

No. 11-551

IN THE
Supreme Court of the United States

KENNETH L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

**AMICUS CURIAE BRIEF FOR THE ARCTIC
SLOPE NATIVE ASSOCIATION, LTD.
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether a government contractor which has fully performed its end of the bargain has no remedy in money damages for non-payment when a government agency over-commits itself to other projects and, as a result, elects not to fully pay the contractor.

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AMICUS CURIAE BRIEF FOR THE ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

Amicus curiae Arctic Slope Native Association submits this brief to address how the government's extreme reformulation of government contract law contains no limiting principle and will render utterly illusory the core concept of a binding contract with the government.

INTEREST OF AMICUS CURIAE¹

Amicus Arctic Slope Native Association (Arctic) is a tribal contractor doing business with the U.S. Indian Health Service (IHS) under the Indian Self-Determination Act, 25 U.S.C. §§ 450 to 458bbb-2 (ISDA), and has a Petition pending before this Court in a closely related case. See *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *petition for cert. pending*, 80 U.S.L.W. 3126 (U.S. July 18, 2011) (No. 11-83) ("*Arctic*").

In September 1998, Arctic and IHS entered into a compact and accompanying annual funding agreement for Arctic to operate the IHS Samuel Simmonds Hospital in Barrow, Alaska, commencing October 1, 1998 (fiscal year 1999). *Arctic*, Cir. J.A. 118-76 (compact), 155-86 (funding agreement).

The master compact provided that the contract price each year included the Secretarial amount specified in § 450j-1(a)(1), and the contract support

¹ Undersigned counsel have long represented *amicus* and also represent respondents. Neither counsel nor respondents have made a monetary contribution toward the preparation or submission of this *amicus* brief.

costs specified in § 450j-1(a)(2). *Arctic*, Cir. J.A. 142.² Likewise, the associated annual funding agreement provided that “[Arctic] shall receive contract support as defined in [§ 450j-1(a)(2) and (3)]” (*id.* at 162), and specified these “[c]ontract support funds” in a preliminary funding table. *Id.* at 161.

Since the compact and annual funding agreement were executed before the start of the fiscal year, the compact recited that payments were “[s]ubject only to the appropriation of funds by the Congress.” *Id.* at 133. These provisions echoed the ISDA’s statement that “the provision of funds ... is subject to the availability of appropriations,” 25 U.S.C. § 450j-1(b); see also *id.* § 450l(c)(3) (mandatory contract sec. 1(b)(4)) (repeating “subject to the availability of appropriations” clause), a common feature of government contract law. *Infra* at 1a-12a (collecting 48 statutes).

² Referencing § 303(a)(6) of ISDA Title III, added by Indian Self Determination Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2297 (requiring payment of “an amount equal to that which the tribe would have been eligible to receive under contracts and grants under [Title I of the ISDA]”), *repealed and replaced with* Title V, 25 U.S.C. §§ 458aaa to 458aaa-13, *see* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 10, 114 Stat. 711, 734. The United States and the petitioners in the *Arctic* case agree that there is no difference between a contractor’s payment rights under Title I, Title III or Title V of the ISDA. *Arctic*, Br. for Resp. 6 n.2. Under Title I, a contractor is entitled to be paid the secretarial amount under § 450j-1(a)(1), plus the contract support cost amount under § 450j-1(a)(2); to insist that “the Secretary shall add to the contract the full amount of funds to which the contractor is entitled” under those sections, § 450j-1(g); and to have a funding agreement in which the funding amount “shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)].” 25 U.S.C. § 450l(c), Model Contract sec. 1(b)(4).

IHS promised to pay Arctic its full contract support costs in upcoming fiscal year 1999. When Arctic and IHS executed the contract documents in September 1998, IHS had in place an agency “Circular” addressing various contract support cost issues. *Arctic*, Cir. J.A. 270-91. The Circular was cited in the contract. *Id.* at 162. Under the Circular, IHS maintained a “priority list” which ranked the order in which IHS was going to pay particular contractors their contract support cost requirements. *Id.* at 279-80 (§ 4.A(4)(a)(ii)-(iii)). Contractors at the top of the Priority List were paid first and in full until agency funds ran out. As of September 1998, when the contract documents were signed, Arctic was at the top of the agency’s Priority List (*id.* at 740), meaning that under the fiscal year 1999 contract IHS would pay 100 percent of Arctic’s contract support cost requirements. *Id.* The Priority List (or “queue”) was also cited in the contract. *Id.* at 161 n.5 (“[Arctic] is pending in the queue [or Priority List] for ISDA [contract support] funds of \$2,130,451.”).

Because the contract was subject to the availability of appropriations yet to be enacted, the contract also recited that “all amounts to be paid in [fiscal year] [19]99 are estimates and are subject to amendment to reflect the full amount due for [fiscal year] [19]99.” *Id.* at 162.³ All of these provisions were consistent

³ Elsewhere in the annual funding agreement, the agency indicated that it need not pay contract support costs while funding remained uncertain, *Arctic*, Cir. J.A. 161, but such language does not alter the government’s contractual obligation, both because annual funding agreements cannot supplant the Model Contract and the ISDA’s requirement of full contract support funding, and also because payment of damages for breach can be paid from the Judgment Fund. *See* Resp. Br. 27-28, 49-50. In any event, even if the contractual language were

with the compact's overarching directive that the funding agreement would eventually specify no less than the full amount of contract support costs determined under Title I, *supra* at 1-2 & n.2,⁴ with payment subject to the availability of appropriations.

Arctic would have been paid in full in fiscal year 1999, but for a sudden shift in agency policy announced after the year ended. For fiscal year 1999 Congress enacted a \$35,000,000 increase in the capped IHS earmark used to pay contract support costs.⁵ Because Arctic was at the top of the Priority List, it should have received full payment of its contract support costs. But payments from IHS lagged, and after the contract year was over and performance complete, the agency announced its "departure" from "present policy." *Arctic*, Cir. J.A. 240 (IHS Director's letter). IHS declared that it was eliminating its priority list altogether and moving to an entirely different payment system.

As a result of the agency policy shift, Arctic was never fully paid as originally promised. Instead, all told, Arctic received a mere 42.15% of its full contract

ambiguous, the contracting Tribes prevail. 25 U.S.C. § 450l(c), sec. 1(a)(2).

⁴ The amounts stated in the contract were also "subject to additions for Medicare, Medicaid, and other reimbursements ... including amounts that have historically been distributed as non-recurring funds under Title I." *Arctic*, Cir. J.A. 162 (AFA § 4(b)). IHS classifies indirect contract support costs as "non-recurring" funds. *Id.* at 271.

⁵ See Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998) ("not to exceed \$203,781,000"); compare Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997) (\$168,702,000).

support cost requirement that year, leaving a \$1,912,941 shortfall.⁶

Payments in fiscal year 1999 ranged widely across all IHS contractors. The IHS Director explained that, under the new payment system, IHS wanted to prioritize contract payments to “contractors that have the greatest overall [contract support cost] need.” *Arctic*, Cir. J.A. 240. But, instead of accomplishing that goal, FY 1999 contract payments varied enormously across the 327 contractors, with 44 contractors fully paid, 260 contractors underpaid (some receiving as little as 40.89% of their contract price), and 23 contractors actually *overpaid* (some by over 139%). *2000 CSC Report* 15-17.

In September 1999, Arctic and IHS executed a new annual funding agreement in advance of the coming fiscal year 2000. The agreement, along with the standing compact, again assured full funding of contract support costs subject only to the availability of appropriations. In addition to repeating most of the preceding year’s terms, the new agreement reiterated that “[c]ontract support cost funding is calculated and paid under this AFA in accordance with [§ 450j-1] of the [ISDA],” and it reassured Arctic that “[n]othing in this provision shall be interpreted to waive [Arctic’s] right to be paid the contract support costs to which it is entitled in accordance with [§ 450j-1(a)(2)] of the [ISDA].” *Arctic*, Cir. J.A. 199.

⁶ IHS calculated that Arctic’s full CSC requirement was \$3,306,506, but that Arctic had received only \$1,393,565. See *Fiscal Year 2000 CSC Shortfall Report* 4 (cols. Q, R) (2000), available at http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2000_CSC_Shortfall_Report_-_FINAL_1999_data.pdf (“*2000 CSC Report*”).

Arctic might have been paid in full in fiscal year 2000, but for yet another agency shift in policy. Although Congress increased total contract support cost appropriations by \$25,000,000, see Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 (1999), mid-year IHS issued a new Circular addressing contract support costs. This Circular provided that, unlike previous years, increased appropriations would now be paid in proportion to each contractor's calculated shortfall, and (unlike fiscal year 1999) would not be prioritized to the most severely underfunded contractors. *Arctic*, Cir. J.A. 292, 322-24. Final agency calculations and payments under the new system took the whole year.

As a result, once again, Arctic was not fully paid its contract support costs incurred in operating the Barrow Hospital. All told, Arctic was eventually paid only 86.66% of its full contract requirement for fiscal year 2000, leaving a shortfall of \$489,182.⁷

As for other contractors, payments once again varied widely. Two contractors were paid less than 35% of their contract price, scores of others were paid amounts ranging from 35% to over 90% of the contract price, 38 contractors were fully paid, and 41 contractors were overpaid by as much as 198.32%. *2001 CSC Report* 15-19.⁸

⁷ IHS calculated that Arctic's contract support cost requirement was \$3,677,284, but that Arctic had received only \$3,178,102. See *Fiscal Year 2001 CSC Funding Report* 4 (cols. Q, R) (2001), available at http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2001_CSC_Shortfall_Report_-_FINAL_2000_data.pdf ("*2001 CSC Report*").

⁸ Similar funding disparities continue to this day. See *Fiscal Year 2010 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards* (amended Feb. 2012) (FY 2009 data), available at <http://www.ncai.org/>

Despite many contractors being left unpaid, IHS carried unspent contract support cost funds on its books for both years, and eventually \$179,539 (FY 1999) and \$137,013.51 (FY 2000) lapsed back to the Treasury. *Arctic*, Pet. App. 17a n.11.

ARGUMENT

The government argues that when a bulk multi-hundred million dollar agency appropriation from which over 330 contractors will be paid is insufficient to pay them all, then a contractor only has a legal right to receive whatever amount the agency decides in its discretion to pay him.

This position comes with no limitations. It does not matter—as occurred here—if the agency never tells the contractor in advance that the contract price is going to be reduced. It does not matter—as occurred here—if the agency never tells the contractor of the price change until after performance is complete and the government has received the full benefit of that performance. It does not matter—as occurred here—if the price change is the result of an agency reversal of prior policy about how contracts will be paid. And, at the end of the day, it does not matter if the agency is just \$1 short on what it needs to pay all contractors in full, and then decides to pay the contractors pro rata, first-come first-served, by some other criteria, or by no apparent criteria at all.

fileadmin/contract_support/IHS_FY_2010_CSC_Shortfall_Report_2009_narrative_and_tables_.pdf, showing 19 overpaid contractors (one as high as 352.00%, at 17, col. X), and scores of underpayments running as low as 7.68% (at 17, col. X). Tellingly, and despite the ISDA's command, *see* 25 U.S.C. § 450j-1(c), this report was transmitted to Congress three years late and was thus useless in helping Congress avoid or correct funding deficiencies.

That formulation cannot survive over a century of settled contract law, which provides the backdrop against which Congress authorized these government contracts.

Under that settled law, a normal “availability” clause permits a contract like Arctic’s to be awarded before performance begins and before Congress enacts a liquidating appropriation from which the contract will be paid. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 643 (2005). If the subsequent appropriation is, on its face, sufficient to pay that contract price, the right to be paid that price is secure, *id.* at 637-38, 640, 641, 643 (all citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)), and failure to pay it is a contract breach for which damages will lie. *Id.* at 642-43. On the other hand, if the appropriation on its face is insufficient to pay the contract (which was never the case here), then that fact is also readily apparent from the face of the appropriations Act and the contractor is bound by it. *Sutton v. United States*, 256 U.S. 575, 578-79 (1921).

This is the law that Congress embraced when it referred to ISDA agreements “426 times” as true “contract[s]”—“a promise ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”—and when Congress then made those agreements binding under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. *Cherokee*, 543 U.S. at 639 (citation omitted).

No principle of government contract law even hints at the extreme formulation now advanced by the government: namely, that a routine and normal availability clause is not just directed at future congressional action, but also vests in the agency unreviewable and carte blanche discretion to pay or not to pay contracts at will; to change rules even after

the government has secured the full benefit of the contractor's performance (here, operation of the government's Barrow hospital for two full years); to promise one thing when the contract is signed, then do something entirely different when it suits the agency; and to do all of this without any accountability under the Contract Disputes Act. Such a notion not only defies over a century of government contract law; it also defies a quarter century of repeated congressional efforts to *eliminate* agency discretion as much as possible in the funding and payment of ISDA contracts. See Indian Self Determination Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2292-94; Indian Self Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250; Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711. See Resp. Br. 39 & n.13; NCAI *Amicus* Br. § II.

What this Court said 125 years ago is just as true today: "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1877). To accept the government's formulation would not just inject "legal uncertainty" into the government contracting world, *Cherokee*, 543 U.S. at 644 (citing *Franconia Assocs. v. United States*, 536 U.S. 129, 142 (2002); *United States v. Winstar Corp.*, 518 U.S. 839, 884-85 & n.29 (1996) (plurality opinion); *id.* at 913 (Breyer, J., concurring); *Lynch v. United States*, 292 U.S. 571, 580 (1934)); it would eviscerate the whole concept of a mutually-binding contract and it would be "madness" for contractors ever to deal with the government. *Winstar*, 518 U.S. at 864 (plurality opinion) (quoting *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1866)). Fortunately,

that is not the law, as this Court made plain in *Cherokee*.

CONCLUSION

For the foregoing reasons, the Court should affirm the Tenth Circuit's decision in *Ramah*, grant the Petition in *Arctic*, vacate the Federal Circuit's decision, and remand *Arctic* for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX**COMPARABLE STATUTES**

1. 7 U.S.C. § 8503(a) (“Subject to the availability of appropriations to carry out this section, the Secretaries shall provide funds to support brown tree snake control, interdiction, research, and eradication efforts carried out by the Department of the Interior and the Department of Agriculture, other Federal agencies, States, territorial governments, local governments, and private sector entities. Funds may be provided through grants, contracts, reimbursable agreements, or other legal mechanisms available to the Secretaries for the transfer of Federal funds.”).
2. 8 U.S.C. § 1324b(l)(2)(A) (“In order to carry out the campaign under this subsection, the Special Counsel . . . may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign . . .”).
3. 10 U.S.C. § 1076a(i) (“The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.”).
4. 10 U.S.C. § 1092(b) (“Subject to the availability of appropriations for that purpose, the Secretary of Defense may enter into contracts with public or private agencies, institutions, and organizations to conduct studies and demonstration projects under subsection (a).”).

5. 10 U.S.C. § 2324(e)(3)(A) (“Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which paragraph (2) applies) may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . .”).
6. 10 U.S.C. § 2360(a) (“Subject to the availability of appropriations for such purpose, the Secretary of Defense may procure by contract under the authority of this section the temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at defense research and development laboratories.”).
7. 10 U.S.C. § 2780(a)(2) (“The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.”).
8. 16 U.S.C. § 1863(a)(3) (“Subject to the availability of appropriations, the Secretary shall award contracts, grants and other financial assistance to United States citizens to carry out the purposes of subsection (1) . . .”).
9. 22 U.S.C. § 277d-44(c)(1) (“Notwithstanding any provision of Federal procurement law, the Commission may enter into a multiyear fee-for-services contract with the owner of a Mexican facility in order to carry out the secondary treatment requirements of sub-section (a) of this section and make payments under such contract, subject to the availability of appropriations and subject to the terms of paragraph (2).”).

10. 22 U.S.C. § 1465d(b) (“The Board may carry out the purposes of section 1465a of this title by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.”).
11. 22 U.S.C. § 1465cc(c) (“The Board may carry out the purposes of this subchapter by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.”).
12. 22 U.S.C. § 2716(a)(1) (“Subject to the availability of appropriations, the Secretary of State shall enter into contracts for collection services to recover indebtedness owed by a person, other than a foreign country, to the United States which arises out of activities of the Department of State and is delinquent by more than 90 days.”).
13. 22 U.S.C. § 4024(a)(4)(B) (“In the exercise of functions under this subchapter, the Secretary of State may . . . if and to the extent determined to be necessary by the Secretary of State, obtain without regard to the provisions of law governing appointments in the competitive service, by appointment or contract (subject to the availability of appropriations), the services of individuals to serve as language instructors, linguists, and other academic and training specialists (including, in the absence of suitably qualified United States citizens, qualified individuals who are not citizens of the United States) . . .”).

14. 22 U.S.C. § 4026(a) (“In order to facilitate their transition from the Service, the Secretary may provide (by contract or otherwise, subject to the availability of appropriations) professional career counseling, advice, and placement assistance to members of the Service, and to former members of the Service who were assigned to receive counseling and assistance under this subsection before they were separated from the Service, other than those separated for cause.”).
15. 22 U.S.C. § 6435a(c)(1) (“Subject to the availability of appropriations, the Commission may contract with and compensate Government agencies or persons for the conduct of activities necessary to the discharge of its functions under this subchapter.”)
16. 22 U.S.C. § 6435a(c)(2) (“In the case of a study requested under section 6474 of this title, the Commission may, subject to the availability of appropriations, contract with experts and shall provide the funds for such a study.”).
17. 25 U.S.C. 450j(c)(1) (“A self-determination contract shall be—(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and (B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract. The amounts of such contracts shall be subject to the availability of appropriations.”).

18. 25 U.S.C. § 450j-1(b) (“Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.”).
19. 25 U.S.C. § 450l(c) (“The model agreement referred to in subsection (a)(1) of this section reads as follows . . . ‘Funding amount—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2).’”).
20. 25 U.S.C. § 458aaa-18(b) (“Notwithstanding any other provision of this subchapter, the provision of funds under this subchapter shall be subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this subchapter.”).
21. 33 U.S.C. § 891d(a)(3)(A) (“The Secretary may not enter into a contract pursuant to this subsection unless the contract includes a provision under which the obligation of the United States to make payments under the contract for any fiscal year is subject to the availability of appropriations provided in advance for those payments”).
22. 38 U.S.C. § 2021(a) (“Subject to the availability of appropriations provided for such purpose, the Secretary of Labor shall conduct, directly or

through grant or contract, such programs as the Secretary determines appropriate to provide job training, counseling, and placement services (including job readiness and literacy and skills training) to expedite the reintegration of homeless veterans into the labor force.”).

23. 38 U.S.C. § 8111A(b)(1) (“[T]he Secretary, to the extent authorized by the President and subject to the availability of appropriations or reimbursements under subsection (c) of this section, may enter into contracts with private facilities for the provision during such period by such facilities of hospital care and medical services described in paragraph (2) of this subsection.”).
24. 41 U.S.C. § 256(e)(2)(A) (“Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . .”).
25. 41 U.S.C. § 4304(b)(1) (“Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract . . .”).
26. 42 U.S.C. § 293k-2(e) (“The period during which payments are made to an entity from an award of a grant or contract under subsection (a) shall be 5 years. The provision of such payments shall be subject to annual approval by the Secretary and subject to the availability of appropriations for the fiscal year involved to make the payments.”).

27. 42 U.S.C. § 295o-1(e)(1) (“Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.”).
28. 42 U.S.C. § 296e(d)(1) (“Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.”).
29. 42 U.S.C § 1437f(c)(2)(B) (“The contract shall further provide for the Secretary to make . . . additional adjustments in the maximum monthly rent for units under contract (subject to the availability of appropriations for contract amendments) to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption.”).
30. 42 U.S.C § 1437f(c)(8)(A) (“Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any

number or years, with payments subject to the availability of appropriations for any year.”).

31. 42 U.S.C. § 6249(b)(4) (“A contract entered in-to under subsection (a) of this section shall include a provision that the obligation of the United States to make payments under the contract in any fiscal year is subject to the availability of appropriations.”).
32. 42 U.S.C. § 12206(d)(1) (“Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations.”).
33. 42 U.S.C. § 12655n(c) (“Contract authority under this division shall be subject to the availability of appropriations.”).
34. 46 U.S.C. § 51317(b)(3) (“Each contract under the program . . . shall be subject to the availability of appropriations.”).
35. 50 U.S.C. § 1521(n)(3)(B) (An incentives clause under this subsection shall specify that the obligation of the Government to make payment under such incentives clause is subject to the availability of appropriations for that purpose.”).
36. Pub. L. No. 106-31, Title III, § 3011, May 21, 1999, 113 Stat. 93, 93-94, as amended Pub. L. No. 106-113, Div. B § 1000(a)(2) [Title V, § 585], Nov. 29, 1999, 113 Stat. 1535, 1501A-117; Pub. L. No. 106-554, § 1(a)(2) [Title III, § 310], Dec. 21, 2000, 114 Stat. 2763, 2763A-119 (“Subject to the availability of appropriations, the head of the administering agency—(i) may contract with nongovernmental organizations having expertise

in carrying out the activities described in subsection (a) for the purpose of carrying out the administrative functions of the program (other than the awarding of grants)”).

37. Pub. L. No. 103-322, § 130007(b)(1), Sept. 13, 1994, 108 Stat. 2024, 2029, as amended Pub. L. No. 104-208, Div. C, Title III, § 308(g)(5)(F), (10)(F), Title VI, § 671(a)(6), Sept. 30, 1996, 110 Stat. 3009-623, 3009-625, 3009-721 (“Subject to the availability of appropriations, the Attorney General may—(1) construct or contract for the construction of 2 Immigration and Naturalization Service Processing Centers to detain criminal aliens”).
38. Pub. L. No. 102-484, Div. B, Title XXVIII, § 2822(a), Oct. 23, 1992, 106 Stat. 2608 (“Subject to the availability of appropriations therefor, the Secretary of Defense shall enter into a one-year contract with a private relocation contractor operating on a nationwide basis to test the cost-effectiveness of using national relocation contractors to administer the Homeowners Assistance Program.”).
39. Pub. L. No. 102-135, § 2(a), Oct. 24, 1991, 105 Stat. 635 (“The Secretary of Commerce shall, within 30 days after the date of enactment of this Act, and subject to the availability of appropriations, contract with the National Academy of Sciences (hereinafter in this Act referred to as the ‘Academy’) to study—(1) means by which the Government could achieve the most accurate population count possible; and (2) consistent with the goal under paragraph (1), ways for the Government to collect other demographic and housing data.”).

40. Pub. L. No. 111-281, Title III, § 307(d), Oct. 15, 2010, 124 Stat. 2927, 2928 (“The Secretary of the department in which the Coast Guard is operating may, subject to the availability of appropriations, enter into cooperative agreements, contracts, or other agreements with, or make grants to individuals and governments to carry out the purpose of this section or any agreements established under subsection (b).”).
41. Pub. L. No. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305, 2681-308, as amended Pub. L. No. 107-171, Title VI, § 6102(d)(5), May 13, 2002, 116 Stat. 419; Pub. L. No. 110-161, Div. F, Title IV, § 434, Dec. 26, 2007, 121 Stat. 2153; Pub. L. No. 111-8, Div. E, Title IV, § 428, Mar. 11, 2009, 123 Stat. 749 (“The Forest Service, subject to the availability of appropriations, may carry out any (or all) of the requirements of this section using private contracts.”).
42. Pub. L. No. 94-329, Title IV, § 413(b), (c), June 30, 1976, 90 Stat. 761 (“Subject to the availability of appropriations therefor, the President is authorized to adopt as a contract of the United States Government, and assume any liabilities arising thereunder (in whole or in part), any contract which had been funded or approved for funding by the Agency for International Development prior to June 30, 1975 . . .”).
43. Pub. L. No. 103-236, Title V, § 573(c), Apr. 30, 1994, 108 Stat. 486 (“The Secretary of State shall, subject to the availability of appropriations, contract with appropriate individuals and organizations to carry out the purpose of the Office.”).

44. Pub. L. No. 104-239, § 16(c)(3), Oct. 8, 1996, 110 Stat. 3133, 3138 (“Each contract with a shipyard under this section shall . . . be renewable, subject to the availability of appropriations, for each subsequent fiscal year through fiscal year 1998.”).
45. Pub. L. No. 111-204, § 2(h)(2)(B)(iii), July 22, 2010, 124 Stat. 2228, 2228-89 (“In conducting recovery audits under this subsection, the head of an agency . . . may conduct recovery audits directly, by using other departments and agencies of the United States, or by procuring performance of recovery audits by private sector sources by contract (subject to the availability of appropriations), or by any combination thereof.”).
46. Pub. L. No. 106-256, § 3(c)(2), Aug. 7, 2000, 114 Stat. 644, 646, as amended Pub. L. No. 107-206, Title I, § 206, Aug. 2, 2002, 116 Stat. 833; Pub. L. No. 107-372, Title III, § 306, Dec. 19, 2002, 116 Stat. 3096 (“In carrying out its functions under this section, the Commission . . . may enter into contracts, subject to the availability of appropriations for contracting . . .”).
47. Pub. L. No. 106-579, § 7(f)(1)(B), Dec. 28, 2000, 114 Stat. 3078, 3082, as amended Pub. L. No. 110-161, Div. H, Title I, § 1502(e), Dec. 26, 2007, 121 Stat. 2250 (“Subject to the availability of appropriations, to carry out this Act, the Chairperson or Vice Chairperson of the Commission or the Executive Director and White House Liaison may, on behalf of the Commission . . . enter into contracts, leases, and other legal agreements.”).
48. Pub. L. No. 104-299, § 3(b), Oct. 11, 1996, 110 Stat. 3644 (“The Secretary of Health and Human Services shall ensure the continued funding of

grants made, or contracts or cooperative agreements entered into, under subpart I of part D of title III of the Public Health Service Act (42 U.S.C. 254b et seq.) (as such subpart existed on the day prior to the date of enactment of this Act), until the expiration of the grant period or the term of the contract or cooperative agreement. Such funding shall be continued under the same terms and conditions as were in effect on the date on which the grant, contract or cooperative agreement was awarded, subject to the availability of appropriations.”).