

Bona Fide Need

1. The Bona Fide Need rule (law) requires appropriated funds be used only for goods and services for which a need arises during the period of that appropriation's availability for obligation.

2. The three major legal provisions that concern funds execution are the: Anti-deficiency Act, Misappropriation Act, and the Bona Fide Need Rule (also known as the "time statute"). U.S. Code, Title 31, Section 1502(a) states that, "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with Section 1501 of this title."

3. The strict interpretation of this law, combined with the appropriation act language, means that the need may arise anytime during the period the appropriation act states the funds are available.

4. Several examples of Bona Fide Need follow:
 - a. For supply contracts, generally bona fide need is determined by when the government actually requires (i.e., will be able to use) the supplies being acquired. Supply needs of a future year are the bona fide need of the year in which they are required, unless one of the following exceptions applies:
 - (1) Lead-time exception: Agencies are permitted to consider normal production lead-time in determining bona fide need for a purchase. For example, if the normal lead-time for an item is 30 days, the government may obligate Fiscal Year (FY) 16 funds for an item required on or before Oct. 30, 2016.

 - (2) Stock level exception: Agencies may use current year funds to replace stock consumed in the current fiscal year, even though the replacement stock will not be used until the following fiscal year. However, fiscal-year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

 - b. For service contracts, generally services are a bona fide need of the fiscal year in which the services are performed. Thus, service contracts have not

normally been permitted to cover a period which involves two different fiscal years. However, two important exceptions exist to this general rule:

(1) Non-severable services exception. If the services produce a single or unified outcome, product or report, the services are non-severable and the government may fund the entire effort with dollars available for obligation at the time the contract is awarded and the contract execution may cross fiscal years. A non-severable contract is essentially a single undertaking that cannot feasibly be subdivided (Comptroller General Decision B-259274, May 22, 1996). The basic concept is that the government does not receive value from the service rendered until that service is completed.

(2) Statutory exceptions: The FY 98 Defense Authorization Act amended Title 10 of the U.S. Code (Section 2410a) to permit authorized DOD agencies to obligate funds available at the time of contract award to finance a severable service contract with a period of performance not to exceed 12 months. For example, the DOD agency may obligate FY 16 funds for a 12 month severable service contract that begins anytime during FY 16 and continues into FY 17. This provision of the statutes provides greater flexibility to DOD agencies and also allows for a better distribution across the year for the workload of the contracting offices supporting buying organizations. However, a Service or Defense Agency has the discretion to limit application of this exception and require subordinate activities to budget for and execute this type contract on a strictly fiscal year basis or a period less than the 12 months.

c. For construction contracts to be properly considered a bona fide need of a fiscal year, construction contracts obligated and awarded late in a fiscal year (e.g., September) must have a performance start date within 90 days of contract award, even if this performance start date occurs during the first quarter in the following fiscal year. For example, if a contract was awarded on Sept. 15 with funds from that fiscal year, performance must start by Dec. 13 of the new fiscal year, as derived from DOD fiscal law to be a bona fide need of the fiscal year that ended Sept. 30. The government should also consider normal lead-time, normal weather conditions, and factors within government control (e.g., site access availability) in determining bona fide need for construction projects.

(1) Weather conditions: A project that cannot reasonably be expected to commence before the onset of winter weather is not a bona fide need of the prior fiscal year.

(2) Factors within government control: In considering bona fide need, the government must consider the required delivery date, the normal rate of construction, when the government intends to make facilities, sites, or tools available, and the degree of control the government has over when the contractor may begin work.