

## The Arsenal Statute - A New Decision

In what may be perceived by many as a blow to the Arsenal Statute, the United States District Court for the Central District of Illinois has granted the Government's motion for a summary judgment in a lawsuit filed by the American Federation of Government Employees (AFGE).

This lawsuit, *AFGE v. Cohen*, was brought by the AFGE as a result of reductions in force that were caused by the Army's decision to award two projects to the private sector. The AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute, 10 U.S.C. 4532(a). More specifically, the AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute in that no cost comparison had been performed to demonstrate that production at a Government-owned facility could not be done on an economical basis.

As background, the Arsenal Statute states:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis."

In a series of decisions rendered by the General Accounting Office (GAO) beginning with an Opinion Letter (B-143232) written on December 15, 1960 to the Subcommittee for Special Investigations of the House Armed Services Committee, the GAO has consistently interpreted the phrase "economical basis" "...to require a comparison of all costs incurred by the Government as a result of producing an article in Government-owned facilities, with the price at which the article could be purchased from a private manufacturer." See B-143232, page 5. This comparison has become known as an out-of-pocket cost comparison.

In the AFGE litigation, one of the defenses raised by the Government was that notwithstanding the use of the term "shall" in the Arsenal Statute, the statute is really permissive rather than mandatory. It did not take the Court long to dispose of this defense by concluding that "shall" means "shall" and hence, the statute is mandatory in nature.

The Court, however, found the remainder of the Arsenal Statute to be much more ambiguous. In discussing the term "supplies" the Court noted that the language of the statute had been changed from "all supplies" to "supplies", thus implying that less than all supplies were covered by the statute, but leaving it somewhat ambiguous as to exactly what "supplies" were subject thereto. The Court further noted that the statute contained "no guidance, criteria, or direction" as to how

the cost analysis required by the statute was to be performed. As a result of these perceived ambiguities in the statute, the Court concluded that as long as the agency interpreted and implemented the statute in a reasonable manner, the Court would not disturb the resulting decision.

More specifically, because of these ambiguities, the Court found that the Secretary of the Army has discretion to determine what "supplies" fall within the purview of the Arsenal Statute. As an exercise of this discretion, it would seem the Secretary has the sufficient authority to determine whether an end item should be acquired as a "system" or acquired utilizing component breakout and as long as that authority was exercised in a reasonable manner, that exercise of authority would be upheld by the courts.

In addition, as long as an acquisition had separate statutory authority, it has been Army policy to treat that acquisition as an exception to the requirements of the Arsenal Statute. For example, if the acquisition of an item is being conducted on a sole source basis under the authority of 10 U.S.C. 2304(c)(1), the Army has treated that acquisition as being an exception to the requirements of the Arsenal Statute. After reviewing this practice, the Court concluded that it "... cannot find that the Army's policy of incorporating these same exceptions [i.e., 10 U.S.C. 2304] into its procurement procedures and policies implementing the Arsenal Act is either an unreasonable construction of the statute or inherently inconsistent with the plain language of the statute."

In summary, *AFGE v. Cohen* tells us two things. First, "shall" means "shall". Second, and more importantly, because of the lack of specific definition in the Arsenal Statute, there are ambiguities in the statute and these ambiguities vest the Secretary of the Army with discretion as to how to implement the statute and as long as that implementation has a reasonable basis, the courts, or at least this particular Court, will not upset that implementation.

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