

CHAPTER 11:



THE JUDGMENT FUND

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CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

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CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

I. REFERENCES.

- A. 31 U.S.C. § 1304 (providing a permanent appropriation from which to make payments for compromise settlements, awards, and judgments).
- B. 41 U.S.C. § 7108 (authorizing payment of claims under the Contract Disputes Act from the Judgment Fund).¹
- C. Treasury Financial Manual (TFM) 6-3100, vol I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund (Apr. 2009) [hereinafter TFM 6-3100]. Available at <http://tfm.fiscal.treasury.gov/v1/p6/c310.pdf>.
- D. General Accounting Office, *Principles of Fed. Appropriations Law*, vol. III, ch. 14, GAO-08-978SP (3d ed. 2008) [hereinafter GAO Red Book].
- E. DoD Regulation 7000.14-R, *Financial Management Regulation*, vols. 3 & 10 [hereinafter DoD FMR]. Available at <http://comptroller.defense.gov/fmr>.
- F. Defense Finance and Accounting Service--Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation [hereinafter DFAS-IN 37-1]. Available at <https://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200>.

¹ Title 41 has undergone reorganization in order to remove “ambiguities, contradictions, Public Law No. 111-350, 124 Stat. 367 (Jan. 4, 2011) effected a renumbering of Title 41 and gave new section numbers to many of the most important government contract laws. Some examples of the revised citations—

The Buy American Act, formerly at 41 U.S.C. §§ 10a-10d, will be found at 41 U.S.C. §§ 8301-8305.

The Anti-Kickback Act, formerly at 41 U.S.C. §§ 51-58, will be found at 41 U.S.C. §§ 8701-8707.

The Competition in Contracting Act, formerly at 41 U.S.C. § 253, will be found at 41 U.S.C. §§ 3301-3311.

The Service Contract Act, formerly at 41 U.S.C. §§ 351-358, will be found at 41 U.S.C. §§ 6701-6707.

The Contract Disputes Act, formerly at 41 U.S.C. §§ 601-613, will be found at 41 U.S.C. §§ 7101-7109.

The changes will require updating your references to these and other commonly cited statutes.

- G. Army Federal Acquisition Regulation Supplement, pt. 5133.212-90-9 [hereinafter AFARS].
- H. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (16 August 2012) [hereinafter AFI 65-601].

II. DEFINITIONS.

- A. Judgment. A judgment is a “decision issued by a court . . . that resolves a case, as far as that court is concerned, by ruling on the issue in that case.” *See* Ralph C. Nash et al., *The Government Contracts Reference Book*, p. 305 (4th ed., 2013).
- B. Consent Judgment. A consent judgment (or “consent decree”) is a judgment issued by a court in which the court sanctions an agreement reached by the parties.
- C. Settlement. A settlement is an administrative determination that disposes of a claim. *See e.g.*, 10 U.S.C. § 2731 (defining the verb to “Settle” as to “consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance”).
- D. Compromise Settlement. A compromise settlement is an "agreement reached by the parties involving mutual concessions." *GAO Red Book*, vol. III, ch. 14, 14-34 (citing 38 Op. Att'y Gen. 94, 95-96 (1933)).
- E. Award. An award is a decision issued by an administrative board such as the agency-level Boards of Contract Appeals.
- F. Unexpired Appropriation (Unexpired Account). An appropriation account available for obligation during the current fiscal year (current funds). *See* DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.
- G. Expired Account or Appropriation. An appropriation or fund account in which the balances are no longer available for incurring new obligations because its period of availability has ended, but which retains its fiscal identity and remains available to adjust and liquidate previous obligations. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

- H. Closed (or Canceled) Account or Appropriation. An appropriation that is no longer available for any purpose. An appropriation is closed/canceled five years after the end of its period of availability. *See* 31 U.S.C. § 1552(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

III. OBLIGATION OF FUNDS FOLLOWING AGENCY-LEVEL SETTLEMENT OF A CONTRACT CLAIM. Generally, obligate funds using the same obligation rules that are used for normal contract changes. *See* DFAS-IN 37-1, Table 8-6, paras. 13-14; *see also supra* Chapter 3, *Availability of Appropriations as to Time*; Chapter 5, *Obligating Appropriated Funds*.

- A. If the settlement relates to an in-scope contract change (the "relation-back theory"), that settlement should be funded from the appropriation cited on the original contract.
See DoD FMR, vol. 3, ch. 8, para. 080304.B; DFAS-IN 37-1, Table 8-7, para. 4; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1; *The Honorable Andy Ireland, House of Representatives*, B-245856.7, 71 Comp. Gen. 502 (1992) ("the liability relates back to the original contract and the price increase to pay the liability is charged to the appropriation initially obligated by the contract").
 - 1. If the appropriation that was used to fund the original contract has expired, it may still be used to obligate against the settlement, subject to agency restrictions. *See* DoD FMR, vol. 3, ch. 8, para. 080304.B, E; DFAS-IN 37-1, Table 8-7, note 1 (requiring submission of written documentation); AFI 65-601, vol. I, para. 6.4.2 and Figure 6.1 (limiting local level approval authority to adjustments under \$100,000); AFARS 5133.212.90-9(b) and (c)(2); *see also* DoD FMR, vol. 3, ch. 10, para. 100202.
 - 2. If the appropriation that was used to fund the original contract has expired (and is not yet closed) but is exhausted, a consent judgment is required with payment of that judgment from the Judgment Fund and reimbursement using current funds. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.90-9(b) and (c)(2)(iii) (contracting officer must contact ASA(FM&C) for authorization prior to entering into a consent judgment).

3. If the appropriation that was used to fund the original contract has closed/canceled, current funds must be obligated. *See* 31 U.S.C. § 1553; AFI 65-601, vol. I, para. 6.3.7, para. 6.4.1.1, and Figure 6.1; AFARS 5133.212.90-9(b) and (c)(2)(iv). However, the total amount of such charges to the current account may not exceed an amount equal to one percent of the total appropriations for that account. 31 U.S.C. § 1553(b)(2).
- B. If the settlement relates to an out-of-scope change, fund it from appropriations available for current obligation. *See* DoD FMR, vol. 3, ch. 8, para. 080304.C-E; AFI 65-601, vol. I, para. 6.3.8 and Figure 6.1.

IV. OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD.

- A. If the agency has current funds available, pay the judgment/award using current funds (not the Judgment Fund). *See* AFARS 5133.212.90-9(d)(1).
- B. If insufficient current funds are available, the Judgment Fund must be used to pay the judgment/award. *See* AFARS 5133.212.90-9(d)(2). The Contract Disputes Act requires the agency to reimburse the Judgment Fund from its operating appropriations current at the time of judgment/award. 41 U.S.C. § 7108(c). *See also* DoD FMR, vol. 3, ch. 8, para. 080304.F; AFI 65-601, vol. I, para. 6.3.6.7.1; DFAS-IN 37-1, Table 8-6, para. 15.

V. BACKGROUND BEHIND THE NEED FOR AND CREATION OF THE JUDGMENT FUND.

- A. The Appropriations Clause (Article I, § 9, cl. 7) prohibits the withdrawal of funds from the Treasury absent an appropriation. This Constitutional requirement applies to both the executive branch and the judiciary. *See Collins v. United States*, 15 Ct. Cl. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities through issuance of a judgment, but likewise does not authorize the withdrawal of money to satisfy that judgment).
- B. Judgments can be satisfied through one of the following methods:
 1. A specific appropriation covering a specific judgment;
 2. A general appropriation covering multiple or a class of judgments; or

3. An authorization from Congress to use existing appropriations.
-
- C. The Judgment Fund was established in 1956 to alleviate the need for specific authorizing and/or appropriating legislation following each successful claim against the United States thereby reducing or eliminating the amount of interest successful claimants would receive pending such legislation. *See* H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

VI. THE JUDGMENT FUND. 31 U.S.C. § 1304.

- A. General Concept of the Fund. The primary purpose behind the Judgment Fund is to establish a permanent appropriation, which would allow the prompt payment of judgments and compromise settlements, thereby reducing the cost to the Government of post-judgment interest. *See United States v. Varner*, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).
- B. Characteristics.
 1. Permanent and Indefinite. The Judgment Fund is "standing authority" to access and disburse appropriations from the Treasury. The Judgment Fund has no fiscal year limitations, nor are there any limits with respect to the amount of funds available. Consequently, there is no requirement that Congress appropriate or "replenish" the Fund either annually or at any other time. 31 U.S.C. §1304(a).
 2. Applicability. Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund. 31 U.S.C. § 1304(a)(3), (b), and (c); *see also GAO Red Book*, vol. III, ch. 14, 14-32. These statutorily specified judgments, awards, and compromise settlements consist of the following:
 - a. Judgments:
 - (1) A United States District Court judgment made pursuant to 28 U.S.C. § 2414;
 - (2) A Court of Federal Claims judgment made pursuant to 28 U.S.C. § 2517 or 41 U.S.C. § 7108(a); and

- (3) A state or foreign court judgment made pursuant to 28 U.S.C. § 2414 if the Attorney General certifies that payment is in the best interest of the United States.
- b. Awards (administrative adjudications) made pursuant to:
- (1) The Federal Tort Claims Act (28 U.S.C. § 2672);
 - (2) The Small Claims Act (31 U.S.C. § 3723);
 - (3) The Military Claims Act (10 U.S.C. § 2733);
 - (4) The Foreign Claims Act (10 U.S.C. 2734);
 - (5) The National Guard Claims Act (32 U.S.C. § 715);
 - (6) The National Aeronautics and Space Act of 1958 (50 U.S.C. § 20113); and
 - (7) The Contract Disputes Act of 1978 by a Board of Contract Appeals (41 U.S.C § 7108(b)).
- c. **Compromise Settlements.** When Congress created the Judgment Fund in 1956, it initially did not permit payment out of the fund for compromise settlements. In the late 1950's, many people resorted to reducing compromise settlements to consent judgments for the sole purpose of taking advantage of the Judgment Fund. In 1961, Congress cured this situation by making the Judgment Fund available for compromise settlements to the same extent that it was already available for judgments in similar cases. *See* P.L. 87-187, 75 Stat. 416 (1961). Payment from the Judgment Fund is now statutorily authorized for the following compromise settlements:
- (1) Compromise settlements negotiated by the Department of Justice (DOJ) to dispose of actual or imminent litigation (28 U.S.C. § 2414); and

(2) A compromise settlement pursuant to the Federal Tort Claims Act (28 U.S.C. § 2677).

3. Finality. The Judgment Fund is only available for judgments, awards, and compromise settlements that are final. 31 U.S.C. § 1304(a). For payments under the Judgment Fund, finality attaches to those judgments which "have become conclusive by reason of loss of the right to appeal." B-129227, Dec. 22, 1960 (unpub.) Judgments become final under the following circumstances:
 - a. The court of last resort renders a decision or elects not to hear an appeal;
 - b. The parties elect to not seek further review; or
 - c. The time allowed for appeal expires. *The Judgment Fund and Litigative Awards under the Comprehensive Environmental Response, Compensation and Liability Act*, B-253179, 73 Comp. Gen. 46 (1993); *see also Herman I. Kamp*, B-198029, 1980 U.S. Comp. Gen. LEXIS 3133 (May 19, 1980) (unpub.) (noting that the rationale for this requirement is to protect "the United States against loss by premature payment of a judgment which might later through appeal be amended or reversed").
4. Money Damages Only. The Judgment Fund addresses only those judgments where the court directs the government to pay money, as opposed to performing or refraining from performing some specific act (i.e., injunctive relief). *Availability of Expired Funds for Non-Monetary Judicial Awards*, B-238615, 70 Comp. Gen. 225, 228 (1971) (finding that a court order to implement extended GI Bill benefits should be paid for out of unobligated but expired VA appropriations rather than the Judgment Fund); *see also United States v. Garney White - Funding of Judgment*, B-193323, 1980 U.S. Comp Gen LEXIS 3730 (Jan. 31, 1980) (unpub.) (finding that a court order to take all steps necessary to correct structural defects in house of rural home loan borrowers should be paid from funds appropriated to Department of Agriculture for administrative expenses of programs).

5. Payment Must Not Be Provided For Otherwise. One of the fundamental tenets for access to the authority under the Judgment Fund is that no other appropriation or funding vehicle exists for payment of the judgment, award, or compromise settlement. 31 U.S.C. § 1304(a)(1). *See, e.g., Lieutenant Colonel Hervey A. Hotchkiss*, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993) (unpub.) (because 10 U.S.C. §§ 2733(d) and 2734(d) otherwise provide the funding source for \$100,000 on a Military Claims Act settlement, the Judgment Fund may only be used to pay that portion of any settlement in excess of \$100,000); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment*, B-202083, 62 Comp. Gen. 12, 14 (1982) (since the HUD's Special Risk Insurance Fund was available to pay a housing contractor's judgment, the Judgment Fund was unavailable). *See also* S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961) (the Judgment Fund can pay settlements only to the extent that agency appropriations are not otherwise available); 31 U.S.C. § 1304(a)(3)(D) (the Judgment Fund may be used to make payment only on that portion of any claim settlements in excess of the amount the agency is capable of paying from its appropriations when the claim arises under the Military Claims Act, the Foreign Claims Act, the National Guard Claims Act, or the National Aeronautics and Space Act of 1958).
- a. The issue of whether funds are "otherwise provided for" centers on whether, as a matter of law, a specific appropriation exists to cover the judgment and not on whether there are sufficient funds in the account to cover payment of the judgment. *The Honorable Strom Thurmond*, B-224653, 66 Comp. Gen. 157, 160 (1986); 22 Op. Off. Legal Counsel 141 (1998). *See also GAO Red Book*, vol. III, ch. 14, 14-39 (where another more specific appropriation exists but contains insufficient funds to pay the judgment, the agency's only recourse is to seek additional funds from Congress).
- b. Source-of-Funds Determination. In every case, there is only one proper source of funds with which to make payment, and therefore no election to be made. If agency funds are available, the Judgment Fund is not. Conversely, if the Judgment Fund is the proper source, then agency funds may not be used to pay the judgment. *GAO Red Book*, vol. III, ch. 14, p. 14-40. *See* 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made); *See, e.g., In the matter of Payment of Judgments under Back Pay Act and Title VII of Civil Rights Act*, B-178551, 58 Comp. Gen. 311 (1976) (the Air Force erred by charging agency appropriations rather than Judgment Fund in paying a court judgment resulting from the Back Pay Act).

VII. ACCESS TO JUDGMENT FUND UNDER THE CONTRACT DISPUTES ACT.

- A. The Contract Disputes Act (CDA) of 1978. Prior to 1978, monetary awards by the boards of contract appeals were payable from agency appropriations only. The CDA requires that awards by the boards of contract appeals be treated in a manner similar to federal court judgments. 41 U.S.C. § 7108.
1. Any monetary judgment against the United States must be paid in accordance with the procedures applicable under the Judgment Fund statute. *See* DoD FMR, vol. 10, ch. 12, paras. 120208-10.
 2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Fund. *See* 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15; AFI 65-601, vol. I, para. 6.3.6.7.1.
- B. Consent Judgments. The Judgment Fund is generally not available to pay agency settlements (i.e., settlements between the contracting officer and the contractor). One way to work around this restriction is for the agency and the contractor to stipulate or consent to entry of award based upon the terms of the settlement. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.90-9(b) and (c)(2)(iii); *See, e.g., Casson Constr. Co.*, GSBICA No. 7276, 84-1 BCA ¶ 17,010. The Army policy, however, is that personnel must provide prior notification to DA of their intent to enter into a consent judgment and must also determine whether sufficient non-closed funds are available. *See* AFARS 5133.212.90-9(b) and (c)(2)(iii) (contracting officer must contact ASA(FM&C) for authorization prior to entering into a consent judgment).
- C. Compromise Settlements. The Judgment Fund will provide necessary appropriations for compromise settlements reached by the DOJ. *See* 31 U.S.C. § 1304(a); 28 U.S.C. § 2677; 28 U.S.C. § 2414 (compromise settlements "shall be settled and paid in a manner similar to judgments in like causes, and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.").

D. Reimbursement of the Judgment Fund.

1. The CDA requires the agency to reimburse the Judgment Fund. 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210. In 2002, the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 (Pub. L. No. 107-174, 116 Stat. 566) was enacted. This Act requires agencies to reimburse the Judgment Fund for payments arising out of discrimination or whistleblower causes of action. *See* DoD FMR, vol. 3, ch. 8, para. 080304.F.
2. Prior to passage of the CDA in 1978, there was no requirement to reimburse the Judgment Fund. *See* S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978). This, combined with the fact that agency funds were used to pay off pre-CDA adjudications by the boards of contract appeals, resulted in a natural incentive on the part of agencies "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds." *Id.*
3. Reimbursement must be made with funds current at the time of judgment against the agency. *Id.*; *see also* DoD FMR, vol. 3, ch. 8, para. 080304.F (if the funds were current at the time of judgment, they may be used even if they are expired by the time reimbursement is made); *Bureau of Land Management--Reimbursement of Contract Disputes Act Payments*, B-211229, 63 Comp. Gen. 308, 312 (1984); S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978) (indicating that forcing "agencies to shoulder the responsibility for interest and payment of judgment brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution.").
4. While reimbursement is mandatory, neither the CDA nor any other guidance establishes a specified time during which payment by the agency must occur. Indeed, sensitive to the potential for disruption of "ongoing programs or activities in order to find the money," the GAO has opined that the earliest an agency may be in violation of the CDA requirement to reimburse the Judgment Fund "is the beginning of the second fiscal year following the fiscal year in which the award is paid." *Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act*, B-217990.25-O.M., Oct. 30, 1987 (unpub.).
5. For reimbursements greater than \$ 1 million, DOD agencies must first obtain approval from their respective comptrollers. *See* DoD FMR, vol. 3, ch. 8, para. 080304.F 5.

- E. Payment of Interest. Unless otherwise allowed by statute or contract, interest associated with disputes is generally not recoverable from the United States. *See, e.g., Monroe M. Tapper & Assocs. v. United States*, 611 F.2d 354, 357 (Ct. Cl. 1979). The Contract Disputes Act of 1978 (CDA) is one of the statutes that allow the payment of interest—it requires agencies to pay interest on all meritorious CDA claims from the date received by the contracting officer to the date of payment. 41 U.S.C. § 7109; *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 862-63 (Fed. Cir. 1991).
1. Interest on CDA claims is calculated as simple interest according to rates established by the Department of Treasury pursuant to the Renegotiation Act. FAR 33.208(b); *ACS Constr. Co. v. United States*, 230 Ct. Cl. 845 (1982). *See also A.T. Kearney, Inc.*, 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing claim).
 2. Claims that exceed \$100,000 must be accompanied by a CDA certification to be considered a valid claim. FAR 33.201; FAR 52.233-1.
 3. Claims accompanied by defective CDA certifications accrue interest from the date of receipt by the contracting officer or 29 October 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate. FAR 33.208(c).

- F. Payment of Attorney Fees. The general rule is that each party pays its own legal expenses. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), is a statutory exception to this general rule which permits a prevailing party to recover legal fees from the Government when the position of the Government was not substantially justified. 5 U.S.C. § 504(a)(1).
1. Substantially Justified. A plaintiff is not entitled to an award under the EAJA if “the position of the United States was substantially justified.” “The Government bears the burden of showing that its position was substantially justified.” *Freedom, N.Y., Inc. v. United States*, 49 Fed. Cl. 713, 717 (2001) (citing *Helper v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)). “[S]ubstantially justified” means “‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Government’s “position” includes “both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself.” *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012) (citations omitted). This standard does not raise a presumption that the Government’s conduct was not substantially justified just because it lost the case. *See Scarborough v. Principi*, 541 U.S. 401, 415 (2004). As then-Judge Roberts stated, the law does not even require that the Government establish that it entered litigation with a “substantial probability of prevailing.” *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983)). Rather, a presiding court is to look at the totality of the Government’s conduct and “make a judgment call whether the government’s overall position had a reasonable basis in both law and fact.” *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). *See 360Training.com, Inc. v. United States*, No. 12-197 C (Fed. Cl. June 7, 2013) (COFC grants EAJA motion for attorneys fees and expenses incurred in successful bid protest, including attorneys fees incurred in unsuccessful motions during protest, except for fees associated with an ultimately unsuccessful government motion to dismiss for lack of jurisdiction (because the jurisdictional issue was one of first impression) and fees associated with related district court litigation by another protester).
 2. Attorneys fees awarded under the EAJA are not payable from the Judgment Fund. Instead, the agency must use funds current at the time of the award. *See* 5 U.S.C. § 504(d); DoD FMR, vol. 10, ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16.

- G. The Judgment Fund may be used to pay certain costs to the prevailing party in litigation, see 28 U.S.C. §§1920 and 2412(a); for example, court fees and compensation for court-appointed experts.

VIII. CERTIFICATION.

- A. Requirement for Certification. As discussed above, in order to qualify for payment an award or judgment must be final, require payment of specific sums of money, and may not be legally payable from another source of funds. Before payment may be made from the Judgment Fund, judgments and administrative awards must be "certified" as having met these prerequisites. Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)); *see also* 31 U.S.C. § 1304(a)(2).
- B. Who Performs the Certification. When the Judgment Fund was initially established, Congress gave this "certification" responsibility to GAO, but then later decided to transfer the responsibility to OMB effective June 30, 1996. *See* Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)). Shortly thereafter, certification responsibility was given to the Secretary of the Treasury. *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, tit. II, § 202(m), 110 Stat. 3826, 3843 (codified at 31 U.S.C. § 1304(a)(2) (2000)). The Secretary of the Treasury has delegated this responsibility to the Department of the Treasury's Financial Management Service (FMS).
- C. Mechanics of the Certification Process. 31 C.F.R. 256.
 - 1. The "responsible agency" must submit a request for payment to the FMS which certifies that the request complies with all prerequisites for qualifying for payment under the Judgment Fund statute. A "responsible agency" is either the agency responsible for defending the United States in federal courts (typically the DOJ), or the agency authorized to settle the claim (e.g., the contracting officer may settle appeals before the board of contract appeals). *See* Treasury Financial Manual 6-3100, § 3125.

2. Prescribed forms. *See* TFM 6-3100, § 3125. Unless made through the Judgment Fund Internet Claims System (JFICS), all payment requests require submission of FMS Form 194, *Judgment Fund Transmittal*, FMS Form 196, *Judgment Fund Award Data Sheet*, and FMS Form 197, *Judgment Fund Voucher for Payment*. These required forms are available on the Financial Management Service's Judgment Fund website, <http://www.fms.treas.gov/judgefund>.
3. Detailed guidance on the procedures for submitting requests for payment is located at <http://www.fms.treas.gov/judgefund>; the Treasury's regulations at 31 C.F.R. Part 256, *Obtaining Payments from the Judgment Fund and Under Private Relief Bills* (see the website at <http://www.fms.treas.gov/judgefund/regulations.html>); and at Treasury Financial Manual 6-3100.

IX. FUNDS RECEIVED FROM THE CONTRACTOR.

- A. General Rule. Funds received from an outside source (e.g. other than through the appropriations process) must be deposited in the General Fund of the United States Treasury, as required by the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). *See supra* Chapter 2, *Availability of Appropriations as to Purpose*, Section IX (Augmentation of Appropriations & Miscellaneous Receipts).
- B. Exceptions. Congress has given federal agencies several exceptions to the Miscellaneous Receipts Statute, but unfortunately these exceptions are scattered throughout the United States Code and public law. In addition, GAO has recognized a limited number of non-statutory exceptions. For a comprehensive overview of the Miscellaneous Receipts Statute and its exceptions, *see* Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sep. 1997, at 31. The exceptions include some situations in which funds may be received from contractors and retained and used by the agency:

1. Replacement Contracts. One of the GAO recognized exceptions to the Miscellaneous Receipts Statute allows an agency "to retain recovered excess procurement costs to fund replacement contracts." *See Bureau of Prisons -- Dispositions of Funds Paid in Settlement of Breach of Contract Action*, B-210160, 62 Comp. Gen. 678 (1983). Thus, if an agency obtains funds from an original contractor through a judgment, award, or settlement based upon defective workmanship or due to a default termination, the agency may "retain the amount of funds necessary to procure the goods or services that would have been provided under the original contract" but any "excess money will be considered miscellaneous receipts and must be deposited into the Treasury." *Id.*
2. Refunds. If an agency is entitled to a refund from a contractor due to a payment made in error, an overpayment, or an adjustment for previous amounts disbursed, the general rule is that agency must credit such refund to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. *See Secretary of War*, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).
3. False Claims Act (FCA) Recoveries. If an agency obtains a damage award or settlement pursuant to the FCA, it may "retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses." *See Federal Emergency Management Agency -- Disposition of Monetary Award Under False Claims Act*, B-230250, 69 Comp. Gen. 260, 264 (1990). If "treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts." *Id.*

X. CONCLUSION.

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