



Office of Command Counsel Newsletter

April 2001, Volume 2001-2

AMC Chief Counsels and PARCs Meet

The AMC Chief Counsels and the AMC PARCs met in a joint session in late February. Many issues and concerns impacting both communities were discussed.

A copy of the agenda is provided (Encl 1).

Additionally, there were separate sessions planned for each community.

General Coburn addressed the PARC/Chief Counsel Workshop on the afternoon of Tuesday February 27. The **CG's Top 10 Focus Items** was highlighted:

1. Single Stock Fund
2. National Maintenance Program
3. GCSS-A
4. Recapitalization
5. Revolution in military logistics (CS/CSS Transformation)
6. Technology in support of Army transformation
7. Force Protection
8. Army Field Support Centers
9. People (hiring, retaining, training, awards, EO/EEO)
10. QDR

Additionally, **General Coburn** made several important observations as to his view of AMC:

1. AMC —as the Army's Contracting Command: the warfighter should not be in the contract field.

2. PARCs should be involved earlier in development and sustainment planning.

3. HQ AMC expanded role in Source Selection process—SSA in A-76 process.

4. Awards to small business.

5. Contracting personnel shortages: actions up while personnel are down.

6. PARC/Legal Team: "The very essence of what we do. Great men and women doing great work and who understand the system."

See you at the AMC Continuing Legal Education Program..... 21-25 May 2001.

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Legal The Research Lexis Links "Corner"

The world of legal research has changed dramatically in the last generation. Oldtimers like this editor developed sneezing fits combing through old textbooks, while the young among us perhaps suffer callouses typing on the computer as they navigate Lexis.

The Natick Legal Office under the leadership of **John Stone** provides an outstanding four-page document--Legal Research Links to the courts, DOD and DA regulations, Federal statutes, libraries and ISP's that have legal links, and a topic listing with more than a dozen topics identified with multiple links for each topic.

Telephone and zip code directories on line are also addressed,

This is an outstanding effort and we are pleased to pass it on to our readers (Encl 2).

Rachel Hankins (LNG--Lexis-nexis Group) has provided an update snapshot on the latest legal research tips and tools(Encl 3).

The Tip of the Month:

Verify your work's accuracy in its earliest stages, pinpoint the right facts as you build your premise, and save research time.

LEXLink™ Feature - copies word-processing or html documents, counts the recognizable citations, and adds direct hyperlinks to full-text documents in the *lexis.com* research service and current reports in *Shepard's®* Citations Service.

Other topics covered in this edition include: Bankruptcy Deskbook, Patent Licensing, Star Pagination on *lexis.com* and enhancements to the public records database.

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Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

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

Electronic Signatures

The Electronic Signatures in Global and National Commerce Act, 15 USC Sec. 7001, P. L. 106-229, provides at Section 101, that a signature, contract or other record relating to interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

The Act further provides that a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Oral communications do not qualify as an electronic record.

Retaining

The Act also provides that if there is a requirement that a contract or other record to a transaction be retained, that requirement is met by retaining an electronic record of the information, provided it accurately reflects the information set forth in the contract or other record and remains accessible to all persons who are entitled to access.

Definition of electronic signature

An electronic signature is defined at 15 USC Sec. 7006 as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” An electronic record is defined as “a contract or other record created, generated, sent, communicated, received, or stored by electronic means.”

Exceptions

There are several specific exceptions one of which may be of particular interest to the legal community, is:

“(b) Additional Exceptions. – The provisions of section 101 shall not apply to –

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings; “

POC is **Jim Scuro**, CECOM, DSN 992-9801(Encl 4)

List of Enclosures

1. AMC PARC/Chief Counsel Workshop Agenda
2. Legal Research Links
3. Lexis Corner
4. Electronic Signatures
5. Payment/Recovery of Bid Preparation Costs
6. Workers' Comp-- Overseas Performance
7. Unacceptable License Terms
8. Mngmt Dec Docs & Task Orders Under IDIQ K's
9. Commerciality Decision and Documentation of Market Research
10. EO Ends Labor Mgmt Partnerships
11. OPM Guidance on EO
12. Coordination w/CPOC
13. Hiring During RIFs
14. Briefing on Environmental Justice
15. DOD GC re Env Actions Abroad
16. Analysis of Encl 15
17. Env Law Bulltn:Jan.Feb
18. Protecting non-Public Information
19. Gov't Support to K'ors
20. K'ors moved from Pentagon
21. Collecting Internet/E-Mail Info

Payment/Recover of Bid Preparation Costs

HQ AMC's **Maj Sandy Forston**, DSN 767-, provides a treatise that addresses the issue: What Authority is There for AMC to Pay Bid Preparation Costs? (Encl 5)

The discussion suggests that there is authority for a bidder to recover bid and proposal preparation costs if the government's review of its bid was arbitrary and capricious.

A bidder that incurs substantial costs in preparing a response to a solicitation may seek to recover bid and proposal preparation (B&P) costs if it contends that the Government did not fairly and honestly consider its bid. Keco Industries, Inc. v. U.S., 203 Ct.Cl. 566, 492 F.2d 1200, 1203, 16 G.C. ¶ 104 (1974); 31

U.S.C. 3554(c)(1)(B)(2000); FAR 33.102(b), 33.104 (h).

Protesters may request B&P costs by filing a protest with the agency, General Accounting Office (GAO), or the United States Court of Federal Claims (COFC).

The Conclusion

There is clear authority for bidders to recover B&P costs from the agency, GAO, or the COFC, if a timely bid protest or proper claim is filed.

Likewise, under certain circumstances, specific authority exists to recover B&P costs from the agency or GAO, when an untimely bid protest is filed.

However, there is no specific authority for agencies to resolve a bidder's request for B&P costs when the bidder has not filed a bid protest requesting said costs. Hence, the conclusion must be that if a bidder fails to file a timely agency bid protest for B&P costs, AMC can only pay these costs if it determines that a good cause or significant issue exists for AMC to consider an untimely bid protest on the merits. In that case, the bidder should be advised to submit its untimely bid protest for action. If no good cause or significant issue exists, then the bidder must file a claim with the COFC to recover these costs.

Workers' Comp--Overseas Performance

The military is becoming increasingly dependent on U.S. civilian contractors to support its operations overseas. The FAR provisions and clauses which address compensation for detention, injury and death of the civilian contractor workforce outside the United States is the sub-

ject of this article submitted by CECOM's **Janet Baker**, DSN 879-0662 (Encl 6)

At the outset of World War II, Japanese forces attacked the strategically important Wake Island in the Pacific Ocean. During the battle numerous contractor employees were killed or wounded; 1146 were captured

and detained by Japan for the duration of the War.

A number of legal avenues of relief are currently available for contractor employees (or their survivors) who, like the construction workers on Wake Island, are captured, injured, or killed while supporting military operations.⁷

Federal Contractors Must Inform Their Employees--Concerning Union Dues

Federal contractors must inform their employees that they have the right not to join a union, and to limit the amount they pay in union dues, according to a recent Executive Order.

Issued the same day as Executive Order 13203, which dissolved the National Partnership Council, Executive Order 13201 mandates the notice federal contractors must give their employees about their right not to pay certain union dues or fees.

Under E.O. 13201, federal agencies must include in their contracts the following provisions:

(1) During the term of the contract, the contractor will post a conspicuous notice stating that employees cannot be required to join a union or maintain membership in a union in order to keep their jobs; and

(2) The contractor's notice will also advise employees that in certain cases, the law allows a union and an employer to enter into an agreement requiring employees to pay periodic dues and initiations fees, but that employees who are not union members can only be required to pay costs relating to collective bargaining, con-

tract administration, and grievance adjustment.

Non-union member employees cannot be required to pay other costs, and are entitled to reduced dues and fees.

Contractors who fail to comply with these notice provisions may have their contracts cancelled, terminated, or suspended. The same notice language must also be included in all federal sub-contracts. E.O. 13201 was published in the February 22, 2001 Federal Register, Vol. 66, No. 36, pp. 11219-11224.

Unacceptable License Terms

ARL's **Bob Chase**, DSN 390-1599, reports that there has been an increase in the number of cases wherein license agreements contain terms that the government is unable to accept (Encl 7).

His paper states that the problem was seen originally in software licenses but now it also involves online subscriptions.

Some of the problems that are identified include:

Merger Clauses that do not recognize the validity of other contract clauses required by the government.

Applicable Law when we must remind the vendor that Federal law applies, not just state law.

Disputes and the appli-

cability and relevancy of the Disputes Clause.

Credit Card Buys and the applicable law under the Contract Disputes Act.

Vendors are often surprised that doing business with the government mandates certain mandatory terms, conditions and clauses.

Management Decision Documents and Task Orders under ID/IQ Contracts

There are a number of statutes that deal with advisory and assistance services. These statutes either require identifying to Congress the amount of funding used for these services or determinations to be made before issuing contracts for advisory and assistance services. These are **Management Decision Documents**. For example:

31 USC 1105 requires "The Director of the Office of Management and Budget shall establish the funding for advisory and assistance services for each department and agency as a separate object class in each budget annually submitted to the Congress under this section." This section identifies the terms for the 3 categories of advisory and assistance services i.e. management and professional support services; studies, analyses, and evaluations; and

engineering and technical services.

10 USC 2212 provides the meanings of the terms used in 31 USC 1105. Each year the Secretary of Defense must conduct a review of services expected to be performed under contract to ensure that advisory and assistance services are properly classified in the advisory and assistance services object class.

The paper also addresses other laws, DOD regulations, ARs and AMC Circulars that address task orders and IDIQ contracting.

The paper suggests that requiring a MDD or a mini-MDD for task orders when a full MDD has already been approved adds little and may be contrary to acquisition streamlining principles (Encl 8).

POC is **Sharon Patterson**, AMCOM, DSN-746-6133 (Encl 8).

Commerciality Decision & Documenting Market Research

The Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items. The FASA requires documentation of the Government's commerciality decision.

A commerciality decision is a determination of the availability of commercial items that will meet the Government's requirements. Notwithstanding Government acquisition reform initiatives that have emphasized the preference for acquisition of commercial items, it is still evident that many obstacles exist to ensuring this legislative preference is understood and effectively implemented.

How can Government acquisition personnel make more informed decisions with respect to whether to acquire a commercial item? This is question that forms the basis by an excellent article prepared and submitted by **Marla Flack**, CECOM Competition Management Division, DSN 992-5057 (Encl 9).

Labor-Management Partnerships No Longer Mandated

On February 17, 2001 President Bush signed Executive Order 13203. The Executive Order abolishes the requirement to form labor management partnerships and partnership councils. It also revokes the requirement to bargain on those “permissive” matters covered by 5 USC Section 7106(b)(1).

The XO revokes Executive Order 12871, Labor-Management Partnerships. It also revokes the Presidential Memorandum of October 28, 1999 entitled “Reaffirmation of Executive Order 12871 — Labor Management Partnerships.”

It should be noted that the President Bush’s Order specifically provides that “Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order.” It also directs OPM and heads of executive agencies

to “promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12871 of October 1, 1993, or the Memorandum, to the extent consistent with law.” (Note that the Order does not direct installations to take any specific action at this time.)

What does the Order mean to you? Well, first of all, President Bush’s Order does not preclude partnerships, it simply does not require them as EO 12871 may have been interpreted. Likewise, the new Order does not seek to reverse cooperative labor-management relationships. Further, the Order specifically provides that it does not abrogate any collective bargaining agreements. As such, labor-management agreements requir-

ing partnerships or bargaining overpermissive matters remain enforceable until renewal. If either party wants to modify any “partnership” language contained in their agreement, it must do so during the open window period. Otherwise, an automatically renewed agreement would continue to contain the previously agreed to “partnership” language. (Even if the parties wish to maintain their contractual “partnership” language, they should remove all references to EO 12871 during the renewal period.)

Thanks to **Dave Helmer**, DAPE for providing this information.

Enclosed for your information are:

Executive Order 13203 (Encl 10) and

OPM Guidance on the Implementation of the executive Order (Encl 11).

Installation-CPOC Coordination on Grievances and EEO Complaints

DAPE--Civilian Personnel Policy issued a memorandum on March 16, 2001, reemphasizing the requirements for coordination between installations and CPOCs when processing grievances and EEO complaints involving CPOC actions (Encl 12)

All formal grievances challenging CPOC actions must be coordinated with the appropriate CPOC upon receipt. Coordination is also required before settling or resolving EEO complaints or grievances if the terms of the agreement or the remedy require action by a CPOC or have the effect of changing or overruling a CPOC action. These requirements are specifically described in paragraphs 1 and 4 of reference 1.a and paragraph 3 of reference 1.b.

Army personnelists, EEO officers and labor counselors are strongly encouraged to review the above references and ensure compliance in processing and set-

tling grievances and complaints. The references are available at http://cpol.army.mil/library/armyregs/memos2k/mer_cpoc_griev.html and <http://www.cpol.army.mil/library/armyregs/memos/eeocpoc9.html>, respectively.

The document encourages communication between the installation and activity to develop a process that works for all concerned. Importantly, it recommends feedback to and from the CPOCs to the serviced activities and installations.

Although not required by the memo, the document suggests that the same coordination be accomplished for employment issues that are not grievances or EEO matters.

The document is a product of the work of the OTJAG Labor and Employment Law Office, DA EEOCRA and DA Personnel.

MSPB: Gov't Smaller

The Merit Systems Protection Board has just updated its findings concerning a number of federal-sector Human Resources issues that it has studied over the past five years.

First, the MSPB says that while many believe that the federal government has gotten bigger over the years, the fact is that the number of federal employees has decreased as the U.S. population has increased. In fiscal year 1970, there were 14.4 federal workers per 1,000 people. In FY 1995, that number declined to 10.9 federal employees per 1,000, and dropped even further in FY 1999, to 9.9 per 1000.

The MSPB also found that the percentage of the federal workforce that is perceived as unsatisfactory is small. In the MSPB's Merit Principles survey 2000, federal employees believe that only 3.9 percent of their fellow employees are performing poorly enough to be fired. Only 25 percent of survey participants believed that corrective action is taken when employees fail to meet performance standards. For more information, contact the MSPB at 1-800-209-8960, or by e-mail at studies@mspb.gov.

Hiring During a RIF

Unfortunately, Reductions in Force (RIF) have been an all too familiar experience within the Department of Defense over the last few years. Fortunately, however, many of our employees are ready to retire, or are willing to take a buyout and move on to greener pastures. Often times, our organizations must down size because the mission of the organization has changed. Certain skills that were once required are required no longer and new skills—and positions—are needed. In many cases, employees who are to be separated under a RIF do not have the qualifications necessary to be placed into the new positions and management is unwilling to waive qualifications because the positions are critical to the success of the new organization and success is needed quickly. Not surprisingly, employees facing separation believe they are entitled to vacant positions in the new organization, even if they are not qualified.

What is particularly hard to swallow for employees facing separation is when their organization competitively fills positions with personnel from outside of the organization. The fact of the matter is that hiring during a RIF is legal.

“Each agency is responsible for determining the categories within which positions are to be required, where they are to be located, and when they are to be filled, abolished, or vacated.” 5 CFR § 351.201(a)(1). That decision is for management alone. *Griffin v. Dept. of Agriculture*, 2 M.S.P.B. 335, 337 (1980). In a RIF appeal to the Merit Systems Protection Board (MSPB), once an agency has proved by preponderant evidence that the reorganization was bona fide and based on good faith with appropriate management consideration, the MSPB will defer to the agency’s decision. There is no regulatory requirement for an agency to fill vacancies during a RIF. *Klegman*

v. DHHS, 16 MSPR 455, 457 (1983). However, once an agency determines to fill vacancies during a RIF the agency must fill those positions based on employee retention standing and their respective assignment rights through the use of “bumping” and “retreating”. The situation is different when an agency decides to fill its vacant positions competitively. If during a RIF an agency decides to fill positions competitively, RIF regulations do not apply to the selection procedures. Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*, Dewey Publications, Inc. (1999), p. 1985; *Dante v. National Science Foundation*, 16 MSPR 314 (1983). The MSPB has no jurisdiction over RIF appeals based upon a claim of non-selection for vacant positions filled competitively.

For more on this subject from Steve Kellogg, OSC, DSN 793-7364, your attention is invited to Enclosure 13

Briefing Commanders on Environmental Justice

In 1994 President Clinton issued Executive Order 12898 on Environmental Justice to ensure the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Since then there has been a wealth of development of policies and strategies for implementing this Executive Order.

How do our Army actions comply with this directions, and what does it mean?

The SBCCOM environmental team, **Peggy Giesecking** and **Ruth Flanders** recently putting together a briefing for their Commanders and program people. It is provided here for your use, including hyperlinks to the many sources of information (Encl 14)

April 2001

EPA Issues Stricter Lead Standards

As part of EPA's ongoing efforts to protect children from lead poisoning, the Agency in December 2000 announced tough, new standards to identify dangerous levels of lead in paint, dust and soil.

These new national standards are more protective than previous EPA guidance and will, for the first time, provide home owners, school and playground administrators, childcare providers and others with standards to protect children from hazards

posed by lead, including children in federally-owned housing.

Under these new standards, federal agencies, as well as state, local and tribal governments, will have new uniform benchmarks on which to base remedial actions taken to safeguard children and the public from the dangers of lead.

The new EPA rule and other information on lead programs can be found at <http://www.epa.gov.lead/>

Environmental Reviews: Actions Abroad

The Department of Defense Office of General Counsel recently wrote an opinion critical of the Air Force for not conducting a review of whether the requirements of Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, applied to a program which the

Air Force had with the Czech Republic regarding collection of data from the open air testing of chemical agents (Encl 15).

Ruth Flanders, SBCCOM DSN 584-4652, provides an analysis of the opinion and its possible application to other Army programs abroad (Encl 16).

ELD Bulletin

The January/February edition is provided (Encl 17).

Ethics Focus

Civilian Visitors Operating Military Equipment

DEPARTMENT OF THE ARMY
WaSHiNGTON, D.C. 20310
March 2, 2001

MEMORANDUM FOR PRINCIPAL OFFICIALS
OF HEADQUARTERS, DEPARTMENT OF THE
ARMY

SUBJECT: Civilian Visitors Operating Military Equipment

Department of the Army message subject: Civilians Operating U.S. Army Equipment dated 191 326Z Feb 01 is rescinded.

The Secretary of Defense has directed in a memorandum dated February 22, 2001, same subject, a DoD-wide moratorium on permitting civilian visitors to operate military vessels, aircraft, vehicles, and crew-served weapon systems (to include equipment under the control of the Army National Guard and Air National Guard) when such operation could cause, or reasonably be perceived as causing, an increased safety risk. This moratorium is effective regardless of how closely military personnel supervise civilian visitors.

Civilian and contractor employees who must operate military equipment as part of their duties are not considered civilian visitors for the purposes of this memorandum and are not covered by this moratorium.

The moratorium imposed by the Secretary of Defense is to be observed by all units and organizations in the U.S. Army. In addition, commanders will ensure that civilian operation of other types of equipment, including small arms, is done safely, under the direct supervision of Department of Defense employees or military personnel and in accordance with prescribed policies and regulations. In those instances where established policy or regulation does not cover the situation, approval authority will rest with the first general officer in the chain of command.

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Interactive Simulators

During CLE 2001 visit and tour the STRICOM Technical Center and try out simulators.

Protecting Non-Public Information

At the CG's last townhall meeting, **Mike Wentink** gave a short presentation about contractor employees in the Federal workplace, with the primary focus on the protection of nonpublic information, because this is where there is a significant vulnerability. In continuing to raise our awareness of these issues, Mike decided to reissue this Ethics Advisory from 1998.

There are a number of laws and regulations that protect nonpublic information, such as:

Σ The procurement integrity law restricts the release of source selection and contractor bid and proposal information, and provides civil fines and criminal penalties for improper release.

Σ The trade secrets act makes it a crime to improperly release contractor trade secrets and other confidential business information outside the Government.

Σ *The Standards of Ethical Conduct for Employees of the Executive Branch* prohibits us from releasing, exploiting, or allowing others to exploit nonpublic information.

In addition, restrictions on our use of information can arise in other ways:

Σ We often buy technical data and computer software with restrictions on our release outside the Government.

Σ A release of advanced procurement information to a potential competitor could result in a contracting officer determining that this source is barred from competing for the requirement.

Σ An improper release of information outside the Government could result in having to re-do or fix a procurement as a result of a successful protest.

The full article is at Enclosure 18,

Contractors in the Workplace-- GAO Protest Decision

In a recent case, we were not sensitive to the issues, and did not protect anyone — everyone lost when the GAO sustained the protest.

It seems that the successful contractor's subcontractor had access to nonpublic information (the sub maintained a database under another contract) that gave it a competitive advantage when preparing the proposal.

Not understanding the potential for organizational conflicts of interest, and not working to set up walls or otherwise to minimize it, the successful contractor had an unfair competitive advantage. See Johnson Controls World Services, Inc., GAO, B-286714.2, 2/13/01).

Ethics Focus

Government Support to Contractors...

Related to the important issue of government support to contractors, HQ AMC promulgated a guidance statement with respect to the Future Combat Systems Program

Recently, the Defense Advanced Research Projects Agency (DARPA) awarded four "Section 845 Other Transactions" for development work for the Future Combat Systems (FCS) program. Success of the FCS program will require interaction and cooperation between the contractor teams and the Research, Development and Engineering Centers and the U.S. Army Research Laboratory.

Before we establish such relationships, we need to consider the ramifications such actions will have on our resources and the integrity of

the future acquisition process for the FCS. .

This program is being executed in a new way and there is some risk inherent in the approach.

In order to maximize chances of success, we must make ourselves available to the contractor teams to the maximum extent possible consistent with good practice and available resources.

In doing so, we must take necessary steps to ensure that a "level playing field" is maintained and that no perception of impropriety is allowed to develop. We must ensure the integrity of the process.

The complete policy guidance statement to include new approval staffing requirements is provided for you (Encl 19).

...And moving contractors from the Pentagon

In the March 5, *Inside the Army*, we enclose a report that the Pentagon has moved about 30 contractors, as an

expression of concern regarding its ongoing review of the government-contractor relationship (Encl 20).

Collection of Internet and E-Mail Addresses...and Conducting Intelligence Operations

We have provided a recent policy statement entitled "Principles Governing the Collection of Internet Addresses by DOD Intelligence and Counterintelligence Components." (Encl 21)

The document lays the groundwork for determining how to apply intelligence oversight principles to the conduct of intelligence and counterintelligence activities.

The single question addressed in the paper is: Does obtaining an e-mail or site address constitute a collection of information about a United States person?

The paper addresses the impact that EO 12333 and the implementing DOD 5240.1-R has on the issue, although both predate the development of the Internet.

Faces In The Firm

Hail and Farewell

Arrivals

HQ AMC

Bill Adams has been hired to a position in the HQ AMC Intellectual Property Law Division. Welcome back Bill. Retired JAG Colonel and former AMC SJA began his new career on April 8.

CECOM

CPT Robert Paschall left active duty and has become a civilian attorney in Business Law Division B. In connection with his departure from active duty, CPT Paschall received a Meritorious Service Medal on 29 March for exceptionally meritorious service while serving as Environmental Law Attorney, Ethics Counselor and Special Assistant United States Attorney.

AMCOM

CPT Douglas J. Becker, who is assigned to the Acquisition Law Division. CPT Becker comes to us from Hunter Army Airfield, Ft. Stewart, Georgia.

Departures

HQ AMC

Cassandra Johnson, who had been with HQ since 1984 and previously with ARL and MERADCOM at Ft. Belvoir, departed to assume the senior employment law counsel position with the DA Office of General Counsel.

Maj Cindy Mabry, resigned her commission for family reasons—to take care of two beautiful young children—Ben and Olivia.

OSC

Joanne Lieving, Legal Assistant, General Law, has accepted a position with the Rock Island District Corps of Engineers. She has accepted a position as a Real Estate Specialist with the Corps.

TACOM

Paul S. Clohan, Jr., will be resigning from Federal Government service to pursue outside interests. Mr. Clohan will be leaving his Team Leader position within the ARL Office of Chief Counsel, Intellectual Property Law Branch.

Recognition

CECOM

Jignasa Desai, William Kampo, Kim Sawicki, Lea Duerinck and Marc Moller, received the CECOM Quality Team award for the First Quarter, FY2001.

Promotions & New Positions

CECOM

1LT Michael Stephens was promoted to Captain on 1 February 2001

AMCOM

Emanuel A. Coleman was recently promoted to the position of Chief, Adversary Proceedings Division.

TACOM

David Kuhn has been selected as the Chief, Intellectual Property Law Division.

AMC PARC/CHIEF COUNSEL CONFERENCE

Embassy Suites - Ft. Lauderdale, FL

Feb 26-27, 2001

26 Feb

JOINT SESSION

0730-0800 Registration

0800-0815 Welcome and Opening Comments: (Sallie Flavin/Ed Korte)

0815-0930 Working Together to Find Solutions: Task Order Contracting (Nick Femino, Moderator; Pam Locke, AMCRDA-GSA Study & IDIQ Policy; Bob Spazzarini, AMCOM; Harlan Gottlieb, STRICOM; Pat Sheldon, SBCCOM)

0930-0945 Break

0945-1130 Roundtable – Emerging Issues: (PARCs/Chief Counsels)

- Partnering Update (Ed Korte/Sallie Flavin),
- ASA(ALT) Issues & Contractor Manpower Reporting Requirements (Esther Morse)/
- DODIG Price Reasonableness Audit (Ed Cornett)
- FAR Part 9 Changes (Ann Budd/Bill Medsger)
- Award Fee Subject to Disputes Clause (Tony Sconyers),
- A-76 (Vick White/COL Miller)
- Military Extraterritorial Jurisdiction in Deployment Situations (Bill Medsger),
- Smart Business IPT (Emily Clarke)
- AMC Support to Future Combat Systems (Bill Medsger)

1130-1230 Lunch

PARC BREAKOUT SESSION FOR MONDAY

1230-1300 Review of Action Items from Last Conference (Sallie Flavin)

1300-1330 Section 808 (1102 Educational Requirements) (Ed Elgart)

1330-1400 DAR Committee Update (Ed Cornett)

1400-1430 OMA/Contracting Workforce (Emily Clarke)

1430-1500 Contract Closeout/DRID 53 (Ed Cornett)

1030-1100 Break

1030-1100 Charges for Testing – Helen Morrison
1530-1545 AMCOM* (Marlene Cruze)
1545-1600 CECOM* (Ric Keleman)
1600-1615 OSC* (Bill Turnis)
1615-1630 Robert Morse Acquisition Center* (Helen Morrison)
1030-1100 STRICOM*(Daryll Nottingham)
1645-1700 TACOM* (Dan Mehney)
1700-1800 Executive Session: Suite of acquisition metrics; CG's VTCs with PARCs

*Discussion of metrics used by the PARCs in their Acquisition Center

CHIEF COUNSEL BREAKOUT SESSION FOR MONDAY

1230-1245 Introductory Remarks (Ed Korte)
1245-1300 Personnel Changes (Ed Korte)
1300-1500 Washington Update

- IAV Protest Status (Ed Korte)
- Command Group Intent (Ed Korte)
- CCAD Settlement Status (Ed Korte)
- Litigation Reports (Nick Femino)
- HQS RFP Reviews (Nick Femino)
- PEO Structure (Bill Medsger)
- FLSA (Steve Klatsky)
- GOCO Cost Recovery (Steve Klatsky)
- Bottled Water (Bill Medsger)
- Partnering Update (Steve Klatsky)
- Status of Blacklisting Rule (Bill Medsger)
- A-76 SSA at HQs (Bill Medsger)
- Drug Testing of Civilians (Steve Klatsky)
- CLE (Steve Klatsky)
- CLP (Steve Klatsky)
- New Travel Policy (Steve Klatsky)
- Environmental Fine Update (Steve Klatsky)
- Off Post Contamination (Steve Klatsky)

- Hiring Freeze (Steve Klatsky)
- Professional Liability Insurance (Steve Klatsky)

1500-1515 Break

1515-1700 Chief Counsel Roundtable

OSC: (Tony Sconyers)

- Burnside-Ott Award Fee Case
- Preserving the Independence of the KO
- Contractor Responsibility
- Designing Electronic Processes

CECOM: (Kathy Szymanski)

- Meaning of "Urgency" in Sole Source Awards
- Use of the 'Assist' Tool
- DA Policy on Fair Opportunity for Consideration Competitions

TACOM: (Verlyn Richards)

- Draft Arsenal Act Compliance Regulation
- Section 341 FY 01 DoD Auth Act
- Partnering with Acquisition

AMCOM: (Bob Spazzarini)

- Corporate Mergers Increasing OCI

*Dinner at Bimini Boatyard. The cost is \$31.00 per person. It is 3 blocks from the Embassy Suites on the intercoastal waterway.

27 Feb

PARC BREAKOUT SESSION FOR TUESDAY

0800-0830 Roadshow Update/Acquisition Briefing (Ann Budd/Sallie Flavin)

0830-0900 DOD 5000.1 Changes (Sandy Rittenhouse)

0900-0930 ACE/Professional Development Committee (Emily Clarke)

0930-0945 Paperless Update for CG's Spec Assist (Gene Duncan)

0945-1000 Enterprise Learning Center (Ric Keleman)

1000-1015 Break

CHIEF COUNSEL BREAKOUT SESSION FOR TUESDAY

0800-1000

ARL: (LTC Robert Lloyd)

- Collaborative Technology Alliance
- Lab Revitalization Program
- AMC Corporate Contracts

STRICOM: (Harlan Gottlieb)

- Partnering Tips
- Delta Contracting

SBCCOM: (Pat Sheldon)

- Release of Sensitive Info by Patent Office
- AMHA Accounts

JOINT SESSION

1015-1030 Past Performance Update (Sandy Rittenhouse)

1030-1100 Updates (Corporate Contracts/CLS/Waivers) (Vic White)

1100-1130 PMR/RFP/ Review & Source Selection Program (COL Gregory Miller)

1130-1200 Open Discussion

1200-1300 Lunch

1300-1330 PM Transition (COL Lee Parker)

1330-1445 Panel Discussion: 'New developments in E-Commerce' (Bill Medsger, Moderator; Lisa Simon-Electronic Signatures and IT Accommodation for the Disabled; Kathi Szymanski-Reverse Auctions; Gene Duncun-Paperless Contracting Update)

1445-1500 Break

1500-1600 AMC CG Discussion (GEN John Coburn)

1600-1615 Besson Awards (GEN Coburn/Sallie Flavin)

1615-1630 Photos

1630-1700 Wrap-Up/Action Items (Sallie Flavin/Ed Korte)

1700-1730 Executive Session

Legal Research

Court and Board Decisions

[Customs Rulings and Informed Compliance](#)
[DOL Employees' Compensation Appeals Board Decisions](#)
[GAO Comptroller General Decisions](#)

Statutes, Regulations and Publications

Federal Law

[Code of Federal Regulations](#)
[Executive Orders](#)
[Federal Register \(1994 to present\)](#)
[Office of Management and Budget Circulars](#)
[Public Laws](#)
[Public Papers of the Presidents](#)
[THOMAS -- Legislative History](#)
[United States Code](#)
[United States Congress - GPO Access](#)
[Weekly Compilation of Presidential Documents](#)

State Law

[General Laws of Massachusetts](#)
[Texas Statutes](#)

Department of Defense

[Defense Acquisition Regulations Directorate](#)

[DoD Administrative Instructions](#)
[DoD Directives \(1000.1 thru 4999.99\)](#)
[DoD Directives \(5000.1 thru 8999.99\)](#)
[DoD Directive-Type Memoranda](#)
[DoD Forms Program](#)
[DoD Instructions](#)
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[Navy Publications and Regulations](#)

Libraries & Legal Links

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[Legal Ethics.com](#)
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Professional Associations & References

[American Bar Association](#)

[JAGCNet Web Site](#)

[Massachusetts Bar Association](#)

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Search Engines

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[HotBot \(Search Entire Web\)](#)

[Lexis Exchange](#)

[Go.com \(Search Entire Web\)](#)

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[GPO Government Information Locator Service \(GILS\)](#)

[SearchGov.com](#)

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[Reverse Phone Directory](#)

[SuperPages®.com](#)

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Topic Listing

Acquisition Law

[Acquisition Reform \(Navy's Turbo Streamliner\)](#)

[Advanced Concept Technology Demonstrations](#)

[Army Office of General Counsel Fiscal Law Outline](#)

[ASA\(ALT\) - Acquisition, Logistics and Technology](#)

[Defense Acquisition Deskbook](#)

[Defense Acquisition Regulations Directorate](#)

[DoD Procurement Gateway \(RFQs and K Awards\)](#)

[Defense Programs of the Bureau of Export Administration](#)

[Electronic Guide to Alternate Dispute Resolution](#)

[Federal Acquisition Circulars \(FACs\) Looseleaf](#)

[Federal Acquisition Jumpstation \(Acquisition Links\)](#)

[GAO Comptroller General Decisions](#)

[Office of Federal Procurement Policy \(OFPP\) - Policy Letters](#)

[Prompt Payment Act Interest Rate](#)
[Treasury's Listing of Approved Sureties \(Department Circular 570\)](#)

Civilian/Military Personnel

[Army Benefits Center - Civilian \(ABC-C\)](#)
[Army Civilian Personnel Online](#)
[DASD for Civilian Personnel Policy](#)
[Defense Civilian Personnel Management Service \(CPMS\)](#)
[DoD Civilian Personnel Manual](#)
[DOL Employment and Training Administration \(Federal Employee's Survival Guide\)](#)
[Employee-Member Self Service \(E-MSS\)](#)
[Navy Military Personnel Manual \(MILPERSMAN\)](#)
[U.S. Office of Personnel Management](#)

Customs Department

[U.S. Customs Service](#)

Equal Employment Opportunity

[HQ AMC Equal Employment Opportunity Homepage](#)
[United States Department of Labor](#)

Ethics

[DoD Standards of Conduct Office](#)
[Joint Ethics Regulation](#)
[HQ AMC Government Ethics Team](#)
[Office of Special Counsel - Political Activity \(Hatch Act\)](#)
[Office of Special Counsel - Whistleblower Disclosures](#)

Finance

[ASA \(FM&C\) - Financial Management & Comptroller](#)
[ASA \(FM&C\) - Resource Management Publications](#)
[Defense Finance and Accounting Service](#)
[DoD Financial Management Regulations \(DoD 7000.14-R\)](#)
[DFAS-IN Regulation 37-1](#)
[Office of the Under Secretary of Defense \(Comptroller\)](#)
[Treasury Department - Financial Management Service \(FMS\)](#)

FOIA and Privacy Act

[DoD Privacy Act Systems of Records Notices](#)
[DOJ Freedom of Information Act \(FOIA\) Guide](#)
[Privacy Act Issuances](#)

Health Benefits Information

[Blue Cross and Blue Shield - Federal Employee Program](#)
[Blue Cross Blue Shield of Massachusetts](#)
[Massachusetts Board of Registration in Dentistry](#)
[Office of Personnel Management - Federal Employees Health Benefits](#)
[TRICARE, Military Health System](#)

Intellectual Property

[United States Patent and Trademark Office](#)

Legal Assistance

General

[Aberdeen Proving Ground - Legal Assistance Fact Sheets](#)
[Federal Voting Assistance Program \(FVAP\)](#)

Family Law

[California Department of Child Support Services](#)
[Federal Office of Child Support Enforcement](#)
[Handbook on Child Support Enforcement](#)

Bankruptcy

[U.S. Code Title 11 \(Bankruptcy\)](#)

Credit Reporting Agencies

[Equifax](#)
[Experian Consumer Center](#)
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Military & Veteran

[Army Homepage](#)
[Army Materiel Command](#)
[Army Office of the General Counsel](#)
[Department of Veteran Affairs \(Electronic\)](#)
[Department of Veterans Affairs \(Standard\)](#)
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Small Business Innovative Research (SBIR)

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[Defense Acquisition University](#)
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Travel and Transportation

[DoD Per Diem Committee](#)
[Joint Federal Travel Regulation \(JFTR\) - Military](#)
[Joint Travel Regulation \(JTR\) - Civilian](#)

SPRING 2001

LEXTALK

a newsletter from LEXIS-NEXIS

Enhancements to Public Records Databases

The following enhancements have been made to the public records databases available on the Lexis-Nexis services to help you obtain more thorough and consistent results. These changes apply only to public records databases. Other types of data -- news, company reports, transcripts, etc. -- are not impacted by these changes.

EQUIVALENTS- For example, using words like "avenue", "street", and "road" in your searches in the public records data will also find their standard abbreviations "ave", "st", or "rd" -- and *vice versa*. With the exception of Oregon, state abbreviations are now equivalents for the state's name.

SEARCHING LEADING ZEROS- For example, a search for the ZIP code "01045", will now look for exactly that number, leading zero and all!

DEPLURALIZATION- Automatic pluralization of search terms has been "turned off" in the public records database. This means that if you were looking for information on someone named "Connor", you will not automatically receive information on someone named "Connors" as well.

REMOVAL OF NOISE WORDS - All standard noise words, (those words that are used so commonly in text that they have been deemed non-searchable by the Lexis-Nexis system), are now searchable in the public records databases. The following standard noise words have been added to the equivalency list for public records data: "assoc", "associate", "association", "co", "company", "corp", "corporation", "inc", "incorporated", "limited", and "ltd". "Of" and "the" continue to be noise words.

What's New On LEXIS®???

BNA Tax Management Weekly State Tax Report

Provides state-by-state analysis of the state code and regulations, state administrative and judicial court decisions, and state administrative pronouncements. Covers income and franchise taxes, sales and use taxes, property taxes, miscellaneous taxes and other developments.

PRACTISING LAW INSTITUTE:

Bankruptcy Deskbook

Provides comprehensive and accessible guidance to serve bankruptcy clients' interests. Written by experts who offer both a judge's and practitioner's perspective on bankruptcy issues, this resource clarifies and analyzes the Bankruptcy Code, related federal and state statutes, and the growing body of case law, enabling bankruptcy practitioners to select and secure the proper legal remedy for every client.

Patent Licensing

Offers a complete and practical guide to negotiating and drafting patent license agreements. A step-by-step resource that enables practitioners to ensure that the provisions in the final agreement serve the client's financial goals while minimizing risks.



Practice Area Corner

NEED TO NAVIGATE TO SPECIFIC PAGES WITHIN CASELAW REPORTERS LAW REVIEW ARTICLES PUBLIC LAWS AND OTHER DOCUMENTS THAT ARE PAGINATED ONLINE

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Or

2) There is a new Page box located on the stationary navigational bar at the bottom of the screen, where you'll find a drop-down list of reporters available for the case. Simply click on the drop-down arrow and choose the reporter you're interested in.

Tip Of The Month

Verify your work's accuracy in its earliest stages, pinpoint the right facts as you build your premise, and save research time.

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Electronic Signatures

1. The Electronic Signatures in Global and National Commerce Act, 15 USC Sec. 7001, P. L. 106-229, hereinafter “the Act”, provides at Section 101, that a signature, contract or other record relating to interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form. The Act further provides that a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. Oral communications, or a recording of an oral communication, however, do not qualify as an electronic record under the Act. The Act became effective on 1 October 2000.
2. The Act also provides that if there is a requirement that a contract or other record to a transaction be retained, that requirement is met by retaining an electronic record of the information, provided it accurately reflects the information set forth in the contract or other record and remains accessible to all persons who are entitled to access in a form that is capable of being accurately reproduced.
3. An electronic signature is defined at 15 USC Sec. 7006 as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” An electronic record is defined as “a contract or other record created, generated, sent, communicated, received, or stored by electronic means.”
4. There are several specific exceptions to the use of electronic records and electronic signatures at 15 USC Sec. 7003 - Specific Exceptions. One of the listed exceptions, which may be of particular interest to the legal community, is:
 - (b) Additional Exceptions. – The provisions of section 101 shall not apply to –
 - (1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
5. Under the Government Paperwork Elimination Act (GPEA), part of P.L. 105-277, included in H.R 4328, the Omnibus Consolidated and Emergency Supplemental Appropriation Act for FY 1999, the Office of Management and Budget (OMB) is charged with development of a policy for Executive agencies to follow in using and accepting electronic documents and signatures. The GPEA provides that in developing procedures for the use of electronic signatures, OMB is to give due consideration to maintaining compatibility with standards and technology for electronic signatures generally used in commerce and industry and by state governments. OMB is not to inappropriately favor one industry or technology, is to ensure that electronic signatures are as

reliable as is appropriate for the purpose in question and that electronic record keeping systems reliably preserve the information submitted.

OMB Guidance

6. On 5 March 1999, OMB issued proposed guidance for implementation of the GPEA. In the proposed guidance, OMB emphasized the need for security and privacy protection in the use of electronic signatures. Before selecting the type of electronic signature to be used and accepted, Government agencies must perform a risk assessment of the electronic signature alternatives and they must maintain appropriate confidentiality and security in accordance with OMB Circular A-130, Appendices I and III. According to OMB, the goal of information security is to protect the integrity of electronic records and transactions.

7. There are several methods of authenticating electronic signatures discussed by OMB in its guidance. Some methods are non-cryptographic such as the “shared secrets” method using personal ID number and passwords; smart cards; digitized signatures and biometric means of identification such as fingerprints or retinal patterns and voice recognition. There are also methods using cryptographic control such as symmetric (or shared private key) cryptography, or asymmetric (public key/private key) cryptography, which are used to produce digital signatures.

8. In using electronic signatures it is important that clear procedures be established so that all parties know what the obligations, risks and consequences are. According to OMB, digitized (not digital) signatures, Personal Identification Numbers (PINs) and biometric identifiers do not directly bind a company or individual to the content of a document. For them to do so, they must be used in conjunction with some other mechanism.

Non-cryptographic Methods of Authenticating Identity

9. The “shared secrets” system provides for a user accessing an agency’s electronic application to enter a “shared secret” such as a password or PIN. The system checks the password or PIN to authenticate the user. If this process is done over an open network, such as the internet, it is necessary that the shared secret be encrypted.

10. A smart card is a plastic card that contains an embedded chip that can generate, store, and/or process data. A user inserts the card into a card reader device attached to a microcomputer or network input device. In the computer, information from the chip is read by security software only when the user enters a PIN, password or biometric identifier. This method provides greater security than use of a PIN alone as the user must have physical possession of the smart card and knowledge of the PIN.

11. Digitized signatures are graphical images of handwritten signatures. Some applications require a user to create a hand-written signature using a special computer input device, such as a

digital pen and pad. The digitized representation of the entered signature is compared with a stored copy of the graphical image of the handwritten signature.

12. Biometrics are unique physical characteristics that can be converted into digital form and then be interpreted by a computer such as voice patterns, fingerprints and the blood vessel patterns present on the retina of one or both eyes. In this method, the physical characteristic is measured, converted into digital form, and then compared with a copy of that characteristic stored in the computer and then authenticated beforehand as belonging to a particular person. This method provides a high level of authentication but as with all shared secrets, if the digital form is compromised, impersonation becomes a serious risk. Thus, this information should not be sent over open networks unless it is encrypted.

Cryptographic Control

13. In a shared private key approach, the user signs a document and verifies the signature using a single key that is not publicly known. The key must be transferred to the recipient of the message. This, however, could undermine confidence in the authentication of the user's identity because the private key is shared between sender and recipient and is no longer unique to one person.

14. Digital signatures are created when the owner of a private signing key uses that key to create a unique mark (called a "signed hash") on an electronic document or file. The recipient employs the owner's public key to validate the authenticity of the attached private key. This process also verifies that the document was not altered. If the private key has been properly protected from compromise or loss, the signature is unique to the individual who owns it, that is, the owner is bound by their signature. A potential problem with this approach is that the private key owner could feign loss to repudiate a transaction. This concern can be mitigated by encoding the private key onto a smart card or an equivalent device, and by using a biometric mechanism (rather than a PIN or password) as the shared secret between the user and the smart card for unlocking the private key to effect a signature.

15. To produce a digital signature, a user has his or her computer generate two mathematically linked keys – a private signing key that is kept private, and a public validation key that is available to the public. The private key cannot be deduced from the public key. In practice, the public key is made part of a "digital certificate," which is a specialized electronic document digitally signed by the issuer of the certificate, binding the identity of the individual to his or her private key in an unalterable fashion.

Agency Implementation of Electronic Signatures

16. In its proposed guidance, OMB advises that, in implementing the use of electronic signatures, Agencies develop a well-documented and established mechanism and procedure to ensure that transactions between the Government and outside contractors are legally binding. The

integrity of even the most secure digital signature rests, however, on the continuing confidentiality of the private key. If a contractor were later charged with a crime or a breach of the terms and conditions of a contract based on an electronically signed document, the contractor would have every incentive to show a lack of control over (or loss of) the private key or PIN. Indeed, if a contractor plans to commit fraud, the contractor may intentionally compromise the secrecy of the key or PIN, so that the Government would later be unable to link the contractor to the electronic transaction.

17. Transactions which appear to be at high risk for fraud, e.g. one-time high-value transactions with contractors not previously known to an agency, may require extra safeguards or may not be appropriate for electronic transactions. One way to mitigate this risk is to require that private keys be encoded on hardware tokens, making possession of the token a critical requirement. Another way to guard against fraud is to include other identifying data in the transaction that links the key or PIN to the individual, preferably something not readily available to others.

Department of Defense (DoD) Guidance

18. On 13 December 1999, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence issued "X.509 Certificate Policy for the Department of Defense." DoD is developing a Key Management Infrastructure (KMI) to provide engineered solutions for security of networked computer-based systems. Part of this KMI is a Public-Key Infrastructure (PKI) consisting of products and services that provide and manage X.509 certificates for public-key cryptography. These certificates identify the individual named in the certificates and bind that person to a particular public/private key pair. The DoD Certificate Policy was issued to provide a unified certification policy for DoD but does not define how the components of DoD are to implement PKI. The intent of the policy is to identify the minimum requirements and procedures that are necessary to support trust in the PKI and to minimize imposition of specific implementation requirements on DoD components. The policy statement defines the creation and management of Version 3 X.509 public-key certificates for use in applications requiring communication between networked computer-based systems. Such applications include contract formation signatures. According to the DoD policy the PKI must support five primary security services: access control, confidentiality, integrity, authentication and technical non-repudiation. The PKI supports these security services by providing Identification and Authentication (I&A), integrity and technical non-repudiation through digital signatures, and confidentiality through key exchange.

19. By memorandum dated 12 August 2000, the DoD Chief Information Officer in the Office of the Assistant Secretary of Defense, issued a memorandum to update DoD policies for the development and implementation of a Department-wide PKI. DoD intends to develop a common, integrated, interoperable DoD PKI to enable security services at multiple levels of assurance. To this end, the memorandum sets forth various dates for the implementation of the use of electronic signatures. For example, the memorandum provides that all electronic mail, as distinct from organizational messaging, sent within DoD will be digitally signed by October 2002.

As part of this plan, PKI certificates will be issued to all active duty military personnel and civilian employees. A PKI certificate is defined as “(a) digital representation of information that binds the user’s identification with the user’s public key in a trusted manner.” The memorandum also states that it is DoD policy that:

Secure interoperability between DoD and its vendors and contractors will be accomplished using External Certificate Authorities (ECAs). ECAs will operate under a process that delivers the level of assurances that is required to meet business and legal requirements. Operating requirements for ECAs will be approved by the DoD Chief Information Officer, in coordination with the DoD Comptroller and the DoD General Counsel. In Interim ECA (IECA) capability is currently available. Requirements for interoperable PKI-enabled services with industry partners shall be met via certificates generated from IECA or ECA.

An ECA is defined as “(a)n agent that is trusted and authorized to create, sign, and issue certificates to approved vendors and contractors for the purpose of enabling secure interoperability with DoD entities.”

20. In discussing this issue with the Office of the General Counsel of DoD, Mr. James Scuro of the CECOM Legal Office spoke with Mr. Douglas Larsen, Deputy General Counsel for Acquisition and Logistics, and Ms. Shauna Russell of his office. Mr. Scuro was advised that the General Counsel’s Office’s position is that electronic signatures should not be used for legally binding documents, such as contracts, until a DoD-wide system is established to ensure that a contractor cannot subsequently repudiate an electronic signature used to execute a contract or other legally binding document. The Office of the General Counsel’s concern is similar to that set forth in the OMB guidance regarding repudiation of contracts by a contractor if electronic signatures are used. Electronic signatures, however, may be used for non-binding documents using the PKI method.

Proposed FAR Revisions

21. On 1 November 2000, the General Services Administration, National Aeronautics and Space Administration and the DoD published a proposed rule in the Federal Register, Vol. 65, No. 212, to amend the Federal Acquisition Regulation (FAR) to authorize the use of electronic signatures. The proposed rule, which has not as of this date been approved, provides for the following amendments to the FAR:

- a. FAR Section 2.101- Definitions, to be amended to incorporate the following definitions:

Electronic commerce means business transactions accomplished by electronic bulletin boards, purchase cards, electronic funds transfer, or electronic data interchange.

* * * *

In writing or written means any expression of information in words, numbers, or other symbols, including electronic expressions, that can be read, reproduced, and stored.

* * * *

Signature or signed means the discrete, verifiable symbol of an individual that, when attached to or logically associated with a written contract or other record with the knowledge and consent of the individual, indicates a present intention to authenticate the contract or other record. This includes an electronic signature made by electronic sound, symbols, or process.

b. FAR Section 4.502 – Policy, to be amended to include the following:

(d) As required by the Government Paperwork Elimination Act (GPEA) (Title XVII of Division C of Public Law 105-277), by October 21, 2003, agencies must allow individuals or entities the option to submit information or transact with the agency electronically when practicable. The GPEA requirement includes execution of contracts and associated records using electronic signatures of the offeror or contractor and the agency.

22. According to Ms. Shauna Russell of the Office of the General Counsel of DoD, the proposed FAR revisions are based on using electronic signatures in accordance with the guidance set forth in the Assistant Secretary of Defense and Intelligence’s memorandum dated 13 December 1999, as updated by the 12 August memorandum by the DoD Chief Information Officer.

SUMMARY

23. Pursuant to 15 USC Sec. 7003, electronic signatures cannot be used for court orders, notices or official court documents, including briefs and pleadings. The Office of the General Counsel for DoD has taken the position that electronic signatures cannot be used to execute legally binding documents such as a contract until a system is established to ensure that a contractor cannot subsequently repudiate an electronic signature. For non-legally binding documents, electronic signatures can be used in accordance with the PKI guidance provided in the 13 December 1999 memorandum by the Assistant Secretary of Defense, Command, Control, Communications and Intelligence.

24. The Point of Contact for this subject in the CECOM Legal Office is Mr. James Scuro, (732) 532-9801; DSN 992-9801.

KATHRYN T. H. SZYMANSKI
Chief Counsel

Source Materials:

1. 15 USC 7001 etc. seq., Electronic Signatures in Global and National Commerce Act (2000).
2. 40 USC 3504(a)(vi), Government Paperwork Elimination Act, amended by Pub. L. 105-277 (1998).
3. Office of Management and Budget Circular A-130, Appendices I and III.
4. Management of Federal Information Resources, 64 Fed. Reg. 43, 10896 (1999).
5. X.509 Certificate Policy for the United States Department of Defense, issued by the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) (1999).
6. Memorandum from Department of Defense Chief Information Officer, Office of the Assistant Secretary of Defense to Secretaries of the Military Departments; Chairman of the Joint Chiefs of Staff; Under Secretaries of Defense; Director, Defense Research and Engineering; Assistant Secretaries of Defense; General Counsel of the Department of Defense; Director, Operational Test and Evaluation; Assistants to the Secretary of Defense; Director, Administration and Management and Directors of the Defense Agencies, Subject: Department of Defense (DOD) Public Key Infrastructure (PKI) (August 12, 2000).
7. Federal Acquisition Regulation; Electronic Signatures, 65 Fed. Reg. 212, 65698 (2000).

POSITION PAPER

ISSUE: What Authority is There for AMC to Pay Bid Preparation Costs?

DISCUSSION: There is Authority for a Bidder to Recover Bid and Proposal Preparation Costs if the Government's Review of its Bid was Arbitrary and Capricious.

A bidder that incurs substantial costs in preparing a response to a solicitation may seek to recover bid and proposal preparation (B&P) costs if it contends that the Government did not fairly and honestly consider its bid. Keco Industries, Inc. v. U.S., 203 Ct.Cl. 566, 492 F.2d 1200, 1203, 16 G.C. ¶ 104 (1974); 31 U.S.C. 3554(c)(1)(B)(2000); FAR 33.102(b), 33.104 (h). Protesters may request B&P costs by filing a protest with the agency, General Accounting Office (GAO), or the United States Court of Federal Claims (COFC). *Id.*; ES-KO, Inc. v. United States, 44 Fed Cl.Ct. 429 (1999); Miller Elevator Service Company, B-284870.3, Aug. 3, 2000, 2000 C.P.D. ¶ 126. California Marine Cleaning v. United States, 42 Fed. Cl. 281 (1998). The Government's policy, however, is to try to resolve all conflicts by mutual agreement at the contracting officer's level through open and frank discussions. FAR @ 33.102(e), 33.103(b), 33.204. Hence, prior to submitting a protest, the parties are encouraged to try to mutually resolve the conflict. *Id.*; Dock Express Contractors, Inc., B-223966, Mar. 4, 1987, 87-1 CPD ¶ 243. If the parties are unable to resolve the conflict through open and frank discussions, the protestor may file a protest with the agency or GAO, or appeal to the COFC. ES-KO, Inc. v. United States, *supra*; Miller Elevator Service Company, *supra*; California Marine Cleaning v. United States, *supra*. Likewise, if an agency protest is filed and the conflict is not resolved, the protestor may file a protest with the GAO, or appeal to the COFC. Chas. H. Tompkins Company v. United States, 43 Fed. Cl. 716 (1999); FAR @ 33.102. A protestor that is not satisfied with GAO's recommendation may seek judicial review of the agency's action through the COFC under the Administrative Procedures Act (APA). *Id.*; Shoals American Indus. Inc. v. United States, 877 F.2d 883 (11th Cir. 1989).

Agency Action

A bidder may recover its B&P costs from a government agency, if a timely bid protest is filed with the contacting officer. FAR

33.102(b)(1). Furthermore, in some situations, a bidder that files an untimely bid protest with an agency may recover B&P costs from the agency. FAR 33.103(4)(e). The decision regarding whether to pay a protester's B&P costs should be based on an assessment of the risk and cost of litigating an issue, and, the likelihood that the protester will prevail on the issue if a protest/appeal is subsequently filed with GAO or the COFC. The assessment should be completed using the standard that both GAO and COFC have adopted for determining whether protesters are entitled to be paid B&P costs. That standard is fully discussed in the discussion of Protests to GAO.

If the assessment leads the contracting officer to believe that the protester would most likely be awarded B&P costs by GAO and COFC, and it is in the Government's best interest to pay the claimant's claim for B&P costs, the contracting officer should strongly consider settling the matter. The payment of B&P costs should be charged to the agency's procurement appropriations. 31 U.S.C. @ 3554(c). If the contracting officer elects not to pay the B&P costs, or the protester is not happy with the proposed resolution, the protester may file a protest with GAO, or appeal with the COFC, for payment of the claim. ES-KO, Inc. v. United States, supra; Miller Elevator Service Company, supra; California Marine Cleaning v. United States, supra. The claimant may also appeal the contracting officer's decision to the COFC. FAR § 33.211(a)(4)(v)

Protests to the Agency

Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests. ES-KO, Inc. v. United States, supra; FAR @ 33.103(a); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). An agency protest is a written objection, by an interested party, filed directly with the contracting officer or other cognizant official within the agency regarding a solicitation, proposed award, or award. ES-KO, Inc. v. United States, supra; Mammoth Firewood Company, B-223705, Sep. 4, 1986, 86-2 CPD ¶ 261; FAR @ 33.101(b)(2), 33.103(b), 33.103(d)(3), 33.204. The written objection must convey dissatisfaction and request corrective action. Mammoth Firewood Company, supra.

If the agency head determines that, as a result of a protest¹, a solicitation, proposed award, or award is improper, he may take any action the GAO could have recommended had the contractor filed the protest with GAO. FAR @ 33.102(b)(1). Thus, the agency must be familiar with GAO's standards for recommending the payment of B&P costs, and understand when B&P costs can be awarded². Since GAO can recommend the agency pay B&P costs, the agency head can pay B&P costs if, as a result of a protest, he determines that a solicitation, proposed award or award is improper. FAR @ 33.102(b), 33.104(h). The agency must use funds available for the procurement to pay the costs awarded. FAR @ 33.104(h); 31 U.S.C. 3554(c)(2)(2000).

Agency protests are filed directly with the contracting officer. ES-KO, Inc. v. United States, *supra*. The contracting officer must consider and seek legal advice for all agency protests. FAR 33.102(a). However, in accordance with agency policy, protesters may request an independent review of their protest at a level above the contracting officer. ES-KO, Inc. v. United States, *supra*; FAR @ 33.103(d)(4). Agency procedures and solicitations must advise potential bidders and offerors of this right. *Id.* Executive Order 12979 directs agency heads to create a system "to the maximum extent possible," that allows for the "inexpensive, informal, procedurally simple, and expeditious resolution of protests." DataVault Corp., B-249054.2, Aug. 27, 1992, 92-2 CPD ¶ 133; 31 U.S.C. @ 3554 (2000); FAR @ 33.103(c); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). The use of alternative dispute resolution (ADR) techniques, third party neutrals, and another agency's personnel are acceptable agency protest resolution methods. FAR @ 33.103(c). Established procedures for effectively resolving agency protests are stated in FAR 33.103(d)³. The purpose of these procedures is to effectively resolve agency protests, build confidence in the Government's acquisition system, and reduce protests outside of the agency. *Id.* Protestors must comply with these procedures, as well as the timelines for filing protests. *Id.*; FAR 33.102(f), 33.103(e); 4 C.F.R. § 21.2(a)(3)(1996); Canadian Commercial Corporation, B-222515, July 16, 1986, 86-2 C.P.D. ¶ 73. Consolidated Management Services, B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76.

Agency protests must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has

¹ "[A]s a result of a protest" means the agency head is limited to taking this action only after a protest (a written objection by an interested party) has been made.

² GAO's standards for recommending the payment of B&P costs, and the issue of when B&P costs can be awarded are discussed below in the subsection pertaining to "Protests to GAO."

³ This paper does not discuss these procedures in detail.

established more restrictive time frames. 4 C.F.R. § 21.2(a)(3)(1996); Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228; IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169. Bid Protests, based upon improprieties in a solicitation, must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. @ 21.2(a)(1)(2000); Pemco Aeroplex, Inc., B-280397, Sep. 25, 1998, 98-2 CPD ¶ 79. On the other hand, bid protests based on matters other than alleged solicitation improprieties, must be filed with the contracting officer no later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier. FAR 33.103(d)(4); 4 C.F.R @ 21.2(a)(2); g. Marathon LeTourneau Sales & Services Co., B-254258, Aug 3, 1993, 93-2 CPD ¶ 77; Davidson Company, Inc., B-249331, Jul. 14, 1992, 92-2 CPD ¶ 21; WildCard Associates, B-241295, 241300, Oct. 19, 1990, 90-2 CPD ¶ 321. Agencies are required to attempt to resolve agency protests within 35 days after the protest is filed. *Id.*; FAR @ 33.103(g). If the agency protest does not resolve the conflict, interested parties may file a protest with GAO or the COFC. Chas. H. Tompkins Company v. United States, *supra*. These timelines are important because bid protests are serious matters that can adversely impact on the procurement system, unless effective and equitable standards exist. Dock Express Contractors, *supra*. These timelines ensure that all parties have a fair opportunity to present their cases, and protests are resolved in a reasonably speedy manner without unduly disrupting the government's procurement process. *Id.*

Agency Resolution without a Bid Protest

No authority has been found, which allows the agency or contracting officer to resolve any conflict they deem should be resolved. Likewise, no specific authority has been found, which authorizes the contracting officer to pay B&P costs to a contractor that has not filed a bid protest. Although the Armed Services Board of Contract Appeals (ASBCA) previously professed jurisdiction over bid protests for B&P costs based on an implied contract theory, case law is clear that the ASBCA does not have jurisdiction to hear bid protest cases, and no implied contract exists based on these types of cases. Apex Management Services, ASBCA No. 27341, 86-3 BCA ¶ 19,167; Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318. Hence, the agency, GAO and COFC are the proper entities to resolve bid protests. FAR 33.103, 33.104, Shoals American Indus. Inc. v. United States, *supra*.

Previously, the Armed Services Board of Contract Appeals (ASBCA) believed it had jurisdiction to award B&P costs for a claim filed regarding a non-award and cancelled procurement or solicitation. Hi-Tech Electronics Corp., ASBCA No. 25968, 81-2 BCA ¶ 15,360; Consumers Packing Company, ASBCA No. 27092, 82-2 BCA ¶ 15,996. The Board rationalized that its jurisdiction under the CDA clearly depended upon the existence of a contract; and, the CDA applied to any express or implied contract (including those of the nonappropriated fund activities. Hi-Tech Electronics Corp., *supra*. The Board further rationalized that allegations that the contracting officer failed to give honest consideration to contractors' bids provided a "colorable factual situation within the purview of the implied contract." *Id.* Thus, the Board concluded that its jurisdiction was established by the existence of an implied contract, which authorized it to grant the same remedy that the COFC declared to be available for a breach. *Id.* However, the findings of jurisdiction in those cases were ultimately overruled by the Federal Circuit in Coastal Corporation, Moss Bluff Storage Venture and New Jersey Strategic Reserve v. United States, 713 F.2d 728 (U.S. App. 1983); James M. Smith, Inc., ASBCA No. 81-251-1, 83-2 BCA ¶ 16,866; Ammon Circuits Research, *supra*.

In Coastal Corporation, *supra*, Appellant claimed it should be awarded B&P costs under the theory of implied contract because the Government improperly cancelled a solicitation. The court vacated the decision rendered by the Energy Board of Contract Appeals and stated as follows:

The theory upon which a contractor may recover bid preparation costs is that the government had breached an

implied contract, obligating it "to treat a bid honestly and fairly," because its "conduct was arbitrary and capricious toward the bidder-claimant." . . . That implied contract, which defines the way the government must deal with bids in the process of selecting a contractor, is not a contract for the procurement of goods under section 3(a) of the Act. The implied contract to give bids "fair and honest consideration" . . . that the appellants assert the government breached, was preliminary and ancillary to any contract, express or implied, the government might enter into for goods or services. It was not itself such a contract, however.

Id. The court further quoted United States v. John C. Grimberg, 702 F.2d 1362, 1368 (Fed. Cir. 1983), which stated that "Congress explicitly specified the types of contracts that it intended the Act to cover. An implied contract to treat bids honestly and fairly is not one of them. The [Act] deals with contractors, not with disappointed bidders . . ." *Id.* These statements have been restated in ASBCA cases. Ammon Circuits Research, supra; LaBarge Products, ASBCA No. 33593, 91-3 BCA ¶ 21,110; Fil-Coil Company, Inc., ASBCA No. 27216,82-2 BCA ¶ 16,125. Since Coastal Corporation, supra, the ASBCA has held that it does not have jurisdiction to hear bid protest issues. Zero Manufacturing Company, ASBCA No. 16,850, 83-2 BCA ¶ 16,850; Wendel Lockard Construction Co., ASBCA No. 33896, 87-3 BCA ¶ 20,055; E.M. Scott & Associates, ASBCA No. 45869, 94-1 BCA ¶ 26,258; Apex Management Services, supra. In fact, in Wendel Lockard Construction Co., supra, the ASBCA concluded that "[u]nder the Contract Disputes Act, the Board has jurisdiction over claims relating to contracts. Bid protests - whether concerning awards to other offerors or cancellation of solicitations - do not relate to contracts. Boards of contract appeals lack jurisdiction to consider such matters." *Id.*

Based on the above stated discussion, requests to the agency for B&P costs are to be resolved by the protestor's filing of a protest with the agency. If the protestor fails to file a protest with the agency within the mandated timeline, in most cases, its only recourse for resolution of the issue is to file a claim with the COFC. In some cases, however, the agency may consider the merits of an untimely protest. FAR 33.103(4) (e). FAR 33.103(4)(e) states that "the agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed." Marathon LeTourneau Sales &

Services Co., supra. Good cause is defined as a compelling reason beyond the protester's control that prevented it from filing a timely protest. Central Texas College, B-245233, Feb. 6, 1992, 92-1 CPD ¶ 151. NPF Services, Inc., B-236841.2, Jan. 3, 1990, 90-1 CPD ¶9. On the other hand, issues significant to the agency's acquisition system are protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. System Dynamics International, Inc., B-253957, Nov. 8, 1993, 93-2 CPD ¶ 274; Davidson Company, Inc., supra.

Government agencies have considered untimely protests on the merits. WildCard Associates, supra; East West Research, Inc., B-235031, B-235032, Jul. 6, 1989, 89-2 CPD ¶ 20. Thus, in accordance with FAR 33.103(4)(e) and case precedence, if a protestor fails to file a timely protest for B&P costs, the Government may consider an untimely bid protest for good cause, or for issues significant to the agency's acquisition system. GAO, however, has stated that the fact that an agency considers an untimely protest on the merits does not alter the fact that it is untimely filed, and GAO's timeliness regulations are not waived by the contracting officer's consideration of the untimely protest. WildCard Associates, supra; East West Research, Inc., supra. Therefore, if the agency considers an untimely bid protest for B&P costs and the protester is not satisfied with the results, GAO may conclude that no good cause or significant issue exists for it to consider the case on its merits, although the protester may still file a claim with the COFC.

Protests to GAO

A bid protester may recover B&P costs by filing a protest with GAO. The Competition in Contracting Act (CICA), Pub.L.No. 98-369 (1984), 31 U.S.C. §§ 3551-56 (2000), was enacted to promote competition in the government's procurement of goods and services. United States v. Instruments, S.A., Inc., D.D.C., 807 F.Supp. 811 (1992); Virginia Electric and Power Co., Baltimore Gas & Electric Co., B-285209, Aug. 2, 2000, 2000 Comp. Gen. Proc. Dec. ¶ 134. Under CICA, GAO has jurisdiction to resolve bid protests concerning solicitations and contract awards issued by a federal agency. Compugen, Ltd., B-261769, Sep. 5, 1995, 95-2 CPD ¶ 103. CICA provides that the Comptroller General shall decide protests "concerning an alleged violation of a procurement statute or regulation." Department of the Air Force; Defense Contract Audit Agency; Canadian Commercial Corporation/Heroux, Inc., B-253278,

253278, 253278, Apr. 7, 1994, 94-1 CPD ¶ 247. Hence, under CICA, GAO's authority to allow the recovery of B&P costs is predicated on a determination that a solicitation, proposed award, or award does not comply with a statute or regulation. EAI Corporation, B-252748, Jul. 26, 1993, 93-2 CPD ¶ 56; 31 U.S.C. @ 3554(c)(1); 4 C.F.R. @ 21.6(d).

The protest system established by CICA and implemented by GAO Bid Protest Regulations is designed for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp, *supra*; AAA Engineering & Drafting, Inc., B-236034.3, Apr. 6, 1993, 93-1 CPD ¶ 295; 31 U.S.C. @ 3554 (2000). GAO's bid protest procedures are set forth at 4 C.F.R. Part 21 (1996). Additionally, several agency FAR supplements contain other procedures governing GAO bid protests. DFARS 233.1, AFARS 33.104, AFFARS 5333.104, NAPS 5233.104. DLAAR 33.104.

Bid protests to GAO, not based on alleged solicitation improprieties, must be filed within 10 working days after the basis for protest is known, or should have been known. Davidson Co., Inc., *supra*; 4 C.F.R. @ 21.2(a)(2)(2000). If a protest is first filed with the contracting agency, a subsequent protest to GAO must be filed within 10 days of the date the protester learns of the initial adverse agency action on the agency-level protest, but only if the initial protest was timely. *Id*; 4 C.F.R. @ 21.2(a)(3)(2000); WildCard Associates, *supra*. However, an untimely protest may be considered for good cause, or, if a significant issue raises issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. 4 C.F.R. @ 21.2(a)(3)(c)(2000); Marathon LeTourneau Sales and Service Co., *supra*; Davidson Co., Inc., *supra*.

GAO recommends the payment of B&P costs on a case-by-case basis. Propulsion Controls Engineering, B-244619.2, Mar. 25, 1992, 92-1 CPD ¶ 306; Kime Enterprises, Inc., B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523; 4 C.F.R. § 21-6(e)(1996). B&P costs must be reasonable, and anticipatory profits are not recoverable. Rockwell International Corp. v. United States, 8 Cl.Ct. 662 (1985); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995). The recovery of B&P costs is based on the theory that the government, when issuing a solicitation, enters into an implied contract with the bidders or offerors that their bids or proposals will be fairly and honestly considered. Ultra Publicaciones, S.A., B-200676, Mar. 11, 1981, 81-1 CPD 190, citing Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956).

The standard adopted for recovery of B&P costs by both the GAO and the United States Claims Court was set out in Keco Industries, Inc. v. U.S., *supra*; Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. United States, *supra*. The Keco standard is whether the Government's conduct was arbitrary and capricious. *Id.* The court in Keco refers to the terms "arbitrary" and "capricious" as joined conjunctively, and not as used in a disjunctive sense. In determining whether the government's actions are sufficiently capricious to warrant reimbursement of these costs, GAO has held that it is not enough that a claimant can establish that the actions complained of appear arbitrary in retrospect. Base Information Systems, Inc., B-186932, Mar. 22, 1979, 79-1 CPD ¶ 196. It must appear that the action was motivated by caprice or constructive bad faith, the evidence showing that those involved knew, or should have known, that what they were doing was arbitrary. *Id.* The claimant need not show actual ill will on the part of government officials but must show that under the circumstances, procuring officials should be held responsible for at least not having recognized the nature of what they did. *Id.* The claimant must demonstrate that the action complained of was taken without reason. *Id.* Furthermore, to be arbitrary and capricious, the government action must result from something more than "ordinary" or "mere" negligence. Ultra Publicaciones, S.A., *supra*, citing Groton Piping Corp. and Thames Elec. Co. (Joint Venture), B-185755, Jun. 3, 1977, 77-1 CPD 389 and Morgan Business Ass., B-188387, May 16, 1977, 77-1 CPD 344. The court has not held that the Government warrants that procurements will be wholly free of error, and the Government is not required to indemnify offerors if a mistake is made. Base Information Systems, Inc., *supra*. The possibility of error is a risk of doing business with the Government. *Id.*

The criteria for determining whether the Government's actions were arbitrary and capricious are as follows:

- (1) There was bad faith on the part of the procuring officials;
- (2) There was no reasonable basis for the administrative decision depriving the bidder of fair consideration of its proposal;
- (3) The degree of proof of error necessary for recovery is related to the amount of discretion entrusted to the officials by applicable statutes and regulations; and

Proven violation of pertinent statutes and regulations can, but need not necessarily be grounds for recovery.

- (4) Proven violation of pertinent statutes or regulations can, but need not necessarily, be grounds for recovery.

Keco Industries, Inc. v. U.S., *supra*; Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. United States, *supra*. A protester is not entitled to compensation for every irregularity that occurs during the solicitation/bid process. Kinetic Structures, 6 Cl.Ct. 387, 26 G.C. ¶ 316, 318 (1984); Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. U.S., *supra*. Hence, although a determination that a solicitation, proposed award, or award of a contract does not comply with a statute or regulation may be a basis for recommending an award of B&P costs, statutory or regulatory violations are not always grounds for recovery of B&P costs. Dynalectron Corp. v. U.S., 4 Cl. Ct. 424, 429 (1984); Decision Sciences Corp., B-196100, Oct. 20, 1980, 80-2 CPD ¶ 298; Base Information Systems, Inc., *supra*.

The GAO set forth its initial standard for recovery of B&P costs in Discount Machinery & Equipment, Inc., B-220949, Feb. 25, 1986, 86-1 CPD ¶ 290. In that case, the Comptroller found that the contractor was entitled to recover its protest costs, since GAO was unable to recommend contract award to the protester. Recovery of B&P costs was deemed allowable when the agency unreasonably excluded the protester from the procurement, and no other remedy or corrective action was appropriate. The decision in Discount Machinery, *supra*, illustrates the rigid standards in 4 C.F.R. @ 21.6(e), initially applied by GAO for recovery of B&P costs. Previously, GAO allowed recovery of B&P costs only when the protester was unreasonably excluded from the procurement, **unless** some other remedy was deemed appropriate. However, after the 1987 amendments, GAO ceased to adhere to those standards, having found that its use of that practice did not always lead to a just result. 52 Fed. Reg. 46,448 (1987). Therefore, the 1987 amendments totally deleted 4 C.F.R. @ 21.6(e). *Id.*

If an agency promptly initiates remedial action in response to a bid protest, the GAO generally will not award B&P costs. Tidewater Marine, Inc., B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81; Cantu Services, Inc., B-250592.2, Feb. 23, 1993, 93-1 CPD ¶ 390. However, if the agency decides to take corrective action in response to a protest, but unreasonably delays the corrective action, GAO generally will recommend that the agency pay B&P

costs. Miller Elevator Service Company, supra; Griner's-A-One Pipeline Services, B-255078, July 22, 1994, 94-2 CPD ¶ 41: 4 C.F.R. § 21.8(F)(1)(1996). The protester is required to file its request for declaration of entitlement to B&P costs within 15 days after notification of the agency's decision to take corrective action. 4 C.F.R. § 21.8(e)(1996); Moon Engineering, B-247053, Aug. 27, 1992, 92-2 CPD ¶ 129.

If GAO recommends the agency pay the protester B&P costs, the protester is required to file its claim for costs with the contracting agency within 60 days after receipt of GAO's recommendation. 4 C.F.R. § 21.8(f)(1)(1996); FAR 33.104 (h)(2). Miller Elevator Service Company, supra. Failure to file the claim within that timeframe may result in forfeiture of the protester's right to recover its B&P costs. *Id.* The parties must attempt to agree on the amount of costs to be paid. Diverco, Inc., supra; FAR 33.104(h)(3); 4 C.F.R. § 21.8(f)(1) (1996). If the parties cannot reach an agreement within a reasonable time, GAO may recommend the amount to be paid. *Id.* GAO may also recommend the agency pay the costs of pursuing the claim for costs before the GAO. York Building Services, Inc., Olympus building Services, Inc., B-282887, Aug. 29, 2000, 2000 CPD ¶ 141.

The agency must promptly pay the costs, or promptly report to GAO its reason(s) for not following the recommendation. York Building Services, Inc., supra. The agency has 60 days to notify the GAO of its response to GAO's recommendation of the amount of B&P costs to be paid to the protestor. 4 C.F.R. § 21.8(f)(3)(1996); FAR 33.104 (h)(4). However, agency personnel should consult legal counsel before paying a recommended award. FAR 33.104 (h)(6). As previously stated, under the APA, a protestor that is dissatisfied with GAO's recommendation may seek judicial review of the agency's action through the COFC. Hawpe Construction, Inc. v. United States, 46 Fed. Cl. 571 (2000).

United States Claims Court

A dissatisfied bidder may recover B&P costs by a filing a claim with the COFC. The Tucker Act grants the COFC jurisdiction to render judgment upon any claim for damages against the United States based on the Constitution, an Act of Congress, agency regulation, or express or implied-in-fact contract. ES-KO, Inc. v. United States, supra; 28 U.S.C. § 1491 (2000). The Federal Court Improvement Act of 1982 grants the COFC the authority to grant complete relief on any contract claim filed before contract

award, including declaratory judgments, or other equitable and extraordinary relief it deems proper. Pub.L.No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3)(2000). Additionally, the Administrative Dispute Resolution Act of 1996 (ADR Act) amended the Tucker Act and provides the COFC with federal procurement post-award bid protest jurisdiction, concurrent with that of federal district courts, thereby giving it the jurisdiction to hear pre-award and post-award bid protests. Allied Technology Group, Inc. v. United States, 39 Fed. Cl. 125 (1997); Pub.L.No. 104-320 § 12, 110 Stat. 3870, 3874 (1996). Hence, the ADR Act extended the COFC's jurisdiction in pre-award and post-award bid protests, specifically giving the COFC jurisdiction to hear protests by interested parties objecting to a solicitation, proposed award, or alleged statute violation. *Id.*; 28 U.S.C. § 1491(b)(1)(2000). Likewise, the ADR Act gives the COFC the express authority to award successful protesters monetary relief in the form of B&P costs. Allied Technology Group, Inc. v. United States; *supra*.

The scope of the COFC jurisdiction to award B&P costs is founded on the implied contract theory. Kinetic Structures Corp. v. United States, *supra*. When the government solicits bids on a contract, it automatically enters into an implied-in-fact contract to treat the bidders fairly. Hawpe Construction, Inc., *supra*; IMS Services, Inc., 33 Fed. Cl. 167, 178 (1995). This implied-in-fact contract requires the government to fully and fairly consider all bids submitted in accordance with an invitation for bids. *Id.* Thus, in order to recover B&P costs, a plaintiff is required to show that the Government breached its implied-in-fact contractual obligation to fully and fairly consider the plaintiff's bid. *Id.* As previously stated, the standard adopted for recovery of B&P costs was set out in Keco Industries, Inc. v. U.S., *supra*. Hence, the Government is said to have breached the implied-in-fact contract if its consideration of offers is found to be arbitrary and capricious toward the protestor. *Id.* Furthermore, the court has applied the stringent standards required of bidders seeking injunctions to protesters seeking to recover B&P costs. Blackwell v. U.S., 4 Cl. Ct. 424, 429 (1984). The bidder is not only required to show that a breach of the contractual obligation of fair consideration occurred, but must also show that (1) its bid was responsive, (2) the bid was within the zone of active consideration, and (3) there is substantial chance of receiving award. *Id.* Contrary to GAO, the COFC currently has no specific timeliness requirement for filing an action. However, actions should be quickly filed after the protestor becomes aware of the conflict, and actions for B&P costs must be completed within 6

years of the date the right of action first accrues. 28 U.S.C. § 2401(a)(2000).

CONCLUSION:

There is clear authority for bidders to recover B&P costs from the agency, GAO, or the COFC, if a timely bid protest or proper claim is filed. Likewise, under certain circumstances, specific authority exists to recover B&P costs from the agency or GAO, when an untimely bid protest is filed. However, there is no specific authority for agencies to resolve a bidder's request for B&P costs when the bidder has not filed a bid protest requesting said costs. Hence, the conclusion must be that if a bidder fails to file a timely agency bid protest for B&P costs, AMC can only pay these costs if it determines that a good cause or significant issue exists for AMC to consider an untimely bid protest on the merits. In that case, the bidder should be advised to submit its untimely bid protest for action. If no good cause or significant issue exists, then the bidder must file a claim with the COFC to recover these costs.

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WORKERS' COMPENSATION CLAUSES FOR OVERSEAS PERFORMANCE

INTRODUCTION

The military is becoming increasingly dependent on U.S. civilian contractors to support its operations overseas.¹ The FAR provisions and clauses which address compensation for detention, injury and death of the civilian contractor workforce outside the United States is the subject of this article.

At the outset of World War II, Japanese forces attacked the strategically important Wake Island in the Pacific Ocean.² The island was defended by U.S. Marines and a handful of sailors.³ Also located on the island were about 1200 civilian construction workers tasked to build bases for the U.S. Navy throughout the Pacific.⁴ During the battle numerous contractor employees were killed or wounded; 1146 were captured and detained by Japan for the duration of the war.⁵ Of the 1146, about 16 percent died while under Japanese control.⁶ A number of legal avenues of relief are currently available for contractor employees (or their survivors) who, like the construction workers on Wake Island, are captured, injured, or killed while supporting military operations.⁷

This article will focus on the application of FAR 52.228-3 and 52.228-4. Both clauses pertain to worker's compensation insurance for contractor employees when the government contract involves "public work" to be performed outside the United States. Essentially, FAR 52.228-3, "Workers' Compensation Act (Defense Base Act)" requires contractors whose work involves public work by employees outside the United States, to provide workers' compensation insurance in compliance with the Defense Base Act (42 U.S.C. 1651 et seq.). FAR 52.228-4(b) provides that if a contractor employs a person who, but for the waiver of the applicability of the Defense Base Act, would be entitled to benefits under the War Hazards Compensation Act (WHCA), then the contractor shall provide the same protection as the WHCA would, subject to certain limitations. It is important for solicitations to include the appropriate clauses in order for offerors to be able to accurately price their proposals.

THE DEFENSE BASE ACT

Pursuant to the Defense Base Act (DBA), 42 U.S.C. § 1651(a) (1994), workers' compensation insurance coverage is required for contractor employees performing public work contracts and certain other contracts outside the United States.⁸ The Defense Base Act affords compensation benefits to those engaged in employment at any military, air or naval base acquired after a specified date; upon land occupied or used by the government for military or naval purposes in any territory or possession outside the continental United States; or, with certain exceptions, upon any public work in any territory or possession outside the continental United States if the employee is so engaged under the contract of a contractor with the United States. The Act also affords compensation for injury or death occurring during transportation to or from a worker's place of employment, where the employer or the government provides the transportation or the cost of the transportation.⁹

The DBA was enacted in 1941 "to provide substantially the same relief for injuries or death of employees at bases leased by the United States . . . as existing law affords similar employees in the United States, and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates."¹⁰ "To achieve the indicated objectives of the Act, as stated in the Senate Report, Congress extended 'the provisions of the Longshoremen's and Harbor Workers' Compensation Act to private employment at all

bases acquired after January 1, 1940 . . .’ The Defense Base Act has been amended to expand the area of coverage outside the continental United States but the basic compensation act remains the Longshoremen’s and Harbor Workers’ Compensation Act.”¹¹

Thus, by the terms of the DBA, the Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA) applies “in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such a contract is to be performed outside the continental United States . . . for the purpose of engaging in public work.”¹² The Act was originally intended to cover civilians employed at overseas military bases, was later extended to cover civilians working on overseas construction projects for the United States government or its allies, and was finally extended to protect employees fulfilling service contracts tied to such a construction project or to a national defense activity.¹³

One of the key terms in § 1651 of the DBA is “public work.” The types of work that fall within the meaning of that term have been extensively litigated. The term “public work contract” is defined in FAR 28.305. Generally, public work involves improvement projects, and any service related to the improvement/construction project, and projects related to national defense. Whether an employee is subject to the DBA is a matter of law. Many authorities have interpreted the law, applied it to diverse factual situations, and made determinations as to an employee’s entitlement to benefits under the DBA. Since the determinations are fact-specific, this article will not provide a review of the various determinations with regard to the meaning of “public work” for purposes of the DBA.

Another important aspect of the DBA is that the Secretary of Labor, upon recommendation from the head of any department or agency, may waive the application of the DBA with respect to any contract, subcontract, subordinate contract, work location or classification of employees.¹⁴ In my research I found no circumstances under which this had occurred. However, the Defense Contract Audit Agency in its Contract Audit Manual mentions situations under which waivers should be considered. “Waivers of the DBA should be considered where foreign employees are subject to compensation laws or comparable provisions of their country. In these instances, the benefits provided by the country of the employed foreign national are less than the benefits offered under the DBA and consequently the ultimate cost to the government would be less.”¹⁵

As stated in FAR 28.305(b), the DBA extends the LHWCA to various classes of employees working outside the United States. There are various insurance companies that provide this kind of compensation insurance. For example, the U.S. Agency for International Development (USAID) has contracted with Rutherford International, Inc. to administer its Defense Base Act Insurance program. The premium for the coverage is computed per \$100 of employee remuneration. Employee remuneration is defined as direct salary plus overseas recruitment incentives and post differential but excluding per diem, travel expenses, housing allowance, education allowance and other miscellaneous allowances. The current rate used to compute the premium for USAID contracts is \$1.84.

FAR 28.309(a) instructs contracting officers to insert the clause at 52.228-3 in solicitations and contracts “when the Defense Base Act applies” (i.e. when its application has not been waived), and when the contract “will be a public-work contract performed outside the United States.”

THE WAR HAZARDS COMPENSATION ACT

Where the DBA applies, the benefits of the LHWCA are extended through the operation of the War Hazards Compensation Act, as amended (42 U.S.C. 1701 et seq.), to afford protection to employees against the hazards of war (injury, death, capture, detention).¹⁶ In his opinion to the Secretary of the Army, the Comptroller General discussed the background of the War Hazards Compensation Act. “The War Hazards Compensation Act was enacted December 2, 1942 to supplement the DBA. It provides for the compensation of several categories of persons employed outside the continental United States in the event of injury resulting from a war-risk hazard ‘whether or not such person then actually was engaged in the course of his employment . . .’ 42 U.S.C. 1701(a). It further provides that as to such persons the provisions of the act . . . shall apply with respect thereto in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty, and any compensation found to be due shall be paid from the compensation fund established pursuant to section 35 of [the Federal Employees’ Compensation Act].”¹⁷

The Comptroller General goes on to describe the War Hazards Compensation Act (WHCA) by citing language from a House of Representatives report. “ ‘It will be noted that the coverage extended by this subsection supplements coverage for injury or death arising out of and in the course of a person’s employment under the Defense Base Act. Injuries or deaths sustained by employees of a contractor with the United States at the offshore bases if arising out and in the course of employment are compensable under the provisions of the [DBA]. This includes injuries or deaths proximately resulting from war-risk hazards. This subsection extends similar benefits to such employees for such injuries or deaths when they are not compensable under such act (i.e., not arising out of and in the course of employment). In other words, the coverage of this subsection dovetails with the coverage of the [DBA] and 24-hour protection is therefore provided for such employees.’ ”¹⁸

Generally, the purpose of the WHCA is to provide compensation for employees in the event of war hazards. War-risk hazard means any hazard arising during a war in which the United States is engaged; during an armed conflict in which the United States is engaged, whether or not war has been declared; or during a war or armed conflict between military forces of any origin, occurring within any country in which a person covered by the Act is serving, from— (1) The discharge of any missile . . . (2) Action of a hostile force or person, including rebellion or insurrection . . . (3) The discharge or explosion of munitions intended for use in connection with a war . . . 20 CFR 61.4(e) The WHCA provides for reimbursement of workers’ compensation benefits paid under the Defense Base Act, or under other workers’ compensation laws . . . for injury or death causally related to a war-risk hazard.¹⁹

“By the [WHCA] the government undertook to assume responsibility for and to self-insure the payment of compensation for injuries resulting from war-risk hazards to employees within the purview of the [DBA] as well as those within the purview of the [WHCA]. It did so because of the difficulty of government contractors in obtaining such coverage for their employees and the problem of determining a fair premium rate. Citation omitted. In cases under the [DBA] involving an injury or death resulting from a war-risk hazard the [WHCA] provides for the reimbursement of an employer or his insurance carrier for the benefits paid, except where a premium was charged.”²⁰

What the Comptroller General is saying is that there are two sources of entitlement to benefits under the WHCA. One way to derive entitlement is to be a contractor employee for the purposes of the DBA. In that case, the DBA insurance carrier is still liable for the payment of compensation benefits to the insured; however, the carrier would be reimbursed by the government from the Federal Employees’ Compensation Act (FECA) fund. These employees remain for the purposes of compensation employees of the government contractor.²¹

The second way to derive entitlement is directly through the WHCA, which provides entitlement to benefits to classes of employees who are not employees within the DBA. This second form of entitlement exists because there are many employees who may be at risk of injury or death from war hazards, but are not doing the type of work that puts them within the purview of the DBA. Under this second form of entitlement, the employee is entitled to benefits paid from the FECA fund for death or injury causally related to a war-risk hazard. Only persons whose entitlement arises under the [WHCA] are for the purposes of compensation to be considered as if they were civil employees of the United States.²²

It is important to note that the DBA insurance carrier who paid benefits to an employee, or his estate, is entitled to reimbursement through the WHCA only if the premium was not loaded to cover the war-risk hazard. The purpose of the government's "self-insurance" for war hazard risk is to control costs paid to contractors who are required to provide workers' compensation insurance.

FAR 52.228-4

FAR 52.228-4, "Workers' Compensation and War-Hazard Insurance Overseas" applies when the contract will be for public work performed outside the United States, and the Secretary of Labor waives the applicability of the DBA (see discussion above about the guidance by DCAA regarding DBA waivers).

The first paragraph of the clause applies to persons who, but for the waiver, would be entitled to/subject to workers' compensation insurance under the DBA. The clause requires contractors employing persons under these circumstances to provide worker's compensation insurance. The insurance shall be at least the level of insurance as the laws of the country of which the employees are nationals would require. The same requirements are imposed on subcontractors under relevant circumstances. Thus, even though the Secretary of Labor waived the applicability of the DBA to a group or class of contractor employees who would, but for the waiver, have been protected under the DBA, the contractor is still required to provide workers' compensation insurance.

The second paragraph of the clause requires the contractor to afford the same protection as that provided in the WHCA, except that the level of benefits shall be subject to the terms of any law or international agreement which controls the entitlement to benefits. To reiterate, a contractor employee who qualifies for coverage under the DBA, by operation of law, is subject to the WHCA. FAR 52.228-4(b) provides that if a contractor employs a person whom, but for the waiver of the applicability of the DBA, would be entitled under the WHCA, then the contractor shall provide the same protection as the WHCA would, subject to certain limitations. The clause includes provisions for applicability to subcontracts.

CONCLUSION

The purpose of FAR 52.228-4 is to require certain contractors to provide some level of workers' compensation insurance if there is a waiver of the applicability of the DBA, and hence loss of coverage under the WHCA. The contractors who would be required to comply with this clause are those who are engaged in contracts for "public work" to be performed outside the United States, and employ persons to whom applicability of the DBA has been waived.

The DBA is an extension of the Longshoreman's and Harbor Workers' Compensation Act. It requires workers' compensation insurance for contractor employees engaged in "public

work” outside the United States. “Public work” is any project for the public use of the United States or its allies, involving construction, alteration, removal or repair, including projects in connection with the national defense or with war activities. The Act allows the Secretary of Labor to waive the applicability of the DBA to a group or class of employees, upon the recommendation of the head of an agency. By operation of law, an employee entitled to benefits under the DBA is subject to protection under the WHCA. The WHCA provides compensation to a contractor employee (if already within the purview of the DBA) for death or injury caused by a war-risk hazard, where such death or injury was not already compensated for through the DBA (e.g. if the death or injury occurred during the employee’s non-work hours.) FAR 52.228-3 requires contractors in applicable circumstances to provide workers’ compensation insurance pursuant to the DBA. FAR 52.228-4 requires contractors to provide some level of workers’ compensation insurance even in the instance where the applicability of the DBA has been waived.

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¹ Michael J. Davidson, *Ruck-Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, Public Contract Law Journal, Winter 2000, Vol.29, No.2, at 233.

² *Id.* at 248.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Matter of: Fidelity and Casualty Company of New York, B-281281, January 21, 1999.

⁹ 32B Am. Jur.2d Federal Employer’s Liability and Compensation Acts § 146 (1996).

¹⁰ 51 Comp. Gen. 125, To the Secretary of the Army, B-162408, August 26, 1971 citing S. Rept. No. 540, 77th Cong. 1st sess. 51 Comp. Gen. 125, To the Secretary of the Army, B-162408, August 26, 1971 citing S. Rept. No. 540, 77th Cong. 1st sess.

¹¹ 51 Comp.Gen. 125, B-162408, August 26, 1971.

¹² 42 U.S.C. 1651.

¹³ University of Rochester v. Hartman, 618 F.2d 170 (2d Cir. 1980).

¹⁴ 42 U.S.C. 1651(e).

¹⁵ DCAA Contract Audit Manual, sec. 7-507.4, Vol.1; July 2000

¹⁶ DCAA Manual 7-507.4, July 2000.

¹⁷ 51 Comp. Gen. 125, B-162408, August 26, 1971.

¹⁸ 51 Comp. Gen. 125, B-162408 citing H.Rpt. No. 2581, 77th Cong., 2d Sess.12.

¹⁹ 20 CFR 61.1(a)

²⁰ 51 Comp. Gen. 125, B-162408.

²¹ 51 Comp. Gen. 125, B-162408.

²² 51 Comp. Gen. 125, B-162408.

UNACCEPTABLE LICENSE TERMS

Recently, we have noticed a spate of licenses which include terms that the government is unable to accept. At first, this problem was seen in software licenses but lately it has spread into online subscriptions. There appear to be several reasons for this. One is the draft UCITA code which would effectively make little sovereigns out of software manufactures, a subject we do not currently have time or space to explore. There is also the fact that these licenses are generally for such a relatively small amount of money that they are never subject to legal review. In fact, there is a danger that procurement personnel will not be aware of licenses because they will have been signed by the requisitioners. Finally, there may in some instances be a perception that since there is an emphasis on commercial contracting, we are obligated to accept whatever marketplace terms are presented.

Presented below are some of the most common objectionable terms.

Merger Clauses These are usually found at the end of the license and are both the most common problem and the crux of all other problems with licenses. Typically, such a clause will say something to the effect that the license represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter. The obvious problem is that when dealing with the Government, the license is *not* the complete and final agreement of the parties. With the exception of credit card buys (dealt with below) there is always going to be a contract or purchase order which will have some mandatory clauses. This is sometimes a shock to the vendor, who professes ignorance of the existence of any such contract. Most of the time, some of these clauses will contradict license provisions.

Applicable Law Just before you get to the merger clause, you will likely find a clause stating that the agreement will be construed according to the laws of [state.] (The really nasty ones will say something like "This license shall be construed under the law of the Republic of Eire and any action concerning this license must be brought in Irish courts." The idea being to effectively foreclose any redress on part of the buyer.) Since this is a federal contract, we must change this language to reflect that it will be controlled by federal law as implemented by the FAR and its supplements.

Disputes Aside from the question of where to bring disputes and the law under which they will be governed, the most common problem is the contractor's reservation of a right to self-help; that is, to terminate the service unilaterally if he believes we are in breach. The contractor's actual recourse is found in the Disputes Clause, FAR 52.233-1, incorporated in contracts for commercial items by way of 52-212-4.

One contractor's attorney recently argued that the Disputes clause usually deals with monetary disputes and so should have no application if, for example, the contractor believes we are misusing proprietary information. The clause makes it clear that this interpretation is incorrect in that it deals with "*any* (emphasis added) request for equitable adjustment, claim, appeal, or action arising out of or relating to this contract."

Furthermore, the “contractor shall proceed diligently with performance pending final resolution of the dispute.”

Credit Card Buys When we are purchasing goods or services with a credit card, we cannot fall back on mandatory clauses because the contractor does not sign up to any clauses. Nonetheless, the Contract Disputes Act (41 USC 602) applies to all contracts, express or implied, for the procurement of property or services. For this reason, one view of this situation would be that you should always use a purchase order rather than a credit card if there is a license attached. At the very least, impermissible terms must be deleted.

And so forth Although the above are the most common problems, each license may have its own individual quirks. One license with several option periods has language which allows the contractor to unilaterally alter terms and conditions. Obviously, in that case there is no option. Another, in an otherwise unobjectionable *Force Majeure* clause, absolved the contractor for responsibility for any hardware or software errors. Yet if there are errors in his hardware or software they are hardly beyond his control.

Conclusion The important thing for the us is not to let these issues slide beneath our radar just because they tend to be of relatively low dollar value. The important thing for contractors is to realize that these objections to their terms are not discretionary on our part, but are mandated by federal law.

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Management Decision Documents and Task Orders under ID/IQ Contracts

There are a number of statutes that deal with advisory and assistance services. These statutes either require identifying to Congress the amount of funding used for these services or determinations to be made before issuing contracts for advisory and assistance services.

31 USC 1105 requires “The Director of the Office of Management and Budget shall establish the funding for advisory and assistance services for each department and agency as a separate object class in each budget annually submitted to the Congress under this section.” This section identifies the terms for the 3 categories of advisory and assistance services i.e. management and professional support services; studies, analyses, and evaluations; and engineering and technical services.

10 USC 2212 provides the meanings of the terms used in 31 USC 1105. Each year the Secretary of Defense must conduct a review of services expected to be performed under contract to ensure that advisory and assistance services are properly classified in the advisory and assistance services object class.

10 USC 2331 requires “The Secretary of Defense shall prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided.” Professional and technical services are a subset of advisory and assistance services. This section further addresses the content of the regulations.

10 USC 2410l requires before entering into a contract, “the Secretary shall determine whether Department of Defense personnel have the capability to perform the services proposed to be covered by the contract.” This section applies to any contract of the Department of Defense for advisory and assistance services that is expected to exceed \$100,000. If Defense personnel have the capability to perform the services, the Secretary shall conduct a study comparing the cost of performing the services with Defense personnel and the cost of performing the services with contractor personnel.

DoD Directive 4205.2 covers Acquiring and Managing Contracted Advisory and Assistance Services (CAAS). Under paragraph 6 Procedures subparagraph 6.3 Procurement and Contract Administration, the DoDD requires that each purchase request package for CAAS, including task orders, include the type of CAAS being procured, a statement of work, certification by the requiring activity that the services have been reviewed for the most cost-effective or efficient means of accomplishment, a statement that the DTIC and other information sources have been queried, estimated cost and level of effort, proposed evaluation and selection criteria, surveillance plans, and properly chargeable funds certified. The DoDD further specifies that as a minimum an official at a level above the requiring activity approve the procurement request. If the request is

initiated during the 4th quarter of the fiscal year, for award during the same fiscal year, the approval shall be by an official at a second level or higher, above the requiring activity. The following approval authorities are set forth for contract actions estimated at \$50,000 or more:

- 1) An SES manager.
- 2) A general or flag officer.
- 3) An officer in the grade of O-6 filling a general or flag officer position.
- 4) An officer in the grade of O-6 who has subordinate SES personnel.

Army Regulation (AR) 5-14 Management of Contracted Advisory and Assistance Services covers the Army's management tools for CAAS. Under Chapter 4-3 Validation, the Army requires the need for the CAAS services to be justified in the form of a Management Decision Document (MDD), which clearly identifies the approval official and the disposition of the request for approval. The MDD is the document for assigning element of resource codes for CAAS in accounting records. The AR restates the DoDD approval requirement and specifically states for contract requirements estimated at \$50,000 or more, "the approval authority may not be delegated below the SES or GO level. However, at those subordinate organizations headed by a Colonel (O6) but which are authorized a GO position, or where SES personnel are subordinate to the commander, the commander may be delegated the approval authority.

AMC Circular 5-6 covers Contracted Advisory and Assistance Services (CAAS). Contracts for advisory and assistance services shall not be awarded without an approved MDD. The MDD shall be used to document the coordination and approval process of all CAAS, regardless of dollar value. AMC-C 5-6 requires the preparation of a MDD for basic agreement, task and delivery orders, follow-on contracts and modifications (if the scope of work changes). There are separate paragraphs addressing task order contracts (IDIQ contracts are a type of task order contracts. A "class MDD" is required:

- when the SOW for the IDIQ contract clearly defines services to be performed;
- where the MDD provides adequate certification that a single element of resource (EOR) and Federal Supply Code (FSC) applies to the basic contract and the task orders;
- where cost of individual task orders are covered in the total cost estimate in the basic MDD;

Task orders that differ in only one of these criteria must have a separate MDD.

Management approval is mandatory for all CAAS requirements at the following levels:

- 1) If the proposed contract requirement is estimated below the Simplified Acquisition Threshold (\$100,000) the MDD approval authority shall be one level above the requiring activity (levels being branch, division, Deputy Chief of Staff, Chief of Staff, Commander).
- 2) Contractual CAAS requirements above the SAT must be approved by a GO or SES or a colonel (O-6) occupying a Commanding Officer position. Where SES

personnel are subordinate to a commander at the 0-6 grade, the approval authority to the 0-6 commander. Approval authority may also be delegated to non-GO/SES personnel (GS/GM-15) that are acting or detailed into a GO/SES position.

When putting the requirement together for the AMCOM Omnibus 2000 (O2K) program a total program MDD was prepared, which covered Logistics, Programmatic and Technical. Each of the three SOWs were clearly written to specific the types of advisory and assistance services (only) that could be ordered off the O2K IDIQ contracts. The total cost of the program (\$2.5 billion) was included in the MDD. All information sources were queried and all required certifications were made. The only information not included in the "class MDD" for O2K was a single EOR. The MDD was staffed throughout Team Redstone and approved by the Deputy to the Commanding General (SES) and each of the resident PEOs (GO). A verbal request was made to the AMC CAAS coordinator to change the AMC Circular to no require a MDD for task orders under IDIQ contracts. A favorable response was not received. AMCOM then requested a waiver to having to prepare a full MDD for each task order. A waiver applying only to the Omnibus program was granted to allow the use of a mini-MDD in lieu of a full MDD. The mini-MDD is still approved at the SES or GO level.

Requiring a MDD or a mini-MDD for task orders when a full MDD has already been approved adds no value to the procurement process. Requiring the approval of an SES or GO just to report the EOR is not an efficient/effective use of Army managers. There should be a better way to capture and report EOR codes. The MDD process for task orders under IDIQ contracts should be changed to be in-line with acquisition streamlining philosophy.

The Commerciality Decision and Documentation of Market Research

The Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items. The FASA requires documentation of the Government's commerciality decision. A commerciality decision is a determination of the availability of commercial items that will meet the Government's requirements. Notwithstanding Government acquisition reform initiatives that have emphasized the preference for acquisition of commercial items, it is still evident that many obstacles exist to ensuring this legislative preference is understood and effectively implemented. According to a 5 January 2001 memorandum signed by the Under Secretary of Defense For Acquisition and Technology, an Integrated Process Team (IPT) chartered in March 1999 to review Department of Defense (DoD) commercial item determinations, found inconsistent commercial item determinations and weak market research among the obstacles that still exist to broader use of commercial items within the DoD.¹ The Army Materiel Command (AMC) found similar obstacles to more widespread use of commercial items during its Acquisition Reform Initiatives Assessment Team (ARIAT) reviews.²

How can Government acquisition personnel make more informed decisions with respect to whether to acquire a commercial item? Clearly, knowledge of what is available in the commercial marketplace is fundamental to an informed commerciality decision. In order to determine if there are commercial items capable of meeting the Government's performance requirements Federal Acquisition Regulation (FAR) (Parts 10 and 12) requires that market research be conducted to determine whether or not commercial items are available that could meet the agency's need.

Specifically, FAR 10.001 states (a) "Agencies shall... (2) conduct market research appropriate to the circumstances (i) before developing new requirements documents for an acquisition by that agency." This must be accomplished prior to soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold (\$100,000). If market research establishes that a commercial item cannot fill the Government's need, agencies are required (FAR 10.002 (c)) to reevaluate the requirement for possible restatement to enable use of commercial or non-developmental items, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002 (e)).

FAR 12.101 also requires Agencies to conduct market research. Specifically, FAR 12.101(a) states the following:

Agencies shall --

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;

¹ Memorandum for Secretaries of the Military Departments, J.S. Gansler, 5 Jan 2001, with attached Clarification of FAR Part 12 for Consistency

² AMC ARIAT Final Report for FY 99

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

This FAR Part 12 policy expands the preference for commercial items established by the FASA by mandating that agencies shall acquire commercial items, or non developmental items, to meet the needs of the agency. (FAR 12.101(b)).

Too often, however, it is difficult to discern whether or not a thorough investigation of current market capabilities or an evaluation of commercially available items has been accomplished. It has become evident that even when market research is conducted, it is not documented in sufficient detail to provide maximum value in the strategy planning and solicitation preparation phases of an acquisition.

The lack of documentation of market research findings and associated commerciality determinations may be the result of misunderstandings of what market research really is. Requirements personnel often have a great deal of technical knowledge in their particular area of expertise, but fail to recognize that constant market surveillance is equally vital to the acquisition process. An increased understanding is needed by all Government personnel involved in the acquisition process of the importance of documenting market research findings. This information is essential in acquisition planning for competition issues, consideration of small business set-asides, and understanding customary commercial market business practices to shape negotiation strategies and contract terms and conditions. Additionally, this information is needed for Contracting Officers to make informed commerciality determinations. Market research information is available in many forms to include knowledge that is attained at professional symposiums and conferences, and information that is available from internet sources and trade journals. However, if this information is not documented, it is often unknown by the Contracting Officer and, therefore, not considered in the commerciality decision. The issuance of a Sources Sought Announcement in the Commerce Business Daily (CBD) is another valid method of performing market research for some requirements, but often, complex items require an in-depth review of current technologies. Reliance on CBD Sources Sought Announcements alone may not be sufficient depending on the complexity of the Government's requirement. To the extent that CBD Sources Sought Announcements are used, the Government's description of its requirements should be stated in terms of performance requirements that will enable use of commercial solutions.

FAR 10.002(e) establishes that market research findings must be documented, but many questions remain on how and to what extent the research findings should be documented. The documentation should contain evidence of recent and thorough market research, and should address the availability of commercial or nondevelopmental items, as well as the possibility of using modified items to meet the agency's need.

FAR Part 10 does not stipulate how the documentation should be prepared; it merely states that it should be prepared “in a manner appropriate to the size and complexity of the acquisition.”

FAR 10.002 does, however, list seven areas that should be included in the conduct of the research, subject to urgency, estimated dollar value, complexity, and past experience. This regulatory information provides a guide as to the types of information that should be documented as a result of market research. Market research involves obtaining information specific to the item being acquired and should include --

- (i) Whether the Government's needs can be met by --
 - (A) Items of a type customarily available in the commercial marketplace;
 - (B) Items of a type customarily available in the commercial marketplace with modifications; or
 - (C) Items used exclusively for governmental purposes;
- (ii) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;
- (iii) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;
- (iv) The requirements of any laws and regulations unique to the item being acquired;
- (v) The availability of items that contain recovered materials and items that are energy efficient;
- (vi) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates; and
- (vii) Size and status of potential sources as set forth in FAR Part 19.

It should be noted that the first item in the above list discusses commercial items, and emphasizes the importance of market research to obtain information to support the commerciality decision.

When considering whether a commercial item is available, it is first necessary to be clear about what a commercial item really is. FAR 2.101 defines a commercial item as an item of a type customarily used for nongovernmental purposes that has been sold or offered for sale to the general public, or that will be available in the commercial marketplace in time to meet delivery requirements. Surely items like space heaters and other environmental control units fit the

definition, so a closer look at requirements of this type must be made to ascertain whether or not an existing commercial item could satisfy the Government's specific requirements. If a commercial item is not readily available, the requirement should be revisited, and the user requirements confirmed to ascertain whether or not the requirements could be modified to enable use of a commercial item.

FAR Part 11 states that to the maximum extent possible, requirements for supplies and services shall be stated in terms of functions to be performed, performance required, or essential physical characteristics. Requirements are to be defined so that offerors are enabled and encouraged to supply commercial items, or nondevelopmental items if commercial items are not available, and offerors of commercial items shall be provided an opportunity to compete in any procurement. Prime contractors and subcontractors should be required to incorporate commercial items or nondevelopmental items as components.

FAR 11.002(v) further requires that agencies shall "modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items."

This regulatory guidance further emphasizes the need to perform comprehensive market research so that potential technical solutions including commercial equivalents are explored before requirements are finalized.

Headquarters AMC sponsored training in June 2000 to help requirements and acquisition personnel with the issues associated with conducting thorough market research and documenting the research findings for use in acquisition planning.³ This "train the trainer" course emphasized the planning, conduct and documentation of market research, and use of market research documentation in making a commerciality decision. AMC activities can contact their Competition Advocate's office to find out about the availability of this training. While the course is structured as an intense exercise in market research, it can be tailored to meet local needs, including just-in-time training for teams that are initiating planning for a new acquisition and, therefore, could benefit from an increased understanding of research techniques and documentation requirements.

A very useful market research tool can be found on the DoD Commercial Advocates Forum, an Internet source at <http://www.cadv.org/cadv.htm>, which provides access to i-MART, a comprehensive search tool for locating potential sources. The i-MART tool searches by either a description of the product or service, or by Federal Supply Classification or Federal Supply Group. It utilizes various search engines that can be selected to search for sources by industry (Aircraft, Chemicals, Computers and Electronics, Office Equipment, et al.). The direct web link to i-MART is <http://www.imart.org>. Many different sources of market information are available from the various sites accessible through i-MART.

³ Market Research & Commerciality Workshop developed by BRTRC for AMC

The legislative requirement to maximize use of commercial items to fulfill the Government's requirements is a challenge to everyone involved in the acquisition process. Only by learning more about the commercial marketplace, and the business practices that prevail there, can acquisition professionals make informed decisions regarding availability of commercial items to meet mission requirements.

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Chief Counsel

**REVOCAION OF EXECUTIVE ORDER AND PRESIDENTIAL MEMORANDUM
LABOR-MANAGEMENT PARTNERSHIPS**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered that:

Section 1. Executive Order 12871 of October 1, 1993, as amended by Executive Orders 12983 and 13156, which established the National Partnership Council and requires Federal agencies to form labor-management partnerships for management purposes, is revoked. Among other things, therefore, the National Partnership Council is immediately dissolved.

Sec. 2. The Presidential Memorandum of October 28, 1999, entitled "Reaffirmation of Executive Order 12871 -- Labor-Management Partnerships" (the "Memorandum"), which reaffirms and expands upon the requirements of Executive Order 12871 of October 1, 1993, is also revoked.

Sec. 3. The Director of the Office of Personnel Management and heads of executive agencies shall promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12871 of October 1, 1993, or the Memorandum, to the extent consistent with law.

Sec. 4. Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order.

GEORGE W. BUSH

THE WHITE HOUSE,
February 17, 2001.

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

FROM: STEVEN R. COHEN (...*signed March 1, 2001*...)
ACTING DIRECTOR

SUBJECT: Guidance for Implementing Executive Order 13203

Through Executive Order 13203, signed on February 17, 2001, President Bush revoked Executive Order 12871 of October 1, 1993 (Labor-Management Partnerships) as well as all executive orders that amended it. The President also revoked the Presidential Memorandum of October 28, 1999, which reaffirmed EO 12871, and dissolved the National Partnership Council. OPM is issuing this guidance memorandum to help agencies meet the requirements of Executive Order 13203.

Section 1 of Executive Order 13203 abolishes the requirement previously imposed on agencies to form labor-management partnerships and partnership councils, as well as the mandate to bargain on matters covered by 5 USC Section 7106(b)(1). The Order does not prescribe any particular approach to labor-management relations. Agencies have discretion under the Federal Service Labor-Management Relations Statute (5 USC Chapter 71) to adopt a labor relations strategy best suited to their own needs.

In Section 3 of the Order, the President directed the Office of Personnel Management and the heads of executive agencies to “promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12871...or the Memorandum, to the extent consistent with law.” To fulfill this directive, OPM is withdrawing its Guidance for Implementing Labor-Management Partnerships (December 1993) and its Guidance for Implementing the President’s Memorandum Reaffirming Executive Order 12871 (February 2000). We remind agencies of the obligation to thoroughly review their own orders, rules, regulations, guidelines, and policies to ensure compliance with Section 3 of the President’s Order.

If you have any questions about this guidance or Executive Order 13203, please contact Jeffrey Sumberg, Director of the Office of Labor and Employee Relations. He can be reached by phone at (202) 606-2639 or by e-mail at jsumberg@opm.gov.

March 16, 2001

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Installation–Civilian Personnel Operations Center (CPOC)
Coordination on Grievances, and Equal Employment Opportunity
Complaints (EEO) Involving CPOC Actions

References:

- a. OASA (M&RA) memorandum, dated December 9, 1996, subject: Processing Grievances Concerning CPOC Actions.
- b. OASA (M&RA) memorandum, dated July 7, 1997, subject: Processing EEO Complaints Concerning CPOC Actions.

This memorandum reemphasizes the requirements for coordination between installations and CPOCs when processing grievances and EEO complaints involving CPOC actions. All formal grievances challenging CPOC actions must be coordinated with the appropriate CPOC upon receipt. Coordination is also required before settling or resolving EEO complaints or grievances if the terms of the agreement or the remedy require action by a CPOC or have the effect of changing or overruling a CPOC action. These requirements are specifically described in paragraphs 1 and 4 of reference 1.a and paragraph 3 of reference 1.b.

Army personnelists, EEO officers and labor counselors are strongly encouraged to review the above references and ensure compliance in processing and settling grievances and complaints. The references are available at http://cpol.army.mil/library/armyregs/memos2k/mer_cpoc_griev.html and <http://www.cpol.army.mil/library/armyregs/memos/eeocpoc9.html>, respectively.

A summary of the guidance follows:

- a. Grievances: When a grievance is filed stemming from a CPOC action, a representative of the Civilian Personnel Advisory Center (CPAC) where the grievance was filed should immediately inform the CPOC point of contact of the specifics of the filing. The CPOC should gather and/or develop pertinent background material (for which it is responsible) for the installation's processing of the grievance in a timely manner. The CPOC may also communicate to the

installation its views on the merits of the grievance as it relates to the CPOC's processing of the personnel action(s). **Close, timely coordination between the installation and the CPOC is essential for proper processing and successful resolution of the grievance.**

b. EEO Complaints: When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination that involves action taken by the CPOC, the EEO Office servicing the commander/director is responsible for counseling and complaint processing. EEO counselors, EEO officers, and labor counselors must be given direct access to CPOC records and CPOC personnel to carry out their respective responsibilities in the EEO complaint process. EEO counselors, EEO officers, and labor counselors are encouraged to coordinate with their servicing CPAC before requesting records directly from the CPOC. CPOC directors will designate an individual within the CPOC to serve as the EEO liaison/point of contact.

c. Settlements and Remedies: If the activity is considering entering into a settlement agreement, the terms of which require action by the CPOC (e.g., processing an action by a certain date, purging the Official Personnel Folder, etc.) or have the effect of changing or overruling a CPOC action, the activity must coordinate the proposed agreement with the CPOC. The same is true when the activity is considering a remedy in a grievance. Normally, this coordination will be accomplished by the CPAC. Where time is of the essence (e.g., proposed settlement reached during a hearing before an EEOC Administrative Judge), the labor counselor or EEO officer may contact the CPOC directly. The CPOC should immediately raise any concerns regarding any proposed personnel action or the legality/feasibility of the proposed settlement/remedy.

d. Disputes Between CPOC and the Installation: Where there is a dispute concerning a proposed remedy/settlement (e.g., legality, unexpected conflict with other benefits, insufficient time for CPOC to process, etc.), the CPOC will immediately detail its concerns to the CPAC representative/labor counselor/EEO officer or the commander concerned. Under these circumstances, the concerned commander (after consulting with the labor counselor, CPAC director and, for EEO complaints, the EEO officer) will make a final determination concerning the remedy/settlement. [The commander may delegate the authority to settle an EEO complaint over the objections of the CPOC to his or her immediate subordinate (deputy commander or chief of staff). For negotiated grievances, the authority to implement a settlement or remedy over the objections of the CPOC can be delegated by the installation commander to individuals above the directorate level at the installation.] The CPOC will then process the matter as decided by the commander/designee.

e. Develop a Coordination Process: Installations should work with their CPOCs in developing a process of coordination that meets the requirements of the above references and this memorandum.

Though not specifically addressed in the above references, as necessary or appropriate, CPOCs should provide feedback to the installation staff office, indicating execution of the personnel action directed by or for the installation commander. For example, for completion of the EEO complaint case file, CPOCs should provide the necessary documentation showing accomplishment of the required personnel action to the installation/activity identified official responsible for monitoring compliance with the terms of EEO settlement agreement. (See reference 1b, para 3e.) Additionally, each CPOC will identify and publish its point of contact for coordinating grievances, appeals or EEO complaints and settlements.

Finally, though also not specifically addressed in the above references, installations should follow the same coordination and consultation process before resolving employment disputes that are not grievances or EEO complaints. For example, if an activity is considering settling an MSPB appeal or an Office of the Special Counsel complaint and the terms of the proposed settlement require action by the CPOC or have the effect of changing or overruling a CPOC action, the activity should coordinate with the CPOC before entering into the agreement.

This policy has been developed in coordination with the Labor and Employment Law Division, Office of The Judge Advocate General, the Department of Army Equal Employment Opportunity Agency, and the Department of Army Equal Employment Opportunity Compliance and Complaints Review Agency. This information should be provided to your Civilian Personnel Advisory Centers, Equal Employment Opportunity Offices, and Labor Counselors.

Questions concerning this guidance or the referenced policies should be raised through appropriate chains of command.

/s/ David L. Snyder

David L. Snyder
Deputy Assistant Secretary
(Civilian Personnel Policy)

NOTE: Pacific, Korea and Europe may modify this policy only as necessary given their distinct CPOC/MACOM relationship. A copy of the changes must be sent to HQDA (SAMR-CPP).

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OFFICE OF THE ARMY GENERAL COUNSEL, ATTN: MR. WILLCHER
OFFICE OF THE JUDGE ADVOCATE GENERAL, ATTN: DAJA-LE
(MR. WILLCHER)

Hiring During a Reduction in Force

**Steven M. Kellogg, Attorney-Advisor
U.S. Army Operations Support Command**

Unfortunately, Reductions in Force (RIF) have been an all too familiar experience within the Department of Defense over the last few years. Fortunately, however, many of our employees are ready to retire, or are willing to take a buyout and move on to greener pastures. Often times, our organizations must down size because the mission of the organization has changed. Certain skills that were once required are required no longer and new skills—and positions—are needed. In many cases, employees who are to be separated under a RIF do not have the qualifications necessary to be placed into the new positions and management is unwilling to waive qualifications because the positions are critical to the success of the new organization and success is needed quickly. Not surprisingly, employees facing separation believe they are entitled to vacant positions in the new organization, even if they are not qualified. What is particularly hard to swallow for employees facing separation is when their organization competitively fills positions with personnel from outside of the organization. The fact of the matter is that hiring during a RIF is legal.

“Each agency is responsible for determining the categories within which positions are to be required, where they are to be located, and when they are to be filled, abolished, or vacated.” 5 CFR § 351.201(a)(1). That decision is for management alone. Griffin v. Dept. of Agriculture, 2 M.S.P.B. 335, 337 (1980). In a RIF appeal to the Merit Systems Protection Board (MSPB), once an agency has proved by preponderant evidence that the reorganization was bona fide and based on good faith with appropriate management consideration, the MSPB will defer to the agency’s decision. There is no regulatory requirement for an agency to fill vacancies during a RIF. Klegman v. DHHS, 16 MSPR 455, 457 (1983). However, once an agency determines to fill vacancies during a RIF the agency must fill those positions based on employee retention standing and their respective assignment rights through the use of “bumping” and “retreating”. The situation is different when an agency decides to fill its vacant positions competitively. If during a RIF an agency decides to fill positions competitively, RIF regulations do not apply to the selection procedures. Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*, Dewey Publications, Inc. (1999), p. 1985; Dante v. National Science Foundation, 16 MSPR 314 (1983). The MSPB has no jurisdiction over RIF appeals based upon a claim of non-selection for vacant positions filled competitively.

Fortunately for our employees, existing collective bargaining agreements, or mid-contract bargaining agreements reached in anticipation of a RIF, may guarantee employees the right to vacant positions in the new organization even if they do not possess the requisite qualifications. In a recent RIF conducted by a tenant DOD organization on the Rock Island Arsenal, the organization agreed to reserve certain entry-level positions in the new organization for those employees facing involuntary separation. The positions were not considered in the RIF, but rather were filled competitively. The organization determined that it would waive qualifications for the positions, in return for a lower entry-level grade. As a result, several employees were placed who would otherwise have been separated. Many other positions were also filled competitively with people from outside of the organization (though many of the placements were made off of the priority placement list). Unfortunately, several other employees, who failed to be selected for the reserved positions, were separated. In their RIF appeals they learned that in fact the government can hire during a RIF and that vacant positions do not necessarily have to be filled through the use of traditional placement rights.



ENVIRONMENTAL JUSTICE

***Commanders' Conference
13-14 March 2001***



Environmental Justice – What is it?

Environmental Justice:

Environmental Justice is the **fair treatment** and **meaningful involvement** of **all people** regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of **environmental laws, regulations, and policies.**

Fair Treatment:

Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.



Genesis of Environmental Justice

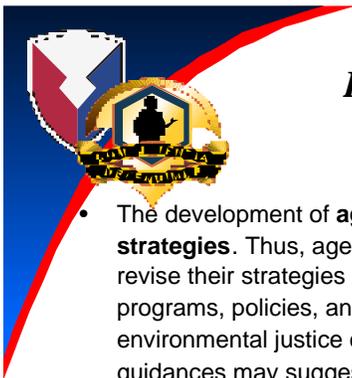
- The movement was started by people, primarily people of color, who needed to address the inequity of environmental protection services in their community. EPA's FAQs <http://es.epa.gov/oeca/main/ej/faq.html>
- *"Many people of color, low-income and Native American communities have raised concerns that they suffer a disproportionate burden of health consequences due to the siting of industrial plants and waste dumps, and from exposure to pesticides or other toxic chemicals at home and on the job ... EPA is committed to addressing these concerns and is assuming a leadership role in environmental justice to enhance environmental quality for all residents of the United States."*

Carol M. Browner, EPA Administrator
- Executive Order (EO) 12898, February 11, 1994, William J. Clinton.



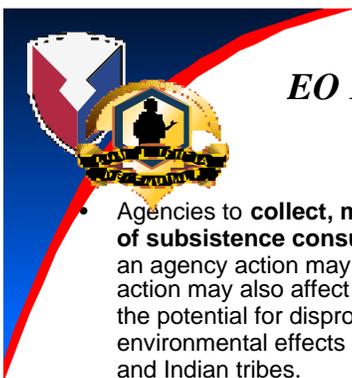
Goals of EO 12898

- Focus federal agency action on the environment and human health conditions in minority communities and low-income communities.
- **Promote nondiscrimination in federal programs** that substantially affect human health and the environment.
- Provide minority communities and low-income communities greater access to information on, and **opportunities for public participation** in, matters relating to human health and the environment.



EO 12898 requires:

- The development of **agency-specific environmental justice strategies**. Thus, agencies have developed and should periodically revise their strategies providing guidance concerning the types of programs, policies, and activities that may, or historically have, raised environmental justice concerns at the particular agency. These guidances may suggest possible approaches to addressing such concerns in the agency's NEPA analyses, as appropriate.
- The recognition of **importance of research, data collection, and analysis**, particularly with respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes. Thus, data on these exposure issues should be incorporated into NEPA analyses as appropriate.



EO 12898 requires (cont.):

- Agencies to **collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife**. Where an agency action may affect fish, vegetation, or wildlife, that agency action may also affect subsistence patterns of consumption and indicate the potential for disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.
- The Executive Order requires agencies to work to **ensure effective public participation and access to information**. Thus, within its NEPA process and through other appropriate mechanisms, each Federal agency shall, "wherever practicable and appropriate, translate crucial public documents, notices and hearings, relating to human health or the environment for limited English speaking populations." In addition, each agency should work to "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."



EO 12898 does not :

- Create any right, benefit or trust responsibility, substantive or procedural enforceable at law or equity by a party against the United States, its agencies, its officers or any person.
- Preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory when there is the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe under NEPA. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.



Implementation of EO 12898 by Federal Agencies

- **Council on Environmental Quality (CEQ)**
 - Environmental Justice Guidance under the National Environmental Policy Act - December 10, 1997.
 - <http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf>
- **Environmental Protection Agency (EPA)**
 - Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis - April 1998
 - <http://es.epa.gov/oeca/ofa/ejepa.html>
- **Department of Defense**
 - Strategy on Environmental Justice - March 24, 1995
 - <https://www.denix.osd.mil/denix/Public/Library/Planning/Justice/note7.html>
- **Department of Army**
 - Still Draft - September 24, 1999
 - Proponent: Assistant Secretary of the Army for Installations and Environmental (ASA (I&E)) – Mr. Raymond Fätz



NEPA Approach to Decision-Making

- Identify need or situation
- Propose course of action
- Identify all reasonable alternatives (including no action)
- Describe the affected environment
- Analyze anticipated impacts and effects of all reasonable alternatives
- Involve the Public
- Select course of action
- Document final decision



Basic EJ Questions

- What geographic area(s) may be impacted by the federal action?
 - Distribution and magnitude of impacts
 - What area of consideration is going to be required by other state and federal law - i.e., CAA
 - Does the area change when considering cumulative effects from other actions
- Who is (are) the potentially affected population(s) and what are the potentially impacted resources?
 - Consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the federal action
 - Recognize impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community's distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis.



Basic EJ Questions (cont.)

- How is the affected public being engaged?
 - Develop effective public participation strategies that acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and incorporate active outreach to affected groups.
 - Are there any significant environmental or human health impacts, including interrelated social, cultural or economic effects?
 - Where a federal action would not cause any adverse environmental impacts, and therefore would not cause any disproportionately high and adverse human health or environmental impacts, specific demographic analysis may not be warranted.



Basic EJ Questions (cont.)

- Are the environmental or human health effects likely to impact low-income and/or minority communities more than the community-at-large?
- When a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes has been identified, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative. In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.
- Where environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.
- What mitigation measures are available to avoid or minimize effects from the proposed action or identified alternative?



What's Needed for an EJ Strategy?

- **Understand the Community**
 - respect local perspectives
 - listen to local issues and concerns
 - understand special circumstances and/or sensitivities
 -
- **Understand the Impacts and Effects on the Community**
 - consider direct and indirect human health or environmental effects, including interrelated social, cultural and economic effects
 - identify and assess multiple exposures and cumulative effects
 -



What's Needed for an EJ Strategy ? (cont.)

- **Understand the Importance of Communication and Relationships**
 - communicate early and often with the community
 - create opportunities to involve the impacted community in planning, analysis and decision-making processes in a meaningful way
 - provide access to information on the proposed action and alternatives, including information on potential impacts
 - engage the impacted community in the identification of potential effects and the development of mitigation strategies for the proposed action and alternatives
 -



What we can do

- Assess the impacts of installations operations and activities on local communities through periodic updates to installation master plans
- Ensure that integrated natural resources management plans (INRMPs) address risks associated with the consumption of well water, fish, wildlife and other natural resources possibly impacted by Army activities
- Report progress annually through the Installation Status Report (ISR), Environmental Quality Report (EQR), and other reports, to the Headquarters, Department of the Army, Environmental Quality Control Committee
- Provide public access to reports about environmental justice concerns. As needed, program managers should request assistance with publicity for these reports from their Public Affairs Office.
- Involve minority and low-income populations in planning and decision-making processes (e.g., RABs). Whenever appropriate, provide translation.



Who needs to be involved

- Key Players
 - Environmental Office
 - Public Works
 - Public Affairs
 - Legal



EJ References

- Army Regulation 200-2 , Analysis of Environmental Effects from Army Actions (New version due to be published any day)
- CEQ (1997), Environmental Justice Guidance Under the National Environmental Policy Act; USEPA (1998), Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis
- Considering Environmental Justice in Federal Planning, Analysis and Decision Making, Recommended Guidance for Implementing Executive Order 12898, "Federal Actions to Address Environmental Justice", David Stone Eady, Eady & Associates, LLC
- Department of Defense Strategy on Environmental Justice, March 24, 1995
- EPA Website <http://es.epa.gov/oeca/main/ej/index.html>
- Executive Order 12898
- 1998 Environmental Justice Biennial Report: Working Towards Collaborative Problem-Solving, Chapter 5, June 1999 <http://es.epa.gov/oeca/main/ej/98biennial.pdf>

U.S. Army

Soldier and Biological Chemical Command

17



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U.S. Army

Soldier and Biological Chemical Command

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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



January 5, 2001

MEMORANDUM FOR DEPUTY ASSISTANT TO THE SECRETARY OF DEFENSE
FOR CHEMICAL AND BIOLOGICAL DEFENSE

SUBJECT: Legal Review of The Czech Republic Chemical Defense Data Collection Program

REFERENCES: (1) Executive Order 12114
(2) Department of Defense Directive 6050.7
(3) Memorandum on Chemical Agent Testing in the Czech Republic, Defense Threat Reduction Agency, 29 September 2000
(4) Bullet Background Paper on Czech Republic Chemical Defense Data Collection Program, U.S. Air Force, 7 September 2000

This memorandum responds to your request that this office comment on actions taken to date in regard to the Czech Republic Chemical Defense Data Collection Program, including comment on compliance with both U.S. and international laws and treaties.

Facts:

On September 1, 2000, the U.S. Ambassador to the Czech Republic sent a message to the Secretary of State expressing concern about a U.S. funded program to conduct open-air tests of chemical agents in the Czech Republic, about which he had not been previously informed, and requesting guidance from Washington regarding continuation of the program. Ambassador Shattuck did not express the view that the program was a violation of international law, Czech law or U.S. law. However, he noted his concern that this program could have serious public and foreign relations implications, particularly if it appeared that it had been undertaken in the Czech Republic in order to circumvent statutory restrictions under U.S. domestic law.

The program at issue involves the open-air testing of chemical agents to determine specific agent characteristics. According to the Defense Threat Reduction Agency ("DTRA"):

This program was established as a result of the addition, by Congress, of \$5 million to the FY 98 DoD Appropriations Bill. The funds were specifically to support Wide-Area Decontamination research. The Commodity Area Manager (CAM) for Decontamination was assigned the responsibility for determining how best to use those funds. After conducting international workshops, the CAM determined that the outdoor work being conducted on two Czech decontaminates would potentially benefit both the U.S. Wide Area Decontamination Program and other nations. Although the Data Exchange Agreement (DEA) with the Czech Republic had not yet been signed, the CAM determined that the data could be



provided to Netherlands and then forwarded to the U.S. under the auspices of the existing U.S. - Netherlands DEA. According to the CAM, the Czech Republic agreed with this approach. The CAM arranged for the Air Force Research Laboratory to contract for the effort.¹

Discussion:

1. The Chemical Weapons Convention.

The Chemical Weapons Convention² ("CWC") prohibits States Parties from developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons, or transferring, directly or indirectly, chemical weapons to anyone. Further, it prohibits States Parties from assisting, encouraging or inducing in any way, anyone to engage in any activity prohibited under the Convention.³ The United States and the Czech Republic are States Parties to the CWC.⁴

Notwithstanding this broad prohibition, and the definition of "chemical weapon," which captures "toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention . . .,"⁵ the CWC defines a range of activities involving toxic chemicals and their precursors that are not prohibited.⁶ Among the purposes not prohibited involving toxic chemicals are research, medical, pharmaceutical or protective purposes.⁷

Additionally, Article X provides: "Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention."⁸ This article also provides: "Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific

¹ See Reference (3).

² Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1997 (entered into force April 29, 1997).

³ CWC, Art. I, para. 1.

⁴ The United States deposited its instrument of ratification on April 25, 1997; the Czech Republic deposited its instrument of ratification on March 6, 1996.

⁵ CWC, Art. II, para. 1.

⁶ CWC, Art. VI and Verification Annex(VA) Parts VI-IX.

⁷ CWC, VA Part VI, para. A.2(a). This section establishes the regime for permissible uses of Schedule 1 chemicals, the most dangerous and highly regulated of toxic chemical categories.

⁸ CWC, Art. X, para. 2.

and technological information concerning means of protection against chemical weapons."⁹

The purpose of this Article, in particular paragraph 2, is to establish the right of States Parties to conduct programs for the continuing development of defenses against chemical weapons,¹⁰ provided that these programs are in accordance with the Convention's definition of "purposes not prohibited."¹¹ Under this definition, "purposes not prohibited" include *any* protective purpose against toxic chemicals, including protection against chemical weapons.¹²

Based upon the information provided about the nature and purposes of the Czech Republic Chemical Defense Data Collection Program,¹³ we conclude that no issues regarding compliance with CWC obligations are raised by this program.

2. United States Domestic Law.

(a) National Environmental Policy Act ("NEPA").¹⁴ It is a well-settled principle that U.S. statutes are presumed not to have extraterritorial application absent express language to the contrary.¹⁵ The courts have generally held that the procedural requirements of NEPA do not apply to Federal activities outside U.S. territory.¹⁶

(b) Executive Order Number 12114. E.O. 12114, which was originally promulgated by President Carter in 1979, establishes procedures and other actions to be taken by Federal agencies undertaking activities with the potential for environmental effects outside the United States, or its territories and possessions. The purpose of E.O. 12114 is "to enable responsible

⁹ CWC, Art. X, para. 3.

¹⁰ S. TREATY DOC. 103-21, Message from the President of the United States Transmitting the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, at 68 (1993).

¹¹ CWC, Art. II, para. 9.

¹² CWC, Art. II, para. 9(b) (emphasis added).

¹³ See References (3) and (4) and "Facts," above.

¹⁴ 42 U.S.C. §§ 4321 *et seq.*

¹⁵ Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). This principle is often referred to as the "Foley Doctrine."

¹⁶ One notable exception is Environmental Defense Fund v. Massey, 986 F. 2d 528 (D.C. Cir. 1993). The D.C. Circuit held that NEPA was applicable to a decision by the National Science Foundation ("NSF") to incinerate the wastes generated at its research station in Antarctica. The court reasoned that since the NSF was making decisions concerning its activities in Antarctica in the United States, the issue of extraterritorial application of NEPA was moot.

officials of Federal agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions."¹⁷ Central among the procedural requirements set forth in the Order is the requirement that an environmental study/review be performed for major Federal actions significantly affecting the environment in the following categories (among others):

- (1) the global commons outside the jurisdiction of any nation;¹⁸
- (2) the environment of a foreign nation not participating with the United States and not otherwise involved in the action;¹⁹ or,
- (3) the environment of a foreign nation by providing to that nation a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk.²⁰

Department of Defense Directive 6050.7 ("DoDD 6050.7") was promulgated on March 31, 1979, to implement the requirements of E.O. 12114 for the Department of Defense and all of its components. Enclosure 2 of DoDD 6050.7 details the specific procedural requirements for DoD components preparing an environmental study/review. Both E.O. 12114 and DoDD 6050.7 remain in effect.

There are two "stages" of analysis for an agency or component to consider in deciding whether it must conduct an environmental study/review for its activities overseas. The first is whether the activity is a "major Federal action" within the scope of E.O. 12114 ("major action" under DoDD 6050.7).

DoDD 6050.7 defines "major action" for purposes of Department of Defense implementation of E.O. 12114:

3.5. Major Action means an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects

¹⁷ E.O. 12114, Sec. 1-1.

¹⁸ E.O. 12114, Sec. 2-3(a).

¹⁹ E.O. 12114, Sec. 2-3(b).

²⁰ E.O. 12114, Sec. 2-3(c).

on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this directive.

Our review of relevant materials suggests that an appropriate analysis of whether the Czech Republic Chemical Defense Data Collection Program meets the criteria of "major Federal action" was not conducted prior to commencement of the program. In our view, the component should conduct such an analysis in consultation with the component's legal counsel. This determination should be fully documented, and we recommend as a matter of policy that the component consider the concerns expressed by the Ambassador on the potential significance of the action for relations with the Czech Republic.

If the Chemical Defense Data Collection Program is deemed to be a "major action that does significant harm to the environment" under DoDD 6050.7²¹, the next question is whether an environmental study/review is required for such action under one of the provisions of E.O. 12114, as set forth above.

Our limited review of the project as described in the package suggests the possibility that an environmental study/review was required prior to the commencement of the Czech program, under the Section 2-3(c) of E.O. 12114. The decision whether to conduct such an assessment is best made by the component, taking into account the specific facts about the program, the environmental regulatory and policy concerns underlying E.O. 12114 and DoDD 6050.7, and other national policy concerns such as those raised by the Ambassador.

In analyzing the applicability of Section 2-3(c) of E.O. 12114, it should be noted that open-air testing of any lethal chemical or biological warfare agent -- as envisioned by this program -- is strictly prohibited within the United States unless specific statutory requirements have been met.²² The applicable statute permits open-air testing in the United States if "the Secretary of Defense has determined that the transportation or testing proposed to be made is necessary in the interests of national security; [if] the Secretary has brought the particulars of the proposed . . . testing . . . to the attention of the Secretary of Health and Human Services. . . ; [and if] the Secretary has implemented any precautionary measures recommended . . .". The requirement to implement the precautionary measures recommended by the Secretary of Health and Human Services is subject to a Presidential override, if he determines that considerations of national security require testing that the recommended measures would make impossible, but even then the testing "shall be carried out in the safest practicable manner."

²¹ DoDD 6050.7, Enclosure 2.

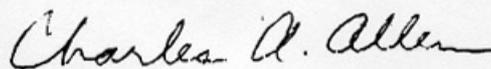
²² 50 U.S.C. 1512.

Finally, to our knowledge, there was no consultation or coordination with the Department of State or the Office of the Secretary of Defense ("OSD") prior to the implementation of this program. In light of the concerns expressed by the Ambassador, we recommend as a policy matter that the component coordinate with the Department of State and OSD prior to any decision on whether to resume the program.

Conclusions and Recommendations:

In our view, the component should have conducted an internal review in consultation with its legal counsel prior to commencing this program. Such review could have led to one of the following courses of action: (1) determination that the requirements of E.O. 12114 and DoDD 6050.7 were not applicable to this program; (2) completion of an appropriate environmental study/review of the program's effects; or (3) invocation of an appropriate exemption available under E.O. 12114. Accordingly, prior to resumption of this program we recommend that the component undertake such a review now. Additionally, if the component desires to continue the program, it should first coordinate the proposed activity with the appropriate officials within the Office of the Secretary of Defense and the Department of State.

This memorandum has been coordinated with the Legal Counsel to the Chairman of the Joint Chiefs of Staff.



Charles A. Allen
Deputy General Counsel
(International Affairs)

NEPA Like Analysis for Research and Other Actions Abroad

A project officer comes to you about an opportunity to piggyback on some research being done in the UK. Your command is going to pay for some additional testing or data from a foreign country that would help with ongoing Army research projects. That doesn't raise any environmental policy issues, right? Not necessarily.

The Department of Defense (DoD) Office of General Counsel (OGC) recently wrote an opinion on the Air Force managed Czech Republic Chemical Defense Data Collection Program. The opinion was the result of a message to the Secretary of State sent by the U.S Ambassador to the Czech Republic expressing concern about the potential for serious public and foreign relations implications if it appeared that the program had been conducted in the Czech Republic in order to circumvent US law. While the opinion was specifically related to the Chemical Defense program, it has potential impacts for all Research and Development (R&D) and production contracts conducted overseas on behalf of the United States.

The OGC opinion looked at three major areas of the law, compliance with the Chemical Weapons Convention, NEPA, and Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, with the majority of the opinion focused upon EO12114. The opinion makes it clear that while NEPA does not apply to federal actions abroad, care must be given to ensure compliance with EO 12114.

EO 12114, as implemented by Department of Defense Directive (DODD) 6050.7 and Chapter 8 of AR 200-2, requires that an environmental study or review be performed for major federal actions significantly affecting the environment in either: 1) the global commons outside the jurisdiction of any nation;¹ (2) the environment of a foreign nation not participating with the United States and not otherwise involved in the action;² or, (3) the environment of a foreign nation by providing a product or physical project producing a principal product or an emission or effluent which is prohibited or strictly regulated in the U.S. because its toxic effects on the environment create a serious public health risk.³

The two-prong analysis anticipated by DODD 6050.7 begins with a determination of whether the proposed action is a "major action", which is defined as:

an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this directive.

The second step in this two-prong analysis is to determine whether the major action fits into one of the three specified in the EO as requiring environmental review. The question raised by this opinion is level of specificity required by law or regulation in order to qualify as "prohibited or strictly regulated in the U.S."

¹ E.O. 12114, Sec. 2-3(a).

² E.O. 12114, Sec. 2-3(b).

³ E.O. 12114, Sec. 2-3(c).

According to Enclosure E of DODD 6050.7: asbestos, vinyl chloride, acrylonitrile, isocyanates, polychlorinated biphenyls, mercury, beryllium, arsenic, cadmium, and benzene⁴ are "prohibited or strictly regulated". But this list may no longer be exhaustive.

The third issue raised by the OGC opinion relates to a failure to coordinate with the Department of State or the Office of the Secretary of Defense on a matter that ultimately had a potential foreign relations impact for the United States.

A key issue not discussed in the OGC opinion is whether the action was exempt from the EO 12114 requirements because it was an action with respect to "arms transfers" to foreign nations. The EO specifically defines the term "arms transfers" as "grant, loan, lease, exchange, or sale of defense articles or defense services to foreign government or international organization, and the extension or guarantees of credit in connection with these transactions." What is unclear is whether "arms transfer" impliedly must include an action carried out abroad under an international cooperative research and development agreement.

What impact does this opinion have for AMC R&D and procurement programs abroad? First, consideration of the applicability of EO12114 should be made in writing and concurred with by legal staff for all programs that involve work overseas. Second, if it is determined that an action is a major action, then the effluents and emissions from carrying out that action should be carefully reviewed to determine whether they are strictly regulated in the United States. And third, since the concerns raised by the Ambassador are more related to perception than to actual environmental consequences, additional consideration should be given to initiating consultation with HQDA (DAMO-SSM) in accordance with AR-200-2, paragraph 8-4 even when an action does not reach the level of a "major action".

Does this mean that environmental studies are going to be needed for any action that would have required at least an Environmental Assessment in the United States? Probably not, the Air Force when they completed their review after receipt of the OGC opinion determined that open air testing of decontamination processes and products with chemical agent did not "produce a toxic effect on the environment creating a public health risk", therefor no further analysis was needed.

⁴ DoDD6050.7, Enclosure 2, E2.2.1.2. 44FR 18722, includes all of the above list as well as pesticides. The complete list was part of the CEQ Publication of Implementing Documents and agreed to between the CEQ and the Import -Export Bank.

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Hart-Rudman Commission Releases Phase III of its Report entitled *Roadmap for National Security: Imperative for Change*

MAJ Jim Robinette

The U.S. Commission on National Security/21st Century, chaired by former Senators Gary Hart and Warren B. Rudman, released on 31 January 2001 its third report on U.S. National Security. Entitled *Roadmap for National Security: Imperative for Change*, the report concludes that "without significant reforms, American power and influence cannot be sustained."¹ Significantly for Environmental Law Specialists (ELs), many of the potential threats to the Nation, both domestic and foreign, entail environmental concerns, either directly, as a causal factor for conflict, or as a collateral effect of military operations to be managed. The Phase III report and its predecessors are available on the internet at [Error! Bookmark not defined.http://www.nssg.gov/phaseIII.pdf](http://www.nssg.gov/phaseIII.pdf). (MAJ Robinette/RNR)

Integrated Natural Resource Management Plans Aren't Just for the Shelf Anymore

Scott Farley²

As installations frantically race the clock to complete Integrated Natural Resource Management Plans (INRMPs) by the statutory deadline imposed by Congress, little attention has been given to the equally critical requirement for plan implementation. Many view INRMP completion as the finish line, at which point the plan can be deposited along with so many others on the shelf to collect dust. The purpose of this article is to explain that successful development of an INRMP is only the first step to compliance with the Sikes Act Improvement Act of 1997 (SAIA).³ It is clear that Congress intended installations to take concrete steps to implement INRMPs to "provide for the conservation and rehabilitation of natural resources on military installations."⁴ An installation's failure to implement an INRMP may be reviewed by

¹ See, Hart, Rudman, et al., Phase III Report of the U.S. Commission on National Security/21st Century, at iv, available at [Error! Bookmark not defined.http://www.nssg.gov/phaseIII.pdf](http://www.nssg.gov/phaseIII.pdf).

² Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

³ The SAIA is codified in the US Code at 16 U.S.C. §§670a-670f.

⁴ See 16 U.S.C. §670(a)(1) & (a)(3)(directing the Secretary of Defense to carry out a program for conservation and rehabilitation of natural resources on military installations and describing the purposes of that program).

Federal district courts under the Administrative Procedure Act (APA)⁵ and result in judicial issuance of injunctive relief that could disrupt mission-related activities. While an installation has a duty to implement an INRMP, the decision on how to implement is largely a matter of agency discretion. While installations should not unnecessarily narrow that discretion by making overly burdensome and precise commitments to implement specific projects in the INRMP, they should be prepared to make annual funding requests to move towards achieving planning goals and objectives.

Prior to 1997, the Sikes Act did not impose an affirmative duty to plan and manage natural resources on military installations. The Sikes Act encouraged and authorized "cooperative" planning for and management of fish and wildlife resources but did not require it. The SAIA marked a sharp departure. The SAIA imposes an affirmative mandatory duty on the Secretary of each military department to both prepare and implement an INRMP for every military installation under his jurisdiction unless an installation had been excluded due to the lack of significant natural resources.⁶ Installations, therefore, must develop and commence implementation of INRMPs by the statutory deadline – 18 November 2001. Installations are scrambling to meet the plan completion deadline, hampered by the requirement that INRMPs be developed in cooperation with and reflect the "mutual agreement" of both the US Fish and Wildlife Service (USFWS) and the State fish and game agency.⁷

After completing development of its INRMP, an installation will immediately face the challenge of implementing the plan.⁸ Neither the statute nor its legislative history sheds light on the meaning of the term "implement." In other words there is no express yardstick against which successful INRMP implementation can be measured. But the SAIA, viewed in its entirety, clearly anticipates some level of concrete INRMP implementation. For example, INRMPs must be action-oriented, providing for: enhancement of fish and wildlife habitat, protection and restoration of wetlands, public access for outdoor recreation; and, enforcement of natural resource laws.⁹ The Secretary of the Army is required to employ sufficient numbers of trained natural resource professionals to perform tasks necessary to implement INRMPs.¹⁰ The Secretaries of Defense and Interior must report annually to Congress on the implementation of INRMPs, including expenditure levels associated with conservation activities conducted pursuant to approved plans.¹¹ And Congress has authorized \$3,000,000 annually for each fiscal year through 2003 to carry out functions assigned to DOI under INRMPs.

Failure to develop or implement an INRMP in accordance with the SAIA and other applicable statutes¹² may place at legal risk ground-disturbing activities that have the potential

⁵ The applicable provisions of the APA include 5 U.S.C. §§551(1), (13); 5 U.S.C. §704; & 5 U.S.C. §706.

⁶ 16 U.S.C. §670a(a)(1)(B).

⁷ 16 U.S.C. §680a(2).

⁸ See 16 U.S.C. §670a statutory note (emphasizing that there is a deadline for installations to "prepare and begin implementing [an INRMP] in accordance with Section 101(a) of [the SAIA]")

⁹ See 16 U.S.C. §670a(b) (required elements of an INRMP).

¹⁰ See 16 U.S.C. §670e-2.

¹¹ See 16 U.S.C. §§670a(f)(1) & (2).

¹² For example, the INRMP can be set aside for an installations failure comply adequately with NEPA or Section 7 of the Endangered Species Act (ESA) in development of the plan. See e.g. Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (concluding that Forest Service Land and Resource Management Plan, while programmatic in nature, is an action reviewable for compliance with NEPA); Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (enjoining the Forest Service from implementing timber sales, cattle grazing, road construction and other ground-disturbing activities for Forest Service failure to conduct Section 7 consultation on the effects of implementing the plan on threatened salmon species).

to impact natural resources. The SAIA, like the National Environmental Policy Act (NEPA)¹³ and the National Historic Preservation Act (NHPA)¹⁴, contains no internal mechanism for citizen or regulatory enforcement. That does not mean, however, that the Army's failure to develop or implement an INRMP will be shielded from judicial review. The Administrative Procedure Act (APA)¹⁵ provides the path to citizen enforcement. Initially, the APA makes clear that individuals aggrieved by an agency's failure to act may seek judicial review.¹⁶ It further empowers Federal district courts to review final agency action (or inaction),¹⁷ and establishes the scope and standard of judicial review.¹⁸

An individual that is concerned with an installation's failure to develop or implement an INRMP may, therefore, use the APA as a means of obtaining judicial relief. The reviewing court can provide the following remedies. It can: (i) declare the installation's action or failure to act illegal; (ii) direct the installation to comply with the law (i.e. to prepare and implement an INRMP); and, (iii) if warranted, issue an injunction precluding or limiting certain ground-disturbing activities (e.g. training) until the legal deficiency is remedied.¹⁹

In summary, installations have an affirmative duty to both develop and implement INRMPs. While installations will be accorded discretion in determining how to develop and implement such plans, Federal district courts are empowered to review an installation's compliance with the SAIA and provide injunctive relief, if appropriate. To avoid unnecessary litigation risk, ELS's can take action. Initially, they should ensure that a thorough and deliberative administrative record supporting development of the INRMP has been maintained and preserved.²⁰ In addition, ELSs should review INRMPs to ensure that the installation has not made overly burdensome commitments to implement specific projects given the lack of certainty of out-year funding. By including precise lists of projects and schedules, installations may unwittingly narrow their discretion and increase their legal risks where resource limitations require deviation. The INRMP should include language explaining that such projects are not hard commitments, but are included as targets to allow for rational programming.²¹ The INRMP should include subject to availability of funding (SAF) funding language developed by ODEP noting that annual funding for implementation is not guaranteed, and commit to revisit planning goals and objectives where implementation does not occur as anticipated (i.e. adaptive management language). Finally, ELS's should review INRMP implementation on an annual basis to ensure that natural resource managers have

¹³ 42 U.S.C. §§ 4321, et seq.

¹⁴ 16 U.S.C. §§ 470, et seq.

¹⁵ 5 U.S.C. §§ xxxx, et seq.

¹⁶ See 5 U.S.C. §702 (identifying parties entitled to a right of review)

¹⁷ See 5 U.S.C. §§551(1), (13) (defining agency action to include an agency's failure to act); 5 U.S.C. §704 (defining agency actions that are subject to judicial review).

¹⁸ See 5 U.S.C. §706 (empowering Federal district courts to compel agency action unlawfully withheld and to set aside agency action where that was: (i) arbitrary and capricious; (ii) an abuse of the agency's discretion; or (iii) amounted to a failure to comply with a procedure required by law).

¹⁹ Id.

²⁰ The administrative record should include all relevant information documenting the decisional path of the installation, coordination with the USFWS and State fish and wildlife agency (including their "mutual agreement), and public involvement. It should also include other relevant legal compliance documentation (e.g. NEPA documents, Endangered Species Act, Section 7 consultation; National Historic Preservation Act, Section 106 consultation).

²¹ The following is suggested language: "Implementation of this Integrated Natural Resource Management Plan is subject to the availability of annual funding. The installation will make best efforts to request funding through appropriate channels. Where projects identified in the plan are not implemented due to lack of funding, or other compelling circumstances, the installation will review the plan's goals and objectives to determine whether adjustments are necessary."

identified project requirements and made best efforts to request necessary funding. (Scott Farley/AEC)

Migratory Bird Rule Does Not Fly with the Supreme Court

LTC Jacqueline Little

On 9 January 2001, the United States Supreme Court issued its opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (hereinafter *SWANCC*).²² At issue was the scope of the Corps of Engineers' regulatory jurisdiction under § 404 of the Clean Water Act (CWA). Specifically, the Court was asked to decide whether the provisions of §404 could be "fairly extended" to "an abandoned sand and gravel pit" that, over time, had evolved into a habitat for migratory birds, and, if so, "whether Congress could exercise such authority consistent with the Commerce Clause."²³ The Court, in a 5-4 decision delivered by Chief Justice Rehnquist, in which Justices O'Connor, Scalia, Kennedy and Thomas joined, ruled that the Corps exceeded its statutory authority under the CWA when it issued and applied a rule defining its regulatory authority to include jurisdiction over non-navigable, isolated, intrastate waters that serve as habitat for migratory birds (commonly referred to as the "Migratory Bird Rule").²⁴

Section 404(a) of the CWA regulates the discharge of dredged or fill material into "navigable waters" by authorizing the Army Corps of Engineers to issue or deny permits for such discharges.²⁵ Under the CWA, "navigable waters" are defined as "waters of the United States."²⁶ Corps regulations, in turn, define the term "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce."²⁷ In 1986, the Corps, through issuance of its Migratory Bird Rule, "clarified" these regulations, asserting that its jurisdictional authority under the CWA extended to intrastate waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties or . . . other migratory birds which cross state lines."²⁸

The *SWANCC* case involved an abandoned sand and gravel pit with excavation trenches that had developed into a series of permanent and seasonal ponds frequented, at various times, by numerous migratory bird species. When the Solid Waste Agency of Northern Cook County decided to purchase the site for conversion into a solid waste disposal facility, it contacted the Corps of Engineers to determine if it needed CWA § 404 permits to fill in some of the ponds. After initially determining that it had no jurisdiction, the Corps later concluded that the site, while not a wetland, was a "water of the United States", because the ponds located at the site were used as habitat by migratory birds.²⁹

²² No. 99-1178. 2001 U.S. LEXIS 640 (U.S. S.Ct. Jan. 9, 2001).

²³ *Id.* at *6-7.

²⁴ *Id.* at *14, *27.

²⁵ 33 U.S.C. § 1344(a).

²⁶ 33 U.S.C. § 1362 (7).

²⁷ 33 C.F.R. § 328.3(a)(3).

²⁸ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The U.S. Environmental Protection Agency adopted a similar rule in 1988. See 53 Fed. Reg. 20,764, 20,765 (Jun. 6, 1988).

²⁹ 2001 U.S. LEXIS 640, at * 7-10.

In reversing the Seventh Circuit's decision upholding the Corps' jurisdiction over intrastate waters based on the presence of migratory birds,³⁰ the Court did not address the issue of whether the Migratory Bird Rule is unconstitutional under the Commerce Clause.³¹ Rather, the Court decided the case on narrower statutory grounds.³² Specifically, the Court held that:

(1) The text of the CWA does not support extending the Corps' regulatory jurisdiction to ponds that are not adjacent to open water.³³ In so ruling, the Court emphasized that § 404 of the CWA grants the Corps regulatory authority over "navigable waters." Citing its earlier opinion in *United States v. Riverside Bayview Homes*,³⁴ the Court noted that although Congress may have evidenced an intent to allow Corps regulation of *some* waters that could not be characterized as navigable in the traditional sense, such as the adjacent wetlands at issue in *Riverside Bayview Homes*, the plain language of the CWA did not support a more expansive reading.³⁵ In distinguishing *Riverside Bayview Homes* from *SWANCC*, the Court noted, first, that "[i]t was the significant nexus between the wetlands and 'navigable' waters" that informed [its] reading of the CWA in *Riverside Bayview Homes*," and, second, that in *Riverside Bayview Homes*, the Court "did not 'express any opinion' on the 'question of the authority of the Corps to regulate . . . wetlands that are not adjacent to bodies of open water'."³⁶

(2) Congress' failure to pass legislation that would have overturned regulations broadening the Corps' § 404 jurisdiction to include non-navigable, isolated, intrastate waters "the degradation or destruction of which could affect interstate commerce" does not demonstrate Congress' acquiescence to such regulations or any subsequently issued rules (like the Migratory Bird Rule) intended to clarify or explain them.³⁷ In 1977, the Corps of Engineers promulgated a regulation that defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."³⁸ In *SWANCC*, the Corps of Engineers argued that Congress had "recognized and accepted" this broader definition when it failed, as part of the 1977 CWA Amendments, to enact a bill restricting the meaning of the term "navigable waters" to "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."³⁹ The majority rejected this argument, pointing out that the Court

³⁰ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999).

³¹ 2001 U.S. LEXIS 640, at *7.

³² *Id.*

³³ *Id.* at *16.

³⁴ 474 U.S. 121 (1985).

³⁵ *Id.* at 15-16.

³⁶ *Id.* at 15-16.

³⁷ *Id.* at *20.

³⁸ 33 C.F.R. § 323.2(a)(5).

³⁹ 2001 U.S. LEXIS 640, at *17-18. The Corps also argued that when Congress extended the U.S. Environmental Protection Agency's jurisdiction under § 404(g)(1) to waters "other than traditional navigable waters" it broadened the concept for purposes of the CWA as a whole. *Id.* at 18. The Court

is extremely careful when it recognizes congressional acquiescence to administrative interpretations of a statute, and “[failed] legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute’” since legislation can be proposed or rejected “for any number of reasons.”⁴⁰

(3) Even if the CWA were not clear, the Migratory Bird Rule is entitled to no deference under *Chevron v. National Resources Defense Counsel*⁴¹ since the rule raises significant constitutional questions, and Congress did not clearly state that it intended the Corps’ jurisdiction under the CWA to extend to intrastate waters that may be used as habitat by migratory birds.⁴² In discussing the issue of *Chevron* deference, the court also noted that the Migratory Bird Rule raised important federalism questions that, given the lack of anything “approaching a clear statement from Congress” should not be resolved in a manner that “would result in a significant impingement of the States’ traditional and primary power over land and water use.”⁴³

Although *SWANCC* involved dredge and fill permits under § 404 of the CWA, a 19 January 2001 EPA/Corps of Engineers memorandum explaining the meaning and effect of *SWANCC* confirms that the decision applies with equal force in the § 402 National Pollutant Discharge Elimination System (NPDES) arena. Like the regulations implementing CWA § 404, the § 402 regulations define “waters of the United States” to include intrastate waters “the use, degradation, or destruction of which could affect interstate or foreign commerce.”⁴⁴ Further, before *SWANCC*, EPA had accepted the Corps’ view that waters which support significant migratory bird use generally possess the requisite interstate commerce nexus to be considered under this definition.⁴⁵ Thus, to the extent that regulators or other stakeholders rely solely on the presence of migratory birds to establish federal CWA jurisdiction over non-navigable, isolated intrastate waterways, installations can now argue that the water body in question is not a “water of the United States” and therefore no permits (either NPDES or dredge and fill) are required for discharges into such water body. If *SWANCC* were interpreted as being limited to cases arising under § 404 of the CWA, this would lead to the rather odd result that permits are required for pollutant discharges into a designated waterway under § 402 of the CWA, but not dredge and fill discharges into the same waterway under § 404. Such an outcome would hardly comport with Congress’ stated purpose for enacting the CWA – i.e., “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.”⁴⁶

Despite EPA’s and the Corps’ concession on the issue of § 402 application, the 19 January memorandum makes clear that both agencies view *SWANCC* as a limited decision having minimal impact on their “broad” jurisdictional authority under the CWA. Citing numerous quotes from the Supreme Court’s decision in *Riverside Bayview Homes*, EPA and the Corps conclude that Congress intended to define the waters covered by the Act broadly, despite explicit language in *SWANCC* to the contrary. The EPA/Corps memorandum quotes the Court in *Riverside Bayview Homes* as follows:

rejected this argument, finding that Congress’ use of the term “other waters” in § 404 (g) was ambiguous, and, therefore, of no use in resolving the issue. *Id.* at 21.

⁴⁰ *Id.* at *19.

⁴¹ 467 U.S. 837 (1984).

⁴² 2001 U.S. LEXIS 640, at *26.

⁴³ *Id.* at *25-26.

⁴⁴ 40 C.F.R. § 122.2.

⁴⁵ See 53 Fed. Reg. at 20,765.

⁴⁶ 33 U.S.C. § 1251.

. . . Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a *comprehensive legislative attempt* 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' This objective incorporated a *broad, systemic view* of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word integrity . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained. . . .'" Protection of aquatic ecosystems, Congress recognized, demanded *broad federal authority* to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . *In keeping with these views, Congress chose to define the waters covered by the Act broadly.*⁴⁷

The *regulation* of activities that cause water pollution *cannot rely on . . . artificial lines . . . but must focus on all waters* that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.⁴⁸

In view of the *breath of federal regulatory authority* contemplated by the Act itself . . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.⁴⁹

Lost on the Corps and EPA, however, is the SWANCC majority's clear statement that the Court's decision in *Riverside Bayview Homes* hinged on 1) the "significant nexus" between navigable waters and the wetlands at issue, and 2) an examination of Congress' intent solely with regard to the regulation of wetlands "inseparably bound up with the 'waters' of the United States."⁵⁰ Further, it appears that EPA and the Corps have turned a blind eye and deaf ear to SWANCC's counsel that "navigable waters", as used in the CWA, be read narrowly, since nothing in the Act's legislative history "signifies that Congress intended to exert anything more than its commerce power over navigation."⁵¹ Consequently, Army installations are likely to continue to encounter situations where there will be disagreement with EPA or the Corps as to whether "waters of the United States" are affected by installation activities. (LTC Little/CPL)

⁴⁷ 474 U.S. at 132-33 (emphasis added).

⁴⁸ *Id.* at 133-34, citing the Preamble to the Corps' 1977 regulations (emphasis added).

⁴⁹ 474 U.S. at 134 (emphasis added).

⁵⁰ 2001 U.S. LEXIS 640, at *15-16.

⁵¹ *Id.* at 816, n. 3. The Court also cites the Corps' original interpretation of its authority under § 404 of the CWA, as articulated in its 1974 regulations, emphasizing that the Corps itself defined "navigable waters" in terms of "the water body's capability of use by the public for purposes of transportation or commerce. . . ."

Coordination of Enforcement Actions with ELD

MAJ Elizabeth Arnold

Army Regulation (AR) 200-1, chapter 15 contains two important paragraphs for reporting and coordinating environmental enforcement actions with ELD. Environmental Law Specialists (ELs) at many installations do an excellent job of following the letter and the spirit of these provisions. However, some ELs have indicated uncertainty as to what sort of coordination is expected. The following discussion is intended to assist ELs in their duty to properly coordinate the enforcement actions that they are handling.

AR 200-1, paragraph 15-8 requires that environmental agreements “will be forwarded through command channels to ELD for review prior to signature.” As a practical matter, this means that the EL should coordinate with ELD’s Compliance Branch, generally by phone (703-696-1593), fax (703-696-2940), or e-mail ([Error! Bookmark not defined.Elizabeth.Arnold@hqda.army.mil](mailto:Elizabeth.Arnold@hqda.army.mil)), to forward a draft copy of the agreement prior to signature. For the most part, ELs do a good job of following this paragraph. Naturally, early coordination allows for a more detailed and meaningful review as compared with rushed coordination in contemplation of a short suspense.

The majority of coordination problems occur at the reporting stage for enforcement actions. Note that paragraph 15-7 is entitled “Reporting Potential Liability of Army Activities and People.”⁵² The word “potential” is significant here, as it should lead to erring on the side of contacting ELD whenever a regulator has indicated an intention to take any sort of enforcement action. Regarding instances of civil liability, the facts of a given case do not always lend themselves to bright-line determinations. Not all regulators specify a fine, for example. Some regulators specify a fine as the statutory maximum, without making a specific dollar amount. Other regulators engage in discussions during which the subject of a fine is mentioned but never put in writing. In all of these scenarios, ELs should at least contact ELD to determine whether more extensive coordination under paragraph 15-7 is needed.

The following guidance applies to identifying when federal, state, or local environmental regulators trigger the reporting requirement under paragraph 15-7. At the point when the regulator expresses a serious intent to assert itself *vis-à-vis* an alleged environmental violation, the EL should report up the chain per AR 200-1, paragraph 15-7(c). For those ELs who are unclear as to the sort of information that needs to be reported per paragraph 15-7, here are some suggestions: (1) name of the installation involved, as well as the state in which it is located; (2) name the statute(s) that the installation allegedly violated; (3) specify if the regulator is a federal, state or local entity; (4) provide a copy of the Notice of Violation to ELD, if it was in writing; (5) if there is no written Notice of Violation, but the regulator has communicated a dollar amount, share that information with ELD. Again, this information can be shared with ELD using the contact information given above.

Providing this information to ELD within 48 hours, per the time frame stated in the regulation, will enable ELD to start working with the EL to identify and work legal issues at an early stage. In some cases, ELD may know of a similar situation at another installation and can then assist the EL with the sharing of relevant information. In other words, early reporting and coordination can avoid the proverbial re-invention of the wheel.

⁵² Para. 15-7 requires reporting of “[a]ny actual or likely ENF not involving Civil Works that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact” (emphasis added).

After making a quick report within 48 hours, the regulation requires written reporting within seven days and a “report of significant development thereafter.” Examples of what constitutes a “significant development” would be: (1) discovery of evidence that either inculpatates or exculpates the installation; (2) assignment of an administrative law judge (ALJ) to the case; (3) a synopsis of any conference calls with the regulator or ALJ; (4) any offers or counter-offers for penalties of any kind; (5) any plans to assert affirmative defenses, particularly the defense of sovereign immunity.

Even ELSs who are experienced in environmental law practice can benefit from early and regular coordination of their cases. As new court decisions affect policy at the Headquarters level, ELSs can best ensure that their strategy is in line with current policy by following paragraphs 15-7 and 15-8 in a proactive fashion. Enforcement actions receive a high level of visibility at the Headquarters level, and regular reports on pending cases are shared with the Chief of Staff and the Secretary of the Army. Thus, early reporting of enforcement issues allows ELD to respond timely and accurately to inquiries that filter to Army leaders through technical channels. (MAJ Arnold/CPL)

Report to Congress on Environmental Penalties

MAJ Elizabeth Arnold.

In reporting the Defense Authorization Act for Fiscal Year 2001 (FY01),⁵³ the Joint Conferees included a requirement for the Secretary of Defense to prepare a report that “includes an analysis of all environmental compliance fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001.”⁵⁴ The suspense for this report is no later than 1 March 2002.

According to this Congressional mandate, “[t]he analysis shall address the criteria or methodology used by enforcement authorities in initially assessing the amount of each fine and penalty. Any current or historical trends regarding the use of such criteria or methodology shall be identified.” At a minimum, all of the Services will have to pull data from their closed cases as far back as FY95, and going up to those cases that will have been closed by the end of FY01.

All of the Services will have to work together to gather data on their respective cases and give it to the Office of the Secretary of Defense (OSD) in a timely manner. Because the Army will have the majority of the data that will ultimately go into the Report, Army ELD has started to plan the format and timelines of the Report. Suggestions are welcome during this early stage of planning. OSD has already indicated that whatever data is reported will have to be at OSD NLT 30 November 2001. That will leave exactly two months after the close of FY01 to get all the Services to report their coordinated data to OSD.

This mandate presents the Services with an opportunity to put some important facts on the table. However, in order to do so, it will be necessary to compile data from cases that are long since closed. Some installations may be asked to do a scrub for data on old cases. Currently ELD is compiling as much data as possible based on the records available at the Headquarters level. Where deficiencies appear, individual installations will be contacted in an attempt to fill in the gaps for the needed data. Meanwhile, those installations with old closed cases are encouraged to refrain from purging any such files.

⁵³ 106 HR 5408.

⁵⁴ Senate Report 106-292 (May 12, 2000) of the Senate Armed Services Committee, to accompany the National Defense Authorization Act for Fiscal Year 2001 (Senate Bill 2549).

Currently ELD is working closely with OSD to draft the format of the report. The final product will probably resemble the Environmental Quality Annual Report to Congress, but with a bit more detail than what is annually reported. OSD plans to send out a data call on September of 2001. Between now and September, the individual Services will have to plan internally so as to make the ultimate suspense to OSD of 30 November 2001. (MAJ Arnold/CPL)

The Butterfly Effect: New Coastal Zone Management Act Regulations and Army Operations

MAJ Gerald P. Kohns (Chief, 10th Legal Support Organization (USAR) Environmental Law Team)

An oft-cited illustration from chaos theory involves the potential effect of a butterfly flapping its wings in the Amazon causing, through minute but cascading air disturbances a tornado in Kansas. A similar event for Army operators may have occurred early in December when NOAA promulgated the final regulations implementing two rounds of amendments to the Coastal Zone Management Act (CZMA). These regulations appear in the December 8, 2000, edition of the Federal Register, at pages 77124 through 77175.

The CZMA was enacted in 1972 to protect and, where possible, enhance and restore various resources within the coastal zone of the United States largely through encouraging and assisting coastal States to adopt and implement their own management plans. For purposes of the CZMA, the "coastal zone" is considered to be the coastal waters of the U.S. with the adjacent shorelands "strongly influenced by each other" and includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches extending along both coasts and the Great Lakes.⁵⁵ In regard to federal agencies like the Department of the Army, the CZMA is essentially a planning statute and, like other planning statutes such as the National Environmental Policy Act and the National Historic Preservation Act, the CZMA imposes document-and-consult requirements upon federal agencies prior to undertaking actions that "directly affect" the resource in question.⁵⁶ Completion of this requirement is usually documented by the agency's receipt of a concurrence with the agency's consistency determination from the State agency involved.⁵⁷

However, while the relatively benign NEPA and NHPA do not impose substantive standards upon agency behavior, the CZMA requires Federal agencies conduct their actions in a manner "consistent to the maximum extent practicable" with the enforceable policies set forth in coastal zone management programs adopted by States and approved by NOAA. The NOAA regulations further articulate this standard to be one of mandatory compliance with those policies unless federal law prohibits such compliance.⁵⁸ The Act was intended to cause substantive change in Federal agency decision making within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates. ... Federal agencies shall not use a general claim of a lack of funding or insufficient

⁵⁵ 16 U.S.C. § 1453(1).

⁵⁶ 16 U.S.C. § 1456(1).

⁵⁷ 15 CFR §§ 930.36, 930.41.

⁵⁸ 15 CFR § 930.32(a)(1).

appropriated funds for failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program [in the absence of a] Presidential exemption...”⁵⁹

Although harsh, this proscription’s impact was historically mitigated for the Army as it applied only to actions that “directly affected” the coastal zone. The precise geographic reach of these provisions was a point of contention for years after the CZMA’s initial enactment. In 1984, the Supreme Court held that the Secretary of Interior’s sale of Outer Continental Shelf oil and gas leases was not an activity “directly affecting” the coastal zone and thus the Secretary was not required to obtain a consistency determination prior to approving such sales.⁶⁰ The court found that this language, adopted as a compromise during conference on the 1972 Act, was intended to apply the CZMA only to those federal activities that took place within the coastal zone itself.

In reaction to this decision, Congress replaced §307c(1)’s “directly affecting” language with “Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone...”⁶¹ As noted in the preamble to the final NOAA CZMA regulations, this amendment applies the federal consistency requirement to “any federal activity, regardless of location, [when that activity] affects any land or water use or natural resource of the coastal zone.”⁶² Moreover, the agency’s analysis must also include reasonably anticipated indirect and cumulative as well as direct effects. “[T]he term ‘affecting’ is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁶³ “No federal agency activities are categorically exempt from this requirement.”⁶⁴ Examples of activities with effects on the coastal zone include a National Maritime Fisheries Service rule limiting the catch of a species of fish, a Corps of Engineers rule authorizing activity in navigable waters and wetland, and the establishment of “exclusionary zones” near military ranges and installations.⁶⁵

The nature of the federal action does not determine the applicability of the consistency requirement, but rather whether that action has reasonable foreseeable effects on coastal areas. “For example, a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities [included within the document or regulation] are reasonably foreseeable.”⁶⁶ The new regulations and preamble do not further define “reasonably foreseeable” but leave that as a case-by-case determination.⁶⁷ The regulations cross-reference to the CEQ’s NEPA regulations in defining “indirect (cumulative and secondary) effects.”⁶⁸ Planners must thus consider potential symbiotic effects arising from agency and private activities.

⁵⁹ 15 CFR §§ 930.32(a)(2), 930.32(a)(3).

⁶⁰ . Secretary of Interior v. California, et alia, 464 U.S. 312 (1984).

⁶¹ Pub.L. 101-508, §6208(Nov.5, 1990).

⁶² 65 Fed.Reg. 77124 (Dec. 8, 2000).

⁶³ H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968, 970-971

⁶⁴ Id. At 970

⁶⁵ 65 Fed.Reg. 77124, 77131 (Dec. 8, 2000).

⁶⁶ .” 65 Fed.Reg. 77124, 77130 (Dec. 8, 2000).

⁶⁷ Id.

⁶⁸ Id.

Given the breadth of these new requirements, Army planners are advised to take advantage of two programmatic aspects of the consistency requirement. First, 15 CFR 930.33(a)(3) allows Federal agencies to identify activities having a de minimis effect upon the coastal zone. If the State concurs with such identification, the agency need not again subject those activities to State review.⁶⁹ As the regulatory definition of de minimis, 15 CFR 930.33(a)(3)(ii), is couched in terms of “insignificant direct or indirect (cumulative and secondary) coastal effects”, planners may be able to look to NEPA environmental assessment/ FONSI standards for guidance in making such a determination and consistent with CZMA procedural requirements, use a NEPA EA “as a vehicle for ... consistency determination[s] or negative determination[s].”⁷⁰

Second, the NOAA regulations provide for Federal agency submission of general consistency determinations where the agency “will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal which cumulatively has an effect upon any coastal use or resource....”⁷¹ Although the agency is required to periodically consult with the State agency regarding the manner in which incremental activities are undertaken,⁷² this approach may have value as applied to frequently repeated training activities which may have more than a de minimis effect upon the coastal zone.

As always, consultation with installation or Regional ELSs is strongly encouraged.
(MAJ Kohns/ USAR)

⁶⁹ 15 CFR § 930.33(a)(3)(i).

⁷⁰ 15 CFR § 930.37.

⁷¹ 15 CFR § 930.36c

⁷² id.,

Nineteenth Century Poet Brings Meaning to Army Environmental Law

LTC (P) Dave Howlett

The Library of America has just published *Longfellow, Poems and Other Writings*, a generous selection of the work of a great American poet. The book resonates with themes relevant to Army environmental lawyers.

Henry Wadsworth Longfellow is best known for poems such as “Paul Revere’s Ride,” “The Village Blacksmith,” and “The Children’s Hour.” He also wrote book length poems such as *Evangeline*, *Hiawatha*, and *The Courtship of Miles Standish*. Once considered one of our great poets, he no longer stands with Whitman, Hawthorne, and Melville. Rather, he is grouped with Lowell, Whittier, and Holmes. With publication of this book, however, his stock may rise again.

In 1863, the already-famous Longfellow published *Tales of a Wayside Inn*. Several travelers are stranded in an Inn and tell each other stories for entertainment. The Inn is in Sudbury, Massachusetts. Sudbury, of course, is the location of an Army installation that was disposed of (for the most part) during the last Base Closure round.⁷³

One of the tales, “The Birds of Killingworth,” is a cautionary environmental fable. In it, a town is filled with all types of birds, “the robin and bluebird piping loud,” and seagulls, with their “outlandish noise / of oaths and gibberish frightening girls and boys.” But many citizens want to get rid of the birds, especially crows. A town meeting is held:

They shook their heads, and doomed with dreadful words
To swift destruction the whole race of birds.

And so the dreadful massacre began;
O’er fields and orchards, and o’er woodland crests,
The ceaseless fusillade of terror ran.
Dead fell the birds, with blood stains on their breasts . . .

Disaster follows, of course. Unchecked insects “made the land a desert without leaf or shade.” Worms dropped from leafless trees “upon each woman’s bonnet, shawl, and gown.” “The wild wind went moaning everywhere, / lamenting the dead children of the air.”

Then they repealed the law, although they knew
It would not call the dead to life again;
As schoolboys, finding their mistake too late,
Draw a wet sponge across the accusing slate.

The tale ends with some remarkably successful reintroduction, stabilization, and critical habitat management.

Many of these poems will provoke thought and recognition with today’s readers. This poet and this book are well worth the reader’s time. (LTC(P) Howlett/ LIT)

⁷³ The book was originally advertised as *The Sudbury Tales* but Longfellow did not like the way that title sounded.

Protection of Non-Public Information

At the CG's last townhall meeting, I gave a short presentation about contractor employees in the Federal workplace, and my primary focus was about the protection of nonpublic information, because this is where I see a significant vulnerability. In continuing to raise our awareness of these issues, I decided to reissue this Ethics Advisory from 1998. This time I have also attached the Chief of Staff's 12 February 1998 memorandum for general distribution concerning the protection of advanced procurement and other sensitive information.

There are a number of laws and regulations that protect nonpublic information, such as:

- The procurement integrity law restricts the release of source selection and contractor bid and proposal information, and provides civil fines and criminal penalties for improper release.
- The trade secrets act makes it a crime to improperly release contractor trade secrets and other confidential business information outside the Government.
- The *Standards of Ethical Conduct for Employees of the Executive Branch* prohibits us from releasing, exploiting, or allowing others to exploit nonpublic information.

In addition, restrictions on our use of information can arise in other ways:

- We often buy technical data and computer software with restrictions on our release outside the Government.
- A release of advanced procurement information to a potential competitor could result in a contracting officer determining that this source is barred from competing for the requirement.
- An improper release of information outside the Government could result in having to re-do or fix a procurement as a result of a successful protest.

The important thing to keep in mind with respect to our use of information, is that, when we discuss it with, or give it to, a contractor employee, we have released it *outside* the Government. If we invite a contractor employee to a meeting, whatever we discuss during the meeting has been released *outside* the Government. When we give a contractor employee information to enter into a database or to prepare slides and charts, we have released the information *outside* the Government. None of the laws and

regulations that restrict *our* use of sensitive and nonpublic apply to our contractors' employees, except for the procurement integrity law and privacy act.

This does not mean that we can never release information to contractor employees. But, it does mean that we must be sensitive to the issues and make conscious decisions. First: can we? For example, if it is technical data to which we have only restricted rights, we probably cannot release the information without first obtaining permission from the source of the data. We might have to pay for this permission. Second, even if it is legal, do we really need to/should we release the information? Always practice "need to know." In addition, think of the consequences. For example, will release of this information create an organizational conflict of interest, barring the contractor from competing on an upcoming acquisition?

Once we decide that it is permissible to release the nonpublic information and that we need or want to provide it to a contractor employee, we should not do so without some sort of promise by the contractor and its employee that they will not use or exploit the information in any way other than in furtherance of the contract. The contract might already provide for such a promise. If not, you should consider having the contractor employee sign a non-disclosure certification. Even if the contract has a specific promise by the contractor not to disclose nonpublic information that it has access to during the performance of the contract, you still might want to use a non-disclosure certification with the contractor employees who are supporting your organization or effort.

A sample non-disclosure agreement is attached for your information. It should not be used without fine-tuning it to your situation, and consulting with the contracting officer.

Questions in this area should be directed to the contracting officer, the contract lawyer, or the ethics official, as appropriate.

This and all the Ethics Advisories are maintained in the Ethics Lotus Notes database.

S: 28 September 2000

AMCRDA-TF

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Future Combat Systems -- Government Support to Contractors

1. Recently, the Defense Advanced Research Projects Agency (DARPA) awarded four "Section 845 Other Transactions" for development work for the Future Combat Systems (FCS) program. Success of the FCS program will require interaction and cooperation between the contractor teams and the Research, Development and Engineering Centers and the U.S. Army Research Laboratory. Before we establish such relationships, we need to consider the ramifications such actions will have on our resources and the integrity of the future acquisition process for the FCS. Accordingly, the U.S. Army Materiel Command activities will not enter into arrangements with any of these contractors or their subcontractors to perform such work without prior approval from this headquarters.

2. The four contractor teams are:

- a. The Boeing Corporation, Phantom Works, Seattle, WA
- b. Team Full Spectrum, Science Applications International Corporation (SAIC), McLean, VA
- c. Team FoCuS Vision Consortium, c/o Raytheon Corporation, Plano, TX
- d. Team Gladiator, TRW, Inc., Carson, CA; Lockheed Martin, Inc., Lockheed Martin Vought Systems, Dallas, TX

3. This program is being executed in a new way and there is some risk inherent in the approach. In order to maximize chances of success, we must make ourselves available to the contractor teams to the maximum extent possible consistent with good practice and available resources. In doing so, we must take necessary steps to ensure that a "level playing field" is maintained and that no perception of impropriety is allowed to develop. We must ensure the integrity of the process. The information requested in paragraph 4 will provide you with insights into what we feel are the critical issues.

AMCRDA-TF

SUBJECT: Future Combat Systems -- Government Support to
Contractors

4. Approval requests must address, at a minimum: (a) the legal authority authorizing the relationship, (b) a copy of the proposed legal instrument, (c) a detailed description of the R&D effort to be performed by each party, (d) the government resources that will be committed to the effort and any anticipated reimbursements, (e) your strategy for ensuring a level playing field for all FCS contractors (i.e., nonexclusive vs. exclusive agreements), (f) precautions you intend to implement to minimize the appearance of organizational conflicts of interest, and (g) your plan for safeguarding intellectual property and for preventing inadvertent technical transfusion among contractors.

5. If you anticipate entering into agreements with the DARPA contractor teams, provide this headquarters with your plan to execute these agreements by 28 September 2000, taking into account the considerations listed in paragraph 4 above. Our point of contact for this matter is Mr. Lawrence Levengood, AMCRDA-TF, DSN 767-3094. Our Legal Advisor is Mr. Bill Medsger, AMCCC-B, DSN 767-2556, and our Technical Advisor is Mr. Levengood.

6. AMC -- Your Readiness Command . . . Serving Soldiers
Proudly!

FOR THE COMMANDER:

//signed//

A. DAVID MILLS
Principal Deputy to the
Deputy Commanding General

AMCRDA-TF

SUBJECT: Future Combat Systems -- Government Support to
Contractors

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Inside The Army
March 5, 2001
Pg. 1

Army Relocates Some Contractors Beyond Pentagon Walls

The Army staff last week directed about 30 contractors to move out of the Pentagon as part of an ongoing review of its relationship with contractor support.

While some sources said the loss of the Pentagon office space was needed to offset a shortage of desks, others indicated the change was more about controlling the flow of information in and, most importantly, out of the building.

Contractors at Army headquarters are not always beholden to the directorate in which they find their seats. Often, a program manager or the program executive office pays a contractor's salary and supplies that person as a specialist to work his system's issues. The headquarters directorates, which are nearly always strapped for personnel, usually accept the PM- or PEO-provided bodies happily.

However, the Army staff has found it difficult to control such contractors' actions; where their loyalties lie -- with the PM or with the Army staff they support -- has been questioned. Recently, a contractor leaked "very sensitive information" regarding internal headquarters deliberations to the program manager, a source said. That PM then "started a campaign" to counter proposals under consideration at the staff level, he said.

Having contractors sponsored by a PM, PEO or someone else "doesn't allow us in the Army staff to look at options without getting everyone involved," the source said. The service cannot have a good intellectual discussion if outsiders get a peak, particularly when it leads to congressional inquiries, he asserted.

For now, the change is affecting contractors working within the force development directorate under the deputy chief of staff for programs. About one-third of FD contractors were told their "co-located services" were no longer needed. They remain under contract to the Army and will continue to work with their assigned offices -- just not in them, a source said.

Most of those moved out of the Pentagon have already found new homes in Crystal City, VA.

DCSPRO and the overall Army staff are examining the general role of contractors in the building. According to a source, the Army staff had already decided, prior to the most recent incident, to discard altogether the use of contractors provided by outside organizations. Any support needed in the future will be paid for directly by the Army staff and therefore no conflicts of interest should arise, he said.

For existing contracts that require the Army to provide office space, the service will likely move those personnel to military locations outside the Pentagon. The Defense Department has leased extensive amounts of space in northern Virginia and some of it may be used to address this need, a source said.

Other changes may be in store as the headquarters review of contractor support progresses. The Army is looking at every position to see which are needed, which can be eliminated and whether the services being provided are appropriately focused.

— *Erin Q. Winograd*



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



06 FEB 2001

MEMORANDUM

SUBJECT: Principles Governing the Collection of Internet Addresses by DOD Intelligence and Counterintelligence Components

This document lays the initial groundwork for determining how to apply intelligence oversight principles to the conduct of intelligence/counterintelligence (FI/CI) activities on the Internet. It is not intended to provide comprehensive intelligence oversight guidance. On the contrary, this paper only addresses a single question - *Does obtaining an e-mail or site address constitute a collection of information about a United States Person?*

These Principles provide a framework for answering this question. They are not a substitute for conducting a case-by-case analysis nor are they directive. Instead, they are intended to serve as a tool to assist the attorney and the intelligence officer in determining how to proceed during a given Internet-based activity. It is the expectation of this office that individual FI/CI components will build upon these principles to establish internal guidelines.

While these Principles are being distributed by the Office of General Counsel, they represent the work and collective wisdom of attorneys and intelligence experts from throughout the Department of Defense, including the Office of the Assistant to the Secretary for Intelligence Oversight, the National Security Agency, the Defense Intelligence Agency, the Defense Information Systems Agency, the Joint Staff, USSPACECOM, and each of the Military Services.

Richard L. Shiffin
Deputy General Counsel
(Intelligence)



Principles Governing the Collection of Internet Addresses by DOD Intelligence and Counterintelligence Components

Increasingly, DOD intelligence components are conducting intelligence and counterintelligence activities on the Internet. One challenge they confront is to maximize the use of the Internet while ensuring that such use complies with Executive Order 12333, *United States Intelligence Activities*, and its implementing regulation, DOD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components That Affect United States Persons*.¹ Despite the fact that both of these documents were published well before the development of the Internet as it exists today, the concepts, principles, and procedures they embody remain vibrant and govern the intelligence and counterintelligence use of the Internet.

In order to properly apply the provisions of E.O. 12333 and DOD 5240.1-R to the use of the Internet, intelligence and counterintelligence personnel need to know how to analyze, as well as characterize, IP addresses, URLs, and e-mail addresses. All three of these categories of information present challenges that are different from those encountered when working with traditional forms of information. Yet all three fit well within the framework of DOD 5240.1-R. A discussion of each of the three categories follows.

IP Addresses

An IP address is a numeric string (e.g., 149.122.3.30) that identifies a hardware connection on a network. The numeric string is information about the owner, operator, or user of the hardware connection. As is the case with a telephone number, the numeric string comprising an IP address does not, without further information, identify or consist of information about a United States person. However, open source information about IP addresses is available on the web. Sometimes, the information that is available is very general and would not allow one to determine if the IP address is information about a U.S. person. In other instances, the information that is available is quite specific and would allow such a determination.²

Intelligence and counterintelligence (FI/CI) components are not necessarily required to try to decipher an IP address as soon as they encounter one. They are only required to engage in such an inquiry once a decision is made to conduct analysis that is focused upon specific IP

¹ The stated purpose of these documents is to enable intelligence components to effectively carry out their authorized functions while ensuring that any activities that affect U.S. persons are conducted in a manner that protects the constitutional rights and privacy of such persons.

² Even if a "look-up" site reveals that an IP address is assigned to a U.S. service provider, that is not necessarily sufficient information to require a presumption that the address is associated with a United States person. In the sense that a telephone number gives more information about the caller than about the phone company, the IP address gives more information about the individual connection than about the service provider that is facilitating that connection. Nevertheless, some service providers, for example Erols, principally provide service to a U.S.-based clientele. An IP address within a block assigned to such an ISP might merit the presumption that any IP address within that block identifies a U.S. person. Conversely, if a group of IP addresses is known to be assigned to a non-U.S. person (e.g. a foreign corporation), then the FI/CI component may presume that any given IP address within that block is associated with a non-U.S. person.

addresses. Prior to such analysis, IP addresses may be treated as “data acquired by electronic means.” In accordance with DOD 5240.1-R, procedure 2.B.1, such data is not considered to be collected until it has been processed into intelligible form. There are no intelligence oversight restrictions on the maintenance or disposition of information that is not considered to have been “collected.”

However, once the decision is made to conduct analysis focused upon specific IP addresses, the “collecting” component is obliged to conduct a reasonable and diligent inquiry to determine whether any of the IP addresses are associated with United States persons.³ To conduct this inquiry, the component may use the above described web tools, but also must consider any external information available to it that might assist in identifying the IP address. If the FI/CI component still cannot reasonably determine whether any given IP address is associated with a U.S. person, then it may apply the presumption that unattributed IP addresses do not constitute information about a person and the IP address may be the subject of inquiry without regard to whether or not it is associated with a U.S. person. If, however, the component subsequently obtains information to indicate that an IP address is associated with a U.S. person, then the presumption is overcome and that IP address must be handled in accordance with the procedures governing the collection of information about U.S. persons.⁴ The collecting component should document the efforts made to determine whether the IP address in question is associated with a U.S. person.

E-Mail Addresses

An e-mail address identifies a user so that the user can receive Internet e-mail. An e-mail address typically consists of a name to identify the user to the mail server, followed by “@” and the host name and domain name of the mail server. For example, if Anne E. Oldhacker has an account on the mail server called baz at Foo Enterprises, she might have an e-mail address, aeo@baz.foo.com.

E-mail addresses, unlike both IP addresses and URLs, are nearly universally associated with individuals. It is often difficult, however, to identify the individual with whom any given e-mail address is associated. Some e-mail addresses are configured as a string of alphanumeric symbols that do not convey any meaningful information (e.g. aronssop@ or smi2345@). Others plainly identify an individual (e.g. patti.aronsson@). Regardless of how straightforward an e-

³ The following is an example of when the requirement is triggered:

A counterintelligence component may maintain a database of all IP addresses that have attempted to gain unauthorized access into or information about DOD computers, without regard to whether or not any given IP address is associated with a United States person, and also may conduct statistical analysis of the intruding IP addresses. However, as soon as the CI component decides to investigate whether some subset of these intrusions represents an attack by a foreign intelligence service, the CI component is obliged to conduct an inquiry to try to determine whether any of the IP addresses within that subset are associated with United States persons.

⁴ Information that identifies a U.S. person may be collected by an intelligence or counterintelligence component only if it is necessary to the conduct of a function assigned the component, and only if it falls within one of the thirteen categories listed in DOD 5240.1-R, Procedure 2, Paragraph C, “Types of Information That May Be Collected About United States Persons.” Additional limitations are imposed in Procedures 5 through 10 on the use of specific collection techniques.

mail address appears to be on its face, more often than not, it does not provide sufficient information to identify it as being affiliated with a United States person. Sometimes, though, the name to the left of the "@" will provide persuasive evidence that the e-mail address is associated with a U.S. person; for example, the person may be a well known public figure or may be the target of an investigation or inquiry in which the intelligence investigator or analyst is engaged.

Occasionally, the information to the right of the "@" may provide persuasive evidence about whether an e-mail address is associated with a U.S. person. The information to the right of the "@" represents the service provider. Some service providers predominately serve a non-U.S. based clientele and e-mail accounts with such providers may be presumed not to be U.S. person accounts. Other service providers are so closely affiliated with the U.S. that any e-mail account with that provider should be presumed to be associated with a U.S. person (e.g. aronssop@osdgc.osd.mil).

This latter category of e-mail addresses may only be collected, retained, or disseminated in accordance with the requirements of DOD 5240.1-R. All other e-mail addresses may be treated in a manner similar to the approach described for the treatment of IP addresses. E-mail addresses that are not self-evidently associated with U.S. persons may be acquired, retained and processed by CI and FI components without making an effort to determine whether any given address is associated with a United States person so long as the component does not engage in analysis focused upon specific addresses. Once such analysis is initiated, the CI or FI component must make an effort to determine whether the addresses are associated with U.S. persons.

Unlike IP addresses, there is no central repository of e-mail addresses to assist the component in identifying them. Instead, the component must rely principally upon traditional methods to try to determine whether any given address is being used by a United States person. Oftentimes, particularly for those e-mail addresses which are cryptic, it will be virtually impossible for the CI or FI component to make a determination. In such instances, the component may presume that the e-mail addresses do not identify U.S. persons. As with all presumptions, however, the component is under a continuing obligation to be alert to information that might overcome that presumption.

URLs

URL (Uniform Resource Locator) is a standard way of specifying the location of an object on the Internet, typically a web page. URLs are the form of address used on the World Wide Web. URLs typically appear as words rather than numbers and, while some URLs are gibberish, most of them convey a modicum of information. In some instances, that information is of a character that ostensibly identifies a person (e.g. Mary_Smith.com or USSTEEL.com). In other instances, the words in a URL do not convey, in any apparent way, information concerning persons (e.g. Bicyclists.com).

Unlike IP addresses or e-mail addresses, URLs are, almost by definition, publicly available. As such, even if they identify U.S. persons,⁵ lists of URL addresses may be maintained

⁵ In determining whether a URL identifies a U.S. person, a key factor to consider is the information to the right of the dot (the domain). If the domain is one commonly associated with a foreign country (e.g. .uk, .fr), then,

by CI/FI components provided such collection is within the scope of an authorized intelligence/counterintelligence activity assigned to that component. CI/FI components also may open the websites associated with such URLs if doing so is part of an authorized mission. If, however, the component wants to collect information beyond that which is available on the site, then it must make an effort to determine whether the person about whom they are collecting is a U.S. person and, if so, comply with the requirements of DOD 5240.1-R.⁶

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in the absence of contrary information, the URL can be presumed to identify a non-U.S. person. Conversely, if the domain is associated with the United States (e.g. .gov, .mil), then the URL should be presumed to be information that identifies a U.S. person. Several domains are universally available, such as .com, .net and .org, and thus do not inform the determination about whether or not the URL identifies a U.S. or a foreign person. The mere use of a name in association with a universally available domain is usually insufficient to trigger the presumption that the URL constitutes information that identifies a U.S. person. As with all information, though, if information is obtained to indicate the URL is associated with a U.S. person, then the further collection, retention, and dissemination of the URL name must be handled in accordance with DOD 5240.1-R.

⁶ This discussion does not address those web sites that limit access to subscribers or in some other manner are not available to the public.