



June 28, 2010

ACQUISITION POLICY MEMORANDUM 2010 - 01

To: Heads of Contracting Activity

From: Nancy J. Gunderson /signed/
Deputy Assistant Secretary for Grants and Acquisition Policy and
Accountability

Subject: Guidance Regarding Funding of Contracts Exceeding One Year of
Performance

Effective Date: Immediately

1. Purpose. This Acquisition Policy Memorandum (APM) provides guidance on contract formation and funding strategies applicable to contracts and orders (hereafter “contracts”) exceeding 1 year of performance. It also provides interim HHS Acquisition Regulation ([HHSAR](#)) coverage (attached) pending formal incorporation in the HHSAR, including: (a) policies related to contract funding requirements for severable and non-severable services; and (b) standard solicitation provisions and contract clauses to be used when specific contract types will be incrementally funded.

2. Background. Most HHS appropriations provide funding authority for 1 year, creating challenges when the Department seeks to contract for supplies or services to meet actual or projected multiple-year needs. This APM is one means of ensuring that HHS staff—contracting, program, budget, and finance—understand and appropriately use sound contract formation and funding strategies for contracts exceeding 1 year. It clarifies the intent of current HHS acquisition and funding policies pertaining to contracts exceeding 1 year and revises pertinent aspects of the HHSAR to eliminate possible ambiguities.

3. Definitions.

Continuing resolution is “an appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.”¹

¹ Government Accountability Office (GAO), *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, September 2005, pp. 35-36.

Multiple-year contract means a contract whose period of performance extends beyond 1 year. It includes any contract for: (a) severable services awarded with a base period and 1 or more option years; or (b) the completion of non-severable services that extend beyond a 1-year period. For purposes of this APM, the term “multiple-year contract” does not include any contract awarded using the multi-year contracting procedures authorized under FAR Subpart 17.1.

Multi-year contracting is a special contracting method (see FAR Subpart [17.1](#)) used to acquire planned requirements (for supplies or services) for up to 5 years without establishing or having to exercise options. A multi-year contract using annual appropriations may provide that performance after the initial year is contingent on the appropriation of funds, as long as the funds obligated at award are sufficient to fund the initial year of performance **plus** a cancellation ceiling payable to the contractor if future appropriations are not sufficient to fund continuation of the contract.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract within the existing term of the contract, or may elect to extend the term of the contract. This definition expands on the definition at FAR [2.101](#). Please also see FAR Subpart [17.2](#).

4. Analysis and Discussion.

a. *Incremental Funding: Regulatory Framework, Practice, and Policy.*

“Incremental funding,” as addressed in FAR Subpart [32.7](#) and HHSAR Subpart 332.7 (as provided herein), is a method of funding contracts for severable services that provides specific spending limits that are less than the total estimated cost/price of the entire contract, with the understanding that additional funds are expected to be provided at a later date. Incremental funding typically is used because funds are not available to obligate the total cost/price of an entire contract that will cover multiple years or other periods or increments of performance. After obligation of the initial increment at contract award, normally for the first year, funds are subsequently obligated in periodic installments as work progresses, consistent with the terms of the contract.

FAR guidance on incremental funding is limited to Subpart 32.7, Contract Funding, and to the clauses that subpart prescribes for use in cost-reimbursement contracts. A general reference to the topic appears in FAR 32.703-1(b): “If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.” FAR 32.705-2(b) directs the Contracting Officer to insert the clause at FAR [52.232-22](#), *Limitation of Funds*, in solicitations and contracts “if an incrementally funded cost-reimbursement contract is contemplated.” The clause describes how to manage the funding of cost-reimbursement contracts and establishes the rights and responsibilities of the parties while the contract remains partially funded.

Use of cost-reimbursement contracts is significant throughout the Department. During fiscal year 2009, HHS obligated approximately \$5.6 billion using cost-reimbursement

contracts, accounting for over 42 percent of total HHS procurement obligations for the year. Incrementally funding these contracts is a common practice.

The 2006 version of 332.702(a) (now superseded by this APM) reads [emphasis added in **bold** and underscored]:

*Incremental funding **may be used in cost-reimbursement type contracts for** the acquisition of severable services. It shall not be used in contracts for construction or architect-engineer services. Incremental funding allows severable cost-reimbursement type contracts awarded for more than one year to be funded from succeeding fiscal years.*

The above text was intended to expressly limit the use of incremental funding to cost-reimbursement contracts for severable services.

Prior to 2006, 332.702(a), which was Departmental policy for over 20 years and served as the framework by which Operating Divisions (OPDIVs) structured contracts and allocated funds from annual appropriations, permitted the opposite practice [emphasis added in **bold** and underscored]:

*Incremental funding **may be applied to cost-reimbursement type contracts for** the acquisition of research and development and other types of nonpersonal, **nonseverable** services. It **shall not be applied to contracts for** construction services, architect-engineer services or severable services. Incremental funding allows nonseverable cost-reimbursement type contracts, awarded for more than one year, to be funded from succeeding fiscal years.*

While the HHSAR was revised in 2006 to promote compliance with appropriations law, further clarifying the distinction between “severable” and “non-severable” services, as discussed below, is critical to the appropriate use of incremental funding and to compliance with federal appropriations law, including the *Bona Fide Needs* Rule and the Anti-Deficiency Act (ADA).

Incremental funding is distinguished from the funding techniques that may be used for multi-year contracts. The term “multi-year contract” is defined in section 3. above. The distinctions and examples necessary to understand the appropriate use of incremental funding and other funding techniques that allow less than full funding at contract award are discussed in sections 4.d. and e. of this APM. In addition, this APM revises the HHSAR on an interim basis (pending formal promulgation of a HHSAR amendment) to clarify and emphasize the appropriate use of incremental funding. The affected sections may be found (or referenced) in 332.7, *Contract Funding*.

b. *The Bona Fide Needs Rule and Severability of Services.*

The *Bona Fide Needs* Rule is one of the fundamental principles of federal appropriations law. Simply stated, a “fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to, but continuing to exist in, the fiscal year for which the appropriation was made.”² The general rule is that services acquired by contract generally are chargeable to the appropriation current at the time the services are rendered.³ However, the Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is executed, or to charge funds current at the time the services are performed, depends upon whether the services are severable or entire⁴ (i.e., non-severable).

GAO considers services to be non-severable when they constitute an entire job or single undertaking with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year. GAO’s *Principles of Federal Appropriations Law* presents a contract to conduct a study and prepare a final report as an example of non-severable services and concludes that non-severable services must be funded entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years. Following that logic, GAO has further determined that contracts for non-severable services cannot be incrementally funded.⁵

Severable services are continuing and recurring in nature (e.g., systems development support provided on a level-of-effort basis). “Severable” means tasks can be separated into components that independently meet a separate and ongoing need of the Government. When the need for a discrete portion of the services arises in a subsequent fiscal year, that portion is considered severable and chargeable to appropriations available in the subsequent fiscal year. A notable exception to this general rule was authorized when Congress passed the Federal Acquisition Streamlining Act⁶ (FASA) in 1994, which gave agencies greater flexibility in their use of fiscal year appropriations. As a result, agencies may enter into a contract for severable services beginning in one fiscal year and ending in the next fiscal year and fully fund the contract from the initial year’s appropriation, **provided** that the period of the contract awarded, option exercised, or order placed does not exceed 1 year.

While services may be classified as either severable or non-severable, it is possible for a single contract to contain a significant portion of both types. In such cases, they must be structured as separate contract line items and funded in accordance with appropriations

² GAO-04-261SP, *Principles of Federal Appropriations Law—Volume I*, p. 5-11. Citations related to this principle are numerous. See, for example, 33 Comp. Gen. 57, 61 (1953); 16 Comp. Gen 37 (1936); B-317139, Jun 1, 2009; B-289801, Dec 30, 2002; B-282601, Sep 27, 1999; B-240264, Feb 7, 1994; B-241415, Jun 8, 1992; B-235678, Jul 30, 1990. The underlying statute is 31 U.S.C 1502(a).

³ 38 Comp. Gen 316 (1958).

⁴ GAO-04-261SP, *Principles of Federal Appropriations Law—Volume I*, p. 5-23.

⁵ 71 Comp Gen 428 (1992). These concepts were re-confirmed in B-317139, Matter of Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Non-severable Services Contract; and B-240264, Matter of: *Incremental Funding of U. S. Fish and Wildlife Service Research Work*, February 7, 1994.

⁶ 41 U.S.C 2531, implemented by FAR 32.703-3 and 37.106.

law and the guidance included in this APM. However, in a situation where the contract requirement is primarily for one type of service (e.g., non-severable), but contains incidental services of the second type (e.g., severable) that cannot be feasibly separated, the contract should be managed and funded consistent with its core services. Consider, for example, a 24-month contract for a non-severable research project that includes a requirement for ongoing analysis of drug compounds as a minor component. There is no need to artificially separate the severable drug analysis activity from the core contract requirement for non-severable research services. This contract would most appropriately be considered and managed as a contract for non-severable services given that the severable component is incidental to the contract's primary purpose.

c. *Anti-Deficiency Act Compliance.*

The ADA (codified at [31 U.S.C. 1341](#) *et seq.*) prohibits Government agencies (and their officers or employees) from obligating the Government, by contract or otherwise, in excess of or in advance of appropriations, unless authorized by a specific statute.⁷ FAR 32.702, *Policy*, cautions Contracting Officers that ADA compliance is required whenever a contract action will involve funding.

The ADA requires the heads of executive agencies to report ADA violations (through the Office of Management and Budget [OMB]) to the President and the Congress, with a copy to the Government Accountability Office (GAO). To comply with this requirement, HHS employees must report any suspected ADA violation immediately to the OPDIV or STAFFDIV Chief Financial Officer (CFO), who, in turn, will report the matter to the HHS Deputy CFO (Office of Finance within the Office of the Assistant Secretary for Financial Resources [ASFR]).

d. *Contract Formation and Funding Strategies for Acquiring Severable Services.*

Severable services—those that are continuing and recurring in nature—must be funded from the appropriation available during the fiscal year of performance. Depending on the requirement and type of contract chosen, when acquiring severable services, one of the following funding strategies is appropriate: multi-year contract for severable services, incremental funding, or use of options. Each of these funding techniques is described in this section. Those descriptions are followed by a discussion of the HHS policy preference for use of options and full funding of options. (**NOTE:** Section 4.e. of this APM identifies funding strategies for acquiring non-severable services.)

⁷ *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement*, Ralph C. Nash, Jr., Steven L. Schooner, and Karen R. O'Brien. George Washington University Law School Government Contracts Program, 2nd Edition, 1998, pp. 30-31.

- ***Multi-year Contracts for Severable Services***

Under the authority of [41 U.S.C. 254c](#), a contract for severable services may be fully funded at initial award for up to 5 years.⁸

- ***Incremental Funding of Contracts for Severable Services***

Incremental funding, as defined in section 4.a. above, may be used only when acquiring severable services and full funding is not available at initial award. At the time of award, the Government obligates an amount to cover a specified period or increment of performance and establishes a schedule for allotment of additional “increments.” This APM expressly allows use of incremental funding in cost-reimbursement, fixed-price, time and materials, and labor-hour contracts⁹ for severable services.

Animal-holding contracts (i.e., requirements for care and feeding of laboratory animals) provide an illustration of when the use of incremental funding is appropriate. For example, a contract may provide for a total estimated cost-plus-fixed-fee for such services required over a 5-year period of performance. The required services are clearly severable—care and feeding is a daily event. The contract establishes an up-front intention (given the circumstances known at time of award) to continue for the full 5-year term (at the total estimated cost-plus-fixed-fee), **provided** that appropriations are available in the subsequent years. At award, the contract’s initial term (not to exceed 1 year) must be funded from the current year’s appropriation. The amount obligated should cover the estimated cost of the initial term, plus a pro-rated portion of the total fixed fee commensurate with the amount obligated for the estimated cost. Subsequent years are handled in a similar manner, always using the appropriation account current for each specific year involved. If a continuing resolution (CR) during a subsequent year limits the funds available, a lesser amount may be incrementally funded to continue performance, pending later obligation of the amount required to fund the balance. To acquire less than all of the covered services for the full 5-year period would require a termination for convenience of the Government.

⁸ FASA also authorized the use of multi-year contracting to obligate the entire amount of an up-to-5-year contract from the fiscal year appropriation current at the time of contract award, even though the supplies or services procured during the remainder of the contract do not constitute needs of the fiscal year of contract award. In this type of “multi-year contract,” which is an exception to the *Bona Fide Needs* rule, a cancellation ceiling is not required because the contract is funded in full at award and the issue of a cancellation ceiling is moot. Although available for HHS use, we expect that use of this authority to acquire severable services will be limited.

⁹ The Department of Defense, the Department of State, and the National Aeronautics and Space Administration also have authorized in their FAR supplements the use of incremental funding when acquiring severable services under contract types other than cost-reimbursement contracts.

- ***Use of Options under Contracts for Severable Services***

The fundamental difference between the incremental funding example above and a contract that includes options is that any continuation of the contract beyond the base period is at the unilateral discretion (*option*) of the Government. All options, regardless of the type of services involved, must comply with FAR Subpart 17.2. Use of options as a unilateral right of the Government requires their identification in the solicitation, evaluation of their terms and pricing as part of the award determination, and their inclusion in the contract award.

An example would be a contract for janitorial services, generally awarded at a firm-fixed price and paid in monthly installments. Contracts for severable services typically establish a base period funded from the current year's appropriation, with one or more option years that reflect a *bona fide* need of separate future fiscal years. As options are exercised, the option year funding must be charged to the fiscal-year appropriation available for the year covered by the option.

Options may not be forward funded.¹⁰ An OPDIV or STAFFDIV operating with annual appropriations cannot use excess funds available at the close of a particular fiscal year to exercise an option for services that will be performed in the subsequent fiscal year. A significant exception to this general rule was authorized by FASA as implemented by FAR 32.703-3, *Contracts crossing fiscal years*. Applying this authority to the janitorial contract example, the Contracting Officer could establish a base period that begins in the current fiscal year and extends into the next fiscal year, fully funding it from the current fiscal year appropriation, **provided** that the base period does not exceed 1 year. Option periods may be similarly structured and funded, as long as they each do not exceed 1 year. Moving such contracts away from fiscal year-based option periods can also aid in avoiding disruptions to critical services that often occur during periods when operating under a continuing resolution (see section 4.h. below).

- ***Policy Preferences and Implications of Funding Strategy for Acquiring Severable Services***

As specified in 332.702-70(b), when severable services will cover more than 1 year, it is HHS policy to structure contracts with a base period (not to exceed 1 year) and annual options. This approach is preferred over the use of incremental funding because the use of options limits the Department's liability, i.e., the Department would not incur termination costs.

When funding options for severable services, the preference is for full funding of each option. When the amount needed to fully fund the option is not available (e.g., budgetary constraints, including those imposed by a CR), options may be incrementally funded, provided that the appropriate FAR and HHSAR clauses are

¹⁰ See B-308026, Matter of: National Labor Relations Board—Improper Obligation of Severable Services Contract.

included in the contract and the then-current appropriation is used to provide the funding. This last point is critical because the use of incremental funding to partially fund an option may eliminate the flexibilities authorized by FAR 32.703-3(b) with regard to funding contracts that cross fiscal years. For example, if an option to extend a contract from August 1, 2010 to July 31, 2011 is fully funded, the entire 12-month period may be funded using an FY 2010 appropriation. If, however, the option year will be funded on an incremental basis, the answer would be different. Assuming the option exercise contained four increments of 3 months each, the first increment (August 1, 2010—October 31, 2010) could be funded with FY 2010 funds. However, the second increment (November 1, 2010—January 31, 2011) and the subsequent two increments require use of FY 2011 funds. Because these increments begin in FY 2011, they cannot be funded with FY 2010 funds (which would have been acceptable if the option was fully funded for all 12 months upon execution during FY 2010).

Contracting Officers must closely administer contracts where the performance of subsequent periods is predicated on the availability and obligation of additional funds (whether options or incremental funding). Also, Contracting Officers must remind both the Contracting Officer's Technical Representative (COTR) and the contractor that performance can continue only upon the Contracting Officer's notice and execution of the appropriate contract modification. Any direction to encourage performance beyond the level of funding available may result in an ADA violation.

e. *Contract Formation and Funding Strategies for Acquiring Non-severable Services.*

Non-severable services, i.e., those that constitute an entire job or single undertaking with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, must be funded entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years, unless the multi-year contracting authority specified in FAR Subpart 17.1 is used.

This section describes the available means to fund contracts for non-severable services: full funding, options, and multi-year contracting. The discussion of multi-year contracting explains the use and administration of the cancellation ceiling and the use of options to acquire services beyond the 5-year limit in FAR Subpart 17.1. This section also addresses the use of phases when acquiring non-severable services. Phases are distinct from options and are not considered a form of funding; rather they represent a means to manage the work under the contract.

- ***Fully Funded Contracts for Non-severable Services***

Contracts for non-severable services must be fully funded from the appropriation current when the contract is awarded unless authorized by statute, i.e., incremental funding, as described in sections 4.a. and d. above, is not permitted. Statutorily authorized exceptions include: multi-year or no-year appropriations; agency-specific statutory authority; or the general authority to use multi-year contracting as discussed under the next bullet.

An example of non-severable services would be a contract with a consulting firm to evaluate the HHS internal control program. Within 18 months of award, the firm has to conduct interviews at several OPDIVs, develop case studies, and prepare a final report with findings and recommendations for program improvement. While the contract may require interim products, the purpose of the contract and the value to the Department is the final report. The services constitute a specific, entire job that cannot be subdivided for separate performance in each fiscal year. Accordingly, the contract must be fully funded from an appropriation current at the time of contract award, notwithstanding that performance extends into the following fiscal year.¹¹

OPDIVs and STAFFDIVs should be mindful of the requirement to fully fund contracts for non-severable services when preparing their budgets, program plans, and acquisition plans.

- ***Multi-year Contracting***

HHS may use the general authority conferred by 41 U.S.C. 254c and FAR Subpart 17.1 to enter into multi-year contracts. This special contracting method may be used to acquire up to 5 years of planned requirements; however, it is not considered “incremental funding” within the meaning of FAR Subpart 32.7 and HHSAR 332.7. HHS does not have specific statutory authority to exceed the 5-year limitation in FAR 17.104(a).

When using multi-year contracting procedures to acquire non-severable services and annually fund program requirements, the funding must be provided in full at the start of each program year from a then-current appropriation. Use of this type of multi-year contract also requires that a cancellation ceiling be established and fully funded at the time of contract award. Each program year under a multi-year contract represents discrete funding for that year. If funds remain at the end of a given program year, they cannot be “carried over” to a subsequent program year. Additionally, the use of incremental funding in the manner prescribed in Subpart 332.7 is prohibited in any acquisition using multi-year contracting procedures.

While noted in the FAR as a flexible contracting method applicable to a wide range of acquisitions, the form of multi-year contracting for acquisition of non-severable services explained in this section is a complex acquisition method requiring careful planning, budgeting, and application of specialized contracting expertise. Within HHS, multi-year contracting appears to lend itself to certain classes of acquisitions for non-severable services—e.g., certain types of research that represent established, reasonably stable requirements—as an alternative means of contracting for those types of services using annual appropriations.

A new Subpart 317.1 was added to the HHSAR in January 2010 to address the use of multi-year contracting, including individual and class determinations and approval authority.

¹¹ GAO-04-261SP, *Principles of Federal Appropriations Law—Volume I*, p. 5-24.

- o Determination of the Cancellation Ceiling

During acquisition planning, as part of the independent government cost estimate, the Government must develop an internal estimate of potential cancellation costs, considering the facts of the acquisition and the issues discussed in FAR 17.106-1(c). The resulting solicitation should request that offerors identify the amount and basis for their cancellation ceilings within their cost/price proposals. The content of competitive proposals and discussions may require changes to the cancellation ceiling before final negotiation and award. Upon award, the Government **commits** to the full contract term and the full, aggregate requirement, subject to the availability of appropriations for the subsequent years. The amount **obligated** at award must fund the initial year’s requirements plus the full cancellation ceiling.

Cancellation is the decision not to continue performance (in any year other than the first or last year of performance) and not to fund the next and all subsequent fiscal years due to the unavailability of appropriations. It stops the contract from moving into the next program year and cancels all remaining years. If a multi-year contract is cancelled, the Government’s liability is limited to the amount of the cancellation ceiling. Final settlement is a matter of contract negotiation.

A multi-year contract (like any contract) may be terminated for convenience at any time (in whole or in part). In the event of a total termination for convenience, the liability of the Government shall not exceed the amount obligated for performance, plus the cancellation ceiling.

Table 1 below provides a multi-year contract example using a 5-year contract for a non-severable research study to illustrate contract formation and funding requirements, as well as the amortization of the cancellation ceiling.

Table 1. Multi-year Contract Funding Illustration

	Fiscal Year					Totals
	1	2	3	4	5	
Initial year program obligation	\$20M	---	---	---	---	---
Obligation of cancellation ceiling	\$5M	N/A	N/A	N/A	N/A	---
Amortized cancellation liability	N/A	\$4M	\$3M	\$2M	0	0
Annual program performance level	\$20M	\$20M	\$20M	\$20M	\$20M	\$100M

In this example, the total estimated cost-plus-fixed-fee for the full, 5-year performance of all services is \$100 million. At contract award, the Contracting Officer obligates a total of \$25 million—\$20 million for the initial year’s program requirements and \$5 million for the cancellation ceiling. The cancellation ceiling, per FAR 17.106-1(c), is established by the

Contracting Officer to account for non-recurring costs,¹² while excluding all labor and other expenses that might be incurred during performance of subsequent-year program requirements. Fully obligated in Year 1, the cancellation ceiling amortizes each program year to reflect the decrease in the Government's cancellation liability as subsequent program years are funded and performed.¹³ With the availability of an appropriation for Year 5 (final year), any liability for cancellation ends and the remaining \$2 million of the cancellation ceiling is no longer needed.

In the event of cancellation, the contractor would be compensated in an amount not in excess of the cancellation ceiling applicable at the time of cancellation. As shown in Table 1 above, if cancellation occurred at the conclusion of Year 2, the maximum liability of the Government would be \$3 million. The final determination of compensation due to the contractor, however, is a matter of negotiation and is handled as if the contract had been terminated for convenience. The contractor must submit a detailed claim and justify all costs for which payment is sought. Guidance on handling cancellations is provided by the clause at [FAR 52.217-2](#), *Cancellation Under Multi-year Contracts*.

- ***Use of Options under Contracts for Non-severable Services***

In addition to the use of options to fund a new period during which the contractor will provide continuing severable services, it is also possible to use options to authorize the contractor to undertake tasks that are non-severable in nature. When used to acquire non-severable services, an option is considered a *bona fide* need of the year in which it is exercised and must be either: (1) funded in full at that time irrespective of the time period covered, or (2) structured as a separate multi-year requirement with its own cancellation ceiling and funded accordingly.

As an example of the first case, consider a project where the contractor is required to perform clinical research over a 36-month period of performance. The statement of work contains three discrete requirements, each of which will end with a product of value to the Government. Upon award, the base period is funded to cover a 12-month drug study resulting in a final report. The second and third requirements are included as options: an 18-month clinical drug trial with an accompanying final report; followed by a 6-month effort that will require a consolidation of the data and findings of the first two requirements and the production of a consolidated final report. Upon submission of the final report for the drug study, the Government may then exercise the option to authorize the clinical drug trial. At the conclusion of the clinical drug

¹² *Non-recurring costs* means those costs that are generally incurred on a one-time basis, such as: lab/plant or equipment relocation or rearrangement necessary to undertake the contract work; acquisition of special equipment; and specialized workforce training). They are distinguished from recurring costs—the labor, materials and other costs that will directly and repeatedly be incurred as the work is performed.

¹³ In the near future, HHS plans to issue guidance regarding the status of unused funds resulting from amortization of the cancellation ceiling. Pending this proposed guidance, contracts shall not carry over unused cancellation funding.

trial, the Government may exercise the third option. As constructed, each requirement is a non-severable, discrete work segment that must be fully funded from an appropriation source that is current at the time the work is authorized to begin. The funds for each requirement, regardless of duration, must be kept separate and used only for the work covered by that discrete work segment.

The above-described approach is appropriate only if the products resulting from each requirement have independent merit and value to the Government. If the consolidated final report is the only item of value, such that termination of the contract prior to its completion would deny the Government the value sought, then the required services in their entirety are non-severable. Thus, the contract must be funded in full using the appropriation current at the time of award, or funded as a multi-year effort. However, even if the requirement is fully funded, the Government may use “phases” as described below.

The second case concerns the use of an option structured as a separate multi-year requirement with its own cancellation ceiling and annual program funding. Because the FAR limits the term of a multi-year contract to 5 years, an option may **not** be used to continue the performance of the original requirement beyond the 5-year limitation. The inclusion of an option to extend the multi-year funding and performance of the original non-severable research study illustrated in Table 1 above would violate the 5-year limitation.

However, HHS could include one or more options to acquire **related non-severable services**¹⁴ that are independent of the original multi-year requirement, thereby continuing the overall contract for more than 5 years, even though the performance of any multi-year segment is constrained by the 5-year limit in FAR 17.104(a).

For example, assume that the multi-year contract illustrated in Table 1 has two line items. The first line item covers the original 5-year study, concluding in a final report documenting the research results. The second line item covers an option for related non-severable services—a 3-year follow-up study of research participants. Upon exercise, the option could be either funded in full or funded as a separate multi-year requirement (if originally so structured). In addition, when an option will be structured as a multi-year effort, all terms, including the negotiation of the cancellation ceiling, must be evaluated as part of the original contract award decision.

In developing contracts and options to acquire non-severable services, each requirement, line item, or option must stand alone and provide independent merit and value to the Government. Contracting Officers shall not artificially divide requirements when those requirements are part of one integrated activity that only benefits the Government upon final completion of all related work.

¹⁴ While this section focuses on the use of options to acquire non-severable services, it also is possible to include an option for related severable services in a contract for non-severable services, including a multi-year contract. Any such option must be funded from the then-current appropriation, comply with FAR Subpart 17.2, and follow the applicable guidance in this APM.

- ***Use of Phases Under Contracts for Non-severable Services***

Using the clinical research project example above, if it is determined that all three work segments are integral parts of one non-severable requirement (i.e., it is not appropriate to treat them as options), the contract statement of work may be structured to define three phases and to divide the work into stages of accomplishment. The contractor must complete, and the Contracting Officer must approve, each phase before the contractor may begin work on the next phase. While the use of phases can facilitate the management of contractor progress during the execution of complex research, development, or demonstration projects, phases are not equivalent to options and the terms should not be used interchangeably. Phases do not provide a means to separately fund the work involved because the simple separation of an otherwise entire (non-severable) requirement into phases or similar grouping of tasks does not render a requirement severable.

- f. ***Using Indefinite-Delivery/Indefinite-Quantity Contracts to Acquire Severable and Non-severable Services.***

Indefinite-delivery/indefinite-quantity (ID/IQ) contracts establish a guaranteed minimum amount that the Government is committed to purchase. The Contracting Officer must obligate appropriations available at the time of the ID/IQ award to cover the required minimum, and at the time of each individual task order award consistent with the type of services acquired (severable or non-severable).

It is possible to order both severable and non-severable services under a single ID/IQ contract. Using an ID/IQ contract for information technology services to develop, enhance and maintain a set of OPDIV systems as an example, Task Order 1 is awarded to convert a system from a client-server to a web-based application. There are interim products, but the contractual commitment is to deliver a working web-based application within 18 months of award. The required work represents a single undertaking, thus the services are non-severable, and the Contracting Officer must obligate the entire task order value at the time of award execution using current appropriations.

Task Order 2 under the same ID/IQ contract requires the contractor to provide continuous maintenance support for a different system. The task order establishes and funds an estimated level-of-effort for a base period and 3 option years. Here, the contractual commitment is to provide hours of labor to deal with system problems as they occur. The services are needed on a continual and recurring basis and do not represent a single undertaking; thus they are severable. The Contracting Officer must fund the base period and the options from appropriations current at the time of the award or option exercise.

g. *Contract Modifications: Principles Applicable to Non-severable and Severable Services.*

A modification that extends the contract performance period without an obligation of additional funds is commonly referred to as a “no-cost extension.”

- ***Non-severable Services***

Generally, a no-cost extension may be used to extend the performance period of a contract for non-severable services. This assumes that the original obligation represented a *bona fide* need of the fiscal year in which the contract was executed. If the completion of the end product(s) will require more time than originally established, a no-cost extension may be granted if it is determined to be in the Government’s best interests.

A modification within the general scope of the original contract that involves an adjustment to the contract price requires careful consideration when determining the proper appropriation chargeable. Most government contracts contain clauses which, under certain conditions, allow the contractor to assert a claim and make the government liable for possible adjustments in the contract price. Such liability may arise due to changes in specifications, government-caused delay, changed conditions, or other circumstances.

When an upward price adjustment is requested in a subsequent year for other than a cost-reimbursement contract, and is attributable to an “antecedent liability” (i.e., the government’s liability arises and is enforceable under a provision in the original contract), the modification must be funded from the appropriation current at the time the contract was originally executed.¹⁵ Under a cost-reimbursement contract, any increase in the contract cost ceiling (i.e., total estimated cost) is solely a matter of Government discretion, and must be charged to an appropriation current at the time of the contract modification.¹⁶

A contract modification that is beyond the general scope of the original contract or is not made pursuant to a provision of the original contract is *not* based on an antecedent liability and is, therefore, chargeable to an appropriation current at the time the modification is executed.¹⁷ Further, this type of modification requires: compliance with the provisions of FAR Subpart [6.3](#) concerning other than full and open competition, and the signature of both parties.

- ***Severable Services***

Under an annual appropriation, a modification to authorize a no-cost extension of a contract for severable services is permitted only if it is for the continuation of the

¹⁵ GAO -04-261SP, *Principles of Federal Appropriations Law—Volume I*, pp. 5-34—5-35.

¹⁶ *Ibid*, p. 5-36. See also B-195732, September 23, 1982, 61 Comp. Gen. 609.

¹⁷ GAO Decision B-219829 and 65 Comp Gen 741.

same services and would not extend the performance period involved beyond 12 months. This limitation includes situations involving an excusable delay or Government-caused delay—neither justifies a no-cost extension that would extend the funded performance period beyond 12 months.¹⁸ Given the above, and the common HHS practice to structure contracts for severable services with a base period and option periods of 12 months each, the use of a no-cost extension under a contract for severable services should be a very rare occurrence. Further, a no-cost extension cannot be used to add work that is outside the scope of the original contract.

h. *Continuing Resolutions.*

In 30 of the 34 fiscal years between 1977 and 2010, Congress and the President did not complete action on the majority of the 13 regular appropriations by the start of the fiscal year.¹⁹ As a result, HHS generally does not receive its budget at the start of the fiscal year. However, to allow for continued Government operations, Congress passes one or more temporary funding measures, known as CRs, pending passage of regular appropriations. CRs create contract funding challenges that contracting activities must address to ensure achievement of HHS mission objectives and compliance with both federal appropriations law and the FAR. Because the terms of CRs may vary, for each CR, specific operating guidance will be issued at the Departmental level by the ASFR, e.g., to indicate the availability of funds for existing and new projects or activities; identify any specific limits or constraints; and establish the authorized level and timing of obligations. OPDIVs may supplement the general Departmental guidance on the CR to reflect the specific conditions and limitations imposed by the CR on their operations.

Contracting activities should take the following actions to ensure that contract funding decisions during a CR are made in an appropriate manner:

- ***Confer with OPDIV and STAFFDIV budget/finance personnel*** to determine the availability of funds for existing and new contract requirements. OPDIV and STAFFDIV budget/finance staff will prepare an operating plan to ensure that available funds are used as efficiently and effectively as possible and minimize disruption of operations.
- ***Carefully assess contract funding decisions*** to ensure compliance with Departmental guidance regarding the specific terms of a CR and guard against violations of the ADA.

¹⁸ Similarly it is not appropriate to use the clause at FAR 52.217-8, *Option to Extend Services*, without providing new funding from a current appropriation. This practice essentially provides a “no-cost extension” allowing performance to continue beyond the life of the annual appropriation. Proper use of this authority requires obligation of additional funding from a then-current appropriation.

¹⁹ Frequency of CR occurrence is drawn from two sources—1) *Principles of Federal Appropriations Law: Third Edition, Volume II*, GAO-06-382SP, February 2006, Chapter 8, *Continuing Resolutions*, p. 8-3; and 2) OMB Circular A-11, *Preparation, Submission and Execution of the Budget*, Section 123, *Apportionments Under Continuing Resolutions*, p. 2.

- ***Follow prudent contracting principles and practices***, consistent with appropriations law principles, HHS guidance, and the OPDIV or STAFFDIV operating plan for the period of the CR. While the terms of CRs may vary, the following general guidance will ensure compliance with appropriations law requirements:
 - ***Existing contracts*** may be funded for twelve months or a more limited period, depending on OPDIV or STAFFDIV policy and practices. A cost-reimbursement contract for severable services is used to illustrate this point. If the award was made on July 1 of the prior fiscal year and incrementally funded through September 30 and the OPDIV had planned to fund the next increment on October 1, covering performance through the following September 30, it will be affected by a CR as follows: If the CR authorizes operations through November 15, depending on the OPDIV's prior practices and operating plan, this increment may be funded (1) for needs through November 15; (2) in full (through September 30); or (3) for an increment beyond November 15 but less than the full year (to preserve budgetary flexibility prior to enactment of a regular appropriations act). Each of these choices must be coordinated with the responsible program and budget/finance offices.
 - ***New or follow-on contracts for recurring services*** may be awarded if —
 - they provide continued support for agency operations or existing program support;
 - they represent an acquisition of services consistent with projects, activities, or initiatives authorized in the prior fiscal year; and
 - funding is available and consistent with the terms of the applicable CR.

Because most federal fiscal years begin with at least one CR, when developing solicitations for recurring services where the contract is expected to be awarded in the following fiscal year, the solicitation should include the clause at FAR [52.232-18](#), *Availability of Funds*. Per FAR 32.703-2, this clause is intended for use only in solicitations and contracts for operations and maintenance and continuing services (1) that are necessary for normal operations; and (2) for which Congress previously had consistently appropriated funds.

During a CR, alternatives available to provide for uninterrupted services will be driven by the terms of the CR itself, Departmental guidance, and the OPDIV's prior practices and operating plan. A solicitation for janitorial services (a common recurring need) may be used to illustrate this point. The solicitation (containing the *Availability of Funds* clause) was issued in one fiscal year, with award planned for the next fiscal year. Prices were sought for a base period (date of award through September 30) and 4 option years. Because janitorial services are generally acquired at a firm-fixed-price, the potential alternatives are to: (1) fully fund the base period; (2) negotiate the price and fund a shortened base period; or (3) defer action on the pending award and extend the existing janitorial services contract using the clause at FAR [52.217-8](#), *Option to Extend Services*. Again,

each of these choices must be coordinated with the responsible program and budget/finance offices.

- “*New starts*,” i.e., programs, projects, activities or initiatives that were not authorized or funded during the prior fiscal year, shall not be started or awarded during a CR, unless specifically authorized by the terms of the CR.

5. Impact on the HHSAR. The interim HHSAR coverage (attached) modifies the HHSAR, as follows:

a. *307.7108—Statement of work*

Paragraph (c) is revised to clarify the use of phases as part of a statement of work in order to ensure consistency with the funding principles described in other sections of the HHSAR and this APM.

b. *Subpart 317.1—Multi-year Contracting*

317.105-1 revises paragraph (c) to clarify how multi-year contracts must be funded, and adds paragraph (d) to prohibit the use of incremental funding as described in Subpart 332.7 in any acquisition using multi-year contracting. The entire text of 317.105-1 is included in the attached interim HHSAR coverage for ease of reference/understanding. All other content was added to the HHSAR as published in the *Federal Register* on November 27, 2009 (effective January 26, 2010), and updated by the Technical Corrections published on April 26, 2010.

c. *Subpart 332.7—Contract Funding.*

- 332.702 is added to establish HHS policy for reporting suspected ADA violations.
- 332.702-70 is added to clarify HHS contract funding policy including (1) establishing specific circumstances that must be present to use incremental funding; (2) establishing a policy preference for use of options rather than incremental funding for contracts for severable services that will cover more than 1 year; and (3) expressly prohibiting the use of incremental funding in contracts for non-severable services.
- 332.703-1 is revised to clarify the general guidelines applicable to incrementally funded contracts, including that the estimated total cost drives the determination of applicable pre-award requirements, justifications, clearances, approvals, and other dollar-based requirements.
- 332.703-71 is added to provide guidance on incrementally funded cost-reimbursement contracts.
- 332.703-72 is added to provide guidance on incrementally funded fixed-price, time and materials, and labor-hour contracts.

- 332.705-2 is added to prescribe the use of solicitation provisions and contract clauses appropriate to specific contract types when using incremental funding.

d. *Subpart 352.2—Texts of Provisions and Clauses.*

- 352.232-70 is added to provide a means to identify in the solicitation the period of time the incremental funding is estimated to cover.
- Two new clauses are added to address the appropriate use of incremental funding for severable services under specific contract types:
 - 352.232-71 is prescribed for use in all cost-reimbursement contracts involving incremental funding to clearly state the total estimated contract costs, the portion being incrementally funded, and the period of time the incremental funding is expected to cover.
 - 352.232-72 is prescribed for use in all fixed-price, time and materials, and labor-hour contracts using incremental funding, to place limits on the Government’s obligation and establish a mutually agreed schedule for the allotment of funds to the contract.

6. OPDIV and STAFFDIV Responsibilities. As of the effective date of this APM, OPDIVs and STAFFDIVs are expected to comply with the requirements stated herein for new solicitations and applicable contract actions, including modifications. Specifically, OPDIV and STAFFDIV Contracting Activities must do the following:

a. *Near-term actions.*

- For new requirements in process, if the funding strategy is not in compliance with this APM:
 - If the solicitation has not been issued, make all necessary changes to bring it into compliance.
 - If the solicitation has been issued but proposals have not been received, amend the solicitation to include the appropriate provision(s) and clause(s) shown in the interim HHSAR coverage (attached).
 - If proposals have been received, provide the appropriate new clause(s) to all offerors still under consideration and include the clause(s) in the resultant contract(s).
- In the remote event that there are any existing incrementally funded contracts for non-severable services (or other types of non-compliance), consult with the OPDIV’s or STAFFDIV’s budget/finance office and OGC for next steps.

b. Ongoing responsibilities.

- Consistent with 304.7100, Heads of Contracting Activity shall establish interdisciplinary pre- and post-award quality assurance procedures (including the contracting, finance/budget, legal, and program functions) to ensure the appropriate planning, award, and administration of multi-year contracts.
- Project Officers shall coordinate any Acquisition Plan contemplating the use of multi-year contracting procedures with the appropriate OPDIV or STAFFDIV budget/finance officials to ensure compliance with funding requirements, including the up-front funding of the full amount of the estimated cancellation ceiling.
- Contracting Officers shall verify that DCIS entries for the data field *Multi-Year Contract* (Yes or No—FPDS/NG data element #6C) are accurate and consistent with the content of section 4.e. of this APM and Subpart 317.1.

Attachment

cc: ASFR
OGC
OPDIV and STAFFDIV Senior Management Officials

INTERIM HHSAR COVERAGE (based on 4/26/10 version of the HHSAR)

(1) **Subpart 307.7.** *Revise HHSAR 307.7108(c) as follows:*

307.7108—Statement of Work

* * * * * (The paragraphs preceding 307.7108(c) are unchanged.)

(c) Phasing. When appropriate, the SOW and the associated delivery schedule may be divided into phases representing stages of accomplishment. Based upon written performance evaluation criteria for each phase, the Government must approve in writing each phase before performance of the next phase.

(2) **Subpart 317.1.** *Under 317.105-1, revise paragraph (c) and add a new paragraph (d) as follows:*

[This entire section is reprinted below for ease of reference and understanding. All of the content, with the exception of paragraphs (c) and (d), was added to the HHSAR as published in the *Federal Register* on November 27, 2009, and updated by the Technical Corrections published on April 26, 2010. Paragraph (c) below, as struck through, was added by the Technical Corrections published on April 26, 2010, but is changed as shown.]

317.105-1 Uses.

(a) Each HCA determination to use multi-year contracting, as defined in FAR 17.103, is limited to individual acquisitions where the full estimated cancellation ceiling does not exceed 20 percent of the total contract value over the multi-year term or \$11.5 million, whichever is less. Cancellation ceiling provisions shall conform to the requirements of FAR 17.106-1(c). The determination is not delegable and shall address the issues in FAR 17.105-1(a) and the following:

(1) The amount of, and basis for, the proposed cancellation ceiling;

(2) Identification and assignment of a Contracting Officer holding a FAC-C Level III certification or, alternatively, one familiar with the application of this contracting method;

(3) Availability of appropriations to fund the obligation of total contract costs for the first year of performance plus the estimated amount of the full cancellation ceiling;

(4) Reasonable expectation that, throughout the contemplated contract performance period, the OPDIV, through its annual budget request, will seek funding for the contract at the level necessary to avoid contract cancellation; and

(5) Program requirements are reasonably stable and the associated technical risks are not excessive--i.e., not of the nature or level to jeopardize contract completion or result in its cancellation.

Upon SPE request, the HCA shall provide a copy of each determination (other than those specified in 317.105-1(b) below).

(b) (1) SPE approval is required for any—

- (i) Individual determination to use multi-year contracting with a cancellation ceiling in excess of the limits in 317.105-1(a); or
- (ii) Class determination (see FAR Subpart 1.7).

(2) A determination involving a cancellation ceiling in excess of the limits in 317.105-1(a) shall present a compelling justification for the estimated cancellation ceiling. When the estimated cancellation ceiling exceeds \$11.5 million, the determination shall be accompanied by a draft congressional notification letter pursuant to FAR 17.108 and 317.108.

~~[(e) The funding required for performance of each year of a multi-year contract under FAR Subpart 17.1 and this subpart must be provided in full at the start of that program year.]~~

(c) When using multi-year contracting procedures to acquire non-severable services and annually fund program requirements, such funding must be provided in full at the start of each program year from a then-current appropriation. Use of this type of multi-year contract also requires that a cancellation ceiling be established and fully funded at the time of contract award.

(d) The use of incremental funding in the manner prescribed in 332.7 is prohibited in any acquisition using multi-year contracting procedures.

(3) *Subpart 332.7.* *Under Subpart 332.7, add sections 332.702, 332.702-70, 332.703-71, and 332.703-72, and paragraphs 332.703(b) and 332.705-2(b);*

PART 332—CONTRACT FINANCING

Subpart 332.7—Contract Funding

332.702 Policy

Departmental employees shall report any suspected violation of the Anti-Deficiency Act (31 U.S.C. 1341) immediately to the OPDIV Chief Financial Officer (CFO), who in turn will report the matter to the HHS Deputy CFO.

332.702-70 Contract funding policy

It is HHS policy to--

- (a) Fully fund, upon execution, any contract for non-severable services, unless the services are acquired using multi-year contracting procedures pursuant to FAR Subpart 17.1 and Subpart 317.1.
- (b) Structure contracts with a base period (not to exceed 1 year) and annual options, when severable services will cover more than 1 year. This approach is preferred over the use of incremental funding.
- (c) Fully fund the base period (not to exceed 1 year) and each option, when using options for any contract for severable services.
- (d) Allow Contracting Officers to use incremental funding as prescribed in 332.703-1, when full funding is not possible -- notwithstanding (c) above. An incrementally funded contract is a multiple-year contract in which funds are allocated to cover specific periods or increments of performance consistent with the requirements of 332.703-1.
- (e) Prohibit the use of incremental funding in contracts for non-severable services. Guidance on distinguishing between severable and non-severable services is available in the Government Accountability Office's publication *Principles of Federal Appropriations Law* ("GAO Red Book") at <http://www.gao.gov/special.pubs/redbook1.html>.

332.703 Contract funding requirements.

332.703-1 General.

(There is no paragraph (a) in the HHSAR, because HHS is not supplementing FAR 32.703-1(a))

(b) The following requirements govern all solicitations and contracts using incremental funding, as appropriate:

(1) The Contracting Officer shall consider the estimated total cost/price of the contract, including all planned periods (including options) or other increments of performance when determining the requirements that must be met before contract execution – e.g., JOFOC, clearances, approvals.

(2) The solicitation and resultant contract shall include a SOW/PWS that describes the total project, covers the proposed multiple-year period of performance, and contains a schedule of planned periods (including options) or other increments of performance. The resultant contract shall also include the corresponding amount of funds planned for obligation for each planned period or other increment of performance. The separate periods or other increments of performance must be defined to independently meet an HHS need,

such that the services rendered during each period or increment of performance provide a specific material benefit that can stand alone if the remaining effort is not funded.

(3) The Contracting Officer shall request that offerors respond to the solicitation with technical and cost/price proposals for the entire project, and shall require distinct technical and cost/price break-outs of the planned periods or other increments of performance.

(4) Proposals shall be evaluated and any discussions and negotiations shall be conducted based upon the total project, including all planned periods or other increments of performance.

* * * * * (332.703-70 is unchanged)

332.703-71 Incrementally funded cost-reimbursement contracts.

Incremental funding may be used in cost-reimbursement contracts only as provided in 332.702-70(d) and when all of the following circumstances are present:

- (a) Funding of future periods beyond the initial year or increment of performance is provided from the appropriation account available for obligation at that time;
- (b) The project represents a *bona fide* need of the fiscal year in which the contract is awarded and initially funded (i.e., the initial period or increment of performance) and is also a *bona fide* need of each subsequent fiscal year whose appropriation will be used; and
- (c) The project's significance provides reasonable assurance that subsequent year appropriations will be made available to fund the project's continuation and completion.

332.703-72 Incrementally funded fixed-price, time and materials, and labor-hour contracts.

(a) Fixed-price, time and materials, and labor-hour contracts may be incrementally funded only if—

- (1) The contract is not for commercial items as defined in FAR 2.101; and
- (2) The contract base period or any option period—
 - (i) Is for severable services;
 - (ii) Does not exceed 1 year; and
 - (iii) Is funded using the appropriation in effect on the date the funds are obligated.

(b) Upon receipt of the contractor's notice under paragraph (c) of the clause at 352.232-72, Limitation of Government's Obligation, the Contracting Officer shall promptly provide written notice to the contractor that the Government is taking one of the following actions:

(1) Allotting additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(2) Terminating the contract for convenience; or

(3) Considering whether to allot additional funds. In this case the written notice shall further state that, in the interim: the contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(c) If the contract will receive no further funds, the Contracting Officer shall promptly give the contractor written notice of the Government's decision and terminate the contract for convenience.

(d) The Contracting Officer shall ensure that, in accordance with paragraph (b) of the clause at 352.232-72, Limitation of Government's Obligation, sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

(e) Although incremental funding may be used as outlined above, the Department's preference is to provide full funding when awarding fixed-price, time and materials and labor-hour contracts. If incremental funding is used, full funding is required as soon as funds become available.

* * * * * (332.704 is unchanged)

332.705 Solicitation provision and contract clauses.

332.705-2 Provision and clauses for limitation of cost or funds

(There is no paragraph (a) because HHS is not supplementing FAR 32.705(a))

(b) In addition to the clause at FAR 52.232-22, Limitation of Funds, the Contracting Officer shall insert:

(1) The provision provided at 352.232-70, "Incremental Funding," in all solicitations when a cost-reimbursement contract for severable services using incremental funding is contemplated. The provision provides a means for the Contracting Officer to insert a specific period or increment of performance that the initial funding is expected to cover.

(2) The clause provided at 352.232-71, "Estimated Cost – Incrementally Funded Contract," in all cost-reimbursement contracts for severable services using incremental

funding. The clause provides a means for the Contracting Officer to: (i) insert the initial funding obligated by the award; (ii) identify the period or increment of performance covered by the funding provided; and (iii) specify the start and end dates for such period or increment of performance, as required by the “Limitation of Funds” clause at FAR 52.232-22.

(3) The clause at 352.232-72, “Limitation of Government’s Obligation,” in all solicitations and resultant incrementally funded fixed-price, time and materials or labor-hour contracts for severable services. The Contracting Officer may revise the contractor’s notification period, in paragraph (c) of the clause, from “90” to “60” or “30” days, as appropriate.

(4) Subpart 352.2. *Under Subpart 352.2, add new sections 352.232-70, 352.232-71 and 352.232-72 as follows:*

PART 352 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 352.2 Texts of Provisions and Clauses

352.232-70 Incremental Funding.

As prescribed in 332.705-2(b)(1), the Contracting Officer shall insert the provision provided below in all solicitations when a cost-reimbursement contract for severable services using incremental funding is contemplated.

INCREMENTAL FUNDING (June 2010)

The Government intends to negotiate and award a cost-reimbursement contract using incremental funding as described in the clauses at FAR 52.232-22, “Limitation of Funds,” and 352.232-71, “Estimated Cost – Incrementally Funded Contract.” The initial obligation of funds under the contract is expected to cover [*insert the appropriate period or increment of performance*]. The Government intends to obligate additional funds up to and including the full estimated cost of the contract for the remaining years of performance by unilateral contract modification. However, the Government is not required to reimburse the Contractor for costs incurred in excess of the total amount obligated, nor is the Contractor required to perform beyond the level supported by the total amount obligated.

(End of provision)

352.232-71 Estimated Cost - Incrementally Funded Contract.

As prescribed in 332.705-2(b)(2), the Contracting Officer shall insert the clause provided below in “Section B: Supplies or Services and Prices/Costs” in all cost-reimbursement contracts for severable services using incremental funding. The Contracting Officer must insert applicable information as shown below, including information about the planned periods or other increments of performance and their associated funding. The Contracting Officer also may revise the language to reflect the specific type of cost-reimbursement contract awarded (e.g., cost-plus-fixed-fee, cost-plus-award-fee).

ESTIMATED COST - INCREMENTALLY FUNDED CONTRACT

(June 2010)

(a) The total estimated cost to the Government for full performance of this contract, including all allowable direct and indirect costs, is \$_____ [*insert full amount*].

(b) The following represents the schedule* by which the Government expects to allot funds to this contract:

CLIN, Task Number, or Description	Start Date of Period or Increment of Performance	End Date of Period or Increment of Performance	Estimated Cost (\$)	Fee (\$) (as appropriate)	Estimated Cost Plus Fee (\$) (as appropriate)
			[Total]	[Total]	[Total]

* To be inserted after negotiation

(c) Total funds currently obligated and available for payment under this contract are \$_____ [*insert amount funded to date*].

(d) The Contracting Officer may issue unilateral modifications to obligate additional funds to the contract and make related changes to paragraphs (b) and/or (c) above.

(e) Until this contract is fully funded, the requirements of the clause at FAR 52.232–22, *Limitation of Funds*, shall govern. Once the contract is fully funded, the requirements of the clause at FAR 52.232-20, *Limitation of Cost*, govern.

(End of clause)

352.232-72 Limitation of Government's Obligation.

As prescribed in 332.705-2(b)(3), insert the following clause in solicitations and resultant incrementally funded fixed-price, time and materials or labor-hour contracts for severable services:

LIMITATION OF GOVERNMENT'S OBLIGATION (June 2010)

(a) Contract line items through are incrementally funded. For these items, the sum of \$ of the total price is the amount currently obligated, available for payment, and allotted to this contract. A projected allotment schedule is set forth in paragraph (i) of this clause. However, the Government may at any time allot additional funds for the performance of these contract line items.

(b) For items identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates, but does not exceed, the total amount currently allotted to the contract. The Contractor is not required to continue work on those items beyond that point. The Government shall not be required in any event to pay the Contractor in excess of the amount allotted to the contract for those items notwithstanding anything to the contrary in the clause entitled "Termination for Convenience of the Government." As used in this clause, the total amount payable by the Government in the event of such termination of the contract line item(s) identified in paragraph (a) above includes costs, profit, and estimated/negotiated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (i) of this clause, the Contractor shall notify the Contracting Officer in writing at least 90 days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable items. The Contractor notification shall provide: (1) the estimated date when that point will be reached; and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (i) of this clause, or up to a mutually agreed upon substitute date. The notification shall also advise the Contracting Officer of the estimated amount of additional funds that will be required for the timely performance of the items funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (i) of this clause or otherwise agreed to by the parties. If, after such notification, additional funds are not allotted by the date identified in the Contractor's notification, or by a mutually agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(d) When additional funds are allotted for continued performance of the contract line items identified in paragraph (a) of this clause, the parties will agree to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) and (c)

of this clause will apply in like manner to the additional allotted funds and mutually agreed date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds by the dates indicated below in amounts sufficient for timely performance of the contract line items identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are subsequently allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the items, or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact under the clause entitled "Disputes."

(f) The termination provisions of this clause do not limit the rights of the Government under the clause entitled "Default." This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) and (e) of this clause.

(g) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for the Convenience of the Government." Furthermore, in the event of a termination for convenience of the contract, for line item(s) identified in paragraph (a) of this clause, the Government's liability is limited to the total amount allotted and obligated for those line item(s) as of the date of such termination.

(h) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is prohibited under 31 U.S.C. 1342.

(i) The following represents the mutually-agreed schedule* by which the Government will allot funds to this contract. [The illustrated schedule may be revised as necessary to suit the specific circumstances of the contract.]

CLIN, Task Number, or Description	Start Date of Period or Increment of Performance	End Date of Period or Increment of Performance	Fixed Price or Contract Ceiling (\$)
			[Total]

* To be inserted after negotiation.

(End of clause)

ALTERNATE I (June 2010)

If only one contract line item will be incrementally funded, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) Contract line item ____*____ is incrementally funded. For this item, the sum of \$* of the total price is currently available for payment and allotted to this contract. A projected allotment schedule is set forth in paragraph (i) of this clause. However, the Government may at any time allot additional funds for the performance of this contract line item.

* To be inserted after negotiation.