



Office of Command Counsel Newsletter

December 2002, Volume 02-06

Ed Korte Retires

To my friends and colleagues,

As we publish our final newsletter for the calendar year I realize that this will be my last opportunity to communicate with you collectively before my retirement from the federal service on 3 January 2003.

I regret that I was unable to speak to you at our 2002 CLE Program because I very much would have liked to convey these thoughts to you in person.

For the past 15 years as the Command Counsel of AMC I have had the privilege and honor of working with all of you, our outstanding lawyers and supporting administrative staff personnel. I have enjoyed our personal and professional association immensely. You are exemplary civil servants committed to the highest ideals and dedicated to the most noble of causes . . . serving the soldiers who defend our nation.

Your professionalism, courage, integrity and com-

mitment reflect the values we hold dear and inspire those we serve.

We must never forget that we are an integral part of the Army and continue to make our contributions, to improve our services and ensure accomplishment of the missions we support.

During these many years you have been the major focus of my professional career and I know that I will find it difficult to leave this position for many reasons. I thank you for your invaluable personal support to me.

Most of all I thank you for your friendship and the encouragement you have consistently given me.

Because of you, I conclude my career in the federal service with a justifiable sense of pride knowing that together we have done our best to serve our clients and our nation.

I wish you the Happiest of Holidays and all the best in the years to come.

Ed

Kathi Szymanski Named Deputy

Kathi Szymanski, former Chief Counsel, CECOM, who started her career at TACOM-Warren was selected as Deputy Command Counsel. Congratulations and Welcome.

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Frequently Asked Questions About Absentee Ballots

Can I vote absentee?

Generally, all U.S. citizens 18 years or older who are or will be residing outside the United States during an election period are eligible to vote absentee in any election for Federal office. In addition, all members of the Armed Forces, their family members and members of the Merchant Marine and their family members, who are U.S. citizens, may vote absentee in state and local elections.

How do I apply for an absentee ballot?

The SF 76 Federal Post Card Application (FPCA) is accepted by all states and territories as either an application for registration form or for registration, or as an application for absentee ballot. You may also send a written request for a ballot to your county, city, town or parish clerk. The mailing addresses (and some on-line registration) may be found on the web at www.fvap.ncr.gov or the SF 76 can be obtained at the local Legal Services Branch.

Do I have to be registered to vote absentee?

Registration requirements vary from state to state. Many states and territories allow the citizen to register and request an absentee ballot by submitting a single FPCA. However, other states may require the use of two separate

FPCA forms: one to register, and a second FPCA to request an absentee ballot. Consult Chapter 3 of the 2002-03 Guide or your Legal Services Branch for specifics

.Where do I send my FPCA?

Chapter 3 of the Guide outlines absentee voting procedures for each state and territory. In your state or territory of legal voting residence under the heading of "Where to Send It" you will find a list of addresses for county and local election officials.

When is the best time to apply for an absentee ballot?

Generally, the FPCA is used to request a ballot and should be received by election officials at least forty-five days before election day to allow ample time to process the request and mail the ballot. If the FPCA is being used to apply for registration and an absentee ballot, the FPCA may have to be mailed earlier. Consult Chapter 3 of the Guide for further information on state or territorial deadlines. Be sure to advise your election official of any change to your address.

Thanks to the CECOM Ft. Monmouth Legal assistance Office for the contribution.

The entire paper is at Enclosure 1.

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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.

Indemnification and Reimbursement Clauses Violate the Anti-Deficiency Act

In E.I. DuPont De Nemours vs. United States of America, No 99-101, November 13, 2002, the United States Court of Federal Claims rendered an opinion of particular interest to the Army in general and to AMC in particular.

Senior Judge James Turner opined that even though the Army entered into a contract with broad indemnification and reimbursement clauses with E.I. Dupont in 1940 to limit DuPont's liability, these clauses were void and unenforceable since they violated the Anti-Deficiency Act, 31 U.S.C. § 1341.

The United States Court of Federal Claims found that the indemnification and reimbursement clauses showed a clear intent by the government to assume nearly all liability incurred by DuPont in execution of the contract.

This specifically includes CERCLA costs, even though these costs were incurred after termination of the contract.

However, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) states that "An Officer or employee of the United States Government may not ... involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

The Court relying on the ADA, states that the ADA and its predecessors, prohibits the inclusion of indemnification clauses without specific appropriation or statutory authority.

Appreciate the contribution by the newest attorney in the Business Law Operations Division, **Bob Paschall**, DSN 767-3117 and **Dave Harrington**, DSN 767-7570. (Encl 2)

List of Enclosures

1. FAQs About Absentee Ballots
2. Indem & Reimb Clauses Violate Anti-Deficiency Act
3. High Value Items Clause Rejected as Contractor Defense
4. USPTO Electronic Filing System
5. Berry Amendment
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17. Revisions to the Migratory Bird Treaty

Acquisition Law Focus

High Value Items Clause Rejected as a Contractor Defense Barring Damages Under the False Claims Act

AMCOM's **Brian Toland**, DSN 788-0539, has written a paper on the 6th Circuit Court of Appeals decision in US ex rel. Brett Roby v. Boeing Co.

The Court held that although the loss of the aircraft occurred after Government acceptance, and was the result of a defective Speco gear, the loss was specifically caused by Boeing's misrepresentation at delivery that the aircraft met and conformed to all contractual requirements set forth in the underlying contract.

The Court went on to reject Boeing's position that the HVIC should be interpreted as a standard insurance policy with ambiguous provisions and exclusionary clauses being construed against the insurer.

In its decision, the Court stated: "The HVIC insures contractors only indirectly; it is, by its own terms a self-insurance policy, which means the Government is both insurer and insured. Because nothing in the HVIC suggests that its limitation of contrac-

tor liability covers statutory violations, we hold that the district court did not error in concluding the HVIC does not provide a defense to damages sought under the FCA." *2002 FED App. 0315P (6th Cir.) at page 5*. For a lot more including case cites and analysis. (Encl 3)

USPTO Electronic Filing System

The almost complete reliance of the United States Patent and Trademark Office on mail correspondence has wreaked havoc on its operation since the terrorist activity of contaminating US mail following the bombing of the World Trade Towers. First there were substantial delays in mail transmission and lost correspondence, followed by

mail being damaged by sanitizing radiation treatment. Fortunately, the USPTO had already instituted a procedure for securely filing patent applications and other patent prosecution papers electronically before this tragic and disruptive event

POC is TACOM-ARDEC's **John Moran**, DSN 880-6590. (Encl 4)

FMS Customer Involvement Clause Changed

DFARS 225 has been changed as indicated in the Federal Register/ Vol.67, No. 226/Friday, November 22, 2002, page 70325.

The primary change is increased FMS customer involvement in the procurement process. However, proprietary information must still be protected. POC is **Craig Hodge**, USASAC Counsel, DES 767--8940. (Encl 8)

Acquisition Law Focus

Police Mutual Aid Under the Patriot Act

The events of September 11th have increased federal installations' need to develop mutual aid agreements with police forces in the surrounding communities. The uniqueness of the terrorist threat has required installations to share information and resources with the surrounding police communities to an extent not previously anticipated.

42 USC 1856a authorizes reciprocal fire protection agreements, allows for compensation of costs for outside fire departments rendering aid to the installation, and, significantly, creates a statutory waiver of personal injury or other claims against the government. 42 USC 1856b authorizes the installation fire department personnel to

provide assistance offpost. 15 USC 2210 establishes a system for reimbursement for costs of firefighting on Federal property.

No statutory or regulatory authority similar to that existing for reciprocal fire protection agreements exists for police or security protection. Prior to September 11th, it was presumed that federal resources were adequate to meet installation security needs, and *posse comitatus* concerns caused installations to generally keep to themselves in terms of security and police protection.

TACOM ARDEC's **Jerry Williams**, DSN 880-6598 provides a paper on developments in this growing area of concern. (Encl 6)

Berry Amendment

SSC-Natick's **Peter Tuttle**, DSN 256-5057 provides an outstanding treatise on the above subject.

The Berry Amendment, now codified at 10 U.S.C. § 2533a, proscribes the use of appropriated (or any other) funds available to DOD for the purchase food; clothing; tents; natural and synthetic fibers, fabrics, and yarns; any

item of individual equipment containing such fibers, fabrics, and yarns; specialty metals; and hand tools from foreign sources, subject to enumerated exceptions.

The Amendment has been of historical import to operations at the Soldier Systems Center, as virtually all SSC programs are implicated. (Encl 5)

The Acquisition Corner...from the desk of Larry Anderson

Business Operation Law Division counsel, **Larry Anderson**, DSN 767-2552, will be providing periodic articles and entries for those practitioners of the art of acquisition law.

The first issue cites court and GAO decisions of interest, OMB draft revisions to the A-76 process, DOD acquisition rules. (Encl 7)

Electronic Filing

CECOM's **Frank DiNicola**, DSN 992-9808, provides a point paper that discusses electronic filing standards and various agency positions--ASBCA--but also EEOC and MSPB and FLRA. (Encl 9)

Lessons Learned From Case Law On Urgency-Based Sole Source Actions

Perilous times have once again been thrust upon our nation and we must defend ourselves against the insidious threat of terrorism.

Those of us whose pursuit of “Enduring Freedom” consists of acquiring goods and services for the Warfighter are likely to be called upon, more frequently, to act on urgent requirements for which there is only one source.

Previous opinions of the Comptroller General of the United States have provided insight into its interpretation of the Competition in Contracting Act (CICA) and instances when other than full and open competition may be appropriate. Given the anticipated likelihood that there will be increased urgent requirements that are proposed to be fulfilled on a sole source basis, it is prudent that we look at case law to ensure that the mistakes of the past are avoided.

The overarching position of the Comptroller General regarding documentation requirements for other than full and open competitive acquisitions is articulated in National Aerospace Group, Inc. (National), B-282843, August 30, 1999, “While the overriding mandate of CICA is for ‘full and open competition’ in government procurements obtained through the use of competitive procedures . . . CICA does permit noncompetitive acquisitions in seven specified circumstances. When an agency uses noncompetitive procedures . . . it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority.

Our review of the agency’s decision to conduct a sole-source procurement focuses on the adequacy of the rationale and the conclusions set forth in the J&A.

When the J&A sets forth a reasonable justification for the agency’s actions, we will not object to the award.”

The above opinion outlines the Comptroller General’s position on protests involving any of the seven exceptions to CICA. The specific focus of this article is application of the exception provided by 10 U.S.C. 2304(c)(2), Unusual and Compelling Urgency. An excellent overview of this exception to full and open competition is provided in an article by Richard Paul Rector, from the Piper Rudnick business law firm, entitled “Streamlining Procurements: “Unusual and Compelling Urgency””.

Three cases and more are discussed in the enclosed paper written by CECOM’s **Garrett Nee**, DSN 992-1361. (Encl 10)

Court Rules: Employees Have Judicial Remedy for Grievances Covered by CBA

Complaints filed by Contingent Employees

Relying on the “plain language” of § 7121(a)(1), as amended in 1994, the Federal Circuit abandons the position it took in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), where it had interpreted § 7121(a)(1) as precluding judicial remedies for matters (except for certain specified statutory options) that have not been explicitly excluded from the negotiated grievance procedure. *Robert O. Mudge v. United States, No. 02-5024* (Fed. Cir., Oct. 17, 2002).

Prior to 1994, 5 USC 7121(a)(1) provided that negotiated grievance procedures contained in the collective bargaining agreement [CBA] would “be the exclusive procedures for resolving grievances which f[ell] within its coverage.

In addressing the pre-1994 language, the court in *Carter v. Gibbs* found that the

statutory language precluded Federal employees from resolving grievances in court when the grievance was covered by the collective bargaining agreement.

In 1994, though, Congress modified section 7121(a)(1) so that it now provides that the negotiated grievance procedure shall be “the exclusive ADMINISTRATIVE procedures for resolving grievances which fall within its coverage.” (Capitalization added.)

The court found that Congress effectively overruled *Carter* when it added the word “administrative” to section 7121(a)(1) as the Statute, therefore, no longer forecloses judicial review of employment grievances that are included within a collective bargaining agreement’s negotiated grievance procedure.

POC is **Linda Mills**, DSN 767-8049. (Encl 11)

Before the Equal Employment Opportunity Commission (EEOC) or the agency can consider whether the agency has discriminated against a complainant, it must first determine whether or not the complainant is an employee or an applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. Section 2000e-16 (a) *et seq.*

“In order to determine whether an individual is an employee under Title VII, the court will consider all of the incidents of the relationship between the [Complainant] and the agency . . .” *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998).

CECOM--Ft. Belvior **Kathryn DuCharme Poling**, DSN 654-0235, prepared a long paper on this issue, highlighting the extensive fact finding responsibilities of the EEO-Labor Counselor Team. (Encl 12)

Workers' Comp Insurance for Deployed Contractors

As the amount of contractor support to U.S. military operations increases, both contractors and contracting officers are faced with more questions about contractor employees deployed outside the continental United States performing "public work."

O What are the requirements for contractors to provide workers' compensation for their deployed employees?

O How can contractors obtain workers' compensation insurance?

O Where can someone learn about the requirements for reporting and processing claims through the Department of Labor?

O What is the organization within the Department of Labor that handles compensation for death or injury to contractor employees who are performing covered work?

O What are the statutes and regulations that address compensation for deployed employees?

O What are the penalties for failing to secure the necessary insurance?

O Can a company self-insure?

This article attempts to answer these and other questions, and to provide leads to sources of information for those questions that are not addressed.

Previous articles have covered the basics of the federal workers' compensation regulations, and provided a review of the contract clauses that are required by the Federal Acquisition Regulation.

This article will focus on how to achieve compliance with those regulations.

POC is **Janet Baker**, DSN 879-0662. (Encl 13)

An Early Retirement or a Fast One?

Wouldn't it be great if Civil Service Retirement System (CSRS) employees got cash bonuses, years of service credit and a minimum of 75% of their base salary! Perhaps, just suppose, CSRS employees would gain five years added tenure along with a fifty thousand dollar incentive bonus! Doesn't that sound great?

If these proposals sound too good to be true, it is probably because they are! Rumor has it that Congress is in the midst of a major retirement proposal.

In fact, these rumors have gained the attention of reliable news sources. These tantalizing "bills" have tickled the fancy of aspiring retirees for years. Nevertheless, like all dreams too good to be true, they will soon enter into the land of fairy tale and make believe.

The retirement hoax emails started in early 2001.

For more please see the article by CECOM's **Frank DiNicola**, DSN 992-9808. (Encl 14)

Holiday Activities

The time of year for holiday celebrations is approaching, a season to enjoy with your friends, family and co-workers. In order to keep these events enjoyable, there are some workplace ground rules that should be observed.

Before addressing specific issues, we must point out that we need to be sensitive to the fact that not all of us celebrate the same holidays. What we call the celebration, how we refer to the season, and our greetings to one another should reflect this.

At times, generic holiday references may be the most appropriate greeting.

Use of Government Time

Some holiday celebrations may occur on Government time, but only up to a point. Time taken for an actual event — perhaps a “pot luck” in the office, or a luncheon at a restaurant—is not typically an issue. However,

preparation for these events can create issues. Supervisors may permit some use of duty time for preparations. However, preparing holiday events should not become a significant part of any employee’s duties. Examples:

A committee of employees should not spend two duty days visiting potential restaurants to explore facilities and menus, followed by another two days worth of time to inform the group, obtain votes, and develop consensus, followed by another trip to make final arrangements. On the other hand a few telephone calls during the day requesting faxes from restaurants, a couple of short planning discussions in the office, and visiting one or two restaurants during lunch would be permissible.

Other issues covered by this Advisory includes fundraising, Contractor Employees circumstances, gifts, attendance at parties, holiday greetings and alcohol consumption.

POC is **Bob Garfield**, DSN 767-8003. (Encl 15)

Using Appropriated Funds for Official Courtesies

Soldier Systems Command counsel **Sri Dixit**, DSN 256-5971, provides an overview of the rules on use of appropriated funds in support of official visits to the SSC by important visitors.

Among the important questions addressed are the following:

Q: How can I use appropriated funds to purchase food, gifts, or entertainment for visiting VIPs? **Q:** Who is an authorized guest? **Q:** Can we use representation funds for the military or DoD civilians? **Q:** What is an official courtesy? **Q:** If SSC is hosting a luncheon/dinner in honor of an authorized guest, can the total costs of the event be paid with ORFs? **Q:** How much can I spend on a function? **Q:** How much can I spend on a gift for an authorized guest? **Q:** Are there any absolute prohibitions on using Representation Funds?

Prior to decisions on spending monies, the legal office and RM should be consulted. (Encl 16)

DOD gets bird law altered in final authorization bill

The Defense authorization bill, **H.Rpt. 107-772**, received much attention from conservationists and other groups this year when the Department of Defense proposed changes to several environmental laws. By the end of Congress' lame-duck session, only a change to the Migratory Bird Treaty Act entered the bill, but DOD's continued concerns about encroachment may lead to other requests.

DOD requested changes to the Endangered Species Act, MBTA and other laws in April, just days before the House Armed Services Military Readiness Subcommittee began its mark up of the bill. DOD felt the limitations these laws placed on land use and other activities adversely affected training missions at numerous military facilities.

In the request, DOD said it aimed to "ensure military readiness by addressing problems created by encroachment on military readiness activities and lands, marine areas and airspace reserved, withdrawn or designated for military use."

Defense authorization conferees — and ultimately Congress — only approved the change to the MBTA. The provision creates a one-year interim period where rules on incidental takings of migratory birds would not apply to military readiness activities. During the interim, the Interior Department is instructed to start designing regulations that exempt the Armed Forces from the incidental taking of migratory birds, and DOD must agree to the regulations before they take effect.

This is an excerpt as revised from an article by Suzanne Struglinski, a staff writer for the Environment & Energy Daily. (Encl 17)

Bush approves FUDS, BRAC increases

DOD environmental accounts received small increases when Congress successfully pushed the Defense appropriations bill (P.L. 107-248) and military construction appropriations bill (P.L. 107-249) to the president's desk -- the only two FY '03 spending measures to become law before Congress adjourned for the year.

BRAC

Meanwhile, 5 percent of the military construction funds went toward the Base Realignment and Closure program. The approved \$561 million is \$43 million more than the administration's request and a \$16 million increase in the original House bill. However, it is a decrease from the \$645 million originally approved by the Senate. The funding includes \$501 million for environmental cleanup and \$60 million for operations, maintenance and other costs.

Environmental Law Focus

Military Specific Surface Coating NESHAP

Within the next two years, EPA plans to finalize five different National Emission Standards for Hazardous Air Pollutants (NESHAPs) that will affect most of the Army's surface coating operations.

These upcoming NESHAPs have the potential to paralyze the Army's surface coating operations in a mess of record-keeping requirements.

Only the military faces this problem because civilian organizations usually specialize in one type of work and are normally affected by only one of the rules.

As a result, EPA has agreed to prepare one NESHAP that the military can use in place of these five. USAEC has already commented on the Large Appliance, Metal Furniture, Fabric Surface Coating, and Miscellaneous Metal Parts and Products Surface Coating NESHAPs.

Impact of Spill Rule Revisions to Army Facilities

Impact of SPCC Rule Revisions to Army Facilities. On 17 July 2002, EPA published revisions to the Oil Pollution Prevention rule (67 FR 47042) that will affect most Army installations. Each installation must now reevaluate their need for, and if necessary, amend their existing Spill Prevention Control and Countermeasures Plan (SPCCP). In many aspects the rule is good news for the Army, as some installations may no longer be required to maintain an SPCCP, Plan review time periods are extended from three years to five years,

and containers with a capacity of less than 55 gallons are exempted. However, the revisions may also have a negative impact to installations that will be required to update their Plan. The short timeline for Plan amendments, which must be certified by a Professional Engineer (PE), is of particular concern. Spill Plans must be amended by 17 February 2003 and amendments must be implemented by 18 August 2003. We recommend you contact your Regional EPA office should a time extension be required.

ECAS Name Change

On 1 October 2002, the Environmental Compliance Assessment System (ECAS) program changed its name to Environmental Performance Assessment System (EPAS). This change reflects the transition to change the auditing focus from environmental compliance to Environmental

Management Systems (EMS). As installations become more involved in internal auditing and identifying and correcting compliance deficiencies, the ECAS/EPAS program will begin to assume a guidance/support role in identifying and providing assistance with environmental program management issues.

Lexis Corner

Pending Legislation

Lexis.com can give you easy access to pending legislation and related materials that are important to the AMC.

Congressional Background

You also have access to a wide range of news sources and Congressional background information.

For example, let's say you needed to find information on the Defense Authorization and Defense Appropriations Act for FY 2003. Just log onto lexis.comTM and visit the Legislative Library,

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Defense Budget

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Faces In The Firm

ARRIVALS DEPARTURES PROMOTIONS

HQAMC

Robert Paschall, was selected for a position with the Business Law Operations Division after serving as counsel at CECOM

ARL

Les Mason, with 30 years of service at Anniston, was selected as ARL Chief Counsel.

AMCOM

LTC Kathryn R. Sommerkamp has been assigned as Deputy Chief Counsel/SJA. She comes to AMCOM from White Sands, New Mexico.

TACOM-Red River

Captain Jay Combs, whose previous assignment was as a trial counsel in the 1st Infantry Division in Katterbach, Germany.

AMCOM

Robert Norris, Chief, Acquisition Law Branch C, retired October 3rd and returned to St. Louis, MO., where he worked for many years as a counsel to the AMC commands.

Georgia Kirkland, Claims Clerk, retired September 27th.

SFC David E. Watkins Chief Paralegal NCO PCS to Yongsan, Korea October 31st.

SPC Greg Bushey transferred to Headquarters Company.

CECOM

Joann Andreula, Computer Specialist, retired from the Government after 21 years of service. She and her husband moved to Alabama.

TACOM-ARDEC

Denise C. Scott of the TACOM-ARDEC Legal office was recently promoted to Chief, Business Law Team. She has been an acquisition attorney with the TACOM-ARDEC Legal office for seventeen years.

AMCOM

Frank Faraci, who has been promoted to GS-15 as Chief, Acquisition Law Division, Team A.

Michael W. Lonsberry, who has been promoted to GS-14 General Attorney in the Adversary Proceedings Division

RECALL TO ACTIVE DUTY

CECOM

MAJ Tom Adams has been recalled to Active Duty and will join the SJADivision in early December for a one year tour of duty.

BIRTH

AMCOM

Congratulations to **Rachel Howard** who gave birth to a baby boy November 1, 2002, weight 6 lb and 11 ounces.