



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!**

In This Issue:	
<i>CLE: Open Forum with AMC Legal Office Leaders</i>	1
<i>Contractors on the Battlefield</i>	2
<i>The Stealth Statute</i>	3
<i>Acquisition Corner</i>	4
<i>GAO Overrides</i>	4
<i>Supreme Court on Prevailing Party</i>	6
<i>DOJ Discrimination Newsletter</i>	7
<i>Job Hunting: Saying NO</i>	8
<i>Senior Environmental Law Specialist Workshop</i>	9
<i>Faces in the firm</i>	10
<i>Lexis Corner</i>	10

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)

Newsletter Details

Staff

Command Counsel
Edward J. Korte

Editor

Stephen A. Klatsky

Layout & Design

Holly Saunders

Webmaster

Joshua Kranzberg

The AMC Command Counsel Newsletter is published bi-monthly, 6 times per year (Feb, Apr, Jun, Aug, Oct and Dec)

Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to sklatsky@hqamc.army.mil

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 superseded 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.

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.

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)

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.

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.

Recognition

HQ AMC

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

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

UNCLASSIFIED

AMSEL-LG

POINT PAPER

1 NOVEMBER 2002

SUBJECT: The Status of Contractors on the Battlefield

PURPOSE: To summarize the rules and regulations concerning the use of contractors on the battlefield.

FACTS:

- 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.
- Contractor employees are expected to adhere to all guidance and obey all instructions and general orders issued by the theater commander or his/her representatives. In the event the instructions/orders are not followed, the commander may limit access to facilities and/or revoke any special status that a contractor employee has as an individual accompanying the force. The contracting officer may direct the contractor to remove offending employees. Field Manual 100-21 'Contractors on the Battlefield' addresses the use of contractors as an added resource for the commander to consider when planning support for an operation. The manual's purpose is to define the roles of contractors, describe their relationship to the combat commanders and describe the contractor's mission, i.e., augmenting operations and weapon systems support. The field manual emphasizes that the field commander does not have

the same authority over contractors that he/she has over military personnel and Department of the Army civilian personnel. “The terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor directly supervises its personnel. The military chain of command exercises management control through the contract.”

- On the issue of removing contractors from the battlefield, Chapter 6 of Field Manual 100-21 sets forth the commander’s responsibility to provide force protection commensurate with that provided to Department of the Army civilian personnel and delineates specific levels of force protection to be provided to contractors on the battlefield based upon the existing threat level. For example, in a HIGH-level threat scenario, the manual outlines minimum measures that the commander should implement. These measures include: issuing contractors protective equipment; transporting contractor personnel in protective vehicles; placing contractors in protected areas; removing all but essential contractors from the theater of operations and providing military assistance and/or replacements, if possible. This guidance is in keeping with the general policy on the use of support contractors on the battlefield, which is set out in AR 715-9, ‘Contractors Accompanying the Force’. This regulation sets out, as general guidance, the standard that contractors should be assigned duties at the echelon above division level recognizing that contractors could be deployed elsewhere as needed, consistent with the terms of the contract and the tactical situation. On 11 June 2002, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) issued a memorandum, Subject: Contractor Support Restrictions, which specifically recommended that Product Managers “should strive to develop systems that do not require the routine assignment of contractor personnel in the ground maneuver area forward of the Division Rear.... or Intermediate Staging Base...”
- Should a contractor refuse to go where requested, the remedies (termination for default, etc.) for the failure of the contractor to perform under the terms of a support contract are the same as those presently available under other Government contracts. These remedies will not provide the commander in the field with immediate solutions to the problems that arise from the lack of the required contractor support. A West Group Briefing Paper (No. 02-7, June 2002, Subject: Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations) states that the Government should have alternatives in place in the event of non-performance. “The prospect of contractor personnel discontinuing performance of their contractual duties to avoid a potentially life-threatening situation may provide an important incentive for military commanders to ensure that contractor

personnel provide military personnel with supplementary training in advance of hostilities. The goal of such training would be to ensure that military personnel have at least some familiarity with how to perform key contractor tasks in the event that contractor personnel are unwilling or unable to continue performance.”

- As a general rule, the UCMJ does not cover contractor personnel although court-martial jurisdiction may be expanded to cover contractors in time of war. The Military Extraterritorial Jurisdiction Act of 2000 does provide for federal jurisdiction over crimes committed outside of the United States. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces. The Act allows the Secretary of Defense, under specified conditions, to authorize DOD law enforcement personnel to arrest suspected offenders outside the United States involved with crimes punishable by imprisonment of more than one year.

BRIEFER: John Reynolds, AMSEL-LG-B, ext. 29780.

REVIEWED/APPROVED BY:

Mark Sagan
Deputy Chief Counsel

Procurement for Experimental Purposes, 10 U.S.C. 2373, the "Stealth Statute"

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. This customer utilizes both classified and unclassified data and this data is essential for operational tests, training, and analyses of U.S. military hardware effectiveness, tactics, techniques, procedures, and doctrine. This customer also supports the development of countermeasures against foreign weapon systems. 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.

10 USC 2373 Procurement for experimental purposes

- (a) **Authority**.-The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, and aeronautical supplies, including parts and accessories and designs thereof, that the Secretary of Defense or the Secretaries concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.
- (b) **Procedures**-Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137 of this title applies only when such purchases are made in quantity.

Similar provisions to the current statute were enacted in the late 1930s as the Congress, with eyes on the events unfolding in Europe, enacted legislation to purchase equipment and supplies (generally from foreign sources) for experimental and test purposes for those developing services, the Air Corps, Ordnance, Signal Corps and Chemical Warfare Service that developed and used noncommercial equipment and supplies. The "Section 800 Panel" surveyed the DoD regarding use of this authority and recommended that it be consolidated into its current format. In the FY 1994 Defense Authorization Act (Public Law 103-160) the Congress consolidated several service-

unique statutes into the current 10 U.S.C. 2373. A clear reading of this statute would lead one to conclude that the Secretary of Defense and the Secretaries of the military departments may procure items for experimental or test purposes inside or outside the United States by contract or otherwise. Of particular note is the last phrase: "Chapter 137 of this title applies only when such purchases are made in quantity." One would therefore conclude that 10 U.S.C. 2373 may be utilized for a purchase that is not "in quantity" of "ordnance, signal, chemical activity, and aeronautical supplies" for "experimental and test purposes" ... "in the development of the best supplies that are needed for the national defense". Moreover, one would further conclude that if the above prongs are met the resultant contract would be exempt from the requirements of Chapter 137 Procurement Generally of Title 10 U.S. Code. It appears, therefore, that the Congress, in its collective wisdom, custom tailored this statutory provision for highly sensitive, extremely unusual procurements similar to those required by this command's tenant activity. Finally, for procurements that are not "in quantity," it provides relief from the normal requirements for competition, pricing information, and even the FAR contractual format.

JOHN A. HENNINGSEN.
DSN 746-1124

GAO OVERRIDE PROCEDURES IN THE PRE AND POST-AWARD ENVIRONMENTS

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 notwithstanding 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.”

In analyzing the applicability of the two bases for the override request, keep in mind the usual time frame for the GAO to reach its decision, since in an override, the agency contends that it cannot wait for such a decision. 4 CFR 21.9 establishes the GAO due date for a decision as 100 calendar days.

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.

There are two general questions that an override analysis must address:

- (1) How urgently is the item or service to be provided by the awardee needed and why?
- (2) What is the likelihood of losing the protest?

The analysis of the override request will consider the probability of winning the protest weighed against the need for the award and the immediate commencement or continuation of contract performance, as applicable.

If a determination is made that an override would be appropriate, the next question is: Who prepares the override request?

The Contracting Officer, working with the PM and the Legal Office, must prepare and forward the override request in the form of a Determination and Findings (D&F) to the Head of the Contracting Activity (HCA) for signature. The HCA must *personally* sign the document. Since the FAR states that the approval authority is nondelegable, a person acting in an HCA capacity will not suffice. Accordingly, if the HCA position will not be filled for a protracted period of time, prior coordination with AMC and DA on the Acting HCA's authority in such situations as override requests is recommended.

The next question is: When and where must this request be forwarded? AFARS 5133.104(b)(1)(B) states that the override request must be forwarded to AMC within three days after the contracting office has received notification of the protest. The three day timeframe applies to both protests before and after award.

In 1997, the AMC Office of Command Counsel prepared a Handbook entitled "AMC Bid Protest Handbook - Tactical Operations in the Face of GAO Protests." Appendix B of the Handbook lists seven requirements for the D&F:

1. Describe the requirement, the Request for Proposals (RFP), the dollar value and any unique aspects which are relevant to the override decision.
2. Address each of the protest issues to include their merits and the expected results.
3. If the protested acquisition is a continuation of a prior contract, such as a new year of services, address why the incumbent contractor cannot continue the services during the protest decision period.
4. Address damages, including dollar amounts, the Army would suffer if award or performance is not permitted.
5. Address mission impact if award or performance is not permitted.
6. Address any political, Congressional or state interest if this is known.
7. Address potential damage to the Army.

These statements must be factually based; conclusionary statements will not be persuasive. Additionally, in a pre-award protest, the D&F must clearly explain the damages the United States will suffer (a) if the award is not made and (b) if the award is made and the protest is sustained. In a post-award protest, the D&F must clearly explain the damages the United States will suffer (a) if continued performance is not authorized and (b) if continued performance is authorized and the protest is sustained.

Override requests must provide a thorough explanation for the request and contain a complete file with all of the relevant documentation supporting such a request. If a protestor learns of the override request and believes it will be irreparably harmed by the commencement/continuation of performance, it may go to Federal Court and seek an injunction. The Courts will use the override D&F file as the basis for their review. If a favorable decision has been obtained on the override, the Courts will review that decision and the contemporaneous evidence (D&F with supporting file) on which it was made. Consequently, the override package must be complete in the event of judicial scrutiny.

The last question is: Who makes the final decision regarding the override request? AFARS 5133.104(b)(1)(A) and 5133.104(c) state that in protests before and after award, respectively, the AMC Command Counsel is the approval authority.

In conclusion, the override request is a much discussed but infrequently used procedure. In fact, during the past eight years, CECOM has not submitted, and AMC has not approved, one such request. There are various reasons for this situation. One is that the GAO has been consistently shortening its decision time. In 1996, the GAO was required to decide a case in 125 *business* days; a decision is now required in only 100 *calendar* days. Furthermore, other tools are available now such as the accelerated AMC Agency Protest Procedure which have tended to reduce the number of override requests. The override procedure does, however, still exist and is available for use in the appropriate circumstances.

The Point of Contact for this subject in the CECOM Legal Office is Marc J. Moller, (732) 532-1150; DSN 992-1150.

KATHRYN T. H. SZYMANSKI
Chief Counsel

ACQUISITION CORNER

A. New Acquisition Rules

1. **Federal Acquisition Regulation**

a. Special Simplified Procedures for Purchases of Commercial Items in Excess of the Simplified Acquisition Threshold

FAR Final Rule – FAR Case 2002-028 – Effective Date: 1 January 2003

This rule amends FAR Subpart 13.5 to extend through January 1, 2004, the test of special simplified procedures for purchases of commercial items greater than the simplified acquisition threshold, but not exceeding \$5 million.

67 Federal Register 80320 – 80321, December 31, 2002.

b. Section 508 Micro-Purchase Exception Sunset Provision

Interim Rule – FAR Case 2002-012 Effective Date: 1 January 2003

Comments due on or before March 3, 2003

This rule extends the electronic and information technology micro-purchase exception until October 1, 2004.

67 Federal Register 80321 – 80322, December 31, 2002.

c. Procurements for Defense Against or Recovery from Terrorism or Nuclear, Biological, Chemical or Radiological Attack

Interim Rule – FAR Case 2002-026 Effective Date: 24 January 2003

Comments due on or before March 28, 2003

For a one year period (starting on date of enactment of the Homeland Security Act [Public Law 107-296] – November 25, 2002), increases the amount of the micro-purchase threshold and, in certain situations, the simplified acquisition threshold and provide streamlined procedures for the procurements of supplies or services by or for an executive agency that are to be used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

68 Federal Register 4048 – 4054, January 27, 2003

d. Commercially Available Off-The-Shelf Items

Advanced notice of proposed rulemaking FAR Case 2000-305

Comments are due on or before March 31, 2003.

The Federal Acquisition Regulatory Council is soliciting comments regarding the implementation of section 4203 of the Federal Acquisition Reform Act with respect to Commercially Available Off-The-Shelf Item Acquisition. The Act requires the Federal Acquisition Regulation to list certain provisions of law that are inapplicable to contracts for the acquisition of such items. Certain laws have already been determined to be

inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (see FAR 12.503).

68 *Federal Register* 4874, January 30, 2003

e. Depreciation Cost Principle

Proposed Rule FAR Case 2001-026

Comments are due on or before March 31, 2003

It is proposed to revise the depreciation cost principle -- FAR 31.205-11
68 *Federal Register* 4876-4877, January 30, 2003

f. Insurance and Pension Costs

Proposed Rule FAR Case 2001-037

Comments are due on or before March 31, 2003.

Proposed amendment to the insurance and indemnification cost principle (FAR 31.205-19) and the portion of the compensation cost principle relating to pension costs (FAR 31.205-6(j)).

68 *Federal Register* 4880 - 4883, January 30, 2003

g. Contract Bundling

Proposed FAR Rule FAR Case 2002-029

Comments are due on or before 1 April 2003

The rule proposes to amend the FAR to implement the recommendations of the OMB in its report entitled "A Strategy for Increasing Opportunities for Small Business" [October 2002].

68 *Federal Register* 5138 - 5142, January 31, 2003

2. Department of Defense Federal Acquisition Regulation Supplement

a. Extension of the DOD Pilot Mentor-Protege Program

Final Rule – DFARS Case 2002-D029 Effective Date: December 20, 2002

This rule extends through September 30, 2005, the period during which companies may enter into agreements under the DOD Pilot Mentor-Protégé Program.

67 *Federal Register* 77936 – 77937, December 20, 2002.

b. Trade Agreements Act – Exception for U.S. Made End Products

Final Rule – DFARS Case 2002-D008 Effective Date: December 20, 2002

This rule implements the determination of the Under Secretary of Defense (Acquisition, Technology, and Logistics) that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act to U.S. made end products that are substantially transformed in the United States.

67 *Federal Register* 77937 – 77939, December 20, 2002

3. Office of Management and Budget

Prompt Payment – 5 CFR Part 1315

Effective Date: December 20, 2002

This rule was a revision to the OMB rules on Prompt Payment Act. Agencies are required to pay an interest penalty whenever they make an interim payment under a cost-reimbursement contract for services more than 30 days after the agency receives a proper invoice for payment from the contractor.

67 *Federal Register* 79515 – 79516, December 20, 2002

4. **General Accounting Office – Revision of Its Bid Protest Rules**

67 *Federal Register* 80321 – 80322, December 31, 2002

B. Interesting General Accounting Office Decisions

1. **Appropriation Opinions**

a. Use of Conservation Operations Appropriation to Fund Technical Assistance for Conservation Programs Enumerated in Section 2701 of the 2002 Farm Bill, B-300325, December 13, 2002

A violation of the Purpose Act and Anti-Deficiency Act.

b. Bureau of Land Management: Payment of Pocatello Field Office Photocopying Costs, B-290901, December 16, 2002

DIGEST: "Photocopying services procured by a Bureau Land Management field office from a commercial source in violation of 44 USC 501, requiring that all such services be procured through the Government Printing Office absent a waiver, were not authorized and may not be paid with federal funds."

c. U.S Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants. B-289801, December 30, 20

The questions presented concerned the use of appropriations available for only one fiscal year to fund grant awards for multiple years. The two general legal conclusions of the GAO opinion were that (1) for grants, the principle of severability is irrelevant to a *bona fide* need determinations, and (2) a *bona fide* need analysis in the grant context focuses on whether the grants are made during the period of availability of the appropriation charged and further the purposes of program legislation.

d. Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, January 27, 2003

GAO Conclusion: "GSA does not have the authority to permit agencies to use appropriated funds to pay for employees' food and refreshments except as part of an employee's travel subsistence allowance. . . . Certifying officers should not rely on GSA's travel regulation on conference planning to authorize light refreshments at conferences for employees in nontravel status. Agencies (and their accountable officers) should rely on existing, relevant statutory authority as interpreted by the Comptroller General."

2. **Bid Protest Decisions**

a. USA Information Systems, Inc., B-291488, 2002 U.S. Comp. Gen. LEXIS 203, December 2, 2002

End of the fiscal year procurement case.

b. All Seasons Construction, Inc., B-291166.2, 2002 U.S. Comp. Gen. LEXIS 208, December 6, 2002

DIGEST: "Contracting officer reasonably determined bid bond accompanied by power of attorney bearing computer printer-generated signatures unacceptable because signatures were not applied to the document after its creation and thus do not serve to authenticate its contents."

See the Court of Federal Claims opinion on this case at C.2

c. Warden Associates, Inc., B-291238, 2002 U.S. Comp. Gen. LEXIS 206, December 9, 2002

DIGEST: "Agency [Social Security Agency] was not required to conduct discussions with protester regarding evaluated weaknesses in its quotation where the quotation was effectively eliminated from consideration as unacceptable and, in any case, agency did not conduct discussions with other vendors."

d. JGB Enterprises, Inc., B-291432, 2002 U.S. Comp. Gen. LEXIS 210, December 9, 2002

DIGEST: "Protest that agency [UNICOR (Federal Prison Industries)] improperly evaluated the protester's past performance is denied where the agency has provided a reasonable explanation for its evaluation and the protester has failed to rebut it."

A best value award where the past performance evaluation was only difference between the two quotations received. The awardee received a perfect score for past performance because its three references rated its performance as "excellent". On the other hand, the protester received a lower score for past performance because two of its references rated its performance as "excellent" and one rated it as "good". The person

who gave the protester a good rating was not the person named in its submission because the named reference had retired. Instead, the good rating came from the Director of Contracting at Fort Lee, who had personal knowledge of the protester's contract performance and also provided narrative comments and responded to specific questions regarding the protester performance on the referenced contract.

e. ITT Federal Services International Corporation, B-289863.4; B-289863.6; B-289863.7; B-289863.8, 2002 U.S. Comp. Gen. LEXIS 221, December 16, 2002

Sustained Protest

DIGEST: "Protest challenging agency's [Army Corps of Engineers] cost realism evaluation is sustained where record shows that evaluation contained errors that, if corrected, could significantly reduce the amount of awardee's cost advantage, and also could affect the agency's technical evaluation of proposals, so that the award decision could be different."

f. CSE Construction, B-291268.2, 2002 U.S. Com. Gen. LEXIS 212, December 16, 2002

Sustained Protest

DIGEST(1): " In a negotiated procurement for a fixed-price construction contract [a new range at Fort Leonard Wood], based upon a price/technical tradeoff, the selection of the higher-rated priced proposal was unreasonable where the source selection authority [Corps of Engineers] did not credit the protester for its substantially lower proposed price, but improperly viewed the protest's low price as too low and demonstrating the protester's lack of understanding of contract requirements, where the solicitation did not provide for an evaluation of offerors' understanding."

g. Martin Electronics, Inc., B-290846.3; B-290846.4, 2002 U.S. Comp. Gen. LEXIS 234, December 23, 2002

Sustained Protest

AMC Protest

DIGEST: "Protest is sustained where agency (Joint Munitions Command, old OSC) conducted exchanges with offerors in a manner that favored one over the other and where, in evaluating awardee's past performance, agency failed to include consideration of negative past performance information that occurred within the period defined by the solicitation as "recent" contract performance.

h. The CDM Group, Inc., B-291304.2, 2002 U.S. Comp. Gen. LEXIS 214, December 23, 2002

DIGEST: "Where an agency [National Guard] solicited a requirement under the Federal Supply Schedule (FSS) program, it properly rejected a quote from a vendor that did not possess a FSS contract covering the solicited requirement."

i. Consolidated Engineering Services, Inc., B-291345; B-291345.2, 2002 U.S. Comp. Gen. LEXIS 229, December 23, 2002

Sustained Protest

A-76 Protest

DIGEST: "Protest is sustained where the record fails to reasonably support the agency's [DOD] decision to eliminate from consideration as technically unacceptable the only proposal received from a commercial offeror in the private-sector portion of the competition conducted pursuant to Office of Management and Budget Circular A-76."

j. Warden Associates, Inc., B-291440; B-291440.2, 2002 U.S. Comp. Gen. LEXIS 219, December 27, 2002

DIGEST: "Protest that agency established unreasonably short deadline to respond to request for quotation issued under the Federal Supply Schedule program is denied, where protester essentially admits it could have timely responded but chose not to."

k. Department of the Army - - Request for Modification of Recommendation B-290682.2, 2003 U.S. Comp. Gen. LEXIS 3, January 9, 2003

DIGEST: "Agency [Army] request for modification of recommendation in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD 157 [2002 U.S. Comp. Gen. LEXIS 138], to recognize that the agency may limit the competition to small business holders of indefinite-delivery/indefinite-quantity contracts in conduct a small business set-aside required by Federal Acquisition Regulation 19.502-2(b) **is denied** because the Competition in Contracting Act of 1984 provides for full and open competition among eligible small business concerns for acquisitions required to be set aside for small businesses."

l. SKJ & Associates, Inc., B-291533, 2003 U.S. Comp. Gen. LEXIS 5, January 13, 2003

Sustained Protest

DIGEST: "Agency [Health and Human Services] did not have a reasonable basis to reject the protester's quotation under request for quotations (RFQ) for training services where the RFQ required submission of a technical proposal but gave no guidance as to its content or how it would be evaluated; the protester submitted a technical proposal; and the agency then rejected the proposal as "unresponsive" because it was too short and too general and failed to provide evidence that the firm understood how to perform the work or to include a plan showing how the firm would implement the substance of the work."

m. McKesson Automation Systems, Inc., B-290969.2; B-290969.3, 2003 U.S. Comp. Gen. LEXIS 11, January 14, 2003

DIGEST: "Protest that procuring agency [DLA, Defense Supply Center Philadelphia] improperly proposed award to a firm on a sole-source basis for the procurement and installation of a pharmacy robotic refill system is denied where the record shows that the

agency's [Air Force] justification for concluding that only one responsible source could meet its needs is reasonable."

n. HpkWebDac, B-291538.2, 2003 U.S. Comp. Gen. LEXIS 9, January 22, 2003

Of interest to the Protest Bar is the second footnote in the Decision:
"HpkWebDac's assertion that the individual representing the agency in preparing the agency report on this protest is not a lawyer provides no basis to challenge the award. There is no requirement that a lawyer represent the agency in a protest."

C. Notable Court Decisions

1. **Court of Appeals for the Federal Circuit**

a. Fireman's Fund Insurance Company v. Secretary of the Navy, 313 F.3d 1344, 2002 U.S. App. LEXIS 24238, Court of Appeals for the Federal Circuit, November 27, 2002.

Surety had no "contract" with the U.S. Government.

b. Rumsfeld v. Applied Companies, Inc., Court of Appeals for the Federal Circuit No. 01-1630, 2002 U.S. App. LEXIS 25237, December 10, 2002.

The question for decision in the case was whether anticipatory profits should be included in the measure of contract breach damages for grossly inaccurate estimates.

c.. Metric Constructors, Inc. v. United States, Court of Appeals for the Federal Circuit 02-5086, 2002 U.S. App. LEXIS 26093, December 18, 2002.

A "Severin" case – on release signed by subcontractor.

d. Information Technology & Applications Corporation v. United State, Court of Appeals for the Federal Circuit 02-5048, 2003 U.S. App. LEXIS 404, January 10, 2003.

The Court of Appeals for the Federal Circuit affirms the Court of Federal Claims in a review of a bid protest decision that involves the distinction between "clarifications" and "discussions" under FAR 15.306.

e. Rumsfeld v. United Technologies Corporation, Pratt & Whitney, Court of Appeals for the Federal Circuit, 02-1071, 2003 U.S. App. LEXIS 569, decided January 15, 2003

An appeal from the Armed Services Board of Contract Appeals (ASBCA). ASBCA found that payments made to Pratt's foreign suppliers to acquire parts under

"collaboration agreements" were not "costs" for purposes of calculating indirect cost pool (overhead) allocation bases under the Cost Accounting Standards (CAS).

f. Eastman Kodak Company v. Rumsfeld, Court of Appeals for the Federal Circuit 02-1058, 2003 U.S. App. LEXIS 593, January 16, 2003.

Court of Appeals for the Federal Circuit in an opinion by Chief Judge Mayer affirms the Armed Services Board of Contract Appeals (ASBCA) finding that Kodak's claimed pension costs were not allocable to the cost objectives of its government contracts and the government was entitled to a refund of the reimbursed pension costs for the period 1984 through 1986.

g. Allegheny Teledyne Incorporated et al. v. United States, Court of Appeals for the Federal Circuit 02-5008, 5009, 5010, 5011, 2003 U.S. App. LEXIS 1014, January 23, 2003

The Court of Appeals for the Federal Circuit (opinion by Judge Michel) affirms a decision by the Court of Federal Claims (Judge Firestone) on government claims regarding a pension surplus or deficit due to one of the parties as a result of a "segment closing" within the meaning of Cost Accounting Standard (CAS) 413.

2. **Court of Federal Claims**

All Seasons Construction, Inc. v. United States, Witherinton Construction Corp., Intervenor, Court of Federal Claims 02-1895, 2003 U.S. Claims LEXIS 10, January 23, 2003 -- A Post Award Protest Case. Basically, the Court of Federal Claims affirms the GAO decision in All Seasons Construction, Inc., B-291166.2, December 6, 2002 that a computer-generated signature is not acceptable on a bid bond. The Court does not directly review GAO decisions, but it found that the Contracting Officer had a rational basis when it found the bid bond non-responsive based upon GAO precedents that photocopied powers of attorney are not acceptable.

D. Miscellaneous

1. 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.

2. The Supreme Court argument on the Contract Dispute Act is scheduled for March 4, 2003. The question presented: **Where a National Park Service regulation that states that National Part Service concession agreements are not**

contracts within the meaning of the Contract Dispute act of 1978, 41 U.S.C. 601 *et seq.* is valid.”

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

Larry D. Anderson
Associate Counsel
31 January 2003

AMSRL-CS-CC

SUBJECT: Use of Appropriated Funds for Refrigerators, Microwaves, and Other Miscellaneous Items

Recently, there has been 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. This office was asked to look into the question, as well as the “purchase of miscellaneous items such as coffee, coffee pots, napkins, plates, utensils...”

The plan of this memo is to lay out the basic fiscal law framework, then see how it has been applied in relevant Comptroller General decisions, and finally to analyze how all of this relates to our situation in ARL

Basic Fiscal Law

Perhaps the most fundamental statute in this area is 31 USC 1301(a): “Appropriations shall be applied only to the objects for which appropriations were made except as otherwise provided by law.” In other words, public funds may be used only for the purposes for which they were appropriated. Without this doctrine, Congressional power of the purse would be largely meaningless. Note that violation of this statute may well involve a violation of the Antideficiency Act which may carry criminal penalties.

Generally, one looks to the words of the appropriation to determine those purposes. However, this can be expanded a bit by the “Necessary Expense” doctrine. This may be thought of as a combination of two closely related concepts:

- i) An appropriation made for a specific object is available for expenses *necessarily* incident to accomplishing that object unless prohibited by law or otherwise provided for.
- ii) Appropriations frequently use the term “necessary expenses” to refer to “current or running expenses of a miscellaneous character arising out of and directly related to the agency’s work.”

There is no clear formula for the application of this doctrine. Instead, determinations are made on a case by case basis. However, there are three tests which must be met.

- i) The expenditure must make a director contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
- ii) The expenditure must not be prohibited by law.
- iii) The expenditure must *not* be otherwise provided for.

We can now take a look at relevant case law. 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). The Comptroller General noted that CIA headquarters is "somewhat isolated and relatively distant from private eating establishments" 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.

The point of these cases is not that there are loopholes in the basic prohibition. The point is that it is the purpose of the expense which controls, not the item purchased. Employee morale or convenience is not a sufficient reason for the expenditure of appropriated funds. Entertainment is not a good reason. Demonstrable benefit to the efficiency or mission of the agency, and lack of other practical alternatives, *will* generally constitute sufficient justification.

Proposed Changes to OMB Circular A-76 (Revised)

1. Draft Circular No. A-76, proposed by the Office of Management and Budget (OMB), has totally revised the concept and approach to an A-76 study. 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.
2. 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).
3. The ATO is given the responsibility to develop and certify what the OMB Circular refers to as the Agency Tender, which is currently referred to as the Management Study or the Most Efficient Organization (MEO). The ATO is to represent the Agency Tender during the source selection process and in any subsequent appeals. The ATO is to be independent of the CO, the SSA and the AAA. The ATO position is to be held by an inherently governmental official and for the purpose of filing appeals, the ATO is considered a directly interested party. This is a change from the previous procedure, which did not allow appeals by the Management Study/MEO.
4. The role of the CO is revised in the draft Circular. The CO shall be independent of the activity being competed, the ATO and the AAA. The CO is responsible for designation of the Performance Work Statement (PWS) Team and assisting the team in developing the PWS. Under the current procedure set forth in DA Pam 5-20, the Commercial Activity Study Team writes the PWS.
5. The draft Circular sets forth in more detail than previously provided in DA Pam 5-20 and OMB Circular No. A-76 - Revised Supplemental Handbook, the role and responsibilities of the HRA. This position is to be filled by an inherently governmental official who is a HR expert and shall act independently of the CO, SSA and AAA. The HRA is to provide guidance on employee and labor relations issues and assist the ATO and MEO Team with human resource related requirements during development of the Agency Tender.
6. The draft Circular changes the time for completion of an A-76 study. The draft Circular provides that the completion of a Standard Competition shall not exceed 12 months from the date of public announcement unless the 4e Official grants a one-time 6 month extension subject to approval by the Deputy Director

of Management of OMB. The OMB Circular No. A-76 - Revised Supplemental Handbook, March 1996, provided for 18 months to complete a study for a single activity.

7. The draft Circular requires that the PWS be performance-based with measurable performance thresholds and enables it to encourage innovations. (Emphasis added). The current OMB Circular and DA Pam 5-20 do not encourage innovations in the submissions by offerors or the Government Management Study/MEO and require that the offerors and the Management Study meet the requirements of the PWS.

8. Under the draft Circular, Agencies conducting an A-76 study are required to issue the solicitation within 8 months of the A-76 study start date and if the Agency is unable to issue the solicitation within this timeframe, the 4e Official shall notify the Deputy Director for Management of OMB in writing, no later than 7 months after the start date. The present guidance set forth in DA Pam 5-20 and the OMB Supplemental Handbook do not contain a time frame for the issuance of the solicitation.

9. The draft Circular gives the CO discretion to select the type of contract to be used from the list set forth in the draft Circular. This list consists of (a) sealed bids; (b) negotiated procurements using Low Priced Technically Acceptable Source Selection Procedures; (c) negotiated procurements using Cost/Technical Tradeoff Source Selection Procedures with an Integrated Evaluation Process; or (d) Negotiated Procurements using Cost/Technical Tradeoff Source

Selection Procedures with a Phased Evaluation Process. DA Pam 5-20 merely states that the CO will identify the contract type to be used in the solicitation.

10. A negotiated procurement using Cost/Technical Tradeoff Source Selection Procedures is one in which cost or price may be traded off against factors governing technical performance or quality. A Cost/Technical Tradeoff does not include tradeoff processes where the technical factor is graded on a Pass/Fail, Go/No-Go or similar rating system where all offerors meet the same level of performance and where cost or price is then traded off only against non-technical factors. The Integrated Evaluation Process may be used in competitions for information technology activities performed by Agency personnel, contracted commercial activities, new requirements or segregable expansions where an Agency Tender will be submitted or any other commercial activities where the 4e Official receives written approval from OMB prior to issuance of the solicitation. When using the Integrated Evaluation Process, the Agency Tender may be eliminated from the competitive range and the Performance Decision may be based on factors other than lowest cost.

11. A Phased Evaluation Process is one where an Agency determines technical capability in Phase One and evaluates cost in Phase Two. The Performance Decision is based on the lowest cost of all technically acceptable offers and tenders. The SSA shall not end Phase One and commence Phase Two until the SSA agrees that the Agency Tender is technically acceptable. A detailed description of how Phase One and Phase Two are to be performed is set forth at pages B-14 and B-15 of the draft Circular.

12. Government Furnished Property is treated differently in the draft Circular than in DA Pam 5-20, paragraph 3-10d. The DA Pam requires that a cost-benefit analysis be performed to decide if it would be more beneficial to provide prospective contractors with Government Furnished Property. Under the draft Circular, the determination to provide Government Furnished Property must be justified in writing and approved by the 4e Official.

13. To decrease the complexity of performing source selections in Standard Competitions, the draft Circular allows the CO to include a cross-reference Compliance Matrix in Section L of the solicitation. This is a new provision not previously allowed in an A-76 study.

14. The draft Circular requires that the solicitation explicitly state which requirements will not be applied to the Agency Tender. The draft Circular provides that the following requirements shall not apply to an Agency Tender:

- a. labor strike plan

- b. small business strategy
- c. subcontracting plan goal
- d. participation of small disadvantaged businesses
- e. licensing or other certification and
- f. past performance criteria

15. Under the draft Circular, the Management Study/MEO is replaced with what is referred to as the Agency Tender. The Agency Tender is the Agency response to the solicitation. The Agency Tender is considered a procurement sensitive document until a Performance Decision is reached. The ATO is to develop the Agency Tender, which shall be prepared in accordance with the requirements of Sections L and M of the solicitation. Under the current guidance, there is no requirement that the Management Study meet the requirements of Sections L and M of the solicitation, however, rulings by the General Accounting Office have established that the Management Study must comply with Sections L and M of the solicitation. The draft Circular is merely incorporating these rulings into the A-76 process. The Agency Tender shall include a MEO; an Agency Cost Estimate developed in accordance with Attachment E of the draft Circular; a Quality Control Plan; and a Phase-in Plan. The MEO may be comprised of either (1) Federal employees or (2) a mix of Federal employees and existing contractor support. New contracts, however, shall not be created as part of the Agency Tender development. This is a change from DA Pam 5-20, which did not prohibit the use of new contracts as part of the MEO.

16. Prior to submission of the Agency Tender to the CO, changes to the Agency Tender are at the discretion of the ATO. After the due date stated in the solicitation, the ATO can make changes to the Agency Tender only if it is the result of negotiations with the SSA, official OMB Office of Personnel Management guidance, or Agency cost rate/factor updates approved by the 4e Official. The Agency Tender may also be revised if no private sector offers or public reimbursable tenders have been opened and if the CO extends the submission date for all offers and tenders. Other changes to the Agency Tender shall not be permitted. Under DA Pam 5-20, no changes to the MEO in-house cost estimate are permitted after the due date for submission of proposals/bids.

17. Under the draft Circular, the ATO is to develop and certify the Agency Cost Estimate, and shall include a Quality Control Program and Phase-in Plan in the Agency Tender. The ATO is to sign the Standard Cost Comparison Form (SCF), which is the decision making document, and certify that the Agency Tender is complete and otherwise reflects the requirements of the Circular. The ATO is also responsible for delivering the Agency Tender to the CO. All communications between the ATO and the SSA are to be in writing and submitted through the CO.

Under DA Pam 5-20, the Independent Reviewer certified the MEO's Cost Estimate.

18. A new provision set forth in the draft Circular is that if the ATO does not submit the Agency Tender to the CO on or before the due date, the CO shall not open any received offers or tenders and must notify the ATO and 4e Official that the Agency Tender was not submitted. The ATO must provide the 4e Official with a written rationale for not submitting the Agency Tender on time and the 4e Official may instruct the CO to return received offers and tenders and amend the solicitation allowing additional time for resubmission of all offers and tenders or instruct the CO to proceed with the source selection without the Agency Tender. Under the draft Circular, it is possible that the organization under study will not participate in the competition. The present A-76 Circular requires that the Government organization under study participate in the competition.

19. If no private sector offers are submitted or those received are found to be non-responsive or not responsible, the Agency shall hold discussions with the private sector sources and document in writing:

- a. Any restrictive, vague, confusing or misleading portions of the solicitation;
- b. Possible revisions to the solicitation to encourage participation;
- c. The reasons provided by sources for not submitting responses; and;
- d. The reasons offers or tenders were either not responsive or not responsible.

The draft Circular does not define or identify who the private sector sources the ATO is to hold discussions with are, but it must be assumed that they are private sector companies who had shown interest in submitting a proposal. The CO and SSA are to evaluate the results of these discussions and propose a course of action in a written document to the 4e Official. The CO shall provide a copy of this written document to the PWS Team, ATO and the public.

20. The 4e Official will evaluate the CO's written documentation and make a determination to either (a) revise the solicitation or (2) implement the Agency Tender. Therefore, under the draft Circular, it is possible to have a situation where there is no competition with the private sector and the Agency Tender is simply implemented.

21. The draft Circular also revises the source selection process. Under the draft Circular, the SSA is to evaluate all offers concurrently including the Agency Tender. Neither the SSA nor the CO are to direct or request adjustments to the

Agency Tender that would identify a private sector or public reimbursable offeror's proprietary methodology or require, direct or make specific changes to the Agency Tender including the approach used by the Agency and Agency staffing requirements. The SSA or CO may, however, question whether sufficient resources have been included in the MEO. A public reimbursable offeror is a federal agency that could perform a commercial activity for another federal agency on a reimbursable basis via a commercial Inter-Service Support Agreement (ISSA).

22. The draft Circular changes the structure and make up of the PWS Team and the Government/MEO Team. Under DA Pam 5-20, paragraph 4-9, the PWS can be developed by separate PWS and MEO/Management Study Teams working independently or jointly to develop the PWS requirements with the Management Study Team splitting off once the workload has been identified. There must, however, be continued coordination between the teams throughout the process as neither team can operate in a vacuum. Under the draft Circular, members of the PWS Team cannot be members of the MEO Team and members of the MEO Team cannot be members of the PWS Team in order to avoid the appearance of a conflict of interest.

23. In addition, members of the MEO Team, directly affected personnel and any individuals with detailed knowledge of the MEO or Agency Cost Estimate in the Agency Tender cannot be members of the SSEB. However, members of the PWS Team who are not affected personnel may participate on the SSEB. The draft Circular also provides that personnel who are personally and substantially participating in developing the solicitation or the Agency Tender lose the Right of First Refusal.

24. Pursuant to the draft Circular, the SSA will subject the Agency Tender to a Cost Realism analysis to determine if the cost estimate reflects the requirements of the solicitation. The SSA will validate the Agency Cost Estimate to determine if the estimate was calculated in accordance with Attachment E of the draft Circular and the solicitation. The ATO shall respond to the SSA's request for adjustment to the Agency Tender's Cost Estimate and other questions the SSA may have regarding the Agency Tender. If the SSA and the ATO cannot reach agreement on a specific issue, the 4e Official shall appoint an individual to resolve the disagreement.

25. Under the draft Circular, directly interested parties who can appeal to the AAA are the ATO, a private sector offeror or the official that certifies the public reimbursable tender. The draft Circular also defines Other Interested Parties who have the right to challenge the contents of an Agency's Commercial Activities Inventory under the FAIR Act. This appeal right has been given to private sector

sources, unions, representatives of any business or professional association and affected employees not represented by a union.

26. The draft Circular changes the public review period from 20 calendar days as set forth in Section 7-5 of DA Pam 5-20 to 10 working days. The draft Circular also permits a comment period to allow directly interested parties to comment on any appeals that have been filed with the AAA.

27. The draft Circular also added an additional ground for appeals to the AAA. An appeal can now be filed based on errors in the source selection process.

28. The draft Circular also changed the period of time in which AAA has to issue a decision. Under DA Pam 5-20, Sec. 7-6, AAA had 30 calendar days from receipt of an appeal to issue a decision. Under the draft Circular, AAA now has 30 working days to issue a decision unless the issues are complex, in which case AAA has 45 working days to issue a decision.

29. Under the draft Circular, Agencies are to implement the AAA decision unless an exception is requested by the 4e Official and approved by the Deputy Director for Management of OMB. Under the current procedure, there is no appeal of the AAA decision.

30. The Point of Contact for this subject in the CECOM Legal Office is the undersigned, (732) 532-9801, DSN 992-9801.

JAMES SCURO
Attorney-Advisor

Employment Discrimination Task Force

NEWSLETTER

December 2002
Vol. V, No.3

RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW

A. UPDATE ON THE CONTINUING VIOLATIONS DOCTRINE AFTER MORGAN

In the six months since the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002), a wave of lower court opinions have grappled with how to interpret and apply Morgan. Some of the principles taking shape in these opinions will undoubtedly impact future cases.

* Of primary interest is the way lower courts are analyzing timeliness in the wake of Morgan. By and large, courts have acknowledged that Morgan abrogated the continuing violation doctrine. When challenging discrete discriminatory acts, a federal employee must contact an EEO counselor within 45 days of the action, and stale claims are not saved even if related to a timely personnel action. See Miller v. New Hampshire Dept. of Corrections, 296 F.3d 18, 21-22 (1st Cir. 2002); Jarmon v. Powell, 208 F. Supp. 2d 21, 28-30 (D.D.C. 2002). Further, in the context of hostile work environment claims, the concept of a serial violation is now irrelevant. Instead, the trial court must examine the work environment in its entirety, and determine if the "smallest portion" of the unlawful employment practice falls within the limitations period. Shields v. Fort James Corp., 305 F.3d 1280, 1282 (11th Cir. 2002)(also noting that Morgan "essentially rejected" the continuing

violation doctrine); see also Crowley v. L.L. Bean, Inc., 303 F.3d 387, 406 (1st Cir. 2002)(noting that Morgan "supplants our jurisprudence on the continuing violation doctrine in hostile work environment claims."); Marinelli v. Chao, 222 F. Supp. 2d 402, 415 (S.D.N.Y. 2002)(observing that Morgan "abrogated the continuing violation doctrine in the context of discrimination claims brought pursuant to Title VII").

* Some courts, however, continue to use the "continuing violation" terminology in examining timeliness. For instance, in Tinner v. United Insurance Company of America, 308 F.3d 697 (7th Cir. 2002), the Seventh Circuit acknowledges that Morgan prevents an employee from relying upon a pattern of discrete discriminatory acts to salvage untimely claims. Id. at 708. Nevertheless, the court undertook a continuing violation analysis of the type typical in pre-Morgan cases (albeit in dicta), inquiring whether the untimely acts should have put the employee on notice of his duty to file an EEO claim.

* A few cases have addressed the question left unanswered by footnote 9 in Morgan – how the continuing violation doctrine might apply to discrete discriminatory acts in the context of a pattern or practice case. See 122 S. Ct. at 2073, n.9. After Morgan, some plaintiffs seized on this footnote to breathe life into otherwise time barred employment actions by insisting that the untimely claims are part of an on-going policy of discrimination. So far, this theory has not found any support.

For instance, in Lyons v. England, 307 F.3d 1092 (9th Cir. 2002), the plaintiffs alleged that, over a period of several years, they were denied promotions and not given favorable work assignments due to their race. The Ninth Circuit found that any claims earlier than 45 days prior to their EEO contact were time barred. Id. at 1106-07 ("If a plaintiff chooses to bring separate claims based on each discriminatory act [rather than a class action], his assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability"). See also Kaster v. Safeco Insurance Co., 212 F. Supp. 2d 1264, 1269, n.4 (D. Kan. 2002)("Plaintiff's bald assertions that defendant engaged in a pattern and practice of discrimination against him individually is a wholly distinct theory from 'pattern-or-practice' cases brought by a class of persons alleging general discriminatory treatment.").

* Finally, in Jensen v. Henderson, ___ F.3d ___, 2002 WL 31748850 (Dec. 10, 2002, 8th Cir.), plaintiff's EEO complaint challenged the adequacy of the Post Office's investigation of a report of sexual harassment and not the underlying conduct itself. In reversing the district court's granting of a motion to dismiss plaintiff's EEO complaint as untimely, the Eighth Circuit held that the employer's failure to take action on the complaint continued into the 45 day period, making the complaint timely even without any evidence that the plaintiff, who was on stress leave, was actually harassed during this time period. The court remanded for development of the facts underlying plaintiff's allegation that her complaint was timely. The opinion is

published and may prompt future EEO complaints that challenge an agency's investigation, but not the underlying harassment itself. This theory risks creation of an open-ended 45 day window that is only closed when the agency takes final action on a complaint of hostile work environment. See also Swenson v. Potter, 271 F.3d 1184, 1191 (9th Cir. 2001)(in a pre-Morgan decision, the Ninth Circuit determined that the matter alleged to be discriminatory related to the adequacy of the employer's response to a claim of sexual harassment, not to the co-workers' underlying behavior and, thus, the 45-day period did not begin to run until the agency took final action on plaintiff's EEO complaint).

*** The decisions in Jensen and Swenson are problematic because they extend the filing deadline for a hostile work environment claim. Under these decisions, the act that triggers the filing of a discrimination complaint is not a hostile or otherwise adverse act by a co-worker or employer, but rather the action or inaction by the employer in response to plaintiff's complaint. Arguably, the employer's decision about how to respond to the employee's hostile work environment claim is distinct from the discriminatory acts themselves, going more to the question of the degree to which the employer should be liable and not to the underlying basis for the claim itself.

Please feel free to contact the Employment Discrimination Task Force regarding application of the Morgan decision. We would also appreciate receiving any Morgan briefs that address the

points discussed here or any other aspects of the decision. The Department has not yet articulated any policy positions regarding the ramifications of Morgan.

B. ANALYSIS OF "BECAUSE OF" SEX COMPONENT IN SEXUAL HARASSMENT CASES

Two recent circuit court decisions have examined the question of what it means to be discriminated against "because of" sex under Title VII. In Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002), the Ninth Circuit held that a male employee who alleged he was subjected to severe, pervasive, and unwelcome physical contact of a sexual nature in the workplace due to his sexual orientation asserted a viable Title VII claim. Plaintiff alleged that he was the subject of continuous, daily physical harassment by male supervisors and coworkers. The Court held that it was clear that the plaintiff had alleged physical conduct that constituted an objectively abusive work environment. The Court emphasized that the sexual orientation of the victim was irrelevant, and that the physical attacks, which targeted body parts clearly linked to his sexuality, were "because of sex." The Court concluded that this case is a straightforward sexual harassment claim (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), in which the Court noted that Title VII forbids severe or pervasive same sex offensive sexual touching and that offensive sexual touching is actionable discrimination even in a same sex workforce). The dissent noted that assault or harassment is actionable under Title VII only if it is "because of" one of the protected characteristics covered by the statute, and pointed out that the plaintiff

alleged that he was discriminated against because of his sexual orientation, which is not "because of" sex, and thus not actionable under Title VII.

The decision in Ochletree v. Scollon Productions, Inc., 308 F.3d 351 (4th Cir. 2002) is harder to explain. Plaintiff, a female employee, worked in the production shop of the defendant. During her tenure at the company, "some of the primarily male staff engaged in open conversations about sex, made comments about the sexual habits of others on the staff, used foul, vulgar, and profane language, and told sexually-oriented jokes." 308 F.3d at 353-54. Other specific incidents that occurred during plaintiff's employment included "an incident where she witnessed employees pretending to perform oral sex and other sexual acts on a mannequin, another incident when employees showed [her] a picture of pierced male genitalia and asked her what she thought about it" and "an incident where a co-worker sang her a song" with offensive, explicit lyrics. Id. at 354.

The Fourth Circuit held that the critical question is whether the complaining employee in this case would have suffered the same harassment had she been of a different gender. The court concluded that, except for three incidents, "the vast majority of offensive conduct upon which Ochletree relies the uncontested evidence demonstrates conclusively that Ochletree would have been exposed to the same atmosphere had she been male." Id. at 356. The court concluded that the three incidents directed at the plaintiff over the course of a year and a half because of her gender were not severe or pervasive enough to alter the terms of her

employment. The dissent, however, stated that a reasonable jury could find that the banter plaintiff was subjected to was "because of sex" inasmuch as it was intentionally said in her presence in order to make her uncomfortable and self-conscious about her status as the only woman in the shop and due to the relentless, graphic descriptions of her co-workers' sex lives were sex-based because they portrayed women as sexually subordinate to men. The dissent concludes by stating that its primary objection to the majority opinion is that it has turned the "because of" sex requirement into an obstacle where it had not been an obstacle before, thereby making it more difficult to establish a sexual harassment claim.

C. RECENT DECISIONS INVOLVING "ADVERSE EMPLOYMENT ACTIONS"

The question of what constitutes an adverse employment action in a discrimination or retaliation case is one to which the courts continue to offer a range of answers. Although most circuits have developed a definition of what constitutes an adverse employment action, the determination of whether a particular action by an employer rises to the level of an adverse employment action remains an intensely fact-dependent exercise. Some recent decisions that address this issue and conclude that no adverse action was presented include:

a. In Gu v. Boston Police Department, 312 F.3d 6 (1st Cir. 2002), plaintiffs, two senior analysts in the Office of Research and Evaluation of the Boston

Police Department, filed a discrimination complaint based on gender after they failed to obtain promotions. Following the selection of an outside male candidate, the office was reorganized and plaintiffs alleged their job duties were diminished in retaliation for having filed an EEO claim. The court rejected plaintiffs' claims of retaliation, finding that they had not suffered an adverse employment action. The court noted that, generally, to be adverse, an action must "materially change" the conditions of plaintiffs' employ. Id. at 14. Under First Circuit case law, material changes include demotions, disadvantageous transfers or reassignments, failures to promote, unwarranted negative performance appraisals, and "dramatically decreased supervisory authority" with no voice in major decisions. Id. In this case, plaintiffs lost some of their supervisory authority due to a reorganization of the office, but their essential jobs remained the same. The court concluded that "[w]hen a general reorganization results in some reduction in job responsibilities without an accompanying decrease in salary, or grade, those changes cannot be dubbed adverse employment actions." Id.

b. In another case involving an office reorganization, the D.C. Circuit also declined to find an adverse employment action. The plaintiff in Forkkio v. Powell, 306 F.3d 1127 (D.C. Cir. 2002), alleged, inter alia, that he was discriminated against based on his race when, after the section in which he worked at the FDIC was reorganized, his temporary promotion to a section chief was not automatically made permanent (although plaintiff later received a promotion to a different section chief position). The court

rejected plaintiff's claim that he suffered an adverse employment action based on a loss of prestige. Further, the court noted that, although plaintiff reverted from a temporary GS 15 to a GS 14 as a result of the reorganization, he did not suffer from a loss of pay or benefits. Moreover, plaintiff's substantive responsibilities were not reduced inasmuch as he was given additional duties and he continued to supervise staff. The fact that he no longer attended management meetings or received emails and other management communications did not cause any adverse consequence to his position or future career and, thus, plaintiff did not establish an adverse employment action.

c. The Sixth Circuit issued a recent decision involving the definition of an adverse employment action in a reassignment case. In White v. Burlington Northern & Santa Fe Railway Co., 310 F.3d 443 (6th Cir. 2002), plaintiff had been hired as a railroad track laborer. After she complained to management that the foreman was treating her differently based on her sex, she was reassigned from the position of forklift operator to more physically demanding duties within the same job classification. The court noted that, to establish an adverse employment action, plaintiff must show a materially adverse change in the terms or conditions of her employment, such as a termination, a demotion with concurrent reduction in salary, a less distinguished title, or a material loss of benefits. In this case, the position to which plaintiff was reassigned was within the job classification for which she had been hired and, thus, she did not make a cognizable claim of an adverse employment action.

A BIG THANKS to Kay Baldwin, who during her time at the Federal Programs Branch provided invaluable insights and support to the endeavors of the Employment Discrimination Task Force. Kay has now taken her considerable legal skills and judgment to her new position as the Deputy Special Counsel for the Office of Special Counsel for Immigration-related Unfair Employment Practice in the Civil Rights Division.

PRACTICE TIPS

1. FRONT PAY

When you have good reason to believe that a plaintiff will seek front pay in lieu of reinstatement, consider retaining an expert to testify regarding an appropriate amount of front pay given the particular plaintiff's employment history and future employment prospects. Front pay "is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843, 846 (2001); Green v. Administrators of the Tulane Educational Fund, 284 F.3d 642 (5th Cir. 2002). Like back pay, front pay is not considered to be an element of compensatory damages and, thus, may be awarded in addition to any compensatory damages. Pollard v. du Pont de Nemours & Co., 532 U.S. 843, 853-54 (2001). In general, courts will not award lengthy front pay awards because they are too

speculative, see, e.g., Peyton v. DiMario, 287 F.3d 1121, 1128-29 (D.C. Cir. 2002)(district court abused discretion by awarding 26 years of front pay based solely on plaintiff's subjective intent to remain in job until retirement); United Paperworkers Int'l Union Local 274 v. Champion Int'l Corp., 81 F.3d 798 (8th Cir. 1996); McKnight v. General Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992), cert. denied, 507 U.S. 915 (1993), or where such awards would constitute a windfall to plaintiff, see, e.g., Moysis v. DTG Datanet, 278 F.3d 819, 829 (8th Cir. 2002).

Nevertheless, there have been cases where courts awarded significant amounts of front pay. See, e.g., Mathieu v. Gopher News Co., 273 F.3d 769, 779 (8th Cir. 2001)(front pay award based on time until retirement; plaintiff was 57 at date of judgment and would have retired at 65, so 8 years of front pay upheld); Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 285 (8th Cir. 1993)(front pay awarded for 10 years, but limited to the difference between pay when discharged and lower pay at new job).

Especially where plaintiff has retained an expert to testify about front pay issues, the government should consider retaining its own expert to review the expert's report and conclusions. Cf. Peyton v. DiMario, 287 F.3d 1121, 1128-29 (D.C. Cir. 2002)(noting that expert testimony concerning plaintiff's earning potential would be appropriate for purposes of calculating front pay). An economic expert may also be used to rebut plaintiff's testimony about future job intentions, even if plaintiff does not proffer expert testimony on this point,

to reduce the amount of front pay in a particular case.

2. COMPENSATORY DAMAGES

A word of caution: Some courts have demonstrated a willingness to award significant compensatory damages in federal sector employment discrimination cases based primarily, if not solely, on lay testimony concerning plaintiff's physical, emotional, and psychological injuries due to discrimination or retaliation. In other words, plaintiffs may not need expert testimony in order to justify significant awards of compensatory damages. As a result, be prepared to produce evidence to rebut plaintiff's testimony regarding the nature and extent of his or her injuries, even if it appears that such evidence is vague and uncorroborated. The cost of inaction can be steep, as the cases discussed below demonstrate.

In Salinas v. O'Neill, 286 F.3d 827 (5th Cir. 2002), plaintiff, a Customs agent, alleged that he was discriminated against on the basis of his race and age, as well as retaliated against, when the Customs Service failed to promote him. At trial, the court ruled in the government's favor with respect to plaintiff's race discrimination claim. The jury determined, however, that the agency had retaliated against plaintiff and awarded \$1 million in compensatory damages. The district court, inter alia, reduced the compensatory damage award to the \$300,000 cap, but denied defendant's motion to remit the award on the basis that there was insufficient evidence to support emotional and mental suffering meriting that amount of damages. The only evidence

plaintiff introduced at trial was his own testimony and that of his wife regarding plaintiff's loss of self esteem, feelings about not being a competent agent, loss of sleep, stress, paranoia, fear of future retaliation, and high blood pressure. The court of appeals noted its wariness when upholding emotional damage awards based solely on the testimony of plaintiff and a spouse. Nevertheless, the court ultimately deferred to the jury's determination that plaintiff had in fact suffered such damages. After comparing the case with other similar cases and applying a multiplier pursuant to the maximum recovery rule, the court remitted the district court's award to \$150,000.

her last few months, had been intimidated, physically assaulted and retaliated against for exercising her rights, and ultimately was fired for engaging in protected activity under the statute. Given these circumstances, the evidence supported the jury's conclusion that plaintiff was depressed and angry, and had suffered a loss of self esteem.

In another recent federal sector case, Peyton v. DiMario, 287 F.3d 1121 (D.C. Cir. 2002), plaintiff was an employee of the Government Printing Office for 11 years. Plaintiff alleged she was subjected to quid pro quo sexual harassment and a hostile work environment, as well as retaliation. A jury found in plaintiff's favor and awarded \$482,000 in compensatory damages. The district court remitted the damages to the statutory cap, or \$300,000. In affirming this award on appeal, the D.C. Circuit rejected the government's argument that the upward cap of \$300,000 should be awarded only in the most egregious cases. The court noted that the language of 42 U.S.C. § 1981a(b) merely provides a cap and, thus, as long as the damages awarded are supported by the evidence and do not shock the conscience or otherwise are unreasonable, then the award should be upheld. The court determined that plaintiff had been the victim of the egregious conduct Title VII is designed to remedy: she had worked her way up the career ladder, had been harassed by a supervisor in

3. TAX ENHANCEMENT

With increasing frequency, plaintiffs are attempting to obtain monetary awards in settlement agreements that would provide them with the amount necessary to cover their tax liability with respect to awards of damages, fees, and costs. In other words, plaintiffs seek not only an amount of damages, costs, and fees that makes them whole, but also the sum they will be out of pocket to pay the taxes due and owing on such awards. Because plaintiffs who receive awards in employment discrimination cases as a result of either judgments or settlement agreements are responsible for paying taxes on the total amount, including attorneys fees, in some instances the amount of an award realized by the plaintiff after taxes and fees are paid is a relatively small portion of the total amount of the award.

To remedy the perceived unfairness of this situation, a growing number of plaintiffs and their representatives have attempted to obtain court approval of enhanced awards so that, in effect, the government pays the plaintiff's taxes. When faced with such an argument, counsel for the government should argue that Title VII (and the other employment discrimination statutes) do not waive sovereign immunity from tax enhancement damages, citing Arneson v. Callahan, 128 F.3d 1243, 1247 (8th Cir. 1997) (treating the tax enhancement remedy like the prejudgment interest remedy, court held that "Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government."). In addition, we note that legislation has been introduced in Congress

to amend 42 U.S.C. § 1988 to permit tax enhancement awards in employment discrimination cases. To date, no action has been taken on the bill, but we will keep you advised of developments as they occur.

4. EEO SETTLEMENT AGREEMENTS

Another issue arising more and more often relates to plaintiff's claims that an agency has breached an agreement reached to resolve a prior EEO claim at the administrative level. The EEOC's regulations provide that, if an employee believes an EEO settlement has been breached, he must notify the EEO Director of the noncomplying agency within 30 days of when he knew or should have known of the noncompliance. 29 C.F.R. § 1614.504(a). The agency must resolve the matter of noncompliance and respond to the complainant in writing. 29 C.F.R. § 1614.504(b). If the complainant is not satisfied with the agency's response (or lack thereof), he may appeal to the EEOC for a determination as to whether the agency has complied with the agreement or decision. Id. However, the regulation by its terms does not require a complainant to appeal to the EEOC before filing suit in federal court. Saksenasingh v. Secretary of Educ., 126 F.3d 347, 350-51 (D.C. Cir. 1997); contra Ramirez v. Runyon, 971 F. Supp. 363, 368-69 (C.D. Ill. 1997) (an appeal to the EEOC is required for the exhaustion of administrative remedies).

When a case alleging breach of an EEO settlement agreement is filed in court, the plaintiff often seeks specific enforcement and damages resulting from the breach. The question is whether the district court has

jurisdiction over the breach of contract claim. Several district courts have determined that these cases should be in the Court of Federal Claims. See Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994)(claim for enforcement of a settlement agreement requires its own jurisdictional basis, and there is no derivative jurisdiction based on the nature of the original dispute that was settled). The Court of Federal Claims, however, has consistently taken the position that Title VII provides the exclusive remedy for all claims relating to discrimination, including claims involving breaches of administrative EEO settlement agreements.

The Department has taken the position that the court probably has jurisdiction to specifically implement the terms of an administrative settlement agreement under Title VII. On the other hand, we have argued that the court does not have jurisdiction to award damages because there has been no waiver of sovereign immunity for such a claim under Title VII. The cases in this area have reached some anomalous results. Please let the Task Force know if you have a breach of contract issue and would like some assistance in briefing it.

FYI

**EEOC PROPOSES CHANGES TO
FEDERAL SECTOR CLAIMS PROCESS**

In November, the EEOC heard testimony and received recommendations from a broad range of interested parties on reforming the discrimination complaint process for federal employees. Witnesses

included EEO complainants, EEO officials in a variety of federal agencies, EEOC officials, and representatives of the plaintiff's bar. Chair Cari M. Dominguez noted that, although there is no formal plan under consideration by the Commission, the EEOC is in the process of collecting data that would support a potential revision of the federal sector claims process, possibly as early as September 2003. Indeed, she claimed that a streamlined federal sector EEO process is a top item on the EEOC's regulatory agenda. We will keep you informed of developments in this area.

***Need to know if the Attorney
General has been served with a
complaint?***

The DOJ Mail Referral Unit keeps track of this information and should have the answer. The number is (301) 436-1020.

U.S. Office of Government Ethics
1201 New York Avenue, NW.
Suite 500
Washington, DC 20005-3917

December 24, 2002
DO-02-031

MEMORANDUM

TO: Designated Agency Ethics Officials and Alternate
Designated Agency Ethics Officials

FROM: Jack Covaleski
Deputy Director, Office of Agency Programs

SUBJECT: Revisions to the Annual Agency Ethics Program
Questionnaire

In accordance with 5 C.F.R. §2638.602(a), this memorandum serves as notice of changes to the reporting requirements for the Annual Agency Ethics Program Questionnaire (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. The Questionnaire that is due to OGE on February 1, 2003 covering calendar year 2002 was distributed by email to all executive branch Designated Agency Ethics Officials (DAEOs) and Alternate Designated Agency Ethics Officials (ADAEOs) on October 29, 2002.

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 detailed below by section. Please note, there are

several questions in the Questionnaire that may require you to contact another office within your agency, such as Human Resources, to obtain the information you need to answer the questions.

Organization/Resources

These two sections have been combined and streamlined to eliminate questions that ask for information that OGE obtains through other means throughout the year.

Program Administration

This new section includes reformatted questions previously found in the Resources section. The questions address the amount of time required to administer specific ethics program functions, areas of the program that agencies have contracted out or automated, and internal reviews of the ethics program.

Education and Training

This section has been significantly revised. The table of training, which required agencies to identify the training conducted in accordance with each specific provision of the training regulation, has been eliminated. For calendar year 2003, you will be asked to provide totals for the following:

Initial Training

- Number of employees required to receive initial training.
- Number of employees who received initial training.

Annual Training

- Number of employees who were required to receive annual training.
- Number of required employees who received annual training.
- Total number of employees who received annual training.
(Including employees that you trained that were not required to receive training.)

We have added multiple choice questions on the methods you use to ensure that your covered employees received training as well as the topics you covered in your training.

Ethics Opinions, Advice and Counseling

We reformatted the question asking how frequently you provide opinions, advice and counseling on specific ethics topics by replacing the numeric ranking with a rating scale. We added a multiple choice question on the methods you use to ensure that accurate opinions, advice and counseling are provided to employees.

Enforcement of Standards of Ethical Conduct, Criminal and Civil Statutes

Previously, enforcement was divided between two sections. One dealing with the standards of conduct and the other with the statutes. The sections have been combined under one heading and the questions on the criminal and civil statutes have been consolidated.

We have also added a question asking which office in your agency is responsible for notifying OGE when a referral of a potential violation of the conflict of interest statutes has been made to the Department of Justice.

Public Financial Disclosure

This section has the most significant changes that require you to collect new data. For calendar year 2003, you will need to break out the number of Schedule C employees who were required to and filed the SF 278. In addition, you will need to break out the number of career and non-career SES employees who were required to and filed the SF 278. These new categories are also included in the table for reporting corrective and remedial actions.

You will be asked several new questions in this section that deal with administering the public financial disclosure system. Because OGE has delegated authority for granting filing extensions and waivers of the late filing fee, you will be asked to report the number of requests you received for extensions and waivers and the number that you granted. In addition, you will be asked to report the number of requests (OGE form 201) you received to release SF 278s and the total number of individual SF 278 reports requested to be released. You will also be asked to break out the number of career and non-career SES SF 278 reports requested to be released.

We have simplified the reporting requirements for the

confidential financial disclosure system. You will be asked to report the total number of OGE 450 reports required to be filed and the number actually filed. You will be asked to separately report the number of the Alternative OGE 450A reports required to be filed and the number actually filed.

Advisory Committees/Special Government Employees (SGEs)

We have added a question on advisory committee members and a question that will require you to identify any boards or commissions for which you provide ethics program services that are independent of your agency.

Waivers

We removed this as a separate section and eliminated the questions on the number of waivers issued to public and confidential filers as this is captured in the financial disclosure sections. The question on the number of waivers issued for SGEs has been moved into the SGE section.

Lastly, we expect to offer an on-line version of this revised questionnaire on the OGE website to allow you to submit your report for calendar year 2003 electronically. More information regarding the on-line version will be provided in the fall of next year.

If you have any questions regarding the changes to the questionnaire, please contact Barbara Mullen-Roth at 202-208-8000, extension 233 or bamullen@oge.gov.

Attachment (A PDF version of the questionnaire can be found at:
[USOGE\pages\daeograms\dgr_files\2002\do02031a.pdf](file:///C:/USOGE/pages/daeograms/dgr_files/2002/do02031a.pdf))

The Environmental Law Division, OTJAG, Hosts Senior Environmental Law Specialist Workshop

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. A brief synopsis of each presentation is provided below. Also provided, as attachments, are copies of the PowerPoint presentations used at the Workshop.

Keynote Address, Ms. Janet C. Menig, Deputy Assistant Chief of Staff for Installation Management.

Part of the impetus for TIM was to meet the challenge of getting all the MACOMs to agree to do something at the installation level and prevent the migration of installation support funds to mission related activities. One of the primary objectives of TIM is to cross level the quality of facilities and support at the installation to reduce, eventually eliminate the gap between the haves and the have nots. In order to manage installation support across the country in a centralized manner, a new organization, the IMA, was established. The IMA manages its installations through four Regional Offices – the Northeast Regional Office (NERO), Northwest (NWRO), Southeast (SERO) and the Southwest SWRO). The Regional Offices are the eyes and ears of the IMA Headquarters and will focus on compliance. Environmental compliance and conservation will be funded through the IMA HQ. The Office of the Director of Environmental Programs (ODEP) and the Army Environmental Center (AEC) will handle Restoration issues and funding for active site restoration. Base Realignment and Closure (BRAC) issues and funding will be handled by the BRAC office (BRACO), which will have three Field Offices (FO) – the National Capital Region (NCR) BRAC FO, the Hampton BRAC FO, and the Atlanta BRAC FO.

Panel #1, Understanding the Legal Side of IMA. Panel members: COL James Rosenblatt, TRADOC SJA; COL Douglas Baker, Chief, BRACO; LTC Richard Jaynes, Command Counsel AEC, and LTC Jacqueline Little, Chief, Resource Sustainment and Restoration Branch, ELD.

TRADOC SJA. The fundamental change wrought by TIM is the centralization of installation management. Because of its centralized nature, it was COL Rosenblatt's

opinion that the IMA regional offices may just be a temporary feature with the IMA eventually managing all installations from one location. The basic goal is to sit up a system that provides one-stop shopping for installation support.

BRACO. The BRACO will manage the BRAC and Excess Property sites through three BRAC Field offices. It was initially hoped that the three offices would handle sites on a more regional basis, but the geographical imbalance, and past MACOM involvement lead to a distribution that is not necessarily regional in nature. An attempt will be made to more closely align the future BRAC sites along regional lines. For BRAC installations that have been closed and lack the necessary support staff, Inter-Service Support Agreements (ISSA) will be negotiated with a larger installation in the general proximity to provide the necessary support.

AEC. AEC has hired two additional attorneys to work restoration issues. AEC manages the restoration dollars provided by the Army Budget Office and funds the installation workplans directly. AEC has signature authority for Records of Decision (RODs) less than or equal to \$10 million, and will review all other RODs.

ELD. Reporting environmental fines and penalties, and the coordination of agreements should be in accordance with the 18 December 2002 ELD guidance that is available in the December 02 ELD Bulletin. In general, the reporting /coordinating POC should be the supporting IMA regional attorney. The signature authority for environmental agreements is also in the above referenced ELD Bulletin, but is still a little murky. If the guidance doesn't provide clear direction, then ELD should be consulted. Lastly, the ELD Civil/Criminal Enforcement Handbook is being updated and should be out by the end of June 2003.

Panel #2, AR 200-2. Panel members: Mr. Timothy Julius, ODEP; LTC David Mayfield, ELD; MAJ Michael Bobrick, TRADOC/NERO IMA; and Mr. Thad Keefe, FORSCOM/SERO IMA.

ODEP. 32 CFR 651 has superseded AR 200-2, which is being revised to reflect the changes to how the Army conducts, processes, and reviews NEPA actions. One of the biggest confusions in the NEPA process triggered by TIM is determining who is the proponent for the federal action being proposed; i.e., is the proposal a garrison support or mission action. The basic guidance is the decision-maker and the funding source determines where the NEPA legal support comes from.

TRADOC/NERO IMA. Under existing regulations, the Installation Commander must review and approve the NEPA documentation. However, the General Order establishing the IMA can be cited as the authority to delegate this power to the Garrison Commander. If in doubt as to whom has the responsibility to review the NEPA action, have both the mission and BASOPs folks work the action.

ELD. Looking at revising 32 CFR 651 to incorporate all the changes brought about by TIM before re-publishing as AR 200-2. Until that time, there is a potential for NEPA actions to slip through the crack because current guidance/regulations reflect the staffing under the pre-TIM organizational structure, so installation ELSs need to remain vigilant.

Panel #3, Training Ranges. Panel members: Mr. Thomas Macia, Army G3; COL Vernon Abadoo, ODEP; and CPT Jeffrey Hatch, ELD.

Army G-3. The individual that has command and control of the range needs to be distinguished from the proponent for the range actions. The primary focus of the environmental mission as it relates to ranges activities is to ensure that military ranges can support training and provide readiness platforms. G3 establishes priorities and requirements for training, plans for the modernization and expansion of ranges, and formulates policy for range operations and management.

ODEP. ACSIM, through ODEP, establishes policy guidance and procedures for installation operations and real property management. Objective is to develop a Sustainable Range Plan (SRP) for all military ranges.

ELD. Still a lack of cross communication between the biologists in the environmental arena and the trainers in the G3 arena. Foresters tend to manage forests to maximize sustainable timber yields, not maximize training lands or habitat for species. Major push to change this mindset that was incubated during the period when forests on Army lands were looked at primarily as a revenue source.

Conservation Buffers, presenter BG (Ret) Barnes.

Recognizing that the loss of habitat in and around military installations poses both risks to the survival of certain species and often leads to restrictions on the military use of such lands, Congress enacted section 2811 of the FY03 DOD Authorization Act. Section 2811 amends 10 USC 2684 and codifies existing authority to use DOD funds to acquire a property interest in lands around military installations in order to create conservation buffers to deter encroachment and/or eliminate/reduce training restrictions on existing military property. This legislation provides a means whereby DOD can leverage financing by entering into partnership agreements with eligible entities in order to acquire and manage land for conservation purposes. One of the most powerful aspects of the new legislation is not just its ability to arrest encroachment on military training lands, but its potential to actually reverse encroachment. Some of the legal issues yet to be resolved include (1) Who enforces violations of any conservation easements created; and (2) Would the DOD really exercise a reversionary interest should it be included as an enforcement mechanism?

Use the LexisNexis™ Services for all of your Litigation Needs... The LexisNexis services offer a complete online Litigation library including primary sources (cases, statutes, codes, regulations & court rules), secondary sources (Am Jur, Restatements, Law Reviews & ALR®), practice materials (forms, treatises, jury instructions, briefs & transcripts), factual resources for pre-trial evaluation (jury verdicts, demographic information, property records, company data and people & business locators) along with directories, legal publications and much, much more...

- Utilize the **Federal Litigation Practice Page** as your single location on the web for virtually all your litigation needs. From the practice page, you can research analytical & primary law sources; find people, property, & financial information; track recent news & developments concerning federal procedure and evidence; and draft forms... It's all just a "click" away!
TO ACCESS THE FEDERAL LITIGATION PAGE GO TO: www.lexis.com/practicepages
- Keep on top of recent decisions with The **Daily Opinion Service** from LexisNexis, your electronic daily advance sheet. Updated every two hours throughout the day, this service provides you with the most timely and comprehensive coverage of electronic caselaw from Federal and State appellate and high courts nationwide. Simply select one or more courts that are of interest to your practice, select one or more dates, and click on "Search". It's that easy! The Daily Opinion Service provides you with FREE cite lists that include our revolutionary Core Terms summaries. You can easily and efficiently review summaries of today's opinions to determine which cases deal directly with the issues you are researching. The full text of the documents is available through the use of a LexisNexis ID. Access to the Daily Opinion Service is on the sign-in page for lexis.com®.
TO ACCESS THE FEDERAL LITIGATION PAGE GO TO: www.lexis.com
- LexisNexis™ **Courtlink®** enables you to access the most untapped source of litigation discovery information – dockets! **CourtLink® e-Access** service offers easy-to-use search and tracking functions to access or receive critical information at your desktop. It can be used to *Alert* you to new cases, *Track* specific cases and be notified by e-mail of new activity, *Search* for cases and *Retrieve* case information anytime, even when the court is closed.

For more information, please contact Rachel Hankins: 202.857.8258

- LexisNexis offers an unmatched collection of **specialized analytical materials** and forms designed to meet the needs of government litigators. These include:
 - Moore's Federal Practice®
 - Matthew Bender® Forms of Discovery
 - Mealey's Litigation Reports
 - Weinstein's Federal Evidence®
- **Time Matters® practice management tool** brings matter information into one centralized location and ties calendar, contact, notes, phone calls, e-mails and LexisNexis research information to individual matters.

For more information, please contact Rachel Hankins: 202.857.8258

- No litigator can survive without the **Shepard's®** Citation Service, exclusively on LexisNexis. *Shepard's* has been the premier citation service for more than 125 years

and continues to serve as the premier citation verification tool. You can customize your Shepard's reports by treatment code, jurisdiction, headnote, date and key words!

- Check all of the cites in your document or brief using **CheckCite®**. CheckCite software collects the citations from your document, verifies them through *Shepard's Citation Service* and then generates a summary report that tags problem cites for immediate attention. It even verifies quotes! For more information on CheckCite, please give Rachel Hankins a call at 202.857.8258.

Search Tip- Changing your Options to view more than 10 documents on the first page of your cite list... Did you know that you can change the number of documents you see on the first page of your cite list? If you are only seeing 1-10 or 1-25 on that first page, you can quickly and easily change that so you will see 1-50. Just go to the top right section of your lexis.com screen and click on the button for "options". On the left hand side of the screen, you will see a section for "Retrieve..." and under that will be a pull down for how many documents you want to retrieve at a time. Choose the maximum number of 50 and then click on "Set" at the bottom of the options page. From that point on, any searches that you run under your ID number will automatically give you the first 1-50 in your cite list.

Government Contracting Practice Page...Did you know that there is one place to go to view all of the sources needed for a government contracts practitioner? If you go to www.lexis.com/practicepages, you will see a page for Government Contracting. This practice page brings together all of the sources a government contracts practitioner needs from federal court decisions, Board of Contract Appeals and the Comptroller General to federal regulations, including the FAR. The page also includes statutes, legislative histories and all of the treatises that cover government contracts, law reviews and journals, including the Public Contract Law Journal, and government contract periodicals and news stories. Check out this site and see how easy it can make the practice of government contracts!

Coming Soon... A LexisNexis website for our federal government customers. Visit this site to find out what's new at LexisNexis, to get PDF versions of LexisNexis literature, to see what events are taking place at LexisNexis!

If you would like more information or would like to set up a training session, please contact: Rachel Hankins at (202) 857-8258.
