

Frequently Asked Questions

The following questions have been asked by Department of Commerce employees regarding developing and implementing agreements. The answers may be useful in guiding all employees. Employees are also encouraged to contact the OGC/Admin General Law Division at (202) 482-5391 for further assistance.

A. Developing Agreements

1. Why are written agreements necessary?

Written agreements are necessary to memorialize relationships with other operating units, Federal agencies or non-Federal entities particularly when funds are being transferred or resources are being committed to a project. Further, they are needed to document collaborative efforts between the parties and serve as the basis for a Federal agency to record an obligation in their financial management system where that agency is transferring funds under the agreement.

2. Are agreements required in order to have a meeting with another Federal agency to discuss a potential project?

No. A formal agreement is not necessary to carry out routine tasks such as engaging in meetings or conference calls.

3. Do I need to involve an attorney during the initial process of developing of an agreement?

An attorney is not necessary, but if you are unsure whether “programmatic” authority exists for the activity being contemplated, you should contact your program counsel for assistance. If you have questions regarding how to draft your agreement or how to structure a transfer of funds, you should contact OGC/Admin for assistance.

4. What are severable services?

Severable services are services that are ongoing or repetitive in nature. These are services that generally have natural breaking points. Examples include ongoing accounting services, transit benefits, or research work where either the extent of the work is the provision of data on an ongoing basis or periodic reports for which the requesting agency receives a benefit.

5. What are non-severable services?

Non-severable services are services that constitute a single, indivisible undertaking for which the requesting agency receives no benefit until the entire project is completed. An example includes a research project where the requesting agency does not receive anything of consequential value until the entire project is completed and it receives a final report.

6. Why is it important to know whether services being sought by the requesting agency are severable or non-severable?

This distinction between severable and non-severable services is important to know because this determination will define what funds may be obligated and for what time period.

7. Can an agency obligate current year funds to pay for services to meet a future fiscal year's needs?

No. In those instances where the requesting agency only has one-year funds available to it, the requesting agency generally cannot obligate funds for the next fiscal year's services, and, therefore, the agencies cannot mutually execute an agreement to provide for such services until funds for the next fiscal year have been appropriated to the requesting agency. If the requesting agency has multi-year funds, then those funds may be used to purchase services for any year within the funds' period of availability.

8. Can a requesting agency transfer one-year or multi-year funds to a servicing agency for a non-severable service that exceeds the period of availability of the funds when using an authority other than the Economy Act?

Yes. If the requesting agency has determined that it has a bona fide need for the service and that the service is non-severable in nature. If the requesting agency is paying the servicing agency to perform non-severable services, then its funds are available to pay the servicing agency's costs (including contractual costs) even though the work extends beyond the funds' period of availability. For non-severable services, the requesting agency must obligate funds to pay the entire cost of the service up front.

9. Can a requesting agency transfer one-year or multi-year funds to a servicing agency for a severable service and that exceeds the availability of the funds when using an authority other than the Economy Act?

Yes, if the requesting agency is paying the servicing agency to procure a severable services contract on its behalf, then the funds may be used even if the contract extends beyond the period of availability of the funds so

long as the contract (excluding option years) is no longer than one calendar year.

No, if the requesting agency is paying the servicing agency to perform severable services and the work is being done in-house by the servicing agency, then funds are only available to pay for services to be completed by the end of the period of availability of the funds.

10. Is there a difference in how severable and non-severable services are treated when using the Economy Act?

No. Because of the Economy Act's deobligation requirement, whether the service is severable or non-severable, the funds must be obligated by the servicing agency by the end of the funds' period of availability or the requesting agency must deobligate the funds (if funds were advanced to the servicing agency, the funds must be returned).

This means that either all work must be completed by the end of the period of availability if the work is being done "in-house," or the funds must be properly obligated on a contract before the end of the funds' period of availability.

If all of the funds will be obligated by the servicing agency on a contract procured on behalf of the requesting agency, then there is no problem if the servicing agency executes a contract before the end of the period of availability of the funds and either:

- the contract is for non-severable services; or
- the services are severable and the contract (excluding option years) is no longer than one calendar year.

11. If an agreement includes the language, "subject to the availability of funds," would that allow operating units to sign the agreement even though the requesting agency does not yet have the funds available?

No. Under the Antideficiency Act (ADA), 31 U.S.C. §§ 1341-42, absent statutory authority to do otherwise, a Federal agency cannot incur obligations in excess or in advance of appropriations. Accordingly, one agency cannot enter into an interagency agreement with another for the provision of goods or services that obligates that agency to reimburse the other when it does not have currently available appropriations. Adding the phrase "subject to the availability of funds" to such an agreement does not prevent an ADA violation. Agencies cannot obligate funds in advance of receiving them or obligate more than they have.

12. If a Federal agency wants to enter into an umbrella agreement with another Federal agency that covers several years, can that be done without violating the ADA?

Yes. An agency can enter into an umbrella agreement that sets forth the terms and conditions but does not obligate any funds. Instead, the agreement would explain that funds for specific activities will be obligated via amendment. The amendment would be the affirmative action needed to obligate funds once those funds became available.

13. If I am using a one- or multi-year account to transfer funds under an agreement, isn't it true that "the law" makes the funds "available" for an additional five years after the end of the funds' period of availability?

No. The "law" being referred to here is the account closing statute (31 U.S.C. §§ 1551-58). It provides that once a one- or multi-year appropriation has expired, the appropriation account remains open for a period of five years only for recording, adjusting, and liquidating already incurred obligations properly chargeable to that appropriation account. After the passage of five years, the account is closed and any remaining balance is cancelled. The account closing statute does not extend the obligational life of fixed-year appropriations. It merely provides agencies with time to liquidate, adjust, or record obligations properly incurred during the appropriation's period of availability.

B. Authorities

1. For an Economy Act agreement, must a completed Determination and Finding (D&F) statement be included with the agreement at the time it is forwarded for legal review?

When the Department is the requesting agency, a D&F must be obtained. When the Department is the servicing agency, you should make every effort to obtain D&Fs from the requesting agency. If you are attempting to obtain a D&F from a servicing agency, you may forward agreements through the proper channels for legal review in anticipation of obtaining the D&F.

2. Do I need a separate D&F for each amendment that I make to an Economy Act Agreement?

Yes, unless the base agreement includes a D&F that covers the entire duration of the agreement, including amendments.

3. I am working with another Federal agency. What should I do if one agency suggests that the Economy Act should be used as the authority to transfer funds and the other agency suggests that there is a more specific authority?

Generally, the Economy Act should not be used if there is a more specific authority to transfer funds. Both parties should work together to determine if a more specific authority exists. If agreement cannot be reached, please contact OGC/Admin for assistance.

4. Is a Military Interdepartmental Purchase Request (MIPR) an agreement authority?

No. A MIPR is simply a form. Specifically, it is DD Form 448, MIPR, which can be accompanied by DD Form 448-2, Acceptance of MIPR. Generally, by means of a MIPR, Department of Defense components transfer funds to other Federal agencies. However, an agreement in the form of a MIPR must include all the same required provisions as an agreement in any other form.

5. I am drafting a Joint Project agreement; can you explain the additional Department policy requirements?

Yes. In accordance with Department's Accounting Principles and Standards Handbook, Joint Project agreements must explain why the project cannot be done at all or as effectively without the participation of the other party and that the project is essential to further a Department program.

6. Can any operating unit rely on the Department's Special Studies Authority?

Yes. The agreement must, however, set forth the operating unit's specific "programmatic" authority to do the work contemplated under the agreement. The Special Studies authority permits outside organizations to transfer funds to operating units; however, the study must involve a matter within the authority of the Department. The Special Studies authority is not programmatic authority. Operating units may only provide services upon payment of actual costs. This means that no products are to be delivered in advance of receiving payment.

- 7. A state agency has contacted our office to request technical assistance on a project. Can we work with them and receive payment for our services? The state is not able to pay in advance.**

Yes. If you have “programmatic” authority to engage in the work requested. The Intergovernmental Cooperation Act permits reimbursement to Federal agencies for services rendered rather than solely on an advanced payment basis as required by the Special Studies authority.

C. Drafting an Agreement

- 1. What is the difference between an interagency agreement, memorandum of understanding, and memorandum of agreement?**

While some agencies may use the terms to represent different types of transactions, there is no legal difference between the terms. They are all subject to the same legal requirements.

- 2. What elements must be present in all agreements that do not transfer funds?**

The project title, names of the parties, purpose of the agreement, a “programmatic” authority for all Federal parties, the duration of the agreement, a termination provision, a dispute resolution provision, contacts for the parties, and signatories for the parties.

- 3. What elements must be present in all inter/intra-agency agreements that transfer funds?**

The project title, names of the parties, purpose of the agreement, an authority to transfer funds, the amount being transferred, a programmatic authority for each agency, the duration of the agreement, a collection of costs upon cancellation clause, a termination clause, a dispute resolution provision, contacts for the parties, and signatories for the parties.

In addition, for agreements between Federal agencies include the following information for each agency: TAS, BETC, and DUNS Number.

- 4. What is the BETC?**

The BETC is a code used in the Government-wide accounting system to indicate the type of activity being reported, such as payments, collections, borrowings, etc. This code must accompany the TAS. Generally, the BETC used for transactions within the scope of this handbook are: DISB (for

disbursement) for the requesting agency and COLL (for collections) for the servicing agency. For more information, please refer to http://www.fms.treas.gov/gwa/factsheet_betc.html.

5. What is the TAS and how do I find it?

A TAS, or Treasury Account Symbol, is the receipt, appropriation, expenditure and other fund account symbols and titles as assigned by the Department of the Treasury for Government-wide accounting purposes. You should work with your finance/budget office to obtain the proper TAS for your activity.

Generally, the TAS consists of three independent pieces of information. The first two numbers of a TAS code usually represents the agency. For the Department, the first two numbers are always 13. The second set of numbers can vary in length and indicate the length of time the funds are available. No-year funds are denoted by an "X." If the funds are one-year funds, the number will represent the fiscal year in which the funds were appropriated (e.g., 10 would indicate the funds were appropriated in fiscal year 2010). If the funds are multi-year funds, the code will generally include two numbers, often separated by a slash, indicating first the year the funds were appropriated then the year the funds expire. For example, three-year funds appropriated in fiscal year 2010 would appear as 10/12. The final set of numbers, usually four numbers in length, but sometimes longer, is the fund code, that is, the appropriation.

So, for example, the TAS for the Department's Departmental Management Salaries and Expenses one-year appropriation for fiscal year 2011 would look like: 13 11 0120. The TAS for NOAA's Operations, Research, and Facilities two-year appropriation for fiscal year 2011 would look like: 13 11/12 1450.

For more information, please refer to http://fms.treas.gov/gwa/factsheet_tas.html.

6. Do I have to use the Department's model agreements?

No. However, if you follow the Department's model agreements and checklists, your agreement will include the necessary provisions and meet the required elements of the specific agreement authority. If you are working with a party that insists on using its own model or form, you can do that as long as the model or form includes all of the necessary provisions and required elements.

7. How much detail should an agreement include regarding the activities being conducted?

The key to a well written agreement is to begin with a clear explanation of the activities that are being conducted. The language should simply explain the overall work involved and the roles and responsibilities of the parties involved. Often, a statement of work is referenced to set forth specific milestones, timeframes, and deliverables.

8. Why does an agreement need to clarify the activities as well as the start and end dates of the activities?

Accurate start dates and end dates are critical in order to make determinations as to whether the agreement complies with Federal appropriations law. When funds are being transferred, those specific funds must be associated with specific activities.

9. What is the difference between the period of availability of funds and an agreement's period of performance?

The period of availability of funds is the time period during which the funds remain available by law for an agency to incur obligations. The performance period is the window of time within which the work is to be performed as specified in the agreement.

10. Is there a difference between a period of performance and an agreement's termination date?

Yes. The performance period is the window of time within which the work is to be performed as specified in the agreement. The termination date is the date on which the agreement expires. However, in some agreements, these dates are the same, and in some agreements, the termination date is often referenced as the end date of the period of performance.

11. When should I execute an amendment to extend an agreement's termination date?

You should have the amendment approved and signed before the underlying agreement terminates. The amendment should clearly state the new termination date.

12. Can an expired agreement be amended?

No. If an agreement has expired, there is no live agreement to amend.

13. What information should be included in Amendments?

Refer to the Amendment Checklist in Appendix B of the full Agreements Handbook located at <http://www.commerce.gov/os/ogc/general-law-division>.

14. What is meant by the term “No-Cost Time Extension”?

A No-Cost Time Extension (NCTE) generally refers to extending the period of performance of an agreement without the need for additional funds to carry out the project. A NCTE may become necessary if the project was delayed for some reason. A NCTE cannot be used to pay for new work using funds obligated to pay for previously requested work.

15. When does an amendment extending an agreement’s period of performance without additional costs (commonly referred to as a “no-cost time extension”) require formal legal review by OGC/Admin?

Such an amendment requires clearance if:

- The underlying agreement was not cleared by OGC/Admin; or
- The extension goes beyond the period of availability of the funds obligated by the underlying agreement (if Federal funds were transferred); or
- The extension is for more than 6 months; or
- The extension is not the first extension; or
- The extension changes the scope of work set forth in the underlying agreement or provides for tasks that were not paid for from the original funds.

16. Can funds from an agreement that commenced in one fiscal year be “carried over” into the next fiscal year?

Maybe. Whether carrying funds into the next fiscal year is permissible depends on the authority being used to transfer the funds, the nature of the work, and the period of availability of the funds being transferred. If the agreement contemplated the continuance of activities beyond the funds’ period of availability, the legal permissibility of carrying over the funds beyond their availability would have been addressed by OGC/Admin during its review.

17. If the period of performance is extended for an agreement with a non-Federal partner, is the funding also extended?

If the parties mutually agree to extend the performance period via written amendment, the partner’s funds would remain available. Non-Federal

parties do not have a congressionally-defined period of availability by which they must be obligated.

18. Where can I find model agreement templates and checklists?

Visit the OGC/Admin General Law Division's website at http://www.ogc.doc.gov/gen_law.html.

19. What should I do if my agreement contemplates the other party making use of a Department emblem or logo or the Department seal?

If your agreement contemplates the use of logos, emblems, or the Department seal, please read Department Administrative Order (DAO) 201-1 (logos/emblems) or DAO 201-17 (seal). If an outside party would like to use a Departmental/Bureau logo/emblem or Department seal in conjunction with activities contemplated under the agreement, please contact OGC/Admin for assistance.

20. What if my agreement involves intellectual property issues such as use of trademark or copyright?

Contact the OGC/Admin for assistance. Depending upon the facts, the agreement may need to include references to relevant Departmental policies or additional Federal laws.

21. How much lead time should we allot for clearance by OGC/Admin?

A general rule of thumb is 30 days.

22. Will OGC/Admin provide training on agreements?

Yes. Please contact OGC/Admin General Law Division's Chief or Deputy Chief with any requests for training. Requesting offices should develop a proposed plan for when and where the training will be conducted and how the training will be administered, that is, in person, video-conferencing, etc. Requesting offices will be responsible for organizing the training, making any necessary conference-room reservations, and administering all technical aspects of approved training sessions.