



Office of Command Counsel Newsletter

August 2000, Volume 2000-4

Korte: Briefing the AMC Board of Directors (BOD)-- "Top 10 Legal Issues"

The AMC Commander hosts his subordinate commanders and senior staff at quarterly BOD meetings. Command Counsel **Ed Korte** provides attendees with point papers on ten important and timely legal matters that we are working at HQ AMC. Mr. Korte may choose to brief a few of these if he is on the agenda, but all receive copies of the ten point papers.

On June 28, 2000 Mr. Korte provided point papers on the following topics:

Partnering Implementation Assessment Team (Encl 1)

Contract Delinquencies (Encl 2)

Use & Misuse of Government Resources (Encl 3)

Professional Liability Insurance (Encl 4)

Environmental Differential Pay (Encl 5)

Overtime Pay (Encl 6)

Protest Lessons Learned (Encl 7)

GAO/Court of Federal Claims Protest Procedures (Encl 8)

Transportation Issues (Encl 9)

FMS Marketing (Encl 10)

Copies of each of these Point Papers are provided for your information and use.

Thanks to **Vera Meza**, who coordinates this effort.

Colonel Bill Adams Retires

Colonel Bill Adams, who served as AMC Deputy Command Counsel/Staff Judge Advocate, and later as a member of the Intellectual Property Branch of the Office of Command Counsel, retired in June after six years of exceptional service to the AMC legal community.

Colonel Adams brought a unique and rare commitment and dedication to work from his first to his last day on the job. When a HQ AMC or field

client was unsure as to where to go for legal advice, **COL Bill Adams** was always a great place to start.

In a warm and moving ceremony presided over by AMC Deputy Commander **LTG James Link**, **Bill** received the Legion of Merit in the presence of his wife, Nancy, several family members, and distinguished guests including **MG Walt Huffman**, The Judge Advocate General of the Army.

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500th AMC-Level Protest Filed

Who would have thought that a pilot program starting in April 1991 would lead to a Presidential Executive Order, government-wide recognition, and over 500 cases handled at HQ AMC and not by some external forum?

The above describes the very successful and influential AMC-Level Protest Program.

The pilot proved so successful that HQ DA granted permanent authority to AMC in 1992.

In 1995, the Office of Federal Procurement Policy recognized the program as one of the "Ten Best Government Procurement Practices."

In October 1995 President Clinton signed Executive Order 12979 directing Federal agencies to allow protests to be filed at the agency level above the contracting officer, a process modeled after the AMC program.

The statistics are staggering:

Over 500 protests filed

Average decision time: 17 days (at GAO 75 days)

Corrective action rate: 15%

Only 49 AMC decisions appealed, 47 decided in AMC's favor.

The AMC-level Protest Program remains the most successful alternative dispute resolution program within the Command (Editor's Note: I also feel confident in saying it is the most successful ADR program in DOD, if not the Federal sector).

The current roster of Protest Litigation Branch attorneys is **Vera Meza**, who is Branch Leader, **Jeff Kessler**, **Josh Kranzberg**, and **Maj Cindy Mabry**.

Newsletter Details

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

WLMP--History & Background

The efforts to modernize and overhaul our logistics system has given rise to the crucial Wholesale Logistics Modernization Program (WLMP). While most of you have heard of this effort,

Victor Ferlise, Deputy to the Commander, CECOM, and former CECOM Chief Counsel has written an excellent paper that we share with you (Encl 11).

It describes the background circumstances leading to WLMP, problems encountered and efforts to solve issues using a Team approach.

Among the important sections of the article includes four major issues-opportunities, that governed the overall strategy:

- First and foremost, the acquisition leadership throughout DoD was committed to acquisition reform — not reform for reform's sake, but to achieve substantive innovations in the processes the government uses to acquire products and services.

- Second, we did have the cash flow of approximately

\$40 million a year for maintenance, which could be expected to increase over time.

- Third, automation advances had resulted in systems much more adaptable, upgradeable, reconfigurable, scaleable, and interoperable than was possible when the initial COBOL systems were built.

- Fourth, the commercial sector had expended significant amounts of money in developing the science of supply chain management via velocity management and similar techniques. Companies were advertising that, within one day of receiving an order, they could have a product enroute to any customer in the world.

So again, the challenge was to find a way that the Army could capitalize on the advances that had occurred in the commercial world and DoD's commitment to acquisition reform, that did not require the influx of additional dollars over and above the estimated annual maintenance costs.

List of Enclosures

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18. Professional Conduct Reminder (PCR)-Army Attys Representing
19. PCR--Counsel as Advisor
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21. Environmental Fines
22. Ct. Dec. Hazard Waste
23. Preference for Local Remed Contractors

The ABC's of T for C: One-Year Settlement Proposal Rule

Jignasa Desai, CECOM, DSN 992-9827, has provided an interesting paper addressing FAR provisions and case law related to the general rule that the Contractor must submit its settlement proposal within a year after the contract was terminated for convenience (Encl 12).

The article highlights FAR 52.249-6(f) and the case of Do-Well Machine Shop, Inc. v. US, 870 F.2d 637 (Fed.Cir. 1989), that upheld a contracting officer's decision that a settlement proposal was untimely under the one-year rule.

Rehab Act Mandates Accessibility Requirements for IT Purchases

AMC Computer Technology counsel **Lisa Simon**, DSN 7672552, provides a point paper on an important development in information technology purchases (Encl 13).

Congress amended section 508 of the Rehabilitation Act to "beef up" the extent to which federal electronic and information technology must be accessible to disabled employees and disabled members of the public.

All federal electronic and information technology devel-

oped or procured after the law's effective date must be comparably accessible to disabled employees and disabled members of the public as to their able-bodied counterparts unless to do so would represent an "undue burden". (29 USC 794d)

To the extent there is an "undue burden", the law requires that agencies provide disabled employees and disabled members of the public an alternative means of access to the data or information.

Contracting Parties: Can Not Limit Disputes Clause Applicability

Should the parties to a Government contract be able to agree contractually on which provisions of the contract are subject to the Disputes clause? (Encl 14).

The Court of Appeals for the Federal Circuit answered that question in the negative in a 1997 decision that was recently implemented in the Federal Acquisition Regulation (FAR). Federal Acquisition Circular (FAC) 97-15, effective February 25, 2000, implements the Federal Circuit's decision in Burnside-Ott Aviation Training Center v. Dalton, 107 F.3d 854 (Fed. Cir. 1997).

The court held that the parties could not contract away the contractor's right to ASBCA review of its claim under the Contract Disputes Act. Any attempt by the parties to deprive the Board of jurisdiction to hear a dispute that otherwise falls under the Contract Disputes Act defeats the purpose of the Act and the intent of Congress.

Thanks to OSC's **Bernadine McGuire**, DSN 793-8436.

Handling Proprietary Contractor Data-- Properly

The TACOM-W Intellectual Property Division, **Pete Taucher, David Kuhn, Gail Soderling** and **John Moran** shared in the submission of a paper, in the form of an Advisory to their clients.

The article groups applicable handling rules into four categories:

Restricted rights or Limited Rights Data

Small Business Innovative Research (SBIR) Rights Data

Government Purpose License Rights (GPLR) Data

Other Proprietary Data

The reader is reminded that a government employee can be jailed or fined under the provisions of 18 USC Sec 1905 for unauthorized release of contractor proprietary data (Encl 15).

Covenants Not to Compete

In support services contracts, it is not unusual for the Government to provide training to contractor employees.

This training represents a valuable investment by the Government. It is bad enough when that investment is lost when the employee decides to move on to other things. What is worse, and is generally a surprise to Government requisitioners, is the situation where a contractor employee wishes to continue and discovers that he is forbidden to do so.

The situation can arise in the following ways.:

A contractor may fail to win a follow-on contract. Or a small business may grow so much that it no longer qualifies for a small business set-aside. In such circumstances, the requisitioner may hope that certain key personnel will be picked up by the successor contractor.

However, if the employment agreement with the contractor contains a covenant not to compete, sometimes called a noncompetition covenant, this may be impossible.

ARL's **Bob Chase**, DSN 290-1599 provides a paper with suggestions.

As reported in the *Washington Post* (March 18, 2000; page E01), the number of non-competition agreements and actions to enforce them have "risen very dramatically in the last couple of years." Companies see this as a way to protect their trade secrets and, perhaps, a way to limit competition generally. Others call it a new form of indentured servitude.

Suggestion Raised

In future service contract solicitations, if we expect contractor employees to pick up valuable on-the-job training or expertise, we may state that a company practice of prohibiting employees to work for a successor contractor will make the bid non-responsive. An RFP can take that tack, or penalize an offeror a specified number of points in the evaluation. Note that we are not requiring potential contractors to forfeit all protections of non-competition agreements. They may still protect their client lists and trade secrets.

Employment Law Focus

Hatch Act--Civilian Employee Activities

CPT **Robert Paschall**, CECOM, DSN 992-9798 provides an outstanding paper on the Hatch act (Encl 16).

As authorized by the Hatch Act

Federal civilian employees **may** engage in the following activities in their personal capacity:

- (1) Run for public office in nonpartisan elections (ones in which none of the candidates are affiliated with any political party);
- (2) Register and vote as they choose;
- (3) Assist in voter registration;
- (4) Express opinions about candidates and issues;
- (5) Contribute money to political organizations;
- (6) Attend political fundraising;
- (7) Attend events sponsored by political party or club;
- (8) Join and be an active member of a political party or club;

(9) Sign nominating petitions;

(10) Campaign for or against referendum questions, constitutional amendments, or municipal ordinances;

(11) Campaign for or against candidates in partisan elections;

(12) Make campaign speeches for candidates in partisan elections;

(13) Distribute campaign literature in partisan elections;

(14) Hold office in political clubs or parties.

Federal civilian employees **may not** do the following:

(1) Use their official authority or influence for the purpose of interfering with or affecting the result of an election;

(2) Run for the nomination or as a candidate for election to a partisan political office;

(3) Knowingly solicit, accept, or receive a political contribution from a subordinate (an employee under the supervisory authority, control

or administrative direction of the other employee);

(4) Make a political contribution to any "employer or employing authority" meaning any person in the supervisory chain of command, this does not include the Vice President's campaign for President;

(5) Engage in political activity while on duty (this includes wearing political buttons while on duty);

(6) Engage in political activity while in any room or building while in the discharge of official duties;

(7) Engage in political activity while wearing a uniform or official insignia (to include military uniforms commonly worn by technicians);

(8) Engage in political activity using a U.S. Government owned or leased vehicle;

(9) Intimidate, threaten, command, or coerce a Federal employee to engage in, or not to engage in, political activity.

There are special rules for Federal employees who live in specific jurisdictions, primarily those with large Federal service employee populations.

Political Activities of Military Personnel

The political activities of officers and enlisted members of the Active Army, USAR, and the ARNG are governed by DODD 1344.10 and AR 600-20, paragraph 5-3. The Hatch Act does not apply to military members.

The restrictions in AR 600-20 apply to soldiers on active duty, which is broadly defined.

Army personnel may not use military authority to influence or attempt to influence the vote of a member of the Armed Forces, or require a member to march or attempt to require a member to march to a polling place (18 U.S.C. § 609).

Members of the Armed Forces on active duty generally may not campaign for, or hold, elective civil office in the Federal Government, or the government of a state, territory, the District of Columbia, or any political subdivision thereof (10 U.S.C. § 973).

Soldiers on active duty

may:

(1) Register, vote, and express their opinions on political candidates and issues, but not as representatives of the Armed Forces;

(2) Attend partisan and nonpartisan political meet-

ings or rallies as spectators; however, they may not attend in uniform, during duty hours, when violence is likely to occur, or when their activities constitute a breach of law and order;

(3) Make monetary contributions to a political organization, but not to other members of the Armed Forces on active duty or employees of the Federal Government, and subject to other requirements.

(4) Encourage other military members to vote;

(5) Serve as an election official, if such service: is not in uniform, does not interfere with military duties, and has the prior approval of the installation commander;

(6) Sign a petition for legislative action or to place a candidate's name on the ballot but only in the soldier's personal capacity;

(7) Write a letter to the editor expressing personal views, and place bumper stickers on cars (but not large banners or posters).

Soldiers on active

duty may not:

(1) Use their official authority or influence to interfere with an election, solicit votes for a particular candi-

date or issue, or require or solicit political contributions from others;

(2) Participate in partisan political management, campaigns or conventions;

(3) Write and publish partisan political articles that solicit votes for or against a partisan political party or candidate, speak before partisan political gatherings, or participate in partisan political radio or television shows;

(4) Serve in any capacity or be listed as a sponsor of a partisan political club;

(5) Distribute partisan political literature or conduct a political opinion survey under the auspices of a partisan political club;

(6) Use contemptuous words against the President, Vice President, Congress, the Secretaries of the military departments, Defense, or Transportation, and the governors or legislatures of any state or territory where the soldier is on duty;

(7) Engage in fund-raising activities for partisan political causes on military reservations or in Federal offices or facilities;

(8) Attend partisan political events as an official representative of the armed forces.

Personal Liability Insurance

The DoD Policy Guidance issued on professional liability insurance allows for payment of up to one half the cost of the policy, not to exceed \$150.00 (Encl 17).

The policy is retroactive to 1 October 1999, and an employee's first step would be to submit an SF 1164 through local personnel channels.

The DoD guidance indicates that DoD components should "establish processing procedures." Based on the information received informally from DA. This is being interpreted to mean local implementing procedures, and that the DoD guidance is sufficient authority for local implementation.

DOD Memo

Diane Disney,
Deputy Assistant Secretary of Defense for Civil-

ian Personnel Policy writes as follows :

Authority

Section 636 of the Treasury, Postal Service, and General Appropriations Act for Fiscal Year 1997, Pub. L. 104-208, as amended, requires agencies to reimburse qualified employees for up to one-half the cost incurred for professional liability insurance.

Authority to make such payments resides with heads of DoD Components and may be delegated to the lowest practical level.

OPM

The Office of Personnel Management (OPM) does not plan to issue regulatory guidance on this issue. Therefore, in coordination with the Defense Finance and Accounting Service and the DoD Office of the General

Counsel, we have prepared the attached DoD guidance to assist in implementing this new authority. The provisions of this new authority became effective October 1, 1999.

In February 1998, OPM surveyed Federal agencies on the implementation of Pub. L. 104-208 (which, in its original form, allowed Federal agencies to contribute to the costs of professional liability insurance).

Based on this past practice, DoD Components may wish to maintain documentation on reimbursements for professional liability insurance should OPM survey Federal agencies in the future.

POC is HQ AMC Employment Law Team Chief, **Linda B.R. Mills**, DSN 767-8049

Professional Conduct Reminders

It is important for us to keep these rules at the forefront as we engage in the daily practice of law. To help us do that, Ethics Team Chief **Mike Wentink**, DSN 767-8003, will periodically send a short quote from the rules, as they are set out in AR 27-26, or some other relevant item. This series will be known as “*Professional Conduct Reminders*” and this is the first one.

“Rule 1.13 Army as Client

(a) Except when representing an individual client pursuant to (g) below [duly assigned defense or legal assistance counsel], an Army lawyer represents the Department of the Army acting through its authorized officials. ... When an Army lawyer is assigned to such an organizational element and designated to provide legal services to the head of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the lawyer-client privilege or the rule of confidentiality for the head of

the organization’s own benefit but may invoke either for the benefit of the Army ... subject to being overruled by higher authority in the Army.

“(b) An Army lawyer shall not form a client-lawyer relationship or represent a client other than the Army unless specifically assigned or authorized by competent authority. Unless so authorized, the Army lawyer will advise the individual that there is no lawyer-client relationship between them.”

Mr. Wentink continued addressing Army as Client in the next Professional Conduct Reminder.

Then, Mike extracted comments from the rule and made comments of his own.

The first two PCRs focused on Rule 1.13 in AR 27-26, “Army as Client.”

PCR #00-01 explained that, except when duly appointed to represent an individual as a defense counsel or legal assistance officer, the Army lawyer represents the Army acting through its authorized officials.

Then PCR #00-02 continued with additional extracts that helps the Army lawyer deal with an Army official who intends to proceed in a manner that will violate a legal obligation to the Army or violate law. The lawyer shall proceed as is reasonably necessary in the best interest of the Army taking into account all of the facts and circumstances. In addition, whenever it is apparent that the Army’s interests are adverse to those of the official, the lawyer shall explain the identity of The Army as the client

Comment: Army Attorney's Represent the Army

What now follows are some extracts from the "Comment" to the Rule.

"For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees or members, in their official capacities. It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists...

"When one of the ... Army [officials] communicates with [you] the Army's lawyer on a matter relating to [your] representation of the organization on the organization's official business, the communication is generally protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the [official] is a client of the lawyer. It is the Army, and not the [official] which benefits from Rule 1.6 confidentiality. The Army's entitlement to confidentiality ... may not be asserted by an [official] as a basis to conceal personal misconduct from the Army.

"When [Army officials] make decisions for the Army, the decisions ordinarily must

be accepted by the lawyer even if their utility or prudence is doubtful. Decision concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an [official] that is in violation of law or directive."

Mike then offers the following:

1. Even though confidentiality protects communications from disclosure "to anyone outside the Army," this does not mean that such communications may be discussed freely with anyone "inside the Army."

We still need to exercise discretion and ensure that there is really a "need to know." Unnecessary disclosure to officials within the Army could invite censure under the rules (e.g., the attorney's casual disclosures within the Army could lead to disclosure to others outside the Army). And, from the perspective of the individual official, it might be that we can accomplish our job, satisfy

our fiduciary relationship to the Army, and comport with the Rules of Professional Conduct, and still extend a modicum of privacy to our conversation with the individual.

2. I disagree with the proposition that "[d]ecisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Well, perhaps the "as such" modifier saves the statement. But, as part of the command or organization that we support, I consider us to be full partners with the command and its management.

This means that we do not strictly limit ourselves to rendering legal advice. See **Rule 2.1 Advisor**: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

For complete coverage of this issue and discussion of a dialogue within the AMC legal community see Enclosure 18.

Professional Conduct Reminder: Meritorious Claims and Contentions

Mike Wentink addresses an important area of practice:

Rule 3.1 Meritorious Claims and Contentions

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous [or] which includes a good faith argument for for an extension, modification, or reversal of existing law...”.

“COMMENT:

“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. ... [I]n determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

“The filing of an action ... for a client is not

frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery ... not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. ... The action is frivolous, however, if the client desires to have the action taken solely for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits ... or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”

Frivolous Claim Case in the News

The link below is to a newspaper article about a

case where the court decided that the cause of action that an attorney brought against a doctor was “frivolous” and awarded the doctor \$72,000 to include \$60,000 in punitive damages.

The jury was not impressed with the attorney’s explanation as to how he performed his due diligence, *i.e.:*

- (1) obtained assurances from other lawyers;
- (2) some unspecified and undocumented (he could not produce any notes) personal research in a medical library; and
- (3) a disputed elevator consultation with a client physician, whom he was defending for fondling patients.

<http://www.courier-journal.com/localnews/2000/0006/07/000607doc.html>

Professional Conduct Reminder:

Counselor as Advisor

Rule 1.4

Communication

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation, but not in conflict with the law.

COMMENT:

Scope of Advice

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. ...

Mr. Wentink 's Comment: This brings to mind the story of the balloonists who were out for a wonderful Sunday outing, and while floating over the countryside, they lost their bearings. They

noticed a group of people by a river. They let some air out of their balloon so that they could drop down just enough to halloo the crowd and ask where they were. It was then that they noticed that it was an ABA picnic. As they hovered over a group of the picnicking lawyers, they yelled down: "Where are we?" The lawyers looked at each other, discussed it, and their spokesperson yelled back: "You are about 25 feet in the air hovering over a flowing body of water." With disgust, the balloonists fired up the air and moved on, and one commented to the other: "Ain't that just a typical lawyer's answer ... absolutely, precisely correct, but absolutely useless!"

Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

The complete treatment of this issue is at Enclosure 19.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. ...

Mike Wentink's comment and discussion is at Enclosure 20.

Environmental Law Focus

Who Can Fine Us-Get Out Your Checkbook

The issue of whether EPA or the states can impose penalties for environmental violations is always of concern to our clients, and a matter that is constantly changing. Here is a matrix summary of where we stand today, on that issue, prepared by the Army's Environmental Law Division (Encl 21)

A A copy of the Department of Justice opinion holding that EPA, but not the states, can impose penalties for underground storage tank violations is available by calling **Bob Lingo**, DSN 767-8082.

In addition to the situation addressed in the ELD Matrix, EPA can also impose stipulated penalties for violation of Federal Facility Agreement obligations, and the Nuclear Regulatory Commission (NRC) can, and has, imposed penalties against federal facilities for violations of NRC nuclear material license requirements.

Green Travel--

Environmentally Friendly Rental Cars

Next time you go on official travel, how about trying an environmentally friendly rental car. They now are available at some locations, which provide eco-cars (natural gas, electric, and gas-electric hybrids) for rent. The first site opened in December 1998 at Los Angeles International Airport and has expanded since to several other California airports, including San Francisco and Sacramento. A Phoenix site is scheduled to open next month, and locations in Las Vegas, Atlanta,

Dallas, Houston, and Washington, D.C., are due to open by the end of this year. The fleet includes alternative-energy vehicles built by Honda, Nissan, Toyota, Ford, and GM. An electric version of the Toyota RAV4, for example, rents for as little as \$59 a day. All fuel costs are included in the daily rental and each location provides a short orientation and a list of charging/fueling stations. For more information, see: <http://www.evrental.com/home.html>

Service Fees for Hazardous Waste Management

The RCRA makes the federal government subject to any "reasonable services charges" imposed by Federal, State, or local authorities for solid or hazardous waste management requirements.

Is a fee program that imposes higher fees based on the volume of waste generated or the type of hazardous waste management facility, such as landfills or incinerators. The Department of En-

ergy and other federal agencies thought not.

The Court of Appeals for the Second Circuit recently ruled that such charges WERE reasonable, even though the fees imposed may far exceed the actual cost of providing the regulatory services. While the opinion is binding only in the 2nd Circuit, it has a good chance of being followed in other circuits. The case is at Encl 22.

Registering Your Closed Landfill

The RCRA hazardous waste management regulations require the owner, within 60 days of closure of a hazardous waste disposal unit to record a notation on the deed, or some other instrument which is normally examined during a title search. The notice shall indicate the unit was used to manage hazardous waste and the restrictions on disturbing. Many states have similar provisions for com-

pleting the closure of sanitary or industrial waste landfills. RCRA requires the federal government to comply with all federal, state, and local laws regarding the management of solid or hazardous waste. Some confusion has been caused by a General Services Administration (GSA) opinion which cautions that imposing institutional controls by deed restrictions on federal lands is a real estate transfer, and should not be

done unless in the process of disposal of the property. However, the GSA has clarified that their opinion was not meant to apply to notices or other annotations required on land records by hazardous or solid waste requirements, even on active installations. In such cases, you should consult with the Corps of Engineer and file the appropriate notice to protect closed hazardous or solid waste disposal units.

Preference to Local Remediation Contractors

The Comptroller General sustained a pre-award protest by a paving company against award of a contract for the capping of a landfill as a BRAC closure military base. The protestor alleged that the Corps of Engineers failed to comply with a statutory requirement that government agencies give a preference, to

the maximum extent possible, to contracting with local, small, and small disadvantaged businesses for work associated with closing military installations under a base closure law. The Comptroller General held that the USACE solicitation for a regional environmental remediation indefinite delivery/indefinite quan-

tity (IDIQ) contract failed to give reasonable consideration to the practicability of providing a preference to local contractors, Ocuto Blacktop & Paving Co., B-284165. The Corps of Engineers Chief Counsel has issued a memorandum of lessons learned from the case (Encl 23),

Faces In The Firm

Hello

HQ AMC

LTC Mike Walters joined the General Law Division in July. A Buckeye, Mike arrives from his previous assignment at Ft. Riley with his wife Candy and son Michael.

ARL

Effective 14 July 2000, **LTC Robert B. Lloyd** will be the new ARL Chief Counsel. LTC Lloyd is coming from a position as Chief Counsel located at the Armor Center and Fort Knox.

Promotions

HQAMC

Mike Lassman, member of the Employment Law team was promoted in July to the GS-15 level.

AMCOM

CPT Erick S. Ottoson was promoted on 1 August 2000. Erick is a member of the Office of Staff Judge Advocate.

Goodbye

OSC--Tooele

CPT Humphrey Johnson Chief of the Tooele Legal Office, begins transition leave on 15 August 2000. He is leaving the Army to return to private practice in his beautiful home State of Maine.

HQAMC

Fran Gudely, General Law Division Legal Technician retired on 31 July after 16 years of exceptional service with the Office of Command Counsel. Her dedication, loyal service and commitment will never be matched and will be impossible to replace.

Birth

MAJ Kevin Fritz, Deputy SJA, Fort Monmouth, and his wife, Beth, celebrated the birth of a 7 pound, 13 ounce baby boy, Robert Joseph, on 11 July 2000.

AMCOM

MAJ Steven L. Butler, Deputy Staff Judge Advocate, has left this office for an assignment in Korea.

ARL

Effective 12 August 2000, **Mark D. Kelly**, will be leaving ARL, Intellectual Property Law Branch, to work for private industry.

Death

CPT Jeffery M. Neurauter has left the Acquisition Law Division for assignment with the Trial Defense Service at Ft. Leavenworth, Kansas.

On 25 June 2000, Ralph Matheson, a former CECOM Legal Office attorney, passed away from heart failure as a result of burns received from a kitchen fire. Ralph had great knowledge and fascination with military history and leaders in particular. He will be missed.

CPT Martin N. White has left the Office of Staff Judge for an assignment in Germany.

COL Steven B. Lundberg, left as Chief Counsel for the ARL Office of Chief Counsel. His new duty station is the U.S. Army Space and Missile Defense Command located in Huntsville, Alabama.

Faces In The Firm

Passing of the first Female Army JAG Officer

Phyllis Propp Fowle, the first woman to be an officer in the Army Judge Advocate General's Corps died recently at age 92. Fowle also was the only woman to serve in the JAGC overseas during World War II. She was made a distinguished member of the corps in a banquet in her honor last year.

When Congress opened the Army to women in 1942 by creating the Women's Auxiliary Army Corps, she was the first to sign up.

She soon moved to the

Judge Advocate General's Corps.

She reported to the European Command Headquarters in Paris in 1945.

Fowle achieved the rank of Lieutenant Fowle and processed hundreds of legal cases in Germany, including one involving crown jewels stolen from a castle outside Frankfurt.

When the Army discharged all of its women in 1947, Fowle was asked to stay on as the civilian chief of legal assistance. She remained in that position until 1951.

New Position

MAJ Wade L. Brown has moved from the Acquisition Law Division to the Office of Staff Judge Advocate where he is the Deputy Staff Judge Advocate.

Awards & Recognition

OSC

Terese Harrison (OSC Acquisition Law) was presented with the Commander's Award for Civilian Service. Major General Joseph W. Arbuckle presented the award to members of the Commercial Demilitarization Team.

CECOM

Lee Duerinck, Attorney-Advisor, CECOM had an article published in the July/August 2000 issue of Program Manager magazine on the use of "due diligence" in the Wholesale Logistics Modernization Program (WLMP).

An important aspect of communication in the program was using a commercial business practice "DD"--offerors were provided a vast array of information allowing them and the Government to mitigate risks associated with the program.

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POINT PAPER

19 June 2000

SUBJECT: Partnering 2000: The AMC Partnering Implementation Team (PIAT)& Overarching Partnering Agreements (OPAs)

PURPOSE: To brief the BOD on the impending PIAT MSC on-site visits and CG's Support for Expanded Use of OPAs

FACTS:

O CG memo of 13 June advises Commanders of TACOM-W, CECOM, OSC, STRICOM and AMCOM that he has formed a PIAT under the direction of Command Counsel Ed Korte.

O AMC Partnering Inventory is 70+ with distribution of 16,000 AMC Partnering Guides containing the four-step Partnering Model. The vital question today: What have we learned from the AMC Partnering experience?

O Primary focus is compiling information on three Partnered programs at each MSC by interviewing government and industry participants concerning their Partnering experiences.

O PIAT will be seeking information on lessons learned, benefits derived, issues raised and solutions used, policies and procedures adopted.

O The information sought by the PIAT will be primarily an update of that from the existing AMC MSC Partnering self-Assessment prepared after the January 1999 Lead Partnering Champion Workshop.

O The MSC Lead Partnering Champion (LPC) will be the focal point of the identification of Partnered programs for the PIAT to discuss.

O The information will be used to make revisions to the AMC Partnering Guide, featuring a new chapter on Lessons Learned. The Guide will be republished early in CY 2001.

O OPAs, which are executed between an AMC MSC and industry, express the parties' commitment to enter Partnering arrangements for each specific contract that may be awarded by that MSC to the corporate entity.

O OPAs accelerate the benefits of Partnering by an up front decision to Partner. OPAs have been very successful when used by AMC contracting activities--CECOM being a prime user.

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AMCCC-B

POINT PAPER

19 June 2000

SUBJECT: Contract Delinquency Reviews

PURPOSE: To Provide Information on AMC Contract Delinquency Reviews.

FACTS:

O GEN Coburn directed the AMC Command Counsel, Mr. Edward Korte, to conduct Contract Delinquency Reviews (CDRs) of AMC contracts.

O The purposes of the CDRs are: (1) to assess the extent that delinquent contracts are causing backorders for spare parts and (2) to reduce delinquent contracts. Backorders adversely affect unit readiness and financial management.

O Data is being requested from the MSCs to identify specific contracts that are causing backorders.

O The AMC Command Counsel and the AMC ADCS for Acquisition, Contracting, and Program Management, Ms. Sallie Flavin, will visit the MSCs to determine the causes of delinquent contracts and to assess actions/remedies being used to effectively manage delinquencies.

O Lessons learned and recommendations will be cross fed throughout the command to ensure that effective procedures and tracking systems are in place to manage delinquent contracts.

O MSC visits.

| | |
|-----------------|---------------------|
| 10-12 July | CECOM |
| 24-26 July | AMCOM |
| 31 July - 2 Aug | OSC / TACOM (ACALA) |
| 7-8 Aug | SBCCOM (Natick) |
| 16 Aug | SBCCOM (APG) |
| 21-23 Aug | TACOM (Warren) |

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SUBJECT: Use and Misuse of Government Resources

PURPOSE: Provide information about the Annual Ethics Training theme for AMC for CY 2000.

FACTS:

- Office of Government Ethics (OGE) and DoD Regulations require all employees, who file a financial disclosure report, to have a minimum of one hour of ethics training each year. This requirement includes all general officers and members of the senior executive service, including STs, and all other employees whose position requires them to file an OGE Form 450.
- The AMC Command Counsel identified "Use and Misuse of Government Resources" as the theme for the ethics training in AMC for CY 2000. He issued a memorandum to all his Chief Counsels to establish this theme and encourage them to use this theme within their own organizations. This was further reinforced when the Command Counsel met with his Chief Counsels at the annual Continuing Legal Education (CLE) program. In addition, the head of his Ethics Team prepared a training package that has been distributed to all AMC legal offices.
- The training will focus on Government computers, e-mail and internet access, and revolve around these principles:
 - These resources are paid for with taxpayer money and provided to employees to accomplish mission, not for employees' personal convenience or as their personal resources.
 - However, employees have a "life" outside the Federal workplace, and sometimes this "life" needs to be attended to during the workday.
- The ethical rules that address these principles are:
 - The OGE *Standards of Ethical Conduct* require employees to conserve Government resources and to ensure that they are used only for authorized purposes.
 - The DoD *Joint Ethics Regulation* permits "agency designees" (supervisors) to authorize some limited, occasional personal use, subject to conditions (e.g., no significant additional cost, and no embarrassment to DoD).
 - As the "agency designee" for AMC, the CG issued AMC Policy #97-08 that, subject to additional local restrictions, permits AMC employees some limited, occasional and reasonable personal use.
- Authorized personal use of Government communications systems, including e-mail and internet access, might include:

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- Checking with children when return home from school;
 - Dealing with automobile mechanic;
 - Making a medical appointment;
 - Making a financial transaction;
 - Checking a sports score.
- Authorized personal use will never include the following:
 - Sending or forwarding chain letters (even if for a "good cause");
 - Fundraising (except CFC and AER);
 - Surfing or sending sexually oriented material;
 - Gambling, or any gaming on the internet;
 - In furtherance of any off-duty employment or business activity.
 - The training concludes with a reminder of what e-mail is, and is not. This is important especially for our official use of e-mail.
 - E-mail is not private conversation.
 - E-mail is a record, and when it is deleted, it is still archived.
 - As a record, e-mail is subject to FOIA and it is discoverable in litigation.
 - Write every e-mail as if it were a memorandum on letterhead, with the knowledge that it might become public in the future --
 - Avoid gratuitous remarks.
 - Avoid jokes.

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AMCCC-G

POINT PAPER

16 June 2000

SUBJECT: Professional Liability Insurance

PURPOSE: Provide information about new requirement for agencies to share cost of professional liability insurance.

FACTS:

- The Treasury and General Government Appropriations Act for FY 2000, Public Law 106-58, requires agencies to pay "up to half" the cost incurred by covered employees for professional liability insurance.
- Covered employees include DoD management officials, executives, supervisors and law enforcement officers.
- Service members and NAF employees are not covered.
- Effective date was 1 Oct 99, but DoD has not yet implemented.
 - ñ The U.S. Office of Personnel Management (OPM) is not expected to issue guidance.
 - ñ DoD's draft guidance gives personnel the responsibility for confirming the eligibility of interested employees, and requires employees to submit insurance policies and proof of payment to DFAS.
 - ñ DoD expects to issue implementing guidance "soon."
- Some agencies already voluntarily share costs for professional liability insurance under a 1997 law that gave federal agencies that option.
- We have only identified one company that issues professional liability policies; it provides \$500,000.00 of coverage for approximately \$225.00 or \$1 million coverage for approximately \$300.00.

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DISCUSSION:

- If an employee is sued in his or her official capacity, the Army will be substituted as the defendant.
- If an employee is sued in his or her individual capacity, the Department of Justice decides whether or not the employee was acting within the scope of employment and whether or not it is in the best interests of the government to provide legal representation.
 - According to the U.S. Army Litigation Division, OTJAG, the Department of Justice has rejected only 150 of 7,000 requests for representation filed during a five year period.
 - Of 15 federal employees found liable in civil suits during a five year period, 11 of the employees were reimbursed by their agencies.
- The availability of coverage for administrative proceedings is not clearly defined in the policies we've seen. Professional liability insurance should cover the legal costs an employee would incur as the subject of disciplinary charges imposed by the employing agency. There is no clear indication that legal advice would be available to an insured employee who is merely the subject of an agency investigation or who is named as a principal agency witness in a discrimination complaint against the agency.
- Careful review of any policy prior to payment is essential. Broadly worded exemptions may mean that the policy provides no real protection even in the unlikely event of a finding of personal liability.

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SUBJECT: Corpus Christi Army Depot (CCAD) Asbestos Arbitration

PURPOSE: To provide information regarding CCAD Asbestos Environmental Differential Pay (EDP) Arbitration

DISCUSSION:

- **Background.** On 24 March 2000, an arbitrator awarded EDP to virtually all CCAD wage grade employees (over 1,800 employees). The EDP award was retroactive to six years prior to filing of the grievances. The total amount of back pay will amount to tens of millions of dollars.
- **Payment of the Award.** AMC has requested that the award be paid as a “non-recoverable loss” to the Working Capital Fund to minimize impact to the CCAD rates. A final decision has not been made on this request.
- **Future EDP.** We are currently attempting to negotiate a settlement with the Unions that will resolve the back pay and future EDP issues. We would expect that any future EDP costs would be treated as a normal cost of doing business and be included in CCAD rates.
- **Government-wide Impact.** The CCAD decision is the largest EDP award against any federal agency. The decision has little precedence value since arbitrators are not bound by precedent and each arbitration case is decided on its own merits. However, the CCAD decision is likely to encourage other unions to seek similar EDP awards.
- **Potential Regulatory/Legislative Solution.** DoD recently proposed a new OSHA based asbestos EDP standard. The AFGE Union was highly critical of the DoD proposal. The Federal Prevail Rates Advisory Committee (FPRAC) is currently reviewing this matter. If the FPRAC will not support the DoD proposal, DA supports requesting special legislation to resolve this problem.

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POINT PAPER

AMCCC-G

15 June 2000

SUBJECT: The Fair Labor Standards Act: Overtime Pay

Purpose: To provide information on potential litigation under the Fair Labor Standards Act (FLSA)

Facts:

1. Pending FLSA Grievance

a. Filed by AFGE Local 62, representing approximately 30 employees of the Soldier System Team (SST), SBCCOM, Integrated Materiel Management Center (IMMC). The employees are physically located at a DLA installation in Philadelphia, PA.

b. Grievance alleges that GS employees in various series, grades 9 through 12, should be nonexempt. They also seek back pay for overtime and travel time.

c. The law firm representing the union, Mulholland & Hickey of Washington, D.C., has represented DLA employees located at the same installation as well as other employees nation-wide.

d. DLA has already settled FLSA grievances for approximately \$5 million, but still has numerous grievances and court cases in process.

e. Many DLA employees at the Philadelphia, PA site received settlements of approximately \$1400.00 per person.

f. DLA personnelists service the SST employees, but elected not to handle this grievance in recognition of the fact that it may have AMC-wide and DA-wide implications.

g. Negotiations are currently being conducted by an AMC, SBCCOM, and SSC team of personnelists and lawyers headed by Linda Mills, AMCCC-G.

2. The Fair Labor Standards Act

The FLSA of 1938, as amended, 29 USC 201-219, provides for minimum standards for both wages and overtime entitlement, and spells out administrative procedures by which covered worktime must be compensated. Non-exempt employees receive time and a half for overtime, as opposed to straight time for exempt employees. Non-exempt employees earn overtime if supervisors "suffer and permit" the work. Overtime for exempt employees must be ordered and approved. Non-exempt employees are often paid while travelling under circumstances which would not be considered duty hours for exempt employees.

3. Coverage

a. The FLSA began applying to employees of the United States Federal Government in 1974. Section 3(e)(2) of the Act authorizes the provisions of the Act to be applied to any person employed by the Government of the United States, as specified in that section.

b. Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act.

c. An **FLSA exempt employee** is one who is not covered by the minimum wage and overtime provisions of the Act.

d. An **FLSA nonexempt employee** is one who is covered by the minimum wage and overtime provisions of the Act.

4. Agency Authority

The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria in part 551 of title 5, Code of Federal Regulations (CFR), and supplemental guidance issued by OPM.

5. General Principles of Exemptions

a. Each employee is presumed to be FLSA non-exempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria in 5 CFR 551 and supplemental guidance issued by OPM.

b. Exemption criteria must be narrowly construed to apply only to employees who are clearly within the terms and spirit of the exemption.

c. The burden of proof rests with the agency.

d. An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

e. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (as opposed to duties described in a job description).

6. Statute of limitations

An FLSA pay claim is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (29 USC 255(a)), which imposes a **2-year statute of limitations**, except in cases of a willful violation where the statute of limitations is **3 years**. The term "willful violation" is broadly interpreted to include agency neglect. Liquidated damages can double the back pay award.

7. Remedies

There are four ways you may file an FLSA claim. You may file through a negotiated grievance procedure, an agency's administrative process, the U.S. Office of Personnel Management (OPM), or an appropriate United States court.

a. **Negotiated grievance procedure (NGP).** If at any time during the claim period, you were a member of a bargaining unit covered by a collective bargaining agreement that did not specifically exclude matters under the FLSA from the scope of the negotiated grievance procedure, you must use that negotiated grievance procedure as the exclusive administrative remedy for all claims under the Act. You have no right to further administrative review by the agency or by OPM.

b. - c. **Non-NGP administrative review by agency or OPM.** You may file a claim with the Federal agency employing you during the claim period or with OPM, but not both at the same time, if during the entire claim period you--

- (1) Were not a member of a bargaining unit, or
- (2) Were a member of a bargaining unit not covered by a collective bargaining agreement, or
- (3) Were a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the negotiated grievance procedure.

d. **Judicial review.** Nothing limits your right to bring an action in an appropriate United States court. Filing a claim with a Federal agency or with OPM does not stop the statute of limitations governing FLSA claims filed in court from running. OPM will not decide an FLSA claim that is in litigation.

8. What's Being Done?

a. Personnelists at DA level have formed a team which holds regular meetings to assess DA's position with respect to potential FLSA claims and to help recommend a plan of action. The team includes a legal representative from OTJAG, Labor & Employment Law Division, and from each MACOM.

b. At the team's request, CPOCMA (which manages DA's Civilian Personnel Operating Centers), is training a "swat team" to conduct a paper review of all positions at the GS 7 through GS 12 levels. This will help us identify and correct clear errors, while also preparing for future challenges.

c. Labor relations specialists at the local level are being asked to review the bargaining unit status of local employees. Correct coding of bargaining unit employees in advance of "group" grievances will save time.

9. What Should Be Done?

a. Labor counselors should inform their CPACs that they are interested in being informed of any FLSA cases, particularly at installations where grievances are customarily handled exclusively by personnel.

2. Labor counselors at the local level should immediately notify the Office of Command Counsel (Linda B.R. Mills) of any grievances challenging FLSA determinations.

c. Labor counselors throughout the command should attempt to familiarize themselves with existing law on FLSA determinations. The OPM web site has an enormous amount of information. Information was also provided at the AMC CLE.

d. Labor counselors should encourage and assist local bargaining to resolve FLSA disputes prior to arbitration and before involvement of lawyers who will seek liquidated damages (double back pay for 2 years or, if agency found negligent, double back pay for 3 years).

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AMCCC-PL

POINT PAPER

14 June 2000

SUBJECT: Applying Protest Lessons Learned Instantly (APPLI)

PURPOSE: Provide information about the new initiative to share our knowledge by applying protest lessons learned.

FACTS:

- The Army Federal Acquisition Regulation Supplement requires a bid protest quarterly report that we furnish to DA. AFARS 33.190-2. The reports require information on the number of protest cases, issues raised and lessons learned. The information is furnished to DOD for consolidation with the other services. In years past, the focus has been on analyzing lost cases only.

- The Bid Protest/Litigation Branch of Command Counsel began to concentrate on sharing lessons learned when we win a case. The goal was to provide useful information to newer attorneys and to give us insight into the appropriate level of risk to take in procurement actions.

- At first, the Lessons Learned were shared by e-mail through our Protest POCs in each legal office. We then encouraged the submission of lessons learned at our Protest VTC on 1 Feb 00 and announced the APPLI initiative.

- For the FY 00 Second Quarterly Report we received many more submissions, which emphasized how we could improve even in cases we have won.

- We have taken the lessons learned and reformatted them as questions. For example:

00-1. How many companies should be solicited under a Federal Supply Schedule buy?

Safety Storage, Inc., B-283931, Withdrawn
POC Les Renkey, DSN 745-6692 (AMC Vera Meza)

Protest of an order placed under an optional federal supply schedule. The protest was filed by a company that had been contacted by the using activity for information but was not solicited for a quote by the contracting office. The purchasing agent contacted three companies on GSA Advantage as required by the regulations and the company contacted for information was not on the GSA Advantage listing. The protest could have been avoided by the purchasing agent requesting a quote from the company that had submitted information, not just the minimum required for regulatory compliance.

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- The lessons learned will be indexed so that issues are easily retrievable by word search or some similar method. This will result in a more systematic and candid method of in-house communication.
- Publication of lessons learned will follow the Quarterly Bid Protest Report so that the new initiative will not appreciably increase anyone's workload.
- The goal is to keep the entire legal and acquisition community in the know about current protest issues and provide them with practical guidance and experience on actual cases.

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POINT PAPER

12 June 2000

SUBJECT: Differences in Procedures During the Initial Phase of Bid Protests at the General Accounting Office and the Court of Federal Claims

PURPOSE: To brief the significant differences between the two

FACTS and Procedures:

o Disappointed offerors may file bid protests at the General Accounting Office (GAO), the Court of Federal Claims (COFC) or with the contracting officer or higher level officials within the agency. At the present time bid protests may also be filed in the federal district courts but their jurisdiction may end at the end of the year.

oo The GAO protest is started by filing a letter. There is an automatic stay of award or of contract performance if the protest is filed within specified time limits and GAO notifies the agency in a timely fashion. If it is not, GAO has no authority to order a stay. A firm which does not get an automatic stay must litigate in a federal court to convince a court that it is entitled to an injunction.

oo The COFC protest process is started by the filing and serving of a "Pre-filing Notice," with the court, DOJ and the contracting officer in accordance with the court's General Order 38. This is done prior to the filing of a complaint in order to enable DOJ to assign an attorney and to let that person quickly assemble its team and present a defense, as necessary, to any request for a temporary restraining order (TRO) or preliminary injunction (PI).

ooo The next step is a quick transmission of information about the procurement up the chain. The DOJ attorney represents the Government. Attorneys from DA Litigation Division, AMC Command Counsel and the MSC are part of the team. The court litigation may be a follow-on of a GAO or HQ, AMC-Level protest. Initial assessments must be made of what tack the protester will likely take and what position will be taken if the protestor requests a TRO or PI.

ooo Once the complaint is filed, there may be a request for a TRO or PI. The supporting briefs, memoranda and affidavits may run to a dozen or more separate documents. The judge may set the case up almost immediately for the initial status conference, which may be done whether in person or by teleconference. The most important matter is whether the protester wants a TRO or PI, and if so, whether the Army is willing to concede one.

ooo If a single contract which cannot be separated into component parts is involved, agreement on a TRO or PI may not be possible. If a task order/delivery order contract is involved, agreement may be possible if the Army is willing to forgo the issuance of additional

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delivery orders, and the protester is willing to let previously issued delivery orders proceed

ooo If agreement is not possible, the judge will quickly schedule a TRO or PI hearing. The Army/DOJ must select the most knowledgeable witness or witnesses and prepare him/her to testify at the hearing.

oo The COFC judge intensively manages a bid protest from the time the complaint is filed. A lot of work up front is devoted to the single issue of whether a TRO or PI should be granted. Once this is resolved, the case proceeds to submission of the record, briefings and discovery or a hearing, if permitted by the court

o As a general matter, things are much quieter up front at the GAO. The reason is that either the automatic stay falls into place or it doesn't. GAO has no jurisdiction over this question. There is a strict regulatory order for filing the administrative report and subsequent pleadings. There is a relatively short time allowed for decision on all GAO protests by statute, namely 100 days.

oo While there is less fury during the first week of a GAO protest, the short time frame involved for GAO to reach its decision means that there is always time pressure during the first 30 days of a GAO protest during the preparation of our Administrative Report. If GAO convenes a late hearing, the time pressure remains.

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POINT PAPER

AMCCC-G

12 May 2000

SUBJECT: Transportation Issues

PURPOSE: To provide information concerning the legal and ethical aspects of some common transportation issues.

FACTS:

1. Government-owned and -leased Nontactical Vehicles (NTVs).

a. NTVs may be used only for official purposes. Unauthorized use includes:

(1) Transportation to private social functions;

(2) Transportation for unofficial office activities or functions, such as coffee funds and office luncheons;

(3) Transportation of dependents or visitors without an accompanying official (even with the accompanying official, there must be an official purpose for their transportation);

(4) Transportation between home and work, including any part of the route between home and work.

b. The permissible operating distance (POD) of NTVs is 100 miles one way from installation or activity, subject to Commander's determination otherwise to meet the needs of the command.

c. NTVs may be used to travel to military or commercial terminals for emergencies or security, or if other means of transportation are not available or cannot meet mission requirements. In the NCR, DoD policy is that public and commercial transportation to commercial terminals (*e.g.*, Reagan National Airport, Dulles, BWI, and Union Station) is adequate for all but emergency situations, security requirements, and other unusual circumstances. NTVs may be used for travel to Andrews AFB and Davison AAF.

d. Government transportation to official after-hours functions may be approved, but only where the employee is attending in his or her official capacity; the transportation must begin and end at the duty station.

e. If there is an official purpose, an employee's spouse may accompany the sponsor to an event in an NTV if space is available and no additional costs (*e.g.*, may not use larger than

SUBJECT: Transportation Issues

normal vehicle to accommodate spouse). Such transportation must begin and end at the duty station.

f. Use of NTVs on TDY is limited to transportation between temporary lodging and places of official business and, when public transportation is impractical, travel to eating establishments, drugstores, place of worship, barber shop, cleaners, and similar places required for sustenance, comfort or health. May *not* use NTV for travel to entertainment or recreational facilities (e.g., movie theaters, sightseeing, or to visit relatives).

g. A vehicle rented by an employee while on TDY, subject to Government reimbursement, is not a GOV. The employee may use it for other than official business and sustenance, comfort and health purposes. However, the employee may not claim the additional costs incurred by this additional use (e.g., gas).

2. Commercial air travel.

a. Government policy is to travel coach, and to plan trips so that coach can be used.

b. First-class air travel requires Secretary of the Army (SECARMY) approval and must meet one of the following criteria:

(1) No other reasonably available accommodations exist within 24 hours of proposed departure or arrival time.

(2) The traveler is so handicapped or otherwise physically impaired that other accommodations cannot be used (must be substantiated by competent medical authority).

(3) Exceptional security requirements.

c. Premium-class (less than first-class) (if there are only two classes of travel on the aircraft, the higher class is deemed to be “first-class”) travel is permitted as follows:

(1) Regularly scheduled flights along the required route provide only premium-class seats.

(2) No space is available in coach and travel is so urgent it cannot be postponed.

(3) Necessary to accommodate a disability or other physical impairment (substantiated in writing by competent medical authority).

(4) Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

SUBJECT: Transportation Issues

(5) Overall savings to the Government result by avoiding additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

(6) When travel costs are paid by a non-Federal source and properly accepted under statutory authority (*see* paragraph 4, below). Note that first-class air travel may not be accepted from a non-Federal source unless first-class travel is approved by the Secretary of the Army under one of the three exceptions in paragraph 2.b., above.

(7) When the scheduled flight time for OCONUS travel is in excess of 14 hours, including stopovers between flights. No rest stops are permitted during the travel or at the destination; the employee is expected to begin work upon arrival (after checking in hotel and freshening up, if necessary). This authority is not to be used when coach travel can be scheduled to allow for authorized rest stops en route or at the destination. Premium-class, less than first-class, will not be authorized for the return trip just because it is more than 14 hours.

(8) Security concerns or exceptional circumstances make such travel essential to the successful performance of the mission.

d. In all cases, the traveler, or the senior member of the traveling party will sign a written request for the premium-class travel that includes a justification for such travel, a comparison of the costs of coach and premium class travel, and alternative travel plans that were considered (including an earlier departure that allows for a rest period). The normal travel-approving authority approves the request for premium-class (less than first-class) travel. Requests for first-class travel are submitted to SECARMY.

e. Frequent flyer miles (FFMs) earned on official travel may not be used to upgrade to first-class air travel unless the travel meets one of the criteria in paragraph 1.b., above, with SECARMY approval.

f. FFMs earned on official travel may not be used to upgrade to premium-class (less than first-class) travel unless:

(1) Premium-class (less than first-class) is authorized in accordance with paragraph 1.c., above;

(2) The FFMs may be used only for upgrades (e.g., the airline only permits their use for upgrades; or there are not enough FFMs to reduce the cost of a current trip, and they will expire before they can be used for a ticket).

g. First-class air travel is permitted in the following circumstances without SECARMY approval:

SUBJECT: Transportation Issues

(1) You use your own resources, including personal frequent flyer miles, to upgrade to first class;

(2) You accept an on-the-spot upgrade that is **not** being offered because of your grade or position (for example, you arrive late and the aircraft is full except for a first-class seat which you are offered);

(3) You use a coupon that you received because you are a member of an airline “club” by virtue of the number of miles that you have flown with the airline, even if some or all were flown on TDY. However, this must be a “no cost” upgrade, meaning that you did not “cash in” official mileage points to gain membership to the club, or exchange official points for the coupon.

h. If a military member is authorized to travel in premium-class, SECARMY policy requires the member to **not** travel in uniform.

3. Accompanied spouse travel.

a. Spouses may accompany their sponsors at Government expense as an exception to policy only if:

(1) There is an unquestionably official function in which the spouse is to actually participate (more than attendance) in an official capacity; or

(2) Such travel is deemed in the national interest as desirable because of diplomatic or public relations benefit to the country (representatives of a foreign government must attend).

b. Approval for accompanied spouse travel:

(1) The Director of the Army Staff must approve all official travel for spouses by commercial air, except

(2) Four-star general officers (and the USARPAC 3-star commander) may approve the travel of their spouses by MILAIR.

4. Gifts of travel and related expenses.

a. Gifts of travel and related expenses may be accepted for official travel of employees to “meetings or similar events” (not mission travel) if:

(1) The travel approval authority, after a conflict of interest analysis, determines that the acceptance of such gift will not impugn the integrity of Army operations or programs;

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SUBJECT: Transportation Issues

(2) The travel approval authority gives prior written approval;

(3) The ethics official concurs;

(4) The employee is in an official travel status (not leave, excused absence or permissive TDY).

b. In addition:

(1) The gift does not have to include all the expenses of the trip;

(2) The gift may include only the free attendance at the event (but, the employee must be in an official travel status);

(3) Payment-in-kind is preferred;

(4) Cash payment to the employee is prohibited;

(5) Checks must be payable to U.S. Army (reimburse travel account);

(6) If value of gifts exceeds \$250, employee must submit a report and certification through Ethics Counselor to Army Standards of Conduct Office for transmittal to Office of Government Ethics where the report is available for public inspection.

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ACTION OFFICER: MICHAEL J. WENTINK
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POINT PAPER

12 June 2000

SUBJECT: Permissible Actions to Encourage Foreign Military Sales (FMS)

PURPOSE: To brief the BOD on FMS marketing

FACTS:

o The primary statute on FMS marketing is found at Sec 515 (f) Foreign Assistance Act (FAA) [22 USC 2321]

oo "The President shall continue to instruct United States diplomatic and military personnel *in the United States missions abroad* that they should not encourage, promote, or influence the purchase by any foreign country of the United States-made military equipment, *unless they are specifically instructed to do so by an appropriate official of the executive branch.*" Emphasis added.

ooo This only impacts personnel in US missions abroad.

ooo The Secretary of State has repeatedly (1988, 1990, and 1993) instructed missions **to promote** US-made military equipment.

ooo The primary concerns in those letters from the Secretary of State involve warnings **not to favor one US firm over another**.

ooo *There is no specific guidance* from the Secretary of State suggesting that we may favor one US firm over another because the US is contracting with one of them, or because the US has had a bad experience with one of the US firms.

ooo Nevertheless, the potential customer country should be provided all *objective information* helpful in making a correct selection. The Secretary of State has allowed the Security Assistance Office not to support marketing where the sale is not in the US interests, or where there is a potential to damage US credibility and relations with the country.

oo Presidential Decision directive (PDD) - 34 on Conventional Arms Transfers (PDD-34) states that the US Government will provide support for US arms transfers when such transfers are approved. Support will include: "Tasking our overseas missions to support overseas marketing efforts of American companies bidding on defense contracts [as well as] actively involving senior government officials in promoting sales of particular importance to the United States. . . ."

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o FMS is a tool of US foreign policy and, consequently, these sales may only be done with full Government coordination (to include inter-departmental consultation and Congressional notification). Similarly, direct commercial sales are subject to State Department licenses for export.

oo Sales of any military equipment must be appropriate for the country. In general, both the CINC and the Ambassador are major players in this decision.

ooo Nearly every US embassy has a Security Assistance Officer (or office). That military person (or office) should be aware of both the DOD and Department of State positions on sale of military equipment to that country, and is your best single source of information.

oo Any promotion of the sale of military equipment needs to be coordinated and approved by both Departments.

o There is no express statutory authorization to spend appropriated funds directly in the promotion of American military equipment. Currently the only expressly authorized support DoD provides is at air and trade shows where defense incremental costs for such efforts are reimbursed by a defense contractor or trade associations. See section 1082, Public Law 102-484 [106 Stat. 2516-2517 (1992)].

oo There are special rules for participation in exhibitions and trade shows. Contact the legal office for more information on trade shows.

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Wholesale Logistics Modernization Program (WLMP) Will Overhaul Army's Logistics System

In this era of continuing downsizing and budget decrements, the biggest challenge we face is finding creative and innovative solutions to the problems that confront us, coupled with the perseverance to see them through to successful conclusion. The U.S. Army Communications-Electronics Command (CECOM) and its Commanding General, Army MG Robert L. Nabors, recently encountered and successfully confronted such a challenge when faced with the pressing need to overhaul the Army's automated logistics systems. At the same time, MG Nabors was charged with implementing a mandated reduction of 1,400 personnel spaces with a corresponding budget decrease.

No Longer State of the Art

By the early 1990s, a wide chasm had grown between the Army's requirements for logistics automation and the capabilities of its two antiquated logistics and depot maintenance systems: the Commodity Command Standard System (CCSS) and the Standard Depot System (SDS). These systems dated back to the early 1970s, were based on Common Business Oriented Language (COBOL), were tied to the Defense Information Systems Agency's (DISA) mainframe/megacenter batch processing, were increasingly complex, and were very expensive to maintain.

Through a patchwork series of enhancements effected by very dedicated government workers at CECOM's support centers in St. Louis, Mo., and Chambersburg, Pa., the army limped along with these systems through the 1970s, '80s, and '90s.

Joint Logistics System

The Department of Defense (DoD) attacked this problem in the early 1990s with the Joint Logistics System (JLS). The objective was to generate new code for all logistics systems throughout DoD. During this period, the Services were precluded from adding any enhancements to CCSS and SDS, making these systems even more out of step with both the Army's logistics needs and modern, technological advances in automation and supply chain management. For a variety of reasons, JLS failed to produce the desired results. Meanwhile, the Army continued to march forward toward a completely digitized force, while dragging behind archaic logistics systems.

While the Army's situation became more acute, industry took significant steps forward in automation and supply chain management for the commercial sector and attempted to sell their solutions to DoD and the Army. Industry's objective, of course, was to obtain a sole-source contract for installing new proprietary systems. The other obvious alternative, consistent with the Army's traditional approach to solving a problem of this nature, was to expend hundreds of millions in capital investment money by awarding a contract for the development and installation of a new logistics automation system specifically designed to meet the Army's needs.

Several studies were made in this area and some Services did, in fact, award such contracts. With either approach, however, the Army still had to maintain the existing systems at a cost of almost \$40 million per year until a new system was in place. Once the new system was in place, the cycle would begin again and we would soon be facing the problem of maintaining the new software and keeping up with ongoing technological advances.

The problems confronting us were many, and would have been insurmountable had we clung to the traditional ways of doing business. The money — the investment capital — was simply not available. Our workforce, immersed in maintaining our COBOL-based systems, was unable to keep pace with the increasingly rapid technological advances required to create, integrate, and maintain a new system. And we still had downsizing targets to meet. In short, there was no way to solve our problems without adopting a bold and innovative approach.

Taking Stock

To quote Dr. Albert Einstein, “In the middle of difficulties lies opportunities.” In fashioning the solution — known until recently as Logistics Modernization (LOGMOD), now referred to as the Wholesale Logistics Modernization Program (WLMP) — we began by taking stock of the opportunities available to us.

- First and foremost, the acquisition leadership throughout DoD was committed to acquisition reform — not reform for reform's sake, but to achieve substantive innovations in the processes the government uses to acquire products and services.
- Second, we did have the cash flow of approximately \$40 million a year for maintenance, which could be expected to increase over time.
- Third, automation advances had resulted in systems much more adaptable, upgradeable, reconfigurable, scaleable, and interoperable than was possible when the initial COBOL systems were built.
- Fourth, the commercial sector had expended significant amounts of money in developing the science of supply chain management via velocity management and similar techniques. Companies were advertising that, within one day of receiving an order, they could have a product en route to any customer in the world.

So again, the challenge was to find a way that the Army could capitalize on the advances that had occurred in the commercial world and DoD's commitment to acquisition reform, that did not require the influx of additional dollars over and above the estimated annual maintenance costs.

Strategic Partnership

After consideration of various alternatives, we focused on the development and implementation of a strategic, partnership-type arrangement that would contractually commit all our business in the logistics automation area to one contractor over an extended period of time. Further, we would reserve the right to extend the term and expand the scope of the contract as the needs of the government dictated. We would develop a Request for Proposal, thereby generating a serious competition among commercial bidders to ultimately attain a single strategic partner. This, we anticipated, would bring us forward to a modernized system of logistics services. Accordingly, we structured a solicitation that would prompt industry to partner across disciplines to compete for CCSS and SDS modernization. We made a fundamental switch from the procurement of systems to the acquisition of services. To keep the effort manageable, we purposely limited modernization to two systems unlike JLS, which proposed a “silver-bullet” solution to fix all logistics systems. At the outset we recognized, as did industry, that this approach could achieve savings of about 20 percent in DISA's megacenter processing. To this end, we worked extensively with DISA, who supported us in every way. My personal belief was that, while the savings in processing costs would be fairly stable, the savings in maintenance costs would be increasingly and significantly higher because of the agility of modern automation systems.

WLMP — It Takes a Team

To ensure the successful implementation of our proposed solution and with the enthusiastic support and commitment of all CECOM Directors and key players at the Army Materiel Command (AMC), we established what we called the WLMP Team, headed by Paul Capelli, an outstanding leader from our Logistics and Readiness Center, as the project manager. We populated the team with a multitude of experts, the best and brightest, from across CECOM and AMC. The team took the nucleus of the plan and synergistically improved it in innumerable ways. One example was the award factors to motivate the contractors. We structured the solicitation so that the contractor would be highly motivated not just to satisfy, but to exceed the Army's needs throughout the 10 years of performance. In our initial guidance, we made it clear to industry that the competition was not only for the initial award, but also for the long term. The solicitation reflected that, as our strategic partner, the successful offeror would continue to receive our business if it tendered the desired results during the term of the initial contract.

Concerns

The plan was met with considerable resistance by our union. Unlike the American Federation of Government Employees' participation with the Navy during their 1997 transition of the Naval Air Warfare Center, Aircraft Division, to Hughes; the National Federation of Federal Employees, despite our efforts, declined to participate with us in the WLMP process. The union was committed instead to an A-76 competition in which the government workforce would compete with industry for the work. We knew that approach was not viable in this case, and we were concerned about what would happen to our employees when a contractor inevitably won the A-76 competition.

Under A-76 procedures, government employees are guaranteed rights of first refusal for employment “openings” under the contract in positions for which they are qualified. However, there was no guarantee that the successful offeror would have enough, or any openings for our government employees or that the openings would be with pay, benefits, or hours comparable to their government jobs.

Accordingly, we obtained a waiver to the A-76 process and focused our efforts on ensuring that the successful contractor would guarantee our employees a comparable job with comparable benefits. We were seeking a win-win situation — an award to a contractor who would excel at modernizing our logistics systems, make a profit, and guarantee our employees a “soft landing.”

As is often the case with new ideas, the plan sparked concerns within the government bureaucracy and created a great deal of interest in Congress. Innumerable trips to Capitol Hill were required for meetings with staffers and congressmen, as well as with officials at various levels in the Army and DoD. Fortunately, the program enjoyed the support of key leaders such as Dr. Jacques S. Gansler, Under Secretary of Defense, (Acquisition, Technology and Logistics); retired Navy Adm. David Oliver, Principal Deputy Under Secretary of Defense (Acquisition, Technology and Logistics); the Secretary of the Army; and the Army Chief of Staff.

Response From Industry

Our greatest expectations were exceeded by the response from industry to this new and innovative approach to doing business. Rather than proposing individual system solutions, industry collaborated on a scale that I have not seen in almost 30 years of government service. They built cross-functional teams to meet the government's needs in the best way possible. The competition was extraordinary and resulted in two outstanding proposals from market leaders. As we reviewed the proposals, it was clear that industry had bought into our concept, was prepared to do business in this new manner, and was excited about leading the way in acquisition reform.

Industry was also very interested in hiring our people. There were other COBOL systems still in existence and, while our experts could not rival industry's ability to build new systems, they were outstanding at repairing old systems. Therefore, our employees had an intrinsic value to the contractors above and beyond efforts associated with their performance of the WLMP contract. The winning contractor agreed to offer our employees a minimum three-year contract, \$15,000 bonus (in some cases more), comparable pay and benefits, training, and a job site in St. Louis or Chambersburg, their original place of employment. We had truly achieved our objective – a win for industry, a win for our employees, and a win for Army logistics.

The Bottom Line — Keeping Pace

More importantly, our logistics modernization business process review resulted in a changed paradigm, a new way of doing business. It is the embodiment of acquisition reform and represents an outstanding acquisition achievement that will provide the Army with a support system to keep pace with the digitized force and successfully rival any commercial system.

Additionally, since it is trading on commercial technologies, it will keep pace with continuing advances in supply chain management and automation. It will cost no more than we were spending on maintenance, and requires no

additional capital investment expenditure. The associated reduction in government employees will bring us a step closer to achieving our manpower efficiencies while simultaneously providing a soft landing for our employees.

This was an extremely challenging program and an enormous opportunity for all the outstanding people who made WLMP a reality. All of us involved with the program are proud of this achievement and look forward to more success in the future. There are many innovative ways of doing business, but our bureaucracy is often uncomfortable with change and trains us, from day one, to follow established procedures. That mentality constrains our thinking along narrow paths that will not easily lead to successful resolution of the kind of challenges that await us.

It is difficult for us within government to fashion solutions like WLMP; nevertheless, for both logistics and communications systems, this type of innovation is the essence of CECOM's contribution to the Army of the 21st century and beyond.

The Point of Contact for this matter is Victor Ferlise, Deputy to the Commanding General, CECOM, Fort Monmouth.

THE ABC's of T for C
(Termination for Convenience)

As we enjoy the technological advances of the millennium, it still pays to remember the basics. Literally. A potentially useful cost-saving rule to keep in mind is that the FAR generally requires the Contractor to submit its settlement proposal within a year after the contract was terminated for convenience.

FAR 52.249-6(f) Termination (Cost-Reimbursement) (September 1996) provides that:

After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor during this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

This language is identical to FAR 52.249-2(e), which governs Termination for Convenience of Fixed-Price Contracts (September 1996).

The case law interpreting the FAR has developed from the following scenario: (1) a proactive Contracting Officer calendared the end of the one-year period; (2) the Contracting Officer sent a letter to the Contractor advising that the time had expired; and (3) the Contracting Officer unilaterally assesses a settlement amount or denies payment of the costs in its entirety.

The decision of a Contracting Officer that a settlement proposal was untimely per the one-year rule has consistently been upheld. Do-Well Machine Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989). There, the termination for convenience claim was returned by the Termination Contracting Officer as untimely, in light of its presentation more than one year after the effective date of termination. In that case, she indicated that she would assess a termination settlement amount. The Court of Appeals for the Federal Circuit held that “the Government correctly recognized that the time bar was fatal to Do-Well’s claim”.

As recently as 3 March 2000, the Department of Transportation Board of Contract Appeals granted the Government's motion to dismiss the Contractor's appeal due to the untimeliness of its settlement proposal. There, the Contracting Officer determined one-year and four months after the termination that the Contractor had failed to properly submit its proposal and denied the Contractor's claim in full. Appeals of Automated Power Systems, Inc., DOT BCA Nos. 3000, 3001, 3003, 3004, 3006, 00-1 BCA P30,825.

It should be noted that the Armed Services Board of Contract Appeals has interpreted the one-year rule to hold that the actual mailing of a settlement proposal within one year after receipt of the notice of termination effected timely filing of the proposal. Jo-Bar Mfg. Corporation, ASBCA No. 39572, 93-2 BCA P25,756. Receipt by the Contracting Officer of the proposal is not critical to effect timely filing.

A valid argument to overcome the one-year time bar would be if the Contractor requested and received an extension to the one-year period. Under the FAR clauses cited above, both the extension request and its approval must be in writing.

Of course, even if the Contractor's settlement proposal is untimely, the Contracting Officer generally has the discretion to pay a settlement amount as stated by the aforementioned FAR clauses.

Thus, the teaching point here is that Contracting Officers are urged to calendar the expiration of the one-year period immediately upon terminating the contract, and to document by correspondence if there is no further action by the Contractor upon the expiration of this period.

The POC for this action is Jignasa Desai, of the CECOM Legal Office, DSN: 992-9827, (732) 532-9827.

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AMCCC-B-IP

POINT PAPER

27 June 2000

SUBJECT: New Accessibility Requirements for Information
Technology Purchases

PURPOSE: To Update AMC Staff on New Accessibility Requirements
for Information Technology Purchases

FACTS:

O THE LAW NOW REQUIRES COMPARABLE ACCESSIBILITY FOR ALL FEDERAL
INFORMATION TECHNOLOGY.

O Congress recently amended section 508 of the Rehabilitation Act to "beef up" the extent to which federal electronic and information technology must be accessible to disabled employees and disabled members of the public.

O All federal electronic and information technology developed or procured after the law's effective date must be comparably accessible to disabled employees and disabled members of the public as to their able-bodied counterparts -- unless to do so would represent an "undue burden". (29 USC 794d)

oo The effective date is sixth months after final standards are published. So far, only the draft standards have been published.

O To the extent there is an "undue burden", the law requires that agencies provide disabled employees and disabled members of the public an alternative means of access to the data or information.

O THE LAW APPLIES TO ALL FEDERAL INFORMATION TECHNOLOGY, INCLUDING
WEB SITES; HOWEVER IT DOES NOT APPLY TO NATIONAL SECURITY SYSTEMS.

O "Federal electronic and information technology" includes federal hardware, software, printers, fax machines, copy machines, telecommunications, web sites, and information kiosks.

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- oo It does not include national security systems or technology or systems that are an integral part of a weapons system.

- oo In addition, it does not include contractor-purchased information technology that is incidental to the performance of a Government contract, although it does include contract deliverables.

O AFTER THE STANDARDS GO INTO EFFECT, DISABLED EMPLOYEES AND DISABLED MEMBERS OF THE PUBLIC WILL BE ABLE TO SUE AGENCIES FOR NON-COMPLIANCE.

O Disabled employees and disabled members of the public will be able bring suit against an agency for failure to make information technology comparably accessible. They may do this in one of two ways:

- oo Through an administrative complaint with the agency;
or

- oo Through a private lawsuit in Federal District Court.

O AN "ACCESS BOARD" WILL ISSUE FINAL STANDARDS - WHICH WILL BE INCORPORATED INTO THE FEDERAL ACQUISITION REGULATION.

O On 31 March 2000, a specially-established "Access Board" issued proposed standards for all federal electronic and information technology. (65 Fed. Reg. 17,346 (2000)(to be codified at 36 C.F.R. Part 1194))

O The standards are extremely detailed. Some general highlights include:

- oo A requirement that all computer work stations be at least compatible with "assistive devices" such as screen readers or refreshable Braille displays;

- oo A requirement that all web pages be capable of being read by assistive devices through text equivalents of

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any images, color-prompts, or image-based documents such as PDF files; and

oo A requirement that all software be capable of being used through keystroke or voice-recognition commands, instead of mouse-only direction.

O The "Access Board" is currently considering comments from agencies and members of the public. Six months after the Board publishes the final standards, they will be incorporated into the Federal Acquisition Regulation.

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THE PARTIES TO A GOVERNMENT CONTRACT MAY NOT LIMIT THE APPLICABILITY OF THE DISPUTES CLAUSE

Should the parties to a Government contract be able to agree contractually on which provisions of the contract are subject to the Disputes clause? The Court of Appeals for the Federal Circuit answered that question in the negative in a 1997 decision that was recently implemented in the Federal Acquisition Regulation (FAR). Federal Acquisition Circular (FAC) 97-15, effective February 25, 2000, implements the Federal Circuit's decision in Burnside-Ott Aviation Training Center v. Dalton, 107 F.3d 854 (Fed. Cir. 1997).

Burnside-Ott involved a cost plus award fee contract for aircraft maintenance, repair, and overhaul at six naval air stations. Under the contract, the contractor was entitled to recover all of its allowable costs and earn an award fee of up to 10% of the estimated costs of the contract, depending on the contractor's performance. The award fee clause in the contract provided that "The Award Fee decision is a unilateral determination made by the FDO [Fee Determining Official] and is not subject to the 'DISPUTES' Clause of the contract." The clause cited FAR 16.404-2(a), which provided essentially the same limitation.

During the course of contract performance, the parties became involved in a dispute concerning the method of computing the award fee. The contractor filed a certified claim, seeking additional award fees based on its method of calculation. The contracting officer denied the claim, stating that the determination of award fee is excluded from the Disputes clause and not subject to appeal. The contractor appealed to the Armed Services Board of Contract Appeals (ASBCA). The Government moved to dismiss for lack of jurisdiction, based on the contract clause. The contractor alleged that the clause was ineffective to remove the statutory right of appeal afforded by the Contract Disputes Act of 1978 (41 U.S.C. 601-613), and the Board should conduct a de novo review of the Government's action. The Board held that it had jurisdiction to hear the appeal, but the standard of review was whether the Government acted arbitrarily or capriciously in determining the award fee. In this case, the Board found the Government acted reasonably.

On appeal to the Federal Circuit, the court held that the parties could not contract away the contractor's right to ASBCA review of its claim under the Contract Disputes Act. Any attempt by the parties to deprive the Board of jurisdiction to hear a dispute that otherwise falls under the Contract Disputes Act defeats the

purpose of the Act and the intent of Congress. The only instance where the parties could agree that a contractual provision is not subject to the Disputes clause is where another statute provides a more specific remedy, e.g. review of wage determinations under the Davis-Bacon Act.

Concerning the standard for review, the Court held that the Contract Disputes Act requires a de novo review of the contract provision at issue. Where the contract provision gives the Government the unilateral discretion to determine the award fee, the court will not disturb that determination unless it is arbitrary or capricious. In this case, the court found no evidence that the award fee determination was arbitrary or capricious. Thus, the Board decision was affirmed.

In order to implement the Burnside-Ott decision, FAC 97-15 has added or modified FAR language in three areas:

1. Award Fee (amount and methodology for determining)
2. Value Engineering Change Proposals (VECPs) (decision to accept or reject, determination of collateral costs or savings, sharing rates, duration of sharing period)
3. Incentive subcontracting program (determination that exceeding goals was not due to contractor efforts)

Prior to Burnside-Ott, the FAR provided that determinations such as these were made unilaterally by the Government and not subject to the Disputes clause of the contract. However, after FAC 97-15, the above FAR provisions now merely state "This determination is a unilateral decision made solely at the discretion of the Government." There is no longer any mention of the Disputes clause.

How significant a change this may be is yet to be seen. Contractors will certainly file more claims and appeals on these issues once they become aware they are not precluded from using the Disputes process. Board decisions subsequent to Burnside-Ott have found jurisdiction to hear appeals concerning VECPs, award fees, and other contractual provisions where the parties attempted to eliminate the applicability of the Disputes clause, e.g. a contracting officer's decision not to renew a contract. However, Burnside-Ott is cited for the proposition that although the Board has jurisdiction over the dispute, the discretion of the decision-maker will be reviewed only for abuse.

In summary, it is important to note that the Government may no longer be able to defeat Board jurisdiction in cases which have traditionally been exempt from the Disputes clause. However, the Board's review can be limited by the use of carefully drafted contractual language which gives the contracting officer the right to make unilateral decisions solely at his or her discretion.

The POC is Ms. Bernadine F. McGuire, OSC, m McGuireb@osc.army.mil, DSN 793-8436.

ADVISORY

PROPER HANDLING OF PROPRIETARY CONTACTOR DATA

Recently an incident occurred in which a TACOM employee may have given proprietary technical data to a contractor without permission from the data's owner. The risk of further such events is heightened by the increased presence of contractor employees working in the same offices, labs or shops as TACOM employees. Many of these contractor employees are doing jobs traditionally done by TACOM employees. It has thus become easier to have conversations, briefings or data exchanges where a contractor's employee unauthorizedly gets proprietary data. All of this is disturbing because the Government can violate a data owner's rights. Additionally, a Government employee can be jailed or fined under 18 USC 1905 for unauthorized release of data.

In view of these circumstances, Government employees who handle proprietary technical data must observe the rules summarized below. The rules are grouped by the type of markings that are put on proprietary data.

1. Restricted Rights or Limited Rights Data. Restricted rights relates to technical data on computer software or software documentation, and limited rights relates to technical data on any other sort of item. The basic rule in either case is that the data can not be released by the Government without permission from the provider of the data. Drawings, disks, documents or other material that have restricted rights data or limited rights data are labeled "Restricted Rights" or "Limited Rights." These materials will also have the contractor's name, the contractor's address and the contract number. With very limited exceptions nobody outside the Government may ever see these materials without the provider's permission. Generally too, no information from these materials can be in a conversation or briefing where nonGovernment people are present.

2. SBIR Rights Data. This relates to data acquired under the Small Business Innovative Research (SBIR) Program. SBIR rights data has the same rules as restricted rights data or limited rights data, except that the restriction on the Government's use of the data expires after a certain period, usually five years. Materials with SBIR rights data will be labeled "SBIR Rights" instead of "Limited Rights" or "Restricted Rights."

3. Government Purpose License Rights (GPLR) Data. This kind of rights can pertain to any sort of item, including software and software documentation. This kind of data can be disclosed to others for governmental purposes only. Briefly, "governmental purposes" means any activity to which the Government is a party. This includes competitive procurements. The recipients of GPLR data must sign an agreement that they will not disclose the data to third parties or use the data for anything but government purposes. Otherwise no information from GPLR materials may be given to people outside

the Government without permission. GPLR materials will bear the legend. "Government Purpose License Rights," the contractor's name, the contractor's address and the contract number.

4. Other Proprietary Data. In most cases, government contractors or business partners are required by regulation to categorize and label technical data they deliver as one of the types discussed in paragraphs 1 through 3 above. In a few other cases, the contractor or business partner can put any restriction or label it desires on technical data. This happens, for example, when a contractor gives the Government technical data without a contractual obligation to do so. In these other cases, Government employees must abide by whatever restrictions or labels are on the technical data.

For more detailed information on data rights questions, please contact one of the following TACOM intellectual property (IP) law attorneys.

Peter Taucher, Chief, IP Law Division at TACOM-Warren, 4-6552

David Kuhn, IP Law Division at TACOM-Warren, 4-5681

Gail Soderling, IP Law Division at TACOM-Warren, 4-8682

John Moran, Chief, IP Law Division, TACOM-ARDEC, DSN 793-

6590

Verlyn E. Richards
Chief Counsel

Political Activities of Federal Civilian Employees and Military Personnel

1. References:

- a. 5 U.S.C. § 3303
- a
b. 5 U.S.C. §§ 7321-7326
- c. 18 U.S.C. § 603
- d. 18 U.S.C. § 607
- e. 32 U.S.C. §§ 316 and 502-505
- f. 5 C.F.R. Part 733, Political Activities of Federal Employees
- g. DOD 5500.7-R, The Joint Ethics Regulation
- h. Department of Defense Directive (DODD) 1344.10, Political Activities of the Armed Forces on Active Duty, 15 June 1990 (with change 1 dated 7 January 1994)
- i. DEPSECDEF Memorandum, subject: Civilian Employees' Participation in Political Activities, 7 February 2000
- j. Army Regulation (AR) 600-20, Army Command Policy, 15 July 1999, paragraph 5-3

2. The references listed above regulate political activities for Federal Civilian Employees and Military Personnel. I have summarized how they apply below. Restrictions that apply to General Officers and members of the Senior Executive Service are addressed in a separate memorandum.

3. Political Activities of Federal Civilian Employees:

a. As authorized by the Hatch Act, all Federal civilian employees may engage in the following activities in their personal capacity:

- (1) Run for public office in nonpartisan elections (ones in which none of the candidates are affiliated with any political party);
- (2) Register and vote as they choose;
- (3) Assist in voter registration;
- (4) Express opinions about candidates and issues;

- (5) Contribute money to political organizations;
- (6) Attend political fundraising;
- (7) Attend events sponsored by political party or club;
- (8) Join and be an active member of a political party or club;
- (9) Sign nominating petitions;
- (10) Campaign for or against referendum questions, constitutional amendments, or municipal ordinances;
- (11) Campaign for or against candidates in partisan elections;
- (12) Make campaign speeches for candidates in partisan elections;
- (13) Distribute campaign literature in partisan elections;
- (14) Hold office in political clubs or parties.

b. Federal civilian employees may **not** do the following:

- (1) Use their official authority or influence for the purpose of interfering with or affecting the result of an election;
- (2) Run for the nomination or as a candidate for election to a partisan political office;
- (3) Knowingly solicit, accept, or receive a political contribution from a subordinate (an employee under the supervisory authority, control or administrative direction of the other employee);
- (4) Make a political contribution to any “employer or employing authority” meaning any person in the supervisory chain of command, this does not include the Vice President’s campaign for President;
- (5) Engage in political activity while on duty (this includes wearing political buttons while on duty);
- (6) Engage in political activity while in any room or building while in the discharge of official duties;

(7) Engage in political activity while wearing a uniform or official insignia (to include military uniforms commonly worn by technicians);

(8) Engage in political activity using a U.S. Government owned or leased vehicle;

(9) Intimidate, threaten, command, or coerce a Federal employee to engage in, or not to engage in, political activity;

c. Federal civilian employees who live in the District of Columbia (DC), designated areas of Virginia and Maryland, and other designated areas where the majority of voters are employed by the Federal Government may:

(1) Run as independent candidates in partisan elections for local office of the designated municipality or political subdivision.

(2) Accept or receive political contributions in connection with those local elections, but they may not solicit political contributions from the general public.

In addition to DC and parts of Maryland and Virginia, the other designated communities are Anchorage, AK; Benecia, CA; Bremerton, WA; Elmer City, WA; Port Orchard, WA; Centerville, GA; Warner Robbins, GA; Crane, IN; Huachuca City, AZ; Sierra Vista, AZ; New Johnsonville, TN; and Norris, TN. For specific areas of Virginia and Maryland, please call the CECOM Staff Judge Advocate Division.

4. Political Activities of Military Personnel:

a. The political activities of officers and enlisted members of the Active Army, U.S. Army Reserve (USAR), and the Army National Guard (ARNG) are governed by DODD 1344.10 and AR 600-20, paragraph 5-3. The Hatch Act does not apply to military members.

(1) The restrictions in AR 600-20 apply to soldiers on active duty, which is defined as full-time duty in the active military service of the United States without regard to duration or purpose, including active duty for training, annual training, attendance at military schools, and full time National Guard duty. These restrictions do not apply to inactive duty for training, or to National Guard soldiers serving in state status.

(2) Commissioned, noncommissioned, or warrant officers of the United States Army may not use military authority to influence or attempt to influence the vote of a

member of the Armed Forces, or require a member to march or attempt to require a member to march to a polling place (18 U.S.C. § 609).

(3) Members of the Armed Forces on active duty generally may not campaign for, or hold, elective civil office in the Federal Government, or the government of a state, territory, the District of Columbia, or any political subdivision thereof (10 U.S.C. § 973).

b. Soldiers on active duty may:

(1) Register, vote, and express their opinions on political candidates and issues, but not as representatives of the Armed Forces;

(2) Attend partisan and nonpartisan political meetings or rallies as spectators; however, they may not attend in uniform, during duty hours, when violence is likely to occur, or when their activities constitute a breach of law and order;

(3) Make monetary contributions to a political organization, but not to other members of the Armed Forces on active duty or employees of the Federal Government, and subject to the following:

(a) 18 U.S.C. § 607 prohibits anyone “receiving any salary or compensation for services from money derived from the treasury of the United States” to solicit a political contribution from any other such person.

(b) 18 U.S.C. § 603 prohibits officers and employees of the Federal Government, and anyone “receiving any salary or compensation for services from money derived from the treasury of the United States” from making a political contribution to any other such person who is the “employer or employing authority” of the contributor. This prohibits both contributions to the individual and to the individual’s campaign committee, but does not prohibit contributions to political parties.

(4) Encourage other military members to vote;

(5) Serve as an election official, if such service: is not in uniform, does not interfere with military duties, and has the prior approval of the installation commander;

(6) Sign a petition for legislative action or to place a candidate’s name on the ballot but only in the soldier’s personal capacity;

(7) Write a letter to the editor expressing personal views, and place bumper stickers on cars (but not large banners or posters);

c. Soldiers on active duty may not:

(1) Use their official authority or influence to interfere with an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others;

(2) Participate in partisan political management, campaigns or conventions;

(3) Write and publish partisan political articles that solicit votes for or against a partisan political party or candidate, speak before partisan political gatherings, or participate in partisan political radio or television shows;

(4) Serve in any capacity or be listed as a sponsor of a partisan political club;

(5) Distribute partisan political literature or conduct a political opinion survey under the auspices of a partisan political club;

(6) Use contemptuous words against the President, Vice President, Congress, the Secretaries of the military departments, Defense, or Transportation, and the governors or legislatures of any state or territory where the soldier is on duty;

(7) Engage in fund-raising activities for partisan political causes on military reservations or in Federal offices or facilities;

(8) Attend partisan political events as an official representative of the armed forces;

5. Soldiers Running for Office:

a. Enlisted members not on extended active duty (EAD is active duty under a call to orders or an order in excess of 180 days) and USAR and ARNG officers who are not on active duty may be candidates for and hold elected offices.

(1) They may not wear uniforms when engaged in any activity in furtherance of a political interest. Wearing Army uniforms is never allowed when engaged in political activity, whether or not a person is on duty and regardless of his or her status.

(2) They may hold elected office in a personal capacity.

(3) They may not hold office that interferes with their official military duties.

b. Enlisted soldiers on active duty, including USAR and ARNG, except as outlined below, may not campaign for or hold elected office in the U.S. Government or the government of any state.

(1) Enlisted members on extended active duty may seek and hold nonpartisan civil office (an election in which none of the candidates are affiliated with a political party) as a notary public, member of a school board, neighborhood, neighborhood planning commission, or similar local agency as long as the office is held in their private capacity and does not interfere with military duties.

(2) Installation commanders may allow a soldier to file for elective office, but this does not authorize prohibited partisan political activity.

6. Campaign Related Activities on CECOM Installations:

a. Inquiries from political campaigns should be treated as queries from the general public and should be referred to the Public Affairs Office. Do not comment or expand on Department of the Army or CECOM policy.

b. Installation commanders should not permit the use of installation facilities by any candidate for political assemblies or meetings; media events, including speeches; fund raising activities for political candidates or partisan causes, press conferences, or any other activity that could be construed as political in nature.

c. Members of Congress may visit installations but may not use these visits to campaign for re-election. Non-incumbent candidates for election may be afforded the same access to CECOM installations as the general public but may not use the installation to campaign.

d. Armed Forces involvement in political events is strictly forbidden. All requests for support to political meetings must be denied.

e. The placement of political signs or advertisements in yards on post housing is strictly prohibited.

6. Point of Contact for this action is CPT Robert Paschall, (732) 532-9798, DSN 992-9798, CECOM Legal Office.

SUBJECT: Professional Liability Insurance

Section 636 of the Treasury, Postal Service, and General Appropriations Act for Fiscal Year 1997, Pub. L. 104-208, as amended, requires agencies to reimburse qualified employees for up to one-half the cost incurred for professional liability insurance. Authority to make such payments resides with heads of DoD Component and may be delegated to the lowest practical level.

The Office of Personnel Management (OPM) does not plan to issue regulatory guidance on this issue. Therefore, in coordination with the Defense Finance and Accounting Service and the DoD Office of the General Counsel, we have prepared the attached DoD guidance to assist in implementing this new authority. The provisions of this new authority became effective October 1, 1999.

In February 1998, OPM surveyed Federal agencies on the implementation of Pub. L. 104-208 (which, in its original form, allowed Federal agencies to contribute to the costs of professional liability insurance). Based on this past practice, DoD Components may wish to maintain documentation on reimbursements for professional liability insurance should OPM survey Federal agencies in the future.

Servicing personnel office staffs should contact David Pearson at (703) 696-6301, ext. 252 for operational related issues.

Diane M. Disney

Deputy Assistant Secretary of Defense
(Civilian Personnel Policy)

Attachment:

As stated

DOD Guidance On Professional Liability Insurance

Background Section 636 of the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1997, Pub. L. 104-208, 110 Stat. 3009-314, 3009-363, as amended by section 642 of the Treasury and General Government Appropriations Act for Fiscal Year 2000, 113 Stat. 477 (5 U.S.C. note prec.594) requires agencies to reimburse qualified employees for not to exceed one-half of the costs incurred for professional liability insurance.

“Professional liability insurance” is defined as liability insurance that covers:

“(A) Legal liability for damages due to injuries to other persons, damage to their property, or other damage or loss to such other persons (including the expenses of litigation and settlement) resulting from or arising out of any tortious act, error, or omission of the covered individual (whether common law, statutory, or constitutional) while in the performance of such individual’s official duties as a qualified employee; and

(B) The cost of legal representation for the covered individual in connection with any administrative or judicial proceeding (including any investigation or disciplinary proceeding) relating to any act, error, or omission of the covered individual while in the performance of such individual’s official duties as a qualified employee, and other legal costs and fees relating to any such administrative or judicial proceeding.”

Coverage. Employees eligible to receive reimbursement for professional liability insurance are law enforcement officers as defined in section 636(b) of the 1997 Act and supervisors and management officials as defined in 5 USC §7103(a). (See Statutory and United States Code provisions attached.)

DOD policy. In accordance with the provisions of section 636 of the 1997 Act, as amended, DoD will reimburse covered employees up to one-half the cost of a covered premium, not to exceed \$150 per year. Reimbursement may be based on either fiscal or calendar year basis, whichever is more efficient to administer. Non-appropriated fund (NAF) employees and military personnel are not covered by the law.

Consistent with Pub. L. 106-58, DoD Components will fund this program from appropriations/accounts available for civilian personnel costs, in accordance with OMB Circular No. A-11, Preparation and Submission of Budget Estimates, which places the cost of this insurance under object class 12.1 (“Civilian Personnel Benefits”).

Employee responsibility for reimbursement. Employees must submit a completed SF-1164, Claim for Reimbursement for Expenditures on Official Business (Attachment 2), an invoice from the insurance carrier (to verify the cost of the premium), the policy number, the name of the insurance company, and proof of payment to the servicing

HRO/CPO or HRO/CPO designee. The employee shall maintain a copy of the completed SF-1164 and supporting documentation so that he/she does not inadvertently submit a request for reimbursement that exceeds the maximum allowance of \$150 per year. After eligibility has been confirmed, the HRO/CPO or HRO/CPO designee shall forward the completed SF-1164 and supporting documentation to the paying office. When the package is received by the paying office, if it is not clear from the invoice that the claim qualifies for PLI coverage, the employee must provide evidence to the paying office that the purpose of the claim is to request reimbursement for a PLI policy. Electronic funds transfer (EFT) for PLI reimbursement is required. Employees must provide the EFT data before payment will be made.

DoD Component HRO/CPO responsibility. Each DoD Component shall establish processing procedures amenable to its operating environment. Responsibility for determining eligibility may be retained by the Component Headquarters, delegated to its HRO/CPO, or delegated to its HRO/CPO designee. As indicated above, after eligibility has been determined, the applicable Component Headquarters, HRO/CPO or designee shall forward the completed SF-1164 and supporting documentation to the paying office.

Eligibility determination. To be eligible for reimbursement because of law enforcement officer status, an employee must occupy a position that has been determined to qualify, and must have been approved for special retirement coverage under either 5 U.S.C. §8331(20) or §8401(17) as a law enforcement officer/special retirement position. If the position has not been designated as a law enforcement officer in a special retirement-covered position, or the individual has not applied for and received special retirement coverage as a law enforcement officer, the request for reimbursement must be denied and the employee will be provided written notification of the reason(s) for denial.

An eligibility determination that a position qualifies as a supervisory or managerial position for purposes of reimbursement is based on the definitions in 5 USC, §7103(a). This determination is separate and distinct from position classification determination of a position exercising supervisory or managerial duties and responsibilities in accordance with 5 USC, Chapter 51. It is possible that positions that are not titled “supervisory”, e.g., do not meet the 25% requirement, may meet the Chapter 71 definition of supervisor for purposes of reimbursement. These positions are generally designated as Supervisory Code 4 in the Defense Civilian Personnel Data System. Further guidance on positions that meet the definitions of “supervisory” or “managerial” in section 7103 of title 5, United States Code, may be found in case law interpreting that section.

particular, in related decisions by the Federal Labor Relations Authority. If it is determined that a position not qualify as a supervisory or managerial position, the employee will be provided written notification of c specifying the reasons for denial.

The signature of the Component Headquarters, the HRO/CPO, or the HRO/CPO designee approving offic block 9 of the SF-1164 confirms the eligibility determination only. DoD Components must ensure they ful any bargaining obligations resulting from this policy.

Paying office responsibility. The reimbursement for professional liability insurance will be processed as a miscellaneous payment through vendor pay. The paying office shall verify the completion of the SF-1164, cost of the premium and the receipt of documentation providing proof of payment. When the package is received by the paying office and it is not clear from the invoice that the claim qualifies for PLI coverage, c the requested amount of the payment is proper, the paying office shall request that the employee provide evidence that the purpose of the claim is reimbursement for a PLI policy and/or that the payment amount proper. Payment will be made by EFT. The paying office shall pay up to \$150, but payment may not exc one-half the cost of the premium listed on the carrier*s invoice or the actual documented cost paid by the employee, whichever is less, The amount of reimbursement will be determined based on cost of the premiu listed on the carrier*s invoice and the actual, documented cost paid by the employee and the DoD policy governing payment amount. The paying office shall confirm that an employee has not been or, as a result c requested reimburse-ment, will not be reimbursed for more than \$150, or one-half of the cost incurred for liability insurance within the applicable fiscal or calendar year period.

The paying office for an organization is the same office that receives travel vouchers for payment. (A listin vendor pay points of contact can be found on the DFAS website at www.dfas.mil/custrvc/).

Questions and answers:

Q. What does “not to exceed one half the cost incurred” mean?

A. The Office of the DoD General Counsel advises that section 636, as amended, requires DoD to reimburs qualified employees for professional liability insurance costs. However, the wording in the statute permits some discretion on the specific amount, provided the total yearly payment does not exceed one-half the cc the premium actually paid by the employee.

Q. What does “up to \$150” mean?

A. Given the current cost of professional liability insurance policies (\$300 for \$1,000,000 liability coverage the provisions of the law, e.g., that reimbursement not exceed one-half the cost of the premium, DoD has determined that \$150 represents a reasonable maximum. It is possible to be reimbursed less than \$150 for premiums costing less than \$300. Therefore, based on the cost of the premium as identified on the carrier* invoice, payment could be an amount up to \$150 per year.

Q. What is the agency*s obligation if the professional liability insurance premium increases after payment been made?

A. None, if the \$150 limit for that year has been paid.

Q. Can more than one reimbursement be made in a fiscal/calendar year?

A. Yes. The law does not limit the number of reimbursements to one per year. Multiple reimbursements o multiple premiums are permitted, provided the total amount in any year does not exceed the dollar cap of t set by DoD.

Q. Is DoD*s implementation retroactive to October 1, 1999?

A. Yes. The requirement to reimburse qualified employees went into effect on October 1, 1999.

Q. Is an employee who renewed an existing professional liability insurance policy on September 30, 1999, eligible for reimbursement as of October 1, 1999?

A. Yes, the change in the law requiring reimbursement became effective on October 1, 1999. DoD will reimburse covered employees up to \$150 of the cost of premiums in effect on or after October 1, 1999 (but DoD Components are not required to reimburse the portion of the cost of premiums covering the period before October 1, 1999.)

Q. What if an employee purchased a policy in January 1999, was reimbursed in June 2000, renewed the policy in July 2000, and resigned in August 2000 -- is the employee eligible for reimbursement for the policy renewed in July 2000?

A. Yes, DoD will pay up to \$150 per [calendar/fiscal] year to reimburse a qualified employee for the cost of insurance premium for a qualified policy. The employee must be qualified at the time he or she seeks reimbursement. The policy must qualify and the employee must not already have been reimbursed the maximum of \$150 in that [calendar/fiscal] year.

Q. Is the reimbursement for professional liability insurance prorated if the employee leaves a covered position e.g., reassigns, retires or leaves to work in another agency?

A. No. When a professional liability insurance policy is cancelled, either by the employee or the insurance company, within fiscal/calendar year period of coverage, or if an individual ceases to be a qualified employee within the coverage period, no recoupment action shall be undertaken.

Q. Is a military supervisor or manager a "qualified employee" for professional liability insurance reimbursement?

A. No. Section 636 of the 1997 Act, as amended, which applies to covered "employees," does not apply to military members who are not "employees."

Q. Are NAF supervisors and managers covered by the provisions of this new authority?

A. No. Section 636 of the 1997 Act applies to qualified "employees." Section 2105 of title 5, United States Code, which defines the term "employee" for civilian personnel law purposes, would exclude NAF employees in this case. Section 2105 includes NAF as "employees" ...[except] for the purpose of--
--[(c)](1) laws administered by the Office of Personnel Management,
except -

(A) section 7204;

(B) as otherwise specifically provided in this title;

(C) the Fair Labor Standards Act of 1938;

(D) for the purpose of entering into an interchange agreement to provide for the noncompetitive movement of employees between such instrumentalities and the competitive service; or

(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to include applicable programs for employees paid from non-appropriated funds; or

(2) subchapter I of chapter 81, chapter 84 (except to the extent specifically provided therein), and section 5304 of this title."

Although OPM has not issued implementing regulations or other guidance regarding implementation of section 636 of the 1997 Act, as amended, it is a "law administered by the Office of Personnel Management" that does not fit within any of the enumerated exceptions. NAF employees do not meet the definition of "employee" and are not, therefore, "qualified employees" for purposes of section 636. While there is no legal requirement to do so, DoD Components may extend this benefit to their NAF workforces, consistent with DoD policy covering appropriated fund employees but may not provide for a rate more generous than that extended to the

appropriated fund workforce. If DoD Components extend this benefit to their qualified NAF employees, dollars must be used to fund the reimbursement.

Q. Who has responsibility for determining if the policy submitted by the employee meets professional liability coverage?

A. If it is not evident to the paying office from the carrier's invoice or the policy itself that it is a qualified professional liability insurance policy, it should be returned to the employee to provide evidence that the purpose of the policy presented for reimbursement is to provide professional liability insurance.

Q. Are team leaders eligible for professional liability insurance coverage?

A. Team leaders do not meet the criteria of 5 USC Chapter 51 to be classified as "Supervisory" positions. However, some team leader positions will meet the definition of "supervisory" positions in 5 USC §7103(c) and will be coded with Supervisory Level Code 4 in the Civilian Personnel Data System. Team leaders in positions that meet the 5 USC §7103(a) definition would be eligible for reimbursement.

Q. What services does the Department of Justice provide to Federal employees with respect to legal representation in connection with any administrative or judicial proceeding relating to any act, error, or omission of the covered individual while in the performance of official duties as a qualified employee?

A. This question requires a response to statutory representation and will be addressed in a forthcoming CPMS/Benefits and Entitlements Branch Reference Guide.

Q. Is an employee required to provide EFT information for PU reimbursement payment?

A. Yes, EFT payment is required by the Debt Collection Improvement Act of 1996. The EFT information must be the same as that provided for pay or travel reimbursements or it may be to a different account. Employees must provide the EFT information along with the request for reimbursement.

Sec. 636 of the Treasury, Postal Service, and General Appropriations Act for Fiscal Year 1997.

REIMBURSEMENTS RELATING TO PROFESSIONAL LIABILITY INSURANCE —

(a) AUTHORITY — Notwithstanding any other provision of law, amounts appropriated by this Act (or any other Act for fiscal year 1997 or any fiscal year thereafter) for salaries and expenses shall be used to reimburse any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance. A payment under this section shall be contingent upon the submission of such information or documentation as the employing agency may require.

Sec. 636(b) of the 1997 Act defines "qualified employee" as an agency employee whose position is that of a law enforcement officer or a supervisor or management official.

Sec. 636(c) of the 1997 Act defines a "law enforcement officer" as "an employee, the duties of whose position are primarily the investigation, apprehension, prosecution, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including any law enforcement officer under section 8331(20) or 8401(17) of... title 5, United States Code, or under section 4823 of title 22, United States Code."
5 USC 8331(20): "law enforcement officer" means an "employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory administrative position. For the purpose of this paragraph, "detention" includes the duties of -

(A) employees of the Bureau of Prisons and Federal Prison Industries, Incorporated;

(B) employees of the Public Health Service assigned to the field service of the Bureau of Prisons or of the Federal Prison Industries, Incorporated;

(C) employees in the field service at Army or Navy disciplinary barracks or at confinement and rehabilitation facilities operated by any of the armed forces; and (D) employees of the Department of Corrections of the District of Columbia, its industries and utilities;

whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia or offenses against the punitive articles of the Uniformed Code of Military Justice (chapter 47 of title 10) require frequent (as determined by the appropriate administrative authority with the concurrence of the Office) direct contact with these individuals in their detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation.”

5 USC Sec. 8401(17): the term “law enforcement officer” means -

“(A) an employee, the duties of whose position -

(i) are primarily -

(I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or

(II) the protection of officials of the United States against threats to personal safety; and

(ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency;

(B) an employee of the Department of the Interior or the Department of the Treasury (excluding any employee under subparagraph (A)) who occupies a position that, but for the enactment of the Federal Employees* Retirement System Act of 1986, would be subject to the District of Columbia Police and Firefighters* Retirement System, as determined by the Secretary of the Interior or the Secretary of the Treasury, as appropriate;

(C) an employee who is transferred directly to a supervisory or administrative position after performing duties described in subparagraph (A) and (B) for at least 3 years; and

(D) an employee -

(i) of the Bureau of Prisons or Federal Prison Industries, Incorporated;

(ii) of the Public Health Service assigned to the field service of the Bureau of Prisons or of the Federal Prison Industries, Incorporated; or

(iii) in the field service at Army or Navy disciplinary barracks or at any other confinement and rehabilitation facility operated by any of the armed forces; whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10) require frequent direct contact with these individuals in their detention and are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the head of the employing agency.”

Section 636(c) of the 1997 Act defines a “supervisor” or “management official” using the same meanings as defined in section 7103(a) of title 5, United States Code:

Sec. 7103(a) (10): “supervisor” means “an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of that authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes those individuals who devote a preponderance of their employment time to exercising such authority.”

Sec. 7103 (a)(11): “management official” means an “individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.”

http://www.gsa.gov/forms/pdf_files/sf1164.pdf

Professional Conduct Reminder #3

The first two PCR's focused on Rule 1.13 in AR 27-26, "Army as Client." PCR #00-01 explained that, except when duly appointed to represent an individual as a defense counsel or legal assistance officer, the Army lawyer represents the Army acting through its authorized officials. Then PCR #00-02 continued with additional extracts that helps the Army lawyer deal with an Army official who intends to proceed in a manner that will violate a legal obligation to the Army or violate law. The lawyer shall proceed as is reasonably necessary in the best interest of the Army taking into account all of the facts and circumstances. In addition, whenever it is apparent that the Army's interests are adverse to those of the official, the lawyer shall explain the identity of The Army as the client. [My suggestion: Be alert. It might be wise to alert the official much earlier than "whenever it is apparent," or in other circumstances, for example, when an Army official comes into your office and prefaces his or her remarks that there is an expectation of confidentiality between you and the official. At that time, you need to ensure that the employee understands that there is no "personal" attorney-client/confidentiality relationship between you.]

What now follows are some extracts from the "*Comment*" to the Rule.

"For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees or members, in their official capacities. It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists...

"When one of the ... Army [officials] communicates with [you] the Army's lawyer on a matter relating to [your] representation of the organization on the organization's official business, the communication is generally protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the [official] is a client of the lawyer. It is the Army, and not the [official] which benefits from Rule 1.6 confidentiality. The Army's entitlement to confidentiality ... may not be asserted by an [official] as a basis to conceal personal misconduct from the Army.

"When [Army officials] make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decision concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an [official] that is in violation of law or directive."

My Comments:

1. Even though confidentiality protects communications from disclosure "to anyone outside the Army," this does not mean that such communications may be discussed freely with anyone "inside the Army." Also, just because there is no attorney-client relationship with the individual

official does not mean that the conversation is subject to publication and public scrutiny. We still need to exercise discretion and ensure that there is really a "need to know." Unnecessary disclosure to officials within the Army could invite censure under the rules (e.g., the attorney's casual disclosures within the Army could lead to disclosure to others outside the Army). And, from the perspective of the individual official, it might be that we can accomplish our job, satisfy our fiduciary relationship to the Army, and comport with the Rules of Professional Conduct, and still extend a modicum of privacy to our conversation with the individual.

2. I disagree with the proposition that "[d]ecisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Well, perhaps the "as such" modifier saves the statement. But, as part of the command or organization that we support, I consider us to be full partners with the command and its management. This means that we do not strictly limit ourselves to rendering legal advice. See Rule 2.1 Advisor: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." However, it is extremely important that, when we do stray into these other considerations, it is clear to the client that such advice is not a legal opinion.

Final Comment: In response to PCR #00-02, an AMCCC attorney pointed out that this Rule requires difficult judgement calls involving all of the unique facts and circumstances of each situation. True. It is not the usual case where it will be absolutely clear that a course of action will result in a violation of a duty to the Army or a violation of law -- it might be the lawyer's "opinion" that it is, but that usually all that it is: opinion! The fact that the client's (Army's) official has decided on a course of action that is contrary to a legal opinion or that the lawyer disagrees with for other reasons is not sufficient to require the lawyer to advise the official that his or her interests are at risk, are adverse to the interests of the Army, and that the official should seek personal counsel. The lawyer might ask for reconsideration, consult with his or her supervisor, but the wrath of Rule 1.13 will arise in only the most compelling of situations involving criminal conduct.

What is the starting point? How should a lawyer deal with these issues? The starting point is always with the lawyer's supervisory attorney. Use the technical chain for resolving these issues. Remember, each case must be dealt with and resolved on its own merits taking into account all of the facts and circumstances. The decision to draft a statement of work for a \$100,000 procurement in a certain way that the attorney believes will be susceptible to a sustainable protest is a lot different from a decision to spend \$100,000 of appropriated funds for drink and food and entertainment for the attendees at the commander's birthday party, or from a decision to participate in a contract matter notwithstanding a conflict of interest.

What is the ending point? Did the lawyer act reasonably in the best interest of the client (the Army)?

Mike Wentink

Good Morning:

We continue with Rule 2.1, the Counselor as *Advisor*. I will quote the rule again, but this time quote from a different part of the Comment to the Rule. All of the Rules and their Comments are in AR 27-26.

COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation, but not in conflict with the law.

COMMENT:

Scope of Advice

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. ...

My Comment: This brings to mind the story of the balloonists who were out for a wonderful Sunday outing, and while floating over the countryside, they lost their bearings. They noticed a group of people by a river. They let some air out of their balloon so that they could drop down just enough to halloo the crowd and ask where they were. It was then that they noticed that it was an ABA picnic. As they hovered over a group of the picnicking lawyers, they yelled down: "Where are we?" The lawyers looked at each other, discussed it, and their spokesperson yelled back: "You are about 25 feet in the air hovering over a flowing body of water." With disgust, the balloonists fired up the air and moved on, and one commented to the other: "Ain't that just a typical lawyer's answer ... absolutely, precisely correct, but absolutely useless!"

Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

...

Matters that go beyond strictly legal questions may also be in the domain of another profession. ... business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer

should make such a recommendation. At the same time, a lawyer's best advice often consists of recommending a course of action in the face of conflicting recommendations of experts.

My Comment: First, make sure that the client knows about other relevant expertise that can help and, where appropriate, refer him or her to that specialist. Conversely, the lawyer should be very cautious about impinging in the area of some other expertise.

Second: Part of the lawyer's job as "Advisor" is to help the client cut through all of the chaff (including that of the other experts), focus on what is relevant to the issue, assess the various conflicting opinions and recommendations, balance the competing facts, views, courses of action, and offer his or her analysis and what he or she considers the best course of action. Remember that the overall title of the section is "Counselor." This requires communication, not just one way, but a dialogue between lawyer and client. Next time we will review Rule 1.14 found under the "Client-Lawyer Relationship," *Communication*.

Mike Wentink

At the end of PCR #00-06 that concluded our review of Rule 2.1, the Counselor as Advisor, I talked about the importance of communication, and that this time we would review **Rule 1.4 Communication**, found under the rules governing the "Client-Lawyer Relationship."

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. ... **[My Comment: An important aspect of "sufficient information" is to ensure that the client has a clear understanding of our advice, even if, especially if, it is unpopular. If our advice/counsel is "no," make sure that this is clear up front. Ensure that the client understands the risk. As mentioned before, we may package our advice in a manner that makes the client more receptive, but be careful that we don't so carefully package the advice that the client misses the main point!]**

Adequacy of communication depends in part on the kind of advice or assistance involved. ... The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

When the client is the Army, it is often impossible or inappropriate to inform everyone of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the Army ... **[My Comment: Notwithstanding that the Army is our client acting through its authorized officials and that we have a professional obligation to "keep a client reasonably informed," this does not mean that any and every official of the Army is entitled to such information. We too need to practice "need to know" and ensure that those we address communications are "appropriate officials" of the client.]**

In some circumstances, a lawyer may be required to withhold information from a client. For example, classified information ... In other circumstances, a lawyer may

be justified in delaying transmission of information when the client would be likely to react imprudently ... [e.g.] withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience, or where disclosure would be favorable to the defense of a criminal accused. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client...." [e.g., protective orders].

[**Final Comment:** We should not forget that communication is a two-way street. I suggest that Rule 1.4 also requires communication in the form of questions, inquiry and examination of the client so that we ensure that we understand what the client is trying to accomplish, limitations, relevant facts and circumstances, fall-back positions, etc.]

Mike Wentink

ARMY AUTHORITY TO PAY PUNITIVE FINES and YEAR AUTHORITY WAS RECEIVED

Updated: 6 Jul 00

| STATUTE | IMPOSED BY STATE | IMPOSED BY EPA |
|--|------------------|-----------------------|
| Resource Conservation and Recovery Act (RCRA) Subtitles C and D only (hazardous and solid waste) 42 U.S.C. §6961 | YES—1992 | YES—1992 |
| RCRA Subtitle I only (underground storage tanks) 42 U.S.C. §6991f | NO | YES—2000 ¹ |
| Safe Drinking Water Act (SDWA) 42 U.S.C. §300j-6 | YES—1996 | YES—1996 |
| Clean Air Act (CAA) 42 U.S.C. §7418 | NO ² | YES—1997 ³ |
| Clean Water Act (CWA) 33 U.S.C. §1323 | NO | NO |

NOTES:

1. DoD disputed EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DoJ) in Apr 99. On 14 Jun 00 DoJ released an opinion that concluded that amendments to RCRA in 1992 gave EPA the authority to assess UST fines against federal facilities.
2. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the 9th Circuit Court of Appeals, but that court recently issued a surprise ruling that remanded the case to state court without addressing the central issue. DoJ will likely appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the 6th Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for CAA violations.
3. The authority of EPA to impose fines stems from an amendment to the CAA in 1990. A DoD challenge to that authority was resolved in favor of EPA in a 1997 opinion by DoJ.

THOMAS C. JORLING, as Commissioner of the New York State
Department of Environmental Conservation and NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF ENERGY,
JOHN S. HERRINGTON, as Secretary of the United States
Department of Energy, U.S. DEPARTMENT OF TRANSPORTATION,
UNITED STATES COAST GUARD, JAMES BURNLEY, IV, as Secretary
of the United States Department of Transportation, PAUL A.
YOST, Admiral Commandant of the United States Coast Guard,
U.S. DEPARTMENT OF THE ARMY, JOHN O. MARSH, JR., Secretary
of the United States Department of the Army, U.S. DEPARTMENT
OF THE AIR FORCE, and EDWARD C. ALDRIDGE, JR., as Secretary
of the United States Department of the Air Force,
Defendants-Appellants.

Docket No. 99-6188

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2000 U.S. App. LEXIS 11978

May 31, 2000, Decided

PRIOR HISTORY: [*1] Appeal from the June 3, 1999, judgment of the United States District Court for the Northern District of New York (Neal P. McCurn, Judge), imposing liability for hazardous waste regulatory charges assessed by New York Department of Environmental Protection against ten federal facilities.

DISPOSITION: Affirmed.

CORE TERMS: waste, hazardous waste, approximation, aircraft, airport, approximate, user, reasonable service, summary judgment, registration, transporter, charity, generators, navigational, interrogatory, impoundment, calculated, superfund, deposited, landing, surface, supplying, disposal, supplied, finance, formula, method of calculating, monitoring, annually, landfill

COUNSEL: Robert H. Oakley, Washington, D.C. (Lois J. Schiffer, Asst. Atty. Gen., Environment and Natural Resources Div., David M. Thompson, John T. Stahr, U.S. Dept. of Justice, Washington, D.C., on the brief), for defendants-appellants.

Maureen F. Leary, Asst. Atty. Gen., New York, N.Y. (Eliot Spitzer, N.Y. State Atty. Gen., Peter H. Schiff, Dep. Solicitor Gen., David A. Munro, Asst. Atty. Gen., Albany, N.Y., on the brief), for plaintiffs-appellees.

JUDGES: Before: NEWMAN, KEARSE, and CABRANES, Circuit Judges.

OPINIONBY: JON O. NEWMAN

OPINION:

JON O. NEWMAN, Circuit Judge:

The issue on this appeal is whether certain hazardous waste regulatory charges imposed by New York on federal installations are "reasonable service charges" within the meaning of the provision of the Resource Conservation and Recovery Act that waives the sovereign immunity of the United States. See *42 U.S.C. 6961* [*2] (a) (1994). The United States Department of Energy and others (collectively "USDOE") appeal from the June 3, 1999, judgment of the District Court for the Northern District of New York (Neal P. McCurn, District Judge), granting summary judgment to the New York State Department of Environmental Conservation and its commissioner (collectively "NYDEC"). The judgment imposed liability for hazardous waste regulatory charges assessed by NYDEC against ten federal facilities in New York, and denied USDOE's cross-motion for summary judgment. We conclude that the hazardous waste regulatory charges were properly determined to be "reasonable service charges," and we therefore affirm.

Background

In January 1989, NYDEC brought four consolidated actions in New York State Supreme Court against USDOE to recover unpaid environmental program regulatory charges, including hazardous waste program and waste transporter program charges, assessed by the NYDEC against ten federal facilities from 1983 to 1989. USDOE counterclaimed for a refund of approximately \$400,000 and related relief for regulatory charges already paid. These actions were subsequently removed to the District Court for the Northern District [*3] of New York.

The parties stipulated to the following relevant facts. At all relevant times, New York has had environmental conservation programs concerning waste pollution. In 1983, the New York legislature enacted and NYDEC began assessing hazardous waste program and waste transporter program charges, as detailed in N.Y. Env'tl. Conserv. Law §§ 72-0402, 72-0502 (McKinney 1997 & Supp. 2000). From 1983 through 1989, the ten federal facilities received billing for these waste regulatory charges in the month of billing, and payment was due under state statute within thirty days.

From 1983 through 1984, all waste regulatory charges were deposited into the state's general revenue fund, which is primarily funded by tax revenues. From 1985 through 1988, half of the waste regulatory charges was deposited into the general revenue fund, and the other half was deposited into a special hazardous waste remedial fund (i.e., the New York State superfund). Starting in 1989, half of the waste regulatory charges was deposited into the New York State superfund, and the other half was deposited into a special environmental enforcement fund.

The parties stipulated to the following charges and payments [*4] for waste regulatory charges from 1983 to 1989:

[SEE TABLE IN ORIGINAL]

Year Charges Payments

1983 70,954.79 70,604.79

1984 112,833.56 112,833.56

1985 142,951.37 38,809.50

1986 227,870.28 24,000

1987 196,471.31 0

1988 197,250.00 0

1989 215,260.27 0

NYDEC waived any claim for unpaid hazardous waste regulatory charges assessed prior to July 14, 1985. For the year 1985, NYDEC billed the annual regulatory charges in September 1985.

The District Court initially granted in part and denied in part cross-motions for summary judgment. See *New York State Department of Environmental Conservation v. United States Department of Energy*, 772 F. Supp. 91 (N.D.N.Y. 1991) ("NYSDEC I"). The District Court explained that although section 6001 of the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 2821, as amended, 42 U.S.C. 6961(a) (1994) ("RCRA"), contains a waiver of the United States' sovereign immunity from suit concerning certain state requirements regarding hazardous waste, including the imposition of "reasonable service charges," section 6001 is not a "blanket waiver[]" [*5] of the United States' sovereign immunity from the imposition and assessment of taxes by a State." *NYSDEC I*, 772 F. Supp. at 98. The District Court noted that the "parties agree that the proper test for this court to utilize in ascertaining whether the charges sought by the NYDEC are impermissible taxes or permissible fees was developed by the Supreme Court in *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978)," *NYSDEC I*, 772 F. Supp. at 99, which we discuss infra.

Arguing that the waste regulatory charges were unreasonably high, USDOE asserted that in every year between 1983 and 1989, "total waste regulatory charges exceeded [NYDEC]'s actual services [to the ten federal facilities] by a ratio of approximately nine to one (\$1,163,591.58 vs. \$126,792.13)." *Id.*

The District Court denied both motions for summary judgment because neither party had submitted evidence "as to the value of the overall benefits the facilities receive in light of the programs and services made available to them by [NYDEC] should the need for such assistance ever arise." *Id. at 100.*

On [*6] subsequent cross-motions for summary judgment, the District Court granted NYDEC's motion for partial summary judgment and denied USDOE's motion for summary judgment. See *New York State Department of Environmental Conservation v. United States Department of Energy*, 850 F. Supp. 132 (N.D.N.Y. 1994) ("NYSDEC II"). The District Court explained that Massachusetts "requires only a rational relationship between the method used to calculate the fees and the benefits available to those who pay them." *Id. at 143* (emphasis added). The Court found such a relationship in this case because

larger facilities are more expensive to regulate and require more services than smaller facilities. In addition, all services which NYDEC provides pursuant to these regulatory programs, whether used or not, are available to the United States should they be needed in the future . . . This evidence, coupled with the fact that the total receipts from these regulatory fees have been substantially less than the actual costs of these programs, demonstrates that NYDEC's method of calculating its waste . . . regulatory charges results in a fair approximation [*7] of the cost of the use of the system.

Id. (footnote omitted).

The District Court subsequently denied USDOE's motion under Fed. R. Civ. P. 60(b), see *New York State Department of Environmental Conservation v. United States Department of Energy*, 1997 U.S. Dist. LEXIS 20718, No. 89- CV-194, 1997 WL 797523 (N.D.N.Y. Dec. 24, 1997) ("NYSDEC III"), and, among other things, granted NYDEC's summary judgment motion against USDOE for almost all the unpaid environmental program regulatory charges, including unpaid waste regulatory charges, for 1986 through 1997, see *New York State Department of Environmental Conservation v. United States Department of Energy*, 1999 U.S. Dist. LEXIS 8386, No. 89-CV-194(NPM), 1999 WL 369965, at *1 (N.D.N.Y. June 3, 1999) ("NYSDEC IV"). The District Court also declared "that the United States and its agencies are liable in the future for all regulatory fees assessed by NYDEC from 1998 onward that are consistent with N.Y. ECL Article 72 and the court's prior decisions in this matter." *Id.*

Final judgment was entered on June 3, 1999. USDOE appeals from the District Court's grant of summary judgment to NYDEC only as to waste regulatory charges.

Discussion

The issue [*8] on this appeal is whether the waste regulatory charges are "reasonable service charges" under the RCRA. As amended, the RCRA provides that each department, agency, and instrumentality of the federal government

engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . ., respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

42 U.S.C. 6961(a) (emphasis added). In 1992, Congress clarified the scope of the waiver of sovereign immunity in this provision by adding the following language:

The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any . . . reasonable service charge). The reasonable service charges referred to in this subsection [*9] include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.

Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a)(3), 106 Stat. 1505, 1505, codified at 42 U.S.C. § 6961(a). See H. R. Rep. No. 102-111, at 6 (1991) ("In providing for the payment by federal facilities of 'reasonable service charges,' the Committee reaffirms and clarifies existing language which requires that federal agencies pay those fees and charges which other persons are subject to under federal, state, interstate and local solid or hazardous waste regulatory programs.") reprinted in 1992 U.S.C.C.A.N. 1287, 1292.

I. The Applicable Standard

The Massachusetts test. Although this case involves a state charge imposed on the federal government, USDOE has agreed that the test for determining [*10] the reasonableness of the charges is the one articulated by the Supreme Court in *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), in upholding a federal charge imposed on a state government. n1 In that case, Massachusetts challenged federal assessments on a state police helicopter pursuant to a registration tax on all civil aircraft flying in United States airspace. See *id.* at 452. In affirming the District Court's dismissal of the challenge, the Supreme Court set forth a three-part test:

So long as the charges [1] do not discriminate against state functions, [2] are based on a fair approximation of use of the system, and [3] are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services.

Id. at 466-67.

n1 "The issue before this Court is whether, using the analysis contained in *Massachusetts*, the regulatory assessments at issue are so high as to be beyond the scope of the reasonable service charges waivers contained in RCRA." Brief for Appellants at 18. The Appellants have not conceded that the *Massachusetts* test is applicable to all state charges assessed against the United States. See *id.*

[*11]

On appeal, USDOE does not dispute the first or third parts of the *Massachusetts* test. It acknowledges that NYDEC's waste regulatory charges are non-discriminatory and are not structured to produce revenues that will exceed the total cost to NYDEC of the benefits to be supplied. See Brief for Appellants at 22 n.10. USDOE disputes only the second part of the *Massachusetts* test, challenging the District Court's finding that no reasonable jury could find that the waste regulatory charges did not meet the "fair approximation" component of the *Massachusetts* test. USDOE argues that the charges cannot meet the "fair approximation" component because, by its calculations, the charges from 1983 to 1989 exceeded the cost of supplying the services actually received by a nine to one ratio.

Approximation of Use. The initial problem in determining whether the "fair approximation" component of the *Massachusetts* test has been met arises from uncertainty as to what the charges must fairly approximate. The uncertainty inheres in the differing phrases that the Supreme Court used in *Massachusetts* to uphold an aircraft registration tax that, along with other taxes, helped to [*12] finance air navigational facilities and services. See 435 U.S. at 446-47. In the portion of the opinion that fashioned the three-part test, the Court stated the second component to be a requirement that the charges "are based on a fair approximation of use of the system." *Id.* at 466 (emphasis added); see also *id.* at 469 ("It follows that a State may not complain of the application of [the registration tax statute] on the ground it is not a fair approximation of use."). However, when the Court applied the three-part test to the challenged aircraft registration tax, it said that the tax satisfied "the requirement that it be a fair approximation of the cost of the benefits civil aircraft receive from the federal activities." *Id.* at 467 (emphasis added); see *id.* at 468 ("The present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives."); see also *id.* at 463 n.19 ("A user-fee rationale may be invoked whenever the United States is recovering a fair approximation of the cost of benefits supplied."). n2

n2 In *United States v. Sperry Corp.*, 493 U.S. 52, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), the Court quoted the phrase "fair approximation of the cost of benefits" from footnote 19 of *Massachusetts* and simultaneously emphasized that the Government need not "record invoices and billable hours to justify the cost of its services." *Id.* at 60.

[*13]

In some circumstances, one would expect no difference whether the fair approximation inquiry focused on the use of benefits or their cost. For example, if each landing of an airplane required one airport employee to perform a particular service, an assessment of fees based on the number of landings would fairly approximate (indeed, precisely reflect) both use of the service and the cost of providing it. A difference would arise, however, if larger airplanes required a greater number of airport employees to render the needed service, but fees were still based on the number of landings. In that event, fees based on the number of landings would still precisely reflect use of the service, but only approximately reflect the cost, and the accuracy of the approximation would diminish for carriers who landed mostly airplanes small enough to require servicing by only one employee; the per-landing fee would oblige them to share part of the added cost of providing the service to planes requiring servicing by many employees.

The Supreme Court's application of the fair approximation test in Massachusetts to uphold the challenged aircraft registration tax appears to tilt the analysis toward [*14] consideration of use. The amount of the tax depended upon the type of aircraft engine (piston or turbine) and the maximum certificated takeoff weight. See *435 U.S. at 446 n.1, 450*. Of the other three taxes, one was imposed on each gallon of aircraft fuel, and two were imposed (at different rates) on each pound of aircraft tires and tubes. See *id. at 468*. Assessing the combined effect of the four taxes, the Court said:

The four taxes, taken together, fairly reflect the benefits received, since three are geared directly to use, whereas the fourth, the aircraft registration tax, is designed to give weight to factors affecting the level of use of the navigational facilities.

Id. at 468-69 (emphases added). The Court noted Congress's recognition of the fact that "heavier and faster aircraft are generally responsible for much of the increased need of sophisticated control facilities and approach and landing facilities," *id. at 451 n.9* (quoting H.R. Rep. No. 91-601, at 48 (1969)), thus demonstrating that calibrating the amount of the tax by the weight of the aircraft fairly approximated use of the navigational system.

The tilt toward use, rather than [*15] cost, is also evident in the Commerce Clause decision from which the Massachusetts test was borrowed. See *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, *405 U.S. 707, 716-20, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972)*. In *Evansville-Vanderburgh*, the Supreme Court ruled that the Commerce Clause did not prohibit states or municipalities from charging commercial airlines \$1 per commercial airline passenger at airports within their jurisdiction in order to defray costs related to airport facilities. The Supreme Court concluded:

At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound*, and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

Id. at 716-17 (emphasis added). n3 Applying this test, the Supreme Court concluded that the charges "reflect a fair, if imperfect, approximation of the use [*16] of facilities for whose benefit they are imposed," *id. at 717* (emphasis added), even despite exemptions for certain classes of passengers and aircraft and for non-passenger users of airport facilities, because "distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied," *id. at 719* (emphasis added); cf. *Northwest Airlines, Inc. v. County of Kent*, *510 U.S. 355, 369, 127 L. Ed. 2d 183, 114 S. Ct. 855 (1994)* (airport's decision to "allocate costs according to a formula that" did not allocate portion of aircraft costs to airport concessionaires "appears to 'reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed'" because airport concessionaires used only terminal facilities, not runways and navigational facilities) (quoting *Evansville*, *405 U.S. at 717*). n4

n3 In *Capitol Greyhound Lines v. Brice*, *339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950)*, the Supreme Court upheld a Maryland tax that assessed two percent of the fair market value of the motor vehicle of any common carrier transporting passengers over Maryland roads. Rejecting the petitioners' argument that the tax's formula, regardless of the amount of revenue generated, violated the Commerce Clause, the Supreme Court explained that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id. at 545*, and later stated that "taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads," *id. at 547*.

[*17]

n4 Cases applying the "fair approximation" test in the Commerce Clause context reflect some uncertainty whether the focus is on use or cost. Compare *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 (9th Cir. 1992) (per curiam) (calculating fee for use of airport access roads as seven percent of gross receipts that rental car company generates from customers picked up at airport fairly approximates the "indirect use of the entire airport facility that [the company] makes through the travelers it services")(footnote omitted) (emphasis added); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516, 520 (11th Cir. 1990) (calculating airport's user fee on off-airport car rental company as ten percent of gross receipts from customers who came from airport fairly approximates use, because airport "could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility") (emphasis added) (footnote omitted) with *Center For Auto Safety, Inc. v. Athey*, 37 F.3d 139, 143 (4th Cir. 1994) (Maryland "fee structure" imposing charity registration fee based on total contributions received by that charity in previous year "represents a fair, if imperfect, approximation of the cost of using Maryland facilities and services for the charity's benefit" because "the record clearly shows that the . . . costs of monitoring charities increase with larger charities") (emphases added).

[*18]

Ultimately, of course, the Massachusetts test is concerned with whether the challenged method for imposing charges fairly apportions the cost of providing a service, but by framing the second component of the test in terms of "use," the Court made clear that a method for imposing charges based on each payer's approximate use will pass muster as an adequate apportionment of costs. The alternative, nowhere evident in the Massachusetts opinion, is to engage in a detailed cost accounting analysis that endeavors to determine the cost, properly allocated to each payer, of every person, product, and facility involved in providing the service. The Court evidently was satisfied that a fair approximation of the use of the service adequately serves as a surrogate for an otherwise complicated and expensive attempt to allocate costs. See *Brock v. Washington Metropolitan Area Transit Authority*, 254 U.S. App. D.C. 190, 796 F.2d 481, 485 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) ("Massachusetts did not hold that a user fee must represent retrospectively a close approximation of the actual, historical benefit to the user. Rather, Massachusetts held only that the method [*19] used to calculate the fee must rationally be designed to approximate prospectively the benefit to the user.").

Services Used and Available for Use. The Massachusetts test applies not only to services used but also to services available for use. As the Court noted:

Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States. And even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed

Massachusetts, 435 U.S. at 468 (footnotes omitted).

II. Application of the Massachusetts Test

It is undisputed that NYDEC's waste regulatory charges are calculated on a basis that reflects the size of an entity's operations. Specifically, the hazardous waste program charges are calculated based on tons of hazardous waste generated annually, see N.Y. Env'tl. Conserv. Law § 72-0402(1), and on the tons of hazardous waste received annually by a treatment, storage, or disposal facility, [*20] see id. § 72-0402(2)(a),(b). Hazardous waste program charges also include additional charges for operating one or more landfills to receive hazardous waste, for each incinerator or unit that burns hazardous waste for energy recovery, and for providing for the treatment, storage, or disposal of hazardous waste in one or more surface impoundments. See id. § 72-0402(2)(i)-(iv). Waste transporter program charges are calculated based on the number of vehicles permitted to be used to transport waste. See id. § 72-0502.

To demonstrate the relationship between its method of calculating hazardous waste program charges and the services it makes available, NYDEC submitted the affidavit of John L. Middelkoop, chief of NYDEC's Bureau of Eastern Hazardous Waste Programs. Middelkoop categorized the purposes of the "regulatory services which NYDEC provides to generators" of hazardous wastes:

a) to assure that New York State has sufficient treatment, storage, and disposal capacity for the amount of hazardous waste which is generated in the State (hereinafter, "capacity assurance services"); b) to effect a reduction in the amount of hazardous waste which is generated in the State [*21] (hereinafter, "waste reduction services"); and c) to assure that

generators properly store, report, label and ship their hazardous waste to a facility which is permitted to receive the waste (hereinafter, "storing, reporting, labeling, and shipping services").

For each kind of service, Middelkoop explained, the service provided increases in proportion to the amount of waste generated, primarily because each service requires NYDEC to inspect the operations of generators, either to ensure compliance with existing requirements or to determine the accuracy of information necessary to execute the services properly. n5 In turn, inspectors must obtain "so much more information" from generators "as they generate larger quantities of hazardous waste" because "there are more requirements in the regulations because the size of the plant, the complexity of the process, the risk to the environment and the amount of records which must be reviewed is, usually, proportional to the quantity of hazardous waste generated." In general, facilities receiving over 1,000 tons of hazardous waste annually "are larger, and their design, construction and operation is more complex. NYDEC's review of a [*22] permit application for a larger facility requires more involvement and time than its review of an application for a smaller facility."

n5 In his deposition, when asked about additional services provided by NYDEC to waste generators but not mentioned in his affidavit, Middelkoop referred to "technical assistance . . . We do have phone numbers and we do have staff provided to assist in making hazardous waste determination, assist in determining what the regulations mean. We have hot lines for waste reduction activities." When asked why he did not mention these services in his affidavit, Middelkoop explained, "Because I have no knowledge as to whether or not federal facilities have ever availed themselves of those services. They are also minor services."

Similarly, in providing services targeted to operators of hazardous waste facilities, "the potential for significant noncompliance occurs more frequently at landfills, surface impoundments and facilities which receive large amounts of hazardous waste annually than [*23] at other facilities." The permit applications for facilities with landfills, surface impoundments, or incinerator units are more complicated and require a large amount of NYDEC involvement and time. For example, to design and site a surface impoundment that receives hazardous waste, one must, among other things, design a liner and groundwater monitoring system.

NYDEC also submitted the affidavit of Robert Haggerty, Director of NYDEC's Bureau of Technical Support of the Division of Hazardous Substances Regulation. Haggerty explained that under the waste transporter program, NYDEC acts to ensure that wastes "are properly identified and shipped to appropriate treatment or disposal facilities." NYDEC inspectors "routinely visit such facilities to assure that transporters are not violating their permits by, inter alia, depositing hazardous waste, regulated medical waste, or low level radioactive waste, at facilities which are not authorized to treat or dispose of such waste."

Based on this evidence, the District Court properly ruled that the waste regulatory charges meet the "fair approximation" component of the Massachusetts test. By assessing a higher charge based on the amount [*24] of hazardous waste generated or received, as well as imposing additional charges for each incinerator, landfill, and surface impoundment, the method of calculating the hazardous waste program charges is reasonably designed to fairly approximate use of the hazardous waste system's available services, and thereby to approximate the cost of supplying such services to particular generators of waste or operators of waste facilities. By charging for each vehicle permitted to be used to transport waste, the method of calculating waste transporter program charges is reasonably designed to fairly approximate use of NYDEC's services and thereby to roughly approximate the cost of supplying these services to transporters of waste.

USDOE disputes that NYDEC's waste regulatory charges fairly approximate the federal facilities' use of the State's available hazardous waste services by pointing out that half of the total waste regulatory charges assessed currently finance the New York state superfund, and that USDOE makes no use of the superfund, which finances decontamination only of sites for which no solvent owner or operator can be found to pay for the cleanup. The Supreme Court has made clear, [*25] however, that, as long as charges fairly approximate use and thereby fairly approximate costs of available services, it does not matter whether or how a governmental entity segregates the money it collects. In *Evansville*, the Court rejected the similar argument that charges were not based on use because half of the revenues generated were allocated to unrestricted general revenue. See *Evansville*, 405 U.S. at 720. "So long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use." Id. See *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 144 (4th Cir. 1994) (immaterial that Maryland does not keep charity registration fees in separate fund but turns them over to state treasury); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 49 (1st Cir. 1984) (irrelevant that 75 percent of revenues from state license fee for vehicles carrying certain amount of hazardous waste will finance state hazardous

waste cleanup fund, even if that fund has "relatively little to do with road transport"). New York does not [*26] violate the Massachusetts test by earmarking half of the hazardous waste fees for its superfund and using general revenues to pay for portions of the services available to hazardous waste producers.

III. Rebutting Reasonableness of Charges That Meet the Massachusetts Test

USDOE contends that even if NYDEC's method of imposing charges is designed to fairly approximate use of available hazardous waste services, the method is not reasonable as applied to USDOE's facilities because the charges imposed greatly exceed the actual cost of supplying services to these facilities. USDOE enlists *Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992), in which the First Circuit ruled that fees imposed by Maine on a United States Navy shipyard had not been shown to be unreasonable under the pre-1992 RCRA waiver of sovereign immunity. See 973 F.2d at 1013-14. That ruling, USDOE points out, rested in part on data showing that fees paid, \$54,500, were slightly less than the actual costs of regulatory activities related to the shipyard, \$61,000. Here, by contrast, USDOE contends, the charges are nine times the costs of the services received.

[*27] Maine, however, did not establish a rule that a fee system, reasonably designed to fairly approximate use of available regulatory services, may be successfully challenged whenever the fees paid by one user can be shown to exceed the actual cost of services made available to that user. Maine simply ruled that the showing that the shipyard's fees were slightly less than actual costs was "sufficient," along with other data, to defeat the Navy's motion for summary judgment. See 973 F.2d at 1013. Moreover, even if we assume, for purposes of this appeal, that a fee system would be unreasonable as applied to a user of regulatory services if the user could show that its fees significantly exceeded the actual cost of services (both those used and those available for its use), USDOE has not made such a showing.

USDOE calculated a nine-to-one ratio of charges to services based on NYDEC's answer to the following interrogatory:

Please describe the services received from you by each facility in each year for each type of fee and assessment, e.g., site inspections, data evaluations, monitoring, reviewing, visits, technical assistance, consultation, processing, reports, [*28] studies, general administration. For each such activity, please state: the type of activity, the identity of each person who performed the activity; the date or dates when the activity was performed; and the cost to you of the activity.

In response, NYDEC answered that it could not provide a "complete answer to this interrogatory because some of the information requested is not regularly recorded and maintained by NYDEC" or "may be in files which are not indexed and/or which NYDEC does not know to exist." Noting that it answered the interrogatory "to the extent NYDEC and the Commissioner are able," NYDEC provided time and activity records, which consisted of sixty-three pages of "computerized raw data and estimates." USDOE then multiplied "the hourly rates established by the [time and activity] sheets" by the "hours spent by each NYDEC employee who performed services for one of the federal facilities." Reply Brief for Appellants at 8.

NYDEC responds initially that these calculations are inaccurate because the answer to the interrogatory asking NYDEC to describe the services received "was not intended to reflect the full scope of the services actually provided by NYDEC nor [*29] the overall benefits received by federal facilities." Brief for Appellee at 25 n.21. The more basic defect in the calculation is that it is incorrectly limited to services used, rather than including services or benefits available for use. See *Massachusetts*, 435 U.S. at 468 ("Even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed . . ."); *Maine*, 973 F.2d at 1014 (permissible to include cost of state emergency response team in state regulatory charge, even though team never had responded to spill at Navy's facility).

In this case, USDOE calculated its nine-to-one ratio from data offered in response to an interrogatory asking for information for services "received" by the federal facilities, not for services made available to those facilities. The time and activity records upon which USDOE rely indicate only hours worked by NYDEC employees for a particular federal facility, and therefore cannot capture NYDEC's additional costs for making services available to that facility.

The method for assessing waste regulatory [*30] charges has not been shown to be unreasonable as applied.

Conclusion

The judgment of the District Court is affirmed.

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, DISTRICT
COMMAND, FIELD OPERATING ACTIVITY & LABORATORY COUNSELS

SUBJECT: CECC-C Bulletin No. 00-12, Lessons Learned from Ocuto Blacktop & Paving Co., Inc., B-284165

1. On March 1, 2000, the Comptroller General sustained a pre-award protest by Ocuto Blacktop & Paving Co., Inc. (Ocuto) against award of a contract for the capping of a landfill at the former Griffiss Air Force Base (AFB) in Rome, New York. Ocuto alleged that the U.S. Army Corps of Engineers (USACE) failed to comply with a statutory requirement that government agencies give preference, to the maximum extent possible, to contracting with local, small, and small disadvantaged businesses for work associated with closing military installations under a base closure law. The Comptroller General held that the USACE solicitation for a regional environmental remediation indefinite delivery/ indefinite quantity (IDIQ) contract failed to give reasonable consideration to the practicability of providing a preference to local contractors.

2. In 1993, the Base Realignment and Closure (BRAC) Commission nominated Griffiss for decommissioning under the BRAC Act, and the base officially closed in September 1995. Section 2912 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, which is codified at 10 U.S.C. § 2687 note, established the following preference for businesses located in the vicinity of base closure and realignment work:

- (a) Preference required. -- In entering into contracts with private entities as part of the closure or realignment of a military installation under a base closure law, the Secretary of Defense shall give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small business concerns and small disadvantaged business concerns. Contracts for which this preference shall be given shall include contracts to carry out activities for the environmental restoration and mitigation at military installations to be closed or realigned.

The statutory preference is implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) at § 226.7103(a). The DFARS provides that a contracting officer (CO) must determine “whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned,” before making a small business or small disadvantaged business (SDB) set-aside determination. The regulations prohibit the use

of set-asides when the CO's market research indicates that local business offers can be expected, unless an offer is expected from a local business within the set aside category.¹ If offers from businesses in the vicinity are not expected, the CO should continue with section 8(a) or set-aside consideration as stated in DFARS Part 219.² In other words, the regulation establishes a priority for awarding to local businesses over 8(a) or other small businesses.

3. Upon request from Region II of the Environmental Protection Agency (EPA), USACE established pre-placed remedial action contracts (PRAC) for environmental remediation actions for civil or military projects within the geographic boundaries of EPA Region II and the Northwestern Division. These combined areas cover 15 states and two U.S. territories. The PRAC work will include projects at any current or former military installations within the established area, however none of the PRAC contracts are limited to BRAC projects. Griffiss AFB is in the BRAC program and BRAC funds will be used to cap the landfill as part of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remediation required by EPA.

4. Until the mid-1990s, the District had endeavored to accomplish this type of work through site specific contracts, but determined that method of contracting to be against the Government's interests of cost, staff resources, and time. Experience showed that it cost the District approximately \$200,000 to \$500,000 for each small acquisition to do site specific contracting. In 1996, USACE successfully defeated a protest against award of a contract for removal of underground storage tanks at Griffiss AFB.³ USACE had issued a solicitation for all work at Griffiss related to base closure, including soil testing to determine the presence of contamination caused by leakage. Among the five evaluation factors listed in the request for proposal (RFP) were local business preference and subcontracting with local and small businesses. USACE made award to the offeror whose proposal represented the best overall value to the Government. The awardee's price was slightly higher than the protester, however, the awardee scored significantly higher on the technical evaluation because it was located in a county in the vicinity of Griffiss AFB and proposed that a majority of the work would be performed by local subcontractors. The GAO accepted the CO's explanation that his greatest concern was for the Government to receive the best quality under a best value formula and that the policy objectives of DFARS Subpart 226.71 be fulfilled to the greatest extent possible. In the Ocuto protest decision, the Comptroller General referred to this 1996 remediation procurement as exemplary.⁴ In the instant procurement, rather than prepare a site specific RFP, USACE issued a regional IDIQ solicitation.

¹ DFARS § 226.7103 (c); Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000.

² DFARS § 226.7103 (b).

³ GZA Remediation, Inc., B-272386, Oct. 3, 1996, 96-2 Comp. Gen. Dec. ¶ 155.

⁴ Ocuto, B-284165, at note 2.

5. USACE published a Commerce Business Daily notice, establishing May 19, 1998 as the prescribed proposal due date. It then created mailing lists for prospective offerors by compiling names of all contractors who requested to be included on the lists. Only those who requested to be on the mailing lists received solicitations. USACE issued three solicitations for PRACs. One solicitation was issued without restrictions, the second was set aside for small businesses, and the third was reserved for small disadvantaged businesses in the Small Business Administration's (SBA) 8(a) set aside program. Each of the solicitations contemplated award of multiple IDIQ contracts. The landfill cap project at Griffiss AFB was to be ordered under one of the two contracts under the 8(a) set aside solicitation. Ocuto was on the mailing list for each of the three solicitations and was among the prospective offerors to whom solicitations were mailed on March. According to the CO, Ocuto did not respond to any of the solicitations. Ocuto claims it cannot recall receiving any of the solicitations

6. USACE selected Cape Environmental Management, Inc. (Cape) for award of the 8(a) contract for all remediation work within EPA Region II. USACE submitted an RFP for capping a landfill at Griffiss AFB to Cape on November 1, 1999. During negotiations, the contract specialist encouraged Cape to solicit quotes from subcontractors in the local Griffiss AFB vicinity, and Cape agreed to use such quotes if it received award. USACE intended to award the base IDIQ contract and the initial task order to cap the landfill at Griffiss simultaneously. Award had not been made by the time Ocuto filed its protest at the GAO, and USACE therefore suspended award.

7. Ocuto, a local contractor, learned from a representative of the BRAC commission that a contract for landfill capping at Griffiss was pending award to Cape, which is located in Waukegan, Illinois. Ocuto filed its GAO protest disputing USACE's failure to award to a contractor in the Rome, New York vicinity, on November 22, 1999. In response, USACE submitted a request for summary dismissal on the bases that (a) the GAO has no jurisdiction over a protest that challenges award of a task order under an IDIQ contract and (b) Ocuto's protest was untimely filed. USACE asserted that the statutory prohibition against protests in connection with the issuance of task orders and Ocuto's failure to file its protest within 10 days of its receipt of the solicitation, mandated dismissal of the protest. The GAO flatly denied the request on both counts. First, Ocuto's challenge is aimed at the solicitation's failure to mention environmental remediation work at closing military bases in the terms describing the underlying IDIQ contracts, not at the delivery order. Therefore, GAO claimed jurisdiction under its authority to review protests alleging a solicitation violates a statute or regulation. Second, because the solicitation gave inadequate notice to potential offerors that BRAC environmental projects were within its scope, Ocuto could not have been expected to protest the agency's interpretation of the solicitation prior to the proposal due date. GAO considered the protest timely because it was filed within 10 days of the date Ocuto knew of its basis for protest.

8. In its decision sustaining Ocuto’s position, the Comptroller General provided an extensive analysis of the statutory and regulatory preference for awarding BRAC work to local and small businesses. The statute requires an agency to give reasonable consideration to whether the preference is practicable. The Comptroller General explained that “where Congress directs that a preference be given to the greatest extent practicable, an agency must either provide the preference or articulate a reasoned explanation of why it is impracticable to do so.” This includes considering alternative solutions. The shortcoming of the USACE procurement strategy was the failure to record any consideration of alternative methods for implementing the local contractor preference.

9. The Comptroller General provided a short list of alternatives USACE might have considered, to include:

- (a) carving out the BRAC-related work and creating a separate contracting opportunity,
- (b) creating a schedule of regional IDIQ contractors, or
- (c) including a contractual requirement in the IDIQ contracts directing contractors to subcontract with local businesses.

Even if USACE had found these alternatives were impracticable, the Comptroller General ruled, the agency would have had to demonstrate that it had made a reasonable analysis of the possibilities. The existing record failed to address those factors that might make the alternatives impractical, such as budgeting and staffing constraints, the degree of local capability, and the number of projects subject to the preference. The Comptroller General concluded that in addition to failing to meet the statutory local business preference, USACE fell short of the regulatory mandate that the CO conduct market research and make a finding of whether local businesses could be reasonably expected to submit offers. Evidence of Ocuto’s interest in participating made USACE’s decision to proceed with an 8(a) set aside contract for the remediation improper.⁵

10. It was the USACE position that implementation of a statutory preference for local contractors is within the discretion of the Department of Defense. Relying on Ocuto Blacktop and Paving Co. v. Perry,⁶ USACE contended that its actions in executing its discretionary duty to implement a local preference had been sufficient to meet the statutory requirement. In Ocuto v. Perry, Ocuto had claimed that the Air Force’s use of IDIQ contracts for environmental remediation denied small contractors the opportunity to successfully bid on work at a base closed under the BRAC law, in violation of Public Law 103-160, § 2912. The Comptroller General, however, was able to distinguish the court’s decision refusing to compel the agency’s discretion to be exercised in a particular manner. In that case, because local businesses in the vicinity of the BRAC work had

⁵ DFARS § 226.7103 (c).

⁶ 942 F. Supp., 783, 787 (N.D.N.Y.1996) (denying mandamus forcing the Secretary of Defense to institute a local preference).

other opportunities available the court found mandamus jurisdiction inappropriate. The Comptroller General affirmed that the statutory preference is not mandatory, but it does require an agency to give reasonable consideration to the practicability of a local business preference. In the instant case, USACE failed to produce any documentation in the record articulating why the preference is impracticable.

11. The CO asserted that under the circumstances, it was too costly and administratively unwieldy to conduct a site specific solicitation with a preference for local and small businesses. USACE contended that time, expense and growing workload combined with staff reductions made the implementation of the local preference impracticable. Moreover, the USACE defended the appropriate exercise of the CO's discretion in deciding to use IDIQ contracts as the procurement instrument. By encouraging Cape to work with local suppliers, USACE claimed it was accommodating the statutory local preference policy in the context of a different and, under the circumstances, necessary acquisition strategy. Ultimately, the opinion concluded that USACE had made an insufficient effort to consider and implement alternatives such as those referenced in paragraph 9, *supra*.

12. The lesson learned in this case is that regional IDIQ contracting for BRAC projects appears to be unworkable in light of statutory and regulatory preferences for local contractors. Award of contracts related to the closure or realignment of military bases cannot be processed without specific compliance with DFARS §226.7103. The acquisition plan must reflect compliance with the DFARS, especially where discretion is exercised. The option of site-specific contracting for BRAC work should be seriously considered. In those circumstances where giving preference to local businesses is indeed found impracticable, the CO should consider whether other alternatives exist to maximize the use of local contractors and carefully document his or her conclusion in a reasoned analysis. Some thought should be given to modeling future solicitations after the RFP in GZA Remediation, B-272386, *supra*, which included locality as a technical evaluation factor.

13. The point of contact for this matter is Karen Da Ponte, who can be reached at (202) 761-8541.

FOR THE COMMANDER:

/s/

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