

Appendix A

Department of Defense Legislation for Fiscal Year 2005

While the appropriations bills impacting civilian agencies languished in the hallowed halls of the Capitol until after the fiscal year's end, the Congress finished worked on the DOD Appropriations Act by mid-summer and completed the Ronald W. Reagan National Defense Authorization Act, 2005, weeks later. As in years past, this year's *Year in Review* addresses some of the more significant provisions in the annual DOD legislative acts that impact the government contracting and fiscal law fields, as well as a few other provisions some may find interesting.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2005

President Bush signed into law the Department of Defense Appropriations Act, 2005, on 5 August 2004.¹ The Act appropriated approximately \$391.1 billion to the DOD for fiscal year (FY) 2005.² This amount is approximately \$25.3 billion more than Congress appropriated for the DOD in FY 2004 and only about \$1.6 billion less than President Bush requested for FY 2005.³

Emergency and Extraordinary Expenses and Combatant Commander Initiative Fund

Congress continued to authorize the Secretary of Defense (SECDEF) and the Service Secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."⁴ In addition, Congress made available to the SECDEF \$40 million in the Defense-Wide O&M appropriations for the Combatant Commander Initiative Fund⁵ account.⁶

Overseas Contingency Operations Transfer Account

Congress appropriated \$10 million this year for "expenses directly relating to Overseas Contingency Operations by U.S. military forces"⁷ As in past years, funds appropriated to this account remain available until expended; however, the

¹ Department of Defense Appropriations Act 2005 (DOD Appropriations Act), 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 108-622, at 67 (2004). See also H.R. REP. NO. 108-553 (2004); S. REP. NO. 108-284 (2004).

² H.R. CONF. REP. NO. 108-622, at 388. The Conference Report breaks down the several appropriations as follows:

Military Personnel	\$103,731,158,000;
Operations and Maintenance	\$121,062,969,000;
Procurement	\$77,679,803,000;
Research, Development, Test, and Evaluation	\$69,932,182,000;
Revolving and Management Funds	\$2,378,836,000;
Other DOD Programs	\$20,655,510,000.

Id. at 70, 97, 139, 239, 360-61.

³ *Id.* at 346.

⁴ 2005 DOD Appropriations Act, tit. II. Congress capped this authority at \$11,144,000 for the Army, \$4,525,000 for the Navy, \$7,699,000 for the Air Force, and \$32,000,000 for the DOD. *Id.*; see also 10 U.S.C.S. § 127 (2004) (authorizing the Secretary of Defense, the DOD Inspector General, and the Secretaries of the military departments to provide for "any emergency or extraordinary expense which cannot be anticipated or classified").

⁵ Formerly known as "CINC Initiative Funds," the National Defense Authorization Act, 2004, re-designated the account as the "Combatant Commander Initiative Fund." Pub. L. No. 108-136, § 902, 117 Stat. 1392, 1558 (2003) (amending 10 U.S.C. § 166a (2000)).

⁶ 2005 DOD Appropriations Act, tit. II (Operation and Maintenance, Defense-Wide); see also 10 U.S.C.S § 166a (2004) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the Combatant Commander Initiative Fund to combatant commanders for specified purposes). The Act also provides \$4,000,000 "for expenses relating to certain classified activities." 2005 DOD Appropriations Act, tit. II (Operation and Maintenance, Defense-Wide). The funds remain available until expended and the SECDEF is granted authority to transfer such funds to operations and maintenance appropriations or research, development, test and evaluation accounts. *Id.* Finally, the \$250,000 ceiling on investment items purchased with operation and maintenance funds does not apply under the circumstances of this specific transfer authority. *Id.* Cf. *id.* § 8040.

⁷ 2005 DOD Appropriations Act, tit. II (Overseas Contingency Operations Transfer Account).

SECDEF may transfer the funds to the military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, research, development, test, and evaluation (RDT&E) accounts, and to working capital funds.⁸ Further, transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must provide the congressional appropriations committees a report each fiscal quarter detailing certain transfers.⁹

Overseas Humanitarian, Disaster, and Civic Aid

Congress again appropriated \$59 million for DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.¹⁰ These funds are available until 30 September 2006.¹¹

Former Soviet Union Threat Reduction

Congress appropriated \$409.2 million for assistance to the republics of the former Soviet Union.¹² This assistance is limited to activities related to the elimination, safe and secure transportation, and storage of nuclear, chemical, and other weapons in those countries, including efforts aimed at non-proliferation of these weapons.¹³ Of the amount appropriated, \$15 million specifically supports the dismantling and disposal of nuclear submarines, submarine reactor components, and warheads in the Russian Far East.¹⁴ Congress again included authority to use these funds for "defense and military contacts."¹⁵ These funds are available until 30 September 2007.¹⁶

Defense Health Program

Though Congress provided the DOD with more than \$18 billion in funding for the Defense Health Program,¹⁷ the conferees "expressed concern with the lack of third-party collections,"¹⁸ as identified in a recent GAO report.¹⁹ The conferees directed the DOD "to make the necessary business process improvements to ensure that [military treatment facilities] are collecting all appropriate third party payments," and to submit a status of collections report quarterly to the Congress.²⁰

Drug Interdiction and Counter-Drug Activities

The DOD received approximately \$906.5 million for drug interdiction and counter-drug activities.²¹ As in year's past, these funds may be transferred to appropriations for military personnel of the reserve components, O&M, procurement,

⁸ *Id.* Upon transfer, the funds are "merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred . . ." *Id.*

⁹ *Id.* § 8114.

¹⁰ *Id.* tit. II (Overseas Humanitarian, Disaster, and Civic Aid). The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to various statutory authorities. *See, e.g.*, 10 U.S.C.S. §§ 401-02, 404, 2557, and 2561 (LEXIS 2004).

¹¹ 2005 DOD Appropriations Act, tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

¹² *Id.* tit. II (Former Soviet Union Threat Reduction Account).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* tit. VI (Defense Health Program).

¹⁸ H.R. CONF. REP. NO. 108-622, at 368 (2004). The DOD is authorized to bill insurance companies under the Third Party Collections Program when DOD beneficiaries with private health insurance coverage receive treatment at a military treatment facility (MTF). *See* 10 U.S.C.S. § 1095 (LEXIS 2004).

¹⁹ The GAO reported that "conservatively, tens of millions of dollars are not being collected each year because key information required to effectively bill and collect from third-party insurers is often not properly collected, recorded, or used by the MTFs." GEN. ACCT. OFFICE, MILITARY TREATMENT FACILITIES: IMPROVEMENTS NEEDED TO INCREASE DOD THIRD-PARTY COLLECTIONS, GAO-04-332R, at 2 (Feb. 20, 2004).

²⁰ H.R. CONF. REP. NO. 108-622, at 368.

²¹ 2005 DOD Appropriations Act, tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

End-of-Year Spending Limited

Congress again limited the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.²³

General Transfer Authority

The Act increases to \$3.5 billion the level of the DOD's general transfer authority.²⁴ Additionally, the Act provides that transfers between military personnel appropriations shall not be taken into account for purposes of this increased limitation amount.²⁵

Multiyear Procurement Authority

Congress continued to prohibit the Service Secretaries from awarding a multiyear contract that: (1) exceeds \$20 million for any one year of the contract; (2) provides for an unfunded contingent liability that exceeds \$20 million; or (3) is an advance procurement which will lead to a multiyear contract in which procurement will exceed \$20 million in any one year of the contract, unless the Service Secretary notifies Congress at least thirty days in advance of award.²⁶ Additionally, Congress continues to prohibit the Service Secretaries from awarding multiyear contracts in excess of \$500 million unless Congress specifically provides for the procurement in the Appropriations Act.²⁷ Congress specifically noted just one multiyear procurement in this year's Act: the lightweight 155mm Howitzer.²⁸

Congress further provided this year that no funds are available for a multiyear contract unless the SECDEF has submitted to Congress a budget request for full funding of the contract; the contract's cancellation provisions do not consider the contractor's recurring manufacturing costs for producing the unfunded units to be provided under the contract; the contract provides that payments shall not be incurred prior to the incurred costs on the funded units; and the contract does not provide for a price adjustment for failure to perform the follow-on contract.²⁹

Limitations on OMB Circular A-76 Competitions³⁰

As in prior years, the DOD Appropriations Act provides no funding to convert a commercial activity to contractor performance if more than ten DOD civilian employees perform the activity, unless the conversion decision is based on a public-private competition in which the agency has developed a "most efficient and cost effective organization."³¹ In such

²² *Id.* Upon transfer, these funds are "available for obligation for the same time period and for the same purpose as the appropriation to which transferred . . ." *Id.*

²³ *Id.* § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officers' Training Corps (ROTC) cadets. *Id.*

²⁴ *Id.* § 8005. In recent years, the level of the DOD's general transfer authority has been between \$2 and \$2.5 billion. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8005, 117 Stat. 1054, 1071 (2003); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247 (2002); Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8005, 114 Stat. 656, 674 (2000).

²⁵ 2005 DOD Appropriations Act § 8005.

²⁶ *Id.* § 8008. Congress continued the requirement for a present-value analysis to determine whether a multiyear contract will provide the government with the lowest total cost, as well as the requirement of an advance notice at least ten days prior to terminating a multiyear procurement contract. *Id.*

²⁷ *Id.*

²⁸ *Id.* See also Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, § 111, 118 Stat. 1811, 1827 (2004) (authorizing the Army and Navy, pursuant to 10 U.S.C. § 2306b, to jointly enter into a multiyear contract for procurement of the light weight 155-millimeter howitzer).

²⁹ 2005 DOD Appropriations Act, § 8008.

³⁰ See U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter REVISED A-76]. See *supra* section titled Competitive Sourcing (providing additional discussion of recent developments in Revised A-76 competitions).

³¹ *Id.* § 8014(a)(1). This language limits DOD's ability to fully implement the Revised A-76, which permits agencies to use a "streamlined competition" process, if "65 or fewer [civilian employees] and/or any number of military personnel" perform a commercial activity. REVISED A-76, *supra* note 30, atch. B, ¶ A.5.b. In a streamlined competition the agency has flexibility in estimating agency performance costs, as the estimate may be based on the incumbent activity or the agency may "develop a more efficient organization, which may be an MEO [most efficient organization]." *Id.* atch. B, ¶ C.1.a.

public-private competitions, the agency must also determine that the contractor's performance costs would be less costly to the DOD by an amount that is ten percent of the most efficient organization's estimated costs or \$10 million, whichever is less.³² This year's Act adds a new limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by "not making an employer-sponsored health insurance plan available" to the workers who will perform the work under the proposal, or by "offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premiums" than the amount paid by the DOD under chapter 89, title 5 of the United States Code.³³

On 12 November 2004, in a memo to the OMB, the DOD objected to this new "health insurance" restriction arguing the provision "may impose unfair limitations on the private sector, thereby putting contractors at a disadvantage vis-à-vis the agency tender."³⁴ Stating the new provision has a disproportionate impact on small businesses and citing difficulty in incorporating the provision into the competitive sourcing process, the DOD requested repeal of section 8014(a)(3). If repeal of the provision is not possible, the DOD requests a "grandfathering" of the provision "so as not to affect our in-progress public-private competitions upon the enactment of the Department of Defense Appropriations Act."³⁵

In a separate provision in the Appropriations Act, the Congress continued the prohibition on the use of appropriated funds to perform competitive sourcing studies if the government exceeds twenty four months to perform a study of a single function activity or thirty months for a multi-function activity.³⁶

Military Installation Transfer Fund

Congress again authorized the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds received from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations.³⁷ The DOD may use this money to build facilities which have been approved by congressional act to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.³⁸

Burden Sharing Contributions by Kuwait

Again this year, the Appropriations Act authorizes the DOD to accept cash contributions from the Kuwait government and to incur obligations not to exceed \$350 million for the purposes specified in section 2350j(c) of title 10.³⁹

³² 2005 DOD Appropriations Act § 8014(a)(2). Again, this limitation in DOD competitive sourcing decisions is more restrictive than the *Revised A-76*'s requirements. Under the *Revised A-76*, the "ten percent of personnel costs/\$10 million" cost-conversion differential applies only to "standard competitions," which generally involve more than sixty-five civilian employees. *REVISED A-76, supra* note 30, attach. B, ¶¶ A.5 and D.5.c(4)(c).

³³ 2005 DOD Appropriations Act § 8014(a)(3). As in prior years, the Act does grant the DOD a waiver to the above-mentioned requirement for establishing a "most efficient and cost-effective organization," the application of the "ten percent of personnel costs/\$10 million" cost-conversion, as well as the new requirement to consider contractor health insurance coverage, if the DOD agency directly converts performance of a commercial activity to: (1) a firm that is listed on the procurement list by the JavitsWagner-O'Day Act (41 U.S.C.S §§ 46-48c (LEXIS 2004)) which employs severely handicapped or blind employees or is planned to be converted by a qualified nonprofit agency in accordance with that Act; or (2) a firm that is at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. *Id.* § 8014(b). Whether the DOD would rely upon this authority is doubtful, as the OMB and the *Revised A-76* make clear that the use of "direct conversions" is no longer permitted. *See REVISED A-76, supra* note 30, ¶ 4.c and Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

³⁴ Memorandum, Office of the Under Secretary of Defense (Installations and Environment), to Deputy Director for Management, Office of Management and Budget (12 Nov. 2004).

³⁵ *Id.* at 1-2.

³⁶ 2005 DOD Appropriations Act § 8022. In last year's DOD Appropriations Act, the Congress reduced from forty-eight months to thirty months the time permitted the DOD to complete a multi-function study. *See* Department of Defense Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-87, § 8022, 117 Stat. 1054, 1077 (2003). This change jeopardized and halted numerous on-going DOD competitive sourcing studies that were almost complete but past or near the new thirty-month deadline. *See* Jason Peckenpaugh, *Pentagon to Get Authority to Finish Stalled Job Competitions*, Gov't Exec. Com., Dec. 9, 2003, at <http://www.govexec.com/dailyfed/1203/120903p1.htm>. The DOD, however, requested and received legislative relief. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. H, § 111, 118 Stat. 3, 438 (2004) (providing that the forty-eight months limitation, vice thirty months, applied to DOD cost studies of a multi-function activity for which the DOD had solicited private sector proposals as of 30 September 2003).

³⁷ 2005 DOD Appropriations Act § 8018.

³⁸ *Id.*

³⁹ *Id.* § 8026. The statute authorizes the acceptance of contributions from designated countries and specifies that such contributions are only available for compensation of DOD local national employees, DOD military construction projects, and DOD supplies and services. 10 U.S.C.S. § 2350j(c) (LEXIS 2004).

Prohibition Against Divesting Army Corps of Engineers' Missions

The Appropriations Act again prohibits the use of appropriated funds for purposes of studying or implementing any plans to privatize, divest, or transfer any of the Army Corps of Engineers' civil works missions or responsibilities.⁴⁰

Investment/Expense Threshold

The Appropriations Act maintains the investment/expense threshold at its current level, permitting the DOD during FY 2005 to use O&M funds to purchase investment items costing not more than \$250,000.⁴¹

Limit on Transfer of Defense Articles and Services

The Appropriations Act again prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organization during peacekeeping, peace-enforcement, or humanitarian assistance operations without advance congressional notification.⁴²

Limitation on Training of Foreign Security Forces

Unless the SECDEF determines that a waiver is required, Congress has again stated that no funds available under the Appropriations Act may be used to support training programs of foreign country security forces units where "credible information" exists that the unit has committed a gross violation of human rights.⁴³

Government Travel and Purchase Cards Refunds

Previously Congress authorized the DOD to credit refunds attributable to the use of Government Travel and Purchase Cards to O&M accounts current when the refunds are received.⁴⁴ This year's Appropriations Act grants the same authority but also permits the DOD to credit such refunds to RDT&E accounts current when the refunds are received.⁴⁵

Required Actions of DOD Chief Information Officer

The Appropriations Act again prohibits the use of appropriated funds for a mission critical or mission essential information technology system until the system is registered with the DOD Chief Information Officer (CIO).⁴⁶ In addition, for major automated information systems, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996⁴⁷ prior to Milestone I, II, or III approval.⁴⁸

⁴⁰ *Id.* § 8035.

⁴¹ *Id.* § 8040.

⁴² *Id.* § 8064. This provision originally appeared in the Department of Defense Appropriations Act, 1996. *See* Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

⁴³ *Id.* § 8076. Congress has included this provision in Department of Defense Appropriations Acts since FY 1999. *See* Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

⁴⁴ *See, e.g.*, Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8083, 117 Stat. 1054, 1091 (2003).

⁴⁵ 2005 DOD Appropriations Act § 8082. The provision also applies to refunds attributable to official travel arranged by Government Contracted Travel Management Centers. *Id.*

⁴⁶ *Id.* § 8083(a). The Department of Defense Appropriations Act, 2000, first required registration with the Chief Information Officer. Pub. L. No. 106-79, § 8121(a), 113 Stat. 1212, 1261 (1999).

⁴⁷ *See* 40 U.S.C.S. §1401 (LEXIS 2004).

⁴⁸ 2005 DOD Appropriations Act § 8083(c).

Matching Disbursements with Obligations

Since 1996 Congress has required the DOD to match an intended disbursement with an obligation before making any disbursement in excess of \$500,000.⁴⁹ Congress extends this requirement to cover disbursements made in FY 2005.⁵⁰

Financing and Fielding of Key Army Capabilities

The Appropriations Act again directs the DOD and the Department of the Army to make budget and program plans to fully finance the Non-Line of Sight Objective Force cannon and resupply vehicle program, however, the language revises the fielding date for this system from the 2008 timeframe to FY 2010, “consistent with the broader plan to field the Future Combat System (FCS) in fiscal year 2010.”⁵¹ Congress further directs the Army to ensure that program and budget plans provide for the fielding of no fewer than seven Stryker Brigade Combat Teams.⁵²

Defense Counter-Terrorism Fellowship Program

Congress again provided that of the funds appropriated for “Operation and Maintenance—Defense-Wide” \$20 million is available for the Regional Defense Counter-Terrorism Fellowship Program.⁵³ The program funds the education and training of foreign military officers, defense civilians, and other foreign security officials, to include U.S. military officers and civilian officials whose participation directly contributes to the education and training of the foreign students.⁵⁴

Limitation on Integration of Foreign Intelligence

Congress prohibits the use of appropriated funds for the integration of foreign intelligence information “unless the information has been lawfully collected and processed during the conduct of authorized foreign intelligence activities”⁵⁵ Moreover, such information relating to “United States persons” must be “handled in accordance with the protections provided in the Fourth Amendment of the United States Constitution as implemented through Executive Order No. 12333.”⁵⁶

Reservist Notification of Mobilization Duration

When Service Secretaries order Reservists to active duty pursuant to section 12302(a) of title 10, the Appropriations Act requires written notification to each member stating “the expected period during which the member will be mobilized.”⁵⁷ The SECDEF may waive this requirement if necessary “to respond to a national security emergency or to meet dire operational requirements”⁵⁸

Additional War-Related Appropriations

In title IX of the Appropriations Act, Congress provided the DOD with \$25 billion in additional war-related appropriations,⁵⁹ which became available to the DOD upon enactment of the Appropriations Act (5 August 2004).⁶⁰ A few of

⁴⁹ Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, § 8106, 110 Stat. 3009, 3111 (1996).

⁵⁰ 2005 DOD Appropriations Act § 8091.

⁵¹ *Id.* § 8109.

⁵² *Id.*

⁵³ *Id.* § 8119.

⁵⁴ *Id.*

⁵⁵ *Id.* § 8124.

⁵⁶ *Id.*

⁵⁷ *Id.* § 8128.

⁵⁸ *Id.*

⁵⁹ H.R. CONF. REP. NO. 108-622, at 377 (2004). The Conference Report breaks down the several appropriations as follows:

Iraq Freedom Fund	\$103,731,158,000;
Military Personnel	\$3,800,000,000;

the more significant provisions are discussed below.

Iraq Freedom Fund

The Appropriations Act provides the DOD with \$3.8 billion in additional funds for authorized “Iraq Freedom Fund”⁶¹ purposes.⁶² These additional funds remain available for transfer until 30 September 2006. Additionally, the SECDEF may transfer these funds to accounts for military personnel, O&M, OHDACA, procurement, military construction, the Defense Health Program, and working capital funds.⁶³ The authority again requires the SECDEF to notify Congress at least five days prior to transferring funds and to submit a report each fiscal quarter summarizing the details of any transfer from the fund.⁶⁴

Train and Equip (T&E) Funding for the Iraqi and Afghan Armies

With State Department concurrence, the SECDEF has an additional \$500 million to train, equip, and provide related assistance to the Iraqi and Afghan Armies “to enhance their capability to combat terrorism and to support U.S. military operations in Iraq and Afghanistan.”⁶⁵

Commander’s Emergency Response Program Funding

Congress provided an additional \$300 million to fund the Commander’s Emergency Response Program (CERP).⁶⁶ The CERP funds are available to military commanders “to respond to urgent humanitarian relief and reconstruction requirements . . . by carrying out programs that will immediately assist the Iraqi people, and . . . the people of Afghanistan.”⁶⁷ The conferees specifically identified the CERP as “one of the most successful humanitarian assistance programs in Iraq and Afghanistan.”⁶⁸

“Lift and Sustain” Authority in Support of Coalition Forces

The Appropriations Act authorizes the use of O&M appropriations “to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq and Afghanistan.”⁶⁹ The SECDEF must provide quarterly reports to Congress regarding such support.⁷⁰

Operations and Maintenance	\$16,405,000,000;
Procurement	\$1,384,000,000;
Revolving and Management Funds	\$1,478,000,000;
Other DOD Programs	\$683,000,000.

Id.

⁶⁰ 2005 DOD Appropriations Act § 9001.

⁶¹ The Emergency Wartime Supplemental Appropriations, 2003, established a special “Iraq Freedom Fund” and provided approximately \$16 billion to remain available for transfer until 30 September 2004 for expenses in ongoing military operations in Iraq and other activities related to the Global War on Terrorism. Pub. L. No. 108-11, tit. I, 117 Stat. 559, 563 (2003).

⁶² 2005 DOD Appropriations Act, tit. IX (Iraq Freedom Fund).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* § 9006.

⁶⁶ *Id.* § 9007.

⁶⁷ *Id.*

⁶⁸ H.R. CONF. REP. NO. 108-622, at 377 (2004).

⁶⁹ 2005 DOD Appropriations Act § 9009. In a separate authority pursuant to the Emergency Supplemental Appropriations Act for Defense and the Reconstruction of Iraq and Afghanistan, 2004, the DOD received authority to use up to \$1.15 billion in the supplemental Operations and Maintenance, Defense-Wide funds provided “to reimburse Pakistan, Jordan, and other key cooperating nations, for logistical and military support” to U.S. military operations in Iraq and the Global War on Terrorism. Pub. L. No. 108-106, tit. I (Operations and Maintenance, Defense-Wide), 117 Stat. 1209, 1210 (2003). This authority remains until the \$1.15 billion is expended. *Id.*

⁷⁰ 2005 DOD Appropriations Act § 9009.

Promotional Materials Authority

The Appropriations Act provides authority to the SECDEF to “present promotional materials, including a United States flag,” to Active Duty and Reserve members, who participate in Operation Enduring Freedom or Operation Iraqi Freedom.⁷¹

MILITARY CONSTRUCTION APPROPRIATIONS AND EMERGENCY HURRICANE SUPPLEMENTAL APPROPRIATIONS ACT, 2005

President Bush signed the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005 (Military Construction Appropriations Act) on 13 October 2004.⁷² This Act appropriated approximately \$10 billion for military construction, family housing, and base closure activities.⁷³ This amount represents an increase of approximately \$162 million compared to FY 2004 and about \$449 million more than the President requested.⁷⁴ These appropriations include approximately \$100 million for unspecified minor military construction projects and \$10 million for contingency construction.⁷⁵

⁷¹ *Id.* § 9014.

⁷² Pub. L. No. 108-324, 118 Stat. 1220 (2004).

⁷³ H.R. CONF. REP. NO. 108-773, at 91 (2004). The Conference Report breaks the appropriations down as follows:

Military Construction, Army	\$1,981,084,000;
Military Construction, Navy and Marine Corps	\$1,069,947,000;
Military Construction, Air Force	\$866,331,000;
Military Construction, Defense-wide	\$686,055,000;
Military Construction, Army National Guard	\$446,748,000;
Military Construction, Air National Guard	\$243,043,000;
Military Construction, Army Reserve	\$92,377,000;
Military Construction, Naval Reserve	\$44,246,000;
Military Construction, Air Force Reserve	\$123,977,000;
NATO Security Investment Program	\$165,800,000;
Family Housing Construction, Army	\$636,099,000;
Family Housing Operation and Maintenance, Army	\$926,507,000;
Family Housing Construction, Navy and Marine Corps	\$139,107,000;
Family Housing Operation and Maintenance, Navy and Marine Corps	\$696,304,000;
Family Housing Construction, Air Force	\$846,959,000;
Family Housing Operation and Maintenance, Air Force	\$853,384,000;
Family Housing Construction, Defense-wide	\$49,000;
Family Housing Operation and Maintenance, Defense-wide	\$49,575,000;
DOD Family Housing Improvement Fund	\$2,500,000;
Base Realignment and Closure Account	\$246,116,000.

Id. at 1-6.

⁷⁴ *Id.* at 91.

⁷⁵ The Conference Report identifies the following amounts for unspecified minor military construction:

Unspecified Minor Construction, Army	\$20,885,000;
Unspecified Minor Construction, Navy	\$12,000,000;
Unspecified Minor Construction, Air Force	\$13,280,000;
Unspecified Minor Construction, Defense-wide	\$20,938,000;
Unspecified Minor Construction, Army National Guard	\$9,200,000;
Unspecified Minor Construction, Air National Guard	\$5,840,000;
Unspecified Minor Construction, Army Reserve	\$2,923,000;

RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005

On 28 October 2004, the President signed into law the Ronald W. Reagan National Defense Authorization Act for FY 2005 (Authorization Act).⁷⁶

Procurement

Multiyear Aircraft Lease Pilot Program (a.k.a. Boeing Lease) Grounded

Pursuant to the Department of Defense Appropriations Act, 2002, the Air Force received authority to establish a multiyear pilot program to lease up to 100 Boeing 767 and four Boeing 737 aircraft to accelerate the Air Force's desire to replace its aging tanker refueling fleet.⁷⁷ In granting this authority, Congress also exempted the pilot program from the normal lease versus purchase analysis required in government contracting.⁷⁸ Last year, in the midst of great criticism of an Air Force plan to lease the 100 Boeing aircraft,⁷⁹ Congress limited the Air Force's leasing authority to twenty of the tanker aircraft.⁸⁰ This year, amid even greater criticism and scrutiny following the Darleen Druyen controversy,⁸¹ Congress specifically stated the Air Force "shall lease no tanker aircraft."⁸²

Research, Development, Test, and Evaluation Future Combat Systems

The Authorization Act directs the Secretary of the Army to "establish and implement a program strategy for the Future Combat Systems acquisition program of the Army."⁸³ The purpose of the strategy is "to provide and effective, affordable, producible, and supportable military capability with a realistic schedule and a robust cost estimate."⁸⁴ As an incentive, Congress limits funding to \$2.2 billion for the Future Combat System acquisition program, until the Army certifies that it has established and implemented the required program strategy.⁸⁵

Operation & Maintenance

Contractor Performance of Security Guard Functions

In general, section 2465 of title 10 prohibits the DOD from entering into contracts for security guard (and firefighting) services on installations within the United States.⁸⁶ The Bob Stump National Defense Authorization Act, 2003, granted the DOD authority to enter into contracts for any "increased performance" of security guard functions due to the

Unspecified Minor Construction, Air Force Reserve

\$5,263,000.

Id. at 86-87.

⁷⁶ Pub. L. No. 108-375, 118 Stat. 1811 (2004) (2005 National Defense Authorization Act).

⁷⁷ See Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8159, 115 Stat. 2230, 2284 (2002).

⁷⁸ *Id.* § 8159 (exempting the program from 10 U.S.C. § 2401a (2000)).

⁷⁹ See Charles Pope, *McCain Presses White House to Check Tanker Deal*, SEATTLE POST-INTELLIGENCER, Oct. 23, 2003, at C2.

⁸⁰ National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 135, 117 Stat. 1392, 1413 (2003). While limiting the Air Force's leasing authority, Congress authorized a multiyear procurement program, using incremental funding, for up to eighty additional aerial refueling aircraft. *Id.*

⁸¹ See *supra* section titled Procurement Fraud (providing further discussion of the Darleen Druyen controversy).

⁸² 2005 National Defense Authorization Act § 133. While eliminating the Air Force's leasing authority for the aircraft, Congress increased to 100 the number of additional aerial refueling aircraft the Air Force may acquire through a more traditional multiyear procurement program. *Id.* This year's Authorization Act also prohibits the Air Force from retiring any of its KC-135E air refueling aircraft. *Id.* § 131.

⁸³ *Id.* § 211.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 10 U.S.C.S. § 2465 (LEXIS 2004). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 granted the DOD a temporary exception to the prohibition against procuring security functions. The exception applies for the duration of Operation Enduring Freedom and 180 days thereafter and permits the DOD to contract with "a proximately located local or State government" for such security services. Pub. L. No. 107-56, § 1010, 115 Stat. 272, 395-96 (2001).

terrorist attacks on 11 September 2001, notwithstanding the prohibition under section 2465 of title 10.⁸⁷ Congress provided the authority temporarily, with an expiration date of 1 December 2005.⁸⁸ This year's Authorization Act extends this authority to 30 September 2006, unless the SECDEF fails to submit a required report by 1 December 2005 to Congress on the use and impact of contract security guards.⁸⁹

Army Pilot Program for Purchasing Certain Municipal Services

The Authorization Act permits the Army to initiate a limited pilot program to procure specified municipal services, including: refuse collection and disposal; library services; recreation services; facility maintenance and repair; and utilities.⁹⁰ This authority terminates on 30 September 2010.⁹¹

Bid Protests by Federal Employees in OMB Circular A-76 Competitions

The Authorization Act amends the Competition in Contracting Act of 1984⁹² by specifying the term "interested party" for purposes of filing a bid protest includes an agency tender official (ATO) in an *OMB Circular A-76*⁹³ public-private competition involving more than sixty-five full-time equivalent employees (FTEs).⁹⁴ Additionally, the legislation states ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest."⁹⁵ The ATO's determination whether to file a protest "is not subject to administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.⁹⁶ Further, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may "intervene" in the protest.⁹⁷ This new protest authority applies to protests "that relate to [*OMB Circular A-76*] studies initiated . . . on or after the end of the 90-day period beginning on the date of enactment of [the Authorization Act]."⁹⁸

Conversion Differential in OMB Circular A-76 Competitions

Similar to a recurring provision in recent Department of Defense Appropriations Acts,⁹⁹ this year's Authorization Act provides that agencies must determine that a contractor's performance costs would be less costly to the DOD by an amount that is ten percent of the most efficient organization's estimated costs or \$10 million, whichever is less, prior to converting a commercial activity to contractor performance.¹⁰⁰ Whereas the Appropriations Act requires application of the "conversion differential" in those competitions involving more than ten civilian employees,¹⁰¹ the Authorization Act simply states the conversion differential applies to *Revised A-76* competitions where the DOD is "required to include a formal comparison of the cost" of contractor performance and continued federal employee performance.¹⁰²

⁸⁷ Pub. L. No. 107-314, § 332, 116 Stat. 2458, 2513 (2002). The DOD may rely upon the authority where, without the contract, military members are or would perform the increased security functions, and the Secretary concerned determines that the contractor personnel are appropriately trained and supervised and that contract performance will not result reduce security. *Id.*

⁸⁸ *See id.*

⁸⁹ 2005 National Defense Authorization Act § 324.

⁹⁰ *Id.* § 325.

⁹¹ *Id.*

⁹² Pub. L. No. 98-369, tit. VII, § 2701, 98 Stat. 1175 (codified in various sections of titles 10, 31, and 41 U.S.C.).

⁹³ *See REVISED A-76, supra* note 30.

⁹⁴ 2005 National Defense Authorization Act § 326 (amending 31 U.S.C. § 3551(2)). For additional discussion of this development, see *supra* section titled Competitive Sourcing.

⁹⁵ 2005 National Defense Authorization Act § 326 (amending 31 U.S.C. § 3552).

⁹⁶ *Id.*

⁹⁷ *Id.* (amending 31 U.S.C. § 3553).

⁹⁸ *Id.*

⁹⁹ *See* discussion *supra* notes 31-32 and accompanying text.

¹⁰⁰ 2005 National Defense Authorization Act § 327.

¹⁰¹ *See* discussion *supra* notes 31-32 and accompanying text.

¹⁰² 2005 National Defense Authorization Act § 327.

Reimbursement for Protective Equipment Purchased by or for Military Members Deployed in Contingency Operations

The Authorization Act directs the SECDEF to reimburse military members “for the cost (including any shipping cost) of any protective, safety, or health equipment” purchased by the military member or by another person in the member’s behalf “in anticipation of, or during, the deployment of the member in connection with Operation Enduring Freedom, or Operation Iraqi Freedom”¹⁰³ The reimbursement requirement applies only if the SECDEF certifies the equipment was critical to the military member’s protection, safety, or health; the member was not issued the equipment prior to deployment; and the military member purchased the equipment between 11 September 2001 and 31 July 2004.¹⁰⁴ Not later than 120 days following the Act’s enactment, the SECDEF must issue rules to “expedite the provision of reimbursement”¹⁰⁵ Following issuance of the implementation guidance, military members will have one year to submit qualifying reimbursement claims.¹⁰⁶

Other O&M Matters

The Act’s O&M title also addresses several Environmental Provisions,¹⁰⁷ matters relating to Information Technology,¹⁰⁸ and Extensions of Program Authorities.¹⁰⁹

Military Personnel Policy

JAG Independence

Amending several sections of title 10 relating to the authorities of The Judge Advocates General of the respective Services, the Authorization Act states no DOD officer or employee may interfere with the ability of The Judge Advocates General “to give independent legal advice” to their respective Service Secretary or Chief of Staff.¹¹⁰ The amendments also specify no DOD officer or employee shall interfere with the ability of Army, Navy, Marine Corps, and Air Force judge advocates “to give independent legal advice to commanders.”¹¹¹

Authority to Provide Civilian Clothing for Travel in Connection with Medical Evaluation

The Authorization Act amends section 1047 of title 10 to give the DOD authority to provide civilian clothing to enlisted members who are “medically evacuated for treatment in a medical facility by reason of an illness or injury incurred or aggravated while on active duty” or are in an “authorized travel status from a medical facility . . . after being medically evacuated”¹¹² The civilian clothing provided, or the reimbursement for such clothing, may not exceed \$250.¹¹³

Operation Hero Miles Program

Adding section 2613 to title 10, the Authorization Act grants the SECDEF the authority to accept donated “travel

¹⁰³ *Id.* § 351.

¹⁰⁴ *Id.* The Act limits the amount of reimbursement to \$1100 per qualifying equipment item. *Id.*

¹⁰⁵ *Id.* Such rules are to address “the circumstances under which the United States will assume title or ownership of any protective, safety, or health equipment for which reimbursement is made.” *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* §§ 311-318.

¹⁰⁸ *Id.* §§ 331-333.

¹⁰⁹ *Id.* §§ 341-343.

¹¹⁰ *Id.* § 584 (amending 10 U.S.C. §§ 3037, 5148, 5046, and 8037).

¹¹¹ *Id.*

¹¹² *Id.* § 584.

¹¹³ *Id.*

benefits” to facilitate the travel of armed forces members on authorized leave who are otherwise deployed in support of a contingency operation.¹¹⁴ The SECDEF may also accept travel benefits to facilitate family member visitation of members injured in the line of duty during such deployments.¹¹⁵ The new provision tasks the DOD with designating a single office to develop rules and procedures for accepting and distributing donated travel benefits.¹¹⁶ For tax purposes, the Authorization Act also excludes from gross income the benefits received under the program.¹¹⁷

Compensation and Other Personnel Benefits

Basic Pay Increases

Effective 1 January 2005, the monthly base pay of uniformed service members will increase by 3.5 percent.¹¹⁸ Last year Congress authorized a monthly basic pay rate increase for members of the uniformed services based on the Employment Cost Index (ECI).¹¹⁹ This year, the Act waived that increase.¹²⁰

Eligibility for Supplemental Subsistence Allowance, Imminent Danger Pay, Family Separation Allowance, and Other Federal Assistance

Section 402a of title 37 authorizes up to \$500 per month for family supplemental subsistence allowance (FSSA) to low-income members of the armed forces to improve their standard of living.¹²¹ This year, the Authorization Act excludes the amount received in family separation allowance and hostile fire and imminent danger pay from the calculation of household income when determining eligibility to receive FSSA.¹²² The Act also excludes the amount of FSSA received when determining eligibility for other federal assistance programs.¹²³

Family Separation Basic Allowance for Housing

Congress authorizes a basic allowance for housing for service family members when the family is prohibited from joining the service member at the member’s duty station.¹²⁴ This year the Authorization Act extends permissive authority for Service Secretaries to decline to pay the family separation housing allowance if the service member’s circumstances do not justify the payments.¹²⁵ The Act is clear that service members stationed world-wide should receive the family separation housing allowance when family members are prohibited from joining the service member at the member’s duty station and government provided quarters are unavailable to the service member at the duty location.¹²⁶

¹¹⁴ *Id.* § 585. Under the new section, “the term ‘travel benefits’ means frequent flyer miles, credits for tickets, or tickets for air or surface transportation” *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.* § 601.

¹¹⁹ *See, e.g.,* National Defense Authorization Act, 2004, Pub. L. No. 108-136, 117 Stat. 1495 (2004). The ECI is the wages and salaries of private industry workers published by the Bureau of Labor Statistics. The increase is the percentage, rounded to the nearest one-tenth of one percent, by which the ECI for the base quarter of the year before the preceding year exceeds the ECI for the base quarter of the second year before the preceding calendar year, if at all. Congress required an increase of one-half of one percentage point higher than the percentage that would otherwise be applicable for FYs 2004-2006. *Id.*

¹²⁰ 2005 National Defense Authorization Act § 601.

¹²¹ 37 U.S.C.S. § 402a (LEXIS 2004).

¹²² 2005 National Defense Authorization Act § 602.

¹²³ *Id.* Receipt of FSSA may not affect eligibility for school lunch assistance, Head Start, and other federal programs administered by the states. *Id.*

¹²⁴ 37 U.S.C.S. § 403(d).

¹²⁵ 2005 National Defense Authorization Act § 603.

¹²⁶ *Id.*

Family Separation Allowance

The Act maintains the family separation allowance at \$250 per month through 31 December 2005.¹²⁷

Hostile Fire and Imminent Danger Pay

The Act maintains the hostile fire and imminent danger pay at \$225 per month through 31 December 2005.¹²⁸

Family Member Attendance of Burial or Memorial Service

The Authorization Act amends section 411f of title 37 to clarify that family members and parents of a service member who dies on active duty may travel at government expense to the service member's burial site.¹²⁹

Family Member Travel to Ill or Injured Service Members

The Authorization Act also increases from two to three the number of family members entitled to transportation at the government's expense to visit an ill or injured service member.¹³⁰ The Act also grants family members the option of receiving per diem or reimbursement for the expenses associated with visiting the service family member.¹³¹

Acquisition Policy, Acquisition Management, and Related Matters

Internal Controls of DOD Procurements through GSA's Client Support Centers

The Act requires the Inspectors General of the DOD and the General Services Administration (GSA) to review the policies and administration of the policies, procedures, and internal controls of each Client Support Center of the GSA Federal Technology Service (Center).¹³² By 15 March 2005, the Inspector General must report whether each Center complies with defense procurement requirements or has made significant progress toward compliance.¹³³ If not, the Act requires the Inspectors General to submit a second compliance report by 15 March 2006 and prohibits the DOD from placing orders for products or services exceeding \$100,000 from the non-compliant Center, until the Center meets the procurement requirements or makes significant progress.¹³⁴ If the Under Secretary of Defense (Acquisition, Technology, and Logistics) determines procuring from the Center is in the DOD's interest, the Act authorizes a one year exception to the prohibition.¹³⁵

Multiyear Task and Delivery Order Contracts

The National Defense Authorization Act, 2004, amended section 2304a of title 10 to authorize the head of an agency to enter into a task or delivery order contract for not more than five years.¹³⁶ This year the Act amends Section 2304a(f) of title 10, authorizing the head of an agency to extend task or delivery order contracts for up to ten years.¹³⁷ The contract period may exceed ten years if the agency head documents exceptional circumstances in writing.¹³⁸ The Act requires the

¹²⁷ *Id.* § 623.

¹²⁸ *Id.*

¹²⁹ *Id.* § 631. Congress imposed a \$2 million ceiling on FY 2005 expenditures. *Id.*

¹³⁰ *Id.* § 632. Congress also granted Service Secretaries the authority to waive the family member limitation. *Id.*

¹³¹ *Id.*

¹³² *Id.* § 802. The Act defines the GSA Client Support Center as the Client Support Center of the Federal Technology Service of the GSA. *Id.*

¹³³ *Id.* The Center complies with defense procurement requirements if the policies, procedures, and internal controls, as administered, comply with the DOD procurement laws and regulations. *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* The exception must be in writing. The Act authorizes one year exceptions to the prohibition and a one year extension. *Id.*

¹³⁶ Pub. L. No. 108-136, § 843, 117 Stat. 1392, 1553 (2003).

¹³⁷ 2005 National Defense Authorization Act § 813.

¹³⁸ *Id.*

Secretary of Defense to report contract extensions beyond the ten year limitation within sixty days of the end of the fiscal year.¹³⁹

Funding Ceiling for Certain Multiyear Procurement Contracts

Amending sections 2306b(g) and 2306c(d) of title 10, which address multiyear procurement contracts with cancellation ceilings in excess of \$100,000,000, the Act requires the head of an agency to notify the congressional defense committees if the budget does not include funding the cancellation ceiling costs established in the contract.¹⁴⁰

Increased Threshold for Other Than Competitive Procedures

The Act requires head of the procuring activity approval for contracts using other than competitive procedures and that exceed \$10 million but are less than \$75 million.¹⁴¹ The Senior Procurement Executive must approve contracts using other than competitive procedures that exceed \$75 million.¹⁴²

Commercial Item Test Program

The Act extends until 1 January 2009 the commercial item test program authority to use simplified acquisition procedures to procure commercial items up to \$5 million in value.¹⁴³

Increased Thresholds for Special Emergency Procurement Authority

This year the Authorization Act maintains the micro-purchase threshold at \$15,000 if the head of an agency determines the contract supports a contingency operation or facilitates defense against or recovery from nuclear, chemical, biological, or radiological attack against the United States.¹⁴⁴ Outside the United States, the micro-purchase threshold increases to \$25,000 and the simplified acquisition threshold increases from \$500,000 to \$1 million.¹⁴⁵

Defense Procurements Made Through Contracts of Other Agencies

Effective 6 April 2005, interagency orders¹⁴⁶ by the head of a DOD agency to a non-DOD agency that exceed the simplified acquisition threshold must comply with the DOD agency head's reviewing and approving requirements for interagency procurements.¹⁴⁷ The requirement does not apply to printing, binding, or blank-book services by the government Printing Office or services from the Library of Congress' Federal Library and Information Network and Federal Research Programs.¹⁴⁸ The Act also requires the Service Secretaries, heads of Defense Agencies, and heads of Defense Field Activities to submit reports to the SECDEF detailing the service charges imposed for such contracts.¹⁴⁹

¹³⁹ *Id.* The Act requires reports for FYs 2005 through 2009. The report requires a discussion of the exceptional circumstances and the justification for the determination of exceptional circumstances. *Id.*

¹⁴⁰ *Id.* § 814. The Act requires written notification of: "(1) the cancellation ceilings amounts planned for each program year in the proposed multiyear procurement contract, together with the reasons for the amounts planned; (2) the extent to which costs of contract cancellation are not included in the budget for the contract; and (3) a financial risk assessment of not including budgeting for costs of contract cancellation." *Id.*

¹⁴¹ *Id.* § 815. The Act increases the authority from \$50 million to \$75 million. *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* § 817.

¹⁴⁴ *Id.* § 822.

¹⁴⁵ *Id.*

¹⁴⁶ The new approval requirements apply to interagency orders for information technology placed under government-wide acquisition contracts. *Id.*

¹⁴⁷ *Id.* § 854. The Act defines head of an agency as the SECDEF or Service Secretary. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

DOD Organization and Management

Extension of Authority for Commercial Intelligence Collection Activities Abroad

The Act amends section 421(a) of title 10 and extends until 31 December 2006 the SECDEF's authority to engage in commercial activities that provide security for authorized intelligence collection activities abroad.¹⁵⁰

General Provisions

Transfer Authority

The Act authorizes the SECDEF to transfer no more than \$3.5 billion of FY 2005 authorizations provided the transfer is in the national interest and the authorizations are only used for items that have a higher priority than the items from which transferred.¹⁵¹

Retention of Fees for Licensing of Intellectual Property

Adding section 2260 to title 10, the Act authorizes the SECDEF to license intellectual property and expend the fees earned to pay the costs of securing trademarks and operating the licensing programs.¹⁵² The Act also authorizes the SECDEF to use excess fees for morale, welfare, and recreation activities.¹⁵³

Working Capital Fund Transfer Notifications

Adding a new subsection to section 2208 of title 10, the Act requires the SECDEF to notify Congress before transferring funds from or to a working capital fund.¹⁵⁴

Military Extraterritorial Jurisdiction over Contractors Supporting Oversea Defense Missions

Amending the definitions in section 3267(1)(A) of title 18, the Act expands military extraterritorial jurisdiction. The Act includes personnel employed by or contracting with any other Federal agency or provisional authority if their employment supports the DOD mission overseas.¹⁵⁵ Previously jurisdiction only extended to DOD civilian employees (including a nonappropriated fund instrumentalities), DOD contractors, and DOD contractor employees.¹⁵⁶

Matters Relating to Other Nations

Commanders Emergency Response Program (CERP)

The Act authorizes up to \$300 million in FY 2005 DOD O&M funds for the CERP in Iraq and Afghanistan.¹⁵⁷ The SECDEF may waive any law prohibiting the implementation of the programs but must submit quarterly reports to Congress detailing the source, use, and allocation of the funds for the program.¹⁵⁸

¹⁵⁰ *Id.* § 921.

¹⁵¹ *Id.* § 1001. The transfer may not be used to provide authority for an item Congress denied authorizations.

¹⁵² *Id.* § 1004. Fees are available for obligation for a three year period beginning with the year retained. *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 1009.

¹⁵⁵ *Id.* § 1088.

¹⁵⁶ 18 U.S.C.S. 3267 (LEXIS 2004).

¹⁵⁷ 2005 National Defense Authorization Act § 1201. *See supra* notes 66 to 68 and accompanying text providing further discussion of legislation related to CERP funding).

¹⁵⁸ 2005 National Defense Authorization Act § 1201. The Act also requires the SECDEF to submit a report to the Armed Services Committees in the House and Senate identifying laws that prohibit, restrict, or constrain the CERP. *Id.*

Assistance to Iraq and Afghanistan Military and Security Forces

The Authorization Act authorizes the SECDEF to use O&M funds to equip, supply, service, and train Iraq and Afghanistan military and security forces to enhance their ability to combat terrorism and support the United States or coalition military operations.¹⁵⁹ Assistance may not exceed \$500 million in FY 2005 O&M funds.¹⁶⁰ The Act also requires the SECDEF to notify Congress not less than fifteen days before providing any assistance.¹⁶¹

Guidance on Contractors Supporting Deployed Forces in Iraq

The Act requires the SECDEF to issue guidance on how the DOD will manage contractor personnel supporting deployed forces and requires the Service Secretaries to develop procedures to implement the guidance.¹⁶² Within thirty days of issuing the guidance, the Act requires the SECDEF to issue a report on the guidance to the Armed Services Committees in the House and Senate.¹⁶³

Report on Contractors Supporting Deployed Forces and Reconstruction Efforts in Iraq

By 6 April 2005, the SECDEF must submit a report to the Armed Services Committees in the House and Senate detailing contractors supporting deployed forces and reconstruction efforts in Iraq.¹⁶⁴

Military Construction Authorizations

Approval and Notification Requirements for Repair Projects

The Act requires advance approval by the Service Secretary concerned and notification to Congress for major repair projects exceeding \$7.5 million.¹⁶⁵ If a repair project exceeds \$10 million, the justification for the repair and estimated cost of the project must include the total cost of all phases of the project for multi-year projects to a single facility.¹⁶⁶

General and Flag Officer Military Family Housing Reporting Requirements

Amending section 2831 of title 10, the Act requires the SECDEF to submit to Congress a report identifying the total cost of operating, repairing, and maintaining general and flag officer military family housing that exceeds \$35,000.¹⁶⁷ The Act also requires the SECDEF to report the total cost of operation, maintenance, utilities, lease and repairs of general and flag officer family housing.¹⁶⁸ For repairs exceeding \$35,000, the Act requires the Service Secretary to justify the repair to the congressional defense committees and wait twenty-one days.¹⁶⁹ The SECDEF must also report the anticipated need for general and flag officer housing in the National Capital Region in addition to submitting a report identifying the cost of operating general and flag officer family housing worldwide.¹⁷⁰

¹⁵⁹ *Id.* § 1202. The Act defines military and security forces as “national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces and police.” *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* § 1205. The guidance will establish policies, delineate the roles and responsibilities of commanders for contractor personnel, and integrate into one document other guidance affecting DOD responsibility for contractors. The guidance will also address warning, locating, identifying, sharing of information, and assisting contractor security personnel. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 1206. The report will include a description of the overall chain of command and oversight mechanisms, available sanctions, past disciplinary and criminal actions, an explanation of the legal status of contractor employees engaged in security functions, and a description of incidents in which contractor employers have been engaged in hostile file or other incidents. The report will also include a plan to establish and implement contractor data collection. *Id.*

¹⁶⁵ *Id.* § 2801. The approval requirement increased from \$5 million, and the notification requirement decreased from \$10 million. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 2802.

¹⁶⁸ *Id.* The Act requires the report within 120 days from the end of the fiscal year. *Id.*

¹⁶⁹ The Secretary may proceed after fourteen days if the justification and estimate are provided electronically. *Id.*

¹⁷⁰ *Id.*

Continued Limited Authority to Use O&M Funds for Construction

The Act extends the limited authority to use O&M funds for construction for temporary operational requirements outside the United States related to war, national emergency or contingency requirements, provided the DOD continues to submit quarterly reports to Congress.¹⁷¹ The Act also directs the DOD to determine whether permanent authority is required for this authority.¹⁷²

Majors Kevin Huyser and Bobbi Davis.

¹⁷¹ *Id.* § 2810.

¹⁷² *Id.*