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Military Construction Law Deskbook

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The Military Construction Law Deskbook is a guide for U.S. Army Corps of Engineers (USACE) attorneys who advise on military construction matters. While designed to be a thorough resource and an excellent starting point, the Deskbook is not an all-encompassing treatise and should not replace independent research. Attorneys advising on military construction matters should independently verify that they are applying current legal authorities, regulations, and policies relevant to the specific program, project, or activity they are advising on. Furthermore, the contents of this publication should not be construed as official positions, policies, or decisions of the Federal Government, the Department of War, the U.S. Army, USACE, or any agencies, activities, commands, units, or personnel thereof.

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Chapter 1

Project Identification and Work Classification

CHAPTER 1: PROJECT IDENTIFICATION AND WORK CLASSIFICATION

I. INTRODUCTION

A. The inception of any construction effort on a military installation occurs when the installation first identifies a requirement that involves the repair to, and/or construction of, real property facilities or additions. Many such identified requirements are immediately pursued through applicable authorization and budgeting processes, while others may languish for years due to restrained resources and competing priorities. For projects that are pursued, the threshold determination is whether the work required to complete a project is considered "repair," "military construction," or something else (e.g., removable investment items), which drives the authority and budgeting processes relied upon to pursue and execute the project. This chapter briefly discusses, generally, the work classification process and some important distinctions between work classification categories.

B. Definitions:

1. Repair: Defined in various regulations to encompass, generally, the restoration of a real property facility, or component of such facility, to such condition that it may be used effectively for its designated functional purpose. *See e.g.*, AR 420-1, Glossary.

2. Repair Project: A project –

a. to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose; or

b. to convert a real property facility, system, or component to a new functional purpose without increasing its external dimensions.10 U.S.C. 2811(e).

Practice Tip: Congress added the concept of converting a facility without increasing its external dimensions as a permissible "repair project" via section 2802 of the FY 2017 National Defense Authorization Act (NDAA) (Pub. L. 114-328). Prior to such enactment, all facility "conversions" were considered military construction and some outdated regulations still provide for the same. *See e.g.*, AR 420-1, Ch. 4, para. 4-17.c. (April 15, 2026). For current implementation guidance of section 2802, *see* Assistant Secretary of Defense for Energy, Installations, and Environment (ASD (EI&E)) memorandum, subject: *Guidance for Facility Repair Projects* (June 28, 2024); and Deputy Assistant Secretary of the Army for Installations, Housing, and Partnerships (DASA (IH&P)) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor*

Construction Projects Using Funds Available for Operation and Maintenance (June 30, 2025).

Additionally, the retention of the term "conversion" in the definition of "military construction" under 10 U.S.C. 2801 presents some ambiguity as to which conversion projects should/can be considered repair verses construction. One possible reconciliatory reading of the two statutory definitions is that "conversions" under section 2811 are limited to those that do not increase the exterior building dimension, as defined under Department of Defense implementation guidance, while "conversions" under section 2801 are those that do.

1. Military Construction: "[A]ny construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in 23 U.S.C. 210)." 10 U.S.C. 2801(a).

2. Military Construction Project: "[A]ll military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law)." 10 U.S.C. 2801(b).

3. Facility: "[A] building, structure, or other improvement to real property." 10 U.S.C. 2801(c)(2).

4. Military Installation: "[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." 10 U.S.C. 2801(c)(4).

II. WORK CLASSIFICATION

A. Work classification is the process of categorizing construction efforts associated with a real property facility at a military installation as "repair," "construction," or something else (e.g., removable investment items). Work classification requirements are typically contained in regulations specific to each Military Component (*see e.g.*, DA PAM 420-11), with all such regulations seeking to apply the above statutory definitions.

B. As a general rule, repair projects are those that bring failed or failing components of an existing facility back to their original functional purposes. *See* 10 U.S.C. 2811(e); DA PAM 420-11, para. 1-7.b. Subject to specific restraints discussed in Chapter 2, repair projects may also include the conversion of existing facilities to new functional

purposes. *See id*. Construction projects, on the other hand, are those that, as a general rule, result in the construction of a new facility or additions to an existing facility. *See* 10 U.S.C. 2801(a); DA PAM 420-11, para. 1-7.c. However, there are several nuances to these general rules (e.g., repair projects may include minor additions to comply with current building code requirements), so reference must be made to applicable Military Component regulations to ensure work classification is conducted appropriately.

Practice Tip: The classification of work as "repair" vice "construction" often creates confusion because repairs to real property facilities fall under the definition of "construction" in the general sense of that term (*see e.g.*, "construction" definition under Revolutionary FAR Overhaul (RFO), Subpart 2.101, which expressly includes repairs to real property). Thus, it is important to keep in perspective that the distinction between repair and construction in the work classification context is specific to the authority and funding requirements for pursuing such work and does not change the fact that such work is still considered "construction" in other contexts.

C. Multi-faceted Projects: A single facility requirement may involve both repair and military construction work. *See* AR 420-1, para. 4-17.c. In such instances, the work is classified accordingly and may be pursued either: (1) via separate lines of authority and funding as explained in Chapters 2 and 3 for repair and military construction, respectively; or (2) for major military construction projects (i.e., those exceeding the minor military construction thresholds under 10 U.S.C. 2805), as a single military construction project **if** the repair or other non-"construction" components are expressly called out in the DD Form 1391 submitted to Congress for project authorization/appropriation as part of the construction effort that is to be funded with Military Construction funding made available for the project. Note that this latter approach may be restricted by specific Military Component policy and may not always be supported by congressional authorization and appropriation committees.

D. Project Incrementing or "Splitting:" Unless otherwise authorized by law, the work included in a project description, particularly for construction projects, must include all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Incrementing or "splitting" work into smaller, incomplete segments for budgetary or other reasons is not permissible. *See e.g.*, AR 420-1, Ch. 2, paras. 2-12.c. and 2-15.a.(2).

III. AUTHORITY AND FUNDING

A. As part of their operation and maintenance responsibilities, military installations have inherent authority based on the Necessary Expense Doctrine and available operation and maintenance funding to identify real property facility requirements and perform work classifications. Accordingly, such efforts are typically funded by operation and maintenance funding sources that are expressly authorized for appropriation and made available for Facility Sustainment, Restoration and Modernization (FSRM)

purposes. As discussed further in Subchapter 3.1, for military construction projects, work classification efforts fall under the "planning" phase of a construction project.

IV. PROCEDURAL MATTERS

A. Approval Authority: Work classification is primarily the responsibility of the requiring installation. *See e.g.*, AR 420-1, para. 2-5.b.(6). For Army installations, the installation Director of Public Works (DPW) typically serves as the work classification authority. Such work classification authorities are responsible for implementing and following work classification procedures applicable to their installation. *See e.g.*, DA PAM 420-11. As a general matter, legal counsel defers to work classification determinations of the installation work classification authority. However, in instances where the justification for a work classification is patently unclear, further explanation from the work classification authority should be sought, which may necessitate coordination with installation counsel to ensure statutory and regulatory definitions are properly applied.

B. Construction Agent: Work classification factors into the determination of which entity is primarily responsible for executing the work. Entities designated to execute military construction or repair projects are often referred to as the "construction agent."

1. For repair projects and minor military construction projects funded with operation and maintenance funding pursuant to 10 U.S.C. 2805(c), installations typically hold the authority/responsibility to serve as the construction agent, as provided in regulations and policy directives specific to the applicable Military Component. *See e.g.*, AR 420-1, Ch. 2, sec. III. However, installations, at their discretion, can typically request support from other military elements via support authorities, as applicable (e.g., via the Economy Act (31 U.S.C. 1535) or 10 U.S.C. 2818 (*see* Chapter 9 for further discussion on support authorities)).

> **Practice Tip**: Standing regulations for operation and maintenance funded repairs and minor military construction are often outdated, superseded, and/or clarified by recurring memoranda issued by the respective Military Components. For example, *compare* AR 420-1, Ch. 2, Sec. III, *with* DASA (IH&P) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor Construction Projects Using Funds Available for Operation and Maintenance*, (June 30, 2025). Thus, it is always best to ensure you are working from the most recent guidance.

2. For military construction projects funded by Military Construction appropriations, to include Unspecified Minor Military Construction (UMMC) funding (e.g., those projects costing less than the UMMC threshold under section 2805(a), but more than the section 2805(c) operation and maintenance threshold), 10 U.S.C. 2851 requires that a military component (historically the

U.S. Army Corps of Engineers or the Naval Facilities Engineering Systems Command) or another federal agency designated by the Secretary of Defense serve as the construction agent.

3. Implementation of section 2851 for projects funded by military construction appropriations has traditionally been contained in DoDD 4270.5. However, a recent memorandum from the Secretary of War appears to have replaced, or at least largely superseded, this directive by permitting the Secretaries of the Military Departments to make independent construction agent designations for military construction projects. *See* Under Secretary of War for Acquisition and Sustainment memorandum, subject: *Accelerating Delivery of Infrastructure to the Warfighter* (April 28, 2026).

Practice Tip: A plain reading of section 2851, coupled with section 2801 and 2805(c) of title 10, suggests that section 2851 would apply to military construction projects funded with operation and maintenance funds under section 2805(c) and similar authorities; however, existing guidance is clear, at least for the Army, that Army installations have authority to execute such projects without any formal designation pursuant to section 2851. *See e.g.*, AR 420-1, Ch. 2, Sec. III; DASA (IH&P) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor Construction Projects Using Funds Available for Operation and Maintenance* (June 30, 2025).

4. For military construction projects that are funded from non-military construction appropriations and exceed the section 2805(c) operation and maintenance funding threshold (e.g., Section 2835 of the FY24 NDAA (Pub. L. 118-31)), the construction agent designation is not always clear and clarification from secretariat level offices responsible for installation infrastructure may be necessary.

Chapter 2

Repair Projects

CHAPTER 2: REPAIR PROJECTS

I. INTRODUCTION

A. This chapter addresses repair projects, a critical component of maintaining real property inventory of the Military Components. Unlike military construction projects that create new capabilities, repair projects focus on restoring existing facilities to a condition where they can be effectively used for their designated purpose. This chapter outlines the legal authorities, funding principles, procedural requirements, and key fiscal constraints that govern the execution of repair projects.

B. Definitions: See Chapter 1.

II. AUTHORITY

A. Section 2811 of title 10, United States Code provides standing authorization for military components to execute repair projects for DoD facilities.

B. Repair projects under section 2811 fall into two general categories:

1. Projects to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose. 10 U.S.C. 2811(e)(1).

    a. For Army, facility components must be in a failed or failing state to qualify as a repair project under this category. *See* DA PAM 420-11, para. 1.5.a.(2)(a).

2. Projects to covert a real property facility, system, or component to a new functional purpose without increasing its external dimensions. 10 U.S.C. 2811(e)(2).

    a. Military Components executing conversion projects must comply with capital improvement reporting requirements under DoD FMR Vol. 4 and properly record such projects in real property records. *See* Assistant Secretary of Defense for Energy, Installations, and Environment (ASD (EI&E)) memorandum, subject: *Guidance for Facility Repair Projects* (June 28, 2024).

C. In certain circumstances, repair projects may include the addition/expansion of facility components (e.g., to comply with building code requirements or to increase gross square footage without increasing the facility's external dimensions). *See id*. and related Military Component guidance.

III. FUNDING

A. Repair projects under section 2811 are funded using applicable funds available for operation and maintenance. 10 U.S.C. 2811(a).

B. Typically, such sources are annual operation and maintenance appropriations made available for each Military Component (e.g., Operation and Maintenance, Army (OMA) funds for the Army). However, other sources made available for operation and maintenance may also be used, as applicable (e.g., for DoD labs, Research, Development, Test, and Evaluation (RDT&E) funds specifically budgeted for facility operation and maintenance requirements as contemplated in RDT&E appropriation language). *See* DoD FMR Vol. 2B, Ch. 5, para. 1.5.6.

IV. PROCEDURAL REQUIREMENTS

A. Documentation:

1. All repair projects, regardless of funding or construction agent, must be properly classified and documented as repair. The work classification must be clearly documented on project forms, as this documentation is the basis for funding and approval decisions.

2. For Army projects, project files must include DA Form 4283 (Facilities Engineering Work Request) to support proper work classification. *See* DA PAM 420-11, para. 4-2.

3. For projects exceeding installation approval authority levels, project files must include a DD Form 1391 detailing the requirement, scope, and cost of the project. *See* AR 420-1, paras. 2-5.b.(10)(q) and 2-16.g.

> **Practice Tip**: The DA Form 4283 and DD Form 1391 serve as authorization/approval documentation, not funding documents. Appropriate funding is required in addition to authorization documentation. It is important to confirm that the contract award amount does not exceed the authorization/approval amount documented in the DA 4283/DD 1391. If the contract award will exceed the project authorization, the DA 4283/DD 1391 may need to be revised/reapproved.

4. Repair to Replacement Ratio (R-R): The R-R ratio is the total funded cost of all known repairs and construction being performed on a facility divided by the replacement cost of the facility including demolition and disposal and restoration of the site (within the 5-foot line). *See* AR 420-1, para. 1-8.c.(3)(b). The R-R must be calculated for each repair project with a funded cost greater than the current operation and maintenance construction limit in 10 U.S.C. § 2805(c), with documentation of the same include in the project

approval file. *See id*. Repair projects with an R-R ratio greater than 75% may require additional justification and higher approval. *See* 10 U.S.C. 2811(d)(2); Deputy Assistant Secretary of the Army for Installations, Housing, and Partnerships (DASA (IH&P)) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor Construction Projects Using Funds Available for Operation and Maintenance* (June 30, 2025).

B. Approval Authority:

1. Repair projects with an estimated cost exceeding $7,500,000 require advance approval by the Secretary of the Military Component concerned and Congressional notification. 10 U.S.C. 2811(d).

2. Approval authority for repair projects with an estimated cost less than $7,500,000 is determined by Military Component delegations. Within the Army, such delegations are currently codified in the DASA (IH&P) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor Construction Projects Using Funds Available for Operation and Maintenance* (June 30, 2025).

3. Distinguishing between funded and unfunded costs is a critical financial control for adhering to statutory limits and determining the correct project approval authority for repair projects. Only funded costs count toward project approval thresholds. *See* AR 420-1, para. 2-17.

Chapter 3

Military Construction Projects

CHAPTER 3: MILITARY CONSTRUCTION PROJECTS

OVERVIEW: Military construction projects are executed in three distinct phases from an authority and funding perspective: (1) planning (formerly “advance planning”), which involves identifying the requirement for a project and undertaking basic preparation and programming actions; (2) design (formerly “planning and design”), which focuses on procuring architect and engineering services to design a project; and (3) construction, which results in a complete and usable facility. The following subchapters discuss these three phases, to include the authorization and funding requirements associated with each.

SUBCHAPTER 3.1: Military Construction – Planning

I. INTRODUCTION

A. "Planning" or "Advance Planning" activities associated with a military construction project are the threshold activities required to scope and program a military construction project. The planning phase results in supporting documentation for a project approval/budget request. This chapter discusses various planning activities and related guidance.

B. Definitions:

1. Capitalization: The process of accounting for the total costs of an asset. Planning costs for a military construction project are expensed rather than capitalized. *See* DoD FMR Vol. 3, Ch. 17, paras. 5.2.4., 6.2.1.1, and 6.2.2.1.

2. DD Form 1391: Form that is prepared by the installation and later, after review and approval within the Military Component, ultimately submitted to DoD, the Office of Management and Budget (OMB), and Congress as the principal project justification form. This form provides a narrative justification for the project and specifies the components, quantifies, and funding amounts required to complete the proposed project. *See* AR 420-1, para. 4-20.

3. Planning/Advance Planning Activities: Preliminary activities designated by DoD as necessary to produce a basic project scope, prepare approval/budget submissions, and certain efforts to prepare a project site for construction. As provided in the Assistant Secretary of Defense for Energy, Installations, and Environment memorandum, subject: *Guidance for Military Construction Planning and Design*, (June 1, 2023) (hereinafter "OSD Planning and Design Policy" or "OSD Policy"), design activities include (*see* para. 1 of the OSD Policy):

a. Development of an installation master plan, or related sub-plan.

b. Site selection efforts, including siting alternative analysis, preliminary site investigation, and utility analysis for the purpose of determining a suitable site for a project.

c. Development of project requirements, concept studies, economic analysis, and initial DD 1391 documentation (except for cost certification effort) required as part of the budget development, justification, and submission process.

d. Studies, surveys, documentation, consultation, mitigation planning or other analysis efforts necessary to plan

compliance with local, state, federal, DoD, or international, environmental requirements (e.g., National Environmental Policy Act (NEPA), Endangered Species Act, Clean Water Act, Coastal Zone Management Act, National Historic Preservation Act).

Practice tip: While planning activities necessary to comply with NEPA and related laws, to potentially include identifying mitigation measures, are part of the planning phase of a project, execution activities to comply with such laws (e.g., the design and construction of mitigation measures) are not.

e. Development of a preliminary hazards analysis, or any investigations/surveys of radiation contamination, asbestos, radiation contamination (RADCON), radon, Munitions and Explosives of Concern (MEC), Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS), or other hazardous substance necessary to quantify the remediation required for budget purposes.

Practice tip: Unknown/unforeseen environment remediation requirements discovered during project execution can present unique authority and funding questions. *See* Subchapter 6.5 for further discussion on that point.

f. Preservation activities associated with historic properties, cultural and archaeological sites, including investigation, documentation and consultation (e.g., State Historic Preservation Office (SHPO) recordation effort), any subsequent documentation of further study required by agreement, and recovery/salvage.

Practice Tip: Prior to the issuance of the OSD Planning and Design Policy, planning activities were described as "advance planning" activities, which is still the terminology used in several regulations and guidance documents, to include the current version of DoD FMR Vol. 3, Ch. 17. *See also* AR 420-1. However, as provided in the OSD Planning and Design Policy, to better clarify the distinction between "advance planning" activities and "planning and design" activities discussed in Subchapter 3.2, DoD is shifting to the terms "planning" and "design," which will be incorporated into the next update of DoD FMR Vol. 3, Ch. 17. *See* OSD Policy.

During this period of terminology transition, it is often necessary to be very deliberate in clarifying what is meant when the terms "planning" and

"design" are used in the military construction context to ensure there is no confusion as a result of the former "advance planning" and "planning and design" terminology.

4. Planning Charrette: A process that brings together all interested parties to create and support a consensus plan. AR 420-1, Glossary. Planning charrettes are required for all Army military construction projects unless HQDA approves a waiver. *See id.* at para. 4-20(a)(1). Although not expressly referenced in the OSD Planning and Design policy, several of the defined planning activities are inherently encompassed in the planning charrette process and, thus, planning charrettes are also considered planning activities that should be funded from operation and maintenance sources, and not military construction appropriations. *See* AR 420-1, para. 4-21.

5. Program Objective Memorandum (POM): This memorandum is submitted to DoD to propose resource allocation for all Army programs, not just military construction, in accordance with budgeting guidance.

6. Programming: Chapter 17 of the DoD FMR includes programming in the first phase of a military construction project with planning. Following the determination that a construction project is necessary to meet the installation's mission requirements, the installation creates a military construction budget request which includes a general description of the project's requirement, scope, cost estimate, and supporting documentation (i.e., a completed DD Form 1391). Prioritized military construction projects are considered in the budget process and identified in the overall POM. AR 420-1, Ch. 4, Sec. III provides a detailed overview of the programming process.

7. Real Property Master Plan (RPMP) or Master Plan: Interconnected documents which describe the current composition and long-range development plans for the garrison to meet its assigned mission requirements efficiently and economically over the course of 20 years. Construction needs are identified and documented in the RPMP. AR 420-1, para. 4-20. The RPMP is discussed in detail in AR 210-20.

II. AUTHORITY

A. As part of their operation and maintenance responsibilities, military installations have inherent authority based on the Necessary Expense Doctrine and available operation and maintenance funding to identify real property facility requirements, scope such requirements, and undertake planning actions to program such projects. *See generally*, AR 420-1, para. 4-4.s.

B. Planning activities are not encompassed by, and should not be performed under, military construction design authorities, such as 10 U.S.C. 2807 or 10 U.S.C. 18233(f). DoD FMR Vol.3 Ch. 17, para. 5.2.2.

III. FUNDING

A. As an operation and maintenance function, planning activities are funded from applicable funds made available for the operation and maintenance of the installation in question. *See* OSD Planning and Design Policy, para. 5(a)(1); DoD FMR Vol. 3, Ch. 17, para. 5.2.3. Planning activities are expensed, not capitalized. *See* DoD FMR Vol.3, Ch. 17, paras. 5.2.4. and 6.2.2.1.

> **Practice Tip**: Funds available for the operation and maintenance of an installation do not always fall under appropriations that include "operation and maintenance" in the appropriation heading (e.g., Operation and Maintenance, Army). For example, DoD laboratory and research facilities typically fund their facility operation and maintenance costs from a specific sub-activity group of defense Research, Development, Test, and Evaluation (RDT&E) appropriations, which expressly contemplate the operation of facilities and equipment" in the RDT&E appropriation language. *See* DoD FMR Vol. 2B, Ch. 5, para. 1.5.6. Similarly, specialized production installations are permitted to fund their installation operation and maintenance costs from special procurement appropriations or Defense Working Capital Funds established under 10 U.S.C. 2208. In these unique situations that involve non-traditional operation and maintenance funding sources, it is recommended to seek confirmation from the project proponent's office of counsel on the proper source of funding and coordinate concerns up your internal legal chain, as needed.

B. For minor military construction projects, planning costs are excluded for the purpose of determining compliance with the statutory thresholds under 10 U.S.C. 2805. DoD FMR Vol.3, Ch. 17, para. 5.2.2.

IV. PROCEDURAL MATTERS: Initiation and execution of planning activities is the responsibility of the requiring installation. *See e.g.*, AR 420-1, para. 4-4.s. However, as desired and applicable under relevant authority, installations may seek planning activity support from other Commands/Military Components on a reimbursable basis or as otherwise permitted by statute. *See* Chapter 9 for a discussion of common reimbursable authorities.

SUBCHAPTER 3.2: Military Construction – Design

I. INTRODUCTION

A. Design activities generally begin after advance planning activities are completed, but prior to initiation of a construction project. This chapter discusses authorization and appropriation requirements for design activities and identifies different types of design activities.

B. Definitions:

1. Architectural and Engineering Services:

a. Professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide those services;

b. Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

c. Those other professional services of an architectural or engineering nature, or incidental services, that members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. 40 U.S.C. 1102; Revolutionary FAR Overhaul (RFO) 2.101.

2. Design/Planning and Design Activities: DoD designated activities that relate to the design phase of a military construction project. As provided in the Assistant Secretary of Defense (Energy, Installations, and Environment) memorandum, subject: *Guidance for Military Construction Planning and Design*, (June 1, 2023) (hereinafter "OSD Planning and Design Policy" or "OSD Policy"), design activities include (*see* para. 2 of the OSD Policy):

a. Preparation of design manuals and standard designs, development of facility design criteria and development and maintenance of software systems associated with military construction documentation and project tracking, and program management related to design;

b. Architectural and engineering services required to produce designs (including interior design and design analyses), architectural and engineering plans, drawings, specifications and any environmental or historic preservation mitigation aspects thereof, whether performed by contract or by in-house personnel;

c. Site investigations including soils analysis; routine radiation contamination (RADCON), asbestos, radon, Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS), Munitions and

d. Explosives of Concern (MEC) or other hazardous substance surveys; minor demolition, destructive, or other investigative work to assist in determining the design requirement directly in support of a project design solution whether accomplished by contract, or DoD personnel;

e. Land planning report, including title search; American Land Title Association surveys, title sufficiency, purchase and sale agreements, appraisals, and final hazardous materials survey costs to determine fair market value associated with military construction land acquisition whether it occurs prior to or after congressional authorization;

f. Value Engineering (VE) studies;

g. Preparation of construction cost estimates, including cost certification and assessment efforts related to budget ready DD Form 1391;

h. Obtaining environmental/construction permits (e.g., a dredging permit);

i. Documentation necessary to determine design compliance with a green building system or other building sustainability requirements;

j. Extensions of design required by the contract specifications;

k. Construction contractor verification of site conditions such as soil analysis and representations made by the Government;

l. Production of field modification proposals/sketches, shop drawings, as-built drawings and operation and maintenance support information (OMSI);

m. All post-construction contract award services (PCAS), including but not limited to:

    i. Designs for contract changes and post-award interior designs;

ii. Review of field modification proposals/sketches (e.g., shop drawings);

iii. Development and review of VE proposals;

iv. Design support for design-build contracts after contract award, including design review and approval of the design-build contractor's design; and

v. Verification of design intent and optimization of system performance to ensure expected energy savings and required performance are achieved, including acceptance testing for high-risk, critical systems (including heating, ventilation, and air conditioning (HVAC), fire protection/ life safety, electrical, vertical transportation, thermal barriers, and underwater structures), control systems and cybersecurity, and any required special systems certification (including weight handling equipment, shielding, acoustic barrier, etc.)

Practice Tip: Prior to the issuance of the OSD Planning and Design Policy, design activities were described as "planning and design" activities, which is still the terminology used in several regulations and guidance documents, to include the current version of DoD FMR Vol. 3, Ch. 17. *See also* AR 420-1. However, as provided in the OSD Planning and Design Policy, to better clarify the distinction between "planning and design" activities and "advance planning" activities discussed in Chapter 3.1, DoD is shifting to the terms "design" and "planning," which will be incorporated into the next update of DoD FMR Vol. 3, Ch. 17. *See* OSD Policy.

During this period of terminology transition, it is often necessary to be very deliberate in clarifying what is meant when the terms "design" and "planning" are used in the military construction context to ensure there is no confusion as a result of the former "planning and design" and "advance planning" terminology.

3. Design-bid-build (DBB) Contract: the traditional acquisition method where design and construction are sequential and contracted for separately with two contracts and two contractors.

4. Design-build (DB) Contract: acquisition method that combines design and construction in a single contract with one contractor. The project owner generally prepares the preliminary design as a baseline that establishes minimum facility performance requirements used for competition and pricing. The awardee of the design-build contract prepares its own design and delivers the constructed facility in compliance with the original preliminary design.

5. Planning and Design Funds ("P&D Funds"): A subset of Military Construction appropriations that is expressly called out in Military Construction appropriation language.

> **Practice Tip**: Despite the terminology change from "planning and design" activities to "design" activities, the OSD Planning and Design Policy continues to use the terminology "Planning and Design" or "P&D" when referring to Military Construction appropriations provided for such purposes. It is unclear whether the retention of this funding terminology was intentionally or if the terminology will similarly be changed to "design funds" at some future date.

II. AUTHORITY

A. Section 2807 of title 10, United States Code, provides a standing authorization for Military Components to obtain architectural and engineering services and carry out the design of military construction projects. This authority may be used to design projects that have not yet been authorized for construction.

B. Typically, Military Components are free to choose the projects they design, and the design phase of a project is just a natural progression of the project planning phase. However, in some instances, which have become more common in recent years, Congress directs the design of specific projects under the table included in section 4601 of National Defense Authorization Acts (NDAAs).

III. FUNDING

A. Pursuant to section 2807, construction design is funded "[w]ithin amounts appropriated for military construction . . . ." Standing alone, this language could be reasonably read as permitting the use of Military Construction appropriations at large to conduct design activities. However, the language of Military Construction appropriations and DoD regulations more narrowly defines the permissible funding sources and timing during which they can be utilized.

B. As a general matter, Planning and Design (P&D) funds are expressly called out in Military Construction appropriations as a subset of such appropriations. *See e.g.*, Figure 3-1 below.

MILITARY CONSTRUCTION, ARMY

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Army as currently authorized by law, including personnel in the Army Corps of Engineers and other personal services necessary for the purposes of this appropriation, and for construction and operation of facilities in support of the functions of the Commander in Chief, $2,381,909,000, to remain available until September 30, 2030: *Provided,* That, of this amount, not to exceed $415,688,000 shall be available for study, planning, design, architect and engineer services, and host nation support, as authorized by law, unless the Secretary of the Army determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor: *Provided further,* That of the amount made available under this heading, $377,950,000 shall be for the projects and activities, and in the amounts, specified in the table under the heading "Military Construction, Army" in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act), in addition to amounts otherwise available for such purposes.

Figure 3-1

C. The "study" and "planning" terms included in this language should not be confused with planning activities discussed in Subchapter 3.1, which are funded from operation and maintenance funding sources as described in that chapter. Use of P&D funds is limited to those design activities described in paragraph I.B. of this Subchapter. The "authorized by law" requirement in the appropriations language to utilize such funds is typically satisfied by reliance on section 2807.

D. Annually, Congress authorizes and provides line-item authorizations of appropriations for P&D funds under NDAAs and appropriates such funds under Military Construction Appropriations Acts following the same process used for construction funding authorizations and appropriations discussed in Subchapter 3.3. The vast amount of P&D funding is authorized and appropriated as a single, bulk line-item; however, Congress may also expressly authorize and appropriate P&D funding for a specific project. *See e.g.*, Figures 3-2 and 3-3 below, which are excerpts from section 4601 of the FY26 NDAA (Pub. L. 119-60), that show general and project specific authorizations of appropriations for P&D funds, respectively.

SEC. 4601. MILITARY CONSTRUCTION
(In Thousands of Dollars)

Account	State/Country and Installation	Project Title	FY 2026 Request	Conference Authorized
Army	Letterkenny Army Depot	DEFENSE ACCESS ROADS	7,500	7,500
Army	Letterkenny Army Depot	GUIDED MISSILE MAINTENANCE BUILDING.	84,000	84,000
Army	Unspecified Worldwide Locations	DESIGN	287,557	287,557
Army	Unspecified Worldwide Locations	FACILITIES, SUSTAINMENT, RESTORATION & MODERNIZATION ($6,159,744 TRANSFERRED FROM O&M).	0	0

Figure 3-2

SEC. 4601. MILITARY CONSTRUCTION
(In Thousands of Dollars)

Account	State/Country and Installation	Project Title	FY 2026 Request	Conference Authorized
ARMY				
	Alabama			
Army	Anniston Army Depot	ACCESS CONTROL POINT	0	50,000
Army	Redstone Arsenal	COST TO COMPLETE—PROPULSION SYSTEMS BUILDING.	55,000	55,000
	Alaska			
Army	Fort Wainwright	BARRACKS	208,000	80,000
Army	Fort Wainwright	DINING FACILITY (DESIGN)	0	8,000
	Arizona			
Army	Fort Huachuca	FLIGHT CONTROL TOWER (DESIGN)	0	0

Figure 3-3

E. The funding of design activities varies by project funding source as a whole and the timing of project execution as provided in DoD guidance:

1. Minor military construction:

a. Operation and Maintenance Funded Projects: Design activities for operation and maintenance funded projects under 10 U.S.C. 2805(c) are funded from operation and maintenance appropriations. *See* para. 5.a.(2) of OSD Planning and Design Policy. If at any point a proposed project exceeds the section 2805(c) threshold and requires Military Construction appropriation funding, the design activities going forward are resourced from Military Construction appropriations consistent with the Unspecified Minor Military Construction (UMMC) and major military construction funding guidelines discussed below. *See id*.

b. Design activities for UMMC projects are funded with P&D funds in the same manner as major military construction projects discussed in paragraph III.E.2. below. *See* para. 5.b. of OSD Planning and Design Policy.

c. Design costs are excluded for the purpose of determining compliance with the statutory thresholds under 10 U.S.C. 2805. DoD FMR Vol.3, Ch. 17, para. 5.1.3.

2. Major military construction:

a. The funding determination for design activities of projects funded with Military Construction appropriations (to include UMMC funded projects) is based on the timing of construction contract award for the project:

i. Obligations for design activities occurring ***prior to*** the award of a construction contract are funded with P&D funds. *See* para. 5.b.(2)ii. of OSD Planning and Design Policy.

ii. Obligations for design activities occurring ***after*** the award of a construction contract are funded with P&D funds. *See id*. at para. 5.c.(1).

b. For projects with more than one construction contract, the above rules are applied to each separate contract. *See id*. at para. 5.(3).

Practice Tip: The procurement method selected for a project can greatly affect the funding of design activities. For example, for a project procured via design-bid-build, the entirety of the design contract is funded with P&D funds, then, once design is complete and the follow-on construction contract awarded, any remaining design activities are funded with Military Construction funds (i.e., "project funds"). However, for design-build contracts, the entire contract represents a single construction contract award, meaning that all design activities occurring after award of the design-build contract, to include the design component of such contract, are funded with Military Construction funds, not P&D funds. However, with the advent of new procurement methods/authorities (e.g., "Accelerated Design Build" under 10 U.S.C. 3241(f)), DoD has informally expressed a willingness to increase flexibility in this regard. Reviewing attorneys and clients alike should stay informed of the most recent DoD guidance for such procurement methods.

Practice Tip: The legal rationale for designating construction contract award as the fund determining event is not entirely clear or intuitive.

However, is it a well established practice within DoD—which is presumably communicated to congressional appropriations committees through annual military construction budget submittals—and is codified in DoD regulation and directives. Thus, Military Components are required to adhere to it. The practice is potentially supported by the Election Doctrine, coupled with annual DoD budget submittals to Congress that align with such funding elections.

IV. PROCEDURAL MATTERS

A. Approval: Military Component headquarters level elements typically approve the initiation of the design of a project, which is done in phases by the issuance of "design codes" to the construction agent. *See e.g.*, AR 420-1, para. 4-36.

B. Congressional Notification:

1. Pursuant to 10 U.S.C. 2807(b), congressional notification is required when the costs for architectural and engineering services and construction design for a project is estimated to exceed $5,000,000.

2. The Secretary concerned must provide a copy of Congressional notification to the Office of the Assistant Secretary of Defense (Sustainment), Facility Investment and Management Directorate. DoD FMR Vol. 3, Ch. 17, 2.6.1.2.

3. After a 14-day period following electronic notification to the Congressional committee(s), the design contract may be awarded, and funding obligated. 10 U.S.C. 2807(b).

SUBCHAPTER 3.3: Military Construction – Construction Phase

I. INTRODUCTION

A. The construction phase of a project almost universally involves the award and administration of a construction contract for the execution of the project. However, prior to awarding a construction contract for execution of a project, a project must first receive proper authorizations and appropriations, which often take years to obtain and are pursued concurrently with planning and design efforts. This chapter discusses project authorization and appropriation requirements and the construction phase generally.

B. DEFINITIONS: See Chapter 1.

II. AUTHORITY

A. Military construction projects must be authorized by law before construction can commence. 10 U.S.C. 2802(a). Project authorizations come in two basic forms:

1. Standing authorities such as the emergency construction authorization under 10 U.S.C. 2803 and the minor military construction and lab revitalization authorizations under 10 U.S.C. 2805. This category also includes temporary, non-codified authorities (e.g., the pilot authority for barracks replacement projects provided under Section 2835 of the FY24 National Defense Authorization Act (NDAA) (Pub. L. 118-31)). Further discussion of projects in this category will be limited to minor military construction projects contemplated under section 2805, which is the most common standing authority relied upon.

2. Line-item authorizations provided under Division B of annual NDAAs, commonly referred to as "major MILCON projects," "line-item projects," or "Division B projects," the latter being a reference to the division in NDAAs where such projects are authorized.

B. Minor military construction: Minor military construction projects under 10 U.S.C. 2805 are divided into two categories, which differ in their funding and approval, as further specified in paragraphs IV.A. and V.B. of this chapter:

1. Unspecified minor military construction projects that fall below the threshold specified in section 2805(a) ($9,000,000 at the time of this publication), but above the operation and maintenance (O&M) threshold provided under section 2805(c) ($4,000,000 at the time of this publication).

2. O&M funded minor military construction projects that fall under the O&M funding threshold under section 2805(c) ($4,000,000 at the time of this publication).

Practice Tip: If a project exceeds, due to unexpected costs increases or otherwise, the section 2805 thresholds, authority no longer exists to execute the project and execution must stop until the project is properly authorized. As noted in the funding section below, reporting of a potential Antideficiency Act violation may also be required. *See e.g.*, AR 420-1, App. D, para. D-4.

Practice Tip: As provided in Subchapters 3.1 and 3.2, planning costs (formerly "advance planning") and design costs (formerly "planning and design") do not count towards the section 2805 thresholds. See DoD FMR Vol. 3, Ch. 17, paras. 3.2.5.1., 5.1.3., and 5.2.2.

C. Major military construction (i.e., "line-item" or "Division B" projects): The process by which Congress authorizes major military construction projects is unique and not entirely intuitive. The following paragraphs explain the process using a sample project from the FY25 NDAA.

1. Project authorizations are provided under titles specific to the various Military Departments and Defense Agencies under division B of a NDAA. Such authorizations include narrative language followed by a by-installation table that lists the aggregate amount of projects at each installation. This narrative language also incorporates by reference a project specific table most recently included as section 4601 of the NDAA. Authorizations for the Army are typically included as section 2101. *See* Figure 3-4 below for an excerpt from the FY25 NDAA (Pub. L. 118-159, Div. B, Sec. 2101 (2024)).

SEC. 2101. AUTHORIZED ARMY CONSTRUCTION AND LAND ACQUISITION PROJECTS.

(a) INSIDE THE UNITED STATES.—Using amounts appropriated pursuant to the authorization of appropriations in section 2103(a) and available for military construction projects inside the United States as specified in the funding table in section 4601, the Secretary of the Army may acquire real property and carry out military construction projects for the installations or locations inside the United States, and in the amounts, set forth in the following table:

Army: Inside the United States

State	Installation	Amount
Alaska	Fort Wainwright	$23,000,000
California	Fort Irwin	$44,000,000
	Military Ocean Terminal Concord	$68,000,000
Florida	Naval Air Station Key West	$90,000,000
Guam	Joint Region Marianas	$386,000,000
Hawaii	Pohakuloa Training Area	$20,000,000
	Wheeler Army Airfield	$231,000,000
Kentucky	Fort Campbell	$11,800,000
Louisiana	Fort Johnson	$105,000,000
Maryland	Fort Meade	$46,000,000
Michigan	Detroit Arsenal	$37,000,000
Missouri	Fort Leonard Wood	$144,000,000
New York	Watervliet Arsenal	$53,000,000
Oklahoma	McAlester Army Ammunition Plant	$74,000,000
Pennsylvania	Letterkenny Army Depot	$346,000,000
Texas	Fort Cavazos	$147,000,000

Fig. 3-4

2. Such sections include separate subsections for projects inside and outside the United States, with both subsections structured in an identical manner. Figure 3-4 above is the subsection for Army projects "Inside the United States."

3. Note that the amounts included in the tables immediately following the authorization language are by installation, not by project, meaning that the amounts provided in such tables are the aggregate amounts of all projects authorized at the named installations in that particular FY, which could include one or more projects. To identify individual projects and verify the amount authorized for each, reference must be made to the section 4601 table noted in the authorization language.

4. For example, in the Army table included in Figure 3-4 above, Fort Cavazos received an aggregate Army project authorization amount of $147,000,000. Upon consulting the portion of the section 4601 table that lists Army projects at Fort Cavazos (*see* Figure 3-5 below (Pub. L. 118-159, Div. B, Sec. 4601 (2024)), it can be discerned that such amount included authorizations for two

projects: (1) the MOTOR POOL #70 project authorized at $69,000,000; and (2) the MOTOR POOL #71 project authorized at $78,000,000, which together equal the $147,000,000 authorization amount under section 2101.

H. R. 5009—611

SEC. 4601. MILITARY CONSTRUCTION
(In Thousands of Dollars)

Account	State/Country and Installation	Project Title	FY 2025 Request	Conference Authorized
	Kentucky			
Army	Fort Campbell	AIR TRAFFIC CONTROL TOWER (DESIGN).	0	0
. . .				
	Texas			
Army	Fort Bliss	COST TO COMPLETE—RAIL YARD	44,000	44,000
Army	Fort Cavazos	MOTOR POOL #70	0	69,000
Army	Fort Cavazos	MOTOR POOL #71	0	78,000
Army	Red River Army Depot	VEHICLE PAINT SHOP	34,000	34,000

Fig. 3-5

Practice Tip: The authorized amount for a project included in the section 4601 table is often referred to as the "Programmed Amount" or "PA" for a project. However, such terms are not legal terms of art and are often used interchangeably to refer to the authorized amount and reprogramming base for a project, which, as explained further in Subchapters 6.2 and 6.3, are not always the same number. For clarity from a legal analysis perspective, it is recommended to refer to amounts under the section 4601 tables simply as the "authorized amounts" for the projects listed, which may be subsequently adjusted upward or downward within permissible limits pursuant to 10 U.S.C. 2853 as discussed in detail in Subchapter 6.2.

Practice Tip: The math used in deciphering the amounts in the authorization tables and the section 4601 table does not always work out cleanly. For example, incremental funding authorizations, as discussed in section VI of Chapter 4, can skew the figures, as can other anomalies. When anomalies are encountered that cannot be easily reconciled, it is typically best practice to consult the project proponent for clarification. Typically, that will lead to an explanation that is workable within the context of the authorizing legislation. However, there are occasionally budgeting and/or congressional oversights that require further procedural or legislative action before a project can legally proceed.

D. Expiration of Project Authorizations: Military construction project authorizations provided under Division B of NDAAs are not automatically permanent. A provision under Division B (section 2002 in recent years), provides for expiration of project authorizations if funds have not been obligated on a project within a specified time period (roughly three years under recent NDAAs). If funds are obligated on a project within that period, the authorization is then permanent, though, as discussed in Chapter 4, the availability of funding may become an issue if execution extends too long. If funds are not obligated within the NDAA authorization expiration period, the project authorization ceases to exist and some form of renewed legislative authorization is required, which can be achieved by programming the project again or, more commonly, by seeking enactment of a provision that expressly extends the original project authorization beyond the applicable expiration period. *See e.g.*, FY25 NDAA, Pub. L. 118-159, Div. B, Sec. 2104-2108 (2024).

Practice Tip: The expiration of project authorizations under a NDAA is separate and distinct from the expiration of funding appropriated for a project. Clients occasionally confuse the two. Absent legislation providing otherwise, funding appropriated for a project with an expired authorization remains available for reprogramming to other authorized projects. Conversely, so long as funding was properly obligated on a project before the authorization expiration period expired, the expiration of funding appropriated for the project does not affect the continued validity of the project's authorization, though, funding issues may abound, as discussed in Chapter 4.

III. AUTHORIZATION OF APPROPRIATIONS

A. Pursuant to 10 U.S.C. 114, defense appropriations, to include Military Construction appropriations, must by specifically authorized by law before they can be appropriated. This authorization of appropriations is separate and distinct from individual project authorizations, though, it is accomplished in much the same manner via a legislative provision that references the section 4601 table.

B. For example, for FY25 projects, authorizations of appropriations for the Army were provided under section 2103(a) of the FY25 NDAA shown in Figure 3-6 below.

SEC. 2103. AUTHORIZATION OF APPROPRIATIONS, ARMY.

(a) AUTHORIZATION OF APPROPRIATIONS.—Funds are hereby authorized to be appropriated for fiscal years beginning after September 30, 2024, for military construction, land acquisition, and military family housing functions of the Department of the Army as specified in the funding table in section 4601.

Figure 3-6

C. Such authorization of appropriations provisions are not accompanied by an installation specific table as is done for project authorizations. Instead, the provisions simply reference the project specific table under section 4601 and the amount in the "Conference Authorized" column of such table serves as the authorization of appropriations for each project.

D. Authorizations of appropriations for unspecified minor military construction projects are handled as lump sums near the end of each Defense Components section of the section 4601 table.

E. Authorizations of appropriations for O&M funding are provided under the O&M title of NDAAs and associated tables, with funds for repair and O&M funded minor military construction being authorized under the "FACILITIES SUSTAINMENT, RESTORATION & MODERNIZATION" lines of such tables. *See e.g.*, FY25 NDAA, Pub. L. 118-159, 301 and 4301 (2024).

IV. APPROPRIATIONS/FUNDING:

A. Minor military construction:

1. O&M funded projects under 10 U.S.C. 2805(c) are funded from O&M appropriations of the Military Component holding the requirement. Such O&M funding is typically derived from O&M amounts that are specifically budgeted, authorized, and appropriated for Facilities Sustainment and Restoration/Modernization. *See* DoD FMR Vol. 2A, Ch. 3 and Vol. 2B, Ch. 8.

2. Funding for unspecified minor military construction projects is derived from Military Construction appropriations consistent with the authorization of appropriations amount and appropriated amount for such purposes as specified in the applicable NDAA and Joint Explanatory Statement accompanying the Military Construction Appropriations Act for that FY, as explained in the major military construction section below.

B. Major military construction: Funding for these projects is derived from Military Construction appropriations provided under annual Military Construction Appropriations Acts. However, the appropriation language under such acts merely provides a bulk amount of funding and does not specify the amount appropriated for each project. *See e.g.*, Figure 3-7 below (Pub. L. 119-37, Div. D, Title I, 139 Stat. 590 (2025)). To verify the amount appropriated per project, consult the Joint Explanatory Statement (or other legislative history document identified in the applicable Military Construction Appropriations Act), which includes a by-project table and appropriated amount somewhat similar to section 4601 of NDAAs. *See e.g.*, Figure 3-8 below (171 CONG. REC. S8095 (Nov. 9, 2025)).

MILITARY CONSTRUCTION, ARMY

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Army as currently authorized by law, including personnel in the Army Corps of Engineers and other personal services necessary for the purposes of this appropriation, and for construction and operation of facilities in support of the functions of the Commander in Chief, $2,381,909,000, to remain available until September 30, 2030: *Provided,* That, of this amount, not to exceed $415,688,000 shall be available for study, planning, design, architect and engineer services, and host nation support, as authorized by law, unless the Secretary of the Army determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of the determination and the reasons therefor: *Provided further,* That of the amount made available under this heading, $377,950,000 shall be for the projects and activities, and in the amounts, specified in the table under the heading "Military Construction, Army" in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act), in addition to amounts otherwise available for such purposes.

Fig. 3-7

MILITARY CONSTRUCTION
(Amounts in thousands)

	FY 2026 Request	Final Bill
ALABAMA		
ARMY		
ANNISTON ARMY DEPOT		
ACCESS CONTROL POINT (INC)	.....	50,000
FORT RUCKER		
CRASH/RESCUE STATION AT TABERNACLE STAGEFIELD: MINOR CONSTRUCTION	.....	6,600
FLAT IRON SUPPORT FACILITY: MINOR CONSTRUCTION	.....	7,400
FLIGHT CONTROL TOWER—CAIRNS ARMY AIRFIELD: DESIGN	.....	2,700
FLIGHT CONTROL TOWER—TABERNACLE STAGEFIELD: MINOR CONSTRUCTION	.....	8,100
LOWE ARMY HELIPORT AIRCRAFT MAINTENANCE HANGAR: DESIGN	.....	3,600
REDSTONE ARSENAL		
CTC: PROPULSION SYSTEMS BUILDING	55,000	55,000
AIR FORCE		
MAXWELL AIR FORCE BASE		
COMBINED ALL DOMAIN WARGAMING CENTER: DESIGN	.....	4,000
DEFENSE-WIDE		
DEF RETUIL AND DEPOT MKTG OFC ANNISTON		
GENERAL PURPOSE WAREHOUSE	32,000	32,000
TOTAL, ALABAMA	87,000	169,400
ALASKA		
ARMY		
FORT WAINWRIGHT		
BARRACKS (INC)	208,000	184,000

Fig. 3-8

Practice Tip: The appropriated amount for a project in the Joint Explanatory Statement is not always the same as the corresponding authorized/authorization of appropriation amount included in section 4601 of the applicable NDAA. An appropriated amount less than the section 4601 amount suggests that the appropriators did not agree with the authorization amounts. An appropriation amount in excess of the authorization amounts is more complicated as it may require an authorization increase notification under 10 U.S.C. 2853 and potentially violates 10 U.S.C. 114 because Congress arguably did not provide the requisite authorization of appropriation amount for the project. In such instances, it is best to consult the higher headquarters of the Military Component at issue to verify how to proceed.

V. PROCEDURAL MATTERS

A. As a general matter, all military construction projects, regardless of funding source, require the development of a DD Form 1391 that sets forth the scope and estimated cost of the project. *See e.g.*, AR 420-1, paras. 4-20, 4-22, and 4-23. There may be some flexibility in this regard for O&M funded minor military construction projects for which execution authority has been delegated to the installation level, subject to applicable Military Component guidance. *See id*. at para. 2-16. However, unspecified minor military construction and major military construction projects require a DD Form 1391 for submission to Congress.

B. Requirements specific to project authorization/funding type include:

1. O&M funded minor military construction projects:

a. Approval Authority: Typically, delegated to the installation level, at least up to a specified dollar amount. See applicable Military Component regulations and policy directives.

> **Practice tip**: Military Component regulations are often superseded by Component-specific directives without formal amendment to the regulations. Thus, best practice is to verify the most recent guidance through the chain of command. For example, *compare* AR 420-1, Ch. 2, para. 2-14 *with* Deputy Assistant Secretary of the Army for Installations, Housing, and Partnerships (DASA (IH&P)) memorandum, subject: *Delegation of Authority for Facility Repair and Unspecified Minor Construction Projects Using Funds Available for Operation and Maintenance* (June 30, 2025).

b. Congressional Notification: N/A

2. Unspecified minor military construction projects:

a. Approval Authority: Held at the Military Component Headquarters level. For the Army, approval authority has historically been the DASA (IH&P). *See* AR 420-1, App. D.

Chapter 4

Funding Nuances and Flexibilities

CHAPTER 4: FUNDING NUANCES AND FLEXIBILITIES

OVERVIEW: The funding framework and flexibilities for military construction and repair projects are unique in their terminology, application, and underlying legal authorities. Surprisingly, however, there is relatively little formal guidance on the subject, particularly with regard to statutory funding flexibilities for military construction. This chapter discusses some of the most prominent funding categories and flexibilities for projects and provides context for their application, derived from the limited formal guidance available and informal communications with higher Department of the Army and DoD offices.

SUBCHAPTER 4.1: "S&A," "DDC," and Contingency

I. INTRODUCTION: Although funding for a military construction or repair project is typically derived from a single appropriation source (e.g., Military Construction, Army), certain amounts of such project funds are administratively set aside and reserved at the outset of project execution for specific categories of project funded costs. This subchapter discusses three such cost categories: (1) Supervision and Administration (S&A); (2) Design During Construction (DDC); and (3) contingency.

II. SUPERVISION AND ADMINISTRATION

A. S&A activities, also known as Supervision, Inspection, and Overhead (SIOH) activities, are a subset of project funded costs necessary to oversee the execution of a repair or construction project. There is no widely applicable definition for such costs. Instead, they are defined largely by the regulations of the applicable construction agent. Within USACE, such costs are primarily composed of contract administration activities. *See* ER 37-1-30, Ch. 11; ER 415-1-16.

B. Within USACE, S&A costs are charged via one of two methods:

1. At-cost S&A: "at-cost" means that USACE or another designated construction agent is reimbursed for the actual cost incurred in performing S&A activities for a particular project. *See* ER 37-1-30, Ch. 11, para. 11-5; ER 415-1-16, Ch. 4. Under this methodology S&A costs are treated like any other project funded costs for reimbursement purposes. Within USACE, at-cost S&A charging is only permissible when approved by Headquarters, USACE. *See* ER 37-1-30, Ch. 11, paras. 11-3.c. and 11-5.b.

2. Flat Rate S&A:

a. "Flat rate" means that S&A reimbursements accrue to the construction agent as a percentage of the actual construction placement regardless of the actual cost of S&A for a particular project. *See* ER 415-1-16, Ch. 3. Flat rate charging for DoD construction activities is authorized under 10 U.S.C. 2205(b). Under the flat rate S&A method, some projects are inherently overcharged while others are undercharged for S&A activities. Thus, without such express statutory authorization, flat rate charging would not be permissible as it would result in Purpose Statute violations (31 U.S.C. 1301(a)) and improper augmentations.

> **Practice tip**: There is occasionally a tendency to view S&A flat rate accounts as "overhead" accounts or "slush funds" that can be used for any ancillary purposes associated with project execution. **This is not correct**. Flat rate S&A activities are a defined subset of project funded activities, as prescribed under relevant construction agent regulations (*see e.g.*, ER 37-1-30, Ch. 11), which informs the flat rate

percentage amount set under 10 U.S.C. 2205(b). Thus, while a construction agent could potentially revise its S&A regulations to encompass a broader scope of activities to be considered "S&A activities" and adjust S&A flat rates accordingly, there is no broad discretion to make ad hoc determinations and consider activities beyond the scope of existing S&A regulations as valid S&A activities that can be funded from flat rate S&A accounts.

b. DoD, in consultation with DoD construction agents, the Office of Management and Budget, and congressional committees, establishes flat rates for defined categories of military construction projects based on varying levels of S&A support associated with each such category. Military construction rates current at the time of this publication are set forth in the Assistant Secretary of Defense (Energy, Installations, and Environment) (ASD (EI&E)) memorandum, subject: *Military Construction Supervision, Inspection, and Overhead Fixed Rates for Fiscal Year 2024 and Future Projects* (April 14, 2022). Flat rates for operation and maintenance funded construction and repair projects are typically set by individual construction agents, after coordination with DoD. For current USACE rates, see USACE CEMP-ZB memorandum, subject: *Operation and Maintenance Supervision and Administration (S&A) Flat Rate Adjustment* (January 31, 2022).

Practice tip: Occasionally, there is a desire to adjust flat rate S&A rates for a project after project approval/authorization. Section 2205(b) provides no authority to deviate from established flat rates on a per project basis. Thus, in situations where a lower or higher flat rate is desired, actual cost S&A charging should be considered. Also, for major military construction projects that require congressional authorization, the decision to apply at-cost or flat rate S&A and the amount of any flat rate applied is presumably set by whatever method/amount was included on the DD Form 1391 that Congress relied upon when it authorized the project.

c. Flat rates are applied within USACE by: (1) setting aside the flat rate amount associated with a contract award at the time of award; (2) USACE employees who perform S&A activities charging their time to the applicable USACE S&A account; and (3) as contract placement occurs (i.e., billing occurs), USACE applying the applicable flat rate percentage to amounts paid to the contractor and recouping or "earning" such amounts into the applicable S&A account to reimburse such account.

Example: USACE awards a $10M construction contract for a CONUS Army military construction project. USACE applies the 6.5% CONUS Military Construction Flat Rate to set aside $650,000 of project funds for S&A expenses. USACE employees performing S&A activities on the project charge their time to existing funds in the USACE Military Construction S&A account. After the first month of execution, the contractor submits a bill for $100,000 in placement, which USACE pays using project funds. USACE takes $6,500 (6.5% of $100,000) of the $650,000 set aside for S&A on the project and reimburses/"earns" such amount into the Military Construction S&A account. This process continues until all contract placement is performed and the full $650,000 is "earned" into the Military Construction S&A account.

d. If contract costs increase during project execution (e.g., via option awards, in-scope changes, requests for equitable adjustment (REA), meritorious contract claims, contract claim litigation settlements or judgments from a board or court), the S&A amount associated with the project increases accordingly.

Example: Continuing from the example above, a differing site condition is discovered midway through project execution for which the contractor submits an REA for $1.3M. The contracting officer finds no merit in the REA and denies payment. The contractor converts the REA to a claim, which the parties eventually litigate before the Armed Services Board of Contract Appeals. The Board issues a judgment in favor of the contractor for $1M. The contract price is increased accordingly and USACE sets aside an additional $65,000 (6.5% of $1M) from project funds for S&A associated with the project (bringing the S&A total for the project to $715,000) and "earns" such amount into the USACE Military Construction S&A account upon payment to the contractor.

III. DESIGN DURING CONSTRUCTION

A. DDC, formerly Engineering and Design During Construction (EDC), are those activities/services that represent a continuation of the design process/effort subsequent to award of the construction phase contract. *See* USACE Engineering and Construction Bulletin (ECB) No. 2016-28, subject: *Benchmarking of Design during Construction (DDC)* (December 8, 2018). Often, such activities involve the action of a registered engineering professional to review, approve and/or prepare documents required in support of contract execution. *See id*.

B. DDC funds are not a separately authorized funding source with special legal restrictions or flexibilities. Instead, DDC funds are simply an amount of project funds that are administratively set aside by the construction agent for DDC activities. If the total amount of funding set aside for DDC activities is not needed, the remaining funds can be used for other project purposes or be reprogrammed to another project. If additional DDC funding is required for project completion, additional project funds must be obtained.

IV. CONTINGENCY: Contingency is an amount of project funding set aside (typically 5% of the estimated cost of construction) for unforeseen changes such as criteria and stakeholder changes (within the scope of project approval/authorization), differing site conditions, or design defects. *See* ER 4150-1-16, Ch. 5, para. 5-4.e.(2). Like "DDC funds," "contingency funds" are not a separately authorized funding source. Instead, they are simply an amount of project funding that is administratively set aside for specific project purposes, contingencies. If contingency funding is not needed on a project, it may be reprogrammed to other projects. If contingency funding is insufficient, additional project funding, through reprogrammings, as necessary, may be required to fund completion of a project.

SUBCHAPTER 4.2: Military Construction Appropriation Act Funding Flexibilities

I. INTRODUCTION

A. Prior to Fiscal Year (FY) 1979, Military Construction appropriations were no-year funds (*see e.g.*, Pub. L. 95-101 (1977)). Congress changed this in the FY79 Military Construction Appropriations Act by placing a 5-year period of availability on Military Construction appropriations, to include previously appropriated funds. *See* Pub. L. 95-374, Sec. 111 (1978)). Military Construction funds, as a general matter, have remained 5-year funding sources ever since. The rationale expressed by the House Committee on Appropriations for the initial change was twofold: (1) a desire to establish consistency with other Defense appropriations, all of which had limited periods of availability; and (2) the belief that a 5-year period of availability would improve execution and fund obligation rates across the program. *See* H. Rep. 95-1246, at p. 4 (June 1, 1978).

B. Some confusion then followed as DoD and the Military Departments grappled with how to adapt program execution to time limited funding. Congress addressed such concerns by reemphasizing, adding, and, for a brief time, removing certain provisions that expressly provided funding flexibilities in Military Construction Appropriations Acts. By the late 1980s, these provisions were settled and have remained mainstays in subsequent acts to the present. This subchapter will address the three most prominent provisions, most recently included as sections 114, 115, and 116 of Military Construction Appropriations Acts. *See e.g.*, Pub. L. 119-37, Div. D, Title I (2025). Formal Army guidance regarding the implementation of these provisions is limited to a single financial management memorandum. *See* Assistant Secretary of the Army (Financial Management and Comptroller) (ASA (FM&C)) memorandum, subject: *Military Construction Funding Guidance* (June 17, 2021) (ASA (FM&C) memorandum). DoD has not issued any formal guidance implementing these provisions.

> **Background Note**: Despite the 2021 ASA (FM&C) memorandum being an Army product, it was informally coordinated with the DoD Office of General Counsel prior to publication, with DoD counsel making direct revisions to the text of the memorandum. In 2024, DoD counsel informally reaffirmed the memorandum as representing their office's position on the subject.

II. USE OF PRIOR YEAR FUNDS (Sec. 114)

A. Statutory language: "Funds appropriated to the Department of Defense for construction in prior years shall be available for construction authorized for each such military department by the authorizations enacted into law during the current session of Congress." *See e.g.*, Pub. L. 119-37, Div. D, Title I, Sec. 114, 139 Stat. 596 (2025).

B. Congress included a variation of this provision even in appropriations acts that preceded the change from no-year to 5-year funding in FY79. *See e.g.*, Pub. L. 86-630, Sec. 101, 74 Stat. 465 (1960). The provision merely stands for the premise that any funding available at the time a military construction project is authorized and receives appropriations may be used on such project, subject to any necessary reprogramming or cost variation notification requirements (*see* Subchapters 6.2. and 6.3).

C. Section 114 does not change general fiscal law restrictions or otherwise prolong the use of prior year Military Construction appropriations. It merely permits the use of prior year Military Construction funds for new obligations on a project while such funds are still current, and the use of such funds, once expired, for valid obligation adjustments for which the funds are otherwise available.

Example 1 (new obligation): For an Army military construction project that is authorized and receives appropriations in FY26, any Military Construction funding that is current at that time (FY22-FY26 funds) may be used for construction contract award in FY26. However, if the award does not occur until FY27 (e.g., there was a "bid bust" in FY26 that delays award), only FY23-FY26 funds would be available for obligation on the contract because FY22 funds would be expired at that time and not available for a new contract obligation.

Example 2 (obligation adjustment): A military construction project is authorized/appropriated in FY24, with construction contract award occurring in FY24, and an antecedent liability contract modification arising in FY26 (e.g., a differing site condition). Section 114, coupled with basic Antecedent Liability Rule principles (*see* section V of Subchapter 6.1), permit the use of any funding available at the time of original contract award (FY20-FY24) for the upward obligation adjustment.

D. Arguably, such uses of previously appropriated, multi-year funds would be permissible even without the section 114 provision and its predecessors by following typical bona fide needs principles (e.g., FY22-FY26 Military Construction, Army funds are all technically current and available for bona fide needs arising in FY26), subject, again, to applicable reprogramming requirements. However, for reasons apparently lost to history, Congress elected to expressly include the flexibility in Military Construction Appropriations Acts since at least 1960.

III. USE OF SUBSEQUENT YEAR FUNDS (Sec. 116)

A. Statutory language: "Notwithstanding any other provision of law, any funds made available to a military department or defense agency for the construction of military

projects may be obligated for a military construction project or contract, or for any portion of such a project or contract, at any time before the end of the fourth fiscal year after the fiscal year for which funds for such project were made available, if the funds obligated for such project: (1) are obligated from funds available for military construction projects; and (2) do not exceed the amount appropriated for such project, plus any amount by which the cost of such project is increased pursuant to law." *See e.g.*, Pub. L. 119-37, Div. D, Title I, Sec. 116, 139 Stat. 596 (2025).

B. Congress first inserted this language in the FY81 Military Construction Appropriations Act following a determination by DoD that Congress did away with "split funding" flexibilities when it changed Military Construction funding from no-year to 5-year funding in FY79. To further clarify and assure DoD of congressional intent, the committees emphatically rejected this conclusion in the FY81 committee reports and inserted the section 116 language quoted above. *See* H. Rep. 96-1097, at p. 26 (June 17, 1980); S. Rep. 96-931, at p. 24-25, 54 (September 9, 1980).

C. The conviction of the committees waffled, however, a few years later when they removed the provision from the FY86-FY88 Military Construction Appropriations Acts citing concerns over funding transparency. *See* H. Rep. 99-275, at p. 21 (September 18, 1985). Notably, the committees only removed the ability to use future year funds under what is now section 116. The ability to use prior year funds under what is now section 114, remained in place. *See id*. This "section 116" moratorium was short lived, however, because the committees reinserted, with little fanfare in committee reports, the "section 116" flexibility in the FY89 Military Construction Appropriations Act, using the same language originally included in the FY81 Military Construction Appropriations Act. *See* H. Rep. 100-912, at p. 25 (September 9, 1988).

D. Application of section 116 language has varied somewhat over the years but appears to be settled today under two basic premises:

1. New obligations: Funds appropriated in the four subsequent years following project authorization and appropriation may be used, subject to reprogramming requirements, for new obligations, **but only through the end of the fourth fiscal year**. Once the fourth fiscal year closes, the authority ceases for new obligations. This period is colloquially referred to as the "section 116 window" or "four-year window."

Example 3 (new obligation): A project is authorized/appropriated in FY24 with a construction contract award also occurring in FY24 using FY23 funding pursuant to section 114. The contract included an option for a second parking lot that the construction agent awards in FY26. Without section 116, the contract option would have to be funded with project year or prior year funding that is still current in FY26 (FY22-FY24 funds) under basic fiscal law principles and section 114. However, by virtue of section 116, FY25 and FY26 funds are also available for this new obligation.

2. Obligation adjustments: Funds appropriated during the "four-year window" may be used for proper obligation adjustments **both during the "four-year window" <u>and</u> after it "closes."** The ability to use funds after the "four-year window" closes is permissible because the obligation adjustment relates back to the period during which the window was "open." This ability to use funding appropriated after a contract award for obligation adjustments under the contract is an exception to typical Antecedent Liability Rule requirements.

Example 4 (obligation adjustment during "four-year window"): A project is authorized/appropriated in FY26 with a construction contract award occurring in FY27 using FY26 funding. In FY28 a differing site condition is encountered, the cost increase for which is determined to be an antecedent liability of the FY27 contract. Section 116 permits the use of FY27 and FY28 funding. Typical Antecedent Liability Rule principles, coupled with section 114, also permit use of FY23-FY26 funds.

Example 5 (obligation adjustment after "four-year window"): A project is authorized/appropriated in FY20 with a construction contract award occurring in FY20 using FY20 funding. In FY26 the contractor submits a claim for payment under the Changes Clause of the FY20 contract, which is determined to be an antecedent liability of such contract. Section 116 permits the use of FY21-24 funds for the obligation adjustment. Typical Antecedent Liability Rule principles, coupled with section 114, also permit use of FY17-FY20 funds. FY16 funds, though they fall under the section 114 period for the project, cannot be used because they cancelled at the end of FY25.

E. Extension of "four-year window": For incrementally funded projects or projects that receive a cost-to-complete appropriation specific to the project, the "four-year window" is extended through four additional fiscal years following the enactment of an increment or cost-to-complete appropriation. This conclusion is based on the fact that funds are once again "made available" for the project, as provided under the section 116 language, and the basic rule of statutory construction that congressional action should be read as having effect (*i.e.*, if the "four-year window" was not extended, the additional funding appropriated specifically for the project could not be used on the project). *See* GAO Red Book Vol. I, Ch. 1, at 1-39 (4th ed. 2016).

IV. USE OF EXPIRED FUNDS TO COMPLETE "EXPIRED PROJECTS" (Sec. 115)

A. Statutory language: "For military construction or family housing projects that are being completed with funds otherwise expired or lapsed for obligation, expired or lapsed funds may be used to pay the cost of associated supervision, inspection,

overhead, engineering and design on those projects and on subsequent claims, if any." *See e.g.*, Pub. L. 119-37, Div. D, Title I, Sec. 115, 139 Stat. 596 (2025).

B. Congress first added this language to the FY88 Military Construction Appropriations Act. S*ee* Pub. L. 100-202, Sec. 121, 101 Stat. 1329-317 (1987). The stated intent of the provision was to permit the payment of S&A/SIOH expenses associated with contract execution from the same appropriation source that funded the contract, regardless of whether such funds had expired. Otherwise, following the general rule that government employee labor is considered a bona fide need at the time such labor is performed, only funds current at the time S&A activities were performed could be used. Thus, without this statutory flexibility, projects that encountered antecedent liability contract modifications beyond the "four-year window" would come to a halt because, although the antecedent liability itself could be paid with expired funds that were otherwise available at the time of contract award, no current funding would remain available for S&A costs associated with such obligation adjustments.

C. Section 115 only applies to projects that are being completed with expired funds (i.e., projects that are beyond their "four-year window") and only for the enumerated categories of costs (i.e., "cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any"). Notably, project funded litigation costs for "expired projects" have been identified as qualifying under Section 115. When applicable, any expired funding available for the same purpose (*e.g.*, Military Construction, Army) may be used for such S&A and related costs.

Example 6: A project is authorized/appropriated in FY20 with a construction contract award occurring in FY20 using FY20 funding. S&A is charged to the project on a flat rate basis pursuant to 10 U.S.C. 2205(b). In FY25 an antecedent liability contract claim is settled with the construction contractor and paid with expired FY20 funds. The flat rate S&A amount associated with the settlement may be paid from any expired Military Construction funding available for the same purpose (*i.e.*, FY16-FY20 funds).

Example 7: Same example as above, but the claim is not settled, and the district needs to incur litigation expenses to award contracts for discovery support and an external expert witness in FY26. Section 115 can be relied upon to use expired FY17-FY21 funds available for the same purpose to award the litigation support contracts. If section 115 could not be relied upon for such costs, litigation would be impeded because the project is beyond the "four-year window" and no current funds are available for new obligations on the project.

SUBCHAPTER 4.3: Incremental Funding of Major Military Construction Projects

I. INTRODUCTION: In the context of military construction projects, "incremental funding" refers to the award of a construction contract that is only partially funded, with additional increments of funding being added to the contract over time until the contract is fully funded. Express statutory authority is required to award an incrementally funded contract for non-severable services, such as contracts for the design and construction of facilities. See DoD FMR Vol. 3, Ch. 8, para. 3.4.2.2.; *Incremental Funding of Multiyear Conts.*, 71 Comp. Gen. 428 (June 8, 1992). Otherwise, such a contract would violate the Antideficiency Act prohibitions against awarding contracts in advance or in excess of available funds (*see* 31 U.S.C. 1341(a)), as well as the full funding requirement for construction contracts provided under 41 U.S.C. 6303. Congress typically authorizes incremental funding for military construction projects that exceed $100,000,000 so as not to tie up large amounts of funding that will not be expended until subsequent FYs. This subchapter describes the unique process through which Congress authorizes incremental funding for major military construction projects.

II. TYPICAL PROCESS

A. To understand military construction incremental funding authorizations, an understanding of the typical major military construction project authorization and appropriation process is required. Subchapter 3.3 describes this process in detail, which is summarized here:

1. Step 1 – Congress authorizes the project at the full amount estimated for completion under Division B, Military Construction Authorizations, of a NDAA.

2. Step 2 – Congress provides an authorization of appropriations for the project at the project authorization amount as shown in the section 4601 table of the same NDAA.

3. Step 3 – Congress appropriates funding for the project at the project authorization and authorization of appropriation amount via the Military Construction Appropriations Act for the same FY. The project specific amount is shown in the Explanatory Statement of such Act.

III. INCREMENTAL FUNDING PROCESS

A. To authorize a project for incremental funding, Congress follows the above steps with the following differences, illustrated using an FY24 Defense-wide project at Guantanamo Bay as an example:

1. Step 1 -- Congress authorizes the project at the full amount estimated for completion (usually very large) under Division B, Military Construction Authorizations, of a NDAA. Although subsequent NDAAs will include

incremental authorization of appropriation amounts for the project under table 4601, this will typically be the only time an authorization for the project appears in an NDAA, which makes sense because a project only needs to be authorized once.

Example: Section 2401(b) of the FY24 NDAA (Pub. L. 118-31) authorized a project or projects at Guantanamo Bay in the amount of $257,000,000:

(b) OUTSIDE THE UNITED STATES.—Using amounts appropriated pursuant to the authorization of appropriations in section 2403(a) and available for military construction projects outside the United States as specified in the funding table in section 4601, the Secretary of Defense may acquire real property and carry out military construction projects for the installations or locations outside the United States, and in the amounts, set forth in the following table:

Defense Agencies: Outside the United States

Country	Installation	Amount
Cuba	Naval Station Guantanamo Bay	$257,000,000

2. Step 2 -- This step deviates from the typical process in that, in the year in which the project is authorized, Congress only authorizes appropriations up to the amount of the first increment. In other words, the amount authorized for appropriations under the section 4601 table will be less than the total authorized amount for the project under Division B.

Example: Section 2403, coupled with the section 4601 table, of the FY24 NDAA provides an authorization of appropriation for the Guantanamo project in the amount of $60,000,000 which represents the first authorized funding increment. We learn from the section 4601 table that the project title is "Ambulatory Care Center" and, because no other project at Guantanamo Bay is listed in the section 4601 table, we now know that the entire $257,000,000 from Step 1 above is the authorized amount for the project.

SEC. 2403. AUTHORIZATION OF APPROPRIATIONS, DEFENSE AGENCIES.

(a) AUTHORIZATION OF APPROPRIATIONS.—Funds are hereby authorized to be appropriated for fiscal years beginning after September 30, 2023, for military construction, land acquisition, and military family housing functions of the Department of Defense (other than the military departments), as specified in the funding table in section 4601.

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SEC. 4601. MILITARY CONSTRUCTION
(In Thousands of Dollars)

Account	State/Country and Installation	Project Title	FY 2024 Request	Conference Authorized

Defense-Wide	Buckley Space Force Base	REPLACEMENT WATER WELL	0	5,700
	Cuba			
Defense-Wide	Naval Station Guantanamo Bay	AMBULATORY CARE CENTER (INC 1)	60,000	60,000
	Delaware			
Defense-Wide	Dover Air Force Base	WHOLE BLOOD PROCESSING LABORATORY REPLACEMENT.	0	30,500
	Djibouti			

Note: Congress does not always include the increment number in the section 4601 table and occasionally does not even expressly mark an authorization of appropriation as an increment.

Subsequent NDAAs will similarly include incremental authorizations of appropriations under table 4601 until the aggregate value of the increments reaches the total authorized project amount.

Example: Additional funding increments are authorized for appropriation in the FY25 and FY26 NDAAs, respectively. Because the aggregate of the increments has not yet reached $257,000,000, we know that additional increments will be forthcoming in future years.

	Cuba			
Defense-Wide	Naval Station Guantanamo Bay	AMBULATORY CARE CENTER REPLACEMENT (INC 2).	96,829	96,829
	Cuba			
Defense-Wide	Naval Station Guantanamo Bay	HOSPITAL REPLACEMENT (INC 3)	35,794	35,794

Note: Congress changed the name of this project in the section 4601 table, which, unfortunately, happens from time to time and may require consulting the project proponent to verify that it is in fact the same project.

3. Step 3 – This step follows suit with Step 2 by Congress only appropriating an increment of the total project cost in the year of authorization and additional increments in subsequent years until the aggregate amount of the increments equals the total authorized project amount under Step 1. Typically, these increments are the same as the authorization of appropriation amounts, but they can vary. The amounts appropriated are specified in the Explanatory Statement for the applicable Military Construction Appropriations Acts.

Example: The Explanatory Statement for the FY24 Military Construction Appropriations Act (Pub. L. 118-42) provided:

MILITARY CONSTRUCTION

(Amounts in thousands)

	BUDGET REQUEST	FINAL BILL
CUBA		
DEFENSE-WIDE		
GUANTANAMO BAY NAVAL STATION		
AMBULATORY CARE CENTER (INC 1)	60,000	60,000
TOTAL, CUBA	60,000	60,000

The Explanatory Statements for subsequent Military Construction Appropriations Acts should similarly provide funding increment amounts.

The Joint Explanatory Statement of the Military Construction Appropriations Act for the year in which a project was initially funded, at least for recent Military Construction Appropriations Acts, provides additional evidence of Congress' intent to authorize incremental funding for a project. Such reports typically state the number of projects authorized for incremental funding in a given FY. To ascertain the projects, one either has to comb through the NDAA to verify the projects with a large authorization amount and much lower authorization of appropriation amount (ideally with "(INC)" included in the project name, but that is not always the case) or, more reliably, consult the project proponent.

Example: The Explanatory Statement for the FY24 Military Construction Appropriations Act included the following, with the Guantanamo project being one of the eleven projects named:

Incremental Funding.—The Committees recognize that providing full funding for military construction projects if they are executable is ideal. However, it continues to be the practice of the Committees to provide incremental funding for certain large projects to enable the Services to more efficiently allocate military construction dollars among projects that can be executed in the year of appropriation. Therefore, the agreement includes eleven projects that have been incrementally funded.

B. When a project is confirmed as being authorized for incremental funding, a contract may be awarded that includes the full scope of the project but that is only partially funded. This is accomplished contractually by following the procedures under Defense Federal Acquisition Regulation Supplement (DFARS) Revolutionary Far Overhaul (RFO) class deviation 232.7 and utilizing clause 252.232-7007.

Chapter 5

Procuring a Construction Project

CHAPTER 5: PROCURING A CONSTRUCTION PROJECT

I. INTRODUCTION

A. The execution of a military construction project inevitably involves some form of procurement action to acquire the goods and services necessary to complete the project. This chapter provides a brief overview of current procurement tools and procedures, as well as some restrictions.

> **Citation Note**: At the time of writing of this Deskbook, the Federal Acquisition Regulation (FAR) is being revised in accordance with Executive Order 14275, Restoring Common Sense to Federal Procurement, and Executive agencies are utilizing deviation versions of the FAR, known as the "Revolutionary FAR Overhaul" or "RFO." Therefore, regulatory references herein are to the RFO, not the FAR.

B. Definitions:

1. Accelerated Design-Build: acquisition method revived by section 2809 of the National Defense Authorization Act (NDAA) for Fiscal Year 2026 (FY26) (Pub. L. 119-60), codified at 10 U.S.C. 3241(f), which provides the Contracting Officer with authority to award design-build contracts for military construction projects, using two phase acquisition procedures, prior to the construction project being authorized by law.

2. Architectural-Engineering (A-E) Services:

   a. Professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

   b. Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

   c. Other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. 40 U.S.C. 1102; RFO 2.101.

3. Design: defining the construction requirement (including the functional relationships and technical systems to be used, such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawings, and preparing the construction cost estimate. 48 C.F.R. 36.102.

4. Design-bid-build (DBB) Contract: acquisition method where design and construction are sequential and contracted for separately with two contracts and two contractors. 48 C.F.R. 36.102.

5. Design-build (DB) Contract: acquisition method that combines design and construction in a single contract with one contractor. 48 C.F.R. 36.102. The project owner generally prepares the preliminary design as a baseline that establishes minimum facility performance requirements used for competition and pricing. The awardee of the design-build contract prepares its own design and delivers the constructed facility in compliance with the original preliminary design. FAR Companion 36.000.

6. Design-build-to-budget: a variation of two-phase design-build acquisition procedures where a target budget for the project is also publicized during the solicitation phase with the goal of maximizing offers that propose achievable scopes within the target budget.

7. Firm-Fixed-Price (FFP): acquisition approach that provides for a price that is not subject to any adjustment on the basis of the contractor's experience in performing the contract. RFO 16.202-1.

8. Integrated Design and Construction (IDaC): a design-bid-build delivery method for acquiring construction services using a simplified adaptation of the Fixed-Price Incentive Price Revision (Successive Targets) (FPIS) contract clause, 52.216-17, modified to remove the ability to operate in the incentive mode, and specifically tailored to permit earlier award of the construction contract before the design is complete. The contract always operates as Firm-Fixed-Price and includes a base item for preconstruction services and an option for construction at a competed ceiling price that can be negotiated downwards once the design is complete. USACE Acquisition Instruction (UAI) 5136 and USACE Desk Guide (UDG) Appendix 14.

9. Other Transaction (OT)**:** the term generally used to refer to the statutory authorities that permit a federal agency to enter into transactions other than FAR-based procurement contracts, grants, or cooperative agreements. While the resulting "agreement" between the parties is referred to as an OT agreement to distinguish them from FAR-based procurement contracts, OT agreements are legally valid contracts. They have all six legal elements for a contract (i.e., offer, acceptance, consideration, authority, legal purpose, and

meeting of the minds) and will be signed by someone who has the authority to bind the Federal Government (i.e., an Agreements Officer). *See generally*, Under Secretary of Defense for Acquisition and Sustainment (A&S), Other Transactions Guide, 2.0 (July 2023) (A&S Other Transactions Guide).

10. Turn-key design-build procedures: procedures used for the selection of a contractor on the basis of price and other evaluation criteria to perform, in accordance with the provisions of a firm fixed-price contract, both the design and construction of a facility using performance specifications. 10 U.S.C. 2862.

11. Two-phase design-build selection procedures: a selection method in which a limited number of offerors (normally five or fewer) are selected during Phase One (offerors submit technical proposals with technical qualifications and technical approach) to submit detailed proposals for Phase Two (offerors submit other appropriate technical factors and their price). RFO 36.101-2.

SUBCHAPTER 5.1: Procurement Methods

I. INTRODUCTION: Historically, USACE has executed military construction projects via traditional FAR-based contracts. However, through the enactment of relatively recent authorities, congressional committees are showing an increased interest in, and DoD is directing that USACE and other construction agents pursue, alternatively procurement approaches. This subchapter discusses the general FAR-based approach, as well as currently evolving procurement approaches, to include the use of Other Transaction (OT) authorities.

> **Practice Tip**: The implementation of new procurement approaches/methodologies is a rapidly evolving area, with updates occurring almost daily at the time of publication of this Deskbook. Attorneys should stay apprised of recent updates and ensure they are relying on the most recent regulations and implementation guidance.

II. FAR-BASED PROCUREMENT CONTRACTS

A. Introduction: As prescribed in RFO 36.002(c), which implements 10 U.S.C. 3241, "contracting officer[s] must use one of the following acquisition procedures when contracting for the design and construction of a public building, facility, or work:

1. Design-bid-build established under 40 U.S.C. chapter 11, Selection of Architects and Engineers (also known as "the Brooks Act"). *See* Subchapter 5.5.

2. Two-phase design-build selection procedures authorized by 10 U.S.C. 3241 or 41 U.S.C. 3309.

3. Another acquisition procedure authorized by law."

a. Other acquisition procedures authorized by law for use by the DoD include the turn-key design-build procedures provided in 10 U.S.C. 2862 for military construction and security assistance projects, and for repair projects up to $8 million (section 2806 of the FY24 NDAA (Pub. L. 118-31) increased the threshold for repair projects to $8 million through 22 December 2028, at which time it reverts back to $4 million).

b. All FAR-based procurement acquisition procedures must conform to one of these two authorized delivery methods, DBB or DB, and likewise comply with the stated FAR procedures to acquire such construction contracts, either via the traditional, bifurcated process of contracting for architectural-engineering (A-E) services followed by a construction contract, via the two phase design-build procedures, or via turn-key design-build procedures when they are legally authorized.

B. Procedures:

1. As per RFO 36.101-1, Acquisition Strategy, contracting officers must use sealed bid procedures (see part 14 of the RFO) for a construction contract inside the United States if the conditions in part 6 of the RFO for use of sealed bidding are met. Generally, firm-fixed-price contracts must be used to acquire construction. RFO 36.101-1(b). See Subchapter 5.2. for a discussion of 10 U.S.C. 3323 and the prohibition against cost-plus contracting to acquire military construction.

2. Traditional DBB involves separating the design and construction phases where an initial architectural engineering services contract (or in-house design) is executed, in order to deliver a complete design, plans, and specifications for the facility. That design is then advertised for construction and awarded to a separate construction contractor. The separate construction contractor cannot be affiliated with the original A-E contractor to avoid conflicts of interest. RFO 36.201-1(b). DBB delivery methods most often align with DoD appropriation schedules and project authorization requirements, and DBB must exclusively be used when two phase design-build requirements cannot be met, or when there is not another *authorized in law* acquisition procedure available for use, or when it is determined as otherwise appropriate for use in acquiring the construction project.

Practice Tip: A-E contracts for Military facilities and utilities are subject to statutory fee limits, currently limited to 10% of the estimated construction cost of the military construction project as discussed in section VI of this chapter.

   a. Integrated Design and Construction (IDaC) is a DBB delivery method that provides for an earlier award of the "build" portion of the construction contract before the design is fully completed by the A-E or in-house design team to allow for more collaboration and budget fidelity. It consists of a base Contract Line Item Number (CLIN) and scope of work for pre-construction phase consultation services that are awarded as firm-fixed-price. It also includes an option for the construction phase, which is competitively priced as a maximum ceiling price. The construction portion must be negotiated as a firm-fixed-price that is less than the competitively bid Construction Ceiling Price, prior to exercise of the construction option, and once the design is complete. UAI Part 5136 and UDG Attachment 14.

3. DB contracts are acquired using two-phase procedures, as specifically provided in RFO 36.101-2, unless another acquisition procedure is authorized in law. Two phase procedures involve the Contracting Officer anticipating that there will be at least three offerors, as well as the consideration of other factors such as the suitability of the procedures for the particular project. Phase-one solicits technical proposals only and results in down-selecting the most highly qualified offerors, generally no more than five offerors, who

would advance to compete in Phase-two. Phase-two then solicits price proposals from the down-selected offerors which ultimately leads to the best value evaluation and contract award. See also Defense Federal Acquisition Regulation Supplement (DFARS) 236.101-2 (Class Deviation 2026-O0019), which provides that DoD may advance a different number of offerors to phase-two in certain situations.

a. Accelerated Design-Build requires, by law under 10 U.S.C. 3241(f), the use of two-phase design-build acquisition procedures to acquire military construction contracts, however the manner in which the funding is obligated under this authority permits the award of the design-build construction contract prior to congressional authorization of the construction project.

b. Turn-key Design-Build procedures are also permissible in specific situations because those procedures are authorized in law at 10 U.S.C. 2862. Only military construction, security assistance projects, and those repair projects with funded project costs equal to or less than $8M (through 22 December 2028) are eligible to utilize this authority. Turn-key procedures utilize a single phase, in accordance with RFO Part 15, where technical and price proposals are evaluated simultaneously and the award is made on one single proposal submission by the offerors.

c. Design-Build-to-Budget utilizes the two-phase design-build acquisition procedures to acquire construction per RFO 36.101-2. It varies somewhat from traditional design-build in which an approximately 35% preliminary design is usually provided to offerors. Instead, a less-developed design is solicited as the requirement, and the overall budget is disclosed, to encourage more flexibility in proposals from industry that maximize the budget in delivering design and construction solutions. This method additionally uses more robust negotiations and proprietary meetings with offerors, prior to final proposals being received and the ultimate contract award being made.

III. OTHER TRANSACTION (OT) AGREEMENTS

A. Introduction:

1. OT authority originated in 1958, with the passage of the National Aeronautics and Space Act (Pub. L. 85-568), following the Soviet Union's launch of Sputnik, in recognition of the United States' need for rapid development of technology and acquisition outside of the normal acquisition process of traditional Federal contracts. In 1989, Congress approved the first OT authority for DoD, which applied to advanced research projects performed by the Defense Advanced Research Projects Agency (DARPA). This research

OT authority was made permanent and expanded throughout DoD in 1991. DARPA's OT authority was further expanded in 1993 for weapons and weapons systems *prototype* projects. OT prototype authority was then extended to the rest of DoD in 1996. *See generally*, A&S Other Transactions Guide, Appendix B, OT Authority-Legislative History.

2. DoD's original research OT authority was codified at 10 U.S.C. 2371, and the prototype authority was codified at 10 U.S.C. 2371b. In 2021, over two successive NDAAs (section 1841 of Pub. L. 116-283; section 1701(u) of Pub. L. 117-81)), 10 U.S.C. 2371 and 2371b were first transferred to sections 4002 and 4003, respectively, and then sections 4002 and 4003 were transferred to sections 4021 and 4022, respectively.

3. In 2022, section 843 of the FY23 NDAA (Pub. L 117-263) amended section 4022 by adding temporary authority in a new subsection (i) for a pilot program for installation or facility prototyping. The pilot program has been subsequently modified by the FY24 and FY25 NDAAs (section 822 of Pub. L. 118-31; section 818 of Pub. L. 118-159) to its current parameters.

4. In 2025, section 2802(a) of the FY26 NDAA (Pub. L. 119-60) created a new construction OT authority for military repair and construction projects, allowing bilateral OT agreements that are not FAR-based procurement contracts, cooperative agreements, or grants. The new authority is codified at 10 U.S.C. 2808a.

B. OT Authorities and Procedures:

1. 10 U.S.C. §4022(i) – Pilot authority for use of other transactions for installation or facility prototyping: Under this pilot program, which currently sunsets 30 September 2030, the military departments may "carry out prototype projects that are directly relevant to enhancing the ability of the [DoD] to prototype the design, development, or demonstration of new construction techniques or technologies to improve military installations or facilities (as such terms are defined in [10 U.S.C. 2801])."

    a. Limits: Each military department may carry out not more than two prototype projects under section 4022(i) per fiscal year, and the aggregate value of all transactions entered into under section 4022(i) may not exceed $300,000,000. Per section 4022(i)(2)(B), the number limit and the aggregate value does not apply to repair projects.

> **Practice Note**: The one Army prototype project pursued under section 4022(i) to date is a repair project awarded 25 September 2024 in the amount of $40,368,800.00. Because this transaction was entered into before repair projects were excluded from the aggregate value, the

Army Office of General Counsel determined that this project continues to count against Army's aggregate total for the pilot program.

b. Funding: As provided at section 4022(i)(3), prototype projects carried out under section 4022(i) may use Military Construction, Operation and Maintenance (O&M), or Research, Development, Test, and Evaluation (RDT&E) funds.

c. Waivers/non obstante provisions: As provided at section 4022(i)(3), section 4022(i) prototype projects may be carried out, notwithstanding: (1) subchapters I and III of chapter 169 of Title 10; and (2) chapters 221 and 223 of Title 10. This includes, but is not limited to, waiver of the following:

- the requirement that a project be "complete and useable" (10 U.S.C. 2801(b));
- that contracts for A-E services and construction design in connection with a military construction project must be awarded in accordance with the Brooks Act (10 U.S.C. 2855);
- the Competition in Contracting Act (CICA) (10 U.S.C. 3201 et seq.); and
- Design-build selection procedures (10 U.S.C. 3241).

d. Compliance: To use the section 4022(i) pilot program, a prototype project must comply with other applicable provisions of 10 U.S.C. 4022, including the requirement that the project be a "prototype project," as defined at section 4022(e)(5), and that one of the four conditions at section 4022(d)(1) is met.

e. Follow-on production: As provided at section 4022(f), a transaction entered into under section 4022(i) may provide for the award of a follow-on production contract (i.e., a FAR-based contract) or transaction, without the use of competitive procedures, if: (1) competitive procedures were used for the selection of parties for participation in the original prototype transaction; and (2) the prototype project was successfully completed.

Practice Note: While the requirement at section 4022(b)(2) that competitive procedures be used to the maximum extent practicable does not expressly apply to prototype projects carried out under section 4022(i), follow-on production of a section 4022(i) prototype

project can only be carried out if competitive procedures were used for the section 4022(i) project, as provided at section 4022(f).

f. Procurement ethics requirements (Procurement Integrity Act (PIA)): The Procurement Integrity Act (41 U.S.C. Chapter 21) applies to an agreement entered into under section 4022(i), as provided at section 4022(h).

g. Guidance: *See e.g.*, A&S Other Transactions Guide; USACE Alert 26-HQ-008: Recission of Army Other Transaction Authority (OTA) Policy and Expanding the use of OTAs (18 December 2025).

2. 10 U.S.C. 2808a – Facility construction or repair: transactions other than contracts or grants: Under this authority, military departments "may enter into transactions (other than contracts, cooperative agreements, or grants) to carry out repair and construction projects for facilities, including the planning, design, engineering, prototyping, piloting, and execution of such repair and construction projects." *Note:* 10 U.S.C. 2808a is an authority for repair and construction projects, which may include design. It is not a standalone design authority.

   a. No prototype requirement: While repair and construction projects under section 2808a may include "prototyping" as part of the overall repair/construction, there is no requirement that the project be a prototype, as defined at 10 U.S.C. 4022(e)(5).

   b. Funding: Projects carried out under section 2808a may use Military Construction, O&M, or RDT&E funds.

   c. Waivers/non obstante provisions: As provided at section 2808a(b)), repair and construction projects may be carried out, notwithstanding chapters 221 and 223 of Title 10, and 10 U.S.C 2851(a). *Note:* This is a narrower waiver than under 10 U.S.C. §4022(i). Section 2808a waives compliance with CICA and 10 U.S.C. 3241, but does not waive the "complete and useable" requirement at 10 U.S.C. 2801(b), nor does section 2808a waive compliance with the Brooks Act at 10 U.S.C. 2855 or A-E statutory fee limits at 10 U.S.C . 7640, 8612, and 9540.

   d. Follow-on production: As provided at section 2808a(c), a transaction for a repair or construction project may provide for the award of a follow-on production contract (i.e., FAR-based contract) or transaction without further competition, if: (1) competitive procedures were used for the selection of parties for participation in the original transaction; and (2) the participants in the original transaction successfully

completed a complete and useable facility or a complete and useable improvement to a facility.

> **Practice Note**: Similar to 10 U.S.C. 4022(i), there is no express requirement that competitive procedures be used for repair and construction project transactions entered into under 10 U.S.C. 2808a; however, competitive procedures must have been used for the original transaction in order to carry out follow-on production, as provided at section 2808a(c)(1).

e. Procurement ethics requirements: 10 U.S.C. 2808a does not expressly provide that the PIA applies to transactions entered into under this authority. However, as a matter of policy, USACE applies the PIA to 2808a transactions.

C. Applicability of Laws to Other Transactions Entered Into Under 10 U.S.C. 4022(i) and 10 U.S.C. 2808a.

1. With the rise of OT authority for construction (including repair), the question has arisen about the applicability of laws used in traditional FAR-based procurement contracts for construction. As discussed above, while we refer to OTs as "agreements" to distinguish them from FAR-based procurement contracts, they are still contracts. Therefore, the fact that a statute happens to be implemented in the FAR or uses the word "contract" is not dispositive of its applicability to OT agreements.

2. Therefore, for each statute, counsel needs to review the statutory text and history to determine whether it applies only to a "procurement contract" (i.e., a FAR-based procurement contract) or whether the statute is meant to apply more generally. Further, counsel needs to exercise caution in relying upon older analyses of which laws apply/do not apply to OTs because those analyses did not consider use of recent OT authorities for construction.

3. OTs are subject to general laws, such as appropriations/fiscal laws, socioeconomic laws, and criminal laws. A&S Other Transactions Guide, at Myth #9. Likewise, laws that apply generally to construction of public buildings and public works in the United States will apply when we use an OT agreement for such work, including the Davis-Bacon Act, the Miller Act, and the Buy American Act.

4. Laws that do not apply to OT agreements include the Competition in Contracting Act, the Trade Agreements Act, and the Contracts Disputes Act. Additionally, Executive Order 14063, Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects, applies only to FAR-based contracts (see 88 Federal Register 88708 at 88710, 88717), and therefore does not apply to OT agreements.

SUBCHAPTER 5.2: Prohibition on Cost-Plus Contracting (10 U.S.C. 3323)

I. INTRODUCTION

A. Pursuant to 10 U.S.C. 3323 (formerly 10 U.S.C. 2306(c)), using any form of cost-plus contracting for military construction and military family housing projects is strictly prohibited.

B. As a result of the War Department's heavy reliance on cost-plus contracts to incentivize immediate construction of military infrastructure during World War I and the beginning of World War II, Congress banned use of cost-plus contracts in the Armed Services Procurement Act of 1947. Congress restructured Title 10 in 2021, relocating the cost-plus prohibition from 10 U.S.C. 2306(c) to 10 U.S.C. 3323.

C. Military construction contracts rely on Firm-Fixed-Price (FFP) arrangements, consistent with how the FAR treats construction contracts and their administration. FAR contract clauses for construction, which apply to contractors, describe only FFP relationships, such as Inspection of Construction, Payments, Changes, Liquidated Damages, Default, Bonding, and Warranty. *See e.g.*, RFO Parts 11, 32, 36, 43, 46, and 49.

II. PROHIBITION

A. 10 U.S.C. 3323 outlines the specific cost-plus prohibitions for military construction and military family housing.

1. "A contract entered into by the United States in connection with a military construction project or a military family housing project may not use any form of cost-plus contracting." 10 U.S.C. 3323(a).

2. This prohibition "applies notwithstanding a declaration of war or the declaration by the President of a national emergency under 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the armed forces." 10 U.S.C. 3323(b)(2).

3. Importantly, this statute prohibits *any form of cost-plus contracting* for military construction and military family housing, which is a broader prohibition than the general prohibition against the Cost Plus Percentage of Cost set forth in 10 U.S.C. 3322(a). This means that otherwise allowable cost-plus contracts are unlawful for military construction and military family housing.

B. There are several forms of cost-plus contracting.

1. Cost Plus Percentage of Cost (CPPC) involves calculating a contractor's profit as a fixed percentage of the actual costs incurred. CPPC contracts are always

illegal (*see* RFO 16.101(b)) and are rarely self-identified, but may possess the following characteristics:

a. whether payment is at a predetermined percentage rate;

b. whether this rate is applied to actual performance costs;

c. whether the contractor's entitlement is uncertain at the time of contracting, and

d. whether the rate increases commensurately with increased performance costs.

See Department of State-Method of Payment Provisions, B-196556, Aug. 5, 1980; *Federal Aviation Administration*, 58 Comp. Gen. 654 (1979), 79-2 CPD 34.

Practice Tip: If a prime contractor is allowed to add a fixed percentage markup to every dollar spent by a subcontractor without a "ceiling" or "fixed fee" structure, it may be found to be an illegal CPPC contract. See 10 U.S.C 3322.

2. Cost-Plus-Fixed-Fee (CPFF) involves a fee that remains fixed regardless of whether costs increase. RFO 16.304-1.

3. Cost-Plus-Award-Fee (CPAF) involves a fee that the contractor can earn based on a subjective evaluation of the contractor's performance, instead of a mathematical percentage. RFO 16.402-4.

Practice Tip: An Undefinitized Contract Action that remains undefinitized for too long can function as a retroactive cost-plus contract because the costs have already been incurred, with profit tacked on at the end. Contracting Officers should take note that any profit allowed must reflect reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. DFARS RFO class deviation 217.7404-6.

Practice Tip: Remain vigilant when advising during contingency operations or during emergencies. Emergency authorities may grant flexibility in funding and initiating construction prior to congressional authorization, but emergency authorities do not waive the prohibition on cost-plus contracting.

SUBCHAPTER 5.3: Advertising Subject to the Availability of Funds

I. INTRODUCTION: The budget process for both military construction and repair projects can be slow and often does not align with the most efficient execution timelines for such projects. As a result, construction agents are often prepared to solicit the construction contract for a project before funding is available. This subchapter discusses the regulatory restrictions and requirements for such solicitations.

II. REQUIREMENT

A. Before executing any contract, as a matter of regulatory policy, the contracting officer must obtain written assurance from responsible fiscal authority that adequate funds are available or expressly condition the contract upon availability of funds. RFO 32.702. Absent exception, the Army requires the Contracting Officer to either obtain written assurance that adequate funds are available before advertising a requirement or follow certain procedures to advertise the requirement subject to the availability of funds. AFARS PGI 5132.702.

> **Practice Tip**: The mere solicitation of a contract does not, by itself, create a recordable obligation for such contract. A recordable obligation only occurs at the time of contract award. Thus, the restrictions on advertising in advance of appropriations (assuming proper funding is otherwise available to undertake solicitation activities) are a product of policy, expressed in procurement regulations, and are not direct fiscal law restraints.

B. The standard exception allowing agencies to advertise O&M or continuing services contracts in advance of funds (using FAR clause 52.232-18 Availability of Funds) is inapplicable to military construction. RFO 32.703-2.

C. Separately, however, the Army provides general authority to advertise high priority requirements before ensuring availability of funds, when there is a high probability that the requiring activity will not cancel the requirement and only if the Contracting Officer obtains a specific written statement from the responsible fiscal authority. AFARS PGI 5132.702(a)(i).

D. For military construction projects determined to be a high priority requirement, advertisement subject to the availability of funds is permitted with a Code A Directive, as provided in AR 420-1, AFI 32-1023, or other applicable regulations, in lieu of the written statement from the responsible fiscal authority. *See* AFARS PGI 5132.702(a)(i)(A)(ii).

E. Any military construction solicitation advertised prior to the formal receipt of funding must include a statement in the solicitation that "Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available."

Practice Tip: Continuing Resolutions (CR) generally prohibit the initiation of new projects or activities not funded in the previous fiscal year. Because each specified military construction project is individually authorized and funded, a military construction project is almost always considered a "new start." Therefore, even if a solicitation was issued SAF, the contracting officer generally cannot award the contract during a CR—even if the CR provides a temporary funding stream—unless the CR explicitly exempts the specific military construction project.

Practice Tip: If the acquisition strategy for a military construction project involves paying a stipend to unsuccessful Phase Two offerors (e.g., 10 U.S.C. 3241), the agency must ensure that Planning and Design (P&D) funds are available before promising the stipend. The SAF caveat on the main construction award does not automatically protect the Government from liability for pre-award stipends promised to retain competition.

Practice Tip: The AFARS' Subject to Availability of Funds statement alone does not insulate the Government from later claims from offerors for their costs to prepare proposals, if the requirement is ultimately not funded or not sufficiently funded, and the solicitation must be canceled prior to award. It is also recommended that Contracting Officers insert additional language in solicitations that the Government will not be responsible for offeror proposal costs in the event the solicitation is cancelled due to inadequate funding.

SUBCHAPTER 5.4: A-E Services Funding Cap

I. RESTRICTION

A. AE services may be procured for production and delivery of designs, plans, drawings, and specifications for any public works or utilities projects of the Department of the Army. 10 U.S.C. 7540(a); *see also* 10 U.S.C. 8612 (Navy) and 10 U.S.C. 9540 (Air Force). For the Military Services, the cost of this service is limited to not more than 10 percent of the estimated cost to construct the project to which the service applies. 10 U.S.C. 7540(b), 8612(b), 9540(b).

   i. The 10 percent limit applies only to the portion of the contract (or modification) price attributable to preparation of designs, plans, drawings, and specifications. Services included in the contract (or modification) not for produced as preparation of designs, plans, drawings, and specifications are not subject to the 10 percent limit. DFARS 236.202-371 (DFARS Class Deviation (CD) 2026-O0019).

B. AE services procured by USACE on behalf of a non-DoD agency for production and delivery of designs, plans, drawings, and specifications, or in connection with a civil works project, may not exceed 6 percent of the estimated cost of construction of the public work or utility. 41 U.S.C. 3905; RFO 15.404-9(c)(4)(ii).

SUBCHAPTER 5.5: A-E Selection ("Brooks Act")

I. RESTRICTION AND PROCEDURES

A. Statutes, Regulations, and Policies:

1. Selection of Architects and Engineers, 40 U.S.C. 1101 *et seq*. (formerly known as the "Brooks Act").

2. 10 U.S.C. 2855(a): requires the use of the selection procedures in 40 U.S.C. 1101 *et seq*. for all contracts for architectural and engineering services and construction design in connection with a military construction project or a military family housing project.

3. Revolutionary FAR Overhaul, Part 36, Class Deviation – Revolutionary Federal Acquisition Regulation (FAR) Overhaul Part 36, DFARS Part 236 (DFARS CD 2026-O0019).

4. USACE Engineer Pamphlet (EP) 715-1-7.

B. Award Considerations for AE Acquisitions:

1. The AE statute requires that the Government publicly announce all requirements for AE services and provides a competitive process for AE selection. Unlike procurements subject to 10 U.S.C. 3206(c)(1)(B), which requires that price be a factor in every source selection, AE firms must be selected based solely on qualifications, with price not considered until after determination of the most highly qualified firm. 40 U.S.C. 1101. Negotiating price after selection of the firm ensures that the selection focuses on qualifications rather than award to a firm who provides a lower price. Legislative history highlights that a qualifications-based selection may even ultimately save the government money in the long run, because ensuring competent AE firms to prepare designs and other products requiring a licensed engineer or architect means a higher quality end result. *See* 118 CONG. REC. at 25488 (1972). For example, a highly qualified AE firm who prepares a detailed, accurate design may be likely to result in construction of a more durable or desirable building, which ultimately means less maintenance or replacement costs down the road. *See* RFO 36, DFARS 236 – DFARS DC 2026-O0019, USACE EP 715-1-7.

2. In accordance with EP 715-1-7, USACE evaluates each potential AE contractor in terms of its:

a. Professional qualifications necessary for satisfactory performance of required services;

b. Specialized experience and technical competence in the type of work required;

c. Capacity to accomplish the work in the required time;

d. Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;

e. Location in the general geographical area of the project and knowledge of the locality of the project; provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and

f. Acceptability under other appropriate evaluation criteria.

Practice Tip: These specific criteria are no longer listed in the FAR; however, as they are in the EP, USACE should use these criteria until the EP is updated.

3. In addition to the primary criteria, the DFARS PGI 236.202-1 (DFARS CD 2026-O0019) identifies secondary factors in the case of a tie between the ranking of AE firms. Secondary criteria may include:

   a. Geographic proximity of the firm to the work site;

   b. Equitable distribution of work, to include small business concerns;

   c. Volume of work awarded by DoD during the previous twelve months; and

   d. Extent and commitment to small businesses.

4. The criteria by which the agency will evaluate the qualifications of AE firms are included in a document called the synopsis, which both publicly announces the AE requirement and discloses how the AE firms will be evaluated for that requirement.

Practice Tip: In AE acquisitions, the "solicitation" occurs later, after the AE firm is selected and USACE is seeking to negotiate rates.

C. Selection Process:

1. Agencies are required to provide AE evaluation boards, either permanent or ad hoc as needed.

2. AE evaluation board perform the following functions:

    a. Review the current data files on eligible AE firms and responses to a public notice concerning the particular project;

    b. Evaluate the firms in accordance with synopsis criteria;

    c. Hold discussions with at least three of the most highly qualified firms regarding concepts and the relative unity of alternative methods of furnishing the required services; and

    d. Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms considered to be the most highly qualified to perform the required services and explaining the rationale for the recommendations. *See* RFO 36.202-1.

3. The AE selection authority reviews the Evaluation Board's recommendations and, with the advice of appropriate technical and staff representatives, makes the final selection. This final selection must be a listing, in order of preference, of the firms considered most highly qualified to perform the work. If the firm listed as the most preferred is not the firm recommended as the most highly qualified by the evaluation board, the selection authority shall provide for the contract file a written explanation of the reason for the preference. RFO 36.202-2. All firms on the final selection list are considered "selected firms" with which the contracting officer may negotiate in accordance with RFO 36.202-2.

D. Negotiations: After selection of the most qualified AE firm, the contracting officer may begin negotiations. RFO 36.202-3.

1. The contracting officer must begin negotiations with the most highly qualified firm selected by the selection authority.

2. If the AE firm and the contracting officer cannot negotiate a mutually agreeable contract, with prices considered fair and reasonable by the contracting officer, the contracting officer shall notify the firm that negotiations have been terminated and shall then initiate negotiations with the next firm on the final selection list. This procedure shall be continued until a mutually satisfactory contract has been negotiated.

3. If negotiations fail with all selected firms, the contracting officer should refer the matter to the selection authority, who, after consulting with the contracting officer as to why a contract cannot be negotiated, may direct the evaluation board to recommend additional firms.

E. AE Indefinite Delivery Contract (IDC) Contract:

1. AE contracts may be executed as a stand-alone requirement (for larger projects usually) or issued as a task order against an IDC.

2. If procuring an AE IDC, the IDC scope must be specific enough to select AE firms for the general type of services to be performed under the task orders *See* RFO 16.504-5. Selection of AEs for project specific task orders are outlined in EP 715-1-7, Ch.6.

Practice Tip: For larger projects, AE contracts are typically procured as a stand-alone requirement or as a single IDC; whereas multiple award IDCs are typically set up for multiple smaller requirements.

F. Small Business Requirements: 18 U.S.C. 2855(b) further requires that in the case of a contract involving design of a military construction or military family housing project, in an amount less than the current threshold amount of $1,000,000, the contract shall be awarded in accordance with the set aside provisions of the Small Business Act. 15 U.S.C. 631 *et seq*.

Chapter 6

Project Changes

CHAPTER 6: PROJECT CHANGES

OVERVIEW: Few military construction projects are executed according to plan. Almost invariably, changes occur in either cost, scope, or both. Such changes are driven by numerous variables, to include unanticipated discoveries at a project site once work commences, economic fluctuations, and the evolution of stakeholder requirements. This chapter discusses: (1) the various "scope" analyses for project changes; (2) the limits and approval requirements for cost and scope variations (10 U.S.C. 2853); (3) reprogrammings; (4) special approval requirements for use of expired funds for certain contract changes (31 U.S.C. 1535(c)); and (5) unique issues surrounding environmental remediation efforts during project execution.

SUBCHAPTER 6.1: In-Scope vs. Out-of-Scope Changes

I. INTRODUCTION: While project changes are nearly inevitable, their nature and the standards governing them vary significantly. It is essential to distinguish between legislative, contractual, and funding aspects, as each necessitates a unique procedural approach. This Subchapter discusses project authorization changes, contract modifications, and corresponding antecedent liability/funding analysis. When a project change is under consideration, begin by asking these core questions:

A. Is the change inside or outside the scope of the project authorization?

B. Is the change inside or outside the scope of the contract for competition purposes?

C. Is the change inside or outside the scope of the contract for funding purposes?

D. What type of funding is appropriate for the change?

E. Is there sufficient funding for the change?

> **Citation Note**: At the time of writing of this Deskbook, the Federal Acquisition Regulation (FAR) is being revised in accordance with Executive Order 14275, Restoring Common Sense to Federal Procurement, and Executive agencies are utilizing deviation versions of the FAR, known as the "Revolutionary FAR Overhaul" or "RFO." Therefore, regulatory references herein are to the RFO, not the FAR.

II. TYPES OF "SCOPE" CHANGES

A. The phrases "change in scope," "in-scope change," and "out-of-scope change" can have different meanings in different contexts and are often misinterpreted when analyzing a change to a military construction project and/or contract. There are three distinct analyses that must be undertaken for any "change in scope" to a military construction project:

1. Whether the change is within the scope of the project's authorization.

2. Whether the change is within the scope of a contract awarded for project execution.

3. Whether the change is within scope for antecedent liability and funding purposes.

> **Practice Tip**: It is critical to understand the difference between these three categories of "scope" changes. Imprecise use of terminology can result in the wrong standards being applied. For example, clients may claim that a contract modification that adds new work is "within scope" for contract competition and funding purposes simply because the work is within the scope of the project authorization. However, as

explained further below, the scope of the project authorization is entirely irrelevant for purposes of conducting the contract and funding scope analyses.

III. AUTHORIZATION CHANGES

A. As a threshold matter of legislative authority, any proposed project changes must be assessed against the scope of the project authorization, both in terms of the authorized function, size, and quantity of the project, as well as the authorized amount for the project. This analysis typically focuses on the scope of the DD Form 1391 submitted for approval/authorization of the project and the congressional authorization of the project. Changes within the scope of a project's authorization may proceed without altering such authorization. However, changes outside the scope of a project's authorization require adjustments to such authorization before they can be undertaken and vary depending on the authorizing authority:

1. Unspecified Minor Military Construction: Changes in project scope require revisions to the project's DD Form 1391, approval by the applicable project approval authority, and possibly notification to Congress of the change. *See e.g.*, AR 420-1, para. 4-50.e.(5). If a change would cause the project to exceed the unspecified minor military construction thresholds under 10 U.S.C. 2805, project execution must cease immediately. *See id*. at App. D, para. D-4.b. Determinations will then be made as to whether the project can be de-scoped to stay under the thresholds and still satisfy the requirement or an Antideficiency Act investigation is necessary. *See id*. If a project cannot be de-scoped to stay under the threshold, project execution likely cannot recommence until the project is authorized by Congress as a major military construction project.

2. Major Military Construction: Changes in project scope must comply with 10 U.S.C. 2853, further discussed in Subchapter 6.2. Changes that exceed the flexibilities under section 2853 require new legislation from Congress.

IV. CONTRACT CHANGES

A. Contract changes are modifications to the terms of the Government's contract with its contractor, usually triggered by events post-contract award. Such contract changes must be analyzed in the context of Competition in Contracting Act (CICA) (10 U.S.C. 3201 *et seq*.) requirements. Contract modifications that are "within scope" of the original contract can typically proceed with approval from the Contracting Officer. However, changes that are "out of scope" of the original contract require further action, to include a Justification and Approval (J&A), when permissible under RFO 6.103, for sole-source acquisition without further competition.

B. CICA encourages use of full and open competition for Government acquisitions. 10 U.S.C. § 3201(a). Consequently, modifications to existing contracts are discouraged if the altered work is outside "the scope of the competition conducted to achieve the

original contract." *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993). Work that is outside the scope of the competition must be procured via a new acquisition, rather than added to an existing contract (unless an exception applies). *See Makro Janitorial Services., Inc.*, B-282690, Aug. 18, 1999.

1. Definition of Contract Scope: Work that was fairly and reasonably within the contemplation of the parties at the time of contract award is typically considered "within scope" for competition purposes. Freund v. United States, 260 U.S. 60, 63 (1922). Phrased differently, it is the range of work that offerors would reasonably anticipate based on the language of the solicitation and original contract. Despite its importance, CICA does not define the concept of contract scope. Instead, it is a product of caselaw and is highly associated with the Cardinal Change Doctrine.

2. There is not a bright-line rule to determine if a contract modification is "in-scope" for CICA purposes. The analysis is subjective and highly fact-specific. However, the contracting officer should consider the following:

    a. Would the offerors of the original solicitation have reasonably expected modifications of this nature?

    b. Did the original solicitation alert offerors that this type of modification was a possibility?

    c. Is the modification's work similar to the work described by the original solicitation? *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993); *Neil R. Gross & Co., Inc.*, B-237434, Feb. 23, 1990; *Leupold Stevens, Inc.*, B-417796, Oct. 30, 2019.

3. Significant changes to a contract's cost, period of performance, or work volume can lead to an "out-of-scope" modification, even if the type of work is unchanged. *Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 423 (2018).

C. Authority to Modify Contract: Under the FAR/RFO, only the Contracting Officer has the legal authority to modify a contract and bind the Government. The Contracting Officer may delegate this authority to an Administrative Contracting Office, up to a specified dollar value. Project Managers, District Commanders, and USACE external stakeholders do not have the authority to change the terms of a contract. RFO 1.402-1; RFO 33.205-5; UAI 5142.302-100.

D. Examples of Contract Modifications:

1. Changes:

   a. Directed ("Formal") Changes: Pursuant to the applicable Changes clause in the contract, an authorized Government official expressly directs the contractor to add work, subtract work, or change the work performed under the contract that causes an increase in cost or time to the contract.

   b. Constructive ("Informal") Changes: Actions or inactions by an authorized official that requires the contractor to perform work beyond the contract requirements. The additional work cannot be voluntary.

      i. Example Clause: RFO 52.243-4 Changes. The "Changes" Clause used in Construction Contracts provides that the Contracting Officer may unilaterally make changes in the drawings and/or specifications, the method and manner of work, or they can accelerate performance, if it is within the general scope of the contract.

      ii. Example Cases: *Kiewit Infrastructure W. Co. v. United States*, 972 F.3d 1322, 1329 (Fed. Cir. 2020); *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678, (Fed. Cir. 1994); *M.A. Mortenson Co.*, ASBCA No. 53229, 2004 WL 3029865.

      Practice Tip: Because the Contracting Officer has a unilateral right to make changes to the contract that are within the general scope of the contract, per the express terms of the Changes clause, an analysis of whether a change is in or out of scope is critical. There is no unilateral right to make out-of-scope contract changes.

2. Delay: The contractor's performance was delayed by unforeseeable causes outside the contractor's control. Distinguish between excusable delays and compensable delays.

   a. Example Clauses: RFO 52.249-10 Default (Fixed-Price Construction) [excusable delay]; RFO 52.242-14, Suspension of Work [compensable delay], USACE Special Contract Clause, "Time Extensions for Unusually Severe Weather [excusable delay].

   b. Example Cases: *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000); *K-Con Bldg. Sys., Inc. v. United States*, 131, 321 Fed. Cl. 275 (2017); *Fru-Con Constr. Corp.*, ASBCA No. 53544, 05-1 B.C.A. ¶ 32936.

3. Differing Site Conditions: The contractor encountered unforeseeable physical site conditions that differ materially from what the contract stated or from what a contractor could reasonably expect. Distinguish between Type I and Type II differing site conditions.

    a. Example Clause: RFO 52.236-2 Differing Site Conditions.

    b. Example Cases: *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002); *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (Fed. Cir. 2007); *Nova Group, Inc.*, ASBCA No. 55408, 10-2 B.C.A. ¶ 34533.

4. Defective Specifications: The contractor followed the Government-provided design specifications (as opposed to performance specifications), but those specifications were inaccurate.

    a. Example Clause: RFO 52.243-4 Changes.

    b. Example Cases: *Maverick Constructors, LLC*, ASBCA No. 61989, 25-1 B.C.A. ¶ 38783; *KiewitPhelps*, ASBCA No. 61184, 23-1 B.C.A. ¶ 38254; *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000).

5. Superior Knowledge: During solicitation, the government was aware that contractors lacked knowledge of facts which would significantly affect contract cost or duration.

    a. Example Clause: RFO 52.243-4 Changes.

    b. Example Cases: *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012); *Meltech Corp., Inc.*, ASBCA No. 63556, 25-1 B.C.A. ¶ 38720; *Lee's Ford Dock, Inc.*, ASBCA No. 59041, 14-1 B.C.A. ¶ 35679.

6. Constructive Acceleration: The contractor encountered a valid excusable delay, but the Government required that the contractor meet the original completion date.

    a. Example Clause: RFO 52.243-4 Changes.

    b. Example Cases: *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004); *AEI Pac., Inc.*, ASBCA No. 53806, 08-1 B.C.A. ¶ 33792; *Skanska USA Bldg., Inc.*, ASBCA No. 62430, 21-1 B.C.A. ¶ 37937.

Practice Tip: Distinguish between accelerating and expediting a military construction contract. Acceleration is permissible per the Changes clause, RFO 52.243-4, and involves the situation when the contractor is entitled to time extensions but, because of project urgency, he is compelled to complete by a date earlier than the date which would be established by adding the time entitlement to the currently specified completion date. In other words, the Contracting Officer buys back the time that the contractor is already entitled to have, due to excusable delay. Expediting, on the other hand, is moving the contract completion date forward from the established completion date which would cause cost increases for the contractor to "expedite" its efforts to finish by the new, earlier completion date. Funds cannot be expended for expediting without the applicable Military Department Secretary's approval. 10 U.S.C. 2858 and DoDD 4270.5, "Military Construction."

Practice Tip: Contract claims and Requests for Equitable Adjustment (REAs) are requests to modify the contract. Typically, the contractor asserts that it is entitled to additional money or additional time to complete the contract, but contractors can request changes to other contract terms. The final decision to grant or deny a contract claim lies with the USACE Contracting Officer, not the Project Manager or USACE's customer. Contractors can appeal denied claims at the Court of Federal Claims and the Armed Services Board of Contract Appeals (ASBCA). Caution – Lack of funding is not a legally supportable reason to deny a claim.

V. FUNDING CHANGES (ANTECEDENT LIABILITY RULE)

A. Funding determinations for contractual actions are subject to the Antecedent Liability Rules, which requires a determination of whether a particular cost increase is enforceable under the terms of the original contract.

1. Cost increases that are enforceable under a term of the original contract are considered antecedent liabilities of such contract and, absent statutory authority provided otherwise (*see e.g.*, "section 116" discussion in Chapter 4) are funded with funding available at the time of contract award. *See* GAO Redbook, Vol. I, p. 5-35 (3d ed 2004). The rationale for this rule is that the liability only makes the cost of the original contract fixed and certain and, thus, the liability "relates back" to that initial obligation event. *See id*. Such cost increases are often colloquially referred to as "within scope" cost increases.

Example: While carrying out work under a construction contract for the repair of the roof of a barracks, the contractor discovers asbestos, which was not identified in the contract. The contractor then submits an REA under RFO clause 52.243-4 Changes, for the additional costs and effort required to remediate the asbestos. Payment of the increased costs arises and is

enforceable under such clause in the original contract and is, thus, an antecedent liability.

Note that PDTs often confuse what clause should be cited as appropriate authority, between the Differing Site Conditions clause or the Changes clause, when unexpected conditions arise. The Differing Site Conditions clause is applicable only to the disclosed physical site conditions provided in the contract such as in a Geotech report, or to those physical site conditions normally expected at the contract's site of work. This clause is not appropriate for unexpected conditions found in the contract's specifications/scope of work, such as the roof in this example. Asbestos is properly handled under the Changes clause for changes affecting or made to the contract's specifications/drawings/scope of work. See RFO 52.243-4(a)(1)(i).

Practice Tip: A generalized statement that a modification is "in-scope" is not a sufficient articulation of the Antecedent Liability Rule analysis. A specific clause from the original contract must be cited with a legal explanation as to how the cost increase is enforceable under such clause. This is particularly important when a funding action requires approval at the Military Departments or DoD levels. Requests that do not clearly articulate the analysis are often rejected by such offices or delayed in processing until additional information is provided.

2. Cost increases that are not enforceable under a term of the original contract ***are not*** considered antecedent liabilities, but, instead, represent new obligations that, absent statutory authority providing otherwise, must be funded with funds that are current at the time of the contract modification. *See id*. at p. 5-36.

Example: While carrying out work under a construction contract for the repair of the roof of a barracks, the external stakeholder asks the Contracting Officer to also have the contractor repair the HVAC system in the building, the repair of which is not contemplated in the contract. This new work is beyond the scope of the Changes clause and there is no other clause in the original contract under which the Government could unilaterally direct the contractor to perform the new work to repair the HVAC system and be entitled to compensation for the increased cost. Therefore, the proposed modification is not an antecedent liability.

3. New contract awards are considered new obligations that, absent statutory authority providing otherwise, must be funded with funds that are current at the time of award.

4. The award of a contract option is considered a new obligation that, absent statutory authority providing otherwise, must be funded with funds that are current at the time the option is exercised. DoD FMR Vol. 3, Ch. 8, para 3.4.1.

SUBCHAPTER 6.2: Cost and Scope Variations (10 U.S.C. 2853)

I. INTRODUCTION: For major military construction projects, deviating from a project's authorization amount and scope described in the DD Form 1391 submitted to Congress requires legislative authority. Section 2853 of title 10, United States Code, provides such authority for many, but not all, cost and scope changes. This Subchapter discusses the categories of permissible variations under section 2853 and the attendant procedural requirements.

> **Practice Tip**: As a threshold matter, **DO NOT**, confuse cost and scope variation requirements with reprogramming requirements discussed in Subchapter 6.3. The two are separate and distinct. Section 2853 applies to variations in the authorization amount and scope for a project, whereas reprogramming requirements apply to the amount appropriated for a project. More specifically, section 2853 cost/scope variation requirements apply when the project authorization amount provided under a NDAA or scope described in the DD Form 1391 submitted to Congress needs to be increased or decreased. In contrast, reprogramming requirements apply when the amount appropriated for a project, as provided in the Joint Explanatory Statement accompanying a Military Construction Appropriations Act, is increased or decreased. Often, but not always, congressional approval/notification for both cost/scope variations under section 2853 and reprogrammings are required for the same change. However, the requirements for each differ and each is a separate and distinct action. Clients and attorneys often confuse the two.

II. COST VARIATIONS

A. Section 2853(a) provides blanket authority for cost increases or decreases that do not exceed the lesser of:

1. 25 percent of the total authorized cost of the project (i.e., the authorization amount under the applicable NDAA); or

2. 200 percent of the unspecified minor military construction ceiling under 10 U.S.C. 2805(a) (currently $9,000,000, making the 200 percent $18,000,000).

B. However, this authority comes with an often overlooked condition at the end of subsection (a), which limits its use to instances where: ". . . the Secretary concerned determines that such revised cost is required for the sole purpose of meeting unusual variations in cost ***and*** that such variations in cost could not have reasonably been anticipated at the time the project was authorized by Congress." (Emphasis added).

> **Practice Tip**: The determinations of whether a variation is "unusual" or "could not have reasonably been anticipated" are subjective in nature and occasionally become points of contention between the construction agent and project proponent. When this occurs, it is typically best to raise such disputes to the headquarters elements of the parties and possibly DoD.

C. Cost variations that exceed section 2853(a) thresholds are permissible, but require congressional notification as provided under section 2853(c), discussed in section IV. below.

D. Exceptions: As provided under section 2853(e), cost increase thresholds and notification requirements do not apply to:

1. The settlement of contract claims.

2. The costs associated with the required remediation of an environmental hazard for a project, ***if the required remediation could not have reasonably been anticipated*** at the time the project was approved originally by Congress.

> **Practice Tip**: Similar to the practice tip above, this subjective standard for the remediation cost exception can occasionally lead to differing viewpoints between the construction agent and project proponent. When this occurs, it is typically best to raise such disputes to the headquarters elements of the parties and possibly DoD.

III. SCOPE OF WORK VARIATIONS

A. Reductions:

1. Section 2853(b)(1) provides standing authority to reduce the scope of work by not more than 25 percent of the amount specified in the DD Form 1391 submitted to Congress for a project. DoD implementation guidance applies this standard against the quantities for project components listed on the DD 1391 (e.g., square footage, linear feet, etc.). *See* Assistant Secretary of Defense for Energy, Installations, and Environment (ASD (EI&E)) memorandum, subject: *Guidance for Authorized Cost and Scope of Work Variations for Military Construction Projects*, (June 28, 2024) (hereinafter "DoD Section 2853 Policy").

2. Scope reductions in excess of the 25 percent threshold are permissible, but require congressional notification as provided under section 2853(c), discussed in section IV below.

3. Scope reductions should not be pursued due solely to insufficient project funding. Instead, additional funding to complete the full project scope should be pursued. *See* para. 3.a) of the DoD Section 2853 Policy.

4. Reductions that result in an incomplete or unusable facility or a facility that does not fully meet the mission requirement described in the DD Form 1391 submitted to Congress are not permissible, regardless of amount. 10 U.S.C. 2853(b)(1).

B. Increases:

1. All increases above the scope of work described in the DD 1391 submitted to Congress require congressional notification (Secretaries have no discretionary authority to approve scope increases without congressional notification). *See* 10 U.S.C. 2853(b)(2).

2. Scope increases have a hard cap of 10 percent. *See* 10 U.S.C. 2853(d)(4). Increases above 10 percent require legislation to alter the project authorization.

3. Scope increases should not be used to address changed mission or functional requirements. If such increases are needed, they should be pursued by seeking additional legislative authorization via the annual authorization process. *See* DoD Section 2853 Policy.

IV. PROCEDURAL MATTERS

A. When required, congressional notifications under section 2853 are routed through the DoD Component concerned to the Office of the Deputy Assistant Secretary of Defense for Infrastructure, Modernization, and Resilience and require a 14-day waiting period after transmission to Congress before the cost/scope variation takes effect. *See* 10 U.S.C. 2853(c) and (d); para. 4.b) of the DoD Section 2853 Policy.

B. See DoD Section 2853 Policy for cost/scope variation calculation methodologies, examples, and templates.

SUBCHAPTER 6.3: Reprogramming

I. INTRODUCTION: The reprogramming of funds is a common occurrence for major military construction projects. Because minor military construction projects are bulk funded, either via Unspecified Minor Military Construction line items or operation and maintenance funding sources, reprogrammings for such projects are extremely rare and would only be conducted at the bulk line-item level, not project by project. Accordingly, this subpart only addresses reprogrammings for major military construction projects.

II. DEFINITIONS

A. Reprogramming: The shifting of funds ***within*** an appropriation to purposes other than those contemplated at the time of appropriation. GAO Red Book Vol. I, Ch. 2, Subpart B.7., at 2-44 (4d ed. 2016). For major military construction projects, reprogrammings involve the moving of funding from one line-item authorized project to another within Military Construction appropriations available for the same purpose (e.g., moving current funds from one Army military construction project to another within Military Construction, Army appropriations).

> **Practice Tip**: As a threshold matter, **DO NOT**, confuse reprogramming requirements with cost variation requirements under 10 U.S.C. 2853 discuss in Subchapter 6.2, which are separate and distinct. Reprogramming requirements apply to funding amounts, whereas section 2853 requirements apply to authorization amounts. More specifically, reprogramming requirements apply when the amount appropriated for a project, as provided in the Joint Explanatory Statement accompanying a Military Construction Appropriations Act, is increased or decreased. Section 2853 cost variation requirements apply when the project authorization amount provided under a NDAA needs to be increased or decreased. Often, but not always, congressional approval/notification for reprogrammings and cost variations under section 2853 are required for the same project increase. However, the requirements for each differ and are separate and distinct actions. Clients and attorneys alike often confuse the two.

B. Reprogramming Base: The specific dollar amount for any project or effort that has been jointly approved for appropriation by the Committees on Appropriations. In instances where a prior approval reprogramming request for a project or effort has been jointly approved by the Committees on Appropriations, the amount approved becomes the new base for any future increase or decrease via below threshold reprogramming actions or prior approval reprogramming requests. DoD FMR Vol. 3, Ch. 7, para. 3.2.1.

> **Practice Tip**: Clients often refer to the Reprogramming Base for a project as the "Programmed Amount" or "PA" for the project. However, such terms are not legal terms of art and are often used interchangeably to also refer to the authorized project amount under a NDAA, which are typically the same number, but not always. For clarity from a legal analysis perspective, it is recommended to use the term

"Reprogramming Base" in the context of reprogramming requirements and "authorized amount" in the context of authorization variations under 10 U.S.C. 2853.

C. Prior Approval Reprogramming: A reprogramming that requires congressional approval.

D. Above Threshold Reprogramming (ATR): The colloquial term for a Prior Approval Reprogramming.

E. Below Threshold Reprogramming (BTR): A reprogramming that is not a Prior Approval Reprogramming.

III. AUTHORITY

A. Statutory Authority: Authority for reprogramming Military Construction appropriations is provided as a recurring provision under Military Construction Appropriations Acts, which traditionally incorporates a particular version of DoD FMR Vol. 3, Ch. 7 by reference. See Figure 8-1 below for language provided in the FY26 Military Construction Appropriations Act (Pub. L. 119-137, Div. D, Title IV, § 122 (2025)).

SEC. 122. Amounts appropriated or otherwise made available in an account funded under the headings in this title may be transferred among projects and activities within the account in accordance with the reprogramming guidelines for military construction and family housing construction contained in Department of Defense Financial Management Regulation 7000.14–R, Volume 3, Chapter 7, of April 2021, as in effect on the date of enactment of this Act.

Fig. 8-1

1. This recurring provision is unique in that it incorporates into positive law a particular version of a DoD FMR chapter. Thus, reference to the DoD FMR is required to determine the legal requirements.

2. Notably, the Conference Reports that accompany Military Construction Appropriations Acts traditionally provide a narrative recital of "*Reprogramming Guidelines*," which do not always directly align with the provisions of the DoD FMR chapter that is incorporated by reference in the corresponding appropriations act and, thereby, creates statutory interpretation issues.

Example: In the Joint Explanatory Statement that accompanied the FY23 Military Construction Act, Congress expressed an intent to increase the fixed dollar reprogramming threshold from $2,000,000 to $6,000,000. However, the statutory reprogramming provision under the FY23 Military Construction

Appropriations Act (Pub. L. 117-328, Div. J, Title IV, § 122 (2022)) accounted for no such adjustment and cited an existing version of the DoD FMR chapter that still contained the $2,000,000 figure, which still has not been updated at the date of this publication. Applying basic canons of statutory construction, a plain reading of the reprogramming provisions under the FY23 and subsequent Acts would suggest that the Military Components should be following the requirements under the referenced DoD FMR chapter and that the discussion in the Joint Explanatory Statement was a mere expression of congressional intent that Congress did not incorporate into enacted legislation. However, for reasons that are not apparent from a legal analysis perspective, OSD (C), upon the advice of DoD OGC, has elected to follow the higher $6,000,000 figure with no need to wait for Congress to specify as much in legislation or for DoD to update the DoD FMR chapter incorporated by reference in such legislation. Thus, Military Components have been applying the $6,000,000 threshold since FY23, despite this discrepancy.

B. ATRs vs. BTRs:

1. Prior Approval Reprogrammings/ATRs: Paragraph 3.2.2. of DoD Vol. 3, Ch. 7, sets forth the circumstances under which a Prior Approval Reprogramming/ATR is required. The most common scenarios include:

    a. Any increase exceeding the lesser of 25 percent of the reprogramming base for the project or $6,000,000 (as noted in the example above, the DoD FMR currently lists $2,000,000 as the dollar threshold value, which, pursuant to informal OSD guidance, has been superseded by the committee report language to raise such amount to $6,000,000). *See id*. at para. 3.2.2.1.

    b. Any projects/land acquisitions under 10 U.S.C. §§ 2803, 2854, and 2663(d). *See id*. at paras. 3.2.2.4. to 3.2.2.6.

    c. Increases to the annually appropriated bulk funding amounts for UMMC and planning and design, respectively. *See id*. at paras. 3.2.2.9. and 3.2.2.10.

2. BTRs: Prior Approval Reprogrammings/ATRs are not required in the instances listed under paragraph 3.2.3. of DoD FMR Vol. 3, Ch. 7. These categories are commonly referred to as "exceptions" to ATR requirements. The most common scenarios include:

    a. When a reprogramming does not exceed the 25 percent/$6,000,000 ATR threshold. *See id*. at para. 3.2.3.1.

    b. When the cost increase necessitating a reprogramming is due solely to final settlement of a contractor's claim. *See id*. at para. 3.2.3.6. This

exception applies regardless of whether current or expired funds are properly available to pay the claim.

> **Practice Tip**: This contract claim exception aligns with the cost variation exception for authorization purposes under 10 U.S.C. 2853(e)(1) (*see* Subchapter 6.2). However, section 2853(e)(2) also includes a second exception for certain environmental remediation costs, which is not expressly included in the DoD FMR as a reprogramming exception, but is typically referenced in the Joint Explanatory Statements that accompany Military Construction Appropriations Acts (*see e.g.*, 171 Cong. Rec. S8085 (2025)). This, again, appears to be an oversight by the committees and/or DoD FMR drafters and creates confusion as to the requirements Military Components should apply for reprogramming actions the involve environmental remediation.

c. For any project being completed with expired funds. *See id*. at para. 3.2.3.7. Cost increases are only allowable for valid upward price adjustments, which exclude any work not in the scope of the original contract. *See id*.

> **Practice Tip**: This exception has been historically interpreted as not requiring ATRs for any proper use of expired funding, or, stated conversely, as permitting BTRs for any amount of expired funding that is properly available for use on a project. The most typical scenario in which this occurs is the funding of an antecedent liability under a contract.

3. *See* DoD FMR Vol. 3, Ch. 7 for complete list of ATR and BTR requirements/exceptions.

IV. PROCEDURAL MATTERS

A. Prior Approval Reprogrammings/ATRs: ATRs follow a rote, and often lengthy, approval process. All requests are approved at the Military Department level, followed by DoD approval. ATRs are typically processed in monthly batches, with an entire batch possibly being delayed if one request has issues. It is common for an ATR to take months, and not uncommon for some to take the better part of a year. *See* DoD FMR Vol. Vol. 3, Ch. 7, para. 3.7. for detailed processing instructions.

B. BTRs: The approval process for BTRs is much less formal and typically handled at the execution/construction agent level. *See e.g.*, AR 420-1, Ch. 4, para. 4-50.e.

SUBCHAPTER 6.4: Use of Expired Funds for "Contract Changes" (31 U.S.C. 1553(c))

I. INTRODUCTION: The ability to utilize expired funds, when otherwise legally permissible, for contract modifications is not always automatic. Pursuant to 31 U.S.C. 1553(c), and depending on the amount of prior year funding required, approval from the Under Secretary of Defense (Comptroller) (USD(C)) and congressional notification may be required. This subpart discusses the requirements of section 1553(c).

II. STATUTORY REQUIREMENT

A. Section 1553(c) is a government-wide requirement that sets forth approval and congressional notification thresholds for the use of expired funds for "contract changes." In the military construction context, this requirement is separate and distinct from cost variation and reprogramming approvals/notifications.

> **Practice tip**: Clients routinely confuse and mischaracterize section 1553(c) approval requirements with reprogramming and/or cost variation requirements, or vice versa. Thus, when a client raises a question citing any of the above, it is best practice to request a full description of the facts and pending funding requirements to determine which statutory requirements are at issue.

B. Section 1553(c) is a highly nuanced statute that only applies in specific circumstances provided therein. It applies when all the following are satisfied:

1. In a single fiscal year;

2. Expired funds from a single appropriation account are needed;

3. To cover amounts required for "contract changes;"

4. For a specific program, project, or activity; ***and***

5. The amount required exceeds the statutory thresholds provided under section 1553(c) ($4,000,000 for "head of the agency" and $25,000,000 for congressional notification.

C. The interplay between these criteria is likely best illustrated by discussing each in turn:

1. Single fiscal year: This criterion is set forth in the "during a fiscal year" language under section 1553(c)(1). In application, it means that the $4,000,000 and $25,000,000 threshold only apply per fiscal year (i.e., the thresholds "reset" each fiscal year).

Example: In FY25, a contract awarded in FY24 for a repair project under 10 U.S.C. 2811 requires a $3.8M modification for the contractor to perform additional work due to an unforeseen site condition. The modification is determined to be an antecedent liability of the original contract and is properly funded in FY25 with expired FY24 funds. In FY26, a separate antecedent liability contract modification in the amount of $2.5M is required under the Changes Clause of the original contract and is properly funded with FY24 funds in FY26. Neither modification triggers section 1553(c) requirements because the lesser $4M threshold was not triggered in a single FY.

Note, however, that modifications occurring in the same fiscal year must be aggregated due to the "total amount of obligations" language under section 1553(c)(1). So, if the two modifications above occurred in the same FY, the $4M threshold would be exceeded and approval from USD(C) would be required before the modifications could be awarded.

Practice tip: Clients occasionally ask if they can break known modification out across multiple FYs to stay under $4M each FY and, thereby, avoid USD(C) approval requirement (e.g., award just part of the known modifications in FY1 and the remainder in FY2). While this arguably complies with the plain language of the statute, it appears to violate the statutory intent and USD(C) and DoD OGC have informally opined previously that such practice is inappropriate. Thus, the cost of all known modifications should be aggregated for purposes of applying section 1553(c) requirements.

2. Single appropriation account: This criterion is derived from the singular terms "a fixed appropriation account" and "that account" under section 1553(c)(1) and limits the approval notification requirements to individual appropriations accounts (e.g., FY26 Military Construction, Army). For one-year appropriations (e.g., Operation and Maintenance, Army), it has little significance because a single FY account is typically the only legally permissible funding source for an antecedent liability contract modification. However, for five-year military construction appropriations where split funding is permitted, it may be possible to pull funding from accounts across multiple FYs and, thus, stay under the section 1553(c) thresholds.

3. "Contract changes": Section 1553(c) only applies to contract cost increases that are the result of "contract changes," which are defined under section 1553(c)(3) as: "a change to a contract under which the contractor is required to perform additional work. Such term does not include adjustments to pay claims or increases under an escalation clause."

    a. Thus, not all antecedent liability price modifications trigger section 1553(c) requirements; only those that require the contractor to perform additional work (e.g., to account for differing site conditions or

changes in project specifications that require additional contractor work).

> **Practice tip**: Government in-house costs associated with a contract modification such as Supervision and Administration (S&A)/Supervision, Inspection, Overhead (SIOH) costs discuss in Chapter 4 do not fall under the definition of "contract changes" and should not be included in section 1553(c) calculations or requests.

4. Specific program, project, or activity: In the context of military construction/repair projects, section 1553(c) requirements only apply per project. In the rare event where a single contract is awarded for multiple projects, in theory, applicable costs under section 1553(c) should be attributed to each project and the threshold requirements applied separately for each project.

5. Thresholds:

    a. Per section 1553(c)(1), "head of the agency" (USD(C) as discussed further below) is required before qualifying obligations in excess of $4,000,000 can be incurred. The Army has made legislative attempts to increase this amount, which has remained stagnant since at least the 1980s, but to no avail to date.

    b. Per section 1553(c)(2), in additional to "head of the agency" approval, congressional notification and a 30-day waiting period is required before qualifying obligations in excess of $25,000,000 can be made.

III. PROCEDURAL MATTERS

A. DoD implementation guidance for section 1553(c) is contained in DoD FMR Vol. 3, Ch. 10, paras. 3.4, 3.6, and 3.7.

1. The USD(C) is designated as the "head of the agency" who must approve all qualifying funding requests over $4,000,000 prior to fund obligation. *See id*. at para. 3.6.

2. Request for approval are routed through the applicable Component's secretariat level financial management office and must include:

    a. The amount to be obligated;

    b. The purpose for which the funds are to be obligated; and

c. An explanation of the obligation adjustment including the reason for the adjustment and the contingencies or management practices that necessitated the adjustment. *See id*. at para. 3.6.2.

3. Requests that exceed $25M follow the same routing process, with the additional documentation requirement to include a comprehensive statement concerning the reason for the adjustment that includes an explanation of the circumstances, contingencies, or management practices that necessitated the adjustment. *See id*. at para. 3.7.2.

    a. Obligations cannot be incurred until 30 days have elapsed from the time that OSD provided notification to Congress and no objection from congressional committees is received. *See id*. at 3.7.1.

SUBCHAPTER 6.5: Environmental Considerations

I. INTRODUCTION: Environmental activities and expenses associated with a military construction project, particularly the remediation of contaminants discovered after project execution begins, can present unique issues and delay project execution. This subchapter briefly describes the current guidelines for such environmental requirements.

II. NATIONAL ENVRIONMENTAL POLICY ACT (NEPA): NEPA environmental assessment requirements are triggered when an installation initially contemplates and pursues a construction project. As such, and as provided in Subchapter 3.1, NEPA requirements, to include preparing environmental impact assessments, if required, are part of the planning stage of a project, which are the responsibility of the applicable installation and are typically funded with operation and maintenance funding available to the installation. As needed and as applicable, installations can place reimbursable orders with other DoD activities or non-DoD federal agencies to assist in preparing NEPA documentation. However, as the project proponent, the installation remains responsible for signing and otherwise certifying to all NEPA related determinations and assessments.

III. ENVIRONMENTAL REMEDIATION:

A. The funding guidelines for environmental remediation related to a military construction project have varied somewhat between Military Components over the years. However, current DoD guidance seems to have set a baseline requirement for all such Components to adhere to. This standard provides:

"Environmental and historic preservation mitigation is a part of a MilCon project if included in the cost estimate and description of work on the DD Form 1391 or if the condition was unknown and unforeseen before the annual DoD component project approval. The mitigation is not part of a MilCon project if the condition was known before Service approval but not included on the DD Form 1391, or if it is something other than the physical preservation or protection of an environmentally sensitive or historically significant item."

Paragraph 4.d. of the Assistant Secretary of Defense memorandum, "Guidance for Military Construction Planning and Design," (June 1, 2023).

B. Although this excerpt only uses the term "mitigation," it has been understood and applied to also include necessary remediation activities at a project site. The standard turns on two criteria:

1. Whether the condition that requires environmental remediation/mitigation was expressly included in the DD 1391 as a project funded cost. If so, the remediation/mitigation is a project funded cost.

2. Whether the condition was known or foreseen before project approval. If the condition was unknown/unforeseen, then it is a project funded costs regardless

of whether it was included on the DD 1391. If it was known/foreseen, then it is not a project funded costs unless expressly included on the DD 1391 as noted above.

Practice Tip: The second criteria under this standard is somewhat subjective and can occasionally lead to disagreements between a construction agent and project proponent, particularly the foreseen/unforeseen criterion. When such disagreements arise, it is often best to advise clients to elevate the issue to the construction agent's and project proponent's respective headquarters elements.

Chapter 7

Terminations, Default, and Litigation

CHAPTER 7: TERMINATIONS, DEFAULT, AND LITIGATION

OVERVIEW: Inevitably, some contractors do not perform up to their contractual expectations and some form of adverse action against them is required to protect the Government's equities and satisfactorily complete the project. This chapter briefly discusses contract terminations, bonding protections, certain damage recoveries, the disposition of such recoveries, and fund sourcing for contract litigation costs.

Citation Note: At the time of writing of this Deskbook, the Federal Acquisition Regulation (FAR) is being revised in accordance with Executive Order 14275, Restoring Common Sense to Federal Procurement, and Executive agencies are utilizing deviation versions of the FAR, known as the "Revolutionary FAR Overhaul" or "RFO." Therefore, regulatory references herein are to the RFO, not the FAR.

SUBCHAPTER 7.1: Terminations for Default vs. Convenience

I. INTRODUCTION

A. The Government terminates contracts, whether for convenience or for default, only when it is in the government's interest. A termination for convenience ("T4C") refers to the exercise of a government discretionary right. A termination for default ("T4D") refers to the right of the Government, specifically the Contracting Officer, to terminate a contract because the contractor failed or is expected to fail to perform its contractual obligations.

B. Attorneys play a key, necessary role in helping the Contracting Officer evaluate if a contract should be terminated, whether for convenience or for default. Contracting personnel, technical personnel, and counsel must review the situation to ensure termination is appropriate. RFO 49.402-3(a). Regardless of dollar value, counsel must provide written support of legal sufficiency for terminations. *See* UAI 5101.602-2-90, Legal Coordination.

C. Contract clauses: In military construction contracts, certain clauses are included whether in full or by reference and define the parties' rights and responsibilities as they pertain to terminations.

D. The Revolutionary FAR Overhaul (RFO): RFO Part 49 covers Termination of Contracts, including Terminations for Convenience and Terminations for Default. RFO 49.1 and 49.2 cover terminations for convenience and additional principles for fixed-price contracts. RFO 49.4 covers terminations for default. RFO 49.5 articulates which contract termination clauses should be incorporated into a particular contract. RFO 49.6 provides helpful forms and notice formats when effectuating terminations.

II. APPLICABLE CONTRACT CLAUSES

A. Terminations for Convenience:

1. Contract Clauses: Clause 52.249-2 Alt I*, Termination for Convenience of the Government (Fixed-Price) (*Use Alternate I for construction) provides that the Government may unilaterally terminate performance of the work under the contract in whole or in part if the Contracting Officer determines that termination is in the Government's interest. The termination must be effectuated by written notice specifying the extent of the termination and the effective date. After receiving the notice and except as directed by the Contracting Officer, the contractor must immediately halt work as specified in the notice and proceed with certain obligations required by both the clause and any directives in the notice.

2. To terminate a contract for convenience is a business judgment decision; absent evidence of bad faith, the contracting officer's election to terminate for

the government's convenience is conclusive. *See e.g., Rice Sys., Inc. v. United States*, 62 Fed. Cl. 608 (2004). Examples of rationale can include changing priorities, funding constraints, shifts in technology, changed requirements, or evolving needs.

3. Once a contract is terminated for convenience, the contract becomes a cost reimbursable contract where the contractor must submit a proposal for allowable and reasonable costs that were incurred up to the termination point, plus a reasonable profit if the contract was not a loss contract. RFO 49.206. The total amount agreed to in any settlement with the contractor cannot exceed the contract price minus payments already made under the contract. RFO 49.207.

B. Terminations for Default.

1. Contract Clauses. Clause 52.249-10, Default (Fixed-Price Construction) provides two bases justifying default termination. "If [1] the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or [2] fails to complete the work within this time, the Government may by written notice to the contractor terminate the right to proceed with the work (or the separable part of the work) that has been delayed." RFO 52.249-10(a). However, if the delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor, then the contractor's right to proceed shall not be terminated nor the contractor charged for damages. RFO 52.249-10(b). Subsection (b) of the clause provides eleven examples of such causes (e.g., acts of God, acts of the Government in either its sovereign or contractual capacity, or unusually severe weather).

Practice Example: In 2020, lack of performance due to the COVID pandemic was considered a valid excuse under the Defaults clause. Contractors often were provided with non-compensable time extensions to project performance so long as they showed how and to what extent COVID affected the project performance (e.g., base closures or supply chain issues).

2. The rights and remedies under the Defaults clause are in addition to other rights and remedies provided by law or under the contract. *See* Clause 52.211-12, Liquidated Damages – Construction, (stating under subsection (b) that if the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed; these liquidated damages are in addition to excess costs of repurchase under the Termination clause).

3. Other clauses within the contract can provide the Government a basis to terminate a contractor for default. *See e.g.*, Clause 52.246-12, Inspection of

Construction (stating under subsection (g) that if the contractor does not promptly replace or correct rejected work, the Government may terminate for default the Contractor's right to proceed). Other clauses that provide for a default termination include failure to comply with labor laws and construction wage rates, RFO 52.222-12, failure to comply with the Buy American Act, RFO 25.206(c)(4), and failure to submit acceptable schedules, RFO 52.236-15.

Practice Tip: While this Deskbook's focus is military construction contracts, it is important to note a distinction between military construction and commercial products or commercial service contracts that contain Clause 52.212-4, Contract Terms and Conditions-Commercial Products and Commercial Services. This clause simplifies termination rights, responsibilities, and procedures into two subparagraphs and terminations under these provisions are known as "terminations for cause." Contracting Officers should be reminded that Part 49 does not apply in procurement of commercial products and services. See RFO Part 12.304, Terminations, which explicitly states "Do not use the procedures in part 49." (emphasis added).

C. Interplay between T4Cs and T4Ds: If the contractor establishes or it is otherwise determined that a contractor was not in default, or the failure to perform was excusable, then the termination will be treated as a termination for convenience. *Aptus Co. v. United States,* 61 Fed. Cl. 637 (2004).

III. PROCESS

A. T4C: Procedures for terminations for convenience are governed by the contract clause, the T4C Notice, and RFO 49.1 and 49.2.

1. Notice: Once the notice is issued to the contractor, the contractor must, inter alia, place no further subcontracts or orders and must terminate all subcontracts to the extent they relate to the terminated work, transfer title and deliver completed work to the government, protect the site at the Contracting Officer's direction, and prepare and submit termination inventory schedules. Clause 52.249-2(b), Termination for Convenience of the Government (Fixed-Price). Specifically for construction contracts, the Contracting Officer must direct cleanup actions to ensure site cleanup, protection of usable materials, removal of hazards, and other actions needed for a safe and healthy site. *See* RFO 49.105-2, Clean up of construction site.

2. Settlement:

a. The contractor also is entitled to a settlement of its costs arising out of the termination and the Contracting Officer is expected to quickly

negotiate a settlement with the contractor and form a settlement agreement. RFO 49.105(a)(3).

b. Counsel may be asked to assist in dealings with the contractor or advise on the T4C settlement process. RFO 49.105(b). The Contracting Officer, now known as the Terminating Contracting Officer (TCO), should hold a meeting with the contractor to determine a clear plan for completing the settlement. RFO 49.105(c) provides a list of topics to be discussed and documented.

c. The contractor must submit a final termination settlement proposal to the Contracting Officer promptly but no later than one year from the effective date of the termination (unless extended in writing by the Contracting Officer). RFO Clause 52.249-2(e).

d. After the contractor prepares and submits its settlement proposal, the TCO must review it quickly. *See* RFO 49.101. For proposals with value meeting or exceeding certified cost or pricing data thresholds, the proposal must be sent for audit. RFO 49.107. Otherwise, the TCO will conduct the review and include a written summary in the termination case file. RFO 49.107(a)(3).

e. When the proposal is fully negotiated and agreed upon, the parties must execute a settlement agreement using an SF30. RFO 49.109-1. The SF30 must account for any offsets owed the government and all subcontractor settlement proposals unless specially excluded from the agreement and reserved for separate settlement. *Id*. However, it is best to try to settle all rights and responsibilities of all parties in one agreement. The TCO also must include a Memorandum for Record in the termination case file (i.e. pre and post negotiation memorandums). *See* RFO 49.110.

f. No-cost settlements: The TCO must execute a no-cost settlement if the contractor has not incurred costs or the contractor is willing to waive costs incurred and no amounts are due to the government. RFO 49.109-4.

g. TCO Determination: The TCO must issue a determination of the amount due if the contractor and TCO cannot agree on a termination settlement amount or if the proposal is not submitted within the period required by the termination clause (typically 1 year for construction). RFO 49.109-7; RFO 52.249-2(g).

Practice Tip: Should the TCO suspect fraud in the contractor's settlement proposal, the TCO must discontinue negotiations and report the facts under agency procedures (RFO 49.106), which would include notifying the Procurement Fraud Advisor within Office of Counsel.

B. T4D: Procedures for default are governed by RFO 49.402-3.

1. Cure Notice: For failures covered under the Default clause, the Contracting Officer must provide a written notice to the contractor, with a copy to the surety, specifying the failure and allow 10 days (or longer if necessary) to cure the failure. This notice is typically known as a cure notice, though this information can be contained in the show cause notice as well. RFO 49.402-3(d). RFO 49.607(a) provides a sample cure notice format. *See also* RFO 49.402-3(e). After the cure period, the contracting officer will decide whether to terminate or accept the cure.

2. Show Cause Notice: The Contracting Officer should, when practical, issue a Show Cause Notice to the contractor if default termination appears appropriate. RFO 49.402-3(f). The Show Cause Notice should provide information about the possible termination, the contractual liabilities involved, why the contract might be terminated, the opportunity to explain why termination should not occur, that a lack of response may be taken as an admission by the contractor that no valid explanation exists; and when appropriate, an opportunity to attend a Show Cause Meeting (now known in the RFO as a "suggested discussion:). *Id.*

Practice Tip: A Show Cause Meeting essentially provides the contractor with additional notice and opportunity to be heard. While the Show Cause Meeting does not appear mandatory per the RFO ("should, when practical"), it is best to have one. Both the contractor and the surety should be included in the meeting. Government counsel should attend the meeting, and this should be communicated to the contractor and the surety prior to the meeting so that those parties also have access to counsel.

3. The RFO Mandatory Factors: Per RFO 49.402-3(i)(1)-(7), the Contracting Officer must consider in a written determination the following factors when deciding whether to terminate a contract for default:

    a. The contract terms and relevant laws and regulations;

    b. The specific failure and any explanations provided;

    c. Whether the supplies or services can be obtained from other sources;

d. How urgently the items are needed and how long it would take to get them from other sources compared to the original contractor;

e. How essential the contractor is to Government acquisition programs and how termination might affect their ability to supply other contracts;

f. How termination might affect the contractor's ability to repay guaranteed loans, progress payments, or advance payments; and

g. Any other relevant facts and circumstances.

4. The T4D Notice: Once all earlier procedures have occurred, including review of the RFO mandatory factors, and the contracting officer determines that termination for default is proper, the contracting officer must issue a written notice to the contractor. RFO 49.402-3(j). The elements of the notice are included at RFO 49.402-3(j). Importantly, the notice must include language that the notice is a decision that the contractor is in default and the contractor has the right to appeal under the Contract's Disputes clause. *See also* Clause 52.233-1, Disputes. The notice must be distributed to the parties who received the original contract, with a copy to the surety. RFO 49.402-3(k)(1). It is also important to review the AFARS and DFARS, and determine whether the contractor is a small business and part of the SBA program as there are additional internal reporting requirements of the termination that vary depending on the nature of the contract and the parties to the contract.

Practice Tip: On appeal, contractors will sometimes allege that the Contracting Officer did not consider all FAR/RFO mandatory factors prior to termination. The FAR/RFO requires that the Contracting Officer consider the factors. The FAR/RFO does not require that the mandatory factors are examined in the termination notice sent to the contractor. Typically, the FAR/RFO mandatory factors are analyzed and the findings memorialized in an internal memoranda signed by the Contracting Officer. While the government should commit the findings somewhere in writing, the contractor does not necessarily have access to this analysis at the time of its default. Because the memoranda will likely be requested by the contractor and discoverable during any litigation, counsel should advise on, review, or help draft both the internal documentation justifying the government's course of action as well as all external notices to the contractor and its surety.

5. Financial Considerations: In the event of a termination for default, the appropriation charged for the original contract remains available for obligation for a replacement contract as provided in Subchapter 7.5.

IV. TERMINATIONS AND THE CONTRACT DISPUTES ACT (CDA)

A. Appeals under T4Cs: If the TCO and the contractor cannot agree on the settlement amount for the termination for convenience settlement, and the TCO provides a determination regarding the amount, the contractor has the right to appeal under the Contract's Disputes clause. RFO 52.249-2(j) Alt I. However, if the contractor does not submit a settlement proposal within the clause's time limitation, then the contractor does not have the right to appeal. *Id.*

B. Appeals under T4Ds: The government's decision to terminate a contractor for default is an appealable claim. *See Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. *Educators Assoc., Inc. v. United States*, 41 Fed. Cl. 811 (1998) (dismissing a contractor suit as untimely because the contractor failed to appeal within 12 months of receiving the contracting officer's final termination decision).

C. De Novo Review: Courts review de novo whether a contractor was in default. *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.*, 69 F. 4th 1367 (Fed. Cir. 2023). A contracting officer's failure to consider one or more of the factors does not require that a default termination be converted into a termination for convenience. A termination may also be upheld if proper grounds existed at the time of termination even if those grounds were not known or cited as justifying the termination. *Id.* at fn. 1; *see also DCX, Inc. v. Perry*, 79 F.3d 132 (Fed. Cir. 1996).

D. Burden Shifting Framework: Courts employ a burden-shifting framework to determine whether a termination for default is justified. The government must first meet its burden by demonstrating the propriety of the default. *Lisbon Contractors, Inc. v. U.S.*, 828 F.2d 759 (Fed. Cir. 1987). If the government does so, then the burden shifts to the contractor to prove that its failure to perform was the result of causes beyond its control and without its fault or negligence. *DCX, Inc. v. Perry*, 79 F.3d 132 (Fed. Cir. 1996) (citing *Lisbon Contractors, 828 F.2d* at 764).

> **Practice Tip**: A contractor contesting a default termination due to excusable delay must have submitted a claim for a time extension; otherwise, the court lacks subject matter jurisdiction. *See Maropakis Carpentry, Inc. v. United States*, 609 F.3d, 1323 (Fed. Cir. 2010). After reviewing the Complaint, consider whether a motion to dismiss is appropriate on these grounds.

E. Remedies: When the government cannot meet its burden, courts will convert the termination to one of convenience and return the matter to the parties to negotiate a termination settlement. *Aptus Co. v. United States.,* 61 Fed. Cl. 637 (2004); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 285 (1997). Neither specific performance nor resurrecting the defaulted contract is an available remedy for a wrongful termination for default.

SUBCHAPTER 7.2: Bonding and Sureties

I. INTRODUCTION

A. Enacted in 1935, the Miller Act, 40 U.S.C. Chapter 31, was designed to provide performance and payment bonds for federal construction projects to ensure their proper completion, and because the workers and suppliers that contribute to such projects do not have lien rights over federal property. Federal Acquisition Regulations use the nomenclature of the "Bonds Act" to refer to the Miller Act due to the FAR/RFO convention of citing statutes based on their official title in the U.S. Code.

B. Definitions:

1. Bond: a written instrument executed by a bidder or contractor (the "principal"), and a second party (the "surety" or "obligor"), to assure fulfillment of the principal's obligations to a third party (the "obligee" or "Government"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. RFO 28.001.

2. Payment Bond: an instrument that assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract. RFO 28.001.

3. Performance bond: an instrument that secures performance and fulfillment of the contractor's obligations under the contract. RFO 28.001.

4. Penal Sum: the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond. RFO 28.001.

5. Surety: the insurance company or surety company that issues the bond and guarantees the contractor's performance and payment obligations. If the contractor defaults, the surety is obligated to step in and ensure the project is completed and subcontractors are paid. RFO 2.101.

II. PERFORMANCE AND PAYMENT BONDS (CONSTRUCTION PROJECTS LOCATED INSIDE THE UNITED STATES)

A. Construction, Repair, and Alteration over $150,000: RFO Part 28.102 sets out the requirements for bonding on construction contracts when procuring federal construction, including repair and alteration of federal property, under the RFO. All construction valued at over $150,000 requires performance and payment bonds, including when it is included as part of contracts that are classified as service or

supply contracts. *See e.g.*, *TLC Servs., Inc.*, B–254972.2, 94-1 CPD ¶235, Mar. 30, 1994.

1. Performance Bonds are required for the full amount of the construction contract unless the contracting officer determines that a lesser amount is adequate for the protection of the Government. The penal amount of the performance bonds must equal 100 percent of the original contract price, and if the contract price increases, an additional amount equal to 100 percent of the increase. RFO 28.102-2(b)(1).

2. Payment Bonds must be no less than the amount of the performance bond. Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal 100 percent of the original contract price and if the contract price increases, an additional amount equal to 100 percent of the increase. RFO 28.102-2(b)(2).

3. Standard Bond Forms are mandatory for use by contractors in these contracts including SF 25 for Performance Bonds, SF 25A for Payment Bonds, and SF 1414 for obtaining the Consent of Surety when a contract modification increases the contract price. No other forms are permissible for use, such as AIA forms used in non-federal construction projects, because they do not fully comply with the Miller Act and the RFO requirements. RFO 28.106-1.

4. The RFO mandates standard contract clause 52.228-15, Performance and Payment Bonds—Construction, be utilized in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed $150,000. This clause outlines the duties and liabilities of the contract parties. RFO 28.103-3.

B. Construction, Repair, and Alteration between $35,000 and $150,000: Pursuant to 40 U.S.C. 3132, construction contracts greater than $35,000, but not greater than $150,000, require the contracting officer to select two or more alternate payment protections as performance and payment security. These alternate payment protections include instruments such as Irrevocable Letters of Credit, Certificates of Deposit, Tripartite Escrow Agreements, and Payment Bonds. The penal amount of the payment protection must equal the construction contract price, and if that amount increases, then additional amounts or payment protections are required, up to 100% of the increased construction contract price. *See* RFO 28.102. The RFO mandates use of clause 52.228-13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds $35,000 but does not exceed $150,000.

III. PERFORMANCE SECURITY (CONSTRUCTION PROJECTS LOCATED OUTSIDE THE UNITED STATES)

A. Per the Bonds Act/Miller Act at 40 U.S.C. 3131(d), "[a] contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds." If the Miller Act bonds are waived for impracticability, such as when foreign contractors are not reasonably able to access U.S. Treasury-approved sureties, the Contracting Officer must provide for alternate performance security in amounts sufficient to protect the Government's interest in the event of a default by the contractor. Acceptable alternate security formats include obtaining cash, Bank Letters of Guarantee, Certificates of Deposit, and Irrevocable Letters of Credit.

IV. SURETY OPTIONS ARISING FROM PERFORMANCE BONDS

A. Surety-takeovers: Per the performance bond, if substantial performance issues arise during the contract performance, the surety, as Obligor, is legally liable to the Obligee (the Government), if the Principal (the Contractor) defaults or breaches the contract. *See* Standard Form (SF) 25. While it is generally contemplated that a termination for default of the contractor occurs prior to a takeover, it is legally permissible for the surety to takeover without a default or prior to a default per RFO 49.402-4(a). Since the surety is liable for damages resulting from the contractor's default, the surety has certain rights and interests in connection with the completion of the work. The decision as to the action to be taken shall be made on the basis of the best interest of the Government. RFO 49.404(b).

1. Written Takeover Agreement per RFO 49.404: Because of the possibility of conflicting claims to unpaid prior earnings (retained percentages or amounts representing unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a "takeover" agreement fixing the surety's rights to payment from such funds. Such an agreement is preferred, especially if the defaulting contractor can be included, as well, to help avoid future disagreements. The agreement must provide that:

    a. The surety will undertake the work required by the contract in accordance with all the terms and conditions of the contract.

    b. The Government will pay the surety in the manner provided by the contract, but not in excess of the surety's costs and expenses, the balance of the contract price unpaid at the time of default, subject to conditions provided in RFO 49.404(e).

    c. Such agreement shall not waive or release the Government's right to liquidated damages for delays in completion of the work, except to the

extent that such delays may be excused under the provisions of the contract.

B. Completion by another contractor: If the surety does not arrange for completion of the contract via a takeover, the Contracting Officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of sealed bidding or negotiation, as appropriate under the circumstances. RFO 49.402-6; *Cosmos Eng'rs, Inc.*, ASBCA No. 24270, 88-2 BCA ¶ 20,795 at 105,055 (the government loses its right to excess reprocurement costs under the Default clause if the work is not sufficiently comparable). Full and open competition is not required, but the Contracting Officer shall exercise reasonable diligence to obtain the lowest price available for completion and mitigate damages. RFO 49.402-6(b)(2); *Cascade Pac. Int'l v. United States*, 773 F.2d at 294 (Fed. Cir. 1985) (the government must act within a reasonable time of the default, use the most efficient method of reprocurement, obtain a reasonable price, and mitigate its losses). The surety and the defaulted contractor remain liable for all costs up and until the final completion of the project, including excess administrative and reprocurement costs, and the liquidated damages owed to the Government until final completion. *See generally*, *United States Surety Company, et al. v. United States*, 83 Fed.Cl. 306 (Aug 2008).

C. Liquidation of Liability: The contract provides that the contractor and the surety are liable to the Government for resultant damages. RFO clause 52.249-10(a). The Contracting Officer must use all retained percentages of progress payments previously made to the contractor and any progress payments due for work completed before the termination to liquidate the contractor's and the surety's liability to the Government. RFO 49.405. If the retained and unpaid amounts are insufficient, the Contracting Officer must take steps to recover the additional sum from the contractor and the surety. RFO 49.402-6(c) and 49.405. The surety is liable to the Government until the penal sum of the bond is reached.

1. The Contracting Officer has no authority to enter in a settlement agreement that would limit or liquidate liability of the surety (e.g., in lieu of a takeover, exchanging for a payment of a fixed sum that is less than the penal sum of the bond). The surety has no legal status as a "contractor" under the Contract Disputes Act (CDA) because it is not a party to the contract, except if it formally and officially takes over the construction contract and stands in the defaulted contractor's position, by operation of law. *See, e.g., United States v. Seaboard Sur. Co.*, 817 F.2d 956, 961 (1987) (stating that it is clear from the language of the CDA and from its legislative history that a surety is not a "contractor" for CDA purposes). There is no legal authority for the Contacting Officer to make settlements except to resolve disputes arising under the Contract Disputes Act. RFO 33.205-5.

D. Refusal: The surety may also refuse to take any action and claim the principal (the contractor) was wrongly defaulted and is, therefore, not obligated or liable under the

performance bond. The Government will be required to enter into litigation to attempt to recover its damages in the event the surety refuses to honor its bond.

V. NON-FAR CONTRACTS FOR FEDERAL CONSTRUCTION AND REPAIR

A. The Miller Act (Bonds Act in the RFO) was enacted in 1935, long before the FAR emerged, and it expressly does not limit its application to only those procurement contracts awarded under the authority of federal acquisition regulations. In fact, it applies to "any contract of more than $100,000 [that] is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government", without limitation. 40 U.S.C. 3131(b). Therefore, even non-FAR contracts such as Other Transaction Agreements (OTAs) that result in federal public construction, alteration, or repair, must likewise comply with the Miller Act and require performance and payment bonds from contract or agreement awardees.

VI. FISCAL IMPLICATION OF SURETY TAKEOVERS

A. When the contractor is terminated for default, the surety has the option to takeover the project or pay the government for the cost of completion. *United States v. Seaboard Sur. Co.*, 817 F.2d 956, 959 (1987). *See United States Sur. Co. v. United States*, 83 Fed. Cl. 306, 310 (2008), *Transamerica Ins. Co. v. United States*, 31 Fed. Cl. 532, 536 (1994). *See also*, *Westchester Fire Ins. Co. v. United States*, 52 Fed. Cl. 567, 576 (2002) (stating that the surety may discharge its obligation by taking over and completing performance or, by assuming liability for the costs of completion that exceed the original contract price if the surety allows the Government to reprocure the contract).

1. If the surety takes over the project, the Government receives no direct payments from the surety as the result of the contractor's default and the surety completes the project subject to the terms and conditions of the original contract.

2. If the surety elects to pay the Government for the cost of completion, the surety remains liable for excess reprocurement costs for a replacement contract to complete the project. For fund disposition purposes, payments from a surety in this regard are treated the same as direct payments from, to include judgments/settlements against, the defaulted contractor and follow typical excess reprocurement cost disposition rules discussed in Subchapter 7.5.

SUBCHAPTER 7.3: Architect Engineer (A-E) Liability

I. AUTHORITY

A. Since shortly after the Brooks Architect Engineer Act was first enacted in October 1972, USACE has incorporated into its A-E contracts a provision which makes the A-E firm liable for additional costs that result from its defective design. This provision is derived from case law because professional negligence has always been recognized in tort law. However, a case in 1973 at the Armed Services Board of Contract Appeals (ASBCA) made A-E liability cognizable as a breach of contract claim in federal contracts. *See Roy F. Weston, Inc*., ASBCA No. 17490, 73-2 BCA ¶10,188. The claim asserted by the Government is for damages due to the alleged failure of the A-E to perform the contract in accordance with its terms, and the claim is resolved under the Disputes clause of the contract, RFO clause 52.233-1.

B. The regulatory policy for A-E liability is found in RFO subpart 36.301(b)(5):

1. If a construction contract needs a modification due to architect-engineer design errors, the Contracting Officer must—

a. Assess the architect-engineer's liability, with the advice of technical personnel and legal counsel;

b. Seek cost recovery if the amount exceeds administrative costs or if it benefits the Government; and

c. Include in the contract file a written statement detailing the recovery decision. *See* RFO clause 52.236-23.

C. RFO clause 52.236-23 imposes responsibility on the A-E firm for the quality of its products and services and is liable for damages due to breach of contract based on a professional negligence standard:

52.236-23 Responsibility of the Architect-Engineer Contractor.

(a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract.

(b) The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.

(c) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract.

(d) The Contractor shall be and remain liable to the Government, in accordance with applicable law, for all damages to the Government caused by the Contractor's negligent performance of any of the services provided under this contract.

(e) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(f) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

D. An A-E firm's liability includes professional quality, technical accuracy, coordination of all designs, drawings, and specifications, and other services that are furnished by the A-E firm under the contract. RFO clause 52.236-23. The A-E firm will, without additional compensation, correct or revise any errors or deficiencies in its work (designs, drawings, specifications, and other services as contracted). *Id*.

E. Typical examples of A-E liability occur when, due to an A-E design error or deficiency, a modification of an ongoing construction contract is required or there is a design-related failure after construction. These are referred to as design deficiencies. An A-E firm may also be liable for government damages arising from failure to design within the funding limitations (*see* RFO clause 52.236-22) or to comply with the contract schedule or technical provisions.

PRACTICE TIP: USACE Construction Division personnel generate a Basic Change Document (BCD) for every construction contract modification. The BCD will include a reason code for the change. When a design deficiency is noted as the reason for the change, the Contracting Officer Representative (COR) for the A-E contract should provide an initial assessment of potential liability resulting from A-E error and/or omission to the District/Center A-E Responsibility Coordinator (AERC). The AERC determines whether further steps should be taken to investigate and assess liability in accordance with the procedures in the Engineering Pamphlet (EP) 715-1-7.

II. PROCEDURES

A. RFO 36.301(b)(5) directs the KO to assess the extent to which the A-E contractor may be reasonably liable and to seek assistance of technical personnel and legal counsel. It also directs the KO to seek recovery if such recovery would benefit the government, and to document the recovery decision.

B. Within USACE, chapter 10 of EP 715-1-7 establishes the USACE AE Responsibility Management Program (AERMP) for investigating and asserting A-E liability, which formalizes the investigative and affirmative government claim stages.

C. The EP indicates that a determination of A-E liability requires answering three questions affirmatively:

1. Did the firm make an error or omission?

2. Did the error or omission result from the firm's negligence or from a breach of contractual duty?

3. Has the government suffered damages as a result of the error or omission? *See* EP 715-1-7, para. 10-4.d.

D. Upon an initial assessment that the A-E may be at fault for a design error or omission, the A-E contract COR will coordinate with the Contracting Officer and Office of Counsel to notify the AERC and activate the A-E Responsibility Management Board (AERMB) to organize senior leadership for a consensus on whether to pursue official liability. A series of formal escalatory steps will then occur that are detailed in Chapter 10, para. 10-7 of EP 715-1-7. The main stages that must include legal counsel are summarized below, (*see* Figure 9-1 below for a complete A-E liability process flow chart):

1. Notification and Corrective Action: The first step is to notify the A-E firm and provide them information about a potential design error, omission, or technical deficiency via a Request for Information (RFI) letter. The A-E firm is given the opportunity to review the circumstances and provide a response and to propose a corrective action.

2. Letter of Intent: A liability case is initiated when the letter of intent is sent to the A-E firm indicating an intent to recommend formal review by the AERMB of the firm's liability for damages. The letter will include any documents supporting the government's position and a detailed statement of damages.

3. Demand Letter: The demand letter will be issued to include the charge of professional negligence that created a contract breach, the supporting documentation of the charge, a detailed listing of the damages, and the A-E firm's options. The demand letter can help facilitate settlement negotiations prior to engaging in the formal claims process under the Disputes clause of the contract.

4. Negotiation and Contracting Officer Final Decision (COFD): A reasonable effort will be made to resolve a liability case by negotiation and settlement. If negotiation is unsuccessful, a COFD will be promptly issued, including a Demand for Payment per RFO 32.604.

5. Litigation: The A-E firm may appeal the COFD to the ASBCA or COFC within the specific timelines permitted and any appeal will then be directed by the Trial Attorney. RFO 33.204-6(a)(4) and USACE UAI Part 5133.

E. A settlement with the A-E may occur at any stage of the process, thus obviating the need for further escalation within the AERMP procedures.

PRACTICE TIP: A-E Firms carry Errors and Omissions insurance policies for professional negligence and their Principal Officials additionally may carry Directors and Officers policies. These polices can often be aggregated together to form a compensation pool for any liability assessments or settlements. It is important to try to obtain the A-E Firm's policy limits, to the extent feasible, and potentially engage the Insurer, along with the A-E Firm, in any settlement discussions. This insurance money will almost always be the only source of funding available for any liability judgment or settlement.

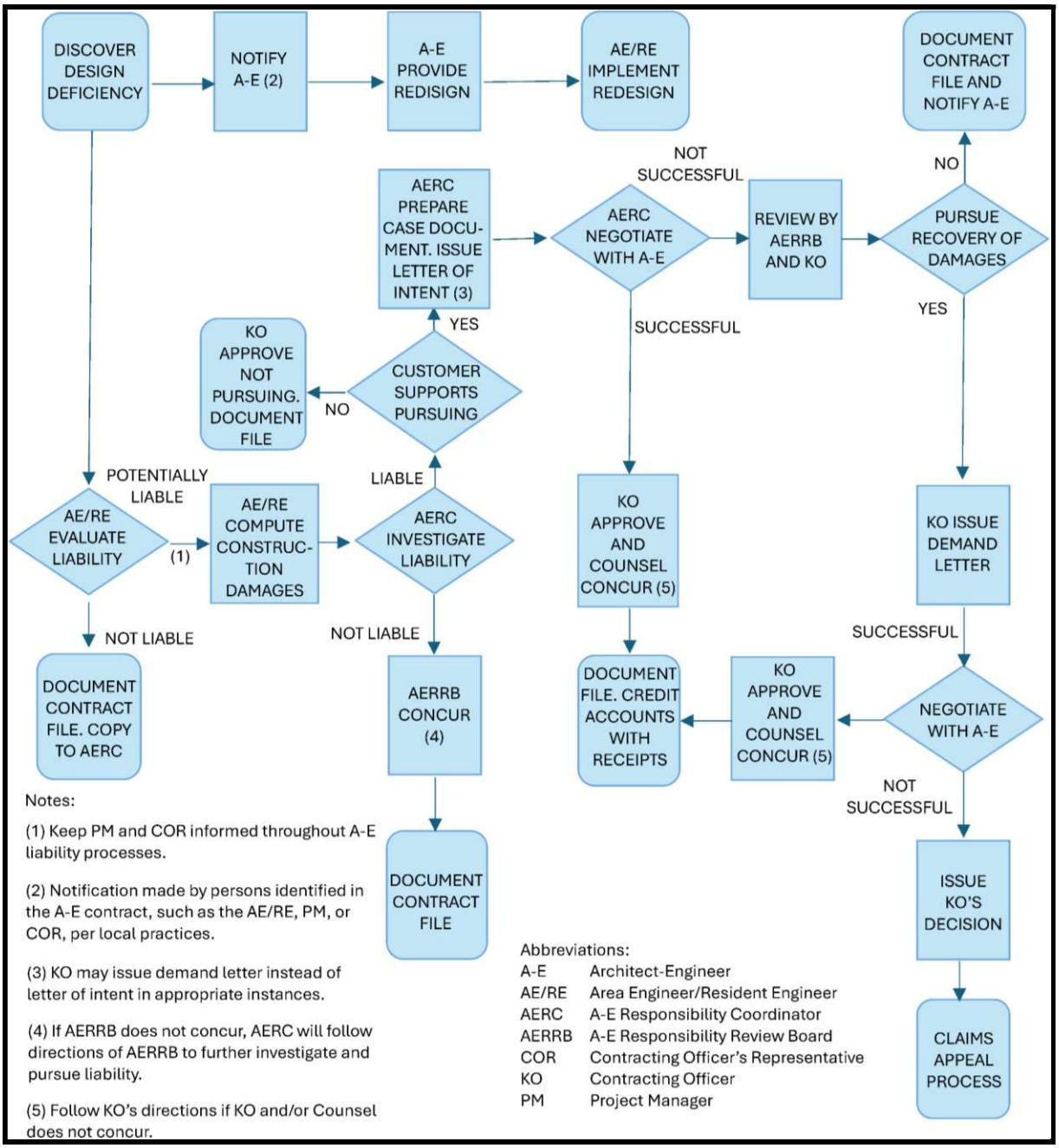

Figure 9-1 (*see* EP 715-1-7, App. G)

III. FUNDING FOR A-E LIABILITY INVESTIGATIONS AND RECOVERY

A. Within USACE, general administration of the AERMP (e.g., meetings and reporting not convened or related to a specific case), is funded by the respective Departmental Overhead or General and Administrative (G&A) overhead accounts of the personnel involved. *See id.* at para. 10-6.c.

B. Investigations and actions to pursue A-E liability recovery that occur during the design phase of military construction projects are funded from applicable Planning and Design (P&D) funds for the project. *See id.* at para. 10-6.d. Investigations and actions to pursue A-E liability recovery that occur during the construction phase (i.e., after construction contract award) are charged to applicable project funded accounts (e.g., direct project funds and Supervision and Administration (S&A) accounts). *See id* at para. 10-6.e; s*ee also* ER 37-1-30, Ch. 11 and App. H.

C. Disposition of monies recovered in A-E liability actions follows the fund disposition rules for excess reprocurement costs discussed in Subchapter 7.5.

Practice Tip: The fund disposition discussion at paragraph 10-8.c. of EP 715-1-7 is incomplete and potentially misleading. For example, the EP discussion suggests that recoveries can always be credited to appropriations used to correct design defects, up to the amount of such correction costs, which is not always correct. As discussed in Subchapter 7.5., if corrective action has already been undertaken with funds that are expired at the time of collection from the AE, such funds cannot be retained and should be deposited in the Treasury as miscellaneous receipts.

SUBCHAPTER 7.4: Liquidated Damages

I. AUTHORITY

A. Damages sustained due to a contract breach by either party may be liquidated in the contractual agreement, but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. Restatement 2d of Contracts, Sec. 356. Therefore, liquidated damages are amounts that are fixed, settled, and agreed upon in advance by contractual parties in order to avoid future litigation about sustained actual damages due to a breach of contract.

B. Liquidated damages can never be used as a penalty or a negative performance incentive. RFO 11.401(b). Liquidated Damages must always reflect only the probable and reasonable damage to the Government in the event of the contractor's breach of contract for late delivery. *See id*.

C. In federal procurement contracts, RFO 11.401 provides the legal requirements governing the implementation of liquidated damages for construction contracts:

RFO 11.401 Policy.

(a) The contracting officer must consider the potential impact on pricing, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when—

(1) The time of delivery or timely performance is so important that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent; and

(2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.

(b) Liquidated damages are not punitive and are not negative performance incentives (see 16.403-2). Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the contracting officer may use more than one liquidated damages rate when the contracting officer expects the probable damage to the Government to change over the contract period of performance.

(c) The contracting officer must take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the contracting officer is considering terminating the contract for default, the contracting officer

should seek expeditiously to obtain performance by the contractor or terminate the contract and repurchase (see subpart 49.4). Prompt contracting officer action will prevent excessive loss to defaulting contractors and protect the interests of the Government.

(d) The head of the agency may reduce or waive the amount of liquidated damages assessed under a contract, if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10)

II. PROCEDURES

A. The procedures for inclusion of liquidated damages and use of liquidated damages in construction contracts are also set forth in RFO 11.402 and require use of RFO clause 52.211-12, Liquidated Damages-Construction, which likewise requires the Contracting Officer to insert a calculated daily rate of liquidated damages that will be assessed for each day of delay beyond the contract completion date. The calculation must be individualized to each contract and to each contract line item or individual project phase (*see Sauer Inc.*, ASBCA No. 62395, (Apr 2021), 21-1 BCA ¶ 37,845) or performance period (*see* RFO 11.403(b)). The calculation must also include costs for increased government inspection and other expected damages, such as renting substitute property. RFO 11.402(b).

PRACTICE TIP: All districts maintain a Liquidated Damages Calculation Worksheet that must be completed for every construction contract that will include the Liquidated Damages contract clause. This worksheet will be used to calculate an individual contract's anticipated damages, based on the additional supervision and inspection costs and other expected damages that are anticipated in the event of the contractor's untimely completion. The worksheet must be completed for every contract line item that has its own performance period (RFO 11.403(b)), and the worksheet must be included in the official contract file in order to support the reasonableness of the amount in the event of future litigation.

B. The Defense Federal Acquisition Regulation Supplement (DFARS) Class Deviation 211.403 mandates inclusion of liquidated damages clauses in all DoD fixed price construction contracts currently valued at $900,000 or greater:

DFARS Deviation 211.403 Contract clauses.
(b) Use the clause at RFO 52.211-12, Liquidated Damages—Construction, in all construction contracts exceeding $900,000, except cost-plus-fixed-fee contracts or contracts where the contractor cannot control the pace of the work. Use of the clause in contracts of $900,000 or less is optional.

III. ENFORCEABILITY

A. The use of liquidated damages provisions in contracts can be very beneficial because it permits the Government to recover its expected damages for a contractor's breach at the specified liquidated damages rate(s) without having to litigate and prove the actual amount of monetary damages it sustained. On the other hand, the use of the liquidated damages provisions in contracts then precludes the Government from recovering its actual damages, if different from the rate(s) provided in the contract. While beneficial to both parties in attempting to provide transparency and to avoid litigation, liquidated damages are a commonly litigated area of law in claims and appeals practice.

1. Excusable Delay: The most common defense by a contractor to an assessment of liquidated damages is excusable delay as described in the RFO clause, 52.249-10, Default (Fixed Price Construction). If excusable delay is proven, the contract completion date must be extended by the number of days of excusable delay and, thereby, reduce (or eliminate) the liquidated damages.

> **PRACTICE TIP**: In the event of concurrent Government and contractor delay, where the fault of the delay is difficult to determine or assign, the Armed Services Board of Contract Appeals (ASBCA) will generally annul the liquidated damages, especially if the Government delay affected the contractor's critical path schedule. If the Government can prove that the total project delay was caused by contractor fault despite the concurrent Government delays, however, the liquidated damages may still be assessed. *Industrial Design Laboratories, Inc.*, ASBCA No. 21603, 80-1, BCA ¶ 14269.

2. Must be Reasonable and Not a Penalty: To be enforceable, the liquidated damages calculations and the resulting rate(s) established in the contract must be reasonable. *Weis Builders, Inc.*, ASBCA No. 56306, 10-1 BCA ¶34,6 at 169, 721-22 (*citing Young Assocs., Inc. v. United States*, 200 Ct. Cl. 438, 455, 471 F.2d 618, 622 (1973)). As provided in RFO 11.401(b), the rate(s) can never be a penalty and can never be a negative incentive that is intended to motivate a certain level of performance rather than compensate the Government for expected damages in the event of the contractor's late completion of the construction contract. Due to the difficulty of proof and the uncertainty associated with forecasting future damages, the amount (i.e. the reasonableness of the rate(s) included in the contract) is a vulnerable area that is often litigated as part of a contract claim or appeal, after the applicable liquidated damages are assessed by the Government. Likewise, the sister claim as to whether the amount is effectively an unenforceable penalty is also commonly asserted.

PRACTICE TIP: It is essential that liquidated damages rates are determined contemporaneously to a contract's solicitation, are reasonable and not a penalty, are individually determined for each particular contract, and include backup data to support the calculations wherever possible. A liquidated damages provision is to be upheld if at the time the parties entered into the contract it was not possible or extremely difficult to compute the precise measure of damages which the Government would suffer as a result of delayed completion and the liquidated damages bore a reasonable relationship to the measure of damages likely to be suffered if the contract was not completed on-time. *See Arctic Seafood Corporation*, ASBCA No. 20833, 77-2 BCA ¶ 12724 on Mot. For Recon.

3. Substantial Completion: Once a construction contract reaches substantial completion, liquidated damages can no longer be assessed or collected. *See Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,742. Substantial completion of a contract occurs on the date the work is completed satisfactorily to the extent that the facilities in question may be occupied or used by the Government for the purpose for which intended. *See Lindwall Construction Co.*, ASBCA 23148, 79-1 BCA ¶ 13,822.

IV. COLLECTION

A. Once the contract completion date passes and it is determined that the contractor is not entitled to any additional excusable delays, the liquidated damages are assessed, on a per-day-of-delay basis by withholding the amounts attributed to the liquidated damages from monthly pay requests. EP 415-1-260, Area/Resident Engineer Management Guide, para. 7-2(m). If the liquidated damages are to be removed from the contract and are intended to be applied/credited to burdened accounts or returned to external stakeholders to reimburse them for their damages identified as part of the Liquidated Damages calculation amount, the Contracting Officer must first issue a Contracting Officer Final Decision asserting an affirmative claim in order to establish entitlement to the withheld liquidated damages that are otherwise considered contractor earnings under the contract. *See* RFO 33. 205-1(b), *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1330 (Fed. Cir. 2010). Alternatively, the Contracting Officer can obtain a final release of claims from the contractor, if the contractor is willing. RFO clause 52.232-5(h), Payments Under Fixed Priced Construction Contracts. The Contractor has appeal rights to any final decision that would be issued. *R&R Sys. Sols., LLC*, ASBCA Nos. 61269, 61405, 19-1 BCA ¶ 37,269 at 181,358.

B. Disposition of Funds: Disposition of liquidated damages collected follows the fund disposition rules for excess reprocurement costs discussed in Subchapter 7.5. Notably, however, unlike other collections from contractors in the construction context (e.g., A-E liability collections), liquidated damage collections may be used to reimburse Supervision and Administration (S&A) costs above established flat rates if it can be demonstrated that the S&A expenses that resulted from delayed contract

execution were never intended to be reimbursed through the S&A flat rate applicable to the project. *See Army Corps of Engineers-Propriety of Depositing Liquidated Damages in Supervision and Administration Account*, B-237421 (Sep. 11, 1991).

C. Remittance of Liquidated Damages: Per 10 U.S.C. 4752, the Secretary of the Treasury is authorized by law to remit (i.e., to forgive) the whole or any part of a liquidated damages assessment. As a result, when liquidated damages were properly assessed, it is only the Secretary that is authorized to remit any part of such damages that in their discretion may be just and equitable, based on a recommendation by the head of the contracting agency. The decision of the agency head and the Secretary of the Treasury to remit liquidated damages is wholly discretionary, rare, and not a legal right of the contractor. The RFO also provides that the head of the agency "may reduce or waive the amount of liquidated damages assessed under a contract, if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10)." RFO 11.401(d).

PRACTICE TIP: The Contracting Officer has no authority to waive, reduce, or return the assessed liquidated damages to the contractor. The Contracting Officer does have authority to determine factual disputes regarding the contract, including the authority to reduce the liquidated damages proportionately to account for properly determined excusable delay.

SUBCHAPTER 7.5: Reprocurements and Excess Costs

I. REPROCUREMENTS/REPLACEMENT CONTRACTS:

A. Background: The fiscal law rules for reprocurements, also called replacement contracts, stem from longstanding Comptroller General guidance. Pursuant to such guidance, federal agencies are permitted, under certain circumstances, to utilize funding obligated on a terminated contract, regardless of whether such funding is otherwise expired, for the purpose of reprocuring the work originally ordered. *See* GAO Red Book Vol. I, at 5-25 to 5-33 (3d ed. 2004). The rationale for this rule is that the original contract properly obligated funding for the work ordered and the government should not be penalized for a contractor's default. *See id*. In limited situations, replacement contracts are also permitted where a contract is terminated for convenience. *See id*.

B. Criteria: The use of expired funding for replacement contracts, to include funding originally obligated on the terminated contract, is permissible when (*see* DoD FMR Vol. 3, Ch. 10, para. 3.8.):

1. There is a continuing bona fide need for the goods or services involved;

2. The original contract was made in good faith;

3. The original contract was terminated for default, or for convenience if termination was the result of a:

    a. Court order;

    b. Determination by a contracting officer that the contract award was improper due to explicit evidence that the award was erroneous and the determination is documented with appropriate findings of fact and of law; or

    c. Determination by other competent authority (e.g., a Board of Contract Appeals) that the contract award was improper;

4. A replacement contract is used to obtain the goods or services that originally had been ordered under another contract that was terminated either for default or convenience of the Government. The replacement contract is:

    a. The same size and scope as the original contract; and

    b. Executed without undue delay after the original contract is terminated.

C. When otherwise permissible, the determination to pursue a replacement contract with expired funds or award a contract as a new obligation using current fund is discretionary. *See* GAO Red Book Vol. I, at 5-33 (3d ed. 2004).

II. EXCESS REPROCUREMENT COSTS/DEFECTIVE WORK COSTS:

A. Reprocurements typically come at a higher cost than the original procurement and often involve damages collected from the defaulted contractor (e.g., liquidated damages). In non-default situations (e.g., a defective design by an AE contractor), additional costs may be similarly incurred to obtain the goods or services originally ordered. In such situations, amounts collected from the defaulting or otherwise culpable contractor may often be used for a reprocurement or a contract needed to correct deficiencies.

B. Amounts recovered from contractors in these situations may be retained for a replacement contract or to otherwise correct defective work if (*see* GAO Red Book Vol. II, at 6-184 to 6-188 (3d ed. 2006)):

1. At the time of recovery, the agency has not yet incurred costs to reprocure or correct deficiencies. Funds are credited to the appropriation originally obligated for the contract and remain available, even if otherwise expired, to fund a valid replacement contract or corrective measures.

2. At the time of recovery, the agency has already incurred costs to reprocure or correct deficiencies and the funding utilized is still current. The agency may retain collections to reimburse the appropriation utilized. However, if the appropriation utilized is expired at the time of collection, the funds must be deposited in the Treasury as miscellaneous receipts.

> **Practice Tip**: These fund disposition rules are derived from Comptroller General decisions and are not entirely intuitive. For example, clients often fail to understand why they cannot retain recoveries from the contract for whatever purpose they want within the applicable appropriation or why funds have to go to the Treasury simply because the funding they already used to reprocure or correct a deficiency has expired. Thus, special care must be taken to ensure the rules are applied correctly.

SUBCHATPER 7.6: Contract Litigation Costs

I. INTRODUCTION: This Subchapter discusses the unique funding structure and requirements specific to USACE for contract litigation associated with military construction projects. However, portions of it may be applicable to contract litigation costs for military construction projects at large.

II. BACKGROUND: As a project funded organization, USACE field activities have no direct appropriations available to fund contract litigation costs. As a result, all contract litigation expenses are derived in some shape or form from project funds. Specifically, three funding mechanisms are involved:

A. General and Administrative (G&A) overhead accounts: G&A accounts are comprised of overhead rates applied to each project/appropriation supported by a USACE district, as authorized under 33 U.S.C. 576. *See* ER 37-1-30, Ch. 19. Thus, every military construction project executed by a USACE district funds its share of G&A costs.

B. Flat Rate Supervision and Administration (S&A) accounts: As provided in Chapter 4, when S&A costs are applied on a flat rate basis pursuant to 10 U.S.C. 2205(b), such flat rate is based on the contract award and placement costs for the project, and project funds are collecting into S&A accounts accordingly.

> **Note**: If the S&A for a project is funded at cost, flat rate S&A accounts are not available and direct project funds must be used for costs that would otherwise be chargeable to S&A accounts.

C. Direct project funds: These are funds directly appropriated for a project that are not collected into G&A or S&A accounts.

III. CONTRACT LITIGATION COSTS

A. In-house counsel labor necessary to litigate a contract claim is funded from G&A accounts. *See* ER 37-1-30, Ch. 19, and Ch. 11, App. H, para. H-2.m.

B. In-house non-counsel costs, to include in-house technical labor, in-house administrative costs, and in-house expert witnesses are funded from applicable S&A account. *See* ER 37-1-30, Ch. 11, App. H, para. H-2.m.

C. Outside litigation support, to include contracted expert witnesses and legal services (e.g., discovery support) is funded from direct project funds. *See id*.

Practice Tip: Unique project circumstances can occasionally lead to inquiries and pressure to alternate the funding rules noted above. However, doing so is rarely legally permissible and can result in potential fiscal law violations. Any proposed deviations should be coordinated with HQ, USACE Directorate of Resource Management and the Office of the Chief Counsel.

Chapter 8

Real Estate Matters

CHAPTER 8: REAL ESTATE MATTERS

I. INTRODUCTION: Real estate requirements are often an integral part of military construction and repair projects and can sometime be the sole purpose of a project. The leasing of real property, and improvements to the same, are also integral to the accomplishment of Military Component missions. While not a complete overview, this chapter touches on key real estate authorities and issues as they relate to military construction/repair projects and leasehold improvements.

II. PROJECT SPECIFIC ACQUISITION AUTHORITIES

A. The acquisition of land is expressly included in the statutory definition of "military construction." *See* 10 U.S.C. 2801(a). Thus, military construction projects authorized by law, as required under 10 U.S.C. 2802(a), may include the acquisition of interests in land. Such acquisitions come in two basic forms in the context of military construction:

1. Military construction projects that are exclusively for the acquisition of real estate interests (e.g., a project to increase the footprint of a military installation by a specified number of acres).

2. Military construction projects for the construction of facilities that require the acquisition of real estate interests as a component of the construction project (e.g., an installation gate expansion project that requires acquisition of real estate interests from the state/county to accommodate the gate expansion or the construction of a building might require a utilities or facility relocation and the acquisition of easement interests held by the utility/facility owner).

B. Both types of projects above, if in excess of the unspecified minor military construction threshold under 10 U.S.C. 2805, require express authorization under a National Defense Authorization Act (NDAA). Such authorization typically comes in the form of a military construction authorization under the section 4601 table and associated DD 1391 as discussed in Subchapter 3.3. However, Congress occasionally enacts standalone real estate acquisition authorities under NDAAs. *See e.g.,* Pub. L. 118-159, Title XXVIII, Subtitle A, § 2804(c), 138 Stat. 2248 (2024).

C. Project specific land acquisition authorizations require use of Military Construction appropriations or other funding source(s) specified in the legislative language.

Practice Tip: It is imperative that any real estate acquisitions required for a project are expressly called out in the DD Form 1391 and that funding provided is sufficient to cover such acquisitions, plus any administrative fees required to complete them. The acquisition of real property interests cannot be implied from a DD Form 1391 and additional legislation may be required if they are omitted or mentioned but estimated as being at no cost (such as when a land exchange is contemplated). Funding amounts sufficient for administrative costs incurred by the construction

agent in acquiring such real estate interests are also required for acquisitions to proceed.

III. STANDING ACQUISITION AUTHORITIES

A. 10 U.S.C. 2663(c):

1. Permits the Military Department Secretary concerned to acquire any interest in land that:

    a. The Secretary determines is needed in the interest of national defense; and

    b. Does not cost more than $4,000,000, exclusive of administrative costs and amounts of any deficiency judgement.

> **Practice Tip**: Section 2663(c)(2) also includes standing authority for acquisitions up to $1,500,000 that are required to correct a deficiency that is life/health/safety threatening. However, as explained further below, with the increased threshold of $4,000,000 under section 2663(c)(1), the $1,500,000 threshold has essentially become defunct. It appears Congress may have overlooked subsections (c)(2) and (c)(3) when it increased the dollar threshold under (c)(1).

2. Appropriations available for operation and maintenance or construction may be used to acquire interests in land under this section.

> **Practice Tip**: As noted in the section 2805 discussion below, operation and maintenance funding is likely the only appropriate funding source for land acquisition not exceeding $4,000,000, per 10 U.S.C. 2805(c) and implementation policies of the same across DoD.

B. 10 U.S.C. 2805:

1. Prior to the FY25 NDAA, land acquisition projects were not pursued as unspecified minor military construction projects under section 2805. Instead, such projects were pursued under the more specific land acquisition authority of 10 U.S.C. 2663(c), which had a threshold of $750,000 at the time for typical acquisitions and $1,500,000 for acquisitions to correct a deficiency that is life/health/safety threatening. That changed, however, with the enactment of section 2804 of the FY 25 NDAA (Pub. L. 118-159), which:

    a. Amended section 2805(a) to expressly include “land acquisition” as a permissible unspecified minor military construction project; and

b. Amended section 2663(c)(1) to raise the land acquisition threshold from $750,000 to $4,000,000, bringing that threshold in alignment with the operation and maintenance minor construction threshold under 10 U.S.C. 2805(c).

Practice Tip: For projects costing $4,000,000 or less, these amendments essentially created two redundant land acquisition authorities (10 U.S.C. 2663(c)(1) and 2805(c)) and it is not entirely clear how the two will be implemented moving forward (e.g., whether approval through typical minor military construction processes for section 2805(c) should be followed, or if a separate process exists for section 2663(c)(1) projects). Perhaps forthcoming guidance from the Military Departments and/or DoD will clarify, but it is clear that the authority exists either way.

Practice Tip: Presumably, project splitting rules still apply for land acquisitions undertaken as minor military construction projects under section 2805. For example, if the Army had a requirement to acquire land for a new caisson facility, for purposes of assessing the thresholds under section 2805, the Army would presumably need to aggregate the cost of the land acquisition with any construction costs needed to make the facility operational (e.g., installing perimeter fencing and any other construction requirements). Perhaps forthcoming guidance from the Military Departments and/or DoD will clarify.

2. Projects/acquisitions costing $4,000,000 or less are funded from applicable operations and maintenance funding sources. *See* 10 U.S.C. 2805(c). Projects/acquisitions costing more than $4,000,000, up to $9,000,000 are funded from Unspecified Minor Military Construction (UMMC) funding. *See* 10 U.S.C. 2805(a). Projects exceeding the UMMC threshold require project-specific authorization.

IV. LAND ACQUISTION RESTRICTION

A. An authorization for land acquisition, whether under specific statutory authority or a standing authority, does not necessarily provide authority to acquire interests in land at any price.

B. Pursuant to a recurring provision in Military Construction Appropriations Acts (*see e.g.,* Pub. L. 119-37, Div. D, Title I, Sec. 105, 139 Stat. 595 (2025)), funds provided under such acts cannot be used for the purchase of land or land easements in excess of 100 percent of the value determined by USACE or the Naval Facilities Engineering Command, except:

1. where there is a determination of value by a Federal court;

2. where purchases are negotiated by the Attorney General or the designee of the Attorney General;

3. where the estimated value is less than $25,000; or

4. as otherwise determined by the Secretary of Defense to be in the public interest.

V. LEASING AUTHORITIES

A. 10 U.S.C. 2661(b):

1. Permits the Secretaries of Military Departments to lease buildings and facilities from private sources. This authority only applies to leases; it cannot be used to acquire other interests in real property.

2. Leases under section 2661(b) are funded as an operating expense using applicable operation and maintenance funding sources. Because operation and maintenance funds are typically one-year funds, this effectively limits permissible lease terms to one year periods, which may commence at any time during a fiscal year by virtue of 10 U.S.C. 3133.

B. 10 U.S.C. 2675:

1. Permits the Secretaries of Military Departments to lease in foreign countries structures and related real property that are needed for military purposes, other than family housing facilities from private sources, for up to a period of ten years, or fifteen years in South Korea. 10 U.S.C. 2675(a). This authority only applies to leases; it cannot be used to acquire other interests in real property.

2. Rent payment for each year may be paid from funds appropriated for operation and maintenance or military construction for such year. 10 U.S.C. 2675(b).

C. General Service Administration (GSA) Authorities (e.g., 40 U.S.C. 581(c)):

1. GSA has several authorities available that permit it to enter into leases on behalf of other agencies. Unlike title 10 leasing authorities available to Military Components, GSA has express authority and funding mechanisms to directly make repairs and improvements to leased property. *See e.g.*, 40 U.S.C. 581(c)(3), 592, and 1303(e)(2).

2. Rent and related expenses under a GSA lease on behalf of a Military Component is ultimate paid by the Military Component as an operating expense of the applicable fiscal year.

Practice Note: The GSA Administrator has delegated authority to USACE for General Purpose leases with a net annual rent below the lease prospectus threshold established under 40 U.S.C. 3307, with limited exceptions. If a new lease delegation is required, agencies must submit a lease delegation request through the GSA Delegation Data System no less than 36 months in advance of lease expiration if there is a continuing need for the space and the agency wishes to obtain a new delegation to satisfy its space requirement. GSA will evaluate available vacant space and long-term housing plans and notify the agency, in writing, if compatible vacant space is available, and, if so, the delegation request will be denied.

VI. REPAIRS/IMPROVEMENTS TO LEASED PROPERTY

A. Title 10 leasing authorities, such as 10 U.S.C. 2661(b), only provide authority to lease buildings/facilities. They do not provide independent authority to make improvements to such leased facilities (e.g., facility buildouts). To obtain any such desired improvements, Military Components have four options:

Note: Discussion of these four options is limited to the authority and funding aspects and does not account for procedural or other legal requirements such as capital vs. operating lease analyses and Office of Management and Budget scoring requirements, Major Land Acquisition Policy (MLAP) and other leasing approvals, and Justification and Approval for other than full and open competition, which are beyond the scope of this Deskbook.

1. Structure the lease in such a way that the lessor self-finances the construction activities and simply charges the Military Component increased rent once the improvements are complete and the Component is able to enjoy the benefit of such improvements (i.e., pay increased rent once the lease space is improved by the lessor).

Practice Tip: It is critical, particularly for leases under section 2661(b) that do not permit advance payment, that the lessor fully complete improvements before the Military Component pays any form of increased rent for the improvements. Doing otherwise could be viewed as the Military Component improperly procuring construction services through a lease, as opposed to a construction contract pursuant to the Federal Acquisition Regulation (FAR)/Revolutionary FAR Overhaul (RFO), and violates 31 U.S.C. 3324 by requiring the government to pay for improved leased space in advance. For example, structuring a lease so as to provide the lessor with construction progress payments as work progresses is not permissible. Any improvement repayments must be incorporated into the lease and can only be paid once the improvement is complete and the Military Component begins utilization of the improved space.

2. Procure the improvements under independent authority (e.g., 10 U.S.C. 2805 or 2811) extraneous from the lease as a military construction or repair projects, as applicable. This option requires:

    a. Permission from the lessor under the lease or otherwise to conduct the improvement to the lessor's property.

    b. An assessment that appropriated funds involved can appropriately be used to improve personal property. *See* GAO Red Book Vol. III, at 13-214 to 12-218 (3d ed. 2008) (setting fourth limitations and requirements to include a four-pronged test).

    c. Approval of the construction/repair project through typical means and in compliance with applicable processes, to include funding source requirements.

    d. Adherence to the FAR/RFO or other applicable procurement requirements.

3. Have GSA procure the lease and perform the improvements via GSA authorities. GSA then charges the Military Component for the cost of the improvements as added leasing costs as permitted under GSA authorities.

4. Seek express statutory authority that authorizes the Military Component to directly undertake improvements to the leased property and designates the funding source(s) to be utilized.

Chapter 9

Reimbursable Authorities

CHAPTER 9: REIMBURSABLE AUTHORITIES

I. INTRODUCTION

A. Often the stakeholder holding the requirement for a military construction or repair project seeks the assistance of another Military Component to serve as the construction agent for a project. When this occurs, and funding is not suballotted to such construction agent as described in Subchapter 9.1, a reimbursable order, supported by proper authority is required. This chapter discusses three of the most prominent reimbursable order authorities utilized for military construction and repair projects: (1) the Economy Act (31 U.S.C. 1535); (2) the Project Order Statute (41 U.S.C. 6307); and 10 U.S.C. 2818.

> **Citation Note**: At the time of writing of this Deskbook, the Federal Acquisition Regulation (FAR) is being revised in accordance with Executive Order 14275, Restoring Common Sense to Federal Procurement, and Executive agencies are utilizing deviation versions of the FAR, known as the "Revolutionary FAR Overhaul" or "RFO." Therefore, regulatory references herein are to the RFO, not the FAR.

B. Definitions:

1. Assisted Acquisition: A type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order. RFO 2.101.

2. Direct Acquisition: A type of interagency acquisition where a requesting agency places an order directly against a servicing agency's indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order. RFO 2.101.

3. Interagency Acquisition: A procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an assisted acquisition or a direct acquisition. The term includes—

    a. Acquisitions under the Economy Act (31 U.S.C. 1535); and

    b. Non-Economy Act acquisitions completed under other statutory authorities, (*e.g.*, General Services Administration Federal Supply Schedules in subpart 8.4 and Governmentwide acquisition contracts (GWACs)). RFO 2.101.

4. Requesting Agency: the agency that has the requirement for an interagency acquisition, or that needs services. RFO 2.101; DoD FMR Vol. 11A, Ch.3, para. 2.6. "Requesting Agency" is equivalent to "Ordering Agency" used in the Red Book.

5. Servicing Agency: the agency that will conduct an assisted acquisition on behalf of the requesting agency, or that provides services. RFO 2.101; DoD FMR Vol. 11A, Ch.3, para. 2.7. "Servicing Agency" is equivalent to "Performing Agency" used in the Red Book.

II. PROCEDURAL MATTERS: In addition to any documentation requirements specific to the reimbursable authority at issue, all reimbursable orders are subject to DoD/DA documentation requirements for reimbursable orders, to include use of FS Forms 7600A/7600B and G-Invoicing, consistent with DoD/DA implementation guidance. *See e.g.*, DoDI 4000.19, *Support Agreements* (Dec. 16, 2020).

SUBCHAPTER 9.1: Suballotments vs. Reimbursable Orders

I. FUNDING FOR MILITARY CONSTRUCTION PROJECTS: Funding is provided to the designated construction agent via one of two means:

A. A suballotment of funds pursuant to 31 U.S.C. 1513(d).

1. Suballotments represent a direct allocation of funding to the recipient organization and do not constitute an obligation of funds (e.g., Army commands receive their annual operating budgets via suballotments).

2. Within DoD, suballotments are issued via Fund Authorization Documents (FADs).

3. Once suballotted, funds must be used consistent with the purpose, time, and amount of the appropriation from which they are derived.

B. Reimbursable orders pursuant to an applicable fund transfer authority.

1. This process involves the requirement holding entity (i.e., the requesting agency) to place an order with, and transfer funds to, the construction agent entity (i.e., the servicing agency). An applicable fund transfer authority must be identified to overcome the general statutory prohibition under 31 U.S.C. 1532 against fund transfers. The most utilized fund transfer authorities for military construction and repair projects are the Economy Act, 31 U.S.C. 1535, and 10 U.S.C. 2818.

2. Within DoD, reimbursable orders are subject to strict documentation requirements and must be issued using Fiscal Service (FS) Form 7600A, which lays out the general terms and conditions of the arrangement, and individual orders placed thereunder using either FS Form 7600B or DD Form 448, Military Purchase Request (MIPR). Such orders obligate funding consistent with the applicable fund transfer authority and must define the goods/services ordered in specific, definite, and certain terms in satisfaction of the Recording Statute (31 U.S.C. 1501(a)).

3. Once transferred, funds must be used consistent with basic fiscal law requirements, any unique requirements or deviations permitted by the applicable fund transfer authority, and pursuant to the terms and conditions of the reimbursable order.

SUBCHAPTER 9.2: Economy Act Orders (31 U.S.C. 1535)

I. INTRODUCTION: The Economy Act (31 U.S.C. 1535) authorizes federal agencies or major organizational units of agencies to order goods and services from other federal agencies or major organizational units of agencies. In the context of military construction and repair projects performed by USACE or other DoD construction agents, the Economy Act serves as a general statutory authority to perform these services in-house or by contract. As general statutory authority, the Economy Act may only be utilized when a more specific statutory authority, such as the Project Order Statute (41 U.S.C. 6307) or 10 U.S.C. 2818 does not apply.

> **Practice Tip**: When researching "the Economy Act," note that the Economy Act as currently codified at 31 U.S.C. 1535 is one provision of a much broader 1932 New Deal law; older source references to the Economy Act or the Economy Act of 1932, may refer to older, superseded sections. Also, do not confuse the Economy Act with the "Chief's Economy Act," 10 U.S.C. 7036(e) (formerly 10 U.S.C. 3036(d)), which is a separate and distinct authority with narrow applicability that is available only to USACE.

II. REGULATIONS AND POLICIES

A. DoD FMR Vol. 11A, Ch. 3: Economy Act Orders.

B. RFO 17.502-2 and corresponding DoD, Army, and USACE supplements (DFARS, AFARS, UAI).

III. REQUIREMENTS

A. Agencies may place Economy Act orders when:

1. Amounts are available. The requesting agency must have funds which are available for the purpose of the order, which means the purpose of the transaction must be something the requesting agency is authorized to do. Also, orders citing annual or multiple year appropriations must serve a bona fide need of the fiscal years for which the appropriations are available. The Economy Act does not authorize an agency to use another agency to do anything it could not lawfully do itself.

> **Practice Tip**: Because the servicing agency may not be aware of all fiscal limitations of the requesting agency's appropriations, the requesting agency must certify that the funds cited in the Economy Act order are properly chargeable for the purposes cited in the order. *See* DoD FMR Vol. 11A, Ch. 3, para. 6.2. However, it is still incumbent on the servicing agency to seek clarification for unclear or patently incorrect proposed funding sources for an order. *See e.g.*, *id*. at para. 6.3.

2. The requesting agency determines the order is in the best interest of the United States.

3. The servicing agency is able to provide or get by contract the ordered goods or services. The Economy Act does not give a servicing agency any authority that it would not otherwise have. USACE is generally able to provide engineering and construction services to requesting agencies.

4. The requesting agency determines ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

> **Practice Tip**: For orders that involve assisted acquisitions, the requesting agency will determine and certify that the order is in the best interest of the United States and that the requested goods or services cannot be provided as conveniently or cheaply by a commercial enterprise, when it makes the Economy Act Determination and Findings supporting an order as discussed in section V below.

B. Economy Act orders should be reduced to writing in advance, to document the limits of the agreement and to satisfy the Recording Statute. 31 U.S.C. 1501(a).

C. Economy Act Coverage: "The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency." 31 U.S.C. 1535(a).

1. All three branches of Government are covered (executive, legislative, and judicial).

2. The entity must be an agency or instrumentality of the United States Government and, therefore, the Economy Act does not apply to the National Guard when acting in a state agency capacity, Non-appropriated Fund Instrumentalities (NAFIs), Indian Tribes, the District of Columbia Government, or a presidential inaugural committee. *See* GAO Red Book Vol. III at pp. 12-31 to 12-33.

D. Specific Authority Preemption:

1. Consistent with the lex specialis legal doctrine, the Economy Act cannot be used as authority if a more specific authority exists. *See* ER 1140-211 at para. 11.a.

2. More specific authorities that may apply to engineering and construction work include the Project Order Statute (41 U.S.C. 6307) and 10 U.S.C. 2818, as discussed in Subchapters 9.3 and 9.4, respectively.

IV. FUND OBLIGATION RULES

A. An Economy Act order obligates the appropriation of the requesting agency once the order is accepted by the servicing agency. 31 U.S.C. 1535(d). The requesting agency obligates the entire amount of the order when the servicing agency accepts the order. For military construction and repair work, the obligation includes amounts provided for USACE labor and amounts provided for USACE to obligate on contracts.

B. Economy Act Deobligation Rule: A significant limitation of the Economy Act is that the requesting agency must deobligate any funds that have not been obligated by the servicing agency by providing goods or services or entering into a contract before the end of the period of availability of the appropriation. 31 U.S.C. 1535(d).

> **Practice Tip**: This deobligation requirement is specific to the Economy Act and does not apply to non-Economy Act orders such as Project Orders or orders under 10 U.S.C. 2818.

C. This deobligation requirement essentially requires the servicing agency to abide by the same obligation rules that would apply if the requesting agency executed the work itself:

1. Servicing agency labor is obligated when the labor is performed. Any funds provided for servicing agency labor must be returned to the requesting agency prior to fund expiration, unless a statutory exception applies.

2. The servicing agency must execute contracts prior to fund expiration.

3. Contracts for non-severable services, like most construction contracts, obligate all funds required for the entire executed contract scope.

4. Contracts for severable services may cross fiscal years only if the contracts satisfies the requirements of 10 U.S.C. 3133, including that it does not exceed one year in duration.

5. Options are obligated when exercised; if not exercised prior to fund expiration, the requesting agency would need to place a new order with current funds to allow the servicing agency to exercise the option.

V. DETERMINATION AND FINDINGS

A. Pursuant to RFO 17.502-2, each Economy Act order to obtain supplies or services by interagency acquisition (i.e., an assisted or direct acquisition) must be supported by a written determination and findings (D&F) produced by the requesting agency. The D&F must:

1. State that the inter-agency acquisition is in the best interest of the Government;

2. State that the supplies or services cannot be obtained as conveniently or cheaply by contracting directly with a private source; and

3. State that either:

    a. The servicing agency has an existing contract that was created before the Economy Act order that meets the same needs, or

    b. The servicing agency has expertise or abilities to enter into a contract that is not available within the requesting agency. *See* RFO 17.502-2(b).

B. The D&F must be approved by a contracting officer from the requesting agency with authority to contract for the supplies or services or by another official designated by the servicing agency. RFO 17.502-2(b)(4). While the RFO allows another official to be designated by an agency, the Army has kept the approval authority with the contracting officer of the requesting agency. *See* AFARS Appendix GG.

C. The requesting agency must send a copy of the D&F to the servicing agency with the order and the servicing agency should place the D&F in the contract file. *See* DFARS PGI 217.503.

Practice Tip: The Economy Act D&F requirement under RFO 17.502-2 routinely confuses clients and attorneys alike, with many incorrectly believing that a D&F is required for orders that do not involve inter-agency acquisitions (i.e., goods/services provided via in-house labor) or for non-Economy Act orders. The D&F requirement only applies to Economy Act orders under which some portion of the goods/services ordered are being provided via direct or assisted acquisition (i.e., interagency acquisitions). Not only is this expressly contemplated by the D&F requirement being limited to "interagency acquisitions" under RFO 17.502-2(c), but it is also evident by the D&F certifications required under the same, the last of which makes no sense in the context of an Economy Act order that does not involve contracting. Of course, any Economy Act order must satisfy the threshold statutory requirements under 31 U.S.C. 1535(a), which partially mimic the D&F requirements under FAR 17.502-2(c), but there is no statutory or regulatory requirement to memorialize the satisfaction of those statutory requirements in a D&F or other document.

SUBCHAPTER 9.3: Project Orders (41 U.S.C. 6307)

I. INTRODUCTION: The Project Order Statute (41 U.S.C 6307) is a unique statutory authority that allows a DoD entity to order goods and services from another DoD entity and follow fund obligation rules applicable to contracts with commercial enterprises. Thus, funds obligated under a project order for non-severable services remain available to pay the obligation after funds expire until the funds cancel, similar to how appropriations remain available to pay an obligation under a non-severable service contract with a commercial enterprise.

II. REGULATIONS AND POLICIES

A. DoD FMR Vol. 11A, Ch. 2

B. ER 37-1-26, Issuance and Acceptance of Project Orders, 3 August 2020.

III. PROJECT ORDER REQUIREMENTS

A. DoD Entities and DoD-Owned Establishments as Parties:

1. Utilization of the statutory authority for project orders is limited to placement by DoD entities and accepted by DoD-owned establishments. DoD FMR Vol. 11A, Ch. 2, para. 5.4.

a. USACE is considered a DoD-owned establishment, but only for purposes of engineering and construction related products or services. *See* ER 37-1-26, para. 5.c.

b. USACE activities are not permitted to place project orders with one another, with the exception of orders placed with the USACE Engineer Research Development Center (ERDC) using direct funding for RDT&E services. *See id*. at para. 6.c.

B. Military Appropriations only:

1. Project orders can only be accepted for defense purposes and funded with military appropriations (i.e., appropriations provided under Department of Defense Appropriations Acts or Military Construction Appropriations Acts). *See* ER 37-1-26 at para. 5.b. Placement of project orders using Civil Works, non-DoD agency, or NAF appropriations is not permissible. *See id*.

C. Fiscal law principles of Purpose, Time, and Amount still apply:

1. Purpose: The DoD entity placing the order must certify that the funds are properly chargeable for the purposes cited in the order. This should be reflected in the order itself.

2. Bona Fide Need: The underlying project order requirement must serve a bona fide need at the time of project order issuance and acceptance. Usually this should be evident on the approval of the project by the issuing activity.

3. Current and Available: Funds must be current and available at the time of initial obligation which occurs at the acceptance of the project order.

4. Amount: Project Orders must be fully funded at the time of initial acceptance.

D. Non-Severable End Products:

1. Project Orders may only be placed for non-severable or "entire" efforts that result in a single or unified outcome or end-product. DoD FMR Vol. 11A, Ch. 2, para. 5.9.

a. Within USACE, a project order is required for each qualifying non-severable end-product; orders for multiple non-severable end-products (e.g., designs for multiple facilities) are not permitted and should be broken into separate project orders. *See* ER 37-1-26, para. 5.g.

2. Project orders solely for the review of A-E designs services or solely for supervision and administration of construction do not constitute entire, non-severable deliverables and cannot be accepted as project orders.

3. Development of Requests for Proposal (RFPs) or similar preliminary contracting actions cannot be accepted as project orders because: (1) they are merely a step in the procurement process and not entire, non-severable deliverables; and (2) they envision procurement for goods and services for the ultimate deliverable, and thus, run afoul of the 51% in-house restriction discussed in paragraph III.F.

E. Scope of Work Must Be Specific, Definite, and Certain:

1. To meet recording statute requirements, project orders must have a definitive scope of work to be completed within a definitive period or amount of time. DoD FMR Vol. 11A, Ch. 2, para. 5.6. Vague or generic scopes of work are not permissible. *See id*.

2. Scopes of work contingent on a future event and/or further input from the stakeholder are not permissible. *See id*. at para. 5.11.

F. 51% Requirement:

1. Project orders must be "substantially" performed by the accepting DoD-owned establishment, defined as requiring the accepting DoD-owned

establishment to incur no less than 51% of total order costs using in-house resources. *See* DoD FMR Vol. 11A, Ch. 2, para. 5.15.

> **Practice Tip**: This requirement greatly limits the use of project orders and, for USACE, essentially precludes the use of project orders for the traditional execution of repair and construction projects, which USACE predominantly executes via contracts.

2. Within USACE, this 51% standard must be met by the USACE activity that accepts the project order (i.e., assistance provided by other USACE activities does not count toward the 51%). *See* ER 37-1-26, para. 6.b.

G. Work Must Start within Ninety Days: Work under a project order must commence within ninety days of order execution. *See* DoD FMR Vol. 11A, Ch. 2, para. 5.10.2.

IV. OBLIGATION RULES

A. Follow Contract Obligation Rules:

1. Funding under a valid project order is obligated in the same manner as a contract placed with a private contractor for the same services. 41 U.S.C. 6307.

2. This means that funding under a valid, non-severable project order is deemed obligated at the time of order execution and remains available to the servicing DoD-owned Establishment for completion of the work ordered until work is completed, the order is terminated, or funding under the order cancels.

B. No De-Obligation Requirement:

1. The project order statute contains no de-obligation language similar to that of the Economy Act. Funds remain obligated on project orders consistent with general contract obligation rules and DoD project order implementation guidance.

C. Modifying Project Orders:

1. After initial acceptance of a project order, the project order can be modified through its life like a contract with a commercial enterprise. *See* DoD FMR Vol. 11A, Ch. 2, para. 5.14. Modifications that are within the general scope of the initial project order are funded with funding available at the time or order execution, whereas modifications that increase or change the original scope of work are funded with current funds. *See id*.

D. Terminating Project Orders:

1. An issuing activity can terminate a project order for non-execution or default at any time.

2. If work does not commence within ninety days of acceptance, the order should be cancelled and the issuing activity should be notified immediately.

3. Terminated or cancelled project orders must have funds de-obligated and returned to the issuing activity.

SUBCHAPTER 9.4: 10 U.S.C. 2818

I. INTRODUCTION AND BACKGROUND

A. As discussed in Chapter 6, few military construction projects are completed without unexpected changes. Such changes often result in antecedent liability cost increases that require expired funding. This is particularly true for projects funded with one-year appropriations. However, due in part to complicated accounting processes, it often takes installations anywhere from months to the better part of a year to obtain expired funds for such purposes, which delays project execution and further increases project costs.

B. Beginning as early as 2018, USACE began pursuing legislation to address this issue. Initially, USACE pursued a limited exception to the Economy Act deobligation requirement under 31 U.S.C. 1535(d) that would permit the requesting agency under an Economy Act order to provide, and the servicing agency to retain, contingency funding throughout the duration of an order. These initial efforts gained little traction until DoD gained interest in the effort circa 2022 and recommended that the legislation be expanded to an entirely new reimbursable authority for military construction and repair projects. The revised legislative proposal then took a few years to garner congressional interest, but Congress eventually enacted it as section 2843 of the FY25 National Defense Authorization Act (Pub. L. 118-159), which codified the authority at 10 U.S.C. 2818.

C. DoD has not promulgated implementation guidance for the authority to date and, instead, the individual Military Departments, and subcomponents of the same, have issued their own implementation guidance. This Subchapter discusses the authority as implemented by USACE, following coordination with offices of the Headquarters, Department of the Army (HQDA).

II. REGULATIONS AND POLICIES

A. CERM Memorandum, *Reimbursable Authority for Design and Construction of Department of War Facilities (UPDATED)* (Feb. 23, 2026) (USACE 2018 Policy).

III. USACE IMPLEMENTATION

A. Entities the Authority Applies To:

1. As provided under section 2818(a), the heads of elements of DoD, as defined under 10 U.S.C. 111(b), may utilize the authority.

2. Congressional staff added this language without coordinating with DoD or the Military Departments. The language submitted by DoD provided for “the

head of a department or organization within the Department of Defense," following verbiage under 10 U.S.C. 2571(b)(1).

3. Initially, there was concern that this language precluded orders between two commands under the same Military Department or DoD "elements" as defined under section 111(b) (e.g., Army to Army orders). Although section 111(b)(11) references subordinate commands, it does so in the context of the commands being subcomponents of DoD elements, not standalone elements by themselves.

4. However, the legislative history suggests that the committee staff revisions were merely intended to streamline the legislative text and not alter the intent of the original proposed language. *See* H.R. Comm. on Armed Services, 118th Cong., Doc. No. 2, at 1179 (Comm. Print 2025) (stating the intent of the provision using the originally proposed language "to allow the head of a department or organization within the Department of Defense to place an order, on a reimbursable basis, with any other such department or organization . . ."). Thus, with HQDA concurrence, USACE implemented the authority as applying both between DoD "elements" and between subcomponents of such "elements."

5. Pursuant to USACE implementation guidance, USACE commanders are authorized to accept section 2818 orders following typical USACE work acceptance delegations. *See* para. 4.c. of USACE 2018 Policy. USACE defers to the requesting activity to determine the proper official with authority to place section 2818 orders with USACE. *See id*.

B. Work That Can Be Ordered Under the Authority:

1. Section 2811(a) permits DoD elements to place contracts/orders with one another ". . . for the design and construction of facilities of the Department of Defense, including facility maintenance and repair projects and unspecified minor military construction projects under [10 U.S.C. 2805], on a reimbursable basis."

2. Committee staff replaced the term "order" in the DoD proposed legislation with "contract" without consulting DoD or the Military Departments. However, consistent with the committee print excerpt cited above, it appears that this change was just an effort to streamline the language in the committee's view and not alter the substance. Additionally, the "on a reimbursable basis" language and the fact that contracts in the traditional FAR-sense between two federal agencies are unworkable, suggests that Congress intended the authority to operate as a typical reimbursable authority. *See* para. 4.d. of USACE 2018 Policy.

3. The authority only applies to orders for the design and construction of DoD facilities, which USACE has interpreted as only applying to non-severable orders for the complete design and/or construction of a facility, and not severable services, such as facility operations support. *See id*. at paras. 4.b. and 4.e.iv.

    a. The authority does not apply to advance planning/budgeting/programming activities that precede the design phase of a project (e.g., 1391 development).

    b. The authority should also not be used to inappropriately segment portions of the design or construction phases of a project into severable, non-beneficial components standing alone.

C. Authority Flexibilities:

1. Section 2818(b) permits orders to be treated the same as contracts with the private sector for fund obligation purposes. This enables application of typical bona fide needs severability rules to order and permits obligation at the time of order execution of the entirety of funds needed to complete work under a qualifying non-severable order, to include in-house costs of the servicing agency.

> **Example**: An Army installation places a valid section 2818 order with USACE in FY26, citing FY26 Operation and Maintenance, Army (OMA) funds, to repair a barracks facility. At the time of order execution, the installation must obligate the full amount of funding needed for both: (1) contracts to be awarded by USACE; and (2) USACE in-house labor support necessary to complete the repair project. Such funding remains obligated and available for USACE expenditure for the work until the project is complete. Thus, despite the funds otherwise being expired come FY27, USACE can continue to utilize the funds to award contracts and pay in-house labor costs until such time as work is complete under the order, the order is terminated, or the funds cancel. Note that any contingency amount up to 10 percent of the order is also obligated at the time of order execution as discussed below.

2. To avoid potential abuses of USACE holding funding for installations and potentially raising bona fide need concerns, USACE adopted the standard for project orders under 41 U.S.C. 6307, as implemented under DoD FMR Vol. 11A, Ch. 2, that work must commence on an order within 90-days of order acceptance. *See* para. 4.e.iv. of USACE 2018 Policy.

3. Additionally, satisfying the original DoD/DA intent of the authority, section 2818(c) permits the obligation of up to 10 percent of the proposed value of an order for contingency expenses. This is an exception to the typical fiscal law

rule that requires obligations be limited to the liability known at the time an obligation is incurred.

a. The amount of contingency funding obligated is discretionary and subject to negotiation between the requesting and servicing agencies up to a maximum of 10 percent. 10 U.S.C. 2818(c); USACE 2018 Policy, para. 4.f.

b. Funding retained for contingency is not a slush fund available for any costs related to a project (e.g., out-of-scope additions). Instead, contingency funding must be used only for cost increases that fall within the scope of the original order. *See* para. 4.f. of USACE 2018 Policy.

c. If contingency costs exceed the amount of contingency funding obligated on an order, the servicing agency must request additional proper funding from the requesting agency following standard processes for reimbursable orders. *See id.*