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PATHWAYS TO EXPEDITE FACILITIES PROJECTS



By Lieutenant Colonel Dean W. Korsak

Legal professionals can help simplify facilities projects by comprehensively identifying legally sufficient options for fiscal, contract, environmental, and basing requirements.

Hotels to Hangars Spectrum

Aging infrastructure and dilapidated buildings undermine the mission.^[1] A web of laws, regulations, and budgetary constraints along with the lack of installation command continuity present challenges. Solutions exist under current authorities and within existing budgets. Legal professionals play a key role in expediting facilities projects. We can direct military installation command teams to fiscal and contractual authorities and help them to avoid common pitfalls. Facilities projects should be built upon a solid *legal* foundation. This article will provide you with the tools to better advise your command team so they can build the infrastructure needed to execute the mission.

Facilities can be considered along the full range of legally sufficient options. On one end are hotel rooms, which are essentially short-term leases. There is nothing inherently

military about lodging facilities. The other end are specialized facilities with a distinct military purpose. For example, stealth aircraft hangars require specialized equipment, security perimeters, and exclusive use. The middle includes office space with no special security or proximity requirements. Keeping this spectrum of facility types in mind will help counsel to provide a better perspective when advising command teams.

Consider your role at the base level. Installation legal offices are tasked with serving as “a Technical Advisor to the Facilities Board, and to the Facilities Board Working Group.”^[2] Installation Facilities Boards exist to “validate requirements for facilities and infrastructure, approve installation priorities, and determine the most effective and efficient course of action for real property and planning

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matters.”^[3] Although that may seem like a tall order, these projects can be rewarding because they can have a lasting impact. Legal offices perform a key role, helping commanders identify legally viable options and find the best match for mission needs.

Facilities Are a Leadership Imperative

All facilities projects begin with a defined need to perform an assigned mission. The Department of Defense (DoD) Unified Facilities Criteria (UFC) establish functional requirements, which are defined by end users based on their operational needs.^[4] To use a familiar example from our career field, the criteria for legal facilities provide parameters for private office space to enable privileged conversations, courtrooms of a certain size and layout with certain unique features, and associated spaces.^[5] The leadership imperative, then, entails actively managing facilities entrusted to one’s stewardship and planning for the remodeling or construction required based on obsolescence or changing requirements.

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Installation commanders should ensure that facilities meet UFC standards and present a professional work environment and, when they do not, that such needs are promptly identified and submitted to the facilities working group and board for consideration. The challenge is that a standard two-year command tour will begin and end before many maintenance and repair projects are started and completed. Simple construction projects may last over a decade from start to finish. This means installation commanders must ensure the functional offices involved in the process develop expertise, cultivate relationships with key offices, and maintain best practices.

Individual units initiate the facilities process by submitting a Civil Engineer work request (Form 332), attaching the applicable UFC, and providing a brief description of how existing facilities are out of compliance. Here is where the process becomes more complicated. Requests are also vetted for environmental compliance requirements, prioritized for funding, and aligned with all pending projects and installation development plans given current and future mission needs. The lack of command continuity can present challenges. For example, one commander may wish to renovate offices in an old building, which will eventually exceed the cost of building a new building. Another commander may wish to push for a military construction project for world-class facilities that would be cheaper than a multi-phased renovation project to a legacy building. Both are legally sufficient options and subject to command discretion.

In addition to the discretionary nature of facilities improvement strategy, facilities projects are one of an installation commander’s toughest responsibilities because of being charged with this responsibility but not having the resources or authority to carry out these duties. For example, commander’s facilities projects present unique challenges given the wide range of authorities, fluctuations in funding availability, discretionary prioritization of projects, and length of time required for larger projects. Commanders welcome competent legal advice to evaluate all legally sufficient options and make the best decisions possible.

Authorities for Facilities Projects – From Simple to Complex

There are multiple stakeholders, including a range of approval authorities and different organizations, in facilities projects. Legal professionals who are familiar with the complex framework will be able to help identify the menu of legally sufficient options and risks associated with each course of action.

An installation commander is ultimately responsible for formulating, advocating for, and executing installation financial plans.^[6] Civil Engineer units also have financial management responsibilities for facility sustainment, restoration, and modernization (FSRM).^[7] The Air Force

Installation and Mission Support Center (AFIMSC) plays a critical role in balancing budget allocations for FSRM projects.^[8] Operations and Maintenance (O&M) appropriations constitute the majority of FSRM funding.^[9] Some organizations have other types of funds available for unique facilities projects. The type of funds available and type of work required also determine which command level has project approval authority.

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Legal advisors must understand the basic project types, funding limits, approval authorities, and common legal pitfalls like project splitting.^[10] The latter refers to illegal efforts that circumvent the rules by dividing large projects into smaller pieces to avoid fiscal or legal constraints. There are occasions where separate smaller projects may legitimately contribute to larger facilities projects, but counsel should generally guide planners away from project splitting. DAFI 32-1020, Attachment 4 is a useful resource on the grouping of different types of work under each classification category.^[11] Most command teams want to know if a project can fit into the definition of a sustainment maintenance or repair project using O&M funds, as those types of projects can move expeditiously under local command authority. It is incumbent on you to know the difference and to be able to explain what that is.

Sustainment, Maintenance, and Repair

Sustainment, maintenance, and repair are generally funded with FSMR monies. Sustainment and maintenance are the “S” in FSMR. The terms sustainment and maintenance are used interchangeably to describe the upkeep necessary to conserve existing facilities in good working order. Examples include “refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work.”^[12] Approval of such funds happens at the installation level, and there is

no funding limit that would trigger headquarters approval requirements. It is normal for CE squadrons to have an indefinite delivery/indefinite quantity (IDIQ) contract in place to purchase the basic supplies and services needed for such work, which may include paint, shingles, and flooring. Because these projects are not subject to the funding limitations or headquarters-level approval, command teams tend to default to this type of project even when, from an enterprise level, doing so makes no financial sense—e.g., patching up facilities at a greater expense when a new building would be cheaper and more conducive to space optimization and similar efficiencies.

Restoration and Modernization Repair

These two categories of work involve longer timelines and more extensive compliance requirements. They comprise the “R” (restoration) and “M” (modernization) in FSRM. There is also a separate category of recapitalization involving major renovations to existing facilities. Facilities require restoration when “damaged by inadequate sustainment, excessive age, natural disaster, fire, accident, or other causes.”^[13] Approval authority levels change and require verification, but for work that clearly exceeds sustainment and maintenance, the installation commander may approve up to \$5 million. The Commander of the Air Force Civil Engineer Center (AFCEC) approves projects over \$5 million up to \$7.5 million, with re-approvals occurring at Headquarters Department of the Air Force, Civil Engineering Directorate (AF/A4C). The Deputy Assistant Secretary of the Air Force for Environment, Safety, and Infrastructure (SAF/IEE) office must approve projects exceeding \$7.5 million and congressional notification is required. Going beyond existing facilities, major facility military construction requires specific congressional approval.

Military Construction

Military construction is “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land,” including all work that is “necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.”^[14] The annual National Defense

Authorization Act (NDAA) includes approval for specific construction projects.[15] Separate statutory authority exists for emergencies[16] and facilities that were unexpectedly damaged or destroyed.[17] There is also authority for smaller construction projects that are not specified in a NDAA and that fall below the \$9 million threshold.

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Construction funding may be a viable option for smaller facilities projects. Such projects are called Unspecified Minor Military Construction (UMMC). Depending on the value of the project, the approval authority may be the installation commander, the AFCEC Commander, or AF/A4C.[18] Competent legal counsel requires asking questions to understand if more than one funding option exists to pursue a project, which office has the legal authority to approve the project, and whether the dollar amount requires headquarters or congressional notification. Secretarial delegations for legal authority to approve such projects begins with Mission Directive 1-18 and any further delegations.[19] Finally, just as sustainment and repair begins with a work order, all military construction projects require a DD Form 1391.[20] The important point is to remind planning teams not to be dissuaded by pushing forward larger complex facilities projects where that is the best solution for a base community. Building the package with solid requirements is the foundation for all successful projects.

Other Authorities for Facilities Projects

So far, the discussion has focused on facilities projects funded with O&M through FAR-based contract authority. This is because most installation facilities needs are met through this funding category and acquisition strategy. If a facilities requirement seems unique, or there are personnel aware of an innovative solution to a facilities requirement, certain organizations, like federal laboratories or Major Commands,

have other categories of funding and unique statutory authorities for research, development, test, and evaluation (RDT&E),[21] working capital,[22] and even weapons system funds.[23] Finance and Contracting offices, along with competent legal counsel, should ensure that the appropriate funds are matched with the best contract vehicle—which may not always be a traditional, FAR-based contract for unique challenges.

Non-FAR authorities exist for special purposes, some of which could easily apply to developing advanced facilities or upgrades to existing facilities. For example, next generation efficient heating, cooling, and power backup systems could fit squarely into Other Transaction Agreement (OTA) authorities for research,[24] prototype,[25] and experimentation.[26] While this authority is not directly available to installation commanders, there is an opportunity for installations to partner with federal laboratories and to explore innovative technologies. There are also opportunities for jointly used facilities in cooperation with another governmental entity.[27] Legal offices may field questions about whether such authorities could expedite a specific project and should obtain their functional headquarters guidance before obtaining a legal sufficiency opinion.

Leases

The Government Services Agency (GSA) has exclusive authority to enter multi-year leases for federal agencies.[28] The GSA has delegated lease authority for certain categories of leases.[29] Familiarity with these categories helps command teams expand the menu of options for facility needs. The DoD has limited statutory lease authority and can only use O&M funds.[30] Installation planning teams may be hesitant to engage GSA on long-term and cost-effective leases. However, it is important to do so because GSA lease options are often less expensive and time consuming than construction projects. Also, planning teams can use leases in conjunction with major facilities projects so displaced offices have professional workspace until project completion. The overall trend to streamline facilities projects includes increasing flexibility, space optimization, and creating specialized space. Leases may be a great choice for each of these requirements. Industry has taken note, is tailoring

office space to better accommodate Air Force requirements, and is thus offering alternatives that are increasingly attractive—especially in comparison with the time and expense associated with on-base construction projects.

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Innovations and Marketing Slogans Are Not Funding Authorities

An industry trend for large organizations is that facilities management tends to outsource nearly all work that was previously accomplished internally.[31] Just as software has shifted toward being outsourced “as a service,” facilities are going through a transition that is somewhat analogous.[32] Companies are now using the software as a service (SaaS) model to market facilities modernization as a service. The broader context is that large organizations are seeking “workplace as a service” options to avoid owning and maintaining expensive infrastructure and sustainment operations. Military installations have a complicated history with this thinking, for example, the military’s ubiquitous privatized housing ground leases and contracts. Privatized housing allows for a steady stream of BAH payments to private companies so that those companies can build and maintain military housing communities better than an internal military management effort could accomplish. The challenge is that privatized housing exists through specific congressional approval, which does not exist for military facilities.

Still, workspace as a service is a new way of thinking that could apply to facilities arrangements outside of an installation and potentially on-base as well. Planning teams can learn best practices from industry trends and lessons learned from privatized housing arrangements to optimize how military facilities are built, used, and maintained. Legal professionals

can encourage planning teams to think outside of normal approaches by understanding best practices in other federal agencies and commercial real estate trends.

Streamlining Strategic Basing and Environmental Compliance

Planning teams must remain mindful of legal requirements that facilities projects may require. For example, the Air Force Strategic Basing Process[33] is a decision-making framework to determine the best location for new or changing missions, aircraft and weapons systems, and locating tenant organizations on military installations. Legal advisors help identify compliance for projects and scope project plans in an effort to keep decision-making local and reduce unnecessary process requirements. Legal advisors must spot project proposals that will trigger the strategic basing process. Common thresholds that trigger this process involve any organization action “that changes the number of personnel at an installation by at least 35, including military authorizations, civilian authorizations, and on-base contract personnel.”[34] This 35-person threshold could also apply to non-federal entities on base operating under a contract, partnership agreement, or enhanced use lease.[35] Planning teams must be familiar with strategic basing thresholds to avoid projects hitting unnecessary roadblocks. Environmental compliance is more involved than strategic basing and more common to facilities projects.

Environmental compliance refers to a host of statutory and regulatory requirements for screening, coordinating, and potentially modifying planned projects.[36] It involves an appropriate level of environmental impact analysis under a host of laws, the main one being the National Environmental Policy Act, but also coordination with federally recognized Tribes, historic preservation coordination, and potentially many other requirements depending on the scope of a project.

It is helpful to understand environmental compliance in three distinct categories. First, smaller projects for shorter duration typically qualify for one of 38 categorical exclusions (CATEX).[37] Projects qualifying for a CATEX means that there is no requirement for extensive analysis or a public comment period.

Second, projects that do not qualify for a CATEX will usually require an environmental assessment (EA).[38] Examples of projects requiring an EA include “minor mission realignments and aircraft beddowns, new building construction on base within developed areas, and minor modifications to military airspace, weapons ranges and training routes.[39] Installation planning teams must account for the time it takes to prepare an EA, including the required involvement of other federal agencies, state, Tribal, and local governments, and a public comment period.[40] Installations may strategically use EAs to assess many anticipated future projects.[41] An easy way to expedite facilities projects is for installation to update the “Installation Development Plan”[42] with an EA that covers all planned projects and land available for future development projects. Pre-screened projects that would normally require an EA could then qualify for a CATEX, saving time and money in project planning and execution.

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The third category of environmental compliance is an environmental impact statement (EIS).[43] Some of the projects that require an EIS will also trigger the strategic basing process. Examples include site selection of new airfields and decisions involving locations for new installations or disposal of installations.[44] Installation planning teams may be required to involve higher headquarters for non-strategic basing actions that require an EIS, for example optimizing military training routes and airspace spanning over a few different states. Operations and International Law Domain – Environmental Law and Litigation (AF/JAOE) organization maintains an Environmental Liaison Officer (ELO) at the MAJCOM level to help installation legal offices navigate more complex environmental processes

like an EIS. The EIS process requires up front public and congressional notice so that the scoping of activity becomes a collaborative process.[45]

Sometimes legal professionals can identify creative solutions that prevent extensive environmental impacts, maximize local command approval authority, or allow for dual use of built infrastructure. For instance, an installation with over a hundred missile silos needed to land helicopters for their security training and operations. The facilities requirement began with evaluating building concrete helicopter pads at numerous locations over a missile field area spanning 8,500 square miles. The planning team, aided by the base legal office, began with understanding the underlying requirement, which was to have a helicopter land in close proximity to a silo for no more than a few minutes to drop off and then later retrieve a small number of personnel. This facilities effort could take up to a decade to plan, fund, and complete. The planning team evaluated nearby built infrastructure that could potentially meet the need. The planning team learned State and local emergency responders safely used remote county roads in the same area of missile silos when responding to incidents. A test flight, filmed by the installation public affairs office, documented the operations would not have downdrift impact on local farm fields and enabled a visual presentation to explain how the Air Force unit would operate. The installation submitted a proposal to the local county commission to use the county roads for scheduled ingress and egress operations. The installation commander and county commission approved the activity and associated safety protocols. The approved plan was a no-cost solution with no significant environmental impacts. This example demonstrates the ways in which attorneys help create pathways to accelerate military facility projects.

Conclusion: Keep Advice Simple and Practical

Legal professionals can help simplify facilities projects by comprehensively identifying legally sufficient options for fiscal, contract, environmental, and basing requirements. Keeping advice simple means always starting with what a unit needs, not necessarily the facilities the unit may think are needed. Once the underlying requirements are finalized,

focus on what the installation commander has authority to approve and then which courses of action require higher approval authority. Spot issues like whether multiple projects can be aggregated for screening, funding, or compliance purposes. Developing a full menu of options brings clarity to the planning process so decisions can be finalized and not significantly modified for the best long-term value for installations. Simple and practical advice also involves helping installations advocate for limited resources. The list of materials in the Appendix can help offices maintain a repository of continuity guidance, installation specific projects, and examples of success that could expedite future projects.

As a final word of encouragement to all involved in federal facilities projects, knowledge and planning prevent most pitfalls and project delays. Most facilities will outlast careers. Excellence in facilities projects is one of the most meaningful ways to ensure success for those who serve our nation in the future. **Go build!**

About the Author



Lieutenant Colonel Dean W. Korsak, USAF

(B.S., Liberty University; J.D., Mississippi College School of Law; LL.M., Columbia Law School) is currently the Staff Judge Advocate for the Air Force Research Laboratory, Information Directorate, Rome, New York.

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Appendix: Installation Legal Office Facilities Planning Continuity Binder Checklist

- Latest version of **Installation Project List** slides under consideration and project prioritization
- Excerpts of authorities and definitions** used by the facilities board members, including current budgetary and work classifications guidance
- AF/A4C Slide “**Work Class and Approval Levels**” (CE or Finance should have a current copy)
- 41 C.F.R. § 102-73.155 (**Categorical listing of delegated GSA lease authority**)
- Air Force Form 332, **Work Order**^[46]
- 32 C.F.R. § 989, Appendix B, Part 989, **Categorical Exclusions**^[47]
- Air Force Form 813, **Request for Environmental Impact Analysis**^[48]
- AFI 10-503, paragraph 1.6. “**Thresholds for Air Force Strategic Basing Actions**”
- Defense Acquisition University “**Contracting Cone**”^[49]
- The Military Commander and the Law** (2022) contains concise overviews of Fiscal and Contracting Issues (Chapter 13) and Environmental law (Chapter 16)
- In depth explanations of particular issues are available in **The Contract Attorneys Deskbook** (Chapter 29 for Construction Contracting), **The Fiscal Law Deskbook** (Chapter 8 for Construction Funding), and on the Contract Law Field Support Center and Environmental Law Field Support Center Knowledge Management pages on **FLITE KM** (restricted access website)

Endnotes

- [1] Patrick Mills et al., *Articulating the Effects of Infrastructure Resourcing on Air Force Missions*, RAND CORP. (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1578/RAND_RR1578.pdf.
- [2] Air Force Instr. 32-1015, *Integrated Installation Planning*, para. 2.27.10 (Jan. 4, 2021).
- [3] *Id.* at para. 8.2.
- [4] *Whole Building Design Guide, Unified Facilities Criteria*, DEPT OF DEF., <https://www.wbdg.org/ffc/dod/unified-facilities-criteria-ufc> (last visited Nov. 14, 2022).
- [5] Dep't of Air Force, *Facilities Criteria*, No. 4-610-04F (Oct. 28, 2015), https://www.wbdg.org/FFC/DOD/UFC/fc_4_610_04f_2015.pdf.
- [6] Air Force Instr. 65-601, vol. 2, *Budget Mgmt. for Operations*, para. 2.10.1 (Jan. 29, 2021).
- [7] *Id.*
- [8] *Id.* at 2.2.
- [9] Dep't of the Air Force Manual 65-604, *Appropriation Symbols & Budget Codes (Fiscal Year 2023)*, para. 3.1. (Sept. 15, 2022).
- [10] U.S. Dep't of Air Force Instruction 32-1020, *Planning & Programming Built Infrastructure Projects*, para. 2.4.6. (Sept. 29, 2022) [hereinafter DAFI 32-1020], (explaining the prohibition on project splitting to circumvent approval authorities, reporting requirements, building code, UFC, environmental compliance, or programming policy).
- [11] *Id.* at Attach. 4.
- [12] Dep't of Def. 7000.14-R, *Fin. Mgmt. Regul.*, vol. 2B, ch. 8, para. 1.5.1 (Nov. 2017) [hereinafter DoD FMR].
- [13] *Id.* at para. 1.5.2.
- [14] 10 U.S.C. § 2801 (2022).
- [15] 10 U.S.C. §§ 2802, 2805 (2022); DoD FMR, *supra* note 12, at vol. 3, para. 3.1.
- [16] 10 U.S.C. § 2803 (2022).
- [17] 10 U.S.C. § 2854 (2022).
- [18] Dep't of Air Force Manual 65-605, vol. 1, *Budget Guidance & Tech. Procedures* (Mar. 31, 2021) [hereinafter DAFMAN 65-605]; DAFI 32-1020, *supra* note 10, at para. 4.2; DoD FMR, *supra* note 12, at vol. 2B, ch. 6.
- [19] Headquarters Air Force Mission Directive 1-18, *Assistant Secretary of the Air Force (Installations, Environment & Energy)*, para. A1.31 (July 10, 2014). Smaller construction projects are referred to in various ways, including “P-341” projects, Unspecified Minor Construction (UMC), and the most common Unspecified Minor Military Construction (UMMC).
- [20] Dep't of Def., DD Form 1391, *Military Construction Project Data* (Jul. 1, 1999).
- [21] DAFMAN 65-605, *supra* note 18, at vol. 1, ch. 4, sec. 14B.
- [22] *Id.* at para. 19.2.2.5.
- [23] *Id.* at para. 9.1.
- [24] 10 U.S.C. § 4021 (2022).
- [25] 10 U.S.C. § 4022 (2022).
- [26] 10 U.S.C. § 4023 (2022).
- [27] *See, e.g.*, 10 U.S.C. § 2679 (2022); 31 U.S.C. § 6305 (2022).
- [28] 40 U.S.C. § 585 (2022).
- [29] 40 U.S.C. § 121(d) (2022); 41 C.F.R. § 102-73.155.
- [30] *See* 10 U.S.C. § 2661(b) (2022).
- [31] Sourav Das Adhikari et al., *Six Emerging Trends in Facilities Management Sourcing*, MCKINSEY & CO., (Nov. 15, 2019), <https://www.mckinsey.com/business-functions/operations/our-insights/six-emerging-trends-in-facilities-management-sourcing>.
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- [33] Air Force Instr. 10-503, *Strategic Basing*, para. 1.6 (Oct. 14, 2020) [hereinafter AFI 10-503].
- [34] *Id.* at para. 1.6.1.2.
- [35] *Id.* at para. 1.6.1.5.

- [36] See generally 40 C.F.R. §§ 1500–1508 (2022) (implementing the National Environmental Policy Act (NEPA)) and 32 C.F.R. pt. 989 (2022) (explaining Air Force implementation for NEPA compliance).
- [37] 32 C.F.R. § 989, App. B (2022).
- [38] 32 C.F.R. § 989.14.
- [39] 32 C.F.R. § 989.14.(k).
- [40] *Id.* at (l).
- [41] *Id.* at A2.3.11.
- [42] Air Force Instr. 32-1015, *Integrated Installation Planning*, Ch. 6 (Jan. 4, 2021).
- [43] 32 C.F.R. § 989.16.
- [44] *Id.* at (b)(3)-(4).
- [45] 32 C.F.R. §§ 989.17–18.
- [46] Air Force Form 332, *Base Civil Engineer Work Request* (Jan. 1, 1991).
- [47] 32 C.F.R. § 989, App. B (2022).
- [48] Air Force Form 813, *Request for Environmental Impact Analysis* (Sept. 1, 1999).
- [49] *Contracting Cone*, DEF. ACQUISITION U., <https://aaf.dau.edu/aaf/contracting-cone/> (last visited July 19, 2022).