

BG 596



## DEPARTMENT OF THE AIR FORCE

Headquarters Air Force Materiel Command  
Wright-Patterson Air Force Base Ohio

03 OCT 1995

MEMORANDUM FOR ALHQCTR FM/JA/PK  
ALHQDRU FM/JA/PK

FROM: HQ AFMC/FMB  
4375 Chidlaw Road, Suite 6  
Wright-Patterson AFB OH 45433-5006

SUBJECT: Contract Funding for Undefined Contractual Actions (UCAs) (OC-ALC/PKC  
Memo to HQ AFMC/PKP, 22 May 95) (Atch 1)

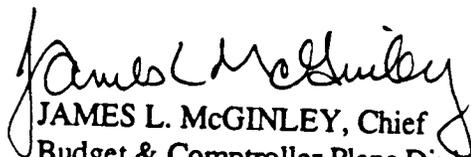
1. This letter is issued as a result of request for clarification from OC-ALC concerning our initial guidance on 23 Jan 95 (Atch. 2). The answers are the product of extensive discussions among the legal, contracting and financial management portions of the HQ AFMC staff.
2. OC-ALC asked how the contracting officer can verify the availability of funds which must be obligated at the time the contract is definitized. The answer to this question falls into two general categories dependent on the circumstances:
  - a. In the case where multi-year funds are used for the procurement, it may only be necessary to reserve sufficient funds at the time of issuance of the UCA to ensure that funds are available to definitize the contract.
  - b. If multi-year funds are not available because they are not the proper appropriation for the tasks being contracted or if the UCA is issued in the expiring year of a multi-year appropriation's life, the situation is more complex. Then, the contracting officer must work closely with the financial management community to ensure that (1) when appropriations become available the definitized contract in question is prioritized high enough to be funded, or (2) timely termination action of the UCA is accomplished if it is determined that funds will not be available. PK/FM planning and coordination could be accomplished with an agreed upon priority funding list, planning PR or similar fund status information. Careful consideration must be given to the funding level and the government's liability to ensure that a violation of the Antideficiency Act (31 USC 1341) does not occur. No level of attention can determine the total amount of funds in an appropriation before it is made. Prudent management can ensure that once an appropriation is enacted it is not exceeded even when there are outstanding UCAs. This can be done by terminating the UCA for convenience or, if applicable, deleting severable tasks to keep the total obligation below 50% (75% with a qualifying proposal) of the NTE Ceiling Price which was the recorded obligation for the undefinitized contract.

2. OC-ALC also asked, "Does the HQ AFMC/FMB, 23 Jan 95 letter apply to UCAs issued against Basic Ordering Agreements (BOAs) and Provisioned Item Orders (PIOs)."

- a. An undefinitized order issued against a BOA must comply with our previous guidance for letter contracts. Each order under a BOA is a separate contract (see FAR 16.703). Therefore, if the order's terms, specifications or price are not agreed upon before performance begins, the statutory UCA limitations would apply. If additional funds are needed at the time of definitization, only funds currently available for obligation may be used.
- b. PIOs, to the extent that they are for the purchase of initial spares, are subject to exemption from the UCA limitations on obligation. The exemption is provided by 10 USC 2326(g) which is also recorded in DFARS 217.7404-5. The NTE Ceiling Price should be obligated at the time of issuance of the UCA. For changes, see paragraph 7(3) and(4) of HQAFMC/JAQ letter dated 1 Aug 95 (Atch. 3).

3. This is an FMB/JAQ/PKP coordinated letter. If you have any questions, please call me or have your staff call my action officer, Mr. Eric Ebert, HQ AFMC/FMBM, DSN 787-3718.

FOR THE COMMANDER

  
JAMES L. MCGINLEY, Chief  
Budget & Comptroller Plans Division  
Directorate, Financial Management  
& Comptroller

Attachment:

1. OC-ALC/PKC Memo, 22 May 95
2. HQ AFMC/FMB Memo, 23 Jan 95
3. HQ AFMC/JAQ Memo, 1 Aug 95

cc:

HQ AFMC/JAS/PKP  
OC-ALC/PKC

Atch 95-11f (FAR 17) Post to FAR 16.603, DFARS 217.74, AFFARS 5317.74 and AFMCFARS 5317.74 by circling the references and noting in the margin: "70-41, atch 95-11F." Then file this atch behind the sups to FAR 17.



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS OKLAHOMA CITY AIR LOGISTICS CENTER (AFMC)  
TINKER AIR FORCE BASE, OKLAHOMA

22 MAY 1995

MEMORANDUM FOR HQ AFMC/PKP  
4375 CHIDLAW ROAD  
WRIGHT PATTERSON AFB OH 45433-5006

FROM: OC-ALC/PKC  
3001 Staff Drive  
Tinker AFB OK 73145-3015

SUBJECT: Contract Funding of Undefined Contractual  
Actions (UCAs)

References: (a) HQ AFMC/FMB Memo, 23 Jan 94, Contract  
Funding of Undefined Contractual  
Actions (UCAs)

(b) SAF/GCA Memo, 1 Nov 94, Obligations Arising  
From the Definitization of Letter Contracts

(c) SAF/FMBM Memo, 15 Dec 94, Contract Funding  
of Undefined Contractual Actions (UCAs)

1. Para 4 of the above referenced letter essentially tasks contracting officers to accomplish a verification of funds availability prior to fiscal year appropriation when it states, "Conversely, if definitization will occur in the next fiscal year, fiscal year 1996, the contracting officer must ensure that funds available for obligation in that fiscal year will be available for the difference between the obligated amount on the letter contract and the additional funds needed to definitize the letter contract up to the NTE ceiling price.

2. As verification of availability of funds for the next fiscal year is not possible in advance of appropriation we do not understand how a contracting officer can make this kind of determination. Request guidance be provided as to the type of documentation necessary for the preparation of a determination by the contracting officers as to the

availability of funds for obligation in the next fiscal year.

3. Request you further clarify whether the referenced funding letter applies to UCAs issued against Basic Ordering Agreements (BOAs) and Provisioned Item Orders (PIOs).

4. The point of contact for this matter is Melissa J Richardson, (PKC)DSN 339-7989.



Bob D. Harwell

Chief, Contracts Committee  
Directorate of Contracts



DEPARTMENT OF THE AIR FORCE  
 HEADQUARTERS AIR FORCE MATERIEL COMMAND  
 WRIGHT-PATTERSON AIR FORCE BASE OHIO

23 JAN 1995

BB  
11.95

MEMORANDUM FOR ALHQCTR FM/JA/PK  
 ALHQDRU FM/JA/PK

FROM: HQ AFMC/FMB  
 4375 Chidlaw Road, Suite 6  
 Wright-Patterson AFB OH 45433-5006

SUBJECT: Contract Funding of Undefined Contractual Actions (UCAs)

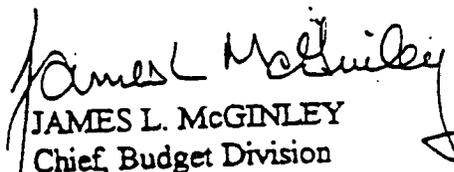
1. At the end of fiscal year 1994, an issue arose concerning the use of expired year funds. Specifically, two letter contracts were issued that obligated expiring year funds up to a specified percentage of the not-to exceed (NTE) price with the intent to administratively reserve the balance of the expiring year funds (up to the NTE price) for the definitization of the letter contracts in the next fiscal year. A recent SAF/GCA opinion (Atch 1) however, allowed that this action would appear to violate the statutory "bona fide need" rule. As a result, this letter provides policy guidance concerning the use of expiring year funds on letter contracts only. In addition, the impact of the Federal Acquisition Streamlining Act (FASA) of 1994 relative to obligations on UCAs is also provided for information.
2. SAF/GCA issued an opinion that when letter contract UCAs are definitized in a subsequent fiscal year, the subsequent definitization reflects a "bona fide need" of that fiscal year. The legal opinion was based on Comptroller General Decision B-197272, which addressed several Department of Justice letter contracts for nonseverable services using annual appropriations. The Comptroller General decision established a position that, prior to definitization, the limitation of government liability to 50 percent (or 75 percent when appropriate) of the NTE amount is the maximum obligation of the government, and establishes the "bona fide need" of the government for the funds on contract at the time. The definitization of the letter contract in the subsequent fiscal year reflects a "bona fide need" of that current fiscal year, and requires the use of currently available funds, i.e. expired year funds cannot be used to definitize the contract. This applies to all appropriations (annual and multiple year).
3. HQ AFMC FM/JA/PK believe there is an apparent conflict between the application of the above GAO decision when using procurement appropriations and the DOD "full-funding" policy. We have agreed to pursue a request through channels to the GAO to clarify the decision as it applies to contracts using procurement funds. HQ AFMC/JAQ is taking the lead on this issue.

4. In the interim, until AFI 65-601 is revised, you are directed to use the 15 Dec 94 SAF/FMBM guidance to definitize letter contract UCAs (Atch 2). Specifically, if definitization takes place in a subsequent fiscal year, those additional obligations are chargeable to a proper appropriation currently available for obligation at the time of definitization. The appropriation, as defined in this context, includes multiple year as well as annual appropriations. Thus, for letter contracts using funds that will expire this fiscal year, ensure the contract schedule reflects definitization this fiscal year, fiscal year 1995, if the intent is to use expiring year funds for the entire contract effort. Conversely, if definitization will occur during the next fiscal year, fiscal year 1996, the contracting officer must ensure that funds available for obligation in that fiscal year will be available for the difference between the obligated amount on the letter contract and the additional funds needed to definitize the letter contract up to the NTE ceiling price.

5. Of recent note, the FASA of 1994 amends existing law (10 U.S.C. 2326) by deleting the word "expend" wherever it appears, and substitutes the word "obligate". This would now make the law consistent with the current AFFARS 5317.7404-4 ("obligations for UCAs shall never exceed 75 percent of the NTE"). The act restricts the amount that may be obligated at the time the letter contract is issued to 50 percent (75 percent if a qualifying proposal is received) of the overall ceiling price (i.e., not-to-exceed). Lastly, the head of the agency may waive this subsection of the law if the contract action is in support of a contingency operation (definition found at 10 U.S.C. 101(13)). Per FASA Section 10001, the amended law should not become effective until 30 days after issuance of implementing regulations, or 1 Oct 95 whichever comes first. To date, no implementing regulations have been issued.

6. This is a coordinated HQ AFMC FMB/JAQ/PAK letter. Action officers for this matter are Major Tom Zajac, (PAK) DSN 787-6757, Major Tom Anderson, (FMB) DSN 787-6188, and Mrs. Marilyn Corbin, (JAQ) DSN 787-5727.

FOR THE COMMANDER

  
 JAMES L. MCGINLEY  
 Chief, Budget Division  
 Directorate, Financial Management  
 & Comptroller

Attachments:

1. SAF/GCA Memo, 1 Nov 94
2. SAF/FMBM Memo, 15 Dec 94



DEPARTMENT OF THE AIR FORCE  
 HEADQUARTERS AIR FORCE MATERIEL COMMAND  
 WRIGHT-PATTERSON AIR FORCE BASE, OHIO

01 AUG 1995

MEMORANDUM FOR HQ AFMC/CPK

FROM: HQ AFMC/JAQ

SUBJECT: Contract Funding of Undefinitized Contract Actions (UCAs) (Your Ltr, 31 May 95)

1. You asked whether the interim policy letter issued by HQ AFMC/FMB on 23 Jan 95 applies to Basic Ordering Agreements (BOAs) and Provisioned Item Orders (PIOs). The letter appropriately provided policy guidance, based on a Comptroller General decision,<sup>1</sup> concerning the use of expiring year funds on letter contracts. That decision examined the facts and circumstances surrounding issuance of two DOJ letter contracts for nonseverable services funded by annual appropriations, including their subsequent definitizations and, in deciding the issue of the proper funds to use, interpreted the bona fide needs rule, one of the fundamental principles of appropriations law.<sup>2</sup> As discussed below, that interpretation appears applicable to most UCAs.
2. UCAs are defined in 10 U.S.C. 2326(g), but it does not recite the type of contractual documents to be identified as UCAs. DFARS 217.74 implements the statute and states that examples of UCAs are "letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun."<sup>3</sup> AFFARS 5317.7404-4 limits obligations for UCAs and is consistent with the amendment to 10 U.S.C. 2326 in the FASA of 1994. This limitation on obligations restricts the maximum recordable obligation under the UCA prior to definitization.
3. The Comptroller General's decision, referred to in para 1 above, stands for the proposition that it is appropriate to obligate only the amount of the maximum liability which may be incurred under the UCA (50 percent, or 75 percent if a proposal has been received) and, if additional funds are needed at the time of definitization, only funds currently available for obligation may be used, which may be funds from a later appropriation if the original appropriation has expired.

<sup>1</sup> B-197274, 23 Sep 83, 84-1 CPD 90.

<sup>2</sup> The decision is also discussed in GAO, Principles of Federal Appropriations, Second Edition, vol 2, pp. 7-11, 12.

<sup>3</sup> There are some purchases under UCAs as stated in the statute and implemented in DFARS 217.7402 which are not governed by the statutory rules or the policies and procedures in DFARS 217.74. In addition, the statute and DFARS 217.7404-5 except initial spares from some of the significant statutory limitations. Lastly, the statute authorizes the head of the agency to waive the monetary limitations for UCAs if the contract action is in support of a contingency operation. Our opinion does not address any of these exceptions.

GAO's decision was predicated upon the GAO's interpretation of the "bona fide need" rule, established by the GAO when construing 31 U.S.C. 1501:<sup>4</sup>

Under that rule, obligations may only be incurred to satisfy bona fide needs of the period of appropriation availability. That is not to say, however, that the needs of a particular period must be fully satisfied during that period. An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next period's appropriation being available for funding.<sup>5</sup>

4. The availability period of an appropriation relates to the authority in 31 U.S.C. 1501 to obligate the appropriation.<sup>6</sup> An appropriation is obligated when a definite commitment is made or a legal liability incurred to pay from such appropriation.<sup>7</sup> According to the GAO, to comply with 31 U.S.C. 1502, "in order to justify charging an appropriation after its period of availability for obligating purposes has expired, it is requisite that some action creating a definite liability against an appropriation must have been taken while it was available for the incurring of obligations. See 27 Comp Gen 711, 714."<sup>8</sup> The "relation back doctrine," allowing charging of an expired appropriation, is predicated upon there being some antecedent legal right.<sup>9</sup>

5. For there to be a valid obligation on the part of the government, there must be a legal duty by the U.S. which "constitutes a legal liability by virtue of actions on the part of the other party beyond the control of the U.S."<sup>10</sup> Under UCAs, the government's obligation is initially limited under the limitation of government liability clause, and unless the GAO recognizes an exception for DoD's full funding policy, there would appear to be no basis to validly apply the relation back doctrine when definitizing the UCA. As noted in paragraph 3 of the HQ AFMC/FM letter of 23

<sup>4</sup> "Generally, a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. 31 U.S.C. § 1502. See 58 C.G. 471, 473 (1979); 54 C.G. 962, 966; B-183184, May 30, 1975." 64 C.G. 410, 414.

<sup>5</sup> 84-1 CPD ¶90, pp. 3-4.

<sup>6</sup> 16 C.G. 205; 37 C.G. 861, 863

<sup>7</sup> Id, at 863.

<sup>8</sup> Ibid.

<sup>9</sup> See, for example, 64 C.G. 410, 414:

A major purpose of the recording statute, 31 U.S.C. § 1501, is to provide to the Congress a reasonably precise picture of an agency's financial requirements so that it can assess more accurately that agency's appropriation needs for the upcoming fiscal year in question. A rule which prohibits an agency from recording an obligation if its underlying obligation is subject to a condition precedent, the satisfaction of which is in the Government's control, results in a more accurate picture of an agency's needs being presented to the Congress because unless and until the agency acts to satisfy the condition, it really has no need for funds. This was the situation we dealt with in our 1982 decision.

<sup>10</sup> 42 C.G. 734; B-197274, 16 Feb 82 (unpublished).

Jan 95, we believe there is an apparent conflict between GAO's interpretation of bona fide need (apparently applicable to all UCAs falling under the statutory funding restrictions in 10 U.S.C. 2326) when using procurement appropriations and the DoD full funding policy. The request through channels to the GAO to clarify its decision as it applies to contracts using procurement funds is still being pursued.

6. In summary, when a UCA which falls under the statutory funding restrictions of 10 U.S.C. 2326 is definitized, only funds currently available for obligation may be used. Our opinion appears to be consistent with the direction in SAF/FMBM letter of 15 Dec 94 to: "Use the current appropriation as UCAs become definitized."

7. With respect to the specific questions raised by OC-ALC we have the following comments:

a. Does the HQ AFMC/FMB, 24 Jan 95, letter apply to UCAs issued against Basic Ordering Agreements (BOAs) and Provisioned Item Orders (PIOs)?

(1) We note that 10 U.S.C. 2326(g) provides that the subsection limiting the amount of obligations that may be made under a UCA "does not apply to an undefinitized contractual action for the purchase of initial spares." Similarly, DFARS 217.7404-5 excepts UCAs for the purchase of initial spares from many of the limitations for UCAs. Accordingly, to the extent that PIOs are actually "the purchase of initial spares," we believe that the statutory and DFAR limitation on fully funding UCAs do not apply to PIOs, i.e., they should be fully funded. Additionally, to the extent that additional funds are required to definitize a PIO in a subsequent fiscal year, the original funds may be used (provided they are not canceled) provided that the increased need for funds is a function of the definitization process of final price determination and the price increase is not the result of changes in quantities or certain other changes (especially out of scope changes).

(2) We see no such exception to the UCA limitations that would apply to most BOAs, and accordingly, believe that an order under a BOA must comply with previous guidance for definitization of letter contracts. Each order under a BOA is a contract (see FAR 16.703) and if, when issued, the order's terms, specifications or price are not agreed upon before performance is to begin, the statutory UCA limitations would apply, and, as discussed above, if additional funds are needed at the time of definitization, only funds currently available for obligation may be used.

(3) The application of the guidance to undefinitized change orders is more complex. We note first that DFARS 217.7401, "Definitions," defines, for purposes of the subpart on UCAs, a "contract action" as an action that results in a contract. It includes contract modifications for additional supplies or services, but "does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals, value engineering change proposals, and over and above work requests as described in Subpart 217.77." However, the bona fide need rules must be applied to changes funded by multi-year appropriations. Except for incrementally funded R&D contracts, changes relating back to the terms of the basic contract are normally within scope and would be funded by the appropriation originally charged even if that

appropriation has expired, so long as it has not yet closed/canceled. The reasoning is that these changes do not give rise to a new liability but only render certain the amount of a pre-existing liability. Thus, such changes represent a bona-fide need of the original procurement. Out of scope changes, or contract modifications increasing quantities of deliverable end items, of course, should be funded by current appropriations.

(4) There is another type of contract modification, however, which may not relate back to the terms of the basic contract and thus may not represent a bona fide need of the fiscal year which funded the basic contract. These changes may be considered within the scope of the Changes clause of the contract even though they add capability or increase end item utility or performance to satisfy a current fiscal year need that were not contemplated at the inception of the contract. Current fiscal year funds must be used to pay for such changes since they represent a bona fide need of the current fiscal year. The rule may generally be stated that if a contract change chargeable to a procurement account (3010, 3020, 3080) (i) modifies an item's originally specified form, fit, or function or adds capability or increases an end item utility or performance; and (ii) such modification represents the fulfillment of a need or requirement of a current fiscal year (but not of the original contract period), then those current fiscal year appropriations must be used. This rule would apply regardless of whether the requirement is satisfied by an in-scope change under the "Changes" clause or out-of-scope change pursuant to some other contract provision or authority. (One means of determining which year funds to use or whether a modification or requirement is within scope is to assess whether the requirements are reasonably described in a current budget justification and how they are described in the approval documentation for the contract modification.) Determining the proper funding for some changes may require detailed analysis of the particular fact and circumstances. AFMC acquisition attorneys have been issued a consistent set of ground rules for funding of modifications citing the Changes Clause. These attorneys are fully expected to actively participate with their clients, on a case-by-case basis, in the analysis leading to the selection of the proper funds.

PERFILLIO  
M.L.M.C.

b. OC-ALC also requested guidance on how to comply with direction ". . . if definitization will occur in the next fiscal year, fiscal year 1996, the contracting officer must ensure that funds available for obligation in that fiscal year will be available for the difference between the obligated amount on the letter contract and the additional funds needed to definitize the letter contract up to the NTE ceiling amount." Specifically, OC-ALC questions how to comply as "verification of availability of funds for the next fiscal year is not possible in advance of appropriation we do not understand how a contracting officer can make this kind of determination." The question highlights the need for the contracting officer and program manager to be working closely with the funds manager, FM, and JA to assure that proper funds are either available or budgeted to cover the requirement if definitization will not occur until the next fiscal year. In some cases involving multiple years funds, the funds required for definitization may already have been appropriated, so the issue may be resolved as easily as reserving the funds. In those cases where the funds required for definitization will not be appropriated until the next fiscal year, it is imperative that the parties contracting officer be working with the financial experts to assure that funds will be budgeted to cover the remaining requirements. If it is found that funds are not or will not be available in the subsequent fiscal year to definitize the requirement as established in the letter contract or UCA, the contracting officer must be prepared to terminate or restructure the requirements to stay within the funds that

are available. The provisions and amount set forth in FAR 52.216-24, Limitation of Government Liability, establishing the government's maximum liability under the contract, becomes particularly critical in this regard.

c. Finally, we would like to note that there is a potential requirement for a contracting officer who anticipates definitizing a letter contract or UCA with subsequent fiscal year appropriations to obtain approval to deviate from the full funding policy where it applies. This applies to both the situation where a UCA is about to be issued and it is anticipated that definitization will not be accomplished before the funds expire, and also when it becomes apparent subsequent to the award of the UCA that definitization will not be complete prior to expiration of the funds. This issue of whether there is a requirement to seek waivers to the full-funding policy is being pursued by AFMC/FM.

8. My point of contact is Mrs. Corbin at 7-5727. This opinion has been coordinated with HQ AFMC/FMB.

*Maudyn Corbin*  
for WILLIAM H. KIRSCHNER, III, Colonel, USAF  
Director of Acquisition Law  
Office of the Staff Judge Advocate