



Office of Command Counsel Newsletter

April 2003, Volume 03-02

CLE 2003: Open Forum with AMC Legal Office Leaders

Chance to ask the AMC Command Counsel,
Staff Judge Advocate and MSC Chief Counsels-
-What is on your mind.

The AMC CLE 2003 Program will introduce an open forum with the AMC Command Counsel (Acting) the AMC Staff Judge Advocate and the AMC MSC Chief Counsel.

This will provide each attendee the opportunity to ask questions of our Legal Office leadership, to discuss management and legal issues, the status of DA and AMC organizational changes and what they mean to use, AMC Attorney Career Program issues and anything else on your mind.

Each AMC Legal Office recently received a CLE 2003

administrative package and draft agenda. The Open Forum is discussed in that package. Additionally, when you check-in at the CLE registration desk index cards and a drop-in box will be available for you to write your questions if you would rather have your issues addressed in that manner rather than asking them orally during the session.

We believe that this Open Forum is an excellent communication tool that will permit a vigorous discussion and dialogue on those issues that you are thinking about. You are encouraged to actively participate in the session.

**AMC CLE
Program
May 19-23
2003**

**See You
there!**

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Be Safe

As this AMC Command Counsel Newsletter is issued, the United States is engaged in armed combat.

AMC is actively engaged in this war, with active duty, reserve, civilian and contractor personnel all contributing to the overall effort.

We are thinking of you always as you conduct your incredibly important duties for the Army, the soldiers, sailors, marines, and all of us at home.

Be safe.

Contractors on the Battlefield

The contract establishes the responsibilities of the Government and the support contractor with respect to the use of contractors on the battlefield. Every effort should be made, therefore, to specifically incorporate the respective duties of the two parties from the outset of that agreement. AMC has issued AMC-P 715-18 'Contracts and Contractors Supporting Military Operations'. This pamphlet seeks to integrate operations and contracting for support of operations. Included at Appendix C of the pamphlet is a compilation of suggested contract special requirements. Specific contractual areas that

should be addressed include: pay, accounting for personnel, logistics, risk assessment and mitigation, force protection, legal assistance, central processing and departure point, identification cards, medical coverage, clothing and equipment, weapons and training, vehicle and equipment operation, passports/visas and customs, staging, living under field conditions, morale, Status of Forces Agreement, tour of duty, health and life insurance, management and next-of-kin notification.

A Point Paper on this important subject is provided by CECOM's **John Reynolds**, DSN 992-9780. (Encl 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.

Procurement: The Stealth Statute--10 U.S.C. 2373

A tenant activity at the Aviation and Missile Command, Redstone Arsenal, Alabama is tasked with the mission of providing realistic threat battlefield scenarios and environments.

This entails building and/or procuring threat simulators, threat simulations, and if at all possible, actual foreign weapon systems. The latter is much preferred as replicating the threat is most clearly achievable with actual threat systems.

At issue is nothing less than future battle survivability for our soldiers. The acquisition of foreign threat systems is absolutely critical because it provides essential intelligence data necessary to defeat foreign systems that our forces are projected to encounter on tomorrow's battlefields.

Procurement for this customer, therefore, requires access to foreign manufacturers

that are often unwilling to sell under regular procurement procedures or enter contracts that meet our Federal Acquisition Regulation (FAR) requirements.

Complicating matters further is the reality that such foreign manufacturers often are unwilling to provide either cost or pricing data or meet other requirements of 10 U.S.C. 2306a Cost or pricing data: truth in negotiations, which is within Chapter 137 Procurement Generally of said title.

In this climate of critical need coupled with very unusual procurement obstacles, this command has turned to the provisions of 10 USC 2373 as a procurement vehicle.

An article on the procurement for experimental purposes is provided by AMCOM's **John Henningsen**, DSN 746-1124, (Encl 2)

List of Enclosures

1. Contractors on the Battlefield: Procedures and Rules
2. The "Stealth Statute": 10 USC 2373
3. GAO Override Procedures: Pre and Post Award
4. Acquisition Corner
5. Appropriated Funds: Purchasing Refrigerators, Microwaves & Related Items
6. Draft--Revised OMB Circular A-76
7. DOJ Employment Discrimination Newsletter
8. Office of Government Ethics: Revised OGE Questionnaire
9. Environmental Law Division Senior Environmental Law Specialist Workshop
10. Lexis Corner

GAO Override Procedures- -Pre and Post-Award

One of the major concerns that a Program Manager (PM) has at the conclusion of a source selection is the immediate commencement of contract performance.

A protest to the General Accounting Office (GAO) received within ten days after contract award or five days after a required debriefing (or the date on which such a required debriefing is offered) shall result in the immediate suspension of contract performance (see FAR 33.104(c)).

In legal terminology, this is called an automatic stay. The statutory basis for this requirement is the Competition in Contracting Act (CICA) of 1984, as amended by the Federal Acquisition Streamlining Act (FASA) of 1994.

An override is an exception to the automatic stay of performance requirement. It permits the Agency, under limited circumstances, to award the contract or to continue contract performance in the face of a protest notwith-

standing the above-referenced statutory and regulatory provisions. FAR 33.104(c)(2) sets forth two bases for the override exception:

“(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO’s decision.”

The analysis of whether an override would be appropriate will consider such items as: stock on hand, production lead time, consumption rate, where the items are used, who would be injured by the items’ unavailability and any other relevant facts.

CECOM’s **Marc Moeller**, DSN 992-1150 provides an article setting forth the criteria for an override and references the acclaimed AMC Bid Protest Handbook treatment of the subject. (Encl 3)

HQ AMC Counsel **Larry Anderson**, DSN 767- 2552 provides his latest update on a host of subjects addressed in regulations, statutes and the courts.

Several timely interim rules are underscored, including Procurements for Defense Against or Recovery from Terrorism or Nuclear, Biological, Chemical or Radiological Attack.

In the miscellaneous section the important case pitting the GAO against the Vice-President on access to records of the Energy Commission is cited. Walker v. Cheney, 2002 U.S. Dist LEXIS 23385, U. S. District Court for the District of Columbia, Civil Action No. 02-0340, December 9, 2002 (Judge John D. Bates)

The District Court found that the Comptroller General does not have the personal, concrete, and particularized injury required under Article III Standing Doctrine, either himself or as the agent of Congress to bring the lawsuit seeking records from the Vice President of the United States. (Encl 4)

Acquisition Law Focus

Appropriated Funds to Purchase Refrigerators, Microwaves and Related Stuff

ARL's **Bob Chase**, DSN 290-1599, reports on the renewed interest in what is almost a perennial topic: may appropriated funds be used to buy microwaves and refrigerators for the use of ARL employees. ARL Legal was asked to look into the question, as well as the "purchase of miscellaneous items such as coffee, coffee pots, napkins, plates, utensils..."

The enclosed memorandum highlights the basic fiscal law framework, cites relevant Comptroller General decisions, and analyses the law to the circumstances at ARL (and perhaps at your location).

All of the items at issue are in one way or another food-related. It was established as long ago as 1930 that the government has no responsibility to provide eating facilities for its employees (10 Comp. Gen. 140).

However, the Government *may* subsidize the operation of an employees' cafeteria if

it is administratively determined to be necessary to the efficiency of operations. (B-169141, November 17, 1970)

It has even been held allowable for the Government to *temporarily* pay for paper napkins for use in a new cafeteria when an agency official determined that improved productivity would result from the use of an on-premises cafeteria (B-204214, January 8, 1982).

More recently, the Central Intelligence Agency was allowed to use appropriated funds to equip the workplace with refrigerators once it administratively determined that this was reasonably related to the efficient performance of agency activities, and not just for the personal convenience of the employees (B-276601, June 26, 1997).

Perhaps the crucial point was that this would not be so much for employee morale as to minimize the time employees spent away from the workplace. (Encl 5)

Proposed A-76 Changes: A Total Revision

An important article addressing the total revision to the concept and approach to an A-76 Study is provided by CECOM's **Jim Scuro** 992-9801.

For example:

The draft Circular has dropped the Steering Committee Concept for administering the A-76 study and the Commercial Activity Program Manager position and replaced them with new positions entitled the Agency Tender Official (ATO) and the 4e Official.

According to the draft Circular, the 4e Official shall be an Assistant Secretary or equivalent level official with responsibility for implementing the draft Circular. The 4e Official shall appoint the ATO, Contracting Officer (CO), Human Resource Advisor (HRA), Source Selection Authority (SSA) and the Administrative Appeal Authority (AAA). (Encl 6)

Employment Law Focus

Damages: Non- Pecuniary Loss in EEO Litigation

One of the more difficult issues in EEO litigation is assessing the amount of damages to which a complainant may be entitled for nonpecuniary losses. In the attached case, Cornell v. Principi, 102 FEOR 1276 (May 30, 2002), the EEOC provides a very helpful review of its case law in this area.

Although Cornell specifically involves disability discrimination, it is recommended reading for anyone expecting to have to predict or negotiate potential compensatory damages.

Mock MSPB Hearing... ...Coming to CLE 2003

Supreme Court redefines Prevailing Party re Attorney Fee Awards

In Sacco v. Justice, the Federal Circuit upheld the Supreme Court's new interpretation of "prevailing party" for purposes of determining attorney fee awards. You can read the complete opinion at www.fedcir.gov/opinion/02-3043.doc, but the bottom line is excerpted below:

Here, the board changed its interpretation of "prevailing party" in its fee-shifting statute based on the Supreme Court's opinion in Buckhannon, which rejected the use of the "catalyst theory" in construing

whether one is a "prevailing party" under fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act.

The Court held that the term "prevailing party" authorizes an award of attorney's fees when it is accompanied by a corresponding "alteration of the legal relationship of the parties." 532 U.S. at 605.

In view of this requirement, Buckhannon is a reasonable justification for the board to adopt a new interpretation of a "prevailing party."

Special Counsel Policy: Legal Representation at Interviews

Effective April 15, 2002, the Office of Special Counsel (OSC) will require that witnesses and subjects who choose to have legal representation at investigative interviews conducted by OSC

investigators and attorneys complete an OSC Designation of Representation form. OSC will not permit legal counsel to be present at an OSC investigative interview without a signed form.

Employment Law Focus

Sovereign Immunity Bars EEOC From Imposing Monetary Sanctions for Violating AJ Orders

The DOJ's Office of Legal Counsel issued an opinion concluding that the doctrine of sovereign immunity bars EEOC from imposing monetary sanctions (e.g., attorneys fees) against federal agencies for violations of AJ orders.

The complete text of DOD's response to the question posed by the Navy is attached.

Re: The Equal Employment Opportunity Commission's Authority To Impose Attorney's Fees Against Federal Agencies for Failure

To Comply with Orders Issued by EEOC Administrative Judges:

The Department of the Navy ("the Navy") has asked our opinion as to whether the Equal Employment Opportunity Commission ("EEOC") has authority to impose attorney's fees against federal agencies as a sanction for failure to comply with the orders of EEOC administrative judges ("AJs") in connection with hearings before Ms. In the past, for example, AJs have assessed such sanctions against federal agencies for failures to comply with

discovery orders. **See** Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Ellen J. Vargas, Legal Counsel, United States Equal Employment Opportunity Commission at 3 n.4 (Jan. 9, 2001) ("EEOC Letter"). EEOC, of course, maintains that it may impose such sanctions. We agree with the Navy that, pursuant to basic principles of sovereign immunity, EEOC lacks authority to impose monetary sanctions (such as attorney's fees) on federal agencies for failure to comply with AJ orders.

Priority Consideration

Have you ever offered "priority consideration" as a settlement term? If so, are you sure you understood management's obligation? Last month, in John S. Pope v. Federal Communications Commission, No. 02-3134, Nov.27,2002, the Federal Circuit concluded that neither the FCC nor the MSPB properly interpreted the meaning of a promised "priority consideration referral."

DOJ Employment Discrimination Newsletter

The Department of Justice periodically publishes an Employment Discrimination Newsletter.

This latest issue highlights: continuing violations, analysis of "because of" sex component in sexual harass-

ment cases, and recent adverse action decisions.

A section on Practice Tips speaks of front pay and expert witnesses; tax enhancement; and, EEO settlement agreements. (Encl 7)

Job Hunting: Telling your boss you said NO to an offer

OGE Revises Questionnaire

An astute employee raised questions about a recent Ethics Advisory-- Frequently Asked Questions on Job-Hunting that is worth sharing with everyone.

The issue deals with rejection of a job offer.

Rejection of an Offer:

If you reject an offer of employment using either of these two suggested examples:

One example of a "rejection" would be: "No, thank you. I'm not interested."

QUESTION: Do you recommend that the employee communicate the rejection to a superior and/or document the rejection in writing?

The employee suggests the reason for the question: Given the protest scenario that you mention later (in the Ethics Advisor) isn't it pos-

sible that there might be a protest if a competitor found out that the Successful Offeror made an offer of employment, albeit refused, to a member of the Government team "participating in a particular government matter that affects a company's financial interests."

ANSWER: Yes, where an employee participates substantially in a contract award, e.g., drafter of specifications, statement of work, evaluation plan or portions thereof; contracting officer or contract specialist; or evaluator, the employee should report any employment contact by an offeror or potential offeror to that solicitation, even if the employee immediately rejects the contractor's offer.

The employee should immediately document the facts surrounding this contact in writing and provide the writing to the Contracting Officer and Ethics Counselor.

The Office of Government Ethics has announced a change to their questionnaire. These changes will go into effect for the Questionnaire due to the Office of Government Ethics (OGE) on February 1, 2004, covering calendar year 2003.

Overall, the questionnaire has been shortened, eliminating questions that ask for information that OGE obtains through other means. Several questions have also been reformatted, replacing numeric ranking with rating scales. However, there are several areas where OGE will be asking for new statistics that we feel will provide us with a better assessment of the ethics program executive branch-wide and aid us in future program policy decisions.

Specific changes in the questionnaire that require additional data collection are highlighted in the enclosed memorandum.

POC is Bob Garfield, DSN 767-8003. (Encl 8)

Environmental Law Focus

Senior Environmental Law Specialist Workshop: Transition Legal Support and More

The Environmental Law Division (ELD) of the Office of The Judge Advocate General, hosted its Winter Senior Environmental Law Specialists Workshop on 26 February 2003.

The primary purpose of the Workshop was to discuss the transition of environmental legal support under the Transformation of Installation Management (TIM), with particular emphasis on the regional structure developed to support the Installation Management Agency (IMA).

In addition, BG Joseph R. Barnes (USA Ret) gave a presentation on the establishment of Conservation Buffers around military installations by using Cooperative Agreements between the DOD and the Nature Conservancy pursuant to recently enacted legislation in the FY03 DOD Authorization Act.

Several panels highlighted the major issues related to the environmental arena.

The impact of Army reorganization on the delivery of environmental legal services was presented by a panel of officials from TRADOC, the OTJAG Environmental Law Division, the BRAC Office, and the Army Environmental Center.

NEPA was highlighted in a panel that discussed AR 200-2, which has been superceded by 32 CFR 651.

Another panel of experts explored issues related to training ranges.

Still another addressed conservation buffers and the relationship between military needs and the survival of species.

A synopsis of the keynote address by **Janet C. Menig**, Deputy Assistant Chief of Staff for Installation Management, and the work of the above-mentioned panels is at Enclosure 9.

Charts and other materials are available by contacting either **Stan Citron** DSN 767-8043 or **John German** at DSN 767-8082.

EPA on Institutional Controls Implementation Guidance

Over the past several years, the issue of institutional controls (IC) implementation has become a growing concern at active and transferring installations.

On 19 February 2003, the EPA took a step toward resolving the confusion in this area by issuing draft guidance on implementing, monitoring and enforcing institutional controls.

A copy of the draft guidance, [Institutional Controls: A Guide to Implementing, Monitoring, and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups](http://www.epa.gov/superfund/new/newstuff.htm), can be accessed at the following URL: <http://www.epa.gov/superfund/new/newstuff.htm>

Faces In The Firm

Arrivals

CECOM

The SJA Division welcomes **Daniel Collins as the Claims Examiner in the Legal Services Division**. After a 22 year career in the Navy, Daniel was a paralegal with a law firm.

Promotion

HQ AMC

Gail Barham was selected to be the secretary to the AMC Command Counsel, after some fine service with the General Law Division.

Recognition

HQ AMC

Ed Stolarun was recognized recently for completing 35 years of Federal Service.

Departures

Night Vision Laboratory

Milt Lee announced his retirement after 43 years of government service.

One of last remaining, and longest serving AMC patent advisors, Milt worked at HQ AMC when it was located near National Airport, and has been at Fort Belvoir for 30 years.

CECOM

Elaine Basile, secretary to the Chief Counsel is retiring after 14 years of Federal service. Thanks for always being a cordial host when HQ AMC attorneys came to visit.

Judith Cleveland, paralegal specialist in the Intellectual Property Law Division retired after 32 years of exemplary service.

John O'Meara, IP counsel retired after 17 years of government service

Lexis Corner

The April issue of the Lexis Corner highlights the litigation services available to Lexis users. This includes **CourtLink**. Contact **Rachel Hankins** 202-857-8258.

Lexis provides **Time Matters**--a practice management tool that centralizes calendar, contact, notes, phone calls, e-mails and LexisNexis research information.

Lexis focuses the practitioner to various practice pages. For example, go to: www.lexis.com/practicepages and you will see a page for Government contracting.

Of course, the Lexis Corner provides a Search Tip--options for viewing more than 10 documents on the first page of your cite list.

Look forward to seeing Lexis at AMC CLE 2003. (Encl 10)