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REPORT

U.S. Budget

GOVERNMENT CONTRACT FUNDING UNDER CONTINUING RESOLUTIONS

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Ordinarily, operations of Executive Branch departments and agencies are funded each year by the enactment of 12 regular appropriations acts.[1] With increasing frequency over the last three decades, Congress has not managed to pass appropriation acts to

[1] *Appropriations* do not represent cash provided to or reserved for agencies. Instead, the term may be defined as ''[a]uthority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes.'' *A Glossary of Terms Used in the Federal Budget Process,* GAO/AFMD-2.1.1 at 21 (Washington, D.C.: Jan. 1993); *Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979). *See also,* 31 USC §§ 701(2) and 1101(2). Appropriations may be distinguished from authorizations, a term used to describe two different but related types of laws. ''Enabling'' laws create a federal agency, establish a federal program, prescribe a federal function, or allow a particular federal obligation or expenditure within a program. The second type of authorization refers to a specific provision of law that authorizes the appropriation of funds to carry out the program or function established in enabling legislation. *See*, Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations,* at 1-2, (Jan. 15, 2010). It should be noted that authorization acts do not permit the expenditure of funds. Appropriation acts do permit the expenditure of funds, whether or not preceded by authorizing legislation.

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coincide with the beginning of federal government fiscal years.[2] Since these bills are annual, expiring at the end of the fiscal year, regular bills for the subsequent fiscal year must be enacted by October 1. At the end of fiscal year 2010 (Sept. 30, 2010), Congress had not passed a single appropriations bill to fund the federal government for fiscal year 2011.

Conflicts between the President and Congress over major budget priorities, usually triggered by growing deficits, have increased the difficulty of reaching agreement on regular appropriations acts, causing delay in their enactment. The frequent result has been the passage of separate or omnibus continuing appropriations acts in order to fund government operations, either on an interim or a full-year basis. In order to keep the government operating in fiscal year 2011, Congress has passed several short-term continuing resolutions (''CRs''),[3] the latest one of which funds the Executive Branch through March 4, 2011.[4]

A CR appropriates funds (provides Continuing Resolution Authority) for Executive Branch departments at levels (rates of expenditure[5]) commensurate with the level of the preceding year's appropriations act. CRs may have a relatively short duration in the expectation that action on regular appropriations bills will be concluded within days or weeks of the beginning of the new fiscal year or may last the whole fiscal year. CRs fund continuing spending only at the rate of expenditure of the preceding year and only for the period stated. In contrast to regular and supplemental appropriations acts, continuing resolutions do not generally provide specific amounts for each budget account. Instead, these bills provide the proportionate amounts from the months or weeks of the preceding year and with the further limitation that the rate of expenditure not exceed that of the preceding year. Full year continuing resolutions effectively become regular appropriations acts for that fiscal year.[6]

For government contractors, the use of CRs in place of actual new appropriations has serious consequences, many of which are neither even recognized nor often well-understood. CRs can also substantially affect government agency operations and program continuity.[7] This paper will explain the applicable basics of federal appropriations funding law and regulation, as well as some key potential business consequences of continuing resolutions to the contracting community.

I. LEGAL FRAMEWORK GOVERNING APPROPRIATIONS. To understand the nature and particularly the limits of CRs, it is necessary to consider some basic elements of federal funding law. There are three ''tiers'' of law and regulation that govern the funding of government contracts and grants. These are in addition to the provisions that actually are included in the contracts themselves.

A. The Constitution. The first tier starts with the Constitution itself. Article I, Section 9, Clause 7 (known as the ''purse strings power'') specifies that ''No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .''[8] This provision gives Congress absolute control over the functioning of the three branches of our government: absent appropriations to fund their operations, they simply may not operate at all. The provision is absolute in its reach,[9]

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[2] With the exception of three fiscal years (1989, 1995, 1997), at least one continuing resolution has been enacted for each fiscal year since fiscal year 1954. Robert Keith, Duration of Continuing Resolutions in Recent Years, Congressional Research Service Report for Congress RL 32614, *Duration of Continuing Resolutions in Recent Years*, at 3 (Mar. 9, 2009).

[3] The term ''continuing resolution'' may be defined as follows: ''An appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.''

A Glossary of Terms Used in the Federal Budget Process, GAO/AFMD-2.1.1 at 35-36 (Washington, D.C.: Jan. 1993). The budget authority provided in a continuing resolution is referred to as ''continuing resolution authority (''CRA''). *See also*, OMB Circular No. A-11, Preparation, Submission and Execution of the Budget, Part 4, Sec. 123.1 (2010); *DoD 7000.14-R Financial Management Regulation*, Vol. 2A, Ch. 1, sec. 010107.B.17 (Oct. 2008); Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U. L. Rev. 51, at 81-82 (1980). The four CRs passed by Congress and signed into law for fiscal year 2011 as of the time of this article are public laws 111-242, 111-290, 111-317, and 111-322.

[4] Continuing Appropriations and Surface Transportation Extensions Act, 2011, H.R. 3082, Pub. L. 111-322 (Dec. 22, 2010).

[5] For a detailed discussion of how rates of expenditure in continuing resolutions work in practice, *see*, Louis Fisher, *Presidential Spending Power*, 143-146 (1975); *see also*, Steven N. Tomanelli, *Appropriations Law, Principles and Practice*, 473-485 (2003) [hereinafter Tomanelli]; US Gov't Accountability Office [hereinafter GAO], *Principles of Federal Appropriations Law*, 3d Ed. Vol. II, ch. 8, secs. B1-B5 at 8-6, 8-10—8-21, GAO-06-382SP (Feb. 1, 2006) [hereinafter GAO Red Book].

[6] For a discussion of Congress' use of full-year continuing resolutions, *see*, Robert Keith, Duration of Continuing Resolutions in Recent Years, Congressional Research Service Report for Congress RL 32614, *Duration of Continuing Resolutions in Recent Years*, at 3-5 (Mar. 9, 2009); *See generally*, GAO Red Book, *supra* note 5, Vol. II, ch. 8, sec. A1 at 8-1—8-9; sec. B1 at 8-10—8-14; For an example of the operative language of a CR, *see, e.g.*, Continuing Appropriations Act, 2011, Pub. L. 111-242 (2010). Section 101 states:

Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2010. . .

[7] For a general discussion of the impact of continuing resolutions on government operations, *see*, Clinton T. Brass, Congressional Research Service Report for Congress RL34700, *Interim Continuing Resolutions (CRs): Potential Impacts on Agency Operations,* (March 16, 2010); GAO, *Continuing Resolutions: Uncertainty Limited Management Options and Increased Workload in Selected Agencies*, GAO-09-879 (September 2009).

[8] The ''power of the purse'' refers not only to the power of Congress to appropriate funds but to prescribe conditions governing the use of those funds. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167 (1992); *see also*, Kate Stith, *Congress' Power of the Purse*, 97 Yale L. J. 1343 (1988) [hereinafter Stith]; For a comprehensive overview of appropriations process, its implementation and the interplay between Congress and the Executive, *see* Louis Fisher, *Presidential Spending Power* (1975).

[9] The ''power of the purse'' literally means that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-425 (1990), *citing, Cincinnati*

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notwithstanding the fact that Congress has occasionally sought to make exceptions and that the Executive Branch, from time to time, has sought to ignore the provision or curtail the limitations it imposes. The admonition that, without appropriations, the government will ''shut down'' is accurate.[10]

B. The Laws.

The Anti-Deficiency Act. The second tier of funding governance is provided by law, the most important provisions of which are found in certain sections of Chapters 13 and 15 of Title 31. Foremost among these is the Anti-deficiency Act (the ADA),[11] which has origins going back about one hundred and forty years. This law is one of the principal mechanisms by which Congress has sought to limit the expenditure of appropriated funds by the Executive Branch.[12] Section 1341[13] has two distinct provisions that are germane to continuing resolution authority and Executive Branch operations.

First, no officer or employee of the federal government may make a *payment* of any sum nor authorize such a payment nor obligate the government to make a payment where such payment would be in excess of the amount ''available'' in an appropriation.[14] This means that a payment may not be made if funds are unavailable, regardless of the reasons and regardless of any contract or other legal obligation on the part of the government to pay. However, recent court decisions suggest that this precept may be less than absolute, and an agency's exhaustion of appropriations may not necessarily preclude a subsequent action by the contractor for breach of contract.[15]

Second, subparagraph B of section 1341(a)(1) further prohibits the very *making of a contract* ''before'' an appropriation is made that would fund the contract.[16] Such a contract can only be made (absent an appropriation) if ''authorized by law.''[17] This exception seems intentionally ambiguous, a problem compounded by contractual requirements found in the Federal Acquisition Regulation [18] and in the conduct of contracting officers. There should not be—as a matter of constitutional law—a ''partially funded'' government contract and no

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Soap Co. v. United States, 301 U.S. 308, 321 (1937). *See generally*, J Gregory Sidak, *The President's Power of the Purse*, 1989 Duke L.J. 1162.

[10] Federal government shutdowns occur when the President and Congress fail to agree on funding measures. The longest such shutdown occurred from December 16, 1995 to January 6, 1996. For a general discussion of this issue, *see,* Clinton T. Brass, Congressional Research Service Report for Congress RL34680, *Shutdown of the Federal Government: Causes, Processes and Effects* (Sept. 23, 2008).

[11] The Antideficiency Act finds its origins in a statute enacted in 1870, known as the Act of July 12, 1870, ch. 251, sec. 7, 16 Stat. 230, 251. Today, a number of statutes codified in various sections of the United States Code are collectively known as the Antideficiency Act: 31 USC 1341-1342; 1349-1351; 1511-1519. The combined effect of the ADA, in conjunction with other funding statutes, has been appropriately summarized as follows:

> These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligation for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.

GAO Red Book, *supra* note 5, vol. II, ch. 6, at 6-37—6-38, *quoting* 42 Comp. Gen. 272, 275 (1962).

[12] ''The statutory mechanism by which Congress guards its appropriations power is the Anti-Deficiency Act.'' J Gregory Sidak, *The President's Power of the Purse*, *supra* note 9, 1989 Duke L.J. at 1234. For a concise history of the Anti-Deficiency Act, *see also,* GAO Red Book, *supra* note 5, Vol. II, ch. 6, sec. C1 at 6-34—6-38, and authorities cited therein; Karen L. Manos, *The Antideficiency Act without an M Account: Reasserting Constitutional Control*, 23 Pub. Cont. L. J. 337, at 339-341 (1993); Herbert Fenster and Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L. J. 155, at 156-162 (1979).

[13] 31 USC 1341; *see*, *Hercules v. United States*, 516 US 417, 427 (1996)(''The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.''). Violations of the ADA must be reported by the agency head concerned to the President and Congress. 31 USC 1351.

[14] 31 USC 1341(a)(1)(A). The statute says:

> (a) (1) An officer or employee of the United States Government or of the District of Columbia government may not—
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> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

[15] *See, Cherokee Nation of Oklahoma v. Leavitt*, 543 US 631, 637-638 (2005), noting that a statutory provision of funds ''subject to the availability of appropriations'' permits an agency and a contracting party to enter into a contract prior to the beginning of a fiscal year, but the contract will not become binding until Congress appropriates funds for that year. *See also*, *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), noting that as long as Congress has appropriated sufficient funds to pay government contracts, the Government cannot back out of a promise to pay on grounds of ''insufficient appropriations,'' even if a lump sum appropriation is insufficient to pay all the contracts the agency has made. ''An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.''

[16] 31 USC 1341(a)(1)(B) says:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
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> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

[17] An example of the ''authorized by law'' exception is the Price-Anderson Act, which provides that:

> [T]he Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31.

42 USC 2210(j). *See also,* the so-called ''Feed and Forage Act,'' codified at 41 USC 11. It is the view of the authors that this exception, if challenged, would likely be held unconstitutional. Congress cannot by statute waive the constitutional requirement for an appropriation. The Government Accountability Office has taken the position that this exception operates only where the intent to exempt a contract from the operation of the Antideficiency Act is facially clear. *See*, GAO Red Book, *supra* note 5, vol. II, ch. 6, at 6-88—6-93.

[18] *See, e.g.*, FAR Subpart 32.7.

such thing as an ''unfunded'' government contract. Every valid government contract should be fully funded; there are no exceptions under the Constitution. There exists only the questionable ''authorized by law'' exception in the ADA itself. The government can, of course, issue ''notices'' of intent to contract and can create binding ''options'' to contract in advance of appropriations and the availability of funds.

Augmenting Appropriations and Volunteering. It should be readily apparent that if an Executive Branch agency could ''raise'' its own funds (for example by carrying on a business or by imposing fees which it then keeps for its operations), it could avoid the purse strings powers entirely. The most important power of Congress would be effectively bypassed. Nevertheless, federal agencies from time to time do engage in what is known as ''augmenting'' appropriations.[19] The general theory of ''augmentation'' is a corollary to the constitutional requirement that no money shall be drawn from the Treasury but in consequence of funds appropriated by Congress and seeks to assure that the executive branch limits its operations to those funded by the appropriations it receives. The control over executive action inherent in passing limited appropriations would be severely eroded if agencies could ''augment'' the funds they have been appropriated. All monies of the federal government must be claimed as public revenues, subject to public control through constitutional processes.[20] Although there is no statute which specifically prohibits the augmentation of appropriated funds *per se*, there is a clear constitutional basis for this concept.[21]

Similarly, if a contracting officer could coax, cajole or otherwise pressure a contractor into ''volunteering'' goods or services, enter into a ''cost sharing'' contract, or knowingly issue a contact that for an amount less than the projected costs, the congressional purse strings powers would be compromised. The reasoning is that if federal agencies are forbidden from obligating funds in excess or in advance of appropriations, they should not be permitted to achieve the same result indirectly by accepting voluntary services. Moreover, to the extent that the ADA was intended to compel agency operations to remain within limits permitted by congressional appropriations, the acceptance of voluntary services would circumvent this purpose.[22] Thus, the prohibition against voluntary services is intended to preserve the integrity of the appropriations process by forbidding government agencies from augmenting their appropriations or creating ''coercive deficiencies'' through the acceptance of voluntary services.[23]

Apportionment of Appropriations. Over many decades, Congress learned that the Executive Branch often simply ignored the purse strings limitations, most often by the expedient of spending more than was contained in appropriations. The slowly evolving remedy was the passage of provisions now found in Part 15 of Title 31, specifically in Sections 1512 through 1514.[24] These provisions, supplemented by guidance from the Executive,[25] require the Executive Branch departments and agencies to apportion[26] or subdivide the received ap-

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[19] GAO Red Book, *supra* note 5, Vol. II, Ch. 6, sec. E1 at 6-162—6-166; *see e.g.*, GAO, *SBA's Imposition of Oversight Review Fees on PLP Lenders*, B-300248 (Comp. Gen. Jan 15, 2004)—''In addition to providing necessary funds, a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations. . . An agency may not circumvent these limitations by augmenting its appropriations from sources outside the government.'' In this case, the Small Business Administration (SBA) directed private lenders subject to its regulation to pay service fees to an SBA contractor in order to reimburse the contractor for the value of services the contractor performed on SBA's behalf. This arrangement was unlawful because it amounted to the constructive imposition of additional fees that were prohibited by SBA's legislation, and because SBA's constructive retention and use of the receipts from that fee augmented the SBA's appropriation. The miscellaneous receipts statute, 31 USC § 3302(b), required the SBA to deposit the amount of the fees into the Treasury's general fund.

[20] Stith, *supra* note 8, 97 Yale L. J. at 1364.

[21] *See*, 31 USC 3302(b) (the miscellaneous receipts statute, which requires that in the absence of authority to the contrary, an agency receiving funds on behalf of the government may not retain those funds but must deposit them in the general fund of the Treasury); 31 USC 1301(a) (restricts the use of appropriated funds to their intended purpose); 18 USC 209 (prohibits payments to the salaries of government officials as compensation for their duties from sources other than the US government).

[22] *See*, 31 USC 1342, which provides in pertinent part:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . .

Note that this statutory provision contains two separate prohibitions. Voluntary services are prohibited and so are personal services that exceed those authorized by law.

[23] The voluntary services prohibition dates back to 1884. ''Coercive deficiency'' is GAO's term for the situation in which government agencies would coerce their employees to ''volunteer'' their services in order to stay within the agencies' annual appropriation. These employees or their agencies would later come to Congress seeking additional appropriations to pay their salaries for the volunteered time, and Congress would often feel morally obliged to appropriate the necessary funds. Government Accountability Office, *Recess Appointment of Sam Fox*, B-309301 at 4 (Letter to Sens. Dodd, Kerry and Casey, June 8, 2007); *see also*, Marci A. Lawson, *Something for Nothing? GAO Considers Voluntary Services Prohibition*, 2008 Army Law. 105, at 105-106.

[24] Of particular import, 31 USC 1512(a) says as follows:

§ 1512. Apportionment and reserves

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

Certain exceptions to this requirement are set out in 31 USC 1515.

[25] *See*, OMB Circular, No. A-11, *supra* note 3, Part 4, Sec. 120 (2010).

[26] OMB Circular No. A-11, *supra* note 3, Part 4, sec. 120.1 defines apportionment in the following fashion:

An apportionment is a plan, approved by OMB, to spend resources provided by one of the annual

appropriations acts, a supplemental appropriations act, a continuing resolution, or a permanent law

(mandatory appropriations). Resources are apportioned by Treasury Appropriation Fund Symbol (TAFS). The apportion-

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propriations before any of the funds may be spent.[27] Moreover, these provisions require all such departments and agencies to create regulations[28] that take appropriations on a descendency from the full amounts granted by Congress through a process of apportionment, allocation, commitment and, finally, obligation—all before any such funds may actually be spent. The primary purpose of the apportionment process is to centralize the Administration's approval of agencies' spending plans to prevent them from obligating funds in a manner that would require supplemental appropriations or violate the ADA. It is important to note that the statutory sections are written so as to make their violation no different than a violation of the ADA itself: the violations of any of these provisions carry both criminal and civil sanctions for the government officials involved.[29] These provisions highlight the extent to which Congress has sought through the ADA to prevent federal agencies from exceeding the limits of their annual appropriated funds.

C. The Regulations. The FAR and other regulations provide incomplete and often obscure guidance on compliance with federal funding law in connection with government contracts. Many ambiguities are long standing and seem designed to enable a kind of funding ''flexibility'' that the law itself would prohibit.

Most of the regulatory guidance is found in Subpart 7 of Part 32 of the FAR. First, although the FAR suggests that a contract may not actually be awarded until funds are ''available,'' it does so in a manner that is elliptical and masks the clear limitations of the law as noted above.[30] Without a detailed address to these provisions, it is enough to say that they—

(a) condition the actual award of a contract on the ''availability of funds'' without addressing the adequacy of those funds;

(b) fail to recite clearly that contracts must always be fully funded and require the use of ''options'' for unfunded work;

(c) omit mention of the fact that the government may not seek or obtain voluntary services.

The most significant provisions in this Subpart relate to the management of unfunded work. Prescribed are ''limitation of cost,''[31] limitation of funds,''[32] and ''limitation of government obligation''[33] provisions. Related contract clauses then appear in Part 52 of the FAR.[34] These provisions all have important common characteristics. First, they meaningfully limit the government's obligation to *pay* any sum that is not literally ''obligated'' to the contract.[35] Secondly, they provide that the contractor is not obliged to perform work that is not covered by sums obligated to the contract.[36] Third, in obscure terms, they suggest that the creation of any funding ''gap'' would entitle the contractor to terminate the contract.[37]

The regulatory guidelines are, in short, convoluted and do not adequately protect the interests of contractors or the government. In the context of contracts which are being funded (or not funded) under CRs, careful attention must therefore be paid to the reach and limits of contract funding law and regulation so that contractors do not unwittingly assume risks or undertake performance in circumstances where it will not be compensated.

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ment identifies amounts available for obligation and expenditure. It specifies and limits the obligations that may be incurred and expenditures made (or makes other limitations, as appropriate) for specified time periods, programs, activities, projects, objects, or any combination thereof. An apportioned amount may be further subdivided by an agency into allotments, suballotments, and allocations. . .

31 USC 1517 prohibits incurring any obligation or making any expenditure in excess of an apportionment or reapportionment or in excess of other subdivisions established pursuant to sections 1513 and 1514 of title 31.

[27] *But see*, *Cessna Aircraft Company v. Dalton*, 126 F. 3d 1442 (Fed. Cir. 1997), holding that a contracting officer's exercise of an option before the Navy had apportioned funds did not violate the Antideficiency Act.

[28] 31 USC 1514(a). For detailed guidance to agencies regarding the apportionment process, see, OMB Circular No. A-11, *supra* note 3, Part 4, secs. 120-123.

[29] An officer or employee who violates the ADA is subject to various adverse personnel actions (31 USC 1349, 1518). An officer or employee who is convicted of willfully and knowingly violating the law shall be fined not more than $5,000, imprisoned for not more than 2 years, or both (31 USC 1350, 1519).

[30] *See*, FAR 32.703-2 Contracts conditioned upon availability of funds.

(a) *Fiscal year contracts*. The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, *provided* that the contract includes the clause at 52.232-18. . .

FAR 52.232-18 recites that funds are not available for the subject contract, that the government's liability is contingent upon the availability of appropriated funds, and that no government liability arises until the contracting officer receives notice of such availability.

[31] FAR 32.704.

[32] Id.

[33] FAR 32.702.

[34] FAR 52.232-18; 52.232-20; 52.232-22.

[35] *See, e.g.*, FAR 52.232-22(f)(1):

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the government to this contract;. . .

[36] *See, e.g.*, FAR 52.232-20(d)(2):

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(2) The contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . .

[37] FAR 52.232-22(c) says, in pertinent part, ''The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the government. . .The notice shall state that the estimated amount of additional funds required to continue performance for the period specified in the Schedule.'' This last sentence implies that the contractor may discontinue performance if additional funds are not allotted to the contract. The term ''funding gap'' refers to the period of time between the expiration or exhaustion of an appropriation and the enactment of a new one. Tomanelli, *supra* note 5, at 447-448; GAO Red Book, *supra* note 5, Vol. II, Ch. 6, at 6-146; *See generally*, Jessica Tollestrup, Congressional Research Service Report RS20348, *Federal Funding Gaps: A Brief Overview* (Dec. 22, 2010).

II. THE USE OF CONTINUING RESOLUTIONS.

A. Continuing Resolutions and Their General Operation. Congress broadly divides spending into two categories: discretionary and mandatory (or direct) spending.[38] Discretionary spending of the kind involved in government contracts is controlled by annual appropriation acts. Funds appropriated by Congress are available for obligation for varying lengths of time. Some are available only for the fiscal year in which they are appropriated, while others are ''multi-year'' or ''no-year'' in nature.[39] If an appropriation is available for obligation for a definite period of time, the appropriation must be obligated by the agency during that period or the authority to obligate will expire.[40] Unless there is specific statutory authority in the appropriations act, agencies may not obligate funds after the expiration of the period of availability.[41] However, under the principle that payment is chargeable to the fiscal year in which the obligation is incurred, appropriations remain available after they expire to make payments to liquidate liabilities arising from obligations made during the period of availability.[42]

Appropriated funds, once in the hands of the Executive Branch, are apportioned and devolved into ''committed'' funds which are ''obligated'' to contracts and grants, at which point the funds are expended. To the extent that a contract is already ''fully funded,'' its continuation is presumptively not affected by the failure of Congress to appropriate funds in a timely fashion in a subsequent fiscal year. However, there are important exceptions in which Congress' failure to act may be problematic for the contracting community. Many contracts, fully funded on their faces, require (a) further funding for changes (made under a ''Changes'' clause[43]), compensable delays,[44] and other intervening matters,[45] (b) ancillary support operations that may not be funded at all or may be subject to options,[46] and (c) changes in nature or scope to the extent that their initiation or continued operation is dependent on the appropriations in a subsequent year. In these cases, passage only of a CR to fund the department or agency in question may lead to funding gaps, disruptions in contract performance, and pressure on contracting officers and contractors alike to take actions of questionable fiscal legitimacy in the name of meeting agency requirements.

Were Congress *not* to provide the bridge funding enabled by a CR, virtually any activity that may be described as ''existing but not fully funded'' could not continue. This conclusion is the product of the power of the purse provision of the Constitution and the application of the ADA. Recognizing the enormous implications of a government shut down which the lack of next-year's money would evoke, Congress has routinely provided bridge funding (continuing appropriations) where the ''normal'' fiscal year appropriations process has simply not happened on time.[47]

The problems with CRs—as to both the contracting process and agency operations—begin with the language which funds continuing operations at the rate of expenditure of the preceding fiscal year. Right on the face of this language, and even without further limitations and caveats, it can be seen that the use of the term ''rate'' will substantially limit expenditures which might otherwise have increased with the availability of the new funds.[48] Moreover, because the entirety of a CR

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[38] Sandy Streeter, Congressional Research Service Report 97-684, *The Congressional Appropriations Process: AnIntroduction*, at 15 (Dec. 2, 2008). Mandatory programs, such as Social Security, are funded through permanent, indefinite appropriations that are not subject to the annual appropriations process. *See*, GAO, *Continuing Resolutions: Uncertainty Limited Management Options and Increased Workload in Selected Agencies*, GAO-09-879, at 8-9 and n. 10 (September 2009).

[39] For a general discussion of the time limitations of appropriations, *see*, GAO Red Book, *supra* note 5, Vol. I, Ch. 5, secs. A2(a)-(c) at 5-4—5-9; *see also*, Tomanelli, *supra* note 5, at 203-210. Time-limited budget authority ceases to be available for obligation after the last day of the specified time period. *See, e.g.*, *West Virginia Association of Community Health Centers, Inc. v. Heckler*, 734 F. 2d 1570, 1576 (D.C. Cir. 1984). The ''bona fide needs'' rule provides that the balance of a fixed-term appropriation ''is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period. . .'' 31 U.S.C. § 1502 (a). What this means is that an agency may validly obligate an appropriation only to meet a legitimate need existing during the period of availability. *See*, *US Dep't of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants*, B-289801, (Comp. Gen. Dec. 30, 2002); *Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929 (Comp. Gen. Apr. 25, 2001).

[40] 31 USC 1552.

[41] 31 USC 1502; *see*, *National Endowment for the Arts—Time Availability for Appropriations*, B-244241, 71 Comp. Gen. 39 (1991). However, recent congressional practice has been for appropriations acts to include specific language time-limiting the availability of appropriations for obligation. See, e.g., Omnibus Appropriations Act 2009, Division E, sec. 403, Pub. L. 111-8 (Mar. 11, 2009). Section 403 states: ''No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.''

[42] 31 USC 1553(a). *See also*, GAO Red Book, *supra* note 5, ch. 8, sec. B4, at 8-19.

[43] 31 USC 1553(c); FAR 52.243-1—52.243-5.

[44] *See*, FAR 52.242-14—52.242-17.

[45] For instance, upon a protest, an expiring appropriation that would have funded the contract remains available for obligation for 100 days after a final decision on the protest. 31 USC 1558(a); *see also*, FAR 33.102(c). In other cases, a contractor may be required to continue performance when the government is transitioning to another contractor or performance in-house. *See*, FAR 52.217-8; 52.237-3; *Akro Executive Services, Inc. v. United States*, 553 F. 3d 1375 (Fed. Cir. 2009).

[46] FAR Subpart 17.2 governs procedures for the execution of options in government contracts. FAR 17.207(c)(1) provides that contracting officers may exercise options only after, *inter alia*, determining that funds are available. *See also*, FAR 32.703-1—32.705 and FAR 52.232-18, which expressly condition the government's obligation under a contract upon the availability of funds. In the case of contracts for services or leases awarded by certain national security-related departments or agencies, there is more explicit statutory and regulatory guidance. *See*, 10 USC 2410a; DFARS 232.703-3: ''The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year.''

[47] *See* note 2, *supra*. In all but three of the last 30 years, Congress has passed at least one continuing resolution. GAO, *Continuing Resolutions: Uncertainty Limited Management Options and Increased Workload in Selected Agencies*, GAO-09-879, at 1 (September 2009).

[48] For an explanation of the operation of funding rates in continuing resolutions, *see* note 5, *supra*, and sources cited therein. *See also*, 31 USC 1512(a): ''Except as provided in this

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funding applies only until the CR's end date (in the case of the current CR, March 4, 2011), the funds would be automatically insufficient to enable any contract function that is predicated on more than the months actually covered by the ''rate'' and the months. Unless a specific exception is made on the face of a CR, it expressly precludes any ''new'' programs, contracts or other functions.[49] In other words, the funds available under a CR are limited not only by the *rate* of expenditure of the preceding year, but also by the number of days and months of that year which are replicated in the CR.

B. Practical Considerations. The use of CRs presents myriad issues for the contracting community. Because this tends to be an arcane area of the law, these issues often are ignored both by the contractors and by their government counterparts. It is quite common for both parties to address funding gaps or obligation issues by the simple expedient of biding time until full year funding is in place. However, this is a risky practice and may be illegal, at least on the part of the government agents.[50] Here is a summary of some specific and not uncommon issues/problems presented by enactment of a CR:

1. No new contract may be awarded which is dependent on new fiscal year appropriations.

2. Contract award exercises, such as options,[51] that are limited in time (e.g., are tied to the first month of a new fiscal year) and are therefore dependent on new fiscal year appropriations, may expire as a matter of law if new funds are not appropriated and then can only be renewed by mutual consent evidenced by a modification to the award instrument. Options that require ''new money'' and/or will be performed over a period longer than the CR (that would be virtually all options) may not be exercised.[52]

3. Contracts that are incrementally funded/partially funded (or otherwise subject to limitation of cost, limitation of funds, limitation of government obligation-type clauses[53]) where the next increment of funding must occur by a particular date and where that date passes during the CR period will generally experience a ''funding gap''[54] since at least some elements of contemplated performance become unfunded. Under these circumstances, the government right to fund the additional increment of work expires and may not be renewed without mutual consent. In other cases, the missing new fiscal year appropriations may contain funding

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subchapter, an appropriation available for obligation for a definite period shall be apportioned **to prevent obligation or expenditure at a rate** that would indicate a necessity for a deficiency or supplemental appropriation for the period.'' [emphasis added].

[49] *see, e.g.*, Continuing Appropriations Act, 2011, Pub. L. 111-242 (2010), *supra* note 6. Section 101 states:

Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts, ***for continuing projects or activities*** (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2010. . .[emphasis added].

Thus, the continuing resolution by its terms prohibits ''new starts.'' New starts typically include new production of items not previously funded for production, increases in production rates, and initiating or continuing or resuming any project, activity operation or organization for which appropriations, funds or other authority were not available during the prior fiscal year. Continuing Appropriations Act, 2011, Pub. L. 111-242 (2010), *supra* note 6, secs. 102-104.

[50] For a discussion of the legal issues associated with enforcement of the principle of appropriations control against the Executive Branch when its agents obligate funds not appropriated by Congress or seek to avoid limitations imposed by Congress in appropriations acts, *see,* Stith, *supra* note 8, 97 Yale L. J. at 1386-1392. For many years, federal agencies continued to operate during funding gaps. However, Attorney General opinions have strictly interpreted the Antideficiency Act in the context of funding gaps and have concluded that, with few exceptions, agencies can avoid ADA violations only by suspending operations until enactment of appropriations. *Applicability of Antideficiency Act upon a Lapse in Agency Appropriations*, 43 Op. Att'y Gen. 224, 4A Op. O.L.C. 16 (Apr. 25, 1980); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriation*, 43 Op. Att'y Gen. 293, 5 Op. O.L.C. 1 (Jan. 16, 1981); *Government Operations in the Event of a Lapse in Appropriations*, Memorandum from Asst. Att'y Gen. Walter Dellinger to Alice Rivlin, Director of OMB, at 2 (Aug. 16, 1995).

[51] In what may be the majority of cases where existing contracts contain options, the options must be exercised by particular dates, and generally the options contemplate a funding level that will take the contract through an entire fiscal year. Usually, the option exercise date is tied to the new fiscal year. *See*, FAR 17.207; 32.703-3; 10 USC 2410a.

[52] *But see*., *American Contract Services, Inc.*, ASBCA 46788, 94-2 BCA ¶ 26,855, aff'd on recons., 94-3 BCA ¶ 27,025, aff'd on appeal, *American Contract Services, Inc. v. Widnall*, 53 F.3d 348 (Fed. Cir. 1995), holding that if the contract contains the FAR clause at 52.232-18 (availability of funds), the government can exercise an option even though funds are not presently available. *See also*, *Cessna Aircraft Company*, ASBCA No. 43195, 93-3 BCA ¶ 25,912 (1993); *United Food Services*, ASBCA No. 43711, 93-1 BCA ¶ 25,462 (1993); *Western States Management Services,Inc.*, ASBCA 37504 et al., 92-1 BCA ¶ 24,663 (1992). Although not specifically addressed, these cases would seem to apply to an option exercise period in which funding is provided by a CR. *Cf., Cessna Aircraft Company v. Dalton*, 126 F. 3d 1442 (Fed. Cir. 1997), *supra* note 27. For a discussion of the circumstances in which the government may exercise options in the context of services contracts, see Vernon J. Edwards, *When the Government Can Choose Among Options: Let the Contractor Beware*, 21 Nash & Cibinic Report ¶ 28 (2007) and *Postscript: When the Government Can Choose Among Options*, 21 Nash & Cibinic Report ¶ 57 (2007).

[53] FAR 32.704; DFARS 252.232-7007.

[54] *See*, notes 37 and 50, *supra*, and accompanying text; The Comptroller General has opined that ''During a period of expired appropriations, the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted.'' *Interpretation of a Section of U.S.C. in Antideficiency Act*, GAO B-197841 (Comp. Gen. Mar. 3, 1980), *in* GAO Red Book, *supra* note 5, ch. 6, sec. 6C, at 6-147; *see also*, *Applicability of Antideficiency Act upon a Lapse in Agency Appropriations*, 43 Op. Att'y Gen. 224, at 228-229, 4A Op. Off. Legal Counsel 16 (1980). The opinion states:

[T]here is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. . . .

[O]n a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.

that is so integrated into the work of the contract that its absence will affect some or all of the ongoing performance.

4. Many government contracts contemplate ''support elements'' that are ancillary to the contract but necessary to performance. These may include government furnished equipment, property, or information and other support, including inspection, engineering, transportation and other services. Where these support elements are represented by contracts/options to be awarded in the new fiscal year, the use of a CR may delay or prevent entirely their availability to support the procurement at issue. This situation could result in a material breach of the existing contract or, at least, a compensable change.

5. Contracts and programs that are not fully funded and contain limitation of costs, limitation of funds or limitations of government obligations clauses are at risk where the CR is the only funding source in place.[55] Special attention should be given to possible funding gaps that are reflected in Contract Funds Status Reports,[56] where such reports indicate that the totals of expenditure and obligations may be exceeded before either full funding or the entirety of the next funding increment is actually obligated to the contract.

C. Recommendations. Contractors that continue performance of a contract for which at least some funding is unavailable because of the funding limitations of a CR do so at considerable peril. While CRs are enacted virtually every year, the fact that the contractor is betting on belated funding presents risks quite apart from simply the costs of late funding and the possibility that there may be reduced funding or no funding at all. Further risks include the potential that the government may refuse to ''obligate'' the next funding increment. The potential for such an eventuality is considerable now, because the fiscal pressures on the Executive to cut costs and prioritize spending (which could result in reprogrammings, deferrals, rescissions, or other funding actions)[57] in order to reduce the federal deficit are great. Where there has been a funding gap, it is possible for the government to take the position that the contract literally ended at the moment when the funding stream first expired, and the contractor may be forced to bear the costs of performance after that date.

In situations where a contractor is affected in any way by the absence of full fiscal year funding and by the presence of a CR, obligated funds management is crucial. A contractor must be able to quantify the risk presented by contract performance ahead of obligated funding, and this task requires accurate assessment of contract fund status reports, cost schedule status reports and other contract documents which may show the amount of available appropriations for the contract as well as the rate of expenditure.[58]

While a contractor may voluntarily extend options existing in commercial contracts, government contract options are not always subject to extensions, particularly where they produce a gap in the funding stream or where the funding lapse of an option will expose the department or agency to the obligation to re-compete the contract. In such instances, careful analysis of contract and program terms and funds management are essential.

There also will be situations in which a contractor would prefer to limit its exposure and risk of further performance, and where renegotiation of contract terms relating to price and other performance criteria would be advantageous. When the failure of timely full funding is the product of a CR, the contractor may have an opportunity to end a contract or to renegotiate its terms.

D. Conclusion. Continuing resolutions provide the authority to obligate funds and make expenditures from the Treasury for a fixed period and at a specified rate. At their core, these legislative vehicles are really funding devices that are intended to protect congressional prerogatives to make final decisions on full-year funding levels and to avoid funding gaps and government shutdowns. The fiscal year 2011 saga, in which Congress has already passed four CRs, with at least one more almost sure to follow, highlights both the uncertainty and the importance to contracting agencies and contractors of these often overlooked funding vehicles.

Contracting actions of the Executive confronted with funding through a CR are limited by the constitutional constraints of the purse strings power, as well as the Antideficiency Act, and other miscellaneous laws and regulations. Many of the constraints imposed on the Executive by Congress have flowed from its frustration with overspending in circumstances that often created a moral obligation on the part of the Congress to pay after the fact. The net effect is that, with relatively few exceptions, government officials may not enter into contracts (or make payments) that exceed available appropriations or before appropriations become available. Government contracts have to be fully funded, and government officials may not obligate funds until they have been appropriated and become available to the agency in question through the OMB-managed apportionment process. Finally, government agencies may not enter into new contractual obligations nor obligate funds in an amount or at a rate greater than that permitted by the authorizing CR.

Congressionally-created exceptions to the foregoing legal framework are constitutionally suspect but relatively commonplace. They have been established over

[55] *See, e.g.*, *Sociotechnical Research Applications, Inc.*, IBCA, 01-1 BCA ¶ 31,235 (2000), holding that the government was not obligated to allocate available funds to an incrementally funded cost-plus-fixed-fee contract for the purchase of indoor air quality program services, because the contract contained a Limitation of Funds clause and did not include a minimum order quantity.

[56] A Contract Funds Status Report (see, e.g., DD Form 1586), is designed to supply funding data about defense contracts to program managers and contracting officer technical representatives for: (a) updating and forecasting contract funds requirements, (b) planning and decision making on funding changes to contracts, (c) developing funds requirements and budget estimates in support of approved programs, (d) determining funds in excess of contract needs and available for deobligation, and (e) obtaining rough estimates of termination costs. They may also provide useful information to contractors about the status of available funding.

[57] *See, e.g.*, Department of Defense Financial Management Regulation, DOD 7000.14R, Vol. 3, Ch. 2, paras. 0207 (Feb. 2009); OMB Circular, No. A-11, *supra* note 3, Part 4, Sec. 112 (2010).

[58] Even contractors who keep a close eye on funds management often fail to include an accurate assessment of termination/winding down costs.

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time in an effort to ensure the continuity of operations of government organizations, programs and activities. For the government, funding through CRs creates tension between the resultant funding uncertainty and the desire to ensure that important contracts are properly executed and taxpayer dollars expended wisely. For contractors, the considerations are different. The desire to satisfy the government customer, generate good will and satisfactory performance that may be of benefit in future procurements must be weighed against the financial and business risk associated with performing when there is no assurance of ultimate payment. At a minimum, this dilemma requires precise knowledge of available funds and obligation rates, as well as sound business and political judgment. For both the government and contractors, understanding the appropriations process and government expenditures when funding occurs through a continuing resolution remains among the most important aspects of government contracting.