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Contract Operations Under a Continuing Resolution

VAO Research Institute

In nearly every fiscal year (FY) since 1997, initial funding of operations for most if not all federal government agencies has been provided under a continuing resolution (CR). In fact, GAO reported in 2018 that in all but four of the last 40 years, Congress has passed CRs to keep agencies running between budgets. This *At a Glance* looks at CRs in general and addresses a few frequently asked questions (FAQs) related to contract actions during a CR.

CRs in general

A CR is a temporary or stopgap spending measure approved by Congress. Office of Management and Budget (OMB) Circular A-11 [defines](#) a CR as:

... joint resolutions that provide continuing appropriations for part of a fiscal year or for a full fiscal year. A CR that covers only a part of a fiscal year is referred to as a “shortterm” CR, and a CR that covers a full fiscal year is referred to as a “full-year” CR. A CR is often enacted when the Congress has not yet passed new appropriations bills by October 1 or when the President has vetoed congressionally passed appropriations bills.

A CR frequently specifies a maximum rate at which obligations may be incurred based on the rate of the prior year, the President’s budget request, or an appropriations bill passed by either or both chambers of Congress. However, there have been instances when Congress has used a CR as an omnibus measure to enact several appropriations bills. A CR is a form of appropriations act and should not be confused with the budget resolution.

A CR will appropriate such amounts as may be necessary to continue projects or activities conducted in the previous FY at a specified rate of operations. The intention is for agencies to continue existing programs and normal operations until a final appropriation is available, but also for such operations to not constrain Congress in determining final funding levels. The term “projects or activities” usually refers to the total appropriation rather than specific projects as provided by the President’s budget request or committee report. If an agency is operating at a rate based

on the prior FY’s funding level (the current rate) during a CR, it is operating within the limits of the resolution as long as the total obligations under the appropriation do not exceed the level enacted in the prior year. Note that Congress may also fund an agency’s entire FY budget or identify a specific program to fund.

OMB is responsible for apportioning executive branch appropriations, including amounts made available under CRs. An apportionment divides appropriations by specific time periods (usually quarters), projects, activities, objects, or combinations thereof, in part to ensure agencies have resources throughout the FY. OMB automatically apportions amounts made available under a CR equal to the annualized amount (or rate) for each appropriations account funded by the CR multiplied by the lower of the percentage of the year covered by the CR or the historical seasonal rate of obligations for that period of the year. An agency may request an amount different than what is automatically apportioned, though OMB rarely approves such exceptions.

In a September 2009 [report](#), the Government Accountability Office (GAO) identified 11 standard provisions applicable to funding for most agencies and programs under a CR. These provisions (see Table 1 on page 2) provide direction regarding the availability of funding and demonstrate the temporary nature of the legislation.

Contract actions during a CR

There are several factors to consider when looking to award or modify contracts under a CR.

! VAO recommends always consulting relevant sections of your agency’s FAR supplement and policies for amplifying details and guidance.

Preparing procurement requests

During a CR, appropriations are available to fund contracts or option years up to the amount authorized. At times, the terms of the CR limit the number of days for which funding is available. When this is the case, the procurement request should contain language similar to:

Funds are provided for the period of performance beginning with the effective date of the award and continuing through [ending date of the CR], under authority of the FY20XX continuing resolution. The remaining balance will be made available upon enactment of the FY20XX regular appropriation or incrementally in the event of successor continuing resolutions.

Contract types for different requirements

Based on a [review](#) of GAO statements and legal decisions, we conclude that incremental funding of a contract action for severable services is permissible for any contract type (i.e., fixed-price (FP), time-and-materials (T&M), labor-hour (LH), or cost-reimbursement) as long as:

1. A bona fide need for the services exists when the initial obligation is made.
2. Incremental funding is not prohibited by the agency's applicable appropriations, financial management reg-

ulations, or acquisition regulations (see this [inquiry response](#) to learn more).

3. The services being acquired are severable.
4. All other applicable regulations are followed.
5. The acquisition instrument includes any relevant Federal Acquisition Regulation (FAR) and agency supplement clauses necessary to limit the government's financial liability.

However, GAO has consistently held that nonseverable services shall not be incrementally funded. Absent special statutory authority, nonseverable services and any supply acquisitions must be fully funded at the time of award, a fact that must be considered when allocating CR funding to competing agency requirements. For supply requirements that must be initiated under a CR, subdividing the requirement into base and option quantities is the primary proper approach.

Awarding new contracts

Agencies may award contracts during a CR. New or follow-on awards that continue program requirements must provide at least partial funding for obligation of the contract

Table 1: Provisions Applicable to Funding Agencies and Programs Under a CR

PROVISION	DESCRIPTION
Rate for operations	Appropriates amounts necessary to continue projects and activities conducted in the prior FY at a specific rate for operations.
Extent and manner	Incorporates restrictions from the prior year's appropriations acts or acts currently under consideration.
No new starts	Amounts appropriated under a CR are not available to initiate or resume projects or activities for which appropriations, funds, or authority were not available during the prior FY.
Coverage of CR operations	Appropriations made available under the CR remain available to cover all properly incurred obligations and expenditures during the CR.
Adjustment of accounts	Expenditures made during the CR will be charged against applicable appropriations acts once they are enacted.
Apportionment timing	Apportionment time requirements under 31 USC § 1513 are suspended during a CR, but appropriations provided under a CR still must be apportioned to comply with the Antideficiency Act and other federal laws.
High rate of operations	Programs or activities with a high rate of obligation or complete distribution of appropriations at the beginning of the prior FY cannot follow the same pattern of obligation, nor should any obligations be made that would impinge on final funding prerogatives.
Limited funding actions	Agencies should implement only the most limited funding action to continue operations at the enacted rate.
Appropriated entitlements	Entitlements and other mandatory payments whose budget authority was provided in the prior year appropriations acts can continue at a rate to maintain program levels under current law (or operate at present-year levels). Amounts available for payments that come due on or near the first day of each month within a CR must continue to be made for 30 days after the CR termination date.
Furlough restriction	OMB and other government officials can apportion up to the full amount of the rate for operations to avoid a furlough of civilian employees. This authority may not be used until after an agency has taken all necessary action to defer or reduce nonpersonnel-related administrative expenses.
Termination date	Date on which the CR expires. Usually based on the earlier of a specific date or enactment of the annual appropriations acts.

Source: GAO report [GAO-09-879](#)

FAR 52.232-18 Availability of Funds

Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

Do not use as is.

FAR 52.232-19 Availability of Funds for the Next Fiscal Year

Funds are not presently available for performance under this contract beyond _____. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer. *Do not use as is.*

consistent with the terms of the CR and the funds it makes available. Awards for supply or nonseverable services must fully fund all firm performance/delivery requirements, but if the award is for severable services, the available funding will necessarily be limited to the amount needed for performance of the services during the period covered by the CR, so the award may need to be incrementally funded, subject to meeting the five conditions on page 2. With respect to condition #5, the FAR and agency supplements do not contain any standard clauses specifically applicable to incrementally funding a contract award under a CR. However, [FAR 32.703-2](#) requires that contracting officers (COs/KOs for the Department of Defense (DoD)):

- Include [FAR 52.232-18](#) for operation and maintenance (O&M) and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) necessary for normal operations and for which Congress previously had consistently appropriated funds, unless specific statutory authority permits applicability to other requirements.
- Include [FAR 52.232-19](#) if the contract is a one-year indefinite-quantity or requirements contract for services funded by annual appropriations and extends beyond the FY in which it begins.

Some COs have invoked FAR 52.232-18 to address CRs in the past. Nonetheless, since the clause was not written for that purpose, it provides less-than-optimal protection of the government's interests in these unique situations.

The risk of future problems can be minimized if COs include a directly applicable special provision that communicates the government's intentions under a CR. Some of the language of FAR 52.232-18 may be adopted as a starting point, but we believe a superior starting point would be FAR 52.232-19, because it is written for a situation in which some funding is obligated but that as of a specified later date additional funds must be obligated to enable performance to continue or finish. However, a suitable clause also needs to expressly limit the government's financial obligation under the contract to the amount of funding already available and the contractor's authorization to perform under the existing obligation so it doesn't exceed the CR timeframe. The provision should identify that neither the funding limit nor performance time frame may be exceeded without explicit, written direction of the CO. Once a new budget authority has been passed, the contract must be modified to fund any remaining period covered by the new budget authority.

Successive CRs may require COs to issue successive modifications to incrementally fund a contract. Remember, however, that absent specific congressional authority, an award for a new initiative or project (as defined earlier) cannot be funded during a CR.

Exercising options

COs may also exercise options under existing contracts during a CR to fund an ongoing project or activity. If the option exercise is for severable services that will have to

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be incrementally funded under the CR constraints, a clause meeting the three characteristics of a new contract award must be contained in the basic contract and cited to expressly limit the government's obligation and contractor's performance unless or until the CO provides additional funding and directs continuing performance. If no such clause is in the contract, it cannot be inserted in a unilateral modification exercising the option. The contracting parties must execute a bilateral modification incorporating a suitable clause before or concurrent with exercise of the option. The CO can only exercise a unilateral option as stated in the contract, and whether unilateral or bilateral, exercise of any option may only occur within the period specified in the contract.

General recommendations

Suggestions from the Office of Federal Procurement Policy (OFPP) include:

- Confer with responsible budget and finance personnel in your agency. Determine the availability of funding for existing and new contract requirements. Modifications to existing contracts may be required due to fiscal constraints imposed by the CR.
- Give contractors appropriate notification of government funding limitations. Specially developed contract-unique and/or agency-specific clauses can limit the government's obligation and contractor's responsibility to perform under the contract subject to the poten-

Content Characteristics of an Incremental Funding Clause Under a CR

- Identify the temporary funding limitation pursuant to the CR.
- Identify the timeframe — the performance period limitation covered by the CR funding.
- Identify that neither the funding limit nor the performance time frame may be exceeded without explicit, written direction of the CO.

tial future availability of funds. Since this is an area of special importance to small businesses, agency contracting and small business personnel should be ready to answer questions from the small business community regarding availability of funds and the government's obligations under a CR.

- Follow prudent contracting principles and practices. Advance planning, maximum use of competition, and effective contract management will help ensure available funds are used as efficiently and effectively as possible and minimize disruption of agency operations.
- Consult with your office of legal counsel. Appropriations made under a CR are generally available only to fund ongoing projects and activities, not new initiatives or projects. Carefully review the terms of the CR with counsel to establish availability of funds. ♦

VAO Resources

- *Advisory*: [Contracting Implications of a Government Shutdown](#)
- *At a Glance*: [Fiscal Year-End Guide](#)

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