



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
FINANCIAL MANAGEMENT AND COMPTROLLER
109 ARMY PENTAGON
WASHINGTON DC 20310-0109

JUN 28 2007

MEMORANDUM FOR LIEUTENANT GENERAL R. STEVEN WHITCOMB
COMMANDER , THIRD ARMY / US ARMY CENTRAL
1881 HARDEE AVE SW
FORT MCPHERSON, GA 30330-1064

SUBJECT: Funding Guidance for Contracts Involving Non-Tactical Vehicles

1. References:

- a. Commander, Third Army /ARCENT memo, subject: Request Exception to Policy for Capital Leases Under OMB Circular No. A-11, undated.
 - b. Commander, Multi-National Corps-Iraq memo, subject: Request for Guidance on and/or Relief from Fiscal and Budgetary Procedures in Support of Operation Iraqi Freedom, dated 12 January 2007.
 - c. OMB Circular A-11, Preparation, Submission and Execution of the Budget, Appendix B - Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, 30 June 2006.
 - d. Defense Financial Management Regulation (FMR) 7000.14, Volume 2A - Budget Formulation and Presentation, June 2006.
 - e. Defense Financial Management Regulation (FMR) 7000.14, Volume 4 - Accounting Policy and Procedures, January 2007.
 - f. DoD Office of General Counsel memo, subject: Logistics Civil Augmentation Program (LOGCAP) Funding, dated 7 March 2006 (Enclosure 2).
 - g. ASA (FM&C) memo, subject: Funding Guidance for Contracts Involving Capital Assets, dated 28 March 2007.
2. In response to ARCENT and MNC-I requests for assistance, this memo provides guidance regarding the type of funding to be used for specified in-theater service contracts for leasing non-tactical vehicles. This is the second of two memorandums addressing the leasing of capital assets in-theater. The first memorandum, dated 28 March 2007, provided guidance on two other major leasing actions: Prime Power Generation Equipment and Dining Facilities. Additionally, it provided a detailed discussion and analysis of the regulatory guidance impacting these leasing actions.

The general guidance in that memo is applicable to the leasing of non-tactical vehicles.

3. Enclosure 1 provides a digest, decision, detailed discussion (Background, Management Issues, Technical Issues, and Legal Issues) and required Command actions for non-tactical vehicle leases. In summary:

- a. Digest: ARCENT requests an operating - capital lease determination for contracts for non-tactical vehicles used in the theater or an exemption from the capital leasing rules.
- b. Decision: It is necessary to modify the leases/contracts to clarify and reinforce the government's intent to lease, not buy, the vehicles, specifically with regard to the settlement of insurance claims (see Enclosure 1, Paragraph 4 for suggested contract modification language). Once the leases have been so modified, and presuming that there are no installment purchases or lease-to-buy options, these leases may be paid with operation and maintenance (O&M) funding.

4. Additional Guidance.

- a. The guidance provided for the leasing of non-tactical vehicles necessitates a reemphasis of the need to carefully prepare contracts for the provision of services in the theater.
- b. Based on the known operational circumstances at the time the NTV requirement is determined, the command is encouraged to do a preliminary lease-purchase analysis IAW Federal Acquisition Regulation (FAR) Subpart 7.4 prior to executing any lease or purchase contract.
- c. If the command determines that the US Government's intent is to purchase, own, or take permanent possession of the equipment currently under lease, then actions will be initiated to obtain the proper procurement funding. ARCENT G-8 should contact the Army Budget Office to request procurement funding.
- d. At the end of a lease any back-side assessments, or settlement fees, which are defined as those maintenance specific costs associated with preparing vehicles for turn-in to the lessor, may be paid for with O&M funding. Total settlement fees shall not exceed the fair market value of the vehicle adjusted for the fair market value of any modifications made to the vehicle to support military operations.
- e. The legal guidelines established by the DoD General Counsel memo at Enclosure 2, along with the reasoning and guidance provided in this memo, should be transmitted to the supporting contracting, legal, and resource

management staffs responsible for formulating, reviewing, executing and managing similar contract efforts in theater.

5. This memo has been coordinated with the Army Office of the General Counsel, the Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology), the G4, the G3 and the Army Budget Office. We also consulted with selected officials in the Office of the Under Secretary of Defense (Comptroller) and DoD General Counsel's Office to insure this memo's guidance is in conformance with OSD policy and guidance.
6. The following HQDA functional staff points of contact are available:
 - a. Office of the Assistant Secretary of the Army (Financial Management and Comptroller):
 - (1) Mr. Joe Hemphill, Army Budget Office - Budget Execution Policy Division, DSN 222-7497, CM 703-692-7497, email: joseph.hemphill@hqda.army.mil
 - (2) Mr. Dave Atherton, Army Budget Office - Investment Division (Other Procurement), DSN 222-4780, CM 703-692-4780, email: david.atherton@hqda.army.mil
 - (3) Mr. Brooke Allen, ODASA(Resource Analysis & Business Practices), DSN 222-7871, CM 703-692-7871, email: brooke.allen@hqda.army.mil
 - b. Office of the General Counsel (Ethics and Fiscal Law Section): Mr. Paul Hancq, DSN 225-4296, CM 703-695-4296, email: paul.hancq@hqda.army.mil
 - c. Office of the Assistant Secretary of the Army (Acquisition, Logistics, and Technology): Mr. David Mabee, DSN 664-7104, CM 703-604-7104, email: david.mabee@hqda.army.mil



Nelson A. Ford
Assistant Secretary of the Army
(Financial Management and Comptroller)

2 Enclosures:

1. Digest, Decision, Discussion, Command Action Detail for Non-Tactical Vehicles
2. OGC March Memo

Copy Furnished:

HQDA: Deputy GC (Ethics & Fiscal), OASA(ALT), G4, ACSIM

OSD: OUSD(C), OGC, OUSD(AT&L)

JCS: Legal Advisor

CENTCOM: J8, SJA, J4

MNC-I: C8, SJA, C4

Enclosure 1 – Non-Tactical Vehicles:

1. **Digest:** ARCENT requests an operating - capital lease determination for contracts for non-tactical vehicles used in the theater or an exemption from the capital leasing rules.
2. **Decision:** It is necessary to modify the leases/contracts to clarify and reinforce the government's intent to lease, not buy, the vehicles, specifically with regard to the settlement of insurance claims (see paragraph 4 below for suggested contract modification language). Once the leases have been so modified, and presuming that there are no installment purchases or lease-to-buy options, these leases may be paid with operation and maintenance (O&M) funding.
3. **Discussion:**
 - a. **Background:** Early in the Iraq operation, theater contracting officials processed contracts for the provision of transportation services by means of non-tactical vehicles throughout the AOR. Based on the assumption that they are leasing a capital asset, the Command contends they are approaching the OMB Circular A-11, Appendix B, capital lease thresholds, and as such they require procurement funding vice operation and maintenance funding for the lease, or an exemption from the OMB capital lease "funding" rules. The Command also cites the capital lease guidance laid out in the DoD Financial Management Regulation 7000.14, Volume 4 (Accounting Policy and Procedures) to further support their request for either procurement funding or an exemption.
 - b. **Technical Factors.**
 - (1) Review of the ARCENT submitted contract documents (e.g., Contract W91GEU-06-A-0005-P00002 issued 11 Oct 2005 by JCC-I/A Victory RCC, Camp Victory, APO, AE 09342 to Trade Links ME) indicates that the intent was to obtain use but not ownership of the vehicles. According to the lease contract, the vendor is responsible for performing all maintenance services on their fleet of vehicles provided. Additionally, the contracting officer(s) has been advised that units utilizing the vehicles do not intend to purchase the vehicles now or in the future.
 - (2) However, specific clauses in the contracts appear to compensate the lessor excessively with regard to insurance claims for destroyed vehicles. Moreover, there are clauses and provisions in the leases/contracts that imply ownership and are not in the best interest of the Government. Fundamentally, the Government should avoid having to purchase any vehicles as a result of settlement of a claim where vehicles were

destroyed due to criminal acts, natural disasters, or hostile acts. Rather, the Government should offer fair and reasonable monetary compensation to the lessors for the loss of their vehicles.

c. **Management Factors.** The apparent intent of the contract was to provide use of the vehicles for an indeterminate period of time while US Forces and their supporting logistical operations conducted in-country operations. This strategy has resulted in the continuing use of the vehicles to this day.

d. **Legal Factors.**

(1) ARCENT and MNC-I correspondence on this matter cites the provisions of OMB Circular A-11, Appendix B. This scorekeeping guidance does not control the selection of the proper appropriation (procurement or operation and maintenance), as discussed in paragraph 3 of 28 March 2007 ASA (FM&C) memo (reference 1. g.).

(2) Additionally the ARCENT and MNC-I correspondence cites the Defense Financial Management Regulation (FMR) 7000.14, Volume 4 (Accounting Policy and Procedures) as applicable guidance in this matter. Volume 4 provides specific guidance on the proper accounting treatment for leases, but it does not control the selection of the proper appropriation (procurement or operation and maintenance), as discussed in paragraph 3 of 28 March 2007 ASA (FM&C) memo (reference 1. g.).

(3) The 7 March 2006 legal opinion rendered by the DoD Office of the General Counsel (Enclosure 2 of base memo) provides the Department's most recent legal guidance for this matter. Though it addresses the fiscal execution for the Logistics Civilian Augmentation Program (LOGCAP) contract, the fiscal principles upon which that opinion is based, in addition to the guidance provided in paragraph 3 of 28 March 2007 ASA(FM&C) memo (reference 1. g.), provide appropriate guidance for resolving this matter. Specifically in the opinion's fifth paragraph:

“Whether a particular...task order in fact constitutes an order for services will depend upon the intent of the government, as evidenced primarily by the task order's terms in context of the contract under which it is issued, including the manner in which the contract allocates business risk between the government and the contractor...Thus where the government intends to acquire logistics or engineering services or supplies, the task order must be funded with O&M appropriations, unless the task order requires the contractor

to deliver investment end items that [then] must be funded from procurement appropriations...”

- (4) Both 10 U.S.C. § 2401a, Lease of vehicles, equipment, vessels, and aircraft, and Defense Federal Acquisition Regulation Supplement (DFARS) 207.470 (b) establish requirements for any lease of vehicles for 18 months or more. While this statute and regulation provide that the contracting officer may lease commercial vehicles and associated equipment whenever the contracting officer determines that leasing of such vehicles is practical and efficient, **there is a legal and regulatory requirement for a proper, written determination before making, extending, or renewing a vehicle lease for 18 months or more. See 10 U.S.C. § 2401a and DFARS 207.470.**

4. Required Command Actions:

- a. Continue to use O&M funding for payment of the vehicle leases, to the extent there is no installment purchase or lease-to-buy.
- b. Based on the known operational circumstances at the time the NTV requirement is determined, the command is encouraged to conduct a preliminary lease-purchase analysis IAW Federal Acquisition Regulation (FAR) Subpart 7.4 prior to executing any lease or purchase contract.
- c. To ensure that there is no confusion concerning the nature of the current contract and the Army's intentions, Command will modify the current leases/contracts to clarify that the US Government (ARCENT and/or MNC-I) will not purchase or otherwise acquire the vehicles. This requires deletion of any inconsistent contractual requirements and inclusion of the following text applicable to insurance coverage and claims:

*The United States Government is self-insured and provides full insurance coverage for all vehicles in its possession. In addition to this coverage, the government carries full coverage liability, medical, and collision insurance with zero deductible to cover all medical and legal expenses to be paid for injuries or death settlement expenses. The contractor **may** submit a claim to the contracting officer for any vehicles destroyed or damaged, while in the possession of the Government, due to criminal acts, natural acts (commonly called Acts of God), or hostile acts. The claim shall include a detailed proposal, documentation substantiating the claim, and an invoice for the replacement vehicle if required by the contracting officer. The Government will compensate the contractor in an amount determined by the contracting officer. This amount*

will not exceed the actual cost of the vehicle, proven by invoice, less a deduction for actual use that shall be computed by multiplying the invoice value of the vehicle at the time of delivery by 3.0% for each month that the government has leased the vehicle, plus other ordinary and necessary costs agreed to by the parties. All paperwork proving that the vehicle was destroyed or damaged will be provided to the contracting officer prior to authorizing payment. Lease payments for a destroyed vehicle will end at the time of destruction, and no further lease payments will be made on the vehicle unless the lessor can supply an equivalent vehicle to replace it within 24 hours of the destruction. The government, however, is not responsible for vehicles under the contractor's control at the time of damage or destruction.

- d. Modify leases/contracts to remove, clarify, or tailor any lease terms which provide that title to items passes to the Government. As a minimum, subsection (n) of FAR clause 52.212-4 must be tailored IAW FAR 12.302 to make it clear that title to vehicles will not pass to the Government.
- e. Command should immediately contact the General Services Administration (GSA) to determine the feasibility of increasing the use of GSA vehicles in the theater, and to the extent feasible, will obtain needed vehicles from GSA.
- f. Command shall work through contracting channels IAW DFARS 207.470 to properly justify and document any continuing leases of vehicles for 18 months or longer.
- g. At the end of a lease any back-side assessments, or settlement fees, which are defined as those maintenance specific costs associated with preparing vehicles for turn-in to the lessor, may be paid for with O&M funding. Total settlement fees shall not exceed the fair market value of the vehicle adjusted for the fair market value of any modifications made to the vehicle to support military operations.
- h. If the command determines that the US Government's intent is to purchase, own, or permanently possess the equipment currently under lease, then actions will be initiated to obtain the proper procurement funding. ARCENT G-8 should contact the Army Budget Office to request procurement funding.

Enclosure 2 – OSD OGC Legal Opinion:



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



MAR 07 2006

MEMORANDUM FOR OFFICE OF THE LEGAL COUNSEL TO THE CHAIRMAN,
JOINT CHIEFS OF STAFF (ATTN: COL T. AYRES)

SUBJECT: Logistics Civil Augmentation Program (LOGCAP) Funding

This responds to your memorandum, subject as above, dated 1 November 2005, requesting this office's opinion regarding the proper funding source for LOGCAP contracts under which the contractor's performance entails (1) military construction costing more than the statutory ceiling on the use of operation and maintenance (O&M) funds for unspecified minor military construction projects; or (2) the expense-investment threshold applicable to the purchase of items. We recognize the uncertainty surrounding this complex issue, as commanders and contracting officers strive to support soldiers executing ongoing military operations in two active combat zones. This opinion clarifies relevant fiscal and contract law principles and establishes a common understanding of how these principles should be applied in administering the LOGCAP.

The Army established the LOGCAP in 1985, as a means to "preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces." Army Reg. (AR) 700-137, *Logistics Civil Augmentation Program (LOGCAP)*, para. 1-1 (1985). Importantly, contracts for obtaining logistics and engineering services and supplies under LOGCAP are not subject to special treatment under the law: they must be formed, funded, and executed in accordance with the laws and regulations governing government contracts generally. Thus, the Army's implementing policies and procedures provide that LOGCAP contracts shall be planned and executed under the authority of the Federal Acquisition Regulation (FAR), Defense Federal Acquisition Regulation Supplement (DFARS), and the Army Federal Acquisition Regulation Supplement (AFARS). *Id.*, at paras. 1-4k.(2) and 3-1d. Further, guidance promulgated by the U.S. Army Corps of Engineers notes that "[t]here are no special fiscal rules when using LOGCAP" and that "[f]unds used to finance work ordered and accomplished under the LOGCAP contract must comply with all normal fiscal rules and restrictions associated with the appropriation(s)" as it is "important that the correct 'color' of money be provided to finance work." EP 500-1-7. This guidance is accurate, and should be followed.

As a general proposition, an agency's operating appropriations are legally available for the acquisition of services and supplies that are necessary to carry out its day-to-day operations, and for which funds are not otherwise provided. *See, e.g., Ms. Comp. Gen. B-303170* (Apr. 22, 2005). Therefore, the Operation and Maintenance, Army (OMA) appropriation is the proper source of funding for task orders issued under LOGCAP contracts, provided the task order under the contract is for logistics or engineering services or supplies in support of military operations, rather than investment end items or

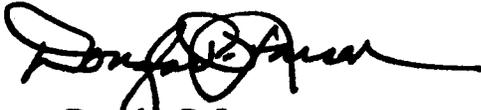


construction. A contractor's election, for its own account, to purchase what in government practice would be investment end items or engage in construction, in order to perform under a proper LOGCAP services task order, is not subject to the monetary limits prescribed by section 8036 of the DoD Appropriations Act, 2006, or title 10, United States Code, section 2805(c). These restrictions are not intended to constrain private contractors in exercising their judgment as to the best means of providing services to the government.

Several Government Accountability Office (GAO) reports describe the construction activities and purchase of high-value material that contractors routinely undertake in performing services under O&M-funded LOGCAP contracts. *See, e.g.,* GAO/NSIAD-97-63, *Contingency Operations: Opportunities to Improve the Logistics Civil Augmentation Program* (February 1997); GAO-04-854, *Military Operations: DoD's Extensive Use of Logistics Support Contracts Requires Strengthened Oversight* (July 2004); GAO-05-328, *Defense Logistics: High-Level DoD Coordination is Needed to Further Improve the Management of the Army's LOGCAP Contract* (March 2005). Congress' continued appropriation of funds that are obligated for LOGCAP, presumably with knowledge of these reports, does not amount to ratification by appropriation, however; the government still must abide by statutory restrictions related to the obligation of appropriated funds, and may not accomplish indirectly through LOGCAP contracts a purpose it could not accomplish by direct expenditure. *See, e.g.,* 1 Government Accountability Office (GAO), *Principles of Federal Appropriations Law*, 4-9 (3d ed. 2004).

Whether a particular LOGCAP task order in fact constitutes an order for services will depend upon the intent of the government, as evidenced primarily by the task order's terms in the context of the contract under which it is issued, including the manner in which the contract allocates business risks between the government and the contractor. The proper funding for the order should be determined at the time funds are obligated. Thus, task orders "must be carefully drafted to specify the services required and the conditions under which they will be required." AR 700-137, para. 3-1d. In preparing task orders for services to be funded with O&M appropriations, contracting officers should consider Federal Acquisition Regulation (FAR) Clause 52.245-5, and the implications of cost provisions that vest in the government title to contractor-purchased property. Whether title to such property vests in the government, however, is only one factor that must be considered in determining proper funding. Other factors include the government's intent, the type of performance required under the task order, and the manner in which business risks are allocated between the government and the contractor. Thus, where the government intends to acquire logistics or engineering services or supplies, the task order must be funded with O&M appropriations, unless the task order requires the contractor to deliver investment end items that must be funded from procurement appropriations, or construct facilities that exceed statutory ceilings on O&M-funded construction, or the contractor is entitled to be reimbursed for the costs of such items or construction as direct items of cost. Consequently, task orders for tactical, support, and non-tracked combat vehicles must be funded with Other Procurement, Army (OPA) funds.

Similarly, task orders that require the construction of base facilities at a cost that will exceed the threshold for O&M-funded minor military construction normally will require military construction (MILCON) appropriations or exercise of the Department's temporary, limited authority under section 2809 of the National Defense Authorization Act for Fiscal Year 2006 to use O&M funds for construction projects outside the United States.



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