

# Recent Changes to USACE's Continuing Contract Authority

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## Outline

- Continuing Contract Authority
- Continuing Contract Clause
- Reprogramming Authority
- Congressional Criticism of USACE's use of Continuing Contract and Reprogramming authority
- FY 06 Changes to Continuing Contract and Reprogramming Authorities.
- Interim Continuing Contract Clauses
- Continuing Resolution and FY 07 Legislation

## Continuing Contract Authority

- As a general rule, agencies:
  - Must obligate the full amount of the contract at the time of award.
  - May not allow the contractor to work beyond the amount of funds awarded for that contract.
- Continuing contract authority allows USACE to:
  - Award a contract for a civil works project without having all funds available at the time of award.
  - In other words, USACE may award the full amount of a civil works contract even when it has less than the full amount of funds available for that contract.

## Continuing Contract Clause

- Under USACE's traditional continuing contract clause:
  - USACE "reserved" the government estimate of contractor earnings for the fiscal year.
  - Once the funds reserved were exhausted, the contractor could work beyond the amount reserved and earn simple interest on the self-financed amount.
  - If USACE failed to reserve additional funds for the contract in the following FY, the contractor could treat the contract as having been terminated for convenience.

## Reprogramming

- Reprogramming is the movement of funds from one object to another in the same appropriation account.
- Authority to reprogram is inherent in lump sum appropriations, unless otherwise limited by law.
- Prior to the FY 06 Energy and Water Development Appropriations Act, requirements for reprogramming were contained in the Conference Report accompanying the annual appropriations acts and required only notice to the committees of reprogrammings that exceeded specified dollar amounts.

## Operation of the Civil Works Program prior to the FY 06 E&WDAA

- Continuing contract authority and reprogramming authority allowed USACE to:
  - Start more projects
  - Carryover fewer funds from year to year
  - Reprogram funds from projects with low funding needs in an FY to a project with high needs in that FY.

## Congressional Criticism of Continuing Contracts and Reprogramming

- Allowing the contractor to work beyond the funding reserved permits the contractor, not USACE or Congress, to decide rate that funds are expended on the project.
- Obligating the Government in advance of current appropriations requires future appropriation or high termination costs.
- USACE uses reprogramming authority too liberally, thwarting Congressional prerogatives.
- USACE uses continuing contracts when other acquisition methods would be more appropriate (e.g., fully funded, base plus options, etc.)

## Congressional Goals for Continuing Contracts and Reprogramming

- Fully fund contracts with low dollar value or contracts that cross only one fiscal year.
- Reprogram funds less and with closer coordination with the Appropriations Committees.

## 2006 Energy and Water Development Appropriations Act

- Section 108 prohibits awarding new or modifying existing continuing contracts to commit an amount in excess of what was appropriated for that project plus funds carried over from prior fiscal years and funds reprogrammed to the project.
- Section 101 restricts reprogramming.

## Impact of Section 101 and 108

- USACE may not permit the contractor to work beyond the amount appropriated for the project for the FY plus funds carried over from the prior fiscal year and funds reprogrammed to the project.
- Reprogramming authority is severely constrained.
- Bottom line: Continuing contracts must now be performed through a series of funding increments established for the most part by Congress.

## New USACE Policies

- Continuing Contracts must be approved by HQ USACE and the ASA(CW)
- Seek approval to use a continuing contract only after rejecting all other acquisition methods.
- All continuing contracts must use one of the two interim clauses unless approval is granted to use the traditional continuing contract clause.

## Interim Continuing Contract Clauses

- To comply with the law, USACE published two interim continuing contract clauses:
  - Special Continuing Contract Clause (Budgeted projects)
  - Incremental Funding Clause (Off Budget projects)
- These clauses are used on an interim basis and are in the DoD process for publication in the Federal Register to solicit public notice and comment.

## **Continuing Resolution and FY 07 Legislation**

- The limitations of Section 108 apply even during the Continuing Resolution.
- The House Energy and Water Development Appropriations Bill, 2007 includes essentially the same language.
- Democratic congress?
- USACE expects to have these limitations for the foreseeable future.