

USE OF PRIOR-YEAR APPROPRIATIONS FOR NON-RECURRING MAINTENANCE PROJECTS

1. SUMMARY OF MAJOR CHANGES: This directive:

a. Updates responsibilities in paragraph 2 for the Veterans Integrated Service Network Capital Asset Manager (CAM) to include a change in the cost amount, which triggers a notification to the Veterans Health Administration (VHA) Office of Finance, Office of General Counsel and VHA Office of Capital Asset Management as appropriate.

b. Adds responsibilities in paragraph 2 for the Deputy Under Secretary for Health; Assistant Under Secretary for Health for Operations; Executive Director, Office of Financial Quality Assurance and Oversight; Office of Resource Management (ORM) Budget Analyst; ORM Supervisor; Executive Director, VHA Healthcare Environment and Facilities Programs, Veterans Integrated Services Networks (VISN) CAM, VISN Chief Financial Officer, VHA Procurement Director of Contracting; Department of Veterans Affairs (VA) medical facility Chief Engineer.

2. RELATED ISSUES: VA Directive 4085, Capital Asset Management, dated December 2, 2020; VHA Directive 1002.02, VHA Minor Construction Program, dated August 23, 2022; VHA Directive 1002.1, Non-Recurring Maintenance Program, dated May 6, 2020.

3. POLICY OWNER: The VHA Office of Finance, Office of Financial Operations and Support (104C) is responsible for the contents of this directive. Questions may be addressed to the VHA Chief Financial Officer Prior-Year Non-Recurring Maintenance mailbox at VHACFOPYNRM@va.gov.

4. RESCISSIONS: VHA Directive 1336, Use of Prior-Year Funds for Non-Recurring Maintenance (NRM) Projects, dated November 28, 2017, is rescinded.

5. RECERTIFICATION: This VHA directive is scheduled for recertification on or before the last working day of February 2028. This VHA directive will continue to serve as national VHA policy until it is recertified or rescinded.

6. IMPLEMENTATION SCHEDULE: This directive is effective upon publication.

February 27, 2023

VHA DIRECTIVE 1336

**BY DIRECTION OF THE OFFICE OF THE
UNDER SECRETARY FOR HEALTH:**

/s/ Steven L. Lieberman, M.D.
Deputy Under Secretary for Health

NOTE: All references herein to VA and VHA documents incorporate by reference subsequent VA and VHA documents on the same or similar subject matter.

DISTRIBUTION: Emailed to the VHA Publications Distribution List on March 1, 2023.

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APPENDIX A

PRIOR-YEAR APPROPRIATION REQUEST FOR NON-RECURRING MAINTENANCE PROJECTSA-1

USE OF PRIOR-YEAR APPROPRIATIONS FOR NON-RECURRING MAINTENANCE PROJECTS

1. POLICY

It is Veterans Health Administration (VHA) policy that modifications to existing prior-year (PY) obligations for non-recurring maintenance (NRM) projects may be paid for from PY appropriations 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. **AUTHORITY:** 31 U.S.C. §§ 1553, 1554; 38 U.S.C. § 7301(b).

2. RESPONSIBILITIES

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

b. **Deputy Under Secretary for Health.** The Deputy Under Secretary for Health is responsible for supporting the VHA Office of Finance with implementation and oversight of this directive.

c. **Assistant Under Secretary for Health for Operations.** The Assistant Under Secretary for Health for Operations is responsible for:

(1) Communicating the contents of this directive to each of the Veterans Integrated Service Networks (VISNs).

(2) Assisting VISN Directors to resolve implementation and compliance challenges in all Department of Veterans Affairs (VA) medical facilities within that VISN.

(3) Providing oversight of VISNs to ensure compliance with this directive and its effectiveness.

d. **Chief Financial Officer.** The Chief Financial Officer (CFO) is responsible for:

(1) Instructing all VISNs and VA medical facilities to use the required Prior-Year Appropriation Request Template for NRM projects (see Appendix A) to submit requests for additional obligational authority from PY appropriations for NRM projects through the appropriate VISN CFO to the VHA CFO PY NRM shared mailbox (VHACFOPYNRM@va.gov) for concurrence.

(2) Concurring on the use of PY appropriations for NRM contract modifications as certified by the VISN CFO, VISN Capital Asset Manager (CAM), VA medical facility CFO and Contracting Officer (CO) 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 VA Assistant Secretary for Management for concurrence when cumulative increases in a single fiscal year (FY) for an expired appropriation exceed \$4 million.

(4) Tracking cumulative PY appropriation increases for contract changes for each expired appropriation.

(5) Preparing notifications to the appropriate Congressional committees about VHA's intent to obligate funds when an obligation of funds causes the cumulative total increase to an expired appropriation to exceed \$25 million. **NOTE:** 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.

e. Executive Director, VHA Healthcare Environment and Facilities Programs.

The Executive Director, VHA Healthcare Environment and Facilities Programs, is responsible for:

(1) Reviewing capital program PY appropriation requests greater than or equal to \$300,000.

(2) As requested by VHA Finance, ensuring the appropriate program office provides concurrence or non-concurrence based on the viability of the PY appropriation request, in accordance with VHA capital asset management policies and guidance. **NOTE:** For more information see VHA Directive 1002.1, Non-Recurring Maintenance Program, dated May 6, 2020.

f. Executive Director, Office of Financial Quality Assurance and Oversight. The Executive Director, Office of Financial Quality Assurance and Oversight is responsible for providing oversight for the VISN and VA medical facility compliance with this directive and ensuring corrective action is taken when non-compliance is identified.

g. Office of Resource Management Supervisor. The ORM Supervisor is responsible for coordinating with the VISN CFO for transfer of additional PY appropriations if required by the requesting VA medical facility.

h. Office of Resource Management Budget Analyst. The ORM Budget Analyst is responsible for processing requests for additional funds. **NOTE:** The ORM Budget Analyst processes the Transfer of Disbursing Authority online in the Financial Management System generally within 2 business days and notifies the VA medical facility.

i. VHA Procurement Director of Contracting. The VHA Procurement Director of Contracting (DoC) is responsible for supporting the assigned CO, as needed, with determining whether a contract change requires additional obligational authority and certifying the additional work when the contract change is within the scope of the original contract and is an antecedent liability of the original contract.

j. **Veterans Integrated Services Network Director.** The VISN Director is responsible for:

(1) Ensuring that all VA medical facilities within the VISN comply with this directive and informing leadership when barriers to compliance are identified.

(2) Ensuring that the CO has made a written determination stating that the effected change is within the scope and an antecedent liability of the original contract.

(3) Submitting the properly executed and approved Prior-Year Appropriation Request Template for NRM projects (see Appendix A) to the shared mailbox VHACFOPYNRM@va.gov. Properly executed requests must contain the signatures of all three approving officials (VISN CFO, VISN CAM and VA medical facility CFO).

NOTE: *When submitting the Prior-Year Appropriation Request Template for NRM projects for approval, a scanned copy of the request (see Appendix A) with signatures, is required. Signatures must be made digitally.*

k. **Veterans Integrated Services Network Capital Asset Manager.** The VISN CAM is responsible for:

(1) Notifying in writing the VHA Office of Finance, Office of General Counsel (OGC) and VHA Office of Capital Asset Management, as appropriate, as soon as it is known and before obligation or modification is made, when the total cost of a project approaches \$16 million in the case of NRM-Sustainment (SUS) projects or \$8 million for Clinical Specific Initiative (CSI) projects 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 \$20 million limit for NRM-SUS and the \$10 million limit for CSI projects.

(3) Addressing any legal or purpose clause issues if the overall project contracts and obligations are in excess of the limits for NRM-SUS and CSI projects stated above.

(4) Preventing an Antideficiency Act violation. **NOTE:** *The Antideficiency Act prohibits a Government official or employee from making an expenditure or obligation that exceeds or is in advance of an available appropriation. For additional information, see the VA Financial Policy Volume II, Appropriations, Funds and Related Information, Chapter 7, Various Appropriations Law Topics, available at:*

<https://www.va.gov/finance/policy/pubs/volumell.asp>.

l. **Veterans Integrated Services Network Chief Financial Officer.** The VISN CFO is responsible for:

(1) Certifying the use of PY appropriations for NRM contract modifications.

(2) Ensuring the submission of all required information for PY appropriations use requiring concurrence using the Prior-Year Appropriation Request Template for NRM projects (see Appendix A).

(3) If the VA medical facility determines additional funds are needed, coordinating with the VA medical facility CFO and if required, contacting the appropriate ORM Budget Analyst to request the additional funds.

(4) Ensuring adequate funding is available and coordinating with the ORM Supervisor for transfer of additional PY appropriations if required by the requesting VA medical facility.

m. **VA Medical Facility Director.** The VA medical facility Director is responsible for:

(1) Ensuring overall VA medical facility compliance with this directive and appropriate corrective action is taken if non-compliance is identified.

(2) Ensuring the VA medical facility Chief Engineer is available, if necessary, to facilitate tracking of NRM PY obligational adjustments.

(3) Ensuring that all NRM projects' obligations, both new and PY obligational adjustments, are obligated under the correct FY appropriation. The first source of funds must be the original account from which the obligation was made.

(4) Ensuring the Prior-Year Appropriation Request Template for NRM projects has been certified by the CO, 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.

(5) Ensuring that all required information for PY appropriations use requiring concurrence is submitted through the VISN CFO using the Prior-Year Appropriation Request Template for NRM projects (see Appendix A).

(6) Assigning the VA medical facility CFO, as needed, as the designee for compliance with this directive, before signature of the VISN CFO. No other delegation from the VA medical facility Director with regard to the responsibilities in this directive may be made.

n. **VA Medical Facility Chief Financial Officer.** The VA medical facility CFO is responsible for:

(1) Certifying the use of PY appropriations for NRM contract modifications by:

(a) Ensuring that the request to use expired appropriations 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. **NOTE:** See definition of bona fide need rule in paragraph 6.

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

(c) Ensuring that NRM project obligations and adjustments are funded using the correct FY and VA medical facilities appropriation fund.

(2) Determining if the required additional funds are available locally or must be obtained from another VA medical facility.

(3) If the VA medical facility determines additional funds are needed, coordinating with the VISN CFO and if required, contacting the appropriate ORM Budget Analyst to request the additional funds.

(4) Submitting requests for use of PY appropriations through the VISN CFO to the VHA CFO for approval.

o. **Contracting Officer.** The CO is responsible for:

(1) Determining whether a contract change request requires additional obligational authority and verifying the additional work is within the scope of the original contract and is an antecedent liability of the original contract.

(2) Requesting the availability of PY funds from the local fiscal office. **NOTE:** *Auditors reviewing modifications to NRM projects involving the use of PY appropriations look to the CO for adequate documentation to support these determinations. OGC procurement law specialists should be consulted on an as-needed basis or as required to determine the parameters of in-scope and out-of-scope modifications.*

(3) Reviewing Appendix A fields 1-15 and if acceptable, certifying the use of PY appropriations requests 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.

p. **VA Medical Facility Chief Engineer.** The VA medical facility Chief Engineer is responsible for:

(1) Facilitating tracking, as necessary, of NRM PY obligational adjustments.

(2) Identifying both the necessity of and circumstances surrounding modifications to NRM projects involving the use of PY appropriations.

(3) Identifying if a professional design by the designer of record is required to accompany the modifications to NRM projects involving the use of PY appropriations.

3. TRAINING

There are no formal training requirements associated with this directive.

4. RECORDS MANAGEMENT

All records, regardless of format (e.g., paper, electronic, electronic systems) created by this directive, must be managed as required by the National Archives and Records Administration (NARA) approved records schedules found in VHA Records Control Schedule 10-1. Questions regarding any aspect of records management should be addressed to the appropriate Records Officer.

5. BACKGROUND

a. P.L. 101-510 § 1405 (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 FY identity to 5 FYs beyond the current FY 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 5-year period has lapsed, all obligated and unobligated balances are canceled, the appropriation or account is "closed" and the 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 contract terms and conditions, it must 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.

d. The Secretary of Veterans Affairs reviews notifications prepared by the CFO regarding VHA's intent to obligate funds when an obligation of funds causes the total increase to an expired appropriation to exceed \$25 million, and, pursuant to 31 U.S.C. § 1553(c)(2), submits the notifications to the appropriate Congressional committees no less than 30 days before the obligation exceeding the threshold is made. Upon submission by the CFO, the VA Assistant Secretary for Management provides

concurrence when cumulative increases in a single FY for an expired appropriation exceed \$4 million.

6. DEFINITIONS

a. **Antecedent Liability.** Antecedent liability is additional work within the scope (general terms and conditions) of the original contract, that 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. There is no exception to the rule for unforeseen conditions. If they lead to additional work within the contract scope and are enforceable under a provision in the original contract, they must be charged to PY appropriations. If not, then current year funds must be used.

b. **Bona Fide Need Rule.** The bona fide need rule states that 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 a limited period, usually 1 year, for the needs of prior or subsequent years. This rule applies to all Federal Government funding activities 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, see the VA Financial Policy Volume II, Appropriations, Funds and Related Information, Chapter 5, Obligations Policy, available at: <https://www.va.gov/finance/policy/pubs/volumell.asp>.

c. **Non-Recurring Maintenance Projects.** NRM projects are designed to correct, replace, upgrade or modernize existing infrastructure and utility systems. **NOTE:** For additional information, see the VA Financial Policy Volume V, Chapter 9, General Property, Plant and Equipment, available at: <https://www.va.gov/finance/policy/pubs/volumeV.asp>.

d. **Obligation.** Obligation is 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. **NOTE:** For additional information, see the VA Financial Policy Volume II, Chapter 5, Obligations Policy, available at: <https://www.va.gov/finance/policy/pubs/volumell.asp>.

7. REFERENCES

- a. P.L. 101-510 § 1405.
- b. 31 U.S.C. §§ 1502, 1551-1557.

c. 38 U.S.C. § 7301(b).

d. VHA Directive 1002.1, Non-Recurring Maintenance Program, dated May 6, 2020.

e. Department of Veterans Affairs, Financial Policy, Volume II, Appropriations, Funds and Related Information, Chapter 5, Obligations Policy.

<https://www.va.gov/finance/policy/pubs/volumell.asp>.

f. Department of Veterans Affairs, Financial Policy, Volume II, Appropriations, Funds and Related Information, Chapter 7, Various Appropriations Law Topics.

<https://www.va.gov/finance/policy/pubs/volumell.asp>.

g. Department of Veterans Affairs, Financial Policy, Volume V, Assets, Chapter 9, General Property, Plant and Equipment.

<https://www.va.gov/finance/policy/pubs/volumeV.asp>.

h. Federal Acquisition Regulation Part 43. <https://www.acquisition.gov/far/part-43>.

i. Veterans Affairs Acquisition Manual Part 843.

<https://dvagov.sharepoint.com/sites/VACOOALALF/ALFA/SitePages/VAAM.aspx?reg=M843>. **NOTE:** *This is an internal VA website that is not available to the public.*

j. Veterans Affairs Acquisition Regulation Part 843.

<https://www.va.gov/oal/library/vaar/vaar843.asp>.

**PRIOR-YEAR APPROPRIATION REQUEST FOR NON-RECURRING MAINTENANCE
PROJECTS**

Requests for prior year (PY) appropriations for non-recurring maintenance (NRM) projects must include the following information when submitted to the Veterans Health Administration (VHA) Chief Financial Officer (CFO) PY NRM shared mailbox (VHACFOPYNRM@va.gov) for concurrence:

1. Request date.
2. Veterans Integrated Service Network (VISN) number.
3. Department of Veterans Affairs (VA) medical facility number.
4. Original contract date.
5. Original obligation number.
6. Original contract number.
7. Fiscal year (FY) and appropriation from which the contract was funded.
8. Original amount of the contract.
9. Total amount of prior year modification.
10. Amount of this modification.
11. FY and appropriation for this modification.
12. Additional amount of funds the VA medical facility needs transferred to obligate the increase.
13. Brief description of the original contract.
14. NRM/Clinical Specific Initiative project number.
15. Justification for the increase. **NOTE:** *The explanation must specifically address legal, regulatory or patient safety 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 (CO) has concluded that the change is based on an antecedent liability enforceable by the contractor.*
16. Certification by the CO that the change arises due to an antecedent liability in the original contract, enforceable by the contractor, and that the contract file contains the

authorities used to justify the modification. **NOTE:** See *Federal Acquisition Regulation (FAR) 36.608, FAR 36.609.2 and FAR 52.236-23 for more information.*

17. CO name and signature.

18. VA medical facility CFO concurrence and signature.

19. VISN Capital Asset Manager concurrence and signature.

20. VISN CFO concurrence and signature.