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MEMORANDUM FOR DISTRIBUTION

Subj: NON-ECONOMY ACT ORDERS WITH NON-DOD AGENCIES

Ref: (a) USD(C) memo of 16 Oct 2006
(b) OASN(FM&C) memo of 4 May 2006 (superseded)
(c) DOD FMR, Volume 4, Chapter 5

Encl: (1) Non-Economy Act Order Financial Management Guidance
(2) Advance Payments Under Non-DoD Contracts

Recent Department of Defense (DoD) Inspector General reviews on the use of non-DoD contracting and the impact to fiscal management has resulted in the review of business processes within the DoD. As a result of the increased interest in this area, the Under Secretary of Defense (Comptroller) (USD(C)) formulated a team of representatives from both the acquisition and financial management communities from each military department. This memorandum promulgates financial management policy and procedures, derived from the team's recommendations and provided in reference (a), for Non-Economy Act orders and supersedes DON guidance provided in reference (b). These procedures should be given wide dissemination and are effective upon the date of this memorandum.

Advance payments to non-DoD agencies have been a particular focus of the USD(C) review. This is a particular area that requires strengthening that has not been addressed in detail in prior guidance memorandums. As defined by USD(C), advance payments are disbursements of money from the Department of Treasury accounts before performance has been certified by an authorized DoD receiving official. The principles and policy for advance payments are addressed in reference (c). If advance payments are authorized, commands are required to establish management procedures, to include pre-approval (in writing), reporting, aging, and liquidation of advance payments. Based on initial discussions with the Defense Finance and Accounting Service (DFAS), they do not have standard operating procedures to address the aforementioned requirements within accounting systems used by the DON. We will continue to work with appropriate organizations to pursue longer term solutions, however, in the interim, standards outlined in enclosure (2) should be implemented immediately.

Subj: NON-ECONOMY ACT ORDERS WITH NON-DOD AGENCY

Addressees are to provide by 20 February 2007 notification that command procedures have been implemented in accordance with this memo. This letter can be accessed on https://pbis.nmci.navy.mil/policy for your convenience. Points of contact for this matter are Ms. Betty Talbert, (703) 692-4809, email elizabeth.talbert@navy.mil or Ms. Pam Balla, (703) 695-5816, email pamela.balla@navy.mil.

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Non-Economy Act Order Financial Management Guidance

A. Purpose. Prescribe policy and procedures applicable to Department of Defense (DoD) procurement of goods or services from Non-DoD agencies under statutory authorities other than the Economy Act.

B. Overview. Non-Economy Act orders are for intra-governmental support, where a DoD activity needing goods and services (requesting DoD agency/customer) obtains them from a Non-DoD agency (assisting/servicing agency/performer). Specific statutory authority is required to place an order with a Non-DoD agency for goods or services, and to pay the associated cost. If specific statutory authority does not exists, the default will be the Economy Act, 31 U.S.C. 1535 which is discussed in volume 11A, Chapter 3 of the "DoD Financial Management Regulations" ("DoDFMR"). The more commonly used Non-Economy Act authorities include, but are not limited to, the following.

- Acquisition Services Fund. The Acquisition Service Fund was established by the General Service Administration Modernization Act. The Act merged the General Supply Fund and the Information Technology Fund to carry out functions related to the uses of the Acquisition Services Fund, including any functions previously carried out by the Federal Supply Service and the Federal Technology Service managed by the General Service Administration.

- Franchise Funds. Franchise Funds were first established by P.L. 103-356, Title IV, Sec 403 to provide common administrative support services on a competitive and fee basis. Franchise fund programs originated within the Environmental Protection Agency (EPA), Department of Commerce, Department of Veterans Affairs (VA), Department of Health and Human Services (HHS), Department of Interior, and Department of the Treasury.

C. Initiating a Non Economy Act Order. Non-Economy Act orders in excess of the simplified acquisition threshold shall comply with Federal Acquisition Regulation (FAR) Part 7, "Acquisition Planning," and Department of the Navy (DON) procedures for "Proper Use of Non-DoD Contracts."

1. Justification. Non-Economy Act orders may be placed with another agency for goods or services if:

- Proper funds are available;

- The Non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real property lease agreements with GSA);

- The requesting agency or unit determines the order is in the best interest of the Department; and

- The performing agency is able and authorized to provide the ordered goods or services.

Non-Economy Act Order Financial Management Guidance

2. Order. Non-Economy Act orders for work and services outside the DoD shall be executed by issuance of a DD Form 448, "Military Interdepartmental Purchase Request (MIPR)" and accepted using DD Form 448-2, "Acceptance of MIPR." If an alternative execution document is used, it must provide information constant with the MIPR to include the purchase request number and the Activity Address Code (DODAAC). A Non-Economy Act order shall comply with the documentation standards in Volume 11A, Chapter 1 of the "DoDFMR," and supported with the items identified in Figure 2 of this enclosure. Non-Economy Act orders must include:

- A firm, clear, specific, and complete description of the goods or services ordered. The use of generic descriptions is not acceptable;
- Specific performance or delivery requirements;
- A proper fund citation;
- Payment terms and conditions (*e.g.*, direct cite or reimbursement, and provisions of advanced payments;
- Specific Non-Economy Act statutory authority such as those referenced in paragraph B above; and
- DoD Activity Address Code (DODAAC).

3. Best Interest Determination. Each requirement must be evaluated in accordance with DON procedures to ensure that Non-Economy Act orders are in the best interest of the DON. Factors to consider include:

- Satisfying the requirements;
- Schedule, performance, and delivery requirements;
- Cost effectiveness, taking into account the discounts and fees; and
- Contract administration, to include oversight.

4. Specific, Definite and Certain. For Non-Economy Act orders in excess of the simplified acquisition threshold, the requesting official must provide:

- Evidence of market research and acquisition planning.
- A statement of work that is specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself.
- Unique terms, conditions, and requirements to comply with applicable DoD-unique statutes, regulations, directives and other requirements.

5. Contracting Officer Review. All Non-Economy Act orders greater than $500,000 shall be reviewed by a DON warranted contracting officer prior to forwarding the order to the funds certifier or issuing the MIPR to the Non-DoD activity. In addition to the review of the contracting officer, the requesting official shall further review the acquisition package to ensure compliance with the FAR part 7. Commands are encouraged to have Non-Economy Act orders greater than the simplified acquisition threshold, currently $100,000, be reviewed by a warranted contracting officer. However, at a minimum, Non-Economy Act orders greater than the simplified acquisition threshold but less than $500,000 should be reviewed by a contract specialist to ensure compliance with the Non-Economy Act Acquisition Package Checklist. (Figure 1 of the enclosure).

6. Certification of Funds. Non-Economy Act orders are subject to the same fiscal limitations that are contained within the appropriation from which they are funded. Because the performing entity may not be aware of all the appropriation limitations, the DON certifying official must certify that the funds cited on the order are available, meet time limitations, and are for the purpose designated by the appropriation.

7. Bona Fide Need. Non-Economy Act orders citing an annual or multiyear appropriation must serve a bona fide need arising, or existing, in the fiscal year (or years) for which the appropriation is available for new obligations.

D. Fiscal Policy.

1. Obligation. The provisions of 31 U.S.C. 1501 govern the recording of the obligation. An amount shall be recorded as an obligation only when supported by documentary evidence of an order required by law to be placed with an agency or upon meeting all the following criteria:

- Binding agreement (funding vehicle) between an agency and another person (including an agency);
- Agreement is in writing;
- For a purpose authorized by law;
- Serves a bona fide need arising, or existing, in the fiscal year or years for which the appropriations is available for obligation;
- Executed before the end of the period of availability for new obligation of the appropriation or fund used; and
- Provides for specific goods to be delivered, real property to be bought or leased, or specific services to be supplied.

2. Deobligation. Funding under Non-Economy Act orders shall be deobligated as outlined below.

a. Goods. Funds provided to a performing agency for ordered goods where the funds period of availability thereafter has expired shall be deobligated and returned by the performing agency unless the request for goods was made during the period of availability of the funds **and** the item(s) could not be delivered within the funds period of availability solely because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. Thus, where materials cannot be obtained in the same fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the bona fide need rule as long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial off the shelf (COTS) items readily available from other sources. Delivery or delay issues should be well documented, thereby justifying the bona fide need, and filed with other documents associated with the transaction. The delivery of goods may not be specified to occur in the year subsequent to funds availability.

b. Severable Services. An agreement for severable services that are continuing and recurring in nature and provide the Department a benefit each time the service is performed (*e.g.*, maintenance and repair services, scientific, engineering, and technical services), is based on statutory authority other than the Economy Act, 10 U.S.C. 2410a permits the performance of severable services to begin in one fiscal year and end in the next provided the period of performance does not exceed one year. Thus, the performance of severable services may begin during the funding period of availability and may not exceed one year. Therefore, annual appropriations provided to a performing agency that have expired shall be deobligated unless the performance of the services requested began during the funding period of availability and the period of performance does not exceed on year. The annual appropriation from the earlier fiscal year may be used to fund the entire cost of the one-year period of performance; however, an annual appropriations may not be used to enter into a severable services agreement where the period of performance for services requested is entirely in the following fiscal year. In no instance may the period of performance extend beyond September 30 of the subsequent year of services funded with annual appropriations. In summary, contracts must be awarded on or before 30 September citing the current fiscal year; **and** the period of performance must requested to commence on or before 30 September of that same fiscal year; **and** may not exceed 12 months from the performance start date.

c. Non-Severable Services. Non-severable services contracts must be funded entirely with appropriations available for new obligations at the time the contract is awarded, and the period of performance may extend across fiscal years. Funds provided to a performing agency that become excess shall be deobligated as identified.

d. Excess or Expired Funds. Activities shall reconcile all obligations and remaining funds available for orders. The purpose of this reconciliation is to ensure the proper use of funds and to identify and coordinate the return of expired or excess funds. Excess or expired funds must be returned by the performing agency and deobligated by the requesting agency to the extent that the performing agency or unit filling the order has not, (1) provided the

goods or services (or incurred actual expenses in providing the goods or services), or (2) entered into a contract with another entity to provide the requested goods or services. Expired funds shall not be available for new obligations.

3. Prohibitions. Non-Economy Act orders may not be used to violate provisions of the law, nor may they be used to circumvent conditions and limitations imposed on the use of funds to include extending the period of availability of the cited funds.

4. Funding Document Requirements. Effective immediately, the following guidelines must be followed relative to future interagency agreement funding documents:

- For all future interagency agreement funding documents for severable services, the following statement must be included on the funding document: "These funds are available for services for a period not to exceed one year from the date of contract award of this order (with contract award occurring before 30 September of any given year). All unobligated funds shall be returned to the ordering activity no later than one year after the contract award of the order or upon completion of the orders, which ever is earlier."

- For all future interagency funding documents for goods, the following statement must be included on the funding document: "I certify that the goods acquired under this agreement are legitimate, specific requirements representing a bona fide need of the fiscal year in which these funds are obligated."

E. Non-Economy Act Follow Up Procedures.

1. Non-Economy Act Order Oversight. The requesting official must establish quality surveillance plans for Non-Economy Act orders in excess of the simplified acquisition threshold to facilitate the oversight of the goods provided or services performed by the performing agency. The plan should include:

a. Contract administration oversight in accordance with the surveillance plan;

b. Process for receipt and review of receiving reports and invoices from the performing agency;

c. Reconciliation of receiving reports and invoices; and

d. Requirements for documenting acceptance of the goods received or services performed.

2. Monitor Fund Status. The requesting official must monitor fund status to:

a. Monitor balances with the performing agency;

b. Conduct tri-annual reviews of Non-Economy Act orders in accordance with the Financial Management Regulation, Volume 3, Chapter 8, Section 0804, "Tri-Annual Review of Commitments and Obligations" and all applicable DON guidance;

c. Confirm open balances with the performing agency;

d. Coordinate the return of funds from the Non-DoD performing agency in accordance with paragraph D2 above; and

e. Coordinate with the accounting office to ensure timely deobligation of funds.

3. Payment Procedures. Payment shall be made promptly upon the written request (or billing) of the performing agency. Under specific conditions, payment may be made in advance or upon delivery of the goods or services ordered and shall be for any part of the estimated or actual cost as determined by the performing agency.

a. The requesting official must be cognizant of the performing agency's payment method. Should the performing agency elect to receive advances or conduct advance billing prior to providing goods or services, the requesting official must comply with the requirements related to advances of public money outlined in Volume 4, Chapter 5 of the "DoD Financial Management Regulation" which implements the general prohibition of advance payments in Title 31, U.S.C. Section 3324 and Title 10, U.S.C. Section 2307. When the conditions under which the advance was made are satisfied, the specific appropriation or law authorizing the advance must be cited on the order and any unused amounts of the advance shall be collected from the performing agency immediately and returned to the fund from which originally made. (See enclosure (2) for more specifics).

b. Payments made for services rendered or goods furnished may be credited to the appropriation or fund of the agency performing the reimbursable work.

4. Non Economy Act Order Close Out. All Non-Economy Act orders shall be reviewed by the requesting official to determine if they are complete. Completed orders shall be fiscally closed out. The requesting official shall reconcile funds and coordinate the return of excess or expired funds held by the performing agency. This review will include:

a. Identify and determine if there are outstanding invoices;

b. Identify and determine existence of excess or expired funds;

c. Coordinate the return of funds from the Non-DoD performing agency in accordance with paragraph D2 above; and

d. Coordinate with the accounting office to ensure the deobligation of funds.

NON-ECONOMY ACT
ACQUISITION PACKAGE CHECKLIST

1. Documented evidence of market research and acquisition planning performed.

2. Package includes a specific, definite, and concise statement of work documenting a bona fide need in the fiscal year that the funds are available for new obligations.

3. Package includes specific performance and/or delivery requirements.

4. Package identifies the statutory authority permitting the performing agency to support the DON for the goods/services required.

5. Package includes the purchase request number and the Activity Address Code (DODAAC).

6. Package includes written justification for the Non-Economy Act order in accordance with DFARS part 217.78 and the DON procedures.

7. Package documents review of fees/surcharges/contract administration/discounts to ensure the cost is reasonable and consistent with task to be accomplished by performing agency.

8. Package includes specific statutory authority authorizing advance payment or billing.

9. Package documents evidence that competition requirements were followed in accordance with DFARS.

10. Order identifies DON unique terms & conditions to the performing agency.

11. Order identifies unique reporting requirements not otherwise specified to the performing agency.

Figure 1

REQUESTING OFFICIAL RESPONSIBILITIES

1. Market Research

2. Acquisition Planning

3. Independent Government Cost Estimate (IGCE)

4. Statement of Work (SOW) or Performance Work Statement (PSW) to include evaluation criteria.

5. Ensure receipt and compliance of MIPR acceptance.

6. Assist in Technical Evaluation

7. Quality Assurance Plan
   a. COR, COTR (Receiving Reports/Invoices - Inspection & Acceptance)
   b. CDRL Procedural/Required Reports/Deliverables Report/Contract Performance
   c. Property/Equipment Management
   d. Perform Contract Oversight

8. Funds Management/Record Keeping
   a. Draw Down
   b. Contract Reconciliation
   c. Initiate Deobligation
   e. Oversight of Billing/Reporting

9. Update all Points of Contact (POC) as necessary throughout acquisition

Figure 2

Advance Payments Under Non-DoD Contracts

Some Federal agencies have separate legal authority, as defined in enclosure (1), to provide services, including contractual services, without the need to return unobligated funds at the end of the fiscal year. These organizations have historically invoiced the requesting agent for the entire amount of the effort prior to services rendered, goods delivered, or contract award without clearly identifying the invoice as an advance payment. As a result, reconciliation between "actual expenditures for work performed" to the "advance payment" amount is delayed. If the reconciliation determines "actual expenditures" lower than "advance billed" amounts, many times the recoupment of funds occurs after funds have expired, resulting in lost resources for the Department.

In discussions with the Defense Finance and Accounting Service (DFAS) to address advance payment processes, it was discovered that DFAS does not currently have standard operating procedures for advance payments. This issue is being addressed with USD(C) and DFAS.

The following practices are provided to limit and/or identify advance payments associated with non-DoD interagency agreements/contracts:

- Clearly document on funding actions and/or interagency agreements that advance payments are <u>not</u> authorized.

- If the receiving agency can not agree with the first premise, commands should finance planning and design, or up front administrative requirements for an effort, with one funding request and the subsequent contract award with a separate funding request. This practice should minimize the value of advance payments as the non-DoD agencies appear to have a tendency to bill for administrative lead time costs.

- To the extent advance payments are authorized, commands are to establish procedures to ensure that: the statutory authority authorizing the non-DoD agency to utilize advance billing is cited on the obligating and/or interagency agreement documents; and documentation for an advance payment is attached with the funding document.