



# Office of Command Counsel Newsletter

April 1998, Volume 98-2

## AMC Names & Trains Partnering Champions

**A**MC launched a significant milestone in the goal of expanding the use of Partnering by training nearly 80 individuals to be AMC Partnering Champions in two 2-day workshops, held 3-4 and 5-6 March 1998.

AMC Commander **General Johnnie E. Wilson** asked each major subordinate commander to designate five Partnering Champions, and a lead Partnering Champion, with the criteria that they each hold important acquisition-related positions. The primary role for these Partnering Champions is to be that command's focal point to provide information on Partnering, and to publicize, market and assist in identifying opportunities to choose Partnering as a business practice.

A special thanks to the members of the AMC Partnering Team: Team Chief **Mark Sagan**, Deputy Chief Counsel, CECOM, **Ken Bousquet**, TACOM Acquisition Center, **Dave DeFrieze**, IOC counsel and expert on

Partnering, and **Steve Klatsky**, Assistant Command Counsel, HQ AMC, the manager of the AMC Alternative Dispute Resolution (ADR) Program.

Lastly, a great job by **Tom Cavey** and **Holly Saunders** in workshop preparation and administration, and **Billy Mayhew** for invaluable assistance in organizing the workshop deskbook.

The Workshop Agenda (Encl 1) and list of Workshop Handouts (Encl 2) are provided for you. Additionally, one of the important handouts is on the History and Background of Partnering, prepared by **David DeFrieze**, which we provide to you (Encl 3).

**Mark Sagan** was a truly outstanding "Master of Cermonies" and Program Director. And thanks to **Ken Bousquet** for not complaining about *hangin'* around the lawyers.

A copy of Workshop handouts is on a disk that was given to each AMC Partnering Champion Work-

shop attendee. Contact your Lead Partnering Champion, or the AMC attorney from your Command who attended the Workshop, if you are interested in obtaining any of the material.

Additional information on this outstanding program, and the names of both AMC Lead Partnering Champions and AMC attorneys who are Partnering Champions, can be found on pages 3 and 4.

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# CLE '98 Coming Up Soon-- June Will Be *Bustin'* Out All Over

AMC's 1998 Continuing Legal Education (CLE) Program will be held 8-12 June 1998 at the Grosvenor Hotel, Lake Buena Vista, Florida. As we go to press the draft agenda and list of CLE Program electives is on the way to each AMC legal office.

The theme of this year's CLE is "AMC Attorneys: Supporting the Total Army."

**Steve Klatsky** is chair of the CLE Planning committee. The CLE is the training highlight of the year for our legal community.

This year we will emphasize the many timely and challenging issues faced by AMC attorneys, and the roles we play in supporting the Total Army--military and civilian and contractors. We invite you to volunteer to actively participate in the program as speakers and, of course, we look forward to seeing you in June.

There is one new program format change that will debut at this year's workshop. The very important sessions held by the leaders of four different legal disciplines--acquisition, employment, environmental and intellectual property, have a new name: Legal Focus Sessions. The new designation represents

what those four-hour programs are: a chance for practitioners to get together and discuss--focus--on important developments.

For the fourth consecutive CLE Program we will emphasize electives, giving each attendee the opportunity to pick from a menu of titles, covering all aspects of our legal practice.

We are very pleased that we will have AMC Chief of Staff **MG James Link** join us at this year's program.

Plenary sessions on Force XXI and the Quadrennial Defense Review will highlight important issues for our future.

As always, the Awards Ceremony will highlight the significant achievements of AMC counsel during the past year. Joining us for that session will be Army General Counsel **William T. Coleman III**.

The annual CLE Program is the training highlight of the year, a rare chance to enhance your legal skills, meet your colleagues, share opinions and views, and become closer as a law firm and family. We hope to see as many as you as possible to enjoy and share this unique opportunity. ©

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

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

# Acquisition Law Focus

## Partnering Workshop Highlights AMC Model

The interactive workshop emphasized the four-step AMC Partnering Model contained in the AMC Partnering Guide. Areas of concentration included team-building exercises, the history and background of Partnering as a tool to improve contract administration through enhanced communication, an overview of the AMC Partnering process, a snapshot of ADR that also discussed conflict escalation, and a discussion of legal and ethical issues.

### Four-Step AMC Model

The four-step AMC Model discussion was conducted through small group discussions of four typical contract scenarios concerning different kinds of contracts and varied facts and circumstances.

The Partnering Charter and Partnering Workshop, step three of the AMC Model, was discussed at length, in that this is considered the most critical part of the process. It is during the

Partnering Workshop that the contracting parties create the important tools of the Partnering process: prepare their mission statement; identify goals and objectives, finding that many are common to both government and industry; surface anticipated “rocks in the road”, problems they know they will face, and designing an action plan to address each; draft a conflict escalation clause, empowering specific individuals with the authority to address issues at the lowest possible level; and agree to an ADR procedure to resolve issues without going to formal litigation.

### Partnering Supports Acquisition Reform

Partnering is a vital component of AMC acquisition reform initiatives. AMC Partnering efforts have proven very successful, with evidence indicating that the Partnering process contributes to enhanced communication, reduced paper work, curtailed litigation, elimination of surprises, while improving the professionalism and morale of participants. ©

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# Acquisition Law Focus

## AMC Lead Partnering Champions Designated

AMC Commanding General **Johnnie E. Wilson** asked each AMC MSC Commander to designate five Partnering Champions (PC) and a Lead PC. The primary role of the Lead PC is to become the MSC Commander's representative in achieving the goal of expanding Partnering initiatives through the Command. The year are:

SSCOM: **Timothy Tweed**, Chief Contracts Division, Acquisition Center;

STRICOM: **Harlan Gottlieb**, Counsel;

CBDCOM: **Helen Morrison**, AMC Acquisition Center;

CECOM: **Lawrence Asch**, Procurement Analyst, Acquisition Center;

AMCOM: **LTC Louise P. Morgan**, Acquisition Center;

TACOM-Warren **Lorraine Maynard**, Acquisition Center;

IOC: **Marshall Collins**, Chief, Rockets, Mortar & Pyrotechnics Branch;

TECOM: **Joyce Roberts**, Chief, Contracting Branch; a

ARL: **Shirley A. Harvey**, Procurement Office; and,

TACOM-ARDEC: **Jerry Williams**, Counsel. ©

## AMC Partnering Champion Counsel

Counsel plays an important role in Partnering. We are asking AMC attorneys to actively participate in the expansion of Partnering by identifying acquisition programs for Partnering, and to join in workforce education that is so important.

AMC attorneys who are AMC PCs are:

**Bob Chase**, ARL,

**Richard Mobley**, SSCOM,

**Harlan Gottlieb**,

STRICOM,

**Caridad Ramos**, ACALA,  
**John Klecha**, TACOM-Warren,

**Jerry Williams**, TACOM-ARDEC,

**Harvey Reznick**, AMCOM,

**David Scott**, TECOM,  
**Maria Esparraguera**,

CECOM,  
**John Metcalf**, Belvoir,

**CPT James Butler**, Tobyhanna Army Depot,

**Phil Hunter**, CBDCOM, and

**Diane Travers**, HQ AMC

## Whose Wearing the Uniform?

An example of the impact that military service downsizing has had is indicated by the following statistics concerning the numbers of employees/personnel who are wearing uniforms.

Army 482, 186

Navy 382, 892

Air Force 370, 297

Marines 171, 589

Coast Guard 33, 892

Postal Service 921, 216

These statistics are as of 31 December 1997.

## Employee & Labor Relations Web Sites

The Internet is an outstanding source of information and legal research tool. We provide an extensive list of general purpose search engines, government agencies and offices, job locator, academic research sites, and some miscellaneous links (Newspapers and Dilbert, too!) (Encl 14). We give you the freedom to determine those links you want to add to your Bookmarks.

## Source Selection Participation Agreement

**Lisa Simon**, CBDCOM, DSN 584-1298, provides an excellent example of a Source Selection Participation Agreement, containing the rules of conduct relating to the procurement, including conflicts of interest, communication with offerors or their subcontractors, and safeguarding confidential information, which must be followed by government personnel involved in the source selection.

### Principles for *ALL* To Follow

The agreement contains two specific provisions that appear applicable to most activities we engage in as government employees:

o You recognize that your participation in this source selection may be subject to intense scrutiny. As such, you agree to conduct yourself in such a way as to not adversely affect the confidence of the public or competing contractors in this source selection process.

o You agree to avoid any action, whether or not prohibited, that could result in, or could create, the appearance of a lack of independence or a lack of impartiality.

### Avoid Conflicts of Interest

The conflict of interest section covers financial interests with a potential competing contractor, financial interests covering spouse and dependent children, and blood and marital relationships with competing contractor personnel.

The section also highlights prohibitions against solicitation regarding future employment, mandates that you do not ask, solicit, accept or receive any money, gratuity or other thing of value from one of the competing contractors.

The section on protecting confidential informational highlights the important role played by the contracting officer, who is the primary person ruling on the propriety of discussions between the government person and contractor personnel (Encl 4). ©

## Cease Privatization: Study Better Says Fed'l Ct.

There is not much case law concerning the application of privatization of former federal activities. Your attention is invited to National Air Traffic Controllers Association v. Secretary of Transportation, DC NOhio, No I94CV0574, March 2, 1998. The Court ruled that the Federal Aviation Administration (FAA) must cancel its program to privatize 129 FAA-operated air traffic controller towers and reconsider whether these services should be contracted out.

The Court stated that since there is no mandate to privatize, there is no statutory basis for ignoring A-76 provisions requiring cost comparison study.

There is also interesting language concerning the issue of inherently governmental functions. The plaintiff union argued that air traffic services are inherently governmental functions and can not be contracted. Unfortunately, the Court decision does not hinge on this issue. Stay tuned! ©

# Acquisition Law Focus

## Using Liquidated Damages

ARDEC's **Bob Parise**, DSN 880-3410, supplies an excellent synopsis on the use of liquidated damages in government contracts. Although stating that the use of liquidated damages in government contracts is infrequent, a recent case may provide emphasis for expanded use. In Manufacturing Corporation v. U.S., 86 F.3d 1130 (Fed.Cir. 1996), the Court recognized that while state courts may be hostile to liquidated damage clauses, the federal law "does

not look with disfavor upon liquidated damage provisions in contracts."

One reason for lack of use may be that the FAR provides guidance on liquidated damages in only the construction contract area (FAR Subpart 11.5).

The court case has a nice quote from the noted jurist Learned Hand: "Courts should encourage (such agreements) to the utmost

instead of being disposed to lean against them." In this case the court stated that the contractor, rather than the government, has the burden of proof in challenging the enforceability (reasonableness) of a liquidated damage provision. The Manufacturing Corporation case contains several useful case opinions for those interested in this issue (Encl 5). ©

## Contingent Fees & Foreign Military Sales Contracts

USASAC's **Larry Anderson**, DSN 767-8040, provides an update on new rules concerning limitations on allowable contingent fees for foreign material sales contracts (Encl 6).

Contingent fees are generally allowable under DOD contracts provided the fees are determined by the contracting officer to be fair and reasonable and are paid to a bona fide employee of an established commercial agency maintained by the contractor for the purpose of securing business.

As of 9 March 1998, the prior contingent fee limitation of \$50,000 per FMS case is no longer in effect. Now you can exceed this amount, provided payment has been identified and approved in writing by the foreign customer before contract award.

There is no change in the list of countries for which contingent fees are not allowed, unless specific facts and circumstances exist. They are Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Korea, Kuwait, Pakistan, Philippines, Saudi

Arabia, Turkey, Thailand and Venezuela.

Contingent fees on FMS contracts with these countries are allowable, provided payment has been identified and approved in writing by these countries before contract award.

DOD 5105.38-M, Security Assistance Management Manual, requires a provision in Letters of Offer and Acceptance with these nations to specifically address the contingent fee prohibition. ©

# Acquisition Law Focus

## Quick Primer: Sale or Exchange of Government Property

TACOM-ACALA counsel **Kay Krewer**, DSN 793-8414, provides an excellent paper on the impact that fiscal law principles have on the sale or exchange of Government property, with the Government keeping or applying the proceeds (Encl 7).

Generally, money from the sale or exchange of Government property must be deposited in the general Treasury fund and can not be applied to a specific contract.

### 2 Principles

The two applicable principles are:

1. The miscellaneous receipts statute, 31 U.S.C. Sec. 3302(b), which provides that moneys received on behalf of the Government have to be deposited in the general U.S. Treasury fund unless (a) there is specific statutory authority to apply the moneys to a specific account or use; or, (b) the receipt of money qualifies as a repayment to an appropriation.

2. The prohibition against augmentation of appropriations, a corollary of the separation of powers doctrine. The objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that purpose.

### Statute & DOD Reg

The paper highlights 40 U.S.C. Sec. 481(c) and DOD implementation at DOD 4140-1.R, which provides an exception to the miscellaneous receipts statute and the augmentation of appropriations rules.

The statute and departmental implementation contain rules regarding property, sales, exchanges and rules concerning documentation and reporting.

Caution: The statute contains some severe penalties for violations. ©

## The Public Votes: Civil Servants over Politicians!!

A recent survey conducted by the Pew Research Center for The People & The Press reported that 69% of those asked held favorable opinions of government workers. The public trusts government workers over politicians by a 67% to 16% margin.

Additionally, a comparison of views held by the public of several Federal agencies indicates an increased favorable rating between 1987 and 1997. For example, favorable ratings rose from 57% to 76% in DOD, with similar increases shown for the Postal Service, National Park Service, Food & Drug Administration, Federal Aviation Administration and NASA. The news is not so good for the Veteran's Administration (down to 59% from 68%) and the Internal Revenue Service (down to 38% from 49%).

American's think that the government is a good employer, but they still rate the private sector over the government by 70% to 23%.

## Superior Knowledge--The Government's Duty to Disclose

IOC's **CPT Brian Weber**, DSN 793-8455, has written an outstanding treatise on the subject of the doctrine of superior knowledge, chock full of excellent case precedent and supported by 50 footnotes (Encl 8).

"If the government possesses special knowledge which is vital to the performance of a contract but which is unknown and not reasonably available to a bidder who is thereby misled, the government must disclose its superior knowledge or be held liable for breach of contract." *J.F. Shea Co. Inc. v. United States*, 4 Cl. Ct. 46, 53(1983).

### Implied Duty to Disclose

Liability is based upon an implied duty to disclose information that is vital for the preparation of estimates for contract performance. *J. CIBNIC & R. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS*, 255-56 (3d ed. 1995). Stated differently, liability is based upon "an implied con-

dition in the contract that neither party will hinder the other in the discharge of the obligations created by the contract." *Bateson-Stolte, Inc. v. United States*, 145 Ct.Cl. 387, 390 (1959). This duty is consistent with the general contract law concepts of good faith and fair dealing.

### Applied When the Government Knows More Than the Contractor Should

"The doctrine of superior knowledge is not aimed at compelling disclosure whenever the Government knows more than the contractor *might*. Its aim, instead, is to address those situations where the Government knows more than the contractor *should*." *Intercontinental Manufacturing, Co. Inc. v. United States*, 4 Cl.Ct. 591, 600 (1981) (emphasis original). "Cases in which the Government has been held to have breached a duty of disclosure involved situations

where the information withheld was not only vital to successful performance, but more important, was information of a character which the Government knew or should have known, and the contractor was neither aware or reasonably likely to become so. See *International Manufacturing* at 598-599.

### Contractor Burden

To establish a breach of contract under the doctrine of superior knowledge, a contractor must produce specific evidence that it:

(1) attempted to perform without vital knowledge of a fact that affects performance costs or direction,

(2) the Government was aware the contractor had no knowledge of and had no reason to obtain such information,

(3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and

(4) the Government failed to provide the relevant information. *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 965 (1992). ©

## Acquisition Law Focus

# A Dissertation on "Due Diligence"

CECOM's **Lea Duerinck**, DSN 992-3188, provides a treatise on the term "due diligence" as it pertains to its myriad meanings in the financial and legal realms. Included are many case citations pertaining to the merger and acquisition arena, in which the term is discussed in situations of acquisition of a government contractor by commercial entities.

"Due diligence is also discussed as it applies as a legal defense, in security regulations, and in the acquisition of real property.

Lastly, the term is discussed in relation to environmental issues, and to federal securities disclosure circumstances. An outstanding paper on an important legal concept (Encl 9).<sup>c</sup>

# Global Certifications Reduces Technical Evaluation Time

CECOM Acquisition Center-Washington counsel **Richard McGinnis**, DSN 221-5981, describes the use of global certifications as a tool in the area of information technology procurements (Encl 10 ) At the CECOM Acquisition Center-Washington (CAC-W), as with many Federal government procuring agencies, the length of time required to conduct best value, tradeoff process procurements for commercial information technology (IT) products had become a matter of increasing concern.

Requiring activities were anxious to have ordering vehicles in place which afforded access to the latest technology. Procurement

cycle times were such that proposed technology often lost some of its cutting edge by the date of award. In order to shrink the period for processing acquisitions, a number of techniques were considered. One of the techniques was the use of a global certification.

Under the global certification approach, a certification is used as an alternative to the submission of detailed material in a proposal for the purpose of establishing compliance with the minimum technical requirements of a solicitation. The global certification approach essentially shifts to the contractor the responsibility for verifying that the minimum re-

quirements have been satisfied. While the submission and evaluation of information on the technical solution is still required to support the tradeoff process typically used in the procurements conducted by CAC-W, the global certification technique provides an opportunity to reduce both the number of evaluators and the amount of time required for the technical evaluation.

This technique has been used at CAC-W solely in the commercial IT arena. The technique may not be appropriate for every procurement and a careful analysis should be conducted of the risks and benefits before applying it to other types of acquisitions.<sup>c</sup>

## Big Changes Proposed for EEO Complaints -- 29 CFR 1614 Revisions

**T**he Equal Employment Opportunity Commission (EEOC) has proposed several significant changes to 29 Code of Federal Regulations 1614 addressing complaint processing. The entire package of changes can be accessed through the EEOC web site. Perhaps the **Ten Top** highlighted changes are:

1. Agencies must offer ADR in the informal complaint/counseling phase.
2. Revises dismissal rules, adding the right to dismiss for abuse of the EEO process.
3. Partial dismissals will be reviewed by EEOC AJs or by DA EEOCRA.
4. Includes a new "Offer of Resolution" provision that according to EEOC is similar to an offer of judgment under Rule 68 of the Fed Rules of Civil Procedure.
5. EEOC AJs will have the power to dismiss complaints and issue real decisions, not just recommended decisions. AJs will have the

power to award attorney fees and compensatory damages.

6. Expands AJs' summary judgment power to certain cases where material facts are in dispute.

7. EEOC AJs will issue real decisions on certification of class complaints. Currently AJs issue recommended decisions and HQDA decides whether a complaint should be certified as a class complaint.

8. The proposed rules include minor changes to the appeal process. The biggest change is agencies may file appeals (if we are dissatisfied w/ an AJ decision). The proposed rules also change the standard of review on appeal.

9. Requests for Reconsideration are live and well (they were eliminated in an earlier version of the proposed rules).

10. Amends the attorney fee provision to authorize payment of attorney fees for work performed by attorneys in the informal/counseling/ADR phase of the complaint process. ©

## MSPB Caseload High Despite Downsizing

The Merit Systems Protection Board (MSPB) issued more than 10,000 decisions in fiscal year 1997. Of these, more than 8,300 decisions were issued by MSPB regional and field offices, and 1,800 by the three-member Board in Washington, D.C. The subject-matter issues include: 50% on adverse actions, 22% addressing retirement appeals, and 10% involving reduction-in-force. The remainder concern performance actions, within-grade denials, and termination of probationary employees.

On the issue of processing cases, MSPB regional and field offices average 108 days from docketing to decision, with more than 80% decided within the Board's 120-day rule.

Cases that start in the field and are then appealed to the three-member Board were completed, on average, in about 10 months.

The Board does very well when cases are appealed to the Federal Circuit Court of Appeals — with 96% being unchanged by the Court.

A copy of the MSPB Annual Review is available at <http://www.mspb.gov> ©

# Employment Law Focus

## SOELR 1998 Strikes Big Again With Library Materials Galore!!!

Once again the annual OPM Symposium of Employee and Labor Relations (SOELR) provides the employment law counselor with an outstanding compendium of materials. Under separate cover you will receive many of these critical updates of various issues. POC is **Cassandra T. Johnson**, HQ AMC, DSN 767-8050.

Here, we do provide you an index of SOELR handouts (Encl 11).

Additionally materials are available on many subjects such as: New Developments in Employee Relations—1997 In Review, Disability Discrimination, Selected Decisions on Leave and Reasonable Accommoda-

tion, Selected Cases Dealing With Medical Documentation, Cases Involving Selected Medical Conditions, Selected Cases Defining “Disabled Person”, Reasonable Accommodation for Emotional and Psychiatric Disorders, and Investigating Special Harassment Complaints..

Sample letters guard against error and prevent re-inventing the wheel. Thus, we provide a group of sample letters for Notice of Proposal to Separate, Proposal to Remove for Unavailability for Duty, Proposed Removal for Physical Inability to Perform, Decision Notice for Medical inability to Perform, and Notice of Decision to Remove—Inability to Maintain Regular Work Schedule (Encl 12).

Telecommuting is becoming an increasingly common issue subject to the collective bargaining process. We include the negotiated agreement applicable to the Department of Labor (Encl 13).

You may want to seek out your labor counselors to see the Glossary of Terms Relevant to Discipline and Appeals. So, now *everyone* will know the difference between discipline and adverse actions.

Once again, thanks so very much to DA DCSPER's **Dave Helmer** for providing these materials. Dave has an extensive E-Mail list for those seeking up-to-date information. Contact **Dave Helmer** at [helmeDA@hqda.army.mil](mailto:helmeDA@hqda.army.mil).

## Public Sector Union Membership Falling

The number of workers in the united States belonging to unions fell 159,000 in 1997, to about 16.1 million, with most of the loss, about 107,000 coming in the public sector. Overall, union members comprise just more than 14% of the total workforce down 0.5 % from 1996.

The number of workers

covered by collective bargaining agreements dropped 225,000 to about 15.6% of the workforce. About 1/2 of this drop occurred in the public sector.

More men than women belong to unions (16.3% vs. 11.6%), and more African-Americans than whites or Hispanics.

The highest percentage of unionization is in the protective services, such as police and firefighters—just shy of 40%.

The median wage for a unionized worker in 1997 was \$640 per week compared with non-union job counterparts at \$478 per week. ©

## Environmental ADR Legislation

**T**he Environmental Policy and Conflict Resolution Act of 1998, Public Law 105-156, Feb 11, 1998, seeks to dramatically expand the use of Alternative Dispute Resolution (ADR) to the environmental sector. The term environmental dispute is broadly defined, referring to disputes or conflicts related to the environment, public lands, or natural resources. A formal ADR training mechanism and an environmental dispute resolution fund are key aspects of the legislation. Federal agencies are encouraged to use ADR processes in several ways, including using a foundation—The United

States Institute for Environmental Dispute Resolution.

AMC has an active Environmental Partnering ADR Program that works closely with ADR experts in the Environmental Protection Agency to identify opportunities to address disputes and conflicts early, without resorting to litigation. This program focuses attention on the interests of the parties rather than their legal positions. It uses the principle of open, honest communication to allow the parties to design their own solution to a problem.

POC at HQAMC for Environmental Partnering is **Stan Citron**, DSN 617-8043.

## *After We're Gone: Whose In Charge of Enforcing Land Restrictions*

Land use restrictions, sometimes also called institutional controls, are a cost-effective approach to tailoring remediation to reuse alternatives at closing installations. However, a question often asked by regulators, local reuse authorities, and the public is how will these restrictions be enforced once the land is transferred to others. The DoD has published an excellent pamphlet, [A Guide to Establishing Institutional Controls at closing Military Installations](#) which can assist all stakeholders in working through such issues. A copy may be obtained from either **Bob Lingo**, DSN 767-8082 or **Stan Citron**, DSN 767-8043. Additional information about Institutional Control may be found on the DoD Environmental BRAC Home Page, <http://www.dtic.mil/envirodod/envbrac.html>

## A New BRIM for BRAC

The Department of Defense has revised the Base Reuse Implementation Manual, DoD 4165.66-M. This is the Bible, Koran, Torah, etc for all those involved in reuse issues for BRAC installations. It may be accessed directly at

<http://emisary.acq.osd.mil/bccr/brim.nsf> or through the HQDA BRAC web site: <http://www.hqda.army.mil/acsimweb/brac/braco.htm> which has a great deal of other valuable information for Army personnel.

# Environmental Law Focus

## Budgeting for Bunnies: Funding Your INRMP

AMC is aware of a funding problem at the Installation and MSC level concerning an ACSIM policy memorandum dated 21 Mar 97, subject "Army goals and implementing guidance for natural resources planning level surveys (PLS) and Integrated Natural Resources Management Plan (INRMP)". The policy requires that all PLS be completed by FY 98, and funded as Class 1 requirements, and that all INRMPS be approved by FY2000. This policy is forcing many installations in AMC to scramble to budget, and to try to find funds to meet the deadlines.

The AMC Deputy Chief

of Staff for Engineering, Housing, Environmental and Installation Logistics, in conjunction with our office, is requesting that this policy requirement be reconsidered by ACSIM. The request asks that the PLS's be allowed to be completed by the installations as funding becomes available, up to and including FY 2000. We will also ask that the policy requirement for class 1 funding for FY 98 be dropped. However, in no case will the PLS's be delayed so as to jeopardize the statutory requirements of the Sikes Act concerning the completion of the INRMPS by 2001 or as otherwise required by the act. ©

## Let the Public Know: Reporting Munitions Activity

The Department of Defense has issued new Guidance on applying the emergency Planning and Community right-to-Know Act (EPCRA) to Munitions to Meet the Requirements of Executive Order 12856 (Encl 15).

The purpose of this guidance is to provide the public information associated with DoD munitions activities. It will require tracking and reporting of demilitarization activities starting in calendar year 1999. ©

## Preparing to Lease Our Property

HQDA has just provided a new revised format for preparing a Report of Availability for outgranting or leasing Army property. This format will be used for both BRAC and non-BRAC properties. Legal offices must review these Reports of Availability. The guidance and revised format is at Enclosure 16.

## Thanks to Bob Lingo...

For continuing to provide many very useful Web Sites for environmental and environmental related issues. It is a great approach to using technology to increase our knowledge.

# Contractor Employees in the Federal Workplace

The profile of today's Total Army looks like a combination of uniformed service personnel, civilian and contractor personnel. And, only one of these three groups wears a uniform. It is difficult to distinguish between Department of the Army civilians and contractor employees.

As contractors are more frequently a part of the Federal workplace, the issue of protecting sensitive information becomes even a more critical one.

AMC Ethics Counsel **Mike Wentink**, DSN 767-8003, has written a Point Paper on this subject, one that we urge you to disseminate to your workforce. No need to reinvent guidance when Mike has done so much (Encl 17).

The paper cautions that today you should always be aware of the status of individuals with whom you are speaking. The procurement integrity rules, the Privacy Act, and proprietary and trade secret requirements all are impacted by the changing face of our personnel.

The risks are great. Federal law makes it a crime to disclose a company's trade secrets, processes, operations, style of work, and other confidential information without permission.

Release of other information may not violate a specific law, but may result in unfair competitive advantage to the entity receiving the information. The result may be litigation and program turmoil, to say the least. ©

# Job Hunting-- Don't Shoot Yourself!

One recurring issue of great concern, especially so as we downsize and look towards privatization and contracting out, is that of job hunting. As with all hunting, you can easily shoot yourself in the foot if you do not safely negotiate your way.

**Mike Wentink** DSN 767-8003, provided still another excellent paper that defines when the hunt begins: upon sending out a resume or the initiation of an expression of interest unless one of the parties unequivocally rejects the contact.

The paper also addresses the importance of reporting such contact as it may lead to determinations regarding disqualification from any official matter that affects that specific company. This directly impacts what kind of work can be performed during the hunt.

Lastly, the paper highlights procurement integrity concerns, and provides a sketch of the various statutory provisions addressing post-governmental employment activities (Encl 19). ©

# Preventive Law Note: OGE Form 450 Info for the Force

Providing timely information to the workforce on Ethics matters saves lots of problems from arising. Here is **CECOM's** Memo to the workforce on the OGE 450 Confidential Financial Disclosure Report. Answers the who, what, when and the ever popular why--the purpose behind the policy (Encl 18). ©

## Is the E-Mail Like a Telephone Without the Cord??

### Rules for Using E-Mail: Flexible BUT DO NOT Abuse!

HQAMC's Ethics Counsel, **Mike Wentink**, DSN 767-8003, practices preventive law the way we want all AMC attorneys to do — often, regular, highlighting issues that focus attention on timely problem identification.

As E-mail proliferates policy guidance on appropriate use and, of course, prohibitions against certain activities, is critical.

### CG Policy

AMC Chief of Staff **MG James Link**, on behalf of the Commander, issued Policy Memorandum 97-08 concerning this issue (Encl 20 ). The policy complies with the DOD Joint Ethics Regulation.

### Looks At...

Important aspects of the CG's policy, which answer most questions, including the following terminology:

- o incidental use, occasional

- o most reasonably made during working hours

- o brief, infrequent, short
- o does not adversely affect official duties

- o reasonable duration and frequency

- o during personal time whenever practicable

- o serves a legitimate public interest

- o no adverse reflection on DoD.

### Prohibitions

Things that we may NOT use e-mail for include:

- o chain letters — if you get one, do not pass it on, except to report it to your Information Systems Security Officer (ISSO), Information Management Area Point of Contact (IMAPOC) and the Helpdesk. If the sender is a Federal employee, the Helpdesk will report the matter to his or her postmaster. You can also let your Ethics Counselor know. After you report it, delete it!

- o broadcast messages of a personal nature to multiple addressees (for example, it might be appropriate to send a message concerning the weekend football game to a couple of your office buddies with whom you discuss sports matters routinely, but it probably would not be okay to send the e-mail to all employees in your branch or office; for sure, it would not be okay to send it to All Personnel! Never use the All Personnel address unless you are sure that there is an official purpose. If you have any doubts, ask your supervisor first.)

- o gambling, including office football or other sports pools.

- o transmitting sexually oriented material.

- o conducting a personal business (such as an antique business that you might have on the side). As with most ethics issues, if you think it is wrong, it may be--so ask before you act. ©

# Faces In The Firm

## Hello-Goodbye AMC Organizational Developments

### Arrivals

#### HQAMC

We welcome **Lisa Simon**, from CBDCOM, who joins the Business Law Branch, concentrating on fiscal law issues. And we thank Lisa for her major contribution to the Newsletter.

Joining the Intellectual Property Division is **William Randolph**, who joins us from the OTJAG Intellectual Property Division.

### Departures

#### IOC

**Joanne Ogden** (Paralegal Specialist) has left Seneca Army Depot Activity after 19-plus years with SEDA. It is with mixed emotions that we bid farewell to Joanne Ogden. We are sad to see Joanne leave, but are extremely delighted that she accepted "an offer she couldn't refuse". Joanne has done an outstanding job and has been a delight to work with. Joanne will be working for the Veteran's Administration in Syracuse, NY. Best of luck to you Joanne.

### CBDCOM and SSCOM Provisional Organization

Effective 15 Jan,  
New Flag in October

Permanent Orders 12-4, 12 January 1998 reorganized CBDCOM, SSCOM, and Surety Field Actv on a provisional basis. The new organization is designated as the U.S. Army Soldier and Chemical, Biological Command (SCBCOM)(Provisional). Effective date of provisional organization was 15 Jan 98. As correspondence will be addressed to Commander, U.S. Army Soldier and Chemical, Biological Command (Provisional). There is no change in the physical location of the two workforces. All personnel will remain in place. UCMJ authority will remain with existing commanders. Command and control authority will transfer on 1 Oct 98. ©

### HooAH! for SSCOM: A Patent Arrives

SSCOM was notified by the U.S. Patent and Trademark Office that two registered trademarks were granted on Feb. 24, 1998 to the Army on the design and mark hooAH!

The marks will be used on the packaging of the energy bar to identify and distinguish the Army as the source of the product. The HOOAH! Bar will be produced by commercial firms for the military, however, there is potential for license agreements to produce a commercial HooAH! Bar. ©

**See You At  
the CLE--Recap  
in August  
Newsletter**

# Faces In The Firm

## Promotions and Awards

### STRICOM

STRICOM is pleased to announce the appointment of **Martha Zukos**, formerly secretary to the Chief Counsel, to the new position of Legal Technician. Her new responsibilities include providing assistance to counsel reviewing SF 450's, and legal research

### **BIRTHS**

Mrs. **Joanne Lieving** (Legal Assistant, IOC Acquisition Law) and her husband, Tony, celebrated the birth of their second child, Monica Christine, on 20 February. The family is doing great. Monica was also welcomed home by her big sister, Kelsey. Congratulations!

Not our usual congratulatory note - but . . . Uncle **Rick Murphy** (IOC Environmental/Safety Law) is deserving of congratulations - his brother and sister-in-law celebrated the birth of quadruplets! The three little boys and one little girl will join their siblings to fill the house. Congratulations to the family and to you, Uncle Rick!

### IOC

Ms. **Joanne Ogden** (Paralegal Specialist, SEDA) received the Superior Civilian Service Award, signed by Major General James Monroe, Commander, U.S. Army Industrial Operations Command, at a ceremony on 26 March. Mr. Anthony Sconyers, Chief Counsel, IOC, presented Joanne the award on behalf of the Command. Not only was Joanne the only member of the legal office at SEDA, but within the past year, she also took on the responsibilities of Public Affairs Officer and Reports of Survey Administrator at SEDA.

She has done an excellent job and demonstrated true commitment to SEDA, the Command, and her local community. Congratulations, Joanne. Well-deserved!

## Wedding Bells

Congratulations to CECOM attorneys **Vince Buonocore** and **Kim Sawicki** who were married on April 4.

Similar sentiments for CECOM Administrative Officer **Dolores Howell** who married Kenneth Beldon Harper, Standard Motor Products, March 7.

## WORKFORCE 2010 PROJECT

AMC Commander, **General Johnnie E. Wilson** has asked the AMC DCSPER to chair a committee to look at the composition of the AMC workforce in the year 2010. Each MSC is represented in this effort that includes looking at workplace challenges, trends and assumptions. The AMC Command Counsel representative to this project is **Steve Klatsky**. AMC Command Counsel **Ed Korte** is a member of the CG's Steering Committee. More information on this program will be forthcoming in the future. STAY TUNED.

# AMC PARTNERING CHAMPIONS WORKSHOP

3 - 4 March 1998

## *INTRODUCTION TO PARTNERING*

TUESDAY, 3 MARCH 1998

<b>0800-1000</b>	<b>Introduction</b>	
	Welcome Introductions and Workshop Goals	Mark Sagan
	Comments from the Command Counsel/ AMC Senior Advisor for Alternative Dispute Resolution	Ed Korte
	Overview of Partnering Champion Workshop Agenda	Mark Sagan
	AMC Partnering Champion Introductions	
	<b>Partnering Champion Table Exercise 1</b> Five Things You Have In Common	Mark Sagan
	<b>Partnering Champion Table Exercise 2</b> Five Problems You Have Experienced In Government-Contractor Relations	Mark Sagan
<b>1000-1015</b>	<b>Break</b>	
<b>1015-1045</b>	<b>Partnering Champion Table Exercise 3</b> Negotiations	Ken Bousquet
<b>1045-1130</b>	<b>History &amp; Background of Partnering</b>	Dave DeFrieze
<b>1130-1135</b>	<b>Stretch Break</b>	
<b>1135-1200</b>	<b>AMC Partnering Videotape</b>	Mark Sagan
<b>1200-1300</b>	<b>Lunch</b>	

## ***THE AMC PARTNERING PROCESS & MODEL***

<b>1300-1400</b>	<b>AMC Partnering Process Overview</b>	<b>Mark Sagan</b>
<b>1400-1415</b>	<b>Break</b>	
	<b>-2-</b>	
<b>1415-1545</b>	<b>STEP 1 Getting Started STEP 2 Communicating with Industry</b>	<b>Dave DeFrieze</b>
<b>1545-1600</b>	<b>Break</b>	
<b>1600-1630</b>	<b>Conflict Escalation and Alternative Dispute Resolution (ADR)</b>	<b>Steve Klatsky</b>

**WEDNESDAY, 4 MARCH 1998**

## ***THE AMC PARTNERING PROCESS & MODEL*** **(continued)**

<b>0800-0930</b>	<b>STEP 3 Conducting the Partnering Workshop &amp; Developing the Partnering Charter</b>	<b>Steve Klatsky</b>
<b>0930-0945</b>	<b>Break</b>	
<b>0945-1030</b>	<b>STEP 3 Conducting the Partnering Workshop &amp; Developing the Partnering Charter (Continued)</b>	<b>Steve Klatsky</b>
<b>1030-1100</b>	<b>STEP 4 Making It Happen</b>	<b>Ken Bousquet</b>
<b>1100-1115</b>	<b>Break</b>	
<b>1115-1145</b>	<b>STEP 4 Making It Happen (Continued)</b>	<b>Ken Bousquet</b>
<b>1145-1230</b>	<b>Lunch</b>	

***OTHER ISSUES AND WHAT'S NEXT FOR AMC PARTNERING  
CHAMPIONS***

**1230-1300**    **Other Issues Related to Partnering**    Dave  
DeFrieze

**1300-1345**    **What AMC Partnering Champions Do Next and**    Steve  
Klatsky  
**Their Role in Supporting Roadshow VII**

**1345-1400**    **AMC Partnering Champion Workshop Wrap-Up** Mark Sagan

# AMC PARTNERING CHAMPIONS WORKSHOP HANDOUTS

## HANDOUT INDEX

### TAB:

- A. Welcome Letter from Ed Korte, AMC Command Counsel and AMC Senior Advisor for Alternative Dispute Resolution.**
- B. Partnering Champion Workshop Agenda**
- C. List of AMC Partnering Champion Workshop Attendees**
- D. AMC Partnering Committee List**
- E. Speaker Biographies**
- F. Partnering Background & History**
- G. AMC Partnering Process Overview**
- H. "Partnering for Success", Contract Management, Aug 1997**
- I. Five Ways to Prevent Successful Partnering**
- J. Four AMC Model Exercise Scenarios**
- K. AMC Model Questions: Step-by-Step**
- L. Alternative Dispute Resolution Snapshot**
- M. Metrics for AMC Partnering Programs**
- N. Ethical & Legal Considerations**
- O. Roles of AMC Partnering Champions**
- P. Roadshow VII Schedule**
- Q. List of Roadshow Partnered Contracts**
- R. Evaluation Sheet to Measure Roadshow Facilitators**

**S. AMC Partnering Champion Workshop Evaluation Sheet**

## **History and Philosophy of the AMC Model Partnering Process**

### **I. History** (a.k.a. “The need for partnering”):

A. The past few decades have seen a dramatic rise in contract litigation. Litigation was consuming more and more time and money as cases experienced an increasing delay in obtaining a court decision. Even alternative forums, such as arbitration or Boards of Contract Appeals were becoming more expensive, and often took years to obtain resolution.

B. Similarly, in government contracts, litigation had steadily increased due to long entrenched adversarial attitudes between the government and its contractors. This adversarial attitude was understandable considering:

1. The confusion over authority to discuss and negotiate with contractors,
2. The rising fear of reprisal or condemnation by the IG, GAO, supervisors, or the public for the appearance of “giving away the store”,
3. The publicity of contractor criminal conduct (such as operation Ill Wind or Wedtech)

C. In the early 80's, some private industry companies (such as Dupont, Flour Daniels, Shell, Kellogg, Bechtel) began looking for a better way to manage their projects, and to reduce the adversarial approach to their contracts. The concept of inter-organizational team building began and was developed into a philosophy and process that the parties to a contract could adopt to reduce the potential for litigation.

D. The construction industry found itself with the dubious honor of having the highest rate of claims and litigation. In response, the construction industry began developing the partnering concept in the mid to late 80's. The Construction Industry Institute as well as the U.S. Army Corps of Engineers developed and promoted a partnering model for construction and A/E efforts with great success. By the early 90's, numerous projects had been partnered and statistical comparisons of partnered versus nonpartnered contracts revealed that partnered contracts not only experienced less litigation, they also had fewer injuries, cost overruns, time overruns, paperwork, and contract changes while experiencing higher VECP's and employee morale.

E. In 1991, the Industrial Operations Command began experimenting with the construction industry model to utilize the concept on a variety of other contract types. Partnering was inserted into the Chem Demil program on several O&M contracts, and the 120mm mortar program and the Hydra 70 Rocket System utilized partnering on production contract efforts. As a result of lessons learned from these programs, it became apparent that a partnering model would be beneficial on virtually all AMC contract types. In 1996 AMC put together a Partnering Team to develop an AMC model partnering program and to provide partnering training and support to AMC programs at the various subordinate commands. Based upon lessons learned from additional pilot programs at the other MSC's (the ASV at TACOM,

the BRAC Revitalization effort and BCIS EMD at CECOM, among others), and interviews with experienced partnering participants, the team developed the AMC model partnering process and published "Partnering for Success, A Blueprint for Promoting Government-Industry Communication and Teamwork" in April 1997 as a "how to partner" guide to those involved with AMC programs.

F. Partnering is continuing to grow nationally and internationally both within the construction field, and now on other contract types. Likewise, partnering is growing within the DOD communities as the benefits of partnering are recognized. While it will take time to provide widespread measurable results from the use of partnering on AMC programs, discussions with AMC program participants indicate that partnering has helped significantly cut decision time and paperwork, and has reduced schedule delays and program costs.

## **II. Philosophy:**

A. Partnering is primarily an attitude adjustment, where the parties to the contract form a relationship of teamwork, cooperation, and good faith performance. Partnering requires the parties to look beyond the strict bounds of the contract to formulate actions that promote the overriding common goals of the parties.

B. This concept is not unique. It is similar to when we pick a partner at the company picnic and enter the three-legged race. The partners have their legs tied together and know they must reach the finish line. But if the parties run in different directions, if the parties don't start at the same time and on the same leg, if the parties don't hold each other up and keep each other out of potholes on the path to the finish line, neither will finish successfully. Your contracts will be the tie that binds you to others. Accordingly, we need to work together, communicate our expectations, agree on common goals and methods of performance, and identify and resolve problems early on - before they bring you both to the ground.

C. If the project owner puts a quality contractor out of business, or backs them into a corner by creating unnecessary financial hardships, the result becomes increased claims as the contractor strikes back, or the inability to gain competition and quality performance on future requirements. Similarly, a "grab what you can get" attitude toward contract performance will not sustain a contractor's long term business or reputation. Both parties have a vested interest in mutual cooperation and meeting the needs of their contractual partners. An adversarial relationship may hinder or destroy these overriding interests. Accordingly, it is mutually beneficial to establish a "we", rather than an "us and them" attitude.

D. In short, partnering can be viewed as "A project specific inter-organizational dispute avoidance process."

1. "Project Specific" because the Competition in Contracting Act and Antitrust legislation does not allow the government to make long term commitments to

individual companies. While the process will be limited to an individual contract, the benefits of having partnered will incidentally carry over to other business.

2. "Inter-organizational" because partnering works to join different organizations into one team for efficient project completion.

3. "Dispute Avoidance" because partnering works to eliminate the root causes of conflict, which not only result in litigation, but eat away at all facets of successful performance.

4. "Process" because philosophy is not enough. We must change our actions to reap the benefits of partnering. By developing a process to follow, we have a tool to create change rather than to simply talk about it.

E. The philosophy behind partnering stems from a variety of sources combined to improve the successful accomplishment of inter-organizational projects. These sources include contract interpretation, "win-win" strategies and interest-based negotiation, synergy, team building and conflict resolution, project management, and acquisition reform.

1. Contract Interpretation: Our contracts define the legal relationship of the parties. Partnering focuses on the working relationship of the parties. Partnering does not affect the rights and responsibilities established in the contract, but does help the parties focus on what the contract is intended to accomplish. One of the most basic premises of contract law is to interpret the contract to reflect the intent of the parties. Over the years, parties to a contract have begun to rely exclusively on the terms of the contract to determine the parties' performance responsibilities. While reliance on the contract to determine legal responsibilities is appropriate, contracts may not always clearly reflect what is envisioned by the parties as successful project completion and legal contract interpretation maxims might not provide the result desired by either contract party. Partnering helps with communication between the parties so that disagreements over contract interpretation are avoided.

2. "Win-win" strategies and interest-based negotiation: Americans have traditionally been raised on a philosophy of "win-lose". Founded in competitive sports, we have grown to believe that you must use whatever strategies you can to come out ahead, often at the loss of the other side. Even compromise results in giving up, or losing, some of the gains desired by each side. When contract parties do not trust each other, or if a contract partner is viewed as an adversary, the parties often take strategic "positions" and hold back information that they feel may be detrimental to those positions. Interest based negotiation anticipates that the parties will communicate their true needs rather than just a stated negotiation position. Often the parties find that both sides' true needs can be met through creative problem resolution, while the stated negotiation positions are often diametrically opposed. Partnering fosters communication between the parties that allows the sides to work together to meet the true needs of both sides, and recognizes that the contract partner is not an adversary to be beaten, but a resource necessary

for successful project completion.

3. Synergy: Synergy is the concept that two elements working together can achieve more than the sum of the two elements working separately. This concept has great application in complex government contracts. For example, many contractors develop teams to bid on certain requirements realizing that only by combining expertise can they hope to achieve contract performance. The AMC Partnering Model envisions that successful performance involves not only the efforts of the contracting community performing to the terms of the contract, but the efforts of the government personnel as well. If government and contractor resources work together, rather than against each other, the end result is often far superior, with both sides meeting or exceeding their goals.

4. Team building and conflict resolution: As teams are formed, the parties go through a series of stages as the members learn to gain trust with each other. Without this trust, the team's performance is slowed as members question purposes, authorities, or check the intent and performance of other team members. The AMC Model Partnering process includes tools which help the team members overcome some of the initial mistrust the parties may have with each other by improving communication and avoiding conflicts. Teams operate most effectively when conflict within the team is properly managed. Studies have shown four basic elements of conflict within teams: a) personality differences, b) a misunderstanding of common goals and objectives, c) a misunderstanding as to roles and responsibilities, and d) lack of a conflict resolution methodology. The AMC Model Partnering process contains procedures designed to address, at the beginning of contract performance, each of these elements of conflict that may occur within the inter-organizational team.

5. Project management: Partnering provides the parties with tools designed to be used throughout performance of the contract to keep the parties focused on success, and to resolve problems before they affect the desired outcomes. Partnering does not assume that a project is, or will otherwise be, poorly managed. Rather it provides a road-map, a series of management tools, that address many of the less obvious influences on successful performance. Similar to the use of SPC to monitor the production process to ensure quality at the end of the line, partnering monitors the human influences of project performance to ensure that these resources are operating efficiently.

6. Acquisition reform: We have learned that the government spends between 15 to 40% more than private industry in obtaining its products and services due to the extensive oversight we place on government contracts. We also recognize that we can no longer afford to pay this premium. Without our traditional oversight, we also recognize that our risks of poor performance or fraudulent activity may increase. As part of acquisition reform we have turned to past performance evaluations to reduce the risk of poor contractor performance. However, once the contract is awarded, we must then turn to partnering to ensure early identification and resolution of problems. By improving communication between the parties, we can reduce the risks of failure by early identification and resolution of problems. By increasing our trust, we can

rely more heavily upon each other to do what is necessary, and measure whether the purposes of the contract are being met, without the expensive oversight that we can no longer afford.

III. Conclusion: As our resources continue to decline, we must find a way to maximize what we have, and eliminate nonproductive activity. As people are viewed as our most important resource, it is imperative that we use them as effectively as we can. As more and more of our requirements are obtained through contracting, we must change our view that contractors are our adversaries and view them as an asset to mission support. The AMC Model Partnering process allows us to adopt the attitude and gain the trust necessary to provide the maximum support to our soldiers.

**SOURCE SELECTION PARTICIPATION AGREEMENT**

***Important! This Agreement concerns a matter within the jurisdiction of a United States government agency. This Agreement prohibits you from making false, fictitious, or fraudulent statements and/or certifications. If you do so, you may be subject to prosecution under 18 U.S.C. § 1001.***

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Solicitation [NUMBER] (“[PROGRAM NAME]”)

Name: \_\_\_\_\_  
(hereinafter referred to as “you” or “your”)

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Appointed By: [NAME]  
Contracting Officer

Date Appointed: \_\_\_\_\_

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**AGREEMENT**

1. This Agreement applies to individuals involved in solicitation [NUMBER], also known as the [PROGRAM NAME] procurement. This Agreement applies to [CLASS(ES) OF INDIVIDUALS INVOLVED IN THE SOURCE SELECTION PROCESS].
2. This Agreement contains the rules of conduct relating to the procurement. It includes rules of conduct regarding conflicts of interest, as well as rules of conduct regarding the safeguarding of confidential information.
3. Your signature on this Agreement indicates that you have read this Agreement and agree to be bound by its terms.
4. **CONFLICTS OF INTEREST.** By signing this Agreement, you agree to avoid conflicts of interest. This means the following:

*For Official Use Only*

a. that you, your spouse, and dependent child(ren) do not have any direct or indirect financial interest or any other beneficial interest in a potential competing contractor on this procurement. Please note any exceptions to this below:

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b. that you, your spouse, and dependent child(ren) agree not to acquire any direct or indirect financial interest or any other beneficial interest in an actual competing contractor on this procurement during the source selection process;

c. that you are not related to anyone, by blood or by marriage, who is employed by a potential or actual competing contractor on this procurement. Please note any exceptions to this below:

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d. that you agree not to solicit or accept, directly or indirectly, any promise of future employment or business opportunity from an officer, employee, representative, agent, or consultant of a competing contractor on this procurement – during the source selection process;

e. that you agree not to discuss any future employment or business opportunity from an officer, employee, representative, agent, or consultant of a competing contractor on this procurement – during the source selection process;

f. that you agree not to ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, whether directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant, of any competing contractor on this procurement; and

g. that you agree not to engage in any personal or professional activity, or enter into any financial transaction, that involves, or appears to involve the direct or indirect use of “inside information” to further a private gain for yourselves or others.

h. In the event that you have noted any exceptions in this paragraph, the Contracting Officer will advise you whether or not you may still participate in the source selection process.

**5. PROTECTING CONFIDENTIAL INFORMATION.** By signing this Agreement, you agree not to disclose confidential, proprietary, and/or source selection sensitive information to any individual or entity, unless that individual or entity is authorized by the Contracting Officer to receive such information. This means the following:

a. that you have read, understand, and agree to abide by the terms of the Federal Acquisition Regulation Part 3.104;

b. that you will not knowingly disclose, directly or indirectly, proprietary or source selection sensitive information to any individual or entity, unless that individual or entity is authorized by the Contracting Officer to receive such information;

c. that you agree not to discuss evaluation or source selection matters (including proprietary proposal information) with any unauthorized individuals, even after the announcement of the successful contractor(s), unless authorized by the Contracting Officer.

d. that you acknowledge that disclosure of proprietary information may violate the "Trade Secrets Act". If you are found to have violated the Trade Secrets Act, you may be subject to criminal penalties.

**6. OTHER RULES OF CONDUCT.** By signing this Agreement you agree to abide by the following additional rules of conduct for this procurement:

a. You agree not to communicate with offerors or their subcontractors concerning this acquisition unless you first obtain the approval of the Contracting Officer.

b. You recognize that your participation in this source selection may be subject to intense scrutiny. As such, you agree to conduct yourself in such a way as to not adversely affect the confidence of the public or competing contractors in this source selection process.

c. You agree to avoid any action, whether or not prohibited, that could result in, or could create, the appearance of a lack of independence or a lack of impartiality.

7. You understand that your obligations under this Agreement are of a continuing nature. If anything takes place which would cause a change to any statement, or create a violation of any representation or rule of conduct contained in this Agreement, you agree to inform the Contracting Officer promptly.

**CERTIFICATION**

8. I certify that I have read and understand the above Agreement. I further certify that the statements made herein are true and correct.

9. I agree to the terms of this Agreement.

\_\_\_\_\_  
Your Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Contracting Officer's Signature

\_\_\_\_\_  
Date

## USE OF LIQUIDATED DAMAGES IN GOVERNMENT CONTRACTS

Other than construction contracts, the use of liquidated damages in government contracts has been infrequent. Regulatory guidance in FAR Subpart 11.5 provides general standards for use of a liquidated damages provision. While the guidance does not limit use of such provisions to construction contracts, the regulations provide specifics only in the construction area (FAR11.503(b)). Additionally, the DFARS implementation appears to provide no additional guidance other than to require the use of a liquidated damages provision in most construction contracts over \$500,000.

Buying activities are frequently frustrated by the late delivery of supplies, particularly spare and repair parts, where the typical government remedy is the default clause. The consequences to the government of late delivery are frequently difficult to establish in terms of the amount of damages. The FAR guidance at 11.502(b) is often cited by contracting and legal personnel as a basis for not including a liquidated damages provision in contracts.

The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages **may** be held to be a penalty, and therefore unenforceable. (emphasis added).

In a fairly recent decision by the United States Court of Appeals, Federal Circuit, (DJ Manufacturing Corporation v. U.S., 86 F.3d 1130 (Fed. Cir. 1996), the Court recognized that while state courts may be hostile to liquidated damages clauses, the federal law “does not look with disfavor upon liquidated damages provisions in contracts.” While the practitioner should recognize that this case involved a contract for supplies (field packs) to support Desert Storm Troops (thus, presumably lending some degree of credibility to the “importance” of the delivery schedule), the contractor raised several issues which have often been the basis for a decision not to include such a provision in supply contracts.

The contractor argued that the rate used to calculate damages was a standard rate used in numerous solicitations; that the amount of liquidated damages bore no relationship to actual damages; and, that the government failed to show that the amount of liquidated damages was reasonable. The Court, granting the government’s motion for summary judgment, dismissed the contractor’s complaint.

The Court stated that the contractor, rather than the government, has the burden of proof in challenging the enforceability (reasonableness) of a liquidated damages provision. The Court provided a useful discussion of numerous federal court decisions in this area. The Court cites an opinion of the noted jurist, Learned Hand, for the proposition that “courts

should encourage [such agreements] to the utmost instead of being disposed to lean against them.”

Where the government determines that liquidated damages are a useful tool to both compensate the government for late delivery as well as a “spur” to performance, contracting personnel should not be unduly constrained regarding the use of a liquidated damages clause. It is suggested that the federal case law in this area be examined and that the acquisition community consider a greater use of liquidated damages provisions in contracts.

INFORMATION PAPER

SUBJECT: Foreign Military Sales Contract Contingent Fees

1. PURPOSE: To provide information on the new FMS contingent fee rule - DFAS 225.7303-4.

2. FACTS:

a. Contingent fees are generally allowable under DOD contracts provided the fees are determined by the contracting officer to be fair and reasonable and are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

b. Contingent fees are not allowable in FMS contracts for the following countries [Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force)] unless payment has been identified and approved in writing by these countries before contract award. NO CHANGE FROM PRIOR ACQUISITION RULE. Same countries as listed in SAMM section 80103.D.

c. The prior Defense acquisition rule limited allowable contingent fees for contracts in support of a FMS case to \$50,000.

d. The new Defense acquisition rule [effective 9 March 98] permits allowable contingent fees [for countries other than listed above] to exceed \$50,000 per FMS case, provided payment has been identified and approved in writing by the foreign customer before contract award.

Mr. Larry D. Anderson  
AMSAC-LA  
617-8040  
10 March 1998

## **A Quick Primer on the Sale or Exchange of Government Property under 40 U.S.C. 481(c)**

### **Background information:**

Proposals for sale or exchange of Government property, with the Government keeping or applying the proceeds, have to be examined in the context of two important fiscal law principles:

1) First is the miscellaneous receipts statute, 31 U.S.C. Sec. 3302(b), which essentially provides that moneys received on behalf of the Government have to be deposited in the general fund of the U.S. Treasury, unless one of several exceptions apply:

-- there is specific statutory authority to apply the moneys to a specific account or use. For example, money received from AWCF sale as can be put back into the AWCF account. - OR -

-- the receipt of money qualifies as a repayment to an appropriation (for example, collection of an erroneous overpayment, or recouped progress payments, or, in some instances, excess procurement costs)

2) The second problem is a corollary to the miscellaneous receipts doctrine, known as the augmentation of appropriations. The GAO Appropriations Law Manual explains it this way:

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. The prohibition against augmentation is a corollary of the separation of powers doctrine. When Congress makes an appropriation, it is also establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount congress has appropriated for that activity.

Simply stated, money from the sale or property would ordinarily have to go to the general fund and can't be applied to a specific contract. The fact that no money may change hands would not take the transaction outside of the rules; credits and property exchanges qualify as a "payment" for these purposes.

#### **40 U.S.C. 481(c)**

A statute that is receiving a lot of new attention is 40 U.S.C. 481(c), which provides that when an agency is acquiring an item, it can "exchange or sell similar items" and apply what it receives from the sale or exchange to the purchase. It's like buying a new car – you can either trade your old car in to the dealer and get money off the purchase price of the new car, OR you can sell the old car yourself and apply the proceeds to the new car purchase.

When DOD implemented this statute in DoD 4140-1.R, its use was limited to exchanges of property; however, on 29 August 1997, a two year waiver was granted to the Army, which now gives us permission to SELL property, as well.

This statute provides an exception to the miscellaneous receipts statute and the augmentation of appropriations rule. However, it contains some limitations, and it refers to other statutory requirements and federal property regulations that must be met before the authority can be used. It is important to understand and meet all the limitations and requirements; because it is an *exception* to a general rule (and the general rule carries some severe penalties for violation!), you will want to make sure that you fit within the exception by following all the necessary procedures. It may be possible that requirements of regulations can be waived upon request, but statutory requirements must *always* be complied with.

#### **Rules relating to the property itself**

Acquisition of new items. The statute makes clear that the sale or exchange must take place in connection with "acquiring personal property," and that the proceeds or exchange allowance from the old property is used as payment, in whole or in part. The DOD regulation also provides that the "items to be acquired are required for approved programs." Similar language appears in the Federal Property Management Regulation (FPMR 101-46.202(b)(2)) (Note, there is no requirement that the approved program be funded, so arguably, there is a possibility of using sale or exchange for unfunded requirements.)

Nonexcess Property to be sold or exchanged. The property to be sold or exchanged cannot be excess, under the DoD regulation and the FPMR.

Federal Supply Classification Groups. The authority to sell or exchange cannot be applied to property in certain Federal supply classification groups *unless* a waiver is received from the General Services Administration, according to the DoD regulation. Those groups listed in FPMR 101-46.200(a) which are relevant to the TACOM mission include weapons, fire control equipment, valve, and hand tools.. (In addition, there is a further prohibition on use of the authority for any material controlled by the Nuclear Regulatory Commission, scrap, excess or surplus property, or strategic or critical material.)

Items must be “similar”. The statute uses the words, “may exchange or sell similar items... .” The DoD guidance uses the same wording. Neither define the term. However, the FPMR defines “similar” as meeting one of three conditions:

- (i) the old and new items are identical;
- (ii) the new item is designed and constructed for the same specific purpose as the replaced item, or both are parts or containers for identical or similar end items; or
- (iii) the old and new items are both within a single Federal Supply Group.

New items are replacements. FPMR 101-46.202(b)(3) requires a one-for-one replacement, with several exceptions. The DoD regulation, however, focuses on one of the exceptions by requiring that the “item or items to be acquired replace and perform substantially all of the functions of the item or items being exchanged.”

### **Special Rules concerning sales**

Requirement for advertised sale. If property is sold, it must be done under 41 U.S.C. 5, which requires advertising and getting bids for the best price. The only exception to this provides that “fixed price sales may be conducted in the same manner and subject to the same conditions as are applicable to the sale of property pursuant to section 484(e)(5) of this title.” The latter referenced code section permits limited negotiated sales of property for particular categories of property as determined by the federal property administrator, with notification and explanation to Congress; the exceptions don’t apply in most instances in which TACOM-ACALA would want to use them.

Procedures for conducting advertised sales are contained in FPMR 101-45 and 101-46. They call for advertising, inspection by bidders, and sealed or spot bids. Sales can be conducted by GSA or the agency.

Time period for obligating proceeds. GAO policy and procedures apply. FPMR 101-46.304 provides that

- ⟨ when the old property is sold before the acquisition of the new property, the agency's account will be credited. The proceeds will be available for obligation for the acquisition of the replacement property during the fiscal year in which the sale is made, and for one fiscal year after.
- ⟨ when the old property is sold after the acquisition of the new, the proceeds are deposited as a direct reimbursement credit to the appropriation previously charged for the replacement.

### **Rules concerning exchanges**

There are no special rules for exchanges; however, since there must be a written determination of "economic advantage" to the Government (see below), care should be taken to establish a reasonable figure for the exchange allowance.

### **Rules concerning documentation and reporting**

Old/new items. Detailed cross-references are not required, but some record must substantiate that the new items were similar to the old items and that any allowances applied were, in fact, available.

Written determination. The DoD regulation requires a written determination of economic advantage by the acquiring activity, indicating:

- 1) the anticipated economic advantage to the Government;
- 2) that the sale/exchange allowance is being applied in payment for the items being acquired; and
- 3) that, if required, the property has been rendered safe or innocuous, or has been demilitarized.

(With regard to the economic advantage, there should be some discussion about whether sale or exchange will obtain the better return for the Government. (see FPMR 101-4.201-1) With regard to demilitarization, the FPMR requires demilitarization if found by an agency official to be in the best interest of public health, safety, or security; in an abundance of caution, the

determination should explain the converse, that is, why particular military items are not being demilitarized for sale or exchange.)

Written evidence of the transaction. Any sale or exchange transaction must be evidenced in writing. FPMR 101-46.200.

Recording of acquisition cost. Under the DoD reg, property acquired through sale or exchange is to be recorded at acquisition cost. Similarly, the credit received through sale or exchange is considered the selling price of the old property and should be accounted for as a in or loss.

Annual Report. Each DoD component is to submit an annual (fiscal year) report to DLA , due by November 30.

K. Krewer  
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# **SUPERIOR KNOWLEDGE - THE GOVERNMENT'S DUTY TO DISCLOSE**

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## **I. INTRODUCTION**

“If the government possesses special knowledge which is vital to the performance of a contract but which is unknown and not reasonably available to a bidder who is thereby misled, the government must disclose its superior knowledge or be held liable for breach of contract.”<sup>1</sup> Liability is based upon an implied duty to disclose information that is vital for the preparation of estimates for contract performance.<sup>2</sup> Stated differently, liability is based upon “an implied condition in the contract that neither party will hinder the other in the discharge of the obligations created by the contract.”<sup>3</sup> This duty is consistent with the general contract law concepts of good faith and fair dealing.<sup>4</sup>

“The doctrine of superior knowledge is not aimed at compelling disclosure whenever the Government knows more than the contractor *might*, its aim, instead, is to address those situations where the Government knows more than the contractor *should*.”<sup>5</sup> “Cases in which the Government has been held to have breached a duty of disclosure involved situations where the information withheld was not only vital to successful performance, but more important, was information of a character which the Government knew or should have known, the contractor was neither aware or reasonably likely to become so.”<sup>6</sup> Prior cases also require the contractor to have been misled by the Government’s failure to disclose the information.

## **II. ELEMENTS WHICH ESTABLISH A BREACH OF CONTRACT FOR FAILURE TO DISCLOSE SUPERIOR KNOWLEDGE**

To establish a breach of contract under the doctrine of superior knowledge, a contractor must produce specific evidence that it:

- (1) attempted to perform without vital knowledge of a fact that affects performance costs or direction,
- (2) the Government was aware the contractor had no knowledge of and had no reason to obtain such information,
- (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and
- (4) the Government failed to provide the relevant information.<sup>7</sup>

### **1. THE GOVERNMENT’S KNOWLEDGE OF VITAL INFORMATION**

#### **a. VITAL INFORMATION**

The term “vital information” refers to the type of information which would impact upon the contractor's estimates or performance.<sup>8</sup> The duty to disclose applies to specific information that impacts the cost of the work.<sup>9</sup> However, the doctrine neither imposes on a buyer an affirmative duty to inquire into the knowledge of an experienced seller,<sup>10</sup> nor, when a contractor is supplied with a performance specification, a duty to disclose information which outlines the manufacturing difficulties which had been experienced by all prior contractors.<sup>11</sup> Moreover, “[t]he government is under no duty to disclose information, such as an opinion or conclusion of its geologist, where the knowledge of both the government and the bidder is based on data equally available to both parties and where more conclusive data is available, but neither party chooses to obtain it.”<sup>12</sup> Last, in the absence of affirmative misrepresentations, the Government is not required to be a guarantor against a contractor’s poor judgment regarding its selected method of performance.<sup>13</sup>

For example, in *Hardeman-Monier-Hutcherson v. United States*,<sup>14</sup> the Navy possessed two reports which described the severity of weather and sea conditions off the coast of Australia where the contractor was required to build, among other things, a pier and radio communications facility. Neither report was shared with bidders who were unable to conduct their own studies due to the limited bidding period. Although the Navy knew that the site was virtually unusable during certain periods of the year, the only information contained within the bid documents was a comment that the area was subject to periodic hurricanes. In this case, the court had no difficulty concluding that the information was vital and unique to the Navy, and ruled that the Navy breached the contract by failing to disclose this information to the plaintiff.

In *GAF Corp. v. United States*,<sup>15</sup> the U.S. Court of Appeals for the Federal Circuit affirmed the Claims Court’s earlier determination that the Navy had no contractual obligation to warn an asbestos producer of the hazards associated with its own product. GAF sought to recover the costs it incurred in judgments, settlements, and legal fees defending wrongful death and personal injury claims due to shipyard workers’ prolonged contact with its own product, asbestos.

In another case, *Intercontinental Manufacturing Co.*,<sup>16</sup> the plaintiff contracted with the Navy for the manufacture of containers for sea mines. Prior to Intercontinental’s contract, there had been previous contracts for the containers, and each prior contractor had encountered manufacturing difficulties. In fact, all prior contractors had filed claims. At a pre-bid conference, the government had discussed some of the prior disputes. Nonetheless, the plaintiff still experienced manufacturing difficulties of its own and filed a claim for its increased costs. In its claim, the plaintiff argued that the government’s disclosure was misleading and, therefore, the government should be liable for the increased costs of performance. The court disagreed and questioned the plaintiff’s assertion that the government had an underlying duty to disclose this information to begin with. The court concluded there was no duty and explained:

. . . the case for imposing upon the Government a duty of disclosure proceeds entirely upon the assumption that since manufacturing difficulties of varying degrees had been experienced by all prior contractors, it could reasonably be

anticipated that [plaintiff] too would come to share this plight and that it was the Government's responsibility to forestall that occurrence.

. . . it is simply too large an assumption to rest upon. It is important to recognize that with an end-product specification such as is here involved, an imposition upon the Government of a duty of disclosure regarding the manufacturing processes and techniques, accomplishes, in practice terms, a reallocation of the performance risks normally shouldered by the fixed-price contractor. Caution demands, therefore, that that before such a shift in contractual obligations be enforced, the record substantiate that the performance difficulties likely to be encountered exceed a rightfully expected level of skill and competence of the industry.

. . . it is incumbent on the aggrieved contractor to explain why, in this procurement, it would have been beyond its properly expected skills and abilities to have foreseen the manufacturing problems that were encountered and the solutions that they demanded. To recognize a duty of disclosure on any lesser basis -- to require it, for example, simply because claims arose in past procurements -- would carry with it the real possibility of obligating the government to assume the duty of informing the contractor about what it ought to know.<sup>17</sup>

In *American Shipbuilding Co. v United States*,<sup>18</sup> the Court of Claims ruled that a delivery schedule contained in bid documents is not an affirmative representation by the government that a project can be performed within the stated period.<sup>19</sup> In *American Shipbuilding*, the specifications were not performance, but design.<sup>20</sup> Contrary to the plaintiff's assertions, the Court of Claims found the specifications were sufficient to show the plaintiff what was required under the contract, and, therefore, there was no issue of defective or misleading specifications.<sup>21</sup> The Court of Claims also found the government did not withhold a vital fact affecting performance which the government knew the plaintiff was not aware of. To the contrary, the court found that all the plaintiff needed to do was to evaluate the specifications and decide whether it could complete the work by the due date.<sup>22</sup> The court concluded that it is "reasonable for the government to assume that a contractor is the best judge of its competency and will exercise good judgment in deciding to bid on a contract."<sup>23</sup> In light of its findings, the Court of Claims concluded that *American Shipbuilding* was not entitled to relief under the doctrine of superior knowledge.<sup>24</sup>

In *L.G. Everist Inc. v. United States*,<sup>25</sup> the government contracted for the excavation of "riprap" from a quarry. Although the government's geologist expressed reservations regarding the quality of the "riprap" in light of its intended use, the government did not share this opinion with the plaintiff. The court ruled that the Government was not liable for its failure to disclose its opinion because both parties could have ascertained the true quality of the "riprap" through "test

quarrying,” but neither party chose to do so. Since information regarding the true quality of the quarry rock was reasonably available to the plaintiff, there was no breach of contract.

In *Granite Construction Co., v. United States*, the plaintiff contracted with the U.S. Army Corps of Engineers for the construction of a salmon fingerling bypass in the John Jay Dam on the Columbia River. One part of the project involved excavation of approximately 1000 feet of the former bypass tunnel which was constructed of concrete and stone aggregate of various sizes. The plaintiff never seriously considered hand-mining the former by-pass tunnel, because it felt such a process would be too labor intensive and costly. Instead, it chose to employ a “roadheader” to excavate the existing tunnel. (A roadheader is a large piece of mining equipment which uses a rotating cutting head attached to a long arm.) Although the plaintiff understood that a roadheader was used primarily to excavate soft materials, such as coal, and would not cut through the stone aggregate, it concluded that the teeth of the cutting head would be able to push through the cement matrix and break off chunks of the matrix with aggregate imbedded.

From the first instant the plaintiff attempted to use the roadheader to excavate, it was apparent that the machine would work poorly at best. In finding for the government, the court concluded:

. . . the Government is not a guarantor against poor judgment with respect to methodologies selected by the contractor. In this case, [the plaintiff’s] belief that the teeth of the cutter head would make constant contact with the low-strength matrix is inexplicable. It was at best a triumph of hope over data. . . . ‘any misleading that occurred was due to plaintiff’s own unreasonable assumptions.’<sup>26</sup>

#### b. THE GOVERNMENT’S KNOWLEDGE

To prevail in its claim of breach under the doctrine of superior knowledge, the contractor must show that the government possessed the undisclosed information. However, in light of the vastness of the business engaged in by the United States Government, with its multitudinous departments and bureaus and independent agencies scattered all over the world, knowledge of one government agency generally will not be imputed to another Government agency absent some meaningful connection between the agencies.<sup>27</sup>

Such a connection was found to exist in *J.A. Jones Construction. Co. v. United States*.<sup>28</sup> In *J.A. Jones*, the plaintiff sued to recover overtime wages paid by it and its subcontractors which resulted from an alleged breach of its contract with the Army Corps of Engineers. The contract required J.A. Jones Construction to build various facilities at the Air Force Missile Test Center at Cape Kennedy. During this procurement, the Corps of Engineers acted as the “construction agency” for the Air Force. In its complaint, J.A. Jones Construction asserts the Corps of Engineers knew but failed to divulge that, during the time J.A. Jones Construction’s contract was being performed, the Air Force intended to initiate a large, high priority construction program in the area premised, in part, on the payment of premium wages. As a result of the Air Force’s project, J.A. Jones Construction experienced a labor shortage which required it to pay higher

wages to acquire the labor necessary for its timely performance. In this instance, the court concluded that the Air Force, the “using agency” of the Corps of Engineer’s services, was obligated to inform the plaintiff that substantial overtime pay probably would be required on its contract. The court further concluded that this obligation applied whether or not the Corps of Engineers actually knew of the Air Force’s plans.

## 2. THE CONTRACTOR’S KNOWLEDGE OR REASON TO KNOW

### a. ACTUAL KNOWLEDGE

The government will not be liable for its failure to disclosure information if it can show that the contractor possessed actual knowledge of the information in question.<sup>29</sup> If the government can not demonstrate a contractor’s actual knowledge prior to the time of contracting, it can still avoid liability for its failure to disclose if the contractor had reason to know of the information.<sup>30</sup>

### b. REASON TO KNOW

Unless the contractor can show that “its claims were borne of problems exceeding the industry’s knowledge, practices and skills; it cannot . . . be heard to say that the Government withheld *superior* knowledge.”<sup>31</sup> Accordingly, the fact that the government may possess more extensive knowledge in a particular area than a contractor does not constitute superior knowledge *per se*.<sup>32</sup> Moreover, the contractor’s size and sophistication may have a bearing on whether the contractor should be charged with reason to know.<sup>33</sup>

In *Drillers, Inc.*<sup>34</sup> for example, the board found that the government’s failure to inform the contractor of the presence of hydrogen sulfide in subsurface water was not a breach of contract because the information was reasonably available to the contractor had it conducted a reasonable site investigation and made pertinent inquiries as required by the contract.

In another case, *Tyroc Construction Corporation*,<sup>35</sup> the government was required to compensate a contractor for additional work caused by onsite water because the government failed to disclose the presence of a nearby sump pump and soil borings that indicated a water problem. In this case, the Board of Contract Appeals considered the contractor’s status as an 8(a) business when it concluded that “it would not seem reasonable to require Tyroc to conduct its own engineering investigation in order to ascertain the accuracy or the completeness of the . . . estimates supplied to Tyroc”<sup>36</sup> by the Government. The Board further concluded that, “[i]n a situation involving a small business set-aside project under 8(a), it is especially important for the Government to reveal the information it possesses that would bear on the conditions of performance.”<sup>37</sup>

Arguably, the degree of a contractor’s sophistication may be born out by its prior experience; the manner in which both the government and private industry recognize the contractor as an (if not the) industry leader in its particular technology; and the detail of the contractor’s purported pre-bid investigation.

Before a court concludes that a contractor *did not have* a reason to know the information, it will consider whether the contractor performed a reasonable investigation of the RFP. A reasonable investigation includes: proper review of the RFP and its drawings; gathering information from the public and the industry; and, where reasonable, asking appropriate questions of the Government. At a minimum, the contractor is expected to have such knowledge as a reasonable investigation of the bidding documents or work site would reveal.<sup>38</sup> For example, a demilitarization contractor may have demonstrated that it possessed the knowledge and expertise to study, research, and develop a safe and effective demilitarization plan.

### 3. GOVERNMENT KNOWLEDGE OR REASON TO KNOW OF THE CONTRACTOR'S IGNORANCE

The government will not be held liable for nondisclosure of information unless it is found to have knowledge or reason to know of the contractor's ignorance of the information.<sup>39</sup> A crucial factor in determining whether the government in fact had superior knowledge is whether the knowledge is exclusively held by the government or so nearly so as to make it unreasonable to expect a contractor to obtain the information elsewhere.<sup>40</sup> Where the information is specific and the contractor likely would not be able to obtain the information, the government is assumed to have reason to know of the contractor's ignorance.<sup>41</sup> Also, when the government has control of the information and has restricted its release, the government is deemed to have reason to know of contractor ignorance.<sup>42</sup>

For example, in *Hardeman-Monier-Hutcherson v. United States*,<sup>43</sup> "a construction contract case, the government refused to disclose certain weather and sea reports despite the plaintiff's requests to examine them."<sup>44</sup> "A limited bidding period made it impossible for the plaintiff to make its own studies of the unusual wind and sea conditions at the site where it was to construct, among other things, a pier for the Navy."<sup>45</sup> "The plaintiff contended that the reports contained information vital to contract performance and that the information was not reasonably available from either a site inspection or from an examination of other weather data provided to the plaintiff. The court ruled that the defendant had breached the contract by failing to disclose the reports."<sup>46</sup>

In *Helene Curtis Indus., Inc. v. United States*,<sup>47</sup> Helene Curtis Industries contracted with the Army to supply large quantities of disinfectant chlorine powder, a mixture of chemicals, to be used by troops in the field to disinfect mess gear and fresh fruits and vegetables. Although the specification stated that the disinfectant was to be "a uniformly mixed powder or granular material" composed of certain ingredients in specified percentages by weight, it failed to inform bidders that grinding of the main ingredient, chlormelamine, would be required. At that time, chlormelamine was a new and patented chemical whose properties were not widely or generally known. In this instance, the Claims Court ultimately found the government liable for breach of its contract with Helene Curtis. Specifically, the court found "the circumstances here gave rise to a duty to share information . . . [In particular, the] Government had sponsored the research [of

the disinfectant] and knew much more about the product than the bidders did or could . . . [I]t knew in particular, that the main ingredient, chlormelamine, was a recent invention, uncertain in reaction, and requiring extreme care in handling; it also knew that the more costly process of grinding would be necessary to meet the requirements of the specification, but that in their understandable ignorance the bidders would consider simple mixing adequate and the urgency for the disinfectant was such that potential bidders could not expend much time learning about it before bidding. In this situation, the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own.”<sup>48</sup>

#### 4. CONTRACTOR WAS MISLED

“Mere governmental failure to disclose each and every bit of information it possesses is not, in and of itself, enough to serve as a basis for recovery by the contractor.”<sup>49</sup> “A bare withholding of information is insufficient without a showing that the contractor was misled by the withholding.”<sup>50</sup>

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<sup>1</sup> *J.F. Shea Co. Inc. v. United States*, 4 Cl. Ct. 46, 53 (1983). See *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 487, 458 F.2d 1364, 1370 (1972); *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 442, 312 F.2d 774, 777 (1963); *Ragonese v. United States*, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954).

<sup>2</sup> J. CIBNIC & R. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS, 255-56 (3d ed. 1995).

<sup>3</sup> *Bateson-Stolte, Inc. v. United States*, 145 Ct.Cl. 387, 390 (1959).

<sup>4</sup> CIBNIC & NASH, *supra* note 2, at 255.

<sup>5</sup> *Intercontinental Manufacturing, Co. Inc. v. United States*, 4 Cl.Ct. 591, 600 (1981) (emphasis original).

<sup>6</sup> *Id.* at 598-599.

<sup>7</sup> *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 965 (1992); See Also. *American Shipbuilding Co. v. United States*, 654 F.2d 75, 79 (1981).

<sup>8</sup> CIBNIC & NASH *supra* note 2, at 257.

<sup>9</sup> *Id.*

<sup>10</sup> *GAF Corp. v. United States*, 932 F.2d at 949.

<sup>11</sup> *Intercontinental Manufacturing, Co. Inc.*, 4 Cl.Ct. at 599.

<sup>12</sup> *J.F. Shea Co.*, 4 Cl. Ct. at 53. See Also *Petrochen Servs., Inc. v. United States*, 837 F.2d 1076, 1079 (Fed. Cir. 1988); *McCormick Constr. Co. v. United States*, 18 Cl. Ct. 259, 265 (1989), *aff'd* 907 F.2d 159 (Fed. Cir. 1990).

<sup>13</sup> *Granite Construction Co. v. United States*, 24 Cl. Ct. 735, 753 (1991).

<sup>14</sup> *Supra*, note 1.

<sup>15</sup> *GAF Corp.*, 932 F.2d at 949.

<sup>16</sup> *Intercontinental Manufacturing Co. Inc.*, *supra* note 5.

<sup>17</sup> *Id.* at 599.

<sup>18</sup> *Supra* note 7.

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- <sup>19</sup> See *J.F. Shea Co., Inc.*, *supra* note 1.
- <sup>20</sup> *American Shipbuilding Co.*, 654 F.2d at 80.
- <sup>21</sup> *Id.* at 79.
- <sup>22</sup> *Id.* at 80.
- <sup>23</sup> *Id.* at 79.
- <sup>24</sup> *Id.* at 80.
- <sup>25</sup> *Everist Inc. v. United States*, Ct.Cl. No. 671-80C (order entered September 24 , 1982)
- <sup>26</sup>
- <sup>27</sup> See *Bateson-Stolte, Inc.*, 145 Ct.Cl. at 391-92; *Bateson-Stolte, Inc. v. United States*, 158 Ct.Cl. 455, 458 (1962); See Also. *Fansteel Metallurgical Corp. v. United States*, 145 Ct.Cl. 496, 501 (1959), *S.T.G. Construction Co. v. United States*, 157 Ct. Cl. 409, 416-17 (1962).
- <sup>28</sup> *J.A. Jones Construction. Co. v. United States*, 182 Ct.Cl. 615 (1968).
- <sup>29</sup> CIBNIC & NASH, *supra* note 2, at 260.
- <sup>30</sup> *Id.*
- <sup>31</sup> *Intercontinental Manufacturing, Co. Inc.*, 4 Cl.Ct. at 600 (emphasis original).
- <sup>32</sup> CIBNIC & NASH, *supra* note 2, at 261.
- <sup>33</sup> *Id.* at 264.
- <sup>34</sup> *Drillers, Inc.*, 90-3 BCA ¶23,056 (EBCA).
- <sup>35</sup> *Tyroc Construction Corporation*, 84-2 BCA ¶17,308.
- <sup>36</sup> *Id.* at 86,261.
- <sup>37</sup> *Id.*
- <sup>38</sup> CIBNIC & NASH, *supra* note 2, at 263.
- <sup>39</sup> *Id.* at 264.
- <sup>40</sup> *Drillers, Inc.*, 90-3 BCA ¶23,056 (EBCA), citing *Continental Rubber Works*, 80-2 BCA ¶14,754 (ASBCA).
- <sup>41</sup> CIBNIC & NASH, *supra* note 2, at 266.
- <sup>42</sup> *Id.* at 265.
- <sup>43</sup> *Hardeman-Monier-Hutcherson*, *supra* note 1.
- <sup>44</sup> *J.F. SheaCo. Inc.*, 4 Cl.Ct. at 53.
- <sup>45</sup> *Intercontinental Manufacturing, Co. Inc.*, 4 Cl.Ct. at 599.
- <sup>46</sup> *J.F. SheaCo. Inc.*, 4 Cl.Ct. at 53-54.
- <sup>47</sup> *Helene Curtis Indus., Inc.*, *supra* note 1.
- <sup>48</sup> *Helene Curtis Indus., Inc.*, 160 Ct. Cl. at 444-45.
- <sup>49</sup> *Drillers, Inc.*, 93-3 BCA at 115,744. See *Piasecki Aircraft Corp. v. United States*, 229 Ct.Cl. 208, 222 (1981).
- <sup>50</sup> *Alvin H. Leal v. United States*, 149 Ct.Cl. 451, 480 (1960).

## MEMORANDUM FOR Chief Counsel

SUBJECT: Due Diligence

1. The purpose of this memorandum is to discuss the various definitions of the term "due diligence." This term takes on a myriad of meanings in both the financial and legal realm. Its definition encompasses both its use as a legal defense, as well as a term for the investigation process done prior to, *inter alia*, corporate acquisitions, initial public stock offerings or acquisition of real property. The term "due diligence" is used in many different legal areas and regulations, however, this memorandum will focus upon "due diligence" in the corporate world.

2. At its most basic meaning "due diligence" is defined as "such a measure of prudence, activity, or assiduity as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances, not measured by any absolute standard, but depending on the relative facts of the special case." Black's Law Dictionary 457 (6th ed. 1990). However, in the business world, "due diligence" has a different, but related meaning. Corporations and individuals often perform "due diligence" investigations prior to making business decisions. Often these investigations are done to analyze the risks, assets and liabilities, of a project, acquisition or venture. In essence, in the business world a "due diligence" investigation is often linked to risk management. In turn, this process has become a legal defense often used by *inter alia*, underwriters, corporations and venture capitalists when being sued by investors, fiduciaries and shareholders. Often, due diligence is used as an affirmative defense that a fiduciary duty has been satisfied.

3. One area where the "due diligence" process is used is in the merger and acquisition realm. For instance, when acquiring privately held corporations a routine practice is something called an "acquisition review," which is very similar to a "due diligence" review. Committee on Negotiated Acquisition, *Purchasing the Stock of Privately Held Company: The Legal Effect of an Acquisition Review*, 51 Bus. Law. 479(1996). Generally, this involves the acquiring corporation's business, financial and legal advisors assessing the corporation to be acquired (target company). *Id.* This review usually consists of two phases: one prior to executing a definitive acquisition agreement and a second before the execution of a letter of intent. *Id.* The first phase, generally conducted by business and financial advisors, focuses on the target corporation's financial and business condition "with a view towards evaluating the business as a basis for negotiating the business terms of the transactions." *Id.* The second phase continues this evaluation and also includes a "legal audit," "analyzing (the Target's) pending litigation, examining leases and contracts from a legal standpoint, checking (the Target's) charter documents and minutes book, and so forth." *Id.* This review is considered very similar in scope to a "due diligence" review done in conjunction with a public offering of stock, discussed *infra*. *Id.* Thus, this type of review is a form of "due diligence" by an acquiring corporation.

4. This same acquisition review or "due diligence" investigation, for business purposes, applies to a commercial corporation's acquisition of a government contractor. For instance, in an article pertaining to such an acquisition, the article suggests that such due diligence review "allows for a reasonable assessment and management of risk in acquiring or merging with a company doing business in the government market." Steven S. Diamond, *Acquiring a Government Contract in Technology Based Industries: Critical Issues for the Due Diligence Review and Risk Assessment*, 68 F.C.R. 1930 (1997). In this context "due diligence" is used as a tool

for assessing a target company's assets and liabilities, but more importantly, as a means of conducting risk management. Specifically, such a review is used to:

- (1) identify key issues that may facilitate a more realistic valuation of the business to be acquired or whether the acquisition even makes sense;
  - (2) provide an assessment of the viability of the business to be acquired as an ongoing concern;
  - (3) identify agencies and contact points for required government approvals;
- and
- (4) provide information necessary to negotiate representations and warranties, indemnifications, and other contract covenants and conditions.  
Id.

Therefore, in this context a "due diligence" investigation is not only used as a legal defense, but as a business decision tool.

5. "Due Diligence" investigation is also used in asset securitization and finance. A suggested sample "due diligence" document checklist should include the following:

- a) Corporate records (i.e. articles of incorporation, description of legal ownership of the company and equity investments, annual reports etc.);
- b) Arrangements with affiliates (i.e. business arrangements entered into by the company with officers, employees or directors);
- c) Financing arrangements (loan and credit agreements, promissory notes, registration statements, documentation of contingent liability);
- d) Legal proceedings (a listing of all litigation or arbitration proceedings, etc.);
- e) Governmental regulations and filings or Compliance matters (SEC reports, governmental permits, licenses, correspondence regarding compliance with agencies and environmental audit reports, etc.);
- f) Material agreements (material contracts, insurance agreements, etc.);
- g) Tax matters (liabilities, filings, etc.);
- h) Properties (all leases and agreements regarding them);
- i) Intellectual property (all trademarks, copyrights, patents, licensing agreements, etc.);
- j) Environmental (audits, reports, consultants); and
- k) Other documents (analysis by management consultants, financial statements, and accounting reports, etc.). Charles E. Harrell, *et. al.*, *Securitization of Oil, Gas, and Other Natural Resource Assets: Emerging Financial Techniques*, 52 Bus. Law. 885 (1997).

6. "Due diligence" also plays an important role in securities regulations. Securities are governed by the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et. seq.* (hereinafter "1934 Act") and Securities Act of 1933, 15 U.S.C. 77a *et. seq.* (hereinafter "1933 Act"). Generally, the 1933 Act pertains to securities registration

and disclosure requirements regarding stock offerings, while the 1934 Act, *inter alia*, applies to publication of securities' information which is traded either via stock exchanges or over the counter trading. Shareholders, fiduciaries or the Securities and Exchange Commission (hereinafter "SEC"), often sue regarding this information, for fraud, misrepresentation or omission of material facts. This is because the Securities Acts often require corporations to disclose certain information, including financial and legal, to the public. It is this disclosure or non-disclosure of information, as well as its veracity, that is often the basis of lawsuits.

7. Prior to a public securities offering, a "due diligence" investigation is performed "to verify all disclosures for accuracy and completeness." C. Schneider, *Going Public: Practice, Procedure and Consequences*, 27 Villanova L. Rev. 1 (1981). Further, "[h]istorically, underwriters in registered offerings conducted an extensive due diligence investigation of the issuers and its business, worked side by side with the issuer, their respective counsel, and the issuers' accountants in the preparation of the prospectus..." Robert F. Quantance, Jr., *How to Stop Arguing about 10b-5 Opinions in Exempt Offerings*, 51 Bus. Law. 703 (1996). It is often this investigation which underwriters use as a "due diligence defense" to securities fraud actions. *Id.* Thus, "due diligence" in this sense is used to protect against potential shareholder suits. Often, a shareholder brings suit for a material misstatement or omission not only in registration statements, but also, *inter alia*, in proxy materials, required SEC financial reports and advertising materials. Under *Dirks v. SEC*, 463 U.S. 646, 653 (1983), the standard for proving a stock fraud case is that the plaintiff must prove the following: (1) a misrepresentation; (ii) the existence of a duty; (iii) scienter; (iv) materiality; (v) reliance and (vi) injury. A proper "due diligence" investigation would be an affirmative defense. *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968). Section 11(b) of the 1933 Act, provides that a "due diligence defense" may be used when someone other than an issuer of stock, can show they "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statement therein not misleading." *Id.* Paradoxically, a defendant may accuse a plaintiff of not exercising "due diligence" prior to his purchase of a security. In fact, failure of the plaintiff to exercise such "due diligence" is also often used as an affirmative defense. Committee on Negotiated Acquisition, *Purchasing the Stock of Privately Held Company: The Legal Effect of an Acquisition Review*, 51 Bus. Law 479 (1996).

8. One of the things that a proper "due diligence" securities review involves is proper accounting methods. The Financial Accounting Standards Board (hereinafter "FASB") promulgates standards for financial accounting and reporting, which are often utilized by the Securities and Exchange Commission in examining various corporate documents, such as filings and proxy statements. For instance some areas that the FASB provides accounting guidance on are "Employers' Disclosures about Pensions and Other Postretirement Benefits," FASB No. 132, and "Employers' Accounting for Postemployment Benefits" FASB No. 112. Using these guidelines, in addition to their own, the SEC determines whether a firm has made adequate financial disclosures.

9. Another area where "due diligence" investigation is often used is in the acquisition of real property. The acquisition of real property can often lead to potential liability for environmental violations if there is a failure by the purchaser to perform an adequate environmental "due diligence" investigation. Often, a defense to such liability, can be made by a defendant's assertion that it performed a proper "due diligence" investigation prior to obtaining the property. When examining whether this standard has been met, "the court will consider any special knowledge or experience held by the purchaser, credibility of the purchase price, reasonably ascertainable information regarding the property and the likelihood of

contamination and the ability to detect it." Sean Sweeney, *Owner BEWARE: Lender Liability and Cercla*, 79 A.B.A.J. 68 (1993).

10. Often "due diligence" environmental investigations involve hiring an environmental consultant to do an investigation and to compare environmental clean up costs versus the purchase price and any "benefits of purchasing an ongoing operation". Ronald E. Cardwell & Jack D. Todd, *Buying, Selling or Closing A Facility: A Summary of Environmental Issues*, 9 S. Carolina Law. 14 (1997). An environmental "due diligence" investigation, which is very similar to the previously discussed "due diligence" investigations, is traditionally "comprised of four segments - a records review, a physical facility reconnaissance, interviews with current owners and operators and an evaluation and report. A due diligence team should be comprised of the buyer's in-house representative, environmental consultant and environmental lawyer and, if appropriate and beneficial to the buyer, the sellers' representatives." *Id.* Additionally, another important aspect to consider when doing such an investigation is to do so in a proper time frame. *Id.*

11. This environmental "due diligence" check is often a key component of more traditional "due diligence" analysis. Sylvia Harrison, *Environmental Due Diligence in Real Property Transactions: Practice Pointers*, 5 Nevada Law. 20 (1997). Specifically:

The purpose of environmental due diligence is to assess the environmental condition of the property to determine the level of environmental risk associated with the transaction, and to evaluate possible constraints on the planned use of the property imposed by the environmental condition of the property. This is easier to describe than to implement. No standards exist governing environmental due diligence, and indeed no single due diligence routine can be devised that is appropriate to all transactions. Adequate environmental due diligence involves far more than ascertaining whether there are hazardous substances on a property. Simply arranging for the performance of an environmental assessment does not fulfill the requirements of environmental due diligence. The major prongs of an environmental due diligence inquiry can be summarized in three words: "conditions," (property conditions), "compliance" (compliance with governmental regulations), and "constraints" (how environmental conditions may prohibit the intended use of a property). *Id.*

Another sample "due diligence" guideline, this for environmental, lists the following as important to performing satisfactory "due diligence":

(1) Compliance policies, standards and procedures to meet such policies; (2) Mechanisms for implementing policies; (3) Communicating standards and procedures to agents and employees; (4) Giving managers and employees incentives to conform with policies; and (5) Procedures for prompt action for compliance violations. Dara B. Less, *Incentives for Self-Policing: The Need for a Rule*, 2 Env'tl. Law. 753 (June 1996).

12. Environmental "due diligence" investigations are also related to federal securities disclosure laws. For instance, in examining corporate security filings, the SEC Commissioner stated, "When the Staff finds material omissions or deficiencies relating to environmental matters, it will continue to request corrective disclosure and, in egregious cases, to refer the matter to the Commission's Divisions of Enforcement for appropriate enforcement consideration." Richard Y. Roberts, *et. al*, *Environmental Liability Disclosure and Staff Accounting Bulletin No. 92*, 50 Bus Law Journal 1 (1994). In connection with environmental financial disclosures the SEC has released their own accounting guidelines in Staff Accounting Bulletin No. 92 (SAB92), based on FASB regulations (the FASB was discussed *supra*). Under FASB

and SAB guidelines, certain contingent environmental liabilities must be recognized in corporate accounting statements and adequately disclosed. Id. Failure to adequately disclose such information can lead to lawsuits for misrepresentation or omission of material facts. By performing adequate "due diligence" investigation of potential environmental contingent liability and disclosing them, these lawsuits may be avoided.

13. The term "due diligence" is also often associated with corporate compliance programs, which not only attempt to protect a corporation from civil liability, but also criminal liability. Specifically, "[a] compliance program's primary goal is to prevent wrongful conduct. Accordingly, an effective program must first identify the potential legal risks facing a business organization." Gardner Davis and Jeff McFarland, *Corporate Compliance Program: Protecting the Business From the Rogue Employee*, 70 Fl. Bar Jnl. 34 (1996). A compliance program, which is currently in existence, provides another important purpose: a court must use it as a mitigating factor when determining criminal penalties. Id. A compliance program is considered effective when there is an appropriate level of "due diligence." Id. Some suggested "due diligence" guidelines, which are once again similar to previously discussed standards, are:

- (1) The established standards and procedures must be reasonably likely to reduce the likelihood of criminal conduct;
- (2) A 'high level' individual in the company must be responsible for the program;
- (3) An employee who is not ethical must not be placed in charge of the program;
- (4) Employees must have knowledge about the program;
- (5) The compliance standards are enforced, consistently and evenly; and
- (6) There is a quick response to discovered offenses. Id.

14. Another business context where "due diligence" is used is when entities have been sued for breach of contract and fraudulent inducement. Once again "due diligence" is used as a defense to such suits. For example, in Banque Arabe Et Internationale D' Investissement v. Maryland National Bank, 850 F. Supp 1199 (1994), the plaintiff sued the defendant for fraudulently inducing a purchase of a real estate loan participation interest, "by failing to disclose material information and by making material misrepresentations prior to execution of a participation agreement." Id. at 1199. The plaintiff had conducted a "due diligence" investigation and credit analysis prior to executing the agreement. Id. at 1203. However, the plaintiff alleged that the "due diligence" investigation was insufficient and misleading because the defendant had made material misrepresentations and omissions. Id. at 1215.

15. When alleging common law fraud a plaintiff must demonstrate: (1) there was a material false representation or omission of an existing fact; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance (5) that causes damage to the plaintiff." Id. Information is material if "it would have assumed actual significance in the deliberation of the reasonable purchaser." Id. at 1217. Scierter is defined as the "intent to deceive, manipulate or defraud." Id. at 1225. In another loan participation agreement, a plaintiff sued the defendant because of fraudulently misrepresenting that it had conducted a due diligence examination prior to entering into an agreement. Great Western Capital

Corporation v. Ingersoll-Rand Corporation, et. al, 1997 U.S. App. Lexis 2864 (9th Cir. 1997). Once again, as in securities fraud cases, "due diligence" was linked to a breach of fiduciary trust. Id. In this case "due diligence" investigation was to have included examination of credit records, loans, and spot checks on partnerships. Id. Additionally, the "due diligence" standard has been applied to the fiduciary duty of trustees in New Jersey. Robertson v. Central Jersey Bank & Trust Company, 47 F3rd 1268 (3rd Cir. 1994)

16. Another context, in which "due diligence" is used, is a two-phase government acquisition of capital assets. In the first stage of such an acquisition the agency asks for information typically about "past performance and experience, a conceptual outline of the proposed technical approach (versus a particular technical solution), and a rough order of magnitude of pricing." "Planning, Budgeting & Acquisition of Capital Assets," Supplement to OMB Circular A-11, Section III.3.2. This allows the agency to advise potential offerors whether they are an award contender. Id. Subsequently, a solicitation is issued in the second phase. Id. The intent of such an effort is that "communications will foster the development of requirements and evaluation criteria that allow the best fit between agency needs and marketplace capabilities. Sources that are advised based on the first phase review that they are strong competitors should be encouraged to participate in such a due diligence effort." Id. In general, "[t]wo-Phased acquisition provides incentives to bidders to invest more of their own resources to perform due diligence to learn about agency needs and develop innovative high value solutions." Id. In essence, "due diligence" in this context appears to relate to communications between the government and offerors and the efforts of offerors to understand agency requirements.

17. Finally, the term "due diligence" also pertains to simple negligence matters. "Due diligence" is often the standard required to rebut a charge of negligence. For instance, the only mention of the term "due diligence" in acquisition regulations is DFARS 252.247-7007, "Liability and Insurance Clause." In it the contractor is required to exercise due diligence to discover defective equipment. This type of "due diligence" negligence issue most likely has little relevance to the present matter.

18. As shown above, "due diligence" is used in many different contexts. Primarily, in all contexts, it is used as a legal defense, as well as a business decision making process. As a business process, due diligence is essentially used to examine business opportunities, and their associated risks and liabilities. Often such "due diligence" investigations or reviews encompass examination of potential legal liabilities. Finally, these "due diligence" investigations not only serve as a valuable business tool, but also are often used as affirmative defenses to law suits.

19. Point of contact for this memorandum is Lea Duerinck, AMSEL-LG-B, Ext. 23188.

Lea Duerinck  
Attorney Advisor

25 February 1998

## GLOBAL CERTIFICATIONS

At the CECOM Acquisition Center-Washington (CAC-W), as with many Federal government procuring agencies, the length of time required to conduct best value, tradeoff process<sup>1</sup> procurements for commercial information technology (IT) products had become a matter of increasing concern. Requiring activities were anxious to have ordering vehicles in place which afforded access to the latest technology. Procurement cycle times were such that proposed technology often lost some of its cutting edge by the date of award. In order to shrink the period for processing acquisitions, a number of techniques were considered. One of the techniques was the use of a global certification.

Under the global certification approach, a certification is used as an alternative to the submission of detailed material in a proposal for the purpose of establishing compliance with the minimum technical requirements of a solicitation. The global certification approach essentially shifts to the contractor the responsibility for verifying that the minimum requirements have been satisfied. While the submission and evaluation of information on the technical solution is still required to support the tradeoff process typically used in the procurements conducted by CAC-W, the global certification technique provides an opportunity to reduce both the number of evaluators and the amount of time required for the technical evaluation.

This technique has been used at CAC-W solely in the commercial IT arena. As discussed below, the technique may not be appropriate for every procurement and a careful analysis should be conducted of the risks and benefits before applying it to other types of acquisitions.

Historically, a number of factors contributed to the length of time required for processing IT acquisitions. Solicitations typically requested the submission of written proposals which were required to address compliance with the minimum requirements as well as describe aspects of the proposed solution that might be entitled to credit under the evaluation criteria. Offerors were required to address each paragraph of the Statement of Work and

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<sup>1</sup> "Tradeoff process" is the term used in the new FAR Part 15, Section 15.101-1, to describe the process formerly known as "best value."

Specifications to reflect their commitment to comply with the minimum requirements. Instructions placed offerors on notice that a simple statement of commitment to perform a requirement would not be acceptable. Instead, the offerors were required to state not only that they agreed to perform each requirement but to describe how the requirement would be performed.

In addition to the narrative, technical literature was requested for the offered products. As CAC-W procurements for IT usually involve extensive requirements and numerous contract line items (CLINs), the proposal narrative tended to be voluminous and the technical literature extensive. In order to assist the evaluators in handling this material, matrices had to be submitted that cross-referenced the proposal narrative and technical literature to the requirements. The process of evaluating in order to determine whether offers satisfied minimum requirements, as distinguished from the assigning of credit for aspects of the technical solution under the evaluation criteria of the solicitation, contributed to bulkier proposals and a lengthier, more complicated evaluation process.

The proposal narrative and technical literature were carefully reviewed by evaluators to validate compliance with the minimum requirements. The evaluation of the traditional proposals required relatively large numbers of evaluation personnel. The evaluation process was laborious and time-consuming. Inevitably, the evaluators noted numerous deficiencies in the proposals. However, many of these deficiencies were minor in nature and most resulted from careless proposal writing and not from defects in the products themselves.

In the spring of 1996, CAC-W started to use global certifications to establish compliance with minimum technical requirements. The first procurement to employ this technique was the Army Personal Computer-2 (PC-2) acquisition, which involved dual indefinite delivery, indefinite quantity awards for commercial hardware and software with help desk and warranty support. The current practice is to include in the solicitation a certification for each offeror to sign, which states that the offer meets the requirements, including those in the Specifications and Statement of Work, and that the offeror agrees to make any necessary changes, at no additional cost to the government, in the event that the offered products or services fail to comply with the requirements.<sup>2</sup> There are related references to the global

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<sup>2</sup> The text of the provision in the Personal Computer-2 procurement is as follows: "The offeror hereby certifies that the offer meets all the requirements of the solicitation including Part D-1, the Specifications and

certification in the Specifications and Statement of Work and in the Instructions to Offerors. In addition, a statement is included in the order of precedence provision of the solicitation to establish the priority of the certification over Part B of the Schedule after an award is made.

The focus of the technical proposal is information related to the evaluation criteria that might earn credit for an offeror in the tradeoff process. Insofar as compliance with the requirements is concerned, the technical proposal essentially consists of a CLIN list and the global certification. Technical literature is normally omitted entirely or solicited on a limited basis. (Under the latter alternative, a few key requirements are identified in the solicitation and detailed technical information for those requirements is solicited and evaluated.)

To date, the procurements employing the global certification technique have involved oral presentations with the slides for the presentation included in the written proposal. The oral presentations address the technical area. The Instructions to Offerors make clear, however, that the focus of the presentation is to be the quality of the proposal, not compliance with the requirements, which is established through the certification. Depending upon the procurement, the oral presentation may involve the examination of a bid sample and the conduct of testing. While not expressly directed toward requirements validation, the methods used to evaluate proposal quality do contribute indirectly to the confirmation of compliance with the requirements. The oral presentation of the technical solution, the examination of bid samples and the conduct of tests on the offered products all provide opportunities to identify proposal deficiencies, if any, and have them resolved.

The use of a global certification permits the submission of shorter written proposals. In conjunction with other streamlining initiatives, the certification has contributed to a reduction in the processing time for evaluation and award. Technical evaluations now require only a few evaluators. The number and complexity of discussion issues have diminished substantially.

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Statement of Work, except as noted below. In the event that the offered products or services, including the provision of substitutions/additions/insertions as per Part C-1-1, paragraph g, and correction of ordered products through repair or replacement under warranty, fail to meet any requirements, the Contractor shall, at no additional cost, make any changes necessary to the products or services to comply with the contract requirements." The certification that offered products meet the requirements applies to the initial offer and, through the reference to Part C-1-1, to products added later as substitutions, additions or insertions.

Cycle time has been reduced to four months for acquisitions that formerly required eight to ten months to complete. During debriefings, vendors consistently applauded the ability of the government to meet the schedule and complete the acquisition in a more timely manner.

The benefit from the global certification is not confined to the evaluation process. The certification provides the government with a useful tool in the event that an issue of noncompliance crops up during performance. An awardee has a fundamental duty to deliver the products set forth in Part B of the contract Schedule. When one of those products proves to be noncompliant, the global certification makes clear not only that a correction must be provided to make the products compliant with the Specifications and Statement of Work but that the correction must be provided at no cost to the government.

The experience of CAC-W has been very positive in procurements for commercial IT. On the other hand, the global certification may not be appropriate for every procurement. Prudence dictates that careful consideration be given to the risks discussed below as well as to the benefits before adopting the global certification for other types of procurements.

As the government does not conduct a detailed evaluation to determine whether offers comply with minimum requirements when a global certification is used, it is possible that an issue of noncompliance may not be discovered until contract administration. In situations where the correction of the problem is costly, there is a potential for delay in the event the awardee plays for time while it attempts to identify a solution for a substitute product that is not unprofitable. Likewise, there is a potential that the awardee will be tempted to dispute the government's interpretation of the Specifications in order to avoid liability entirely. If the issue is of significant magnitude, it could become necessary for the government to terminate the contract.

While the emergence of a noncompliance issue during administration is a potential risk, it is not one that is unique to procurements which use a global certification. Nor has noncompliance proved to be a particularly significant problem when a global certification is used, based upon the experience of CAC-W thus far in procurements for IT. Nonetheless, without the use of a detailed evaluation process to identify noncompliance issues before award, there may be an added risk of noncompliance which should be considered in deciding whether to use this technique.

For those assessing the risk of noncompliance in other types of procurements, it may be useful to examine the factors which have contributed to the limited impact of noncompliance upon the IT procurements by CAC-W. The experience of CAC-W with procurements of IT has been favorable due to the fact that strong incentives exist for an awardee with a compliance problem to provide a compliant substitute even if it means that the contractor will have to absorb any cost difference between the proposed product and the substitute. One such incentive arises from the fact that there are other ordering vehicles available to government buyers of commercial IT. For example, there are Federal Supply Schedules, and multiple-agency and Army indefinite quantity, indefinite delivery contracts. In addition, CAC-W procurements often employ a dual award strategy. The competition from other ordering vehicles places pressure on contractors to correct performance problems in a timely manner in order to prevent the loss of sales.

Additionally, past performance is a significant evaluation factor in IT acquisitions conducted by CAC-W. Failure to correct noncompliance problems that are identified during administration will establish an unfavorable past performance record. If an awardee is unwilling to meet its contractual commitment to make a necessary correction, the contractor may lose future contract awards by CAC-W and other contracting activities. It is in the interest of the successful awardee to address noncompliance issues in order to avoid impairing the prospects for award in other acquisitions.

Another risk relates to the potential for a bid protest based upon the acceptance of an offer that includes a noncompliant product. However, the use of a global certification can also provide protection in protests based upon noncompliance. These considerations are both illustrated by the protest filed in opposition to the dual awards made by CAC-W in the Army Portable-2 procurement. International Data Products, Inc., Commax Technologies, Inc. B-275480.2, B-275480.3, B-275480.4, April 3, 1997. The Portable-2 procurement, like PC-2, made use of a global certification. After award, protests were filed by two unsuccessful offerors. The protesters alleged that certain products proposed by the awardees did not comply with the requirements of the solicitation.

The protests were both denied and the GAO confirmed the propriety of using a global certification instead of a detailed technical proposal for the purpose of establishing technical acceptability. The use of a certification process to establish technical

acceptability is not new. The Comptroller General had approved its use in previous decisions. Mitel, Inc., B-270138, January 17, 1996, 96-1 CPD para. 36; Kahn Industries, Inc., B-248736, September 21, 1992, 92-2 CPD para. 191; Lago Systems, Inc., B-243529, July 31, 1991, 91-2 CPD para.107. The new decision endorses the use of a global certification, but it also makes clear that a certification does not provide absolute protection from challenge. The decision holds that the use of a global certification does not protect an award from attack "where the agency has reason to question the characteristics of the products being offered."

The Portable-2 solicitation had requested the submission of technical literature to "identify products being offered." The literature was not examined by the evaluators to determine the technical compliance of the offers. As it turned out, a review of the literature submitted by one of the awardees would have disclosed that one product failed to meet a solicitation specification. Fortunately, this solitary instance of noncompliance was found not to be prejudicial. Otherwise, the award might have been overturned. As a result of the decision in the Portable-2 procurement, CAC-W has modified its practice. Any information received concerning the technical solution is carefully examined by evaluators to preclude the occurrence of surprise issues of noncompliance.

The GAO decision on the Portable-2 awards establishes that a global certification may be used to demonstrate technical acceptability. A detailed proposal with narrative and technical literature need not be solicited for that purpose. Any information related to the technical solution that is solicited, on the other hand, must be examined to ensure that it does not contain evidence of noncompliance. A risk of successful protest will remain unless such an examination is conducted effectively.

The use of a global certification has assisted CAC-W to reduce the personnel required to conduct large procurements for commercial IT items under the tradeoff process and to compress the time for such procurements to only four months. Use of the certification procedure does entail some risk that awards may include products that are not completely compliant, but the experience of CAC-W with the technique in procurements for commercial IT has been favorable. Awardees have generally done an effective job of assuring that offered products meet solicitation requirements without the type of intensive evaluation scrutiny employed in the past. As there is risk as well as benefit from this approach, a

careful analysis should be undertaken before adopting the global certification approach for other types of procurements.

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///Signed///  
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## Society of Employee and Labor Relations (SOELR) 1998 Annual Conference

### Session Handouts

- 1: New Developments in Employee Relations: 1997 In Review
- 2a: Disability Discrimination Law Applicable to Federal Employment
- 2b: Recent Developments in Disability Case Law
- 3: Recent Significant Federal Sector EEOC Decisions
- 4a: Sample Letters
- 4b: Compendium of Selected Decisions on Leave and Reasonable Accommodation
- 4c: Selected Cases Dealing with Medical Documentation
- 4d: Cases Involving Selected Medical Conditions
- 4e: Selected Cases Defining "Disabled Person"
- 5: Reasonable Accommodation for Emotional and Psychiatric Disorders
- 7a: Leave Based Actions: The Basics
- 7b: Questions and Answers (Leave Related)
- 7c: Compendium of Selected Decisions on Leave and Reasonable Accommodation (see 4b)
- 8: Important Information Relating to Your Retirement and Insurance Benefits
- 9: Investigating Allegations of Sexual Harassment
- 10a: Helping the Investigator Help You
- 10b: Evidence: A Few Useful Cases
- 10c: The Function of Union Representatives in "Weingarten Interviews"
- 10d: Glossary of Terms Relevant to Discipline and Appeals
- 10e: Tips for Conducting Effective Investigations
- 10f: Tips for Conduction An Effective Investigation
- 11: Reduction In Force
- 19a: Supreme Court Case No. 96-1395, 21 Jan 98, OPM vs Erickson. "False Statements"
- 19b: OPM Guidelines for Settlement of Federal Personnel Actions Involving Civil Service Retirement

- 20: How to Lose an Administrative Law Case
- 21: MSPB Evidence Law
- 24a: Telecommuting: Glancing Backward and Moving Forward
- 24b: Telecommuting Briefing Kit
- 24c: Telecommuting
- 24d: U.S. Department of Labor Negotiated Agreement on Flexiplace
- 25: When Chocolate Isn't Enough (Managing Stress)
- 26: Counseling, Coaching, and Collaborating
- 28: Dealing with Workplace Trauma
- 29: The Internet: Finding and Using Employee and Labor Relations Sites
- 30: MSPB Charges and Penalties
- 34: Building Relationships for Success
- 43: The Three Essential Elements of Power Writing

## SAMPLE LETTERS

**U.S. Office of Personnel Management  
Office of Workforce Relations  
1998 Symposium on Employee and Labor Relations**

### SAMPLE LETTER

#### Notice of Proposal to Separate

Dear

This is to notify you that it is proposed to separate you from your position with the (agency) not earlier than 30 calendar days from the date of your receipt of this letter. This notice of proposed separation is based on your inability to perform a critical duty of your position because of your medical condition and to promote the efficiency of the service. As of (date), (name of medical officer and address), has established for you a permanent limitation of not being required to give briefings. This action is being proposed in accordance with (agency rule(s)).

The reasons for this proposed action are as follows:

- a. You are assigned to the position of (position) in (agency, branch, office). A critical duty of your position requires you to prepare and give briefings to top-level executives in (agency office) and (Bureau/Office) in order to present proposals and gain approval of recommended actions. (Name) has established for you a permanent limitation of not being required to give briefings. As a result of your permanent limitation, you are unable to perform the aforementioned critical duty of your position.
- b. On (date) (name) stated that there were no positions available within (Bureau/Office) and (Office) for which you qualified for reassignment that were also consistent with your permanent limitation. On (date), the Affirmative Employment Section in the 2750 ABW Civilian Personnel Office was asked to consider you for reassignment to any vacancy for which you qualify in accordance with your permanent limitation. (During a placement counseling session on (date), you told (name) and (name) of the 2750 ABW Civilian Personnel Office that you were not willing to accept a change to lower grade with retained pay.)

On (date), the Affirmative Employment Section reported that their placement efforts had not been successful. In addition, it has not been possible to restructure a position in order to place you on another job.

- c. Therefore, in view of your inability to perform a critical duty of your position because of your medical condition and the inability of management and the 2750 ABW Civilian Personnel Office to place you on another position consistent with your qualifications and permanent limitation, your separation is being proposed.

You may reply to this letter personally, in writing, or both to me (address, Room No. telephone No.). You may also submit affidavits or other documentary evidence in support of your reply. In addition, you may be accompanied by an attorney, a union representative, or other representative of your choosing in accordance with the criteria outlined in (agency regulations) when making your reply. It is necessary that a memorandum be made of the principal points of any oral reply you make. Therefore, you must inform any of the above named supervisors at the beginning of your conversation that you intend your conversation to be an oral reply to this proposed action.

If you do not agree with this proposed action, you have the opportunity to present any evidence which you feel would tend to support your contention that this action should not be taken. You may furnish with your reply or as a part of your reply an evaluation of a duly licensed physician if you so desire. Your designated licensed physician can review the medical file or obtain copies of the medical findings at no cost to him/her if requested in writing. Any evidence that you submit will be taken into consideration before arriving at a final decision.

You will be allowed 21 calendar days from the date of your receipt of this notice to reply. Consideration will be given to extending this time limit if you submit a written request stating your reasons for desiring more time. This right to reply is a significant right granted to you. If you believe this proposed action is unwarranted, it is important that you reply stating completely all the reasons supporting your belief.

If you wish to review the regulations pertinent to this action, or review the material being relied upon to support this action, or obtain advice and assistance in preparing your reply, you may contact your Employee Relations Specialist (name, address, room number, and telephone number). An appointment will be arranged by the undersigned upon your request.

If you are otherwise in an active duty status, you will be allowed eight hours of official time off from your job without charge to leave for reviewing all the material being used to support the reasons in this notice, for preparing a written reply, for making an oral reply, and for securing

affidavits and other documentary evidence in support of your reply. Your request for official time off from your job must be requested by you from the undersigned.

This proposed action is nondisciplinary in nature. It is proposed as a result of your inability to perform a critical duty of your position because of your medical condition and to promote the efficiency of the service.

No decision to separate you has been made or will be made until you reply, or until the time limit for your reply has expired if you do not elect to reply. Any reply you make will be given careful consideration before a final decision is made. Whether or not you reply, a written notice of final decision will be given to you.

If you do not understand the above reasons for this proposed action, contact me for further explanation.

No action, based on the reasons set forth herein, will be taken to separate you from duty status in your present position during this 30 calendar day advance notice period. You are reminded that you are eligible to apply for disability retirement because you are physically disqualified from your current position and have more than five years of civilian service. If you are interested in applying for disability retirement or wish to obtain more information, you should contact (name, room number and telephone number).

Sincerely,

## SAMPLE LETTER

### Proposal to Remove for Unavailability for Duty

Dear

This is notice that I propose to remove you from your position as (title, grade) and from the Federal service due to your unavailability for duty. This action is being proposed in order to promote the efficiency of the service and will be effected no earlier than 30 calendar days after the date you receive this memorandum. This action is being processed in accordance with Part 752 of Title V of the Code of Federal Regulations and Chapter 752 of the Federal Personnel Manual for the following specific reasons.

You were injured on a car accident in (date), and have been unable to perform the duties of your position since that time. In (date), your physician provided medical documentation which stated that you would be totally disabled for at least an additional 18 months. Subsequently, on (date), you were notified by letter, of your options to resign, file for a disability retirement, or be separated for unavailability.

You returned to duty on (date), with your doctor's written permission allowing you to return to work on an interim basis. Your doctor recommended that you be allowed to work in a sedentary position with no lifting, climbing ladders or steps, for no more than 12 hours a week and not to exceed 4 hours a day. You were permitted to return to work in that capacity on an interim basis pending receipt of more comprehensive medical documentation regarding your progress and some indication of when you could return to part-time and subsequently to full-time duty. Based on your request for an extension, you were given until (date) to provide the medical documentation.

On (date), you failed to report for duty indicating you could not meet the demands of the position on a part-time basis. You are currently being carried on LWOP. On (date), I received further medical documentation from your physician, dated (date), your physician, estimates that you will be able to return to work after a period of three months of very extensive physical therapy. However, he estimates you will only be able to work 20 hours a week.

I have been extremely flexible in accommodating your continued absence for almost two years (through Voluntary Leave Transfer, LWOP, return to work part-time, etc.); however, there is a critical need to fill your position on a full-time basis. Your continued absence has had an adverse impact on our operations, due to the fact that we have a critical shortage of available personnel to perform your duties.

Since you are presently unavailable and, as indicated by your physician, that you will continue to be unavailable/unable to work on a full-time basis for at least the next six months (approximately (date)), this has resulted in our inability to (1) conduct onsite surveys of all reprographic program/operations to ascertain whether procedures used are consistent with agency policies and procedures; (2) provide technical assistance to other components within (office); (3) analyze changes in Federal laws, rules and regulations to determine the impact on (office's) reprographic program and; (4) schedule and coordinate the use o reprographic equipment, chemicals and supplies. These are critical requirements of the position. The Division currently has a critical personnel shortage due to the periodic absence of 1 employee and the extended absence of another, both of whom are on workers compensation. Therefore, your position must be filled on a full-time, continuous basis if the mission of the Division is to be satisfactorily accomplished.

It is my understanding that you currently meet the basis eligibility requirements for disability retirement. It is strongly recommended that you contact (name, office, address and telephone number), to discuss your benefit entitlement and application procedures.

In accordance with the Master Agreement between (agency) and (union), you have the right to reply to this proposal orally, in writing, or both, within 10 workdays after you receive this notice. In any case, no final decision will be made until your reply is received or if no reply is made, until after the 10 workdays allowed have passed. You may submit affidavits and any other documentary evidence in support of your response. Replies should be made to the deciding official (name, room number, and telephone number).

You have the right to be represented by the Union, an attorney, or other representative of your choice. If you elect a representative other than the Union, you will bear any and all costs associated with such representation. If you select a representative, you must notify (name) in writing, of your representative's name and affiliation.

If you are in a duty status, you and your representative (agency employees only) are entitled to a reasonable amount of official time to prepare and present your reply and to secure affidavits and other evidence. You must make arrangements with me if you wish to use official time for this purpose.

You and your representative have the right to review the materials relied upon in support of this proposed action. Please call me on (telephone number) if you wish to review these materials.

Please sign and return the attached copy of this notice as acknowledgment of receipt of the original.

## SAMPLE LETTER

### Proposed Removal for Physical Inability to Perform

Dear

This letter is to inform you that I propose to remove you from your position as a (name of position) at the (agency) no sooner than thirty (30) calendar days from the date you receive this letter. The reason for your removal is physical inability to perform the full range of duties of your position, with or without accommodation, due to a medical condition caused by a work-related injury, as described below.

As a result of an on-the-job injury on (date), in which you injured your back, you were incapacitated from the performance of the full range of your official duties. On (date), I requested you to provide medical documentation from your paint shop and to make an informed decision on whether to continue to carry you in a Leave Without Pay (LWOP) status, as you had already used up your sick and annual leave. In response on (date), Dr. (name) indicated that "a ruptured lumbar disc is a permanent injury and there will not be full recovery." He also stated, "at this present time, it is my opinion that he [you] had already reached maximum improvement and thus is stuck with a permanent disability which in my opinion will not allow him [you] to return to his [your] previous position description as a painter leader on a permanent basis." As a follow up, (Name) OWCP Rehabilitation Specialist, provided a status report on (date), stating that you were "unable to return to his [your] former employment, but is [are] released to return to employment with restrictions."

Based on the above, the (name) performed a search of available positions to determine if you could be returned to employment in another position. Based on a review of your Official Personnel Folder and your last SF-171, you have only worked as a (title of position) and as a plant worker and bus operator in the private sector. Based on your limited qualifications and your physical restrictions, the (agency) found and offered you a position involving four duties which appeared within your capability. On (date) (name, title, and office), interviewed you for this position which was located in her office, discussing the four potential duties with you. Then, (name) from the Personnel Office submitted a formal job offer to your physician, dated (date), with a description of the four different duties restructured to meet your physical restrictions: transportation; mailroom; mailroom (sorting), and printing. However, on (date),

your doctor rejected that formal offer, stating that you were incapable of performing the referenced duties, as they would place you at risk for worsening your symptoms. In addition, you contacted (name) to say that you were turning down the job offer.

Based on the medical information on file and the fact that you have been on Workers' Compensation in excess of one year, your inability to perform the full range of your duties as a painter leader has continued beyond a reasonable time. It is evident that you are unable to perform your duties because of a medical condition as substantiated by medical statements from your physician. Your inability to perform is due to compelling reasons beyond your control.

As a (agency) employee, you have the responsibility to perform the full scope of duties of your position. Because of your disability, you are unable to do so. This significantly impacts the efficiency of the Paint shop and the (agency), in that the Paint Shop's ability to provide effective and responsive service is severely hampered by the absence of its personnel. The duties of your officially assigned position remain and the requirement exists for them to be performed on a regular, full-time basis.

Due to your absences from duty, other employees have been utilized to perform the duties of your position in addition to their own. In (date), I made another employee the acting leader and attempted to hire a temporary employee to fill in behind you. However, because your disability is permanent, with no foreseeable end, this proposed removal is necessitated to promote the efficiency of the (agency) by enabling the (agency) to fill the leader position permanently and hire an employee to perform the duties required of a painter.

You may respond to this proposal, orally and/or in writing to (name) Maintenance Manager, (title). You may have an attorney or other representative present at your own expense. You will be allowed fifteen (15) calendar days from the date you receive this letter to submit your answer. Consideration will be given to extending this period if you submit a request, in writing, to (name) stating your reasons for desiring more time. You may be allowed official time to prepare your response. Full consideration will be given to any answer you submit. You may contact (name) in the Personnel Office at (room) to review any materials relied upon in making this proposal.

As soon as possible after your answer is received or after the expiration of the fifteen (15) calendar day limit, a written decision will be issued to you.

Should this proposed action ultimately be taken, it will not affect your eligibility to apply for disability retirement benefits. For your information, you are able to make application within one (1) year after separation from the Federal Service. (Name) recently mailed you an estimate of your disability retirement benefits. If you have any questions or need any additional information

concerning disability retirement or your entitlement to other benefits, please call (name).

Sincerely,

## **SAMPLE LETTER**

### **Decision Notice for Medical Inability to Perform**

This is notice that I have decided to remove you from your position of Visual Information Specialist, GS-1084-6, and the Federal service, in order to promote the efficiency of the service.

By letter dated March 1, 1997, Ms. I.M. Boss proposed that you be removed from your position and from the Federal service based on your medical inability to carry out the duties of your position. You were also informed of your right to respond to the proposal either orally, in writing, or both, and were given 21 days in which to make and/or submit your response. You submitted a written response on March 19, 1997, and I have given careful consideration to the issues you raised in your letter as well as the evidence presented by the proposing official in support of the removal action.

In your response, you reiterated that you believe your supervisor had acted in a discriminatory manner by not accepting your personal choice of pursuing a holistic, non-traditional medical treatment for your back pain. You outlined your many efforts to keep your supervisor informed of your message therapy treatment throughout the period of your absence. You noted that, in response to an earlier proposed action, you had submitted a detailed medical report from Dr. I.M. Theman, Chief of Osteopathy with the University Medical Center which supported your need for continued approved leave and questioned your supervisor's authority to take any further action following receipt of this medical documentation.

I note that a copy of Dr. Theman's assessment of your condition was included as supporting documentation for the proposed removal. In it, Dr. Theman states that he examined you on February 5, 1997, and found that initial tests results indicated the beginning stages of degenerative disc disease. He recommended an aggressive treatment program including surgery to replace 3-5 lower discs. Dr. Theman stated in his report that he could not estimate a return to work date until he evaluated your initial recovery from surgery but that he felt you may be able to return to work someday.

The information in your response was not sufficient to overcome the evidence presented by the proposing official that current medical information indicates that you are not physically able to perform the duties of your position. Further, the medical documentation you have submitted does not provide any projected recovery date and, in fact, states that a prognosis for recovery cannot even be developed until after you have surgery to repair the damage from the degenerative disc disease. As you have repeatedly indicated, you do not wish to pursue the more traditional medical approach recommended by Dr. Theman and want to maintain your efforts to restore your health through holistic treatment programs, including the on-going massage therapy. While I wish you success in your treatment, I must examine the practical impact of a potential long-term absence. Your absences are having a negative impact on the work of the organization and have created an inefficient situation where two other employees are detailed to cover your

assignments, resulting in backlogs of work at their home offices. With no projected date of return to duty, it is not reasonable for this agency to continue to keep you on the roles and approve an unspecified amount of leave without pay to cover your absence. Based on the medical information submitted by your treating physician, there is no likelihood of a change in your medical status at any time in the near future unless you elect to have the recommended surgery. Further, even with the surgery, your physician was unable to state that you would certainly be able to return to work. Having considered both the evidence supporting the proposed action and your response, I have decided that your removal is necessary for the efficiency of the service.

In determining that it is necessary to remove you from your position, I have considered lesser actions such as suspension or demotion but neither are appropriate. I am well aware that you are not absent by choice and, therefore, a disciplinary action would serve no purpose. I realize that your performance was highly regarded during the first few years that you were with our organization, but your current inability to be at work on a regular basis overshadows past performance. I appreciate your desire to stay on the job but you have offered no viable means of accommodating your condition other than a continuing approval of leave without pay. As I have stated, that is not possible due to the negative impact your absences are having on the organization.

My decision to remove you from your position and from the Federal service is a final one and the effective date of the removal action will be April 15, 1997.

You have the right to either appeal this action to the Merit Systems Protection Board (MSPB) or to grieve this action through the negotiated grievance procedure, but you may not use both procedures. Attached is a copy of the MSPB appeals form and a copy of the MSPB regulations, for your information. Your appeal may be filed immediately after the effective date of April 15, 1997, but must be filed no later than 30 calendar days after the effective date of this action and should be addressed to: MSPB Atlanta Regional Office, 401 West Peachtree Street, NW, 10th Floor, Atlanta, GA 30308-3519.

Also attached for your information is a copy of the negotiated grievance procedures found at Article 26 of the Collective Bargaining Agreement between Local 1234 and the agency. Should you choose to grieve the removal action, follow the timeframes and procedures outlined in Article 26 for submission of your grievance.

If you wish to file an application for disability retirement with the U.S. Office of Personnel Management, please contact Ms. I. Can Help at 555-1214. Ms. Help is the agency's Benefits Counselor and she will provide you with information concerning your potential disability benefits and application procedures, as an employee covered under the Federal Employees'

Retirement System (FERS). Your application for disability retirement must be received by the U.S. Office of Personnel Management no later than one year from the date of your separation.

I am requesting that you sign and date the acknowledgment copy of this memorandum as a record that you received it. Your signature does not mean that you agree or disagree with the contents of the memorandum and, by signing it, you do not forfeit any of your grievance or appeal rights.

## **SAMPLE LETTER**

### **Notice of Decision to Remove - Inability to Maintain Regular Work Schedule**

This is notice that I have decided to remove you from your position of Administrative Assistant, GS-301-9, and the Federal service, in order to promote the efficiency of the service.

By letter dated January 20, 1997, Ms. I.M. Boss proposed that you be removed from your position and from the Federal service due to your inability to maintain a regular work schedule. You were also informed of your right to respond to the proposal either orally, in writing, or both, and were given 21 days in which to make and/or submit your response. You submitted a written response on February 5, 1997, and I have given careful consideration to the issues you raised in your letter as well as the charges and evidence presented by the proposing official.

In your response, you indicated that the agency has an obligation to continue approving your leave under the donated leave transfer program, and when that is exhausted, to approve LWOP because your absences are due to a medical condition. You noted that the Americans with Disabilities Act of 1990 protects you from removal because the agency is obligated to provide you with reasonable accommodation in the form of approved leave. Finally, you indicated that your physician believes your condition of chronic asthma will be improving and you will not need as much leave in the future.

After reviewing your response, I contacted you and asked you to submit an updated medical report from your physician to support your statement that your condition has changed and that he believes there is an improved prognosis. The February 20, 1997, notice from your doctor confirmed the diagnosis of chronic asthma and stated that there was no way to estimate the onset of asthmatic attacks nor the duration. He indicated that he has recently adjusted your medication in the hopes of reducing the incapacitation you experience during attacks.

The information in your response was not sufficient to overcome the evidence presented by the proposing official and I believe that your removal for inability to maintain a regular work schedule would promote the efficiency of the service. Your absences are having a negative impact on the work of the office and have resulted in missed deadlines and backlogs of work. I cannot continue to approve overtime for other staff nor is the hiring of a temporary employee a solution. Based on the medical information submitted by your treating physician, there is no likelihood of a change in your medical status at any time in the near future. Although the doctor indicated that he hoped a change in medication would reduce the level of incapacitation during your asthma attacks, he did not indicate that the absences would be any less frequent than those you are currently experiencing.

In determining that it is necessary to remove you from your position, I have considered lesser actions such as suspension or demotion but neither are appropriate. I am well aware that you are not absent by choice and, therefore, a disciplinary action would serve no purpose. I realize that

your performance has been good during the first few years that you were with our organization, but your current inability to be at work on a regular basis overshadows past performance. Since this action is not disciplinary in nature, previous adverse actions taken against you were not relevant to my decision. I appreciate that you wish to stay on the job but you have offered no viable means of accommodating your condition other than a continuing approval of leave without pay. As I have stated, that is not possible due to the negative impact your absences are having on the organization. Further, nothing in the Americans with Disabilities Act nor the leave transfer program requires your supervisor to continue approving leave when medical documentation supports that the condition causing your absences is chronic and there is no reasonable expectation of improvement in the near future.

My decision to remove you from your position and from the Federal service is a final one and the effective date of the removal action will be March 30, 1997.

You have the right to either appeal this action to the Merit Systems Protection Board (MSPB) or to grieve this action through the negotiated grievance procedure, but you may not use both procedures. Attached is a copy of the MSPB appeals form and a copy of the MSPB regulations, for your information. Your appeal may be filed immediately after the effective date of March 30, 1997, but must be filed no later than 30 calendar days after the effective date of this action and should be addressed to: MSPB Atlanta Regional Office, 401 West Peachtree Street, NW, 10th Floor, Atlanta, GA 30308-3519.

Also attached for your information is a copy of the negotiated grievance procedures found at Article 26 of the Collective Bargaining Agreement between Local 1234 and the agency. Should you choose to grieve the removal action, follow the timeframes and procedures outlined in Article 26 for submission of your grievance.

If you wish to file an application for disability retirement with the U.S. Office of Personnel Management, please contact Ms. I. Can Help at 555-1214. Ms. Help is the agency's Benefits Counselor and she will provide you with information concerning your potential disability benefits and application procedures, as an employee covered under the Federal Employees' Retirement System (FERS). Your application for disability retirement must be received by the U.S. Office of Personnel Management no later than one year from the date of your separation.

I am requesting that you sign and date the acknowledgment copy of this memorandum as a record that you received it. Your signature does not mean that you agree or disagree with the contents of the memorandum and, by signing it, you do not forfeit any of your grievance or appeal rights.

**U.S. Department of Labor**  
**Negotiated Agreement on Flexiplace (Telecommuting)**  
**Article 28**

**Section 1- Purpose**

The NCFLL and the Department recognize circumstances where it is mutually beneficial for employees to perform work at sites other than the traditional office or at locations other than where typical field work is performed. Such circumstances include, but are not limited to, accommodation of special needs, disabilities, energy or environmental conservation, savings in commuting costs, the need for an uninterrupted work environment, cost or space savings, or better geographic coverage for agency mission. Employees and their supervisors may make Flexiplace arrangements for purposes of promoting the efficiency of the government and fostering a family friendly DOL. While Flexiplace is not intended to be a substitute for family care, it may enhance the quality of family life through savings in commuting time. Flexiplace must be voluntary and consistent with mission accomplishment and customer service.

**Section 2 - Types of Arrangements**

There are two basic types of Flexiplace arrangements.

- a. Informal arrangements are episodic in nature, requiring agreement between employees and their supervisors; however, no written agreements are required.
- b. Formal arrangements are more permanent in nature, and include Telecommuting Centers or Home-office sites. These require a written agreement. Trial periods may be utilized to determine the practicality of long term formal arrangements.

**Section 3 - Eligibility and Applications**

Both parties anticipate that the predominant use of Flexiplace will be informal or episodic. When employees wish to participate in formal programs, they will apply to their respective supervisor(s) who will evaluate requests by considering aspects such as:

- Whether the employee's work can be performed at an alternate work site.
- Cost of such arrangement.
- Technological and equipment needs.
- Communication needs.

Employees are encouraged to seek guidance and advice from their designated steward when requesting to participate in the formal Flexiplace program. The designated steward shall be notified before a written agreement is finalized. Management will notify the NCFLL at the tri-annual meetings of the names of the individuals approved for formal Flexiplace arrangements and the effective dates.

If the supervisor and employee agree to a formal program, the specifications of the agreement will be reduced to writing and signed by both. If consensus cannot be reached, the supervisor will explain the reason(s) for denial.

Pre-existing Flexiplace arrangements should be brought into conformance with the requirements of this article.

#### **Section 4 - Recall**

Employees participating in Flexiplace programs must be accessible and available for recall to their regular offices for a variety of reasons. Employees may be called back for emergencies or new work assignments.

A recall is not a termination of the Flexiplace arrangement.

#### **Section 5 - Consideration for formal programs**

Supervisors shall consider aspects such as:

- (1) Whether the work can be performed at the proposed site and whether the arrangement would be consistent with the mission of the agency.
- (2) Costs of such arrangements.
- (3) Existing performance, conduct, or leave restriction situations.
- (4) Technology requirements.
- (5) Office coverage, access to the customer, team involvement, and access to the supervisor.

#### **Section 6 - Termination of Agreements**

A. Supervisors may terminate agreements whenever:

- (1) The arrangement no longer supports the mission.
- (2) Performance standards are not being met or conduct is unacceptable.
- (3) Normal production and quality of work are not being maintained.

- (4) Costs of the agreement become impractical.
  - (5) Technology changes require return to the regular office.
  - (6) Reassignment causes a change of work.
  - (7) Employees do not conform with the terms of their agreement.
- B. Management will attempt to provide appropriate advance notice of the termination of an agreement to the extent practicable.
  - C. Employees may voluntarily terminate participation in Flexiplace arrangements at any time; however, employees may be expected to continue working at home offices or Telecommuting centers for a reasonable period to allow management time to arrange a work station.
  - D. Termination of agreements may necessitate shared work stations in the regular office or reassignment to another office.

### **Section 7 - Pay Status**

- A. Overtime and night pay differential agreements will conform to regulations and this contract. Employees will not perform overtime or night work at alternate work sites without prior approval.
- B. Agreements will conform with time and attendance regulations and this contract. Hours of work will be described in formal agreements. Agreements may conform to the flexitime plan for the office and will conform to the contract.

### **Section 8 - Dispute Resolution**

Supervisors and employees are expected to resolve disputes related to the Flexiplace program informally.

Disputes related to denial of participation, recall, or termination of agreements that cannot be resolved informally will be submitted in writing directly to the Regional head of the Agency.

The Regional head of the Agency will hold a face-to-face meeting with the employee and his/her union representative within 5 working days to hear the appeal of actions taken by management.

The Regional head of the Agency will make a written determination to all parties within 2 working days after the meeting.

Time extensions and alternatives for face to face meetings will be made by mutual consent of the union and the Regional head of the Agency.

The Regional head of the Agency's decision is final and binding.

### **Bargaining History**

The parties agreed that a viable Flexiplace program had to promote the mission of the Agency, maintain the present level of customer satisfaction, and preferably be cost neutral. There was discussion among the parties that the program cost could be off-set by replacing presently rented work space with the Flexiplace location. Both parties felt the Flexiplace program provided an opportunity to foster family work arrangements and increase employee morale .

The parties agreed that the Flexiplace program had a natural line of delineation that separated the formal arrangement from an informal (episodic or ad hoc) arrangement. There was a consensus that each program must have its own identity for the purpose of clarity and implementation.

The informal or episodic program is temporary in nature, requires little to no cost and has been in use in some agencies for several years. Episodic arrangements will be informal in nature, thus extensive guidelines will not be established. The formal Flexiplace program will serve as a reference to provide guidance for episodic agreements.

The formal Flexiplace arrangement is a structured program, not a work schedule. Therefore, definitive guidelines are established to ensure that the employee understands his/her personal commitment and the Agency's expectations for the program to be a success. A written agreement will be developed by the applicant and the supervisor prior to the Flexiplace program being implemented. This agreement will define the work at the traditional work site and the Flexiplace site, employee accessibility, communication lines, necessary equipment and technology needs, and other specific concerns of the employee and supervisor.

Several items relating to the establishment of a permanent Flexiplace program were discussed during the bargaining session. Major concerns focused on the compatibility of the employee and his/her position with the program, logistical and personal issues at the Flexiplace site, and the impact of terminating the Flexiplace program.

The parties agreed that it was important for the employee to understand that the formal Flexiplace program is a not an entitlement, but rather an individualized structured program with a formal written agreement. It was agreed that the applicant's work had to be portable in some

respect to be compatible with the program and that the Flexiplace program had to maintain at least the same level of Agency competency and customer satisfaction. All agreed that a candid informational exchange had to occur at the supervisor/applicant level in order to ensure that the employee did not become involved in a program that would inhibit the person's ability to adequately perform the required duties and impact negatively on the employee or the Agency.

The parties agreed that the Agency's decision regarding purchase of equipment, release of leased work space and rearrangement of assignments must be understood by the applicant so that the long-term ramifications can be factored into the employee's decision to enter the program. The applicability of the Flexiplace program to employees with disabilities was discussed and the parties agreed that this program could be of benefit to these employees.

There was mutual agreement that technology must be available to support the Flexiplace program in order for the Department to achieve its mission. The parties agreed that the Department would not necessarily make additional equipment/technology purchases for the purpose of facilitating the Flexiplace program.

The availability of the program to DOL employees was discussed at length. The Flexiplace program is compatible with all existing work schedules, but participation will be dependent upon the capability to meet the mission goals of the respective Agency. Active team membership does not preclude participation in the Flexiplace program. Participants who are also team members will be expected to participate in all team activities. There was a consensus that an employee could volunteer to use personal equipment such as a home computer, to comply with the needs of the program.

It was emphasized that certain positions by their very nature such as on-site lab technicians, office client service personnel etc. may not lend themselves to the concept of the formal Flexiplace program. In addition employees on leave restriction or those who were not successfully meeting the performance expectations will not be considered for the program.

The cultural change involved in implementing the Flexiplace program was discussed during the bargaining session. The importance of building a foundation into the work agreement that would provide the employee, supervisor, and client with an acceptable comfort zone regarding work accomplishment and communication was of major concern of the parties. The discussion of the parties focused on devising mechanisms to promote the use of the Flexiplace program when applicable, while at the same time ensuring that the employee understood the personal safety, communication availability, and home site environmental compatibility issues associated with the Flexiplace program. The parties agreed that self inspections of the Flexiplace, itineraries or equivalent notification of schedule, call forwarding or equivalent means of client service (no cost to employee) and an initial evaluation of the Flexiplace environment could be ways and means to successfully reach a Flexiplace agreement. Workers' Compensation coverage was discussed and

it was agreed that the present regulations cover Flexiplace arrangements.

The parties discussed their concerns about situations where the Flexiplace program could be dissolved by either party. The possibility that an employee may opt to jump in and out of the program was discussed and it was acknowledged that lack of program continuity could be a factor when making a decision on a future approval of this employee's request for Flexiplace. The potential for an employee to go on a long term Flexiplace program and lose his/her traditional office work space was also discussed. Given management's potential investment it was understood that an employee in this situation may have to be placed in a different work space or office.

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SOELR - 1998

THE INTERNET: FINDING AND USING  
EMPLOYEE AND LABOR RELATIONS SITES

General purpose search engines:

<http://search.com/>

<http://www.aol.com/netfind/>

<http://www.lycos.com/>

<http://www.hotbot.com>

<http://www.excite.com>

<http://www.altavista.com>

Phone number and address search engines:

<http://www.whowhere.com>

<http://www.bigfoot.com/>

<http://www.four11.com/>

Business yellow pages

<http://superpages.gte.net>

Area codes and White and Yellow pages Phone Directories and E-mail addresses

<http://www.555-1212.com/ACLOOKUP.HTML>

Reverse telephone directory - person finder

<http://www.anywho.com/>

Government Agencies, Offices, Branches, etc.:

FLRA information and decisions

<http://fedbbs.access.gpo.gov/flra01.htm>

MSPB Home Page (includes MSPB decisions since 1994, as well as MSPB forms)

<http://www.mspb.gov>

EEOC

<http://www.eeoc.gov>

U.S. House of Representatives:

<http://law.house.gov/1.htm>

Library of Congress:

<http://lcweb.loc.gov/homepage/lchp.html>

Census Bureau

<http://www.census.gov/>

Federal Web Locator B Links to every Federal agency B all branches

<http://www.law.vill.edu/Fed-Agency/fedwebloc.html>

Every Federal agency, board, bureau, commission and links to other sources

<http://www.lib.lsu.edu/gov/fedgov.html#inde>

National Credit Union Administration

<http://www.ncua.gov/>

Office of Personnel Management

<http://www.opm.gov/>

Office of Thrift Supervision

<http://www.ots.treas.gov/>

Bureau of the Public Debt

<http://www.publicdebt.treas.gov/bpd/bpdhome.htm>

US Postal Service (including zip code finder for any address)

<http://www.usps.gov/>

Looking for a job??

Dept. of Justice:

[www.us.doj.gov](http://www.us.doj.gov)

FAA:

[www.jobs.faa.gov](http://www.jobs.faa.gov)

Department of the Interior:

[www.usgs.gov/doi/avads/announcements/index.html](http://www.usgs.gov/doi/avads/announcements/index.html)

FEMA:

[www.fema.gov/career/femajob.htm](http://www.fema.gov/career/femajob.htm)

NIH: [www.nih.gov](http://www.nih.gov)

[gopher://gopher.nih.gov:70/00/campus/vacancies/RELOCATED](http://gopher://gopher.nih.gov:70/00/campus/vacancies/RELOCATED)

Naval Post Graduate School:

[www.web.nps.navy.mil/](http://www.web.nps.navy.mil/)

Department Of Labor:

[www.dol.gov](http://www.dol.gov)

Department of Health and Human Serv.

[www.os.dhhs.gov/psc/hrs/dhhsjobs.txt](http://www.os.dhhs.gov/psc/hrs/dhhsjobs.txt)

USDA-Food Safety and Insp. Svc.:

[www.net.usda.gov/fsis/pob/nation.htm](http://www.net.usda.gov/fsis/pob/nation.htm)

OPM:

[www.usajobs.opm.gov/](http://www.usajobs.opm.gov/)

Employment/Job Search=s Resume=s etc.

<http://www.monster.com>

Research sites:

Willamette University College of Law Labor and Employment Law (includes discussions of recent developments in Labor and Employment law

<http://www.willamette.edu/law/laborlaw/>

Wide range of Legal Resources

<http://www.findlaw.com/>

Wide range of Legal Resources

<http://www.lawcrawler.com/>

Washington, DC Bar Association (numerous links to legal research sites)

<http://www.dcbbar.org/>

Securities and Exchange Commission B SEC Filings

<http://www.edgar-online.com>

Department of Commerce B site gives access to several search engines devoted to government reports/data

<http://www.fedworld.gov/>

General Services Administration Reports and Employee locator

<http://w3.gsa.gov/index/index.nsf>

Heiros Gamos B Comprehensive Legal Site B Guide to Employment Law (a wealth of information and links)

<http://www.hg.org/employ.html>

Heiros Gamos B Comprehensive Legal Site B Guide to Federal Law

<http://www.hg.org/judge.html>

Duke University Law School Legal Links:

<http://ives.biochem.duke.edu/legallinks.html>

Washburn University School of Law

<http://lawlib.wuacc.edu/washlaw/washlaw.html>

Washington University School of Law

<http://ls.wustl.edu/Library/index.html>

Federal Register (search engine for the Federal Register and CFR parts affected)  
<http://www.gpo.ucop.edu/search/fedfld.html>

Searchable databases of numerous government reports/documents through  
Government Printing Office  
<http://www.gpo.ucop.edu>

Government Printing Office  
<http://thorplus.lib.purdue.edu:8100/gpo/>

Miscellaneous Useful Sites:

Thousands of links to various sources of information on just about any subject

<http://www.ahandyguide.com/index.html>

Access to just about every newspaper in the United States

<http://www.naa.org/hotlinks/index.html>

Access to just about every newspaper in the world

<http://www.newspapers.com/>

Dilbert

<http://www.unitedmedia.com/comics/dilbert/>

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ENVIRONMENT AND SAFETY)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)

SUBJECT: Guidance on Applying the Emergency Planning and Community Right-to-Know Act (EPCRA) to Munitions to Meet Requirements for EO 12856

The attached document provides guidance on applying EPCRA to munitions to meet requirements for EO 12856. The guidance:

- < Reiterates that DoD installations will comply with EPCRA sections 302 and 304 and notes that DoD facility emergency plans will support Local Emergency Planning Committee efforts.
- < States that installations will fully comply with EPCRA sections 311-312 and notes that the hazardous chemicals contained in stored munitions end items will not be included in sections 311-312 threshold requirements. Also states that Chemical Stockpile Emergency Preparedness Programs (CSEPPs) meet the requirement of EPCRA sections 311-312 for hazardous chemical components (of chemical munitions) stored in bulk.
- < States that the EPCRA section 313 reporting will apply to munitions manufacturing immediately, and that reporting for demilitarization activities will commence with the Calendar Year 1999 TRI data submitted to EPA by July 1, 2000.
- < States that DoD will provide installations with technical guidance in 1998 to aid in reporting munitions activities.
- < Clarifies the laboratory exemption for munitions testing.

The guidance demonstrates DoD's commitment to providing the public information associated with our munitions activities. Please distribute this guidance to all installations within your organization. My point of contact is Mr. Andrew Porth (703-604-1820, DSN 664-1820, email: portham@acq.osd.mil). DoD Component POCs are listed in Appendix A of the attachment.

Sherri W. Goodman  
Deputy Under Secretary of Defense  
(Environmental Security)

Attachment

**MARCH 1998**

**Updated Guidance**

**EPCRA Compliance for Munitions Related  
Issues**

**Note: This Guidance Supplements DoD's March 1995  
and Supplemental June 1996 Guidance**

## **Introduction**

The following document provides updated guidance on Emergency Planning and Community Right-to-Know Act (EPCRA) and Toxic Chemical Release Inventory (TRI) reporting and compliance for munitions. This guidance supplements the DoD March 1995 and June 1996 guidance. This guidance is to be used along with DoD's March 1995 and June 1996 guidance for DoD installations to complete EPCRA reporting as required by Executive Order 12856 and DoD implementing instructions.

## **General Guidance**

General principles, approach, applicability, and definitions of the DoD March 1995 and June 1996 guidance apply to the application of EPCRA in the munitions community. DoD personnel should pay particular attention to national security issues when reviewing and reporting information associated with munitions.<sup>1</sup> The following provides specific direction for munitions related issues.

## **Documentation**

Ensure documentation is in place to support TRI reporting efforts. Threshold and release calculations provide support documentation for installations that meet thresholds and must file Form R reports. Threshold calculations provide support documentation for installations that do not meet thresholds, and therefore, need not file Form R reports. EPA routinely requests this documentation when determining whether or not private sector facilities have complied with TRI reporting. For Federal facilities, EPA is analyzing permit and other regulatory information to determine whether facilities that did not report should have reported TRI information. To be prepared for possible EPA inquiries, DoD installations should have appropriate documentation available that demonstrates how thresholds were calculated. In any case, all installations must maintain TRI reporting documentation for 5 years. Examples of documents that should be kept include the following:

- Previous years' Form Rs,
- Engineering calculations and other notes used to determine reporting thresholds, releases, and transfers;
- Inventory records and purchasing data;
- Routine and non-routine monitoring data from other statutes and permits (UIC, NPDES, RCRA, state and local) if used in TRI reports;
- RCRA hazardous waste reports, manifests, etc.;

- Invoices from waste management companies;
- Other Environmental reports (EPCRA Section 312, NPDES monitoring, CAA permit applications and other state or local air permit monitoring/applications);
- Process information, equipment manufacturers specifications, industry guidelines, references used; and,
- Support data and documents (copies of DoD guidance documents and EPCRA regulations) that demonstrate why an exemption was taken.

**Emergency Planning And Reporting Requirements Applicable Immediately  
(EPCRA Section 301-305)**

The primary purpose of the emergency planning and reporting notifications in sections 301-305 is to protect public health, safety, and the environment, and to establish and coordinate the nation's chemical emergency planning activities. Local Emergency Planning Committees (LEPCs) are responsible for developing local emergency plans. Existing DoD explosives safety policy discourages the use of local fire departments in fighting fires involving explosives because this places local fire department personnel at greatly increased risk. Therefore, DoD installations that have munitions maintain their own fire departments and train personnel in the nature and type of hazards represented by stored munitions. These installations have detailed emergency plans for munitions related incidents. DoD installations should provide their emergency response plans to LEPCs to support the local emergency plans and cooperate with LEPCs to the maximum extent possible to protect public safety.

The purpose of section 302 of EPCRA is to inform emergency planners about the presence of extremely hazardous substances (EHS). Facilities shall fully comply with this requirement for munitions and munitions related items. Munitions and munitions related items containing EHSs, as listed in 40 CFR Part 355 Appendices A and B, must be included in all facility calculations for Section 302 threshold requirements and facilities will report as required.

The primary purpose of the emergency release notification requirements of Section 304 is to protect the public in the event of hazardous chemical releases through the establishment and formation of local and state emergency response capabilities. The accidental release of EHSs, as listed in 40 CFR Part 355 Appendices A and B, and CERCLA Hazardous Substances (HSs), as listed in 40 CFR Table 302.4, from munitions and munitions related items is covered under Section 304 requirements. Facilities will fully comply with the requirements of Section 304 for munitions and munitions related items.

When reporting, facilities will provide as much information as possible to the LEPCs, including the effects of energy releasing reactions as well as information on listed EHS or HS characteristics.

**Hazardous Chemical Inventory Requirements  
(EPCRA Sections 311-312) Applicable Immediately**

The primary purpose of the chemical inventory requirements of Sections 311-312 is to increase community awareness of chemical hazards; provide comprehensive information about the identity and amounts of stored chemicals; and make the information available to the public, emergency planners and responders. Facilities shall fully comply with the requirements of section 311-312 EPCRA for munitions and munitions related items.

For the purposes of determining section 311-312 threshold calculations and inventories, the term “hazardous chemical” means any chemical that is a physical hazard or a health hazard as defined in 29 CFR 1910.1200 (The Hazardous Communication Standard, an Occupational Safety and Health Administration regulation). Section 311(e) of EPCRA (42 USC Section 11021(e)) states that the definition of hazardous chemical does not include:

- < Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration;
- < A substance present as a solid in any manufactured item such that exposure to the substance does not occur under normal conditions of use;
- < Any substance that is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public;
- < Any substance used in a research laboratory, hospital, or other medical facility under the direct supervision of a technically qualified individual;
- < Any substance used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

DoD and OSHA have consistently interpreted stored munitions end items, (rockets, bombs, fuses, initiators, bursters, etc.) to be “a solid in any manufactured item” and therefore the chemicals contained in the munitions end items are exempt from section 311-312 threshold calculation requirements.

Hazardous chemical components of munitions and munitions related items stored in bulk are not ordnance or munition end items and are subject to section 311-312 EPCRA reporting. Due to the unique nature of the material stored, materials that are controlled under the Chemical Stockpile Emergency Preparedness Programs (CSEPP) meet the requirements of section 311-312. As allowed by national security regulations, CSEPP information can should be shared with LEPCs to the maximum extent practicable.

**NOTE:** It is important to remember that the various rules and regulations of different sections of EPCRA are distinct. The Section 311-312 exemption for solids present in a manufactured item is

not the same as the “article exemption” contained in Section 313. Exemptions must be applied separately for each EPCRA section.

### **Toxic Release Inventory (TRI) Requirements (EPCRA Section 313)**

The primary purpose of the TRI Reporting is to establish a facility-wide inventory of toxic chemical releases, as listed in 40 CFR 372.65 (a) and (b), to all environmental media, to support State and local planning efforts, and inform the public about routine releases of toxic chemicals to the environment. Munitions related items are covered as follows:

#### **Manufacturing (Applicable Immediately)**

The manufacture, processing, or other use of listed toxic chemicals to produce munitions related items is covered by Section 313 requirements. Pilot scale or larger manufacturing operations should both be included in threshold and release calculations. Facilities shall fully comply with this requirement for munitions and munitions related items.

#### **Testing (Applicable to CY 1999 Reporting (reports due July 1, 2000))**

The manufacture, process, or other use of toxic chemicals for the purpose of testing of munitions, weapons systems or qualifying munitions by personnel as part of the testing process is considered part of “laboratory” use and is therefore exempt from section 313 threshold calculations. DoD Components should apply this exemption as narrowly as possible. The laboratory exemption is not intended as a blanket exemption for any facility which has the title "laboratory" in its name. To qualify, the munitions or munitions related items must be tested as part of a laboratory activity at a DoD facility designated to test munitions or munitions related items on a regular basis. Activities that do not directly support research and development, sampling and analysis, or quality assurance and control are not exempt. For example, a Naval facility that regularly engages in the testing of munitions to ensure that the munitions function as designed would not need to include in the facility’s threshold calculations chemicals involved in the testing.

Further details on applying this guidance will be published in a separate technical guidance document to be provided later in 1998.

**Demilitarization (Applicable to CY 1999 reporting (reports due July 1, 2000))**

The demilitarization of munitions and munitions related items is an activity that includes many operations, among which is the demilitarization of conventional and chemical munitions. The following demilitarization operations may be considered processing activities for the purposes of section 313 of EPCRA:

- Disassembly
- Dismantling
- Recycling
- Recovery
- Reclamation
- Reuse

For these activities, installations shall report on each toxic chemical that exceeds the 25,000 pound processing threshold.

Demilitarization activities considered to be treatment for the purposes of EPCRA section 313 include:

- Open Burning and Open Detonation (OB/OD)
- Incineration
- Chemical neutralization
- Other methods of final treatment which alter the chemical composition of the munitions and/or its components.

EPCRA regulations state that if a product is brought from off-site for the purposes of disposal, stabilization, or treatment for destruction, then the 10,000 pound “otherwise used” threshold for reporting applies to each toxic chemical present in the product. For demilitarization activities, the key part of this analysis is whether munitions are brought from off-site for the purpose of treatment or not. Under the RCRA Military Munitions Rule, unused munitions are not considered a solid waste until the munitions are removed from storage for the purpose of disposal or treatment prior to disposal. Not until the decision is made to treat the munition prior to disposal, does the munition become a solid waste. By applying the reasoning of the Military Munitions Rule to the issue of how to apply the EPCRA “otherwise used” regulation, most munitions brought onto a site would not be considered to be solid waste brought on-site for the purposes of disposal, stabilization, or treatment for destruction. Using this logic, most DoD demilitarization treatment activities would not be counted when calculating the 10,000 pound otherwise used threshold.

Nonetheless for EPCRA reporting purposes, it is DoD policy that all military munitions treated on-site shall be counted in the 10,000 pound “otherwise used threshold.” Therefore, if an installation uses any of the above treatment processes for military munitions that are to be treated prior to disposal the 10,000 pound “otherwise used” threshold applies. The 10,000 pound threshold applies whether or not the treated munitions exist on-site or were brought from off-site. DoD is setting this policy to fulfill the intent of EO 12856 to provide the public with as much information about activities involving toxic chemical releases as practical. It should not be interpreted as a disagreement with logic of the Military Munitions Rule, but rather a decision to maximize reporting authority under EO 12856.

Details on applying this guidance to demilitarization activities will be published in a separate technical guidance document provided later this year.

### **Toxic Chemical Release Reduction Goals (EO 12856 Sections 3-302(b) and 3-304)**

DoD facilities meeting threshold reporting levels for toxic chemicals pursuant to EPCRA section 313 must develop goals to help reduce DoD's total releases and off-site transfers of TRI chemicals 50 percent by December 31, 1999. The 50 percent reduction goal is applied on a DoD-wide basis allowing for variation in the achievement of these reductions at individual facilities. The baseline will consist only of those toxic chemicals that were reported to EPA as part of the CY 1994 EPCRA Section 313 reporting. Since DoD policy does not require munitions and munitions related items to be reported for CY 1994-1998, the baseline and reduction efforts do not include releases and off-site transfers associated with munitions and munitions related items.

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<sup>1</sup> The following is from the March 1995 DoD Guidance for TRI reporting and applies to munitions issues: “Section 6-601 of EO 12856 states that the ‘head of a Federal agency may request from the President an exemption from complying with the provisions of any or all aspects of this order for particular Federal agency facilities, provided that the procedures set forth in section 120(j)(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980” (CERCLA) as amended (42 USC 9601 et. seq.) are followed.’ This exemption and the 120(j)(1) process applies for facilities that need a blanket exemption for the entire facility. Only in rare circumstances, should facilities request a 120(j)(1) exemption. However, for individual classified activities section 120(j)(2) of CERCLA states ‘Notwithstanding any other provision of law, all requirements of the Atomic Energy Act and all Executive Orders concerning the handling of restricted data and national security information, including ‘need to know’ requirements, shall be applicable to any grant of access to classified information under the provisions of [CERCLA] or under [EPCRA].’ Consequently, notwithstanding the provisions of EO 12856, classified information may not be provided unless doing so can be accomplished in strict accordance with all requirements of the Atomic Energy Act

and all Executive Orders concerning the safeguarding of national security information. This restriction on the disclosure of **classified information** exists whether or not the President issues an order exempting a **specified site or facility** from the requirements of EO 12856.” A copy of EO 12356 “National Security Information” is included in the March 1995 guidance for reference.

## **Policy Points of Contact**

### **Army**

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### **Marine Corps**

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March 1998

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**OSD**

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## Determination of Availability and Report of Availability Format

### HEADQUARTERS, DEPARTMENT OF THE ARMY INSTRUCTIONS FOR PREPARING A REPORT OF AVAILABILITY (ROA)

Except for Section A, the ROA is a checklist. Certain questions may require the attachment of supporting information or documents. The final approved package is designed to incorporate all data necessary to complete an outgrant on the subject property and to show the issues which were considered throughout the chain of command. Flexibility is essential, yet still yielding a final product which can be staffed and finally put in the outgrant file. The ROA format is set up so that different sections can be prepared and staffed separately and signed by different Army elements, if required.

Section A is the Determination of Availability, and, although shown first, is signed after Sections B and C have been completed, reviewed and approved. Part 1, MACOM certification is only used if the ROA is not within the approval authority of the MACOM.

Section B is the general and operational information for making property available. This Section of the ROA would usually be the starting of the outgrant process. If the outgrant is the culmination of the Master Plan process, then this section would pull information from the Master Plan and installation data. If a private party has requested the outgrant or outgrant expansion, then the office which takes the request would fill in as much information as is available and submit it for further processing.

Section C contains environmental considerations. Section C would be added to the Section B by the appropriate environmental office or offices with expertise in the various areas. This section could be divided into more than one subpart if the installation organization involves several offices which each need to sign a portion.

The ROA, with attachments, will be forwarded to HQDA, if applicable, via a cover memo which states that staffing within required MACOM offices (BRAC, environmental, legal and real estate) has been completed. The FOSL and the Environmental Baseline Study (EBS) should be prepared in accordance with AR 200-1 and DA PAM 200-1. National Environment Policy Act (NEPA) documentation should be in accordance with AR 200-2. When responding to an item for which the answer is contained in a document previously submitted to the MACOM or to HQDA (in sufficient copies), clearly identify where the document is located and reference document title, date, page, paragraph, etc.

If the ROA is required to be forwarded to HQDA, and a Record of Consideration cites Categorical Exclusion A-21 based on a pre-existing NEPA analysis, then appropriate extracts from the NEPA document are to be attached to the ROA.

SECTION A

DETERMINATION OF AVAILABILITY

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Part 1. MACOM CERTIFICATION  
FOR THOSE ACTIONS TO BE EXECUTED BY ACSIM OR DASA(I&H):

The information furnished in Sections B and C has been fully coordinated with BRAC, if applicable, Environmental, legal, and real estate and is accurate and complete. I recommend that the Determination of Availability be approved by signing Section A, Part 2, of this ROA.

\_\_\_\_\_

Date

\_\_\_\_\_

MACOM Certification Authority

I have reviewed Section C, Environmental Considerations, including all attachments, and, if this is a lease action, the draft FOSL and EBS, and have determined that the environmental considerations are legally sufficient.

\_\_\_\_\_

Date

\_\_\_\_\_

SIGNATURE  
(MACOM Staff Judge Advocate/Counsel)

## DETERMINATION OF AVAILABILITY

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### Part 2. APPROVAL

1. Based upon the attached Report of Availability (ROA) and its findings, which have been reviewed for accuracy and completeness, I have determined that the intended use of this property as set out in the attached Report of Availability is in the public interest or promotes national defense and is consistent with delegated authorities, applicable laws and regulations.
2. I have determined that the proposed use is compatible with the installation mission and with the installation Master Plan. (INSERT IF APPLICABLE: The use will directly support or further the installation mission.)
3. (NON-BRAC) I have determined that the property is not excess to the overall installation purpose and has not been identified as not utilized in an ICARPUS.
4. The proposed outgrant action described in the ROA is approved (subject to

**(INSERT ANY ADDITIONAL INSTRUCTIONS PERTAINING TO THE OUTGRANT NEGOTIATIONS OR EXECUTION AND ANY MODIFICATION TO THE ROA OR ADDITIONAL CONDITIONS WHICH MUST BE PLACED IN THE OUTGRANT DOCUMENT).**

5. I determine that the property is available for the proposed use with the restrictions as stated in the Report of Availability (and as added above) and hereby authorize negotiation and execution of an outgrant in accordance with the attached ROA and applicable laws, regulations, and policy guidance.

\_\_\_\_\_  
Date

\_\_\_\_\_  
(Approving Official)

**SECTION B**

**REPORT OF AVAILABILITY**

**(Installation: \_\_\_\_\_ )**

**GENERAL AND OPERATIONAL INFORMATION**

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**SECTION I. OUTGRANT ADMINISTRATION:**

1. Name, address and telephone number of Applicant or requestor's representative(s), if any:
2. Proposed use:
3. Proposed type of outgrant:
  - Lease
  - For BRAC: \_\_\_\_\_ Interim Lease  
\_\_\_\_\_ Lease in Furtherance of Conveyance
  - Easement
  - Permit or License
4. Start date, if applicable:
5. Recommended term of outgrant:
  - \_\_\_\_\_ years; or
  - \_\_\_\_\_ months.

**SECTION II. PROPERTY INFORMATION:**

1. General property identification. Provide sufficient information to locate the property for environmental reviews and for the USACE District to develop a legal description to include in the outgrant document. Provide legal descriptions, if available. Attach existing maps or aerial photographs. Map(s) should also be attached to the Finding of Suitability to Lease (FOSL), if a lease, showing the nearest installation boundary.

2. Acreage: \_\_\_\_\_ Of only building space is being granted, there is no acreage.

3. General character of the property (short description of the uses of the property; i.e., industrial, residential, warehouse, etc.):

-----  
-----  
-----  
-----

4. Are Government buildings and improvements included in the area?  
 No.

Yes. If yes, identify and describe all buildings, facilities and improvements, e.g., Identification Nos., square footage outgranted/percentage of building, type of construction, and condition:

-----  
-----

5. Existing or preceding property use (Provide a description below for each building, facility, area, etc., in either list or table format. If the overall use is the same, i.e. industrial, then a general description is sufficient.):

-----  
-----

6. United States property interest:

- fee simple title
- easement
- in-lease
- other.

7. Is the property subject to a reversionary interest which would be violated by the proposed use?

- No.
  - Information not known. USACE District should check title documents.
  - Yes. If yes, describe:
- -----

8. Army interest:

- direct control
- permit from a Federal Agency
- withdrawn from the public domain.

9. Type of jurisdiction:

- Exclusive Federal Jurisdiction
- Concurrent Federal Jurisdiction
- Proprietary status

10. If Exclusive or concurrent, does jurisdiction need to be retroceded to allow for the proposed use?

- No
  - Yes, Explain. If a retrocession action is pending, identify the status of that effort:
- -----  
-----  
-----

**SECTION III. OPERATIONAL FACTORS:**

**1. Will the proposed use require utilities?**

No. If no, go to question 2.

Yes. Will Army be providing required utilities or services on a reimbursable basis?

No. Are utilities, e.g. electricity, natural gas/propane/heating oil, potable water, wastewater treatment, telephone, etc., available from public utility companies?

No

Yes. If yes, identify the type, quantity, and provider of such services: \_\_\_\_\_

Yes. If yes, identify the instrument to be used to establish the terms under which such services will be provided and the type, quantity, and estimated cost. Note that this instrument should be executed prior to execution of the outgrant.

**2. Will the proposed use require destruction, relocation, modification, or replacement of Government facilities?**

No

Yes. If yes, please explain:

**3. The grant of the proposed use:**

a. is compatible with the operation of the installation,

b. is compatible with the BRAC Implementation Plan, if BRAC,

c. is compatible with contemplated development and other activities as shown in an approved Master Plan, or

d. is in support of the installation mission.

**4. If it is not compatible with any of the above or in support of the installation missions, please explain why the use should be approved or list the site specific limitations, restrictions, or conditions to be included in the outgrant to make the proposed use compatible, e.g., security, access, parking, hours of operation:**

**5. Non-Environmental Safety Issues and Concerns, if any:**

**6. Airfields and Airspace:**

**a. Will the planned use of the property affect the airspace over or near the**

property or military installation?

No

Yes. If yes, the proposed occupancy or modification may be allowed subject to the following restrictions being incorporated in the outgrant:

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 Yes, near the property or military installation but affecting property not owned by the United States. If yes, does the United States have a potential "taking of private property" issue? Explain.

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b. Will the outgrant of the property require the notification of the FAA?

No

Yes. If yes, please explain who will notify the FAA and when:

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c. Will structures be built on the property which will require an airspace study?

No

Yes. If yes, please explain who will do the study and any other requirements: \_\_\_\_\_

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7. REMARKS - include any legal, policy, or mission factors you are aware of which may affect the proposed use of the property:

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-----  
**SECTION IV. PRELIMINARY PROCEDURES:**

1. Inventory and Condition Reports: A recent inventory showing the condition of the property is available:

No

Yes. Give date and location of the document: \_\_\_\_\_

2. Consideration:

For BRAC, less than fair market value is recommended for this action under authority of 10 USC 2667(f). Provide justification. Current estimated caretaker or operational costs are \_\_\_\_\_. Provide any specific recommendations:

USACE district is requested to determine fair market value for the outgranted interest.

Consideration should be collected in cash.

Consideration should be in cash or in-kind as set out in the attached discussion of possible in-kind consideration.

Consideration should be offset for the improvement, maintenance, protection, repair or restoration of the property outgranted, as shown in an attached offset plan.

**3. Waiver of Competition:**

Competition is not required in accordance with AR 405-80.

A waiver of competition is not recommended.

A waiver of competition is recommended. Provide full justification and proposed grantee, if waiver is recommended.

**4. Other applicable laws, regulations, MOA's, etc. requiring consideration for processing this action:**

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**5. Additional information that will assist in processing this application/action:**

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**6. Stewart B. McKinney Homeless Requirements:**

McKinney Act requirements do not apply to this action.

McKinney Act requirements apply, necessary screening has been completed, and no interest was expressed. Give dates.

**7. Estimated Costs to further process the outgrant:**

USACE District costs: \_\_\_\_\_

Installation costs: \_\_\_\_\_

Funds are currently available  Yes  No

If No, how will costs be funded? \_\_\_\_\_

**8. I certify that I have reviewed Section B, that is has been coordinated in accordance with applicable command guidance, and that it is accurate and complete. Based on the information provided above, I recommend that the outgrant be**

APPROVED  DENIED.

-----  
Date

-----  
SIGNATURE  
Title

Enclosures:

**(list)**

**SECTION C**  
**REPORT OF AVAILABILITY**  
**ENVIRONMENTAL CONSIDERATIONS**

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**1. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) REQUIREMENTS:**

**a. The requirements under NEPA for the proposed outgranting action have been met as follows:**

**CX/REC.** This action falls under one of the Categorical Exclusions (CX) contained in AR 200-2 (Environmental Effects of Army Actions). The environmental effect of the action has been considered. A Record of Environmental Consideration (REC) is attached, indicating the CX pursuant to which the proposed outgrant is authorized.

**[If the ROA is required to be forwarded to HQDA, and the CX is based on a pre-existing NEPA analysis, then state:**

for BRAC, NEPA document is on file at HQDA (Identify location, title and date:

\_\_\_\_\_)  
 pertinent extracts are attached from the applicable NEPA analysis.]

**EA/FONSI.** The impact of this action is considered to be minimal or insignificant. The Environmental Assessment (EA) with Finding of No Significant Impact (FONSI) is:

for BRAC, on file at HQDA (Identify location, title and date:

\_\_\_\_\_)  
 attached.

**EIS/ROD.** The impact of this action is considered to be significant. An Environmental Impact Statement (EIS), or supplement thereto, along with the Record of Decision (ROD) is:

for BRAC, on file at HQDA (Identify location, title and date:

\_\_\_\_\_)  
 attached. (IF the EIS is too large to attach, then state where it can be viewed)

**b. For EA and EIS, identify mitigation actions, if any, which are required, costs, and responsible party for the mitigation:**

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**c. If the EIS or EA covers more than the proposed outgranting action, explain how and where the outgranting action is analyzed and considered in the NEPA documentation:**

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**2. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), For Leases only:**

**a. Environmental Baseline Study:**

An EBS has been conducted and no hazardous, toxic, radiological waste (HTRW) substances were identified as released, stored, or disposed on the property in the threshold quantities. Go to question 3. A draft FOSL is attached. A copy of the EBS is:

on file at HQDA (Identify location, title and date:  
\_\_\_\_\_)

attached.

An EBS has been conducted which indicates HTRW substances were released, stored, or disposed on the property in the threshold quantities. Hazardous storage, disposal, or release notification must be included in the outgrant document (reference 40 CFR Part 373). A draft FOSL is attached. A copy of the EBS containing the details is:

on file at HQDA (Identify location, title and date:  
\_\_\_\_\_)

attached.

**b. Choose the appropriate status of remedial actions:**

Remedial actions have been completed so that the property is considered safe for the proposed use.

Remedial actions are not required.

Remedial actions have not been completed. Estimate the time to complete such action: \_\_\_\_\_. Provide details and justification for outgranting in the current condition, if applicable. Attach any land use restrictions and access clauses that must be put into the outgrant.

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**3. REAL PROPERTY CONTAMINATED WITH AMMUNITION, EXPLOSIVES OR CHEMICAL WEAPONS.**

**a. Does the property contain ammunition, explosives or chemical weapons?**

No. If no, go to question 4.

Yes. If yes, Reference AR 385-64, "US Army Explosives Safety Program." Has a Land Disposal Site Plan (LDSP) to clean up the property been submitted through the MACOM and HQDA, DACS-SF and DAMO-SWS, the U. S. Army Technical Center for Explosives Safety, to the Department of Defense Explosives Safety Board (DDESB) for approval before cleanup and outgrant?

No.

Yes. If yes, have the ammunition, explosives, or chemical weapons been removed using the most appropriate technology consistent with the proposed use of the property?

Yes

No. Provide date when property will be cleared:  
\_\_\_\_\_

**b. Will access rights to implement any monitoring plan or use restrictions be required?**

**No.**

**Yes. Describe. (Set out proposed language to be inserted in outgrant):**

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**c. If outgrant is to another Federal agencies for compatible use of surface de-contaminated real property, list limitations, restrictions and prohibitions concerning the use of the property, to ensure personnel and environmental protection:**

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**4. WASTE DISPOSAL (The Solid Waste Recovery Act, as amended; Resource Conservation and Recovery Act (RCRA)).**

**a. Choose one:**

**The applicant will not generate hazardous waste or will not treat, dispose or store waste defined by EPA or State with RCRA primacy.**

**The applicant will generate hazardous waste or will produce waste defined by EPA or State with RCRA primacy. Identify all waste streams and quantities:**

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**The applicant will treat or temporary store, for less than 90 days, hazardous waste as defined by EPA or State with RCRA primacy. Identify all waste streams and quantities.**

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**b. If applicable, choose the appropriate:**

**The applicant has obtained a hazardous waste generator identification number from EPA. ID No.**

**The applicant has established records, waste management requirements, and a Spill Prevention Plan.**

**c. Will the grantee be required to comply with an installation's Hazardous Waste Management Plan?**

**No**

**Yes, provide date and location of plan.**

**5. COMPLIANCE WITH 10 USC 2692:**

**The applicant will not store or dispose of non-DOD toxic or hazardous materials pursuant to 10 USC 2692.**

**Storage or disposal of non-DOD toxic or hazardous materials has been authorized pursuant to 10 USC 2692. (Attach copy of authorization).**

**6. UNDERGROUND/ABOVE GROUND STORAGE TANKS.**

There are no Underground Storage Tanks (USTs) on the property and the applicant will not be installing such tanks. Go to question 7.

There are no above ground storage tanks for fuel or other regulated substances and the applicant will not be installing such tanks. Go to question 7.

There are USTs on the property and/or the applicant will be installing such tanks.

a. Existing underground storage tanks are in compliance with current laws and regulations:

Yes

No. Explain:

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b. Construction of proposed underground storage tanks have been certified for such compliance:

Yes

No. Explain:

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 There are above ground storage tanks for fuel or other regulated substances on the property and/or the applicant will be installing such tanks.

a. Existing above ground storage tanks are in compliance with current laws and regulations:

Yes

No. Explain:

-----  
b. Construction of proposed above ground storage tanks have been certified for such compliance:

Yes

No. Explain:

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**7. CLEAN WATER ACT (FEDERAL WATER POLLUTION CONTROL ACT):**

This action will not involve the discharge of any pollutants into the waters of the United States or less than one million gallons of discharge per day will be made.

This action will entail the discharge of any pollutants into the waters of the United States or it is more than one million gallons into the waters of the United States per day.

Will the grantee's activities on the outgranted property result in a discharge of wastewater to an accumulation, collection, or drainage system?

No.

Yes. If yes, can the existing wastewater collection system and treatment system accommodate such discharge without adverse operational or environmental impacts?

Yes.

No. If not, are there other options? Describe.

Has the applicant applied for or obtained a National Pollutant Discharge Elimination System (NPDES) Permit or State equivalent from the EPA/appropriate

state agency?

Yes.

No. If not, state whether the grantee must have a NPDES Permit or State equivalent to operate.  No.  Yes. If not received, state circumstances:

-----

Would the grantee's operations result in a violation of a NPDES permit or State equivalent held by the United States?

No.

Yes. Explain.

The Grantee is complying with the requirements of a NPDES Permit and the Grantee has a monitoring and reporting procedure.

**8. CLEAN AIR ACT (FEDERAL CONFORMITY REQUIREMENTS):**

This action does not require a written conformity determination in accordance with EPA's rule because:

The installation is in an attainment area. NOTE: The EA or EIS must contain a statement that the action conforms to the applicable State or Federal Implementation Plan, if any, with adequate supporting analysis.

The installation is in a non-attainment or maintenance area and the action falls within an exemption in the rule. Attach a Record of Non-Applicability (RONA) in accordance with Army Guidance. List pollutants:

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 This action is not exempt from the conformity regulation. Attach conformity determination. Describe the mitigation requirements or other restrictions, if any, which must be incorporated in the outgrant:

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**9. ENDANGERED SPECIES:**

Coordination with the USFWS to determine the possible presence of any federally listed endangered, threatened, or candidate species in the action area has occurred (attach correspondence). Provide date of last coordination and describe results of coordination:

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This action will not jeopardize the habitat of any endangered, threatened or candidate species of fish, wildlife, or plants pursuant to the Endangered Species Act or a state listed species.

This action may jeopardize or affect: (identify on an attached map.)

a federally listed endangered or threatened species; list:

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 a federal candidate species; list: \_\_\_\_\_

a state listed species: \_\_\_\_\_

designated critical habitat; describe:

-----  
[ ] This outgranting action may affect a federally listed endangered, threatened, or candidate species and required consultation with the USFWS has been completed. Attach any biological assessment, opinion, and correspondence with the USFWS. Accordingly, the following restrictions must be incorporated in the outgrant to protect the affected species and its habitat:  
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**9. FISH AND WILDLIFE COORDINATION ACT (FWCA):**

[ ] This action will not jeopardize fish and wildlife species or habitat integral to Congressionally authorized mitigation or General Plans, or Army agreed to recommendations in Fish and Wildlife reports prepared under the provisions of the FWCA.

[ ] This action will jeopardize fish and wildlife species or habitat integral to Congressionally authorized mitigation or General Plans, or Army agreed to recommendations in Fish and Wildlife reports prepared under the provisions of the FWCA. Impact description, and recommended actions prior to availability:  
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**10. COASTAL ZONE MANAGEMENT (CZM) (if applicable):**

[ ] CZM is not applicable.  
[ ] CZM is applicable, and a CZM Act determination with the approved state CZM Plan has/will be obtained.

**11. FLOODPLAIN:**

[ ] This property is not located within the 100 year floodplain and does not fall under the purview of Executive Order 11988.

[ ] This property is located within the 100 year floodplain and does fall under the purview of Executive Order 11988 and (check the appropriate):

( ) The proposed occupancy or modification will not adversely impact the floodplain.

( ) There is no other practicable alternative available for this intended use.

( ) The proposed occupancy or modification may be allowed subject to the following restrictions being incorporated in the outgrant document:  
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**12. WETLANDS:**

Does the property to be outgranted contain wetlands regulated under Section 404 of the Clean Water Act (CWA) or falling under the purview of Executive Order 11990:

[ ] No.

[ ] Yes. Attach map showing wetland areas. The following restrictions must be incorporated in the outgrant document:  
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Does the action require a 404 Permit?

No

Yes. State status of Section 404 permit process:

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**13. HISTORICAL AND CULTURAL RESOURCES:**

No historical, cultural, or archaeological sites or resources have been identified on this property.

Historical and/or cultural resources may be present on this property. This action has been coordinated with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation, if applicable, in accordance with 36 CFR 800, and not restrictions apply. (Attach relevant correspondence).

Historical and/or cultural resources have been identified by a survey of this property. This action has been coordinated with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation, if applicable, in accordance with 36 CFR 800. The following restrictions must be incorporated into the outgrant document to protect the property (attach any Programmatic Agreement, MOA, and relevant correspondence):

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Native American graves have been identified on this property. (Refer to requirements of the American Indian Religious Freedom Act and Native American's Graves Protection and Repatriation Act). Consultation on the disposition of Native American graves and objects has been initiated with interested Native American organizations; correspondence attached.

Archaeological sites or resources have been identified on this property. Refer to the Antiquities Act; Archaeological and Historical Preservation Act; and Archaeological Resources Protection Act. The plan for curation and disposition of these resources is attached.

**14. LEAD-BASED PAINT:**

a. Are there improvements constructed prior to 1960 which are considered to contain lead-based paint or which have been determined to contain lead-based paint?

No

Yes. If there has been a survey, attach.

b. Are there improvements constructed between 1960 and 1978 which are considered to contain lead-based paint or which have been determined to contain lead-based paint?

No

Yes. If there has been a survey, attach.

c. Are these improvements the type that children under age seven frequently inhabit, e.g. housing, child care?  No  Yes, lead-based paint notice is required.

**15. OTHER ENVIRONMENTAL CONSIDERATIONS:**

a. Is there any Asbestos Containing Material (ACM) on the property?

No

Yes. If yes, attach any surveys, condition and type.

b. Will the proposed outgrant activity impact an area designated under the Wild and Scenic Rivers Act?

No

Yes. If yes, what conditions may need to be included in the outgrant?

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c. Will the proposed outgrant activity involve the use of insecticide, fungicide, and rodenticide so that compliance with the Federal Insecticide, Fungicide, and Rodenticide Act is necessary, e.g. Agricultural, golf courses, restaurants?

No

Yes. If yes, list:

-----

d. Are there polychlorinated biphenyls (PCBs) present?

No

Yes.

e. Has a radon survey been completed for the buildings to be outgranted?

No.

Yes. Choose one:

no buildings have radon in excess of applicable standards.

the following buildings exceed standards: List with appropriate use restrictions:

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f. Are there any other special-purpose environmental laws applicable to the proposed activity?

No

Yes. Explain:

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g. Is further environmental study required?

No

Yes. Explain:

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16. ADDITIONAL COMMENTS:

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17. I certify that I have reviewed Section C, that is has been coordinated in accordance with applicable command guidance, and that it is accurate and complete. Based on the information provided above, I recommend that the

outgrant be  
[ ] APPROVED [ ] DENIED.

-----  
Date

-----  
SIGNATURE  
Title

18. I have reviewed Section C, Environmental Considerations, including all attachments, and, if this is a lease action, the draft FOSL and EBS, and have determined that the environmental considerations are legally sufficient.

-----  
Date

-----  
SIGNATURE  
(Installation JAG/Counsel)

**SUBJECT:** Contractor Employees in the Federal Workplace and the Protection of Sensitive Information

**PURPOSE:** Provide information about the need to protect sensitive information when contractor personnel or other non-Federal employees are in and around the Federal workplace.

**FACTS:**

1. Contractor employees are not Federal employees. We must be aware of this status to ensure that we protect sensitive information. Improper release of certain information to contractor employees could violate Federal criminal law, result in the lost of technical data (the owner demands its return), and jeopardize procurements.
2. The procurement integrity law protects source selection and contractor bid or proposal information before the award of the procurement to which it pertains.
3. Federal law makes it a crime to disclose a company's trade secrets, processes, operations, style of work, and other confidential information without permission.
4. Release of other information may not violate a specific law, but may result in unfair competitive advantage to the entity receiving the information. The result may be litigation and termination of the contract.
5. How to avoid improper release of information.
  - a. Before discussing sensitive information in a meeting, make sure that you know whether contractor employees are present. Even those in uniform might be employed by a Defense contractor if they are in the Reserve Component.
  - b. If a contractor employee briefs a proposal in a meeting, it is essential that he or she be identified as such.
  - c. Before you give information to a contractor employee for filing, entering into a database, preparing slides, etc., ensure that this information is properly releasable to the employee.
  - d. Do not give a contractor access to a database with other contractors' technical data packages in it, unless the other contractors have agreed to this access by non-Government personnel.
  - e. The Privacy Act protects certain personal information, such as social security numbers, whether it is being maintained by Federal employees or contractor personnel. If you need to give contractor personnel access to Privacy Act information, they must be told of their obligations under the Privacy Act.
  - f. Do not leave sensitive information on our desks or discuss such information in common office areas.

g. Think consciously about protecting sensitive information and instill this consciousness in your employees to avoid the improper release of information.

h. If there is any question about the propriety of the release of sensitive information, consult with the cognizant contracting officer or legal counsel.

## MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Confidential Financial Disclosure Report (OGE 450)

1. The Policy Behind Financial Disclosure. Department of the Army personnel, civilian and military, regardless of assignment, must avoid conflicts and the appearance of conflicts between private interests and official duties. An important tool for identifying, evaluating, and resolving present and future conflicts of interest is the OGE 450 Confidential Financial Disclosure Report.

2. Who Must File. Filing is based on responsibilities, not on specific pay grades or positions. The Joint Ethics Regulation (JER), DoD 5500.7-R, requires DoD employees to file an OGE 450 when their official responsibilities require them to participate personally and substantially through decision making or the exercising of significant judgment in the following areas:

- a. taking an official action related to contracting or procurement,
- b. administering or monitoring grants, subsidies, licenses, or other Federally conferred financial or operational benefits,
- c. regulating or auditing any non-Federal entity, or
- d. conducting other activities in which the final decision or action may have a direct and substantial economic impact on the interests of any non-Federal entity.

3. Others Required to File. The JER also requires DoD employees to file an OGE 450 when their supervisor determines that they should file to avoid an actual or apparent conflict of interest.

4. Time for Filing. Employees who are required to file an OGE 450 should make their initial filing within thirty (30) days of assuming their position. Thereafter, OGE 450's must be filed annually between October 1 and October 31.

5. Where to File. Employees who are required to file an OGE 450 should submit their completed forms to their department or unit designated POC for financial disclosure reports.

6. What Happens to the Form After Filing. After an employee submits the form to a department POC, the form is reviewed for conflicts by the employee's supervisor and then by a CECOM Ethics Counselor. The forms are kept confidential, and they are only filed locally here at Fort Monmouth.

7. What Happens If You Fail to File. An employee who fails to file a report may be subject to disciplinary action including termination from employment. Any employee who knowingly or willfully falsifies information on a report may be subject to criminal prosecution.

/s/

KATHRYN T. H. SZYMANSKI  
Chief Counsel

DISTRIBUTION:  
M, O & R

AMCCC-G

**SUBJECT:** Job Hunting and Post-Government Employment Restrictions

**PURPOSE:** Provide information on restrictions on USAMC personnel when seeking employment, and in subsequent non-Federal employment.

**FACTS:**

1. Seeking Employment. Once an employee begins to seek employment, he or she is disqualified from participating in any official matter that affects the financial interests of the company where seeking employment.

a. Seeking employment begins upon sending a resume, or even with a telephonic or other contact with an expression of interest unless one of the parties unequivocally rejects the contact.

b. If a contractor suggests to an AMC employee that it would like to hire him or her, and the AMC employee responds that he or she would like to think about it, the AMC employee is seeking employment and is disqualified at that point for participating in any official matter that affects that company.

c. If the prospective employer is a USAMC contractor, the AMC employee probably should issue a written notice of the disqualification.

d. If the prospective employer is a bidder or offeror in a procurement in which the AMC employee is participating (e.g., wrote the statement of work, reviewed and approved the statement of work, or on the source selection evaluation board), the procurement integrity law requires the AMC employee to give a special notice in addition to the written notice of disqualification.

2. Post-Government Employment.

a. The procurement integrity law restricts a former agency official from accepting compensation from a contractor for one year after the official held one of the following positions with respect to a contract exceeding \$10 million: procuring contracting officer, source selection authority, member of source selection evaluation board, chief of a financial or technical evaluation team, administrative contracting officer, program manager, or deputy program manager.

b. The procurement integrity law restricts a former agency official from accepting compensation from a contractor for one year after the official personally made one of the following decisions: to award a contract, subcontract, task order or deliver order exceeding \$10 million; to establish overhead or other rates exceeding \$10 million; to approve contract payments exceeding \$10 million; or to pay or settle a claim for more than \$10 million.

c. An officer or employee may not ever represent a non-Federal party back to the Government concerning a particular matter involving a specific party (e.g., contract, task order, delivery order, investigation, audit, etc.) in which he or she participated personally and substantially.

d. An officer or employee may not represent a non-Federal party back to the Government for two years concerning a particular matter involving a specific party which was pending under his or her official responsibility during the last year of Federal employment.

e. Former senior officials (general officers and SES Level V and higher civilians) have a one-year cooling off period:

(1) For one year they may not attempt to influence official action in the agency in which they served in their last year on behalf of a non-Federal party;

(2) For one year, they may not even advise and assist a foreign government to help influence a Federal action (not just in their formal agencies).

3. Ethics advice and counsel are available to assist employees make the transition in compliance with the applicable law and regulation. AMC employees should seek this advice and counsel before they send their first resume.

THIS CORRESPONDENCE IS SENT TO YOU AS ORGANIZATIONAL ELECTONIC MAIL IAW THE PROVISIONS OF AR 25-11, RECORD COMMUNICATIONS AND THE PRIVACY COMMUNICATIONS SYSTEM, AND AMCR 25-1, ELECTRONIC MAIL. THIS IS THE OFFICIAL COPY. YOU WILL NOT RECEIVE A PAPER COPY.

AMCIO-T (25)

4 September 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy Memorandum #97-08, Use of United States Army Materiel Command (USAMC) Communications Systems and Other Resources

1. Reference Department of Defense (DoD) 5500.7-R, Joint Ethics Regulation (JER), 30 August 1993 (w/C2).

2. The USAMC communication systems and resources shall be for official use only, except for authorized personal (non-official) use. These communication systems include Government owned telephones, facsimile machines, electronic mail, internet systems, and commercial systems where the Federal Government pays for their use or access. Other resources include computers, typewriters, calculators, libraries, and similar resources and facilities.

a. "Official use" includes communications, including the Internet, that are necessary in the interest of the Federal Government, as well as emergency communications. Upon approval, official use will be extended to Government employees deployed away from home for an extended period of time on official business.

b. "Authorized personal use" include incidental use of communications, including the Internet, as authorized by this policy memorandum or as specifically authorized by supervisors using guidelines issued under this memorandum. Examples of authorized incidental use include the following:

(1) Personal communications, not involving long distance charges to the Federal Government, made from the employee's usual workplace that are most reasonably made during working hours such as:

(a) Briefly checking in with family members.

(b) Scheduling medical appointments, arranging auto or home repair, and making similar appointments.

(c) Occasional short e-mails to and receipt of e-mail from relatives, friends, and fellow employees.

(d) Making a bank transaction.

(2) Authorized incidental use also includes brief

communications (including long distance service) from a Federal

AMCIO-T

SUBJECT: Policy Memorandum #97-08, Use of United States Army Materiel Command (USAMC) Communications Systems and Resources

Government employee in an official travel status made to family members notifying them of schedule changes.

c. In addition to e-mail, the Internet provides a tremendous resource of information interchange and other communications through such vehicles as mail list servers, databases, files, and web sites. You have permission to use your computers to access these Internet resources for professional development purposes, subject to ensuring that your primary duties and mission are accomplished. Subject to paragraphs 3a(5)&(6) and 3b(3)&(4) below:

d. Under some contracts, similar communications systems resources are provided to contractors for carrying out their contract. Contractors must ensure that these Government-provided resources are used only for the purposes set forth in the contract, except that contractors may permit their employees, who do not otherwise have ready access to contractor facilities, the "authorized personal use" set out in paragraph 1b(1)(a) through (e) above, subject to the specific terms of the contract or other contracting officer direction.

### 3. Responsibilities.

a. Supervisors must review employee use of Federal Government communication systems and resources to ensure that the above guidance is followed. The employee's supervisor must first approve any non-official use of Government communications systems not covered above. To preserve security, supervisors are encouraged to minimize unofficial access to the internet. Before authorizing any non-official use, supervisors must ensure that the communications:

- (1) Do not adversely affect official duties.
- (2) Are of reasonable duration and frequency, and whenever practicable, made during the employee's personal time.
- (3) Serve a legitimate public interest. For example, the use keeps employees at their desks, educates employees on the communication system, enhances professional skills, or assists in job searches in response to downsizing.
- (4) Do not reflect adversely on DoD. For example, the use may not involve sexually oriented material, gambling, chain letters, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or other uses incompatible with public service.

AMCIO-T

SUBJECT: Policy Memorandum #97-08, Use of United States Army Materiel Command (USAMC) Communications Systems and Resources

(5) Do not overburden the communication system.

(6) Do not create significant additional cost to DoD.

b. Supervisors may revoke the authorized personal use noted above, or parts thereof, for any perceived misuse of Federal Government resources. To ensure that such use does not adversely affect the performance of official duties and serves a legitimate public interest, this permission is subject to the following:

(1) Whenever practicable, do it before or after your work hours or during lunch or other authorized break.

(2) If made during your normal work hours, keep the communications infrequent and short.

(3) The Federal Government must not incur any long distance charges for these communications; you must use toll-free numbers, reverse the charges, or charge the communications to your own personal credit card.

(4) This permission does not extend to personal communications to solicit business, advertising or other selling activities in support of a private business enterprise, or any other use that would reflect adversely on DoD or which is incompatible with public service (e.g., threatening or harassing phone calls, gambling, transferring sexually oriented material, or other sexually oriented communications).

(5) You may not send group electronic mailings to offer items for sale or other personal purposes (e.g., selling an automobile or renting a private residence).

c. Employees shall use Federal Government communication systems with the understanding that:

(1) Use of such systems serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or unauthorized.

(2) Use of such systems is not anonymous. For each use of the Internet, the name and computer address of the employee user can be recorded, as well as the locations searched.

(3) Most Federal Government communication systems are not secure. Employees shall not transmit classified information over any communication system unless approved security

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procedures and practices are used (e.g., encryption, secure networks/workstations).

(4) Employees shall not disclose communication system access data (such as passwords) to anyone, unless such disclosure is authorized.

(5) Employees shall use extreme care when transmitting unclassified information or other valued data. Information transmitted over an open network, such as e-mail, the Internet, telephone or fax, is accessible to anyone else on the network. Information transmitted through the Internet or by e-mail is accessible to anyone in the chain of delivery, and may be re-sent to others by anyone in the chain.

d. Supervisors may permit employees limited use of computers, typewriters, calculators, libraries, and other similar resources and facilities, if the supervisor determines that the use:

(1) Does not adversely affect official duties.

(2) Is of reasonable duration and frequency, made only during the employee's personal time.

(3) Serves a legitimate public interest. For example, the use enhances professional skills or assists in job searching resulting from downsizing.

(4) Does not reflect adversely on DoD. For example, the use may not involve sexually oriented material, gambling, chain letters, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or uses incompatible with public service.

(5) Does not create significant additional cost to DoD.

4. This policy is based on the direction and guidance in the Department of Defense Joint Ethics Regulation (DoD 5500.7-R) and the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R., Part 2635) concerning the use and misuse of Government resources and official positions. Violation of this policy will subject military members and employees to possible discipline; additionally, military members are subject to punishment under the Uniform Code of Military Justice. Finally, some misuse of Government resources could result in referral to the local U.S. Attorney for investigation and prosecution for violation of criminal law. Information gathered during the monitoring described in paragraph 2(c)(1) above can be used in any disciplinary or criminal proceeding.

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5. Point of contact for this action is Howard Russell, commercial  
(703) 617-9741, DSN 767-9741, e-mail: **Error! Bookmark not  
defined..**

6. AMC -- America's Arsenal for the Brave.

FOR THE COMMANDER:

//signed//  
JAMES M. LINK  
Major General, USA  
Chief of Staff

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