



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
6. Police Mutual Aid Under Patriot Act
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8. FMS Customer Clause
9. Electronic Filing
10. Lessons Learned: Urgency-Based Sole Source
11. Judicial Remedy for Grievance under CBA
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13. Workers Comp Insurance for Deployed Contractors
14. An Early Retirement or a Fast One?
15. Holiday Activities
16. Use of Appropriated Funds for Official Courtesies
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)

Employment Law Focus

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,

Bill Track

You can identify whether it has become a Public Law or use BILLTRACK to track its progress on the Hill.

You can also search full-text bills, legislative histories, *Congressional Record*, committee reports, committee

hearing transcripts, and more.

LexisNexis provides access to full-text bills and bill tracking reports for the U.S. Congress and for all fifty states.

Defense Budget

You can find a wealth of news about the Defense Budget for FY 2003 and the important legislative issues surrounding it from thousands of NEWS sources. These sources range from local to national, inside-the beltway to international.

You can monitor all activity on the Defense Appropriations and Authorization Acts and stay up to date on important issues surrounding the act. The monitoring can be done automatically on lexis.com.

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For assistance contact **Corinie Gee** at 202-857-8236 or **Rachel Hankins** at 202-857-8258.

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.

Frequently Asked Questions about Absentee Voting

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.

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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.

I would like to vote but don't know how. Where can I find assistance?

Specific information on applying for absentee registration and a ballot is contained in the 2002-03 Voting Assistance Guide. Hard copies of the Guide are available for your review at the Legal Services Branch in Building 677 on Wilson Avenue. Members of the Armed Forces can obtain hard copies and CD-ROM versions of the Guide through the services distribution channels. You can also print the Guide off the Internet at the website or request hard copy by contacting the Federal Voting Assistance Program directly (by email) at www.vote@fvap.ncr.gov.

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.

Must I submit a separate application for each election?

In some states and territories you must submit a separate FPCA for each election. Many states and territories accept a single FPCA for all ballots issued during an election year. When in doubt, send a separate application for each election.

If I am required to have my FPCA or ballot notarized, how do I do it?

Generally, election materials may be witnessed or sworn to before a notary, U.S. Commissioned Officer, Embassy or Consular officer or other official authorized to administer oaths. Notary services are available at the Legal Services Branch every day from 1200–1300 and 0900-1630 on Wednesday and Thursday. Most states and territories do not require notarization of the FPCA or ballot, therefore consult Chapter 3 of the Guide to determine your state's or territory's requirements. In all instances you must sign the FPCA.

When mailing an FPCA or other election materials to my state or territory, do I have to pay postage?

Yes. All election-related materials are mailed postage paid from any APO or FPO mail facility, all U.S. Embassies and Consulates and any post office in the U.S. You must pay postage if the materials are mailed from a non-U.S. postal facility.

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.

When should I receive my ballot?

Under normal circumstances, most states and territories begin mailing ballots to citizens 30-45 days before an election. Always sign and return your absentee ballot regardless of when you receive it. Court decisions sometimes require the counting of ballots voted by election day, but received late.

What is an election for Federal office?

An election for Federal office is any general, special, or primary election held solely or in part for the purpose of selecting, nominating, or electing any candidate for the office of President, Vice President, Presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegates from the District of Columbia, Guam, Virgin Islands, and American Samoa, and Resident Commissioner of the Commonwealth of Puerto Rico.

What is my "legal state of residence?"

For voting purposes, your "legal state of residence" can be the state or territory where you last resided prior to entering military service or the state or territory which you have since claimed as your legal residence. To claim a new legal residence you must have simultaneous physical presence and the intent to reside at that location as your primary residence. Military and family members may change their legal residence every time they change permanent duty stations or they may retain their legal residence without change. A legal officer should be consulted before legal residence is changed because there are usually other factors that should be considered besides voting. Be sure to enter the complete address of your legal residence, including street or rural route and number, when completing the residence section of the FPCA. Even though you may no longer maintain formal ties such as property ownership to that residence, the address is needed to place you in a proper voting district, ward, precinct or parish.

Can I vote where I am stationed?

Military members may vote in the state or territory where stationed if they change their legal residence to that state or territory, even if they live on a military installation. Be advised that there are legal obligations that may be incurred, such as taxation, when changing your state or territory of residence. Therefore, consult a legal officer before making such a decision. At the present time, there are no provisions for personnel stationed outside the United States to vote, in person, where stationed.

My family members are not in the military; can they also vote absentee?

The law entitles eligible family members of military personnel to vote absentee. Family members are considered to be in the same category of absentee voter as military members and generally should follow the same procedures. Family members of military personnel residing overseas, who are U.S. citizens and who have never resided in the U.S., usually claim one of their parent's legal state of residence as their own.

E.I. DuPont De Nemours vs. United States of America, No 99-101, November 13, 2002

On 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.

In 1940 the Department of the Army entered into a cost-plus-fixed-fee contract with DuPont to build and operate a chemical production facility in Morgantown, West Virginia, the Morgantown Ordnance Works (MOW). The United States owned the plant, and all of its products and DuPont would acquire the site, design and construct the plant and staff and operate the plant. The plant produced poisonous chemicals including methanol, hexamine, ammonia, formaldehyde and heavy water. To shield DuPont from liability, the contract contained extremely broad, unconditional indemnification and reimbursement clauses common to this type of production facility during the early 1940s. The clause reads:

It is the understanding the parties hereto, and the intention of this contract, that all work under this Title III is to be performed at the expense of the Government and that the Government shall hold (DuPont) harmless against any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under this Title III....”.

In 1946, the U.S. terminated the contract and entered into a termination supplement to the contract in accordance with the Contract Settlement Act. In 1984, the United States Environmental Protection Agency (U.S.E.P.A) notified DuPont that the plant needed to be remediated in accordance with the Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601. After 1946 the MOW changed ownership on several occasions and it is unclear as to how much of a Potentially Responsible Party DuPont is under CERCLA. In fact, this case arose after DuPont had incurred significant costs in assessing the remediation site. DuPont asserted that the government was responsible for all CERCLA remedial action costs in accordance with the terms of the indemnification clause and submitted claims to the Contracting Officer. When the Contracting Officer did not respond to DuPont's claim in sixty days, DuPont treated this lack of a response as a denial of the claim and filed suit in the spring of 1999.

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.

The plaintiff also argued that even if the ADA prohibits open ended indemnification clauses, this prohibition does not apply to the reimbursement clause in this specific contract. DuPont argued that the Act of July 2, 1940, Pub. L. No. 76-703, 54 Stat. 712, specifically authorized the use of cost-plus-fixed fee method of contract formation and the reimbursement clause is authorized by the “unless authorized by law” language of the ADA. The reimbursement clause reads:

The Contractor shall be reimbursed in the manner hereinafter described for such actual expenditures in the performance of the work under this contract, heretofore or hereinafter incurred, as may be approved or ratified by the Contracting Officer and as are included in the following items:

Losses, expenses, and damages, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the contractor in connection with the work ...”

The Court rejects this argument since the 1940 act only authorizes the execution of contracts “out of the moneys appropriated for the War Department for national-defense purpose...” and such a limitation is consistent with the ADA.

The Court ends its opinion by stating that the indemnification clause is void and unenforceable, even though almost full indemnification was the clear intent of both parties in the contract and suggests that the plaintiff considers pursuing a Congressional Reference case under 28 U.S.C. §§ 1492 & 2509.

DuPont is expected to appeal and currently two other cases with similar issues are in the courts.

This decision is of particular interest since many Government-Owned, Contractor-Operated (GOCO) munitions plants constructed prior and during World War II were operated under cost plus fixed fee contracts that contained a very similar or identical clause to that the Court ruled unenforceable. A total of 88 plants produced munitions for the Army during World War II. A version of this clause was still in use in the 1970's in contracts for operation of the remaining GOCO munitions plants that were actively producing for the Army. Contractors regarded it as a cornerstone of the agreement between the Government and the plant operators. Its unenforceability as a result of the DuPont decision greatly increases the potential financial exposure of past GOCO operators to claims for environmental damage from plant operation, several of which have arisen in recent years.

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6th Circuit Court of Appeals Rejects High Value Items Clause as a Contractor Defense Barring Damages Under the False Claims Act

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On September 12, 2002, in a 2-1 ruling, the United States Court of Appeals for the Sixth Circuit issued a decision in *United States of America ex rel. Brett Roby v. Boeing Co.* affirming a District Court ruling that allows the United States Army (“Army”) to recover damages under the False Claims Act (FCA) for loss of a Chinook (CH-47) helicopter resulting from the failure of a defective flight safety critical item. The incident giving rise to the litigation involved an Army CH-47D helicopter crash that occurred in Saudi Arabia in January 1991. It was found to be a result of defective transmission gears and occurred after the aircraft had only fifty-six flight hours in operation. The genesis of this decision arose from a *qui tam* action filed by Mr. Brett Roby in May 1995 on behalf of himself and the Government alleging that The Boeing Co. (Boeing) and its subcontractor, Speco Corp. (Speco), had violated the FCA by making false statements about the manufacture, sale and installation of defective flight safety critical transmission gears delivered to the Army by Boeing under the CH-47D remanufacture contract. That contract represented an upgrade of the Chinook fleet to its present configuration (D-model). In conjunction with an approximately \$40M settlement agreement between the Army and Boeing signed in August 2000, the District Court had certified for interlocutory appeal the question of law as to whether the High-Value Items clause (HVIC)(Federal Acquisition Regulation (FAR) 52.246-24), that had been incorporated into Boeing’s contract, operates as a defense to damages under the FCA.

The HVIC represents the Government’s assumption of the risk for high dollar value items, like aircraft, that may be lost or critically damaged after acceptance due to defects in the equipment. It exists to minimize the cost of liability insurance borne by the contractor that is ultimately passed on to the Government in the negotiated price for high-dollar value weapon systems. The salient portion of FAR 52.246-24 reads as follows: “(a)...the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that- (1) Occurs after Government acceptance of the supplies delivered under this contract; and (2) Results from any defects or deficiencies in the supplies. (b) The limitation of liability under paragraph (a) of this clause shall not apply when the defect or deficiency in, or the Government’s acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor’s managerial personnel.” The Sixth Circuit, however, rejected Boeing’s argument that the HVIC “prohibits the recovery of damages under any and all causes action, when those damages result from fraud of non-managerial personnel,...” *2002 FED App. 0315P (6th Cir.) at page 4*. (Note: the parties stipulated to

the fact that the fraud had not committed by Boeing's managerial personnel). 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 reject Boeing's position 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 contractor 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.*

In arriving at the decision the Court had to distinguish two cases that seemed to support Boeing's position. First, the facts in *Roby* are very similar to a 1952 case decided by the Eighth Circuit, *United States v. Untied States Cartridge Co.*, 198 F.2d 456 (1952). In that case, the defendant constructed and operated the Government-owned St. Louis Ordnance Plant during World War II mass-producing small arms ammunition for the armed forces under a cost-plus-fixed-fee contract. The Government alleged that the defendant defrauded the Government by presenting claims for payment that were false because they knowingly maintained an inadequate system of inspection that allowed for a variety of fraudulent practices. The fraudulent conduct included resubmitting rejected ammunition for acceptance without being reworked and surreptitiously intermingling and packing rejected ammunition with accepted ammunition. The result was much of the ammunition produced by the plant was substandard and failed when used by the armed forces. The contract contained a limitation of liability clause similar to the present day HVIC exempting the contractor from liability for the failure of ammunition or delays in delivery of ammunition except for the personal failure of the corporate officers or certain supervisory personnel to exercise good faith or due diligence in the performance of their duties. The Eighth Circuit upheld a District Court decision dismissing the Government's suit stating the Government had failed to meet its burden of proof to present substantial evidence that there was personal failure on the part of the defendant's corporate officers or key supervisory personnel to exercise good faith or due diligence in the performance of the contract and, therefore, the Government could not show they had committed fraud in the presentment of claims to the Government. The Court refused to impute to the defendant knowledge of, or to hold responsible for, the misconduct of the defendant's subordinate personnel that the Government had relied upon to establish its case against the defendant. See *198 F.2d at 461.*

The Sixth Circuit in *Roby* distinguishes *United States Cartridge Co.* citing the fact that the ammunition contract was made during a time of a national emergency (World War II) and noted the unique contractual arrangement that existed where the Government owned

the facility and exercised substantial supervision and control over the contractor, its employees and the facility itself. Roby cites the Eighth Circuit opinion for support that the unique situation at the St. Louis Ordnance Plant created relief for the contractor from penalties under the FCA: “If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for supplying goods and services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve the contractor from liability of its own fraud, the Government’s argument [that the limitation of liability was void] might be unanswerable. 2002 FED App. 0315b (6th Cir.) at page 6 citing United States Cartridge Co., 198 F2d at 464-465. The Roby Court clearly did not want to rule that Boeing could contractually limit their liability for false claims under the FCA: “[W]e believe that the Government’s public policy argument in this case is stronger than it was in United States Cartridge Co.,...The contract in this case was a conventional one for the remanufacture of helicopters almost entirely during peacetime, and Boeing was not subject to Government supervision or control. These differences suggest that the limitation of liability in United States Cartridge Co. allocated risks in a way much more favorable to the defendant than does the HVIC. In short, we do not read the HVIC as an agreement by the Government to assume the risk of damages to high-value items that it sustains because of FCA violations.” 2002 FED App. 0315b (6th Cir.) at page 6.

Boeing also cited a more recent decision in support of its position that the Government was contractually bound not to pursue damages for an FCA violation by virtue of the inclusion of the HVIC in their contract. In United States v. Bankers Insurance Co., 245 F.3d 315 (4th Cir. 2001), the question on appeal was whether the existence of an FCA claim negated an arbitration clause in the contract and allowed the Government to immediately pursue litigation. The case involved the Government suing a private insurance company for alleged fraud and breach of contract in connection with the selling and administrating of flood insurance policies under the National Flood Insurance Program. The Fourth Circuit reversed a lower District Court opinion and found that an FCA claim did not negate the arbitration provision in the contract and required the Government to submit to non-binding arbitration before it could pursue its FCA claim against the contractor. Boeing used the rationale in Banker’s Insurance to argue that the Government was foreclosed from pursuing an FCA violation for damages because inclusion of the HVIC created a contractual obligation on behalf of the Government to refrain from seeking damages under the FCA unless managerial personnel committed the fraud. The Roby Court, however, compellingly distinguishes the Banker’s Insurance decision, noting that the contract in that case merely deferred litigation of the FCA claim until after the non-binding arbitration had been completed as opposed to the facts in Roby where Boeing’s interpretation of the HVIC would limit the Government from recouping anything more than a \$10,000 civil penalty for damages. The Court went on to state: “Given Congress’s explicit recognition while amending the FCA ‘that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts,’ it strikes us as incongruous that the HVIC would relieve contractors for high-

value items from the FCA's damage provision. After all, the motivating purpose of the FCA is to combat and to deter fraud, which would not be served in the context of defense contracts by civil penalty alone." *2002 FED App. 0315b (6th Cir.) at page 7.*

Judge Boggs issued the dissenting opinion in *Roby*. He argues that both the wording and purpose of the HVIC support Boeing's position that the Government has contracted away its right to seek property damages from suppliers of high-value items. The FAR language at 52.246-24 specifically cites an exception to the contractor's protection from damages under the clause when there is "willful misconduct or lack of good faith" on the part of managerial personnel. Judge Boggs equates willful misconduct and lack of good faith with "fraud" and goes on to state "[t]herefore, the HVIC expressly exempts from protection losses to fraud on the part of managerial personnel. The negative pregnant, therefore, would be that the HVIC does protect contractors from losses due to non-managerial fraud." *2002 FED App. 0315b (6th Cir.) at page 10.* Judge Boggs also cites the legislative history on the HVIC to support the argument that the clause was intended to act as a self-insurance policy for DOD precluding liability for loss of certain Government equipment- even when the loss was a result of non-managerial fraud by contractors. He points to the overriding purpose of the HVIC as relieving contractors from the necessity to purchase liability insurance when producing high dollar value items, the cost of which would be prohibitive and passed on to the Government. He concludes: "The plain language of the HVIC at issue in the present case conforms to that purpose. However, the court's decision today does not; under it, contractors will have to insure against potential FCA liability for treble damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel. Presumably, this cost will be passed on to the Government." *2002 FED App. 0315b (6th Cir.) at page 11.*

The *Roby* decision is important for all Government agencies (and specifically DOD) in attempting to recover damages for losses to high-dollar value equipment resulting from fraudulent conduct by contractors. Had the Sixth Circuit adopted Boeing's position, damages for the lost CH-47D helicopter would have been limited to a \$10,000 civil penalty. The parties had previously negotiated a \$15 million dollar settlement (out of the total settlement amount of approximately \$40M) for the damages resulting from the crash in Saudi Arabia that was contingent upon the favorable outcome of this issue for the Government. Boeing has appealed the decision and has requested an en banc hearing before the Sixth Circuit. If the decision stands, agencies will know that claims pursued under the FCA will not have restrictive damage limitations simply by virtue of the inclusion of the HVIC in their contracts. Whether it will also translate into Judge Boggs' fear of higher costs to the Government for these items due to the liability concerns of contractors will have to be determined. So stay tuned.

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.

Such a system is no small undertaking since the USPTO has been toying with the concept and implementation of having a near paperless office for over 20 years. Furthermore the slow reaction time of the community of patent attorneys to use this procedure, although understandable, has somewhat helped to contribute to the magnitude of these problems. The wide acceptance of this electronic process will develop, but has yet to occur.

For all of these reasons, the USPTO has been strongly advocating the use of their Electronic Filing System (EFS). To our best knowledge, TACOM-ARDEC is the first IP operation in AMC to put EFS into operation. If other offices have some experiences with EFS, we would be glad to share lessons-learned.

In July, the TACOM-ARDEC Intellectual Property Team began utilizing the U.S. Patent and Trademark Office's Electronic Filing System. While there are a few "bugs" to be aware of, generally the filing process is easily accomplished and ensures a filing date for the day the transmission is forwarded. Utilizing the U.S. Post Office Express Mail is a problem here at TACOM-ARDEC due to the shortage of people in the Post mail room. There is never a guarantee that there will be personnel available that have the knowledge of the postage machines to ensure a timely postmark. Even the USPTO's first class certification of mail procedure is not compatible with our operation since it is based on the assumption that outgoing mail will be post marked and placed in the mail the same day it is destined for sending.

The EFS requires downloading software from the USPTO's webpage and a scanner is required for the Figures and Declaration/Power of Attorney. The specification is prepared in PASAT, which is a Word based program that "talks" you through each element of the specification. A word of caution to anyone implementing this process - -- save your work frequently!!!--- Once the specification is completed, scanned figures are attached to the saved specification. The document

is then exported to XML. This is accomplished through the PASAT program and does not require any knowledge of XML. Once the XML document is saved, another program E-PAVE is used to compile the specification, application data sheet, fee transmittal sheet, and declaration and, where appropriate, assignments. The package is then transmitted electronically. At the completion of the transmission, an automated message provides an acknowledgment receipt complete with the serial number assigned to identify and track the patent application.

This process combined with the USPTO's Right Fax procedures have helped to ensure timely filing and response to office actions. Instead of waiting for a month for the acknowledgement of correspondence, this system provides an official faxed acknowledgement no later than the following day, which is almost a real time operation, compared to the experience of using the conventional process.

As we gain further experience with EFS wherein status information and other features are made available, we hope to provide favorable reports from our experience as we assess their value.

John Moran
Lead Patent Attorney
Picatinny Arsenal



DEPARTMENT OF THE ARMY
U.S. ARMY SOLDIER AND BIOLOGICAL CHEMICAL COMMAND
SOLDIER SYSTEMS CENTER
NATICK, MASSACHUSETTS 01760-5035

PLY TO
ATTENTION OF:

AMSSB-OCC(N)

November 8, 2002

MEMORANDUM FOR XXXXX

SUBJECT: Application of Berry Amendment to Proposed XXXX Contract

In response to your email request of November 7, 2002, the following legal opinion regarding applicability of Berry Amendment proscriptions relating to foreign textile products incorporated into the XXXXX system is provided:

The Berry Amendment, now codified at 10 U.S.C. § 2533a, proscribes the use of appropriated (or any other) funds available to the Department of Defense 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. As may be expected, the Amendment has been of historical import to operations at the Soldier Systems Center, as virtually all SSC programs are implicated by the Amendment's broad proscription.

The XXXX program represents one such gray area. The XXX Project Office has identified more than fifty items of individual equipment for use by the Special Forces warfighter, many of which are clearly covered by the Berry Amendment. However, the Project Office proposed -- and this office endorses -- an approach to acquisition of these items that provides maximum flexibility to the user while adhering to the domestic content provisions of the Amendment. The approach, outlined below, has never been tested at the GAO, ASBCA, or in Federal Court, but is a reasonable interpretation of statutory and regulatory language as well as case law addressing the Berry Amendment's reach.

The XXX Project Office proposes a prime vendor contract with XXX, a nonprofit participating agency under the Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. §§ 46-48c. XXX provides rehabilitative services to blind and severely disabled persons, and has provided many items to SSC under the JWOD Act and Subpart 8.7 of the FAR. Under Subpart 8.7, agencies may contract directly with a nonprofit agency such as XXX for supplies or services on the Procurement List maintained by the Committee for Purchase from People who are Blind or Severely Disabled, see FAR ¶¶ 8.703 & 8.705

Prime vendor contracts entail a single contractor offering a number of commercial products from various sources, available for shipment within days of receipt of an order. Prime vendor contracts have been employed by the Department of Veterans' Affairs and DSCP for more than ten years, without adverse comment from GAO, *e.g.*, In Re Food Services of America, B-276860, 97-2 GPD ¶ 55 (1997); In re Support Services International Inc., B-271559, 96-2 GPD ¶

20 (1996); In Re Moore Medical Corporation, B-261758, 95-2 GPD ¶ 204 (1995). In fact, the Comptroller General views such contracts as “warehouse” contracts:

In essence, DPSC is procuring a stocked warehouse and distribution facility to provide medical and surgical items, when needed, to government medical facilities, replacing existing DPSC depots for such items.

In Re Baxter Healthcare Corporation, B-259811.4, 95-2 GPD ¶ 151 (1995)

Prime vendor contracts allow government agencies to reduce inventory and depot storage by creating a responsive prime vendor that can rapidly respond to customer orders by maintaining contracted items in warehouse stock. In most cases -- and in all reported cases -- the prime vendor supplies commercial products produced by others, offering only limited integration, packaging, and shipment.

NIB/NISH has offered prime vendor services on other DoD contracts, including several here at SSC, essentially integrating commercial products into “kits” that are packaged and shipped in accordance with military specifications. The proposed contract with XXX envisions a similar integrative service. Fifty-eight separate items are identified on the PEPSE kit, supplied by twenty-five primary vendors (and approximately twenty secondary vendors). Only sixteen of the fifty-eight are definitely subject to the Amendment (clothing items), although at least several others are “items of individual equipment” that probably contain fibers, fabrics or yarns. Two of the items are available only from foreign sources.

The contract envisions an initial order for more than 2000 PEPSE kits. Upon receipt of the order, XXX will purchase kit items from vendors, receive and catalogue shipments, then assemble items into the kits. The overall value of the initial order is approximately \$7 million, with slightly more than \$1 million provided by foreign sources. However, no single foreign-supplied item acquired by XXX under the prime vendor arrangement will exceed the simplified acquisition threshold of \$100,000.00, also an exception to the Berry Amendment, 10 U.S.C. § 2533a(h).

Accordingly, this arrangement does not violate the Berry Amendment. Were XXX not providing integrative services, SSC could acquire each of the individual items in an amount not exceeding the simplified acquisition threshold, and integrate the items into a kit here. Alternatively, we could purchase the items and provide them to another contractor as GFE to build into kits, again without running afoul of the Amendment. The mere fact that we intend to engage a contractor to both acquire and integrate the items does not bring this otherwise exempt action under the Amendment’s reach. Finally, individual Special Forces units could buy integrated kits themselves, as no single unit’s acquisition would exceed the simplified acquisition threshold. If none of these alternative procurement methods violate the Berry Amendment, it follows that a

coordinated acquisition that achieves the same end does not violate the amendment, particularly in the absence of specific statutory guidance or governing case law.

There is no doubt that simplified acquisition are exempt from the Amendment, 10 U.S.C. § 2533a(h). However, there are other potential statutory bases that might authorize this acquisition. First, the Amendment applies to “an article or item,” 2533a(b)(1), not to kits. The Comptroller General considered this distinction in a case involving the Buy American Act and a statutory provision (remarkably similar to the Berry Amendment) that prohibited GSA from acquiring foreign-made hand tools. The GAO held that tool kits, integrated domestically, could contain foreign-made hand tools, subject only to the Buy American Act’s more general proscription against foreign content, In Re Imperial Eastman Corporation; Thorsen Tool Company, B-177865, B-179812, 53 Comp. Gen. 726 (1974). See also In Re O.Ames Company, B-283943, 2000 Comp. Gen. Proc. Dec. ¶ 20, (2000) (an SSC case in which foreign tool components were assembled into hand tools domestically).

Another potential statutory basis is found at 10 U.S.C. § 2533a(I):

Applicability to contracts and subcontracts for procurement of commercial items. This section is applicable to contracts *and subcontracts* for the procurement of commercial items, notwithstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. § 430) (emphasis added).

This is the only mention in the Amendment of subcontracts, and is consistent with the planned acquisition in this instance. All fifty-eight items to be acquired under this contract are commercial items, and consistent with this provision of the Amendment, no non-exempt subcontracts are to be awarded. As mentioned, acquisition of foreign items will be capped at \$100,000.00 each. Any subcontracts above this threshold will be awarded to domestic suppliers in accordance with the statute.

There is little case law regarding the Berry Amendment’s reach. The principal case, In Re Department of Defense Purchase of Fuel Cells, B-246304.2 et. seq., 1992 Comp. Gen. LEXIS 884 (1992), involved the purchase of fuel cells manufactured in Italy in a manufacturing process wherein American-made nylon was laminated to rubber to form resilient and puncture resistant fuel cells. The Comptroller General reviewed the legislative history of the Amendment and determined that Congress intended the law’s proscriptions to be applied broadly:

We stated that the intent of Congress in enacting the Berry Amendment restriction was to consider an article “American” only where the raw fiber, “as well as each successive stage of manufacture,” was of domestic origin.

In Re Department of Defense Purchase of Fuel Cells, B-246304.2, citing National Graphics, Inc., 49 Comp. Gen. 606 (1970).

The decision also deemed the fuel cell to be an “item of individual equipment” under the Amendment, thereby extending the reach of the statute beyond DoD’s interpretation -- still reflected in the DFARS -- that items of individual equipment are only those identified by Federal Supply Class (FSC) 8465.

However, it must be stressed that this seminal case was very fact-specific, and manifestly the subject of intense public and Congressional interest. For example, the Comptroller General noted the following legislative history:

The Committee notes that it has long been the intent of Congress that this provision covers not only fabrics and apparel themselves but also all stages of textile production and all types of textile products, including manufactured articles. The Committee further notes that synthetic fabric fuel containers for military aircraft are included within the coverage of this provision and directs the Secretary to instruct the relevant offices within the Department of Defense to take note of this and ensure that Department procurements are consistent with the requirements of this provision.

In Re Department of Defense Purchase of Fuel Cells, B-246304.2, citing S. Rep. No. 154, 102d Cong., 1st Sess. 368 (1992).

Somewhat ironically, the Secretary of the Air Force subsequently signed a nonavailability determination under the Amendment and acquired the fuel cells from the Italian manufacturer, an action upheld even after two protests to the Comptroller General, In Re Dash Engineering, Inc.; Engineered Fabrics Corporation, B-246304.8 et. seq., 93-1 Comp. Gen. Proc. Dec. ¶ 363 (1993); In Re Dash Engineering, Inc.; Engineered Fabrics Corporation, B-246304.12 et. seq., 93-2 Comp. Gen. Proc. Dec. ¶ 184 (1993).

Another case, decided by ASBCA, held that not all components of an “article or item” covered by the Amendment were required to be manufactured domestically, if those (sub) components did not themselves contain any materials covered by the Amendment, Appeal of -- Specialty Plastic Products, Inc. Appeal of -- Accusonic Systems Corporation, ASBCA No. 42085, 95-2 B.C.A. ¶ 27,895 (1995). This decision also cites legislative history that urges a “common sense” approach to *de minimis* inclusion of covered materials in other than textile end products:

The drafters of the changed Berry Amendment expected the Defense Department to be "guided by the Federal Supply Schedule." However, the Congressional conferees emphasized that the foregoing "restriction is not intended to apply more generally to the purchase of items such as automotive or electrical equipment, which only incidentally

contain such material," and expected "similar common-sense applications of the provision as individual cases arise." H. R. Conf. Rep. No. 100-498, 100th Cong., 1st Sess. 665-66 (1987)

Specialty Plastics, ASBCA No. 42085 (1995).

There are only a handful of other cases that have considered the Amendment, *e.g.* In Re Gumsur, Ltd., B-231630, 88-2 GPD ¶ 329 (1988) (protective clothing not chemical warfare protective clothing); In Re Acton Rubber Ltd., B-253776, 93-2 GPD ¶ 186 (1993) (also related to chemical warfare protective clothing).

While this procurement may be perceived by some as violative of Congressional intent as expressed in legislative history cited herein and elsewhere, it is not at all clear that Congress actually intended to restrict the type of arrangement contemplated by this contract. The proposed acquisition is a good-faith interpretation of the statute, intended to serve warfighters at the very tip of the spear, who are even now engaged in action in a number of theaters. The XXX Office has identified the best products to support those actions, and has developed a plan to acquire these products within the statutory framework of the Berry Amendment. This office strongly recommends that this effort be approved and executed as expeditiously as possible.

Peter G. Tuttle
General Attorney

Police Mutual Aid Agreements under the Patriot's 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.

Historically, installations have had mutual aid agreements with surrounding fire departments but have been self-reliant on federal resources for security and police support. 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 off post. 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.

However, post-September 11, federal resources have been stretched too thin to meet installation needs for security, and there is recognition that the installations are part of a larger community that has to work together make homeland security possible. To this end, the Patriot's Act of 2001 has provided some relief. Section 1010 of P.L. 107-56 provides that notwithstanding the prohibition of 10 USC 2465 on using appropriated funds for contracts to perform security-guard functions at military installations,

“funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or **other agreements** for the performance of security functions at any military installation or facility in the United States with a proximately located local or State government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.”

This is a temporary authority and there have been no implementing regulations to date. It would be preferable that the fire protection statutes, cited above, be amended to include security and police protection at the installation. However, in the absence of such legislation, the Patriot's Act would appear to provide a limited authority to enter into mutual aid agreements with outside police departments if the statutory and regulatory limitations and concerns that remain are acknowledged and addressed in the agreements. These limitations and concerns are summarized as follows:

For Services the Outside Officers Perform at the Installation

- No authority for open agreement to reimburse town for costs incurred. Firemen have statute and regulatory authority for this.

- Possible personal liability to anyone (Commander?) who invites outside officer's here to perform services for us. There is a general prohibition under the Anti-Deficiency Act (31 U.S.C. 1342) against accepting voluntary services for the government or employing personal services exceeding that authorized by law except for emergency situations involving the safety of human life or the protection of property.
- No authority to defend or pay suits against their officers.
- No statutory protection to federal government against claims by their officers to Federal Worker's Compensation. Firemen have a specific statute saying that their firemen are not covered.

For Services Installation Officers Provide Off Base

- No authority to provide service off-post beyond AR 500-50 and AR 500-51. If our officers go beyond their authority, and are
 - Sued (for say, false arrest) - might not get Govt. representation, immunity, or indemnity;
 - Hurt - might not be covered by Worker's Comp.
- AR 500-50 and AR 500-51 require that Govt. be reimbursed for its costs in providing services.

Notwithstanding these concerns, there is still a need try to resolve these issues with the surrounding municipalities before an emergency arises that requires that aid be requested or given. Attempting to negotiate mutual aid agreements at least alerts the municipalities to our limitations and gives the installation an idea what kind of aid the municipalities might be able to provide and at what cost. Attached is a suggested form of agreement that attempts to address the government's concerns, and tries to take full advantage of the Patriot's Act authority.

Jerry Williams

Suggested Mutual Aid Agreement

**DEPARTMENT OF THE ARMY, AMC, TACOM-ARDEC
MUTUAL LAW ENFORCEMENT ASSISTANCE AGREEMENT**

THIS AGREEMENT, made and entered into this ____ day of _____, between (Local Governmental Entity) _____, and the Commander, US Army Tank-automotive and Armaments Command, Armament Research, Development and Engineering Center, (TACOM-ARDEC), located at Picatinny Arsenal, New Jersey according to the authority of Public Law (P.L. 107-56, Section 1010 (Patriot's Act of 2001).

WHEREAS, each of the parties hereto maintains equipment and personnel for the enforcement of laws within its own jurisdiction and areas, and;
 WHEREAS, the parties hereto desire to augment the law enforcement available in their jurisdictions in the event of mass casualty, weapons of mass destruction (WMD), terrorist incidents, or other emergency, and;

WHEREAS, it is the policy of the U.S. Army (TACOM-ARDEC) and of the municipal or county governing bodies to conclude such agreements whenever practicable, and; WHEREAS, it is mutually deemed sound, desirable, practicable and beneficial for the parties of this agreement to render assistance to one another in accordance with the terms and applicable federal laws and regulations (Department of Defense Regulations 5525.5. and U.S. Army Regulations 500-50 (Civil Disturbances) and 500-51, (Support to Civilian Law Enforcement Authorities).

THEREFORE BE IT AGREED THAT:

1. Whenever an authorized law enforcement agency Chief, or designee, decides to activate this agreement, the following agreed upon conditions will be complied with:
 - a. Determine the exact nature of the assistance requested and determine if it is within the scope of this agreement.
 - b. Immediately determine what resources can be released from the current staffing.
 - c. The senior officer shall dictate department resources and dispatch in a timely fashion with complete instructions as to their mission.
2. The rendering of assistance under the terms of this agreement shall not be mandatory. The parties recognize that resources may not always be available for mutual aid, and that TACOM-ARDEC can only provide assistance to the extent permitted and authorized by AR 500-50 and AR 500-51.
3. The Agency receiving the request for assistance will inform the requesting Agency as soon as possible if assistance cannot be provided or potential for delay.
4. Parties to this agreement will not be used to assist in law enforcement functions directly relating to: Arrests, Warrants, or Deadly Force when the responding agency does not have incident jurisdiction. The Agency may be requested to assist with, but limited to: Crowd Control, Crime Scene Control, Perimeter Access Control, Traffic Control, Search and Rescue, Emergency Operations Center Assistance, First Responder Medical Assistance, Administrative Support, Transportation of Equipment.
5. Under exigent or unforeseen circumstances where imminent harm to life is encountered, the Officer may exercise appropriate measures to cease the encounter by utilizing use of force measures of their Agency. The situation will immediately be turned over to the hosting law enforcement agency for action and investigation.
6. Each party to this agreement waives all claims against the other party for compensation for any loss, damages, injury, or death occurring as a consequence to the performance of this Agreement. The performance of any services by (local Govt.) personnel shall not constitute such individuals as officers or employees of

the United States for any purposes, including, but not limited to the Federal Employees Compensation Act. (*Local Govt*) shall so advise all personnel that may be dispatched to TACOM-ARDEC pursuant to this Agreement. (*From the Government's view, it would be preferable to try to have the town obtain gratuitous service agreements from the individuals it intends to send. However, this may be unreasonably difficult to obtain or administer.*)

7. Should a civil or criminal complaint be filed against either party or against individual employees of that party for acts performed pursuant to this Agreement, each party will be responsible for providing legal representation for itself and its own employees only. Neither party shall be responsible for the legal defense or liability of the other party or its employees.
8. All services rendered by TACOM-ARDEC shall be reimbursed in accordance with AR 500-50 and AR 500-51. (*To change, you need to obtain a class waiver from ASD(MRA&L.)*)
9. Each party agrees the incident command responsibilities are coordinated solely by the requesting agency. Under certain circumstances incident command may change in accordance with applicable state or federal laws.
10. Both parties are encouraged, on a reciprocal basis, to conduct joint familiarization and training as is consistent with local security requirements and feasibility.
11. The Agencies will attach any detailed plans and procedures as Annexes to this agreement.
12. This agreement will become effective upon signature of the parties.
13. This agreement will remain in force until written notice to cancel or change by any one party, given ten (10) days notice of said cancellation or change.

IN WITNESS WHEREOF, the parties hereto have executed this agreement at the U.S. Army Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey on the date above written.

Commander ARDEC Signature Block

Municipal Agency Signature Block

THE ACQUISITION CORNER

1. **OMB Draft Revisions to A-76 Circular “Performance of Commercial Activities”**

14 November 2002, OMB published a revision of the A-76 Circular
www.whitehouse.gov/omb/

19 November 2002, Federal Register Notice – public comments on the revised Circular are due on or before 19 December 2002.

67 Federal Register 69769 – 69774, November 19, 2002.

2. **Final DOD Acquisition Rules**

A. Competition Requirements for Purchase of Services under Multiple Award Contracts.

67 Federal Register 65505 – 65509, October 25, 2002.

Implementation of section 803, Public Law 107-107, 115 Stat. 1178 – 1180, December 28, 2001 (FY 2002, Defense Authorization Act).

B. Contracting Officer Qualifications DFARS 201.603-2

67 Federal Register 65509, October 25, 2002.

C. Enterprise Software Agreements

67 Federal Register 65509 – 65512, October 25, 2002.

D. Performance Based Contracting using Federal Acquisition Regulation Part 12 Procedures

67 Federal Register 65512 – 65514, October 25, 2002.

Implementation of section 821, Public Law 106-398, 114 Stat. 1654A-217 to 1654A-219, October 30, 2000 (FY 2001, Defense Authorization Act).

E. Caribbean Basin Country – Honduras

67 Federal Register 65514, October 25, 2002.

F. Foreign Military Sales Customer Involvement – DFARS 225.7304

67 Federal Register 70323 – 70325, November 22, 2002.

G. Army Acquisition Address Number Changes
67 Federal Register 70325 – 70329, November 22, 2002.

3. **Proposed DOD Acquisition Rules**

A. DFARS Case 2002-D019, Transportation of Supplies by Sea – Commercial Items.

67 Federal Register 65528 – 65529, October 25, 2002

Comments are due on or before 24 December 2002.

B. DFARS Case 2002-D013, Provisional Award Fee Payments

67 Federal Register 70388 – 70389, 22 November 2002.

Comments are due on or before 21 January 2003.

4. **Interesting General Accounting Office Decisions**

A. *National City Bank of Indiana*, B-287608.3, August 7, 2002

Sustained Protest – Agency cost realism analysis not supported by the record.

B. *Intermark, Inc.*, B-290925, October 23, 2002.

Sustained Protest – Suggested procedures to conduct procurement with Randolph-Sheppard preference with small business set-aside.

C. *OMNIPLEX World Services Corporation*, B-291105, November 6, 2002.

Sustained Protest – Record not clear whether the services to be provided by the “team members” were within the scope of offeror’s Federal Supply Schedule contract.

D. *Maryland Office Relocators*, B-291092, November 12, 2002.

Price adjustment evaluation in a fixed-price office relocation award.

E. *Network Security Technologies Inc.*, B-290741.2, November 13, 2002.

Violation of an GAO Protective Order – GAO may impose sanction of dismissal in future cases.

F. *Global Communication Solutions, Inc.*, B-291113, November 15, 2002.

Sustained Protest – Price consideration on a different basis [3 years] than stated in the solicitation [10 years].

5. **Notable Board or Court Decisions**

A. *S.P.L. Spare Parts Logistics, Inc.*, ASBCA Nos. 51118, 51384, September 6, 2002.

TACOM tank road wheel requirements case.

B. *United States of America ex rel, Brett Roby v. Boeing Co.*, 302 F.3d 637 2002 U.S. App. LEXIS 18700, Sixth Circuit, September 12, 2002.

Does FAR High-Value Item Clause (52.246-24) trump damages under the False Claims Act? NO.

C. *Florida Power & Light Co. et al., v. United States*, 307 F.3d 1364, 2002 U.S. App. LEXIS 20858, Federal Circuit, October 4, 2002.

Contracts for services provided by the United States were not contracts subject to jurisdiction under the Contract Disputes Act.

D. *John Doe, et al., v. United States* (Judge Robert H. Hodges, Jr.), 2002 U.S. Claims LEXIS 304, November 14, 2002.

The Court of Federal Claims found that the Department of Justice had “ordered or approved” overtime for attorney members of the class.

6. **Miscellaneous**

A. United States Supreme Court – Contract Disputes Act

United States Supreme Court on November 12, 2002, granted a writ of certiorari on the following question: **“Where a National Park Service regulation that states that National Park Service concession agreements are not contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. et seq. is valid”**.

National Park Hospitality Association v. Department of the Interior, et al., 2002 U.S. LEXIS 8331.

The District of Columbia Circuit opinion can be found at *AMFAC Resorts, LLC v. United States Department of the Interior*, 282 F.3d 818, 2002 U.S. App. LEXIS 3290.

B. Government Printing Office - - Administration Attempt to Break the Monopoly

Documentation:

OMB Memorandum M-2-07, Procurement of printing and Duplicating Through the Government Printing Office, May 3, 2002.

Section 4, Public Law 107-240, 116 Stat. 1492, October 11, 2002 (which amends section 117 of Public Law 107-229, 116 Stat. 1465, September 30, 2002).

Proposed FAR rule – Procurement of printing and Duplicating Through the Government Printing Office. *67 Federal Register* 68914 – 68918, November 13, 2002.

GAO Opinion B-300192, November 13, 2002 (Failure to abide by section 117 would constitute a violation of the Antideficiency Act).

C. Cancellation of the DOD Acquisition Rules

On 30 October 2002, the Deputy Defense Secretary Paul Wolfowitz signed a memorandum that cancelled DOD Directive 5000.1, “The Defense Acquisition System”, DOD Instruction 5000.2, “The Operation of the Defense Acquisition System”, and DOD 5000.2-R, “Mandatory Procedures for Major Defense Acquisition Programs and Major Automated Information System Acquisition Programs”. New rules will be issued within 120 days. In attachments to the Wolfowitz memorandum, there were 40 pages of interim guidance.

LDA – 29 November 2002

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.

225.7304 -- FMS customer involvement.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR Subpart 6.3.

(b) FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to-

(1) Develop technical specifications;

(2) Establish delivery schedules;

(3) Identify any special warranty provisions or other requirements unique to the FMS customer; and

(4) Review prices of varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary unless the contractor authorizes its release.

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left to the discretion of the contracting officer after consultation with the contractor. The contracting officer shall provide an explanation to the FMS customer if its participation in negotiations will be limited. Factors that may limit FMS customer participation include situations where-

(1) The contract includes requirements for more than one FMS customer;

(2) The contract includes unique U.S. requirements; or

(3) Contractor proprietary data is a subject of negotiations.

(e) Do not allow representatives of the FMS customer to-

- (1) Direct the exclusion of certain firms from the solicitation process (they may suggest the inclusion of certain firms);
 - (2) Interfere with a contractor's placement of subcontracts; or
 - (3) Observe or participate in negotiations between the U.S. Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with Subpart 201.4.
- (f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).
- (g) Do not honor any requests by the FMS customer to reject any bid or proposal.
- (h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract ...

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POINT PAPER

SUBJECT: Electronic Filing

PURPOSE: To advise the Chief Counsel about electronic filing standards and various agency positions regarding the use of such filing practices.

FACTS:

- Electronic filing is the process by which information required by a court is delivered by electronic means rather than in the conventional paper form. Typically, any documents that normally become a part of the case file are considered information required by the courts.
- Judicial Conference standards are to govern technical matters. However, to date, there are no uniform Judicial Conference guidelines. In fact, the last proposed guidelines were established in February of 1998. These proposals were never formally accepted to be the Judicial Conference's standards on technical matters.
- Recently, a number of state courts have set forth proposals for a uniform electronic filing standard.¹
- Fed. R. Civ. P. 5(e) states, in relevant part, "A paper filed by electronic means in compliance with a *local rule* constitutes a written paper for the purposes of applying these rules."² The 1996 amendment to Fed. R. Civ. P. 5(e) asserts that, "[A] district that wishes to establish electronic filing need no longer await Judicial Conference action."³ This rule gives individual jurisdictions and agencies considerable latitude as to whether or not they will accept an electronic filing. The aforementioned position is evidenced by the fact that various agencies exercise different practices relating to electronic filing. Uniformity will occur only to the extent that local rules copy other local rules.
- The Merit Systems Protection Board (MSPB) utilizes a fill-in computer version to assist MSPB Administrative Law Judges in processing appeals.⁴ The MSPB rules do not specifically state that electronic filing is acceptable. However, the MSPB web page makes reference to an appeal form available via computer that is considered to be an acceptable method by which appeals may be relayed to the appropriate Administrative Law Judge.

¹ www.ncsconline.org

² Fed R. Civ. P. 5(e) (2002).

³ Id. 1996 amendment

⁴ www.mspb.gov/whatsnew/pressreleases/pr08-10_fillin.html

- The Equal Employment Opportunity Commission (EEOC) does not permit electronic filing.⁵
- The Federal Labor Relations Authority (FLRA) does not allow electronic filing.⁶
- The Armed Services Board of Contract Appeals (ASBCA) does not permit any electronic filing. The appeal must be in writing.⁷
- The General Accounting Office (GAO) did experiment with electronic filing but has now abandoned the practice and does not permit electronic filing of any kind.⁸
- It is important to note that most agencies and districts are aiming toward an electronic filing system. However, most do not have the technological capabilities to realize this goal.

The Point of Contact for this subject in the CECOM Legal Office is Mr. Frank DiNicola, (732) 532-9808, DSN 992-9808.

KATHRYN T. H. SZYMANSKI
Chief Counsel

⁵ www.eeoc.gov/facts/howtofil.html

⁶ 5 C.F.R. § 2422.5

⁷ Rule 1(a) of ASBCA code

⁸ www.gao.gov/

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 are discussed below which provide further insight into the Comptroller General’s analysis of protests of sole source acquisitions that were based on the Unusual and Compelling Urgency exception to competition.

In the matter of Polar Power, Inc. (Polar), B-270536, March 1996, Polar alleged that the Army lacked sufficient justification for a sole source award to Mechron Energy Systems (Mechron), for an urgent quantity of 600 2 kilowatt (kW) AC generator sets and 50 DC generator sets. In 1988 and 1989, the Government experienced reliability and obsolescence problems with its 3kW generators and awarded a contract for new 3kW Tactical Quiet Generators (TQGs). In 1990, the Government conducted market research to determine if commercially available generators could meet the Government’s requirements. As a consequence of negative market research results, the Army issued a draft solicitation in 1992 for a two-step research and development (R&D) program to design a 3kW generator capable of meeting the Government’s

requirements. However, funding for that effort was cancelled and a solicitation was, therefore, not issued. In 1993, after new market research indicated that commercial solutions still did not exist, the Army sought solutions for obtaining 2kW generators. Since the Canadian National Defense had already tested and approved Mechron Generator Sets, the Army requested testing of the sets under the Foreign Comparative Testing (FCT) program. The Army successfully conducted tests over a seven-month period ending in September 1995. Due to continuing difficulties, the 3kW TQG contract was terminated for convenience in March 1995 and a new multi-step R&D strategy for 3kW generators was initiated with deliveries planned for FY00. In February of 1995, the Army again surveyed the market through the Electrical Generating Systems Association (EGSA), the official trade association of electrical generating systems manufacturers, and once again concluded that suitable generators were not commercially available. The Army determined that specific units, such as the Rapid Deployment Force, urgently required generators and, therefore, it announced its intent to award a sole source contract to Mechron, in the Commerce Business Daily in November 1995, for the urgent delivery of 650 Mechron Generator Sets within three months of contract award.

Polar protested the award on the basis of inadequate market research and lack of advanced planning. Polar disputed neither the urgent quantity nor that only Mechron could meet the delivery schedule. The Comptroller General's assessment was that only the 1995 EGSA market survey was relevant since its negative results showed the need for the 2kW gapfiller of 650 Generator Sets. Polar was not included in the EGSA survey as EGSA's members principally produce AC Generator Sets while Polar claimed DC generators as its "specialty". The Army contacted 27 manufacturers from EGSA's list and 18 participated in the survey. The Comptroller General found the fact that Polar was not on the list did not make the list unreasonable. Polar claimed that the Army waited too long to terminate the TQG program while waiting for the program to meet its generator needs, constituting a lack of advanced planning. The decision stated that there was nothing in the record demonstrating that the Army acted unreasonably while relying on the 3kW TQG program to meet its needs. In fact, it reflects the opposite; that the Army was involved in advanced planning and eventually initiated the long-term TQG program to meet future requirements coupled with the FCT program to meet current urgent requirements.

The lesson from this case is that even though the 3kW TQG program failed, the Government was taking reasonable actions to meet its requirements and, therefore, these actions cannot be considered a lack of advanced planning.

In the matter of National, B-282843, National protested that it was not given a reasonable opportunity to compete for a length of metal tubing. In anticipation of future buys, National, in October 1998 and again in December 1998, submitted technical data and drawings for the required metal tubing. In April 1999, Defense Supply Center Columbus issued a Request for Quotations (RFQ) for 219 feet of metal tubing from Specialized Metals, Inc. (Specialized), the Original Equipment Manufacturer (OEM) and only approved source for this item. Due to an increase in requirements, the RFQ was cancelled and on 5 May 1999, a Request for Proposals (RFP) was

issued for 541 feet of metal tubing on a sole source basis from Specialized based on urgency. The RFP contained neither a description of the item nor how the metal tubing would be used. On 4 May 1999, the Contracting Officer approved an urgency-based J&A, for a sole source acquisition of 416 feet of metal tubing from Specialized (Note: it is not clear from the record why the RFP was issued for 541 feet of metal tubing but the J&A was for 416 feet of metal tubing). The J&A was a pre-printed form on which the Contracting Officer checked boxes to indicate the statutory authority and that “no technical data can be obtained economically” and that “offers are solicited from as many sources as practicable”. Another box was also checked that stated that an attached certification would detail the extent and nature of harm to the “Military Services”. No additional information was included in the J&A nor was any certification attached to the J&A.

On 10 May 1999, the Agency determined that National’s alternate part was unacceptable stating in its evaluation documentation that the Agency did not have OEM specifications and could not evaluate an alternate submittal. National protested based on the fact that it had submitted technical drawings in December 1998 and despite repeated inquiries, no response was received from the Government. Only the OEM and National, with a lower price, made offers by the 11 May 1999 closing date.

The protest was sustained. The decision to conduct a sole source procurement focuses on the adequacy of the rationale and the conclusions set forth in the J&A. The J&A was completely inadequate since it consisted only of check marks entered on statements on a pre-existing form without supporting explanation and offered no rationale for certifying the extent of harm to the Government. There was no evidence that the Contracting Officer ever attempted to ascertain why this exact item was needed. In accordance with 10 U.S.C. 2319(b), Encouragement of New Competitors, when a procurement is restricted to approved products, offerors proposing an alternate product must be given a reasonable opportunity to qualify. The Agency did not know what the metal tubing was used for, yet took the word of the OEM that its metal tubing was unique, and, therefore, aided in perpetuating the sole source environment which constituted a failure to engage in advanced planning. Justifications for sole source must reasonably show that only an exact product will satisfy the agency’s needs and must show that the agency’s need for the item is of unusual and compelling urgency that was not created by a lack of advanced planning.

There are three lessons to be gleaned from this case: (1) just checking boxes on pre-existing forms, with no supporting rationale, and only conclusory statements, is not sufficient in the GAO’s opinion to establish that the Government has a critical need, (2) lack of technical data is not sufficient justification for a sole source acquisition where the agency can not explain why it needs only a specific item, and (3) where a procurement is going to be restricted to an “approved” product, the agency must give potential offerors a reasonable opportunity to demonstrate that an alternate product is acceptable.

In the matter of McGregor Manufacturing Corporation (McGregor), B-285341, August 2000, McGregor protested an urgent delivery order awarded to General Electric Company (GE)

for deswirl ducts. A deswirl duct is a component of a system that reduces the ability of heat-seeking missiles to lock on, track and destroy a hovering helicopter. McGregor claimed that the Army unreasonably determined that it had an urgent need and, therefore, improperly acquired deswirl ducts from GE, the OEM. Prior to 1996, only GE and Sikorsky Aircraft Corporation (Sikorsky) had been approved sources but GE was a subcontractor to Sikorsky and the sources never competed for awards. In 1996, McGregor submitted a source approval package and became an approved source. In August 1996, McGregor was awarded a contract for 343 deswirl ducts as a result of a competitive procurement in which GE was nonresponsive to the required delivery date. McGregor and the Army experienced numerous delays, some due to deficiencies in the Technical Data Package (TDP) and others due to McGregor's manufacturing process changes that differed from the processes used to pass First Article Tests (FAT). Because of the delays, a new delivery schedule was negotiated with the first delivered unit scheduled for May 1998, which was one year later than the original delivery date. In May 1998, the Army determined that it had an urgent need for 100 deswirl ducts as its supply of deswirl ducts was depleted and a large backorder of requirements had accumulated, thereby creating a potentially serious impact for Warfighters depending on the Blackhawk helicopter. Shortly after the urgency determination was made, McGregor advised the Army that one of its subcontractors had experienced a major fire that would cause significant delivery delays. In June 1998, the Army awarded a sole source contract to GE for 100 deswirl ducts on an urgency basis. McGregor protested the award.

In December 1998, the Army agreed to a revised delivery schedule with McGregor and in February 1999, in order to settle the protest, it awarded McGregor a second contract for 100 deswirl ducts. In April 1999 and again in January 2000, the Army discovered that the TDP provided to McGregor did not contain two GE revisions. Lack of the first revision was causing severe problems on Navy Aircraft using McGregor's parts including deswirl ducts shooting out of the aircraft. The Navy was planning to ground aircraft and a stop work order was issued to McGregor. Eventually, these problems were resolved and new FAT and delivery dates were established. Prior to the resolution of these issues, in February 2000, the Contracting Officer executed a J&A for 273 deswirl ducts from GE on an urgent basis. The J&A calculated the exact quantity of the urgent requirements and stated that "Failure to immediately award the contract will have an adverse effect on operational capabilities of . . .", listing the various types of aircraft and the geographical areas in which they were to operate and the agencies that required them. The Army issued a delivery order for 273 deswirl ducts on 24 March 2000. McGregor protested that the items should have been competed since the Army knew as far back as October 1998 that it had a large requirement.

The protest was denied since an agency may use noncompetitive procedures and award to the only source it believes can meet its schedule. A military agency's assertion that there is a critical need related to human safety which also impacts military operations carries considerable weight and, in this instance, the Army reasonably concluded that only GE could fulfill its requirement within the available time. Although McGregor challenged the quantity of the urgently required items, the calculations provided in the J&A left no basis for questioning the

method used. Although McGregor argued that its delays were either excusable or caused by the Army, that was determined to be not relevant since at the time of award McGregor still had not delivered one useable deswirl duct to the Army.

The lesson from this case is most clearly reflected in the following quotation from the GAO's decision: "Without attributing fault for the numerous delays to either party, it is clear from the record that the reason that the parts were urgently needed was because of the inability of the agency to obtain usable deswirl ducts from McGregor. In these circumstances, the Army reasonably restricted the procurement to GE--the only approved source that had successfully produced usable deswirl ducts to the most recent drawing revisions in the past and the only firm that the Army reasonably believed could deliver sufficient quantities of usable deswirl ducts within the required timeframe--while continuing to work with McGregor in order to have it produce usable deswirl ducts under its outstanding contracts."

The three situations, above contain some common threads. If there is an urgent requirement that negatively impacts mission readiness and personal safety, it must be reasonably documented in a J&A. The documentation must include market research findings and the Government may only acquire the specific quantities of an item needed to address the urgent matter. Additionally, the urgency requirement cannot have resulted from a lack of advanced planning. All acquisition workforce personnel involved in preparing and certifying J&A documents need to understand the goods or services being acquired and ensure that recent market research has been performed and that thorough and complete justifications for sole source actions are prepared in order to ensure that any protests received can be effectively refuted. The review of lessons learned from previous Comptroller General decisions, such as those discussed above, can assist acquisition personnel when they have sole source requirements and are considering the applicability of the urgency-based exception to CICA.

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Case Summaries

CARTER v. GIBBS OVERRULED

Robert O. Mudge v. United States, No. 02-5024 (Fed. Cir., Oct. 17, 2002).

Holding

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.

Summary

In January 1990, Mr. Mudge, an FAA maintenance mechanic, transferred from Nevada to Alaska, where he worked until March 1992, at which time he returned to Nevada. He filed a grievance for backpay under the CBA, seeking, among other things, a 12% pay differential for the time he worked in Alaska. When the agency rejected his claim the union refused to invoke arbitration.

Mr. Mudge consequently sought relief from the GAO and the MSPB, both of which found that they lacked authority to hear his case. He then filed his pay differential claim in the Court of Federal Claims (CFC), which dismissed his complaint on the ground that 5 U.S.C. § 7121(a)(1) deprived it of jurisdiction. That decision was appealed to the Federal Circuit.

In 1994 Congress amended § 7121 by, among other things, adding the word "administrative" to § 7121(a)(1). That section, which initially stated that collective bargaining agreement grievance procedures were the "exclusive procedures" for resolving grievances that fell within its coverage, was amended, in part, to read "exclusive *administrative* procedures." (Emphasis added.) The issue before the court was whether the insertion of the word "administrative" undermined the position that had been taken by the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), where had it interpreted § 7121(a)(1) as precluding judicial remedies for matters that have not been explicitly excluded from the negotiated grievance procedure.

The court noted that Congress characterized its amendments of section 7121(a)(1) as "Technical and Conforming Amendments."

Nothing else in the direct legislative history of the 1994 amendments informs the meaning of the term "administrative" or Congress's intent in adding the word to § 7121(a)(1). H.R. 2970, the bill that ultimately amended § 7121(a)(1), passed the House without the term "administrative," and the word was only added later as a floor amendment in the Senate. *See* 140 Cong. Rec. 27,361 and 28,823-28 (1994). While the House subsequently adopted the Senate's amendment to the bill, *see id* 29,350, neither the House nor the Senate provided a discussion or an explanation of the disputed term.

The court also noted that there was some indirect history on the matter. Two NTEU officials testified, during subcommittee hearings on H.R. 2970, that Congress should overrule *Carter* by clarifying that while the NGP was a Federal employee's exclusive administrative remedy, it didn't foreclose access to judicial remedies. Also, a House committee report accompanying a different bill that failed to pass stated that the addition of "administrative" to § 7121 would clarify that

"[t]he grievance procedure was never intended to deprive employees of access to the courts" and thereby "correct" the decision in *Carter*.

The court further noted that the the CFC, in *Mudge v. United States*, 50 Fed. Cl. 500 (2001), rejected the aforementioned indirect history and had concluded that the word "administrative" merely made clear that the NGP constituted the only avenue of redress except where § 7121 explicitly offers a choice of administrative remedies, as it does in subsections (d), (e), and (g). There had been five other decisions by the CFC: in two of them the CFC reached the same conclusion as it did in *Mudge*. But in the other three cases CFC concluded that the 1994 amendments overruled *Carter*. After summarizing the arguments in those cases, the court reached the following conclusion, based on the "plain language" of the statute (aided by the distinction made between "administrative" and "judicial" in *Black's Law Dictionary*):

We conclude that Congress's addition of the word "administrative" to § 7121(a) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA. To the extent that *Carter* held otherwise, the court based its decision on the language of the statute as it read prior to the 1994 amendments and that decision is therefore no longer applicable. Accordingly, we reverse the Court of Federal Claim's dismissal of Mr. Mudge's claim for lack of jurisdiction and remand for further proceedings.

The rest of the Federal Circuit's decision gives its reasons for rejecting various Government arguments in support of *Carter*.

! It rejected the Government's claim that the word "administrative" merely makes plain that the NGP is the employee's only remedy, except where § 7121 explicitly offers a choice of other administrative remedies on the ground that such an interpretation "reads the word 'administrative' out of the subsection."

! It also rejected the Government's contention that because Congress characterized the insertion of "administrative" as a "technical and conforming amendment" it didn't intend to substantively change § 7121(a)(1), saying that "we 'appl[y] the usual tools of statutory construction' to all relevant amendments to the CSRA, regardless of their title."

! The Government's legislative history argument, that if Congress intended such a drastic change to the current scheme it would not have done so "without discussion, explanation, or debate" was rejected because it "impermissibly distorts the correct approach to legislative history when it suggests that Mr. Mudge bears the burden of finding additional support therein for the plain and unambiguous language of the statute. . . . To the contrary, it is the government that must show clear legislative history supporting its construction because it is the government that seeks to construe the statute contrary to its plain text."

! Nor did the court's interpretation render § 7121(a)(2), which states that the CBA can exclude any matter from the application of the NGP, superfluous. That section not only served as a means to preserve an employee's right to pursue his or her grievance in court, but also as a means of foreclosing access to the NGP and "directing certain matters to alternative administrative channels, such as an agency's administrative process or the Office of Personnel Management." Besides, the Government's proposed interpretation "itself risks rendering elements of the statutory language superfluous by disregarding the presence of the word 'administrative' in § 7121(a)(1)."

! The court rejected the Government's claim that construing "amended § 7121(a)(1) according to its plain text . . . would disrupt the congressional preference for collectively bargained grievance procedures expressed in the CSRA."

We agree that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system. . . . We cannot agree, however, with an interpretation of § 7121(a)(1) that privileges these policy concerns to the exclusion of the plain language of the statute.

! Nor was it convinced by the Government's assertion that limiting amended § 7121(a)(1)'s exclusivity provision "to the administrative realm" would create an imbalance between the procedural rights arising under subsections (d), (e), and (g) and grievances falling outside these subsections. But it continued as follows:

As for the argument that this interpretation privileges employees whose claims are not covered by these subsections by allowing them to obtain both administrative *and* judicial relief, we note that the Court of Federal Claims never addressed this question and that it is not properly before us on appeal. While the issue may or may not be dispositive on remand, we explicitly do not decide whether the addition of the word "administrative" to subsection (a)(1) permits a federal employee to pursue both arbitration and a judicial remedy under § 7121(a)(1).

Finally, the court declined to address the Government's non-statutory argument--viz., that the CBA that applied to Mr. Mudge had waived his right to go to court on his grievance. (The CBA stated that its NGP "shall be the exclusive procedure [not exclusive *administrative* procedure] available to the Parties and the employees in the unit for resolving grievances.") "As the government conceded, however, the *Mudge* court did not decide this issue, and for that reason, we decline to resolve the question on appeal."

Comments

Of the Government's arguments, it seems to us that its "imbalance" argument is the most cogent. In providing for the exceptions, under subsections § 7121(d), (e), and (g), to the exclusivity of the negotiated grievance procedure, Congress was at pains to make clear that the grievant would not be given "two bites at the apple." It is hard to believe that Congress would want to override *Carter* without at the same time making clear that the employee had to choose between arbitration and whatever judicial forum that would be available once *Carter* is overruled. It seems to us that both subsections (d), (e), and (g) of § 7121(d) and § 7123(a)(1), which permits court review of arbitration awards only when the award involves an unfair labor practice, favor an interpretation barring "two bites at the apple." But we'll have to wait and see how the CFC (and, thereafter, the Federal Circuit) will handle this issue.

Regarding the waiver-of-statutory-rights argument, it should be pointed out that the Federal Labor Relations Authority, in *INS*, 10 FLRA No. 40, held that an unknown statutory right cannot be "clearly and unmistakably" waived. Whether the Court of Federal Claims, on remand, takes a similar position, also remains to be seen.

EEO Complaints Filed by Contingent Employees

Or, “When are Government contractor employees, independent contractors, volunteers, and individuals participating in training, work-study or fellowship programs considered ‘employees’ under Title VII?”¹

Before the Equal Employment Opportunity Commission (EEOC) or the agency can consider whether the agency has discriminated against a complainant in violation of Title VII, 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.* Title VII prohibits discrimination by federal agencies against “employees” and “applicants for employment.” It does not expressly prohibit discrimination by federal agencies against independent contractors. “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).

Current guidance for the Department of the Army concerning contingent employees is found in “EEO Joint Employer Guidance - Interim Guidance Oct 98” (EEO Joint Employer Guidance). It states, “This memorandum is intended to provide guidance in the processing of such complaints. This guidance applies to complaints brought by independent contractors, volunteers, employees of government contractors, individuals participating in training, work-study or fellowship programs and all other individuals working on Army installations or projects without being on the activity's payroll or meeting the definition of a civil service employee under 5 U.S.C. 2105(a) or a nonappropriated fund employee described at 2105(c).” This guidance dictates that, “In all formal complaints filed by individuals who are not Title 5 employees or applicants, Labor Counselors must provide a fact-based analysis and legal opinion on whether the complainant is covered under 42 U.S.C. 2000e-16 or the other discrimination laws. To expedite and aid this analysis, upon the assignment of an EEO Counselor, EEO Officers shall contact the appropriate agency management officials to obtain the information referenced on Attachment 1, Working Relationship Information; this information shall be forwarded to the Labor Counselor with the formal complaint for review.”

Attachment 1 to the EEO Joint Employer Guidance, “Working Relationship Information,” asks the EEO Office to answer the following questions and gather the following information:

¹ My thanks to James M. Szymalak, EEO Program and Policy Legal Advisor, Labor and Employment Law Division, Office of the Judge Advocate General, for his talk “Contingent Employee EEO Complaints” presented at the DA EEO Conference, 28 Apr 02 - 3 May 02. I had begun to write this paper months before, but his talk helped me both by providing a structure and by expanding the number and diversity of the cases I addressed.

- 1) Does a contract describing the working relationship between the complainant and the Army exist? If so, submit a copy.
- 2) Are you the Contracting Officer's Representative or Army official responsible for the project the complainant is working on? Please provide your name, title, and telephone number and the same information for any other key players.
- 3) How is the complainant paid and who determines his/her rate of pay?
- 4) What type of work does the complainant do for the Army?
- 5) Is there an end product you expect at the completion of complainant's contract? If so, what is it and when is it due?
- 6) Who assigns work to the complainant?
- 7) Does the complainant report to an office provided by the Army?
- 8) What equipment, materials and supplies does the complainant need to do his/her work for the Army and who provides them?
- 9) Does the complainant do work for anyone else besides the Army?
- 10) If a Government contractor employs the complainant, does that contractor provide an on-site supervisor?
- 11) Does the Army/DFAS withhold social security taxes or other taxes from the complainant's compensation?
- 12) Does the Army provide medical insurance for temporary or long-term disabilities?
- 13) Does the Army reimburse the complainant for any expenses? If so, please describe.
- 14) How were the complainant's working hours established?
- 15) Who determines whether the relationship between the complainant and the Army will continue and on what basis is that determination made?
- 16) Is a performance evaluation prepared on the complainant? If so, who prepares it and what input do Army officials have to it?

17) To whom does the complainant submit leave requests, and who approves those requests?

18) What are the details of any documents or conversations showing that the complainant was not being hired as an employee of the Army?

After the appropriate information is provided to the Labor Counselor, it is the Labor Counselor's duty to advise the EEO Office as to whether the complainant is a *de facto* "employee" or an "applicant." The EEO Joint Employer Guidance states, "Unless the Labor Counselor determines that the complainant is an 'employee' or 'applicant' within the meaning of 42 USC 2000e-16, the complaint should be dismissed on the grounds that it fails to state a claim, as well as any other applicable grounds."

Further guidance is found in EEOC Notice 915.002 (12/3/97) entitled, "Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms." This guidance sets forth the EEOC's criteria for determining whether a contingent worker is an "independent contractor" or qualifies as an "employee" within the meaning of the anti-discrimination statutes. The threshold question is whether a contract worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of his or her work performance rests with the staffing firm and/or the agency rather than with the worker himself or herself. The guidance states that even though a contractor employs a worker, the label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the contractor and the agency. After having determined that the employee is not an independent contractor, the next step is to determine who is the worker's employer. Both the staffing firm and the agency, either separately or jointly, can be the employer. This guidance makes clear that the principle of joint and several liability applies to contingent employee cases.

Since *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (May 29, 1998), the EEOC case law has repeatedly stated that the test to determine whether or not the contingent worker is an "employee" is the common law definition of "employee" from *National Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), adopted by the EEOC in *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998). *Helene E. Park v. Army*, EEOC Appeal No. 01A10015 (September 27, 2001) synopsizes:

In order to determine whether an individual is an "employee," . . . the Commission applies the common law of agency test, considering the full nature of the relationship between the complainant and the agency. See *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *National Mutual Insurance*

Co. v. Darden, 503 U.S. 318, 323-324 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors:

- (1) the extent of the employer's right to control the means and manner of the worker's performance;
- (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision;
- (3) the skill required in the particular occupation;
- (4) whether the 'employer' or the individual furnishes the equipment used and the place of work;
- (5) the length of time the individual has worked;
- (6) the method of payment, whether by time or by the job;
- (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;
- (8) whether annual leave is afforded;
- (9) whether the work is an integral part of the business of the 'employer';
- (10) whether the worker accumulates retirement benefits;
- (11) whether the 'employer' pays social security taxes; and
- (12) the intention of the parties.

In *Ma*, the Commission noted that the common-law test contains, 'no shorthand formula or magic phrase that can be applied to find the answer . . . All of the incidents of the relationship must be assessed and weighed with no one factor being decisive.' *Id.*, (citations omitted). The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, were not appreciably different from the common law of agency test. *See id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (December 3, 1997) (Guidance), we also recognize that a 'joint employment' relationship may exist where both the agency and the 'staffing firm,' . . . may be deemed

employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the ‘staffing firm’ and the agency each maintained over complainant's work. *See Lopez v. Department of the Navy*, EEOC Appeal No. 01A03036 (February 23, 2001). Thus, a federal agency will qualify as a joint employer of an individual assigned to it if it has the requisite means and manner of control over that individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Guidance, supra* at 11.

In *Helene E. Park v. Army*, EEOC Appeal No. 01A10015 (September 27, 2001), the Commission applied this test and found that the employee provided by a staffing firm to work as an administrative assistant to a manager in Korea was, in fact, a *de facto* employee of the Government. The agency argued that the contractor paid complainant's wages and benefits, deducting her taxes and her social security payments. The agency acknowledged that complainant worked at its facility and used its equipment, but argued that ManTech (the contractor) controlled the scope of her work. The agency argued that ManTech maintained the authority to terminate her. In a detailed analysis, the Commission found that complainant's work was clerical in nature and did not require specialized expertise. The complainant was closely supervised by the manager, who shared her office space and was the person who had selected her. The complainant even accompanied the manager on travel at agency expense. The Commission noted that the ManTech supervisor, who worked approximately an hour away, had little input into complainant's day-to-day assignments. The complainant's appraisals were based solely on the agency Contracting Officer's reports, who, in turn, got his information from the manager. Though the contractor determined the amount of complainant's leave, the agency first had to approve leave requests; they were then submitted to the contractor. Her reassignment was also a “joint” effort. As a result, the Commission found that complainant did not work independently and that she received supervision from no one other than the agency manager. The Commission found that “the agency exerted the degree of control necessary to qualify as a joint employer with ManTech, such that complainant may be deemed an ‘employee’ of the agency for the purpose of invoking Title VII protection.”

Because these analyses are all fact-based, a review of the cases that the EEOC has decided since *Wenli Ma* is critical to the Labor Counselor who is making the recommendation regarding whether or not a contingent employee is a *de facto* employee. A review of EEOC decisions regarding complaints by contingent employees shows that a thorough investigation into the employment relationship between the contingent employee and the agency may result in the successful dismissal of the claim. The EEOC has repeatedly upheld the agency's decision to dismiss a complaint on the grounds of failure to state a claim, holding that the contingent employee was not an agency employee. It is not enough, however, to simply assert that the complainant is a contractor. *Darrell Clark v. U. S. Postal Service*, EEOC Appeal No. 01994112 (July 25, 2000). The agency must present facts in support of its claim. The following cases are illustrative of circumstances that may result in a dismissal:

Not De Facto Employee

LaShant Burroughs v. Department of Health and Human Services, EEOC Appeal No. 01A12130 (May 21, 2002). The Commission found that the record supported the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. The complainant did not dispute that The Kevric Company paid her salary. The complainant failed to refute the agency's position that it was The Kevric Company that provided her with annual leave and other benefits. The complainant did not establish that the agency terminated her employment or that the agency's influence on her termination consisted of anything more than informing The Kevric Company that her situation had not worked out with the agency. Based on the record, the Commission found that complainant's relationship with the agency was that of an independent contractor and not an employee.

Ramon Barrera v. Department of Health and Human Services, EEOC Appeal No. 01A12566 (May 9, 2002). The Commission found that complainant was not an employee of the agency. The record showed that the complainant was a Residential Assistant through Kirk Enterprises (KE). The agency furnished basic materials required for residential services; provided limited computer equipment; and provided Government vehicles and paper/copying for work-related activities; however, the record indicated that KE was the primary supervisor of complainant. The record also reflected that complainant was paid, supervised and disciplined by KE; that KE gave complainant assignments and performance evaluations; that insurance benefits were provided by KE; and that complainant was not considered an employee of the agency for tax purposes. The employment agreement between complainant and KE indicated that KE made no representation regarding the duration of the assignment; that KE could cancel at any time; and that complainant's employment would end upon termination of his services at the agency facility. Under such circumstances, the Commission determined that complainant was not an agency employee under the purview of its regulations.

John P. Long v. Tennessee Valley Authority, EEOC Appeal No. 01A13290 (March 8, 2002). The Commission found that the record supported the agency's determination that complainant was not an employee of the agency at the time of the alleged incident. Upon review of the contract, the Commission determined that it was the intention of the parties that personnel provided by General Electric would not be considered agency employees. The contract stated that all persons engaged in carrying out any of General Electric's obligations under the contract shall be the servants of General Electric or its subcontractors and not the servants or agents of the agency. The complainant had failed to refute the agency's position that the agency did not provide him with annual leave, retirement benefits, or pay his social security taxes. The complainant also failed to establish that his salary was directly paid by the agency. The complainant stated in an e-mail to the EEO Counselor dated January 20, 2001, that an agency manager notified his employer, General Electric, that he would not be allowed to work on an agency site. Based on the record, the Commission found that complainant's relationship with the agency was that of an independent contractor and not an employee.

Pauline M. Yamane v. Department of the Army, EEOC Appeal No. 01A20421 (February 6, 2002). The record indicated that at the time of the alleged incidents, complainant was not employed by an agency, but was a participant in the Work Hawaii Program with the City and County of Honolulu. The record indicated that the Work Hawaii Program was responsible for the payment of complainant's salary, payroll taxes, and appropriate fringe benefits. Specifically, the record indicated that complainant signed and acknowledged the terms of her temporary employment with the City and County of Honolulu. The record also indicated that the agency did not provide complainant with annual, sick, holiday or other leave with pay provisions. The agency did not reimburse complainant for any expenses or provide her with medical insurance, retirement benefits or temporary or long term disability benefits. The agency stated that its obligation was to provide necessary supervision, training, work equipment and/or materials to enable complainant to perform her duties and to provide her sufficient work to occupy a full day. The agency also stated that it was responsible for maintaining and submitting to the Work Hawaii Program accurate sign-in/out sheets for verification of complainant's working hours. Based on the foregoing, the Commission found that complainant was not an agency employee.

Darrel Clark v. U. S. Postal Service, EEOC Appeal No. 01A11615 (January 4, 2002). In *Darrel Clark v. U. S. Postal Service*, EEOC Appeal No. 01994112 (July 25, 2000), the Commission vacated the agency's decision and remanded the case to the agency to conduct a supplemental investigation. After conducting this supplemental investigation, the agency again dismissed the complaint for failure to state a claim. The complainant signed a "Contract Employee Agreement" with TECH/AID Corporation, a private contractor, to fulfill an order with the agency. The Commission found that complainant was at the agency for two days prior to the alleged discriminatory action and that, therefore, there was little evidence available to document the nature of the work done by complainant at the agency other than the contract. The contract stated that the complainant was hired to complete an assignment at the agency, set the length of the assignment, and fixed the rate of pay. The complainant was paid directly by TECH/AID. The record reflected that there was a high degree of skill necessary to complete the assignment and that TECH/AID determined that complainant possessed the relevant skill to complete the assignment. A contract clause provided that he was not to accept employment directly or indirectly with the agency for a specified period upon completion of the assignment. Thus, complainant knew that he was not considered an employee of the agency. The Commission noted that although complainant claimed that he was supervised by the agency and told on a daily basis what assignments to complete, complainant was only oriented two days and participated in a practice drill and a test. In addition, the Commission notes that the computer work performed by complainant was not the main business of the agency. Thus, the Commission determined that complainant was not an agency employee under the purview of its regulations and that the complaint was properly dismissed for failure to state a claim.

Jacquelyn D. Collins v. Department of the Army, EEOC Appeal No. 01A13679 (November 20, 2001). The complainant provided relocation services for the agency's Directorate of Community Activities. In upholding the agency's dismissal of the complaint, the Commission

relied upon complainant's response to the agency's request for additional information. The complainant stated "I served as an independent contractor on two contracts for Fort Myer Army Community Services office; No SS taxes were withheld; No medical insurance was withheld; I received no reimbursable expenses; I was allowed to establish my own hours; and I never received a performance evaluation, only feedback regarding my performance from [an agency official] or through the rumor mill." In addition, complainant, in discussing the termination of the contract with an EEO representative stated, "Because of my contractor status, I'm not allowed to use the Pentagon's Housing Office computers."

Laurie Gruel v. Department of the Interior, EEOC Appeal No. 01A04606 (September 26, 2001). The complainant was employed as the Executive Director of the San Juan Mountains Association (SJMA) from May 1989 to December 1998. The SJMA was a non-profit organization that was created in 1988 to assist the San Juan National Forest in providing education and interpretation of public lands in Southwest Colorado. It had an agreement with the San Juan Forest and the Department of the Interior's Bureau of Land Management to develop educational programs, publications, and volunteer projects. The Commission found that complainant received her pay from the SJMA and was never appointed to the civil service. In addition, the record revealed that complainant did not have direct supervision by an agency supervisor, but rather was supervised by the board of directors of the SJMA. Further, according to the SJMA, the agreement between the SJMA and the agency provided that SJMA personnel were not to be considered federal employees. The record reflected that the agency had essentially no control over any aspect of complainant's work, providing only space and equipment.

Imelda Tovar v. Department of the Army, EEOC Appeal No. 01A12597 (June 29, 2001). The complainant alleged sexual harassment by the agency. The agency dismissed the complaint because it found that the complainant was employed by an independent contractor, LSI. The agency's Supervisory Production Controller stated the agency established complainant's working hours and the duration of the job and was able to assign additional work. The agency also provided complainant with work space, equipment and tools. However, the Commission found that the independent contractor was the primary supervisor of complainant. It found LSI gave complainant assignments; performance evaluations; and provided an on-site supervisor. LSI directed the hiring, removal and discipline of complainant. The complainant was considered an employee of LSI for tax purposes, salary and rate of pay. The contractor also provided complainant with insurance benefits, leave and workers compensation. Thus, the Commission affirmed the agency's final decision dismissing the complaint.

Lisa M. Butler v. U. S. Postal Service, EEOC Appeal No. 01996361 (May 4, 2001). The Commission upheld the dismissal of a complaint filed by a complainant worker employed by a contractor with the agency, USPS, for failure to state a claim. The contractor was responsible for providing all repairs to and maintenance of equipment used in performance of the contract. Moreover, the contract provided that the contractor provide to the agency a copy of complainant's driving record. The contractor was responsible for the return of agency property when an employee left its employment or at the end of the contract.

D. J. Gallegos v. Department of the Air Force, EEOC Appeal No. 01996720 (April 26, 2001). The Commission upheld the dismissal of a complaint by a contract Family Advocacy Treatment Manager for failure to state a claim. The complainant argued that she was an employee of the agency. She said that malpractice suits against contract employees were processed in the same manner as suits against general schedule employees and military personnel; only military personnel could sign her time sheet; only military personnel could approve her leave requests; and her security clearance was processed and approved by the agency. The Commission found that the complainant was a contract employee, and that under her employment contract, her job would end if the contract with the agency ended. The complainant's leave, health, and insurance benefits were set by her employment contract and her salary, increases and performance appraisals were determined by the contractor.

Tisa L. Manis v. Department of the Army, EEOC Appeal No. 01994513 (March 30, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. A private Government contractor hired, paid, and provided benefits to the complainant. The contractor maintained on-site management and assigned complainant her duties and work hours. The contractor was solely responsible for her training and performance evaluation.

Hazel Hunt v. Department of Interior, EEOC Appeal No. 01A11193 (March 27, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. The complainant was a janitor at the agency facility at the Hoover Dam. The record contained evidence that the complainant was paid, supervised, and disciplined by contractor employees. The contractor provided the necessary tools, materials, and equipment. The contractor paid insurance benefits. The complainant was not considered an employee of the agency for tax purposes.

Barbara D. Mosley v. Department of the Navy, EEOC Appeal No. 01996317 (March 21, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. A private contractor selected the complainant and told the agency that, although her Government supervisor could tell the complainant “what to do and how to do it,” complainant was accountable to the private company's supervisors. In a memorandum, the agency asked the contractor to monitor and supervise the complainant's performance to ensure she performed at an acceptable level. The agency indicated that if her performance did not improve, “she should be removed from her duties”. When the contractor terminated her, it stated that it had “lost confidence in [her] ability to perform as [its] employee.” The record also reflected that the duties were set by the contract and that the contractor was responsible for providing her leave, handling her travel and training, paying her wages and maintaining her personnel file.

Patricia Smith v. Department of Veterans Affairs, EEOC Appeal No. 01994173 (March 15, 2001). The agency initially accepted this complaint because the complainant worked under “close supervision” by the agency and was terminated based upon its advice. Later, after its investigation, the agency dismissed the complaint for failure to state a claim. The agency found that the contractor paid complainant, withheld taxes, provided benefits, controlled training,

assigned complainant's duties, supplied her uniforms, and supervised her performance. The Commission upheld the dismissal finding that the contractor trained, supervised, and evaluated complainant's performance. Though the agency had the right to request that the complainant not work on agency grounds, the decision to terminate the complainant was the contractor's.

Richard E. Sundberg v. U. S. Postal Service, EEOC Appeal No. 01A10964 (March 9, 2001). In *Sundberg v. USPS*, EEOC Appeal No. 01993955 (August 2, 2000), the Commission vacated the agency's decision and remanded the complaint to the agency for a supplemental investigation. Specifically, the agency was ordered to conduct a supplemental investigation to determine whether complainant was an applicant for employment using the common law of agency test. The complainant was a Highway Contract Driver. On appeal after a second dismissal, the Commission found that the record reflected that by contract, complainant's work was specified, negotiated for a set period of time, to be performed at a specified location and at a predetermined formulized payment of wages. The agency did not provide complainant with annual leave, retirement benefits, or social security taxes. The complainant was responsible for providing his equipment and paying for his expenses. Moreover, complainant had appeal rights within the contract itself for disputing termination or non-renewals. Dismissal for failure to state a claim was upheld.

Robert McKernan v. Defense Commissary Agency, EEOC Appeal No. 01995741, (March 8, 2001). The complainant filed a complaint against the commissary because it failed to hire him as a bagger. The Commission looked at the terms of the agreement between the baggers and the commissary. Baggers expressly acknowledged that they were not employees of the commissary and were not under the supervision, direction or control of any employee of the commissary. Furthermore, baggers were only paid tips provided by patrons. The commissary did not deduct taxes from the baggers' earnings or provide baggers with any type of employee benefits, such as an employer pension, health or other fringe benefit plan of the commissary. The head bagger, not the commissary, established the work schedules for the baggers. Moreover, either party could terminate the agreement effective immediately upon the giving of reasonable notice of termination for cause. The fact that the agency may have held some minimal control over the manner and means of the baggers' work performance did not render the baggers employees of the agency when balanced against the findings listed above. Under the terms of the agreement between the baggers and the commissary, baggers expressly acknowledged that they were not employees of the commissary, but rather independent contractors. Thus, the Commission found that although the commissary may have had some minimal control over the baggers' work performance, it did not render them employees of the agency.

Susan R. Prather-Soppeck v. Department of the Air Force, EEOC Appeal No. 01990137 (December 22, 2000). The complainant was providing professional medical services in the agency's "Homes Program" when she allegedly suffered harassment. The agency dismissed the claim because she was an independent contractor. The Commission upheld the dismissal. It noted that the complainant was a highly skilled, independently licensed, medical professional who worked autonomously off-site in the homes of her patients providing patient care. Any

control exercised by the agency was limited to assessments of contract compliance. The Commission noted she was not on the agency payroll, did not receive agency employee benefits, and supervision was limited to peer review of her work.

Deborah A. Settles v. Tennessee Valley Authority, EEOC Appeal No. 01995149 (October 13, 2000). The Commission upheld the dismissal of a complaint by a Firewatch Laborer for failure to state a claim. The complainant was a contract employee with Stone and Webster Construction Company (SWCC). The Commission found that the complainant was not employed by the agency, but by SWCC. SWCC made employment decisions, including work assignments and termination of employment. It was also responsible for the payment of complainant's salary, payroll taxes, and employment benefits. The agency did not provide the complainant with annual leave, retirement benefits, or social security taxes. Furthermore, the record indicates that the duties of a Firewatch Laborer required a set route to be walked every shift to watch and check for signs of fire. An agency employee only provided general direction, including the route to be walked and the times thereof.

Albert Beard v. U. S. Postal Service, EEOC Appeal No. 01A03926 (August 22, 2000). The complainant claimed racial discrimination, but the agency determined he was an independent contractor and thus dismissed his claim on the grounds of failure to state a claim. The Commission found that complainant submitted a bid in response to the agency's solicitation for a mail transportation supplier. The agreement required complainant to provide a vehicle that met agency specifications. The complainant was paid a gross amount every twenty-eight days based on the fixed price established by the contract. The agency did not withhold taxes, pay social security and retirement benefits, or provide for annual leave and sick leave. Moreover, the record contained correspondence from complainant reflecting that the parties had an independent contractor relationship wherein the complainant identified himself as "owner/president" of B Enterprises Trucking.

Kenneth L. Ryfkogel v. Department of the Navy, EEOC Appeal No. 01A03701 (August 16, 2000). The Commission upheld the dismissal of a complaint by a contract optometrist for failure to state a claim. The Commission held that the agency did not sufficiently control the "means and manner" of the complainant's work. It noted that the complainant was a highly skilled, independently licensed, medical professional, who was expected to work autonomously in providing patient care. The length and nature of the relationship with the agency was determined by the contract between the complainant and the staffing firm. It noted that the staffing firm had the sole authority to terminate the complainant, which it did without affording him the rights normally given to federal employees. The Commission added that the complainant was not on the agency's payroll, did not receive any employee benefits, and could engage in the private practice of optometry, which the agency employees could not.

Kenneth L. Ryfkogel v. Department of the Army, EEOC Appeal No. 01A04012 (August 16, 2000). The complainant claimed sexual harassment during his employment as an optometrist at an agency medical center. The agency rejected the claim because complainant was an independent

contractor. The complainant appealed, claiming that he was a “joint employee” of the staffing firm and the agency. The Commission determined that as a highly skilled, independently licensed, medical professional, complainant worked autonomously in providing patient care. Any control by the agency related merely to office routines, such as scheduling and patient referrals. While the agency could request reassignments; schedule changes; or even removal to better accommodate its needs, it did not have the authority to do so directly. The agency had no authority to prohibit complainant from engaging in the private practice of optometry, a control it exercised over the doctors that it did employ. The Commission found that complainant was not on the agency's payroll, or receiving any agency employee benefits and that, therefore, he was not an "employee" of the agency.

Linda M. Lewis v. Federal Emergency Management Agency, Agency Appeal No. 01995707 (July 13, 2000). The Commission found that the complainant was an employee of the U.S. Department of Agriculture (USDA), and not FEMA. As an employee, complainant received pay, annual leave, and benefits from the USDA. USDA supervised her and provided her with evaluations. Although complainant argued that FEMA controlled her working conditions, the Commission viewed complainant's brief and occasional contact with FEMA as too infrequent to warrant finding an employer-employee relationship between the agency and complainant. Thus, the Commission found that the agency properly dismissed the complaint for failure to state a claim.

William Ackley v. Environmental Protection Agency, EEOC Appeal No. 01A01626 (May 19, 2000). The Commission upheld the dismissal of a complaint for failure to state a claim filed by a contract employee with the National Council of Senior Citizens (NCSC), a contractor with the EPA. The complainant filed when his contract was not renewed. The Commission found that the complainant was not an employee of the EPA. He received his pay from the NCSC, received both annual and sick leave from the NCSC, his unemployment insurance was to be paid by the NCSC, and he was to receive the same holidays as the assigned agency. The complainant did not have direct supervision by an agency supervisor but rather an agency official signed off on the complainant's administrative paperwork. The contract specified that contractors were not agency employees.

Bernard G. Lopez v. Department of the Navy, EEOC Appeal No. 01A03036 (February 23, 2000). The complainant, a former agency employee, was contracted to work in the agency's shipyard. The complainant had a documented disability and requested a designated disability parking space on the shipyard premises. The agency refused on the grounds that the complainant was not an agency employee and thus, the agency was not obligated to provide a reasonable accommodation. The agency also noted that the union agreement prohibited the agency from assigning parking spaces to non-employees. The complainant brought a complaint for failure to provide a reasonable accommodation, but the agency dismissed for failure to state a claim. In *Bernard G. Lopez v. Department of the Navy*, EEOC Appeal No. 01986332 (August 24, 1999), the Commission vacated the agency's decision, finding insufficient evidence to determine whether or not the complainant was an employee. The agency conducted a

supplemental investigation and again dismissed the complainant's claims. The Commission found that the agency had essentially no control over any aspect of complainant's work, providing only space and equipment. The complainant acknowledged that he had been employed by Applied Technology Associates. Thus, the Commission found that the complainant was not solely or jointly an employee of the agency, and upheld the dismissal.

De Facto Employee

Sharon L. Koob v. U. S. Postal Service, EEOC Appeal No. 01A10705 (October 11, 2001). The Commission vacated the agency dismissal of this complaint and remanded it for further investigation in *Koob v. U.S. Postal Service*, EEOC Appeal No. 01A01713 (June 9, 2000). The record shows that complainant provided services to the agency as an Occupational Health Nurse Administrator (OHNA) under a standardized contract used by the agency in its procurement of health services. The contract set forth very specific duties, to be performed at the agency, on certain days during certain hours, and required the OHNA to supervise all activities by the health unit. The contract further specified that the OHNA was "functionally" supervised by the Senior Area Medical Director, and "administratively" supervised by the same director, as well as the Manager of Human Resources. The Commission followed its decision in *Woods v. U. S. Postal Service*, EEOC Appeal No. 01971155 (June 12, 1998), decided under similar facts. The Commission determined that the "position description" in the agency's standardized contract resulted in the agency exercising "primary control" over the work performed under the contract, such that the complainant could not be deemed an independent contractor.

Gerald W. Hammock and Doris C. Chaney v. Tennessee Valley Authority, EEOC Appeal No. 01A02271 and 01A02273 (July 17, 2000). This was a case brought under the ADEA. The complainants were journeyman machinists working at the Power Shop Service, operating machinery necessary to rebuild and repair generators. The contract provided that the contractor would remove from the job site any contractor personnel determined to be unfit for performance of his or her duties or acting or working in violation of job site work rules. Additionally, the contract specified that the contractor agreed to work as an independent contractor. Despite this, the Commission found that complainants were "employees." The Commission found that the agency held complete control over the manner and means of complainants' work performance. The complainants were supervised by agency employees, subjected to agency employment rules, and evaluated by agency management. Further, they worked alongside regular agency employees performing the same or similar tasks, had access to agency facilities comparable to those given to regular employees, and used agency tools and equipment in the performance of their jobs. The agency also released complainants from their employment with the agency, although it is unclear whether the agency chose which individual machinists to lay-off. Additionally, the agreement provided for the agency to pay the contractor the salary and payroll taxes of its workers, and for the contractor to record, process, and distribute the paychecks. The work complainants were completing involved repairing and constructing power generation equipment and the Commission considered the generation of power to be an integral agency duty. As a result, the Commission found these complainants to be "employees."

Steven M. Lonergan v. Department of Veterans Affairs, EEOC Appeal No. 05970406 July 10, 2000. In 1991, complainant was placed by his vocational rehabilitation specialist in a “Chapter 31 Training Program” (unpaid work experience) at the agency's Bay Pines, Florida, Medical Center. Between December 1991 and November 1992, complainant worked as a Claims Clerk in that facility's Medical Administration Service. From October 1993 to February 1994, complainant worked as a Clerk in the facility's Police & Security Service. Though the Commission had found that the complainant was not an employee in *Steven M. Lonergan v. Department of Veterans Affairs*, EEOC Appeal No. 01963586 (January 15, 1997), and the Commission rejected the complainant’s request for reconsideration as insufficient, it exercised its discretion to reconsider the prior decision on its own motion. The Commission distinguished this case from *Meador v. Department of Veterans Affairs*, EEOC Request No. 05920836 (April 1, 1993), in which an unpaid trainee was held not to be an employee. The Commission noted that the complainant has been identified as having worked in two specific positions, and that, like a regular employee, he worked designated hours in those positions. Therefore, though complainant was technically a trainee, there were aspects of his relationship with the agency indicative of an employer/employee relationship. Finding application of the Darden test appropriate, the Commission considered that, for upwards of 14 months, complainant worked designated hours and that the work he performed fell within the parameters of the agency's regular business. The agency, as evidenced in part by the three performance evaluations the complainant was issued, both assigned him work and controlled the manner in which that work was accomplished. Although the complainant was not paid an actual salary, he did receive a monthly stipend through an agency rehabilitation program that was directly related to his participation in the program. For these reasons, the Commission found that the agency's control over the complainant and his work product was such that, under the common law of agency, he should be considered an employee.

Charlene E. Scott v. Department of Energy, EEOC Appeal No. 01984578 (November 23, 1999). The complainant alleged that she was an employee. She said she had no written contract; however, she supplied her resume, was hired for an indefinite period, and believed she could become permanent. She worked exclusively for the agency and was not permitted any outside work. She had assigned projects, but was also to help out where needed. The agency supervised and trained her and controlled her day-to-day work. She exercised little independent judgment. She had the same building access as other employees and was integrated into the business of the agency. The agency hired, supervised, and terminated her assistants. She was paid by the hour through time cards submitted through the agency. She did not have a separate business plan or insurance. The agency did not respond to the appeal, although the Commission noted that there was information in the file. The letter from the agency’s Office of General Counsel stated that the complainant had a six-month renewable agreement and that the agency did not provide annual leave, sick leave, retirement benefits, hospitalization/health benefits, or withhold taxes. The contract was not included, nor was there information addressing any of the other *Ma* factors. Due to the agency’s failure to support its assertion that the complainant was an independent contractor, the Commission found the complainant to be an employee of the agency. [*Charlene*

E. Scott v. Department of Energy, EEOC Appeal No. 05A00268 (December 12, 2001) is also instructive because it reiterates that if you have evidence at the time of the hearing, you must produce it at the hearing. Having lost at hearing, the agency, in its request for reconsideration, produced evidence by which it sought to prove that Ms. Scott was an independent contractor. The Commission said that it should have been produced at the hearing and rejected the new evidence.]

Remanded

Kymbal D. Lindsay v. General Services Administration, EEOC Appeal No. 01990084 (November 16, 2001). The Commission vacated the dismissal of a complaint for failure to state a claim and remanded it for further investigation. A Telecommunications Specialist who worked for Spencer Reed Company at the Agency's Federal Communications Services in Denver, Colorado, filed the complaint. The Commission found that there was insufficient evidence in the record addressing whether the complainant was an "employee" of the agency under the common law of agency. Specifically, there was no evidence showing whether complainant was paid, supervised, or disciplined by contractor employees. In addition, there was no evidence showing the contractor provided complainant's vacation and insurance benefits and whether the complainant was considered an employee of the agency for tax purposes.

Patricia L. Lawless v. General Services Administration, EEOC Appeal No. 01A13826 (September 6, 2001). This case found that the agency had not provided sufficient evidence to address whether complainant was an "employee" of the agency. The complainant was a cafeteria manager through Southern Food Service working in a Government facility. The Commission noted that the record contained evidence reflecting that complainant was paid, supervised and disciplined by contractor employees. The record further reflected that the contractor provided vacation benefits and insurance benefits and that complainant was not considered an employee of the agency for tax purposes. The Commission found that the record did not support the agency's dismissal of complainant's complaint. The case was remanded.

Barbara M. Walker v. U. S. Postal Service, EEOC Appeal No. 01996514 (May 31, 2001). The Commission found that complainant identified herself as a private contractor, but that there was little evidence in the record indicating that complainant was hired and paid by a private employer, and was under contract with the agency. The agency appeared to rely on statements made by the Transportation Manager in which he asserted that complainant did not report to him and that he was not her supervisor, to attempt to establish that it did not control the means and manner of complainant's employment. The agency was faulted for relying heavily on the Spirides, Id. factor which states that "the extent of the employer's right to control the means and manner of the worker's performance is the most important factor". The agency failed to address any of the other factors mentioned in Ma.

John Pettyjohn v. Department of Veterans Affairs, EEOC Appeal No. 01A04097 (April 3, 2001). The Commission vacated the dismissal of a complaint filed by a complainant who said he was a volunteer for failure to state a claim. The Commission remanded the case for further investigation. The Commission found that there was insufficient evidence in the record to determine whether the Commission had jurisdiction over the complaint. In both his formal complaint and on appeal, complainant stated that he volunteered and maintained an office at the agency. The Commission found that it was unclear when complainant occupied the various service officer positions and whether these volunteer positions qualified him for protection under the EEO regulations. The Commission found that the record did not clearly identify complainant's status with the agency at the time of his complaint.

H. Douglas Hamilton II v. Department of the Navy, EEOC Appeal No. 01996039 (December 19, 2000). The complainant alleged that he was subject to discrimination based on race. The agency dismissed the complaint for failure to state a claim. The agency maintained that complainant was an employee of an independent company under contract with the agency. However, in the narrative attached to complainant's formal complaint, he asserted that he was discriminated against when applying for employment with the agency. The Commission found that the complainant was working as an independent contractor at the time he suffered the alleged discrimination. However, his claim of discrimination was based on his status as an applicant for a permanent position with the Government. Based on this rationale, the Commission found the agency's dismissal improper.

Marvin J. Matthaei v. U. S. Postal Service, EEOC Appeal No. 01996122 (October 27, 2000). The Commission found that the Contract Personnel Questionnaire that was part of the record did not provide all of the information that was necessary to render a determination as to complainant's status. Therefore, the Commission was unable to ascertain whether complainant was an employee of the agency at the time of the alleged discrimination.

Processing Pointers²

The EEO Office should initially determine whether the employee wishes to file against the Army, the contractor, or both. If the complainant wishes to file against the Army, the EEO Office should assign a counselor and collect the information needed to perform the "Working Relationship Information" analysis. If the employee wishes to file a formal complaint, the labor counselor must render a fact-based analysis and legal opinion as to whether the worker is a *de facto* employee. If it is determined that the complainant is not a *de facto* employee, the complaint may be dismissed and the employee given their appeal rights to the Office of Federal Operations. If the analysis indicates that the complainant is a *de facto* employee, then the complaint should be processed. The labor counselor should work with the contracts attorney responsible for the contract regarding liability and possible litigation against the contractor. If the complaint is accepted and it is later determined that the complainant was not a *de facto* employee, the agency may claim that the action should be dismissed due to lack of jurisdiction over the complaint. Jurisdictional issues may be raised at any stage of the proceedings.

A few final comments: 1) always issue a “Notice of Right to File a Formal Complaint of Discrimination;” 2) don’t forget to apply your other 1614.107 dismissal bases when they apply; 3) avoid improper contact with the contractor; go through the Contracting Officer’s Representative; and 4) if the complainant files directly against the contractor, the EEO Office becomes the point of contact, but no information is released without labor counselor concurrence.

The Point of Contact for this subject in the CECOM Legal Office is Kathryn DuCharme Poling (703) 704-0235; DSN 654-0235.

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² These processing pointers are derived from the talk “Contingent Employee EEO Complaints” presented at the DA EEO Conference, 28 Apr 02 - 3 May 02, by James M. Szymalak, EEO Program and Policy Legal Advisor, Labor and Employment Law Division, Office of the Judge Advocate General.

WORKERS' COMPENSATION INSURANCE for DEPLOYED DEFENSE 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.”

- What are the requirements for contractors to provide workers' compensation for their deployed employees?
- How can contractors obtain workers' compensation insurance?
- Where can someone learn about the requirements for reporting and processing claims through the Department of Labor?
- What is the organization within the Department of Labor that handles compensation for death or injury to contractor employees who are performing covered work?
- What are the statutes and regulations that address compensation for deployed employees?
- What are the penalties for failing to secure the necessary insurance?
- 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.

The Basics

For contracts with the U.S. Army Materiel Command (AMC), Army Pamphlet 715-18, “AMC Contracts and Contractors Supporting Military Operations,” published in June 2000 provides guidance on Workers' Compensation in Chapter 33. Although the pamphlet is published by AMC, the information regarding the laws is applicable to contracts with all military departments.

The pamphlet describes the three laws that impact compensation for contractor employees deployed outside the continental United States (OCONUS): the Defense Base Act (DBA), the Longshore and Harbor Workers' Compensation Act (LHWCA), and the War Hazards Compensation Act (WHCA). Each of these laws individually is complex, and to complicate matters, for purposes of defense contractor employee workers' compensation, they are woven together. A brief review of each follows.

The **Defense Base Act (DBA)**, Title 42, U.S. Code, Chapter 11 (42 U.S.C. 1651-1654) affords compensation benefits for the injury or death of any employee engaged in any

DBA-covered employment under certain contracts. There are several instances of covered employment set forth in the DBA, and the pamphlet states those situations, as described in 42 U.S.C. 1651(a)(1) through (6).

The **Longshore and Harbor Workers' Compensation Act (LHWCA)** is incorporated by reference into the DBA. Rather than creating a new compensation scheme to achieve the objectives of the DBA, 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 [LHWCA].” 51 Comp. Gen. 125, B-162408, August 26, 1971. Thus, entitlement to benefits is first established according to the DBA; once entitlement is established, look to the LHWCA to determine the benefit.

Lastly, another statute that provides benefits for contractor civilian employees deployed abroad is the **War Hazards Compensation Act (WHCA)**. The WHCA, 42 U.S.C. 1701 et seq., enacted in 1942, provides compensation for employees in the event of war hazards. When the DBA applies . . . the benefits of the [LHWCA] are extended through the operation of the [WHCA] . . . to protect the employees against the risk of war hazards (injury, death, detention). FAR 28.305(c)

The Department of Labor’s Role

The U.S. Department of Labor (DOL) includes, among its many organizations, the Employment Standards Administration (ESA). The ESA includes the Office of Workers’ Compensation Programs (OWCP). The OWCP includes the Division of Longshore and Harbor Workers’ Compensation (DLHWC). The DLHWC published in September 2000 the Longshore and Harbor Workers’ Compensation Act (LHWCA) Procedure Manual. This manual can be found on-line at www.dol.gov/esa/regs/compliance/owcp/lspm01.pdf.

One of the key roles of the Director of DLHWC is that of administering the provisions of the Acts pertaining to the authorization of insurance carriers desiring to write LHWCA compensation insurance policies and to the authorization of self-insured employers issuing certificates. There will be more about the authorization of insurance carriers below. In addition, the Division processes and adjudicates claims filed under the WHCA.

Authority and Background of the LHWCA

The LHWCA (33 U.S.C. 901-950), passed in 1927, provides compensation payable by an employer to an employee (or employee’s dependents) for disability or death due to an injury occurring upon the navigable waters of the U.S. Since 1927, provisions of the Act have been extended to include additional groups of employees. Pertinent to this discussion is the extension of the Act under the DBA.

The DBA was enacted in 1941. Through its several amendments, the DBA provides workers' compensation coverage for workers engaged in employment on overseas defense bases, or under contracts with the United States (or an agency thereof) for public work to be performed OCONUS. To be compensable under the Act, a claim must stem from employment either on a U.S. base overseas or under a "contract" for "public work" overseas, public work constituting Government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity.

The DBA was enacted "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." 51 Comp. Gen. 125, *To the Secretary of the Army*, B-162408, August 26, 1971 *citing* S. Rept. No. 540, 77th Cong. 1st sess. As stated above, Congress chose not to create a new workers' benefit/compensation scheme, but to use the one already in place under the LHWCA.

The LHWCA provides a comprehensive program to compensate for partial or total disability, personal injuries, necessary medical services and supplies, death benefits, loss of pay, and burial expenses for persons covered by it. Generally, compensation is payable irrespective of fault as to the cause of the injury.

The War Hazards Compensation Act

The WHCA applies the benefit structure of the LHWCA to certain employees of contractors engaged in work OCONUS who are exposed to war risks. These cases are normally adjudicated under the DBA until a compensation order is issued and there is a determination that the death/injury was the result of a war-risk hazard, at which point the employer/carrier applies to the Division of Federal Employees' Compensation (FEC) Branch of Special Claims, for reimbursement from the FECA Compensation Fund under provisions of the WHCA (see 5 U.S.C. §8147, the statute that establishes the Compensation Fund). Thus, the DBA provides a system by which carriers/self-insured employers are reimbursed for losses that they may have covered, once the injury/death is determined to have been caused by a war risk hazard.

Under Section 101 of the WHCA, if an employee was not eligible for benefits under the DBA, but was injured or died as a result of a war-risk hazard, the employee or his survivors may claim under the WHCA directly. It's important to note that 20 C.F.R. §610.100(b) provides that the DOL shall not provide reimbursement in any case in which an additional premium for war-risk hazard was charged. 20 C.F.R. 61.100(b)

The website for the Office Workers' Compensation Programs has a link to the Index of Resources About Claims Under the Federal Employees' Compensation Act (Index is hosted by The Fien Group). The Index of Resources website has a link to Program Procedures, Special Case Procedures. Chapter 4-0300 outlines the procedures to follow in making claims under the WHCA. Section 8 of that chapter addresses terrorist attacks. As stated on the Fien Group's website, although the statutory definition of a war-risk hazard does not specifically address terrorist attacks, coverage may be extended to some victims of terrorist acts. The Group provides some examples to demonstrate the potential for coverage.

The Source of Benefits

Perhaps one of the first questions asked by a contractor who is sending employees abroad to perform work that is covered under the DBA is: from where do the benefits come that are paid to the employee in the event of death or injury? Each employer who has employees covered by the LHWCA or one of its extensions (in this case, the DBA) must secure its obligation to provide compensation and medical benefits in accordance with section 32 of the Act (see 33 U.S.C. §932). A contractor must secure the obligation of its subcontractor unless the subcontractor has secured its own obligations under the Act(s). Thus the simple answer is that the benefits come from insurance that the employer secures.

Every employer carrying on covered employment is required to secure its obligation to pay compensation and provide medical care to injured employees by one of two ways: insuring with any insurance company **authorized** by the Office of Workers' Compensation Programs of the DOL; or by becoming an authorized self-insurer.

Authorization of Insurance Carriers and Self-insurers

The LHWCA Procedure Manual, Chapter 7-200, contains the regulations and procedures regarding authorization of insurance carriers and self-insured employers. A brief explanation of the requirements follows.

To receive initial authorization under the LHWCA or one of its extensions (such as the DBA), an insurance company should have five years' experience in writing workers' compensation coverage and should be listed in Best's Insurance Reports with a rating of "B+" or better. An application for authority to issue insurance coverage must be submitted in writing and be signed by an officer of the applicant. "Every applicant for authority to write insurance under provisions of [the LHWCA] . . . shall be deemed to have included in its application an agreement that the acceptance by the [District Director of the DLHWC] of a report of the issuance of a policy of insurance . . . shall bind the carrier to full liability for the obligations under the Act or its extensions of the employer named in the [report of issuance of a policy of insurance], as well as the distinct

obligations imposed on the carriers themselves by the Act.” LHWCA Procedure Manual, Ch 7-300, para. 9.

The Office of Workers’ Compensation Programs will authorize an employer to self-insure obligations under the Act or its extensions when the company has established that it has:

- Ample financial resources to meet all obligations in regard to its potential liability under the Act
- Obtained adequate excess or catastrophic loss insurance
- Made adequate arrangements to provide prompt authorization and payment for all necessary medical care
- Made a security deposit in the name of the OWCP in the manner and amount prescribed by the OWCP
- Agreed to carry out all requirements of the Act and the regulations for administering the Act under which authorization is sought.

Uninsured Employers and Penalties

Section 38(a) of the LHWCA (see 33 U.S.C. §938) provides that any covered employer failing to secure compensation shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than \$10,000, or by imprisonment of not more than one year, or both. The LHWCA Procedure Manual describes various ways in which an “uninsured employer” situation can arise. One example is that a credible source contacts the District Office to report that an employer is operating in the Compensation District without the required insurance. Although this situation typically arises in the context of admiralty, the same reporting could occur from any contractor employee who is covered under the DBA. Another example given is that an injured worker contacts the District Office to request assistance in filing a claim for benefits, and the Office does not have a report of injury from the employer and cannot otherwise identify the employer.

The exclusivity of the workers’ compensation remedy, provided for in section 5(a) of the Act (see 33 U.S.C. § 905), does not apply “if an employer fails to secure payment of compensation as required by this Act.” In such situation, an injured employee, or legal representative, may elect to claim compensation under the Act, or to maintain an action at law (or in admiralty) for damages on account of such injury or death.

Regulations and Information Resources

Most of the following is guidance for getting information from the internet about the workers’ compensation laws. The DOL hosts a very informative website. The information below is intended to help users find pertinent information more quickly.

The homepage for the DOL is at www.dol.gov. Basic information about the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 and 20 C.F.R. §§701-704) is at www.dol.gov/asp/programs/handbook/longshor.htm.

The Office of Workers' Compensation Programs' Division of Longshore and Harbor Workers' Compensation administers the LHWCA and its extensions, including the Defense Base Act. The OWCP's website is at www.dol.gov/esa/owcp_org.htm.

The Division of Longshore and Harbor Workers' Compensation website is at www.dol.gov/esa/owcp/dlhwc/1stable.htm. On the Division's homepage, under Other Longshore Information, there is a link to authorized insurance carriers and self-insured employers. Contact the Longshore National Office at (202) 693-0038 to get information about authorizations for specific carriers. Also, under Other Longshore Information, there is a link to the previously mentioned DLHWC Procedure Manual.

On the Division's homepage, under About DLHWC, there is a link to contacts as well as other helpful information about claims and customer assistance.

The DOL's Office of Administrative Law Judges homepage is at www.oalj.dol.gov. That page has links to the OALJ Law Library and to the 2002 Longshore Judges' Benchbook. The Benchbook contains information about claims under the DBA extension of the LHWCA.

The DOL has promulgated regulations for the implementation of the War Hazards Compensation Act in Part 61 of Title 20 of the Code of Federal Regulations. (Title 20, Chapter I, subchapter F, Part 61)

The Point of Contact for this subject in the CECOM Legal Office is the undersigned, DSN 879-0662, (520) 538-0662.

DISCLAIMER - This document is for informational purposes only. The U.S. Government bears no responsibility for the results of any action taken by any entity based upon the information contained in this document.

JANET BAKER
Attorney-Advisor

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 e-mails started in early 2001. Slowly, they made their way around Government offices, lunchrooms and activity facilities. Ultimately, these rumors were given a badge of legitimacy by various "news" centers. Allegedly, Rep. Bill Chavez and Lynn Faust proposed H.R. 28344, the early retirement bill. The fact is that currently, there are no Rep. Bill Chavez or Lynn Faust in Congress. A complete and total falsehood! In addition, the highest bill number is four digits, not five. Thus, H.R. 28344 could not be a legitimate bill in the House.

There was yet another e-mail that made its way through the corridors of Government facilities. Supposedly, the Senate version was the "long-awaited" 50-50 bill. That is, an aspiring retiree would receive five years added to tenure and age along with a fifty thousand dollar incentive bonus. This e-mail declares itself a "news" report and lists Sen. Bingaman and Rep. Abercrombie as its sponsors. Unlike the other "bill", these individuals are, in fact, elected officials. However, the Legislative Record shows that such a bill has never been proposed. In addition, calls were made from the CECOM Legal Office to both Senator Bingaman's and Rep. Abercrombie's Washington offices. Our suspicions were confirmed; neither official ever sponsored such a bill.

So what have we learned? First, be wary of e-mails! These things travel fast with little regard for the truth. Second, beware of official-sounding news reports. These news reports often find their information from those same reckless e-mails. Third, some healthy skepticism oftentimes reveals the truth. Don't let your desires blind you from the truth. Lastly, think long and hard before you hit the send button!

The Point of Contact for this subject in the CECOM Legal Office is Mr. Frank DiNicola, (732) 532-9808, DSN 992-9808.

KATHRYN T. H. SZYMANSKI
Chief Counsel

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. Our Office presented many of these issues during our Annual Ethics Training; however, we did not cover all of them, and not at the same level of detail as this Advisory.

Before addressing specific issues, I 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.

A decorations committee should not spend a duty day visiting party shops, followed by another workday organizing decorations. However, a brief planning session on Government time, followed by a few telephone calls to party shops, with visits and purchases made after duty hours, and with decorations made during lunch periods or after the duty day, would be permissible.

Fundraising.

Your office may decide they want to raise money to reduce the cost of a holiday event. The general rule is "no fundraising in the Federal workplace." However, there is an exception for office events:

The DoD Joint Ethics Regulation, 5500.7-R, permits employees to raise money among their members for their own benefit when approved by the head of the organization and the Ethics Counselor. For example, employees could have a bake sale to reduce the cost of tickets for the office holiday celebration. Use the following checklist for such events:

Keep it low key.

Use minimal Government time. No duty time should be used to bake or purchase cookies. Some minimal time during the day may be used to plan the sale. Employees conducting the sale should do so on their personal time.

Government equipment, such as computers and printers, may be used at no cost to the Government. Items, such as placards and announcements, may not be ordered from the audio-visual office. Use of Government resources should be of reasonable duration and frequency.

Do not solicit outside sources (such as employees of support contractors) to contribute baked goods.

Contractor employees and visitors who become aware of the bake sale may purchase items. The important thing is that we do not personally solicit them, or engage in solicitation that targets them.

Outside sources (local restaurants, car dealerships, department stores, professional associations, and contractors) may not be solicited for donations, to include door prizes.

Raffles may not be used to raise money for office functions.

Contractor Employees.

Contractor employees may attend our celebrations. However:

There should be no official encouragement for someone else's employees to leave their workplace. We can let it be known that they may attend and will be a welcome part of the event.

Contractor employee time off, and the nature of the time off (leave, personal day, administrative absence) are between the contractor and its employees. When a contractor's employee is absent, the contractor cannot bill for services not delivered, and may have concerns about issues such as contract schedules, delivery dates, and other matters. Accordingly, the contractor must decide if, and under what conditions, its employees may be absent.

Contractor employees may not be tasked, or asked to volunteer, to organize holiday events.

Gifts.

Gifts among employees may be exchanged during the holiday season. However, be mindful of appearances. It requires good judgment to avoid creating the perception of partiality or favoritism. Gift-giving in the workplace should be even-handed and democratic in spirit. No one should be left out. Some specific rules apply:

The value of a holiday gift to a superior is limited to \$10 and you may not solicit contributions from other employees. There are no restrictions on gifts to peers and subordinates.

We may not accept a gift from anyone who makes less money than we do as a Federal employee, unless there is no superior-subordinate relationship, and there is a personal relationship that would justify the gift. Again, the exception would be for a gift where the value does not exceed \$10, with no soliciting of contributions from other employees.

We may have a gift exchange among employees. If it is an anonymous exchange, a reasonable value should be established for the individual gifts. (If it is not anonymous, \$10 is the limit.) If contractor employees are participating in an anonymous gift exchange, they should be held to the same gift limit as Federal employees (even though limit on gifts from contractor employees is \$20 per occasion and no more than \$50 in the aggregate for the calendar year).

Attendance at Parties.

All employees and contractor employees are free to attend a private party hosted by a Federal employee. Food, refreshments and entertainment may be shared and enjoyed. Subordinates may bring hospitality gifts, such as a bottle of wine, but they must not be lavish. Hospitality gifts are not strictly limited to \$10 in value, but this should be a guide. However, hospitality gifts from contractor employees are strictly limited to \$20 in value. Ideally, hospitality gifts will be edible.

Federal employees may accept free attendance at a private party hosted by a contractor or a contractor employee if any of the following conditions apply. If

none apply, then the invitation must be declined or the employee must pay for attendance.

The average cost per guest does not exceed \$20.

The invitation is based on a bona fide personal relationship with the contractor employee--not just a congenial office relationship.

The party qualifies as a "widely-attended gathering"--that is, there will be more than 20 attendees representing a diversity of views and backgrounds, and the employee's supervisor determines (after consulting with the Ethics Counselor) that it is in the agency's interest for the employee to attend.

The contractor is having an open-house, open to the public or to all Government employees or military personnel in the area.

The invitation is offered to a group or class that is not related to Government employment, such as all GEICO, PFCU or USAA customers.

You have been assigned to represent the Army at an official function (such as an embassy event).

You may accept free attendance at a party hosted by someone who is not a prohibited source (that is, someone who does not do business with the Army) as long as no one in attendance is being charged for the event.

Holiday Greetings:

Appropriated funds may not be used to purchase holiday greeting cards. Subordinates may not be given the task of preparing or addressing personal greetings. Finally, official resources--including paper, printers, envelopes and postage--may not be used for holiday greeting cards.

DoD 4525.8-M, *DoD Official Mail Manual*, 30 Jul 87, Chapter 3, para. P9, does authorize organizations to use appropriated fund postage for holiday greetings when required for international diplomacy.

Electronic greeting cards with digital photographs, video, sound, or other large file attachments may not be transmitted on official Army systems. Further, sending such messages with executable attachments, including files that end in "exe" or "jgb," (such as Santa Bowling for Dwarves) or opening such attachments is not appropriate. This prohibition does not apply to transmitting or sharing "hot links" to holiday greeting sites.

Alcohol.

Consistent with paragraph 2-5, AR 600-85, *Alcohol and Drug Abuse Prevention and Control Program*, official and unofficial functions will not encourage or glamorize consumption of alcohol, and alcoholic beverages may not be given as prizes.

Conclusion.

Employees may plan and participate in holiday events. And, while some limited use of Government resources and time is permitted, we must use common sense and good judgment. If you have any questions, contact me at 617-8003.

Robert H. Garfield
Associate Command Counsel for Ethics

Guidelines on Use of Appropriated Funds for Official Courtesies

The following information is intended to provide an overview of the rules on use of appropriated funds in support of official visits to the SSC by important visitors. Application of the rules in this area is quite fact specific, and you should always consult with the legal office and RMD prior to spending money for such purposes.

Q: How can I use appropriated funds to purchase food, gifts, or entertainment for visiting VIPs?

A: It depends on the nature of the VIPs, the type of funds, and the availability of those funds. The starting point is that expenses of this nature are generally considered to be personal expenses, and not payable with appropriated funds. However, there are a number of limited exceptions to this rule that may be applicable when SSC or a tenant activity is hosting important visitors. The most likely approach would be to first consider whether Official Representation Funds (ORFs) are appropriate and available for the particular occasion. ORFs are primarily used for extending official courtesies to authorized guests.

Q: Who is an authorized guest?

A: The authority to invite such guests at SSC is limited to the Installation Commander. The regulation (AR 37-47) defines the types of individuals who are considered authorized guests. The definition includes:

- Foreign citizens whose rank, position, function, or stature justifies official entertainment
- Federal, state, county, and local government officials such as the President and VP of the U.S., Cabinet members, Members of Congress and their staff, state governors, and city mayors.
- National or regional dignitaries, prominent citizens of local communities who make a substantial contribution to the Nation or the Army, individuals who are recognized leaders in their fields of expertise.

Q: Can we use representation funds for the military or DoD civilians?

A: ORFs cannot be used for the entertainment of, or in honor of, DoD personnel including military members and civilian employees of DoD except as specifically authorized. There are exceptions for select senior DoD personnel such as the Secretary of Defense and DoD General Counsel. See AR 37-47 for a list of all “select senior DoD personnel.”

Q: What is an official courtesy?

A:

- Hosting of authorized guests to maintain the standing and prestige of the United States;
- Luncheons, dinners, and receptions at DoD events in honor of authorized guests;
- Entertainment of local authorized guests required to maintain civic or community relations;
- New commander receptions for local authorized guests;
- Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;
- Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
- Dedication of facilities.

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?

A: Maybe, but there are limitations. In order to pay the costs of other attendees, a prescribed ratio of authorized guests to DoD personnel must be met or exceeded.

- For parties consisting of less than 30 individuals, at least 20% of the official guest list should consist of authorized guests and members of their party; a ratio of one authorized guest to four DoD personnel.
- For parties of more than 30 individuals, at least 50% of the official guest list should consist of authorized guests and members of their party, a ratio of one authorized guest to one DoD person.

Q: How much can I spend on a function?

A: Levels of expenditures are to be **modest**.

- You may consider the rank and position of the authorized guests when considering the amount of the expenditure.
- Commanders are encouraged to establish expense limits for various expenses they may incur.
- \$10,000 is the threshold per event. (i.e. an entire visit by an authorized guest can cost no more than \$10,000).
- Any expenditure above \$10,000 must receive approval from the Secretary of the Army.

Q: How much can I spend on a gift for an authorized guest?

A: Gifts, mementos, or tokens, can cost no more than \$260.
(This dollar figure is subject to change. You should consult DoD Directive 7250.13 prior to any such purchase).

Q: Are there any absolute prohibitions on using Representation Funds?

A: Yes, Representation Funds cannot be used for the following:

- Classified projects and intelligence projects;
- Entertainment of DoD personnel, except as specifically authorized by regulation;
- Membership fees and dues;
- Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
- Gifts and mementos an authorized guest wishes to present to another;
- Personal items (clothing, cigarettes, souvenirs);
- Guest telephone bills;
- Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
- Repair, maintenance, and renovation of DoD facilities.

Q: If use of ORFs is not allowable under these rules or ORFs are not available, can I use other kinds of appropriated funds to purchase food, gifts, or courtesies for VIPs?

A: Other appropriated funds may occasionally be used for food and entertainment purposes for VIPs who are government employees, subject to the guidelines below.

(A) Food

Generally, appropriated funds are *not* available to pay for government employees' **food or refreshments** within their official duty stations.

Q: Are there any exceptions?

A: Yes, there are exceptions for light refreshments, formal meetings and conferences, training, and award ceremonies.

Exceptions

- (1) Light Refreshments during a government-sponsored conference.

Q: What is considered a light refreshment?

A: Light refreshments for morning, afternoon or evening breaks are defined to include, but not be limited to, coffee, tea, milk, juice, soft drinks, donuts, bagels, fruit, pretzels, cookies, chips, or muffins.

Q: What is the definition of a government sponsored conference?

A “conference” is defined as a “meeting, retreat, seminar, symposium or . . . training activities that are conferences . . .” where **A majority (51%) of the attendees at the conference must be from a permanent duty station other than that of the sponsoring activity.**

2) Formal Meetings and Conferences (not internal meetings)

Q: When exactly can the government pay for meals during a meeting or conference?

A: The government may pay for **meals** while government employees are attending meetings or conferences if:

- the meals are incidental to the meeting;
- attendance of the employees at the meals is necessary for full participation in the meeting; and
- the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.

Q: Does this apply to civilians and military?

A: This provision applies only to civilian employees.

Q: When could meals be provided to military members?

A: Military members may be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS. (subject to provisions in JFTR ch. 4, paragraph U4510).

Q: Is there any authority to purchase meals for non-federal VIPs during a meeting or conference?

A: If the VIP is on Invitational Travel Orders provided by the agency, then appropriated funds may be used to pay the reasonable travel costs, including meals and lodging, for such individuals. However the above rules concerning civilian and military do not

otherwise provide a basis for paying for meals or other entertainment costs of VIPs who are not government employees.

(3) Training

Q: Are regularly held meetings considered training programs?

A: No, regularly scheduled meetings are not considered training. Additionally, an agency's characterization of a meeting as "training" is not controlling. (e.g., "quarterly managers' meetings" do not constitute "training").

Q: When can the government pay for meals during a training?

A: The government may provide meals if necessary to achieve the objectives of a training program. For example, this exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program.

(4) Award Ceremonies.

Q: Can the government pay for light refreshments for civilian and military award programs?

A: Agencies may use appropriated funds to pay for refreshments incident to employee award ceremonies but this does not apply to the award of medals, trophies, badges, etc. to members/units of armed forces for accomplishments.

B. Entertainment.

Q: When is it appropriate to use appropriated funds for entertainment?

A: Appropriated funds are generally not available to pay for entertainment.

Q: Are there exceptions?

A: Yes, agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. (live musical performance generally entertainment; exception for agency EEO cultural and ethnic programs).

It is permissible to expend appropriated funds for entertainment if authorized by statute.

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."

Drafts of the bill circulated in April included changes to the Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, Marine Mammal Protection Act, Noise Control Act and the Comprehensive Emergency Response, Compensation and Liability Act, which opponents viewed as meaning those laws would no longer apply to bombing ranges, air bases and training grounds or munitions and other materials related to such areas.

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.

Conferees approved the agreement 12 November with the House quickly passing the report the same day and the Senate following on 13 November. President Bush is expected to sign the Defense Authorization bill into law later this year.

The House version of the bill, [H.R. 4546](#), that passed in May, included the MBTA change and an alteration to the Endangered Species Act that would allow the military to use an Integrated Natural Resources Management Plan instead of designating critical habitat for listed species. House Military Readiness Chairman Joel Hefley (R-Colo.) said the other changes needed more discussion before they could be added to the bill.

The original Senate bill, [S. 2514](#), which passed in June, did not include any of DOD's requested changes to laws, with Senate Armed Services Committee Chairman Carl Levin (D-Mich.) saying it was out of his panel's jurisdiction.

Some held the environmental provisions responsible for holding up the conference report, while others attribute it to President Bush's veto threat on the bill for a veteran's benefit issue. Critics of the legislation said they were not against military training per se, but rather objected to the blanket exemption DOD wanted and even argued that the laws already contain military exemptions.

An excerpt, as revised from an article by Suzanne Struglinski, a staff writer for the ***Environment & Energy Daily***