

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

21 March 2001

REPLY TO
ATTENTION OF:

CECC-G

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, DISTRICT
COMMAND, FIELD OPERATING ACTIVITY AND LABORATORY COUNSELS

SUBJECT: CECC-G Bulletin No. 01-04, Guidance on the Appropriate Use of
Installation Support Operations and Maintenance, Army Funds

1. The purpose of this bulletin is to transmit an Office of the Chief Counsel legal opinion on the appropriate use of Installation Support Operations and Maintenance, Army funds. This issue was raised to this office by the Installation Support Division of Military Programs and may impact the way that your clients do business.
2. This legal opinion is intended to assist you in advising your ISO clients with regard to the use of their OMA funds as well as assist the Installation Support Division in preparing guidance to the ISOs. This opinion will be added to the Legal Opinions Database.
3. The point of contact for this bulletin is Julie Matta, who can be reached at (202) 761-4931, or by email at julie.c.matta@usace.army.mil.



RUPERT JENNINGS
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DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-G (27-1a)

19 March 2001

MEMORANDUM FOR CEMP-IS (Attn: Michael Kastle)

SUBJECT: Appropriate Use of Installation Support Operations and Maintenance, Army Funds

1. Reference:

a. Your request, 31 January 2001, that this office provide you with our views on the appropriate use of Installation Support ("IS") Operations and Maintenance, Army ("OMA") funds to provide services to the various customers of an Installation Support Office ("ISO").

b. E-mail, 9 March 01, from Gary Mosteller to Marvin Ormerod, Subject: OMA Support for AFH.

2. Background. According to the CEMP-IS website, ISOs were established in December of 1998 with the mission of small project development, O&M technical services, and guidance to installation DPWs and MACOMs within each of the Corps' Divisions. Both staffing and funding for the ISOs is devolved from HQUSACE. Currently, there are eight established ISOs, which report to their respective Major Subordinate Commands (MSCs). Funding for the ISOs is provided through HQUSACE from the Corps' OMA budget. It is my understanding that your request regarding the appropriate use of IS OMA funds arises out of the fact that ISOs are using IS OMA funds to support customers funded with fund sources other than OMA and may be funding actual engineering work on behalf of non-OMA funded customers.

3. Quick Answer.

a. IS OMA dollars may be used to evaluate and advise customers on their prospective needs regardless of the customer's funding source. In other words, ISOs may provide "baseline support" to any customer.

b. IS OMA dollars may also be used to meet OMA funded customers' needs for actual engineering services.

c. IS OMA dollars may not be used to provide such engineering services to customers who are non-OMA funded. In the view of this office, to do otherwise would

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constitute a purpose statute violation and an improper augmentation of appropriations. Such services may be provided on a reimbursable basis only.

4. ISO Services. This office was not consulted prior to the devolvement of IS personnel or funds. If we had been, we likely would have advised that HQUSACE consider various options between two extremes (i.e., IS OMA funds will only be used to support customers funded with OMA and IS OMA funds will be used to provide "baseline support" to all customers because providing reimbursable support is a USACE mission), make decisions with respect to implementation of the ISO baseline support, and issue guidance accordingly. Note that I use the term "baseline support" to describe the process of explaining USACE capabilities to customers and how USACE would perform the actual work versus providing actual engineering services to a customer.

5. Baseline Support.

a. Since we were not consulted prior to implementation, and we do not know what options were considered and what decisions were made, we have reviewed the implementation of the ISOs' from the perspective of whether various implementation schemes can be considered to be legally supportable. One alternative which can be supported legally is that IS OMA dollars may be used to evaluate and advise customers on their prospective needs regardless of the customer's funding source (i.e., ISOs may provide "baseline support" to any customer). This alternative can be supported legally under the theory that, since providing reimbursable support to Army installations (See AR 10-87, Major Commands in the Continental United States, Par. 3.1b (30 Oct 92)) is a USACE mission, we can use mission funds to advise IS customers whether and how we could provide reimbursable services to them. (And most likely, we can make a credible argument that part of providing support for Army installations includes providing some level of support to non-Army tenants on Army installations). Therefore, our OMA funds are available to enable USACE to introduce IS customers, regardless of funding source, to the scope of IS services.

b. However, our conclusion is predicated on our understanding that there is or was an expectation that some significant percentage of our IS customers are OMA funded. I cannot give an absolute "bright line" rule for what this percentage must be. However, I likely would not be comfortable unless either that percentage is sufficient enough to justify the number of full-time equivalents (FTEs) we are funding at each ISO, or we have some process and procedure for reconciling costs on an annual basis if most of the reimbursable customers in any given year are not active Army activities. If an ISO is primarily servicing customers who are non-OMA funded, then the role of that specific ISO, and the appropriate funding for it should be examined further from both a policy and legal perspective.

6. Doing Actual IS Work. IS OMA dollars may also be used to meet OMA funded customers' needs for actual engineering services. For example, an ISO may use its IS OMA funded personnel and, if there are any IS OMA funds available beyond that, OMA

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funds to hire district engineering personnel to perform engineering services for an OMA funded customer. However, ISOs may not provide such engineering services to customers who are non-OMA funded. In the view of this office, to do otherwise would constitute a purpose statute violation and an improper augmentation of appropriations. Such services may only be provided on a reimbursable basis.

7. Improper Augmentation of Appropriations.

a. Title 33 U.S.C. § 1301, known as the purpose statute, provides that appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. The concept of “augmentation” basically provides that agencies may not augment their appropriations from outside sources, without specific statutory authority. There is no specific statutory prohibition against augmentation (although there is a statutory basis in both the purpose statute and the miscellaneous receipts statute, 33 U.S.C. § 3302(b)). Rather, it is a doctrine developed by “case law” (i.e., Comptroller General decisions). It is also based on the “separation of powers” doctrine. In other words, when Congress makes an appropriation, it is telling an agency that it can’t carry out the program or project beyond the level of funds Congress has appropriated for it.

b. Here, if the ISOs were to provide actual engineering services to non-OMA funded customers, it would not only constitute a violation of the purpose statute (because OMA funds would be used for purposes other than which they were appropriated i.e., operation and maintenance of the active Army), it would also improperly augment the appropriations of the non-OMA funded customers. In other words, USACE would be augmenting the appropriations of the non-OMA funded customers by providing OMA funds to pay for services which should have been paid for out of the customer’s own appropriations. Again, while not specifically prohibited by statute, the Comptroller General, through more than fifty years of case law, has clearly determined that agencies may not augment their appropriations without specific statutory authority

8. From a theoretical perspective, it is probably possible that the Army could decide to budget in the Corps’ OMA budget all installation support for the entire Army, to include other than OMA funded activities, for example, Army Reserve and Army Family Housing. If that were to occur, the Corps would have to fund all installation support services for the Army and would be unable to accept reimbursement from any Army customer without augmenting the Corps’ appropriation. However, unless and until the Army makes such a determination, it is our opinion that IS OMA dollars are not available to fund engineering services for non-OMA funded customers.

9. Definition of “Work”. We recognize that the distinction between preliminary project development-type efforts (i.e., what I have characterized as “baseline services” above) and actual “work” may in certain circumstances be very fact specific. However, a useful rule-of-thumb to use in distinguishing this preliminary work and doing-the-work is “explaining our capabilities and how we’d do the work” versus “actually beginning to

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perform the services.” We strongly encourage ISOs to seek the advice of CEMP-IS and their supporting counsel office in circumstances where they may be unsure of the proper use of their funds.

10. Master Planning. Per the reference 1b e-mail, it is our impression that some discussion of whether IS OMA Funds may be used for installation master planning has occurred. As an academic matter, providing master planning services to an OMA-funded installation, even where that installation has some non-OMA funded tenants, most likely complies with the purpose statute and is permissible. However, please recognize that this legal determination is extremely fact-dependent and that ISOs should consult with their Office of Counsel before agreeing to perform master planning services. Additionally, it is our understanding that master planning is an installation responsibility under the applicable regulations. Thus, we recommend that your office examine whether it is appropriate for USACE to be providing master planning services to installations, even OMA-funded installations, on a non-reimbursable basis using IS OMA funds.

11. New Guidance.

a. We also strongly recommend that CEMP-IS consider issuing new guidance with specific examples of the difference between preliminary project-evaluation type work and actual engineering services as well as revising the existing Consolidated Command Guidance on the Installation Support Program. Specifically, you have discussed with Julie Matta of my staff that p. 2-64 of the USACE Fiscal Year 2001 Consolidated Command Guidance, which deals with the Military Programs Installation Support (IS) Program, contains a significant misrepresentation to the field concerning the appropriate use of IS funds. Specifically, paragraph 7 provides

It is appropriate for IS personnel to talk with and advise any customer, whether the customer is Army (AC, AR, NG), Navy, AF, or other customers. Direct funded travel should be restricted to support of Army customers. Check book funds should be used solely to support Army Installations (AC, AR, NG), not non-Army customers.

Section 4, Procedural Guidance, Par. 7, USACE Fiscal Year 2001 Consolidate Command Guidance, p. 2-64

b. This guidance was not coordinated with this office. As explained above, in our view, IS OMA funds may not be used to actually perform “work” for non-OMA funded customers. Here, both the Army Reserve (AR) and the National Guard (NG) are non-OMA funded as they receive their O&M budgets from the Operations and Maintenance, Army Reserve (OMAR) appropriation and the Operations and Maintenance, Army National Guard (OM-ANG) appropriation respectively. See the Department of Defense Appropriations Act, 2001, P.L. 106-259 (August 9, 2000). Thus, it is our view that this guidance should be revised consistent with this opinion.

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12. Summary. An ISO may provide baseline support, using IS OMA funded personnel, to any customer, regardless of the customer's funding source. The term "baseline support" is informally defined as discussing USACE capabilities and advising potential customers on what USACE can do for them. An ISO may also do actual "work" i.e., provide actual engineering services to OMA funded customers without reimbursement. However, an ISO may provide engineering services to non-OMA funded customers on a reimbursable basis only.

13. If you have any questions my POC for this matter is Julie Matta at 761-4931.



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