# Fiscal/Monetary Considerations

## Who Pays for the Cost of an ADR Procedure?

Each party to an issue in controversy bears the cost of their own internal ADR preparation (i.e., fact finding, document control, expert witnesses, etc.). The program office, on a systems contract, or the requiring activity, on an operational contract, would fund these preparation costs. JA generally funds attorney TDY costs. The parties usually share the cost of the private sector Neutral.

## Funding Settlements

### General Principals and Anti-Deficiency Act (ADA) Concerns

There are differences in how a settlement can be funded, versus how a judgment is funded. Settlements are an agree-to resolution that does not involve a court or board sustained appeal or consent judgment. Judgments, on the other hand, involved a sustained appeal or consent judgment. Because there are differences in how settlements and judgments are funded, it is necessary to discuss some basic principles of fiscal law. This will help all parties understand courses of action that may be taken when engaging in settlement, as well as knowing limitations. There are specific rules regarding which type of funds can be used for funding a settlement agreement. Be sure to always consult Financial Management as well as a fiscal law attorney when discussing settlement funding and judgment funding issues.

**Fiscal Law Basics**

Funds fall into one of three categories: (1) current, (2) expired, or (3) cancelled.

*Current year funds* are funds whose availability for *new obligations* has not expired under the terms of the applicable appropriation. For example, procurement funds are current for three years, R&D funds for two years and O&M funds for one year.

*Expired funds* are those funds whose availability for new obligations has expired but they retain their fiscal year identity for five years after expiration and are available to adjust and liquidate obligations already incurred. Funds move from current to expired status after a varying number of years depending on their type. For example, O&M funds “expire” and can no longer be obligated, after 1 year from the time the funds are first appropriated; RDT&E after 2 years; procurement after 3 years; and MILCON after 5 years. *Both obligated and unobligated funds in the expired accounts are available for settlements and in-scope changes so long as the fiscal year identity of the funds and the fund types are respected.*

*Canceled funds* are funds that are no longer available for any purpose. Funds become canceled after their five-year period in an expired account. The Anti-Deficiency Act prohibits the use of canceled funds. Any payments beyond the expired phase must be taken from currently available appropriations and cannot exceed one percent of current Agency appropriations without congressional approval.

### Source of Settlement Funds

A CO entering into settlement negotiations should consult with Finance and a fiscal law attorney to determine the source of the settlement funds and have a fairly good estimate of how long it will take to actually make the payment after the parties agree to settle.

In general, settlements can be paid from available contract funds, available expired accounts, or other available, like-type, current funds. Cases that result in monetary relief to the contractor often occur when settlement discussion among the parties results in an agreed-to compromise of the BCA appeal and underlying claim(s). In this instance, the settlement is normally effected by a bilateral agreement between the parties and modification to the contract. The settlement amount is normally paid by the contracting officer from the appropriation available to fund the contract. In certain cases, this settlement payment may come from expired money on a “relation back” theory. In essence, the settlement can be paid from expired funds if the claim “relates back” to work that could have been funded with current funds.

However, in some settlements, the parties have may agree to a stipulated judgment (the parties agree to the facts and the amount of the judgment) or a consent judgment (one party consents to the facts and amount of judgment to which the other party raises no objection). These judgments are then adopted by the BCA in an order of award that is satisfied from the Judgment Fund. However, the Judgment Fund cannot be used to directly fund settlements.

Use of stipulated or consent judgments to be paid from the Judgment Fund may be advantageous to the Government when: (1) the appropriation which funded the contract is no longer available or is exhausted; (2) the contracting officer must obtain funds from higher headquarters which may involve substantial delay and the unnecessary incurrence of interest charges on the CDA claim; (3) the delay in obtaining funds from higher headquarters may jeopardize an otherwise advantageous settlement for the Government; or (4) reimbursement of the award from subsequent annual appropriations would have a “cash flow” advantage to the contracting agency.

There are disadvantages in the use of stipulated or consent judgments. Reimbursement of the Judgment Fund, which is necessary when stipulated or consent judgments are used, must be from current year funds, whereas payment of settlements by the contracting officer may occur on a “relation back” theory from expired funds. Any decision to use a stipulated or consent judgments should be coordinated with the Agency financial community prior to execution

In summary:

* If contract funds are still available, they are the preferred source to fund settlements.
* If contract funds are exhausted, determine availability of funds in “expired” accounts.
* If expired accounts are not available (insufficient amount of the correct FY or type); current year funds must be used.
* If current or expired year funds are not available, but settlement is determined to be most advantageous to the Government, consult with the assigned trial attorney to prepare a motion to the board. This motion should seek to have the board adopt the settlement as its decision in the case, and have the settlement, now a “judgment,” paid by the Judgment Fund. As discussed previously, the Judgment Fund will have to be repaid by the Agency. In most instances the Agency will look to the appropriate requiring activity to reimburse the fund.

## Funding Judgments

A judgment is an order from a BCA or U.S. Court of Federal Claims (COFC) (or higher court following an appeal of the original decision) directing the Agency to pay an amount of money because Appellant has prevailed in at least part of its case. The Contract Disputes Act,[[1]](#footnote-1) provides, “[a]ny monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in [the Judgment Fund statute]....” Judgments can be funded from available contract funds, the Indefinite Judgment Fund (this is a special fund established for this purpose), [[2]](#footnote-2) or other available, like-type, current funds. Expired account funds cannot be used to reimburse the Judgment Fund although, depending on the circumstances, they may be used to fund a settlement.

If contract funds are exhausted, and there is no expired money a “consent judgment” and payment from the judgment fund may be the only option to avoid an Anti-Deficiency Act (ADA) violation (consult finance and your legal counsel). Also note that even in this situation, the Agency will be required to reimburse the Judgment Fund with “current year” funds.

Congress created the Judgment Fund as a source of funds to pay judgments against the United States Government.[[3]](#footnote-3) The Judgment Fund certification of payment function has been transferred from the General Accounting Office (GAO) to the Financial Management Service (FMS), Department of the U.S. Treasury. This change only affects the administrative procedures for tapping the Judgment Fund and does not impact the substantive guidance on the appropriate use of the Judgment Fund.

The U.S. Treasury requires that when a BCA renders a monetary award to a contractor, a certificate of finality be executed by the parties (certifying neither party contemplates an appeal or further action on the appeal) and three Treasury Department forms be completed by the contracting officer: Judgment Fund Transmittal FMS Form 194, Judgment Fund Award Data Sheet FMS Form 196, and Judgment Fund Voucher for Payment FMS Form 197. [[4]](#footnote-4)

A BCA will include copies of the FMS forms and certificates of finality for completion by the parties when it forwards a decision reflecting the monetary award to a contractor. The Agency Trial Team docket clerk will forward these forms to the CO upon receipt of the authenticated copy of the Board’s decision. The contracting office will then submit the completed forms, along with the Board’s decision, to the Treasury Department in accordance with the directions on the FMS forms.

The Treasury Department will send payment to the contracting office; not to the contractor or the contractor’s attorney. The contracting office will be responsible for delivering the payment to the contractor or the contractor’s representative. The Treasury Department also requires that all check or wire transfers have the payee’s Taxpayer Identification or Social Security Number on the payment. If the payee is the contractor’s attorney, include the attorney’s tax identification number.

The Contract Disputes Act requires the contracting activity listed on the certificate of finality reimburses the Judgment Fund out of current appropriations or obtain additional appropriations from Congress for the judgment.[[5]](#footnote-5) Such reimbursement must be out of current year funds unless a specific appropriation is obtained. Reimbursements come from funds available for obligation when the judgment is entered. The rationale for Congress requiring agencies to reimburse the Judgment Fund is to foster responsible agency decision making during the claims resolution process.

As mentioned above, the Judgment Fund cannot be reimbursed with expired account funds. The Agency will normally seek the necessary funds from the local base or MAJCOM involved to reimburse the Judgment Fund after the Agency has reimbursed the Treasury.

## Other Issues Associated with the Cost of ADR

Agency personnel should be familiar with a number of cost allowability issues that may arise under certain types of contracts and in certain types of cases. The text below is designed to briefly address this area so that Agency personnel can begin to make informed choices regarding how to proceed. None of these matters alone are likely to tip the scales on when to pursue ADR if it is appropriate. They are matters that should be considered in entering into ADR, writing the ADR Agreement and in preparing settlement documents.

### Interest

The Contract Disputes Act of 1978 (CDA) entitles contractors to interests on their claims. Accrual of CDA interest begins on the date the contracting officer receives a proper claim under the CDA.[[6]](#footnote-6) Interest prior to the submission of a contractor’s claim is generally unallowable.[[7]](#footnote-7) Generally, settlements should address the issue of interest and the settlement agreement should reflect the terms to which the parties have agreed i.e., define the exact terms of the agreement rather than relying upon general statements such as “ interest is due.” Payment of Attorney’s Fees

Although as a general rule of law parties to litigation are not entitled to attorney’s fees and costs, government contractors may be entitled to attorney’s fees and costs under certain circumstances. The Equal Access to Justice Act (EAJA) provides that government contractors who meet specified eligibility requirements relating to business size may be permitted to recover attorney fees and associated litigation costs.[[8]](#footnote-8) EAJA can apply to the ADR process as well. As a result, the issue of attorney’s fees and costs must be considered in any ADR and addressed within any ADR settlement agreement. The effects of the EAJA also play a role in the timing of ADR. EAJA fees are imposed upon the granting of a “final judgment”; however, an “order of settlement” is considered a final judgment for the purposes of the Act. As a result, ADR should be timed to avoid or minimize EAJA attorney fees when possible and any settlement should contain language waiving or satisfying any EAJA fee obligation. Resolution prior to a CO Final Decision is normally desirable if EAJA fees are a primary concern.

### Allowable Claim Preparation Costs

The cost of preparation and presentation of claims against the government are not reimbursable (allowable) costs as part of an equitable adjustment or damage award.[[9]](#footnote-9) However, costs associated with contract administration, such as preparation of a request for equitable adjustment etc, are generally reimbursable expenses. Unfortunately, there is rarely a bright line between claims preparation and contract administration in practice. Consequently, every case is unique and requires a case-by-case determination. If the parties have questions about whether costs are allowable in their particular controversy, they should contact legal counsel for additional guidance.

1. 41 U.S.C. § 7108 [↑](#footnote-ref-1)
2. 31 U.S.C. § 1304 [↑](#footnote-ref-2)
3. 31 U.S.C. § 1304 [↑](#footnote-ref-3)
4. <http://www.fms.treas.gov/judgefund/forms.html> [↑](#footnote-ref-4)
5. 41 U.S.C. §7108(c) [↑](#footnote-ref-5)
6. 41 U.S.C. §7109; FAR 33.208 [↑](#footnote-ref-6)
7. FAR 31.205-20 [↑](#footnote-ref-7)
8. 5 U.S.C. §504. EAJA has two effects: (1) it waives the immunity of the United States to claims for attorney fees in situations in which other civil litigants would be subject to such fees, and, (2) it applies fees to the United States when they would not ordinarily apply if the individual opposed to the United States meets certain income criteria defined by the Act. [↑](#footnote-ref-8)
9. FAR 31.205-47 [↑](#footnote-ref-9)