



# Office of Command Counsel Newsletter

April 1997, Volume 97-2

## Newsletter Gets Facelift

### From the Editor:

**O**vercoming my resistance and inability to change, I thank CPT Joe Edgell for his efforts to create a newsletter which will be sent electronically to you, our readers. I still can't believe we're doing this!

The new format will have several key features. Breaking stories will be found on the first page. The first page will also contain notes from the editor, and a quick reference to other sections.

On page two you will find

a complete list of attachments.

If you are lucky enough to be viewing the newsletter electronically, you will find that all attachments are linked electronically to the comprehensive list on page two.

What does this mean to you? All you need to do is click on the attachment with your mouse, and voila, you jump directly to that attachment! Stories that extend to several columns or pages will be linked so that you only need to click your mouse to

read the whole story from beginning to end.

Later in the newsletter, you will find sections devoted to the substantive areas of law you normally find; this includes acquisition, labor and employment, environment, ethics, intellectual property, and any thing else that needs highlighting that issue.

We are still experimenting with format. Some features we like may stay, others we don't may go. Your feedback, as always, is appreciated. Enjoy the new newsletter!

## Command Counsel Goes Live on World Wide Web

**C**PT Joe Edgell, General Law Division, DSN 767-2306, recently completed his exceptional work in designing and compiling information for the Office of Command Counsel Home Page which went on line the week of 31 March. Joe worked tirelessly to get us off to a great start with an accessible, user-friendly website that contains a tremendous amount of substantive information.

This effort will serve as a model for all of our legal offices as we use this medium to reach out to our clients and customers and as we expand our abilities to communicate with each other. A great job, CPT Edgell!

Our home page is linked to the AMC home page or it can be accessed directly:

**[http://www.dtic.mil/amc/command\\_counsel/](http://www.dtic.mil/amc/command_counsel/)**

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# Femino Named Deputy Command Counsel

**Dominic A. Femino, Jr.** has been appointed as the new AMC Deputy Command Counsel. He joined the Office of Command Counsel effective 31 March after serving as Chief Counsel, Vint Hill Farms Station. Nick has been

a major participant in shaping numerous Command Counsel initiatives for many years. He is an experienced leader who brings vision, dedication, and hard work to our Headquarters. Congratulations, Nick!

## List of Enclosures

1. Tips for Agencies in Establishing Protest Procedures, And Factors Potential Protesters Should Consider in Selecting A Forum.
2. Ten Tips For A Great Contracting Officer's Statement.
3. SAMM Changes.
4. Best Value Selection Issues.
5. Contractor Technical Experts in Germany.
6. Availability of Army Appropriations to Pay Cash Awards for Employees Who Enroll in Commercial "Frequent Flyer" Programs.
7. Funding Requirements for Indefinite Quantity Contracts (IDQC)
8. Labor Relations Issues in Contracting Out.
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## Newsletter Details

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Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil)

Check out the Newsletter on the Web at [www.dtic.mil/amc/command\\_counsel/](http://www.dtic.mil/amc/command_counsel/)

### Agency Level Protest Procedures

Tips for Agencies Establishing Protest Procedures And Factors Potential Protesters Should Consider In Selecting A Forum

**J**eff Kessler, HQ AMC Protest Litigation Group counsel, DSN 767-8045, wrote the above-captioned article which appeared as the Feature Comment of the February 19, 1997 The Government Contractor. The article highlights the extremely successful AMC-

Level Protest Program, offers insight to those seeking to establish a protest resolution process at the agency level, and analyzes issues that commonly arise (Encl 1). This article is reprinted with permission from The Government Contractor Advisory Board.

### Reviewing Solicitation Clauses Made Easy

**M**ICOM's Dayn Beam, DSN 786-8195, has created a system that can be used to quickly check either an individual clause or the entire action for applicability and currency. It can be used as a tool to supplement individual knowledge and research. Mr. Beam suggests that at first the user read the actual FAR/DFARS prescription until the system summary can key your memory on the less used provisions and clauses. While the system is now electronically available via a disc, Mr. Beam recommends that the user work from a hard copy when

performing a complete package review.

For maximum efficiency, the following procedure is recommended for a complete clause review:

- a. During normal review of the solicitation (or award if solicitation is not reviewed under this system) photocopy section I and L reference clauses and record on a separate piece of paper all full text and other reference (E, F and K) clauses. The exact method is not important so long as you have a complete list of clauses giving number and date (to include all alternates). One short cut

**M**ajor Dave Harney, HQ AMC Business Law counsel, DSN 767-8003, recently wrote an opinion that it is appropriate for OMA funds to be used to purchase 27 sets of Desert BDUs for AMC soldiers going TDY.

OMA funds are normally used to purchase Organizational Clothing and Individual Equipment (OCIE), (CTA 50-900, para. 9; DFAS-IN 37-100-96, chapter 321). Military Personnel, Army (MPA) funds are used for initial clothing allowances and clothing replacement (CTA 50-900, para. 8). Desert BDUs are considered OCIE and must be purchased with OMA funds (CTA 50-900, Table 4).

These uniforms are also subject to the accountability procedures in AR 710-2 which require soldiers receiving the uniforms to sign hand receipts while the items are in their possession and to return them at the end of the mission (CTA 50-900, para. 4.o). The procedures in DOD Instruction 4000.19, Interservice and Intragovernmental Support, should be followed.

*continued on page 5.....*

# Acquisition Law Focus

## Contracting Officer's Statements in Bid Protests

**C** BDCOM's **Lisa Simon**, DSN 584-1298, has prepared an excellent paper, "Ten Tips For A Great Contracting Officer's Statement", which she describes as the single most important document in a bid protest administrative report. It is the best opportunity to tell your side and to convince the GAO that the decision by the contracting officer is correct. Ms. Simon's suggestion to the contracting officer is to "...think of your Statement as a story" (Encl 2).<sup>c</sup>

### Funding Requirements For Indefinite Quantity Contracts (IDQC)

**T** ACOM's **Wendy Saigh**, DSN 786-8002, has written a memorandum addressing potential Anti-Deficiency Act problems when IDQC contracting is used. The paper highlights that a specified minimum quantity must be ordered and funds for this minimum must be obligated. It is incorrect to believe that they could be ordered at any time during the first year — it must be ordered at the time of contract award (Encl 7).<sup>c</sup>  
April 1997

## Cash for Frequent Fliers?

No Availability of Army Appropriations to Pay Cash Awards for Employees Who Enroll in Commercial "Frequent Flyer" Programs.

**E** **l i z a b e t h Buchanan**, Business Law Group Team Leader, DSN 767-7572, provides a memorandum from the Army Deputy General Counsel (Ethics & Fiscal) dated 14 March 1997 addressing the availability of Army appropriations to pay cash awards to employees who enroll in commercial "Frequent Flyer" programs.

That memorandum concludes that Army appropria-

tions may NOT be used to pay cash awards to employees who enroll in commercial "Frequent Flyer" programs because cash awards must be paid for superior accomplishment or other personal effort contributing to the efficiency, economy or other improvement of Government operations.

Enrolling in a "Frequent Flyer" program does not entail that quality or degree of personal effort warranting a cash award (Encl 6).<sup>c</sup>

## Changes to DoD 5105.38-M, Security Assistance Management Manual (SAMM)

**S** ecurity Assistance practitioners should note that two significant changes to the SAMM have been published and are effective as of 31 December 1996. The first change (paragraph 8021.F) provides guidance in implementation of the direct exchange repair program authorized by section 152(a) of Pub-

lic Law 104-164 [110 Stat, 1438-1439 (1996)]. The second change (paragraph 80207 and revised SAMM Table 802-2) includes new guidance on the processing of Supply Discrepancy Reports (formerly known as Reports of Discrepancies). The POC is **Larry D. Anderson**, International Law counsel, DSN 767-8040 (Encl 3).<sup>c</sup>

# Acquisition Law Focus

## Best Value Source Selection

**T** ACOM - ARDEC counsel **Jerry Williams**, DSN 880-6455, has prepared a paper on the relationship among source selection, best value and the Revised A-76 Handbook process. The paper reflects Mr. Williams' experience working with the PM Paladin on the Fleet Management Initiative (Encl 4). The basic thesis of the article is that the Revised A-76 Handbook appears to have fallen considerably short of the mark in its attempt to interject best value contracting into the A-76 process.

## Contractor Technical Experts in Germany

**H**Q AMC's LTC **Paul Hoburg**, DSN 767-2552, provides a point paper on contractor "technical experts" in Germany. Several AMC activities have experienced difficul-

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.....continued from page 3

is to assume all FAR clauses are dated APR 84 and all DFARS clauses are dated DEC 91 unless otherwise noted on your list. This list should be kept with your review comments as it will speed up your award review and provide an accurate record of what the reviewer saw and approved. Often the file will not reflect the document submitted for review only; the document as revised. It is then impossible at a later time to establish what was seen or not seen by the reviewer. This is especially useful when the document is to be processed through the PADDs system, as errors in the documents so generated are, for whatever reason, not uncommon.

b. The list now can be checked in 30 to 45 minutes by someone familiar with this system. With use

ties in this area as a result of recent challenges by German authorities to the designation of contractor employees as tech experts. All acquisition counsel should be aware of the issues in this area and of a recent DFARS change that impacts award of contracts which call for U.S. contractor employees to perform services in Germany (Encl 5).

you will begin to skip whole parts depending upon type of contract or method of acquisition. The following are essential items of information which should be determined prior to your review. Mr. Beam notes these items at the top of the review sheet for quick reference:

(1) Contract type: FP, FPI, FPEA, CPFF, CPIF, Cost-No-Fee, CPAF, T&M, L-H, IQ, Requirements, etc. including type of effort (services, supplies, R&D, CON, mix, etc.).

(2) Dollar value of total action and largest subcontract (by individual CLINS if different contract types are involved).

(3) Are FMS requirements involved or is performance outside the U.S. likely. If performance outside U.S. is possible you must know if performance (to include recruiting personnel) will be entirely Outside the U.S.

(4) Any restriction on responsible sources: J&A basis, 8a, SB, etc.

c. You can now flip through the clause list skipping parts and individual clauses as you become familiar with the system and mark your list as errors are noted.

## MSPB Reverses Removal Based on Sleeping Disorder

In Spencer v. Department of Navy, 97 FMSR 5004, Jan 3, 1997, the appellant's removal, based on a sleeping disorder, was reversed because the agency failed to prove that his condition caused either deficiencies in his performance or a high probability of hazard to himself or others.

The agency removed the appellant and he filed an appeal, claiming that he was not disabled from performing his duties and raising the affirmative defense of disability discrimination. The AJ affirmed the agency's removal action.

The AJ found that the appellant's obstructive sleep apnea, which frequently caused the appellant to fall asleep at work, posed a high probability of hazard to himself and others. He determined that this condition rendered him unable to perform the duties of his position.

In addition, he rejected the appellant's claim of disability discrimination, finding that his condition could not be accommodated. The appellant petitioned for review. The Board granted review and reversed the initial decision.

The Board explained that, in order to remove the appellant for that charge, the agency had to establish a nexus between his medical condition and either: (1) observed deficiencies in his performance, or (2) a high probability of hazard that could result in injury to himself or others.

As to the first one, the Board found that his satisfactory performance appraisals provided sufficient evidence to rebut the agency's claim that he was unable to perform his duties. In addressing the second one, the Board determined that there was insufficient evidence that he slept on duty or that his condition interfered with the safe performance of his duties. Therefore, the Board concluded that the agency failed to prove the charge.

## Labor Relations Issues in Contracting Out

**Linda B.R. Mills**, AMC Employment Law Team, DSN 767-8049, has prepared an excellent treatise on this very important issue — subtitled: “Yes, No, Yes, No, Maybe or Are Contracting Out Proposals Negotiable”. The paper supplemented a presentation Ms. Mills used at the recent Society of Federal Labor Relations Professionals (SFLRP) Symposium (Encl 8).

### Privatization, Outsourcing, Contracting Out

**Cassandra Tsintolas Johnson**, HQ AMC Employment Law Team, prepared the enclosed paper, which highlights important legislative and regulatory developments, as part of the SFLRP presentation described in paragraph 4a above (Encl 9).

Taken together, these two papers represent an excellent compendium of the statutory, regulatory, and labor relations issues faced by those seeking to effectuate Administration policies to reduce the size of government and to make government agencies more efficient.

### Agency Removal for AWOL Was Proper

In Bryant v. National Science Foundation, 97 FMSR, Jan 25, 1997, the Federal Circuit Court affirmed the Board's decision, finding that the agency properly removed the petitioner for excessive lateness.

The petitioner's Division participated in the agency's Flexitime Program which allowed employees, with fixed work schedules, to report to work either 15 minutes before or 15 minutes after their scheduled start time. The supervisor advised the petitioner that due to numerous instances of tardiness, she would no longer be permitted to participate in the Flexitime Program. In addition, the pe-

tioner would be charged with one hour absence without official leave (AWOL) for each time she reported late.

Subsequently, the petitioner requested and was granted a later start time. Still, the petitioner was tardy 33 times on AWOL and was granted a later start time. Nevertheless, the petitioner was again late 23 times in a 17 week period. Based on her pattern of lateness, the agency removed her. She appealed and the AJ affirmed the agency's action.

He found that the agency was under no obligation to excuse her lateness and rejected her Family and Medical Leave Act argument because she never requested leave under that Act.

In Powell v. Department of Justice, 97 FMSR 5011, Jan 9, 1997, a majority of the MSPB ruled that the employee's threat to kill 5 employees, made in a conversation with a employee assistance program coordinator, did not meet the standards set forth in Metz v. Department of Treasury, 86 FMSR 7001. Thus, the removal was overturned.

In Metz, the Federal Circuit stated that the MSPB must "use the connotation that a reasonable person would give to the words to determine if the words constituted a threat". Several factors go into this analysis: (1) listener's reactions; (2) listener's apprehension of harm; (3) speaker's intent; (4) conditional nature of the statements; and (5) attendant circumstances.

### BRAC-Private Companies and Federal Unions

The American Federal of Government Employees (AFGE) represented employees at the former Naval Air Warfare Center, Indianapolis, being closed under BRAC. The city was allowed to seek bids from companies willing to keep the Center open. Hughes Technical Service Company was selected, agreeing to retain the majority of

the Center's workforce. AFGE petitioned for and won exclusive recognition of the hourly employees for the Company. This is the first time that a purely Federal union has won recognition with a private company, and subsequently negotiated a collective bargaining agreement. Some background and a summary of the parties' agreement is enclosed (Encl 10).

Hope you're making plans to meet your colleagues at the 1997 AMC Continuing Legal Education Program

June 16-20  
Radisson Mark Center  
Alexandria, Virginia

## Principles of Behavior in Labor-Management Partnership

The National Partnership Council developed a list of principles to guide the partnership relationship between labor and management. (Editor's Note: In re-reading this list, it appears that it also represents a good guide to any interpersonal relationship). POC is **Stephen A. Klatsky**, DSN 767-2304.

1. Let the other side know of planned actions/events in advance so that they will not be surprised or feel "tricked" or betrayed.

2. Communicate openly with the other side without unexpressed interests.

3. Maintain contact and keep lines of communication open, even in the face of serious disagreements.

4. Carefully consider the impact of your own words and actions on the other side and on the relationship.

5. Use fact and logic to support assertions.

6. Test assumptions about the other side's thoughts and motives before acting on assumptions.

7. Understand that labor and management play different roles and do not take such role playing personally or as an indication that the other side is acting in bad faith.

8. Agree not to agree on some issues without judging the other side.

9. Remain unconditionally constructive even when the other side does not.

10. Treat individual issues on their own merits independently of other issues.

11. Value the partnership relationship as an absolute plus, independent of the individual outcomes it may or may not produce.

12. Initiate one-on-one discussions, directly and in a timely manner, with the person whose behavior does not appear to be consistent with one or more of the principles.

13. Use the National Partnership Council as a forum for discussion of perceived inconsistent behavior, and share the resolution with interested parties, as necessary and appropriate (acknowledgments, remedies, apologies, recommendations, etc.).

# Environmental Law Focus

## Cultural Resources Management Cooperative Agreements

The November 96 ELD Bulletin has an article by MAJ Tom Ayres regarding ***New Cooperative Agreement Authority to Manage Cultural Resources***. It mentioned that the National Defense Authorization Act for Fiscal Year 1997 gives military land managers another tool to manage cultural resources on their installation.

The National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422, Section 2862 (1996) adds section 2684 to Chapter 159 of Title 10 of the United States Code to give the Secretary of Defense and the Secretaries of the military departments new authority to enter cooperative agreements.

## Cooperating Agency Status on BRAC NEPA Documents

During the development of NEPA documentation for the disposal and reuse of BRAC properties, state and local agencies have sometimes requested to be designated a Cooperating Agency. Enclosed is a Memorandum

The cooperative agreements may be made with a "State, local government or other entity for the preservation, maintenance, and improvement of cultural resources on military installations and for the conduct of research regarding the cultural resources." *id.* All contemplated cooperative agreements benefitting Army installations under this new provision will be reviewed by the Environmental Law Division prior to being forwarded to the Secretary of the Army for signature.

The ELD and the Army Environmental Center has provided additional details on what should be included in such agreement, Encl 21. ©

of Agreement recently concluded with a state and county for designating them cooperating agencies with relation to the BRAC disposal and reuse environmental impact statement, Encl. 22. ©

## Who You Gonna' Call?

Who does what on the AMC Command Counsel Environmental & Real Estate Law Team? With the departure of Melinda Loftin from our office, and the increasing work load related to BRAC and real estate actions, we have adjusted and reassigned various environmental functional areas and responsibilities for real estate/BRAC actions for specific installation. Team attorney responsibilities are at Encl 19 and installation responsibilities at Encl 20. Keep posted to the AMC Command Counsel Home Page, where we make future changes, as necessary. ©

## Environmental Law Division Bulletins

ELD Bulletins for February and March 97 are provided (Encl 17 and 18) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version. They, as well as previous ELD Bulletins, are also accessible from the AMC Command Counsel Home Page. ©

# Environmental Law Focus

## DLA Environmental Products Catalogue

The latest DLA Environmental Products Catalogue was published December 1996. DLA has hundreds of environmental products in its supply system ranging from citrus-based degreasers and complete antifreeze recycling systems to natural resource conservation products.

Purchasing these products can help you meet your

organization's goals in: (1) Reducing hazardous waste, (2) Eliminating use of ozone-depleting chemicals, (3) Protecting your employees, and (4) Saving money.

DLA has done the cataloging, item management and contracting for you and can ensure you receive the benefits of its purchasing power. Ordering is easy.

Internet home page address:

<http://www.dscr.dla.mil>.

Copies of the catalog can be obtained from: 1-800-352-2852. Products from this catalogue are a GREAT way to promote pollution prevention. Please pass this information on to appropriate acquisition, logistics, and purchasing officials. ©

## IP Focus

### Correcting Inventorship at Patent Office

TACOM Patent Counsel, **David Kuhn**, DSN 786-5681 submits an article highlighting a petition TACOM filed in the US Patent and Trademark Office to correct the inventorship in a patent application. A second inventor's name had to be added to the existing application. The petition required, among other things, the written permission of the assignee of the application. The US Government is the assignee of the application, and the Assistant Secretary of the Army for Research, Development and Acquisition is the authority who gives the consent.

Mr. Kuhn believes that this is the first time the AMC IP legal community has ever filed such a petition. For the benefit of other AMC IP lawyers, Mr. Kuhn submits sanitized versions of various documents associated with the petition (Encl 11). These include:

- The petition itself
- The first inventor's declaration supporting the petition
- The letter to the Assistant Secretary of the Army for Research, Development and Acquisition requesting consent to the proposed inventorship correction. ©

### How to Lose An Administrative Law Case

1. File untimely submissions
2. Ignore regulatory board rules and regulations]
3. Forget the burden of proof evidentiary requirements
4. Try the case to the jury
5. Be silly (file waves of discovery requests)
6. Try to fool the Administrative Law Judge
7. Misrepresent the law
8. Fail to get to the point
9. Make unnecessary objections
10. Fail to listen
11. Forget when to shut up
12. Argue with AJ's rulings
13. Be unprepared

—from a lecture he heard by **Judge Tom Lanphear**, MSPB (Atlanta) Regional Director and Chief Administrative Judge

# Ethics Focus

## Waiver of Restriction of Use of Special Government Employees (SGES)

HQ AMC Ethics Counsel **Alex Bailey**, DSN 767-8004, has written a paper highlighting recent changes in the Federal Procurement Integrity Act as it relates to use of SGES. The waiver process, standards to meet and agency certification requirements are described (Encl 12).

## Job Hunting and Post Government Employment Restrictions.

The CECOM Staff Judge Advocate Division has prepared a comprehensive summary of the important above-captioned issue, defining "seeking employment" and describing the rules in an easy-to-read manner (Encl 13).

## Payment from Non-Federal Sources for Official Travel Expenses

CECOM's **LTC Craig L. Reinold**, DSN 992-4444, is the POC for this paper which includes a Report of Payment pursuant to 31 U.S.C. Sec 1353 (Encl 14).

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## Attendance at Meetings of National Service-Related Organizations

HQ AMC's **Alex Bailey** provides a point paper outlining the regulatory requirements applicable to this recurring issue. AR 1-211 and AR 210-1 are the primary regulations. Mr. Bailey describes several factors controlling the attendance decision (Encl 15).

## Official Speaker Support to Non-Federal Entities

CECOM's **CPT Matt Mahoney**, DSN 992-4444, describes the requirements of the Joint Ethics Regulation as it pertains to the common occurrence of Army employees being asked to participate as speakers at meetings hosted/sponsored by non-Federal activities. Seven factors must be present in order for an agency to permit this participation (Encl 16).

## Downsizing Report Card

In a report contained in the February 1997 issue of the Government Executive, author **Robert Goldenkoff** states that downsizing is ahead of the schedule mandated by the Federal Workforce Restructuring Act.

•The Federal government

## Why They Sue

According to an ABA study of 11,000 malpractice suits:

### Alleged Errors

- o Substantive 47%
- o Administrative 27%
- o Client Relations 17%
- o Intentional Wrong 9%

### Among the Substantive Errors

- o Failure to know or properly apply the law 11%
- o Planning error/procedure choice 11%
- o Inadequate discovery/investigation 10%
- o Conflict of Interest 4%
- o Mathematical calculation error 0.4%

### Among Administrative Errors

- o Procrastination in performance/failure to follow-up 9%
- o Failure to file document 3%
- o Clerical error 2%

### Among Client Relations

- o Failure to obtain consent/inform client 10%
- o Failure to follow client's instructions 6%

### Among Intentional Wrongs

- o Malicious Prosecution/Abuse of Process 4%
- o Fraud 3%
- o Libel or Slander 1%

is smaller than at any time in the last 30 years — 1.94 million, nearly 63,000 below the statutory target.

•Since 1993 the workforce has been reduced 11%. Some agencies: OPM 38%, GSA 23%, DoD 16%, NASA 15%, Agriculture 15%.

# Faces In The Firm

## Wedding Bells

We are happy to announce the marriage of CECOM Chief Counsel, **Kathryn T. Hoener** and Peter Szymanski. The ceremony took place in Kenosha, WI, on St. Patrick's Day, 17 March 1997. Our best wishes to the Bride and Groom!

## Retirements

**Ed Goldberg**, Chief of TACOM-ARDEC's Intellectual Property Division, retired on 3 April 1997. Ed held that position for the past 10 years and before that he was a patent attorney at CECOM. Before entering government service, Ed was a patent attorney at ITT. We all wish Ed a long and happy retirement and sincerely hope that he draws the right cards in his bridge matches.

## Arrivals and Departures

### Arrivals

#### CECOM

**Carrie J. Schaffner** has joined the staff as labor counselor from the **IOC** Legal Office.

Welcome to **Marla Flack** who joined **CECOM's** Competition Management Division in March 1997. Marla came to CECOM from TACOM in 1989. She began in the Acquisition Center and moved to ARL in 1991.

April 1997

## Bouncing Babies!

As an update of a previous report, Katherine Elizabeth, infant daughter of **Joe** and Laura **Picchiotti**, came home from the hospital on 16 March. She continues to improve and has attained the weight of two pounds!

**Steve Kellogg** (General Law/Installation Support Division) and his wife, Lai Leng, welcomed the birth of their daughter, Victoria Irene, on March 5. "She's a doll" (her two brothers think she's pretty cute, too).

**Diane Travers** of the HQ Business Law Division gave birth to a beautiful baby boy. Joshua R. Stromberg was born on March 24, 1997. Mom and baby are home on maternity leave.

## Departures

#### CECOM

**Linda Daniels**, Paralegal Specialist since January

## Promotions

#### MICOM

We are very pleased to announce that effective 16 February, **Robert J. Spazzarini** has been appointed to the Senior Executive Service as Chief Counsel of **MICOM**.

#### IOC

Congratulations to each of the following attorneys:

**T. Harrison** has been promoted. T. is an attorney in the Acquisition Law Division.

**Amy Armstrong** has been promoted. Amy is an attorney in the General Law/Installation Support Division.

**Sandy Bierman** has been promoted. Sandy is an attorney in the Acquisition Law Division.

**Steve Kellogg** has been promoted. Steve is an attorney in the General Law/Installation Support Division.

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1981, of **Vint Hill Farms Station**, Warrenton, VA, accepted a Paralegal Position in Contract Law Division, OTJAG.

**William** and **Catherine Anderson** will be leaving **CECOM** the 25th of April for the Pentagon. Will has accepted a GS1222-15 in the Office of The Secretary of the Air Force. The couple both began with CECOM in 1989, Kate as an Attorney Advisor in the Procurement Law Division, Will as a Patent Attor-

*continued on next page.....*

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# Fifty Years Ago....

On April 15, 1947 in Ebbets Field, Brooklyn, New York, Jack Roosevelt Robinson became the first African-American to play in the major leagues of baseball since Moses Fleetwood Walker played for the Toledo Mud Hens in 1884 (the American Association was recognized as a major league in that era). The informal "gentleman's agreement" to exclude blacks ended when Jackie Robinson, the fifth child of a sharecropper from Cairo, Georgia, played first base.

Jackie was a four-sport star at UCLA. He was an officer in the Army during WWII. In 1944 he refused to go to a seat in the back of an Army bus. He was court-martialed but acquitted, receiving an honorable discharge.

Jackie became Rookie of the Year (the award is now named for him), Most Valuable Player in 1949, and contributed to Brooklyn winning six pennants and its only world championship during his 10 years in the major leagues.

Jackie Robinson conquered over unbelievable circumstances: a threatened strike by several teams, legal

segregation during Spring Training, numerous death threats and intentional attempts to injure him during games. One memorable moment occurred in Cincinnati when teammate Pee Wee Reese, a southerner, walked across the diamond and draped an arm around Robinson's shoulder, standing with him in defiance of the crowd's mood.

Jackie died of a heart attack, brought on by diabetes, on October 24, 1972 at age 53. This year, each major league player will wear a patch on his uniform that reads: "Jackie

Robinson, 50 years, Breaking Barriers".

At the beginning of the World Series of 1947, I experienced a completely new sensation when the National Anthem was played. This time, I thought, it is being played for me, as much as for anyone else. This is organized major league baseball, and I am standing here with all the others; and everything that takes place includes me.

—Jack Roosevelt Robinson

.....continued from previous page

ney in the Intellectual Property Law Division.

## IOC

**Carrie Schaffner**, Acquisition Law Division, left the office for a position with the Legal Group, ACALA, located at Rock Island.

**Mary Fuhr**, Acquisition Law Division, left the office for a position with the Rock Island Arsenal Legal Office.

**Roger Corman**, Acquisition Law Division, has ac-

cepted a position with the Department of Energy and will be leaving our office in May. Roger will certainly be missed, but he and his family are excited about heading West to beautiful Idaho. Good luck to you.

**Bob Blackwood** is leaving Pine Bluff Arsenal in April and heading west to Texas. Bob accepted a position with Corpus Christi Army Depot. Bob's new job as Depot Counsel is a promotion. Congratulations, Bob and best of luck.

## ATCOM

**James Casey**, IP Branch retired effective 31 January 1997.

**Abby Horowitz**, transferred to Los Angeles, California 28 March 1997.

**Anne Wright**, Claims Examiner, left government for a position with United Van Lines.

**Charles Blair**, Procurement Law Division, PCSed to Huntsville, Alabama 11 April 1997.

# The Government Contractor<sup>®</sup>

information and analysis on the legal aspects of procurement for contracts professionals



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*This first page lists, by headline, the paragraphed items appearing in this issue. Although this entire issue is protected by United States copyright law and international treaty provisions, you are permitted to copy this first page only and circulate it among your colleagues to alert them to the items you feel are of importance. A more detailed index appears at the end of this issue.*

¶ 81

## **FEATURE COMMENT • Tips For Agencies In Establishing Protest Procedures, And Factors Potential Protesters Should Consider In Selecting A Forum**

A RECENT FEATURE COMMENT in THE GOVERNMENT CONTRACTOR discussed bid protest litigation from the perspective that "most protesters will have to choose between three potential forums for bid protests—the U.S. Court of Federal Claims, those U.S. District Courts which have jurisdiction and venue, and the General Accounting Office." See Petrillo, Powell, & Conner, "Where To File The Protest? Implications Of The Expanded Bid Protest Jurisdiction Of The Court of Federal Claims," 38 GC ¶ 536. The omission of any discussion of the evolving world of higher level agency protests ignores a viable and powerful tool available to potential protesters.

THIS FEATURE COMMENT addresses both the concerns of potential protesters, and of agencies that are attempting to set up a higher level protest program. Regarding the agency viewpoint, the COMMENT analyzes the issues that typically arise in handling protests at the agency level, and suggests procedures to resolve protests (many of which have been used successfully in the Army Materiel Command's higher level agency protest process). With regard to prospective protesters, the COMMENT addresses what potential protesters should look for in an agency's protest program.

**Executive Order**—Higher level agency protests have been in existence in both civilian and military executive agencies for at least a decade. Based upon experience gathered from these protest forums, and the desire to provide an alternate dispute resolution type forum to the General Accounting Office and the courts, President Clinton in October 1995 issued Executive Order 12979, titled "Agency Procurement Protests" (see 37 GC ¶ 554). The Order set forth four goals regarding the resolution of contested procurements:

(1) All parties to the procurement should attempt to resolve matters with agency Contracting Officers;

(2) Agencies should prescribe procedures for inexpensive, informal, procedurally simple and expeditious resolution of protests, including permissible techniques that are not normally part of a formal protest process (use of third-party neutrals being one example);

(3) Agencies should allow interested parties to file protests for review of CO decisions which are alleged to have violated a statute or regulation, resulting in prejudice to the protester, at a level above the CO; and

(4) Agencies should implement a stay of award or of contract performance when a higher level agency protest is filed, unless it is in the best interests of the Government, or urgent and compelling reasons exist, which require immediate contract award or performance.

**Resolution of Procurement Problems with the Contracting Officer**—There is significant question in the procurement community as to how to interpret the Executive Order's first stated goal that parties attempt to resolve problems with agency COs. In the prebid opening or preclosing stage of a procurement, there is no question that any disagreement or suggestion as to the terms of the solicitation should initially be brought to the CO. This provides the CO with the potential to correct an error without the need for higher level involvement. It is only after a negative response (or a lack of a response) from the CO that a potential bidder or offeror should take its complaint to a higher level for resolution. If the problem is not solved to the satisfaction of the potential offeror, steps should be taken to initiate a timely bid protest appeal either to a higher level agency protest forum, the GAO, or the courts. In a postaward situation, however, time is of the essence because there is limited time from the date of notice of award or from the debriefing to file an appeal. Any attempt to resolve a potential protest with the CO by a losing bidder or offeror must be immediate. If the problem is not quickly resolved, steps must be taken to preserve the timeliness of protest allegations.

**Selecting the Protest Decision Authority**—The determination of who shall act as the protest decision authority is probably the most important determination to be made in establishing the higher level agency protest process.

An agency could choose to put the protest decision authority at a lower level—likely meaning an individual who is co-located with the CO, and who has had some degree of contact with the procurement under review. For instance, this individual may have had award approval authority, or have been involved in processing waivers or requests for deviations, or processing necessary interim approvals during the conduct of the procurement. However, the Federal Acquisition Regulation directly addresses this issue by stating: “Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the CO’s chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement” (FAR 33.103(d)(4); see 39 GC ¶ 7, addressing amendments made by Federal Acquisition Circular 90-45). Thus, as a practical matter, officials one step above the CO will normally be precluded from being the designated agency official.

Another possibility is to elevate the level of the protest decision authority to a position substantially higher than the CO. Such an individual should also be higher in rank than any likely higher level Source Selection Authority. When a protest decision authority is at this level, it is unlikely that he or she will have had any direct contact with the protested procurement. Being located in a different building, city, or state also makes unlikely any prior participation or knowledge of the procurement. An individual at this level can approach the protest like a “blank slate” for first time review of the procurement.

Must the higher level protest decision authority be in the CO’s direct “chain?” Prior to the Executive Order, it was always possible to file an agency level protest with someone who was higher than the CO but who also was in the CO’s chain of authority. In fact, this was often one of the most powerful means of protesting a procurement. Some protests were filed with a higher level official, like an agency Secretary (or Under Secretary) or an installation commander. A person in this position normally was not substantially involved in the area of procurement, but was directly in the CO’s chain of authority.

When that person received a letter of protest, he or she was in a position to let it be known to the CO that either the procurement had been conducted properly, or that corrective steps would be taken to rectify the error.

As noted in the FAR text above, there is no regulatory reason why an appropriate person outside of the CO’s chain should not be designated as the protest decision authority. However, whoever acts as the protest decision authority must not only have experience in the field of Government contracting (although not necessarily as a CO) and knowledge of the FAR, but also knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in which this person typically acts. No matter who is selected as the protest decision authority, it is important for that person to receive some form of legal assistance.

There are two primary candidates for protest decision authority other than someone in the CO’s chain of command. One is the agency chief counsel, senior procurement attorney, or other high level legal officer with significant procurement and protest experience. Their legal experience is invaluable in making sure that the higher level agency protest is decided in accordance with both the facts and the law. The second alternative is an ombudsman that is at a sufficiently high level to enforce agency compliance with a sustained protest. The ombudsman’s expertise is in the resolution of problems, and a protest is simply a specific kind of procurement problem in need of resolution, albeit an essentially legal one. The ombudsman, like the higher level procurement person, should use the assistance of experienced counsel for the formal resolution of a higher level bid protest.

No matter who is selected as the protest decision authority, the bottom line is this: that person must wield sufficient clout within the bureaucracy to be able to sustain a meritorious protest, an action which is likely to be resisted by the CO and his chain. That person must also have the authority to make sure that any rec-

commended corrective action in a sustained protest is properly implemented in the field.

**Agency Procedures**—Procedures for higher level agency protests should be short and clear. Their purpose is to alert potential protesters of critical aspects of the agency's procedures to enable them to make their choice of protest forum. The general sequence and procedures may resemble those of a GAO protest. However, the time provided for a higher level agency protest is only about one third of the 100-day GAO decision requirement. As such, compromises usually have to be made in structuring the process to allow the protest decision authority to decide cases within the permitted time. The goal should be to maximize the likelihood of providing a just and fair protest decision (one which will be upheld by a reviewing forum) in the limited amount of time available. Specific issues that commonly arise in protests, and suggestions for resolving those issues, follow.

*Stay and Stop Work Orders:* A stay of contract award or stop work order halting performance of a previously-awarded contract is a requirement of both the Executive Order and the FAR. The stay is a mandate that no contract be awarded pending resolution of the protest unless there is a written determination, approved at a level above the CO, that there are urgent and compelling reasons requiring immediate contract award, or that an immediate award would be in the best interests of the Government. The stop work order is a requirement that contract performance be halted pending resolution of the protest unless a similar determination is made. However, a protester is only entitled to a stop work order if the postaward protest is filed within 10 days of contract award, or within five days after a debriefing date offered to the protester under a timely debriefing request.

There are two critical factors about the handling of the stay of award or stop work order in a higher level agency protest. First, these actions are mandatory under both the Executive Order and the FAR. Second, automatic stays of award and stop work orders are also automatically available to a protester which files at GAO, absent an appropriate agency determination to proceed. Such determinations ("overrides") are

rare in GAO litigation. They also should almost never be necessary in an agency protest in light of the short time span for issuing decisions (FAR 33.103(g) establishes a goal that higher level agency protests should be resolved within 35 days after the protest is filed).

The AMC higher level agency protest program has an even shorter period for decision—20 working days. Based on available statistics, AMC has handled the highest number of higher level agency protests of any agency to date, and it has issued no overrides in almost 400 protest cases. There has been no acquisition which could not wait for the extremely short turn-around involved in AMC protest decisions. Reality dictates that firms will hesitate to use higher level agency forums if those forums routinely issue overrides prior to decisions on the merits. This is especially the case in light of the fact that overrides are rarely granted by higher level authorities when protests are filed at GAO.

*Administrative Report:* A common question presented after a protest is initiated is whether an administrative report should be provided to the protester. It is obviously a desirable goal to provide an administrative report to the protester. This facilitates full litigation of the protest, including the raising of all protest issues, at the agency level. However, it may not be feasible to do so. First of all, it is additional work for the contracting office, which is under a short fuse to provide its report to the protest decision authority. Second, if the report is provided, the protester must be given a reasonable period of time to submit its comments on the report, and the contracting office must be given an opportunity to respond. This is a major problem given the tight time constraints associated with agency protests.

On the other hand, the failure to provide an administrative report to the protester means that some issues will remain timely when first raised on appeal to GAO. In addition, the protest decision authority must realize that he or she bears a significant risk when making a decision without the full comments of all parties.

The approach taken in the AMC protest program is that its regulations do not provide for production of an administrative report as a matter of right. However, if the attorney drafting

the decision sees the need for further comment by the protester based upon release of specific documents (for example the CO's statement or a technical analysis), he or she will request permission for release of this material, making sure that documents or portions of documents which must be protected are not released. This permits comment by the protester on critical protest issues (and rebuttal by the contracting office), without making document release a mandatory part of the agency protest process. This methodology clearly has been working, in that only two (of almost 400) AMC higher level agency protests have been reversed on appeal.

*Protective Orders:* The most controversial issue regarding release of documents in the agency level protest process is the potential use of "protective orders" to permit release of a full administrative report to a protester's counsel. One practical reason against this is simply the time factor. However, even apart from the time factor, it is recommended that those desiring full release under a protective order currently have viable protest forums (GAO and the courts) where they can obtain a protective order and litigate their issues at the more leisurely pace that full disclosure of documents demands. Those forums also have a wider range of sanctions available for violations of a protective order. (It is questionable whether agencies truly have any viable sanctions available for such violations.)

**Selling Higher Level Agency Protest Programs**—Once a higher level agency protest program has been established (a protest decision authority has been selected and procedures for processing the protest have been developed), the biggest question to the agency is whether anyone will bother using it. The clear answer is yes, so long as the program is properly "sold" to the consuming public, namely firms that currently contract with the Government, potential contractors, and law firms that represent contractors and potential contractors.

The AMC higher level protest program is the most widely used program to date, with almost 400 protests having been filed since 1991. The reason for this level of activity is that the program has been actively promoted from the highest level of the command (its Commanding General) down to the working level attorneys in

the program. Their collective efforts have resulted in numerous protests being filed at the AMC level rather than with the GAO (or, prior to this year, with the General Services Administration Board of Contract Appeals).

The selling effort has been accomplished through several paths. At the most basic level, notice of the AMC higher level protest process is included in solicitations issued by AMC contracting activities. At the General Officer/Senior Executive Service level, AMC's top level management has described the program and encouraged its use during presentations at major industry gatherings. The theme has been that while the process is quick from start to finish, protests will receive an intensive review by experienced procurement/protest attorneys prior to decision by the protest decision authority, and complaints will be fairly and impartially reviewed. Not infrequently, this has resulted in Chief Executive Officers of major firms bringing up specific procurement problems to the speaker. This usually results in a repeated reference to the higher level agency protest forum (and the ombudsman, when the topic is appropriate). Multimillion dollar protests have been brought into the forum in this manner.

The process has also been "sold" intensively at the working level. AMC acts as the point of contact for all GAO protests involving its subordinate contracting activities. In its initial correspondence to protesters (be they pro se or represented by counsel), AMC includes a brief description of its higher level agency protest process and an invitation to the protester to make use of this process. Individual AMC attorneys are also involved in giving presentations on the AMC higher level protest process at bar association meetings and at other forums. In addition, the process is mentioned, discussed, and promoted whenever possible with opposing counsel and pro se litigants during the conduct of GAO protests with the hope that the litigant can be convinced to file future protests at AMC.

Ultimately, one of the biggest factors in the success of a protest program is the reputation in the community of the attorneys handling the protest. At AMC, the drafting attorneys are the same attorneys that are responsible for GAO litigation. Thus, private law firms with experi-

ence in GAO protest litigation have a feel for the quality of the work that will be done should they file their protest with AMC. The reputation has developed over a decade, and is likely a major factor in the large number of protests filed at this forum.

Thus, with a well-planned approach to promoting a higher level agency protest program, a significant proportion of bid protests can be diverted from outside forums. However, while these methods can bring law firms or contractors to the forum in one protest, it is only the fairness of the program, both in fact and as perceived by the litigant, that results in repeat customers and referral of others to the program.

**Advantages to Using Agency Procedures—** Even after agencies select higher level bid protest decision authorities, draft regulations for handling the anticipated protests, and sell their products to the consuming public, the critical question remains for the potential protester: Why should I file my protest with this higher level agency bid protest authority rather than with GAO or the courts? There are several significant reasons why a potential protester should file at a higher level agency forum once a determination is made that it respects and trusts that forum.

The first reason is simply a matter of reciprocal customer relations. If your firm is responding to an agency's solicitations, you obviously consider that agency to be a customer or potential customer of your firm. On the other hand, to the agency, your firm is a supplier or potential supplier of goods and services. By filing your initial protest at the agency level, you are providing the agency with the opportunity to review your protest and take corrective action, if warranted, without being in the limelight of a sustained GAO protest. A sustained GAO protest is not only published, but is also sent to the agency head, a form of attention which no CO should willingly seek. A sensible agency will be aware that it is being given the chance to "clean up its dirty linen" in house, if that is what the facts reveal.

Practical reasons also exist for deciding in favor of a higher level agency protest forum. The first is that the decision on the protest is faster than in any other forum. If a protest is

filed at GAO and an override is granted by the agency, performance may be complete prior to GAO's decision. As stated above, there should be few protests in which an override is granted when the protest is filed with a higher level agency protest decision authority.

In addition to speed of decision, the process is normally more informal and procedurally more simple than procedures in other forums. Costs of litigating the protest are likely to be less than in other forums. Because of simplified procedures, there is increased opportunity for a potential protester to file without counsel. Even if a protester does use counsel, costs still are likely to be low because in those agency protest forums where administrative reports are not provided, the primary involvement of counsel will be the drafting of the initial letter of protest.

Significant substantive reasons also favor selecting a higher level agency protest program. The first is that GAO and the courts must review a protest based upon statute and regulation. However, many procurement problems do not obviously violate either statute or regulation, and may thus not be a basis for a decision in favor of the protester in these forums. Such problems may not be recognized by the CO or the working level team of evaluators, but may cause corrective action if brought to the attention of a higher level agency protest decision authority. This is especially the case regarding prebid opening or preclosing matters, usually involving evaluation factors, specifications, or the statement of work.

A protest to GAO of an apparently minor aspect of the evaluation factors, specification or statement of work, which might appear insignificant to an inexperienced observer, could easily result in a decision that the agency may define its own needs. However, review by higher levels within the agency by persons with expertise in the area may generate different results, especially since these are the people responsible for defining the agency's needs. Corrective action in such situations, when the matter is timely raised, is a low cost method of correcting the problem for the Government.

Timeliness concerns also favor filing at the agency. If a protest is not timely filed at the

GAO, it will not be heard. Agencies, however, are free to review protests and take corrective action *at any time*. If a protest is clearly meritorious, and the protest is only slightly untimely, chances of relief are enhanced, especially in a pre-award mode.

The higher level agency protest program is capable of handling both pre- and postaward protests, including the simple and the complex. The AMC level protest program has reviewed individual best value awards worth almost \$600 million. Resolution of such complex protests may involve extension of the usual time for decision, but there are frequently supplemental protests in such cases which permissibly extend the decision time.

**Possible Disadvantages are Minimal**—Assuming an experienced and qualified protest decision authority (and supporting staff), the only likely disadvantage in comparison to other forums is the lack of full discovery of the administrative record under a protective order. Thus, the cornerstone of the decision regarding where to file the initial protest will frequently boil down to the question of whether the protester feels that it needs a protective order and full administrative report.

Another possible disadvantage involves a fear often expressed by protesters that they will lose their stay if they lose the agency protest and decide to appeal to GAO. This is a matter which should be dealt with through negotiations prior to filing the agency protest. The potential protester should specifically request that the agency agree to continue the stay if the agency dismisses or denies the protest, and the protester appeals to the GAO. The agency's decision on continuing the stay will be a factor in the protester deciding where to file its initial protest.

Further, if the protester's basic outlook is that the agency is biased and unfair, or perhaps does not have the experience to do the job, it is wasting its time and the time of the protest decision authority by filing with the agency.

**Conclusion**—It is clear that higher level agency protest programs can serve as a quality alternative to protests at GAO and in the courts. They offer significant advantages not available in other forums. These advantages include speed,

low cost, greater opportunity for review of an untimely protest, and the potential for enhanced "customer relations" for both the protester and the Government. In addition, while higher level agency protests must conform to statute, regulation and precedent, there is also the ability, primarily in the prebid opening or preclosing time frame, to review problems which may not violate statute or regulation, but represent unwise actions on the part of the agency. The primary downside to the protester is the likelihood of less discovery, which may or may not be a factor in any given protest. In fact, the AMC experience has shown that once parties have faith in the forum, they are willing to accept this aspect of the process, knowing that they have access to appeal if they deem it necessary. Thus, the challenge to each agency is to create higher level protest forums which protesters will trust sufficiently to use, and to prospective protesters to seek out and make use of these programs.

★

*This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Jeffrey I. Kessler, a civilian protest attorney for the U.S. Army.*

## ¶ 82

### **ITAA Calls Government Cost Estimates For Year 2000 Compliance "Incredibly Low"**

The Government has grossly underestimated the costs involved with resolving the year 2000 computer problem, according to the Information Technology Association of America. Agencies estimate that they will spend \$2.3 billion between Fiscal Years 1996 and 2000 on software code date-field conversion, a figure well below the \$30 billion estimated by private sector experts. By establishing such "incredibly low" cost estimates, "the Administration is not showing sufficient commitment to meeting the challenge," stated Harris Miller, ITAA President.

The Government's cost estimates are compiled in an Office of Management and Budget report, "Getting Federal Computers Ready for 2000," that was submitted to Congress with President Clinton's Fiscal Year 1998 budget re-

## TEN TIPS FOR A GREAT CONTRACTING OFFICER'S STATEMENT

### 1. Tell It Straight

Above all, be candid. Tell it straight and don't "spin" the facts. If you're caught in a half-truth, it will undermine your position – no matter how strong. In addition, if you later discover an inadvertent misstatement, tell your attorney immediately – so that AMC can inform the GAO and the other parties.

Similarly, be reasonable. Make sure that every statement or argument passes the "straight-face-test" (at a minimum!). If it doesn't, don't use it. Even one unreasonable statement will undermine your credibility.

### 2. Cover Every Argument

Make sure you address each and every issue which the protester raises. If you don't, the GAO may decide that you have conceded the protester's argument.

This will be more difficult for you if you receive a rambling or extremely disorganized protest. In this case, it may help to impose your own reasonable organization on the protest issues. But at any rate, cover them all.

### 3. Cite Effectively From The Record

Make sure you follow every factual statement with a citation to the Record. ("The Record" means all relevant documents, e.g., RFP, Technical Evaluations, Source Selection Decision etc ... ) Your citations should be complete; that is, they should lead the GAO attorney to the exact location of the information. As an example:

(See TAB X, para.Y, p. Z.)

In addition, you can enhance the impact of your Statement if you provide relevant quotations from the Record, especially from the RFP. (See Attachment 1 for an example.) Don't go overboard, though, as too many quotations may dilute your analysis.

### 4. Be Complete – But Concise

Your statement will be most effective if you strike a healthy balance regarding the level of detail.

Above all, be complete. This means you should discuss the program, procurement, and protest issues in enough detail so the GAO fully understands your decision and the context in which you reached it. Write as if your reader knows nothing about your program or your procurement.

Balance this, however, with a reasonably concise style. Focus on what's relevant. Make every word count!

### **5. Include A Clear Organization**

There are a number of ways to organize your Statement. Do whatever makes sense and is comfortable to you.

At a minimum, be sure to include a description of the program (i.e., background); a chronological statement of facts; an analysis of the facts in light of the protester's arguments; and your conclusions and recommendations.

If your Statement is very complex, consider using some effective headings. This will help your reader follow your Statement better.

### **6. Put Your Conclusions First**

Tell your reader where you're going. State your key point or conclusion up-front. That way, your reader will understand the relevance of the information which follows.

Sometimes, people refer to this technique as giving the reader a "road map":

1. Here's what I'm going to tell you.
2. Now I'm telling you.
3. Here's what I told you.

You can and should use this technique on all levels of your Statement: overall; for each "argument"; and even for paragraphs. This technique is especially useful for complex or confusing procurements.

### **7. Two Words: Active Voice**

Use the active voice. It has two advantages: clarity and responsibility. First, it is the clearest way to tell your story. Second, it shows that we are willing to take responsibility for our actions. (E.g., "I determined that Acme's proposal represented a high risk approach. I based my determination on the following: ....")

### **8. Keep It Professional**

Your tone should be confident and professional. When you point out a protester's mistakes or failures, do so in a straightforward, calm manner -- never angry or in a manner that belittles the protester.

## **9. Keep It Simple**

Your Statement will be easiest to follow if you use a simple and direct style. Some examples include:

- a. using short and medium-length sentences;
- b. keeping the subject and verb close together;
- c. avoiding "run-on" paragraphs; and
- d. using simple, familiar words (e.g., "think" instead of "deem")

## **10. Avoid Acronyms, Jargon**

When you write, always remember your reader. He or she won't understand our "inside" language. So, be sure to use terms which an "outsider" can understand. If you must use acronyms, be sure spell them out first.

ATTACHMENT ONE

5. Regarding the preparation of responsive proposals, the RFP provided:

L.31.3. The offeror is cautioned that unsupported promises to comply with the contractual requirements will not be sufficient. The proposal must not repeat the contractual specifications, but rather must provide convincing documentary evidence in support of any conclusionary statements.

L.31.5.1. PART I - (Technical/Management): Offeror is responsible for including sufficient details (WITHOUT REFERENCE TO COST) to permit a complete and accurate evaluation of the proposal strictly from a Technical/Management standpoint.

App. 22-23 (emphasis added).

Replace Section 80201 with the following:

**80201 GENERAL** The overall policy concerning logistics support is shown in Section 20202. This section provides guidance in logistics related areas not covered elsewhere in the Manual.

- A. Use of US Logistics System** Implementation of LOAs will be accomplished within the existing organizational and procedural structure of the US military logistics, including acquisition, system. Use of the DTS is an exception to this policy as discussed in section 80206.
- B. Items to Reflect Favorably on US** Items provided under FMS will normally be new or unused or, as a result of rehabilitation, possess original appearance insofar as possible and have serviceability standards prescribed for issue to US forces. If the Purchaser desires exclusively new equipment, this requirement will be stated in the LOA. If the Purchaser desires "as is/where is" items, this will also be stated in the LOA.
- C. Purchaser Service** Delivery performance directly reflects the degree to which the US meets its FMS commitments and is therefore a key element of the supplier-customer relationship. The importance of prompt and effective service to the Purchaser must be continually emphasized to assure overall success in the attainment of FMS program objectives.
- D. Discrepancy Reporting** Every effort must be made to provide the correct defense article or service in the quantity and quality shown in the LOA. Positive actions should be taken to prevent discrepancies. After a discrepancy has occurred, the submission of a discrepancy report should be encouraged. In order to take advantage of a fresh audit trail, Purchasers should be reminded of the importance of reporting discrepancies as soon as possible. SDR (ROD) submissions should be recorded to find and correct program weaknesses and minimize loss of resources and customer confidence. SDRs will be considered based on guidance in Section 80207.
- E. ILCS** The International Logistics Communication System has been developed for the improvement of logistics communications service to SA countries, freight forwarders, and contractors. DLA's DAASO, Wright-Patterson Air Force Base, OH 45433-5328 manages ILCS under DLA General Order 2-83, dated 10 January 1983. As a stand-alone system, or in tandem with processes such as Supply Tracking and Repairable Return/Personal Computer based (STARR/PC), ILCS provides a computer-to-computer telecommunications capability which allows a subscriber to exchange logistics related information with the DoD logistics community and other ILCS subscribers.
- F. Direct Exchange (DX) and Repair and Return Programs** A serviceable item in the stocks of DoD may be exchanged for a repairable item of the same type under certain conditions. The repairable must previously have been obtained under the AECA, must not be an end item, and DoD (including FMS) must have a requirement for the repairable item. Programs may be executed under defined line, BO, or CLSSA LOAs. Also see DoDD 4000.21-1-M.
1. To accept the DX repairable, it must be assured that sufficient customer funds have been provided for the cost of the serviceable replacement. The requisition for the replacement will normally be filled according to normal supply procedures.

2. Repair and return will normally be used when a serviceable replacement is not available from stock on hand or due in within a reasonable time, or if the customer requests repair and return of a specific item. Repair of a customer-owned article requires that the customer return a repairable article under an LOA established for that purpose and await the necessary leadtime for repair. For either DX or repair and return, the total cost will be the same as that charged US forces for similar transactions, plus normal administrative surcharges.

**G. Returns** Returns should be accepted if the defense article (1) was previously provided under the AECA, (2) is not SME, and (3) is in fully functioning condition without need of repair or rehabilitation. DoD, including FMS requirements, must have a funded requirement for the defense article. The customer will not be reimbursed directly, the customer's FMS account must be credited to reflect the transaction, using DoD appropriations or other customer funds, dependent upon the buyer. Also see DoDD 4000.21-1-M and DoD 4140.1-R.

1. Return credits may be added, at customer request, to specific BO or CLSSA LOAs. In order to facilitate program efficiencies (e.g., automated processing), no more than three country LOAs will normally be designated to receive credit funds.

2. Title for returned items will normally accrue to the US following acceptance at the point of US receipt inspection. Returns to or through US controls do not constitute a third party transfer as discussed in 60004.

Paragraph 80206.G.1.c.(1) will be replaced with:

(1) Shipments of sensitive material (Sensitive Arms, Ammunition, and Explosives Categories I, II, III, and IV; see DoD 5100.76-M), including sensitive ammunition, explosives, and other hazardous materiel moving under DTS control, will be shipped DTC 7, 8, or 9, through CONUS water or aerial ports controlled by DoD. FMS shipments of non-sensitive ammunition and explosives or other controlled items, such as pilferable materiel, shown by their Controlled Inventory Item Code (CIIC) to be non-sensitive may be transported to or through Purchaser representatives (normally freight forwarders) and through CONUS commercial airports or seaports, providing:

(a) The Purchaser has directed the shipment in response to a shipper-supplied Notice of Availability (NOA).

(b) The shipment, if hazardous, is certified by the shipping activity for commercial shipment in accordance with 49 CFR (Code of Federal Regulations)/IMDG (International Maritime Dangerous Goods code)/ ICAO (International Civil Aviation Organization)/IATA (International Air Transportation Association) requirements. The Purchaser representative must also comply with international, federal, state, and local codes when handling, storing, and exporting the materiel.

(c) Any classified material is transitioned from DTS to non-DTS channels in accordance with the approved transportation plan developed by the Purchaser (see Table 503-4).

This guidance will normally allow items initially moved via DTS to be released to a Purchaser representative for temporary storage and movement beyond CONUS when the representative has demonstrated experience or the capability to safely and securely ship similar items, from FMS or commercial sources. This will include

movement of most Hazard Division 1.4 items, such as CAD/PAD. If doubt exists, the IA should confirm experience or capability by obtaining, from the Purchaser representative prior to shipment, information showing comparable items have been handled in the past, or other information which confirms capability.

Paragraph 80206 will also be changed by replacing Paragraphs N. and O. with the following (Paragraph P., Documentation, has been moved to Section 80207.C):

N. **Tracers** When the IA has furnished status showing item pickup by a carrier, but materiel has not been received, the Purchaser is responsible for conducting tracer action. Regardless of whether the shipment was tendered on a prepaid or collect basis, and whether shipment was a small parcel or freight size carrier, DoD shipping activities will assist by providing evidence of shipment documents, or pertinent information from the documents, so the Purchaser can effect the tracer action.

1. For all shipments processed through a freight forwarder, tracers should first be directed to the freight forwarder and, if the item has been transshipped, to the addressee.
2. If it is believed that the item has not been received by the freight forwarder, a request for shipping information should be sent to the activity from which shipment status was received. That activity will provide a copy of the bill signed by the carrier and shipping information such as TCN, bill of lading number, carrier, and date of shipment. Further follow-up should then be made to the freight forwarder to ascertain if the item has, in fact, been received.
3. If the item is still missing, the Purchaser should assure the freight forwarder starts tracer action with the carrier, obtains proof of delivery, or makes a claim against the carrier on behalf of the Purchaser. During the intransit stage of movement (carrier departure at origin to arrival at destination), the IA ILCO may be contacted for coordinating correction of potential discrepancies; e.g., to redirect a shipment which would otherwise go astray.

O. **Transportation Discrepancies** If the DTS ships an item (GBL or small parcel carrier) to an FMS recipient, including a recipient freight forwarder, and loss or damage occurs, the recipient must file any claim with the carrier. If resolution with the shipper is unsuccessful, recipient may submit qualifying SDRs per section 80207 to request additional shipment or billing information or to obtain IA assistance in resolving the discrepancy. The USG has responsibility for filing and processing claims with carriers when shipment is made on a prepaid basis to DoD activities. When the USG files the claim, the benefits will be reimbursed to the Purchaser. The US shipper should provide information, complementing that provided under paragraph N above, needed to support claims discussed in this paragraph.

New section 80207 will be added as follows:

#### **80207 PROCESSING SUPPLY DISCREPANCY REPORTS (formerly RoDs)**

A. **General** This section provides SA-unique guidance for processing of SDRs (SF 364). Further guidance, such as definitions, instructions for SF 364 completion, DoD processing timeframes, and responsibilities may be found in Joint Regulation DLAI 4140.55/AR 735-11-2/AFJMAN 23-215/NAVINST 4355.18, "Reporting of Supply Discrepancies," hereafter referred to as JR 4140.55. Initial screening of FMS SDRs is outlined in Table 802-1. Table 802-2 summarizes the financing of SDRs. See Section 80206 for additional guidance regarding transportation tracers and discrepancies and 130802 for

further financial guidance. Should guidance elsewhere appear to conflict, guidance herein will normally be followed.

1. AECA Sec 21 and 22 requirements that USG recover full costs under FMS also apply to SDRs. FMS customers directly or indirectly fund DoD procurement, DBOF item surcharge, and other costs related to discrepancies. Emphasis should be placed on providing articles and services under terms and conditions shown on the LOA, at minimum cost and with maximum customer satisfaction.

2. Item discrepancies are often not due to USG erroneous action or inaction. Further, not every USG erroneous action or inaction gives rise to responsibility for SDR compensation from USG or FMS funds. Table 701-1, LOA Standard Terms and Conditions, should be studied by the IA and FMS customers, with particular attention to 1, 3, 5.4, 6, and LOA supplemental conditions pertaining to assumption of risk. There should be no automatic approval of SDRs based solely on dollar value. Until final decisions are available, commitments to the customer for US financing of discrepancies will not be made.

3. Due to loss of information and customer confidence with the passage of time, SDRs will be addressed as thoroughly and quickly as possible. SDR responses should be provided by the IA within timeframes established by JR 4140.55. Any extension must be approved by the IA FMS SDR focal point. Any required DSAA review should be completed within 30 days of receipt within DSAA.

4. DSAA approval will be obtained when (1) The IA determines the USG is liable for correction of the SDR under terms of the LOA and recommends use of FMS Funds, and the value is in excess of \$50,000; or, (2) The SDR involves an issue likely to be raised at DSAA or higher levels, such as treatment to one country which is not consistent with guidance herein.

5. Each IA is responsible for designating to FMS customers the single point(s) of contact for SDR corrective action. Only those points and DSAA are authorized to accept and convey USG liability or originate a commitment for corrective action.

6. When customer countries re-requisition items, the current price should be paid without regard to the price under the original requisition.

7. Any problems involving GFE furnished per Section 603 should be directed by the foreign customer to the contractor. FMS funding and FMS SDR processing do not apply to these sales.

B. **Supply Discrepancies** These include shortages or overages due to incorrect quantity counts, improper packing or marking, duplicate shipments, incorrect items, and condition or quality discrepancies (including damage) prior to release to the carrier by the origin shipper. They also include, for security assistance purposes, documentation, including billing, errors and deficiencies in performance of services. Non-receipt of shipment units qualify only if no evidence of shipment (signed carrier receipt and shipping document) can be produced by the shipper. The IA, in conjunction with the DoD or commercial supply source, retains responsibility for resolving these problems and determining financial responsibility.

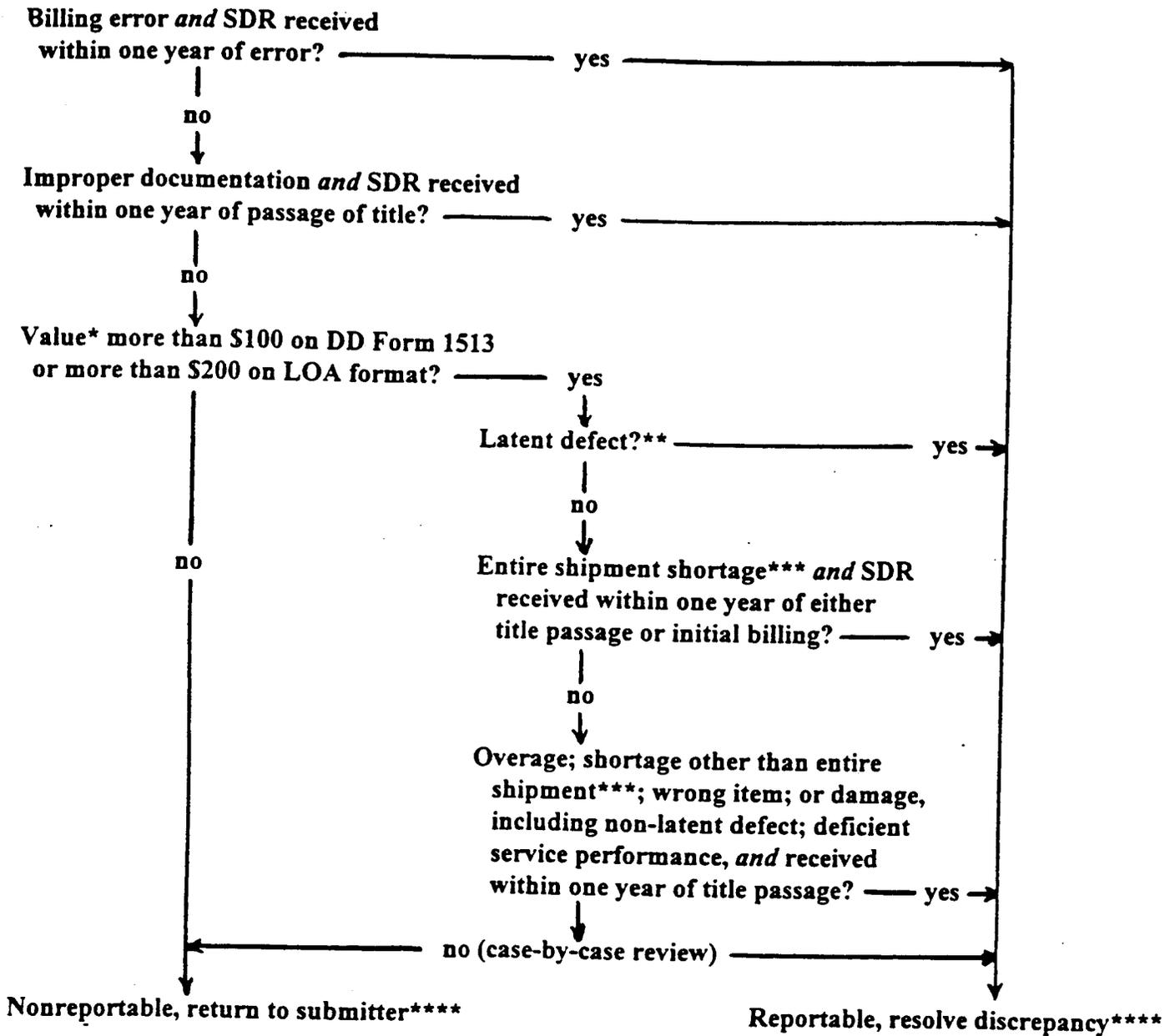
C. **Shipment Documentation** Any movement document or receipt, signed by a carrier representative, which shows that the US has shipped or released materiel to a carrier for shipment to the country's designated representative, constitutes evidence of shipment. Such documents generally show the

quantity, NSN, mode of shipment, date, TCN, notice of availability number, bill of lading/parcel post insured or registered number, addressee, vessel/voyage or flight number (to the extent possible), and name of the shipper and carrier. This information is essential for adjudication of SDRs. If the freight forwarder has not received the consignee copy of the bill of lading, and proof of delivery to a carrier is requested, a duplicate of the appropriate documents establishing evidence of shipment will be provided to the customer representative.

D. **SDR Documentation** The documentation package is often the key to effective SDR resolution. It should be initiated carefully but quickly after a discrepancy is reported and expedited through each step. The following are required when SDRs are submitted to DSAA and should be merged into IA procedures tailored for effectiveness (e.g., less research/documentation for low value and non-sensitive item SDRs):

1. Copy of the SDR, SF 364, and supporting data from the customer.
2. Copy of the LOA and any Amendment or Modification bearing on the discrepancy.
3. Chronology of events. The following statement covers pertinent events for most SDRs: "The SDR was filed within the time period allowed by the LOA, which in this instance is [period, normally "one year"] from ["the date of shipment"/"the date of furnishing of services" or "the date of billing"]. Date of ["shipment"/"completion of services"] was [date]. Date of billing was [date]. The SDR was received by [organization] on [date] with document origination date of [date signed by initiator]." Principal SDR processing actions and dates, present status of any assets, and other substantial information pertinent to the SDR background should also be included.
4. An IA General Counsel position regarding USG liability, to include "This office was furnished relevant documents pertaining to SDR [number]. The determination of USG liability for this SDR is supported by [list LOA General Terms and Conditions paragraph(s), footnotes, attachments, legal principle, legal precedent, or other bases for the determination]."
5. Options, with costs, to remedy the SDR. Discuss article or service the USG was responsible to provide. How does that differ from what the country was provided? Will the supply source repurchase the item(s), hold item(s) for DoD/FMS sale, repair, or replace the item? Provide detailed cost estimates, including transportation, TDY, and other associated charges for each remedy. If rework or repair is indicated, include source documents, if possible, from the office responsible for correcting the SDR upon receipt of authority.
6. Corrective action. Discuss policy, procedure, or systems change; education; or other actions to reduce probability of reoccurrence.
7. Retention of records. Show status of records required for resolution, including present and anticipated preservation.

**TABLE 802-1  
INITIAL SUPPLY DISCREPANCY REPORT (SF 364) SCREENING**



\* Example - Ten items, with a U/P of \$100, are shipped together. When received, five have damage which will cost \$150 to repair. Four are missing. The SDR value is \$550 plus transportation, PC&H, or other directly related costs.

\*\* Detection of reduced item operability is dependent upon initial operation or extensive testing, disassembly, or other extraordinary receipt inspection.

\*\*\* When shipped through a freight forwarder, return to submitter if freight forwarder verification that material has not been received on the TCN that applies is not provided.

\*\*\*\* All SDRs which contain sufficient information to be useful in trend analysis should be recorded and, based on continuing process refinements, minimized.

**TABLE 802-1. Initial Supply Discrepancy Report (SF 364) Screening**

**TABLE 802-2**

**FINANCING SUPPLY DISCREPANCY REPORTS**

The table below shows the most common SDRs and methods of financing when IA research results in approval of an item discrepancy. In summary, corrections will normally be financed:

- (1) Within contract costs for DBOF, O&M, PA, and RDT&E items obtained from procurement.
- (2) Within the surcharge for DBOF items or services supplied from stock.
- (3) From the O&M, PA, or RDT&E account for O&M, PA, or RDT&E items supplied from stock.

(4) From the FMS (Administrative, Transportation, or PC&H) Fund accounts when sources above do not apply. These SDRs are to be financed from current year FMS Administrative/Logistics Support Expense (LSE) budget obligation authority, or reissuance of past unused budget authority.

<u>Nature of Discrepancy</u>	<u>FMS Funds \1</u> (Admin, PC&H, Transportation)	<u>USG Funds/Appropriations</u> (DBOF, PA, O&M, RDT&E)
1. Damage, Defect, or Other Deficiency		
a. From Procurement \2	Generally not applicable except where US action or inaction caused inability of USG to obtain satisfaction from contractor for customer	Generally not applicable. Usually corrected by contractor within existing contract terms.
b. From Stock	Peripheral costs of correction (e.g., testing, transportation, TDY)	Replacement, refund to customer account, or rework of defective items for costs not listed under FMS Fund heading
2. Nonreceipt or Shortage		
a. From Procurement \2	Generally not applicable except where US action or inaction caused inability of the USG to obtain satisfaction from contractor for customer	Generally not applicable (Normally corrected by contractor within existing contract terms)

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**TABLE 802-2. Processing Supply Discrepancy Reports**

b. From Stock	Not applicable except where item shipped DTS and US action or inaction caused inability to obtain satisfaction from carrier (see 80206 and USG Fund/Appropriations column at right)	(Shortage/misdirection at origin based on no evidence of shipment) Credit to customer account, charged to USG fund or appropriation initially credited. Lost items will be absorbed as inventory losses.
3. Overage		
a. From Procurement <u>2</u>	Generally not applicable	Generally not applicable
b. From Stock	Generally not applicable See next column.	If billed and customer does not want item, amount charged will be refunded to customer account and USG appropriation fund charged. If USG directs no return, will be absorbed as inventory loss
4. Incorrect Item		
a. From Procurement <u>2</u>	Generally not applicable See next column.	Generally not applicable. Normally corrected by contractor within contract terms.
b. From Stock	Generally not applicable See next column.	Unless the item manager chooses to reissue, refund to the customer account, charged against appropriation or fund initially credited. If USG directs no return, absorb as inventory loss.
5. Missing or Improper Documentation		
a. From Procurement <u>2</u>	Generally not applicable See next column.	Generally not applicable. Normally corrected by contractor.
b. From Stock	Generally not applicable See next column.	Issue documentation and/or proper items without additional charge to FMS customer. If not available for issue, refund against USG appropriation/fund initially credited. If USG directs no return, absorbed as inventory loss.

TABLE 802-2. Processing Supply Discrepancy Reports

6. Duplicate or Erroneous Billings (From procurement <u>1</u> or stock)	Generally not applicable See next column.	Refund or adjustment to customer account. Adjustments charged against appropriate USG or customer account.
7. Loss of Customer Item (provided for repair, etc)	Reimburse customer when item is nonstandard (no longer maintained in USG inventory)	Reimburse customer when item is DoD standard (currently maintained in USG inventory) and the loss is bookkeeping or inventory control only.

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1 In some instances, Administrative, Transportation, or PC&H funds may complement other financing for SDR resolution. For example, it could be appropriate to reimburse PC&H or transportation costs for initial delivery of an overage when this is the sole means for resolution.

2 Procurement includes defense articles and services acquired to fill the FMS requirement and therefore not supplied from on-hand DoD assets. Both stock and procurement guidance may apply in some instances (e.g., item on hand in DoD inventory reworked through a commercial contract prior to shipment).

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**TABLE 802-2. Processing Supply Discrepancy Reports**

## BEST VALUE UNDER THE REVISED A-76 HANDBOOK

The Revised Supplemental A-76 Handbook (March 1996) appears to have fallen considerably short of the mark in its attempt to interject best value contracting into the A-76 process. The Handbook now recognizes that the Source Selection Authority should identify the contractor offer which “represents the best overall value to the Government” (Chap. 3, H.3.c., page 12). However, the Handbook fails to have the competition between the selected contractor and the Government in-house MEO also conducted on a best value basis. This selection is based on an go/ no go/ low price evaluation where a minimum 10 percent or \$10 Million cost differential must be established to convert to contractor performance (Chap 4, A1, page 28). This disparity in selection criteria for the two competitions a) actually discourages the use of best value contracting in selecting the best contractor, and b) may not allow the type of selection decision that would be most useful in deciding whether or not to proceed with innovative programs, like the M109 Fleet Management Program, that offer potential system enhancements as well as cost savings.

Having different selection standards for the contractor/contractor and contractor MEO competitions will most likely cause Source Selection Authorities to use go /no go / low price in both competitions. If best value is used in the contractor competition, contractors would be told that the winning contractor will be selected based on merit factors as well as price. (For pilot programs to reinvent the system where only cost type contracts will be possible, merit will most likely be at least equal to or greater in importance than cost.) Contractors will also be told in the contractor/contractor best value competition that the Government reserves the right to award to other than the low offeror or the highest merit proposal. Under these conditions, contractors will not be proposing their least expensive method of performing the work. Consequently, the contractor selected in the contractor competition may be the best value for the Government, but it probably won't be the least expensive contractor in the field. Yet, this is the contractor that will be pitted against the Government MEO bid that is prepared for a competition where A-76 procedures only allow selection to be based on a determination whether in-house or contractor performance is least expensive. Industry will readily recognized the futility of competing under these conditions: Other than low cost contractor offer v. MEO proposal prepared for low cost. In addition, the best value contractor proposal also will have to beat the MEO proposal by at least 10 per cent or \$10 Million in cost savings in order to be considered for award. Contractors won't want to play in this game. Market surveys for the M109 Fleet Management Program, for example, have indicated a strong industry position that unless the A-76 contractor / MEO selection procedures give contractors a fair opportunity to receive award, industry will not expend the effort and expense to propose innovative solutions on how to reinvent the M109 maintenance and supply system. To ensure industry's participation in the pilot program, the Source Selection Authority must either obtain some type of waiver relief from the A-76 cost comparison procedures or abandon best value in the contractor / contractor competition in favor of go/no go/low cost in both the contractor / contractor and contractor / MEO competitions.

Omitting best value analysis from the contractor / MEO selection decision causes a special frustration for pilot programs that are intended to examine whether outsourcing could produce substantial and innovative system performance enhancements as well as cost savings. The point of having a pilot program is to do a test case to see what differences in performance, risk, and cost can result from outsourcing. Ideally, the decision whether or not to go forward with a pilot program should involve an examination of the differences in performance and risk that are associated with the differences in cost between contractor and MEO. Under the present A-76 procedures, the Source Selection Authority can only take the performance improvements that result from industry innovations, give the MEO an opportunity to meet the higher standards, make a go / no go type determination that the higher standards have been met and then treat both offerors as if there are no performance or risk differences. An innovative contractor solution that has proven successful in the private sector and that offers greater system enhancements and lower risk will not be permitted to be tried if the contractor can only show a 9 per cent cost savings over an MEO that has yet to exist and didn't have the expertise to propose the innovative solution. For all the reasons that best value source selection is superior in complex buys, best value should be available to the Source Selection Authority deciding whether a pilot program to revamp a suspect system would be worthwhile.

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AMCCC-PA

POINT PAPER

31 March 1997

SUBJECT: Contractor Technical Experts in Germany

PURPOSE: Provide information about how a new interpretation of "technical experts" affects AMC

FACTS:

- German state authorities recently adopted a more restrictive interpretation of who qualifies for "technical expert" status under Art. 73, NATO SOFA Supplementary Agreement. This affects AMC and all DoD contracts which call for U.S. contractor employees to perform services in Germany.
- Article 73 states, "technical experts...who serve (the) Force in an advisory capacity in technical matters or for the setting up, operation or maintenance of equipment...shall be treated as members of the civilian component." It also states that persons who are "ordinarily resident" in Germany may not be considered technical experts. Unless tech expert status has been granted, U.S. contractor employees in Germany: (i) may not work in-country without a work permit granted by the German government, (ii) are subject to German income taxes, and (iii) are ineligible for certain logistic support, including commissary and PX privileges.
- Traditionally, U.S. has had broad discretion in designating contractor employees as tech experts. However, German authorities have recently begun challenging these designations. The Germans contend that in many cases the U.S. has granted tech expert status to contractor employees (i) whose duties do not require specialized technical expertise and/or (ii) who are "ordinarily resident" in Germany by virtue of long term physical residence, marriage to German spouse, or ownership of real property. The Germans' objection reflects concern over lost tax revenue and jobs for German citizens. Under the German federal system, individual states, as opposed to the national government, have primary responsibility for tax collection. Several states ("Laender") have initiated tax enforcement actions against individual contractor employees.
- There are currently about 2500 technical experts in Germany. Of these, roughly 2200 are affiliated with Army contracts. Based on a recently completed data call, we believe approximately 700 belong to AMC. STRICOM has the highest number, but all AMC MSCs are affected.
- The tech expert issue impacts AMC in several ways: First, individual contractor employees are at risk of German criminal/civil action for nonpayment of taxes and working in-country without a permit. Second, enforcement of work permit requirements could prevent contractor personnel from performing, which would

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disrupt contract support AMC provides to USAREUR. Third, AMC could incur substantial contract cost increases to the extent individual contracts allow pass through of costs related to this issue. These costs include employee tax liability as well as logistic support which contractor employees could heretofore obtain at less cost from U.S. facilities. Fourth, as noted in the last bullet, AMC will have to modify its procurement procedures to provide German authorities with advance notice and consultation on tech expert determinations in future contracts.

- USAREUR, USAFE, and USEUCOM have briefed the tech expert problem to the DA and DoD staffs. The U.S. Embassy in Bonn is conducting ongoing negotiations with German authorities. In addition, AMC is participating in a DoD working group on this issue.
- On 26 Feb 97, the Director, Defense Procurement, issued a memorandum prepared by the working group, subject: Contracts to be Performed in the Federal Republic of Germany (Germany). This memorandum supplements DFARS 225.802-70 and provides interim acquisition guidance on the tech expert issue. It requires DoD contracting activities, contemplating solicitation/award of a contract where contractor employees will have tech expert status, to follow a two-step coordination process with designated U.S. offices in Germany. The initial coordination must be completed prior to issuance of the solicitation. The second coordination, which includes by-name designation of proposed tech experts, must be completed prior to contract award. These procedures implement a July 1995 international agreement and are designed to provide German authorities with advance notice and consultation on proposed tech experts.

RELEASED BY: EDWARD J. KORTE  
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DEPARTMENT OF THE ARMY  
OFFICE OF THE GENERAL COUNSEL  
104 ARMY PENTAGON  
WASHINGTON DC 20310-0104

14 March 1997

MEMORANDUM FOR COMMAND COUNSEL, ARMY MATERIEL COMMAND

SUBJECT: Availability of Army Appropriations to Pay  
Cash Awards for Employees who Enroll in Commercial  
"Frequent Flyer" Programs

This responds to your request for a legal opinion concerning a proposal by U.S. Army Tank-automotive & Armaments Command (TACOM) to establish an incentive awards program under which employees who enroll in "frequent flyer" programs and obtain free airline tickets through official travel would receive cash awards based on savings the government accrues in using the tickets. For the reasons set forth below, we conclude that Army appropriations are not available for the purpose of making such awards.

According to 10 U.S.C. § 1124, cash awards may be paid to members of the armed forces whose "disclosure, suggestion, invention, or scientific achievement contributes to the efficiency, economy, or other improvement of operations or programs relating to the armed forces." Voluntarily enrolling in a commercial airline's "frequent flyer" program clearly does not constitute the type of act for which cash awards may be paid under the terms of this statute. Accordingly, we conclude that Army appropriations are not available for this purpose.

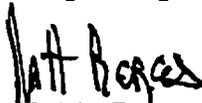
The Government Employees' Incentive Awards Act [hereinafter "Act"], 5 U.S.C. § 4501-4506, authorizes agency heads to "pay a cash award to, and incur necessary expenses for the honorary recognition" of a federal civilian employee who "by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork," or who "performs a special act or service in the public interest in connection with or related to his official employment." 5 U.S.C. § 4503. In our opinion, enrolling in commercial "frequent flyer" programs does not entail the quality and degree of personal effort for which Congress intended to authorize monetary recognition under the Act.

Encl 6



Under DoD policy, cash awards must be based either upon accomplishments that are outside the employee's job responsibilities, or accomplishments that are within these responsibilities, but so superior as to warrant special recognition. See DoD Instruction 5120.16 (Encl. 2), para. I.A.1. The responsibility to conserve government resources when traveling falls well within the scope of a federal employee's duties. See Joint Travel Regulation, para. C1058. Indeed, while DoD employees are not required to enroll in "frequent flyer" programs, the Defense Travel System has taken steps to facilitate employees' enrollment in these programs. See Under Secretary of Defense (Comptroller) Memorandum, subject: Travel Reengineering Implementation Memorandum #13--Department of Defense (DoD) Frequent Flyer Program Policy, dated 12 November 1996. Thus, it is clear that enrollment in such programs is neither beyond the scope of DoD employees' job responsibilities, nor an act of superior accomplishment warranting special recognition.

Our conclusion is consistent with guidance promulgated by the Office of Personnel Management (OPM), the agency statutorily entrusted with the responsibility to prescribe regulations under which executive branch award programs will be administered. 5 U.S.C. § 4506. The OPM regulations define an "award" as "something bestowed or an action taken to recognize and reward individual or team achievement[.]" 5 C.F.R. § 451.102 (emphasis added). The Comptroller General has similarly concluded that the Act contemplates an employee's "superior performance" as the basis for an award. 67 Comp. Gen. 349, 350 (1988) (agreeing with OPM's disapproval of proposed incentive awards program for nonuse of sick leave). Accordingly, we conclude that Army appropriations are not available for the purpose of paying cash awards to civilian employees for enrolling in "frequent flyer" programs.



Matt Reres  
Deputy General Counsel  
(Ethics & Fiscal)

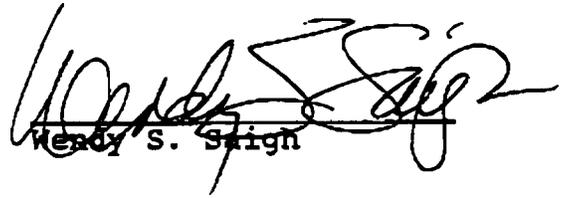
21 February 1997

## MEMORANDUM FOR Procurement Law Attorney-Advisors

## SUBJECT: Funding Requirements for Indefinite Quantity Contracts

1. This may be redundant for some of you, but it seems as though there is still some question regarding the funding requirements, under the Anti-Deficiency Act (hereinafter "ADA"), for indefinite quantity contracts (hereinafter "IDQC"). Hopefully, this memorandum will resolve those questions.
2. ██████████ addressed this issue in a cc:mail message dated 2 December 1996. Enclosed you will find this message and his related research. I have expanded this research to include additional authority under FAR 16.504 and 31 USC § 1341, copies of which are also enclosed, as well as information received from the Fiscal Law Course.
3. In a nutshell, at the time of contract award in an IDQC, the specified minimum quantity must be ordered and the funds for this minimum quantity must be obligated. At one time, it was believed that the minimum could be ordered at some time during the first year but that is incorrect, it must be ordered at the time of contract award. Because the minimum quantity must be ordered at the time of award, there must be funds obligated for such, or the ADA would be violated. Further, this rationale is true regardless of whether the contract contains a First Article Test.
4. According to the GAO Office of General Counsel, "[a]n indefinite-quantity contract, under current regulations, must include a minimum purchase requirement which must be more than nominal. 48 CFR § 16.504(a). An indefinite-quantity contract without a minimum purchase requirement is regarded as illusory and unenforceable. It is no contract at all." (citations omitted). Principles of Federal Appropriations Law, 2d Ed, Vol II, page 7-17. "[A]ny required minimum purchase must be obligated when the contract is executed." Id.
5. FAR 16.504(b) provides that "[f]unds for other than the stated minimum quantity are obligated by each delivery order, not by the contract itself." (emphasis added) This implies that funds for the stated minimum are obligated by the contract itself.
6. Failure to obligate funds for the minimum quantity will result in an antideficiency violation of 31 USC § 1341.
7. This issue was recently addressed in The Judge Advocate General's School, U.S. Army, Volume 97-A, Fiscal Law Course, Page 2-24, 10-14 February 1997. It stated that the government must "[o]bligate the amount of the stated minimum quantity at the time of contract award and obligate additional funds for each

additional order at the time the order is issued. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.5; DFAS-IN 37-1, tbl. 9-1; AFR 170-8, para. 19d(3); cf. Federal Elec. Corp., B-160560, 47 Comp. Gen. 155 (1967)."



Wendy S. Stign

## LABOR RELATIONS ISSUES IN CONTRACTING OUT

Linda B. R. Mills  
U.S. Army Materiel Command  
Office of Command Counsel  
March 1997

Excerpts from applicable statutory provisions of the Federal Service Labor-Management Relations Act (also referred to as Title VII of the Civil Service Reform Act of 1978):

### **Management Rights - 5 USC 7106**

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -

(2) in accordance with applicable laws -

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted...

(b) Nothing in this section shall preclude any agency or any labor organization from negotiating

(2) procedures which management officials of the agency will observe in exercising any authority under this sections; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

### **Representation Rights - 5 USC 7114**

(a)(1) A labor organization which has been accorded exclusive recognition...is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit...

### **Duty to bargain in good faith - 5 USC 7117**

(a)(1) ...the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

## **Grievance Procedures - 5 USC 7121**

(a)(1) ...any collective bargaining agreement shall provide procedures for the settlement of grievances...

(b) Any negotiated grievance procedure...shall -

(3) include procedures that -

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration...

## **Definition of a Grievance - 5 USC 7103(a)(9)**

(9) 'grievance' means any complaint -

(C) by any employee, labor organization, or agency concerning -

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

## **Union Rights to Information - 5 USC 7114(b)(4)**

[The duty to negotiate in good faith includes the obligation - ]

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials relating to collective bargaining...

**YES, NO, YES, NO, MAYBE**

OR

**ARE CONTRACTING OUT PROPOSALS NEGOTIABLE?**

At the most basic level, the answer to the above question depends on how one reconciles management's authority to make determinations with respect to contracting out under 5 USC 7106(a)(2)(B) with the union's rights to bargain in accordance with 5 USC 7114(a)(4) and to grieve "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" pursuant to 5 USC 7121.

One might expect that a decision from the Supreme Court of the United States would provide a reliable answer to the above question, but the Federal Labor Relations Authority (FLRA or the Authority) is not easily persuaded to limit the scope of bargaining.<sup>1</sup>

In 1990, the Supreme Court reviewed a union proposal to adopt its negotiated grievance procedure as the administrative appeals process required by OMB Circular A-76. This would allow employees to use the collective bargaining agreement's grievance and arbitration provisions to contest contracting out decisions.

The FLRA held that the Internal Revenue Service was required to bargain over this proposal. The U.S. Court of Appeals for the District of Columbia Circuit affirmed. In a six to three decision written by Justice Scalia, the Supreme Court reversed and remanded:

**Department of the Treasury, IRS v. FLRA 494 US 922 (1990).**

According to Justice Scalia: "The FLRA's position is that the management rights provisions of Sec. 7106 do not trump Sec. 7121, which entitles the union to negotiate and enforce procedures for resolving any 'grievance' as defined in Sec. 7103 -- that is, any claimed 'violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.'...Thus, according to the FLRA, it makes no difference whether OMB Circular A-76 is an 'applicable law' [under 5 USC 7106(a)(2)]; so long as it is a 'law, rule, or regulation' within the meaning of Sec 7103(a)(9)(C)(ii), Sec. 7106(a) does not bar mandatory negotiation..." The Supreme Court concluded that "the FLRA's construction is not reasonable."

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<sup>1</sup> All opinions expressed herein are those of the author and do not express the views of the U.S. Army Materiel Command.

In essence, the Court held that the management rights provisions of 5 USC 7106(a) supersede the grievance provisions of 5 USC 7121 regardless of whether or not OMB Circular A-76 is an "applicable law":

Section 7106(a) says that, insofar as union rights are concerned, it is entirely up to the IRS whether it will comply at all with Circular A-76's cost-comparison requirements, except to the extent that such compliance is required by an "applicable law" outside the [Civil Service Reform] Act.

The Court did not decide whether or not Circular A-76 is an "applicable law" under 5 USC 7106(a), nor whether it is a "law, rule, or regulation" under 5 USC 7103. Furthermore, the Court did not consider IRS's argument that the union's proposal could also be held nonnegotiable under 5 USC 7117(a)(1) as a "Government-wide rule or regulation" prohibiting arbitration.

Justice Stevens agreed with the Court's conclusion that the union's proposal was nonnegotiable, but dissented because he would have held either that Circular A-76 placed no limitations on management rights under 5 USC 7106(a) because it is not an "applicable law;" or that Circular A-76 would certainly have to be considered a nonnegotiable "Government-wide rule or regulation" under 5 USC 7117(a)(1).

Justice Brennan, joined by Justice Marshall, dissented on the theory that the union's proposal should have been viewed as negotiable even if Circular A-76 were considered to be both an "applicable law" and a "Government-wide rule or regulation" because the proposal "would not affect the Internal Revenue Service's authority to make contracting out decisions."

On remand, the FLRA concluded that Circular A-76 was an "applicable law" within the meaning of 5 USC 7106(a) and that a union's negotiated grievance procedure could be used to challenge alleged failures by the agency to comply with its requirements. NTEU and Dept. of Treasury, IRS, 42 FLRA 377 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)]. The Authority contended that unions could seek to enforce Circular A-76 as an "applicable law" under negotiated grievance procedures even if the Circular itself appears to preclude such grievances. In subsequent cases, the FLRA held that a proposal requiring compliance with Circular A-76 could also be found negotiable under 5 USC 7106(b)(3) as an "appropriate arrangement for employees who are adversely affected by management's decision to contract out." NTEU and Dept. of Treasury, Bureau of Pub. Debt, 42 FLRA 1333 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)].

**Dept. of Treasury, IRS v. FLRA 996 F.2d 1246 (D.C. Cir. 1993).**

When the D.C. Circuit reviewed FLRA decisions which continued to find union proposals negotiable even after the Supreme Court issued its decision in 1990, it applied the reasoning of Justice Steven's dissent. Accordingly, it held that Circular A-76 is nonnegotiable as a "Government-wide rule or regulation" under 5 USC 7117(a) whether or not it is an "applicable law" under 5 USC 7106(a). Furthermore, it reached the rather obvious conclusion that "collective bargaining over the method for resolving disputes concerning application of the Circular and arbitration of claimed 'violations' of the Circular would both be inconsistent with the terms of the Circular":

We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance - that is, if there is no preexisting legal right upon which the grievance can be based - and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it may not be hoisted on its own petard.

The D.C. Circuit Court also noted that: "Unlike the exemption in the management's rights section, the government-wide regulation exception to an agency's obligation to bargain is not conditioned by the need to bargain over 'appropriate arrangements'."

The Authority continued to resist what might by then have appeared to be an inevitable conclusion. In cases such as NTEU and Dept. of Treasury, 47 FLRA 304 (1993), it continued to uphold the negotiability of provisions requiring agency compliance with Circular A-76.

Shortly thereafter, however, in AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 168 (1993), the Authority surrendered to the views of the D.C. Circuit Court.

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**AFGE Local 1345 and Dept. of Army, Fort Carson 48 FLRA 168(1993).**

"We adopt the Court's conclusion [in Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)] that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed."

The Authority also conceded the fact that proposals which are inconsistent with a Government-wide regulation such as Circular A-76 could not be held negotiable as "appropriate arrangements" under 5 USC 7106(b)(3).

The Authority continues to rely on the Fort Carson case in finding union proposals nonnegotiable if the proposals would infringe on management rights under 5 USC 7106(a) or if, contrary to 5 USC 7117(a), they are inconsistent with Circular A-76:

In IFPTE Local 3 and Dept. of Navy, Philadelphia Naval Shipyard, 51 FLRA No. 40 (Oct. 31, 1995) [Proposal #2], the Authority held that proposals such as those prohibiting an agency from contracting out any function that had undergone a reduction-in-force (RIF) for a 1-year period following the effective date of the RIF were nonnegotiable under 5 USC 7106(a)(2)(B): "Proposals prescribing when a management right may be exercised constitute substantive limitations on, and directly interfere with the exercise of, that right. See, e.g., National Guard Bureau, 49 FLRA at 890. By prohibiting the Agency from exercising its right to contract out during the specified time period, Proposal 2 constitutes such a substantive limitation. Accordingly... we find that Proposal 2 affects the exercise of management's right, under section 7106(a)(2)(B), to make determinations with respect to contracting out."

In AFGE Local 151 and Dept. of Navy, Naval Air Station Whidbey Island, 52 FLRA No. 70 (Dec. 20, 1996) the Authority again relied on its Fort Carson decision in upholding an Arbitrator's award. The arbitrator found that the claim of a violation of OMB Circular A-76 or the Supplemental Handbook thereto does not concern a grievable or arbitrable matter. The Authority agreed: "[E]ven though determinations regarding contracting out must be made in accordance with the Circular, the Circular itself bars grievances under the negotiated grievance process. As such, the Arbitrator correctly held that the grievance is not arbitrable."

## IMPACT & IMPLEMENTATION BARGAINING

OR

### WHAT IF THE UNION PROPOSAL IS NOT INCONSISTENT WITH A-76 ?

If a union proposal neither incorporates nor conflicts with OMB Circular A-76, the union may be able to successfully argue that it is negotiable under 5 USC 7106(b)(2) as a procedure for implementing management's right to contract out or under 5 USC 7106(b)(3) as an appropriate arrangement for employees adversely affected by the contracting out determination. Although the Authority's decision in Department of Army Headquarters, Fort Sill and NFFE, 29 FLRA 1110, 29 FLRA No. 82 (1987) actually concerned an election, rather than bargaining rights, it does contain the flat statement that "...impact and implementation bargaining concerning contracting out is within the duty to bargain."

In the context of contracting out, where many of the procedures are controlled by Circular A-76, most of the cases dealing with I & I bargaining focus on "impact" (i.e., "appropriate arrangements") rather than "implementation" (i.e., "procedures").

### HOW CAN YOU DISTINGUISH A NEGOTIABLE APPROPRIATE ARRANGEMENT FROM AN INFRINGEMENT OF MANAGEMENT'S RIGHT TO CONTRACT OUT ?

As recently as October 30, 1996, the Authority confirmed that the approach it still uses for determining whether or not a proposal is within the duty to bargain under 5 USC 7106(b)(3) is set out in NAGE, Local R14-87 and Kansas Army National Guard (KANG), 21 FLRA 24; 21 FLRA No. 4 (February 7, 1986). Under KANG, the FLRA initially determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. In order to address this threshold question, a union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. The alleged arrangement must be tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management rights. If the proposal is an arrangement, the Authority determines whether it is appropriate or is inappropriate because it excessively interferes with the relevant management right. AFGE, Local 1687 and VA, 52 FLRA No. 48 (1996).

**NAGE, Local R1487 and Kansas Army National Guard (KANG),  
21 FLRA 24; 21 FLRA No. 4 (February 7, 1986).**

"Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit [in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983)], by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

(1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree?

(2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?...

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?...

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?...

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved?

These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. Inasmuch as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties to cases of this nature filed in the future to address any and all relevant considerations as specifically as possible."

## **Beyond the Federal Service Labor-Management Relations Act**

### **I. Access to Information**

If the union's requests for information are unrelated to a matter within the scope of bargaining, it cannot rely on 5 USC 7114(b)(4) to obtain that information. The union can, however, submit requests under the Freedom of Information Act, 5 USC 552, provided that it is willing to be treated the same as any other private citizen. More importantly, however, the union can rely on the formalized requirements for agencies to consult with labor representatives under OMB Circular A-76 with Revised Supplemental Handbook (March 1996).

### **II. Challenges to Contracting Out Decisions**

A. The fact that unions have not been able to rely on their negotiated grievance procedures to challenge management's substantive decisions to contract out does not mean that they have no recourse to seek review of management decisions. The union representatives of federal employees "that will or could be impacted by a decision to waive a cost comparison or have submitted bids to convert to or from in-house, contract or ISSA performance, as a result of a cost comparison" are "affected parties" as defined by the A-76 Supplemental Handbook, and have access to the administrative appeals process required by A-76.

B. It is not yet clear whether or not federal employees and unions will have standing to bring suits in federal courts under the Administrative Procedure Act (APA), 5 USC 701(a)(2). Although courts have traditionally limited appeals of contracting decisions, we can anticipate an increasing number of cases as contracting out continues to receive government emphasis. Recent cases which discuss jurisdictional issues include:

National Federation of Federal Employees v. Cheney, 883 F. 2d 1038 (D.C. Cir. 1989), cert. denied, 496 US 936 (1990) - holding that federal employees and their representatives lacked standing to challenge the merits of a decision to contract out.

Diebold v. US, 947 F. 2d 787 (6th Cir. 1991), rehearing denied, 961 F. 2d 97 (1992) - holding that the contracting out decision in a wrongful privatization case is reviewable in a federal court under the Administrative Procedure Act. (Remanded for further proceedings including development of the facts and laws governing standing).

LABOR RELATIONS AND CONTRACTING OUT  
REVERSING THE TIDE

"Americans want to 'get their money's worth' and want a Government that is more businesslike and better managed. The reinvention of Government begins by focusing on core mission competencies and service requirements. Managers must begin by asking some fundamental questions, like: why are we in this business, has industry changed so that our involvement or level of involvement is no longer required; is our approach cost effective and, finally, assuming the Government has a legitimate continuing role to play, what is the proper mix of in-house, contract and interservice support agreement resources . . . The OMB Circular A-76 Revised Supplement Handbook is designed to enhance Federal performance through competition and choice." Introduction, Notice of Transmittal Memorandum No. 15, to the OMB Circular No. A-76, "Performance of Commercial Activities, Revised Supplemental Handbook." April 1, 1996, 61 FR 14338.

I. WHY IS CONTRACTING OUT BECOMING SUCH A HOT ISSUE TODAY?

A. 1980s -- federal agencies' attempts to use Office of Management and Budget (OMB) Circular A-76 creates Congressional backlash - series of anti-A-76 protective statutes enacted (e.g., 10 USC 2461 and Public Law (PL) 99-661, Section 317).

B. 1990s.

1. Limited federal dollars--stagnant or declining agency budgets.

2. Bipartisan support for cutting down the federal government and making it leaner and more cost effective.

3. President's Reinventing Government Program.

a. March 3, 1993, President Clinton asked Vice President Gore to lead the National Performance Review (NPR), a campaign to reinvent government.

b. Phase I: Putting customers first; cutting red tape; empowering employees to get results; and cutting back to basics.

c. Phase II: Cutting Back to Basics - February 13, 1995, Privatization Resource Guide and Status Report (Draft).

"Basics means taking a hard look at what, the government does and determining what changes to make in federal programs and functions, if any;...moving the service delivery capability to the most effective provider....

In general, a refocusing and downsizing of federal activities will result." (Page 1).

"This is not a privatization exercise . . . This is a most cost effective alternative exercise. It would be irresponsible to do privatization for the sake of privatization. Privatization itself is not the goal. It's only a tool." Julia Stasch, GSA Deputy Administrator. (Page 9).

## II. STATUTORY AND REGULATORY FRAMEWORK.

A. OMB Circular No. A-76, Performance of Commercial Activities, August 4, 1983.

B. OMB Circular No. A-76, Revised Supplemental Handbook (March 1996).

C. Office of Federal Procurement Policy Letter (OFPP Letter) 92-1, Inherently Governmental Functions (57 FR 45096, September 30, 1992). This sets the policy for Executive departments and agencies that certain functions are inherently governmental functions that must only be performed by Government officers and employees. The functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority; and (2) monetary transactions and entitlements.

D. Federal Acquisition Regulation Subpart 7.5, Inherently Governmental Functions, January 26, 1996, 61 FR 2628. This implements OFPP Letter 92-1. The premise is that it's a policy matter, not a legal determination, that a function is so intimately related to the public interest as to mandate performance by Government employees.

E. Federal Workforce Restructuring Act of 1994, PL 103-226, March 30, 1994. It requires the reduction of federal full-time equivalent positions (FTE) between 1994 and 1999 of approximately 272,900. Section 5(g) requires the President to take appropriate action to ensure that agencies not convert the work of employees included in the reduction target or the work of employees that accept a buyout to contract performance, unless a cost comparison demonstrates that there is a financial advantage to the Government.

### III. RELATED STATUTES AND REFERENCES.

A. Conflict of Interest laws, 18 USC 201 et seq., generally prohibit any federal employee from engaging in official activities that could conflict with personal interests.

B. Procurement Integrity Act, 41 USC 423, governs the relationships between government officials and current or potential contractors.

C. Government Ethics Newsgram, Summer, 1995, Volume 12, No.2, U.S. Office of Government Ethics.

D. Chief Financial Officers Act of 1990, PL 101-576, November 15, 1990, provides new tools to improve the management of the Federal government by establishing Chief Financial Officers in 23 major Executive agencies as well as a new Deputy Director of Management and a Comptroller in the Office of Management and Budget, and establishing Federal accounting standards, integrate and modernize the Government's financial systems, and produce audited financial statements.

E. Government Performance and Results Act of 1993, PL 103-62, August 3, 1993, in response to the American public's "disdain for government and objections to

paying higher taxes," the Act improves the efficiency and effectiveness of Federal programs by establishing a system to set goals for program performance and to measure results in order to reduce waste, inefficiency and ineffectiveness in Federal programs.

F. Government Management Reform Act of 1994, PL 103-356, October 13, 1994, was enacted in response to both Congressional concern that the Federal Government be accountable for the spending of taxpayers' dollars and to the NPR's report, "From Red Tape to Results," that concludes that "those in positions of responsibility must have the information they need to make good decisions." It essentially expands the coverage of the 1990 Chief Financial Officers Act to provide for annual audited financial reports of all the activities, spending and revenues of 24 major Government departments and agencies reports; establishes pilot programs to create franchising operations that will consolidate administrative support services, improve competition and cut costs; and promotes electronic funds transfer for Federal wages, salaries, and retirement payments.

#### IV. HISTORICAL BACKGROUND.

A. In 1955, the Senate Select Committee on Small Business stated that government agencies should give high priority to eliminating competition with the private sector.

B. The Second Hoover Commission (1955) endorsed the policy of "Eliminating Government-operated services and functions that compete with private enterprise.

C. Bureau of the Budget Bulletin (BOB) 55-4 (1955) stated that the "public sector shall not carry on any commercial activity to provide a product or service for its own use, if such products and services can be obtained through ordinary business channels from private enterprise." Similar policy expressed in Budget Bulletins issued in 1957 and 1960.

D. Circular A-76 of 1966 issued for the first time which prescribed policy and implementing guidelines in BOB Bulletin 55-4 in a permanent directive.

E. The Circular underwent revisions in 1967 to clarify some provisions and to lessen the burden of work by agencies in implementation, and in 1976 to provide additional guidance on cost comparisons and prescribing standard cost factors for Federal employee retirement and insurance benefits.

F. Revised Circular A-76 issued in 1979 which included a Cost Comparison Handbook to ensure consistent and equitable cost comparisons and provisions for the protection of federal employees ("sunshine" access to reviews, appeals procedure, 10% cost differential favoring in-house performance, and requirement that contractor give right of first refusal to qualified Government employees).

G. Revised Circular A-76 issued in 1983.

#### V. HIGHLIGHTS OF CHANGES TO THE REVISED OMB CIRCULAR A-76 SUPPLEMENT.

A. **Cost comparison requirements.** Modifies and in some cases eliminates cost comparison requirements for recurring commercial activities and the establishment of new or expanded interservice support agreements.

B. **Listing of commercial activities.** Retains current listing of commercial activities attached to the August 1983 Circular A-76 and includes OFPP Policy Letter 92-1 guidance on what is "Inherently governmental functions." (See Supplement, Appendix 5).

C. **Reliance on the private sector.** Revision retains 1983 Supplement's requirements to contract new or expanded work, unless a cost comparison is conducted to support conversion to in-house or interservice support agreement performance. It also requires conversion to contract only when it's cost effective. It doesn't require conversion of in-house work to contract, as a matter of policy, without cost comparison.

#### D. **Exemptions from cost comparison.**

1. Circular itself exempts certain recurring commercial activities from cost comparison, including

mobilization requirements within the Department of Defense, the conduct of research and development and direct patient care activities in Government hospitals or other health facilities. The Revision clarifies this policy to permit exempt activities to be retained in-house or converted to or from in-house, contract or interservice support agreement performance, without cost comparison.

2. The list of exempted activities has been expanded to include national security activities, mission critical core activities and temporary emergency requirements. The determination of "core" functions is, fundamentally, a management decision.

**E. Reduces reporting and other administrative burdens.** Eliminates previously required study schedules and quarterly study status reporting as unnecessary and administratively burdensome. Agencies are still required to maintain an inventory of commercial activities with information on completed cost comparisons.

**F. Waivers.** Broadens an agency's authority to waive cost comparisons to convert to or from in-house, contract or interservice support agreement without cost comparison if it is found that (a) the conversion will result in a significant financial or service quality improvement and that the conversion will not serve to reduce significantly the level or quality of competition in the future award or performance of work or (b) there is a finding that the in-house or contract (in the case of a possible conversion from contract to in-house performance) offers have no reasonable expectation of winning a competition (for example, when an agency conducts a major independently conducted business analysis). Broadens the agency's authority to waive by delegating it down from the Secretary to the Assistant Secretary level. Within DOD this has been further delegated down to the Assistant Service Secretaries.

**G. Provides for enhanced employee participation.** Since the 1983 Supplement was silent on the subject, the revision clarifies employee participation opportunities and formalizes the requirement for agencies to consult with employees and their labor representatives for their full participation and involvement in the earliest

possible stages of the procurement process. Agencies are requested to afford employees and private sector interests an opportunity to comment on solicitations prior to the opening of bids. Revision also affords parties additional time to submit cost comparison appeals. **(See Chapter 1, Section G).**

1. Full participation in the development of performance standards, the Performance Work Statement (PWS), in-house management plan, Most Efficient Organization (MEO), and in-house and cost estimates, subject to the restrictions of the procurement process and conflict of interest statutes.

2. Upon issuance, a solicitation used in the conduct of the cost comparison will be made available to directly affected Federal employees or their representatives for comment. The employees or their representatives will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Private sector offerors shall comment as provided by the Federal Acquisition Regulations.

3. Agencies shall make all relevant documents available for review as part of the administrative appeal process.

**H. Performance standards.** Though the 1983 Supplement did not permit conversion decisions to be based on the comparison of performance measures or standards, the revision does permit conversion to or from in-house, contract or interservice support agreement performance if the agency determines that performance meets or exceeds generally recognized performance and cost standards.

**I. Eases transition requirements to facilitate employee placement.** The revision authorizes the conversion of functions involving 11 or more FTEs to contract performance, without cost comparison, if fair and reasonable prices can be obtained from qualified commercial sources and all directly affected federal employees serving on permanent appointments are reassigned to other comparable federal positions for which they are qualified. This provision is limited to

competitive awards only. There is no requirement that restricts placement efforts within the federal employee's commuting area. **Note**, no commercial activity shall be modified, reorganized, divided or in any way changed for the purpose of circumventing the requirements of this provision.

**J. The 10 FTE or Less Rule.** The revision expands the 1983 supplement's rule that permits the conversion of a function to contract performance without cost comparison - even with adverse employee impacts - to the conversion of similarly sized activities to in-house or interservice support agreement performance, without cost comparison. The 10 FTE or Less Rule is a recognition that there is a break-even point where the cost of conducting the comparison is not likely to outweigh the expected benefits while cost comparisons at the 11-50 FTE levels do result in significant most efficient organization (MEO) and competition savings.

**K. MEO Implementation.** Requires agencies to develop a transition plan for each competitive solicitation. This facilitates agencies planning for employee placements and a more orderly transition of work to or from in-house, contract or interservice support agreement.

**L. Post MEO Performance Reviews.** Revision requires agencies to conduct Post-MEO Performance reviews on not less than 20% of all functions are retained or converted to in-house performance as a result of a cost comparison. This will ensure that the MEO was properly estimated and implemented and the work is being performed in accordance with the terms, quality standards and costs specified in the Performance Work Statement (PWS).

**M. The streamlined cost comparison alternative.** In addition to the generic cost comparison methodology, a streamlined cost comparison process has been developed for activities involving 65 FTEs or less. **Note**, management cannot modify, reorganize, divide or in any way change a commercial activity involving 66 or more FTEs for the purpose of using the streamlined cost comparison procedure.

N. **Source Selection.** Criticism levied against the 1983 Supplement was that it was too cost determinative and it relied too heavily on the low bid offer. The Revision allows for "best value" and "past performance" type concepts to be used in A-76 cost comparison process using competitive negotiation or source selection.

O. **Appeals.** The Revision extends to time frame for appeals to be submitted from 15 working days to 20. The agency may extend the appeal period to a maximum of 30 working days if the cost study is particularly complex; expands scope of appeals to include formal information denials, instances of clear A-76 policy violations, and clarifies that streamlined and sector specific cost comparisons are subject to appeal. Not accepted for appeal basis was an agency's decision to reorganize, that appeals be decided by another agency and agency's decision to conduct or not conduct a cost comparison.

P. **Right of First Refusal - Personnel Considerations.** Expands the Right of First Refusal first established by the 1979 Supplement. (**See Chapter 1, Section H**).

1. Adversely affected Federal employees are employees identified for release from their competitive level by an agency in accordance with 5 CFR Part 351 as a direct result of a decision to convert to contract, ISSA performance or the agency's MEO.

2. The right of adversely affected federal employees for first refusal for jobs created as a result of the decision to convert to contract or ISSA performance and for which they are qualified has been expanded to extend the right to existing and to subsequent contractor employees in the original or follow-on contracts, as provided for in Executive Order 12933, "Non-Displacement of Qualified Workers Under Certain Contracts."

3. Agencies should exert maximum efforts to find available positions for federal employees adversely affected by conversion decisions including priority consideration for available positions within the agency, establishing a reemployment priority list and an effective placement program, and paying reasonable costs

for training and relocation that contribute directly to placement.

## VI. FEATURES OF THE A-76 PROCESS.

A. Exceptions to the OMB Circular A-76 cost comparison requirement to convert these activities to or from in-house, contract or ISSA.

1. National Defense of Intelligence Security.
2. Patient Care.
3. Core Capability.
4. Research and Development.
5. No satisfactory commercial source available.
6. Functions with 10 or fewer FTEs.
7. Meet or exceed generally recognized industry performance and cost standards.
8. Lower cost - as result of a cost comparison conducted with the Supplement procedures.
9. Temporary and emergency authorizations for in-house performance - when contractor defaults or is otherwise terminated, agencies should seek interim contract support, if feasible, otherwise, in-house or ISSA performance of a "contracted" activity may be authorized on a temporary and emergency basis.

### B. Cost Comparison - Full Procedure (**Part I, Chapter 3**)

1. **Development of the Performance Work Statement (PWS) - (Section C)**. Defines what is being requested, the performance standards and measures, and time frames required. It provides the technical performance sections of the Request for Proposals (RFP), or Invitation for Bid (IFB), issued by the contracting officer.

2. **Development of the Quality Assurance Surveillance Plan (QASP) - (Section D)**. QASP describes

the methods of inspection to be used, the reports required and the resources to be employed with estimated work-hours.

**3. Development of the Management Plan for the Most Efficient Organization (MEO) - (Section E).**

Describes the Government's most efficient organization and is the basis of the Government's in-house estimates. It must reflect the scope of the PWS, should identify the organizational structures, staffing and operating procedures, equipment, transition and inspection plans necessary to ensure that the in-house activity is performed in an efficient and cost effective manner. Should include all initiatives and assumptions factored into developing the MEO.

**4. Development of cost estimates and reviews by the agency's A-76 Independent Review Officer (IRO) - (Section I).** Government's cost estimates are certified in writing as being in full compliance with the procedures and requirements of the Supplement. The PWS, Management Plan, QASP and all Government developed cost estimates with supporting documentation are forwarded to the agency IRO. (In Army's case, review is by U. S. Army Audit Agency).

**5. Bids or proposals solicited from private industry - (Section H).** All competitive methods of federal procurements provided for by the Federal Acquisition Regulation (FAR) are appropriate, including the sealed bid, two-step, source selection and other competitive qualification based or negotiated procurement techniques. A "best value" contract offer consideration is an acceptable criterion for selection.

**6. Evaluation of bids and tentative decisions - (Section J).** Evaluation of bids and tentative decision are made pending outcome of evaluation of bids for responsiveness, responsibility and resolution of possible administrative appeals of any appeals. For sealed bid procurements, the contracting officer opens the bids, including the Government's in-house cost estimate, and enters the price of the apparent low offeror on the Cost Comparison Form (CCF). The appeal process period begins when access to the completed CCF, and all supporting documentation, is provided to

affected parties for review, usually the day of the bid opening.

**7. Public review and appeal period - (Sections J and K).** Must be received within 20 calendar days after the date that all supporting documentation is made publicly available. The agency may extend to appeal period to a maximum of 30 days for a particularly complex cost comparison.

a. Basis will address specific questions regarding the agency's compliance with the requirements and procedures of the Circular, factual questions regarding agency justifications to waive a cost comparison (doesn't include right to appeal a decision not to issue a waiver, Chapter I, Section E4), or address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form. It will provide the rationale for questioning those items.

b. Identify specific instances of agency denials of information not otherwise protected by law or regulation. Demonstrate that the items appealed, individually or in the aggregate, would reverse the tentative decision.

c. An appeal can be submitted by an eligible appellant defined as federal employees (or their representatives) and existing Federal contractors affected by a tentative decision to waive a cost comparison; federal employees (or their representatives) and contractors that have submitted formal bids or offers who would be affected by a tentative decision to convert to or from in-house, contract or ISSA performance as a result of a cost comparison; or agencies that have submitted formal offers to compete for the right to provide services through ISSAs.

d. Agency A-76 Administrative Appeal procedures do not apply to questions concerning the selection of one contract offeror or another for competition with the in-house cost estimate; award to one contractor in preference to another; Government management decision involving the Governments certified in-house MEO, and the policies or procedures contained in the Circular and the Supplement.

e. The procedure does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals.

**8. Decision to award contract or cancel solicitation - (Section K).** The appeal procedure should provide for a final decision within 30 days of the appeal by the Appeal Authority.

**9. Transition period - (Section E4d).** Included in the Management Plan is the transition plan for the transition to or from current organizational structure to MEO, contract or ISSA performance, designed to minimize disruption, adverse impacts, capitalization and start-up requirements.

**10. MEO or contract operational.**

**11. Post-MEO Performance Review - (Section L).** When the MEO is selected as a result of the cost comparison, a formal review and inspection of the MEO should be conducted following the end of the first full year of performance. Post-MEO Performance Reviews will be conducted on not less than 20% of the functions performed by the Government as a result of a cost comparison. An annual list of Post-MEO Performance Review certifications will be made available to the public upon request. This list will identify the total number of cost comparisons completed since the issuance of the Revised Supplemental Handbook and the number of Post-MEO Performance Reviews completed.

C. Agency specific A-76 procedures can implement above general provisions and may include additional steps for undertaking A-76 cost comparison process.

D. Minimum threshold of defined costs that must be exceeded prior to the conversion to or from in house, contract or ISSA performance is established to ensure that the Government will not undertake a conversion for marginal estimated savings. The minimal cost differential is the lesser of 10% of the in-house personnel-related costs or \$10 million over the performance period. Factors such as decreased productivity, and other costs of disruption that cannot

be easily quantified at the time of the cost comparison are included in this differential. (**Part II, Chapter 2, Section 8**).

F. Streamlined Cost Comparisons for Activities with 65 FTE or Less. (**Part II, Chapter 5**).

1. Employees' participation and notification provisions are same as for full cost comparisons.

2. Upon notification of adversely affected Federal employees and publication of the tentative decision in the Commerce Business Daily to either contract, enter into an ISSA, or to retain the activity in-house, the A-76 Administrative Appeal process applicable to full cost comparisons will be initiated.

3. The Right-of-First-Refusal will be offered to employees adversely affected by the award.

#### VII. EXAMPLES OF RECENT CONTRACTING OUT/PRIVATIZATION INITIATIVES AT FEDERAL AGENCIES.

A. OPM training and investigations.

B. IRS.

C. DOE.

D. DOT-FAA.

E. DOD.

F. HUD.

G. GSA.

#### VIII. CURRENT CHALLENGES TO FEDERAL AGENCY CONTRACTING OUT/PRIVATIZATION INITIATIVES.

#### IX. THE FUTURE OF OMB CIRCULAR A-76 ACTIONS.

A. Chief Financial Officers view.

B. OMB view.

CASSANDRA TSINTOLAS JOHNSON  
Society of Federal Labor Relations  
Professionals Symposium 1997  
March 6, 1997

From: HelmeDA @ hqda.army.mil on 03/13/97 02:48 PM

To: afrc-fmd-cp @ devens-emh2.army.mil, agomez @ corpus-chr-emh2.army.mil, andersod @ emh1.gordon.army.mil, bkirkpat @ bluegrass-emh1.army.mil, brileyt @ cpac.bragg.army.mil, claytonc @ smtp305.appg.army.mil, conklinf @ ftmcphsn-emh1.army.mil, corbin @ dugway-emh3.army.mil, costanmo @ deca-gw.deca.mil, crottyp @ cpac-carson.army.mil, ctjohnson @ alexandria-emh1.army.MIL, db4649 @ smtp.nwscs.sea06.navy.mil, deavilae @ bliss-cpo.army.mil, deisn @ pom-emh1.army.mil, floydi @ hoffman-emh1.army.mil, francis.nurthen @ inet.hq.usace.army.mil, grignonp @ cpac.belvoir.army.mil, hamletr @ campbell-emh5.army.mil, hawleyc @ bayonne-emh3.army.mil, jbuchanan @ emh1.buchanan.army.mil, karen\_baillie @ hq.dla.mil, kennak @ cpac-benning.army.mil, lchapman @ anniston-emh1.army.mil, lmills @ alexandria-emh1.army.MIL, lrinaldi @ corpus-chr-emh2.army.mil, lschmalfeldt @ cleveland.dfas.mil, michael.zullo @ inet.hq.usace.army.mil, morales @ bliss-cpo.army.mil, naglem @ hood-emh3.army.mil, nora.b.seifert @ usace.army.mil, perryck @ pentagon-hqdadss.army.mil, rfarmer @ anniston-emh1.army.mil, rhargrov @ emh3.arl.mil, scalesy @ eustis-cpac.army.mil, sklatsky @ alexandria-emh1.army.MIL, smallb @ amsc.belvoir.army.mil, smithb @ carlisle-emh2.army.mil, stan\_citron @ alexandria-emh1.army.MIL, tellesj @ hood-emh3.army.mil, warner @ dugway-emh3.army.mil, whitee @ drum-emh3.army.mil, wjamison @ alexandria-emh1.army.MIL, wozniakb @ dix-emh1.army.mil, yencharf @ richardson-emh2.army.mil, zhrc @ arpstl-emh1.army.mil

cc: (bcc: STEVE KLATSKY/CC/HQAMC/AMC/US)

Subject: Agreement--Hughes/AFGE

---

AFGE represented employees at the former Naval Air Warfare Center in Indianapolis. The installation was being closed as a result of base closure. The city was allowed to seek bids from companies willing to keep the center open. Hughes Technical Service Company was selected and agreed to retain the majority of the Center's workers. AFGE petitioned for and won exclusive recognition of the hourly employees working for the Company. This is the first time a purely Federal union has won recognition with a private company and negotiated a major agreement. Some background and a summary of the parties' agreement follows:

#### Federal Union Representation of Privatized Employees

##### General

\* The Naval Air Warfare Center, Indianapolis, closed in June 1995 as a result of the DoD base closure program.

\* Local 1744 of the American Federation of Government Employees had represented General Schedule and Wage Grade employees at the Center since 1967.

\* Indianapolis obtained approval to seek bids from private companies willing to keep the center open; Hughes Technical Service Company won the bid and agreed to retain the majority of the Center + s federal workers and to employ no fewer than 2,000 employees in 1997.

\* Local 1744 followed the privatized work and employees, organized a unit of over 2,000 hourly employees working for the Company, and

negotiated a collective bargaining agreement with the Company. The recognition is with AFGE and AFGE Local 1744.

\* This is the first major agreement between a federal union and a large contractor.

\* A Washington Post reporter reported that John Sturdivant, AFGE National President, stated that AFGE will continue to oppose contracting out and privatization of federal jobs on the basis that federal employees can do the work more effectively, efficiently and cheaper, but that if that battle is lost, the union will pursue the work.

#### Major Provisions in the Collective Bargaining Agreement between the Company and Union

\* Lockout/job actions. Management is prohibited from locking out employees and the union is prohibited from taking job actions (e.g., strikes).

\* Management rights. Management reserves the right to manage and operate the plant. This includes the right to establishing work processes, standards, and shifts; to increase, decrease, or rotate the workforce; to establish and modify job classifications; to evaluate and appraise employees; to establish, revise, and enforce reasonable rules and regulations not inconsistent with the agreement; to hire, promote, demote, discharge or discipline for cause; to transfer or reclassify employees; to assign personnel to shifts, schedules, and methods; to plan, route and schedule production; and to determine the extent to which and where the business, or part of the business, shall be operated or shut down. Management retains all other rights to the extent consistent with provisions of the agreement, i.e., if it has not been negotiated away it is retained by management.

\* Work restrictions. Non-bargaining unit employees cannot perform work regularly assigned to bargaining unit employees except in cases of emergency, job instruction, training, developmental work, or to alleviate production difficulties.

\* Political Action Committee (PAC) contributions. Employees can voluntarily elect deductions to the AFGE PAC.

\* Drug Testing. Employees are subject to drug testing based on reasonable suspicion in accordance with DoD regulations.

\* Hiring Preferences. Employees who become unemployed as a result of a mass layoff or plan closing will receive preferential consideration for job vacancies which may occur at other Company locations for which they are qualified and capable of performing.

\* Union Representation and Official time for union representational activities. Time spent working on the labor-management committee establishing under the agreement is considered work time. Three union officials are on the committee which meets to exchange view on matters affecting the Company and its employees. The agreement permits one steward for each shift having 40 to 100 employees and an additional steward for each additional 50 employees on the shift. The stewards are allowed to handle matters within their area of jurisdiction on work

time. The union is also entitled to one Chief Steward per shift selected from the general group of stewards. Among other things, the Chief Stewards handle grievances at the second step and consult with management and union representatives. Stewards cannot be transferred to another shift or out of their area of jurisdiction unless there is no work being performed in their group. They must be the first employees returned to that group or shift when work is again available.

\* Services to the Union. Union officials are provided desks and access to telephones, including outside lines, to conduct legitimate union business.

\* Outsourcing. Work is performed by Company employees in Company plants whenever, in the Company's opinion, such work can be performed competitively at required quality levels and in accordance with delivery requirements.

\* Hours of Work, Overtime, and Premium Pay. The agreement establishes workweeks, shift hours, and overtime and premium pay. Overtime is time and one-half pay except that an employee receives two-times pay for all time worked on the seventh workday in a workweek for everything hour worked during that workweek in excess of 40 hours. Employees called into work for other than their regular shift, or for other than a continuous extension of their regular shift, receive a minimum of two hours work or two hours pay. Overtime is distributed on an equitable basis consistent with production needs by job classification, section, and shift. There are two ten-minute rests period, one in each half of an employee's shift, and a rest period between the regular shift and overtime work if the overtime is scheduled for two or more hours.

\* Wages. The wages of privatized employees are grandfathered. If their wage rate exceeds the maximum established for the wage rate range established for their job grade or classification (there are six grades), they retain their existing wage rate. There is a general wage increase of 3% per year for each of the three years under the agreement.

There are also two wage progression increases of 0.25% effective June 26, 1998 and June 25, 1999. The increases do not apply to employees whose wage rate exceeds the maximum rate for the rate range of their job classification. In addition, employees who are below the mid-point of the rate range of their job classification receive wage progression increases of 0.25% to their base rate effective June 26, 1998 and June 25, 1999. Employees hired from January 6 through March 15, 1997, receive a lump sum payment of \$200. Swing shift employees receive a shift premium of 7 1/2% of their base hourly wage and graveyard shift employees receive a shift premium of 10% of their base hourly wage. Pay is also provide for a specified amount of jury duty (10 work days in any twelve month period) and for annual military training (eleven work days of differential pay (the difference between Military pay, including allowances other than travel pay, and employer pay at the straight-time base rate) in a twelve month period.

\* Classification. Management has the right, as noted above, to delete, establish, or revise job classifications together with job descriptions and rates of pay. However, if the union does not agree with the labor grade, it may file a grievance. Job descriptions may not be construed to restrict in any manner the rights of the company to assign work to employees nor to permit an employee to refuse to perform assigned work

based on the reason that the work is not described in the job description or is described in another job description.

\* Seniority.

\* Seniority for Government Service. Seniority is based on prior government service occurring immediately before privatization. All employees hired and on the rolls of the company on the date of privatization have a seniority date which reflects credit for their government service time exclusive of any military service and performance appraisals. The company is required to provide the union with a list of all employees and their seniority dates agreed to at the time of hiring. Thereafter, all employees hired or rehired after loss of seniority will be treated as -new hires- for purpose of calculating seniority.

\* Application. Seniority is established by job classification within the bargaining unit. New and former employees must serve a 90 day probationary period and they possess no seniority during that period. But, once their probationary periods are over, they are credited with seniority as of the effective date of their hire or rehire. Employees transferred and/or reclassified into the bargaining unit possess no seniority during the first thirty (30) days, plus absences, of employment therein. If their employment continues beyond the 30 days, they are credited with seniority as of the effective date of their transfer and/or reclassification.

\* Super seniority. The Chief Steward and union stewards are entitled, subject to their ability to perform any remaining work within the areas of their jurisdiction and on the shift they serve as steward (and without regard to their seniority), to be the last employees laid off from, and first to be recalled to, their respective areas of jurisdiction.

\* Seniority Loss. Seniority can be lost for a number of reasons including those associated with leaving the bargaining unit (e.g., resignation), layoffs of over 24 consecutive months, leaves of absence in excess of six months; and industrial illness or injury leaves of absences in excess of nine months.

\* Promotion. The senior qualified employee among applicants must be selected for a position. A promotion is defined as any change in an employee's classification status, other than recalls, which results in the employee being reclassified, with or without an immediate change in base rate, to a classification of a higher rate range. Bargaining unit employees must be offered bargaining unit vacancies for which no eligible employees is laid off.

\* Layoff and Recall. Employees are reduced by first separating probationary employees and then separating employees, by classification, in the inverse order of their seniority. Prior to being laid off, employees in a higher classification, will be offered -open positions- in seniority order provided they have the qualifications to perform the required work. An employee offered a lower classification in lieu of layoff has the option to take the layoff with recall rights to their position or to take the lower position. An employee who exercises layoff rights is recalled to the employee's former position prior to any other method of filling the

position if permitted by seniority. An employee who accepts the lower classification is entitled to recall rights to his original position in order of his seniority along with those employees who accepted layoff when work is again available. Employees are subject to recall in the inverse order in which they were laid off, by classification, i.e., last out, first back. -Open positions- not subject to recall, are offered to laid off employees provided they have the experience, training, and ability to perform the work prior to filling the position by any other means. Offers are made on the basis of seniority. An employee who accepts recall to a position other than the position he has recall rights to, does not forfeit his right to be recalled to his original position.

\* Union Security. Employees who were union members on the effective date of the agreement or who voluntarily join the union must, as a condition of employment, maintain their membership for the duration of the agreement to the extent of continuing to pay periodic dues and initiation fees uniformly required as a condition of retaining union membership. Those who are not union members must, as a condition of employment, pay an agency fee to the union on and after the 31st day following their employment (or reemployment) and must continue to do so during the term of the agreement. Upon written request by the union, the Company will terminate an employee who fails to pay unions dues or the agency fee.

\* Holidays. There are 9 holidays.

\* Leave (Personal Time Off (PTO) Program). PTO is a bank of days that employees can use for any reason (sick time, school programs, family leave). Employees accrue PTO based on completed years of service as follows: Less than 1 year, 10 days or 80 hours; one through four years, 15 days or 120 hours; five through nineteen years, 20 days or 160 hours; 20+ years, 25 days or 200 hours. Active full-time employees on Jan. 6, 1997,(i.e., privatized employees), were granted 5 days of PTO. Their accrual of PTO is determined on their seniority date based on government service time exclusive of any military service. Employees can cash out up to five PTO days each benefit year. The cash out is at 50% of the employee + s working rate multiplied by the number of hours cashed out. In addition to PTO, employees are allowed up to three days (five days when traveling out of the home state) bereavement leave.

\* Grievance and Arbitration Procedure. The agreement contains a detailed grievance and arbitration procedure.

\* Benefits. Employees enjoy the same benefits the Company provides to salaried employees of the company. They are: Comprehensive Hughes Medical Options, Health Maintenance Option(s), Hughes Dental Plan Option(s); Dental Maintenance Organization Option(s), Vision Care, Basis and Option Life Insurance, Dependent Life Insurance, Accidental Death & Dismemberment Insurance, Short Term Disability, Long Term Disability, Flexible Spending Accounts, Retiree Group Life Insurance, HTSC Employee Thrift and Savings Plan, and HTSC Retirement Plan Non-Contributory Option.

\* Alternative Work Schedules. Employees, with the approval of their management and team (if applicable), may participate in a compressed work schedule

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Patent Application Document

NAME OF INVENTOR: Inventor X  
TITLE OF INVENTION:

FILING DATE:  
SERIAL NO.:

EXAMINER:  
CLASS (Preliminary): 364

ATTY DOCKET NO.

\*\*\*\*\*

**PETITION TO CORRECT INVENTORSHIP UNDER 37 CFR 1.48**

This petition seeks to add Dr. Y as an inventor to application Serial No. \_\_\_\_\_, filed \_\_\_\_\_(Date). The application is entitled "\_\_\_\_\_" and Inventor X is presently the sole named inventor. The following items are included with this petition:

- A declaration by Inventor X, as required by 37 CFR 1.48.
- An oath or declaration by each actual inventor as required by 37 CFR 63.
- Two copies of an authorization for charging Deposit Account \_\_\_\_\_ for the fee for this petition required under 37 CFR 1.17.
- The written consent of the assignee in this case. A copy of the assignment, from Inventor X to the US Government, is also enclosed. No other assignments presently exist in the case.

DISCUSSION

The invention, as defined by the application's claims 1 and 6, is ...(brief description of invention).

As shown by Inventor X's affidavit, it was Dr. Y's idea both to (include description of Dr. Y's contributions to the claimed

invention). Hence, Dr. Y should be added as an inventor in the application.

Dr. Y also conceived ... (more description of Dr Y's contributions to the invention as claimed). For this added reason, Dr. Y should be added as an inventor to the application.

It should be noted that Inventor X's ideas and work still contribute to the subject matter of the claims. First, as noted above, ... Inventor X contributed to ... (description of Inventor X's contributions to the invention as claimed).

As shown by Inventor X's declaration, it is customary academic practice for a doctoral student to be considered the primary investigator on his or her doctoral thesis. This led Inventor X to believe he was the inventor of the subject matter of his thesis. Inventor X's declaration also shows that he spent an estimated minimum of 3000 man-hours on his doctoral thesis over a period of two years. His extensive work on his thesis reinforced his belief that he would be considered the inventor of methods developed by the thesis.

As Inventor X's declaration states, the application in this case filed with him as sole inventor through error and without deceptive intent on his part. At the time the application was filed, Inventor X was not aware of the legal significance of Dr. Y's contributions. He learned of this legal significance in

January of 1997. Shortly afterward, preparation of this petition began.

In summary, Dr. Y's contribution to the invention are such that he should be named a co-inventor. Inventor X's being named as sole inventor on the patent application was a result of innocent error. Therefore, the petition to add Dr. Y as an inventor in the application should be granted.

Respectfully submitted,

Peter A. Taucher, Gail S.  
Soderling, David L. Kuhn  
ATTORNEYS OF RECORD  
US Army Tank-Automotive Command

AC 313-574-5681  
AV 786-5681

By \_\_\_\_\_  
DAVID L. KUHN

**CERTIFICATE OF MAILING**

Date \_\_\_\_\_

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class mail in an envelope addressed to: The Commissioner of Patents and Trademarks, Washington, D.C. 20231 on or before \_\_\_\_\_.

\_\_\_\_\_  
DAVID L. KUHN  
Reg. No. 30,957



customary academic practice for a doctoral student to be deemed the principle investigator of his or her doctoral thesis. Accordingly, I considered myself to be the principle investigator on my thesis. Since I was the principle investigator, I believed that was the inventor of subject matter in the thesis. Additionally, I estimate that I spent at least 3000 man-hours on my doctoral thesis over a period of two years. My extensive work on the thesis reinforced my belief that I was the inventor of its contents.

An advisor for my doctoral thesis was Dr. Y, a professor at \_\_\_\_\_ University in \_\_\_\_\_ (city). Some time after the patent application was filed, I began reconsidering the input Dr. Y gave me in my doctoral thesis; as a result I began to wonder whether Dr. Y should be deemed an inventor on the application. I was not then aware of the legal significance of Dr. Y's contributions noted below. I subsequently received legal advice concerning the significance of Dr. Y's contributions.

[Insert a paragraph discussing of the claims' elements, and what each inventor contributed to each claim element.]

I now know the legal significance of Dr. Y's contributions and believe that Dr. Y is a co-inventor of the invention. The application was filed with me named as sole inventor through error and without deceptive intent on my part. I now desire, and believe it appropriate, to include Dr. Y as an inventor on the application.

\_\_\_\_\_  
Inventor X

\_\_\_\_\_  
Date



DEPARTMENT OF THE ARMY  
UNITED STATES ARMY TANK-AUTOMOTIVE AND ARMAMENTS COMMAND  
WARREN, MICHIGAN 48397-5000

REPLY TO  
ATTENTION OF

AMSTA-CS-LP

March 5, 1997

MEMORANDUM THRU DEPARTMENT OF THE ARMY, Office of the Judge Advocate General, Intellectual Property Law Division, ATTN: JALS-IP (Mr. Earl T. Reichart, Acting Chief) 901 North Stuart Street, Suite 700, Arlington, VA 22203-1837

FOR The Assistant Secretary of the Army for Research Development and Acquisition, ATTN: SARDA (The Honorable Gilbert F. Decker) 103 Army Pentagon, Room 2E672, Washington, D.C. 20310-0103

SUBJECT: Request for Consent to Correction of Inventorship on a US Army Patent Application

1. Purpose. This request concerns a patent application filed in the US Patent and Trademark Office (USPTO) by the US Army Tank-Automotive and Armaments Command (TACOM). We seek your written consent to add an inventor to the patent application.

2. Background.

a. Particulars of the application. The application is entitled "-----." Inventor X, a TACOM scientist, signed the application as the sole inventor and assigned his rights thereto to the US Government. The application was filed in the USPTO on (Date), and received Serial No. \_\_\_\_\_.

b. Description of the invention. The invention is ... (Short description of the invention) Attached is a copy of the patent application, which describes the invention in detail.

3. Reason for Request. After the application was filed, we learned of a second inventor, Dr. Y, a professor at \_\_\_\_\_ University at (city). This is a problem since US law (35 USC 116) requires that all inventors sign a patent application. A USPTO regulation, 37 CFR 1.48, provides a way to add an inventor to a patent application. 37 CFR 1.48 requires an assignee of the invention to give written consent to corrections of inventorship. Per 1-6(c) of AR 27-60, Intellectual Property, you are the authority to give such consent. 1-6(c) states that the ASA(RD&A) can "Execute, on behalf of the Army, documents relating to change of inventors in an application pending before the USPTO." Hence, we need your written consent to add Dr. Y as an inventor to the application.

4. Key issue. The key issue here is whether both Inventor X and Dr. Y are inventors. Relevant to this issue is 37 CFR 1.45(c), which states "...each named inventor must have made a contribution, individually or jointly to the subject matter of at least one claim of the application..." Based on the facts below, we have concluded that both Inventor X and Dr. Y made contributions to subject matter of claims of the application. Consequently, they both are inventors in the application.

a. Dr. Y. (Here, describe Dr. Y's contributions to each element in the affected claims of the patent application,)

b. Inventor X. As noted above, Inventor X participated in formulating a new way to determine ... (Here, list Inventor X's contributions to each of the relevant claims of the patent application.)

5. Advisement of issue under 37 CFR 1.48. In order to correct inventorship under 37 CFR 1.48, the failure to name Dr. Y as an inventor must have been the result of "error without deceptive intent." The attached petition to correct inventorship addresses that issue as follows: Inventor X was unaware of the legal ramifications of Dr. Y's contributions. At the time the application was filed, Inventor X believed that his authorship of his doctoral thesis meant that he should be the inventor in a patent application based on the thesis. This was consistent with customary academic practice in which a doctoral student is deemed the principle investigator of his or her doctoral thesis. Hence, Inventor X's signature as sole inventor on the application was an innocent error.

6. Consequences. If the requested consent is obtained, the petition to correct inventorship succeeds and the application is allowed, then TACOM will share ownership of the patent with either Dr. Y or \_\_\_\_\_ University. However, without the consent, the petition will fail and TACOM will be unable to obtain any patent. The application relates to ....; if no patent is obtained, TACOM's leadership in this technical area will suffer. Also, based on TACOM's expertise in this area, TACOM has a Cooperative Research and Development Agreement (CRDA) with Z Corporation (Z), in which Z is studying... (description of Z's research under the CRDA). Without the requested consent, TACOM's position vis-a-vis Z to negotiate future similar CRDAs may be degraded.

7. Diligence. 37 CFR 1.48 requires diligence in amending applications to correct inventorship. By extension, diligence in obtaining consent from the assignee is required. Therefore we ask that priority be given to this request for consent to correct inventorship.

8. Further information. For your reference, a copy of the petition

to correct inventorship is attached, as is Inventor X's declaration in support of the petition. A copy of the patent application is also enclosed. TACOM's POC is David Kuhn, AMSTA-LP, DSN 786-5681.

Encl

DAVID L. KUHN  
Patent Attorney

INFORMATION PAPER

AMCCC-G

30 January 1997

SUBJECT: Waiver of Restriction of Use of Special Government Employees; Waivers issued pursuant to 18 U.S.C. 208(b)(3)

PURPOSE: To provide information regarding recent changes in the Federal Procurement Integrity Act as it relates to Governmental Use of Special Government Employees pursuant to the Federal Advisory Committee Act.

1. Pursuant to 18 U.S.C. 208(b)(3), an agency may determine in an individual case that the prohibition of 18 U.S.C. 208(a) should not apply to a special Government employee serving on, or an individual being considered for, appointment to an advisory committee established under the Federal Advisory Committee Act, notwithstanding the fact that the individual has one or more financial interests that would be affected by the activities of the advisory committee.

2. The agency's determination must be based on a certification that the need for the employees services outweighs the potential for a conflict of interest created by the financial interest involved.

3. Waivers issued should comply with the following requirements:

(a) The advisory committee upon which the individual is serving, or will serve, is an advisory committee within the meaning of the Federal Advisory Committee Act, 5 U.S.C. app.;

(b) The waiver must be issued in writing by the Government official responsible for the individual's appointment (or other Government official to which authority to issue such waivers has been delegated) after the official reviews the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978;

(c) The waiver must include a certification that the needs for the individual's services on the advisory committee outweighs the potential for a conflict of interest;

(d) The facts upon which the certification is based should be fully described in the waiver, including the nature of the

financial interest, and the particular matter or matters to which the waiver applies;

(e) The waiver should describe any limitation on the individual's ability to act in the matters or matters;

(f) The waiver must be issued prior to the individual taking any action in the matter or matters; and

(g) The waiver may apply to both present and future financial interest of the individual, provided the interests are described with sufficient specificity.

4. Agency's certification for the individual's services. In determining whether the need for an individual's services on an advisory committee outweighs the potential for a conflict of interest created by the disqualifying financial interest, the responsible official may consider the following factors:

(a) The type of interest that is creating the disqualification (e.g., stocks, bonds, real estate, other securities, cash payment, job offer, or enhancement of a spouse's employment);

(b) The identity of the person whose financial interest is involved, and if the interest is not the individual's, the relationship of that person to the individual;

(c) The uniqueness of the individual's qualifications;

(d) The difficulty of locating a similarly qualified individual without a disqualifying financial interest to serve on the committee;

(e) The dollar value of the disqualifying financial interest, if it is known or can be estimated (e.g., the amount of cash payment which may be gained or lost, the salary of the job which will be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the matter to the company issuing the stock, the change in the value of real estate or other securities);

(f) The value of the financial instrument or holding from which the disqualifying financial arises (e.g., the face value of the stock, bond, other security or real estate) and its value in relationship to the individual's assets. If the disqualifying financial interest is that of a general partner or organization specified in section 208, this information must be provided only to the extent that it is known by the employee; and

(g) The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee.

5. This point paper is consistent with the point paper dated 30 December 1996 with subject: Restrictions on the Use of Contractor Employees.

Prepared by:

Alex C. Bailey  
Senior Ethics Counsel

**JOB HUNTING & POST-GOVERNMENT  
EMPLOYMENT RESTRICTIONS  
(A SUMMARY)**

**I. Job Hunting.**

A. If seeking employment with a company, you are disqualified by law and regulation from participating in any official matter that affects the company (even if someone else makes the final decision). Written notice of this disqualification is often required.

B. “Seeking employment” includes sending a resume or not rejecting outright an unsolicited inquiry. If you tell a company representative who contacts you that you have to wait until next month to discuss the possibilities, you are “seeking employment” now. Sending blanket resumes to industry or asking for a job application would not be “seeking employment.” Also, if you send a resume to a company and do not hear anything for two months, you are no longer “seeking employment.”

C. Under the new procurement integrity law (effective 1 January 1997), if you are participating personally and substantially in a procurement and are contacted by a bidder or offeror before award, you must give written notice to your supervisor and Ethics Counselor.

D. Letters of recommendation on official letterhead may be obtained from other government employees who have dealt with you in the course of your government job and who have personal knowledge of your ability or character.

E. Travel expenses for job interviews. You may accept such expenses from potential employers, including a DoD contractor, in connection with job interviews. To avoid the appearance of a conflict of interest, the cost of the accommodations should be customary in such situations. For those required to file a financial disclosure report (SF 278 or SF 450), travel expenses totaling \$250 or more must be included on these reports.

F. Terminal leave. Remember you are still on active duty, and you cannot represent any non-Federal entity before the Federal Government while on terminal leave. In CECOM those required to file a financial disclosure report must also have written permission of their agency designee to work during terminal leave. Your agency designee is the first supervisor in your chain who is a commissioned military officer or a civilian GS12 or above.

## **II. Post-Government Employment Restrictions.**

A. Switching sides. If you participated personally and substantially in a particular matter, you may never represent someone else back to the Federal Government on the same particular matter.

B. Switching sides. If a particular matter(s) was under your official responsibility during your last year of service, you may not represent someone else back to the Federal Government for two years on the same particular matter(s).

C. Former general officers and senior employees (SES Level V and up) are prohibited from representing someone else back to their agency for one year concerning any matter, even if they were never involved in it.

D. Under the new procurement integrity law (effective 1 January 1997), PMs, Deputy PMs, contracting officers, and others involved with \$10+ million contracts may not accept compensation from the contractor for a period of one year after serving in such capacity for the Government; others include members of the source selection evaluation board, the chief of the financial or technical evaluation team, and the source selection authority for \$10+ million contracts. Also restricted are those who make the decision to award a task order or delivery order of \$10+ million.

E. The new provision cited immediately above does not prohibit working for a division or affiliate of the contractor who does not produce the same product or services.

## **III. Miscellaneous Military Provisions.**

A. Use of Title. Retirees may use military rank in private commercial or political activities, but retired status must be clearly indicated, there must be no appearance of DoD endorsement, and the use must not discredit DoD.

B. Wearing the Uniform. Retirees may wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions (AR 670-1, para. 29-4).

## **IV. Ethics Advice and Counsel.**

A. Before sending a resume or pursuing an employment contact, you may seek the advice of your organization's Ethics Counselor. Contact the CECOM Legal Office, SJA Division, (908) 532-4444.

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Payment from Non-Federal Sources for Official Travel Expenses

1. Under certain conditions non-Federal sources may pay travel and related expenses for Government officials and employees to attend meetings, conferences, symposia, or events of a similar nature.

2. The authority to accept such expenses is found in 31 U.S.C. § 1353.

a. This law provides the authority for Army personnel to accept **unsolicited** gifts of travel and related expenses from non-Federal sources when going TDY to a meeting or similar function.

b. The person receiving the gift of expenses must be in an official travel status, away from the duty station. This authority does not extend to permissive TDY, leave, or pass. Similar expenses for a spouse may be accepted **if** the Secretary of the Army has approved the spouse's travel. First class air travel is not permitted.

c. The gift approval authority is the official who normally would approve TDY travel.

d. Before approval, the deciding official must determine that acceptance under the circumstances would not cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of Army programs or operations. The official must take into account the source, the purpose of the meeting or similar function, the identity of other expected participants, the nature and sensitivity of any matter pending at the agency affecting the source, the significance of the traveler's role in any such matter, and the value and character of the travel benefits offered.

e. Prior to authorizing acceptance of a non-Federal source's payment of official travel costs and related expenses, travel-approving officials must obtain the written concurrence of their ethics counselor that acceptance is appropriate.

AMSEL-LG

SUBJECT: Offer of Payment from a Non-Federal Source for Official Travel Expenses

f. After travel is completed, if more than \$250 worth of benefits have been accepted, the traveler signs and sends a report concerning the travel, with a certification, through the travel approving authority (if different from the traveler) to the ethics counselor for review and forwarding to the Army Standards of Conduct Office (enclosure).

3. Point of contact for this memorandum is LTC Craig L. Reinold, Staff Judge Advocate, x24444.

Encl

KATHRYN T. HOENER  
Chief Counsel

DISTRIBUTION:

M, O & R

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**REPORT OF PAYMENT OF TRAVEL & RELATED EXPENSES  
ACCEPTED FROM NON-FEDERAL SOURCES  
(31 U.S.C. § 1353)**

Employee's Name: \_\_\_\_\_

Command/Organization: \_\_\_\_\_

Employee's Position: \_\_\_\_\_

Spouse's Name (if applicable): \_\_\_\_\_

**EVENT**

(for which more than \$250 in travel and related expenses were donated)

Nature/Title of Event: \_\_\_\_\_

Sponsor: \_\_\_\_\_

Location: \_\_\_\_\_

Dates:                      From: \_\_\_\_\_ To: \_\_\_\_\_

**TYPE OF DONATION**

Donating Organization: \_\_\_\_\_

Total Amount: \_\_\_\_\_

Amount of Payments In-Kind: For Employee: \_\_\_\_\_ For Spouse: \_\_\_\_\_

(pre-paid conference fees, hotel costs, airline tickets, pre-paid meals, etc.)

Amount of Payments by Check for Employee: \_\_\_\_\_ For Spouse: \_\_\_\_\_

(Check must be made to "Department of the Army". Submit to your travel office)

*Itemized Expenses:*

Hotel: \_\_\_\_\_

Airline: \_\_\_\_\_

Meals: \_\_\_\_\_

Other: \_\_\_\_\_

"I certify that the statements on this report are true, complete, and correct to the best of my knowledge."

\_\_\_\_\_  
Signature of Traveler

\_\_\_\_\_  
Date of Signature

**SUBMIT REPORT TO YOUR ETHICS COUNSELOR WITHIN 30 DAYS OF TRAVEL**

\_\_\_\_\_  
Ethics Counselor Printed Name and Signature

\_\_\_\_\_  
Date of Signature

**SUBJECT:** Attendance at Meetings of National Service-Related Organizations

**PURPOSE:** To provide guidance on attendance by military and civilian personnel at Private organizations meetings. The following Army Regulations are the bases of this determination:

AR 1-211, Attendance of Military and Civilian Personnel at Private Organizations Meetings; AR 360-61 Community Relations; AR 210-1, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations; AR 690-400, Employee Performance and Utilization; JFTR, (Joint Federal Travel Regulations, VOL 1), Uniformed Service Members; JTR, (Joint Travel Regulations VOL 2), Department of Defense Civilian Personnel; DOD 5500.7-R (Joint Ethics Regulation, JER); and Private Organizations Reference Guide (HQDA, Director of Management).

This point paper provides guidance for attending (at Government expense), meetings of service-related professional organizations. Such events include, but are not limited to, the 1997 annual meetings of the Association of the United States Army in Washington, D.C., 13-15 October; The Reserve Officers Association in Kansas City, 18-21 June; the Retired Officers Association in Tulsa, OK, 25-28 October; the American Legion in Orlando, FL., 29 August -4 September; the Veterans of Foreign Wars in Salt Lake City, 15-22 August; the Noncommissioned Officers Association in Nashville, TN, 3-6 July; Army Aviation Association of America in Louisville, KY 23-26 April; and others.

AR 1-211 and AR 210-1 remain the primary regulations governing such attendance (See AR 360-61, Chapter 4, for speaking engagements). Decisions regarding attendance should consider the following:

- a) Attendance at Government expense is authorized only when information gained will substantially benefit the approving authority's mission accomplishment. It should relate directly to the member's professional background or primary duties, represent a valuable training opportunity, and improve the attendee's value to the Army. Attendance should not provide selective benefit or favor any individual, political organization, corporation, or commercial venture. See JER, Chapter 3.
- b) Government expense should be minimized by designating the minimum number of participants (qualified to accomplish the purpose of the meeting and located nearest to the meeting site) necessary to acquire and relate information from the meeting to other members of the organization.
- c) When attendance is authorized at government expense and the meeting is authorized specifically in the travel order, authorized reimbursable expenses may include transportation, per diem, miscellaneous expenses, and registration fees in accordance with the Joint Federal Travel Regulations or the Joint Travel Regulations.

Prepared by:

Alex C. Bailey  
Senior Ethics Counsel

AMSEL-LG (27-1a 65u)

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Official Speaker Support to Non-Federal Entities

1. IAW Section 3-211 of the Joint Ethics Regulation, DoD 5500.7-R (JER), if you get invited to speak in your official Government capacity at an event sponsored by a non-Federal entity, you may only do so after receiving **prior approval** from the head of your DoD Component command or organization. The Commanding General, CECOM and Fort Monmouth, has final approval for all CECOM personnel. All such requests for approval should go through AMSEL-LG-JA for review and concurrence.

2. In order to approve the speaker support, the head of the DoD Component command or organization must determine all of the following:

- a. the support does not interfere with official duties;
- b. the support serves DoD community relations;
- c. it is appropriate for DoD to associate with the event;
- d. the event is of interest and benefit to the local civilian community or any part of DoD;
- e. the command is able and willing to provide the same support to comparable events;
- f. use of DoD speakers is not restricted by other statutes; and
- g. no admission fee will be charged beyond what will cover the reasonable costs of sponsoring the event.

AMSEL-LG

SUBJECT: Official Speaker Support to Non-Federal Entities.

3. If speaker support is approved, those speaking in their official capacity may accept unsolicited offers of free attendance at the event. This free attendance may include food, refreshments, entertainment, instruction, and materials furnished to all attendees as an integral part of the conference. Not included would be travel expenses, lodging, or entertainment collateral to the event.

4. POC on this matter is CPT Mahoney at x24444.

KATHRYN T. HOENER  
Chief Counsel

DISTRIBUTION:  
M, O, & R

**THE ENVIRONMENTAL LAW DIVISION  
BULLETIN**



February 1997

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Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

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***Editor's Note***

Spaces are still available to attend the U.S. Air Force's Basic Environmental Law course. The course will be held in Montgomery, Alabama, from 5 through 9 May 1997. There is no tuition; however, participants are responsible for their travel and per diem costs. If you would like to attend, please send a facsimile with your name, rank or grade, installation, and telephone number to the attention of SSG Stannard of the Environmental Law Division. The facsimile number is (703) 696-2940 or DSN 426-2940.

Beginning with the March edition of the Environmental Law Division Bulletin, CPT Silas DeRoma will take over as the Bulletin's editor. Any inquiries regarding the Bulletin should be addressed to CPT DeRoma at (703) 696-1230 or DSN 426-1230, or electronic mail address [deromasi@otjag.army.mil](mailto:deromasi@otjag.army.mil). Thank you for the support and cooperation that you have shown in helping us to bring the Bulletin to you via electronic mail. Ms. Fedel.

***Environmental Structured Settlements - CPT Stanton***

Structured settlements have been used for a number of years to spread out payments in personal injury and medical malpractice cases, but only recently have they been applied to environmental cleanup cases. Structured settlements can take a number of forms and can be tailored to meet a variety of different situations. A common manner of setting up such a settlement involves the creation of a reversionary trust, where a trustee manages the corpus of the trust, the United States retains ownership, and any reversion left in the trust is returned to the U.S. Treasury after the United States' obligation has been satisfied. Not only does this allow the trustee to invest the money not yet paid out of the trust to the benefit of the United States, but the beneficiary may avoid significant tax liability by not realizing the full amount of the settlement in the first year.

Structured settlements may make payments according to a pre-determined schedule, or they may be used to pay a percentage of cleanup costs on an ongoing basis. For example, in one rather complex structured settlement, the private potentially responsible parties (PRPs) have agreed to perform the cleanup (using their own contractors), while the United States has agreed to fund a percentage of cleanup costs. Under this arrangement, the private PRPs will submit bills to the United States' trustee, and will receive reimbursement for costs that the trustee determines are "allowable." In addition, the trust will hire (1) an investment manager in order to leverage the maximum possible amount of time-value out of the funds in the trust, (2) an accounting firm to conduct periodic audits, and (3) an environmental consulting firm to act as a technical advisor. The cost savings in such a case can be considerable, and in this example, where cleanup costs may run as high as \$300 million, savings to the United States are estimated to be more than \$20 million.

DID YOU KNOW? . . . ROAD TRAFFIC KILLS AN AVERAGE OF 45 ENDANGERED KEY DEER IN FLORIDA ANNUALLY AND IS THE SUBSPECIES' SINGLE LARGEST CAUSE OF DEATH. AVERAGE ANNUAL MORTALITY IS 63 DEER FROM A TOTAL POPULATION OF APPROXIMATELY 300.

### ***RCRA General Permit To Be Proposed In Upcoming Rulemaking - MAJ Anderson-Lloyd***

The U.S. Environmental Protection Agency (USEPA) is nearing completion of a plan for a streamlined permitting process that will allow some generators and recyclers to qualify for a general permit rather than the more complex individual permit. The agency's Permit Improvement Team (PIT) has been working on improving and streamlining the permitting process for the past two years. The PIT recommendations for a general permit will be included in an upcoming rulemaking that will amend the definition of solid waste and modify the current recycling program.

Through this new initiative, the general permit would be available to off-site recyclers and to hazardous waste generators who accumulate their wastes in tanks or containers on-site for more than 90 days. The USEPA would formulate technical and management standards for a general permit that would be applicable to facilities nationwide. Under the general permit, the RCRA requirements would remain the same; however, USEPA would require much less information for permit approval.

Under the new scheme, a facility interested in a general permit would first hold a public meeting to discuss the planned waste management activities. In place of filing a Part A application, the facility would file with the permitting agency a notice of intent to be covered by a general permit. The notice of intent includes a summary of the public meeting and information on waste streams, management practices, and volumes of waste managed. Based on this information, the permitting agency would make the initial determination whether the facility meets the scope of the general permit. If necessary, site-specific conditions are added to the general permit and public notice of the tentative decision is provided. On the request of a stakeholder, a public hearing and public comment period of 45 days follows the notice of the tentative decision. After considering the public comments, the agency would make the final decision on the permit; the permit is effective after 30 days.

In addition to streamlining the review of the initial application, any modifications to the permit would also be expedited. Changes such as an addition of new waste streams or increases in capacity would require only the submission of the information, not agency oversight or approval. USEPA plans to formally propose the rule in April 1997.

DID YOU KNOW? . . . RADIAL TIRES CAN BOOST YOUR GAS MILAGE BY AS MUCH AS 10%.

### ***New Ozone and Particulate Matter Standards - LTC Olmscheid***

The U.S. Environmental Protection Agency (USEPA) published new proposed National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter on 13 December 1996. 61 Fed. Reg. 65638 - 65872 (1996). The USEPA proposed these new standards because it does not believe the current standards adequately protect the public from the adverse health effects caused by ozone and particulate matter. These standards will likely have an adverse effect on military operations.

One of the standards involves ozone. Ozone is used as an indicator of photochemical smog and is caused by the chemical reaction of ozone precursors in the atmosphere. Exposure to ambient ozone concentrations has been linked to increased hospital admissions for respiratory

causes such as asthma and is associated with 10-20 percent of all of the summertime respiratory-related hospital admissions. Repeated exposure to ozone increases the susceptibility to respiratory infection and lung inflammation, and can aggravate preexisting respiratory diseases. Long-term exposures to ozone can cause repeated inflammation of the lung, impairment of lung defense mechanisms, and irreversible changes in lung structure, which could lead to chronic respiratory illnesses such as emphysema, chronic bronchitis, or premature aging of the lungs.

Mobile and stationary combustion sources are the primary source of ozone precursors. The primary stationary source of ozone precursors on Army installations is fossil fuel boilers.

The USEPA projects that a number of counties that are currently in attainment for either ozone or particulate matter will be in nonattainment under the proposed standards. Based on these projections, the new standards will place 13 Army installations that are currently located in ozone attainment areas into ozone nonattainment areas. These installations include Forts Bragg, Gordon, and Jackson.

The U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) evaluated the costs of meeting the new ozone standards. Their study indicates it will cost installations currently in attainment areas, and that will be placed in nonattainment areas, from one to five million dollars to comply with the new standards. Installations that are currently in nonattainment areas may also incur additional costs if regulators impose additional control measures on sources.

The other standard involves particulate matter. Particulate matter refers to solid or liquid material that is suspended in the atmosphere. It includes materials of both organic and inorganic chemicals, and is divided into primary and secondary components. Primary particulate matter consists of solid particles, aerosols, and fumes emitted directly as particles or condensed droplets from various sources. Secondary particulate matter is produced from gaseous pollutants that react with one another and with oxygen and water in the atmosphere to form new chemicals that are particles or condensable compounds.

The current particulate matter program is designed to protect the public from the effects of "coarse" particulate matter of ten microns or smaller (PM10). Coarse particles affect the respiratory system and contribute to health effects such as aggravation of asthma. PM10 at military installations primarily consists of dust kicked up on unpaved roads from vehicular traffic or from soldier training activities. The USEPA proposed minor changes to the PM10 standard, and these changes will not adversely affect Army operations.

A number of recently published community epidemiological studies indicate that "fine" particulate matter of 2.5 microns or smaller (PM2.5) are more likely than coarse particles to adversely affect health (e.g., premature mortality and increased hospital admissions). As a result, USEPA proposed PM2.5 standards. The new annual PM2.5 standard is set at 15 micrograms per cubic meter, and a new 24-hour PM2.5 standard is set at 50 micrograms per cubic meter.

PM2.5 is generally emitted from activities such as industrial and residential combustion and vehicle exhaust. PM2.5 also is formed in the atmosphere from gases and volatile organic compounds that are emitted from combustion activities and become particles as a result of chemical transformations in the ambient air. Dust is also a major contributor to PM2.5.

The new PM2.5 standards will have a major adverse affect on obscurant training (smoke consists of particulates of 0.5 - 1 microns), open burning, open burning/open detonation operations, troop training exercises that produce a large amount of dust, and Army Materiel Command (AMC) installations with industrial activities. Using USEPA's projections, 22 Army installations will be in PM2.5 nonattainment areas.

The USEPA has solicited comments regarding the impact of the new proposals, as well as the impact of several other possible standards to better control ozone and particulate matter. It should be noted that industry, many state regulators, and some members of Congress have been very critical of these proposed rules, asserting that they are both unnecessary and too costly.

DID YOU KNOW? . . . ENVIRONMENTALISTS REFER TO  
THEODORE ROOSEVELT'S PRESIDENCY AS THE "GOLDEN AGE OF CONSERVATION."

#### ***Environmental Law Division On Line - CPT DeRoma***

The Environmental Law Division's Environmental Law Link pages are up and running. The pages may be reached by the link off of the Judge Advocate General's (JAG) Corps home page at <http://www.jagc.army.mil/jagc2.htm>, or by going to <http://160.147.194.12/eld/eldlinks.htm> directly. The site is designed to be used as a starting point for legal and general law research. The pages contain links to the following areas: DOD environmental sites, DA environmental sites, environmental regulations, environmental legislation, environmental statutes, courts, case law, U.S. Government environmental departments and agencies, environmental interest groups, international environmental sites, search engines, general law sites, and general points of contact in the armed forces. You may also view an e-mail listing of personnel in the Environmental Law Division. Please enjoy the site and e-mail us your comments.

DID YOU KNOW? . . . THE SNOWY OWL WEIGHS 4 TO 6 POUNDS AND HAS A WING SPAN OF 5 FEET.

#### ***Ninth Circuit Rules on Natural Resource Damages - Ms. Fedel***

The United States Court of Appeals for the Ninth Circuit has held in favor of Federal natural resource trustees on two important issues concerning natural resource damage (NRD) recoveries. U.S. v. Montrose Chemical Corp., et al., No. CV-90-03122-AAH, 1997 U.S. App. LEXIS 704, (9th Cir. January 17, 1997). The Ninth Circuit decision overrules a district court decision holding that the Trustees' action was barred by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations. CERCLA §113(g)(1), 42 U.S.C. §9613(g)(1) (1986). Section 113(g)(1) provides that an action for NRDs must be commenced within three years of the later of (A) the date of discovery of the loss and its connection with the release in question, or (B) the date on which regulations are promulgated under CERCLA §301(c), 42 U.S.C. §9651(c) (1986). Section 301(c) instructs the U.S. Department of Interior (DOI) to promulgate two types of regulations governing NRDs, "Type A" and "Type B" regulations. The district court had held that the statute of limitations began to run when the Type B regulations were promulgated in 1986, and since the Trustees had filed the complaint in 1990, the action was time barred. The Trustees argued that the statute of limitations did not begin to run until the Type A regulations were promulgated in 1987. The Ninth Circuit agreed with the Trustees, stating that:

[T]he phrase in section 9613(g)(1)(B) that triggers the statute of limitations on 'the date on which regulations are promulgated under section 9651(c)' should also be interpreted as referring to 'regulations' as used by section 9651(c)--including both Type A and Type B regulations.

Montrose, 1997 U.S. App. LEXIS at \*13. Therefore, the statute of limitations did not begin to run until all of the regulations contemplated in the statute had been promulgated.

The court also reversed the district court's ruling that the Montrose defendants' liability was capped at \$50,000,000 pursuant to CERCLA §107(c)(1). CERCLA §107(c)(1), 42 U.S.C.

§9607(c)(1) (1994). Section 107(c) limits each owner's and/or operator's liability for "each release of a hazardous substance or incident involving release of a hazardous substance" to the costs of response plus \$50,000,000. The Montrose defendants had argued successfully to the district court that the legislative history of CERCLA demonstrates that the term "incident" is a term of art synonymous with "contaminated site," and that the Complaint had alleged only one "incident involving release." Montrose, 1997 U.S. App. LEXIS at \*33. The Ninth Circuit disagreed, holding that the term "incident involving release" should be interpreted in accord with its common definition and the legislative history to mean an "occurrence" or "event." As stated by the court, "a series of events that lead up to a spill of hazardous substance would be considered an incident involving release; however, a series of releases over a long period of time might or might not." *Id.*, at \*35. Therefore, the record was insufficient to support the district court's conclusion that the Complaint only alleged one "incident involving release." The court reversed the district court's holding and remanded the case for further determination of whether the Montrose defendants' liability was capped at \$50,000,000.

**THE ENVIRONMENTAL LAW DIVISION  
BULLETIN**



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***Clean Air Act Credible Evidence Rule - LTC Mel Olmscheid***

On 13 February 1997, the U.S. Environmental Protection Agency (USEPA) issued its "credible evidence" rule that allows any "credible" data, such as continuous emissions monitoring data, parametric data, engineering analysis, witness testimony or other information, to be used as evidence to determine whether a facility is violating emission standards under the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1996)(CAA). The rule does not alter current emission standards, create any new monitoring or reporting requirements, or change the compliance obligations for the regulated community. Previously, the Agency usually used reference test methods - specific procedures for measuring emissions from facility stacks - to determine compliance. The rule makes it explicit that regulated sources, EPA, States and citizens all can use non-reference test data to certify compliance or allege non-compliance with CAA permits. In some instances, the use of non-reference test data to prove compliance will be less expensive than using reference tests. The rule will be published in the Federal Register soon. This rule, while heavily criticized by industry, should not have a major impact on enforcement actions against federal facilities.

DID YOU KNOW? . . . MAKING CANS FROM RECYCLED ALUMINUM CUTS RELATED AIR POLLUTION (E.G., SULFUR DIOXIDES, WHICH CREATE ACID RAIN) BY 95%.

***Ethics, the Internet, and the Environmental Attorney - Ms. Carrie Greco***

You are the new attorney for environmental matters on your installation. You are excited as you receive your first project: assist Environmental Law Division (ELD) counsel in drafting a response to a Comprehensive Environmental Response, Compensation, and Liability Act § 104(e) request from EPA. You turn to your computer to utilize your e-mail and Internet systems to request assistance from other personnel in the investigation for your response. You then decide to e-mail your draft response to the ELD counsel for review. After all, e-mail is cheaper and faster than the fax or overnight or regular mail. Your other work picks up at the office, the due date for EPA's request is approaching fast, and you find yourself unable to find the time to finish the response. You decide that you will finish the response at home this Saturday and send it to ELD through the Internet from your new home computer. What a great idea . . . or is it?

Army environmental attorneys are finding the Internet and e-mail indispensable tools for effective and efficient communication. But with little guidance from the courts and the legal profession on the ethical ramifications, the attorney who uses the Internet could find himself or herself in the middle of a number of ethical problems, including the breach of attorney-client privilege

Here are some important points to consider before jumping onto the Internet.

Identify what form of technology you are utilizing and your potential audience. While e-mail within your office may maintain the attorney-client privilege and confidentiality, the same is

not true for e-mail sent over the Internet, especially if you are going to use the Internet from outside sources, such as your home computer. Check with your Information Management Office (IMO) to determine the different modes of technology you are utilizing. Ask your IMO how many

people have access to your information before it gets to its destination. You will be surprised at the answer.

Define whether the information you plan to send over the Internet is classified and/or privileged. If the information is classified or privileged, then you should not send that information over the Internet unless you are using a protective device known as encryption. If the new environmental lawyer in the above scenario submits his or her draft response or other sensitive information unencrypted through the Internet to ELD from a home computer, he or she could be facing an ethics violation. The ethical and evidentiary issues involving the transmission of an unencrypted, yet classified or privileged, message over the Internet have not been addressed by many states. The states of Iowa and Arizona, however, have stated that attorneys should encrypt their messages before sending them through the Internet to avoid a breach of confidentiality. See, e.g., Iowa Ethics Opinion 95-30. You should check with your local bar for recent opinions on the issue.

Consider whether the missent or intercepted unencrypted e-mail is a waiver of privilege or confidential communications. The answer may depend on your local state bar. As with any waiver of privilege or waiver of confidentiality, you should look to whether your State uses either the traditional rules, i.e., finds it a waiver, or a more recent trend that bases the answer on the facts of the situation. If your State follows the latter, your answer may depend on whether the disclosure was intentional or inadvertent, and, if inadvertent, the impact of disclosure.

How can you protect yourself?

Talk to your IMO about the security of your e-mail and the Internet. Ask him or her whether you can obtain the encryption software to protect your sensitive e-mail. This is a costly method of protection and may not be readily available to many personnel.

Discuss this issue with your client. Explain to your client and support personnel the risks of the Internet and the potential for unconfidential communications. Make an informed decision and establish a policy on whether or when to use the Internet. Remember it is necessary to obtain your client's consent before you disclose any confidential information through the unsecured Internet.

Consider placing the following warning on your Internet e-mail:

This Internet e-mail contains confidential, privileged information intended only for the addressee. Do not read, copy or disseminate it unless you are the addressee. If you have received this e-mail in error, please call us immediately at \_\_\_\_\_ and ask to speak to the message sender. Also, please e-mail the message back to the sender at \_\_\_\_\_ by replying to it and then deleting it. We appreciate your assistance in correcting this error.

This warning will communicate your intent that this information is considered confidential,  
and

places a duty on the receiver to avoid reviewing the contents and abide by the instructions. Some, however, feel warnings are not effective and argue that encryption is the best protection.

When you consider using e-mail or the Internet to assist you on your next project, think again. Do not send information through the Internet that you would not want published in the local paper. Consider obtaining a software package that encrypts your messages so you can handle

those urgent situations by using the Internet. Also, consider obtaining encryption software on your home computer for those occasions when you want to e-mail your work from home.

DID YOU KNOW? . . . THE WOOD PALLET AND CONTAINER INDUSTRY IS THE LARGEST USER OF HARDWOOD LUMBER IN THE UNITED STATES.

### ***Considering NAFTA - MAJ Thomas Ayres***

Even though you may not be located near the borders of Mexico or Canada, a side agreement to the North American Free Trade Agreement, 19 U.S.C. §§ 3301 - 3473 (1996)(NAFTA) regarding environmental cooperation may soon warrant your attention. The North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, Mexico and the United States, came into force on 1 January 1994, at the same time as NAFTA. Under the NAAEC, the signatories sought to protect, conserve, and improve the environment in North America. Environmental Law Specialists should be aware of the following two specific provisions within the NAAEC.

Under Article 10.7 of the NAAEC, the U.S., Canada, and Mexico agreed to develop a process to consider and analyze, and provide advance notice of, actions that may have transboundary environmental impacts. The deadline for the development of a recommendation on this process is "early 1997." Accordingly, the U.S. State Department and the U.S. Environmental Protection Agency initiated negotiations with Canada and Mexico to develop such a process, and are now seeking input from the Department of Defense and other federal agencies on a preliminary draft process. Issues of discussion include: notification to neighbor countries for certain categories of actions conducted within 100 kilometers of the border, notification and opportunity to comment on actions that will likely have significant transboundary environmental impacts, and timing and detail of notifications. This office will provide further information on the details of this process as they become final or available.

As opposed to Article 10.7, Articles 14 and 15 are already in force under the NAAEC. Under Article 14 of the NAAEC, any non-governmental organization or person residing in a signatory country may file a petition asserting that a Party to the Agreement (U.S., Mexico, or Canada) failed to effectively enforce its environmental laws. The Commission for Environmental Cooperation (CEC) then determines if the petition meets the criteria in Article 14, and determines whether the petition merits a response from the concerned country. In light of the signatory nation's response, the CEC may then request the preparation of a factual record, in essence a fact-finding hearing, under Article 15 of the NAAEC. A final factual record may be made publicly available upon a 2/3 vote of the CEC's governing body. For the United States, response to petitions are submitted by the EPA, after coordination with interested federal agencies.

While several Article 14 petitions have already been filed with the NAAEC, the NAAEC recently ruled for the first time that the United States must respond to a submission by a non-governmental organization alleging ineffective enforcement of environmental laws by the United States. The petition centers upon the Army's compliance with the National Environmental Policy Act

at a specific Army installation. The U.S. response to the petition was closely coordinated between the installation, this office, the Department of Justice, the Department of State, and the U.S. Environmental Protection Agency.

DID YOU KNOW? . . . YARD WASTE IS THE SECOND LARGEST COMPONENT (BY WEIGHT) OF THE MUNICIPAL SOLID WASTE STREAM.

### ***EPA Rethinks Hazardous Waste Identification Rules - Major Anderson-Lloyd***

USEPA is rethinking both of the proposed Hazardous Waste Identification Rules (HWIR) that address standards for managing industrial process waste and contaminated media. The proposed

HWIR-media applies only to wastes and contaminated media generated during remediation activities. Proposed in April 1996, one approach under the rule would delegate cleanup control to the States for wastes that fall below a risk-based "bright line." Industry opponents to this approach favor a "unitary" method that would exempt wastes from the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 - 6992k (1988), as long as they are managed under an approved

State or USEPA cleanup plan. While USEPA considers other options, legislative proposals to relax remediation standards and speed cleanups are priorities for industry groups, the Senate Environment and Public Works Committee, and the House Commerce Committee. USEPA has pushed the rule's promulgation back to Spring 1998.

USEPA was required to finalize the HWIR-waste rule by February 1997 under a consent agreement with the Environmental Technology Council and the Edison Electric Institute. USEPA is negotiating the rulemaking schedule with the petitioners and has received an extension of the deadline to 28 March 1997 from the court. Exit levels for hazardous constituents set in the proposed rule were based on a pathway risk assessment model which has been severely criticized. USEPA is now negotiating for time to overhaul the risk assessment. USEPA's Science Advisory Board made numerous recommendations for incorporating the "best available science" in a revised multi-pathway analysis. As with HWIR-media, there are legislative initiatives aimed at Congress enacting exemption standards rather than waiting for the revised risk assessment. The reworking of the risk assessment and rule could take USEPA from two to four years; however, the litigants could push for a much shorter time frame.

DID YOU KNOW? . . . EVERY TON OF NEW GLASS PRODUCED CONTRIBUTES 27.8 POUNDS OF AIR POLLUTION, BUT RECYCLING GLASS REDUCES THAT POLLUTION BY 14-20%.

### ***Army Corps of Engineers Revises Wetlands Permitting - CPT DeRoma***

On 11 February 1997, the Army Corps of Engineers (Corps) gave final notice of issuance, reissuance, and modification of the Nationwide Permits (NWP) in the Corps NWP Program. See 61 Fed. Reg. 65,874 (1997) (to be codified at 33 C.F.R. at 330). The original thirty-seven NWPs expired on 21 January 1997, and the new permits took effect on 11 February 1997. The changes included NWP 26, which addresses discharges of dredged and fill materials into headwaters and isolated waters of the United States -- typically recognized as wetlands areas. The changes to NWP 26 reflect a Corps effort to regionalize the NWP program, especially NWP 26. During the transition to regionalized, activity-specific permits, Corps has reissued NWP 26 as an interim permit for a period of two years. Following this period, the interim permit will be replaced by industry specific permits. The Corps expects that this change will allow for clear and effective evaluation of potential impacts to the aquatic environment, while also allowing the Corps to effectively address specific group needs.

The former NWP 26 allowed discharges of dredged or fill materials into waters of the United States provided the discharge did not cause the loss of more than 10 acres of wetlands. If such activity would cause the destruction of more than one acre of wetlands, the Corps required preconstruction notice (PCN) in writing as early as possible prior to commencing the activity. Unless informed otherwise by the Corps, within thirty days of providing notice the permittee could proceed with the planned activity.

The revised NWP 26 reflects substantial changes imposed to ensure only minimal adverse effects from the use of the NWP and to provide greater protection of the aquatic environment. Most notably, the new NWP 26 only allows discharges of dredged or fill materials provided the

discharge will not cause either the loss of greater than 3 acres of wetlands or the loss of waters of the United States for a distance greater than 500 linear feet of a stream bed. Discharges that will cause a loss of greater than 1/3 acre of wetlands are now required to follow the notification procedure. The PCN review period, however, has been extended to forty-five days. After this time, unless the Corps has stated otherwise, activities may proceed. Finally, all discharges causing a loss of less than one-third of an acre require filing a report with the Corps within thirty days of completing construction. The report must contain the following information:

1. The name, address, and telephone number of the permittee;
2. The location of the work;
3. A description of the work, and;
4. The type and acreage (or square feet) of the loss of waters of the United States.

The Corps is presently accepting comments regarding the proposed industry specific NWP's, and expects to publish a list of proposed permits in May 1998. Although the Corps recognizes that these changes will result in an increased workload, the Corps does not expect a delay in publishing the replacement permits. At a recent panel discussion where Deputy Assistant Secretary (Policy and Legislation) Michael Davis, of the Office of the Assistant Secretary of the Army (Civil Works), outlined the interim NWP's, one panelist representing regulated entities predicted that changing the allowable level of wetlands impact to 3 acres from 10 would result in the Corps receiving between 500 and 1000 new applications for individual permits in wetlands areas. As a result of the increased impact, the Corps anticipates a request for increased funding to meet these demands. At the time of the discussion, there was no indication that such a request would not be approved.

DID YOU KNOW? . . . BEGINNING IN APRIL 1997, THE ELD BULLETIN WILL BE AVAILABLE VIA THE ELD ENVIRONMENTAL LAW LINKS PAGE ([HTTP://160.147.194.12/ELD/ELDLINKS.HTM](http://160.147.194.12/ELD/ELDLINKS.HTM)).

### ***ELS Update - LTC Bell***

ELD is updating the Army ELS list. Please provide a current listing of your ELS staff to Staff Sergeant Stannard via E-mail ([stannard@otjag.army.mil](mailto:stannard@otjag.army.mil)). Include the following information: Name of all ELSs; mailing address; telephone number; FAX number; and e-mail address. ELD will distribute the updated list via the Internet in early April. In order to meet the April distribution date, please forward your updates NLT 1 April 1997.

## **AMC ENVIRONMENTAL and REAL ESTATE TEAM**

### **AREAS OF PRIMARY RESPONSIBILITY**

From time to time, we have received inquiries about which attorney on the AMC Environmental and Real Estate Law Team is primarily responsible for a particular subject matter area. Enclosed is a breakout among the team attorneys, and "some" of their areas of primary legal responsibilities. If you have a question regarding one of these particular areas, it is recommended you contact the identified attorney first. Of course, we all are available for assistance, if that particular attorney cannot be reached.

#### **Bob Lingo: 617-8082, DSN 767-8082**

- o Environmental Law Team Leader
- o 10 USC 2692 Storage/Disposal Issues
- o Acquisition Environmental Requirements
- o Ozone Depleting Substances Restrictions
- o Water Law and Water Rights Law Program
- o Safe Drinking Water Act Requirements
- o Hazardous & Solid Waste Management
- o NEPA Compliance
- o Licensing and Disposal of Army Radioactive Material/Wastes
- o Occupational Health and Safety Program

#### **Stan Citron: 617-8043, DSN 767-8043**

- o Conventional and Chemical Munitions Issues
- o Environmental Compliance and Enforcement
- o Clean Air Act
- o Environmental Alternative Dispute Resolution

- o Chemical Stockpile Emergency Preparedness Program
- o ECAS Program and Review
- o Federal Facility Agreements (IAGs)
- o Restoration and IRP Program

**Joe Edgell: 617-2306, DSN 727-2306**

- o BRAC Environmental Documentation
- o Real Estate Leasing or Disposal
- o Lead Based Paint Issues
- o Endangered Species Act Issues
- o Cultural Resources Protection
- o Native American Protection Issues
- o Asbestos Containing Materials Issues
- o PRP Liability, including Radiation Sites

## BRAC ENVIRONMENTAL & REAL ESTATE DOCUMENTATION

### ATTORNEY RESPONSIBILITIES

With the large number of BRAC actions and BRAC related environmental and real estate issues and documents being reviewed by our office, sometimes there is confusion as to which member of the Environmental and Real Estate Law team is responsible for what issues. While we all attempt to maintain some familiarity with various actions, for your assistance here is a list of the primary attorney assigned to each of our BRAC installations, with the MSC or Installation attorney who we are aware of as also reviewing such issues.

<u>Installation</u>	<u>AMC Attorney</u>	<u>NEPA Document</u>	<u>MSC Attorney</u>
Savanna Army Depot	Bob Lingo	Disposal EIS	IOC/CPT Murphy
Seneca Army Depot	Bob Lingo	Disposal EIS	IOC/CPT Murphy
Vint Hill Farm Station	Bob Lingo	Disposal EIS	CE/CPT Hamilton
Stratford AEP	Joe Edgell	Disposal EIS	TA/Violet Kristoff
Ft Monmouth Evans Area	Joe Edgell	Disposal EIS	CE/CPT Hamilton
Watertown Arsenal	Stan Citron	Disposal EIS	ARL/Tim Connolly
Tooele Army Depot	Joe Edgell	Disposal EIS	IOC/David DeFrieze
Jefferson Proving Ground	Stan Citron	Disposal EIS	TE/Mark Melnyk
DPSC (DLA)	Joe Edgell	Disposal EA	
Ogden Def Depot	Joe Edgell	Disposal EA	
Memphis Def Depot	Joe Edgell	Disposal EA	
Letterkenny Army Depot	Stan Citron	Disposal EA	
Red River Depot	Bob Lingo	Disposal EA	
Sierra Army Depot	Joe Edgell	Disposal EA	IOC/CPT Murphy
Detroit Army Tank Plant	Bob Lingo	Disposal EA	TA/Violet Kristoff

Lexington Army Depot	Stan Citron	Disposal EA	BGAD/Les Renkey
Woodbridge RF	Bob Lingo	Disposal EA	ARL/Tim Connolly
Pueblo Army Depot	Joe Edgell	No Disposal NEPA	CBD/Ruth Flanders
Umatilla Army Depot	Bob Lingo	No Disposal NEPA	
Ft. Wingate Depot	Joe Edgell	EA/NEPA Deferred	
Alabama AAP	Bob Lingo	No NEPA Action Pending	
Redstone Arsenal	Bob Lingo	Relocation EA	
Anniston Depot	Bob Lingo	Relocation EA	ANAD/ M Starling
Tobyhanna Depot	Bob Lingo	Relocation EA	TOAD/M Stanczak
McAlester (Ammo School)	Joe Edgell	Relocation EA	
Universal Test Range	Joe Edgell	Relocation EA	
Hawthorne Depot	Bob Lingo	Relocation EA	
Ft Monmouth	Joe Edgell	Relocation EA	CE/CPT Hamilton

## ELD/AEC COMMENTS

### ON AN INSTALLATION

#### CULTURAL RESOURCES COOPERATIVE AGREEMENT

Document should be named a "cooperative agreement" for consistency with the authorizing legislation, Army Regulation 200- 1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, and past practice.

The term "paleoenvironmental resources" should not be included in the express purpose section of the agreement. The authorizing legislation for the cooperative agreement, National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, §2862, 110 Stat. 2422 (1996), allows execution of cooperative agreements for management of cultural resources. The Department of the Army, in the draft and soon to be released, Army Regulation 200-4, CULTURAL RESOURCES MANAGEMENT (AR 200-4) , defines cultural resources to include "archeological resources." That definition does not include "paleoenvironmental resources." The implementing regulations to the Archeological Resources Protection Act (ARPA); however, define "archeological resources" in a manner that would likely cover "paleo-environmental resources." 43 C.F.R. §§7.3(a)(2)(iv)-(x) (1996).

The following legal requirements may be triggered by activities undertaken pursuant to the cooperative agreement. Procedures for compliance should be included in the Agreement:

(1) The cooperator may need to obtain a permit pursuant to ARPA and its implementing regulations if the cooperator excavates archeological resources. Draft AR 200-4, Section 2-6, provides permitting procedures with reference to applicable statutes and regulations. Issuance of permits is generally an Installation Commander responsibility that is carried out through the support of a USACE District Real Estate Office.

(2) The cooperator may need to comply with the procedures for dealing with the intentional excavation or inadvertent discovery of "cultural items" as defined by the Native American Graves Protection and Repatriation Act (NAGPRA) and its implementing regulations. See 25 U.S.C. §§3001 et seq.(1994); 43 C.F.R. §10 (1996). Draft AR 200-4, Section 2-5, establishes procedures for complying with these requirements.

(3) To the extent that the cooperator may impact traditional cultural properties (TCPs) or other sites of historic significance, the requirements for

consultation pursuant to the National Historic Preservation Act (NHPA), Section 106, and its implementing regulations may be triggered. See 16 U.S.C. 470 (1994); 36 C.F.R. §800 (1996). Draft AR 200-4, Section 2-3, establishes procedures for consulting.

(4) Archeological resources excavated pursuant to the cooperative agreement must be managed in accordance with the requirements of 36 C.F.R. §79 (1996) and Draft AR 200-4, Section 2-7.

(5) If activities undertaken pursuant to the cooperative agreement require coordination with Federally recognized Indian Tribes, communications must occur consistent with the "Presidential Memorandum for Heads of Executive Departments dated April 29, 1994: Government to Government Relations with Native American Tribal Governments", referenced in Draft AR 200-4, Section 2-8.

(6) The proponent should review proposed activities under the cooperative agreement to determine whether such activities trigger the environmental impact analysis process set forth in the National Environmental Policy Act (NEPA), the regulations published by the Council on Environmental Quality, and Army Regulation 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIVITIES. See 42 U.S.C. §§ 4321 et seq.(1994); 40 C.F.R. H1500-1508 (1996).

The Agreement should be consistent with ARPA, to require that an item shall not be treated as an archeological resource - unless it is a minimum of 100 years old.

With respect to the cooperative agreement's treatment of Installation responsibilities, we suggest the following:

(1) The Agreement should require coordination with "culturally affiliated Federally recognized tribes."

(2) The Installation should take steps to ensure that the cooperative agreement is carried out consistent with the requirements of any existing or prospective Integrated Cultural Resource Management Plan (ICRMP) and Integrated Natural Resource Management Plan (INRMP) for the installation.

(3) The Installation should also be responsible for processing and issuing the appropriate ARPA authorization for excavation of archeological resources prior to allowing ground-disturbing activities on post. The cooperator is responsible for applying for and obtaining necessary authorization.

(4) The Installation should also be responsible for Native American notification and consultation under NAGPRA, consultation under Section 106 of the NHPA, any environmental documentation required by NEPA; and, proper management of archeological resources.

The proponent should consider whether, and to what extent, the cooperator should provide the resources necessary to achieve compliance with the legal requirements of the Installation as discussed above.

The cooperative agreement should contain a property rights clause that ensures that the Installation remains the owner of any archeological resources collected and any other data generated as a result of this effort. As presently drafted, the agreement merely allows the installation access to "books, papers, and documents ... related to this agreement. The cooperator should receive appropriate licenses and/or authorizations to utilize resources and data generated under the agreement.

MEMORANDUM OF AGREEMENT

BETWEEN

U.S. DEPARTMENT OF ARMY, ARMY MATERIEL COMMAND

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AND

SENECA COUNTY, NEW YORK

FOR COOPERATING AGENCY STATUS

ON THE SENECA ARMY DEPOT DISPOSAL AND REUSE EIS

This Memorandum of Agreement (MOA) is entered into between the United States Department of the Army, Army Materiel Command (AMC), the New York State Department of Environmental Conservation (NYDEC), and Seneca County, New York (County) and authorizes the NYDEC and the County to be Cooperating Agencies (CA) for the Seneca Army Depot (SEAD) Disposal and Reuse Environment Impact Statement (EIS).

I. PREAMBLE

a. The Base Closure and Realignment Act of 1990, Public Law 101-510, mandates a series of base realignments and closures known as BRAC. Implementing that law in 1995, the Defense Secretary's Commission on Base Closure and Realignment recommended the following action at Seneca Army Depot in its report to the President, dated 1 July 1995. The President transmitted the recommendation to Congress on July 13, 1995, and the 1995 BRAC recommendations became effective on September 28, 1995, not being rejected by Congress.

The Commission recommends the following: Close Seneca Army Depot, except an enclave to store hazardous material and ores.

b. Public Law 101-510 mandated that provisions of the National Environmental Policy Act (NEPA) apply to DoD actions during the process of property disposal. Therefore, an Environmental Impact Statement (EIS) on the disposal and reuse of SEAD will be prepared under the provisions of NEPA, the Council on Environmental Quality (CEQ) Regulations (40 CFR 1500 *et seq.*), Department of Defense (DoD) Guidance on Accelerating the NEPA Analysis Process for Base Disposal Decisions, Army Regulation 200-2, Environmental Effects of Army Action, and Army guidance. Thus, the EIS for SEAD will assess the environmental and socioeconomic effects associated with the disposal and reuse of SEAD.

c. The CEQ regulations, 40 CFR 1506.2(a) require Federal agencies to “cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements....” New York State’s Environmental Conservation Law, sections 3-0301(1)(b), 3-0301(2)(m) and 8-0113 require compliance by Seneca County and the State of New York with the State Environmental Quality Review (SEQR) regulations at 6 NYCRR Part 617. Section 617.15(a) of those regulations allows the State of New York and Seneca County to utilize a Federal EIS to satisfy SEQR, so long as “the Federal EIS is sufficient to make findings under Section 617.11...,” including a finding that “from among the reasonable alternatives available, the action is one that avoid or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.”

d. The Secretary of the Army has designated the Assistant Secretary of the Army (Installations, Logistics and the Environment), (ASA(IL&E)), to serve as the Army’s responsible official for NEPA matters. The Army Materiel Command has been designated by the ASA (IL&E) to be the lead agency responsible for BRAC 1995 NEPA documentation for SEAD.

e. In disposing of SEAD, the Department of the Army must also comply with the U.S. Fish and Wildlife Coordination Act ( 16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) and other applicable federal laws, including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, and various Executive Orders, including Executive Order No.12393, Environmental Justice, Executive Order No.11990, Protection of Wetlands, and Executive Order No. 13007, Indian Sacred Sites.

f. The Seneca County Board of Supervisors by a resolution, dated 24 October 1995, created a Local Redevelopment Authority (SLRA) to develop a final Redevelopment Plan (Plan) and oversee the implementation of an economic redevelopment strategy that addresses the employment, economic, and land use issues arising from the closing of SEAD.

g. Section 2838 of the National Defense Authorization Act for FY 1996, Pub. L. 104-106 provides that the NEPA environmental assessment of the closure or realignment of an installation shall treat the redevelopment plan submitted by the redevelopment authority for the installation as part of the proposed federal action for the installation. Section 2911 of Pub. L. 103-160, the National Defense Authorization Act for FY 1994, requires the Army to complete the NEPA environmental impact analysis with respect to a closed installation and with respect to the redevelopment plan, if any, within 12 months after the date of submittal of the redevelopment plan to the Secretary of Defense.

h. The County and the State of New York, through the NYDEC, have requested and are authorized to be Cooperating Agencies in the NEPA preparation and review process for the Seneca Depot Disposal and Reuse EIS.

i. In conformance with 40 CFR 1506.2, the Army, the NYDEC, and the County shall make every effort to cooperate to the fullest extent possible to reduce duplication between NEPA and the requirement of the SEQR.

j. It is in the interest of all parties to participate in the task of preparing the Seneca Army Depot Disposal and Reuse EIS. This will assist with the reduction in the duplication of staff efforts and sharing of existing staff expertise and information to meet the requirements of NEPA and SEQR. This will produce a more efficient environmental analysis and public review process.

k. Nothing in this agreement shall alter the responsibility assigned to AMC to develop an EIS that fulfills the Army's responsibilities under NEPA, DoD and Army guidance, the CEQ regulations, and the cited provisions of various National Defense Authorization Act. Nothing in this agreement impairs, alters, limits or in any way affects NYDEC's statutory or common law rights, including but not limited to its rights under the New York State Environmental Conservation Law. No statements made in this agreement shall be deemed an admission or position adopted by NYDEC with respect to the environmental or other situation at SEAD.

2. PURPOSE. This Memorandum of Agreement (MOA) is to establish and record agreed upon principles of mutual support, cooperation, and responsibilities in the preparation of the EIS for disposal and reuse of SEAD. It is in the interest of all parties identified to participate in this effort to develop a timely, accurate, thorough, complete and impartial analysis of the anticipated direct and indirect effects of the disposal and reuse of SEAD arising from the disposal of the installation, including potential effects from the County's Redevelopment Plan.

### 3. ORGANIZATION AND COORDINATION

#### a. GENERAL:

(1) To the maximum extent practicable, the parties agree to share all relevant information regarding environmental conditions pertaining to SEAD, its disposal, and reuse and to the region surrounding SEAD.

(2) When the term AMC is used in the MOA, it not only represent Army Materiel Command interests, but also represents the Industrial Operations Command (IOC), and Seneca Army Depot (SEAD) as participants in the development and review of the EIS.

(3) AMC, including SEAD and the Mobile District Corps of Engineers (MDCOE), the County, and NYDEC shall each appoint a project representative who will serve as its primary point of contact for that party in the SEAD EIS process. Each party may change its designated representative upon formal notice to the other party.

(a) AMC - James Davidson, phone (703) 617-5510

(1) Mobile District COE -

(2) SEAD -

(b) County -

(c) NYDEC -

(4) These representatives shall constitute the SEAD Disposal and Reuse EIS Primary Coordinating Team.

(5) The SLRA is preparing a Seneca Redevelopment Plan for SEAD, following extensive input and participation from the community, the region, and agencies of the State of New York. The Army and AMC support the development of a consensus redevelopment plan, recognizing that an approved redevelopment plan is a key factor in the successful reuse of a closing defense installation and is consistent with President Clinton's Five Point Plan for Revitalizing Base Closure Communities. AMC will cooperate with the SLRA and the County in the development of the redevelopment plan. The redevelopment plan, to the extent available, will be included and analyzed in SEAD Disposal and Reuse EIS.

(6) Frequent and continued coordination will be maintain among the parties. AMC, including the MDCOE and SEAD, NYDEC, and the County will participate in planning and progress review meetings, as mutually determined necessary, to assure consistent coordination of effort. The parties shall cooperate to ensure that to the maximum extent permissible with Federal law and NEPA, the EIS includes information and analysis that will assist NYDEC and the County in fulfilling their duties under Section 617.11 of the SEQR regulations, including the identification of practicable mitigation to identified adverse environmental impacts.

(7) A copy of all comments and correspondence regarding the EIS received by any Party from other agencies, organizations, or individuals will be provided to the other Parties.

b. AMC

(1) Is the lead agency for the preparation of the SEAD Disposal and Reuse EIS under the NEPA, CEQ regulations, DoD and Army guidance, and Army regulations

(2) Directed the U.S. Army Corps of Engineers, Mobile District to be responsible for preparation of the Disposal and Reuse EIS, consistent with the NEPA and the aims and objectives of the Parties to identify and assess the direct and indirect environmental impacts of the disposal and reuse of SEAD. The NEPA, Federal laws and regulations, Army regulations and applicable state environmental laws, such as SEQR, to the extent consistent with NEPA, will be followed for the final determination of the content of the EIS.

(3) Has sole responsibility for formal coordination with the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act, and for formal coordination with the Advisory Council and the State Historic Preservation Office pursuant to the National Historic Preservation Act.

(4) In furtherance of the objectives of this Agreement, AMC will

- (a) Establish formal points of communication with the NYDEC and the County.
- (b) Provide periodic in-process briefing on the development of the EIS.
- (c) Identify and provide access to and an opportunity to comment on all studies and analyses to be used in the environmental documentation.
- (d) Establish a centralized repository at SEAD of documents related to the EIS.
- (e) Provide information on the proposed disposal alternatives and reuse descriptions to be analyzed in the EIS.
- (f) Identify and discuss significant issues to be addressed in the EIS, including environmental impacts, possible mitigation measures, and recommended encumbrances.
- (g) Provide information on and discuss the proposed description of high, medium, and low intensity reuse alternatives ( Reuse Alternatives).
- (h) Provide the County and NYDEC a copy of the Administrative Draft EIS (ADEIS) and an opportunity to review and comment on the ADEIS prior to final review and release by the Army of the Draft EIS
- (i) Provide the NYDEC and the County with copies and an opportunity to comment on all comments received by the Army on the proposed disposal and reuse of SEAD, including comments received on the Draft EIS.
- (j) Provide the NYDEC and the County a copy of the Administrative Final EIS

(AFEIS) and an opportunity to review and comment on the AFEIS prior to release by the Army of the Final EIS.

b. New York Department of Environmental Quality

(1) Has the responsibility to work with the County in the development of a community consensus redevelopment plan for SEAD, which plan may include the identification of significant portions of the Depot to be transferred to the State of New York for wildlife or conservation purposes..

(2) The level of participation by the NYDEC shall be determined in accordance with available Department resources and consistent with agency priorities.

(3) In furtherance of the purposes of the MOA, the NYDEC will:

(a) Establish formal points of contact with AMC and the County for consultation on the SEAD NEPA process.

(b) Participate in joint working groups to exchange information, identify issues, and discuss analysis.

(c) Discuss, as necessary, with the SEAD NEPA process team the County consensus redevelopment plan and its anticipated environmental impact.

(d) Provide the Army access to any environmental documentation analyzing environmental conditions with relation to the Depot disposal or potential reuse in relation to or in support of the redevelopment plan.

(e) Provide the Army with access to correspondence received by the NYDEC related to environmental conditions or effects addressed in the EIS or in the redevelopment plan.

(f) Provide the Army with information on local or regional environmental conditions or development plans, to the extent known.

(g) Identify related proposals or developments which the Army should consider in assessing cumulative impact in the SEAD EIS.

(h) Identify significant environmental issues for consideration in the EIS, including issues known to be sensitive with the Seneca region.

(i) Provide comments to AMC respecting the description of intensity reuse alternatives (Reuse Alternatives) to be addressed in the EIS.

(j) Identify any particular environmental analysis concerns which need to be addressed under SEQR, which would not be addressed under NEPA.

(k) Provide information concerning the natural environment of the Seneca area, as well as information regarding socioeconomic impacts to the extent developed by the NYDEC.

(l) Will consolidate all comments from the State of New York in a comment review package from New York State agencies, for the following review, and provide a consolidated State comment to AMC:

[1] Administrative Draft EIS (ADEIS) - within 20 calendar days

[2] Draft EIS (DEIS)

[3] Administrative Final EIS (AFEIS) - within 20 calendar days

[4] Final EIS (FEIS)

c. Seneca County, New York

(1) Has the responsibility to approve a community consensus redevelopment plan for SEAD, as recommended and developed by the SLRA.

(2) In furtherance of the purposes of the MOA, the SLRA on behalf of the County will:

(a) Establish formal points of contact with AMC for consultation on the SEAD NEPA process.

(b) Participate in joint working groups to exchange information, identify issues, and discuss analysis.

(c) Prepare and submit a consensus redevelopment plan, and discuss, as necessary, such plan with the SEAD NEPA process team.

(d) Provide the Army access to all environmental documentation developed in relation to or in support of the redevelopment plan.

(e) Provide the Army with access to correspondence received by the County or the SLRA related to the environmental conditions or effects addressed in the redevelopment plan.

(f) Provide the Army with information on local or regional environmental, social and economic conditions or development plans, to the extent known.

(g) Identify related proposals or developments which the Army should consider in assessing cumulative impacts in the EIS.

(h) Identify significant environmental issues for consideration in the EIS, including issues known to be sensitive within the region.

(i) Provide comments to AMC respecting the description of intensity reuse alternatives (Reuse Alternatives) to be addressed in the EIS.

(j) Identify any particular environmental analysis concerns which need to be addressed under SEQR, which would not normally be addressed under NEPA.

(k) Provide information concerning the natural environment of the area, as well as information regarding socioeconomic impacts, to the extent developed by the County or the SLRA.

(l) Will consolidate all comments from local government in a comment review package from local or county agencies, for the following reviews, and provide consolidated comments to AMC:

[1] Administrative Draft EIS (ADEIS) - within 20 calendar days

[2] Draft EIS (DEIS)

[3] Administrative Final EIS (AFEIS) - within 20 calendar days

[4] Final EIS (FEIS)

#### 4. PUBLIC PARTICIPATION

a. The Notice of Intent (NOI) to prepare an EIS was published in the Federal Register, Vol. 60, Number 184, page 49263, September 22, 1995, as amended in the Federal Register, Vol. 61, No. 181, page 48920, September 17, 1996. The first scoping meeting was held on September 9, 1996, at the SEAD. Scoping of issues to be addressed in the EIS shall be an on-going process during the development of the DEIS.

b. AMC shall prepare a Public Involvement Plan as required by Chapter 7, AR 200-2. The NYDEC and County shall review and comment on the AMC Public Involvement Plan, and will cooperate in the development and implementation of the Public Involvement Program.

c. It is to the benefit of the Parties that all affected or interested persons or entities be aware of and participate in the SEAD NEPA process. The Parties shall cooperate in developing a master mailing list of agencies, institutions, organization, groups, and persons who will receive copies of the Draft and Final EIS and notices for public hearing and workshops.

d. All information developed or provided to AMC, which pertains to the EIS process or used as backup or supporting information or data, shall be available to the public at a SEAD NEPA Reading Room, to be located at SEAD, except where release of such information would pose a danger to sensitive resources or violate Army or DoD national security restrictions.

#### 5. DOCUMENT REVIEW AND PREPARATION

a. As part of or in addition to its review of information development by the Army, the NYDEC and the County may request that the Army perform additional environmental studies either deems reasonable and necessary to verify, corroborate, or supplement existing environmental information or studies.

b. If the Army declines to perform such studies, the NYDEC or the County may provide the information at its own cost, in which case the information will be included in the EIS analysis, provided it is timely provided to meet the Army's schedule for completing the EIS.

#### 6. DISPUTE RESOLUTION

a. The Parties shall attempt to timely discuss and resolve any difference of opinion or conflicts regarding the technical data, reports, or information supporting the EIS analysis.

b. Should the Parties be unable to resolve conflicts or differences of a scientific or technical nature during the EIS preparation process, the difference or conflict shall be noted in the EIS and any information, studies, or data furnished by the NYDEC or the County shall be included, or summarized, in the EIS as an Appendix, or otherwise referenced in the EIS.

c. AMC shall determine the scope of the EIS. Should AMC determine not to require detailed treatment of a significant issue or factor identified by the NYDEC or the County, the EIS shall clearly identify the criteria used to eliminate such issue or factor from detailed consideration.

#### 7. AGREEMENT, EFFECTIVE DATE, MODIFICATION AND TERMINATION

a. The Army, the NYDEC, or the County may terminate its participation in this agreement upon 30 days written notice served upon the other Parties. The Party electing to terminate the Agreement should demonstrate good cause and shall state in writing its reasons for desiring to terminate the Agreement.

b. The MOA is effective upon the last date of signature by authorized representatives of AMC, the NYDEC, and the County, and shall remain in force until 30 days after the Army issues a Record of Decision for the Disposal and Reuse of SEAD.

Signed and agreed to among the Parties, on the date indicated, as set forth below:

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MICHAEL C. SANDUSKY  
Chief, Special Analysis Office  
U.S. Army Materiel Command

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XXXXXXXXXXXXXXXXXXXXX  
Director  
New York State Department of

Environmental Conservation

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Chairperson

Board of Supervisors

Seneca County, New York