

GC GUIDANCE ON MINOR CONSTRUCTION THRESHOLDS

We have been asked about how the Department implements what is known as the “minor construction threshold,” which limits the amount of certain funds that can be spent on minor construction projects that are not specifically authorized by law. This Guidance is intended to clarify both the applicable law and Department policy.

The Secretary’s authority to carry out construction projects is subject to several limitations in the Atomic Energy Defense Act (AEDA) on the use of funds appropriated for DOE national security programs. One of these limitations, the “minor construction threshold,” caps the amount of “operation and maintenance funds” or “facilities and infrastructure funds authorized by a DOE national security authorization” that may be spent on General Plant Projects (GPP), defined as minor construction projects that are not specifically authorized by law.¹ This Guidance addresses two issues: (1) the applicability of the minor construction threshold to funds beyond those specified in the statute, and (2) the effect of recent statutory amendments raising the cap to \$10 million.

With respect to the first issue, although the statutory minimum construction threshold only applies to GPP projects using “operation and maintenance funds” or “facilities and infrastructure funds” which are “authorized by a DOE national security authorization,” the Department has the discretion, and has decided, to apply the threshold more broadly than the statute requires. Applying the threshold limit to all GPP spending streamlines accounting and facilitates compliance with the statutory requirement, particularly where Department elements may pay for GPP from a mix of funding sources. Accordingly, DOE Order 430.1B – which establishes reporting mechanisms and responsibilities for real property asset management – specifies that Total Estimated Costs may not exceed “the congressionally established limit of \$5 million” for all GPPs, without regard to their funding source.²

The second issue relates to the effect of two recently enacted statutory provisions regarding the minor construction threshold. These provisions affect three sections in the AEDA – sections 4703, 4704, and 4706 – that reference the “minor construction threshold,” which is defined in section 4701 of the AEDA as a certain dollar amount.³ Section 4703 authorizes the Secretary to carry out “minor construction projects” which fall under the threshold amount, subject to certain reporting requirements.⁴ Section 4704 exempts projects below the minor construction threshold from construction cost ceilings and notification requirements.⁵ And section 4706 exempts

¹ The DOE Accounting Handbook, <http://www.cfo.doe.gov/policy/actindex/chap10.pdf>, explains that GPP are projects “necessary to adapt facilities to new or improved production techniques, to effect economies of operations, and to reduce or eliminate health, fire, and security problems.”

² DOE Order 430.1B, § 4(c), available at <https://www.directives.doe.gov/directives/current-directives/430.1-BOrder-bc1/view?searchterm=None>. (Last amended on February 8, 2008). This limit also applies to Institutional General Plant Projects (IGPPs), which are a “class of GPPs that are of a general institutional nature whose benefit cannot be directly attributed to a specific or single program and are required for sitewide need.”

³ Section 4701 of the AEDA is codified at 50 U.S.C. § 2741.

⁴ 50 U.S.C. §§ 2743, 2743a.

⁵ 50 U.S.C § 2744.

projects below the minor construction threshold from a limit on conceptual design costs that otherwise applies to construction projects.⁶

The first of the two new statutory provisions, enacted in the Department's annual appropriation for FY 2009, instructed the Department to assume that projects that cost less than \$10 million are below the minor construction threshold for purposes of two of the three AEDA sections that reference the threshold (sections 4703 and 4704).⁷ This change is permanent: it applies to funds appropriated in FY 2009 and in subsequent years. A second provision, enacted in the National Defense Authorization Act for Fiscal Year 2010, temporarily amended the "minor construction threshold" definition in section 4701 (which applies to all three referencing sections in the AEDA) from \$5 million to \$10 million.⁸ That change will expire on September 30, 2010, at which point the definition in 4701 will revert back to \$5 million.

While the interaction of these two new provisions is a little unusual, they are capable of a harmonious reading. The first provision did not amend the definition of "minor construction threshold" in section 4701. Instead, it directed the Department to assume the threshold to be \$10 million for two of the three sections referencing that definition. The second provision – amending the underlying definition of the threshold for all three referencing sections until September 2010 – simply had the effect of temporarily raising the threshold for the one section (section 4706) not affected by the first provision. After the second provision sunsets, the "minor construction threshold" for purposes of section 4706 conceptual design reporting requirements will revert back to \$5 million, while the Department will continue to assume the threshold for sections 4703 and 4704 to be \$10 million (per the first provision).

Department of Energy orders and budget requests should be updated to reflect these statutory changes. While it continues to be the Department's policy to apply the minor construction threshold to *all* GPP spending, not just the two national security funding sources specified in the statute, the threshold should be raised to \$10 million, consistent with the recent statutory changes. DOE Order 430.1B (which still references the \$5 million limit for GPP) will be amended accordingly. For the FY 2010 budget, the Department applied the expanded \$10 million minor construction threshold to all GPP. The FY 2011 budget request, which was prepared prior to the GC analysis described above, assumed the threshold would revert to \$5M. Barring any new amendments, the budget request should go back up to a \$10M threshold for FY 2012.

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⁶ 50 U.S.C. § 2746.

⁷ Section 310 of the Energy & Water Development and Related Agencies Appropriations Act (part of the Omnibus Appropriations Act 2009), Pub. L. No. 111-8, Div C, Title III, § 310, 123 Stat. 627 (Mar. 11, 2009).

⁸ Section 3118 of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, Div C, Title XXXI, Subtitle B, § 3118(a), 123 Stat. 2709 (Oct. 28, 2009).