

(UNCLASSIFIED)

INFORMATION PAPER

JALS-KFAB

06 November 2013

SUBJECT: Availability of Prior-Year Appropriations after a Contract Protest or Other Challenge

1. **Purpose:** To provide Army JAG-wide guidance on the conditions under which prior year, expired funds remain available for contract obligations after a contract protest or other challenge delays the award of a contract; or when terminations for convenience or default lead to the award of a new contract.

2. **Applicable Fiscal Law:** In accordance with the Government Accountability Office's (GAO's) *Bona Fide Needs Rule*,¹ the proper fiscal year of an appropriation used to fund a command's requirement is the "current appropriation,"² or funds whose Period of Availability (POA) is available for obligation at the time of both the command's requirement and the time of contract award. A protest of a contract solicitation or award, however, can sometimes delay a contract award into the next period of availability for the respective appropriation. In the simplest example, assuming a one year fund like OMA is the proper purpose appropriation, the command identifies a requirement in FY1, and a contract protest delays the contract award until FY2. Although the general Bona Fide Needs rule is that the OMA-funded contract award in FY2 should be funded with FY2 OMA, both the GAO "Funding Replacement Contracts" case-law and the statutory authority of 31 U.S.C. § 1558 authorize the obligation of expired FY1 funds for the subsequent award of the contract in FY2. If the agency satisfies the conditions of either of these exceptions, it has the option of using the expired funds for the subject contract

a. GAO Case-Law: Termination for Default or Cause (T4D). After a T4D, the government usually still has a bona fide need for the supply or service. In such a case, the originally obligated funds remain available for obligation even after the expiration of the normal period of availability, as long as the agency re-awards the follow-on contract "without undue delay."³

b. GAO Case-Law: Termination for Convenience (T4C). A T4C, however, generally extinguishes the availability of expired prior year funds available to award a new contract.⁴ In most instances, such funds are not available to fund a replacement contract in a subsequent year because there is no longer a continuing bona fide need for the supply or service. However, an exception to this general principle allows the originally obligated funds to remain available after a T4C, if certain conditions discussed in para. 5(a) below are met, and the agency re-awards the follow-on contract "without undue delay."⁵

c. 31 U.S.C. § 1558: Availability of funds following resolution of a formal protest or other challenge. Originally enacted in §813(a) of the National Defense Authorization Act of 1990 on November 29, 1989, this statute authorizes agencies to extend the availability of funds, when a solicitation or proposed contract award has been delayed by a protest or other action, for up to 100 days after the "final ruling" is made on the protest or other challenge.⁶

¹ The *bona fide needs* rule is a fiscal "time" rule that requires both the timing of the obligation and the *bona fide need* to be within the fund's period of availability. DoD FMR, Vol. 3, Ch. 8, para. 080303.

² Current Appropriation. An appropriation that is still available for new obligations under the terms of the applicable appropriations act. 31 U.S.C. § 1502.

³ *Funding of Replacement Contracts*, 60 Comp.Gen. 591 (1981).

⁴ Department of Defense Financial Management Regulation (*hereinafter*, DOD FMR), Vol. 3, Ch. 8, para. 080512.

⁵ *Funding of Replacement Contracts*, 68 Comp.Gen. 158, 158 (1988).

⁶ 31 U.S.C. § 1558, available at <http://www.law.cornell.edu/uscode/text/31/1558>.

JALS-KFAB

SUBJECT: Availability of Prior-Year Appropriations after a Contract Protest or other Legal Challenge

3. **GAO Case-Law on Funding Replacement Contracts vs. 31 U.S.C. § 1558**: The GAO cases which establish the tests for the funding of replacement contracts were decided prior to the enactment of 31 U.S.C. §1558. In addition, these two authorities may overlap where a T4C is required after an improper award decision. However, we are of the opinion that the statute prevails; and if one of the criteria of the statute is not satisfied, the funds may not be extended, even if the criteria of the GAO case law are met. For example, if the funds are not extended under 31 U.S.C. §1558 because there is no delay for a COFC case, you could not use the case law to extend the availability of funds. From a practical perspective, we believe the statute now covers almost all of the instances to extend the availability of funds, except *sua sponte* action by the KO, as detailed below.

a. Application of 31 U.S.C. §1558: Delay in award, or T4C and re-award, in response to a protest or other challenge (includes both pre-award and post-award protests). Generally, 31 U.S.C. § 1558 may apply where a protest delays the award until the follow-on fiscal year, as discussed in para. 4. below. If a protest or other action causes a delay of the contract award, or results in a T4C of the original contract and re-award, prior-year funds may remain available in the subsequent fiscal year if the agency satisfies the criteria of 31 U.S.C. § 1558.

b. Application of GAO's "Funding of Replacement Contracts" case-law: *Sua sponte* action by the KO to T4C and re-award because the original contract award was improper.⁷ After the enactment of 31 U.S.C. §1558, a determination by the KO that termination is required by CICA or other law *absent a protest or other challenge* is likely the only circumstance that falls solely under this case law test. Therefore, commands may obligate expired funds when the KO determines that the contract award was improper, and terminates the contract for convenience (*not in response to a protest or other challenge*) and re-awards in the subsequent fiscal year, as long as the action satisfies all of the requirements of the GAO case-law on funding of replacement contracts.

4. **Applying 31 U.S.C. § 1558 (Protests of Solicitations or Awards)**: If a protest or other action delays award of a contract into the follow-on fiscal year, 31 U.S.C. § 1558 states that funds remain available for obligation for award in the subsequent fiscal year if: the funds were available to an agency for obligation at the time of the protest or other action; and the protest or other action was filed in connection with a solicitation for, proposed award of, or award of a contract (see paragraphs (a) and (b) below).⁸

a. GAO Protests. If funds were available at the time of the protest, this exception applies to any protest under subchapter V of chapter 35 of title 31, U.S.C.⁹ (GAO protest) filed in connection with a solicitation for, proposed award of, or award of such contract.

b. Other action(s). If funds were available at the time of the action, this exception applies to any other action, either administrative or judicial (agency level protest, COFC protest, etc.),¹⁰ which challenges a solicitation for a contract, proposed award of a contract, award of a contract, or eligibility of an

⁷ The Competition in Contracting Act (CICA) provides a statutory mandate protecting the *procurement status quo* by prohibiting the issuance of an award or providing for the cessation of performance of a newly awarded contract once timely notification of a protest is provided by the GAO to the proper federal agency. See 31 USC § 3553; FAR §§ 33.103 and 33.104.

⁸ 31 U.S.C. § 1558(a); see also DOD FMR, Vol. 3, Ch. 8, para. 081203.

⁹ *Id.* at (b)(1).

¹⁰ *Id.* at (b)(2).

(UNCLASSIFIED)

JALS-KFAB

SUBJECT: Availability of Prior-Year Appropriations after a Contract Protest or other Legal Challenge

offeror/contractor.¹¹ **In addition**, the other action must also *delay* or prevent the executive agency from making an award of a contract or proceeding with the procurement.¹²

(1) **Delay** for Agency Level Protest. If the agency does not override the pre-award stay, then there is a delay. If the agency overrides the pre-award stay, there is an argument that the process of deciding whether or not to override the stay is also a delay. For post-award, if the agency suspends contract performance, then there is a delay. If the agency does not suspend contract performance, there is arguably no delay.

(2) **Delay** for COFC Protest. If injunctive relief is granted (temporary or permanent), there is a delay. If there is hearing or even a motion filed for injunctive relief, there is an argument that the procurement process was delayed. If no motion is filed for relief, there is arguably no delay.

c. If the conditions in paragraph 4.a. or 4.b. above are met, the funds remain available for 100 days after the date of the **final ruling**. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later.¹³ Please note, the wording of the statute indicates that an appeal of a decision may continue the original extension by changing the final ruling date. As such, if a COFC decision is appealed to CAFC, the final ruling date could be the date the appeal is decided by CAFC. However, we are of the opinion that most of the subsequent legal proceedings (for example, a GAO decision later taken to COFC) are probably not appeals. In this case, the proceedings must independently meet the criteria of 31 U.S.C. § 1558 in order for the exception to be available.

(1) “Final Ruling” date after GAO protest. The extension starts 100 days after the final ruling. The final ruling date is either 11 days from date of the GAO decision (expiration of right to file request for reconsideration)¹⁴ or the date of the GAO decision on a timely request for reconsideration, whichever is later.

(2) “Final Ruling” date after Agency-level protest. If agency level protest procedures do not allow for a request for reconsideration, then the 100 days begins on the date of final ruling, which is the date of the Agency level protest decision. If agency level protest procedures allow for a request for reconsideration, then the final ruling date is either the date of expiration of reconsideration rights or decision on the request for reconsideration, whichever is later.

(3) “Final Ruling” date after COFC protest. The extension starts 100 days after the final ruling. The expiration of right to file request for reconsideration is 28 days from date of the COFC decision¹⁵ and the expiration of right to file an appeal to CAFC is 60 days from date of the COFC decision.¹⁶ Without an appeal, the final ruling date is either 60 days from date of the COFC decision (expiration of right to file an appeal)¹⁷ or the COFC decision on the request for reconsideration (if filed), whichever is later. If there is

¹¹ *Id.* at (b)(2)(A).

¹² *Id.* at (b)(2)(B).

¹³ *Id.* at (a).

¹⁴ 4 C.F.R. § 21.14(b), GAO Bid Protest Regulations.

¹⁵ *Rules of the United States Court of Federal Claims*, Rule 59, para. (b)(1), (August 30, 2013).

¹⁶ *Federal Rules of Appellate Procedure*, Rule 4, para. (a)(1)(B), (December 1, 2009).

¹⁷ *Id.*

(UNCLASSIFIED)

JALS-KFAB

SUBJECT: Availability of Prior-Year Appropriations after a Contract Protest or other Legal Challenge

an appeal to CAFC, the final ruling date is probably the CAFC decision date, unless there is a new delay in the procurement process and all the criteria of 31 U.S.C. § 1558 are met independently.¹⁸ *See supra* para. 4(c).

5. **Applying GAO’s “Funding of Replacement Contracts” case law (“Competent Authority” T4C without a protest):** After the award of a contract, using prior year funds can be problematic if the contract is terminated for convenience after the end of the relevant fiscal year. Although most circumstances authorizing the use of prior year-funds are now governed by 31 U.S.C. § 1558, the GAO case law still applies if a “competent authority” – including a KO - terminates an erroneously awarded contract for convenience, *not* as a result of protest or other legal challenge.

a. GAO’s case law provides that if a contract is terminated for convenience in response to a determination by competent authority that the original contract award was improper and violated CICA and/or other statutes, then funds remain available for obligation if: (1) the original award was made in good faith; (2) the agency has a continuing bona fide need for the goods or services involved; (3) the replacement contract is of the same size and scope as the original contract; and (4) the replacement contract is executed without undue delay after the original contract is terminated for convenience.¹⁹ For example, assume a KO decides to T4C a contract whose original award violated CICA. In this case, the agency is allowed to re-obligate those funds on a new contract, even if the funds expired after the original award, as long as the new award complied with the four requirements of the GAO case law.

b. “Without undue delay” may extend beyond 100 days. The GAO has interpreted the 100 day extension in 31 U.S.C. § 1558 as limiting the funding of replacement contracts case law.²⁰ As a result, the “without undue delay” prong is limited to an award within 100 days from the final decision for bid protests and other actions under § 1558. If the replacement contract is outside the scope of 31 U.S.C. § 1558 (i.e., the T4C is not in response to a protest or other challenge), but still satisfies the requirements of the GAO case-law on funding replacement contracts, then there is no statutory definition of awarding “without undue delay.” Therefore, the funds may theoretically remain available for more than 100 days after the termination that led to a new award in the follow-on fiscal year. The best business practice, however, is to seek to re-award within 100 days in all cases. That way, you avoid the potential risk of the GAO deciding that the “without undue delay” definition in 31 U.S.C. § 1558 applies to all cases. If this definition applied to all cases, a re-award outside the 100 days would lead to a potential Anti-Deficiency Act violation.

6. **Conclusion:** JA’s should be aware of and advise their commands on the potential availability of prior year funds under the statutory and GAO case-law exceptions to the Bona-Fide Needs Rule detailed above, and of the applicable time constraints for award and/or re-award if these exceptions apply to their command’s respective procurements.

Prepared by: CPT Matt Freeman/Attorney/KFAB/DSN 260-7864/ matthew.a.freeman10.mil@mail.mil

Approved by: LTC Jose A. Cora/Acting Chief/KFAB/DSN 260-7863/jose.a.cora.mil@mail.mil

Coordination through: OTJAG Ad Law, DA OGC (Fiscal), and DA OGC (Acqs.)

¹⁸ Please see *Federal Rules of Appellate Procedure*, Rule 40 and 41 for the proper expiration dates.

¹⁹ *Funding of Replacement Contracts*, 68 Comp.Gen. 158, 162 (1988).

²⁰ *Principles of Federal Appropriations Law* (GAO Red Book), Volume II, Chapter 7, para. (B)(1)(d), at 7-18.