

APPENDIX 1: Example Questions and Answers

Info Paper: The continued availability of prior year funds after a Contract Protest

Example 1.

An Army solicitation for the subject contract is released on 12 September 2011 and FY11 OMA funds were committed on 10 September 2011. On 22 September 2011, a potential offeror challenges the content of the solicitation with a protest to GAO. GAO decides the case on 15 December 2011 and recommends that the Army amend the solicitation. The solicitation is amended and released on 15 February 2012.

1. Can the Army still award the contract on 30 March 2012 using FY11 funds?
 - a. Yes, subject to the availability of funds, the KO can use FY11 OMA funds.
 - b. Yes, the KO can use FY11 OMA funds.
 - c. No, the FY11 OMA funds expired.
 - d. None of the above.

2. What is the last day that FY11 funds would be legally permissible for this requirement?
 - a. 30 September 2011.
 - b. 8 January 2012.
 - c. 25 March 2012.
 - d. 16 April 2012.
 - e. None of the above.

3. The offeror was not happy with GAO's decision and filed a protest and a request for injunctive relief with COFC on 15 April 2012. COFC decides the merits of the protest in favor of the Army and grants the Government's Motion for Judgment of the Administrative Record on 15 September 2012. No additional actions were filed. Assume FY11, FY12, and FY13 funds are available from an Amount perspective (i.e., the Army has the funds to obligate for this contract – if they are legally available for obligation from a Time perspective). On 17 February 2013, what year funds are legally permissible for this requirement?
 - a. FY13 only.
 - b. FY12 and FY13.
 - c. FY11 and FY13.
 - d. FY11, FY12, and FY13.
 - e. None of the above.

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Answers To Example 1:

1. (a) In this scenario, a pre-award protest of the content of a solicitation delays the procurement. Funds were available at the time of the protest (22 September 2011) because they were committed on 10 September 2011. Since the protest was filed with GAO, there is *no* requirement for the agency to show a “delay” – under the statute the protest is assumed to have delayed the acquisition. Therefore, all the criteria of 31 U.S.C. § 1558 are met. As such, funds are still legally permissible up to 100 days after the “final ruling.” Since no appeal is filed, the final ruling date is 11 days after the GAO decision (expiration of right to file a request for reconsideration), which is 25 December 2011. Therefore, FY11 funds are legally permissible for 100 days after 25 December 2011, which is 03 April 2012.

2. (e) See explanation in (1) above. FY11 funds are available until 03 April 2012.

3. (b) FY11 funds expired for this requirement on 03 April 2012. This is not a continuation/successive appeal of the GAO action – it’s a new action. So when the offeror filed the action with COFC on 15 April 2012, FY11 funds were not currently available (i.e., period of extended) for an award after 03 April 2012. Therefore, the criteria of 31 U.S.C. § 1558 are not met for FY11 funds. If the protest was filed on or before 03 April 2012, FY11 funds would still be legally permissible for this requirement in FY13. Next, there is no reason given in the fact pattern that would exclude the use of FY12 OMA funds for this requirement on 15 April 2012. Therefore, FY12 funds were available at the time the protest was filed. All other requirements for 31 U.S.C. § 1558 were met for FY12 funds, including a delay (offeror merely filing for injunctive relief is enough for a delay). Without filing a request for reconsideration or an appeal, COFC’s final decision date is 14 November 2012 (60 days after the COFC decision date of 15 September 2012). Therefore, FY12 OMA funds are legally permissible for this requirement 100 days after 14 November 2012, which is 22 February 2013. There is no reason given in the fact pattern that would exclude the use of FY13 OMA funds for this requirement during FY13; therefore, they are normally available until the end of FY13. So, since the funds were available in the fact pattern, FY12 and FY13 funds are legally permissible for this requirement.

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Example 2.

A solicitation for the subject contract is released on 12 September 2011 and FY11 OMA funds were committed on 10 September 2011. On 22 September 2011, a potential offeror alleges a defect in the terms of the solicitation and files a protest at the COFC. No action was previously filed with GAO. COFC decides the case on 15 March 2012 in favor of the Government.

1. What year funds are legally permissible on 30 June 2012?
 - a. FY11, subject to the availability of funds.
 - b. FY12, subject to the availability of funds.
 - c. FY11 or FY12, subject to the availability of funds.
 - d. None of the above.

2. What is the last day that FY11 funds would be legally permissible for this requirement?
 - a. 30 September 2011.
 - b. 25 March 2012
 - c. 4 April 2012
 - d. 22 August 2012
 - e. None of the above.

3. Assume there was a delay with the original protest to COFC and the offeror appeals the COFC decision to CAFC on 10 May 2012. CAFC decides the case in favor of the Government on 15 September 2012. No additional actions were filed. Assume FY11, FY12, and FY13 funds are available from an Amount perspective (i.e., the Army has the funds to obligate for this contract – if they are legally available for obligation from a Time perspective). On 20 December 2012, what year funds are legally permissible for this contract?
 - a. FY13 only.
 - b. FY12 and FY13.
 - c. FY11 and FY13.
 - d. FY11, FY12, and FY13.
 - e. None of the above.

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Answers To Example 2:

1. (b) Since the protest was filed at COFC, there is a requirement for the agency to show a “delay” - under the statute the protest to COFC is *not* assumed to have delayed the acquisition. The fact pattern does not indicate that the offeror asked for injunctive relief and COFC decided the case in favor of the Government. Because there was no injunctive relief requested or granted, the agency could have maintained the original funds on the original contract through the COFC protest. Even though all the other criteria of 31 U.S.C. § 1558 are met, FY11 funds are not legally permissible because there is no delay. If there was a delay, and assuming no other subsequent actions were filed, funds would be available until 22 August 2012 (160 after the COFC decision). In addition, there is no reason given in the fact pattern that would exclude the use of FY12 OMA funds for this requirement. Therefore, FY12 funds are legally permissible, subject to the availability of funds.

2. (a) The criteria of 31 U.S.C. § 1558 are not met (no delay). Therefore, FY11 funds are not legally permissible after 30 September 2011.

3. (c) Assuming there was a delay, FY11 funds would be extended past the expiration of the fiscal year. Since there is no delay with the CAFC action, it does not independently meet the criteria of 31 U.S.C. § 1558. Therefore, this is only a continuation of the extension for the original COFC action and not a new analysis for the CAFC appeal. As such, the funds are legally permissible for 100 days after the CAFC decision on the appeal (final ruling date). Therefore, the FY11 funds are available until 24 December 2012, 100 days after 15 September 2012. FY12 funds were not available at commencement of the original COFC action on 22 September 2011. Therefore, FY12 funds are not legally permissible after 30 September 2012 because they were never extended. There is no reason given in the fact pattern that would exclude the use of FY13 OMA funds for this requirement; therefore, they are available.

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Example 3.

A contract for services is awarded on 25 September 2010 using FY10 OMA funds. Contract performance occurs Monday through Thursday, from 0900-1700. After close of business on 30 September, a losing offeror files an agency-level protest of the award decision. On 01 October 2010, the agency denies the offeror's agency-level protest (there is no right to request reconsideration). On 02 October 2010, the offeror files a protest with GAO. The agency properly executes a stay-override on 03 October 2010. On 17 January 2011, GAO recommends that the agency re-evaluate offerors' cost, technical and past performance proposals, conduct discussions and obtain revised proposals if appropriate, and make a new selection decision. On 05 February 2011, after re-evaluating proposals, the agency selects a different awardee and terminates the original award for convenience.

1. Do both GAO case law concerning the funding of replacement contracts and 31 U.S.C. § 1558 apply to this fact pattern?
 - a. Yes.
 - b. No, GAO's funding replacement contracts case-law superseded 31 U.S.C. § 1558.
 - c. No, 31 U.S.C. § 1558 does not apply to agency level protests.
 - d. No, 31 U.S.C. § 1558 superseded GAO's funding replacement contracts case-law.

2. On what day do FY10 OMA funds expire for this requirement?
 - a. 30 September 2010
 - b. 09 January 2011
 - c. 06 May 2011
 - d. 16 May 2011
 - e. There is no definitive date, as the standard is no unreasonable delay.

3. Assume that a prospective offeror files a COFC solicitation protest and requests injunctive relief on 01 May 2011, and COFC decided the matter in favor of the Government on 05 October 2011. No other actions were filed. Assume FY10, FY11, and FY12 funds are available from an Amount perspective (i.e., the Army has the funds to obligate for this contract – if they are legally available for obligation from a Time perspective). What year funds are available for obligation on 07 February 2012?
 - a. FY12
 - b. FY 11 and FY12
 - c. FY10, FY 11, and FY 12
 - d. None of the above.

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Answers To Example 3:

1. (d) No, they both do not apply. A protest to the GAO of an award decision is within the scope of 31 U.S.C. § 1558 and therefore, the GAO case law test does not apply.

2. (c) GAO decision was on 17 January 2011. Therefore, the final decision date is 10 days later (27 January 2011), as no appeal or request for reconsideration was filed. 100 days after the final decision date is 6 May 2011.

3. (c) FY10 funds were available on 01 May 2011, as extended from the original GAO protest of 02 October 2010. FY11 funds were also available to fund this requirement on 01 May 2011 (they were current at this time). All requirements for 31 U.S.C. § 1558, including delay, are met. Therefore, the funds are legally permissible for an extended period. The final decision date is 04 December 2011 (60 days after the COFC decision on 5 October 2011). 100 days after the final decision date is 13 March 2012. Both FY10 and FY11 funds are available until this date. Additionally, FY12 funds are current on 07 February 2012. Therefore, all three funding sources are permissible.

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Example 4.

A contract for services is awarded on 29 September 2010 using FY10 OMA funds. On 01 October 2010, a losing offeror requests a de-briefing. On 02 October 2010, while preparing for the de-briefing, the contracting officer (KO) realizes he made an improper award due to his own mathematical mistake evaluating the pricing proposals. If he had not made the mathematical mistake, the losing offeror would have been the awardee. On 04 October 2010, the KO terminates the original award for convenience, because he determined (assume correctly) that the original award was erroneous and violated the terms of the solicitation and CICA.

1. Do both GAO case law concerning the funding of replacement contracts and 31 U.S.C. § 1558 apply to this fact pattern?
 - a. Yes.
 - b. No, GAO's funding replacement contracts case-law superseded 31 U.S.C. § 1558.
 - c. No, 31 U.S.C. § 1558 does not apply to a *sua sponte* determination by the KO that the original award violated CICA.
 - d. No, 31 U.S.C. § 1558 superseded GAO's funding replacement contracts case-law.

2. On what day do FY10 OMA funds expire for this requirement?
 - a. 30 September 2010
 - b. 12 January 2011
 - c. 22 January 2011
 - d. 16 May 2011
 - e. There is no definitive date, as the standard is "no unreasonable delay."

3. On 5 December, 2011, the KO asks what funds are legally permissible for this contract award. Assume FY10, FY11, and FY12 funds are available from an Amount perspective (i.e., the Army has the funds to obligate for this contract – if they are legally available for obligation from a Time perspective). What year funds are available for obligation?
 - a. FY12
 - b. FY 11 and FY12
 - c. FY10, FY 11, and FY 12
 - d. None of the above.

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Answers To Example 4:

1. (c) No, they both do not apply. A *sua sponte* decision of a KO is outside the scope of 31 U.S.C. § 1558 and therefore, the GAO case law test applies.

2. (e) When applying the GAO's case law regarding funding of replacement contracts, the standard is defined as a follow-on award with no "unreasonable delay," not 100 days after the final decision in accordance with 31 U.S.C. § 1558. However, as a best practice, we recommend awarding the contract by 12 January 2011 to be safe (100 days after the final decision date in accordance with the standard of 31 U.S.C. § 1558).

3. (a) FY10 funds were available until at least 12 January 2011, as extended from the KO's *sua sponte* action on 04 October 2010. Even though the funds might theoretically be extended after 12 January 2011 in accordance with the GAO's case law, 05 December 2011 is more than 400 days later and is likely an "unreasonable delay." FY11 funds were never extended based upon case law or 31 U.S.C. § 1558. Therefore, they were only available until the end of the fiscal year on 30 September 2011. Additionally, FY12 funds are current on 05 December 2011. Therefore, FY12 OMA is most likely the only appropriation that is legally available for this contract.