SEC. ___. AUTHORIZED COST VARIATIONS FOR UNSPECIFIED MINOR MILITARY CONSTRUCTION.

Section 2853 of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "or (e), the cost" and inserting "or (e)—

"(1) the cost";

(B) by striking "Congress." at the end and inserting "Congress; and"; and

(C) by adding at the end the following new paragraph (2):

"(2) the cost of an unspecified minor military construction project undertaken pursuant to section 2805(a)(2) or section 2805(d) of this title may be increased above the applicable ceiling in section 2805(a)(2) or section 2805(d)(1) of this title by not more than 25 percent of such ceiling, if the Secretary concerned determines that such revised cost is required for the sole purpose of meeting unusual and unanticipated variations in cost occurring after award of the project.";

(2) in subsection (c)—

(A) in paragraph (1), by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(B) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(C) by striking "(c) The limitation on cost variations in subsection (a) or the limitation on scope reduction in subsection (b)(1) does not apply" and inserting "(c)(1) The limitations on the amount of cost variations in subsection

(a) and the limitation on scope reduction in subsection (b)(1) do not apply"; and

(D) by adding at the end the following new paragraph:

"(2) An unspecified minor military construction project undertaken pursuant to section 2805(a)(2) or section 2805(d) may be decreased in cost or reduced in scope at the discretion of the Secretary concerned."; and

(3) in subsection (e), by striking "The limitation on cost variations in subsection (a) does" and inserting "The limitations on amount of cost variations in subsection (a) do".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would explicitly apply the authority provided by section 2853 of title 10, United States Code (U.S.C.), to increase the cost of a military construction project, to allow unspecified minor military construction (UMMC) projects authorized by 10 U.S.C. § 2805 to exceed the UMMC limit in section 2805(a)(2) when unforeseen cost increases occur.

Under current law, there is no authority for the Secretary concerned to exceed the applicable limits of section 2805(a)(2) for any UMMC project, except to satisfy a contractor claim under 10 U.S.C. § 2863. This proposal would extend the provision of 10 U.S.C. 2853 on project cost variations to include UMMC projects in need of exceeding the limit of section 2805(a)(2), and afford minor projects the same ability as major projects to respond to unforeseen cost growth. This would provide flexibility to complete projects with unusual variations and avoid (1) project cancellation; (2) constructing a facility or item of infrastructure that does not fully meet the planned mission requirement; or (3) reprogramming the project into the FY+2 Specified Military Construction program. The proposal does not limit the cost variation per project, but section 2805(a) limits the authority to carry out UMMC projects collectively to 125 percent of the amount authorized by law.

This authority is not often needed but nonetheless crucial. As an example, the lack of this authority compelled the Air Force to cancel eight FY 2011 Overseas Contingency Operations (OCO) UMMC projects that had been terminated for default when the projects were approximately 50% complete. The U.S. Army Corps of Engineers re-advertised the contract for all eight projects, but due to the sunk costs and risk associated with assuming the previous contractor's work, the new cost estimates exceeded the UMMC threshold. To complete the projects, the Air Force must resubmit them as specified major projects in the FY+2 Military Construction program—delaying completion by three years at greater cost and significant detriment to the mission.

Budget Implications: The resources impacted are estimated in the table below and are included within the Fiscal Year (FY) 2021 President's Budget. As the actual total amount of all cost variations allowed by this proposal is unknown, an estimate of 5% the total UMMC appropriation was used. For major MILCON projects, DoD adds 5 percent contingency to project estimates to account for unforeseen cost increases during construction, based on historical averages. Applying this to the UMMC program (the focus of this LP), 5 percent of the total UMMC program would be a theoretical worst-case amount, representing a scenario where all UMMC projects were awarded near the UMMC upper limit and subsequently experienced cost growth (in aggregate) matching the historical average for major projects.

RESOURCE REQUIREMENTS ($ MILLIONS)								
	FY 2021	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**
Army	$3.5	$3.6	$3.6	$3.7	$3.8	Military Construction, Army	02	2050
Navy	$1.95	$1.48	$2.29	$4.83	$4.52	Military Construction, Navy	02	1205
Air Force	$4.1	$4.1	$4.2	$4.3	$4.4	Military Construction, Air Force	02	3300
Defense-Wide	$5.0	$5.1	$5.2	$5.3	$5.4	Military Construction, Defense-Wide	02	0500
Total	$14.55	$14.28	$15.29	$18.13	$18.12	--		

Changes to Existing Law: This proposal would make the following changes to 10 U.S.C. § 2853:

§2853. Authorized cost and scope of work variations.

(a) Except as provided in subsection (c), (d), <u>or (e),—</u>

<u>(1)</u> the cost authorized for a military construction project or for the construction, improvement, and acquisition of a military family housing project may be increased or decreased by not more than 25 percent of the amount appropriated for such project or 200 percent of the minor construction project ceiling specified in section 2805(a) of this title, whichever is less, if the Secretary concerned determines that such revised cost is required for the sole purpose of meeting unusual variations in cost and that such variations in cost could not have reasonably been anticipated at the time the project was authorized by <u>Congress; and</u>

<u>(2) the cost of an unspecified minor military construction project undertaken pursuant to section 2805(a)(2) or section 2805(d) of this title may be increased above the</u>

applicable ceiling in section 2805(a)(2) or section 2805(d)(1) of this title by not more than 25 percent of such ceiling, if the Secretary concerned determines that such revised cost is required for the sole purpose of meeting unusual and unanticipated variations in cost occurring after award of the project.

(b)(1) Except as provided in subsection (c), the scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may be reduced by not more than 25 percent from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. Any reduction in scope of work for a military construction project shall not result in a facility or item of infrastructure that is not complete and useable or does not fully meet the mission requirement contained in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition.

(2) Except as provided in subsection (d), the scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may not be increased above the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition.

(3) In this subsection, the term "scope of work" refers to the function, size, or quantity of a facility or item of complete and useable infrastructure contained in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition.

(c)(1) ~~The limitation on~~ The limitations on the amount of cost variations in subsection (a) and ~~or~~ the limitation on scope reduction in subsection (b)(1) ~~does~~ do not apply if the variation in cost or reduction in the scope of work is approved by the Secretary concerned and-

(A~~1~~) in the case of a cost increase or a reduction in the scope of work-

(i~~A~~) the Secretary concerned notifies the appropriate committees of Congress of the cost increase or reduction in scope, the reasons therefor, a certification that the mission requirement identified in the justification data provided to Congress can still be met with the reduced scope, and a description of the funds proposed to be used to finance any increased costs; and

(ii~~B~~) a 14-day period has elapsed after the date on which the notification is received by the committees in an electronic medium pursuant to section 480 of this title; or

(B~~2~~) in the case of a cost decrease, the Secretary concerned notifies, using an electronic medium pursuant to section 480 of this title, the appropriate committees of Congress not later than 14 days after the date funds are obligated in connection with the military construction project or military family housing project.

(2) An unspecified minor military construction project undertaken pursuant to section 2805(a)(2) or section 2805(d) may be decreased in cost or reduced in scope at the discretion of the Secretary concerned.

(d) The limitation in subsection (b)(2) on an increase in the scope of work does not apply if-

(1) the increase in the scope of work is not more than 10 percent of the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition;

(2) the increase is approved by the Secretary concerned;

(3) the Secretary concerned notifies the congressional defense committees in writing of the increase in scope and the reasons therefor; and

(4) a period of 21 days has elapsed after the date on which the notification is received by the committees or, if over sooner, a period of 14 days has elapsed after the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of this title.

(e) The ~~limitation on~~ limitations on the amount of cost variations in subsection (a) ~~does~~ do not apply to the following:

(1) The settlement of a contractor claim under a contract.

(2) The costs associated with the required remediation of an environmental hazard in connection with a military construction project or military family housing project, such as asbestos removal, radon abatement, lead-based paint removal or abatement, or any other legally required environmental hazard remediation, if the required remediation could not have reasonably been anticipated at the time the project was approved originally by Congress.

(f)(1) In addition to the notification sent under paragraph (1) of subsection (c) of a cost increase with respect to a project, the Secretary concerned shall provide an additional report notifying the congressional defense committees and the Comptroller General of the United States of any military construction project or military family housing project with a total authorized cost greater than $40,000,000 that has a cost increase of 25 percent or more.

(2) The report under paragraph (1) shall include the following-

(A) A description of the specific reasons for the cost increase and the specific organizations and individuals responsible.

(B) A description of any ongoing or completed proceedings or investigation into a government employee, prime contractor, subcontractor, or non-governmental organization that may be responsible for the cost increase, and the status of such proceeding or investigation.

(C) If any proceeding or investigation identified in subparagraph (B) resulted in final judicial or administrative action, the following:

(i) In the case of a judicial or administrative action taken against a government employee, the report shall identify the individual's organization, position within the organization, and the action taken against the individual, but shall exclude personally identifiable information about the individual.

(ii) In the case of a judicial or administrative action taken against a prime contractor, subcontractor, or non-governmental organization, the report shall identify the prime contractor, subcontractor, or non-governmental organization and the action taken against the prime contractor, subcontractor, or non-governmental organization.

(D) A summary of any changes the Secretary concerned believes may be required to the organizational structure, project management and oversight practices, policy, or authorities of a government organization involved in military construction projects as a result of problems identified and lessons learned from the project.

(3) If any proceeding or investigation described in paragraph (2)(C) is still ongoing at the time the Secretary concerned submits the report under paragraph (1), the Secretary shall provide a supplemental report to the congressional defense committees and the Comptroller General of the United States not later than 30 days after such proceeding or investigation has been completed. If such proceeding or investigation resulted in final judicial or administrative action against a government employee, prime contractor, subcontractor, or non-governmental organization, the Secretary shall include in the supplemental report the information required by paragraph (2)(C).

(4) Each report under this subsection shall be cosigned by the senior engineer authorized to supervise military construction projects and military family housing projects under section 2851(a).

(5) The Secretary shall send the report required under paragraph (1) with respect to a project not later than 180 days after the Secretary sends to the appropriate committees of Congress the notification under paragraph (1) of subsection (c) of a cost increase with respect to the project.

(6) The Comptroller General of the United States shall review each report submitted under this subsection and validate or correct as necessary the information provided.

(g) Notwithstanding the authority under subsections (a) through (f), the Secretary concerned shall ensure compliance of contracts for military construction projects and for the construction, improvement, and acquisition of military family housing projects with section 1341 of title 31 (commonly referred to as the "Anti-Deficiency Act").