

Recommendation 51: Mitigate the negative effect of continuing resolutions by allowing congressional regular appropriations to remain available for a standardized duration from date of enactment.

Problem

General consensus exists within DoD leadership, the Military Services, and Congress that the ongoing use of CRs is deeply harmful to the defense acquisition system. One of the main problems is the relatively short span of time available to obligate funds under a CR.

Background

Under the regular appropriations process, Congress appropriates funding for DoD prior to the beginning of a fiscal year on October 1. DoD then has a certain number of years, dependent on the appropriations account, to obligate the funds.

Figure 4-14. Multiyear Appropriation Examples from FY 2018¹

Appropriation account or section	Years										
	1	2	3	4	5	6	7	8	9	10	
Military Personnel (MilPers)	current funds	expired funds									
Operation and Maintenance (O&M)	current funds	expired funds									
O&M (no more than 1% of DHA appropriation)	current funds	expired funds					cancelled funds				
O&M (counterterrorism, Iraq, Afghanistan training)	current funds	expired funds									
Procurement (most sections)	current funds		expired funds					cancelled funds			
Procurement (shipbuilding and conversion)	current funds				expired funds						
Procurement (shipbuilding cost increases)	current funds	expired funds					cancelled funds				
Research, Development, Testing, and Evaluation (RDT&E)	current funds	expired funds					cancelled funds				
Military Construction (MilCon)	current funds					expired funds					

When a regular appropriations bill is not enacted until late in the year, DoD, in effect, has a shorter period to obligate much of the funds. For example, when the FY 2009 *Department of Defense* appropriations bill was enacted on the day before the beginning of the fiscal year, it allowed DoD 12 full months to obligate single-year O&M funds.² When the FY 2017 *Department of Defense* appropriations bill was enacted on May 5, however, the government was already well into the third quarter of the fiscal year.³ The appropriations law's timing restrictions, in effect, allowed DoD less than 5 months to fully obligate single-year funding, constrained by new start rules. Although funding can be

¹ See Division C of the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (2018). DHA refers to Defense Health Agency. Counterterrorism, Iraq, and Afghanistan training O&M appropriation is from FY 2018 defense appropriation Title IX: Overseas Contingency Operations/Global War on Terrorism, Operation and Maintenance accounts. For duration of obligation authority for prior year shipbuilding cost increases, see Section 8072 of Title VIII: General Provisions. The Military Construction title is not present in the Department of Defense Appropriation Act, but rather in the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act (see Division J in FY2018 omnibus appropriation).

² Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329 (2008).

³ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017).

obligated under a CR, the timeframe for much of that obligation is reduced. In addition, multiple CRs require multiple funding actions which create an unnecessarily increased workload.

Discussion

When contracting offices have only a few months from time of appropriation to execute a contract, multiple problems arise. The value of strategic planning is diluted when acquisition personnel are uncertain how much money will eventually be made available. Vendors have greater leverage over the government when they know that funds must be obligated on a more urgent timeframe. The workforce, which is already heavily worked at the end of a regular fiscal year, becomes even more overworked at that time. This situation causes indirect problems with morale and retention.⁴

Conclusions

DoD develops its budget requests to Congress each year, and they detail the periods of time in which the DoD intends to spend money. Those yearly budgets then are modified and approved by Congress in both appropriations laws and committee reports.⁵ To meet the intent of appropriations bills that are based on yearly budgets, DoD must be able to spend money over the course of the normally defined yearly periods.

U.S. law defines the term *fiscal year* as the timespan that “begins on October 1 of each year and ends on September 30 of the following year.”⁶ To spend money within the normal yearly blocks of time, DoD must be able to operate within a fiscal year that, in fact, lasts approximately 1 year. This proposal requires, in effect, modifying the definition of the term *fiscal year* for years in which DoD depends on long-term CR funding.

Congress should allow for CR-triggered automatic flexibility in timing of expenditures. For instance, Congress could pass a law allowing for minimum 1-year validity of all funding appropriated under CRs or regular appropriations. This measure would, if a regular appropriations bill were enacted prior to the start of the fiscal year, have no effect. If Congress chose to fund the government under one or more CRs, however, the measure would eliminate the budget-compression effect that currently takes place when Congress fails to appropriate full-year funding until well into the fiscal year.

Some have suggested that implementation of this proposal would entail technical and legal problems. One defense budget expert said,

The cost to modify accounting systems – which are not yet auditable – to handle varying lengths of fiscal years would be a nightmare. A foreseeable consequence of this would be a dramatic increase in the rate of Antideficiency Act violations because program offices and commands would easily lose track of how long their funding is available.⁷

⁴ Installation contracting office personnel, meetings with Section 809 Panel, September 2017.

⁵ Topline appropriations account numbers exist in the text of appropriations laws and have binding legal force (for example, “Operation and Maintenance, Army”). Program element and budget line item numbers, which are much more detailed, appear in appropriations bill conference reports. DoD is expected to abide by both sets of funding numbers, but under reprogramming rules, acquisition personnel have greater flexibility within appropriations accounts than across them.

⁶ Fiscal Year, 31 U.S.C. § 1102.

⁷ Emails with Naval Postgraduate School professor, February 2018. The Antideficiency Act, among other things, makes it illegal for a federal government representative to “make or authorize an expenditure or obligation exceeding an amount available in an

The argument is that the financial management community might experience some disarray stemming from extensions to the de facto length of the fiscal year. The program management and contracting communities, however, face enormous amounts of disarray under the status quo. The main purpose of the DoD acquisition system is to deliver capabilities to the nation’s warfighters. Congress has a responsibility to provide relief to the acquisition communities, even if doing so necessitates redesign of financial management software or practices.

To ensure no Antideficiency Act violations occurred, Congress and DoD would need to provide clear communication to the working-level acquisition community, detailing exactly what was acceptable and unacceptable under the proposed carryover authority.

Alternative Ideas: Automated Appropriations

Some have advocated for a process by which if Congress failed to pass regular appropriations, they would be considered to have been approved by default. One retired DoD acquisition official suggested that the best way to ensure the proper functioning of the defense acquisition system would be for Congress to enact a law guaranteeing defense funding even in the face of a complete breakdown in congressional negotiations:

Should Congress during any budget year fail to enact a Department of Defense Appropriations Bill by the last day of the preceding fiscal year for which the budget is being formed, an appropriations bill shall be enacted de facto on the first day of the fiscal year for which Congress did not appropriate for the Department of Defense, and that the appropriated amount is equal to the prior year's appropriation, and shall include an additional 5 percent of the prior year's appropriation such that the appropriations provided are 105 percent of the prior year's appropriation. Furthermore, no subsequent action shall be taken by Congress to lessen the amount of funding for that fiscal year in which Congress failed to appropriate for the defense of the Nation. Congress may act only to increase the appropriated amount above the 5 percent increase.

Many observers would doubtless see this proposal as raising issues related to constitutionality and separation of powers. This report makes recommendations to Congress that are substantially more restrained in their approach.

Implementation

Note: The precise technical details of the recommendation outlined below would likely require tailoring by experts in the congressional appropriations committees, OMB, and DoD. The core recommendation of the Section 809 Panel is not necessarily to adopt the exact details laid out below, but simply to allow for a longer-lasting obligational authority in the event of a long-duration CR authority. The language below is provided as an example of possible implementation. With respect to auditability, oversight, and financial management software modification, challenges might appear in mid implementation. Congress should defer to OMB, the DoD Comptroller, and the Military Service comptrollers in determining the most effective way to permit longer obligation authority while effectively addressing technical concerns. This change would primarily fall within the jurisdiction of the appropriations committees.

appropriation or fund for the expenditure or obligation.” See 31 U.S.C. § 1341 (Limitations on expending and obligating amounts), 31 U.S.C. § 1342 (Limitation on voluntary services), and 31 U.S.C. § 1517 (Prohibited obligations and expenditures). Also see “Antideficiency Act Resources,” GAO legal explainer, accessed February 23, 2018, <https://www.gao.gov/legal/anti-deficiency-act/about>.

Legislative Branch

- Grant DoD budget authority that expires at the end of the first quarter (of the relevant fiscal year) before which appropriations are enacted into law in fiscal years for which Congress does not pass a regular defense appropriation bill by December 31. For example, with single-year O&M appropriation accounts:
 - If FY 2017 regular appropriations are enacted in the first quarter of FY 2017, funds must be obligated by the end of FY 2017 as is normally the case.
 - If FY 2017 regular appropriations are enacted in the second quarter of FY 2017, the selected portfolios and/or commands may obligate funds as late as the end of the first quarter of FY 2018 (December 31, 2017).
 - If FY 2017 regular appropriations are enacted in third quarter of FY 2017, funds may be obligated as late as the end of the second quarter of FY 2018 (March 31, 2018).
 - Carried over funds may not be decremented from the future budget request simply because they were obligated in a later fiscal year.

Executive Branch

- Permit recipients of pilot funding flexibilities to access funding until the date at which appropriation availability legally expires in the case of a late regular appropriation that is enacted past the end date of the first quarter of the fiscal year.

Implications for Other Agencies

- Altering the period of availability of all DoD appropriations would carry implications for regular appropriations bills in addition to the *Department of Defense* appropriations bill. These bills include *Military Construction and Veterans Affairs* (Division L of the FY 2017 omnibus appropriation, Pub. L. No. 115–31) and *Energy and Water Development and Related Agencies* (Division D of the FY 2017 omnibus). Both of these annual bills contain several billion dollars in appropriations for DoD as well as other agencies.
- The question of whether to apply a similar solution in other nondefense appropriations bills is beyond the scope of the Section 809 Panel.
 - Congress has indicated a willingness to use yearlong CRs for appropriations bills other than the *Department of Defense* bill. In FY 2011, for instance, all appropriations except for the main DoD bill provided agency funding via a yearlong CR.⁸
- In fiscal law circles, a robust argument exists regarding how painful a CR should be for Executive Branch agencies. If insufficiently painful, CRs may eliminate the political incentive for members of Congress to enact regular appropriations bills each year. If too painful, CRs may cripple the ability of agencies to accomplish their missions.

⁸ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 (2011).

- If greater flexibility were granted to DoD than to other Executive Branch agencies under CRs, it could dilute the incentive for members of Congress to enact regular appropriations. If these incentives decreased to the point at which regular appropriations were not enacted, it could produce an indirectly harmful effect on agencies other than DoD.