SEC. ___. SUPERVISION AND ADMINISTRATION COSTS OF SMALL-SCALE CONSTRUCTION FOR PROGRAMS TO BUILD CAPACITY OF FOREIGN SECURITY FORCES.

Section 333(g) of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(3) SUPERVISION AND ADMINISTRATION COSTS OF SMALL-SCALE CONSTRUCTION.—(A) Amounts available in a fiscal year to carry out the authority in subsection (a) may be obligated for supervision and administration costs associated with a small-scale construction project supporting a security cooperation program carried out under such authority at the time funding for such construction is made available to the Department of Defense activity executing the small-scale construction project.

"(B) For purposes of this paragraph, supervision and administration costs include employee labor and all other costs incurred by the Department of Defense activity in executing the small-scale construction project.

"(C) An obligation for supervision and administration costs under this paragraph shall be considered to be an obligation in the same manner as an order or contract placed with a commercial manufacturer or private contractor is an obligation.".

[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

The purpose of this proposed legislation is to add language to 10 U.S.C. 333 that would authorize DoD construction agents to obligate all estimated supervision and administration (S&A) costs during the period of availability of the funds authorized for the construction project.

This legislative proposal would clarify that DoD may use Operation and Maintenance (O&M) funds to perform S&A services throughout the life of the project until the funds cancel. The proposal also aims to align 10 U.S.C. 333 with other existing construction authorities that

allow for the obligation of all estimated S&A costs at the outset of the project. If accepted, this proposal would authorize construction agents to obligate all S&A costs when funds are made available by the requesting organization to the servicing organization for the project. It would allow for better forecasting of S&A costs, and ensure that the funds would be available for continued U.S. Government oversight of construction, contract administration, and quality assurance. In addition, adopting this proposal would eliminate the necessity of executing follow-on programs with additional funds, and would allow S&A costs arising from the warranty and maintenance period to be captured in the total project cost at the outset rather than budgeted and notified to Congress separately in future fiscal years.

The U.S. Army Corps of Engineers (USACE) is unable to obligate O&M funds for programs under 10 U.S.C. 333 to pay for S&A costs for small-scale construction projects beyond the second fiscal year after a program begins due to general fiscal law limitations that require current year funds to be used for bona fide needs of the current fiscal year. In the case of S&A expenses, the bona fide need for the S&A activities does not arise until the S&A activities take place. Therefore, absent an available exception to the bona fide need rule, such as the one provided in Section 333(g)(2)(A), current-year funds must be obligated to pay for S&A costs each fiscal year as construction progresses. These restrictions create significant challenges to executing small-scale construction projects beyond the second subsequent fiscal year since current year funds must be available and allocated to pay for S&A expenses, and therefore require re-notification to Congress for a given construction project each time the funds being used to carry out S&A activities for that project expire.

S&A costs consist of all in-house government labor costs for construction, which include pre-contract award activities, construction phase project management, quality assurance and control, and post-construction warranty enforcement. Congress has already authorized obligating S&A costs for certain construction projects funded from O&M funds at the time that the construction agent accepts the work and receives a transfer of funds from the requesting organization. Section 8070 of the Department of Defense Appropriations Act, 2005 (P.L. 108-287, states " Hereafter, funds appropriated for operation and maintenance and for the Defense Health Program in this Act, and in future appropriations acts for the Department of Defense, for supervision and administration costs for facilities maintenance and repair, minor construction, or design projects, or any planning studies, environmental assessments, or similar activities related to installation support functions, may be obligated at the time the reimbursable order is accepted by the performing activity: Provided, that for the purpose of this section, supervision and administration costs includes all in-house Government cost." A similar provision is included in the annual Department of Defense Appropriations Act for construction projects funded with the Afghanistan Security Forces Fund (ASFF) (see section 9003 of Public Law 115-141, which provides: "Supervision and administration costs and costs for design during construction associated with a construction project funded with appropriations available for operation and maintenance or the Afghanistan Security Forces Fund" provided in this Act and executed in direct support of overseas contingency operations in Afghanistan, may be obligated at the time a construction contract is awarded…")

These provisions are exceptions to the fiscal law principle that the Government may only obligate current year funds for employee labor costs for reimbursable orders executed under the

Economy Act (31 U.S.C. § 1535), they also allow funding provided for S&A costs to remain obligated, despite the requirement under 1535(d)(1) that funds not obligated by the servicing agency during the funds' period of availability be deobligated and returned to the requesting agency.

The use of section 8070 to obligate O&M funds at the outset is limited to military construction projects and other activities related to DoD installation support and, thus, is not available for small-scale construction projects under 10 U.S.C. 333. This legislative proposal, therefore, would provide USACE with the same flexibility when carrying out construction activities under 10 U.S.C. 333 as it has when conducting military construction projects under the military construction authorities or under the ASFF authority.

Budget Implications: The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2021 President's Budget request.

RESOURCE IMPACT ($MILLIONS)									
Program	**FY 2021**	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**	**Appropriation**	**Budget Activity**	**BLI/SAG**	**Program Element (for all RDT&E programs)**
Defense Security Cooperation Agency	$1,036	$1,068	$1,089	$1,120	$1,132	O&M DW (0100)	4	4GT	1002200T
Total	$1,036	$1,068	$1,089	$1,120	$1,132	---	---	---	---

Changes to Existing Law: This proposal would make the following changes to section 333 of title 10, United States Code:

§ 333. Foreign security forces: authority to build capacity

(a) AUTHORITY.-The Secretary of Defense is authorized to conduct or support a program or programs to provide training and equipment to the national security forces of one or more foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following:

(1) Counterterrorism operations.
(2) Counter-weapons of mass destruction operations.
(3) Counter-illicit drug trafficking operations.
(4) Counter-transnational organized crime operations.
(5) Maritime and border security operations.
(6) Military intelligence operations.
(7) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States.

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(g) FUNDING.-

(1) SOLE SOURCE OF FUNDS.-Amounts for programs carried out pursuant to subsection (a) in a fiscal year, and for other purposes in connection with such programs as authorized by this section, may be derived only from amounts authorized to be appropriated for such fiscal year for the Department of Defense for operation and maintenance, Defense-wide, and available for the Defense Security Cooperation Agency for such programs and purposes.

(2) AVAILABILITY OF FUNDS FOR PROGRAMS ACROSS FISCAL YEARS.-

(A) IN GENERAL.-Amounts available in a fiscal year to carry out the authority in subsection (a) may be used for programs under that authority that begin in such fiscal year and end not later than the end of the second fiscal year thereafter.

(B) ACHIEVEMENT OF FULL OPERATIONAL CAPACITY.-If, in accordance with subparagraph (A), equipment or training is delivered under a program under the authority in subsection (a) in the fiscal year after the fiscal year in which the program begins, amounts for defense articles, training, defense services, supplies (including consumables), and small-scale construction associated with such equipment or training and necessary to ensure that the recipient unit achieves full operational capability for such equipment or training may be used in the fiscal year in which the foreign country takes receipt of such equipment and in the next two fiscal years.

(3) SUPERVISION AND ADMINISTRATION COSTS OF SMALL-SCALE CONSTRUCTION.—(A) Amounts available in a fiscal year to carry out the authority in subsection (a) may be obligated for supervision and administration costs associated with a small-scale construction project supporting a security cooperation program carried out under such authority at the time funding for such construction is made available to the Department of Defense activity executing the small-scale construction project.

(B) For purposes of this paragraph, supervision and administration costs include employee labor and all other costs incurred by the Department of Defense activity in executing the small-scale construction project.

(C) An obligation for supervision and administration costs under this paragraph shall be considered to be an obligation in the same manner as an order or contract placed with a commercial manufacturer or private contractor is an obligation.