



Memorandum

January 11, 2008

TO: Rep. Chris Van Hollen
Attention: Kenneth Cummings

FROM: Daniel H. Else
Specialist in National Defense
Foreign Affairs, Defense, and Trade

SUBJECT: The Defense Access Road Program

This memorandum responds to your request for information on the Defense Access Road (DAR) Program. As specified in our telephone conversation and subsequent emails, sections of this memorandum will explain the DAR Program, quoting the statutes establishing it (transcribed at the end of this memorandum), the federal regulations that govern the process, and the detailed Army Regulation that explains how DAR projects are implemented. An example of a DAR project for Mountain Home Air Force Base, Idaho, is included as an illustration. Supporting documents are attached.

Defense Access Road Program

Roads providing access to military installations are usually not owned by the Department of Defense. Military installations are not responsible (nor may they provide funding) for the maintenance of any public highway. The Defense Access Road (DAR) Program (created in law in 23 U.S.C. 210) provides a legal vehicle by which the Department of Defense can indirectly help to pay a portion of improvements to certain public highways when they are designated to the Secretary of Transportation by the Secretary of Defense as important to the national defense. Thoroughfares designated as “defense access roads” may have all or part of the cost of their construction and maintenance paid for by funds appropriated for that purpose.

The Transportation Engineering Agency of the Army’s Military Surface Deployment and Distribution Command (SDDC, known before January 1, 2004, as the Military Traffic Management Command, or MTMC), a component of the Department of Defense’s Transportation Command (TRANSCOM), jointly administers the Defense Access Road Program with the Federal Highway Administration, an agency within the Department of

Transportation.¹ The Federal Highway Administration acts as the link between the Department of Defense and the state and local authorities who are responsible for local highway maintenance and who execute the road projects funded under the DAR.

When a garrison commander believes that highway improvements are justified in assuring adequate access to his installation, he is responsible for informing the appropriate state or local highway agency. If the agency cannot, or will not, correct the deficiencies using its regular highway program, the installation commander then submits a report of the installation's access road needs to the commander of the Military Surface Deployment and Distribution Command (SDDC). The SDDC commander may then request the Federal Highway Administration to evaluate and investigate the local highway facilities. The Administration will respond by indicating whether any improvements are warranted, their estimated cost, and whether any state or local highway authority plans exist to implement the necessary improvements. If required, SDDC will then initiate a military construction program request through the appropriate military service.

There are no hard-and-fast traffic-related benchmarks that trigger the initiation of a DAR project. Rather, each project results from the assessment of the on-site commander that road improvements are required and the resources available to the appropriate transportation agency are insufficient to implement them. It is the responsibility of SDDC to determine the eligibility of proposed improvements for financing through the use of defense access roads funds. It is then the responsibility of the appropriate military department (Army, Navy, Air Force, or defense agency) to request an appropriation.

Military Construction Appropriations

The Defense Access Road Program is funded through the annual Military Construction appropriation process. Individual road construction is considered to be a "line item" project that is normally requested by the military department through the Department of Defense. Funds for these projects are appropriated in the annual Military Construction Appropriation Act, and their expenditure is authorized in the annual National Defense Authorization Act. I have attached to this memorandum an example of such a request and appropriation. 10 U.S.C. 114 requires that appropriated military construction funds be authorized before being expended.

Funds for the sample project, a defense access road at Mountain Home Air Force Base, Idaho, were requested by the Department of the Air Force for Fiscal Year 2000. The project itself is explained in a DD Form 1390 (Military Construction Project Request) and its accompanying DD Form 1391 (Military Construction Project Data). The subsequent appropriation is listed in the military construction conference report for the year, H.Rept. 106-266, as indicated in attached documents.

For items such as military pay, procurement, and operations, Department of Defense funds must be expended during the fiscal year for which they are appropriated and authorized. Military construction appropriations, including DAR funds, may typically be

¹ SDDC is in the process of moving its headquarters from Ft. Eustis, Virginia, to Scott Air Force Base, Illinois, a process that began in 2006 and is expected to be completed in 2011. The DAR Program Manager currently maintains his office at Ft. Eustis.

expended over a period of five years. This time limit is normally stated within the Act's first few sections.

Supporting Documentation

Several documents are attached to this memorandum, and governing statutes are transcribed in the following section.

1. 10 U.S.C. 210 establishes the Defense Access Road program and is quoted later in this memorandum.
2. Title 23, Chapter I – Federal Highway Administration, Department of Transportation, Part 660 Special Programs (Direct Federal), Subpart E (Defense Access Roads) of the Code of Federal Regulations (CFR) implements the DAR program in general terms, prescribe “policies and procedures governing evaluations of defense access road needs, and administration of projects financed under the defense access roads and other defense related special highway programs.” The regulation’s text is contained in a three-page excerpt from the CFR and is attached.
3. Army Regulation 55-80, the Department of Defense Transportation Engineering Regulation, Section 3-6 (beginning on p. 5 of the regulation), describes the Defense Access Road program in detail, explaining how SDDC is to proceed. The regulation covers 26 pages in total and is attached to this memorandum.

If you require additional information, or if I can be of any further assistance, please contact me at 7-4996.

Governing Statutes

Three statutes affect the implementation of DAR projects. 23 U.S.C. 210 establishes the Defense Access Road Program. 10 U.S.C. 114 requires that funds appropriated for military construction also be authorized for expenditure. 23 U.S.C. 112 governs the process of bidding on highway construction projects funded by the federal government. The text of all three of these statutes are transcribed below.

TITLE 23. HIGHWAYS CHAPTER 2. OTHER HIGHWAYS

23 USCS § 210

§ 210. Defense access roads

(a) The Secretary is authorized, out of the funds appropriated for defense access roads, to provide for the construction and maintenance of defense access roads (including bridges, tubes, and tunnels thereon) to military reservations, to defense industries and defense industry sites, and to the sources of raw materials when such roads are certified to the Secretary as important to the national defense by the Secretary of Defense or such other official as the President may designate, and for replacing existing highways and highway connections that are shut off from the general public use by necessary closures or restrictions at military reservations and defense industry sites.

(b) Funds appropriated for the purposes of this section shall be available, without regard to apportionment among the several States, for paying all or any part of the cost of the construction and maintenance of defense access roads.

(c) Funds appropriated for defense maneuvers and exercises, may be used by the Secretary in areas certified to him by the Secretary of Defense as maneuver areas for such construction, maintenance, and repair work as may be necessary to keep the highways therein, which have been or may be used for training of the Armed Forces, in suitable condition for such training purposes and for repairing the damage caused to such highways by the operation of men and equipment in such training.

(d) Whenever any project for the construction of a circumferential highway around a city or of a radial intracity route thereto submitted by any State is certified by the Secretary of Defense, or such other official as the President may designate, as being important for civilian or military defense, such project may be constructed out of the funds heretofore or hereafter authorized to be appropriated for defense access roads.

(e) If the Secretary shall determine that the State transportation department of any State is unable to obtain possession and the right to enter upon and use the required rights-of-way, lands, or interest in lands, improved or unimproved, required for any project authorized by this section with sufficient promptness, the Secretary is authorized to acquire, enter upon, take possession thereof, and expend funds for projects thereon, prior to approval of title by the Attorney General, in the name of the United States, such rights-of-way, lands, or interest in lands as may be required in such State for such projects by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including sections 3114 to 3116 and 3118 of title 40). The cost incurred by the Secretary in acquiring any such rights-of-way, lands, or interest in lands may include the cost of examination and

abstract of title, certificate of title, advertising, and any fees incidental to such acquisition; and shall be payable out of the funds available for paying the cost or the Federal share of the cost of the project for which such rights-of-way, lands, or interests in lands are acquired. The Secretary is further authorized and directed by proper deed executed in the name of the United States to convey any lands or interests in lands acquired in any State under the provisions of prior Acts or of this section to the State transportation department of such State or to such political subdivision thereof as its laws may provide, upon such terms and conditions as may be agreed upon by the Secretary and the State transportation department, or political subdivisions to which the conveyance is to be made.

(f) The provisions of section 112 of this title [23 USCS § 112] are applicable to defense access roads.

(g) If the Secretary shall determine that it is necessary for the expeditious completion of any defense access road project he may advance to any State out of funds appropriated for defense access roads transferred and available to the Department of Transportation the Federal share of the cost of construction thereof to enable the State transportation department to make prompt payments for acquisition of rights-of-way, and for the construction as it progresses. The sums so advanced shall be deposited in a special fund by the State official authorized by State law to receive such funds, to be disbursed solely upon vouchers approved by the State transportation department for rights-of-way which have been or are being acquired and for construction which has been actually performed under this section. Upon determination by the Secretary that funds advanced to any State under the provisions of this subsection are no longer required, the amount of the advance which is determined to be in excess of requirements for the project shall be repaid upon his demand, and such repayments shall be returned to the credit of the appropriation from which the funds were advanced.

(h) Funds appropriated for the purposes of this section shall be available to pay the cost of repairing damage caused to highways by the operation of vehicles and equipment in the construction of classified military installations and facilities for ballistic missiles if the Secretary shall determine that the State transportation department of any State is, or has been, unable to prevent such damage by restrictions upon the use of such highways without interference with, or delay in, the completion of a contract for the construction of such military reservations or installations. This subsection shall apply notwithstanding any provision of contract holding a party thereto responsible for such damage, if the Secretary of Defense or his designee shall determine, in fact, that construction estimates and the bid of such party did not include allowance for repairing such damage. This subsection shall apply to damage caused by construction work commenced prior to June 1, 1961, and still in progress on that date and construction work which is commenced or for which a contract is awarded on or after June 1, 1961.

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART I. ORGANIZATION AND GENERAL MILITARY POWERS
CHAPTER 2. DEPARTMENT OF DEFENSE

10 USCS § 114

§ 114. Annual authorization of appropriations

(a) No funds may be appropriated for any fiscal year to or for the use of any armed force or obligated or expended for--

- (1) procurement of aircraft, missiles, or naval vessels;
- (2) any research, development, test, or evaluation, or procurement or production related thereto;
- (3) procurement of tracked combat vehicles;
- (4) procurement of other weapons;
- (5) procurement of naval torpedoes and related support equipment;
- (6) military construction;
- (7) the operation and maintenance of any armed force or of the activities and agencies of the Department of Defense (other than the military departments);
- (8) procurement of ammunition; or
- (9) other procurement by any armed force or by the activities and agencies of the Department of Defense (other than the military departments);

unless funds therefor have been specifically authorized by law.

(b) In subsection (a)(6), the term "military construction" includes any construction, development, conversion, or extension of any kind which is carried out with respect to any military facility or installation (including any Government-owned or Government-leased industrial facility used for the production of defense articles and any facility to which section 2353 of this title [10 USCS § 2353] applies), any activity to which section 2807 of this title [10 USCS § 2807] applies, any activity to which chapter 1803 of this title [10 USCS §§ 18231 et seq.] applies, and advances to the Secretary of Transportation for the construction of defense access roads under section 210 of title 23. Such term does not include any activity to which section 2821 or 2854 of this title [10 USCS § 2821 or 2854] applies.

(c) (1) The size of the Special Defense Acquisition Fund established pursuant to chapter 5 of the Arms Export Control Act (22 U.S.C. 2795 et seq.) may not exceed \$ 1,070,000,000.

(2) Notwithstanding section 37(a) of the Arms Export Control Act (22 U.S.C. 2777(a)), amounts received by the United States pursuant to subparagraph (A) of section 21(a)(1) of that Act (22 U.S.C. 2761(a)(1))--

(A) shall be credited to the Special Defense Acquisition Fund established pursuant to chapter 5 of that Act (22 U.S.C. 2795 et seq.), as authorized by section 51(b)(1) of that Act (22 U.S.C. 2795(b)(1)), but subject to the limitation in paragraph (1) and other applicable law; and

(B) to the extent not so credited, shall be deposited in the Treasury as miscellaneous receipts as provided in section 3302(b) of title 31.

(d) Funds may be appropriated for the armed forces for use as an emergency fund for research, development, test, and evaluation, or related procurement or production, only if the appropriation of the funds is authorized by law after June 30, 1966.

(e) In each budget submitted by the President to Congress under section 1105 of title 31, amounts requested for procurement of equipment for the reserve components of the armed forces (including the National Guard) shall be set forth separately from other amounts requested for procurement for the armed forces.

(f) In each budget submitted by the President to Congress under section 1105 of title 31, amounts requested for procurement of ammunition for the Navy and Marine Corps, and for procurement of ammunition for the Air Force, shall be set forth separately from other amounts requested for procurement.

TITLE 23. HIGHWAYS
CHAPTER 1. FEDERAL-AID HIGHWAYS

23 USCS § 112

§ 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding requirements.

(1) In general. Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) Contracting for engineering and design services.

(A) General rule. Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 [40 USCS §§ 1101 et seq.].

(B) Performance and audits. Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) Indirect cost rates. Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) Application of rates. Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) Prenotification; confidentiality of data. A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F) [(F)] Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

(3) Design-build contracting.

(A) In general. A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.

(B) Limitation on final design. Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(C) Qualified projects. A qualified project referred to in subparagraph (A) is a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.

(D) Regulatory process. Not later than 90 days after the date of enactment of the SAFETEA-LU [enacted Aug. 10, 2005], the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st Century (23 U.S.C. 112 note; 112 Stat. 230) that--

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), from--

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i); and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102 [23 USCS § 102].

(E) Design-build contract defined. In this paragraph, the term "design-build contract" means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) Standardized contract clause concerning site conditions.

(1) General rule. The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section 106 of this title [23 USCS § 106] a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) Limitation on applicability.

(A) State law. Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) Design-build contracts. Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) Selection process. A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) Temporary traffic control devices.

(1) Issuance of regulations. The Secretary, after consultation with appropriate Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) Effects of regulations. Based on regulations issued under paragraph (1), a State shall--

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with section 109(e)(2) [23 USCS § 109(e)(2)].

(3) Limitation. Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) Positive protective measures defined. In this subsection, the term "positive protective measures" means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.