

# Military Construction Funding: Variation in Cost Rules

Major M. Warner Meadows, United States Air Force

Are you proud of yourself? You should be! You have mastered the construction funding process. By determining the scope of your project<sup>1</sup> and the funded<sup>2</sup> construction<sup>3</sup> costs, you were able to take the final funded construction costs and compare them with the three military construction thresholds. You then determined which of the three fiscal thresholds applied to your project.<sup>4</sup> Next, you acquired the requisite approvals<sup>5</sup> and sent out the invitation for bids. After a well-deserved break, the bid-opening day arrives, and to no one's surprise but yours, all the bids are higher than the approved amount. What do you do now? You award the contract, right? Wrong!

If you have not encountered this situation, you probably have encountered the following situation. You award the contract, then sit back and enjoy watching the project progress. While staring out of your window and watching the base's new training facility begin to block your view, you get a phone call from the contracting officer. She informs you that the contractor has claimed additional costs due to a differing site condition, a variation in estimated quantity, a constructive suspension of work, a contract interpretation problem, or whatever else the contractor could claim. After you and the contracting officer review the contractor's claimed costs, you determine that the costs have merit and recommend that the contracting officer pay them. The contracting officer informs you that she would

be happy to pay the additional costs, but asks whether this would put the project over one of the fiscal thresholds that apply to construction work. After wondering if the new project is high enough to jump off of, what do you do next?

## Introduction

These scenarios involve cost variations. This is not an uncommon situation in construction contracts. Cost increases occur in both the contract formation and administration phases. During contract formation, the government puts together its estimate of project costs, gets the requisite approvals, and then sends out its solicitations. Sometimes, the offers come in much higher than the government estimate. In contract administration, there are normally contract changes that increase the cost of the approved project. Because this is the norm in construction contracting, the buying command generally tailors the scope of the work to allow for such contingencies. In some situations, the approved funding can be increased. When the funding cannot be increased without tripping a fiscal threshold, the scope of the project may have to be decreased.<sup>6</sup>

It is important that all of the work necessary for a "complete and usable facility" is included in the project to avoid project

---

1. The scope of the project is the amount of work that is needed to produce a complete and usable facility or an improvement to an existing facility. See Honorable Michael B. Donley, B-234326, 1991 WL 314260 (Comp. Gen. Dec. 24, 1991). It is important that all of the work necessary for a complete and usable facility is included in the project to avoid project splitting. Project splitting is a violation of the Antideficiency Act. See 31 U.S.C.A. §§ 1341, 1342, 1344 (West 1998).

2. Project limits apply only to funded costs. Unfunded costs are those costs that are charged against appropriations other than those directly paying for the construction project. They include military personnel costs, planning and design costs, and depreciation of government equipment used in the project. All other costs are funded. Funded costs include materials and supplies, non-military personnel labor, cost for temporary duty (TDY) of military personnel, maintenance and operation costs of government equipment, and the value of real property.

See U.S. DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF ENGINEERING AND HOUSING, glossary, sec. II (2 July 1987) [hereinafter AR 420-10]; 1 U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 65-601, BUDGET GUIDANCE PROCEDURES, para. 9.13.3 (21 Oct. 1994) [hereinafter AFI 65-601]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 11010.20F, FACILITIES PROJECT MANUAL, para. 2.1.1 (7 June 1996) [hereinafter SECNAV INSTR. 11010.20F].

3. Military construction includes any construction, development, conversion, or extension of any kind that is carried out on a military installation. 10 U.S.C.A. § 2801(a) (West 1998). The term military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the secretary of a military department, or in the case of an activity in a foreign country, under the operational control of the secretary of a military department or the Secretary of Defense. *Id.* § 2801(c)(2). It includes all work that is necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Construction includes the acquisition, erection, installation, or assembly of a new facility. It also includes work on an existing facility. Examples include: an expansion or extension of the facility to add to its overall dimensions; alteration of the interior or exterior arrangements of a facility to improve its current purpose; conversion of the interior or exterior arrangements so that the facility can be used for a new purpose; and replacement of a real property facility. U.S. DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION, glossary, sec. II (30 Aug. 1994) [hereinafter AR 415-15]; 1 AFI 65-601, *supra* note 2, ch. 9; SECNAV INSTR. 11010.20F, *supra* note 2, para. 6.1.1. Maintenance and repair are not construction; therefore, they are not subject to the \$500,000 Operation and Maintenance funds limitation on construction.

4. Operation and maintenance funds are used for projects that cost \$500,000 or less. 10 U.S.C.A. § 2805(c). For projects that cost more than \$500,000 but less than \$1.5 million, unspecified minor military construction funds are used. *Id.* § 2805(a). For projects that cost more than \$1.5 million, specified military construction funds are used. *Id.* § 2802.

5. Commanders of major commands may approve projects up to \$500,000. They may also delegate the approval authority. This authority is usually delegated to installation commanders. The service secretary approves construction projects greater than \$500,000 but less than \$1.5 million. Congress approves all projects greater than \$1.5 million. AR 415-15, *supra* note 3, para. B-1; 1 AFI 65-601, *supra* note 2, tbl. 9-1; SECNAV INSTR. 11010.20F, *supra* note 2, app. B, tbl. 1.

splitting. Project splitting is a violation of the Antideficiency Act.<sup>7</sup> If the scope of the project is reduced and necessary aspects of the project are deleted, the project will not result in a complete and usable facility or improvement to the facility. It would, therefore, be necessary to award another contract to complete the facility or improvement to the facility. This is a classic example of project splitting.

In passing the Military Construction Codification Act,<sup>8</sup> Congress recognized that the complexities of the construction marketplace make it impossible to estimate a project's cost precisely. Therefore, Congress allows the services some flexibility to approve certain cost increases.<sup>9</sup> Although Congress allows some flexibility, the flexibility to increase the cost of a project is generally contingent on the availability of savings from other projects. This is an important consideration, especially for projects that are funded using specified military construction funds. In other words, since construction funds are limited, the ability to take advantage of the cost variations is contingent on whether funds are available.

It is vital for contract attorneys to understand the cost variation rules for construction work to avoid violating the Antideficiency Act.<sup>10</sup> Surpassing a construction funding threshold violates the purpose statute.<sup>11</sup> In fact, exceeding the limits of operation and maintenance (O&M) funds for minor construction projects is the number one Antideficiency Act violation within the Department of Defense (DOD).<sup>12</sup> This means the command is using the wrong funds. Since the funding threshold has been exceeded, a different type of construction funds must be used.<sup>13</sup> Additionally, this violates 41 U.S.C. § 12, which states that "no contract shall be entered into for the erec-

tion, repair, or furnishing of any public building, or for any public improvement which shall bind the government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."<sup>14</sup> The statute further states that "the purpose of this section is to prevent executive officers from involving the government in expenditures or liabilities beyond those contemplated and authorized by the law making power."<sup>15</sup> A clear understanding of the construction cost variation rules will significantly help ensure that your command does not run afoul of the Antideficiency Act or any other applicable construction funding statute.

It is also important to distinguish between the type of funds being used and whether the contract funding change is made before or after the contract award. The cost variation rules differ for O&M funds, for unspecified minor military construction funds, and for specified military construction funds. Additionally, the rules differ for cost variations that occur in the contract formation and contract administration phases. This article discusses the statutes and regulations concerning cost variations that occur after the installation receives approved funding for construction contracts. The article surveys the statutory guidance applicable to all of the services and highlights any variations found in the regulations applicable to the military departments for each construction funding threshold.

### Specified Military Construction Projects

In the specified military construction program,<sup>16</sup> Congress provides annual approval and funding for the DOD military construction requests.<sup>17</sup> Congress appropriates funds for spe-

6. The scope of the project is the amount of work needed to produce a complete and usable facility or an improvement to an existing facility. *See Donley*, 1991 WL 314260.

7. 31 U.S.C.A. §§ 1341, 1342, 1344.

8. 10 U.S.C.A. § 2801.

9. *See* Major Earle D. Munns, *An Analysis of the Military Construction Codification Act*, ARMY LAW., Nov. 1987 at 26.

10. 31 U.S.C.A. §§ 1341, 1342, 1344.

11. *Id.* § 1502.

12. U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. 7000-14-R, ADMINISTRATIVE CONTROL OF FUNDS AND ANTIDEFIENCY ACT VIOLATIONS [hereinafter DOD 7000-14-R].

13. If the proper funds were available at the time the contract was entered into and at the time the threshold was exceeded, the violation may be correctable. *See id.* ch. 10; DEFENSE FINANCE AND ACCOUNTING SERVICE-INDIANAPOLIS REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION, para. 7.5b (Sept. 1998); The Honorable Bill Alexander, House of Representatives, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

14. 41 U.S.C.A. § 12 (West 1998).

15. *Id.*

16. *See* Department of Defense, Military Construction Appropriation Act of 1998, Pub. L. No. 105-45, 111 Stat. 1142 (1997).

17. *Id.* For fiscal year 1998, the following amounts were authorized and appropriated: for the Army, \$598,750,000 for Continental United States (CONUS) and \$156,100,000 for overseas; for the Navy, \$521,297,000 for CONUS and \$66,120,000 for overseas; for the Air Force, \$559,085,000 for CONUS and \$89,345,000 for overseas; and for the DOD, \$407,890,000 for CONUS and \$16,000,000 for overseas.

cific construction projects in the annual military construction appropriation (MCA) act in a lump sum amount.<sup>18</sup> The conference reports associated with the various MCA acts typically provide a by-project breakdown for this lump sum amount.<sup>19</sup> The specified military construction program normally consists of construction projects that are expected to exceed \$1.5 million.<sup>20</sup> Based on the budget request that is provided by the requesting agency and routed through the DOD, Congress determines the size (scope) of the project and the amount of funding. Increases in the authorized and appropriated amounts are within the purview of the congressional subcommittees that are responsible for overseeing all military construction work.<sup>21</sup>

This means that Congress is the approval authority for all projects with expected costs that exceed \$1.5 million. The installation where the project is to be built determines the planned scope and funded construction costs of the project. If the installation determines during the planning phase that the estimated funded construction costs will exceed \$1.5 million, the project must be forwarded through the chain of command to the service secretary's office. The service secretary then forwards the project request and its justification to the Secretary of Defense who, upon approval, forwards it to Congress. Congress then determines the scope of the project and provides the funding in the annual military construction authorization and appropriation acts.<sup>22</sup>

Suppose Congress provides an installation with the scope and funding for a construction project. What, if anything, can the buying command do if the cost of the project increases either before or after contract award? There are two options. The command may increase the funding or decrease the project

scope. Decreasing the project scope enables the buying command to remain within the congressionally approved funding amount. While this is an option, the project must still result in a complete and usable facility or a complete and usable improvement to the facility.<sup>23</sup>

Often, everything that is included in the project justification that is provided to Congress is necessary for the complete and usable facility; thus, the project scope cannot be decreased. The only remaining option is to somehow increase the amount of funds for the project. If not, the amount of congressionally approved funding could be exceeded, resulting in an Antideficiency Act violation.

The starting point for researching the cost variation rules and the approach to take can be found in 10 U.S.C. § 2853.<sup>24</sup> This statute provides that the cost authorized for a military construction project or for the construction, improvement, and acquisition of a military family housing project may be increased by no more than twenty-five percent of the amount appropriated for the project or 200 percent of the unspecified minor construction project ceiling,<sup>25</sup> whichever is less.<sup>26</sup> The service secretary responsible for the construction project must determine that the increase in cost is required for the sole purpose of meeting unusual variations in cost and that the cost variations could not have been reasonably anticipated at the time Congress originally approved the project.<sup>27</sup> This cost variation statute limits the reduction in the scope of work for military construction projects and the construction, improvement, and acquisition of military family housing projects.<sup>28</sup> The project scope cannot be reduced by more than 25 percent from the amount approved by Congress.

---

18. 41 U.S.C.A. § 12.

19. See generally H.R. REP. NO. 105-132 (1996).

20. 41 U.S.C.A. § 12.

21. The congressional subcommittees that are responsible for overseeing military construction work are the Armed Services and Appropriations Military Construction (MILCON) subcommittees.

22. Although urgent requirements are approved in a much faster fashion, it has been the author's experience that the average specified project takes five-seven years for congressional approval.

23. There appears to be no clear definition of a complete and usable facility or a complete and usable improvement to a facility. Rather, the definition is highly fact specific. For instance, suppose that the military has decided to move an NCO academy to a certain installation. The installation decides to build an administrative facility, a dormitory/barracks facility, and a mess hall/dining facility. For a complete and usable NCO Academy, the installation must determine whether it is necessary to have all three buildings. If so, the project must include all three. But what if the Academy is being built close to the other dormitory/barracks or mess hall/dining facility on the installation? It is then possible for the academy to use these already existing facilities, and therefore, the complete and usable facility is only the administrative building itself. The equation changes if the academy is to be built on a remote part of the installation. One way to look at the equation is to decide what is necessary to have a facility that meets the agency's purposes.

24. See 10 U.S.C.A. § 2853 (West 1998).

25. Currently, the unspecified minor construction project ceiling is \$1.5 million. This threshold is increased to \$3 million for projects intended that are solely to correct deficiencies that threaten life, health, or safety. *Id.* § 2805(a)(1).

26. Currently, the minor military construction authority is capped at \$1.5 million. Therefore, 200 percent of the unspecified minor construction project is \$3 million. 10 U.S.C.A. § 2805(a)(1).

27. *Id.* § 2853(a).

The limitations in cost or scope do not apply, if the service secretary approves the variation and notifies Congress<sup>29</sup> of the change in writing. Once notice is provided, the service secretary must wait a period of twenty-one days before taking final action on the proposed change in cost or scope. If Congress does not act within that twenty-one days, the service secretary may assume that Congress has approved the action.<sup>30</sup> Importantly, the limitation on cost increases does not apply to the settlement of a contractor claim under a contract if the increase in cost is approved by the secretary and the secretary promptly submits written notification of the facts relating to the proposed cost increase to the appropriate congressional committees.<sup>31</sup> Also, cost variations cannot be used to increase the scope of a project; however, limited scope adjustments are permissible if they are required for technical reasons.<sup>32</sup>

As with many statutes, the military services often promulgate their own additional guidance. Each military service has implemented further guidance on how to handle cost or scope increases or decreases. For example, *Air Force Instruction 65-601*<sup>33</sup> discusses how to handle changes in scope and cost. It states that the Air Force Office of Civil Engineering (AF/CE) and the Secretary of the Air Force, Office of Military Installations (SAF/MI), jointly determine if the Air Force will require advance approval for major changes to approved projects. If so, the AF/CE notifies Congress when a project's scope decreases more than twenty-five percent or when its cost increases more than \$1.5 million or by twenty percent, whichever is less.

Regarding changes to the project's scope, the project justification documents<sup>34</sup> that were submitted to Congress show the scope of a facility in units of measure such as square feet of building space or square yards of pavement. When Congress approves a project, it establishes the project's scope. Therefore,

not more than ten percent of the approved scope should be added without prior approval of the AF/CE.<sup>35</sup> Likewise, decreasing the approved scope of the construction work by more than twenty-five percent requires prior AF/CE approval.<sup>36</sup> It is necessary to stay within the total amounts provided in each annual appropriation act. The Air Force instruction further states that "within the aforementioned guidelines, the requiring activity may adjust financing to complete projects approved and started, to cover projects expected to start during the current fiscal year, and to meet other project costs that represent valid unfinanced requirements for the budget year."<sup>37</sup>

Army<sup>38</sup> and Navy<sup>39</sup> regulations also discuss changes in scope and cost. Both of these regulations begin by reviewing the statutory language behind construction cost variations.<sup>40</sup> They state that the services may approve cost increases that could not have been reasonably anticipated at the time of congressional approval and that are necessary to meet unusual variations in cost. The cost increase, however, must not be the result of an increase in the authorized scope. The service secretary may approve a cost variation up to twenty-five percent of the appropriated amount or 200 percent of the unspecified minor military construction threshold, whichever is less.

Although congressional notification and approval are required, it is easy to envision cases where cost increases must be funded promptly to avoid interest or additional increases in cost. The services have unlimited authority to approve payment of changes that are within the project's scope and meritorious claims if there has been prompt notification to Congress. Also, Congress can approve pre-award increases in the specified authorized amount for initial awards that are greater than twenty-five percent over the appropriated amount, or \$3 million, whichever is less. The award, however, cannot occur until

---

28. *Id.*

29. Notification is made to the House National Security Committee, the Senate Armed Services Committees, and the House and Senate Appropriation Committees.

30. During this twenty-one day time period, Congress can notify the secretary that the action is approved or decide to hold hearings on the matter.

31. 10 U.S.C.A. § 2853(b).

32. 10 U.S.C.A. § 2853.

33. 1 AFI 65-601, *supra* note 2, para. 9.4.3.

34. See U.S. Dep't of Defense, DD Form 1391, Military Construction Project Data (Dec. 1976).

35. 1 AFI 65-601, *supra* note 2, para. 9.4.3.1.

36. *Id.*

37. *Id.*

38. See AR 415-15, *supra* note 3.

39. SECNAV INSTR. 11010.20E, *supra* note 2.

40. 10 U.S.C.A. § 2853.

at least twenty-one calendar days after Congress is notified, provided that Congress has no objections.<sup>41</sup>

Congress is very involved in the military construction process. The reasons for that are numerous. In 1989, the House Armed Services Committee<sup>42</sup> criticized the DOD's use of O&M funds for military construction projects.<sup>43</sup> The committee cited three of the numerous examples it had uncovered where installation commanders ignored construction funding limitations. Although the cited problems focused on the overuse of O&M funds for projects incorrectly classified as repair,<sup>44</sup> the report made it clear that Congress will closely monitor the spending of appropriated military construction funds.

The following synopsis is helpful for analyzing cost variations in a specified military construction project. After Congress approves the project in concept, it determines the size of the project and how much it will cost. This establishes the funding level and the type of appropriation. Only Congress can initially approve specified construction projects and changes in scope or cost after the project is initially approved. If the cost increases more than twenty-five percent, congressional notification and approval are required before the cost increase can be approved by the affected military service. For example, if Congress specified a project at \$10 million and the cost increase is greater than \$2.5 million, additional congressional approval would be required. Also, if the project cost increases by more than 200 percent of the minor military construction project ceiling,<sup>45</sup> congressional notification and approval are required before the cost increase can be approved. Currently, the minor military construction project ceiling is \$1.5 million; 200 percent of that amount equals \$3 million. Therefore, if the project cost increases by more than \$3 million, congressional notification and approval are required.

When requesting approval to increase the project cost, the justification to Congress must include certain considerations. The increase in cost must be solely to meet unusual variations in cost that could not have been reasonably anticipated.<sup>46</sup> Also, the cost variation cannot be requested to increase the scope of

the project. Suppose, however, that the agency failed to program into its project something that is necessary for a complete and usable facility. To have a complete and usable facility, the command must add some item of construction work. In order to do so, however, the project must be increased above the amount specified by Congress. What does the command do in this situation? The statute is clear that the cost variation cannot be requested to increase the scope of the project; however, the statutory provision does not cover this situation. The purpose of the statute is to prevent agencies from asking for more money simply because they decided that a larger building or a higher quality component would be nice. Under the above circumstances, the agency has no choice but to add the necessary work to have a complete and usable facility. Therefore, the work and the cost increase should be submitted to Congress for approval. The command, however, must ensure that the justification documents are well above par in order to convince congress to approve the requested cost and scope increase.

Should a command decide not to pursue the congressional notification and approval process, the only option is to decrease the scope of the project. Two things must be considered before the scope of the project is reduced. First, the project must result in a complete and usable facility or improvement to a facility.<sup>47</sup> The scope cannot be reduced to the point that a complete and usable facility or improvement to the facility would not exist. This is especially true if, after reducing the project's scope, the command awards a separate contract for the deducted work. This is considered to be project splitting and is a violation of the Antideficiency Act.<sup>48</sup> Second, if the project's scope must be reduced by twenty-five percent or more, Congress must be notified beforehand.<sup>49</sup> As to Air Force projects there are lower notification thresholds and different approval levels.

### **Unspecified Minor Military Construction Projects**

In the unspecified minor military construction program, Congress provides annual funding and approval to each military department for minor construction projects that are not

---

41. AR 415-15, *supra* note 3, para. 5-13.

42. This is now called the House National Security Committee.

43. See H.R. REP. NO. 101-21 (1989).

44. The reported cases included the Air Force building a new officers club using \$10 million in O&M funds, the Army using \$26 million in O&M funds to gut a building and to upgrade the interior completely, and the Navy using \$13 million in O&M funds to restore the exterior of a building.

45. 10 U.S.C.A. § 2805.

46. Examples of this include: unanticipated constructive changes, such as differing site conditions or suspension; environmental considerations; or increases in labor or supply costs.

47. Honorable Michael B. Donley, B-234326, 1991 WL 314260 (Comp. Gen. Dec. 24, 1991); 10 U.S.C.A. § 2801 (West 1998).

48. *Donley*, 1991 U.S. Comp. Gen. WL 314260.

49. AR 415-15, *supra* para. 5-13.

specified in the conference report that accompanies the military construction appropriation act.<sup>50</sup> Service secretaries may use these funds for minor projects that are not specifically approved by Congress.<sup>51</sup> Generally, unspecified minor military construction consists of projects that cost more than the O&M threshold (\$500,000 or less) but less than the specified construction threshold (greater than \$1.5 million). Additionally, service secretaries, have the authority to use up to \$3 million for projects that are intended solely to correct deficiencies that threaten life, health, or safety.<sup>52</sup>

As with the cost variation rules for specified construction, Congress provides the DOD and the military services with a greater degree of flexibility for unspecified minor military construction work. This means that Congress gives the DOD and the military services a lump sum amount and the authority to prioritize and fund their individual projects within the appropriated amount. Although the unspecified minor military construction threshold is capped at \$1.5 million, the DOD and the military services have flexibility to exceed this amount. The statute allows the service secretary to increase an unspecified minor military construction project up to 125 percent of the "amount authorized by law."<sup>53</sup> The "amount authorized by law" is up to \$1.5 million, which is the threshold for unspecified minor military construction. For projects that are intended solely to correct deficiencies that threaten life, health or safety, the threshold doubles to \$3 million. Therefore, it appears that, under the current thresholds, a service secretary could approve total project cost increases up to \$1,875,000 for normal projects, or up to \$3,750,000 for projects that are intended solely to correct deficiencies which threaten life, health, or safety.

As with specified military construction, there are notification and approval requirements associated with these cost increases. Once the command decides to increase a project above either the \$1.5 or \$3 million threshold, the service secretary must notify the appropriate committees in writing. The project cannot begin, or the cost cannot be increased, until twenty-one days after the congressional committees receive notification. These requirements are meant to discourage the DOD and the military services from exceeding the unspecified minor military construction threshold. When the command wishes to exceed the statutory threshold, the congressional

intent must be taken into consideration, prior to notifying Congress.

Another basic consideration is financial. Congressional notification is required to increase the project above the unspecified minor military construction threshold, but the congressional notification does not provide either the agency or the command with additional money. The increase must be funded within the overall unspecified minor military construction appropriation provided to the agency at the beginning of the fiscal year. Plain economics may defeat the command's ability to increase the project above the unspecified minor military construction threshold.

If the command is reticent about notifying Congress, or does not have the funds to approve the change after congressional notification, there are two available options. If the project costs are expected to exceed the basic \$1.5 million unspecified minor military construction threshold, either the scope must be decreased or the project must be funded as a specified project.<sup>54</sup> When the project scope is decreased, the project must still result in a complete and usable facility.

Due to the problems with increasing the project scope above the \$1.5 million unspecified minor military construction threshold, it appears that the Air Force has reacted by not allowing itself to take advantage of funding unspecified minor military construction projects above the normal funding levels. Air Force guidance strictly prohibits exceeding the statutory limit of \$1.5 million for a minor construction project.<sup>55</sup> Consequently, if a major command cannot award a contract so that the total current working estimate is under \$1.5 million, it must reduce the scope or cancel the project. It appears that this strict guidance is meant to prevent additional Antideficiency Act violations in this area. This is a harsh rule, because it does not seem to allow any exceptions. There are certainly circumstances beyond the control of the command where the project should be increased above the normal funding threshold for unspecified minor military construction.<sup>56</sup>

In an effort to alleviate Antideficiency Act violations for unspecified minor military construction projects, the Air Force may be subjecting itself to additional Antideficiency Act violations. Since the Air Force instruction does not allow the Air

---

50. Department of Defense, Military Construction Appropriation Act, Pub. L. No. 105-45, 111 Stat. 1142 (1997). For Fiscal Year 1998, Congress authorized and appropriated the following unspecified minor military construction funds: for the Army \$7,400,000; for the Air Force, \$8,545,000; for the Navy, \$11,460,000; and for the DOD, \$26,075,000.

51. 10 U.S.C.A. § 2805(a).

52. *Id.* § 2805(a)(1) as amended by the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2811, 110 Stat. 186 (1996).

53. 10 U.S.C.A. § 2805(a)(1).

54. This is a difficult task if the project has begun because it generally takes Congress five-seven years to approve these projects.

55. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 32-1021, FACILITY CONSTRUCTION PROJECTS, para. 4.6.5 (12 May 1994). This instruction has been amended to allow the Air Force to fund projects that are intended solely to correct deficiencies that affect life, health or safety up to \$3 million.

Force to go above the normal unspecified minor military construction threshold, what happens if the cost for a project that is necessary to correct conditions affecting life, health, or safety exceeds \$1.5 or \$3 million? If the command is prohibited from notifying Congress that it wishes to increase the project up to twenty-five percent, it now faces a potential purpose violation. It has used unspecified minor military construction funds when it should have used specified military construction funds. To avoid the violation, the command must have had the proper funds at the time the original obligation was made and at the time necessary to fix the violation. This is a virtual impossibility; unless the project was specified in the first place or the agency has savings from other specified projects, the money will not be available to correct the violation. For these reasons, the Army and the Navy take advantage of these statutory provisions.<sup>57</sup>

Cost variations for an unspecified minor military construction project can be approved under certain conditions. The service secretary can approve project increases up to the unspecified minor military construction threshold, either prior to the contract award or after the award.<sup>58</sup> After notification to Congress, the service secretary can increase the total project cost up to 125 percent of the threshold.<sup>59</sup> If the total project costs exceed these thresholds, or if Congress does not approve the project increases, the military service must cancel the project and institute the project as a specified military construction project. For the Air Force, either pre- or post-contract award, the secretary can approve the project up to the unspecified minor military construction threshold.<sup>60</sup>

### **Projects Funded with Operation and Maintenance Funds**

Most installations fund their routine operations with O&M funds. To allow commanders the authority to perform small construction work, Congress has authorized the DOD to use these funds of up to \$500,000 for unspecified minor military

construction projects.<sup>61</sup> For projects that are intended solely to correct deficiencies that threaten life, health, or safety,<sup>62</sup> the DOD may also use O&M funds up to \$1 million. Unlike specified and unspecified military construction, there are no provisions to increase construction projects that are funded with O&M above these thresholds. Prior to the contract award, if it is determined that the funded construction costs will exceed \$500,000 or \$1 million, the project's scope must be legitimately decreased or funded with unspecified minor military construction funds. With a scope decrease, the project must still result in a complete and usable facility or a complete and usable improvement to a facility. If, after contract award, the funded construction costs exceed \$500,000 or \$1 million, the project's scope must be legitimately decreased or there is a potential Antideficiency Act violation. The key to avoiding this situation is to anticipate legitimate contract changes and to avoid funding the project near the \$500,000 or \$1 million threshold.

### **Conclusion**

At first glance, the cost variation rules appear complicated, but they are crucial in getting projects funded or completed. The key is to understand how the rules apply to specific projects. The rules for variations in costs differ according to the types of funds used for projects—specified military construction funds, unspecified minor military construction funds, or O&M funds. These cost variation rules also differ depending on whether the construction contract is in the contract formation or contract administration stage. Everyone who is involved in the process needs to be aware of these rules from the beginning of acquisition planning. They need to be ready for the possibility that the command cannot fund the project as expected and to be prepared to move to a higher funding threshold. A firm understanding of the cost variation rules is essential to avoiding unwanted audits and potential Antideficiency Act violations.

---

56. The author envisions constructive changes, such as suspension of work and differing site conditions, as valid reasons to take advantage of this option. Undiscovered environmental concerns that result in additional costs and work stoppages justify paying additional costs; likewise, this situation is also unforeseeable. Although planning for such contingencies is always preferable, it is not always possible.

57. See SECNAV INSTR. 11010.20F, *supra* note 2; AR 415-15, *supra* note 3.

58. This amount is either \$1.5 million or \$3 million.

59. This amount is either \$1,875,000 or \$3,750,000.

60. 1 AFI 65-601, *supra* note 1, vol. 1, para. 9.4.3.1.

61. 10 U.S.C.A. § 2805 (West 1998).

62. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2811, 110 Stat. 186 (1996).