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Principles of Fiscal Law and Government Contracts-Related Funding Issues

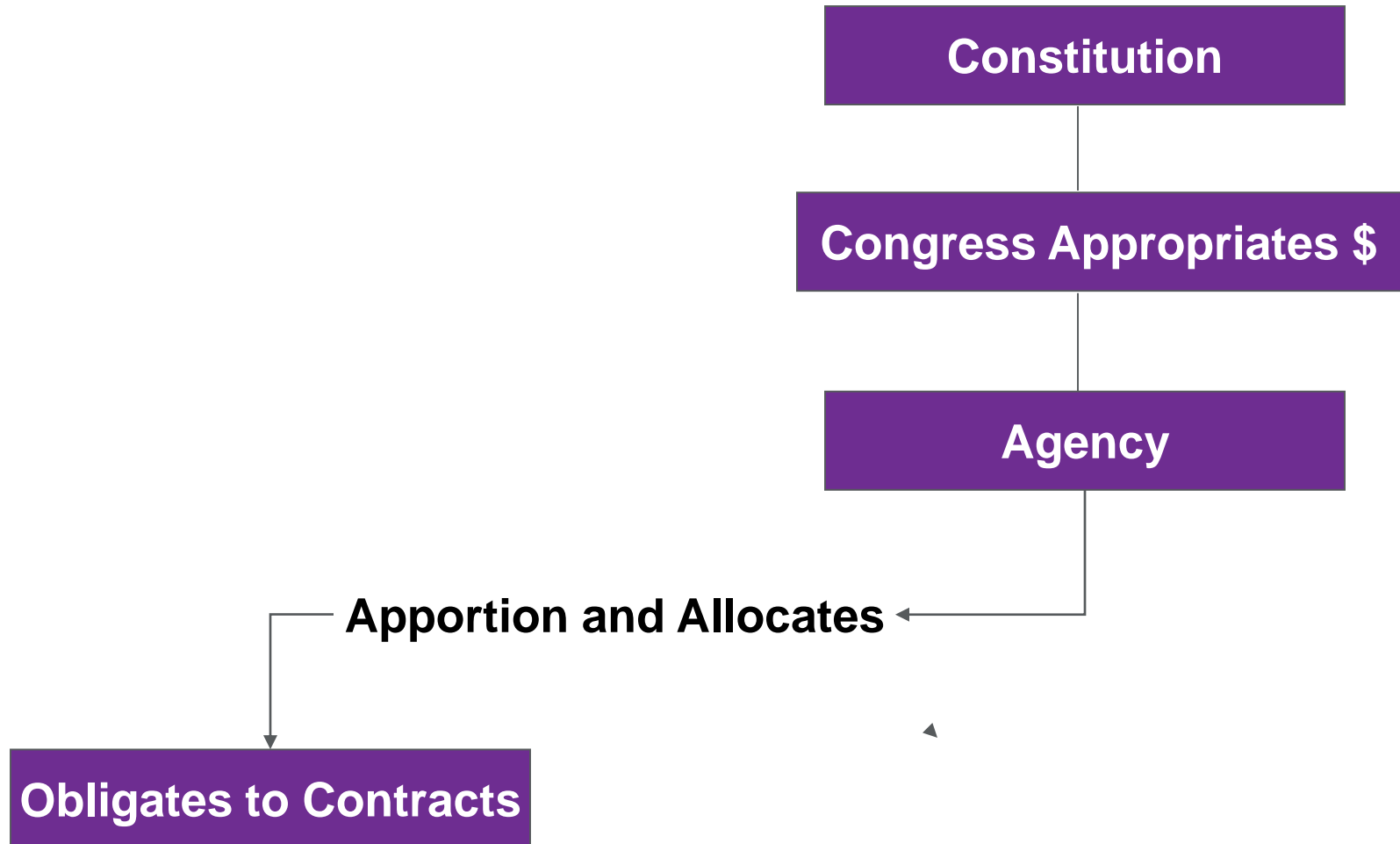
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Agenda

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- Fiscal Law Overview
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 - Legislative Framework
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 - Omnibus Appropriations
 - Continuing Resolutions
- Fiscal Law Statutes
- Hot Topics: Budget/Deficit
- Government Contract Funding Issues

Fiscal Law Overview



Fiscal Law Overview

Constitutional Framework

- Congress has the power of the purse
 - U.S. Constitution, Art. I, § 9, provides that “no Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law”
 - U.S. Constitution, Art. I, § 8, grants Congress the “power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States”
 - Expenditure of public funds is only proper when authorized by Congress (*United States v. MacCollom*, 426 U.S. 317 (1976))

Fiscal Law Overview

Legislative Framework

- Budget: Congressional Budget Act of 1974
 - Enabled Congress to consider the total federal budget and prioritize the allocation of resources
 - Sets forth process for enactment of federal budget and appropriations
 - Requires submission of budget by President
 - Each House of Congress enacts a concurrent budget resolution; enforced through points of order
- Authorization acts
 - Statute that does not provide appropriations but authorizes the appropriation of funds and provides the agency's legal authority for programs
 - Generally contains restrictions or limitations on the uses of the appropriated funds; e.g., National Defense Authorization Act

Fiscal Law Overview

Legislative Framework

- Appropriations acts
 - Makes fund available to an agency to incur obligations and make expenditures
 - Most common type of budget authority
- Debt ceiling
 - The upper limit of money that the government may borrow to meet its existing legal obligations
 - Does not authorize new spending commitments

Appropriations

General Limitations

- Purpose
 - Purpose Statute (31 U.S.C. § 1301(a))
 - Necessary Expense Doctrine
- Time
 - Available for new obligations limited periods (annual, multi-year, no-year)
 - After the funds expire they retain their “fiscal year identity” for five years
 - After five years, the funds are cancelled
 - Bona Fide Needs Statute (31 U.S.C. § 1502(a))
- Amounts
 - Specify amount of appropriation; general terms
 - Ties back to authorization
 - Formal v. informal subdivisions
 - Some revolving/continuing appropriations (Judgment Fund)

Appropriations

General Limitations (cont.)

- A statute will not be construed as making an appropriation unless it does so expressly (31 U.S.C. § 1301(d))
- Should not include substantive legislative acts
 - May effectively do so by restricting appropriations
 - Tied to the expiration of the appropriation; lapses quickly unless reenacted

Appropriations

Appropriations Acts

- 13 Regular Appropriations Acts:
 - Department of Commerce, Justice, State, the Judiciary, and related agencies
 - Department of Defense
 - Department of the Interior and related agencies
 - Departments of Labor, Health and Human Services, Education and related agencies
 - Department of Homeland Security
 - Departments of Transportation, Treasury, and independent agencies
 - Departments of Veterans Affairs, Housing and Urban Development, and independent agencies
 - District of Columbia
 - Energy and Water Development
 - Foreign Operations, Export Financing, and related programs
 - Legislative Branch
 - Military Construction
 - Department of Agriculture, Rural Development, Food and Drug Administration, and related agencies

Appropriations

Omnibus Appropriations Acts

- Omnibus Appropriations
 - Used in 2015/2016
 - Packages smaller appropriations bills into one larger single bill
 - Generally occurs when Congress cannot produce separate bills in a timely fashion to avoid shutdown
- Often criticized for containing unnecessary or wasteful spending

Appropriations

Continuing Resolutions

- Continuing resolution
 - Joint resolution enacted by Congress to fund agencies until the regular appropriations acts are enacted
 - Lapse would result in full or partial government shutdown (depending upon what, if any, appropriations bills were passed)
 - Keeps government operating for specific, limited period
- Generally limit funding to existing levels and existing programs
 - These limits are a function of precedent and political expedience
 - Continuing resolutions could provide any level of funding desired by Congress

Appropriations

Continuing Resolutions (cont.)

- Risks to government contractors
 - Agencies are generally limited to the prior year's rate of funding, meaning
 - New work may be delayed
 - Agency may not be able to exercise contract options, causing option lapsing
 - Additional funding may not be available to pay higher rates or to add funding to contracts
 - Integrated program planning may be delayed
 - Risks if no continuing resolution
 - Performance demands despite no funding; perform at risk
 - Funded contracts not at risk

Appropriations

Government Shutdowns

- Occurs when appropriations lapse
 - No legal authority for executive agency to spend money
 - Government operations cease
 - “Non-essential” personnel are sent home
 - “Non-emergency” government services are suspended
 - Appropriations are generally enacted “retroactively” back to date of lapse
- Presents risks to government contractors
 - Delayed testing, inspections, payments
 - May create effective or constructive “stop work” period
 - Monitor for increased costs that may entitle contractor to request for equitable adjustment

Fiscal Law Statutes

Documentary Evidence of Government Obligations (31 U.S.C. § 1501)

- Obligation
 - Governmental action that creates a legal liability or definite commitment on the part of the government
- Documentary evidence required for a contract between an agency and another person
 - Must be
 - In writing
 - For a purpose authorized by law
 - Executed before the expiration of the period of the appropriation, and
 - Call for specific goods, real property, work, or services

Fiscal Law Statutes

Anti-Deficiency Act (31 U.S.C. § 1341)

- Precludes
 - Spending or obligating funds in excess of the amount available in an appropriation
 - Incurring an obligation in advance of an appropriation
 - Accepting voluntary services
- Administrative and criminal implications
- Critical points in time
 - Contract award
 - Date of modification
- Significance
 - Violation of Anti-Deficiency Act means contract or modification void
 - Critical assessment is whether contract value in excess of appropriation to agency

Fiscal Law Statutes

Miscellaneous Receipts Statute (31 U.S.C. § 3302(b))

- Generally requires all payments to the government to be deposited as receipts in the Treasury
 - “Except [as otherwise provided] an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim”
- Intended to prevent the executive branch from augmenting its own appropriations; can only spend what Congress appropriates
- Some specific exceptions for agencies/accounts that permit them to retain/spend income
 - Economy Act: government-wide authorization for federal agencies to provide work, services, or materials to other federal agencies on a reimbursable basis

Fiscal Law Statutes

Nunn-McCurdy Act

- Requires DOD to report to Congress if a major defense acquisition program experiences cost overruns that exceeds statutory thresholds
- Two types of breaches
 - Significant ($\geq 15\%$ of the current baseline estimate or $\geq 30\%$ of the original baseline estimate)
 - Critical ($\geq 25\%$ of the current baseline estimate or $\geq 50\%$ of the original baseline estimate)
- A program with a critical breach is presumed terminated unless the Secretary of Defense certifies the program
 - Contractor must immediately submit a unit cost report if the program manager has reasonable cause to believe that a program has a significant breach
 - Majority of breaches have occurred during the production phase

Fiscal Law Statutes

Impoundment Control Act of 1974

- Prior to 1974: President had authority not to spend money that was appropriated through “impoundment” of funds
- Impoundment Act
 - President may request that Congress rescind appropriated funds; if not rescinded the President must obligate funds
 - Response to Nixon administration
- Coincided with *Train v. City of New York*, 420 U.S. 35 (1975)
 - President “cannot frustrate the will of Congress by killing a program through impoundment.”

Hot Topics: Budget/Deficit Reduction

- Managing the \$19T debt is a political issue
- FYs 2008-2014 total governmental procurement spending, adjusted for inflation, decreased 25%
- 2011 Budget Control Act
 - Sets caps on discretionary spending for FYs 2012- 2021
- 2013 and 2015 Bipartisan Budget Acts
 - Increases discretionary spending caps

Hot Topics: Budget/Deficit Reduction (cont.)

Fiscal Year	Budget Control Act	Actual
2012	1.043	1.043
2013	1.047	1.043 (American Taxpayer Relief Act of 2012)
2014	.973	1.012 (Bipartisan Budget Act of 2013)
2015	.994	1.014 (Bipartisan Budget Act of 2013)
2016	1.016	1.067 (Bipartisan Budget Act of 2015)
2017	1.040	1.070 (Bipartisan Budget Act of 2015)
2018	1.066	
2019	1.093	
2020	1.120	
2021	1.146	

Government Contract Funding Issues

Contract Clauses

- Limitation of Costs (FAR § 52.232-20)
 - Establishes an upper limit (subject to revision) on the contractor's costs of performance
- Limitation of Funding (FAR § 52.232-22)
 - Sets an upper limit on costs based upon the amount presently available for payment by the government and allotted to the contract
 - Government allots additional funds incrementally to fully fund the contract
- Government is not required to reimburse costs in excess of estimated upper limit
- Contractor is not required to continue performance or incur costs in excess of upper limit until it is increased
- Consider costs necessary to wind down operations; if funding is not increased and these costs surpass the upper limit, you will not be able to recover them

Government Contract Funding Issues

Restructuring and Terminations

- Spending reductions may lead to “restructuring” or terminations of programs
 - “Restructuring”
 - Government extends or stretches performance (i.e., same performance over more time)
 - Change in emphasis between mature and new technology
 - Changes in threats, roles, missions
 - Terminations
 - Partial reductions: deductive change/partial T4C
 - T4C

Restructuring

- Stretched period of performance
 - Change in schedule/milestones increases unit costs
 - Increase in overhead costs
 - Ability to maintain technical competence
- Extension of existing programs
 - Return to proven, mature, technology over more expensive, new, developmental technology
 - Need to recapitalize/re-inventory existing equipment and platforms used in Iraq and Afghanistan
- Delay/production gaps
 - Increased costs if production stopped then restarted
 - Increases risk of unavailability of materials, suppliers unable to accept work to support restart and loss of technical competence
- Acceleration of schedule
 - Response to prior delays, funding shortfalls

Terminations

- Partial terminations/de-scoping
 - Reductions in units ordered, capabilities of systems, reduced testing and research, development, testing and evaluation
 - Building for inventory vs. special missions
 - Drive up costs on per unit basis
 - May cause death spiral for program
 - Increased program risks
 - Lack of R&D/testing increases later performance risk
 - Changes clause improper vehicle for de-scoping
 - Partial termination is appropriate mechanism
- Termination for Convenience (“T4C”)
 - Entire contract ended
 - Recover termination costs pursuant to T4C clause
 - Cost recovery limited by T4C clause, but there is some flexibility
 - No unabsorbed overhead recovery

Terminations: Special Issues

- Cost/funding considerations
 - Track incurred costs and termination liability to ensure compliance with LOF and LOC clauses
 - If the contract was terminated today, is there enough funding to cover unpaid vouchers, uninvoiced costs and termination costs
 - If there is insufficient funding on the contract to pay termination liability, contractor may not recover its costs
 - Beware of direction to not consider termination costs
 - Manage notice requirements
 - Document waivers
- Termination for Default
 - Funding/program pressures may lower contracting officer flexibility on performance or schedule
 - Low risk to government; improper default converted to T4C

Thank you

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