

CHAPTER 8:



CONSTRUCTION FUNDING

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CHAPTER 8

CONSTRUCTION FUNDING

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CHAPTER 8

CONSTRUCTION FUNDING

I. INTRODUCTION.

Congressional oversight of the military construction program is pervasive and extensive. There are very few military construction projects that do not require advance approval by Congress. Of those that do not require advance approval by Congress, most require notifying Congress before executing the project. As such, it is important to understand the construction funding framework discussed in this outline to render timely, relevant, effective legal advice.

II. REFERENCES.

- A. Military Construction Codification Act, Pub. L. No. 97-214, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. §§ 2801-2885).
- B. 41 U.S.C. § 6303.
- C. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.
- D. DOD Directive 4270.5, Military Construction (12 February 2005) [hereinafter DOD Dir. 4270.5].
- E. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (July 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].
- F. DOD Instruction 4165.56, Relocatable Buildings (January 7, 2013) [hereinafter DODI 4165.56] .
- G. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Facilities Sustainment and Restoration/Modernization (July 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].
- H. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 3, Budget Execution – Availability and Use of Budgetary Resources, ch. 17, Accounting Requirements for Military Construction projects (June 2013) [hereinafter DOD Reg. 7000.14-R, vol. 3, ch. 17].

- I. DFAS-IN Regulation 37-1, Finance and Accounting Policy Implementation (December 30, 2013) [hereinafter DFAS-IN 37-1].
- J. Army Regulation 415-32, Engineer Troop Unit Construction in Connection with Training Activities (April 15, 1998) [hereinafter AR 415-32].
- K. Army Regulation 420-1, Army Facilities Management (RAR August 28, 2012) [hereinafter AR 420-1].¹
- L. DA Pamphlet 420-1-2, Army Military Construction and Non-Appropriated Funded Construction Program Development and Execution (April 2, 2009) [hereinafter DA Pam 420-1-2].
- M. DA Pamphlet 420-11, Project Definition and Work Classification (March 18, 2010) [hereinafter DA Pam 420-11].
- N. Memorandum, Assistant Chief of Staff for Installation Management (22 February 2011) Relocatable Building Delegation of Authority Interim Policy Change on Relocatable Buildings.
- O. DFAS-IN Manual 37-100-11, Appendix A, Expense and Investment Criteria (Definition of a system for RLB analysis).
- P. AFI 32-1021, Planning and Programming of Facility Military Construction (MILCON) Projects (June 14, 2010) [hereinafter AFI 32-1021].
- Q. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (October 15, 2003) [hereinafter AFI 32-1032].
- R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 9].
- S. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 21].
- T. OPNAVINST 11010.20G, Facilities Projects Manual (October 14, 2005) [hereinafter OPNAVINST 11010.20G].

¹ AR 420-1 supersedes AR 11-27 (3 Feb 1997), AR 210-50 (3 Oct 2005), AR 415-15 (12 June 2006), AR 420-15 (15 Apr 1997), AR 420-18 (3 Jan 1992), AR 420-49 (19 Sep 2005), AR 420-70 (10 Oct 1997), AR 420-72 (1 May 2000), and AR 420-90 (4 Oct 2006).

- U. OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (March 7, 2006) [hereinafter OPNAVINST 11010.33C].

III. DEFINITIONS

- A. Appropriate Committees of Congress.

10 U.S.C. § 2801(c)(1) defines the “appropriate committees of Congress” as “the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.”

- B. Facility.

10 U.S.C. § 2801(c)(2). The term “facility” means “a building, structure, or other improvement to real property.” Service regulations further define the term. For example, AR 420-1, Glossary, defines facility as including “any interest in land, structure, or complex of structures together with any associated road and utility improvements necessary to support the functions of an Army activity or mission.”

- C. Incrementation - The splitting of a project into separate parts where-

1. It is done solely to reduce costs below an approved threshold or minor construction ceiling, and;
2. Each part *is*² in itself complete and usable, and;
3. The total project is not complete until all parts are complete.
4. In order to determine what constitutes a stand-alone project, i.e., a complete and useable facility, a comparison of interdependence as opposed to facility interrelationship should be made.

- D. Interdependent Facilities

² See AR 415-32. This definition is a better, more accurate definition than the definition in DA PAM 420-11. The definition of incrementation in DA PAM 420-11 is a typographical error and conflicts with the definition above taken from AR 415-32. DA PAM 420-11 improperly included the word “not” in part b. of the definition (“Each part is “not” complete and usable”). The correct incrementation definition is conjunctive, not disjunctive because each part can be complete and useable in its own right as a standalone project, but alone will not meet the definition of “complete and useable” because of the project’s original classification.

Those facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction. AR 415-32, Section II, Terms.

E. Interrelated Facilities

Those facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities. Their common purpose to support health, welfare, and morale creates an interrelationship. However, neither facility is necessary for the operation of the other. AR 415-32, Section II, Terms.

F. Military Construction.

1. Statutory Definition. 10 U.S.C. § 2801(a). The term “military construction” includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements....”
2. Regulatory Definitions
 - a. FAR 2.101. The term “construction” refers to the construction, alteration, or repair of buildings, structures, or other real property.
 - (1) Construction includes dredging, excavating, and painting.
 - (2) Construction does not include work performed on vessels, aircraft, or other items of personal property.
 - b. Service Regulations. See, e.g., AR 420-1, para. 4-17; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20G, para. 4.1.1. a. The term “construction” includes:
 - (1) The erection, installation, or assembly of a new facility;
 - (2) The addition, expansion, extension, alteration, functional conversion, or replacement of an existing facility;
 - (3) The relocation of a facility from one site to another;

- (4) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and
- (5) Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

G. Military Construction Project

10 U.S.C. § 2801(b). The term “military construction project” includes “all military construction work...necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility....”

H. Military Installation

10 U.S.C. § 2801(c)(4). The term “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.”

I. Project Splitting

Programming a MILCON project in separate increments solely to reduce the projects Program Amount (PA) below an approval threshold or a construction appropriation ceiling amount, which would result in programming an other-than complete and useable facility. Incrementation is contained within the definition of project splitting in AR 420-1. As defined, incrementing an OMA funded construction project solely to reduce the estimated cost below statutory limitations, contracting threshold, or project approval levels results in project splitting. AR 420-1, Terms.

J. Relocatable Buildings

Personal property used as a structure designed to be readily moved, erected, disassembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents that use real property utilities will be considered relocatable. AR 420-1, Terms.

K. 20% Rule

The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities. Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1, Terms.

IV. METHODOLOGY FOR REVIEWING CONSTRUCTION ACQUISITIONS.

- A. Define the Scope of the Project.
- B. Classify the Work.
- C. Determine the Funded and Unfunded Costs of the Project.
- D. Select the Proper Appropriation.
- E. Verify the Identity of the Proper Approval Authority for the Project.

V. DEFINING THE SCOPE OF THE PROJECT (WHAT IS THE PROJECT?).

- A. Military Construction Project.
 - 1. Definition. A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L.2; AR 415-32, Glossary, sec. II; AR 420-1, para. 2-12d and 4-17; AFI 32-1021, para. 3.2.1; OPNAVINST 11010.20G, para. 4.2.1; see also The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (concluding that the Air Force improperly incremented a project involving 12 related trailers into 12 separate projects).
 - 2. Project splitting and/or incrementation is prohibited.

See AR 415-32, Glossary, sec. II; AR 420-1, para. 2-15; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20G, para. 4.2.1.

3. An agency may not treat “clearly interrelated”³ construction activities as separate projects. The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991); The Hon. Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub). NOTE: The GAO used the term “clearly interrelated” in the Donley case in the same manner that DOD and the military departments use the term “interdependent.”

B. Guidance and Restrictions.

1. Legislative History. H.R. Rep. No. 97-612 (1982).
 - a. The conference report that accompanied the MCCA specifically prohibited:
 - (1) Splitting a project into increments to avoid:
 - (a) An approval threshold; or
 - (b) The UMMC cost ceiling;
 - (2) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction; and
 - (3) Engaging in concurrent work to reduce the cost of a construction project below a cost variation notification level.

³ AR 415-32, Sec. II, Terms, defines “interrelated facilities” differently (i.e., as “facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities”). In contrast, AR 415-32, Glossary, sec. II, defines “interdependent facilities” like the GAO did in the Donley case (i.e., as “facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction project”). See also; *Illegal Actions in the Construction of the Airfield at Fort Lee, Virginia: Hearings Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov’t Operations*, 87th Cong. (1962); Hon. Sam Rayburn, Comp. Gen., B-133316 (Jan. 24, 1961); and Hon. Sam Rayburn, Comp. Gen., B-133316 (Mar. 12, 1962).

- b. However, the conference report indicated that a military department could carry out an UMMC construction project before or after another military construction project under certain circumstances.⁴
 - (1) A military department could carry out an UMMC construction project before another military construction project if:
 - (a) The UMMC construction project satisfied a new mission requirement; and
 - (b) The UMMC construction project would provide a complete and usable facility that would meet a specific need during a specific period of time.
 - (2) A military department could carry out an UMMC construction project after another military construction project to satisfy a new mission requirement that arose after the completion of the other project.
- 2. DOD Guidance and Restrictions. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170102.I and 170102.L.
 - a. As a general rule, DOD Components may not engage in incremental construction (i.e., the planned acquisition or improvement of a facility through a series of minor construction projects).
 - b. DOD Components must:
 - (1) Identify the required end result of a minor construction project and its correlation with the installation master plan; and
 - (2) Comply with the intent of 10 U.S.C. § 2805 (UMC).
 - c. Multi-Use Facilities.

⁴ The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

- (1) DOD Components may divide construction work in a multi-use facility into separate projects if each project is:
 - (a) Clearly defined; and
 - (b) Results in a complete and usable facility.
 - (2) DOD Components must nevertheless treat the following construction work in a multi-use facility as one project:
 - (a) All construction work for the same or related functional purposes;
 - (b) All concurrent construction work in contiguous (e.g., touching) areas; and
 - (c) All construction work in common areas.
3. Army Guidance and Restrictions. AR 420-1, para.2-15; DA Pam 420-11, para. 1-7n.
 - a. AR 420-1, para. 2-15a, specifically prohibits the following practices:
 - (1) The acquisition or improvement of a facility through a series of minor military construction projects;
 - (2) The subdivision, splitting, or incrementing of a project to avoid:
 - (a) A statutory cost limitation; or
 - (b) An approval or contracting threshold; and
 - (3) The development of a minor military construction project solely to avoid the need to report a cost variation on an active military construction project to Congress.
 - b. In addition, AR 420-1, para. 2-15b, prohibits the Army from using its UMMC funds to begin or complete a “specified” military construction project.

4. Air Force Guidance and Restrictions.
 - a. AFI 32-1021, para. 4.2.2, specifically prohibits:
 - (1) Undertaking an UMMC project at the same time as a “specified” military construction project.
 - (2) Splitting a project into increments to avoid:
 - (a) An approval threshold; or
 - (b) The UMMC cost ceiling; and
 - (3) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction.
 - b. However, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project before a “specified” military construction project to satisfy a new mission requirement if the UMMC project will provide a complete and usable facility that meets a specific need during a specific period of time.
 - c. In addition, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project after a “specified” military construction project to satisfy a new mission requirement that arises after the completion of the “specified” project.
 - d. AFI 32-1032, para. 3.4.2, generally prohibits:
 - (1) Modifying a newly constructed facility within 12 months of the beneficial occupancy date (BOD) unless an unforeseeable mission or equipment change causes the modification(s); and
 - (2) Using O&M funds to correct deficiencies in projects funded by MILCON funds.
 - e. AFI 32-1032, para. 5.3.1, requires the Air Force to include all of the known UMMC work required in a facility during the next 24 months in a single project.
 - f. AFI 32-1032, para. 5.3.2, only permits multiple minor construction projects in a single building within a 24 month period if:

- (1) The Air Force could not have reasonably anticipated the requirement for the additional project when it initiated the previous project;
- (2) The requirement for the additional project is for a distinctly different purpose or function; and
- (3) Each project results in a complete and usable facility or improvement.

5. Navy Guidance and Restrictions.

- a. OPNAVINST 11010.20G, para. 4.2.1, generally requires shore activities to incorporate all work required to meet a requirement in a single facility in a single project.
- b. OPNAVINST 11010.20G, para. 4.2.1.f, specifically prohibits:
 - (1) Acquiring a facility—or an improvement to a facility—through a series of minor construction projects;
 - (2) Splitting a project solely to:
 - (a) Avoid an approval requirement; or
 - (b) Circumvent a statutory funding limitation;
 - (3) Splitting a project if the resulting sacrifice of economy of scale increases the cost of the construction (e.g., building several small buildings instead of one large building); and
 - (4) Undertaking concurrent work to avoid the MILCON reprogramming approval procedures (e.g., using O&M funds to augment a construction project).
- c. However, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project before a “specified” military construction project to satisfy an urgent requirement if the UMMC project will provide a complete and usable facility during a specific period of time.
- d. In addition, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project after a “specified”

military construction project to satisfy a new mission requirement that develops after the BOD of the “specified” project.

- e. OPNAVINST 11010.20G, para. 4.2.3, only permits multiple minor construction projects in a single facility if:⁵
 - (1) They satisfy unrelated/dissimilar purposes;
 - (2) They are not dependent on each other;
 - (3) They are not contiguous; and
 - (4) Each project will result in a complete and usable improvement to the facility.

VI. CLASSIFYING THE WORK.

A. Project Classification.

Project classification is performed by the garrison staff officer charged with facilities engineering, housing, and environmental support (Engineers). AR 420-1, 2-5 (b) (6). This person sometimes holds the title of facilities engineer and resides in the Directorate of Public Works (DPW).

B. Determine whether the work is defined as construction, repair, maintenance, or something else (like RLB’s when they are classified as personal property). This process is outlined in Appendix A.

1. Construction

- a. **Statutory Definition.** 10 U.S.C. § 2801(a). Military construction includes any construction, development, conversion, or extension carried out with respect to a military installation.
- b. **Regulatory Definition.** See AR 420-1, para. 4-17 and Glossary, sec. II; AR 415-32, Glossary, sec. II; DA Pam 420-11, para. 1-6c; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, atch 1; OPNAVINST 11010.20G, para. 4.1.1.
Construction includes:

⁵ Cf. OPNAVINST 11010.20G, para. 4.2.1.a (imposing similar requirements for construction work involving multiple facilities).

- (1) The erection, installation, or assembly of a new facility.
- (2) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility.
 - (a) An addition, expansion, or extension is a change that increases the overall physical dimensions of the facility.
 - (b) An alteration is a change to the interior or exterior arrangements of a facility that improves its use for its current purpose. But see “New” DOD Definition, para. IX.B.2.b.(2), below.
 - (c) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.
 - (d) A replacement is the complete reconstruction of a facility that has been damaged or destroyed beyond economical repair.
- (3) The relocation of a facility from one site to another.⁶
 - (a) A facility may be moved intact, or disassembled and later reassembled.
 - (b) Work includes the connection of new utility lines, but excludes the relocation of roads, pavements, or airstrips.
 - (c) Relocation of two or more facilities into a single facility is a single project.
- (4) Installed equipment made part of the facility. Examples include built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating

⁶ The Secretary of a military department must notify the appropriate committees of Congress before using UMMC funds to transfer or relocate any activity from one base or installation to another. Military Construction Appropriations Act, 2003, Pub. L. No. 107-249 § 107, 116 Stat. 1578 (2002).

and air conditioning equipment, waste disposals, dishwashers, and theater seats.

- (5) Related site preparation, excavation, filling, landscaping, or other land improvements.⁷
- (6) Construction may include relocatable buildings (RLBs) in some circumstances. See, AR 420-1, para. 6-17; Memorandum HQDA, DAIM-ZA, 10 Feb 2008 subject: Interim Policy Change on Relocatable Buildings for Paragraphs 6-13 through 6-17 in AR 420-1, Army Facilities Management (10 February 2008); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (7 Mar 2006), Appendix B, & Appendix E (RLB Funding Flowchart)
 - (a) Personal property used as a structure designed to be readily moved, erected, disassembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents that use real property utilities will be considered relocatable. AR 420-1 Glossary.
 - (b) 20% Rule- The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities. Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1 Glossary.

⁷ This includes the foundation, site work, and utility work associated with the setup of a relocatable building. AR 420-1.

- (c) Under the interim policy relocatable buildings may be used for no more than 6 years unless approved by ASA (I&E).⁸
- (d) If the costs do not exceed 20%, account for the buildings as personal property (use either O&M or Procurement funds, as appropriate).
- (e) When properly classified as an unfunded construction cost, relocatable buildings must be funded “with Operation and Maintenance, Army funds or Other Procurement, Army (OPA) depending on the Expense-Investment Threshold contained in law for capital equipment purchase. Whether the relocatables are procured to be stacked or installed individually, all the modules that comprise the relocatable building are a system.⁹ This includes the normal amenities or components one finds in buildings, plumbing, electrical systems, and heating ventilation and air condition, etc. It does not include furnishings or other attachments.” ASA(I&E) RLB memo, (13 May 2009).
- (f) Legal review required prior to approval of relocatable building purchase or lease. AR 420-1, para. 6-14l(2).
- (g) Disposition: When classified as real property, the cost to disassemble is classified as demolition. Upon becoming moveable, salvageable relocatable buildings are classified as equipment and disposed of in accordance with DoD Instruction 5000.64. DoDI 4165.56, para. 3b.

2. Maintenance and Repair.

- a. Maintenance and repair projects are not construction. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST

⁸ Requests for extensions beyond the 6 years must be approved by the Assistant Chief of Staff for Installation Management, DAIM-ODF and then forwarded to ASA(I&E).

⁹ See Appendix C for definition of system per DFAS-IN Manual 37-100-11 Appendix A, Expense and Investment Criteria. Appendix C in this publication.

11010.20G, para. 3.1.1, and para 5.1.1. Therefore, maintenance and repair projects are not subject to the \$750,000 O&M limitation on construction.¹⁰ See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for “an entire single-purpose facility or one or more functional areas of a multipurpose facility”).

b. Definitions.

(1) Maintenance.

- (a) AR 420-1, Glossary, sec. II, defines maintenance as the “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.
- (b) AFI 32-1032, para. 4.1.1, defines maintenance as “work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same.” It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized. See AFI 65-601, vol. 1, attch 1.
- (c) OPNAVINST 11010.20G, para. 5.1.1, defines maintenance as “the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose.”
 - (i) The term “maintenance” includes work undertaken to prevent damage to a facility that would be more costly to repair (e.g.,

¹⁰ But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds \$7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).

(ii) Maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done to:

- (a) Minimize or correct wear; and
- (b) Ensure the maximum reliability and useful life of the facility or component.

(2) Repair.

- (a) Statutory Definition. 10 U.S.C. § 2811(e). A “repair project” is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.
- (b) Sustainment definition. DOD FMR Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. Sustainment means the maintenance and repair activities necessary to keep an inventory of facilities in good working order. It includes regularly scheduled adjustments and inspections, preventive maintenance tasks, and emergency response and service calls for minor repairs. It also includes major repairs or replacement of facility components (usually accomplished by contract) that are expected to occur periodically throughout the life cycle of facilities. This work includes regular roof replacement, refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work. It does not include environmental compliance costs, facility leases, or other tasks associated with facilities operations (such as custodial services,

grounds services, waste disposal, and the provision of central utilities). When repairing a facility, the military department or agency may.

- (3) Army Definition. AR 420-1, Glossary, sec. II; Repair is:
- (a) Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.
 - (b) Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components.
 - (c) A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.
 - (i) The term “repair” does not include:
 - (a) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;
 - (b) Increasing the quantities of components for functional reasons;
 - (c) Extending utilities or protective systems to areas not previously served;
 - (d) Increasing exterior building dimensions; or
 - (e) Completely replacing a facility.
 - (d) The Army “failed or failing” requirement is discussed more fully in Appendix D, which is an

Army memo requiring a failed or failing state of the item which is to be repaired.

(4) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, atch 1. The term “repair” means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.1.2, specifically states that real property, real property systems, and real property components “need not have failed to permit a repair project.” (emphasis added).

(a) The term “repair” includes:

- (i) Replacing existing heating, ventilation, and air conditioning equipment with “functionally sized,” state-of-the-art equipment;
- (ii) Rearranging or restoring the interior of a facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, seismic, security, or fire);¹¹
- (iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;
- (iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;
- (v) Installing exterior appurtenances (e.g., fire escapes, elevators, ramps, etc.) to meet current building standards, code requirements, and/or access laws; and

¹¹ Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

- (vi) Installing force protection measures outside the footprint of the facility.
- (b) The term “repair” does not include:
- (i) Expanding a facility’s foundation beyond its current footprint;
 - (ii) Elevating or expanding the “functional space” of a facility;
 - (iii) Increasing the “total volume” of a facility;
 - (iv) Installing previously uninstalled equipment unless required to comply with accessibility, health, safety, seismic, security, or fire standards and codes;
 - (v) Relocating a facility;
 - (vi) Upgrading unpaved surfaces;
 - (vii) Increasing the dimensions of paved surfaces unless required to comply with Air Force standards or applicable code requirements;
 - (viii) Changing the permanent route of real property transportation systems;
 - (ix) Installing walkways, roadway curbs, gutters, underground storm sewers, bicycle paths, jogging paths, etc;
 - (x) Completely replacing the vertical section of a facility and a substantial portion of its foundation;
 - (xi) Completely replacing a facility;

- (xii) Converting a facility or portion of a facility from one functional purpose to another;¹² or
 - (xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.¹³
- (5) Navy Definition. OPNAVINST 11010.20G, para. 3.1.1. The term "repair" refers to "the return of a real property facility to such condition that it may be effectively utilized for its designated purposes, by overhaul, reconstruction, or replacement of constituent parts or materials which are damaged or deteriorated to the point where they may not be economically maintained."
- (a) The term "repair" includes:¹⁴
 - (i) Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental);
 - (ii) Minor additions to components in existing facilities to return the facilities to their customary state of operating efficiency (e.g., installing additional partitions while repairing deteriorated partitions);
 - (iii) The replacement of facility components, including that equipment which is installed or built-in as an integral part of the facility. Restoration or sustainment has the effect of merely keeping the facility in its customary

¹² Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

¹³ This limit does not apply to facilities on a national or state historic register. In addition, the SAF/MII can waive it under appropriate circumstances. AFI 32-1032, para. 5.1.2.3.2.

¹⁴ OPNAVINST 11010.20G, para. 3.1.3, contains several additional examples of repair projects.

state of operating efficiency without adding increased capability for the facility;

(iv) The replacement of energy consuming equipment with more efficient equipment if:

(a) The shore activity can recover the additional cost through cost savings within 10 years;

(b) The replacement does not substantially increase the capacity of the equipment; and

(c) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).

(v) Demolition of a facility or a portion of a facility because the extent of deterioration is such that it can no longer be economically maintained, or because the facility is a hazard to the health and safety of personnel is classified as repair. Demolition of an excess facility is always classified as repair. (When demolition is done to clear the footprint for a new facility, the demolition should be included as part of the scope of the construction project and paid for from the same fund source as the construction project fund source.)

(b) The term “repair” does not include additions, expansions, alterations, or modifications required solely to meet new purposes or missions.

3. Concurrent Work. AR 420-1, para. 3-53g; AFI 32-1032, paras. 3.4.3 and 4.1.2.2.5; OPNAVINST 11010.20G, para. 3.1.1.b.

a. A military department or agency can normally do construction, maintenance, and repair projects simultaneously as long as each project is complete and usable.

- b. A military department must treat all the work as a single construction project if:
 - (1) The work is so integrated that the department or agency may not separate the construction work from the maintenance and repair work; or
 - (2) The work is so integrated that each project is not complete and useable by itself.

VII. DETERMINING THE FUNDED/UNFUNDED COSTS OF THE PROJECT.

A. Applicability of Project Limits.

AR 420-1, Glossary, sec. II; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b. Project limits only apply to funded costs.

B. Funded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170203; AR 415-32, para. 2-5a; AR 420-1, Glossary, sec. II; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, attach 1; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b.

- 1. Funded costs are costs chargeable to the appropriation designated to pay for the project.
- 2. Funded costs include, but are not necessarily limited to:
 - a. Materials, supplies, and services applicable to the project;¹⁵
 - b. Installed capital equipment;¹⁶

¹⁵ AR 420-1, para. 2-17c, specifically includes government-owned materials, supplies, and services as funded costs. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.I.6 (prohibiting DOD components from using materials, supplies, or items of installed equipment on their own minor construction projects on a non-reimbursable basis); AR 415-32, para. 2-5a(1) (including materials, supplies, and services furnished on a non-reimbursable basis by other military departments and defense agencies).

¹⁶ Items of equipment that are “movable in nature and not affixed as an integral part of a facility” or “detachable without damage to the building or equipment” are unfunded costs because they are

- c. Transportation costs for materials, supplies, and unit equipment;¹⁷
- d. Civilian labor costs;
- e. Overhead and support costs (e.g., leasing and storing equipment);
- f. Supervision, inspection, and overhead costs charged when the Corps of Engineers, the Naval Facilities Engineering Command, or the Air Force serves as the design or construction agent;
- g. Travel and per diem costs for military and civilian personnel;¹⁸
- h. Operation and maintenance costs for government-owned equipment (e.g., fuel and repair parts); and
- i. Demolition and site preparation costs.

C. Unfunded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170301; AR 415-32, para. 2-5b; AR 420-1, Glossary, sec. II; AFI 32-1021, atch 1; AFI 65-601, vol. 1, para. 9.14; OPNAVINST 11010.20G, para. 2.1.1.k.

- 1. Unfunded costs are costs that:
 - a. Contribute to the military construction project;
 - b. Are chargeable to appropriations other than those available to fund the project; and

funded from O&M, RDT&E, or procurement appropriations. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170304 and 170305.

¹⁷ The cost of transporting unit equipment is a funded cost if the equipment is being transported solely for the construction project; otherwise, it is an unfunded cost (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(9) and b(1).

¹⁸ Travel and per diem costs for military personnel are funded costs if these costs are incurred solely for the construction project; otherwise, they are unfunded costs (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(10) and b(2).

- c. Are not reimbursed by appropriations available to fund the project.
2. Unfunded costs include, but are not necessarily limited to:
- a. Military and civilian prisoner labor;
 - b. Depreciation of government-owned equipment used to build the project;¹⁹
 - c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.²⁰
 - d. Licenses, permits, and other fees chargeable under:
 - (1) A State or local statute; or
 - (2) A status of forces agreement (SOFA);
 - e. Unfunded civilian fringe benefits;
 - f. Contract or in-house planning and design costs;²¹
 - g. Gifts from private parties;²² and

¹⁹ Equipment maintenance and operation costs are funded costs.

²⁰ Generally, DOD Reg 7000.14-R prohibits obtaining equipment or material from another agency on a non-reimbursable basis. In certain cases, DOD regulations permit such acquisition, such as in an excess distribution situation. The costs of capital equipment items obtained in such rare instance on a non-reimbursable basis, including excess distributions from another military department or governmental agency, may be classified as unfunded. However, the value of Army-owned materials, supplies, or items of capital equipment, such as the air conditioner, must always be charged to the construction project as a funded project cost. See DA Pam 420-11, Glossary.

²¹ See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 17010302 (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. § 2805). But see OPNAVINST 11010.20G, para. 2.1.1.k(5) (stating that planning and design costs are funded costs in design-build contracts).

²² The acceptance of monetary gifts may violate the Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). “Fisher Houses” at major military and VA medical centers are a prime example of donated construction funding. The houses, donated by Zachary and Elizabeth Fisher, provide comfortable places for families to stay while attending to sick or injured family members. To

- h. Donated labor and material.²³
- 3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

VIII. SELECTING THE PROPER APPROPRIATION.

A. Sources of Military Construction Funding.

- 1. Military Construction Appropriations Acts (MILCON Appropriations Act). See, e.g., Consolidated Appropriations Act, 201, Pub. L. No 112-74 (2012).
- 2. Provides appropriated funds (MILCON) for DOD's specified and unspecified military construction (UMC) programs.
- 3. MILCON appropriations are generally available for 5 years.

B. Department of Defense Appropriations Act.

See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74.,

- 1. Provides some miscellaneous sources of money for military construction projects, including Operations and Maintenance (O&M) funds and Research, Development, Test, and Evaluation (RDT&E) funds.
- 2. Appropriations are generally available for 1 year.

C. Sources of Military Construction Authority.

- 1. Specified Military Construction Projects.
 - a. Scope of Authorization. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects that are specifically authorized by law. 10 U.S.C. § 2802. Congress typically authorizes these projects in the

date, the Fishers have completed, or are in the process of completing 32 Fisher Houses. See, <http://www.fisherhouse.org/>.

²³ The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

annual Military Construction Authorization Act. The conference report accompanying the Military Construction Authorization Act breaks down project authorizations by project.

- (1) Congress typically specifically authorizes only those military construction projects expected to exceed \$2 million.²⁴
 - (2) A military department may not carry out a military construction project expected to exceed \$2 million without specific Congressional authorization and approval.
- b. Proper Appropriation. Congress provides funding for specified military construction projects in the annual Military Construction Appropriations Act. Congress funds each military department's entire military construction program with lump sum appropriations. For example, the Army's principal military construction appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.²⁵
 - c. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by installation and project. An example of this breakdown is provided at Appendix G
2. "Unspecified Minor Military Construction (UMMC) Projects."
 - a. Scope of Authorization. 10 U.S.C. § 2805(a). See AR 420-1, Appendix D; AFI 32-1021, ch. 4; AFI 32-1032, para. 3.3.3; AFI 65-601, vol. 1, para. 9.12.6; OPNAVINST 11010.20G, para. 4.4.4. The Secretary concerned may use military construction appropriations from the unspecified military construction program to carry out military construction projects not otherwise authorized by law.

²⁴ Congress may also specify projects under \$2 million. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004).

²⁵ The statutory provisions governing military family housing are at 10 U.S.C. §§ 2821-2837.

- b. An UMMC project is defined as a military construction project having an approved cost of \$2 million or less.²⁶
- c. An UMMC project can have an approved cost up to \$3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.
 - (1) There is no statutory guidance as to what constitutes a project “intended solely to correct a deficiency that threatens life, health, or safety.”
 - (2) AR 420-1 provides that a project submitted for approval under the enhanced threshold must include the following justification:²⁷
 - (a) A description when the requirement was identified and why deferral of the project until the next Military Construction Act poses an unacceptable and imminent risk to personnel;
 - (b) A description of ongoing actions and temporary work-arounds to mitigate risk and safeguard lives;
 - (c) An explanation of why the deficiency cannot be corrected by other means; and
 - (d) An assurance that the project is intended primarily to correct the deficiency that threatens life, health, or safety.
- d. Proper Appropriation. Congress usually provides funding for UMMC projects in the Military Construction Appropriations Act or other Consolidated legislation.
- e. Congress appropriates “Unspecified Minor Construction” funds as part of the lump-sum military construction appropriation for each service. Of the lump-sum military construction appropriation, the conference report accompanying the Military Construction

²⁶ Section 2803 of the National Defense Authorization Act for Fiscal Year 2008 increased the cap for Unspecified Minor Military Construction from \$1.5 million to \$2 million.

²⁷ This justification requirement applies to all UMMC projects having an approved cost over \$2M and all OMA-funded military construction projects costing more than \$750,000.

Appropriations Act identifies the amount available for unspecified minor construction.²⁸

- f. The Army refers to its “unspecified” military construction appropriations as “Unspecified Minor Military Construction, Army” (UMMCA). AR 420-1, Appendix D.²⁹
- g. Requirements for Use. 10 U.S.C. § 2805(b).
 - (1) Before beginning an UMMC project with an approved cost greater than \$750,000, the Secretary concerned must approve the project.
 - (2) In addition, the Secretary concerned must:
 - (a) Notify the appropriate committees of Congress;³⁰ and
 - (b) Wait 21 days.³¹

3. UMMC Projects Financed by Operation & Maintenance (O&M) Funds.

- a. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c).
See
Changes made by 2012 National Defense Authorization Act. The Secretary of a military department may use O&M funds to execute

²⁹ Note that throughout this outline the terms unspecified military construction (UMC) and unspecified minor military construction (UMMC) are used interchangeably. UMC can refer to specific MILCON funding or simply to the concept of all unspecified minor construction paid for with either UMMC or O&M funds.

³⁰ The Secretary concerned must notify the appropriate committees of Congress of the justification and current cost estimate for the project. 10 U.S.C. § 2805(b)(2). See AFI 32-1021, para. 4.2 (detailing the information MAJCOMS must submit to HQ, USAF/CEC); see also DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

³¹ The Air Force imposes a 30-day waiting period. AFI 32-1021, para. 4.5. In addition, the statutory waiting period is reduced to 14 days for electronically-submitted notice.

UMMC projects not otherwise authorized by law and costing not more than: \$750,000.³²

- b. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12.
 - (1) Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 12 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.
 - (2) In The Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422, 433 (1984), the General Accounting Office (GAO) interpreted 41 U.S.C § 12 to:
 - (a) Require specific Congressional authorization for military construction projects; and
 - (b) Prohibit the use of other, more general appropriations for military construction projects.
- c. Within the Army, approval authority for O&M-funded minor military construction projects has been delegated to Commander, IMCOM, who may redelegate this authority. AR 420-1, para. 2-14a.
- d. Special Requirements for Exercise-Related UMMC Projects.

See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (2010); see also AR 415-32, para. 3-11d. For procedural guidance for executing ERC, see JOINT CHIEFS OF STAFF, INSTR. 4600.02A, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (18 March 2011).

³² The 2012 National Defense Authorization Act removed language that previously allowed funding a construction project under \$1.5 million with O&M if it was solely to correct a deficiency that is life threatening, health-threatening- or safety-threatening. Currently there is no authority that would fund a O&M Minor Military Construction project with a funded cost above \$750k (i.e. the traditional life, health and safety exception would not be applicable to O&M funded construction). However, the life, health, and safety exception remains for UMMC funded (rather than O&M funded) construction over \$750k as noted in 10 U.S.C. 2805 (a) (2).

- (1) If a military department expects to spend more than \$100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise.
- (2) The SECDEF must provide this notice 30 days before the start of the exercise.

4. **Combat and Contingency Related O&M Funded Construction.**

- a. O & M funded contingency construction started with section 2808 of the FY 04 NDAA and has been extended and modified by each NDAA since 2004 (including National Defense Authorization Act, 2012).
 - (1) Authority derived from the National Defense Authorization Act- the Secretary of Defense may obligate appropriated funds available for operation and maintenance to carry out a construction project inside the area of responsibility of the United States Central Command or the area of responsibility and area of interest of Combined Joint Task Force-Horn of Africa that the Secretary determines meets each of the following conditions:
 - (a) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation.
 - (b) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the military installation is located in Afghanistan, for which projects using this authority may be carried out at installations deemed as supporting a long-term presence.
 - (c) The United States has no intention of using the construction after the operational requirements have been satisfied.

- (d) The level of construction is the minimum necessary to meet the temporary operational requirements.
- (2) NOTIFICATION OF OBLIGATION OF FUNDS. Before using appropriated funds available for operation and maintenance to carry out a construction project outside the United States that has an estimated cost in excess of the amounts authorized for unspecified minor military construction projects under section 2805(c) of title 10, United States Code, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a notice regarding the construction project. The project may be carried out only after the end of:
- (a) the 10-day period beginning on the date the notice is received by the committees or, if earlier,
 - (b) the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of title 10, United States Code. The notice shall include the following:
 - (i) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.
 - (ii) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.
 - (iii) All relevant documentation detailing the construction project.
 - (iv) An estimate of the total amount obligated for the construction.
- (3) Annual Limitation on Use of Authority.—
- (a) The total cost of the construction projects carried out under the authority of this section using, in whole or in part, appropriated funds available for operation and maintenance shall not exceed \$200,000,000 in a fiscal year.

- (b) The Secretary of Defense may authorize the obligation of not more than an additional \$10,000,000 of appropriated funds available for operation and maintenance for a fiscal year if the Secretary determines that the additional funds are needed for costs associated with contract closeouts. Funds obligated under this paragraph are not subject to the limitation in the second sentence of paragraph (1).

(4) QUARTERLY REPORT.

- (a) Not later than 30 days after the end of each fiscal-year quarter during which appropriated funds available for operation and maintenance are obligated or expended to carry out construction projects outside the United States, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a report on the worldwide obligation and expenditure during that quarter of such appropriated funds for such construction projects.
- (b) The ability to use this section as authority during a fiscal year to obligate appropriated funds available for operation and maintenance to carry out construction projects outside the United States shall commence for that fiscal year only after the date on which the Secretary of Defense submits to the congressional committees specified in subsection (f) all of the quarterly reports that were required under paragraph (1) for the preceding fiscal year.

(5) CONGRESSIONAL COMMITTEES.—The congressional committees referred to in this section are the following:

- (a) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and Related Agencies on Appropriations in the Senate.
- (b) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and

Related Agencies of the Committee on
Appropriations of the House of Representatives.

- (6) EXPIRATION OF AUTHORITY.—The authority to obligate funds under this section expires on the later of—September 30, 2012; or the date of the enactment of an Act authorizing funds for military construction for fiscal year 2013.
- (7) DEFINITIONS.—In this section:
 - (a) The term ‘area of responsibility,’ with respect to the CJTF-Horn of Africa, is Kenya, Somalia, Ethiopia, Sudan, Eritrea, Djibouti, and Seychelles.
 - (b) The term ‘area of interest’, with respect to the Combined Task Force-Horn of Africa, is Yemen, Tanzania, Mauritius, Madagascar, Mozambique, Burundi, Rwanda, Comoros, Chad, the Democratic Republic of Congo, and Uganda.

b. Other Contingency Construction Authority.

- (1) 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20G, para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
 - (a) Scope of Authority. The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.³³
 - (b) Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.³⁴

³³ The Secretary of a military department must forward contingency construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3.

³⁴ In 2003 Congress dramatically increased the amount of funding potentially available to DOD under this authority. See Emergency Wartime Supplemental Appropriations for the Fiscal Year

- (c) Requirements for Use.
 - (i) Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with:
 - (a) National security; or
 - (b) National interest.
- (d) In addition, the SECDEF must:
 - (i) Notify the appropriate committees of Congress;³⁵ and
 - (ii) Wait 21 days.³⁶
- (e) Limitations.
 - (i) Legislative History. H.R. Rep. No. 97-612 (1982).

2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to \$150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that had previously been funded under the authority the DOD Deputy General Counsel (Fiscal) 27 February 2003 memorandum be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DOD to spend up to \$200 million of O&M per fiscal year on such construction projects, DOD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. See Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to \$10 million for fiscal year 2005).

³⁵ The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2804(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.3 (detailing the requirements for reprogramming requests). But see DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects).

³⁶ DOD Reg. 7000.14-R, para. 170102.F.1, indicates that the Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

- (a) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.
 - (b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.
- (ii) DOD Limitations.
- (a) DOD Dir. 4270.5, para. 4.2, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.
 - (b) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.4, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”
- (iii) Army Limitations. AR 420-1, para. 4-9b(6).
- (a) The Army generally reserves this authority for projects that support multi-service requirements.
 - (b) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

- (iv) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.
 - (a) The use of this authority is rare.
 - (b) The Air Force must consider using its 10 U.S.C. § 2803 authority first.
- c. **Train and Equip Related Construction:** Section 1201 of the 2013 NDAA expanded the authority normally contained in the train and equip provisions allowed in section 1206 of the 2006 NDAA by adding authority to conduct “small scale military construction activities.”
 - (1) Limitations
 - (a) Not more than \$750,00 may be obligated for small scale military construction activities; and
 - (b) Not more than \$25,000,000 may be obligated or expended for small-scale military construction activities under all programs authorized under this authority.
- 5. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.5; AR 420-1, para. 4-55; AFI 32-1021, para. 5.2.1; AFI 65-601, vol. 1, para. 9.12.3; OPNAVINST 11010.20G, para. 4.4.2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
 - a. Scope of Authority. The Secretary of a military department may use this authority to carry out emergency construction projects not otherwise authorized by law.
 - b. Proper Appropriation. The Secretary concerned must use unobligated military construction funds to finance these projects.³⁷

³⁷ According to the legislative history of the MCCA: “[t]he use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or canceling other military construction projects.” H.R. REP. NO. 97-612 (1982). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

- (1) Congress must normally approve a reprogramming request for the project.³⁸
- (2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.
- (3) The Secretary concerned may not obligate more than \$50 million per fiscal year for emergency construction (per 2007 Nat'l Defense Authorization Act).

c. Requirements for Use.

- (1) Before using this authority, the Secretary concerned must determine that:
 - (a) The project is vital to:
 - (i) National security; or
 - (ii) The protection of health, safety, or the quality of the environment; and
 - (b) The project is so urgent that deferral until the next Military Construction Appropriations Act would be inconsistent with:
 - (i) National security; or
 - (ii) The protection of health, safety, or the quality of the environment.
- (2) In addition, the Secretary concerned must:
 - (a) Notify the appropriate committees of Congress;³⁹ and

³⁸ The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests); see also DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.5 (requiring prior congressional notification and approval for reprogramming action); AR 420-1, para. 4-55c(4) (noting that Congress will probably not approve a reprogramming request unless there is truly a dire need for the project).

(b) Wait 21 days.

d. Limitations.

(1) Legislative History. H.R. Rep. No. 97-612 (1982).

(a) The legislative history of the MCCA indicates that the Secretaries of the military departments should rarely use this authority.⁴⁰

(b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.; AR 420-1, para. 4-55c.

(2) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.E.4, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”

(3) Army Limitations. The Army should execute emergency construction projects under its UMMC program, if possible. AR 420-1, para. 4-55e.

6. Reserve Component Construction Authorities.

a. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.

(1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such

³⁹ The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2803(b).

⁴⁰ In 1985, the House Appropriations Committee stated that: “This authority was provided to give the Department and Congress flexibility in dire situations. A true emergency project should be confined to facilities without which a critical weapon system or mission could not function.” H.R. REP. NO. 99-275, at 23 (1985).

facilities as necessary to meet the missions of the reserve components.

- (2) Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, rehabilitation of facilities for specified purposes. 10 U.S.C. § 18233(a) (2) through (6).
 - (3) Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).
- b. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233 and 18233a . AR 140-483, Ch. 7.
7. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.5; AR 420-1, para. 4-57; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5; OPNAVINST 11010.20G, see para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
- a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects that are necessary to support the use of the armed forces in the event of:
 - (1) A declaration of war; or
 - (2) A Presidential declaration of a national emergency.⁴¹
 - b. Proper Appropriation. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.

⁴¹ The Secretary of a military department must forward construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.H.

- c. Requirements for Use. The SECDEF must notify the appropriate committees of Congress;⁴² however, there is **no waiting period** associated with the use of this authority.
 - d. On November 14, 1990, President George H.W. Bush invoked this authority to support Operation Desert Shield. See Executive Order No. 12734, 55 Fed. Reg. 48,099 (1990), reprinted in 10 U.S.C. § 2808. His son, President George W. Bush invoked this authority on 16 November 2001. See Executive Order No. 13235, 66 Fed. Reg. 58,343 (2001).⁴³
8. Environmental Response Actions. 10 U.S.C. § 2707. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
- a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects for environmental response actions.
 - b. Proper Appropriation. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.⁴⁴
 - c. Requirements for Use.

⁴² The SECDEF must notify the appropriate committees of Congress of: (1) the decision to use this authority; and (2) the estimated cost of the construction projects. 10 U.S.C. § 2808(b).

⁴³ National emergency construction authority. Exec. Ord. No. 13235 of Nov. 16, 2001, [66 Fed. Reg. 58343](#), provides: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Emergencies Act ([50 U.S.C. 1601](#) et seq.), and [section 301 of title 3, United States Code](#), I declared a national emergency that requires the use of the Armed Forces of the United States, by Proclamation 7463 of September 14, 2001 [[50 USCS § 1621](#) note], because of the terrorist attacks on the World Trade Center and the Pentagon, and because of the continuing and immediate threat to the national security of the United States of further terrorist attacks. To provide additional authority to the Department of Defense to respond to that threat, and in accordance with section 301 of the National Emergencies Act ([50 U.S.C. 1631](#)), I hereby order that the emergency construction authority at [10 U.S.C. 2808](#) is invoked and made available in accordance with its terms to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments."

⁴⁴ Congress provides annual appropriations for environmental restoration projects. *See, e.g.*, Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). *See* DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects). *But see* DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

- (1) Before using this authority, the SECDEF must determine that the project is necessary to carry out an environmental response action under:
 - (a) The Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708; or
 - (b) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675.
- (2) In addition, the SECDEF must:
 - (a) Notify the appropriate committees of Congress;⁴⁵ and
 - (b) Wait 21 days.⁴⁶

9. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.5; AR 420-1, para. 4-56; AFI 32-1021, para. 5.2.2; AFI 65-601, vol. 1, para. 9.12.7; OPNAVINST 11010.20G, para. 4.4.3; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

- a. Scope of Authority. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.⁴⁷
- b. Proper Appropriation.

- (1) O&M Funds. See H.R. Rep. No. 97-612 (1982); see also AR 420-1, para. 4-56c; AFI 32-1021, para. 5.2.2.2.

⁴⁵ The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2810(b).

⁴⁶ DOD Reg. 7000.14-R, vol. 3., ch. 17, para. 170102.G.1, indicates that Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

⁴⁷ The intent of this section is to permit military departments and defense agencies to respond to natural disasters, acts of arson, and acts of terrorism promptly to restore mission effectiveness and preclude further deterioration of the damaged facility. H.R. REP. NO. 97-612.

- (a) The Secretary concerned may use O&M funds under 10 U.S.C. § 2805(c) if the cost of the project is \$750,000 or less.⁴⁸
 - (b) The Secretary concerned may also use O&M funds to repair or restore a facility temporarily to:
 - (i) Prevent additional significant deterioration;
 - (ii) Mitigate a serious life or safety hazard; or
 - (iii) Avoid severe degradation of a critical mission.
- (2) Military Construction (MILCON) Funds.⁴⁹ See H.R. Rep. No. 97-612 (1982).
- (a) The Secretary concerned may use MILCON funds to construct a replacement facility if an economic analysis of life-cycle costs shows that replacement is more cost effective than repair.⁵⁰
 - (i) Congress must normally approve a reprogramming request for the project.⁵¹
 - (ii) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

⁴⁸ The expanded thresholds for Life, Health, and Safety threatening situation should be considered for use in these situations.

⁴⁹ MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both “specified” funds and UMMC funds.

⁵⁰ The Secretary concerned may use current design and material criteria for the replacement facility. In addition, the Secretary concerned may increase the size of the replacement facility to meet current mission and functional requirements. See H.R. REP. NO. 97-612 (1982).

⁵¹ The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2; AR 420-1, para. 4-56d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.6 (requiring prior congressional notification and approval for reprogramming action).

- (b) If the Secretary concerned intends to use UMMC funds to construct a replacement facility, the Secretary concerned must comply with 10 U.S.C. § 2805 and any applicable regulations.
- (c) Requirements for Use. If the estimated cost of the project exceeds the UMMC threshold the Secretary concerned must:
 - (i) Notify the appropriate committees of Congress;⁵² and
 - (ii) Wait 21 days.
- (d) Limitations.
 - (i) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.5, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”
 - (ii) Army Limitations. AR 420-1, para. 4-56c(2) restricts the use of this authority for family housing projects.
 - (iii) Air Force Limitations. AFI 32-1021, para. 5.2.2.1, provides additional criteria for repairing damaged Air Force facilities.
 - (a) The damaged or destroyed facility must have been in use (or planned for use) at the time it was damaged or destroyed.
 - (b) The new or repaired facility must normally be the same size as the

⁵² The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2854(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.3 (detailing the requirements for reprogramming requests).

damaged or destroyed facility; however, the MAJCOM may approve limited increases to achieve economy of design or compliance with new criteria. But see H.R. Rep. No. 97-612 (1982) (stating that “any replacement facility [may] use current design and material criteria and may be increased in size to meet current mission and functional requirements”).

(c) A MAJCOM may not use this authority to correct space deficiencies.

(iv) Navy Limitations. Unless a shore activity must restore or replace a facility immediately to prevent an undue impact on mission accomplishment, the shore activity should include the restoration or replacement project in its annual budget program. OPNAVINST 11010.20G, para. 4.4.3 (noting that “[t]he Secretary of Defense has restricted the use of this authority to complete replacement or ‘major restoration’ of a facility which is urgently required”).⁵³

D. Statutory Thresholds.

1. If the approved cost of the project is \$750,000 or less use O&M funds. 10 U.S.C. § 2805 (c) & AR 420-1 para. 4-9 b. (9) (c) 1.
2. If the approved cost of the project is between \$750,000 and \$2 million (\$3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use UMMC funds, unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above. 10 U.S.C. § 2805 a.

⁵³ OPNAVINST 11010.20G, para. 4.4.3, defines “major restoration” as “restoration costing in excess of 50 percent of the plant replacement value (PRV).”

3. If the approved cost of the project is greater than \$2 million, use “specified” MILCON funds unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above.

E. Exceeding a Statutory Threshold.

AR 420-1, app. D, para. D-4; AFI 32-1021, para. 4.7.

1. Exceeding a statutory threshold violates the Purpose Statute and may result in a violation of the Anti-deficiency Act. See AR 420-1, app. D, para. D-4a.
2. When a project exceeds—or is expected to exceed a statutory threshold—the department or agency must:
 - a. Stop all work immediately;
 - b. Review the scope of the project and verify the work classification; and
 - c. Consider deleting unnecessary work.⁵⁴
3. If the project still exceeds the statutory threshold, the department or agency must correct the Purpose violation by deobligating the improper funds and obligating the proper funds.
4. In addition, the department or agency should attempt to avoid a final Anti-deficiency Act report by obtaining proper funds that were available:
 - a. When the violation occurred; and
 - b. When the violation was discovered and corrected⁵⁵;

⁵⁴ The department or agency must avoid project splitting. Therefore, the department or agency should only delete truly unnecessary work. AR 420-1, app. D, para. D-4b(3).

⁵⁵ Obtaining the proper funds (i.e., funds that meet the 2-part test) does not obviate the commander’s obligation to investigate and report the alleged Antideficiency Act violation. See 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD Reg. 7000.14-R, vol. 14, chs. 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995); DFAS-IN 37-1, ch. 4, para. 040204.

F. Authorized Variations.⁵⁶

10 U.S.C. § 2853; AR 420-1, paras. 4-50 and 4-51; AFI 65-601, vol. 1, para. 9.4.3; AFI 32-1021, para. 4.6.5; OPNAVINST 11010.20G.

1. Cost Increases or Decreases.
 - a. No authority exists to increase the authorized scope of a project.
 - b. There are no cost increases authorized for O&M funded projects under 10 U.S.C. § 2805. The \$750K cap is absolute.
 - c. For MILCON funded projects, The Secretary of a military department may increase or decrease the cost of a “specified” military construction project by the lesser of:
 - (1) 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition
 - (2) 200% of the UMMC ceiling (currently \$2 million).
 - (3) Note that certain costs, such as contractor claims and certain environmental remediation costs, do not count. (10 USC 2853c)
 - d. However, the Secretary concerned must first determine that:
 - (1) The increase or decrease is required solely to meet unusual variations in cost; and

⁵⁶ These authorized variations apply only to “specified” military construction projects. 10 U.S.C. § 2853. They do not generally apply to UMMC projects. However, 10 U.S.C. § 2805(a)(1) permits the Secretaries of the military departments to carry out UMMC projects “within an amount equal to 125 percent of the amount authorized by law for such purpose.” In addition, 10 U.S.C. § 2863 permits the SECDEF and the Secretaries of the military departments to use unobligated funds appropriated to the department and available for military construction or family housing construction to pay meritorious contractor claims arising under military construction contracts or family housing contracts “[n]otwithstanding any other provision of law.” 10 U.S.C. § 2863 does not authorize SECDEF or the Secretaries of the military departments to exceed statutory funding ceilings for OMA funded unspecified minor military construction projects.

- (2) The military department could not have reasonably anticipated the cost variation at the time Congress originally approved the project.
 - e. Note that these are changes to a project's authorization with thresholds based off of the project's appropriation.
2. Scope Increases and Reductions.
- a. **Scope Reductions.** The Secretary of a military department may reduce the scope of a "specified" military construction project by not more than 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(1).
 - b. **Scope Increases.** The scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may not be increased above the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(2)
3. Notification Requirements for Variations Exceeding Secretarial Authority. The Secretary concerned must notify the appropriate committees of Congress of any cost increases or decreases, or scope reductions, that exceed the authorized variations discussed above and then must wait for either 14 or 21 days (depending on type of notice). (10 USC 2853(c)).

IX. IDENTIFYING THE PROPER APPROVAL AUTHORITY.

- A. Approval of Construction Projects.
 - 1. Army. AR 420-1, app. D.
 - a. Commander, IMCOM may approve a minor construction project with total funded costs of \$750,000 or less. This authority may be delegated to HQIMCOM staff members and to IMCOM region directors. Commander, IMCOM may also permit redelegation of this authority.

- b. The Deputy Assistant Secretary of the Army for Installation and Housing (DASA (IH)) approves UMMC projects costing between \$750,000 and \$2 million.⁵⁷ AR 420-1, app. D.
- 2. Air Force. AFI 32-1032, 5.1.⁵⁸
 - a. The Deputy Assistant Secretary of the Air Force (Installations) (SAF/MII) has delegated approval authority for UMMC projects costing \$500,000 or less to the Civil Engineer (AF/ILE).⁵⁹
 - b. The SAF/MII approves UMMC projects costing between \$500,000 and \$1.5 million.
- 3. Navy. OPNAVINST 11010.20G, app. C.
 - a. The Commanding Officer (C.O.) or Major Claimant approves projects costing \$300,000 or less (\$1 million or less if the project is intended solely to correct a deficiency that threatens life, health, or safety).
 - b. The Chief of Naval Operations (CNO) approves projects costing between \$300,000 and \$500,000.
- 4. Congressional notification and approval is required for projects expected to exceed \$1.5 million. AR 415-15, app. B, para. B-2f; AFI 32-1032, para. 3.5.4; OPNAVINST 11010.20G, app. C.

B. Approval of Maintenance and Repair Projects.

- 1. Army. AR 420-1, para. 2-16.
 - a. Using funds available to the Secretary concerned for operation and maintenance, the Secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility. 10 USC § 2811(a) Before a military department can carry out a repair project that costs more than \$7.5

⁵⁷ There is a discrepancy between the increased UMMC amount of \$2 million and the \$1.5 that is authorized by AR 420-1. JAs should verify whether the amount has increased to \$2 million.

⁵⁸ This regulation predates the legislation that increased the statutory threshold for O&M projects to \$750,000.

⁵⁹ The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

million, the Secretary concerned must approve the project. 10 U.S.C. § 2811(b). In addition, if the project costs more than \$7.5 million, the Secretary concerned must submit a report to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

- b. Commander, IMCOM may approve maintenance and repair projects when:
 - (1) The funded project cost does not exceed \$3 million; and for a combined maintenance and repair project, the total of the maintenance cost and the repair cost does not exceed \$3 million.
 - (2) The repair cost (or repair plus construction project cost for a combined undertaking) does not exceed 50 percent of the replacement cost of the facility for projects whose funded costs are greater than \$750,000.
 - (3) WWII temporary buildings that have total repair and construction costs in excess of \$40 per square foot in accordance with AR 420-1 paragraph 2-13.
 - (4) Environmental documentation has been completed in accordance with AR 200-1 and 32 CFR 651.
 - c. Commander, IMCOM may delegate and permit redelegation of this authority. AR 420-1, para. 2-16b.
2. Air Force. AFI 32-1032, paras. 3.7 and 4.4.1.
- a. Installation commanders have unlimited approval authority for maintenance projects.
 - b. The AF/ILE may approve – or delegate approval authority for – repair projects costing \$5 million or less.
 - c. The SAF/MII approves repair projects costing more than \$5 million.
3. Navy. OPNAVINST 11010.20G, app. C.

- a. Commander, Naval Installations Command, approval is required for all minor construction projects and combination projects over \$500,000.
 - b. Commander, Naval Installations Command, approval is required for all repair projects over \$500,000.
 - c. The DASN (I&F) approves general repair projects costing \$5 million or more.
 - d. The C.O. approves recurring maintenance projects, and specific maintenance projects costing \$500,000 or less. Commander, Naval Installations Command, approval is required for all maintenance projects over \$500,000.
4. Congressional notification and approval is required for projects expected to exceed \$7.5 million. 10 U.S.C. § 2811(d). The Secretary's notification to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

X. CONCLUSION.

- A. It is important to take a systematic approach in reviewing a construction funding issue. The framework for such a review is located in Appendix D. This checklist does not address every issue but identifies the major steps in the process for construction funding fiscal review.
- B. Regardless of your opinion regarding a construction project, it is valuable to document the rationale that you used to come to your conclusion. Doing this allows others to isolate the issues that you identified within the project file and understand your logic and reasoning. When the file is audited in the future, it especially helps put your analysis and the project in the proper context.

XI. NOTES

APPENDIX A - CONSTRUCTION FUNDING CHECKLIST

1. Define the Scope of the Project. (i.e. What is the construction project? Is there one, two, three, etc.?)

- a. A military construction project includes all construction work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Critical is whether the project, standing alone, meets this requirement.
- b. Avoid project splitting and/or incrementation of projects.
- c. Downscoping is permissible, provided it results in a complete and usable facility.

2. Classify the Work (Is it construction, maintenance, or repair?)

- a. Construction: Erection, installation, or assembly of a new facility, or the addition, expansion, or relocation of an existing facility.
- b. Maintenance: Work required to preserve or maintain a facility.
- c. Repair: Project to restore a facility to its designated purpose. Remember “failed or failing.”

3. Determine the Funded and Unfunded Costs

KEY: Funded costs are capered to relevant thresholds. see AR 420-1 & DA- PAM 420-11

- a. Common funded costs: materials, supplies, services, installed capital equipment, transport of materials, civilian labor, supervision and inspection (Corps of Engineers).
- b. Common unfunded costs: military personnel labor, excess distributions (DRMO).

4. Select the Proper Appropriation (Construction Projects)⁶⁰

- a. Less than \$750,000, O&M Funds
- b. \$750,000 -- \$2M, UMMC Funds (LHS, up to \$3 Million).
- c. Over \$2 Million, Specified MILCON Funds (Congress).

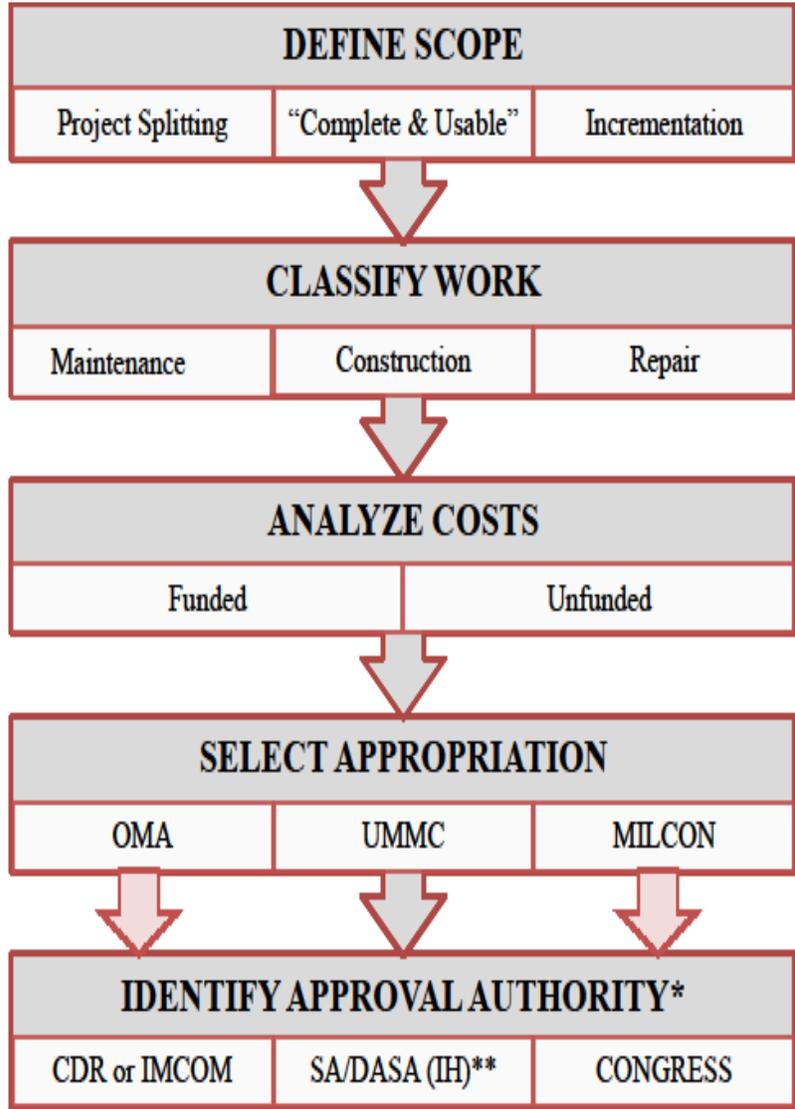
5. Identify the Proper Approval Authority (Construction Projects)⁶¹

- a. Less than \$750,000, ARMY COMMAND Commander/IMCOM .
- b. \$750,000 -- \$2 M, DASA (IH), (LHS, < \$3M).
More than \$2M, Congress.

⁶⁰ Maintenance and Repair Projects are generally funded with O&M funds.

⁶¹ Maintenance and repair projects have different approval thresholds from construction. MACOM commander/IMA Director may approve maintenance and repair projects costing less than \$3 million (which can be delegated). Maintenance and repair projects exceeding \$3 million must be approved by HQDA. The Secretary concerned must approve a repair project exceeding \$7.5 million, and must notify Congress. 10 U.S.C. § 2811.

APPENDIX B - CONSTRUCTION FUNDING FLOW CHART



* If Maintenance & Repair, only O&M (<\$3M CDR, IMCOM) (\$3-7.5M HQDA) (>\$7.5M Congress)

**Notify Congress/Wait

APPENDIX C – RELOCATABLE BUILDING FLOW CHART

