



DEFENSE SECURITY COOPERATION AGENCY
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05 SEP 2018

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR
DEFENSE EXPORTS AND COOPERATION
DEPUTY ASSISTANT SECRETARY OF THE NAVY FOR
INTERNATIONAL PROGRAMS
DEPUTY UNDER SECRETARY OF THE AIR FORCE FOR
INTERNATIONAL AFFAIRS
DIRECTOR, DEFENSE CONTRACT MANAGEMENT AGENCY
DIRECTOR, SECURITY ASSISTANCE, DEFENSE FINANCE AND
ACCOUNTING SERVICE
DIRECTOR, DEFENSE INFORMATION SYSTEMS AGENCY
DIRECTOR, DEFENSE THREAT REDUCTION AGENCY
DIRECTOR, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY
DIRECTOR, MISSILE DEFENSE AGENCY
DIRECTOR, DEFENSE LOGISTICS AGENCY
DIRECTOR, DEFENSE LOGISTICS INFORMATION SERVICE
DIRECTOR, DEFENSE LOGISTICS AGENCY DISPOSITION
DEPUTY DIRECTOR FOR INFORMATION ASSURANCE,
NATIONAL SECURITY AGENCY

SUBJECT: Interim Clarification on 10 USC § 333, DSCA Policy 18-38

References:

- a) National Defense Authorization Act for Fiscal Year (FY) 2017, Public Law 114-328
- b) Email Meeting Summary with the General Counsel (Fiscal Office) of the Department of Defense Office dated April 30, 2018
- c) DSCA Policy Memo 18-19 dated March 27, 2018 "Update to Program Code "7M" used to track FY 2018 DSCA Operation and Maintenance Funds and assignment of "7F" to track FY 2018/2019 DSCA Operation and Maintenance Funds Executed Pursuant to the Section 333 Build the Capacity of Foreign Security Forces Program"
- d) DoD Financial Management Regulation Volume 11A, Chapter 18

Section 1241 of Public Law 114-328, signed December 23, 2016, enacted a revised authority to build the capacity of foreign security forces under 10 USC § 333. Assistance previously provided by the following expired or superseded authorities: 10 USC § 2282, Section 1204 and Section 1207 of the National Defense Authorization Act (NDAA) for FY 2014 (P.L. 113-66), Section 1033 of the NDAA for FY 1998 (P.L. 105-85) and Section 1004 of the NDAA for FY 1991 (P.L.101-510) may now be provided pursuant to Section 333. In addition, the FY

2018 omnibus appropriation reduced the majority of DSCA two year Operation and Maintenance (O&M) funds to one year O&M funds. These changes to the statutory authorization and period of availability of funds appropriated to execute this building partner capacity authority, in conjunction with the integration of counter-narcotics programs designed under prior authorities, requires revisions to policy to now execute programs under the Section 333 authority. This memorandum provides interim execution guidance for programs utilizing the Section 333 authority while a comprehensive revision to Chapter 15 of the Security Assistance Management Manual is underway.

Use of Funds

A Congressionally-notified program must use an appropriation that is available in the year of notification. If DoD notifies a program to Congress in FY 2018, then DoD must use FY 2018 DSCA O&M funds, two year FY 2017/2018 (DSCA O&M or Overseas Contingency Operations (OCO)), or two year FY 2018/2019 (DSCA O&M or OCO) funds to pay for the program. The use of future year appropriations (e.g. one year FY 2019 funds or two year FY 2019/2020 funds) is not permissible for a FY 2018 Congressionally-notified program because those future appropriations were not available at the time of Congressional notification. Multiple appropriations can be used to fund a program as long as they are available for obligation during the fiscal year of notification. For example, a FY 2018 notified program could be funded with a mix of FY 2017/2018, FY 2018, or FY 2018/2019 funds.

Synchronized Start

A Section 333 program begins when the first field activity obligates the first dollar for the program, not when DSCA receives an apportionment from the Office of the Secretary of Defense (OSD) Comptroller. Examples of a valid obligation include, but are not limited to, letting a contract, issuing travel orders, or issuing a project order. The execution timeline provided to Congress should be based on when the first field activity will obligate the first dollar and officially start the program. To achieve a unified start among all offices supporting a single program requires significant communication and coordination to ensure all periods of performance conform to the permissible periods of performance authorized by Section 333.

Funds Availability/Period of Performance

The Bona Fide Needs (BFN) rule is a general fiscal principal that requires appropriations to be obligated only for payment of bona fide needs of the requiring agency during the period of availability of funds. Cross Fiscal Year authority (CFY) and Full Operational Capability (FOC) are two time-limited exceptions to the bona fide needs rule provided in subsection (g)(2)(A) and (g)(2)(B), respectively, of 10 USC § 333. CFY and FOC allow current year funds to pay for the needs not only of the current year, but also needs of subsequent fiscal years that would otherwise have to be paid for with future-year funds. Neither of these exceptions prolong the period of availability of the funds; the funds must still be obligated within their original period of availability.

CFY is the default funds availability provision (meaning that FOC is available only in limited circumstances as discussed below) and the only BFN exception available to execute a training-only program (i.e. no equipment is provided by the program) across fiscal years. For example, if all funds for a FY 2018-notified training-only program were obligated prior to September 30, 2018, then the training may be performed through September 30, 2020. In this scenario the training program is not necessarily required to begin in FY 2018 as long as the training courses and intended beneficiaries are defined with specificity at the time the funds are obligated in order to satisfy the fiscal law requirement that a bona fide need for the training exists in the current fiscal year.

Based on the current authorization language, the FOC provision is only available for Section 333 programs that provide equipment. "Equipment" in the FOC context is the article(s), (the articles do not have to be major defense equipment or significant military equipment) as denoted on the Congressional notification associated with the desired follow-on defense articles, training, defense services, supplies (including consumables), and small-scale construction that requires the prolonged period of performance to achieve FOC.

To qualify for FOC:

- i. the program must obligate all the funds during the period of availability and
- ii. the last piece of equipment for the program that requires the follow-on defense articles, defense services, training, supplies, or small-scale construction in order to reach full operational capability must be delivered to the USG in the FY following the FY in which the program begins.

If i) and ii) are satisfied, the funds can be expended during the year the equipment is delivered to the partner nation and into the next two full fiscal years in order to achieve FOC.

The CFY and FOC exceptions are available for DoD to execute Section 333 programs through a multi-year deliberate planning process to deliver enduring capabilities to our partners. Many common issues associated with utilization of the CFY and FOC funds availability provisions are not a matter of law, but rather that some DoD financial systems may not be able to execute/accommodate the permissible exceptions to the bona fide needs rule that are provided by the statute.

Attachment 1 provides visual depictions of CFY and FOC execution scenarios.

Travel and Allowance Carry Over

Due to the long-range planning required to develop security cooperation capabilities and often extended training course duration, there may be instances that require the use of Travel and Allowance (TLA) expenses across fiscal years. TLA carryover of expenses is generally permissible under Section 333, utilizing the CFY or FOC exceptions to the bona fide needs rule, if the full costs are obligated during the period of availability of the appropriation.

Attachment 2 provides additional financial management guidance.

Production/long lead time exception

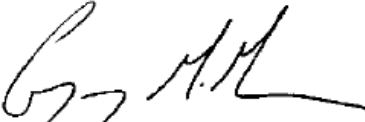
DoD Financial Management Regulation Volume 11A, Chapter 18 addresses severable and non-severable services and funding policy. Generally, non-severable services produce a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Non-severable service contracts must be funded entirely with appropriations available for new obligations at the time the contract is awarded, and period of performance may extend across fiscal years.

For programs utilizing the Section 333 authority, limited non-severable services in the form of initial operator training (as opposed to advanced training on tactics, techniques, and procedures, or maintenance) are permissible to support the delivery of equipment with a long-lead time when the desired non-severable training would fall outside of the allowable period of performance under CFY or FOC. To facilitate timely case closure of Letters of Offer and Acceptance (LOAs) and assist in the assessment, monitoring and evaluation of security cooperation initiatives, DSCA mandates that the equipment delivery and associated non-severable initial operator training be completed prior to funds cancellation.

Authority-Specific New Letter of Offer and Acceptance Case Notes

Attachment 3 provides revised language for the Associated Letters of Offer and Acceptance, Availability of Funds Across Fiscal Years and Estimated Delivery to the Partner case notes and introduces two new notes, BPC Programs with Direct Funded Equipment and BPC Training Only Programs.

If you have any questions concerning this guidance, please contact Ms. Caroline Chin, DSCA-SPI/SPP, caroline.s.chin.civ@mail.mil, (703) 697-9073.



Gregory M. Kausner
Deputy Director

Attachments:

- 1) Case Execution Scenario Diagrams
- 2) Financial Management of Cross Fiscal Year (CFY) and Full Operational Capability (FOC) Authorities
- 3) Section 333 Authority Specific Case Notes

cc:

USAFRICOM

USCENTCOM

USEUCOM

USNORTHCOM

USSOUTHCOM

USPACOM

USTRANSCOM

USSOCOM

STATE/PM-RSAT

USASAC

SATFA

TRADOC

NAVSUP WSS

NETSAFA

AFSAC

AFSAT

DISAM

MARCOR IP

SCETC

USCG International Affairs (G-CI)

DSCA 18-38 – Attachment 1
Case Execution Scenario Diagrams

Please contact the memo POC for this attachment.

- Ms. Caroline Chin
- DSCA-SPP/SPI
- caroline.s.chin.civ@mail.mil
- (703) 697-9073

DSCA 18-38 – Attachment 2

Financial Management of Cross Fiscal Year (CFY) and Full Operational Capability (FOC) Authorities

Agencies should consult their financial, contracting, and legal communities for guidance on utilizing the CFY and FOC provisions of 10 USC 333 prior to execution. The use of CFY or FOC authorities will require agencies to ensure activities can be fully cash-flowed from their own Operation and Maintenance (O&M) accounts upon start of the required activity. Amounts supporting typical USG services, such as travel, can be obligated by way of a miscellaneous obligation document (or a document deemed appropriate by the executing agency) within the period of availability of a current year appropriation. The use of CFY or FOC under 10 USC 333 does not extend the life of the appropriation, rather it allows programs that are funded in a given fiscal year to be executed in subsequent fiscal years when the requirements of the authority are satisfied. Immediately following the completion of the activity provided under CFY or FOC authorities, agencies must execute cost transfer(s) of any associated expenditure from the fiscal year of execution back to the fiscal year from when the miscellaneous obligation was appropriately obligated. For example, if a miscellaneous obligation was established in FY 2018 to support travel taking place in FY 2019 under an FY 2018 section 333 program, the agency must execute a cost transfer to appropriately move travel expenditures from FY 2019 back to FY 2018. In this example, the agency's FY 2019 O&M funding will be made available again for future spending upon completion of the cost transfer.

Another example of executing CFY or FOC involves the execution of Travel and Allowance (TLA) carry-over to support foreign partners' participation in U.S. schools. In some cases, due to the long-range nature of planning required to develop a security cooperation capability and the duration of a training course, TLA expenses may be required to cross fiscal years. TLA carryover of expenses is generally permissible under section 333, utilizing the CFY or FOC exceptions to the bona-fide needs rule, so long as the full costs are obligated during the appropriated period of availability. This carryover can also be accomplished through establishing a miscellaneous obligation and execution of cost transfers, if necessary. **When establishing a miscellaneous obligation, Agencies should ensure that all key supporting documentation (KSDs) are included and retained as part of the package in the accounting and/or financial system(s) as required by DoD Financial Improvement and Audit Readiness (FIAR) guidance and the DoD Financial Management Regulation (FMR) Volume 3, Chapter 8, Section 080302.**

The use of a miscellaneous obligation to execute CFY or FOC is prohibited for the performance of services by a vendor through a contract. All contracts must be awarded by a USG Contracting Officer within the period of availability of a current year appropriation. Agencies are prohibited from establishing a miscellaneous obligation for any contract award or executing any action that seeks to circumvent this specific guidance. If an agency requires a contract to execute a future activity under CFY or FOC, the USG Contracting Officer must award the contract within the period of availability of a current year appropriation and define the

period of performance for the contract in accordance with CFY or FOC. For example, in FY 2018, an agency determines it needs to rent a facility to support a section 333 training event that will occur June 1-5, 2019. The funds appropriated at that time are FY 2018 with a period of availability from October 1, 2017 through September 30, 2018. In this specific example, the agency must award a contract and fully fund the activities being procured by midnight, September 30, 2018, with a contract period of performance of June 1 – June 5, 2019. It is critical that agencies obtain legal clearance prior to executing the provisions of 10 USC 333.

DSCA Comptroller will increase scrutiny and reporting requirements for those agencies that utilize CFY or FOC authorities and demonstrate inappropriate financial practices, such as non-certification of Tri-Annual Review Statements in accordance with the Financial Management Regulation (FMR); excessive number of dormant obligations on expired funds, increased de-obligated balances for expired funds; and, delays with completion of cost transfer(s) for completed section 333 CFY or FOC activities. DSCA may also issue budget policy that is more restrictive than 10 USC 333 to ensure that fiduciary duties are exercised professionally and responsibly to prevent fraud, waste, and abuse of taxpayer dollars. Additionally, any reduction to the DSCA budget as a result of inappropriate financial management of miscellaneous obligations will be imposed on the responsible agency's future programs. Agencies that utilize CFY or FOC are solely responsible for ensuring financial and contracting practices are performed effectively and adhere to all DoD policies and regulations, to include DoD Audit requirements. Any questions concerning this guidance can be directed to Ms. Valerie Pulphus, DSCA Comptroller, DoD, valerie.m.pulphus.civ@mail.mil, (703) 697-8926.

DSCA 18-38 – Attachment 3
Section 333 Authority Specific Case Notes

Associated Letters of Offer and Acceptance

Note Usage					
FMS:	No	BPC:	Yes	Note Input Responsibility	IA
Mandatory for all LOAs that provide desired follow-on defense articles, training, defense services, supplies or small scale construction and utilize the extended periods of performance permitted under the Full Operational Capability provision in accordance with 10 USC 2282 (c)(4)(b) or 10 USC Section 333(g)(2)(b). Mandatory for any Modifications and Amendments if not included on the basic case.					
References					
DSCA Policy Memo 16-38 DSCA Policy Memo 17-50					
Note Text					
Varies. Use the following template : "This Letter of Offer and Acceptance (LOA) supports the Congressionally Notified program for [Country- Program Title], executed under authority of Title 10 United States Code, Section [2282 or 333]. [XX-X-XXX] provides [articles denoted on the Congressional notification that are associated with the desired follow-on defense articles, training, defense services, supplies or small scale construction], the delivery of this equipment determines if the Full Operational Capability provision applies to the [Program Title] program."					

Availability of Funds Across Fiscal Years

Note Usage					
FMS:	No	BPC:	Yes	Note Input Responsibility	CWD
Mandatory for LOAs that utilize the Section 333 authority. Mandatory for any Modifications and Amendments if not included on the basic case.					
References					
N/A					
Note Text					
"Cross Fiscal Year Authority is provided by 10 USC 333(g)(2)(a) and authorizes the period of performance to begin when the program incurs the first financial obligation. All program activities					

must conclude no later than the end of the second fiscal year thereafter. Training-only programs are only permitted to use the Cross Fiscal Year authority.

Full Operational Capability is provided by 10 USC Section 333(g)(2)(b). For a program to qualify for FOC, the U.S. Government must receive the last key article for the program (denoted on the Congressional Notification table) before the end of the fiscal year after the fiscal year in which the program incurs the first financial obligation. If the all the key articles are delivered on time, the U.S. Government may provide the partner with defense articles, training (including Human Rights training), defense services (i.e. field service representatives contractor logistical support), supplies and small-scale military construction (subject to \$750,000 limit) associated with delivered of the key equipment. These activities may continue into the next two full fiscal years after delivery of the equipment to the partner nation but must conclude before the end of that second fiscal year. If the U.S. Government does not receive all the key articles (as denoted in the Congressional Notification table) for the program before the end of the next fiscal year after the first obligation, the program does not qualify for FOC and must revert to the reduced period of performance authorized under the Cross Fiscal Year authority provision from 10 USC 333(g)(2)(a). The U.S. Government will make every effort to deliver articles to the partner nation within 120 days after acceptance of the articles by the U.S. Government or as soon as practical. FOC cannot be applied to programs that only provide training.”

BPC Programs with Direct Funded Equipment

Note Usage					
FMS:	No	BPC:	Yes	Note Input Responsibility	IA
Mandatory for LOAs that provide training utilizing the Section 333 authority but the equipment is directly funded or the procurement is not documented on a LOA. Mandatory for any Modifications and Amendments if not included on the basic case.					
References					
N/A					
Note Text					
"This Letter of Offer and Acceptance (LOA) provides training that supports the Congressionally Notified program for [Country- Program Title], executed under authority of Title 10 United States Code, Section 333. This LOA provides [basic description of training course objectives or course titles]. This is not a stand- alone training program and equipment was directly procured by [procuring activity]."					

BPC Training Only Programs

Note Usage					
FMS:	No	BPC:	Yes	Note Input Responsibility	IA

Mandatory for Section 333 programs that only provide training and no equipment is provided via LOA or directly procured by a Combatant Command, Service Component or Field Activity. Mandatory for any Modifications and Amendments if not included on the basic case.

References

N/A

Note Text

"This Letter of Offer and Acceptance (LOA) provides training that supports the Congressionally Notified program for [Country- Program Title], executed under authority of Title 10 United States Code, Section 333. This LOA provides [description of training]. This is a stand-alone training program and only the cross fiscal year authority provision provided Section 333 applies."

Estimated Delivery to the Partner Nation

Note Usage

FMS: No	BPC: Yes	Note Input Responsibility	IA
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Mandatory for LOAs that provide the equipment associated with desired follow-on defense articles, training, defense services, supplies or small scale construction. The estimated delivery to the PN is a key milestone used to determine the permissible periods of performance under the Full Operational Capability provision in accordance with 10 USC 2282 (c)(4)(b) or 10 USC Section 333(g)(2)(b). Mandatory for any Modifications and Amendments if not included on the basic case.

References

N/A

Note Text

Varies –“Equipment within this LOA (as denoted by the Congressional Notification) determines the applicability of the Full Operational Capability provision in accordance with [10 USC 2282 (c)(4)(b) or 10 USC Section 333(g)(2)(b)]. The equipment will be delivered to the U.S. Government no later than the end of the subsequent fiscal year after the first obligation of funds.

Below is the estimated delivery schedule to the Partner Nation for these articles:

Line	Delivery to Partner	Qty
#####	CY___ QTR___	___
#####	CY___ QTR___	___