Has DOD "Repaired" a Component of the Construction Funding Analysis?

M. Warner Meadows
Professor, Contract Law Department
The Judge Advocate General's School, Charlottesville, Virginia

On 2 July 1997, the Department of Defense (DOD) developed a new standard definition of repair to be applied in a consistent manner throughout the DOD.[1] The new definition of repair implements the statutory guidance concerning the proper use of funds for construction projects.[2] This article introduces the new definition, its application to construction projects, and its place in the process of determining which pot of money to use when funding a construction project.

Funding

The first question to ask is why all the hoopla over a new definition of repair? To put the new definition of repair into perspective, it is important to give a brief overview of the construction funding process. In this era of decreasing budgets and decreasing funds, using the correct pot of money is vital to avoiding an Antideficiency Act[3] (ADA) violation.

In most construction contracts, there are three pots of money from which to choose. Which appropriation the construction funding planner uses is based on the final total of the funded construction costs. For projects greater than $1.5 million, the construction funding planner uses military construction funds specifically appropriated by Congress in the annual Military Construction Appropriation Act. For projects greater than $500,000 but less than $1.5 million, minor military construction funds are available. These funds are also appropriated each year by Congress in the annual Military Construction Appropriation Act.[4] For projects $500,000 or less, the DOD construction planner must use Operation and Maintenance funds (O&M).[5] Most installations fund routine operations with O&M. Additionally, the military services use O&M funds for military construction activities performed in furtherance of specific operational requirements.

Which Pot of Money Should Be Used?

How the construction funding planner determines which pot of money to use is a multi-step process. First, the planner must determine the scope of the project. Simply put, the scope of the project is the project size. Is the planned work one project or two? One building or two? Does it include all aspects of the project, or can the project be legitimately divided? These questions must be answered before continuing the construction funding analysis.

A military construction project includes all military construction work necessary to produce "a complete and usable facility or a complete and usable improvement to an existing facility."[6] An agency may not treat "clearly interrelated" construction activities as separate projects.[7] If an agency does treat "clearly interrelated" construction projects as separate projects, the agency risks engaging in illegal project splitting. Normally, project splitting is done to avoid exceeding monetary thresholds, thereby allowing the agency to use a different type of funding than would otherwise be appropriate. In most cases, an agency will engage in project splitting when appropriate to avoid exceeding the $500,000 threshold for the use of O&M

1. Memorandum, Office of the Secretary of Defense, Comptroller, subject: Definition of Repair and Maintenance (2 July 1997) [hereinafter Repair Memo].

2. *See* 10 U.S.C. § 2811 (1994).

> Using funds available to the secretary concerned for operation and maintenance, the secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility . . . . A repair project costing more than $5 million may not be carried out . . . unless approved in advance by the secretary concerned. In determining the total cost of a repair project, the secretary shall include all phases of a multi-year repair project to a single facility. In considering a repair project for approval, the secretary shall ensure that the project is consistent with force structure plans, that repair of the facility is more cost effective than replacement, and that the project is an appropriate use of operation and maintenance funds.

3. 31 U.S.C.A. § 1341 (West 1996). Exceeding a monetary threshold essentially means that the construction funding planner obligated appropriated monies for the wrong purpose, thereby violating the Purpose Statute. *Id*. § 1301.

4. A minor military construction project is a military construction project that has an approved funded cost equal to or less than $1.5 million. However, if the military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, a minor military construction project may have an approved cost equal to or less than $3 million. 10 U.S.C. § 2805(a)(1).

5. *Id.* § 2805.

6. *Id.* § 2801(b). *See* The Honorable Michael B. Donley, B-234326, 1991 WL 315260 (Comp. Gen. Dec. 24, 1991).

7. The Honorable Bill Alexander, House of Representatives, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

funds. Typically, this is because the installation commander has the delegated authority to approve such construction projects and does not need approval from a higher level.[8]

After determining the scope of the project, the construction funding planner must next define the work. This is done by asking whether the work is maintenance, repair, construction, or a combination of the three. Identifying the nature of the work is vital, because only the construction costs are taken into account when determining whether a project meets a funding threshold.

Last, the construction funding planner must determine the "funded" and "unfunded" project costs. Although this is arguably the easiest step in the process, it is fraught with controversy. Unfunded costs are costs which are charged against appropriations other than those which are directly paying for the construction project. For example, unfunded costs include costs funded by military personnel appropriations,[9] planning and design costs,[10] government equipment used in the project,[11] and excess distributions from other agencies.[12] Although unfunded costs do not apply toward the military construction thresholds, these costs must be reported to higher headquarters and must be listed in the contract file for approval. As a general rule, a cost is a funded cost if it is not specifically listed as an unfunded cost. Funded costs *do* factor into the equation of which funds the construction funding planner uses. Typical examples of funded costs include materials and supplies, non-active duty military labor, military personnel TDY costs, value of real property, and transportation and relocation costs. These items are specifically listed in the regulations and instructions of each agency.[13]

When this analysis is complete, the construction funding planner will have a final total of the funded construction project costs. The next step is to simply compare that amount with the monetary thresholds. If the funded construction costs are $500,000 or less, the planner uses O&M funds. If the project is greater than $500,000 but not more than $1.5 million, the planner uses unspecified minor military construction funds. If the funded construction costs are more than $1.5 million, the installation must go through the chain of command to request that Congress specifically approve and fund the project.

The final step is to determine the approval authority, which is also based on the construction thresholds. Generally, for projects $500,000 or less, the major command has delegated approval authority to the installation commander. For projects between $500,000 and $1.5 million, the service secretary has approval authority.[14]

Defining "Repair"

The focus of the new DOD guidance is the determination of whether work can be classified as repair, maintenance, or construction.[15] The classification is crucial, because only the funded construction costs apply toward the funding thresholds. As more costs are attributed to repair or maintenance, fewer are classified as construction, and the chances that a project will remain within a funding threshold are increased. Of course, when constructing an entirely new facility, all costs are classified as construction.[16] The issue of how to classify costs, however, is vital when performing construction work on an existing facility. But, how does one distinguish construction costs from maintenance and repair costs?

Assuming that the construction funding planner is preparing a project for an existing facility, the determination of what is construction, repair, or maintenance is essential for identifying which funds must be used. Military construction is any construction, development, conversion, or extension of any kind

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8. U.S. DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION, app. B, para. B-1 (30 Aug. 1994) [hereinafter AR 415-15]; U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 65-601, BUDGET GUIDANCE PROCEDURES, vol. 1, tbl. 9-1 (21 Oct. 1994) [hereinafter AFI 65-601]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 11010.20F, FACILITIES PROJECT MANUAL, app. B, tbl. 1 (7 June 1996) [hereinafter SECNAV INSTR. 11010.20F].

9. For example, the salaries of military personnel would be included in these costs.

10. These costs include architect and engineer efforts, as well as environmental studies.

11. Equipment and maintenance and operation costs are funded costs.

12. These distributions are received on a non-reimbursable basis, but transportation costs are funded.

13. SECNAV INSTR. 11010.20F, *supra* note 8; AFI 65-601, *supra* note 8, para. 9.14; U.S. DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, glossary (2 July 1987) [hereinafter AR 420-10]. *Army Regulation (AR) 420-10* only specifically defines unfunded costs. Use the previous Army guidance (*AR 435-10*) for examples of funded costs.

14. AR 415-15, *supra* note 8, para. 3-1; AFI 65-601, *supra* note 8, para. 9.9; SECNAV INSTR. 11010.20F, *supra* note 8.

15. If the construction funding planner cannot legitimately segregate the costs, all of the project costs must be treated as construction. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 32-1032, PLANNING AND PROGRAMMING REAL PROPERTY MAINTENANCE PROJECTS USING APPROPRIATED FUNDS (APF), para. 3.3 (11 May 1994) [hereinafter AFI 32-1032].

16. The term facility means a building, structure, or other improvement to real property. 10 U.S.C. § 2801 (1994). This definition includes buildings, bridges, roads, dams, etc. *Id*.

carried out with respect to a military installation.[17] This includes the acquisition, installation, and assembly of a new facility,[18] as well as work on an existing facility. An expansion or extension to real property is one which changes the facility to add to its overall external dimensions.[19] An alteration is work to the interior or exterior of a facility that changes its current purpose, and it includes the installation of equipment which is made a part of the existing facility.[20] When the interior or exterior arrangements of a facility are changed for a new purpose (for example, changing from an administrative facility to a barracks building or vice-versa), this is a conversion.[21] Replacement of a real property facility (complete rebuilding of the facility) that has been destroyed or damaged beyond economical repair is also construction.[22] All of these projects are considered to be construction when calculating which pot of money to use.

Maintenance and repair are not construction; therefore, they are not factored into the funding analysis. Maintenance is defined somewhat differently by each service, but it is essentially recurrent work required to preserve or to maintain a facility in such a condition that it may be used for its designated purpose.[23] It is day-to-day work required to preserve real property facilities and to prevent system components from prematurely wearing out and failing.[24] Generally, maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done on such parts to minimize or to correct wear and tear and to ensure the maximum reliability and useful life of the facility or component.[25] Examples of maintenance include elimination of hairline cracks, cyclic painting, waterproofing, cleaning of wood floors, grass cutting, fertilization, road surface treatment, dredging to a previously established depth, and filling joints.

Former Use of "Repair"

The crux of these definitions is the determination of what is repair. Prior to the new DOD standard definition, each military service treated repair work differently. The Navy's guidance stated that repairs may include modifications or additions of building or facility components or materials which are required for compliance with "current life safety standards, recognized national or regional building codes, or environmental rules or regulations."[26] The Air Force defined repair as work that is required for any facility or facility component to restore its safe, effective, and economical support of assigned missions and organizations.[27] The Air Force definition included the following example of repair: "restoration or replacement of components and systems that have worn out, failed, or exceeded their economic life, by installing modern, reliable, maintainable, functional, economical, and energy-efficient materials and equipment."[28] The definition also included: (1) work necessary to rectify fire or other occupational safety and health code deficiencies; (2) modifications to utility systems to reduce O&M costs or to provide more reliable services by increasing capacity or efficiency necessary to support current requirements;[29] (3) the addition, removal, or rearrangement of non-loadbearing walls either to restore a building to functional standards[30] or to facilitate the consolidation of similar functions or organizations; and (4) the inactivation or removal of excess facilities.[31]

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17. *Id*. §§ 2801(a)-(b). Military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the secretary of a military department or the secretary of defense. *Id*. § 2801(c)(2).

18. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

19. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

20. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

21. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

22. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8. *But see* 10 U.S.C. § 2854 (1994) (providing that a service secretary may repair, restore, or replace a facility that is damaged or destroyed). O&M funds will be used if the cost of replacement is less than $500,000. The secretary of defense has restricted use of this authority to complete replacement or major restoration of a facility that is urgently required.

23. AR 420-10, *supra* note 13, glossary.

24. AFI 32-1032, *supra* note 15, para. 3.3.

25. SECNAV INSTR. 11010.20F, *supra* note 8.

26. *Id.* para 4.1.1.

27. For example, building, utility system, or other real property infrastructure. SECAF INSTR. 32-1032, *supra* note 15, para. 3.3.2.

28. *Id.*

29. *Id.*

Generally, all of the services agreed that repair was the restoration of a facility for use as its designated purpose by overhauling, reprocessing, or replacing parts or materials which have deteriorated from the elements or from wear and tear in use and which have not been corrected through maintenance.[32] Repair was also defined as work required to restore safe, effective, and economical support of an assigned mission.[33] Although neither the Army nor the Air Force definitions included building codes or environmental laws, can these definitions of repair be read to include these requirements? Do these definitions encompass Occupational Safety and Health Administration requirements, handicapped requirements, or other safety needs?

In past practice, the answers to these questions depended on whom you were asking. It was not uncommon for installation level offices and major commands to interpret these provisions differently. Nonetheless, work was regularly classified as repair when the work was necessary to meet building codes, environmental requirements, or other safety requirements. Were all of these actions ADA violations? The answer hinges on the individual facts of each project. Generally, the services commonly classified such work as repair, and the GAO did not question the practice. Of course, the old axiom that "everyone else is doing it" does not make the practice correct. It was in this context that the DOD announced the new standardized definition of repair. It is the DOD's effort to settle the issue, and it is certainly a step in the right direction. Unfortunately, the new definition is not without its problems.

The New DOD Definition

The DOD memorandum which defines repair states that 10 U.S.C. § 2811 "provides authority for the Department to carry out repair projects costing more than $5 million using O&M funds, provided that they are approved in advance by the Secretary concerned."[34] Although the DOD guidance discusses repair authority for projects greater than $5 million, the military services are logically assuming that the new definition of repair applies to all repair projects, regardless of cost. The memorandum further states that "in order to ensure that this authority is being applied in a consistent manner throughout the [DOD], we have developed the attached standard criteria for determining what constitutes a repair project. These criteria should be applied to all future projects."[35]

The new "criteria" or definition of repair has three parts. To appreciate the impact of this new definition of repair, it is necessary to analyze each part. The first part states that "repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated purpose."[36] With the exception of taking out the verbiage "by overhaul, reconstruction, or replacement" and defining how the facility came to be in need of repair through "the elements or wear and tear in use," the definition for repair remains essentially the same as past practice by the services. These differences, however, have major ramifications.

The lack of specific guidance greatly expands the contracting officer's discretion. The former repair definitions gave the construction funding planner guidance on how to restore (for example, "by overhaul, reconstruction or replacement"), but the term "restore" is now undefined. Does the new definition mean that an installation can now tear down an entire facility and then "restore" the facility through a complete rebuild? Obviously not, but the lack of guidance begs the question of how far the construction funding planner can go in restoring a facility. Also, up to what level can a facility be repaired so that it can "effectively be used for its designated purpose?" This leads to issues such as whether "replacement" can be state-of-the-art or in-kind and to what extent cost is a factor in the determination of how to bring a facility back to its effective use. This issue existed under the previous definitions of repair, and it continues under the new definition.

Another issue in this part of the definition is what is meant by the facility's "designated purpose." This was a problem with the previous definition. All work necessary to change a building from one designated purpose to another is considered to be "conversion" and is classified as construction. One variant on this theme was that, if the repair work would have been necessary (for example, the repair of a leaky roof) even without the conversion, the work could be classified as repair. Deciding what repair work was due to the conversion, however, was a difficult task and allowed for abuse by planners who were attempting to keep the funded construction costs down.

30. Defined as that necessary to make an existing building fully functional and capable of supporting assigned mission or organizations effectively and efficiently. *Id*. para. 3.3.2.1.

31. *Id.*

32. AR 420-10, *supra* note 13, glossary.

33. AFI 32-1032, *supra* note 15, para. 3.3.2.2. If the cost to repair an entire building is greater than $3 million, the repair must be financed with military construction money. This only applies to an entire building renovation; it does not apply if the decision is made to repair parts of the building only.

34. Repair Memo, *supra* note 1. Although titled "Definition of Repair and Maintenance," the memorandum did not offer a definition or guidance on maintenance.

35. *Id.*

36. *Id.*

The new DOD definition has criteria which must be read in conjunction with the new definition and which might answer some of these questions. The first criterion provides:

> [W]hen repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demands/standards. Interior rearrangements (except for load bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental) may be included as repair.[37]

This answers the question of the extent to which a facility can be repaired. Under the new definition, repairs may include replacement, can be state-of-the-art, and can provide more capacity than the original unit. But once again, the question of how far a military service can go in repairing to state-of-the-art levels or in providing for more capacity is uncertain. For example, if a facility has window air-conditioning units and one needs to be repaired, can the repair be in the form of replacement by central air-conditioning? It is certainly state-of-the-art and provides for more capacity than the original unit due to increased demands and standards. It meets the new test, but the "old test" still remains—does it make sense? If a regulation or code requires central air-conditioning, the planner has a stronger argument. The extent to which an installation can "provide for more capacity" is fact-specific, and the planner should proceed with caution. One window air-conditioning unit in a 100-room barracks/dormitory does not justify replacement with state-of-the-art central air-conditioning for the entire facility. The unit can certainly be replaced with a new, stronger BTU unit. On the other hand, if many of the units are in failing condition and the construction funding planner plans to replace all 100 units, the installation of central air may well be justified. In fact, it may be cheaper than replacing all of the window units. Note, however, that the cost of the replacement is not a factor in this new criterion. Therefore, cost will not necessarily dictate whether the replacement of a facility component is repair or construction, but it may be a factor to consider when determining the level of repair.

Another issue that frequently arises with repair work is whether replacement in-kind is required. For example, under the old definition, for a project to be considered repair, worn carpet had to be replaced with new carpet and old tiles with new tiles, but old tiles could not be replaced with new carpet.[38] Does the new criterion change this general rule? Although the safest answer may be "no," the agency may well have greater latitude with this issue than ever before. Indeed, the new criterion provides that work which is associated with meeting current standards, codes, or environmental regulations constitutes repair. It specifically states that "the replacement can be up to current standards or codes" and later clarifies by referring to "accessibility, health, safety, and environmental laws and regulations."[39] The best argument in support of replacement of one item with a different type of item is to argue that the new product is state-of-the-art, meets current code requirements, meets increased demands, or allows for more effective use of the facility. In the area of fiscal law, "silence is not golden."[40]

Do the new criteria clear up the issues involved when a conversion incorporates repair work that would have been necessary even without the conversion? At this point, no. The first criterion provides for "interior rearrangements . . . and restoration of an existing facility to allow for effective use of existing space."[41] However, this fails to answer the conversion question and creates a different issue. The definition of an "alteration" is a change in the interior or exterior arrangements of a facility to improve its current purpose, and alterations are classified as construction. The new criterion for repair concerning rearrangements is similar to the construction definition of alteration. Does this mean that the DOD guidance redefines certain construction work as repair? The most likely answer is no. In order to take advantage of the ability to rearrange interiors to allow for effective use of existing space and to classify the work as repair, the facility must still be in need of repair; if not, the work is still classified as construction.

"Conversion" is defined as work necessary to change the interior or exterior arrangement of a facility so that it may be used for a new purpose.[42] Although this work is classified as construction, all of the services have interpreted the provision as still allowing some of the work to be classified as repair.[43] The general rule has been that any repair work that would have been necessary whether the facility was being converted or not

37. Repair Memo, *supra* note 1.

38. AFI 32-1032, *supra* note 15, subch. 3.3.

39. Repair Memo, *supra* note 1.

40. Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (holding that one may obligate appropriated funds only when authorized by Congress).

41. Repair Memo, *supra* note 1.

42. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

would still be considered repair. Conversely, any work which is only mandated because of the conversion is construction. The problem has been where to draw the line.

Imagine a warehouse that has been sitting vacant on an installation for twenty years and which is in obvious need of repair. The decision is made to convert it to a teaching facility. Is all of the work dictated by the conversion and considered to be construction? Or, since the building is falling apart and needs to be repaired anyway, should all of the work be considered repair? The criteria for the new definition do not shed any light on this issue. The last part of the first criterion states that "additions, new facilities, and functional conversions must be done as construction."[44] This simply reiterates the guidance in the definition of construction; therefore, it is still necessary to follow the guidance provided by individual service regulations or instructions. Planners should be wary of efforts to classify any work in a conversion project as repair. Even if the work may be legitimately classified as repair, the planner should be sure that such a classification makes sense. If defining the conversion work as "repair" keeps the project below a funding threshold, the project deserves a second, and perhaps a third, look.

The final criterion in the DOD memorandum states that "construction projects may be done concurrent with repair projects as long as the projects are complete and usable."[45] This brings the analysis full circle back to the issue of project scope. Remember, a project includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Although the work can be segregated into construction, repair, or maintenance, the construction planner must still fund a complete and usable facility.

The new standardized definition of repair and its criteria for implementation provide the DOD and the services with additional guidance in determining what is repair. The definition has its problems, but, overall, the guidance is helpful. Of particular benefit are the criteria for repair which allow for state-of-the-art replacement; increase in capacity and efficiency; and compliance with building, health, and environmental codes and regulations.

The issue now becomes how the services plan on implementing the new DOD standard definition of repair.[46] An example is the Army's implementing memorandum, which was issued on 4 August 1997.[47] It characterizes the new DOD definition as "more liberal,"[48] and it states that the new definition "expand[s] [the Army's] ability to provide adequate facilities for our soldiers and civilians."[49] The memorandum provides additional basic guidance and examples for using the new definition.

The Army's Implementation

Called "the basic guidance for the new definition of repair,"[50] the Army's memorandum provides some valuable tests which the construction funding planner must meet before characterizing the work as repair. First, "a facility must exist and be in a failed or failing condition in order to be considered for a repair project."[51] Although this seems elementary, the categorization of work as "repair" is subject to great abuse. This rule prevents abuses such as repainting the commander's office simply because he does not like the color then replacing the relatively new carpet because it no longer matches the paint. These projects can still be accomplished, but they can no longer be characterized as repair. Therefore, the first step in the process must be a legitimate determination that the facility or component thereof is in a failed or failing condition.

The second part of the Army guidance, however, is extremely troublesome. It states:

> [W]hen repairing a facility, you may now bring the facility (or a component of the facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair

43. AR 420-10, *supra* note 13; AFI 32-1032, *supra* note 15, subch. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8, para 4.1.1.

44. Repair Memo, *supra* note 1.

45. *Id.*

46. The author does not anticipate any additional Air Force guidance on implementing the DOD standard definition, because the new definition is virtually the same as the previous Air Force definition.

47. Memorandum, Department of the Army, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter Army Memo].

48. *Id.* The Army's characterization of the new definition as being more liberal should give the reader an idea of how the Army plans to implement the new DOD guidance.

49. *Id.*

50. *Id.*

51. *Id.*

> project. Another example would be adding air-conditioning to meet a current standard when repairing a facility.[52]

The Army guidance appears to indicate that once the construction funding planner determines that a facility needs to be repaired, the planner can undertake all work necessary to meet applicable codes or standards and can classify it all as repair. This would effectively open the floodgates to allow construction costs to flow in as repair. Imagine, for example, the following scenario. Upon inspection of a barracks building, the inspector discovers a crack on one interior wall. The building needs repair, because it has failed or failing components. The building has no air-conditioning, and service regulations require central air-conditioning in barracks buildings. According to the Army guidance, the installation may now repair the wall, install the air-conditioning, and classify all of the work as repair. Since such repair and maintenance costs do not count toward the construction funding threshold, the Army could use O&M funds, regardless of cost. Incredible as it may seem, this is exactly what the Army guidance recommends.

If interpreted in this manner, the guidance will create many problems. First, it is inconsistent with the definition of construction, which includes alteration of the interior or exterior arrangements of a facility to improve its current purpose, including the installation of equipment which is made part of the existing facility. Installed equipment includes built-in furniture, cabinets, shelving, venetian blinds, sprinkler systems, fire alarms, and heating and air-conditioning systems.[53] Second, it violates the new DOD definition of repair, which states that "the components of a facility may be repaired by replacement."[54] Replacement is the key word; the component that is being replaced has to exist first.

Not every action taken pursuant to this guidance is illegal, but caution and common sense must be exercised. Interpretations that are clearly inconsistent with long-standing guidance will invite scrutiny from Congress and the GAO—scrutiny that the commander and the Army may not want. If a building needs a new roof and, at the same time, exhaust fans that did not exist are added to bring the building up to code, it is legitimate to classify all of this work as repair. However, common sense dictates that work that has no connection to the need for the facility repair should be classified as construction. Each case must be judged on its own facts.

The Army guidance also attempts to remind the construction funding planner that "pursuant to the new definition, moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction."[55] The word "additions" could be construed as a limitation on the ability to add compliance work to any repair project. However, this word alone neither legitimizes nor contradicts the general guidance. "Addition" traditionally means adding rooms, space, or size to a facility.[56] Thus, the Army's guidance does not prevent the addition of the air-conditioning system in the scenario described above.

Finally, the Army guidance reminds the construction funding planner to ensure that the facility is in need of repair. "Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when the component or facility is not in need of repair, is *construction*."[57] This is important, because work required to bring a facility up to building, safety, health, or environmental standards cannot be classified as repair unless the facility is already in a failed or failing condition.

Conclusion

The DOD's new definition of repair is a valiant effort to help ensure the proper funding of military construction projects and to standardize an area which was previously marked by disparity among the military services. The new definition and implementation criteria are very useful to the construction funding planner, provided they are properly implemented. The construction funding planner cannot substitute the new definition and its criteria for the common sense and caution that construction funding planners must continue to bring to the decision-making process. Worse, if the enhanced flexibility given by the new guidance is abused, the military services face the potential loss of the significant benefits the new definition provides.

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52. *Id.*

53. AR 415-15, *supra* note 8, para. 2-3; AFI 32-1032, *supra* note 15, para. 3.3; SECNAV INSTR. 11010.20F, *supra* note 8.

54. Repair Memo, *supra* note 1.

55. Army Memo, *supra* note 47.

56. Repair Memo, *supra* note 1.

57. Army Memo, *supra* note 47 (emphasis added).