Interagency Acquisition⁷ (IA) authorities when you were trying to fall asleep by reading the *Fiscal Law Deskbook*. You decide to look there.

* Judge Advocate, United States Army. Presently assigned Trial Attorney, United States Army Legal Services Agency, Contract and Fiscal Law Division, Fort Belvoir, Virginia. LL.M., 2016, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia; J.D., 2010, Mississippi College School of Law, Jackson, Mississippi, *Magna Cum Laude*; Certificate of Civil Law Studies, 2010, Mississippi College School of Law; B.A., 2004, University of New Orleans, New Orleans, Louisiana. Previous assignments include: Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, White Sands Missile Range, New Mexico, 2013–2015; Administrative and Civil Law Attorney, Office of the Staff Judge Advocate, 1st Armored Division and Fort Bliss, Texas, 2012–2013; Trial Counsel, 15th Sustainment Brigade, Fort Bliss, Texas, 2011–2012; Chemical Officer, 1st Battalion, 7th Special Forces Group (Airborne), Fort Bragg, North Carolina, 2004–2007. Member of the bars of Louisiana and the United States Court of Appeals for the Fifth Circuit. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ Memorandum from Office of Management & Budget (OMB) Administrator to Chief Acquisition [sic] Officers and Senior Procurement Executives, subject: Development, Review and Approval of Bus. Cases for Certain Interagency and Agency-Specific Acquisitions (Sept. 29, 2011) (on file with author).

² “‘Contracting activity’ means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.” Federal Acquisition Regulation [48 C.F.R.] 2.101 (2015) [hereinafter FAR].

³ A requirement is a description of supplies or services to be acquired that will satisfy an agency’s needs. See FAR 2.101.

⁴ While the term re-compete is not defined in the Federal Acquisition Regulation (FAR), in this article, the term refers to the acquisition process of re-acquiring a supply or service for an agency where such supply or service has been acquired by the agency in the past under the FAR. See generally, FAR 6.000 (discussing competition requirements applicable to all acquisitions).

⁵ “‘Solicitation’ means any request to submit offers or quotations to the Government.” FAR 2.101.

⁶ The Simplified Acquisition Threshold (SAT) means a value of up to \$150,000. See FAR 2.101.

⁷ See generally, FAR 17.502-1(a)(1)–(2) (explaining the difference between assisted acquisitions, when a servicing agency performs acquisition services on behalf of a requiring activity, and direct acquisitions, when a requiring activity places an order against a servicing agency’s contract). This article will cover Interagency Acquisitions (IA) in both categories, plus certain reimbursable operations similar to a direct acquisition. See generally, U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 11A (Nov. 2014) [hereinafter DoD FMR] (covering reimbursable operations that are, and are not, governed by the FAR 17.5).

A working understanding of certain non-Economy Act IA authorities such as the Project Order Statute, the assisted acquisition services of franchise funds, and the Federal Supply Schedule is necessary to provide decision-makers and acquisition professionals meaningful legal advice. This includes a familiarity with how these authorities generally differ from the better-known Economy Act authority, and their individual uses, mechanics, and limitations.

Navigating the amount of information available on the aforementioned IA authorities can be quite daunting for a practitioner. However, this article will guide the reader through the basics of each authority and identify potential problem areas. The article will explain the uses and limitations of the Economy Act then delve into the Project Order Statute, Franchise Funds, and the Federal Supply Schedule; specifically, their uses and mechanics, and limitations.

II. The Economy Act—The Most Commonly Known IA Authority

After the CoS leaves your office, you decide that the best way to tackle this endeavor is to eliminate IA authorities that likely will not fit with this requirement for facility maintenance and training. To start, you plan to look at the IA authorities that are the most common and eliminate them from consideration one-by-one. In this vein, you see that a substantial amount of information is available on the Economy Act—you begin there.

In examining this IA authority, you first research its purpose.⁸ At first glance, this authority seems useful as the facility maintenance and training requirement does seem to qualify as services under the Act; as long as four basic conditions are met the contracting activity should be able to place an order with another major organizational unit within

the Department of Defense (DoD) rather quickly.⁹

A. Economy Act—Uses

As you continue your research, you notice that the Economy Act allows a requiring agency to procure goods and services by means of a servicing agency.¹⁰ This is generally accomplished through the servicing agency's already existing contract vehicle or through an assisted acquisition process.¹¹ In the fact pattern, the requiring or requesting agency is OSMR, and the servicing agency would be whichever agency agreed to assist with OSMR's requirement—such as the USACE. You see that the Economy Act would provide the command options in developing, awarding, and administering this requirement.

Specifically, the command can have another agency either develop, award, and administer the requirement, or order off of the already existing contract vehicle.¹² The Economy Act seems promising, but you see a catch: it has certain limitations to its use.

B. The Economy Act—Limitations

The Economy Act has three major limitations that other IA authorities do not have. A requiring activity¹³ must examine these limitations in order to decide if the Economy Act is the right IA authority for its purposes; specifically, de-obligation, an onerous determination and findings (D&F) requirement, and the last resort clause.¹⁴

1. De-obligation

At the end of the period of availability of the requesting agency's¹⁵ appropriation, subject funds must be de-obligated if certain conditions are present.¹⁶ These conditions include that the servicing agency has not itself incurred obligations by (1) providing goods or services or (2) entering into an conduct an assisted acquisition on behalf of the requesting agency").

⁸ "The Economy Act, codified at 31 U.S.C. § 1535 (2012), provides authority for federal agencies to order goods and services from major organizations within the same agency or other federal agencies and to pay the actual costs of those goods and services. The Congress passed the Act in 1932 to obtain economies of scale and eliminate overlapping activities of the Federal Government. Act of June 30, 1932, ch. 314, § 401, 47 Stat. 382, 413. Within the Department of Defense (DoD), an activity within a DoD component may place an order for goods or services with (1) another activity within the same DoD component, (2) another DoD component, or (3) with another federal agency." DoD FMR, *supra* note 7, para. 030102.

⁹ See DoD FMR, *supra* note 7, at para. 030104.A (explaining the legal authority and listing the four basic conditions as the following: (1) funds are available; (2) the head of the requesting agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to be asked to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the requesting agency decides that ordered goods or services cannot be provided by contract as conveniently or economically by a commercial enterprise); see also *id.* para. 030103.G–H (defining severable and non-severable services).

¹⁰ See generally, 31 U.S.C. § 1535(d)(3) (2012); FAR 17.502-1(a) (2015); FAR 2.101 (2015) (defining a servicing agency as "the agency that will

¹¹ See FAR 17.502-1(a); DoD FMR, *supra* note 7, vol. 11A.

¹² See FAR 17.502-1.

¹³ "A requiring activity is a military or other designated supported organization that identifies, plans for, and coordinates for contracted support during military operations." U.S. DEP'T OF ARMY, OPERATIONAL CONTRACT SUPPORT TACTICS, TECHNIQUES, AND PROCEDURES 4-10, para. 1-4(e) (June 2011) [hereinafter ATTP 4-10]. "A requiring activity may also be the supported unit." *Id.*

¹⁴ See 31 U.S.C. § 1535(d) (2012); DoD FMR, *supra* note 7, paras. 030404.B, 180102; FAR 17.502-2(b)–(c) (2015).

¹⁵ The term requesting agency is synonymous with the term requiring activity in this context. See ATTP 4-10, *supra* note 13, para. 1-4(e).

¹⁶ See 31 U.S.C. § 1535(d); DoD FMR, *supra* note 7, para. 030404.B.

authorized contract with another entity to provide the requested goods or services.¹⁷ In other words, those funds committed, or fenced off, to be used under an Economy Act transaction must be de-committed unless they are otherwise legally obligated at the end of the funds' period of availability.¹⁸

You can see that this is a major limitation to the Economy Act's authority. The concern is that agencies will use the Economy Act to otherwise extend the availability of an appropriation and effectively launder or remove the fiscal identity of the funds.¹⁹ Orange Sands Missile Range receives Research, Development, Test, and Evaluation (RDT&E) funds, which have a two-year period of availability.²⁰ The timing could severely limit the viability of the Economy Act if the command wants the period of performance for this requirement to exceed the RDT&E funds' remaining period of availability.

2. *The Economy Act's Determination and Findings*

You notice that all Economy Act transactions that are not between two DoD activities must be supported with a substantial written D&F by the requesting agency stating that (1) the use of an interagency acquisition is in the best interest of the government, (2) the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source, and (3) a statement covering three specific circumstances.²¹ Further, you notice that the D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services that are being ordered. Additionally, if the agreement contemplates an order with a non-DoD servicing agency, then the D&F must be approved by the head of the major organizational unit ordering the support—generally, that is at the Senior Executive Service (SES) or General/Flag Officer level.²²

The D&F requirement of the Economy Act seems like an additional task for the busy contracting activity you would

like to avoid. Further, if the servicing activity comes from outside the DOD, there is a high level of approval. While you can see scenarios where this would not be such a burden, you still want to avoid making more work for the contracting activity or the organizational head. More and more you start to feel like the Economy Act is not going to work for you; then you find the final nail in the coffin—the last resort clause.

3. *The Last Resort Clause*

You determine that the Economy Act is literally an IA authority of last resort. The last resort clause states, "Specific statutory authority is required to place an order with a Non-DoD agency for goods or services If specific statutory authority does not exist, the default will be the Economy Act" ²³ Therefore, in order to use the Economy Act, you must first eliminate all other IA authorities that have a specific statutory authority for the type of good or service you are trying to procure. Discouraged and frustrated, you realize that your initial gut reaction that the Economy Act was too good to be true was accurate. The last resort clause inevitably will require your command to exhaust all other possible remedies before relying on the Economy Act as a possible procurement authority. Luckily, you remember that there are many other non-Economy Act IA authorities for you to consider, though not without their own limitations.

III. Non-Economy Act Authorities

Quickly you realize that there are many other non-Economy Act IA authorities. Blindly sifting through all of the available authorities just to get to a range of options to choose from seems daunting. Instead, you decide to focus on three that you have heard mentioned in and around the office: (1) the Project Order Statute, (2) Franchise Funds, and (3) the Federal Supply Schedule. You decide to look at their individual uses, mechanics, and limitations to eliminate those that will not work.²⁴ First, you examine the IA authority

¹⁷ See 31 U.S.C. § 1535(d); DoD FMR, *supra* note 7, para. 030404.B.

¹⁸ See U.S. Gov't Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, at 32, 70 (2005), <http://www.gao.gov/new.items/d05734sp.pdf>. (contrasting between a commitment—which is an administrative reservation of allotted funds, or of other funds, in anticipation of their obligation—and an obligation, which is a definite act that creates a legal liability on the part of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States). Here, deobligation actually refers to the decommitment of funds not legally already obligated.

¹⁹ See DoD FMR, *supra* note 7, para. 030407.

²⁰ See CONT. & FISCAL L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 2-10 (2015).

²¹ See FAR 17.502-2(c)(1)(i)–(iii); DoD FMR, *supra* note 7, paras. 030303, 030302.B. However, if the Economy Act transaction is between two DoD activities, the onerous determination and findings (D&F) requirement is

avoided if the transaction is documented on a DD Form 1144, which is a support agreement signed by the head of the requiring and servicing activities—usually an O-6 or General Schedule (GS)-15. See U.S. DEP'T OF DEF., INSTR. 4000.19, SUPPORT AGREEMENTS, ENCLOSURE 3: PROCEDURES, para. 2(b)(4) (2013); DoD FMR, *supra* note 7, para. 030303.

²² See FAR 17.502-2(c)(2); DoD FMR, *supra* note 7, para. 030304. "The [Senior Executive Service] SES includes most managerial, supervisory, and policy positions classified above General Schedule (GS) grade 15 or equivalent positions in the Executive Branch of the Federal Government." Office of Personnel Management, *Senior Executive Service: Overview & History*, <https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history/> (last visited Oct. 17, 2016).

²³ See FAR 15.502-2(b); DoD FMR, *supra* note 7, para. 180102.

²⁴ One of the commonalities among non-Economy Act IA authorities is the absence of a forum to decide disagreements between the parties. See FAR 17.503(c). The FAR suggests the parties should agree in writing to the use of a third-party forum, but does not give any examples of what would be an appropriate forum. *Id.*

discussed at OSMR meetings—the Project Order Statute.

A. The Project Order Statute

As you begin to research the Project Order Statute you realize that it is a unique IA authority that may allow for the subject requirement to be contracted out to another federal entity.²⁵ Perfect; why not get military manpower in the form of that unit on the other side of OSMR to do this? Unfortunately, as you start going through the requirements of the IA you realize that the Project Order Statute may not be as flexible as you had hoped.

1. *The Project Order Statute—Uses*

You start looking into what the general language in the Project Order Statute means, and you quickly realize that the authority is a great resource, but for a very narrow purpose. First, you notice that a project order's funding and modification rules are very permissive. You find that a project order is normally fully funded by the requiring activity at the time the order is issued and accepted.²⁶ Unlike the Economy Act, there is no general requirement to de-obligate funds if the servicing agency has not performed before the expiration of the funds' period of availability.²⁷ This seems extremely useful as it allows funding of projects where performance crosses fiscal periods of availability.²⁸ Further, you see that project orders may be changed or modified at any time to accommodate new or additional work as long as funding is available, and the type of work is appropriate for a project order.²⁹ In fact, if the original appropriation is still available for obligation, it can be used to fund the new work,

²⁵ “An order or contract placed with a Federal Government-owned establishment for work, material, or the manufacture of material pertaining to an approved project is deemed to be an obligation in the same manner that a similar order or contract placed with a commercial manufacturer or private contractor is an obligation. Appropriations remain available to pay an obligation to a Federal Government-owned establishment just as appropriations remain available to pay an obligation to a commercial manufacturer or private contractor.” 41 U.S.C. § 6307 (2012).

²⁶ See DoD FMR, *supra* note 7, para. 020518. There is a research, development, test, and evaluation (RDT&E) exception that allows incremental funding instead of all up front funding of the project order. See DoD FMR, *supra* note 7, para. 020518.

²⁷ See 41 U.S.C. § 6307 (2012).

²⁸ Contrast the multiple year funding authority for nonseverable services provided under the Project Order Statute with the single-year funding authority for severable services that begin in one fiscal year and end in the next provided under 10 U.S.C. § 2410a (2012). See U.S. Army Europe—Obligation of Funds for an Interagency Agreement for Severable Services, B-323940 (Comp. Gen. Jan. 7, 2015).

²⁹ See DoD FMR, *supra* note 7, para. 020514. Contrast this flexibility with open market-type FAR contracts that have competition requirements that limit possible modifications. See FAR 6.001 (2015).

³⁰ See DoD FMR, *supra* note 7, para. 020514. Where the initial appropriation has expired and the modification to the project order is outside of the original scope, the modification is funded from current funds.

even if it is outside of the original scope.³⁰ The project order statute seems useful; however, as you continue researching, you see its availability starts to get more and more narrow.

Continuing your analysis, you learn that the term federal government-owned establishment really means government-owned and government-operated (GOGO) establishments within the DoD that include testing facilities, research and development laboratories, arsenals, factories, and shipyards owned by the military.³¹ Orange Sands Missile Range is a Major Range Test Facility Base (MRTFB) and as such seems to fit into this GOGO category.³² Next, you learn that the term “approved projects” in the statute simply refers to projects approved by officials having legal authority to do so.³³ Believing that the Project Order Statute may still be a viable option, you start to look into the procedural rules, or the mechanics, of entering into a project order agreement.

2. *The Project Order Statute—Mechanics*

The first step occurs in the pre-planning stage. First, the requiring activity must send the servicing activity advance-planning data covering the concerned work.³⁴ This data is used by the servicing activity to develop an overall operating budget.³⁵ Next, the parties start to put the terms of the agreement together, which at a minimum should include a complete description of the requirement, the period of performance, and grievance procedures.³⁶ Although the use of a specific project order form is not prescribed, the Army requires that they be issued on a Military Interdepartmental Purchase Request Department of Defense Form 448 (MIPR DD Form 448).³⁷

Id.

³¹ See *id.* at para. 020303; Mr. John J. Kominski, Gen. Counsel, Library of Cong., B-246773, 72 Comp. Gen. 172 (1993).

³² See DoD FMR, *supra* note 7, ch. 12 (discussing Major Range Test Facility Base (MRTFB)). The fictional missile range OSMR is sized, operated, and maintained primarily for DoD test and evaluation support missions, and is considered a government-owned and government-operated (GOGO) for the purpose of this article.

³³ See DoD FMR, *supra* note 7, para. 020103. The phrase “officials having legal authority to do so” is not defined in the Financial Management Regulation (FMR). *Id.*

³⁴ See DoD FMR, *supra* note 7, para. 020401. The phrase “advance-planning data” generally means work and cost estimates. *Id.*

³⁵ *Id.*

³⁶ See DoD FMR, *supra* note 7, para. 020302; U.S. DEP'T OF DEF., 37-1, DEF. FIN. & ACCT. SERV.-INDIANAPOLIS REGULATIONS, para. 120803.A (9 Apr. 2014) [hereinafter DFAS-IN Reg. 37-1]. Under a Project Order Statute paradigm, there are very few mandatory terms the party must agree to; however, all forms must have a statement to the effect of that “[t]his order is placed in accordance with the provisions of 41 U.S.C. § 6307, as implemented by DoD regulation.” DoD FMR, *supra* note 7, para. 020302.

³⁷ See DoD FMR, *supra* note 7, para. 020302; DFAS-IN Reg. 37-1, *supra*

When determining the period of performance, the “[e]xpiration dates may not extend beyond the point in time in which the appropriation funding the order shall be canceled (generally five years after the appropriation expires for new obligation).”³⁸ After negotiations are complete and the project order agreement is ready for execution, an official of the issuing entity must then certify that the funds cited on the project order are properly chargeable under a purpose analysis.³⁹ After receipt, the requiring activity must verify a bona fide need exists in the fiscal period of availability in which the agreement is issued.⁴⁰ Lastly, at acceptance, evidence must exist that the work will be commenced without delay and that the work will be completed within the normal period for the work ordered.⁴¹

If performance does not play out as planned and the recipient of the project order agreement defaults, you see that you may procure from another source using the original funding appropriation if (1) the new order is made without undue delay and (2) it does not extend beyond the point in time when the appropriation is canceled.⁴² The Project Order Statute has some permissive authorities that may allow your command to quickly get the services they need in a flexible format. Then you remember the issue with the Economy Act—the limitations. So, you turn your attention to the limitations of the Project Order Statute.

3. The Project Order Statute—Limitations

Although permissive on funding and modifications, the Project Order Statute is restrictive on use and purpose. Project orders are analogous to contracts placed with commercial vendors; and, as with such contracts, they must be specific, definite, and certain both as to the work and the terms of the order itself.⁴³ You learn that “[n]o project order shall be issued if commencement of work is contingent upon the occurrence of a future event or authorizing action by the ordering [requiring activity] DoD Component.”⁴⁴ Unlike other IA authorities, you see that the Project Order Statute cannot be used as an authorization for the servicing agency to

act as a general contracting agent for the requiring activity.⁴⁵ Further, “[c]onsistent with the concept that one entity cannot enter into a formal contract with itself, a project order shall not be used by one organizational unit to order work from another organizational unit under the same activity commander.”⁴⁶ While limiting, these restrictions seem reasonable and do not necessarily eliminate the project order from consideration. Nonetheless, as you continue reading, you find that using this authority may not be in the stars.

First, you see that the GOGO must substantially do the work in-house, in other words, it must incur the costs of not less than fifty-one percent of the total costs attributable to performing the work.⁴⁷ You think about how this seems like a restriction on contracting out work and that it may be a major problem if a part of the requirement cannot be performed by the GOGO in-house. Lastly, you discover that project orders may be used only for non-severable services or entire efforts that call for a single or unified outcome or product.⁴⁸

Next, you examine non-severable and severable services. Non-severable services consist of (1) manufacture or modification of ships, aircraft, vehicles, guided missiles, and other weapons systems; (2) construction or conversion of buildings and other structures; (3) development of software programs and automated systems when the purpose of the order is to acquire a specific end-product; and (4) production of engineering and construction related products and services.⁴⁹ Examples of severable services include: (1) routine maintenance; (2) education, training, and travel; and (3) efforts where the primary purpose is to acquire a level of effort rather than a specific, definite, and certain end-product.⁵⁰ Your requirement for facility maintenance and training seems to fall outside of the non-severable effort and tends to resemble a severable service effort. This is an onerous restriction designed to limit the use of the project order and eliminates this IA authority from the list of possibilities. Discouraged, but not defeated, you decide to

note 36, para. 120803.A.

³⁸ See DoD FMR, *supra* note 7, para. 020503.

³⁹ See *id.* para. 020507. Issuing entity is not defined in the FMR; however, it is likely to be the fund authority that services the requiring agency. See *id.* para. 020301.A.

⁴⁰ *Id.* The servicing agency must refuse to accept a project order if it is obvious that said order does not contain a bona fide need in the fiscal year issued. See *id.* para. 020508.

⁴¹ See *id.* para. 020510.A. The phrase “commenced without delay” refers to usually within 90 days. *Id.*

⁴² See DoD FMR, *supra* note 7, para. 020517. This authority does not address grievances with the defaulting party, only authority to use the prior used appropriation on the new project order. *Id.*

⁴³ See *id.* para. 020506.

⁴⁴ See *id.* para. 020511.

⁴⁵ See *id.* para. 020516. This limitation is referring to a concept called off-loading which is “when one agency buys goods or services under a contract entered and administered by another agency.” 3 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 12, pt. B, sec. 1, at 12-75 (3rd ed. 2008) [hereinafter GAO Red Book III].

⁴⁶ See DoD FMR, *supra* note 7, para. 020502. The FMR does not define activity commander or specify how far the breakdown of organizational units goes in this context. See *id.* Glossary.

⁴⁷ See *id.* para. 020515.

⁴⁸ See *id.* para. 020509.B.

⁴⁹ See *id.*

⁵⁰ See *id.* para. 020509.A.

move on to the next potential IA authority—Franchise Funds.

B. Franchise Funds

As you start to examine what franchise funds are, you realize that there is not that much literature available about franchise funds in general.⁵¹ Just like the Project Order Statute, you think this seems like a promising IA authority that may allow you to shift the burden of procuring this requirement to another servicing agency. You start to think how you would use franchise funds and if doing so would solve your problem considering any limitations.

1. Franchise Funds—Uses

Immediately, you learn that franchise funds are revolving, businesslike enterprises that provide an array of common administrative services for a fee, to include contracting services.⁵² As there does not seem to be much literature in your deskbooks as to what constitutes contracting services, you decide to look at an example of the contracting services provided by a franchise fund. Based on a quick Google search, you choose to examine the Franchise Fund run by the Department of Interior (DoI) to get an idea.⁵³

You see that the acquisition services provided under this Franchise Fund IA authority are serviced by the DoI's Interior Business Center (IBC).⁵⁴ These acquisition services include (1) market research and planning, (2) solicitation, (3) negotiation and award, and (4) administration and closeout.⁵⁵ This seems great. Through their assisted acquisition services, this franchise fund seems to be able to provide cradle-to-grave acquisition support to the command. You envision a scenario where the command could offload this requirement to the IBC and just sit back and wait for the contract offers to start

⁵¹ Franchise Funds were first established by the Government Management Reform Act of 1994 to provide common administrative support services on a competitive and fee basis. Franchise fund programs originated within the Environmental Protection Agency, Department of Commerce, Department of Veterans Affairs, Department of Health and Human Services, Department of Interior, and Department of the Treasury. *See id.* para. 180102.B.

⁵² *See* The Government Management Reform Act of 1994, Pub. L. No. 103-356, § 403, 103 Stat. 3413 (1994); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 730, 121 Stat. 1844 (2007).

⁵³ The Government Management Reform Act of 1994 authorized the Director of the Office of Management and Budget (OMB) to establish six Franchise Fund pilot programs. *See* § 403, 103 Stat. 3413. The Department of Interior's Franchise Fund is one of those funds commonly used by DoD. *See* Memorandum of Agreement between Dep't of Army and Dep't of the Interior (6 Mar. 2007), https://www.doi.gov/sites/doi.gov/files/uploads/DoD_AQD_Agreement_Hatfield_Assad.pdf [hereinafter DoI MoA].

⁵⁴ *See* U.S. Dep't of the Interior, *Acquisition Services*, <https://www.doi.gov/ibc/services/acquisition> (last visited Jan. 6, 2016). The Interior Business Center is an organization within the Department of the Interior (DoI) that provides services under the DoI's Franchise Fund IA authority. *See* U.S. Dep't of the Interior, *About the Interior Business Center*, <https://www.doi.gov/ibc/about-us> (last visited Oct. 17, 2016).

pouring in. Encouraged, you delve into the mechanics of offloading the requirement to the IBC.

2. Franchise Funds—Mechanics

Once you start looking into the possibility of offloading the requirement to the IBC you notice there are essentially two parallel processing tracks that will need to be followed since the command is part of the DoD. One is the DoD track under the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), and the other is the IBC's internal process track.⁵⁶ You decide to look at each one in turn.

Looking at the FAR track, you notice that this process must be followed for all non-Economy Act IAs.⁵⁷ Just like under the Economy Act, prior to requesting that the IBC's conduct an acquisition on behalf of the command under their franchise fund IA authority, OSMR must make a determination that the use of this franchise fund's assisted acquisition services represents the best procurement approach.⁵⁸ As part of this determination, the command must obtain the concurrence of the responsible servicing contracting activity.⁵⁹ This may be a problem if the command does not have a good relationship with the responsible contracting activity. However, in this case, you feel that both parties would be open to offloading the subject requirement, given its history.

You see, at a minimum, this determination must include an analysis of procurement approaches considered.⁶⁰ The command must then determine whether using the assisted acquisition service of another agency satisfies the requirement's schedule, is cost effective, and will result in the use of funds in accordance with appropriation laws and policies.⁶¹ This has likely already been worked on by the

⁵⁵ *See* U.S. Dep't of the Interior, *Understanding Federal Acquisitions*, https://www.doi.gov/sites/doi.gov/files/uploads/aqd_lifecycle_brochures.pdf (last visited Feb. 9, 2016).

⁵⁶ *See* FAR 17.5, 17.7; DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT 217.7 (Nov. 2015) [hereinafter DFARS]; *See* Dep't of the Interior, *Getting Started*, <https://www.doi.gov/ibc/services/acquisition/getting-started> (last visited Jan. 8, 2016).

⁵⁷ *See* FAR 17.5. This subpart applies to all IAs, not just non-Economy Act IAs. There are two exceptions to the mandatory use of this process: (1) IA reimbursable work performed by federal employees other than acquisition assistance, where contracting is incidental to the purpose of the transaction; or (2) orders of \$550,000 or less issued against Federal Supply Schedules. *See* FAR 17.5(c).

⁵⁸ *See* FAR 17.502-1. The Defense Federal Acquisition Regulation Supplement (DFARS) specifies factors to consider when making this determination. *See* DFARS, *supra* note 56, at 217.770.

⁵⁹ *See* FAR 17.502-1.

⁶⁰ *See* FAR 17.502-1(a)(i)–(iii).

⁶¹ *Id.*

responsible contracting activity and should not be difficult to complete.

Next, you see that the IBC and the command must both agree to, and sign a written representation of, general terms and conditions governing their relationship, to include roles and responsibilities.⁶² Fortunately, you find that both the IBC and the DoD have already agreed to general terms, conditions, roles, and responsibilities regarding this assisted acquisition service.⁶³ With what seems like a turnkey contract solution for the command, you turn your sights to an additional part of the FAR track that applies in this case—the process requirements for acquisitions by nondefense agencies on behalf of the DoD.⁶⁴

You find that for any assisted acquisitions performed for the DoD, by any agency not part of the DoD, there are additional processes to consider.⁶⁵ Specifically, if the acquisition is in excess of the SAT, the nondefense servicing agency must certify it will comply with applicable procurement requirements for that fiscal year.⁶⁶ This means the nondefense agency's policies, procedures, and internal controls must be adequate to ensure the nondefense agency's compliance with the FAR, DFARS, and other applicable procurement laws.⁶⁷ After some research, you find that the IBC has certified that it will comply with defense procurement requirements for Fiscal Year 2016.⁶⁸ Though not necessarily applicable in this case because the procurement falls under the SAT, you start to feel comfortable about meeting the process hurdles. You now turn to the IBC's internal procedures.

In general, you find that the IBC's process seems user friendly and timely. First, you notice there is a fee for this service, so while you are researching the IBC's internal process you send an email to the IBC's Acquisition Services Directorate (AQD) for the fiscal year's current calculated rate.⁶⁹ Next, you notice that the command must "[p]rovide a clear description of your requirements through a Statement of Work/Statement of Objectives/Performance Based Work Statement."⁷⁰ Then, the command must "[i]nclude an Independent Government Cost Estimate (IGCE)."⁷¹ The IBC

goes on to provide examples and instructions on performing an IGCE. Lastly, the command must provide a period of performance and a desired award date.⁷² You almost cannot believe the two processes could be so simple. The only thing left for the command to do is send funding paperwork and then wait for a turnkey-like contract. Then it hits you; you remember something the CoS told you when she first came in—the requirement was funded with the command's remaining operations appropriation balance, and it was about to expire. Surely this is not the first time this issue has arisen; the franchise fund must have special authorities to deal with this. You continue your research into this potential limitation.

3. Franchise Funds—Limitations

After a discussion with the Resource Manager (RM) you have two concerns. First, the command only committed the exact estimated re-compete cost because of budget policy limitations imposed by the higher command. This could be problematic, considering the assisted acquisition service fee was not included in the original committed amount. Second, the end of the committed funds' period of availability is closing fast and you are worried that the IBC will not have the time to solicit and award the requirement before funds expire. Just then, the IBC emailed you back the fee rate you asked for a little while ago.

The IBC AQD's, "current Interior Franchise Fund fee is calculated at [five percent] for dollars obligated on a contract."⁷³ "The fee percentage is based on [the] AQD's calculated rate for service delivery and is updated at least every two years."⁷⁴ While at first glance it does not seem like much, five percent of the total obligated value on the contract can be a pretty substantial fee; especially in today's fiscally austere environment.

Unfortunately, the RM confirms that the five percent fee would push the requirement's cost over the amount the command committed for this requirement. You think that the command could request more funds to pay the difference, but that takes time and you are already concerned with the amount

⁶² See FAR 17.502-1(b)(1)(i).

⁶³ See DoI MoA, *supra* note 53. Further, the FAR requires sufficient documentation to be included within the file to ensure an adequate audit over and above the agreed to terms between DoI and DoD. See FAR 17.502-1(b)(2).

⁶⁴ The term turnkey contract is used in this context to describe a contract that is substantially developed by a third party for immediate use by the requiring party.

⁶⁵ See FAR 17.5; 17.7; 17.701 (2015); DFARS, *supra* note 56, at 217.700; 217.701.

⁶⁶ See FAR 17.703(a).

⁶⁷ See FAR 17.703(b).

⁶⁸ See Letter from Keith J. O'Neill, Assoc. Dir., Acquisition Services Directorate, Interior Business Center, to Claire M. Grady, Director, Defense

Procurement and Acquisition Policy, Dep't of Def. (Oct. 1, 2015), http://www.acq.osd.mil/dpap/cpic/cp/docs/FY16_DOI_IBC_AQD_-_Nondefense_Agency_Certification_of_Compliance.pdf.

⁶⁹ The Acquisition Services Directorate (AQD) runs the assisted acquisition services of the IBC. See *Acquisition Services*, *supra* note 54.

⁷⁰ See *Getting Started*, *supra* note 56.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Email from Katherine Valltos, Senior Acquisition Advisor, Acquisition Services Directorate, Interior Business Center, to author (Jan. 07, 2016, 11:52 EST) (on file with author).

⁷⁴ *Id.*

of time the IBC would have to award the contract and obligate the funds before they expire. You ponder, “What if the IBC has some special authority to hold on to funds so they do not expire?”

After some research you find the Government Accountability Office’s (GAO) opinion on this issue.⁷⁵ The GAO found that a DoI revolving fund, GovWorks the predecessor to IBC, accepted Military Interdepartmental Purchase Requests (MIPR) to document interagency agreements between the DoI and the DoD that did not identify specific items or services to be procured.⁷⁶ Because the MIPRs did not specify items or services to be ordered, those MIPRs could not properly obligate the DoD-appropriated funds attached to them.⁷⁷

Meanwhile, the GAO found that routinely the DoD would send more specificity to the DoI at a later date; however, by then the DoD appropriations had expired and were not available for obligation.⁷⁸ Thus, when the DoI later used those funds after their period of availability, the use was determined to be improper because it did not fulfill a *bona fide* need arising during the funds’ period of availability.⁷⁹ This practice is called parking or banking funds.⁸⁰ The GAO opined that when an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, like a franchise fund, the withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited until they are earned.⁸¹ Therefore, unless otherwise required by law, unexpired balances must be returned to the customer agency.⁸²

You come to the realization that because your appropriation’s period of availability is coming to an end and a franchise fund cannot park or bank funds, the IBC will not have time to award this requirement, let alone give the

command time to secure more funding. Lamenting, you think that it would be great if there was an IA authority that already had pre-negotiated, turnkey contracts just waiting for you to pull off a shelf. Then it hits you: each month, you buy office supplies without open market competition.⁸³ You just pull out a book, pick out your supplies, and supplies appear on your desk. Energized like you were when you watched *Making a Murderer*,⁸⁴ you remember the other IA authority the logistics team always talks about—the Federal Supply Schedule (FSS).

C. The Federal Supply Schedule

As you have done multiple times before, you set out to learn the gist of the FSS IA authority.⁸⁵ Again, you see some promise in this IA authority; but based on your recent experiences, lots of questions start popping into your head. Will my requirement fit here? How long will this process take? Is Jon Snow really a Targaryen?⁸⁶ You start researching these questions and you realize that you may have found that proverbial needle in the haystack.

1. The Federal Supply Schedule—Uses

You find that the Federal Property and Administrative Services Act authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside the restrictions of the Economy Act.⁸⁷ The FSS program provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.⁸⁸ The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards government-wide indefinite duration and indefinite quantity (ID/IQ) contracts for over 11 million commercial items and services.⁸⁹ Agencies then place orders against these schedule

⁷⁵ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁷⁶ See *id.* A Military Interdepartmental Purchase Request (MIPR) is a type of interagency agreement used to place orders for supplies and non-personal services with a military department. See 48 C.F.R. § 2917.501 (2016).

⁷⁷ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Implementation of the Library of Cong. FEDLINK Revolving Fund, B-288142 (Comp. Gen. Sept. 6, 2001); Continued Availability of Expired Appropriation for Additional Project Phases, B-286929 (Comp. Gen. Apr. 25, 2001).

⁸¹ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁸² See *id.*; see also FAR 15.501 (stating that this IA authority cannot be used to circumvent conditions and limitations imposed on the use of funds).

⁸³ This refers to the Federal Supply Schedule (FSS). See *infra* Part III.C.

⁸⁴ *Making a Murderer* (Netflix broadcast Dec. 18, 2015).

⁸⁵ “The Federal Supply Schedule program is also known as the GSA [General Services Administration] Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.” FAR 8.402(a).

⁸⁶ GAME OF THRONES (Home Box Office broadcast Jun. 26, 2016).

⁸⁷ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4.

⁸⁸ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4. A commercial service is installation services, maintenance services, repair services, training services, and other services if: such services are procured for support of a commercial item as defined by the FAR regardless of whether such services are provided by the same source or at the same time as the item; and the source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. See FAR 2.101.

⁸⁹ See Federal Property and Administrative Services Act, 40 U.S.C. § 501

contracts.⁹⁰

As before, this IA authority seems like a perfect solution for your problem. You are in need of acquiring facility maintenance and training services for support of commercial items within the HVNSTF. Further, because the turnkey-like FSS contracts are already pre-negotiated, full and open competition does not seem to be a concern, which means the command may be able to obligate their expiring funds for this requirement quickly. Hopeful, you start researching the mechanics of this IA authority to determine if it will fit your need.

2. The Federal Supply Schedule—Mechanics

First, you notice that the general IA authority procedures in FAR 17.5 do not apply to orders of \$550,000 or less, issued against the FSS.⁹¹ The value of the subject requirement is under the SAT, which does indeed fall under this limit. Next, you see that the FSS ordering procedures depend on the value of the requirement and whether or not there is a need for a statement of work (SOW).⁹² In this case, you believe it is likely that the services will require a SOW, so you decide to research that applicable procedure.

Once you start researching, you find that the GSA provides a guide to help you through the ordering procedures under FAR 8.405.⁹³ In accordance with the guide and FAR 8.405-2, you determine that first a SOW or Performance Work Statement (PWS) and evaluation criteria will have to be developed.⁹⁴ Again, this step should be an easy task as most of this was likely completed by the responsible contracting activity for the aforementioned re-compete. Next, a Request for Quotations (RFQ), the SOW/PWS, and the evaluation criteria have to be sent to at least three GSA schedule contractors.⁹⁵ You decide to go to the GSA FSS eBuy webpage to find three schedule contractors you believe can

provide the facility maintenance and training contemplated under the immediate requirement just to see what is available.⁹⁶ To your amazement, after registering for the website you find what looks like three potential contractors rather quickly. Lastly, you see that the potential contractors then submit quotes; the ordering agency makes a best value determination, and then selects a contractor.⁹⁷ Using the FSS to fulfill your requirement cannot be this easy. Unconvinced, you decide to look at what are the limitations to using this IA authority.

3. The Federal Supply Schedule—Limitations

The first limitation you see is an increased market research requirement when using the FSS in some situations. In accordance with Army policy, contracting officers for ordering agencies must seek discounts for orders exceeding the maximum order threshold of an individual schedule contract.⁹⁸ The same contracting officer must then document where a discount is obtained and where it is not.⁹⁹ This limitation does not seem overly burdensome and can probably be handled simply by a contracting officer. However, you would need to convince the responsible contracting activity to re-accept the requirement to do this. Given your good relationship with the responsible contracting activity, you feel you may be able to convince them to re-accept the requirement; therefore, you move on.

Next, you see that agencies must use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.¹⁰⁰ Again, this does not greatly concern you as the services you are looking to procure are commercial in nature and generally must be procured under a fixed-price

(2012); FAR 8.4.

⁹⁰ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4. An agency may also establish a blanket purchase agreement (BPA). *Id.* A ____ (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing charge accounts with qualified sources of supply. See FAR 13.303-1(a).

⁹¹ See FAR 17.500(c)(2) (2015).

⁹² See FAR 8.405-1; -2 (2014). The FAR does not differentiate between a Statement of Work (SOW), which is generally used to describe tangible things to be purchased, and a Performance Work Statement (PWS), which is generally used to describe services to be purchased. See FAR 2.101 (2016); 8.405-1; -2 (2014). Therefore, for the purposes of this discussion SOW and PWS should be read interchangeably.

⁹³ See U.S. GEN. SERV. ADMIN., MULTIPLE AWARD SCHEDULES DESK REFERENCE, Vol. 6 (version 7, 2016) [hereinafter Desk Reference].

⁹⁴ See *id.* at 29; FAR 8.405-2(a), (b), (c)(2).

⁹⁵ See *id.* at 28; FAR 8.405-2 (c)(2). If three schedule contractors are not used, the ordering agency must document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the

reasons at FAR 8.405-6(a). See FAR 8.405-2(c)(2)(ii).

⁹⁶ See U.S. Gen. Serv. Admin., EBUY, <http://www.gsa.gov/portal/content/104675> (last reviewed Sept. 15, 2016). eBuy is a component of GSA *Advantage!*®, which is the online Request for Quotation (RFQ) tool. *Id.* eBuy is designed to facilitate the request for submission of quotations for a wide range of commercial supplies (products) and services under the GSA supply schedules. *Id.*

⁹⁷ See Desk Reference, *supra* note 93, at 28; FAR 8.405-2 (c)(2).

⁹⁸ See Memorandum from Dir., Def. Procurement and Acquisition Policy to Assistant Sec'y of the Army (Acquisition, Logistics, and Technology) et al., Subject: Use of Federal Supply Schedules and Market Research (Jan. 28, 2005), <http://www.acq.osd.mil/dpap/policy/policyvault/2004-0810-DPAP.pdf>. While contracts on the FSS are prenegotiated, costs can still be negotiated with the individual schedule contractors to provide further savings. *Id.* These aftermarket negotiated costs apply only to the specific contract they were negotiated for and not to the entire federal government. *Id.*

⁹⁹ *Id.*

¹⁰⁰ See FAR 8.404(h)(2).

paradigm anyway.¹⁰¹ Lastly, you remember a logistics team member saying something to the effect that FSS orders under the SAT must be set aside for small businesses.¹⁰² However, you find that in 2010, Congress amended the Small Business Act to remove the mandatory nature of the small business set-asides under multiple award contracts like the FSS.¹⁰³ You find a couple of minor other requirements, but nothing glaring, unreasonable, or applicable to the immediate case.¹⁰⁴ You finally have a solution—an IA authority that will let you procure your facility maintenance and training contract. Under the FSS the acquisition can be feasibly done quickly to allow the command to use their expiring committed funds. Plus, this vehicle does not bust your budget with a fee. Relieved, you pick up the phone and call the CoS. “Ma’am, I think we have a way ahead.”

IV. Conclusion

In today’s fast-paced operational environment, decision-makers need every tool at their disposal to make the best decision. Army attorneys need to develop a working understanding of non-Economy Act IA authorities like the Project Order Statute, franchise funds, and the Federal Supply Schedule in order to provide proactive acquisition advice. Understanding how they differ from the Economy Act as well as their individual uses, mechanics, and limitations provides a depth of knowledge required for more complete counsel. Developing such a familiarity may not be an easy goal to achieve, especially in these times of increasing workload and shrinking resources. Ultimately, developing a working understanding of non-Economy Act IA authorities will not only elevate the contract law practitioner’s practice to the next level, but will provide a more complete picture for a decision-maker.

¹⁰¹ See FAR 12.207.

¹⁰² Prior to 2010, The Small Business Act required all contracts under the SAT to be exclusively set aside for small businesses. See Aldevra, B-411752 (Comp. Gen. Oct. 16, 2015).

¹⁰³ *Id.*

¹⁰⁴ See generally FAR 8.405-3 (describing other requirements for use of a blanket purchase agreements).