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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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