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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Architect of the Capitol—Payment for Electrical and Security Improvements at the Thurgood Marshall Federal Judiciary Building

File: B-306284

Date: January 5, 2006

DIGEST

1. The Administrative Office of the United States Courts (AOUSC) ordered electric and security upgrades to the Thurgood Marshall Federal Judiciary Building (the building) that were completed in 2000. Because both the electrical and the security work benefited all tenants and enhanced the value of the building and improved its capacity, we do not object to viewing them as capital improvements.
2. Under the Trust Agreement establishing, among others, the Operating Reserve Fund, such Fund was available to the extent of available funds for improvements generally to the building. Although the Architect of the Capitol (AOC) had other funding options available to it, so long as the Operating Reserve Fund has adequate available balances, we would not object to the AOC's use of the Operating Reserve Fund to cover the costs of the electrical and security improvements.
3. Whether, under the circumstances present here, the Architect of the Capitol (AOC) should seek reimbursement from the Administrative Office of the United States Courts (AOUSC) for the electrical and the security work performed is a discretionary judgment reposed in him. Failure to obtain reimbursement would not be an augmentation of the AOUSC's funds because as capital improvements the AOUSC's funds are not directly available and because the AOUSC's appropriation does not constitute a specific and exclusive funding source for all improvements to the building.

DECISION

On September 30, 2005, the Architect of the Capitol (AOC), as certifying officer, requested an advance decision pursuant to 31 U.S.C. § 3529(a) regarding certain fiscal matters related to the disbursement and reimbursement of funds for electrical

and security work performed at the Thurgood Marshall Federal Judiciary Building (the building). Specifically, the AOC asks the following three questions:

“(1) Whether the security and electrical upgrades are capital improvements and not tenant improvements;

“(2) Whether the non-appropriated Operating Reserve Fund was an available source of funds to pay for these upgrades as directed by my letter dated June 22, 2005, or was there a more specific source of appropriated funds that should have been used for either the upgrades to the security system or upgrades to the electrical system; and

“(3) Whether the AOUSC must reimburse the Architect for any of these disbursements from the Operating Reserve Fund?”

For the reasons discussed below, we do not object to the AOC’s view that both the electrical and the security work were capital improvements. Second, we have no basis to object to the AOC’s use of the Operating Reserve Fund to cover the cost of the improvements at issue here. Third, whether the AOC should seek reimbursement for the cost of the work is a discretionary judgment for the AOC.

BACKGROUND

Pursuant to Public Law 100-480, 102 Stat. 2328 (Oct. 7, 1988), codified at 40 U.S.C. §§ 6501–6507, the AOC, acting on behalf of the United States, entered into a series of agreements to effectuate the financing, construction, operation, and leasing of the Judiciary Office Building, now named the Thurgood Marshall Federal Judiciary Building, 40 U.S.C. § 6502(a).

On August 15, 1989, the AOC entered into four agreements for the building project—

- a Trust Agreement with the United States Trust Company of New York (Trust Agreement) to finance building construction through the issuance of certificates of participation and the repayment thereof over 30 years based on payments from building tenants;
- a Ground Lease of the government land where the building would be built to JOB Associates;
- a Development Management Agreement with Boston Properties, as agent of JOB Associates, for the design, development, and construction of the building (Development Management Agreement); and
- a Master Lease with JOB Associates, as owner of the building, leasing the building for a 30-year term (Master Lease).

To supervise the building's design, construction, operation, maintenance, structural, mechanical, and domestic care, and security, Congress created the Judiciary Office Building Commission (Commission).¹ 40 U.S.C. § 6503(c). Congress authorized the Commission to issue rules and regulations governing the AOC's actions related to the building and the building's use and occupancy. The Commission issued rules and regulations on June 22, 1989 (Commission Rules and Regulations).

During the project construction phase, the Commission delegated to the AOC the authority to take the necessary actions to execute the project. Rule 2 of the Commission Rules and Regulations. After completion of the building by Boston Properties in 1992, the AOC entered into an Occupancy Agreement on July 27, 1992, with the AOUSC for the use of the building space. Finally, on August 1, 1996, the AOC entered into a management services contract with Boston Properties to manage the building.² The Commission also delegated to the AOC the authority, both during the project and after, to enter into ancillary agreements necessary to carry out its obligations under the approved Development Management Agreement, Master Lease, and Occupancy Agreement, including any documentation required for financing the transactions contemplated by the above agreements. Rule 2 of the Commission Rules and Regulations.

Funding Sources and Accounting Process

Congress did not appropriate funds for the construction of the building but, rather, authorized the use of private financing to cover its construction. The Commission approved the use of trust funds, consisting primarily of the proceeds from the sale of certificates, to finance the cost of constructing the building. Rule 2 of the Commission Rules and Regulations. To facilitate the financing, construction, operation, and leasing of the building, the Trust Agreement created four accounts—a Project Fund, an Operating Reserve Fund, a Fixed Rent Payment Fund and a Certificate Fund. Article III and IV of the Trust Agreement. Two accounts, the

¹ The Commission is comprised of 13 members as follows: (1) two individuals appointed by the Chief Justice from among justices of the Supreme Court and other judges of the United States; (2) the members of the House Office Building Commission; (3) the majority and minority leaders of the Senate; (4) the chairman and the ranking minority member of the Senate Committee on Rules and Administration; (5) the chairman and the ranking minority member of the Senate Committee on Environment and Public Works; and (6) the chairman and ranking minority member of the Committee on Transportation and Infrastructure of the House of Representatives. 40 U.S.C. § 6503.

² As of March 1, 2002, the building manager is now CESI. However, for purposes of the matters at issue here, the building manager was Boston Properties.

Project Fund and the Operating Reserve Fund, were created generally for the costs of the project and are relevant to the issues here.³

The Trustee deposited the majority of the certificate proceeds in the Project Fund to cover the costs of the project. Trust Agreement at § 3.01. The Project Fund was available, subject to the approval of the Commission,⁴ for the “costs of the project” as defined in the Development Management Agreement. Trust Agreement at § 3.02. The Development Management Agreement defines the “cost of the project” as the “sum of development costs,” which includes professional costs, construction costs, financing costs, costs to be reimbursed to the government, and reserves. Trust Agreement at § 3.02; Development Management Agreement at §§ 8.1 and 12.1. After building completion, if any funds remained in the Project Fund, the Architect could expend such funds “on the costs of construction of improvements, additions, changes or renovations to the [building]” or transfer such remaining moneys to the Operating Reserve Fund. Trust Agreement at § 3.02.

The Operating Reserve Fund received a portion of the certificate proceeds (\$15,000,000), Trust Agreement § 3.01, and is available for, among other things, “costs to own, manage, operate, maintain, and repair premises” and for “costs of any improvements to the [building].” Trust Agreement at § 3.04.

Apart from the accounts established by the Trust Agreement, Congress, in Public Law 100-480, established a revolving fund to, among other things, receive reimbursements from tenants, such as the AOUSC, and make lease payments to the Trustee and to pay for the “structural, mechanical, and domestic care, maintenance, operation, and utilities of the building and other improvements” (revolving fund). 40 U.S.C. § 6507. Finally, the AOUSC receives an annual appropriation for necessary expenses, as authorized by law, for the courts, *see, e.g.*, “Salaries and Expenses, Court of Appeals, District Courts, and Other Judicial Services” in the Judiciary Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2892 (Dec. 8, 2004).⁵

³ The other two accounts, the Fixed Rent Payment Fund and the Certificate Fund, are used to facilitate payment to the certificate holders.

⁴ Paragraph 8(c) of the Occupancy Agreement states that after construction work is complete, the AOC shall make a recommendation to the Commission for any uses of any excess funds in the Project Fund.

⁵ The AOUSC also receives an appropriation for the salaries and expenses of the AOUSC.

The AOC's financial staff explained the flow of federal funds as follows.⁶ Annually, the AOC and the AOUSC agree on the cost of leasing space in the building for that year. The lease payment is comprised of three components—fixed costs, operating expenses, and special services, all of which are defined in paragraph 8 of the Occupancy Agreement.⁷ Monthly, the AOC deposits into its revolving fund the monthly lease payment received from the AOUSC. Also monthly, the AOC expends monies for its operating costs (personnel, insurance, management fees, etc.) out of the revolving fund. Semiannually, the AOC disburses from the revolving fund monies to the Trustee for payment on the zero coupon certificates. *See* Trust Agreement at §§ 3.03 (Establishment and Application of the Fixed Rent Payment Fund) and 4.02 (Transfers to Certificate Fund).

The Work Performed

In February 1998 and in June 2000, the AOUSC asked the AOC to approve proposed security and electrical improvements to the building, respectively. Memorandum from Peter M. Kushner, General Counsel, AOC, to Gary Kepplinger, Deputy General Counsel, GAO, May 13, 2005 (hereafter referred to as Kushner Memorandum). The AOUSC's request for the security upgrades to the building was in response to a 1995 Department of Justice Vulnerability Assessment of Federal Facilities Report. Kushner Memorandum. The work, identified by the vulnerability assessment as needed for this type of federal building, involved the addition of security cameras to the exterior and interior of the building, adding guard booths at the loading dock ramps, placing bollards around the front of the guard booths, and upgrading the monitors at the existing north security desk. *Id.*

⁶ The AOC's financial staff informally told us that there also have been disbursements directly from the trust funds for improvements related to the building, as authorized by the AOC, and the AOUSC confirmed this to us. Electronic mail response from Robert Loesche, Deputy General Counsel, AOUSC, to Jacquelyn Hamilton, Deputy Assistant General Counsel, GAO, October 11, 2005 (hereafter referred to as AOUSC Response to AOC Request).

⁷ Fixed costs, based on a per rentable square footage, is a *pro rata* share of all costs involved in constructing the building; operating expenses are the *pro rata* share of the AOC's (1) actual costs of managing, operating, maintaining, servicing, cleaning, and repairing the building and grounds for tenants in general, (2) cost of capital improvements to the building requested by AOUSC, (3) actual costs of providing security, and (4) actual costs of electricity and other utilities consumed; and special services are for reimbursement of the AOC's actual expenses for providing individual or nonrecurring services requested by the AOUSC, including tenant improvements. Occupancy Agreement at ¶ 8(c), (d), and (e).

With respect to the electrical work, as early as 1999, the AOUSC identified a need for additional circuitry and wiring to meet demands on the building's electrical system's then existing capacity. AOUSC Response to AOC Request. AOUSC officials also told us that the building was designed and built to the 1980s era wattage-per-person standards. Specifically, at the time the building was designed and built, the General Services Administration (GSA) standard was 2 watts of power per square foot of space; the current standard is 6-8 watts per square foot. For both work requests, the AOUSC requested that the AOC cover the costs out of the Project Fund.

The AOUSC ordered the security upgrades from Boston Properties in March 1999, and the electrical upgrades between April and September 2000. The AOUSC accepted the security work in December 2001 and verbally accepted the electrical work around June 2001. The work for both was completed in late 2000 consistent with the AOUSC work orders. Boston Properties invoiced the AOC in August 2001 for the electrical upgrade work in the amount of \$299,560 and in November 2001 for the security upgrade work in the amount of \$208,600.

Although the record is not complete, the AOC and the AOUSC agree that, with respect to the security work, AOC staff approved the AOUSC work request in July 1998, and with respect to the electrical work request, while documentation is limited, AOC staff apparently gave verbal approval sometime in June 2001. Because the process described in the Occupancy Agreement was not strictly followed and questions were raised over who was authorized to approve the requested work, the AOC's contracting officer submitted the procurement actions for proposed ratification of unauthorized commitments. In June 2005, the AOC ratified the unauthorized commitments, evidencing the belief that had the proper procedures been followed, the work orders would have been proper.⁸

ANALYSIS

Question 1: "Whether the security and electrical upgrades are capital improvements and not tenant improvements?"

While the enabling legislation does not use the terms capital improvements or tenant improvements, the various agreements entered into pursuant to the authority

⁸ The AOC ratified these commitments based on its determinations that the work for both improvements was ordered, apparently with the knowledge and approval of staff of the AOC, and needed, performed, and accepted by the AOUSC; Boston Properties, the contractor, performed in good faith in accordance with the terms of the work orders; the amount claimed represented a fair and reasonable value for the benefit received; and there was no statutory prohibition that would preclude use of government funds for this purpose. AOC Memorandum, Approval to Ratify Unauthorized Commitment, June 1, 2005; See B-306353, Oct. 26, 2005.

granted in the enabling legislation use the term “improvement” or “tenant improvement.” Only the Occupancy Agreement uses both the term “capital improvements” and “tenant improvements.” The Master Lease describes tenant improvements as those tenant improvements constructed and installed pursuant to the terms and provisions of the Development Management Agreement. Article 8.1 of the Master Lease. The Development Management Agreement, executed on the same day as the Master Lease, describes a tenant improvement as those tenant improvements that are “designed, constructed and installed within the [building] in accordance with the Construction Documents for . . . the Judiciary.” Development Management Agreement at § 3.1.4. While none of these agreements uses the term capital improvements, the Master Lease uses the term capital expenditures when describing those costs that the AOC, as the tenant, must pay as part of its operating expenses⁹ for operating, maintaining, and repairing the building.¹⁰ Article 5.2(h) of the Master Lease.

It is within this framework that the terms and provisions in the Occupancy Agreement are used. Paragraph 7 of the Occupancy Agreement describes tenant improvements by referring to that term as it is used in Development Management Agreement. Further, paragraph 7 of the Occupancy Agreement contemplated these costs even after construction was complete and distinguished tenant improvements between those that occur during the initial construction of the building (pre-occupancy) and those that occur after occupancy of the building, both envisioning that a tenant improvement would be anything that was designed, constructed, and installed within the building for the AOUSC (or other occupants). Similarly, the term capital improvement in paragraph 8(d) of the Occupancy Agreement is used synonymously with the term capital expenditure in the Master Lease. Both documents include capital items as part of the operating expense component of their reimbursement and envision tenants requesting these capital items.

While these agreements use the distinct words of capital improvement and tenant improvement and describe the term tenant improvement generally, the specificity of those terms as they relate to actual expenditures is absent. Absent a more specific definition, either in the agreements between the parties or the applicable statutes, we resort to the common usages of words and phrases to ascertain their meaning. B-302973, Oct. 6, 2004. In this regard, we used the general parameters defined in the agreements as well as the common understanding of the concept of a capital improvement, which is an improvement that extends the useful life of the asset or

⁹ In addition to paying the operating expenses, the AOC was also responsible for paying fixed rent as tenant under the Master Lease.

¹⁰ Section 3.04(a) of the Trust Agreement expressly adopts by reference the term capital expenditure for purposes of describing uses of the Operating Reserve Fund.

enlarges or improves the asset's capacity.¹¹ A tenant improvement in this instance would be an improvement that is designed, constructed, and installed for the exclusive benefit of the AOUSC.

Regarding the electrical work, AOUSC officials informally advised us that the electrical upgrades were in response to increased use of personal computers and other computing demands on the original electrical system. AOUSC officials also told us that the building was designed and built to the 1980s era wattage-per-person standards. Specifically, at the time the building was built, the GSA standard was 2 watts of power per square foot of space. Now the current standard is 6-8 watts per square foot. Regardless, the electrical upgrades are part of and functionally indistinguishable from the base electrical systems. In our opinion, they are as much an integral part of the building shell as the original electrical system included in the building shell. As an increase in capacity responding to increased computer usage consistent with normal business practices and current standards, they benefit all tenants and enhance the value of the building, both in the sense of the utility of the building and presumably in a financial sense. Accordingly, we view the electrical work as a capital improvement.

Regarding the security work, AOUSC officials informally advised us, and the AOC agrees, that the security upgrades were in response to the 1995 DOJ vulnerability assessment that identified security upgrades needed to secure a federal building of this type. Unlike the electrical upgrades, the type of work as well as the items acquired and installed are not all affixed to the building. For example, the AOUSC can easily remove the cameras and camera monitors without damaging the cameras or the monitors or their settings. Both these items have relatively short useful lives, and, as proof of this proposition, the AOUSC advised us that they have already replaced the cameras originally purchased as part of this work. The bollards, the guard booths, and electrical wiring to connect the cameras and the control monitors at the north guard desk arguably are more in the nature of fixtures and, from a security perspective, improve the value and capacity of the building security. Viewed from the perspective of the various components of the security system, we appreciate that one may doubt whether the security upgrades could be considered a capital improvement. Viewed as a whole, however, we would not object to the treatment of the security upgrade work as a capital improvement for two reasons: first, we think the work can reasonably be said to enhance and benefit the building and its tenants as a whole, and second, under similar circumstances and time frames, the executive branch treated similar security upgrades as capital improvements.

¹¹ This common understanding is consistent with generally accepted government accounting standards. *See* Federal Accounting Standards Advisory Board, Statement of Federal Financial Accounting Standards No. 6, *Accounting for Property, Plant, and Equipment*. *See also* 42 C.J.S. Improvements § 2 (2005).

With respect to the second point, GSA¹² treated similar security upgrades made in response to the DOJ vulnerability assessment to agency leased space as capital improvements. In informal discussions with GSA, we learned that security upgrades were needed to bring its federally occupied buildings into compliance with minimum standards for a federal building, without which the building would not be usable by federal tenants.

Question 2(a): “Whether the non-appropriated Operating Reserve Fund was an available source of funds to pay for these upgrades as directed by [the Architect’s] letter dated June 22, 2005 . . . ?”

As discussed above, the Trust Agreement established the Operating Reserve Fund, Trust Agreement at §§ 3.01, 3.04, and provided for the deposit to that Fund of \$15,000,000 of the proceeds from the sale of the Certificates of Participation. *Id.* at § 3.01. The Trust Agreement provides that moneys in the Operating Reserve Fund may be expended solely for any one or more of the following purposes:

- “(a) to pay Operating Expenses (as that term is defined in the Master Lease);
- “(b) to pay Fixed Rent;
- “(c) to pay *the costs of any improvements to the Judiciary Office Building*; or
- “(d) to pay to the Trustee any and all fees, costs and expenses (including reasonable attorneys’ fees) incurred in connection with any of the matters referred to in Sections 6.03 and 9.04 of this Agreement.”

Id. at § 3.04 (emphasis added). The issue of whether the electrical and security upgrades are capital improvements is irrelevant to the question of whether the Operating Reserve Fund is an available source of funds to pay for the upgrades. The availability of the Operating Reserve Fund does not depend on whether an upgrade is a capital improvement or a tenant improvement. The sole issue is whether the security and electrical upgrades are “improvements.”

The Trust Agreement does not define or limit the meaning of the word “improvement.” To the contrary, the use of the adjective “any,” in the sense of “every; all,”¹³ indicates that the parties understood the Operating Reserve Fund to be

¹² While the relationship between the AOC and the AOUSC is similar to the landlord-tenant relationship used by GSA with federal entities leasing space from it, it is not identical and there are some significant differences. Most notably is the statutory authority for tenants in space leased by GSA to pay GSA for capital improvements. It is important because, as discussed later, unless otherwise provided in law, agencies are prohibited from entering into contracts and paying for the erection, repair, or furnishing of any public building, or for any public improvement to the building without specific statutory authority. 41 U.S.C. § 12.

¹³ The Random House College Dictionary 61 (1980) (“4. every; all: *Read any books you find on the subject.*”). *See also*, B-302973, Oct. 6, 2004.

available without limitation as to the type of improvement. Both in informal discussions with the AOC staff and in the Architect's request letter, the AOC took the view that both the security and the electrical work were improvements, generally, to the building. Given the common, ordinary meaning¹⁴ of the word "improvements" as work done to the building that makes the building more useful, profitable, or valuable, whether benefiting one occupant or all, we would not disagree. Accordingly, to the extent that there are adequate and available balances,¹⁵ we would not object to the use of the Operating Reserve Fund for both the security and the electrical work.¹⁶

Question 2(b): "[W]as there a more specific source of appropriated funds that should have been used for either the upgrades to the security system or upgrades to the electrical system?"

We have long recognized that where Congress has made a specific appropriation for a particular item or activity that such appropriation reflects the judgment of Congress of the amount of public resources available for such item or activity. 33 Comp. Gen. 214 (1953). The exhaustion of the amount provided by the specific appropriation does not authorize charging additional obligations or amounts to a more general appropriation otherwise available to cover the items or activities. 64 Comp Gen. 138 (1984); 36 Comp. Gen. 526 (1957). To do so would constitute an improper augmentation of the appropriation specifically available for the items or

¹⁴ A common definition of "improvement" is "5. a bringing into a more valuable or desirable condition, as of land or real property; a making or becoming better; betterment. 6. something done or added to real property which increases its value." The Random House College Dictionary 669 (1980).

¹⁵ The Trust Agreement at § 3.04 provides in effect for the AOC and the Trustee to maintain a minimum balance in the Operating Reserve Fund of \$5,000,000 during the term of the Trust Agreement. The Trust Agreement further provides that after payment of all amounts due to certificate holders and all other obligations of the government under the Trust Agreement, any amounts remaining in the Funds established under the Trust Agreement shall be remitted to, or upon the order of, the AOC. Trust Agreement at § 3.05.

¹⁶ If we assume the various conditions on the use of the Project Fund are satisfied, *i.e.*, Commission approval and minimum remaining balance, the reserves of the Project Fund are available (1) for the same reasons as the Operating Reserve Fund and (2) because the electrical and the security work would be considered an operating expense as defined by the various agreements. *See* Occupancy Agreement at ¶ 8(c), Trust Agreement at § 3.04, and Exhibit E (Glossary of Terms) of the Master Lease.

activities. 57 Comp. Gen. 163 (1977); 4 Comp. Gen. 476 (A-5216, Nov. 25, 1924). It is these principles which underlie the above question.

If we assume that these concepts are relevant to the circumstances present here, there are possibly two appropriations that could be available for the costs of the improvements at issue. In this regard, the AOUSC receives annual appropriations for the Courts in the appropriation account “Salaries and Expenses, Court of Appeals, District Courts, and Other Judicial Services” (hereafter S&E appropriation). There is also an annual appropriation for “Court Security, Court of Appeals, District Courts, and Other Judicial Services” available for equipment and security services in federal courthouses. Historically, the AOUSC has used the S&E appropriation account for expenses related to the building, including lease payments to the AOC, and does not believe that the Court Security appropriation is available for the electrical and the security work performed in the building. AOUSC Response to AOC Request Letter. The AOUSC’s rationale is straightforward—the Court Security appropriation is limited to security for *U.S. courthouses*, and the building here is not a courthouse.

The second appropriation that may be available to cover these expenses is the revolving fund established in the legislation authorizing the project and its private financing. 40 U.S.C. § 6507. The revolving fund receives amounts transferred from the AOUSC as reimbursement for the costs of space made available to them. *See* 40 U.S.C. §§ 6506(f), 6507; Occupancy Agreement at ¶ 8(a). (The Occupancy Agreement defines the cost components of the reimbursement to include “special services,” which is defined as “including but not limited to tenant improvements made after initial occupancy.” *Id.* at ¶ 8(e).) The revolving fund is available for paying expenses for “utilities” and “other improvements” of the building without distinction between capital and tenant improvements. 40 U.S.C. § 6507(b)(1).¹⁷ Accordingly, the revolving fund would appear to be available to the AOC to pay for the electrical and the security work. The only question is whether it is specifically and, in the appropriation context discussed above, exclusively available for this purpose.

The AOUSC’s S&E appropriation is provided annually to cover, among other things, AOUSC’s costs of occupying the building. Congress established the revolving fund as a general account to receive all funds to design, construct, and operate the building, including rent payments and reimbursements, and to disburse funds for the building’s care, maintenance, operations, utilities, and improvements generally. 40 U.S.C. § 6507. The accounts established under the Trust Agreement were created to facilitate the general financing arrangement for the building as envisioned by chapter 65 of title 40 of the United States Code.

¹⁷ Nothing in the legislative history enacting the revolving fund would be inconsistent with this view.

We do not view either of the two appropriation accounts noted above as specifically available to the exclusion of the accounts established under the Trust Agreement or each other. In our view the underlying principle of a specific appropriation account being available to the exclusion of a general account is inapposite since the accounts established under the Trust Agreement are not appropriation accounts.¹⁸ As we have explained, the accounts mentioned above are generally interdependent and support the financing arrangement Congress chose to cover building construction. Significantly, the AOUSC's appropriation does not specifically and exclusively cover all improvements to the building, tenant or otherwise, but rather generally provides funding to cover the cost of the space including space alteration projects in the courts of appeals, district courts, and other judicial services. Further, the Occupancy Agreement allows¹⁹ the AOUSC to pay for capital improvements as part of the operating expense component of the monthly lease payment and for tenant improvements out of the special services component.²⁰ Moreover, the statutory funding mechanism for the building envisioned the revolving fund being available to accept lease payments and pay for expenses of the building, some of which clearly could be interpreted to be tenant improvements. 40 U.S.C. § 6507. However, we would not view any one of these accounts as more specific than another, as we use that concept for purposes of the rules discussed above. In our view, all these accounts need to be understood as part of the general financing arrangement that Congress adopted for the construction and operation of the building. As such, we do not object to the AOC's use of the Operating Reserve Fund to pay for the work.

Question 3: "Whether the AOUSC must reimburse the Architect for any of these disbursements from the Operating Reserve Fund?"

After the invoices are paid, the AOC may seek reimbursement from the AOUSC but is not required to do so. There is nothing in the various agreements or in the enabling

¹⁸ The accounts established under the Trust Agreement hold private funds held for investment in trust in a commercial bank. Those funds are not held in trust for the benefit of the federal government and their use is governed by the Trust Agreement.

¹⁹ While section 12 of title 41 of the United States Code prohibits AOUSC from entering into contracts and directly paying for the erection, repair, or furnishing of any public building, or for any public improvement to the building, Congress did expressly provide for AOUSC's reimbursement of such expenses through the revolving fund and the Occupancy Agreement implements that authority by permitting the AOUSC to pay for capital improvements as part of the operating expense component of the monthly lease payment. *See* Occupancy Agreement at ¶ 8(d) and 40 U.S.C. § 6507.

²⁰ The Occupancy Agreement also allows the AOUSC to contract for directly and to fund tenant improvements separately with the approval of the AOC. Occupancy Agreement at ¶ 7(b).

legislation that explicitly ties the availability of the Operating Reserve Fund or the revolving fund for improvements to a requirement that the AOC obtain reimbursement.²¹ We do not read the Occupancy Agreement, as discussed above, to preclude the AOC from obtaining reimbursements from the AOUSC for the improvements as part of the monthly lease payment, either as part of the operating expense component for a capital improvement or as part of the special services component for a tenant improvement. While reimbursement may be the norm, it is not required for these expenses if the AOC so chooses. *See* paragraph 8(d) of the Occupancy Agreement.

A decision not to seek reimbursement from the AOUSC would not be an augmentation of the AOUSC funds for two reasons. First, the AOC views the work as capital improvements, which the AOUSC's funds are not directly available for. *See* footnote 18. Secondly, as noted above, we do not view the AOUSC's appropriation as providing specifically and exclusively for all tenant improvements.

CONCLUSION

The electrical and the security work performed were definitely improvements to the building. Because the improvements benefited all tenants and enhanced the value of the building and improved its capacity, we do not object to viewing them as capital improvements instead of tenant improvements. The AOC had the option of funding the improvements from the Operating Reserve Fund (and, indeed, from other accounts). Whether, given the facts and circumstances present here, the AOC should seek reimbursement from the AOUSC for the electrical and the security work performed is a discretionary judgment reposed in the AOC.

/signed/

Anthony H. Gamboa
General Counsel

²¹ As noted above, the only requirement is that the Operating Reserve Fund maintain a balance of \$5,000,000. If the balance goes below \$5,000,000, the AOC must restore the balance with existing available appropriations or seek in good faith an appropriation for such purposes from Congress. *See* Trust Agreement at § 3.04.