

USE OF PRIOR-YEAR FUNDS FOR NON-RECURRING MAINTENANCE (NRM) PROJECTS

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) directive provides policy for the appropriate use of prior-year funds in an expired account in accordance with the Expired Funds Control Act of 1990, 31 U.S.C. 1551-1557; Department of Veterans Affairs (VA) Policy Volume II, Chapter 2: VA's Budget Cycle and Fund Symbols; and Public Law 108-199, Consolidated Appropriations Act, 2004, which established the Medical Facilities (0162) appropriation, as the appropriation to use for non-recurring maintenance (NRM) projects. **NOTE:** *Incorrect use of prior year funds is a purpose clause violation and may lead to an Antideficiency Act (ADA) violation if accounts cannot be reconciled or exchanged to cover the deficiency. ADA violations must be reported to Congress and the White House. Willful and knowing violations may lead to criminal liability.*

2. SUMMARY OF MAJOR CHANGES: Major changes are as follows:

a. Reason for Issue: Adds a note regarding the Antideficiency Act in relation to prior year funds.

b. Responsibilities, paragraph f, Capital Asset Manager (CAM): Includes a reference based on the Deputy Under Secretary for Operations and Management memo from September 12, 2016, that Veterans Integrated Service Network (VISN) Capital Asset Managers should contact the VHA Office of Capital Asset Management Engineering and Support (OCAMES) for NRM projects approaching an estimated cost of \$9.0 million. **NOTE:** *This VHA 10N memo will be available online at the following VA Web site <http://vaww.va.gov/vhapublications/publications.cfm?Pub=3> within 6 months of publication. This is an internal VA Web site that is not available to the public.*

3. RELATED ISSUES: None.

4. RESPONSIBLE OFFICE: The VHA Chief Financial Officer (10A3) is responsible for the contents of this directive. Questions may be addressed to 202-461-6666.

5. RESCISSIONS: VHA Directive 2012-007, dated January 31, 2012, is rescinded.

6. RECERTIFICATION: This VHA directive is scheduled for recertification on or before the last working day of November 2022. This VHA directive will continue to serve as national VHA policy until it is recertified or rescinded.

Carolyn M. Clancy, M.D.
Executive in Charge

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VHA DIRECTIVE 1336

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USE OF PRIOR-YEAR FUNDS FOR NON-RECURRING MAINTENANCE (NRM) PROJECTS

1. PURPOSE

This Veterans Health Administration (VHA) directive provides policy for the appropriate use of prior-year funds in an expired account in accordance with 31 U.S.C. 1551-1557; Department of Veterans Affairs (VA) Policy Volume II, Chapter 2: VA's Budget Cycle and Fund Symbols; and Public Law 108-199, Consolidated Appropriations Act, 2004, which established the Medical Facilities (0162) appropriation as the appropriation to use for non-recurring maintenance (NRM) projects, and subsequent appropriations acts. **NOTE:** *The term "NRM projects" includes both projects that meet the criteria for recording in the Capital Asset Management System database and those which have been historically referred to as "station level" projects that do not meet the criteria.* **AUTHORITY:** 31 U.S.C. 1551 - 1557.

2. BACKGROUND

a. Public Law 101-510 1405(a) (also known as the "Expired Funds Control Act of 1990") enacted on November 5, 1990, prescribed new rules for expired appropriations in 31 U.S.C. 1551-1557. This Act extends an expired appropriation's fiscal year (FY) identity to five fiscal years beyond the current fiscal year and permits the recording, adjusting, and liquidating of obligations properly charged to that appropriation. Thus, an adjustment may be made to an existing obligation where the adjustment or contract change is within the scope and an antecedent liability of the original contract. After the five-year period has lapsed, all obligated and un-obligated balances are canceled, the appropriation or account is "closed," and remaining funds are swept back into the Treasury.

b. For purposes of 31 U.S.C. 1553, which permits agencies to adjust obligations chargeable to expired accounts, the term "contract change" means a change to a contract under which the contractor is required to perform additional work. The change must be within the scope of the original contract, or pursuant to a provision in the original contract. The term does not include adjustments to pay claims, or increases under an escalation clause. A change within the scope of the original contract, or made pursuant to a provision in the original contract, is charged against the appropriation at the time the contract was originally executed as an in-scope modification, not an out-of-scope modification under the "Cardinal Change Rule."

c. If an upward price adjustment occurs and is not severable from the original contract or "out-of-scope," then an antecedent liability exists. When an antecedent liability exists and is enforced by the contractor, it is to be charged against the appropriation at the time the contract was originally executed, even though the adjustment is necessitated in a subsequent year. A contractually-permissible change, based on an antecedent liability, does not give rise to a new liability since that liability existed at the time the original contract was executed, demonstrated in the general terms and conditions to which the parties originally agreed upon and

contemplated. The subsequent price increase is viewed as reflecting a bona fide need of the year in which funds were obligated for payment of the original contract.

3. DEFINITIONS

a. **Antecedent Liability.** If the additional work is within the scope (general terms and conditions) of the original contract, that is, the work would reasonably have been in the original contemplation of the parties at the time of contract award, and VA's liability to pay for the work arises and is enforceable under a provision in the original contract, then such work would be considered to be an antecedent liability. There is no exception to the rule for "unforeseen conditions." If they lead to additional work that is within the contract scope and enforceable under a provision in the original contract, then they must be charged to prior year funds. If not, then current year funds must be used.

b. **Antideficiency Act.** The Antideficiency Act (31 U.S.C. 1341-1342, 1349-1350, 1351-1514, 1517-1518, and 1519) provides that an officer or employee of the United States Government or of the District of Columbia may not (A) make or authorize an expenditure or an obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation, (B) involve either Government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; (C) make or authorize an expenditure or obligation of funds required to be sequestered under the Balanced Budget & Emergency Deficit Control Act of 1985--252; or (D) involve either Government in a contract or obligation for the payment of money required to be sequestered under the Balanced Budget & Control Act of 1985--252. In brief, the Act makes individual Government officers and employees personally responsible for the authorizing or creating of any obligation or the authorizing or making of any expenditure in excess of available funds. **NOTE:** For additional information visit <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter07.pdf>.

c. **Bona Fide Needs Rule.** The balance of an appropriation or fund for obligations to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability, see 31 U.S.C. 1502. Without express statutory authority, no agency may obligate an appropriation made for the needs of a limited period of time, usually one year, for the needs of prior or subsequent years. This rule applies to all Federal government funding activities carried out with appropriated funds regardless of whether the funding mechanism used is a contract, grant, or cooperative agreement, or whether the funds were donated according to a specific statutory authority. **NOTE:** For additional information visit <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter05.pdf>.

d. **Non-Recurring Maintenance Projects.** Non-Recurring Maintenance (NRM) Projects are projects designed to correct, replace, upgrade, and/or modernize existing infrastructure and utility systems. Projects may include, but are not limited to, patient privacy corrections, life safety corrections, facility condition deficiency corrections, utility system upgrades, mental health improvements, window replacements, replacements of

aging heating, ventilation and air conditioning systems and components, boiler system upgrades, and water conservation measures. **NOTE:** For additional information visit <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumeVChapter09.pdf>.

e. **Obligation.** An act legally binding the Government to make a payment, resulting in either future or immediate outlays. When an individual authorized to bind the Government places an order, signs a contract, awards a grant, purchases a service or takes other actions that require the Government to make payments to the public or from one Government account to another, an obligation is incurred
<https://www.va.gov/finance/docs/VA-FinancialPolicyVolumeIChapter06.pdf>.

f. **Severable Services.** Services that are continuing and recurring in nature, such as lawn maintenance, janitorial services or security services and from which the agency realizes a benefit at the time services are provided even if the contract has not been performed to completion. Services are considered severable if they can be separated into components that independently provide value to meet an agency's needs. **NOTE:** For additional information visit <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumeVIChapter10.pdf>.

g. **Non-Severable Services.** Services that require a suite or range of tasks, sub-tasks, and deliverables all to be completed for the Government to receive the benefit of the contract or work are described as non-severable or "entire," and are funded "up front" as a *bona fide* requirement of the year in which the obligation for the non-severable work is incurred.

4. POLICY

It is VHA policy that modifications to existing prior-year obligations for NRM projects may be paid for from prior-year funds in an expired appropriation only when the adjustment or contract change is determined to be within the scope of the original contract and is made pursuant to a provision in the original contract, resulting in antecedent liability. Contract changes that are not within the scope of the original contract, or are not an antecedent liability, must be funded from a current-year appropriation.

5. RESPONSIBILITIES

a. **The Under Secretary for Health.** The Under Secretary for Health is responsible for ensuring overall VHA compliance with this directive.

b. **VHA Chief Financial Officer (CFO).** The VHA Chief Financial Officer (CFO), or designee, is responsible for:

(1) Instructing all field facilities to submit requests for additional obligational authority from the prior-year appropriation for NRM projects, using the required request document (see Appendix A), through the appropriate Veterans Integrated Service Network (VISN) officer to the [VHA CFO PY NRM](mailto:VHACFOPYRNM@va.gov) shared mailbox (VHACFOPYRNM@va.gov) in Outlook for concurrence.

(2) Concurrence on the use of prior-year funds for NRM contract amendments as certified by the contracting officer, facility's CFO, VISN Capital Asset Manager (CAM) and VISN CFO to be within the scope and an antecedent liability of the original contract up to a cumulative total increase of \$4 million within an expired appropriation.

(3) Submitting additional requests for obligation increases to the Assistant Secretary for Management (004) for concurrence when cumulative increases in a single fiscal year for an expired appropriation reach \$4 million.

(4) Tracking cumulative prior-year fund increases for contract changes for each expired appropriation.

(5) Working with VA Budget to prepare notifications to the appropriate Congressional Committees of VHA's intent to obligate funds when an obligation of funds causes the total increase to an expired appropriation to exceed \$25 million. Pursuant to 31 U.S.C. 1553(c)(2), the notification is submitted by the Secretary of Veterans Affairs not less than 30 days before the obligation exceeding the threshold is made.

c. **Veterans Integrated Services Network (VISN) Director.** The VISN Director, or designee, is responsible for:

(1) Verifying that the Project Contracting Officer has made a written determination that the effected change is within the scope and an antecedent liability of the original contract.

(2) Submitting the properly executed and approved Prior-Year Fund Request for NRM Projects (see Appendix A) to the [VHA CFO PY NRM](mailto:VHACFOPYRNM@va.gov) shared mailbox (VHACFOPYRNM@va.gov) in Outlook for concurrence. Properly executed forms request document must contain signatures of all three approving officials. **NOTE:** *When submitting requests for approval, a scanned copy of the request (see Appendix A), with signatures is required. Signatures can be hand written or by digital signature.*

(3) Ensure adequate funding is available and coordinate with the VHA Resource Management Office for transfer of additional prior-year funds if required by the requesting facility.

d. **VA Medical Facility Director.** The VA medical facility Director, or designee, is responsible for ensuring:

(1) The facility fiscal staff, in order to facilitate tracking of NRM prior-year obligational adjustments, ensures that all NRM projects' obligations, both new and prior-year obligational adjustments, are obligated under the correct fiscal year appropriation. The first source of funds should be the original account from which the obligation was made.

(2) The request for use of prior-year funds has been certified by the Project Contracting Officer stating that the additional work is within the scope of the original

contract and arises based on an antecedent liability in the original contract that is enforceable by the contractor.

(3) All required information for prior-year fund use requiring concurrence is submitted through the VISN CFO using the required request document (see Appendix A).

(4) There is full-control accounting and must assist the CAM's evaluation of total contracts and obligations associated with the NRM project.

(5) The VA medical facility Director may designate the facility CFO as designee. No other delegation from the VA medical facility Director with regards to the responsibilities in this directive may be made.

e. **Project Contracting Officer or Network Contract Manager (NCM).**

(1) The Project Contracting Officer or NCM is responsible for determining whether a contract change requires additional obligational authority. The Contracting Officer shall certify the additional work when:

- (a) The contract change is within the scope of the original contract; and
- (b) The contract change is an antecedent liability of the original contract.

(2) Based on Contracting Officer's determination, fiscal determines availability of fund and starts the tracking and concurrence process on use of prior year funds.

NOTE: *Contracting officers need to review the contracting SOP and consult with the Contracting Officers Technical Representative before making this determination. Auditors reviewing amendments to NRM projects involving the use of prior-year funds look to the Contracting Officer for adequate documentation to support these determinations. OGC procurement law specialists should be consulted on an as-needed basis to determine the parameters of in-scope and out-of-scope modifications.*

f. **Capital Asset Manager (CAM).** The CAM can see the entire project. The CAM is responsible for:

(1) Notifying the VHA Office of Finance and the Office of General Counsel (OGC) when the total cost of a project reaches \$9.0 million and thereafter tracking the project costs until closure.

(2) Certifying that all associated contracts and obligations were reviewed to ensure the overall NRM project costs do not exceed the \$10 million limit.

(3) Addressing any legal or purpose clause issues if the overall project contracts and obligations are in excess of \$10 million.

(4) Preventing an anti-deficiency violation.

g. **Facility Fiscal Officer.** The facility fiscal officer is responsible for:

(1) Ensuring that the request to use expired funds includes justifications that specifically address legal elements necessary for certification, such as whether the additional work is based on an antecedent liability in the original contract and meets a bona fide need of the appropriation year.

(2) Ensuring that obligations recorded during year-end spending are supported by adequate documentation prepared while the funds were legally available for obligation.

(3) Ensuring that NRM project obligations and adjustments are funded using the correct fiscal year and Medical Facilities appropriation (0162).

(4) Determining if the required additional funds are available locally or must be obtained from another facility. For example: The original contract was awarded during FY 2012 and obligated under fund - 3620162. First, determine whether funds are available under the original fund obligated by consulting the medical center's Status of Allowance Table (SALT) and entering budget fiscal years (BFYS): 12 and Fund: 0162A1). If funding is not available, the medical facility is to review its fund availability in multi-year funds 361/20162 and 362/30162 (BFYS: 11 12 and Fund: 0162B2 and BFYS: 12 13 and Fund: 0162B2) to determine which would have been available for obligation during FY 2012.

(5) If the facility determines additional funds are needed, coordinating with the VISN CFO, and if required, contacting the appropriate budget analyst from the Office of Resources Management (ORM) to request the additional funds. If funds are requested, ORM processes the Transfer of Disbursing Authority (TDA) on-line in Financial Management System (FMS), within 2 business days and notifies the station. Once the additional funds are available on the SALT table, the Prior- Year Fund Request for NRM Projects must be submitted to the Office of Financial Management and Accounting Systems.

(6) Submitting requests for use of prior-year funds through the VISN CFO to the VHA CFO for approval.

6. REFERENCES

a. 31 U.S.C. 1551 through 1557.

b. Office of Management and Budget (OMB) Circular A-11, Preparation, Submission, and Execution of the Budget, dated August 1, 2017, https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc

c. United States General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law, Second Edition, Volume 1, Chapter 5, <http://www.gao.gov/special.pubs/og91005.pdf>.

d. Department of Veterans Affairs, Financial Policy, Volume II, Appropriations, Funds, and Related Information, Chapter 2, dated September 2012, <http://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter02.pdf>.

e. Department of Veterans Affairs, VA Financial Policies and Procedures Obligations Policy, Volume II, Chapter 5, dated May 2014, <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter05.pdf>.

f. Department of Veterans Affairs, Financial Policy, Volume II, Appropriations, Funds, and Related Information, Chapter 6, 1358 Obligations, dated January 2013, <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter06.pdf>.

g. Department of Veterans Affairs, VA Financial Policies and Procedures Various Appropriations Law Related Topics, Volume II, Chapter 7, dated August 2014, <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumellChapter07.pdf>.

h. Department of Veterans Affairs, Financial Policy, Volume V, Assets, Chapter 9, General Property, Plant, and Equipment, dated May 2017, <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumeVChapter09.pdf>.

i. Department of Veterans Affairs, VA Financial Policies and Procedures, Other Liabilities, Volume VI, Chapter 10, dated December 2010, <https://www.va.gov/finance/docs/VA-FinancialPolicyVolumeVIChapter10.pdf>.

**REQUIRED PROCESSING INFORMATION FOR PRIOR YEAR NRM FUND
REQUESTS**

Requests for Prior Year Non-Recurring Maintenance Funds Projects must include the following information when submitted to the VHA CFO PY NRM , shared mailbox in MS Outlook for concurrence:

- 1. Request Date**
- 2. Veterans Integrated Service Network (VISN) #**
- 3. Station #**
- 4. Original Contract Date**
- 5. Original Obligation #**
- 6. Original Contract #**
- 7. Fiscal Year and Appropriation from which the Contract was Funded**
- 8. Original Amount of the Contract**
- 9. Total Amount of Prior Year Amendments**
- 10. Amount of this Amendment**
- 11. Fiscal Year and Appropriation for this Amendment**
- 12. Additional Amount of Funds the Facility Needs Transferred to Obligate the Increase**
- 13. Brief Description of the Original Contract**
- 14. Justification for the Increase (The explanation needs to specifically address legal elements necessary to demonstrate that the additional work meets a bona fide need of the appropriation year, such as the contract provision authorizing the change, tasks or specifications affected by the change, when the need for the additional work was first identified, and why the Contracting Officer has concluded that the change is based on an antecedent liability enforceable by the contractor).**
- 15. Certification by the Contracting Officer that the change arises due to an Antecedent Liability in the Original Contract Enforceable by the Contractor.**
- 16. Contracting Officer Name and Signature**
- 17. Facility Chief Financial Officer (CFO) Concurrence and Signature**

November 28, 2017

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APPENDIX A**

18. VISN Chief Financial Officer Concurrence and Signature

19. VISN Capital Asset Manager Concurrence and Signature