UNITED STATES GOVERNMENT

Memorandum

GENERAL ACCOUNTING OFFICE

B-208863(1)

May 23, 1983

TO : Senior Group Director, AFMD - David Lowe

FROM : Senior Attorney, OGC - Barry R. Bedrick Barry R Bedrick

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SUBJECT: Defense Obligation Procedures
(Code 903053; File B-208863)

This responds to questions 9 through 12 and 15 through 21 in your memorandum of December 30, 1982, on the above subject.

Question 9: Department of Defense (DOD) regulations specify that in order for a customer to use a project order, the work or service being requested must be "specific and definite." Anything that is not a project order falls under 31 U.S.C. 686 (now 31 U.S.C. § 1535, generally known as the Economy Act.) From a legal standpoint, what are the criteria that distinguish project orders from Economy Act orders?

Answer: As you point out, project orders must be "specific, definite, and certain." (DOD Inst. 7220.1, sec. III.A.) Also, as a general rule, orders placed with industrial funds which do not qualify as project orders (e.g., military interdepartmental purchase requests (MIPRs)) are considered to be Economy Act (31 U.S.C. § 1535) orders, subject to the requirement of deobligation to the extent the order has not been performed when the funds originally obligated expire.

Any order placed with an industrial fund, if it is to serve as the basis for a recordable obligation of funds, must be for specific goods or services. 31 U.S.C. § 1501(a)(1). A specifically identifiable subject matter is a general legal requirement for formation of a binding contract, which in turn is the basis for obligation of funds. Id. Thus, the requirement that the project order be specific, definite, and certain is not a unique distinguishing feature of project orders.

In fact, a project order is simply an order which is specific enough to suport an obligation and which meets the definition in DOD Instruction 7220.1 (sec. III.A.):

> "Any order * * * which is the subject of any of the purposes set forth in [the Instruction] and which is placed with a Government-owned and operated establishment * * * by a component of a Military Department or Defense Agency shall be deemed to be a 'project order' * * *."

Conversely, any order placed with an industrial fund for a purpose not authorized by the DOD Instruction (expressly unauthorized purposes include education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications) cannot be treated as a project order and would fall instead under the Economy Act.

In summary, the difference between Economy Act orders and project orders placed with an industrial fund is not that project orders are necessarily more specific than Economy Act orders; Economy Act orders can be and, if they are to serve as the basis for obligations, must be, as specific as project orders. Rather, the significant difference lies in the different purposes for which they are issued; the difference thus is a result, not of a distinction in the laws governing project orders and Economy Act orders, but because DOD has by regulation limited the purposes for which project orders may be used. (As noted above, there is a difference between Economy Act orders and project orders in terms of whether funds remain obligated at the time they would otherwise expire for obligation or not.)

Question 10: If an industrial fund is going to accomplish all or part of the work to fill an Economy Act order by letting a contract, must that contract be let by the end of the fiscal year (i.e., before the O&M appropriation expires)?

Answer: By law, an Economy Act order cannot be used to extend the availability of funds beyond the end of the period of availability applicable to the ordering agency. 31 U.S.C. § 1535(d). The Department of Defense and the military departments, as well as other agencies, can perform an Economy Act order by letting a contract rather than performing the task themselves. 31 U.S.C. § 1535(b). Thus, a military industrial fund can perform an Economy Act order by letting a contract but, to the extent no contract has been let at the time the customer's funds expire for obligation, the funds obligated by the customer for the order must be deobligated.

In general, therefore, if an industrial fund is going to fill an Economy Act order by letting a contract and if the contract has not been let by the time the funds obligated by the customer expire for obligation, those funds may not be used.

Question 11: Does the project order law permit industrial funds to let contracts to fill those (O&M funded) orders after the close of the fiscal year?

Answer: The O&M funds you refer to are available for one fiscal year. The industrial fund may let a contract to fill an O&M-funded project order after the close of the fiscal year. However, an O&M-funded Economy Act order, in accordance with 31 U.S.C. § 1535(d), cannot be used to extend the availability of the funds. Under an Economy Act order, if the industrial fund has not incurred obligations, before the end of the period of availability of the appropriation, in itself performing or in making an authorized contract with another person to provide the requested goods or services, then the "amount obligated is deobligated." 31 U.S.C. § 1535(d).

Question 12: [a] Can an industrial fund let a work request or project order (e.g., to another industrial fund) to complete work ordered by a customer on a project order or a work request? [b] If so, when the original order was a work request must customer (O&M) funds be deobligated by the end of the fiscal year to the extent the second industrial fund has not completed work (i.e., in the same manner as if the first industrial fund had not let a second work request)?

Answer: [a] This question deals with "subsidiary ordering" by an industrial fund. Industrial funds are authorized to use subsidiary ordering within the Government and to contract with commercial firms, pursuant to a project order, "provided such subsidiary ordering and contracting are incident to and are for use in carrying out the project order." DOD Instruction 7220.1, sec. VI.A.7.

With regard to Economy Act orders placed with an industrial fund, the Economy Act contemplates that DOD and the military services may place Economy Act orders to be filled by letting a contract. 31 U.S.C. § 1535(b). We see no

reason why the contract which is let to fill such an Economy Act order cannot itself be either a project order or an Economy Act order placed with another industrial fund.

[b] To the extent the work under an Economy Act order has not been performed or a contract let at the expiration of availability of the funds obligated by the customer agency under a work request, the customer must deobligate. 31 U.S.C. § 1535(d). Your question involves an Economy Act order to an industrial fund, which places a subsidiary order which may be either a project order or a work request. The recipient of the subsidiary order then does not complete work by the end of the fiscal year from which the original customer obligated funds.

If the customer's funds can remain obligated by an Economy Act order in these circumstances, the effect is to defeat the deobligation requirement of 31 U.S.C. § 1535(d) even though no work has been performed and no contract let outside the Government. The industrial fund accepting the initial order has no apparent function in this kind of transaction except as a conduit, and it is clear that if the order had been placed directly with the second industrial fund, the deobligation requirement would apply. Even if the subsidiary order is a project order, under which the first industrial fund need not deobligate its funds at fiscal year-end, we believe that the original customer's funds should be deobligated pursuant to the Economy Act. (Cf. DOD Inst. 7220.1, sec. VI.A.5. "Project orders may not be issued for the primary purpose of continuing the availability of appropriations.")

Question 15: You found two Navy requirements contracts entered into during FY 82, under which work orders purporting to obligate FY 82 funds were issued both before and after the end of FY 82. The first contract is for interior and exterior painting of various buildings at a Navy base; the second is for weed and pest control on the base. Both contracts were entered into toward the end of FY 82 and continue into FY 83 for one year from the date of the contract. May FY 82 funds be obligated for services performed under the contracts in FY 83?

Answer: Yes.

The general rule is that appropriations of any given year may be obligated only to meet a bona fide need of the same fiscal year. E.g., 58 Comp. Gen. 471, 473 (1979). Service contracts, to the extent that the need for the services arises in a subsequent fiscal year, are to be charged to the fiscal year in which the services are rendered. E.g., 60 Comp. Gen. 219, 221 (1981). While some work orders were placed in FY 1982, other tasks under the contracts will not be ordered to be performed until FY 1983.

The general rules do not apply to these two contracts, however. Section 708(f) of the 1982 Department of Defense Appropriation Act, Pub. L. No. 97-114, 95 Stat. 1565, 1579 (1981), provides that DOD appropriations for FY 82 shall be available for

> "* * * payments under contracts for maintenance of tools and facilities for twelve months beginning at any time during the fiscal year * * *."

It is this language that is cited in the excerpt you provided from the Naval Facilities Engineering Command Contracting Manual, § 9.2.1 (1979), as authority for entering into one-year maintenance service contracts that do not coincide with the Federal fiscal year; apparently it is a recurring provision in DOD appropriation acts. Accordingly, because the two contracts at issue are for facilities maintenance, a service covered by section 708(f) of the 1982 DoD Appropriation Act, the Navy may obligate FY 82 funds for services provided in FY 83 for one year from the date of the contracts.

Question 16: During your visit to the Mare Island Navy Shipyard, you found 13 customer orders, citing FY 82 funds, which were accepted by the shipyard after the end of FY 82. (Most of these customer orders had been backdated to show acceptance on September 30, 1982.) May FY 82 funds be obligated under the 13 customer orders?

Answer: Eight of the customer orders are basic contracts, not amendments to existing orders already accepted in FY 82. Because the orders were not accepted by the shipyard until after the end of FY 82, the FY 82 appropriations had already expired and thus were not available for new obligations. See 31 U.S.C. § 1502(a). Accordingly, these orders

may not be funded from FY 82 appropriations. (In the order in which they appear in Attachment XI to your submission, the contracts are nos. 1, 7-13.)

The five remaining orders are amendments to existing contracts entered into in FY 82. One of this group (no. 2 in Attachment XI) contains what appears to be a correction to data furnished in an earlier amendment. The correction does not affect the amount of funds to be obligated under the contract, nor does it seem to change the scope of work under the original contract. Two other orders (nos. 5 and 6) are amendments decreasing the amount to be obligated on existing orders. Like order no. 2, these amendments do not purport to obligate FY 82 appropriations after they have expired, and thus are unobjectionable.

The remaining two orders (nos. 3 and 4) increase the amount of FY 82 funds to be obligated on existing orders. Because these orders were accepted after the end of FY 82, the FY 82 appropriations had expired and were not available for new obligations. However, expired funds may be restored and used to fund increases on work orders in two situations: (1) to meet upward adjustments to previously recorded obligations, when the adjustment is not due to a change in the original scope of work; and (2) to liquidate obligations that were validly incurred during the fiscal year of availability, but which were not recorded before the end of the fiscal year (for example, where a contract was awarded, but the obligation not recorded, before the end of the fiscal year). E.g., B-179708-O.M. June 24, 1975.

These two orders do not fit the second exception and we cannot determine from the amendments themselves whether the adjustments are due to an increase in the original scope of work. If they are, FY 82 funds may not be obligated in the increased amounts. If they are not--if, for instance, the amendments represent funds needed for a cost overrun on the existing orders--FY 82 funds are available for obligation, provided that the performing agency incurred valid obligations under the order before the end of FY 82. (Because these two orders are Economy Act orders, the original appropriation had to be deobligated to the extent that the performing agency had not incurred valid obligations before the end of FY 82. Thus, expired funds could be used to fund upward adjustments within the original scope of work only if valid obligations under the order were incurred during FY 82.)

Question 17: How specific must the description of work to be performed under a contract be to support obligation of funds under the contract? The question arises in the context of two contracts you found in which the work to be provided is described only generally. The first contract was for revising "tech orders." Although the contract specified a fixed price per page revised and the agency obligated an amount for total costs under the contract, the contract did not specify which tech orders were to be revised. The specific revisions were communicated to the contractor in a series of letters issued in the subsequent fiscal year.

The second contract, a project order, was for repair of "exchangeable components and spare parts." Specific items and quantities to be repaired were not specified in the project orders, which were issued quarterly. Funds were allocated among items repaired during each quarter.

Answer: One prerequisite to recording a valid obligation under a contract is that the contract must call for specific goods or services; a contract lacking a sufficiently specific description will not support a valid obligation. See 31 U.S.C. § 1501(a)(4) B-196109, October 23, 1979.

Both the contracts at issue appear to lack the required degree of specificity. Both fail to describe in any but the most general way the kind of product or service to be provided, and both contemplate that the specific descriptions will be communicated to the performing party at a later date. See B-196109, supra (order for signs held insufficiently specific where description of signs was to be contained in subsequent requisitions, even though total square footage and price per square foot were specified in order); 44 Comp. Gen. 695 (1965) (order to Government Printing Office not firm and complete where copy to be printed was not provided).

Although total estimated obligations should not have been charged against the appropriations current at the time the contract was signed, once specific orders were placed (in the first contract, when the tech orders were specified; in the second, when the repairs were described), those orders became firm and complete and would support a valid obligation of funds then current.

Question 18: How definite must data used to determine the estimated cost of a contract be to support a valid obligation in the amount of the estimated cost? You cite three examples where funds were obligated on the basis of estimated cost data. The first contract involved crash damage repairs to an aircraft. A precise estimate could not be made because the aircraft had not been inspected for the extent of damage. The amount obligated under the contract was based principally on the amount of funds available. The second contract was for "tear down and quote" repairs of liquid oxygen tanks. A fixed price was quoted for the "tear down" portion. However, the amount obligated for actual repairs was an estimate based on past experience. The third type of contract was for engineering services where actual costs were to be based on engineering hours actually used, rather than the estimates used to determine the amount of funds to be obligated at the time of contract award.

Answer: Where the precise amount of the Government's liability is not known when the obligation is incurred, as in a cost-type contract, the obligation should be recorded on the basis of the agency's best estimate. See, e.g., 50 Comp. Gen. 589, 591 (1971). The obligation made under the first contract you cite does not appear to represent the agency's best estimate; to the contrary, it appears that a more precise estimate of the actual cost could have been obtained by examination of the aircraft to be repaired. Moreover, you suggest that the amount obligated was based on the amount of appropriations available, and there is no indication that that amount has any reasonable relation to the amount actually needed.

In comparison, the obligation under the second contract appears to represent the best estimate possible under the circumstances, since the actual cost could not be known until the contractor completed the "tear down" phase of the work. Similarly, assuming the estimated price figures are based on a calculation of estimated total hours required under the contract, the obligation of the estimated amount under the third contract seems reasonable.

In any event, if the contracts referred to in your examples are cost-type contracts, the Government's actual costs are chargeable to the original appropriation cited in the contract, regardless of what estimated costs were

recorded as obligations initially, so long as the actual costs do not exceed a contractually established ceiling. See B-195732, September 23, 1982, 61 Comp. Gen. ___.

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Question 19: For three orders for supplies placed late in FY 82, you ask whether the orders were intended to meet bona fide needs of FY 82. The first order, placed on September 28, was for 58,000 board feet of 2x4 lumber from base supply. The ordering organization normally uses about 10,000 board feet a month and tries to keep one month's supply on hand. The lumber was delivered on October 6, and most remained in storage as of November 1982. The second two orders were for 600,000 sheets of paper, placed on September 23 and 29. The ordering organization uses about 1.2 million sheets a year and had 400,000 sheets on hand at the time of the order. The third order, placed on September 28, was for furniture for a dormitory being refurbished by a contractor. The contract completion date for the refurbishment is July 1983. Base supply estimated that the furniture would be delivered in March 1983.

Answer: The general rule is that appropriations of any given year may be obligated only to meet a bona fide need of the same fiscal year. E.g., 58 Comp. Gen. 471, 473 (1979). Where delivery of goods is scheduled only for a subsequent fiscal year, or if the contract timing effectively precludes delivery until the subsequent fiscal year, it is presumed that the contract was made in the earlier fiscal year only to obligate funds from an expiring appropriation and that the goods were not intended to meet a bona fide need of that year. See 38 Comp. Gen. 628, 630 (1959). However, the presumption does not arise with regard to orders to replace "stock" used in the year in which the contract is made, even though the replacement items will not be used until the following fiscal year. See 44 Comp. Gen. 695 (1965); 32 Comp. Gen. 436 (1953). In this context, "stock" refers to "readily available common-use standard items." 44 Comp. Gen. at 697.

With regard to the first order, the lumber may be characterized as "stock" because the ordering organization has a consistent need for lumber in the standard size ordered. Thus, the order could be funded from FY 82 appropriations, if it were intended to replace lumber used in FY 82. The second order, for paper, also appears to be to replace stock.

In contrast, the third order, for furniture, does not appear to meet a bona fide need of FY 82. It was clear at the time that the order was placed that there would be no need for the furniture until late in the following fiscal year, when renovation of the building in which the furniture was to be used would be completed. Accordingly, FY 82 funds should not have been obligated for the furniture. See B-95136-O.M. August 11, 1972 (order for work involved in relocation of employees held not to create valid obligation for year order made since new office space would not be available until following fiscal year).

Question 20: In the two orders you cite for base maintenance to be performed by an Air Force industrial fund activity, you ask whether obligations may be recorded at the time the industrial fund accepts the order. The first type of order is for work to be performed by the industrial fund itself. You found specific orders where there were no firm estimates of work starting dates and where orders placed in FYs 1979-1981 were still incomplete in FY 82. The second type involves orders placed with an industrial fund for which the work will be performed by a contractor engaged by the industrial fund. You characterize these orders as Economy Act orders, not project orders. You found cases where funds obligated in the fiscal year in which the order was placed were carried into subsequent fiscal years, even though the industrial fund had not awarded contracts for the work ordered. You noted that, according to a Defense Audit Service draft report, about $7.26 million obligated in these cases should have been deobligated at the end of FY 81.

Answer: Under both project orders and Economy Act orders, funds may be obligated at the time the order is accepted. However, appropriations obligated under an Economy Act order must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not incurred valid obligations under the agreement. Funds obligated under project orders are not subject to this limitation. See 59 Comp. Gen. 602 (1980) (Economy Act orders); B-135037-O.M. June 19, 1958 (project orders).

In the first example you cite, because the orders involved are project orders, the funds need not be deobligated at the end of the fiscal year, without regard to the industrial fund's progress in performing the work ordered. (This assumes that the orders were specific enough to constitute valid project orders and were to meet bona fide needs of

the fiscal year in which the orders were placed. If they were not--if, for example, funds are obligated only to prevent their expiration--no valid obligation arose at the time the order was placed. See 58 Comp. Gen. 471, 473 (1979).) However, it appears that the industrial fund may be in violation of the Air Force Regulations you cite, which in part require the activity which accepts an order to be in a position to perform without delay.

With regard to the second category of orders you cite, assuming that your characterization of those orders as Economy Act orders, rather than project orders, is correct, funds obligated under the orders must be deobligated at the end of the fiscal year to the extent that contracts have not been awarded to perform the work ordered.

Question 21: In one case that you found, agency officials stated that notices of award for three contracts were mailed to the contractors between 10 p.m. and 12 p.m. on September 30, 1982. However, there is no documentary evidence (certified mail receipts, postmarked envelopes) to show when the notices were mailed. You ask whether the burden of proof is on the agency to show that the contracts were awarded by mail before the end of FY 82.

Answer: In order to obligate FY 82 funds under the three contracts, the notices of award would have to have been mailed before the end of FY 82. See 59 Comp. Gen. 431 (1980). Your question seems to relate to the adequacy of the agency's proof that the notices were mailed before midnight on September 30. Although documentary evidence would be the best proof of the mailing, lack of such evidence does not give rise to a presumption that the contract award was mailed too late. Rather, without proof to the contrary, we have no grounds to challenge the agency officials' statements that the awards were mailed on September 30.

Question 22: In one case that you found, requisitions from Bergstrom Air Force Base were entered into the base supply's computer, which apparently was programmed to trigger an issue from inventory once a requisition meeting certain specifications was processed by the computer. At 11:30 p.m. on September 30, the computer began reprocessing requisitions that it had rejected earlier due to coding errors in the requisitions. The reprocessing continued until

3:00 a.m. on October 1. You ask when the obligations properly may be recorded, when the requisitions were first entered into the computer, or later, when the rejects were reprocessed and an issue from inventory was triggered.

Answer: The arrangement described in this question appears to be the same as that described in question 14 of your December 30 memorandum, i.e., an industrial fund computer is pre-programmed to process orders meeting certain specifications, which specifications are verified by computer edit checks. In these circumstances, we believe that customer requisitions meeting the specifications may be regarded as "acceptances" for obligation purposes; thus submission of a proper requisition completes the requirements for recording an obligation. However, the requisitions described in your question were defective when first submitted and, accordingly, did not constitute valid acceptances at that time. A recordable obligation would not arise until a proper requisition was submitted. Thus, any requisitions originally rejected by the computer and then not processed until after 12:00 p.m. on September 30 were not valid FY 82 obligations. Accordingly, no binding agreement arose until FY 83 and obligations for those requisitions should not have been recorded until FY 83.

Question 23: In FY 81, an order was placed with an industrial fund to replace roofs on nine specified buildings. The industrial fund did not award a contract for the work until the middle of FY 82. Later in FY 82, it was determined that four of the nine buildings did not need to have their roofs replaced and that the original estimate of funds needed for the work was too high. Instead of deobligating the funds that were freed up as a result of the two changes, the funds were used to perform work on more than four other buildings, which were not identified until late FY 82. You asked whether substitution of the buildings to be repaired constitutes a change in the original scope of work, thus preventing the obligation of FY 81 funds for work on the substituted buildings.

Answer: The general rule is that expired funds may be reobligated for additional work only if it falls within the original scope of work under the contract. E.g., B-179708, June 24, 1975. In the case you cite, it appears that repair of the replacement buildings was not contemplated by the parties when the order was placed in FY 81, nor does the work

appear to meet a bona fide need of FY 81, since the substituted buildings were not identified until late FY 82. See 25 Comp. Gen. 332 (1945) (original appropriation could not be charged with cost of replacing boiler because original contract did not obligate contractor to replace boiler). Accordingly, the deobligated FY 81 funds should not have been used to fund repair of the replacement buildings in FY 82.

Question 24: A project at Lackland Air Force Base provided for renovation of serving lines in five dining halls to "a la carte" feeding systems. The project was funded using operation and maintenance (O&M) funds. An official at the base advised that the project was split into two separate projects and work was spread out over several years in order to comply with a requirement in Air Force regulations that O&M funds obligated for a minor construction project be kept below $100,000 in any one year. An official at the base conceded that the project most appropriately would be classified as a single project. You ask whether splitting the project into parts to avoid complying with the ceiling on use of O&M funds is illegal. You cite several Air Force regulations which appear to prohibit such action.

Answer: The Department of Defense (DOD) is authorized to use O&M funds for military construction projects costing not more than 20% of the maximum amount specified by law for a minor military construction project. Military Construction Codification Act, Pub. L. No. 97-214, § 2(a), 96 Stat. 153, 155 (1982), adding 10 U.S.C. § 2805(c). For FY 83, the maximum authorized amount is $1 million; thus, construction projects could be funded using O&M funds up to $200,000. An earlier provision, 10 U.S.C. § 2674(e), repealed by the Military Construction Codification Act, 96 Stat. 173, provided that O&M funds could be used for construction projects costing up to $100,000. The $100,000 ceiling is also contained in DOD Directive 4270.24(D)(2)(c), which was issued before passage of the Act but remained in effect as of September 30, 1982.

The Military Construction Codification Act[1] provides that

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[1] The definitions in the Military Construction Codification Act are derived from 10 U.S.C. § 2674(g), the predecessor provision repealed by the Act.