

"COVERED BY" DOCTRINE. A doctrine under which an agency does not have to engage in [midterm bargaining](#) on particular matters because those matters are already "covered by" the existing agreement.

At one time FLRA adopted a "clear and unmistakable" test in determining whether a matter was "covered by" the contract--see, e.g., [39 FLRA No. 91](#). However, that test was criticized by the D.C. Circuit in *Marine Corps v. FLRA*, 962 F.2d 48 (1992) on the ground it nullified the terms of agreements and required endless bargaining. The Authority consequently adopted a *three-prong test* to determine whether there is no need to bargain on a particular subject because it already is covered by the existing agreement in [47 FLRA No. 96](#). Under the *first prong* it asks whether the express language of the contract "reasonably encompasses the subject in dispute." See, e.g., [47 FLRA No. 116](#), [48 FLRA No. 89](#), and [49 FLRA No. 1](#). Under the *second prong* (which comes into play only if the express language doesn't encompass the matter), it asks whether the subject in dispute is "inseparably bound up with" and thus an "aspect" of a subject expressly covered by the contract. See, e.g., [48 FLRA No. 10](#), [49 FLRA No. 130](#), and [51 FLRA No. 103](#). In [52 FLRA No. 2](#), the Authority said that "the third prong applies in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated. In such cases, the Authority will give controlling weight to the parties' intent." It went on to say that "[i]n making these determinations, the Authority will, 'examine all record evidence[,] including the parties, bargaining history and prior agreements, to determine whether 'the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances.'" In [56 FLRA No. 136](#) it emphasized that the third prong was not a separate, independent criterion, but rather "an integral component of that part of the 'covered by' analysis to determine whether the matter sought to be bargained is inseparably bound up with and thus is plainly an aspect of a subject covered by the contract."