



Office of Command Counsel Newsletter

December 1998, Volume 98-6

Office of Command Counsel to Hold A-76 Workshop

As profiled in these pages periodically in the last several Newsletters, the issues of competitive sourcing, privatization, contracting out and the A-76 process is of paramount importance to AMC.

AMC attorneys will increasingly be asked to provide legal advice and counsel on the many procurement, personnel, ethics and environmental issues that encompass this discipline. Additionally, we will be a part of the interdisciplinary teams participating in the important planning, consideration, decisionmaking and implementation of the process.

Dates: December 15-17, 1999

To meet this challenge AMC Command Counsel **Edward J. Korte** has asked **Bill Medsger**, Chief, Business Operations Law Division at the HQ, AMC to plan the pro-

gram. The Workshop will be held 15-17 December 1998. Additionally, CECOM Chief Counsel **Kathi Szymanski** volunteered to host the Workshop, and it will be held in the Molly Pitcher Hotel, Red Bank, New Jersey.

AMC has several very important competitive sourcing projects that are currently under various stages of the administrative process. AMC attorneys are integral members of the teams that are participating in the stages of those efforts. We know there will be more proposals in the near future.

An exciting agenda is planned. AMC counsel involved in current competitive sourcing issues and projects will provide critical information to those attendees and Chief Counsel who will soon be engaged in several efforts.

A complete report on the A-76 Workshop will be the theme of Newsletter 99-1.

AMC Legal Office Profiles

A new feature of our bi-monthly Newsletter is a Legal Office Profile. We sincerely thank **John Stone** of the Soldier System Center, Natick, Mass. who was the first to respond to the request.

We hope to profile a different AMC Legal Office in each subsequent edition of the Newsletter.

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Business Cards Can Be An Necessary Expense for Some Federal Employees--Like Who?

The General Accounting Office has changed its approach to the question of using appropriated funds to support the purchase of business cards for government employees.

In response to a request to purchase business cards for employees of the Civilian Personnel Advisory Center, the GAO uses its "necessary expense" perspective. It concludes that it is permissible to use appropriated funds if the employees for whom the business cards are pur-

chased "regularly deal with the public or organizations outside their immediate office."

In GAO Opinion B-280759, the Comptroller General cited a recent opinion by the Justice Department's Office of Legal Counsel (OLC) supporting such expenditures for "mission-related use" by the General Services Administration. OLC used the GAO "necessary expense" analysis. ©

Streamlining Acquisitions through Proper Documentation

HQ AMC's Protest Counsel **Jeff Kessler**, DSN 767-8045, provides a point paper reminding acquisition folks that most bid protest litigation involves, in one way or another, a failure to properly document an acquisition file.

The general GAO standard is set forth in Comdisco, Inc. B-277340, Oct. 1, 1997: "...procuring agencies have a fundamental obligation to ad-

equately document their source selection decisions so that a reviewing forum can determine whether those actions were proper."

Although the FAR often calls for decisions without requiring supporting documentation, reducing to writing is an excellent practice that proves invaluable if litigation occurs (Encl 1). ©

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

Acquisition Law Focus

Protests By Government Agencies

SBCOM's **Phil Hunter**, DSN 584-1299, provides an excellent paper on a recent case in which his organization filed a protest against another Federal agency. The paper contains a factual backdrop to the case. It also contains an analysis of USC Code, Executive Order and FAR provisions related to who is an "interested party" within the context of filing a protest.

Protests are recommended only as a last resort and only when blatant statutory and regulatory violations exist. Governmental agencies must aggressively review CBD announcements to determine if it can satisfy other agencies' acquisition requirements. If you can satisfy an announced re-

quirement, but are prevented from submitting a proposal because of various advertised restrictions, e.g., sole sourceness (only one responsible source), challenge the restrictions and if necessary protest the solicitation prior to the date specified for proposal submission. NOTE: Don't protest unless you are categorically sure that your agency can satisfy all solicitation requirements. Otherwise, we are no better than protesters who submit frivolous, ridiculous and time-consuming protest. Your agency must clearly and unequivocally show a direct economic interest and impact in not receiving the award or not being permitted to submit a proposal (Encl 2). ©

CBD Internet WebSite & Publication Date

AMC Protest Team Leader **Vera Meza**, DSN 767-8177, provided ESC attendees with a point paper highlighting a Court of Claims decision holding that the hard copy publication date, not the elec-

tronic version governs the application of regulatory time provisions. See *FMNI v. US*, No. 98-447C, June 30, 1998, which cites 41 USC 416 as authority for the ruling (Encl 3). ©

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Acquisition Law Focus

Competitive Sourcing and Privatization Legislation: Appropriation and Authorization Acts

HQ AMC acquisition policy counsel **Diane Travers**, DSN 767-7571, provided MSC ESC attendees with an excellent update regarding changes to the DOD competitive sourcing and privatization legislation contained in both the FY 99 DOD Authorization and Appropriations Act. The President signed both laws on 17 October 1998 (Encl 4).

Authorization Act

Several sections are analyzed. For example Sec. 342 amends the reporting and analysis requirements before changing a commercial and industrial type function from performance by DOD civilians to performance by the private sector at 10 U.S.C. 2461. Section 2461 was reorganized with three significant changes.

First, paragraph (a) was changed to read, "A commercial or industrial type function of the Department of Defense that, as of October 1, 1980, was being performed

by Department of Defense civilian employees may not be changed to the performance by the private sector until the Secretary of Defense full complies with the reporting and analysis requirements [of the statute.]"

Second, a requirement was added for the Secretary of Defense to submit a report about a proposed study to Congress prior to its commencement, which must include a certification that the proposed performance of the commercial or industrial type function by the private sector is not the result of a decision by an official of a military department to impose predetermined constraints or limitations on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

A union or other employee representative then has the right to challenge the failure to submit either the report or the certification within 90 days. If the Secretary of Defense determines

the proper documentation was not submitted, the issuance of a solicitation or award of a contract must be delayed until the required documentation is submitted.

Third, the amendment increases the threshold for a waiver from the statutory reporting and analysis requirements from studies with 20 or fewer employees to studies with 50 or fewer employees (but see sec. 8014 of the Appropriations Act).

Appropriations Act

Among the significant provisions in the Appropriations Act is one that requires the Secretary of Defense to submit a report to Congress by 31 March 1999 providing a detailed assessment of the results of DOD's privatization strategy to date. The report must specify those functions or activities selected for outsourcing, the criteria used to select these functions, and the net savings achieved by outsourcing in FY 1996-1998. ©

Putting the Value in Best Value

HQ AMC Protest Litigation counsel Craig Hodge, DSN 767-8940, reports on the recent GAO case Electronics Design, B-279-662.2, August 31, 1998, in which the bidder challenged the acquisition plan as it pertains to price.

In sustaining the protest, GAO stated that the Navy's evaluation and source selection decision did not give significant consideration of price, and therefore, was inconsistent with the Competition in Contracting Act.

Cost or price has not been accorded significant consideration if the agency's evaluation and source selection decision so minimizes the potential impact of cost or price as to make it a nominal evaluation factor. Here, the agency states that price was considered only to determine whether a proposal was eligible for award. To the extent the agency did consider price in this procurement, it was solely to determine basic eligibility for award. Such a consideration of price is nominal; indeed anything less would be to ignore price completely (Encl 5). ©

Central Contractor Registration

IOC Counsel **CPT Marc A. Howze**, DSN 793-8111, has written a paper on the Central Contractor Registration (CCR) (Encl 6). CCR is a database of contractor information that enables contractors to receive payment by Electronic Fund Transfer (EFT) and increases contractor visibility to potential government buyers. By collecting information from each contractor, the CCR provides a central database that records, validates and distributes specific data about contractors to government buyers. While the CCR process will soon be the standard government wide, the Department of Defense (DOD) is the first agency to implement the CCR process across all buying and paying activities.

The DOD developed the CCR to support the President's Executive Memorandum entitled "Streamlining Procurement through Electronic Commerce", dated October 13, 1994 and to comply with the Debt Collection Improvement Act of 1996 which requires contractors

doing business with government to furnish its taxpayer identification number and EFT information.

In the DOD, CCR is not an option. Defense Federal Acquisition Regulation Supplement (DFARS) Subparts 204.73, 212.5, 232.11, 252.204, and 252.232 now require contractor registration in the CCR prior to the award of a contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from a solicitation issued after May 31, 1998.

As a general rule, contracting officers are prohibited from awarding to a contractor that is not registered. Prior to making an award, the contracting officer must verify that the contractor is registered in the CCR database. The offeror is required to provide its Data Universal Numbering System (DUNS) or DUNS+4 number, which the contracting officer will use to verify registration.

Information on CCR may be obtained at www.ccr.edi.disa.mil or 1-888-227-2423. The web site also provides assistance with completing the registration. ©

ADR Comes to the FAR: Highlights of Coverage in Parts 6, 24, 33

The Federal Acquisition Regulations (FAR) was amended effective December 29, 1998, to provide greater coverage/clarity in the area of Alternative Dispute Resolution (ADR) policy guidance. Highlights of changes in FAR Parts 6, 24, and 33 include the following:

- o If this otherwise voluntary method for dispute resolution is requested by the Government or a Contractor, specific reasons must be provided if it is rejected by either.
- o The rule permits a contract with a neutral person as

an exception to requirements for full and open competition.

- o ADR means “any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.”

- o Revises requirements for certification of a claim under the Administrative Dispute Resolution Act to

conform to the requirements under the Contract Disputes Act.

- o Specifies that certain dispute resolution communications are exempt from disclosure under the Freedom of Information Act.

- o Unless required by law, arbitration cannot be required as a condition of contract award. However “an agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.”

Single Award IDIQ Task Order Contracting Successfully Challenged in COFC

HQ AMC acquisition counsel **Lisa Simon**, DSN 767-2552, highlights a recent Court of Federal Claims case on IDIQ task order contracts, WinStar Communications, Inc. v. US, 98-480C, Sept. 9, 1998.

In that case, WinStar objected to GSA’s use of a single award IDIQ task order contract for telephone services, contending that it violated the statutory preference for mul-

iple award IDIQ task order contracts. The court agreed and found that the KO’s single award determination was arbitrary and capricious. The bottom line from the case is that KO’s should provide a detailed analysis in their single award determination (FAR 16.504(c)(1)), which analysis should expressly consider the benefits of multiple awards. In WinStar, the KO did not do this, prompting the court to conclude that

... it is impossible to conclude that a single award will provide more favorable terms and conditions . . . without first considering the terms and conditions which could result from multiple awards. Likewise, the conclusion that the cost of administering multiple contracts may outweigh the potential benefits . . . plainly cannot be made without considering the potential benefits of multiple awards. Finally, the [KO] cannot rationally conclude that a single award is more beneficial to the Government than multiple awards . . . without considering the benefits of multiple awards.

Employment Law Focus

78% Success Rate: ADR for Workplace Disputes--It Really Works!

"One-Person" RIF Does Not Work--Even for Attorney Positions

DA announced the results of its recent survey of ADR programs for workplace disputes in Labor Relations Bulletin #406, November 4, 1998. The results of the survey show approximately 78% of the cases submitted under the activities' ADR programs were successfully resolved without going to formal case processing. One of the more obvious results of the survey was that ADR is not being sufficiently used at installations and activities within the Army.

Other activity comments concerning their local ADR programs include:

O The vast majority of employees using ADR do so to get their problems resolved.

O Cases more appropriate for ADR include performance appraisals, communication problems, written reprimands and harassment/-hostile work environment, though most problems can be resolved under an ADR process.

O A workplace dispute is readily resolved in mediation if: (a) the parties know that mediation is available and what it is; and (b) are willing to honestly attempt resolution.

O Situations in which large financial compensation/damages are sought are harder to resolve in ADR. The same is true where employees are "seeking revenge."

O Few individuals use ADR as a discovery tool.

O Approximately 1,200 cases were identified as being processed under the activities' various ADR programs. Approximately 78% of those cases were successfully resolved during the ADR process. That's approximately 912 cases where the local parties were able to resolve their concerns without the need (and cost) of formal third-party intervention.

The complete report will be sent to AMC labor counselors. POC is **Steve Klatsky**, DSN 767-2304. ©

In the case of Heelen v. Department of Justice, 98 FMSR 7018, August 28, 1998, the US Court of Appeals for the Federal Circuit overturned the RIF of an attorney, highlighting that an agency must provide substantial evidence that it properly conducted a RIF. Here the Court disagreed with both the MSPB Administrative Law Judge and the Board that the agency satisfied this burden. The Court found that the attorney should have been placed in the same competitive level as another attorney who had less seniority. The agency did not establish the reason for placing each GS-15 attorney in separate one-person competitive levels. ©

Employment Law Focus

FSIP: Agencies Have Burden in Flexible/Compressed Work Hour Cases

The DA recently highlighted the extent of the management burden concerning disputes over flexible and compressed work hours. Section 6130-32 of Title 5 requires activities to negotiate with their labor organizations concerning the establishment or termination of flexible or compressed work schedules. If an impasse is reached, the matter is elevated to the Impasses Panel. For management to be successful, it must prove that the schedule creates an adverse agency impact. (See 5 USC 6131.)

In Department of the Army, U.S. Army Ordnance, Missile and Munitions Center and School, Redstone Arsenal, Alabama and Local 1858, AFGE, 90 FSIP 21 (1990), the Panel held that under the Flexible and Compressed Work Schedule Act (the Act), an adverse agency impact determination must be made by the agency head.

The DA asked the FSIP whether Army Regulation

690-990-2, Book 610, Hours of Duty, Subchapter S1-1a, was sufficient to demonstrate delegation of this authority. The portion of the regulation provides, "Authority for establishing and changing the tours of duty of civilian employees is delegated to the commander of any activity employing civilian personnel. This includes the authority to approve overtime and to establish flextime schedules."

The FSIP response reminds us that each installation coming before the Panel on a flexible or compressed work schedule impasse must provide a copy of the regulation with its position. Failure to provide a copy of the regulation containing the delegation authority with your adverse agency impact arguments will likely result in the Panel directing the implementation or continuation of the flexible or compressed work schedule. ©

EEO Complaints from Contractors

The DA Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) has distributed, through EEO channels, interim guidance on EEO complaints from individuals who are not federal employees (i.e., contractors) alleging discrimination or reprisal involving Army personnel with whom they interact.

EEOC's position is that a contractor and its client can be held jointly and severally liable for discrimination against an individual.

The Notice expresses EEOC's intent to allocate responsibility for front pay, back pay, compensatory, punitive, liquidated and other damages between and among liable "joint employers" in the manner that maximizes the potential relief to the complainant. Relying upon King v. Dalton, 895 F.Supp 831 (E.D. Va. 1995), EEOC Notice 915.002 asserts that this joint employer theory is applicable to federal agencies, but it does not explain how such allocation would be effected across sector lines.

The EEOC Notice acknowledges that a federal agency may be held liable for discrimination only in its capacity as a common law "employer" of the complainant. ©

Employment Law Focus

Lautenberg Amendment: Firearm Disability Held Unconstitutional

HQ AMC Labor Counselor **Cassandra Johnson**, DSN 767-8050, provided ESC attendees with a point paper updating commanders on a DC Court of Appeals decision that the Lautenberg Amendment is unconstitutional (Encl 7).

The Omnibus Consolidated Appropriations Act of 1997, amended the Gun Control Act of 1968 with the inclusion of the Lautenberg Amendment (18 USC section 921, 922). It created a new firearms "disability" and made it a felony punishable by up to 10 years in jail for:

○ any person convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce or possess or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce; or

○ any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that such person has been

convicted in any court of a misdemeanor crime of domestic violence.

The United States Court of Appeals for the District of Columbia Circuit issued a decision adverse to the United States in Fraternal Order of Police (FOP) v. United States, No. 97-5304, 28 August 1998. The Court held that the Lautenberg Amendment violates the Equal Protection Clause and is therefore unconstitutional. The Court found unconstitutional the provision prohibiting the possession of firearms in an official capacity by police officers convicted of misdemeanor crimes of domestic violence, while allowing police officers with felony convictions to continue to possess firearms in their official capacities. An appeal has been filed.

DA's guidance is to coordinate with the MACOM and DAJA before initiating an adverse action against an employee who cannot perform the duties of his/her position because of the Lautenberg Amendment. ©

Federal Employment Down 343,000 in the 1990's

In the 1990's the Federal Government reduced its rolls by 343,000 with the Defense Department accounting for 281,000. The total DOD civilian employment of 693,000 is the first time since 1948 that the figure was below 700,000. At the same time, employment in the state and local governments increased by 2 million. ©

Employment ADR: An Overview

Kay Krewer, Chief, TACOM-ACALA Legal Group, DSN 793-8414, has written a paper entitled "An Overview: The Use of Alternative Dispute Resolution for Employment Related Disputes." The paper discusses the characteristics, benefits and disadvantages of ADR, describes private and public sector experiences with ADR, raises issues such as binding arbitration, of which EEOC is an outspoken critic, and concludes with a discussion of the future of ADR. All in all an excellent way for labor counselors, and others, to learn a great deal about ADR (Encl 8). ©

Greening of America through Executive Order: Waste Prevention, Recycling and Federal Acquisition

A Strategy for Environmental Justice

HQ AMC Environmental Team Leader **Bob Lingo**, DSN 767-8082, prepared a Point Paper for the ESC, alerting commanders of EO 13101, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, which imposes additional requirements from those previously required by EO 12873, which is superseded (Encl 9).

EPA and States are directed to include an evaluation of compliance with the requirement to have an affirmative procurement program for EPA designated items made from recovered material as part of their multi-media inspections of Federal Facilities.

Contracts for support services at Government owned or

operated facilities, as well as contracts for operation of such facilities, shall require the contractor to comply with the EO requirements.

The Order continues and strengthens the requirement to purchase EPA designated items containing recovered materials and to have affirmative procurement programs for such items.

Agencies must provide written justification for not purchasing EPA designated items that meet or exceed EPA guidelines.

The DAR Environmental Committee has reported to the DAR Council recommending necessary changes in the Federal Acquisition Regulations to implement the requirements. ©

Environmental Justice issues are increasingly coming under scrutiny, since the President issued Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations. The Army has issued interim strategy and will be issuing final guidance and implementation strategy in 1999. A copy of the interim Army guidance, and the March 1995 DOD Strategy on Environmental Justice may be obtained by contacting **Robert Lingo** at DSN 767-8082 or blingo@hqamc.army.mil. To keep track of the latest developments and policies in this area, an excellent source is the EPA's Office of Enforcement and Compliance Assurance's Office of Environmental Justice Home Page, at <http://es.epa.gov/oeca/oelj.html>. ©

Environmental Law Focus

Report on AMC Environmental Restoration Workshop

The AMC Environmental Restoration Workshop was held on 17-19 November 1998. At the workshop, it was reported that AMC is continuing to do an excellent job executing its environmental restoration program. In particular, the total estimated environmental cleanup costs for Army were reduced from \$7.5 billion (FY 98) to \$6 billion (FY 99). In addition, the Army is initiating the following programs to further improve the environmental restoration process:

* **Independent Technical Review (ITR)** - The purpose of the ITR (formerly known as "Peer Review") is to have a team of experts take a fresh look at environmental projects and provide recommendations improve the decision making process. This program is intended to assist the installation in ensuring that the environmental restoration program is implemented in a protective and cost effective manner. The AMC installations proposed to be visited next year include APG, Badger AAP, DPG, Iowa AAP, Joliet AAP, Kansas AAP, Lake City AAP, Redstone Arsenal, and Tooele Army Depot.

* **Groundwater Pump and Treat Review** - One of the most significant challenges facing the Army environmental restoration program is reducing the long term costs associated with pump and treat operations. In FY 99, the Army Environmental Center will be visiting 6 installations to review pump and treat operations and develop alternatives to reduce the long term cost of these operations. The AMC installations proposed to be visited include Riverbank AAP, Twin Cities AAP, Milan AAP, Pueblo Chemical Depot, and Tooele Army Depot.

* **Site Closeout Guidance** - The Army environmental restoration program is reaching the point of completing cleanups at various installations. However, even after the last remedy is in place, there will still be long term environmental restoration responsibilities (e.g., long term O&M for pump and treat operations, institutional control monitoring, etc.). In the near future, the Army will be publishing a draft Site Closeout Guide to address these long-term responsibilities.

If you have any questions regarding the AMC Environmental Restoration Workshop, please contact **Stan Citron** at DSN 767-8043 or scitron@hqamc.army.mil.

Going to the Source on Historical Preservation

Need to look up the law or regulations related to historic preservation and cultural resource management. The Fort Worth District, U.S. Army Corps of Engineers has prepared a CD-ROM Legal Sourcebook, Historic Preservation and Cultural Resource Management for AMC. The District should have sent a copy to your installation or MSC Cultural Resource Manager. For more information, contact **Robert S. Lingo**, DSN 767-8082 or blingo@hqamc.army.mil.

ELD Bulletins

Environmental Law Division Bulletins for November and December 1998 are provided (Encl 10 and Encl 11) for those who have not received an electronic version or who have a general interest in Environmental Law.

Focusing on ADR: Partnering, DOJ Interagency Group and More

Partnering

DOJ ADR IAWG

Steve Klatsky, AMCCC, DSN 767-2304, prepared a point paper for the ESC highlighting the successful implementation of 18 Partnering Workshops held in conjunction with Roadshow VII. (Encl 12). The paper mentions a Roadshow VII Partnering After-Action Report, distributed during the ESC, which has been provided to AMC MSC Chief Counsels. The report highlights the success stories of these Partnering efforts, discusses barriers to expanded Partnering, and makes specific references to experiences at each of the nine Roadshow stops.

Additionally, the point paper (and after-action report) highlights significant AMC Partnering Program activities for 1999.

First, in January the AMC Partnering Team will host the AMC MSC Lead Partnering Champions in a 1 _ day Workshop to review where we are in reaching General Wilson's goal of institutionalizing Partnering as an AMC business practice.

Second, the AMC Partnering Team and MSC Lead Partnering Champions are developing an MSC Partnering "self-assessment" to determine where we are on this important initiative.

Lastly, the AMC Partnering Team is compiling an inventory of AMC Partnering arrangements conducted under the AMC Partnering Model. A report on this inventory will appear in the February 1999 Newsletter 99-1. ^c

The Department of Justice has been asked by the President to lead interagency committees to facilitate and encourage agency use of Alternative Dispute Resolution. President Clinton asked the Attorney General to convene an Alternative Dispute Resolution Working Group, designated under 5 U.S.C. 573c, and subgroups to focus on the acquisition, workplace, claims and civil enforcement areas.

The DA OGC has implemented this by asking components to provide representation to four subgroups, as described above. **Steve Klatsky** represents on the Contracts and Procurement Section by **Vera Meza**, and in the Workplace Section AMC. A complete list of Army representatives is provided (Encl). The Intergency ADR Working Group (IADRWG) has established an excellent WebSite www.financenet.gov/iadrwg. The site has the official minutes of subgroup meetings and information on ADR developments.

Comments on the initial meetings of the Contracts and Procurement Section and Workplace Disputes Section are provided by Vera (Encl 14) and Steve (Encl 15).

DA DOJ ADR IAWG Representatives

We have provided a complete listing of DA representatives to the four Department of Justice ADR Interagency Working Groups. Periodically you will receive updates as to the specific ac-

tivities of these groups. (Encl 13).

AMC, USACE and TJAG are all represented reported to the DA ADR Specialist at the Office of General Counsel.

DOJ: KEY ELEMENTS TO IMPLEMENTING A SUCCESSFUL ADR PROGRAM

1. Review the Administrative Dispute Resolution Act of 1996 and the Presidential Memorandum of May 1, 1998, for legislative and executive guidance.

2. Learn as much as possible about existing federal ADR program structures to avoid unnecessary duplication of effort in creating your agency's program.

3. Visit the Working Group's ADR website at www.financenet.gov/iadrwg.htm to obtain useful ADR documents, get recent updates on federal ADR developments, and participate in newsgroup discussions with ADR experts in other federal offices.

4. Ensure that your agency makes a long-term commitment by senior leadership to the establishment of an ADR program, pursuant to the Presidential Memorandum.

5. If your agency does not yet have a policy statement on the use of ADR, encourage your agency leadership to adopt the ADR Declaration of Policy prepared by the Working Group which is provided on the Working Group's website.

6. Secure the financial resources, dedicated staff-

ing, and expertise necessary to establish and operate a federal ADR program. This includes a support structure to match agency ADR needs with appropriate agency or private-sector ADR resources.

7. If your agency has not yet done so, appoint a Dispute Resolution Specialist as required by the 1996 Act, so that there will be a clear point of contact for those wishing to use the agency's ADR program.

8. Ensure that appropriate agency personnel receive ADR education and skills training which can encompass both the theory and practice of negotiation, mediation, and related ADR techniques for both program managers and the agency counsel.

9. Review the agency's standard agreements, contracts, grants, and other documents to determine whether to amend such standard agreements to authorize and encourage the use of ADR if disputes arise.

10. Create a system to track ADR use and "lessons learned" to ensure continued progress toward the goals identified in establishing the ADR program. ©

AMC Reorganizations Effective 1 October 1998

The following list contains changes within AMC that became effective 1 Oct. 1998. Other personnel changes such as new Commanders, Chiefs of Staff etc. are continually being made to the Organizational charts and MSC/SRA listings.

USA Communications-Electronics Command, (CECOM) assumes full Command and Control of Tobyhanna Army Depot;

USA Aviation and Missile Command, (AMCOM) assumes Operational Control of Corpus Christi Army Depot and Letterkenny Army Depot;

USA Tank-automotive and Armaments Command, (TACOM) assumes Operational Control of Red River Army Depot and Anniston Army Depot;

USA Soldier and Biological Chemical Command, (SBCCOM) stands up as result of merger of USA Chemical, Biological and Defense Command, (CBDCOM), USA Solder Systems Command (SSCOM), and Surety Field Activity; and, USA Research Laboratory Command absorbs the Army Research Office. ©

Gifts, Mementos Fiscal Law & Ethics Too

AMC Fiscal Law Counsel **Lisa Simon**, DSN 767-2552, provides two papers on the issue of gifts and mementos as they relate to fiscal law matters.

GAO Case Law

First is a list of GAO cases on gifts and mementos, (Encl 16) covering such matters as mugs, pens, food vouchers as incentive awards, jackets, belt buckles, and telephones.

Second, is a paper focused on mementos. This Resource Management/Command Counsel memorandum provides guidance about purchasing mementos (Encl 17).

Mementos

By mementos, we mean things like plaques, trophies, caps, jackets, tote bags, pencils, stickers, mouse pads, coasters, magnets, jar openers, and knives that we give to employees, customers, or other people.

The basic rule is that we cannot use appropriated

funds to purchase these types of items. The General Accounting Office (GAO) has consistently told us that they do not want us to use our program funds for mementos because they consider them to be personal gifts. That said, there are several exceptions to the basic rule, addressed in the paper.

Exceptions

The rules for these exceptions vary depending on the type of funds, the recipient, and the purpose of the purchase.

Under limited circumstances, we can use appropriated funds to purchase modest promotional items. Generally, we have to show that the items are a necessary expense for the fulfillment of our mission. This means that the mementos must make a "direct contribution" to carrying out our mission. In order to meet this standard, we must be able to point to a law or regulation that allows us to purchase and distribute mementos. ©

AMC employees are in the process of completing their Confidential Financial Disclosure Reports (OGE Forms 450). "Confidential" means that these reports contain nonpublic information, are not releasable under the Freedom of Information Act, and they must be protected. Here are some helpful hints to preserve the confidentiality of the OGE Reports as much as possible:

Keep the number of people who have to handle the reports to the absolute minimum.

When not actually processing the reports, keep them out of sight.

No one, without a need to know, should ever review them.

When submitting to supervisor for review, use a PERSONAL INFORMATION cover of some sort.

When submitting to the legal office, send or bring them in a sealed envelope with some sort of restrictive marking (e.g., PERSONAL INFORMATION, TO BE OPENED BY ETHICS OFFICIALS ONLY, etc.)

Contractors in the Federal Workplace--A Fact-Filled Point Paper

HQ AMC Ethics Counsel **Mike Wentink**, DSN 767-8003, just completed an outstanding ethics training cycle highlighting the issue of Contractors in the Federal Workplace. The panel conducted training sessions at HQ AMC, for DSMC, and will soon accomplish the same for OGE in an Interagency Ethics Council session.

In addition, Mike prepared a Point Paper for the ESC highlighting several matters related to this issue (Encl18).

Remember that contractor employees are **not** Federal employees.

Identify contractor employees as such with distinctive security badges, and otherwise ensuring that our employees and members of the public understand their status.

Be aware of intellectual property rights consequences of contractor employee work products created in the Federal workplace. Generally, the contractor will be able to commercially exploit soft-

ware or inventions that it creates in the Federal workplace.

Avoid giving incumbent contractor unfair competitive advantage by including its employees in meetings to discuss aspects of the re-competition, or by accidentally allowing the contractor's employees to overhear or gain access to planning information.

Identify possible conflicts by contractor employees.

Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information. Release of certain types of information to contractor employees could violate the procurement integrity law, the trade secrets act, the Privacy Act, or other laws.

Beware of gifts from contractor employees. Even if they work in the Federal workplace, they are "outside sources" and the rules for their gifts are very different than the rules for gifts between employees.

Address ethical issues promptly and confer with legal counsel. ©

Mike Wentink also provided ESC attendees with an update and reminder of the frequent flyer rules and requirements. This is always such a difficult and sensitive subject, inasmuch as common sense seems to have flown out the window—no pun intended (Encl 19).

This paper highlights the following concerns:

Frequent flyer miles earned while TDY belong to the Government. They may not be used for personal travel, donated to a charity, or given to anyone else, even if the Government cannot use them.

DOD policy is to use "official" frequent flyer miles to reduce the cost of future TDY travel. However, they also may be used to upgrade the traveler.

DOD policy is to use "official" frequent flyer miles to reduce the cost of future TDY travel.

There are some great rules concerning being involuntarily "bumped" from your flight while TDY, which are very different than those when you volunteer to be "bumped".

Ya better read the whole paper to get this one right. ©

AMC Legal Office Profile

Soldier Systems Center, Natick, Mass.

Tin Soldiers

Do you remember the story of the Steadfast Tin Soldier? A craftsman melted down a set of spoons to create a set of tin soldiers, but there wasn't quite enough to finish the set, and so the last tin soldier had only one leg. But this tin soldier stood his ground courageously, persevering against many misfortunes, even surviving a tumble off the mantle, out the window, into the storm drain. He was eventually swallowed by a large fish, which was caught and served up for dinner at the tin soldier's home, and so he returned to the mantle in triumph.

In many ways the steadfast tin soldier reminds me of the small but dedicated group of legal professionals whom I have had the privilege to lead for the last four years. It often seems that we haven't been given some important pieces that we really need to do our jobs (although some people accuse us of being not all there"). We have occasionally been asked to make bricks out of straw (sorry, different allegory). We have survived a number of

stressful journeys and harrowing metamorphoses, some of which might be likened to being swallowed up. But we remain focused on our mission, and the mission of our command.

The Mission

The mission of the AMC organization located at Natick, Massachusetts has also been fairly constant over the last 45 years, though the organization has been anything but. It's a mission that has always focused on ensuring that the American soldier is the best fed, best equipped warfighter in the world. Our product lines are the necessities of life: food, clothing, and shelter. Not to mention precision guided airdrop capability. And laser protective lens technology. And boots that keep your feet from being blown off if you step on a landmine. That kind of thing. It's a great mission and we love it, no matter what the organization happens to be called today.

The Command

The Soldier Systems Center is what it happens to be called today, or SBCCOM North. SBCCOM, in case you haven't heard, stands for the Soldier and Biological Chemical Command, headquartered at the Edgewood area of Aberdeen Proving Grounds (SBCCOM South). This new MSC is the result of a merger of the Soldier Systems Command and the Chemical Biological Defense Command. Most folks who have been around AMC for awhile just say "Natick."

The People

Let me tell you about the staff of the Soldier Systems Center Legal Office. There are 6 attorneys, a paralegal specialist, and a secretary. As is often the case with small offices, we are all generalists, with the exception of Vin Ranucci, our Intellectual Property Counsel. Although not on our TDA, we currently enjoy the support of 2 trained 71Ds, who are assigned at Natick as Human Research Volunteers. Our "ranking members" (in terms of length of time at Natick, NOT AGE!) are **Jessica Niro** and **Richard Mobley**.

AMC Legal Office Profile

Soldier Systems Center, Natick, Mass. (Continued)

Jessica Nero

Jessica, who has been described by COL Buzz France as “the best paralegal in the Army” is very involved with the IP caseload and CRADA processing, and is developing OTJ expertise in the mysteries of foreign filing.

Richard Mobley

Richard is going for the AMC record on number of GAO protests on a single procurement, and can recite all the “Ed Korte” lines from the AMC ethics script verbatim. When he isn’t hip deep in procurement and ethics responsibilities, he’s having fun with FOIA.

Jim Savage

Jim is a name known to many of you. Jim was recovered from the icywaters of the Charles River after the SS Watertown Arsenal was sunk by a BRAC. He is Natick’s Labor Counselor, and now the team leader for labor and administrative law in the merged SBCCOM legal office.

Vin Ranucci

Vin is SBCCOM’s new team leader for Intellectual Property, and spends much of his time trying to find another member of that team. Actually, Vin brings considerable IP experience and business acumen from his days with DOE, Navy, Air Force, Digital Equipment Corp. and Eaton Corp. We hope that Vin has found a job that he can stick with for awhile.

Peter Tuttle and **Srikanti Dixit** round out the general attorneys in the office.

Peter Tuttle

Peter brings a background as a Safety Specialist and a stint in DCMC’s Boston legal office to bear on his responsibilities as our Environmental attorney and procurement advisor. His talent as a hockey player may explain his reputation for skating the edges, but not the thin ice. Peter has found many fans while providing advice to the IMMC in the A76 arena.

Srikanti Dixit

Sri is our newest attorney. Sri previously worked

with us as a legal intern while she was in law school, and we were fortunate to be able to bring her on permanently this past February. She’s getting a crash course in acquisition and admin law issues, and seems to have a dangerous attraction to Marine Corps programs.

Maria McDermott

Which leaves Maria McDermott, the office secretary, and me. Maria, an excellent office administrator. Maria recently returned to the office from maternity leave, after giving birth in August to a beautiful girl, Nicole.

John Stone

I have been in the AMC legal family since 1986, both as an active duty “AMC-JAG Corps MOU Intern” at TACOM, and as a civilian attorney at TACOM and Natick. I like to think I am a better lawyer than I was a soldier. I have always admired the quality of this firm, the best law firm in government, and I appreciate the continuing opportunity to be a part of it. I would really appreciate having the opportunity continue for a few more years yet.

Faces In The Firm

Departures

AMCOM

CPT Christopher J. Wood is leaving active duty and has accepted a position as a civilian attorney with the Corps of Engineers in Huntsville, AL.

Jeffery L. Augustin is leaving the Federal Service and has accepted a position with the State of Missouri in Jefferson City, MO.

Brian E. Toland has accepted a position with Defense Contract Management Command in Hartford, Connecticut, and will be relocating there in January.

Nancy Claggett is returning home to St. Louis where she will be working for the Defense Information Systems Command.

Awards & Recognition

HQ AMC

Linda Mills received the Chief of Staff's coin for her participation in the Disabilities Program.

WSMR

SGT Christopher Buscarini was selected as the AMC Noncommissioned Officer of the Year. He is now attending the Basic NCO Course at Fort Jackson, SC, and will be promoted to SSG upon return to Whites Sands.

Captain Marc Howze, Acquisition Law, was presented the Army Achievement Award. Major General Joseph Arbuckle made the presentation in an unannounced visit to the Law Center on 24 November.

Promotions

HQAMC

Debbie Arnold has been selected as Technology Licensing Specialist in the Intellectual Property Division.

IOC

Brad Byrnes, Deputy Staff Judge Advocate, was promoted to Major on 1 October 1998.

Births

IOC

Brian Weber, former Captain in the IOC Law Center, and his wife Mary are the proud parents of a baby boy. Michael James, weighing in at 6 lbs., 14 ozs., was born 5 November. The Weber's now live in New York. Congratulations to mom, dad, and big sister Katherine!

Mary Lou Massa, Legal Assistant, General Law/Installation Support, became a grandmother for the third time on 13 November. Gramma "Lou" and Grampa Chuck's daughter, Kristin and her husband, Rob Davis, celebrated the birth of their first child, Alyssa Jo. Alyssa weighed in at 7 lbs., 4 1/2 ozs.

AMCOM

Brian and Andrea Toland are the proud parents of Peter Thomas Toland, who was born on 7 October. He weighed 6 pounds and 14 ounces and was 18 inches long.

Jessica Augustin was born on 7 October 1998 to **Jeff and Michele Augustin**. She weighed 9 pounds, 2 ounces and was 22 inches long.

SUBJECT: The Balance Between Streamlining and Documentation of Source Selections

PURPOSE: To emphasize the need for appropriate documentation of procurement files within the context of acquisition streamlining.

FACTS:

Documentation of decisions and determinations during the acquisition process is necessary to satisfy legal requirements. It also helps the decision maker clarify his own thinking, and facilitates defense of the procurement against challenge by unsuccessful offerors.

Unquestionably, documentation of procurement decisions takes time, effort and thought.

Litigating procurement decisions takes substantially more time, effort and thought than contemporaneous documentation.

Most bid protest litigation involves, in one way or another, a failure to properly document the file.

The Federal Acquisition Regulation (FAR) contains directions that certain decisions be in writing. Sometimes it specifies the form of the required document (a Justification & Approval, or a Determination & Findings).

The FAR frequently specifies that a contracting officer make a determination, without an express direction that these determinations be in writing. Proper documentation practice is that these determinations be reduced to writing.

The General Accounting Office has a generalized standard, that "...procuring agencies have a fundamental obligation to adequately document their source selection decisions so that a reviewing forum can determine whether those actions were proper." Comdisco, Inc., B-277340, Oct. 1, 1997. This standard is implemented on a case by case basis. Your acquisition could be the one that gets "bombed."

Proper documentation, in the long run, is the best way to streamline your acquisition.

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PROTEST BY GOVERNMENTAL AGENCIES

By Phil Hunter, SBCCOM

The U.S. AMC Treaty Laboratory (AMCTL), an element of the U.S. Army Soldier and Biological Chemical Command (SBCCOM), Aberdeen Proving Ground, Maryland, recently filed an agency level protest against a solicitation issued by the National Institute of Standards and Technology (NIST), an element of the Department of Commerce. The protest was filed because NIST refused to: a) extend the proposal submission period; b) remove blatant ambiguities from its solicitation's statement of work (SOW); c) include meaningful discriminators in Section M and; d) include required Federal Acquisition Regulation clauses and provisions in the Request for Proposal (RFP). AMCTL prevailed in the protest.

AMCTL utilized NIST'S Alternate Dispute Resolution (ADR) process to proactively advance its position. Discussions with NIST's Attorney and Contracting Officer (prompted by AMCTL) were ongoing during the pendency of the protest. This protest was unique only from the perspective that both the protester and recipient of the protest are federal agencies. This novelty begs the question of whether one federal entity can be considered an "interested party" (within a protest context) if it files a protest against another federal entity. My conclusion is yes, absent statutory or regulatory restriction(s) to the contrary.

The below background, statutory, regulatory and conclusionary information is provided in support of the ADR approach that was utilized in allowing AMCTL to continue to compete and possibly obtain an award in another federal agency's acquisition.

During this era of downsizing and tight budgets, we can ill afford to accept untenable answers from agencies that knowingly or unknowingly place stumbling blocks that impede potential utilization of our capabilities. Our solution was to be proactive via the protest route. Protests are recommended only as a last resort and only when blatant statutory and regulatory violations exist. Protect your client's interest; utilize processes, procedures, remedies, etc., available to contractors, unless prohibited by law.

BACKGROUND INFORMATION

The protested solicitation is NIST's RFP # 52SBNB8C1087. It is for analytical services for retention Indices and Gas Chromatography-mass spectrometry of chemical weapons compounds in complex matrices. The work to be performed consists primarily of identifying, analyzing and reporting the results of some very lethal chemicals. Only six (6) laboratories in the world are approved to perform work pursuant to the RFP SOW. AMCTL is the only approved lab in the United States.

NIST initially synopsised its requirement in the Commerce Business Daily (CBD) as a sole-source acquisition to VERIFIN Laboratory, of Finland. NIST incorrectly stated that VERIFIN was the only lab capable of satisfying RFP requirements. AMCTL vigorously challenged the sole source determination and prevailed. NIST thereafter changed the acquisition from "sole source" to "full and open competition". All potential Offerors were thereby allowed to compete for an award. In the process of changing its acquisition approach, NIST failed to redraft its RFP to remove inherent SOW ambiguities and vagueness that often appear in sole-source acquisitions.

THE PROTEST

The protest was filed because the Department of Commerce refused to:

Remove ambiguous language from the SOW;

Include required Federal Acquisition Regulation (FAR) Clauses and Provisions in the request for proposal (RFP);

Extend the proposal submission period by approximately ten (10) days due to clarifications provided to the SOW;

Include objective discriminators as evaluation criteria in Section M of the RFP.

Based upon this refusal, and the strict time constraints imposed on filing a protest (i.e., defects in the RFP must be filed prior to RFP closing date and time) and the unavailability of an immediate and effective forum and remedy to correct the identified defects, a protest was reluctantly filed.

FAVORABLE ACTION AFTER THE PROTEST

Approximately ten (10) days after the protest was filed, the Protest Decision Authority (PDA) for NIST, requested AMCTL to address the issue of whether our agency possessed statutory authority, as an "Interested Party" (IP), to file a protest against NIST, due to its federal agency status. This very vexing issue became moot when both agencies' counsels, and the contracting officer, telephonically discussed (using ADR techniques) ways to resolve issues in order for the acquisition to proceed. Good faith discussions occurred and the results were that SBCCOM withdrew its protest, with prejudice; the KO agreed to amend the RFP and remove ambiguities from the SOW, and; extend the proposal submission period by 30 days. Without discussions, the protest would have continued indefinitely (with a possible appeal to the General Accounting Office).

Irrespective of the favorable outcome (from our Command's perspective), the troubling issue of whether one governmental agency can file a protest --as an "**interested party**"-- against another governmental agency remains. I am of the opinion that protest can be filed absent some prohibiting federal statute. Authorities supporting said position follow.

APPLICABLE LAWS AND REGULATIONS

To my knowledge, no federal statute, law, or regulation exists that prohibits a federal agency from being considered an "interested party" within the context of filing a protest. The only criteria an offeror must meet in obtaining "interested party" status are: 1) you must be an actual or prospective bidder; and 2) your direct economic interest must be affected by the award or failure to award the contract. No other criteria are specified in law. The law is silent in segregating federal vs. non-federal protesters. No distinctions are specified. Absent express statutory or regulatory prohibition, agencies are not barred from filing protests as "interested parties".

1. 31 USC § 3551 defines an "Interested Party" as:

“[W]ith respect to a contract or a solicitation or other request for offers...means an **actual or prospective bidder** or offeror whose **direct economic interest** would be **affected by the award** of the contract **or by failure to award the contract**”

FAR 33.101 incorporates this definition verbatim.

2. FAR 1.102-4(e), supports the principle that unless prohibited by law, the government has standing to file a protest. It reads:

[I]f a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, Government members of the Team should not assume it is prohibited. Rather, **absence of direction should be interpreted as permitting the Team to [be] innovative and use sound business judgment** that is otherwise consistent with law and within the limits of their authority. (emphasis supplied)

3. FAR 33.102 states that “Contracting Officers shall consider all protests...if, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award *does not comply with the requirements of law or regulation*, the head of the agency may...take any action that could have been recommended by the Comptroller General had the protest been filed with the General Accounting Office....

4. FAR 33.103 permits the filing of an *agency level protest* and reveals that *Executive Order 12979*, establishes policy on agency procurement protests and states that an “agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel are acceptable protest resolution methods”.

5. Executive Order 12979 read in part

“in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered that procedures prescribed pursuant to this order shall...emphasize that whenever conduct of a procurement is *contested*, *all parties should use their best efforts to resolve the matter with agency contracting officers*...allow actual or prospective bidders or Offerors *whose direct economic interests* would be affected by the award or failure to award the contract to **request a review**, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester”.

6. 10 U.S.C. § 2304 (a)(1), states that “[e]xcept as provided in ... the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a *procurement for property or services* ... shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and ... shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.”

7. Federal agencies are equally protected from violation of federal statutes and regulations by other federal agencies to the same degree as the private sector. No discrimination in the application of procurement laws is permitted under the U.S. Constitution.

The above cited authorities fail to expressly, or by implication, disqualify a federal entity from an "interested party" status. In fact, they encourage potential bidders and bidders to resolve conflicts as quickly and economically as possible. Federal agencies must be accorded the same laws, fairness, rights to compete, privileges and immunities, etc., as the private sector. Full and open competition is the byword in this acquisition environment.

DIRECT ECONOMIC INTEREST

The Army's AMCTL was established as a laboratory which is partially Army treaty mission funded and partially customer funded (by other DOD services and other Government Agencies). Customer work is continually sought which is related to treaty efforts. This acquisition involves treaty work. The work in this solicitation would clearly provide both critical funding and new, state of the art treaty experience and scientific information. This experience will enhance the UNITED STATES' capability to perform treaty mission work in support of CWC. The work is significant to the readiness and capability of the UNITED STATES and the US ARMY.

If a federal agency has a direct economic interest and will be affected by an award decision, it cannot be excluded from the competition. AMCTL has a direct economic interest in subject acquisition and is an interested party, as defined by 31 U.S.C. § 3551.

CONCLUSION AND LESSON LEARNED

Governmental agencies must aggressively review Commerce Business Daily announcements to determine if they can satisfy other agencies' acquisition requirements. If you can satisfy an announced requirement, but are prevented from submitting a proposal because of various advertised restrictions, e.g., sole sourceness (only one responsible source), challenge the restrictions and if necessary protest the solicitation prior to the date specified for proposal submission. NOTE: Don't protest unless you are categorically sure that your agency can satisfy all solicitation requirements. Otherwise, we are no better than protesters who submit frivolous, ridiculous and time-consuming protests. Your agency must clearly and unequivocally show a direct economic interest and impact in not receiving the award or not being permitted to submit a proposal.

The timeliness rules relative to filing protests inhibit us sometimes from waiting on agencies to do the right thing. If we fail to protest within 10 days of...or prior to the deadline for submission of proposals, we lose by default due to our failure to act.

The broad mission of the AMCTL is to provide sampling and analysis services and expertise for the protection of U.S. interests under bilateral and multilateral chemical treaties.

SBCCOM became a new command on 1 Oct 98, as a result of the merger of Chemical and Biological Defense Command, Aberdeen Proving Ground, Md., and Soldier System Command, Natick, Ma.

There may be policy statements from a particular agency prohibiting protests between agencies.

41 U.S.C. § 403. The term "full and open competition", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or

competitive proposals on the procurement. The term "responsible source" means a prospective contractor who has adequate financial resources to perform the contract or the ability to obtain such resources; is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments; has a satisfactory performance record; has a satisfactory record of integrity and business ethics; has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills; has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and is otherwise qualified and eligible to receive an award under applicable laws and regulations.

Id. At (5). The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition.

SUBJECT: Commerce Business Daily Internet Postings

PURPOSE: To discuss the legal effect of posting notices on the Commerce Business Daily internet site.

The Commerce Business Daily (CBD) provides an internet site for posting of notices required by the Federal Acquisition Regulation (FAR)--CBDNet. Most of our procurement offices post CBD notices electronically because it is quicker and cheaper. The CBD also sends a reply message to the submitter acknowledging that the notice was accepted on a specific day and time. Our contracting officers have routinely filed the CBD acceptance notice in the contract file and used it as evidence of publication in the CBD.

In a sole source procurement, this is very helpful because publication in the CBD starts the clock running on Note 22 -a mandatory notice affording potential offerors 45 days in which to submit proposals for the Government's review.

The General Accounting Office (GAO) will not hear a protest unless the protestor has submitted a proposal to the Government within 45 days and received a negative response. This prerequisite for filing allows the Government the opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the sole-source decision to diligent potential offerors.

The contracting officer does not receive confirmation of the hard copy publication of the CBD notice. The CBD internet site advises that CBD electronic postings appear in the hard copy publication of the CBD in approximately 2 business days after the post date. FAR 5.203(g) advises contracting officers to presume that the CBD notice has been published in the hard copy 6 days following electronic submission to the CBD, unless there exists evidence to the contrary.

Which publication of the CBD notice is the official notice? Which publication date governs for the application of our regulatory requirements?

The Court of Federal Claims, in *FNMI v. U.S.*, No. 98-447C, 30 Jun 98, held that the hard copy publication date is the official date by which to measure all of our regulatory time requirements.

The court reviewed 41 U.S.C. 416, which imposes the publication requirement in the CBD, and determined that "publication" could only mean publication in the printed version of the CBD and not through its electronic equivalents.

The court's view was bolstered by the Commerce Department's interpretation that "publication" requires publication in the printed version of CBD. The Commerce Department does not believe that one hundred percent of federal contracting offices have access to electronic means of submitting notices, nor do one hundred percent of potential offerors, especially small businesses, have access to electronic means.

In light of the court's holding, the Commerce Department has clarified its instructions to Government personnel on its internet site by stating that:

Notices appearing in CBDNet do not satisfy the requirement of FAR Part 5 until they appear in the printed CBD.

BOTTOM LINE:

Although cumbersome, contracting officers may not rely on the acceptance notice from CBDNet as the official publication date. In procurement actions dependent upon the official publication date, the contracting officer may either search the printed versions of the CBD for the notice or presume that the notice was published 6 days after electronic submission.

The best source of information is to search for the CBDNet posting after a few days. It will provide the electronic posting date and the printed issue date.

The court's holding does not affect electronic commerce in any other manner.

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AMCCC-B-BI

POINT PAPER

23 October 1998

SUBJECT: New Competitive Sourcing and Privatization Legislation

PURPOSE: Provide information about changes to the DOD competitive sourcing and privatization legislation contained in both the FY 99 DOD Authorization and Appropriations Act. Both laws were signed by the President on 17 October 1998.

AUTHORIZATION ACT:

- **Sec. 341** clarifies that an activity can be "depot-level maintenance and repair" pursuant to 10 U.S.C. 2460(a) regardless of the location at which the maintenance or repair is performed.
- **Sec. 342** amends the reporting and analysis requirements before changing a commercial and industrial type function from performance by DOD civilians to performance by the private sector at 10 U.S.C. 2461.
 - DOD must certify that the proposed performance of the commercial or industrial type function by the private sector is not the result a decision to impose limitations in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees. The failure to submit the certification may be challenged to the agency. The issuance of a solicitation or award of a contract is delayed until the certification is submitted.
 - Studies with **50** or fewer employees are exempt from the statutory reporting and analysis requirements.
- **Sec. 343** requires the Secretary of Defense to notify Congress the first time an item is designated commercial under 10 USC 2464 and include a justification that addresses the percentage of commonality of parts between the commercial and government version of the item and the costs of government versus private sector maintenance of the item.
- **Sec. 346** requires the submission of a report to Congress describing the competitive procedures to be used and a cost-benefit analysis demonstrating savings over the life of the contract 30 days prior to entering into a prime vendor contract for depot-level maintenance and repair of a weapon system or other military equipment as defined by 10 USC 2464(a)(3).
- **Sec. 348** requires the Comptroller General to submit to Congress a report concerning the effect that QDR reductions in AMC will have on workload and readiness if implemented, and the projected cost savings and the manner in which savings are expected to be achieved by 31 March 1999. It does **not** require a delay in implementation of the reductions.

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- **Sec. 375** amends 32 U.S.C. 113 to require that financial assistance can be provided to the National Guard for performing work for the Army only if the National Guard was selected using competitive procedures permitting all public and private sector sources to bid on the work.

APPROPRIATIONS ACT:

- **Sec. 8014** requires that functions being performed by more than 10 DOD civilian employees may not be converted to contractor performance until a most efficient and cost-effective organization analysis is completed and certified to Congress. This year's version of the annual provision clarifies that: (1) functions included on the procurement list pursuant to the Javits-Wagner-O'Day Act; (2) functions planned to be converted to performance by a non-profit agency for the blind or severely handicapped; and (3) functions planned to be converted to performance by a qualified firm under 51 per cent Native American Ownership, are exempt from the requirements of both **Sec. 8014 and 10 USC 2461**.

- The Army is required to provide 90 days notice to Congress before awarding any new contracts pursuant to A-76 related studies at Pine Bluff Arsenal, Rock Island Arsenal, or Watervliet Arsenal.

- The SEC DEF is required to submit a report to Congress by 31 March 1999 providing a detailed assessment of the results of DOD's privatization strategy to date. The report must specify those functions or activities selected for outsourcing, the criteria used to select these functions, and the net savings achieved by outsourcing in FY 1996-1998.

S. 314, the Federal Activities Inventory Reform Act (FAIR) (P.L. 105-270, 19 October 1998) passed in both chambers on 5 October 1998. This statute

- Requires agencies to publish annual inventories of activities that the agency performs that are not inherently governmental. Omissions from or inclusions of activities on the annual inventory may be challenged administratively within 30 days by public or private offerors. Federal agencies must compete the functions in the inventory within a reasonable time, using competitive procedures.

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POINT PAPER

30 October 1998

SUBJECT: Putting the Value into Best Value

PURPOSE: To explain a new GAO decision, *Electronic Design*, B-279662.2, August 31, 1998.

FACTS:

- Under 10 U.S.C. 2305(a)(2)(A) the Price or Cost of an item must always be a factor in any procurement, especially one that purports to be a Best Value.
- But when the Navy Sea Systems Command attempted to procure integrated ship control system upgrades for CG47 Ticonderoga class ships, the solicitation, which called for firm-fixed prices, evaluated Price only as to whether the Price was within the Navy Budget.
 - ◆ Electronic design protested the evaluation plan to the GAO, complaining that the plan violated 10 U.S.C. 2305(a)(2)(A).
 - ◆ GAO, sustaining the protest, held:

“As a general rule, the Competition in Contracting Act (CICA) requires contracting agencies to include cost or price as a significant evaluation factor that must be considered in the evaluation of proposals. . . . Cost or price has not been accorded significant consideration if the agency’s evaluation and source selection decision so minimizes the potential impact of cost or price as to make it a nominal evaluation factor. . . .

Here, the agency states that price was considered only to determine whether a proposal was eligible for award. Proposals with prices greater than the budget were not eligible, nor considered for award. Once three of the proposals were determined eligible for award based on price, the Navy states that it did not consider the relative differences in price among the proposals, and did not perform a price/technical tradeoff; rather, technical merit was the sole consideration in the selection decision. Thus, to the extent the agency did consider price in this procurement, it was solely to determine basic eligibility for award. Such a consideration of price is nominal; indeed anything less would be to ignore price completely.

We conclude that the Navy’s evaluation and source selection decision did not give significant consideration to price, and therefore was inconsistent with CICA and cannot form the basis for an award.”

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◆ Recently, Command Counsel discovered a similar AMC procurement that used Price merely to establish whether the offer was to be included in the competitive range. Factors other than Price were then used in the actual award decision.

◆ We have advised HQ, AMC procurement and AMC legal offices of the case and the bottom line. Training is being adjusted to incorporate the lessons from *Electronic Design*.

● All award decisions must include Price or Cost as a significant element of the award decision under *Electronic Design*.

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CENTRAL CONTRACTOR REGISTRATION

The Central Contractor Registration (CCR) is a database of contractor information that enables contractors to receive payment by Electronic Fund Transfer (EFT) and increases contractor visibility to potential government buyers. By collecting information from each contractor, the CCR provides a central database that records, validates and distributes specific data about contractors to government buyers. While the CCR process will soon be the standard government wide, the Department of Defense (DOD) is the first agency to implement the CCR process across all buying and paying activities.

The DOD developed the CCR to support the President's Executive Memorandum entitled "Streamlining Procurement through Electronic Commerce", dated October 13, 1994 and to comply with the Debt Collection Improvement Act of 1996 which requires contractors doing business with government to furnish its taxpayer identification number and EFT information.

In the DOD, CCR is not an option. Defense Federal Acquisition Regulation Supplement (DFARS) Subparts 204.73, 212.5, 232.11, 252.204, and 252.232 now require contractor registration in the CCR prior to the award of a contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from a solicitation issued after May 31, 1998. The policy applies to all types of awards except:

- a. Purchases made with Government wide commercial purchase cards.
- b. Awards to foreign vendors for work performed outside the United States.
- c. Classified contracts or purchases.
- d. Deployment, contingency, emergency operations.
- e. Purchases in support of unusual or compelling needs.

As a general rule, contracting officers are prohibited from awarding to a contractor that is not registered. Prior to making an award, the contracting officer must verify that the contractor is registered in the CCR database. The offeror is required to provide its Data Universal Numbering System (DUNS) or DUNS+4 number, which the contracting officer will use to verify registration. The contractor is required to complete all mandatory information to become registered in the CCR database and is responsible for the accuracy and completeness of the data within the CCR and for any liability resulting from Government reliance on inaccurate or incomplete information. Therefore, if the contractor is not paid as a result of his failure to accurately or completely submit CCR information, the contractor will have no claims for interest for failing to receive prompt payment.

If the contracting officer determines that the contractor is not registered, she may:

- a. delay the award (if the needs of requiring activity allow) until after the contractor is registered, or
- b. if the needs of requiring activity do not allow for a delay, award to the next otherwise successful registered offeror. (Requires written approval one level above contracting officer).

DOD has established a goal of registering an applicant in the CCR database within 48 hours after receipt of a complete and accurate application via the internet and within 30 days for other methods.

Potential problems exist when an unregistered offeror is selected for contract award. The contracting officer may want to delay the award in order for the potential awardee to become registered. However, if the contractor submits or has submitted a complete and accurate application and registration takes significantly longer than 48 hours, the requiring activity may be unable to delay and may push for award to the next otherwise successful

registered offeror. If that happens, the first offeror will cry foul because they would have received the award but for government delay in processing their CCR. I am not aware of any protests involving this issue.

To avoid that problem, ensure that DFARS clause at Subpart 252.204-7004, Required Central Contractor Registration, is included in all solicitations. Thus, by submission of an offer, the offeror acknowledges the requirement that a prospective awardee be registered in the CCR database prior to award, during performance and through final payment of any contract resulting from the solicitation. The offeror also acknowledges that failure to register will make an offeror ineligible for award.

The Director of Defense Procurement, Eleanor R. Spector, in a memorandum dated May 21, 1998 urged the military services and defense agencies to ensure that contracting personnel are aware of the CCR requirement. To that end, the IOC has conducted CCR training for its contracting personnel to ensure compliance with the DFARS as well as promote contractor registration.

Information on CCR may be obtained at **HYPERLINK** <http://www.ccr.edi.disa.mil> or 1-888-227-2423. The web site also provides assistance with completing the registration.

Questions on CCR may be addressed to IOC CPT Marc A. Howze by telephone at DSN 793-8111 or email at howzem@ioc.army.mil.

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AMCCC-G

POINT PAPER

23 October 1998

SUBJECT: Implementation of the Lautenberg Amendment for AMC Military and Civilians - Update

PURPOSE: To provide information concerning the Lautenberg Amendment and update on recent litigation challenges

FACTS:

- Effective 30 September 1996, the Omnibus Consolidated Appropriations Act of 1997 (Public Law 104-208), amended the Gun Control Act of 1968 with the inclusion of the Lautenberg Amendment (18 USC section 921, 922). It created a new firearms "disability" and made it a felony punishable by up to 10 years in jail for:

- ◆ Any person convicted in any court of a **misdemeanor** crime of domestic violence to ship or transport in interstate or foreign commerce or possess or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce; or

- ◆ Any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that such person has been convicted in **any court** of a **misdemeanor** crime of domestic violence.

- ◆ The definition of "domestic violence" includes all misdemeanors that involve a use or attempted use of physical force, or the threatened use of a deadly weapon.

- ◆ The definition excludes convictions that have been expunged, set aside, or pardoned or where civil rights have been restored, and cases where the individual was not represented by counsel or did not knowingly waive counsel.

- The law applies to employees of government agencies, including law enforcement officers and the military, and to both government issued and personal weapons and ammunition.

- DOD, DA and AMC have issued guidance for implementing the Lautenberg Amendment that distinguishes between their application of the Lautenberg Amendment to the military (22 October 1997 and 15 January 1998, respectively) versus civilian employees (21 November 1997 and 27 February 1998, respectively). AMC has also issued separate implementing guidance for its military (30 January 1998) and its civilians (10 April 1998).

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- ◆ DOD's guidance is interim guidance, with final guidance expected within the year as there are open issues to resolve.
- ◆ As a matter of policy, DOD has applied the Lautenberg Amendment outside the United States territory.
- ◆ The Amendment should not be construed to apply to major military weapons systems or "crew served" military weapons and ammunition (tanks, missiles, aircraft, etc.) absent an opinion from the Department of the Treasury to the contrary.
- ◆ Relative to the military, the Services were to take reasonable steps to identify members with qualifying convictions (certification recommended and a DOD form provided).
 - There was also a prohibition on adverse action for soldiers based solely on misdemeanor convictions for acts of domestic violence committed **on or before** 30 September 1996.
- ◆ Relative to the civilians, the Lautenberg Amendment applies to all Army civilians, including nonappropriated fund employees.
 - For civilian employees found to have a qualifying conviction, Commanders should retrieve all Government-issued firearms and ammunition and suspend the authority of those employees to possess, transport in interstate or foreign commerce or receive firearms or ammunition.
 - Commanders should refrain from taking permanent adverse personnel action against an employee based solely on a qualifying misdemeanor conviction for domestic violence. This does not limit the obligation or authority to take adverse personnel action or other appropriate action where, because of the operation of this law, an employee ceases to be qualified to fulfill the duties of his or her position.

UPDATE

UPDATE

UPDATE

- **The United States Court of Appeals for the District of Columbia Circuit issued a decision adverse to the United States in Fraternal Order of Police (FOP) v. United States, No. 97-5304, 28 August 1998. FOP challenged the constitutionality of the Lautenberg Amendment in that it violated its member police officers due process and equal protection rights.**

◆ **The Court of Appeals held that the Lautenberg Amendment to the Gun Control Act (GCA) violates the Equal Protection Clause and is therefore unconstitutional.** The Court held the Lautenberg Amendment unconstitutional in that it prohibits the possession of firearms in an official capacity by police officers convicted of misdemeanor crimes of domestic violence while it would allow police officers with felony convictions to continue to possess firearms in their official capacities.

◆ **The Court of Appeals did not strike down the entire GCA, only the Lautenberg Amendment.**

◆ On 13 October 1998, the Department of Justice (DOJ) filed a petition for rehearing en banc with the Court of Appeals. The Department of the Treasury and its Bureau of Alcohol, Tobacco, and Firearms (BATF) are the lead federal agencies on Lautenberg matters. There has been no further court action on this matter, to date. The Court's decision is not final until such time as the appeal process has been exhausted.

◆ The BATF issued guidance to Federal agencies that the statute remains in full force and effect. DOD has advised that until further notice, continue to follow the DOD Interim Guidance.

◆ DA's guidance is before initiating an adverse action against an employee who cannot perform the duties of his/her position because of the Lautenberg Amendment, coordination should occur with the MACOM and OTJAG Labor and Employment Division (DAJA-LE). Such actions should be coordinated with AMCCC-G that, in turn, will coordinate with DAJA-LE.

◆ DOD is staffing its final policy which will be impacted by the final outcome from the FOP decision.

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An Overview: The Use of Alternative Dispute Resolution for Employment-Related Disputes

What Is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) is a term that refers to a variety of techniques for resolving disputes without litigation. It includes forms of negotiation; mediation, in which parties to a dispute reach a voluntary settlement with the help of a facilitator; and arbitration, in which the parties choose a third party to render a decision.¹ It is currently being used in a wide variety of disputes relating to business and commerce, contracts, construction, insurance, family, intellectual property, technology, securities, international trade, and even in disputes between foreign countries.² The federal government has encouraged the use of ADR through a series of statutes, regulations, and executive orders.³

Characteristics

* ADR is voluntary – the parties participate because they want resolve a dispute or problem. One practitioner noted that, particularly with employment disputes,

“It's important to keep the voluntarism in ADR to make sure that people go to ADR because both parties are persuaded that this is a better course of action, not because one party feels that it's been railroaded into it.”⁴

* ADR is controlled by the parties; the degree of control varies with the technique selected.⁵ ADR practitioners have recognized the importance of keeping the disputants in control of the dispute in order to obtain a solution that is acceptable to all. It also keeps them involved, and doesn't permit them to walk away and “leave it to the lawyers to handle” in litigation. At the same time, it requires that people work, up front, at recognizing and reducing disputes and conflicts at the early stages.⁶

* ADR emphasizes communication. Many times a party to negotiation will be disappointed with the result, feeling that the other side simply didn't understand his or

her position. Consequently, negotiation is only given one or two opportunities to work. Facilitated ADR, however, focuses on communication between the party, with a trained intermediary helping each party to understand the other's side.⁷

* ADR focuses on interests and encourages creative solutions. The techniques and processes involved in ADR attempt, in varying degree, to emphasize interests more than the parties' relative rights and relative power.⁸ ADR seeks to maximize "win-win" situations that are more likely to lead to constructive solutions to problems.⁹

Techniques

The techniques employed in ADR are summarized on the chart at the end of this paper. This summary groups ADR into major headings of unassisted negotiation, in which the parties attempt to reach a solution on their own; assisted negotiation (including mediation and non-binding arbitration) in which the parties use a third party to help them reach an agreement; and adjudicative procedures, in which a third party renders a decision that is binding on the parties.¹⁰ In reality, there are hundreds of ADR techniques, many of which add or combine processes, and the flexibility of ADR permit the parties to select what best fits their dispute. ADR practitioners emphasize that it is important to "fit the forum to the fuss"; for example, complex contract disputes need attorneys and facilitators who understand the law, while other skills are more important in other kinds of disputes.¹¹ The technique or approach should bear a relationship to the dominant theme of the dispute – interests, rights, or power. The parties to the dispute need to "recognize what mode is dominating or might be best for a particular dispute... ." The burden in terms of turmoil, time, and money increase as one moves from interests to rights to power.¹²

Mediation most effective when parties are desirous of maintaining a continuing business relationship.¹³ It is the technique most commonly used in employment-related disputes.¹⁴

Advantages of ADR

ADR is typically more economical than litigation.¹⁵ In particular, the negotiation and mediation phases are usually the least expensive; as one moves closer to adjudicative procedures, the costs rise.¹⁶ One large construction company reported that it increased its in-house legal staff, with the direction to managers to use the attorneys as mediators and advisors rather than litigators, and cut legal expenses by seventy-five percent in a year and a half.¹⁷ Another restaurant chain confirmed that arbitration clauses in contracts, including employment contracts, enabled the company to conduct business at substantially less legal costs, with good results in the decisions rendered.¹⁸ ADR may be more economical in its results, as well; limited data indicate that claimants are more likely to obtain awards, but less likely to receive very large awards, especially punitive damages.¹⁹

ADR also promotes efficiency and prevents delay.²⁰ One study of arbitration, undertaken by the Federal Judicial Center on Arbitration, showed that disputes were resolved 18 months sooner than if the same matter had gone to trial.²¹ The American Arbitration Association (AAA), a highly respected non-profit organization dedicated to dispute resolution, reported that most mediations it processed were resolved in a few weeks, and most arbitrations within a few months of filing.²²

Flexibility is an important advantage in increasing the parties' satisfaction with the outcome, where relaxed rules of evidence give the parties a greater confidence that they had the opportunity to present their whole story.²³ Hearings can take place at any location, at any time, or even over the telephone.²⁴ Flexibility extends to the remedies available to the parties; tailored resolutions are possible.²⁵

By encouraging parties to come to agreement without acrimonious and adversarial proceedings, ADR helps to preserve relationships, particularly when the negotiation/mediation end of spectrum is used.²⁶ This is a prime reason for its use in the employment context -- an important business relationship is in jeopardy, and a

speedy resolution may avoid undesirable human resource repercussions as other employees learn of the dispute. ²⁷

Other advantages include the ability to use a neutral party who is an expert in the subject matter of the dispute, reducing the time needed to educate a judge or jury about technical aspects of a dispute and increasing the confidence of the parties that the result will be well-informed.²⁸

Privacy is also cited as an important advantage; mediation and arbitration sessions are not open to the public as most courtroom trials are, and hearings and awards are typically kept confidential. That confidentiality also helps in preserving positive relationships. ²⁹

Disadvantages

Since one of the reasons for setting aside an arbitration award during judicial review is the failure of the arbitrator to consider relevant evidence, arbitrators tend to admit more evidence, which can “explode into very expensive and long delayed processes.” ³⁰ Parties can also sabotage the process with delays and objections, and appeal decisions despite previously having agreed not to do so.³¹

The training and professional qualifications of ADR practitioners is a subject of concern, particularly with arbitrators who render binding decisions. ³² However, this concern can be readily overcome by the parties to a dispute through their choice of a mutually agreeable third party.

ADR may reduce the generosity and effectiveness of the remedy for cases in which there has been a wrong, and no deterrent effect occurs when the proceeding is confidential. ³³ However, ADR may facilitate public policy in a different way, by encouraging victims of discrimination and human rights abuses to take action. Many people are reluctant to initiate adjudicative proceedings because they fear a loss of privacy and dignity, or may be regarded as “someone who cannot take a joke” or overreacts to an issue; ADR offers a range of options and choices to address diverse

interests in a non-adjudicative, dispute-settling environment.³⁴ Similarly, ADR is also criticized as a means of opening the floodgates to claims that might not otherwise be brought.³⁵ However, that objection does not appear to be supported in experience.³⁶

ADR should not be used when the parties are interested in obtaining a published opinion by a judicial authority in order to establish a precedent that will be useful in the future, or when one of the parties considers it appropriate to challenge existing judicial precedent.³⁷ In addition, some remedies – such as an injunction or restraining order – are available or enforceable only through the judicial process.³⁸

ADR in the Employment Context

The dependence on the judicial system to resolve employment disputes has grown since the 1940's, largely as the result of a number of factors, including the civil rights movement and the expansion of tort law theories, that developed outside the employment context.³⁹ Today, employees are suing corporations in record numbers; between 1969 and 1989, employment discrimination suits increased 2,166 percent, according to one study.⁴⁰ In many federal courts, the docket is crowded with employment cases, the third most prevalent type of case after drug cases and prisoner habeas petitions. Ironically, the press of cases has created increased pressure to settle, but these settlements are not driven by reconciliation but "by the litigants' dawning realization that one's day in court may be too long in coming, too short to tell the story, too expensive to afford, and too hard to understand."⁴¹

Arbitration has long been a tool for settling disputes over collective bargaining agreements⁴², but the use of other forms of ADR, and the application to other employment-related disputes, is still largely "new and untested"⁴³. The use of ADR for employment-related disputes has grown since the early 1990's, with the recognition that regulation of labor through series of individual lawsuits does not

produce satisfactory results.⁴⁴ As one in-house counsel for a large service company explained,

Like most major companies, [our company] won most of the employment cases filed against it or settled the claims for modest amounts. The amounts we spent on outside lawyers exceeded several times what we paid out in settlement. However, the money [we] spent for the privilege of winning most of its cases had little tangible impact on the company or its employees. Most of the cases were litigated years after the events giving rise to the cases occurred. By that time, the terminated employee was usually working somewhere else, many of the managers and co-employees were gone and there was little institutional value in the events that transpired in the litigation.⁴⁵

In addition, the attorney cited the high financial and human cost associated with litigation, particularly dear in a company that considered its employees and their employment relationships with the company to be the organization's most important asset.⁴⁶

Recognizing that the field of employment-related disputes was a fertile one for application of ADR techniques, the AAA hosted a national conclave in the fall of 1995. A topic of discussion was a pilot program established in California with AAA's Employment Dispute Resolution Rules. The rules provided for procedural fairness, substantive rights and remedies, and arbitral accountability.⁴⁷ Concomitantly, a growing number of companies have been moving to formal structured policies, stressing the creation of systems for the management of employment disputes.⁴⁸ The Federal government, too, has embraced the use of ADR for employment-related disputes, leading to the AAA's creation of a Federal Center for Dispute Resolution in Washington, D.C. Among the center's initiatives include providing employment mediators for federal agencies under a contract administered by the General Services Administration.⁴⁹

Many ADR programs now cover complaints and disputes related to discipline, termination, compensation, unlawful discrimination, and other employment-related claims arising from violation of federal, state, or local law.⁵⁰ ADR is not typically used

for workers' compensation and unemployment benefits disputes because of the state statutory framework.⁵¹

One growing phenomenon is the substitution of ADR programs for the customary grievance procedure; ADR practitioners predict that such implementation will continue to grow.⁵² One study concluded dispute mechanisms were more likely to occur in larger firms, and in firms that attached more importance to the human resource function or had more formalized human resource practices. It further concluded that emergence of formalized workplace dispute resolution procedures, particularly among non-unionized firms, underscore the increasing importance that employees attach to being treated fairly at work, and the increasing tendency of American employers to take seriously the goal of actually being fair to employees.⁵³

Management Perspective

Reports from employers emphasize the greatly reduced costs from personnel-related litigation. As one general counsel put it,

Even the most complex private dispute resolution systems are usually substantially faster than litigation, and are almost always cheaper, at least for the employee.⁵⁴

Employers also believe that ADR offers protection from runaway jury verdicts⁵⁵, particularly when the parties agree upon an arbitrator or third party.⁵⁶ Cost reduction can occur in another way; employers are provided with an opportunity to review a disputed decision in a prompt and non-adversarial way, and to correct mistakes before they become large and costly.⁵⁷

In addition to reducing litigation costs and expensive verdicts, many employers believe that ADR agreements are also "an excellent way to protect employee rights and maintain good employee relations."⁵⁸ Many supporters of ADR programs stress the benefit of improved morale that results when employees have the sense that they are treated fairly.⁵⁹ Employers have recognized that the use of ADR techniques depend on the system being viewed as a benefit, not a "take-

away.” To that end, some employers provide counsel, or financial assistance for counsel.⁶⁰

Employee Perspective

Early research suggested that providing employees a “voice” mechanism, through unionism or grievance procedures, reduces voluntary employee turnover and builds loyalty, and that the likelihood of using voice is a function of how effective the mechanism is perceived to be. Later studies found, however, that employees who were less committed to the firm were more apt to file grievances, and that among these employees, the perceived effectiveness of the grievance procedure did not influence the probability of using it. Ironically, employees who perceived the grievance procedure to be of high quality were less likely to use it -- the more loyal the employee, the less likely he or she is to exercise voice. Rather, such employees are more likely to “suffer in silence.” Fear of reprisal is the most significant reason for employees not exercising voice.⁶¹ These findings suggest that the value of ADR-as-grievance- procedure may well be symbolic for the employees the firm values most.

By contract, another study of both employers and complainants in discrimination cases before a state civil rights commission found that the perception of fairness was indeed a predictor of disputants' willingness to submit their cases to an ADR process. Also important was a sense of urgency, where the immediacy of an adverse action (such as a termination) prompts the disputants to seek speedy resolution without further considerable expenditures. ⁶²

Some employees perceive the quick resolution and the reduction of legal expenses through ADR a great benefit, reducing an employer's advantage in outpending and outlasting an employee in court litigation ⁶³; predictably, disputants are most willing to use ADR when it is available early in the process. ⁶⁴ Other employees have reported that mediation is effective in resolving workplace situations that might not end up in court, but nonetheless make life at work

unpleasant.⁶⁵ However, others complain that plans have the effect of discouraging employees from joining unions.⁶⁶

Experiences with Using ADR

On the whole, the evidence supporting the use of ADR is largely anecdotal:

“Not only are employers just beginning to implement ambitious, sophisticated systems of dispute resolution, but dispute resolution, as a field of serious academic study, is in its infancy. The hard data have yet to be gathered”⁶⁷

but it appears that ADR costs substantially less while doing better job of delivering justice

to the average employee. The anecdotal evidence is encouraging:

* Brown & Root, the service company mentioned earlier, established an ADR system in 1993, after winning a sexual harassment suit that cost \$450,000 in legal fees and altered the careers of numerous employees. Designed with input from employees at all levels and the advice of dispute resolution, legal, and employee communications specialists, the Dispute Resolution Program (DRP) provides a four-option program with multiple processes, ranging from an open door policy to mediation to arbitration . The program encourages collaborative approaches, promotes resolution at the lowest possible level, offers compensated access to legal counsel, and ensures independence by reporting to a policy committee of senior executives rather than to an individual or department. In the first two years of operation, nearly one thousand employees utilized some aspect of the DRP; over seventy-five percent of these issues were resolved within eight weeks of the employee's initial contact. The overwhelming majority were resolved through informal, collaborative processes; about fifty went to outside mediation and fifteen to outside arbitration, with a win/loss record similar to that achieved previously in litigation. Only eighty employees asked for assistance of counsel.⁶⁸ The cost of arbitration has ranged from \$6,000 to \$20,000, saving 50 to 80 percent on legal costs.⁶⁹ At the end of four years,

the company reported similar results, with 2,000 disputes brought by its 30,000 employees, only 30 of which reached the arbitration stage.⁷⁰

* Siemens Corporation, the American holding company for a large, German-based multinational corporation, has adopted ADR procedures for all its disputes arising in connection with its business. Its policy derived from its determination that ADR is a faster, cheaper, and more efficient way of resolving claims, as well as its parent company's cultural preference for private dispute resolution. It adopted ADR processes for employment disputes, having found that mediation and mini-trial were effective ways of resolving such disputes. Both the right for the employee to be heard, and the right to confront the manager that purportedly caused the harm, are considered to be important. Siemens uses an internal education program to explain and promote ADR, and stresses that institutionalization of ADR is a process, not an end in itself.⁷¹

* Publisher McGraw-Hill, with a workforce of over 15,000, implemented its Fast and Impartial Resolution (FAIR) program in 1995, with a three step voluntary program. If informal discussions with a supervisor or human resource representative do not resolve a dispute, it moves to mediation with a neutral third party, with binding arbitration as the third step. The company pays all costs.⁷²

* Polaroid's ADR procedures date back to 1949 but were significantly revised in 1994. Polaroid has a five-step process, ranging from a discussion with the department manager to a peer or officer panel, from there to Polaroid's president, and finally to binding arbitration. Over the past ten years, Polaroid reports, about 25 cases per year are settled at the panel level; three or four go to arbitration.⁷³

* American Savings Bank created a four-step process in 1994 and reported success in the first two years. Seventy of its 3500 employees have used the program, mandatory for all new hires, with seven of the cases ending in mediation and one in arbitration. At the same time, legal costs were reduced by more than 60 percent.⁷⁴

* In its first year, the ADR program at Hughes Aircraft worked so well that 70 percent of all employee claims were resolved before making it to the program's third phase. In the program's first two years, no employee pursued a dispute to the final step of arbitration.⁷⁵

* The AAA's own dispute resolution system consists of a three-step process, which it offers as a model to other employers:

1) Employees first try to resolve workplace issues by internal review by informal discussion with the employee's department head, vice president, or national vice president of human resources.

2) Disputes involving termination or legally-protected rights not resolved through the first step are required to go to the second step, mediation before an impartial, outside mediator.

3) Binding arbitration is available at the option of employee as a third step. All expenses for arbitrators and mediators – selected at the employee's option from one of three sources – are borne by the employer, although the employee may elect to pay up to one-half. The employer also provides a one-time \$1000 reimbursement for the employee's attorney fees for the mediation or arbitration. ⁷⁶

* Lockheed Martin, General Electric, and Darden Restaurants are among employers adopting ADR programs. Typically, the procedures start with informal, internal discussions, and move through mediation and arbitration. ⁷⁷

Issues in the Use of ADR

As more employers adopt ADR systems, two issues in particular are receiving increasing attention – making ADR mandatory, and regulating the ADR process.

Mandatory arbitration

One of the great advantages of ADR lies in its voluntary nature, as previously discussed. It is ironic, then, that one of the most hotly contested legal issues in the human resources arena is the imposition of mandatory ADR procedures, particularly

arbitration.⁷⁸ Used among securities firms for years, many companies are now asking employees to sign agreements, sometimes as a condition for getting or keeping their jobs.⁷⁹

In 1991, the U.S. Supreme Court upheld a mandatory arbitration clause for an age discrimination claim in Gilmer v. Interstate Johnson Lane Corp.⁸⁰ However, subsequent disagreement over the exact application of the case has instigated a series of cases with conflicting rulings. Many circuits have held that where the individual has freely agreed to arbitrate, that decision, like the decision to waive or settle a claim, prevents the pursuit of monetary and other remedies in another forum.⁸¹

Some states, including Georgia, Kansas, and Kentucky, have enacted laws prohibiting agreements,⁸² and recently, the United States Court of Appeals for the Fourth Circuit issued a decision that was based upon its belief that a West Virginia statute had barred mandatory arbitration of certain employment-related topics.⁸³ In actual practice, about 75 percent of employers using alternative dispute resolution plans require new employees to participate in the plan as a condition of employment, half require existing employees to participate, and the rest encourage but don't require current employees to do so. Companies report few objections from employees.⁸⁴

Critics of mandatory arbitration argue that "coerced arbitration as a condition of continuing employment is a perversion of the basic tenets of arbitration."⁸⁵ They stress that it is unfair because inequality in bargaining power between the employee and employer results in the diminishment of the substantive rights of employees, particularly the right to a jury trial under the 1991 Civil Rights Act.⁸⁶ Limitations on discovery, interference with the right to an attorney, caps on damages or fees, and shortening of time limits take unfair advantage of the employee.⁸⁷ Moreover, the privacy of ADR procedures allow employers to follow discriminatory and other

reprehensible practices “with much more assurance that it will never be assessed punitive damages due to public knowledge of prior bad actions.”⁸⁸

The Equal Employment Opportunity Commission is outspoken in its opposition to binding arbitration that is a condition of employment or continuing employment. In a policy paper issued in July of 1997, the EEOC objected to mandatory arbitration because it privatizes enforcement of federal discrimination laws and thus undermined enforcement while limiting claimants’ rights and permitting the employer to manipulate the system to its benefit. The EEOC affirmed, however, that voluntary, post-dispute arbitration balanced legitimate goals of ADR with the enforcement framework of discrimination laws.⁸⁹

Similarly, the National Labor Relations Board has, in some situations, abandoned its customary deferral to internal grievance and arbitration procedures, thereby indicating opposition to mandatory arbitration. In one situation, the NLRB’s general counsel instructed the regional director not to defer to the grievance-arbitration procedure specified in an employment contract on the grounds that its prohibition of processing an unfair labor practice charge defeated a major right of the National Labor Relations Act. The general counsel also indicated that the contract was an unenforceable adhesion contract because the employees were not sophisticated as to their legal rights and consequently had an unequal bargaining position. Moreover, such arbitration would chill the rights of other employees to organize, since the right to arbitrate was, in some situations, illusory.⁹⁰

In 1994, the Commission on the Future of Worker-Management Relations, chaired by former Labor Secretary John T. Dunlop, opposed mandatory arbitration programs as a condition of employment and urged Congress to bar them.⁹¹ In a statement issued to that Commission, the American Civil Liberties Union argued against mandatory ADR agreements because of the potential for abuse, the lack of employee bargaining power, and the need to avoid surrender of civil rights as a

condition of employment.⁹² Similarly, in August 1997, the American Bar Association went on record against mandatory ADR.⁹³

Representatives of management, on the other hand, cite the advantages of arbitration in defense of making it mandatory. The Vice President/General Counsel of the Darden restaurant chain, which uses mandatory ADR agreements, believes that challenges to mandatory arbitration in employment are “fed by either unawareness or disbelief that arbitration is good for both the employee as well as the employer.” He also expressed the belief that the best impetus toward serious mediation is having a clause in the contract, which prevents “escape to the court.”⁹⁴ Another commentator agreed that critics of mandatory arbitration overlook the many advantages arbitration offers both sides in an employment dispute.⁹⁵ However, nearly all of the advantages cited are simply advantages inherent in nontraditional dispute resolution, not an effect peculiar to a mandatory procedure.

Supporters of pre-employment agreements maintain that they are fair as long as an employee understands that he is giving up rights on a limited basis in exchange for a faster resolution, and that ultimately, employees have the choice whether they want to participate in that particular work environment. ⁹⁶ While some note that it was very important that ADR not be seen as second-class justice system by requiring people to use ADR first, rather than go to court, ⁹⁷ most suggest that it is more important that the ADR have procedural fairness, and that a sensible trade-off of risks, benefits, and fairness will lead to a posture that appears more reasonable than aggressive ⁹⁸ – that is, that arbitration agreements could be drafted in such a way as to provide applicants and employees with the same degree of due process available to those in a judicial forum. ⁹⁹ In fact, court and legal experts encourage examination of the content of the ADR procedures, rather than limiting analysis to whether the use of them was mandatory.¹⁰⁰

Rockwell International implemented arbitration procedures in 1992 by requiring 970 executives to sign a mutual agreement to arbitrate employment disputes, including those covered by statute, as a condition of participation in an executive stock plan. The program was later extended to cover all nonunion employees; new hires must sign the agreement as a condition of employment.¹⁰¹ Rockwell's assistant general counsel defends Rockwell's practice as fair, and complained that it was wrong to lump all such ADR programs together: "My concern is that there will always be those outfits that do what we have tried not to do and set up arbitration agreements and procedures that will be seen as, and will be in fact, unfair. These will then be held up as an example of what is going on generally, and Congress will see a need to step in and protect everybody."¹⁰²

The AAA remains unconvinced. While it has announced that it would administer mandatory arbitration agreements because most courts hold them to be enforceable, it echoed the majority of human resource experts when it affirmed that ADR is most effective "when the parties knowingly and voluntarily agree on the process and have confidence in the neutrality of the mediator or arbitrator and the procedures" under which the case was administered. It also announced that it would administer binding arbitration programs required as a condition of employment only if the programs were consistent with its national Rules for the Resolution of Employment Disputes and the Due Process Protocol.¹⁰³

Due process / judicialization

The insistence by the AAA and the courts on protection of employees, and the fear of Congressional intervention, raises a related issue current in the ADR field – that of "judicialization." In order to ensure satisfaction with the results of ADR, among the parties as well as the community, it is important that the process be perceived as fair, and that the results have integrity and credibility – which requires some degree of due process.¹⁰⁴ Unfortunately, accomplishment of this end often means that a

process is “judicialized”, using many of the same rules of evidence and processes as courts.¹⁰⁵ Of course, that increases time and cost. Increasingly, lawmakers are attempting not only to expand the use of ADR, but to regulate the process as well, particularly with respect to the qualifications and certification of third parties, rights of the participants, and rules of confidentiality. Statutes relating to non-traditional dispute resolution quadrupled from 1989 to 1993. One bill introduced in California would have required mandatory mediation in most civil cases.¹⁰⁶

Discovery is a prime example -- one practitioner cites a “growing recognition that discovery should be available in arbitration” and an increasing belief on the part of the plaintiff’s bar that “the individual has a substantive legal right to obtain relevant information from the opposing party to a dispute, without limits on the type of method used to obtain the information.”¹⁰⁷ Judicialization may also restrict the remedies that may be used to resolve a dispute; for example, an arbitrator may impose only those remedies that would be available under law.¹⁰⁸

A related debate rages on what evidence should be allowed in ADR proceedings. Within the field of arbitration of labor-management disputes, the debate centers on whether arbitrators should limit their consideration to the “four corners” of the collective bargaining agreement, or should consider external law in order to reach a decision. The “four corners” proponents feel that arbitration proceedings will become more and more like courts if arbitrators and the parties pay too much attention to the “legal trappings” associated with the court system. One professor refers to this phenomenon as “creeping legalism”, fearing that it will undermine the cost-effectiveness of the arbitration process and defeat the primary reason for its existence.¹⁰⁹

The Future of ADR in Employment Disputes

For those companies looking for assistance in setting up an ADR program,

there are a number of guidebooks and professional consultants. Many of these resources stress that a company needs to examine its legal and labor costs, as well as its ability to initiate new training and communication programs.¹¹⁰ A first step in designing an ADR program is assessing the history of employment conflicts, to determine what kinds of disputes have arisen, how frequently, why the disputes occurred, how they were handled, how long the process takes, the cost, and the degree of participants' satisfaction.¹¹¹

It is also important for companies to know what they want to accomplish, setting goals and procedures that fit within the corporate culture.¹¹² An understanding of that culture will help determine who is likely to support or resist a new program, and what incentives and disincentives may influence its use; procedures that suit a more formal or rights-oriented workplace, for example, will differ from those best suited to a more casual workplace characterized by more open communication.¹¹³ As another example drawn from real practice, Polaroid has long-service employee-owners, with an average age that far exceeds the average, concentrated in a small geographic area; a company with a less cohesive culture may be less apt to empower employee peer panels with grievance settlement power.¹¹⁴ Another practitioner notes that arbitration and mediation can provide an external element to distance the decision-maker from those with a stake in the outcome, but the arbitrator or panel must be educated about the company and the workforce. He concludes, "If you want conflict resolution at a minimal cost, but [want to] allow both parties to maintain control, look at mediation. If you want positive employee relations, use peer review."¹¹⁵

At a symposium sponsored by AAA in early 1996, dispute resolution specialists predicted that the use of ADR for workplace situations would expand. One reason given was the decline of unions, leaving more workers without the benefit of rights and grievance procedures spelled out in collective bargaining agreements. A

second reason given was that many disputes were closer to community issues (i.e., racism) than to a typical union versus management employment situation, and needed resolution in ways other than through collective bargaining agreements.¹¹⁶

An important third reason given is key to the future of ADR -- employees have not been trained to think in terms of dispute resolution, and it is in both employers' and employees' interests for them to do so.¹¹⁷ More employees will come to use the systems as they are viewed as a legitimate questioning of authority, encouraging employees to speak up before a problem reaches the critical state.¹¹⁸ Companies, on the other hand, will continue to move to more formal, structured policies, and will view employment disputes as a management, rather than legal, issue.¹¹⁹ Motorola, for example has instituted a mandatory review process for all claims, disputes, and controversies as part of its TQM program, to determine the appropriateness for private dispute resolution. It seeks to uncover process defects in its employee relations just as it does on the production line. AAA predicts that this is the wave of the future, creating a mindset that dispute avoidance and prevention are expected.

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Conclusion

Employers recognize that ADR offers great advantages in controlling both the financial and human resource impact of disputes related to employment, and are setting up programs in record numbers. The advantages to employees are much less clear, particularly where employees must agree to use the programs as a condition of employment. Employers would be well advised to maximize employee participation in developing the procedures as well as in the process itself, to gain employee acceptance and the willing participation that is so important to making ADR work effectively.

¹ "A Beginners' Guide to Alternative Dispute Resolution", 2 June 1998, www.adr.org/guides/guide.html

² Ibid.; "ADR In the New Century," Dispute Resolution Journal, v. 51 (Apr./Sept. 1996), pp. 10-15, citing the use of ADR in the Dayton peace talks to resolve the Bosnian conflict.

³ Fryling, Robert G., and Hoffman, Edward J., "Step by Step: How the U.S. Government Adopted the ADR Idea", Dispute Resolution Journal, V. 53 (1998). This article discusses the statutory and regulatory framework that define policy for disputes to which the Government is a party. See also "Justice Dept. Official Expresses Support for ADR", Dispute Resolution Journal, V. 53 (1998)

⁴ Richard V. Denenberg, quoted in "ADR In the New Century," op cit.

⁵ "A Beginners' Guide to Alternative Dispute Resolution", op cit. See also Schwartz, Steven L., "The Business and Legal Communities Look to ADR", Dispute Resolution Journal, V. 51 (Apr./Sept. 199), pp. 34-39

⁶ "ADR In the New Century," op cit.

⁷ Berman, Gary S., "Facilitated Negotiation: An Effective ADR Technique", Dispute Resolution Journal, V. 50 (Apr. 1995), pp.18-22

⁸ Hill, Richard, "Overview of Dispute Resolution", www.batnet.com/oikoumene/arbover.html; See also Perry, Mike, "Beyond Dispute: A Comment on ADR and Human-Rights Adjudication", Dispute Resolution Journal, V. 53 (1998).

⁹ Schwartz, "The Business and Legal Communities Look to ADR", op cit. ; Wilburn, Kay O., "Employment Disputes: Solving Them Out of Court", Management Review, v. 87 (Mar. 1998), pp. 17-21. For an excellent primer, not in ADR techniques, but on identifying parties' interests and using the interests to create agreement, see Fisher, Roger; Ury, William; and Patton, Bruce, Getting to Yes: Negotiating Agreement Without Giving In, 2nd ed. (New York: Houghton Mifflin Company) 1991.

¹⁰ The information in the chart is based largely on instructional materials used by the Center for Dispute Settlement, presented at Department of the Army Alternative Dispute Resolution Workshop, Arlington, Virginia, 1992. One leading practitioner has recognized that a commonly accepted vocabulary of ADR terms does not exist, and, in a series of articles, has described these basic techniques as well as a number of hybrids and combinations. See Arnold, Tom, "Vocabulary of ADR Procedures," Dispute Resolution Journal, V. 50 (Oct./Dec. 1995) pp. 69-72; "Vocabulary of ADR Procedures, 2", Dispute Resolution Journal, V. 51 (Jan./Mar. 1996), pp. 60-71; and "Vocabulary of ADR Procedures, (part 3)", Dispute Resolution Journal, V. 51 (Oct. 1996), pp. 74-77. Other basic informational materials include "A Beginners' Guide to Alternative Dispute Resolution", 2 June 1998, www.adr.org/guides/guide.html; Buckstein, Mark A., "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", Dispute Resolution Journal, V. 52 (Jan. 1997), pp. 35-39; Gill, Brian, "Resolving Employee Conflicts", American Printer, v. 221 (1998); Kuenzel, Robert B., "Alternative Dispute Resolution: Why All the Fuss?", Compensation and Benefits Review, v. 28 (Jul./Aug. 1996), pp. 43-; McDowell, Wyatt, and Sussman, Lyle, "Overcoming the Pathology of

Litigation: An ADR Primer for Executives", Business Horizons, v. 39 (May/June 1996), pp. 23-29; "Resolving Employment Disputes: A Practical Guide", (June 16, 1997) www.adr.org/guides/resolving_employment_disputes.html
Schwartz, "The Business and Legal Communities Look to ADR", op cit.; Zack, Arnold M., "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", International Labour Review, v. 136 (Spring 1997), pp. 95-108.

For information on specific techniques, see Berman, "Facilitated Negotiation: An Effective ADR Technique", op cit.; "Guide for Employment Arbitrators", www.adr.org/guides/employment_guide.html ; "Mediation Pitfalls and Obstacles", www.adrr.com/adrr1/essays.htm .; Van Slyke, Erik J., "Facilitating Productive Conflict", HR Focus, v. 74 (Apr. 1997), pp. 17; Wilburn, "Employment Disputes: Solving Them Out of Court", op cit.

A chronology of important events in the development of ADR is found in "Past, Present & Future", Dispute Resolution Journal, V. 51 (Apr./Sept. 1996), pp. 108-115.

¹¹ "ADR In the New Century," op cit.

¹² Arnold, "Vocabulary of ADR Procedures," op cit.

¹³ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

¹⁴ "Mediation is ADR Method of Choice", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 6

¹⁵ "A Beginners' Guide to Alternative Dispute Resolution", op cit.; see also Caudron, Shari, "Blow the Whistle on Employment Disputes", Workforce, v. 76, pp. 50-52; Howard, Lisa, "ADR Can Cut Hours, Costs, Lawyers Say", National Underwriter, vo. 101 (Apr. 7 1997), pp. 9-10

¹⁶ Arnold, "Vocabulary of ADR Procedures," op cit.

¹⁷"ADR In the New Century," op cit.

¹⁸ "ADR In the New Century," op cit.

¹⁹ DiCesare, Constance B., "Alternative Dispute Resolution", Monthly Labor Review, v. 119 (Jan./Feb. 1996), pp. 79-80.

²⁰ "ADR In the New Century," op cit; see also DiCesare, "Alternative Dispute Resolution", op cit.

²¹ "ADR In the New Century," op cit.

²² "A Beginners' Guide to Alternative Dispute Resolution", op cit.

²³ "A Beginners' Guide to Alternative Dispute Resolution", op cit.; also, DiCesare, "Alternative Dispute Resolution", op cit., citing catharsis as beneficial effect.

²⁴ "A Beginners' Guide to Alternative Dispute Resolution", op cit.

²⁵ Howard, "ADR Can Cut Hours, Costs, Lawyers Say", op cit.

²⁶ Arnold, "Vocabulary of ADR Procedures," op cit.; see also DiCesare, "Alternative Dispute Resolution", op cit.; Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

²⁷ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

²⁸ "A Beginners' Guide to Alternative Dispute Resolution", op cit., see also Caudron, "Blow the Whistle on Employment Disputes", op cit.; Ganzel, Rebecca, "Second – Class Justice?", Training, v. 34 (Oct. 1997), pp. 84-86.

²⁹ Ibid.

³⁰ Ibid.

³¹ Tillson, Tamsen, "Common Sense Resolution", Canadian Business, v. 70 (Mar. 1997), pp. 83-84.

³² Ganzel, "Second – Class Justice?", op cit.

³³ Ibid.

³⁴ Perry, "Beyond Dispute: A Comment on ADR and Human-Rights Adjudication", op cit.

³⁵ Caudron, "Blow the Whistle on Employment Disputes", op cit. See also DiCesare, "Alternative Dispute Resolution", op cit.

³⁶ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.; McDermott, E. Patrick, "Survey of 92 Key Companies Using ADR to Settle Employment Disputes", Dispute Resolution Journal, V. 50 (Jan. 1995), pp. 8-13.

³⁷ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

³⁸ Ibid.

³⁹ Bedman, William L., "From Litigation to ADR: Brown & Root's Experience", Dispute Resolution Journal, V. 50 (Oct./Dec. 1995), pp. 8-14.

⁴⁰ Nye, David, "When the Fired Fight Back," Across the Board, v. 32 (June 1995), pp. 31-34. Significantly, the study was completed before the passage of the 1991 Civil Rights Act and the Americans with Disabilities Act.

⁴¹ Ibid.

⁴² Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", op cit.

⁴³ Caudron, "Blow the Whistle on Employment Disputes", op cit.

⁴⁴ Unlike most other industrialized nations which manage employment by direct government regulation, direct political involvement, and quasi-political labor tribunals, the American model requires individuals to vindicate broad, rights-based policies through tort litigation in independent courts, a process that is slow, expensive and cumbersome. Ibid. See also Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", *op cit.*

⁴⁵ Bedman, "From Litigation to ADR: Brown & Root's Experience", *op cit.*

⁴⁶ Ibid. Bedman's lament is echoed in a significant number of articles. See, e.g., Wilburn, "Employment Disputes: Solving Them Out of Court", *op cit.*

⁴⁷ "AAA Takes Initiatives in Field of Employment ADR", Dispute Resolution Journal, V. 50 (July 1995), p. 4; "Conclave Held on Employment ADR", Dispute Resolution Journal, V. 50 (Oct./Dec. 1995), p. 3+ .

⁴⁸ Bencivenga, Dominic, "Fair Play in the ADR Arena", HR Magazine, v. 41 (Jan. 1996), pp. 50-56; Ganzel, "Second – Class Justice?", *op cit.* Exact numbers are difficult to establish; a 1995 survey by the General Accounting Office indicated that "almost all employers with 100 or more employees used one or more ADR approaches," but GAO's definition of ADR including informal problem solving and negotiation. GAO also reported that almost 40 percent of the employers surveyed used trained internal mediators, while less than 10 percent had resorted to arbitration. See Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", *op cit.* Similarly, a 1994 survey by Dispute Resolution Journal included such informal techniques as an open door policy. McDermott, "Survey of 92 Key Companies Using ADR to Settle Employment Disputes", *op cit.* More recently, a 1997 study of 600 major U.S. corporations by Cornell University, Price Waterhouse, and the Foundation for Prevention & Early Resolution of Conflict, reported that 88 percent used mediation in the past three years, 79 percent used arbitration, and 41 percent used "mediation/arbitration." Wittenberg, Carol; Mackenzie, Susan; and Shaw, Margaret, "And Justice For All", HR Magazine, v. 42 (Sept. 1997), pp. 131-132 .

⁴⁹ "AAA Launches Federal Center in D.C.", Dispute Resolution Journal, V. 53 (Feb. 1998), p. 4.

⁵⁰ "Corporations Adopt Employment ADR Programs", Dispute Resolution Journal, V. 52 (Spring 1997), p. 5; see also Crawford, Linda S., "ADR: A Problem-Solving Approach for Business", Dispute Resolution Journal, V. 50 (Apr. 1995), pp. 55-60, and Keil, James H., "Using ADR to Satisfy ADA Compliance Issues", Dispute Resolution Journal, V. 50 (Apr. 1995), pp. 61-62, for discussion on the use of ADR for complaints under the Americans with Disabilities Act.

⁵¹ Bencivenga, "Fair Play in the ADR Arena", *op cit.*

⁵² "ADR In the New Century," *op cit.*

⁵³ Feuille, Peter, and Chachere, Denise R., "Looking Fair Or Being Fair: Remedial Voice Procedures in Nonunion Workplaces", Journal of Management, V. 21 (Spring 1995), pp. 27-42.

⁵⁴ Bedman, "From Litigation to ADR: Brown & Root's Experience", *op cit.*

⁵⁵ Ibid.; Selman, Don, "Court of First Resort", CA Magazine, v. 130 (May 1997), pp. 37-39. A 1995 study reported that in cases who brought suit because of discriminatory hostile work environments, unrelated to sexual harrassment, the median compensatory damage award was \$150,000, with a median of \$160,000 in punitive damages added in 43 percent of the cases. For plaintiffs demoted or denied promotion due to unfair policies or standards, the median compensatory damage award was \$97,558, with punitive damages added in 32 percent of verdicts, for a median award of \$175,000. In unjust dismissal cases, where no discrimination was alleged, the median verdict was \$102,000; punitive damages were added in 26 percent of such cases, with a median of \$150,000. See Nye, "When the Fired Fight Back," op cit.

⁵⁶ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?" op. cit.

⁵⁷ Ibid.; Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.; Zimmerman, Philip, "In -House Dispute Resolution Programs", CPA Journal, v. 68 (1998).

⁵⁸ Caudron, "Blow the Whistle on Employment Disputes", op cit. Caudron cites a 1997 survey by Dispute Resolution Journal, in which more than 75 percent of employers cited litigation cost as their major reason for implementing ADR policies; another 15 percent stated they adopted the policies to improve employee relations.

⁵⁹ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁶⁰ Caudron, "Blow the Whistle on Employment Disputes", op cit. Philip Morris, for example, offers a Dispute Resolution Benefits Plan, under which the employee pays 20 percent of legal costs and the company pays 80 percent up to \$3500. See also DiCesare, "Alternative Dispute Resolution", op cit.

⁶¹ Boroff, Karen E., and Lewin, David, "Loyalty, Voice and Intent to Exit a Union Firm: A Conceptual and Empirical Analysis", Industrial and Labor Relations Review, v. 51 (Oct. 1997), pp. 50 + .

⁶² Stallworth, Lamont E., and Stroh, Linda K., "Who Is Seeking to Use ADR? Why Do They Choose To Do So?", Dispute Resolution Journal, V. 51 (Jan./Mar. 1996), pp. 30-38. This study also concluded that approximately 90 percent of discrimination disputes submitted to mediation were successfully resolved.

⁶³ Caudron, "Blow the Whistle on Employment Disputes", op cit.; Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁶⁴ Stallworth and Stroh, "Who Is Seeking to Use ADR? Why Do They Choose To Do So?", op cit.

⁶⁵ Ganzel, "Second - Class Justice?", op cit.

⁶⁶ Ibid.

⁶⁷ Bedman, "From Litigation to ADR: Brown & Root's Experience", op cit.

⁶⁸ Ibid.

⁶⁹ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷⁰ Caudron, "Blow the Whistle on Employment Disputes", op cit.

⁷¹ Gans, Walter G., and Stryker, David, "ADR: the Siemens' Experience", Dispute Resolution Journal, V. 51 (Apr./Sept. 1996), pp. 40-46.

⁷² Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷³ Nye, "When the Fired Fight Back," op cit.

⁷⁴ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷⁵ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

⁷⁶ "American Arbitration Association Implements the Smart Solution, A New Three-Step Dispute Resolution Program to Resolve Disputes with its Employees," Press Release, 9 March 1998, www.adr.org/press/smart_solution.html

⁷⁷ "Corporations Adopt Employment ADR Programs", op cit.

⁷⁸ Goldberg, Adin C., "Top 8 Legal Issues Affecting HR", HR Focus, v. 74 (Dec. 1997), pp. S1 – S3.

⁷⁹ Ganzel, "Second – Class Justice?", op cit. However, use in the securities industry may be on the decline in the wake of the settlement of a sexual harrassment and discrimination suit against Smith Barney. As part of the settlement, Smith Barney agreed to handle discrimination and sexual harrassment cases separately with a three step process leading to an ADR panel, that could provide punitive as well as compensatory damages. See Hoffman, Mark A., "Smith Barney Deal May Cut Use of Mandatory Arbitration", Business Insurance, v. 31 (Nov. 24 1997), pp. 1 et seq.

⁸⁰ 500 U.S. 20 (1991).

⁸¹ See discussion in Equal Employment Opportunity Commission v. Kidder, Peabody & Company, Inc., 1998 U.S. App. LEXIS 21066 (2nd Cir.); 77 Fair Empl. Prac. Cas. 1212, August 28, 1998 (upholding mandatory arbitration provisions because employees may waive rights, and because arbitration supports public policy as enunciated in the Federal Arbitration Act); Mouton v. Metropolitan Life Insurance Company, 147 F.3d 453 (5th Cir. 1998) (upheld agreement to arbitrate Title VII discrimination claims); and Cole v. Burns International Security Services, 105 F.3d 1465 (D.C.Cir. 1997) (superb discussion of all issues and arguments, ultimately concluding that mandatory arbitration agreements are enforceable if standards of due process and fairness are met). See also Prudential Insurance Company of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) (holding that such agreements are enforceable but that the employees in the instant case had not made a knowing waiver of their rights).

⁸² Kelly, Thomas R., and Berke, Danielle L., "What's New in ADR?", HR Focus, v. 73 (Apr. 1996), pp. 15.

⁸³ Price v. Goals Coal Company, 1998 U.S. App. LEXIS 18769 (4th Cir.), August 13, 1998. The court vacated a lower court decision and, in effect, sent the matter back to a state court for final resolution.

⁸⁴ Caudron, "Blow the Whistle on Employment Disputes", citing results of Dispute Resolution Journal survey, 1997. Of course, one must keep in mind that the survey was of employers, not workforce.

⁸⁵ Garrison, Joseph D., "The Employee's Perspective" Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 15-18.

⁸⁶ Ibid.

⁸⁷ DiCesare, "Alternative Dispute Resolution", op cit.

⁸⁸ Garrison, "The Employee's Perspective" Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights", op cit.

⁸⁹ "EEOC Rejects Mandatory Binding Employment Arbitration", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 8-23; see also Vargyas, Ellen J., "EEOC Explains Its Decision: Verdict on Mandatory Binding Arbitration in Employment", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 10; Volin, Andrew W., "What's New in Employment Arbitration?", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 7.

⁹⁰ Hunter, Jerry M., "ADR, the NLRB and Non-Union Workers", Dispute Resolution Journal, V. 50 (Oct. / Dec. 1995), pp. 18-22.

⁹¹ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁹² Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁹³ Miklave, Matthew T., "Why "Jury" Is a Four Letter Word", Workforce, v. 77 (Mar. 1998), pp. 56-58.

⁹⁴ Cliff Whitehill, Senior Vice President and General Counsel of Darden Restaurants, quoted in "ADR In the New Century," op cit.

⁹⁵ Oppenheimer, Martin J., and Johnstone, Cameron, "A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation", op cit.

⁹⁶ Bencivenga, "Fair Play in the ADR Arena", op cit. However, an employment attorney quoted in Ganzel, "Second – Class Justice?", op cit., points out that this choice may appear illusory to the employee faced with house payment and loss of health care benefits.

⁹⁷ "ADR In the New Century," op cit.

⁹⁸ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit. For a different approach, see Marshall, Joseph C., and Theros, Louis, "The Arbitration Alternative", Risk Management, v. 45 (1998), which gives advice on the best way to write enforceable mandatory arbitration agreements.

⁹⁹ Oppenheimer and Johnstone, "A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation", op cit.

¹⁰⁰ See discussion in Estreicher, Samuel, "Predispute Agreements to Arbitrate Statutory Employment Claims", New York University Law Review, V. 71 (Dec. 1997) pp. 1344+

¹⁰¹ Ibid.

¹⁰² Marc Kartman, quoted in Nye, "When the Fired Fight Back," op cit.

¹⁰³ "American Arbitration Association Encourages Use of Voluntary Arbitration to Resolve Employment Disputes", Press Release, 9 July 1997, www.adr.org/press/empstatement.html; "Conclave Held on Employment ADR", op cit. See also True, John, "New Rules for New Challenges: The AAA's California Employment Dispute Resolution Rules", Dispute Resolution Journal, V. 50 (Oct. Dec. 1995), pp. 30-35.

¹⁰⁴ "ADR In the New Century," op cit.

¹⁰⁵ Arnold, "Vocabulary of ADR Procedures, (part 3)", op cit.

¹⁰⁶ Bryan, Kenneth C., "California Lawmakers Turn Focus Toward ADR", Dispute Resolution Journal, V. 52 (Spring 1997), pp. 55-59.

¹⁰⁷ DiCesare, "Alternative Dispute Resolution", op cit. See also Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes, op cit.

¹⁰⁸ Ibid.

¹⁰⁹ Birch, Steven K. "The Arbitrator's Dilemma: External vs. Internal Law? Narrowing the Debate", Dispute Resolution Journal, V. 53, 1998; see also Buckstein,, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

¹¹⁰ Bencivenga, "Fair Play in the ADR Arena", op cit.

¹¹¹ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

¹¹² Bencivenga, "Fair Play in the ADR Arena", op cit.; Verespej, Michael A., "Sidestepping Court Costs: More Companies Are Mandating That Employment Disputes Be Resolved Outside the Courtroom", Industry Week, v. 247 (Feb. 2, 1998), pp. 68.

¹¹³ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

¹¹⁴ Nye, "When the Fired Fight Back," op cit.

¹¹⁵ Verespej, "Sidestepping Court Costs: More Companies Are Mandating That Employment Disputes Be Resolved Outside the Courtroom", op cit.

¹¹⁶ "ADR In the New Century," op cit.

¹¹⁷ Ibid.

¹¹⁸ Caudron, "Blow the Whistle on Employment Disputes", op cit.

¹¹⁹ Bencivenga, "Fair Play in the ADR Arena", op cit.

¹²⁰ "ADR In the New Century," op cit.; Zimmerman, "In -House Dispute Resolution Programs", op cit.

October 1998

SUBJECT: Executive Order 13101-Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition

PURPOSE: To alert MSC Commanders to the requirements of EO 13101

FACTS:

President Clinton issued Executive Order 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, on 14 September 1998.

The Executive Order imposes additional requirements from those previously required by EO 12873, which is superseded.

EPA and States directed to include an evaluation of compliance with the requirement to have an affirmative procurement program for EPA designated items made from recovered material as part of their multi-media inspections of Federal Facilities.

Agencies will be encouraged to include biobased products in their affirmative procurement programs after USDA publishes a Biobased Products List

Contracts for support services at Government owned or operated facilities, as well as contracts for operation of such facilities, shall require the contractor to comply with the EO requirements.

The Order continues and strengthens the requirement to purchase EPA designated items containing recovered materials and to have affirmative procurement programs for such items.

Agencies must provide written justification for not purchasing EPA designated items that meet or exceed EPA guidelines

Written justification must be based on:

- product not available competitively
- product not available within a reasonable time
- product does not meet appropriate performance standards
- product only available at an unreasonable price

Written justification is not required for purchases below the micropurchase threshold.

EPA has designated approximately 40 items subject to requirement for affirmative procurement programs.

DAR Environmental Committee has reported to the DAR Council recommending necessary changes in the Federal Acquisition Regulations to implement the requirements.

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Management of Unexploded Ordnance, Munitions Fragments, and Other Constituents on Military Ranges

Major Michael Egan

The Environmental Protection Agency's (EPA) Military Munitions Rule (implemented in August, 1997) identifies when conventional and chemical munitions become wastes regulated under the Resource Conservation and Recovery Act (RCRA). RCRA wastes must be handled under strict management standards for transportation, storage, treatment, and disposal. EPA has delegated RCRA implementation to most states, which can impose more stringent regulations than the Federal program. The Munitions Rule generally excludes unexploded ordnance (UXO) and munitions fragments on active and inactive ranges from RCRA coverage and postpones an EPA decision on whether to regulate these items on closed, transferring, and transferred (CTT) ranges until after the Department of Defense (DoD) completes its Range Rule.

DoD proposed the Range Rule in September, 1997 and is currently reviewing comments received during the public comment period. The Range Rule sets forth DoD's process for addressing UXO, munitions fragments, and other contaminants on ranges that are no longer needed to support the DoD mission, e.g., Formerly Used Defense Sites or Defense Base Closure and Realignment sites. Fundamental to DoD's efforts, as well as to regulatory and public acceptance, is development of a risk model that integrates explosives safety and environmental concerns. DoD expects to publish a final Range Rule in 1999.

While DoD was successful in persuading EPA that it is appropriate to exclude UXO and munitions fragments on active and inactive ranges from RCRA regulation, recent EPA comments suggest the agency may no longer support such an approach. EPA has indicated that UXO could become RCRA wastes after the passage of some unspecified period of time. Such an interpretation could subject active and inactive ranges to environmental regulations that make continued use of the ranges uncertain, at best, and impossible, at worst. Also, if UXO and munitions fragments on ranges are determined to be RCRA wastes, states may establish management standards that are more stringent than the current federal standards. Additionally, some elements within regulatory agencies and environmental groups have advocated that UXO on CTT are "hazardous substances" under the Comprehensive Environmental Response and Liability Act (CERCLA), thereby subject to release reporting and cleanup requirements that are outside DoD control. As a result of such a designation, activists could seek to use CERCLA to shut down range activities, or, as proposed in current

Superfund Reauthorization bills pending in Congress, seek fines and penalties for non-compliance. Although partnering initiatives with EPA and other stakeholders continue, it is imperative for the Army to emphasize the critical role ranges play in maintaining readiness. Implementation of the Munitions Rule, which successfully survived its initial legal challenge, and the partnering efforts to draft a pragmatic, yet protective Range Rule are designed to avoid overly restrictive regulations that will degrade readiness, while maintaining proper safeguards for human health and the environment. This is, first and foremost, a military readiness and training issue with environmental concerns rather than an environmental issue with readiness and training concerns.

Recent DoD policy initiatives are likely to draw additional attention to the issue. The Office of Secretary of Defense (OSD) has drafted guidance on Emergency Planning and Community Right to Know Act (EPCRA) Toxic Release Inventory (TRI) reporting for munitions used on active ranges. This may result in installations that previously had no reportable releases related to range activities suddenly reporting significant releases into the environment from range activities. The first report would be due July 1, 2001, if the guidance is finalized. OSD's TRI guidance could attract attention to range activities by characterizing range activities as releases of hazardous substances into the environment. The Army is developing data concerning actual emissions and residue from the firing of munitions so that any such reporting would not be overstated. Due to the number of munitions in the inventory and the nature of the testing, it will require several years to complete this effort. While the purposes and standards for reporting under CERCLA and EPCRA are different, the designation of munitions (or their constituents) as hazardous substances under one law will have a spill-over effect into the other law's requirements.

OSD has also drafted Department of Defense Instructions (DODI) that could require periodic clearance of UXO on active and inactive ranges, health risk characterizations, public outreach, and other actions. The Services have non-concurred in the draft DODIs, but it is apparent that some level of information collection and/or response actions on active ranges may be a future requirement.

The cumulative result of these actions will be ever-increasing visibility of range operations to the public and resulting pressure to monitor, if not reduce or curtail, operations that are perceived to have adverse impacts to the environment. Efforts to coordinate responses to these potential challenges require the close cooperation of the environmental and operational communities.¹ (MAJ Egan/CPL)

Recent Developments in Privatization Initiatives

Lieutenant Colonel Allison Polchek

Privatization continues to develop at a remarkable pace. To assist the field in this fast moving area, a number of tools are being developed. In the area of utilities privatization, the Assistant Chief of Staff for Installation Management (ACSIM) has issued guidance, in a question-and-answer format, regarding compliance with the National

¹ This article was originally presented to the Chief of Staff of the Army for inclusion in his weekly summary. The weekly summary highlights issues of national importance to be distributed to all general officers.

Environmental Policy Act (NEPA).² Copies of this guidance may be obtained from this office. In the near future, ACSIM plans to issue guidance regarding preparation of Environmental Baseline Surveys (EBS). The release of this guidance will be discussed in future articles. ACSIM is also examining future compliance issues related to waste water treatment at installations privatizing treatment or collection systems.

The housing privatization initiative has undergone the most intense change. Formerly entitled "Capital Venture Initiative," the concept is now known as "Residential Communities Initiative." This change represents a shift in philosophy whereby installations and the business community will act as partners developing a "total" residential living experience for military members and their families. In order to assist with NEPA compliance, ACSIM and HQUSACE are nearing completion on a boilerplate environmental assessment and NEPA instruction manual. This tool should be available later this year. (LTC Polchek/RNR)

Storage and Disposal of Non-Department of Defense (DoD)-Owned Toxic and Hazardous Materials -- Update³

Mr. Chris Wendelbo

This article focuses on recent amendments to the Military Construction Authorization Act, [hereinafter the Act]⁴ which may affect installations that store non-DoD toxic or hazardous materials. The Act now provides three new statutory exemptions that allow non-DoD (private and other agency) entities to store, treat, and dispose of non-DoD hazardous toxic and hazardous substances on DoD property.⁵ To facilitate timeliness, the approval process for instituting these exemptions has been delegated down the chain of command.

The Act's pre-amendment requirements were particularly onerous for specific installations. These include facilities closing pursuant to Defense Closure and Realignment Act (BRAC) actions, installations contracting for tenant services, and those engaged in privatizing installation maintenance, housing, or utility services.⁶ The recent amendments, however, bring the Act in line with current management trends for DoD installations. First, the statute was amended to allow for the storage, treatment, or disposal of non-DoD toxic or hazardous materials used in connection with a Department of Defense activity or with a service performed at a DoD installation for the benefit of DoD.⁷ Second, the Act now **ELD** exempts the storage of non-DoD toxic or hazardous material generated in connection with

² 42 U.S.C § 4321, *et. seq.*

³ See, Major Allison Polchek, *Storage and Disposal on Non-Department of Defense (DoD) Toxic and Hazardous Materials*, Volume 5, Number 4, ELD Bulletin, January 1998.

⁴ Military Construction Authorization Act, 1985, 10 U.S.C § 2692, Pub. L. No. 98-407, Title VIII, Part A § 805(a), 98 Stat. 1520 (1985).

⁵ National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-88 § 343 (Nov. 11, 1997).

⁶ 10 U.S.C. § 2692.

⁷ 10 U.S.C. § 2692(b)(1), Authorization Act § 343(b).

the authorized and compatible use of a facility.⁸ Finally, the amended act allows, under contract agreement, the treatment and disposal of non-DoD toxic or hazardous material if it is required or generated in connection with a facility's authorized and compatible use.⁹

The Secretary of the Army has delegated approval authority for these exemptions to the Assistant Secretary of the Army (Installations, Logistics, and Environment).¹⁰ In limited circumstances involving only the storage of non-DoD owned toxic and hazardous materials,¹¹ the approval authority has been delegated further to the MACOM Commander, with authority to further delegate to a Flag level Chief of Staff.¹² Sample forms to request an exemption, and the memorandums delegating authority are available by calling the author at the Army ELD Office, (703) 696-1597, DSN 426-1597. (Chris Wendelbo/RNR)

No RCRA Double Jeopardy

Major Robert Cotell

A recent District court case in Missouri provides some encouraging news for those installations struggling to satisfy two masters – the State and the federal Environmental Protection Agency (EPA). The court rejected an argument by EPA that it may take an administrative action when a State has already been delegated authority under the Resource Conservation and Recovery Act (RCRA).¹³ The court held that the EPA cannot seek to take action against a State-regulated entity unless it also withdraws the State's authority to administer RCRA. This is good news in the case where an installation is negotiating with a delegated State and suddenly EPA files a complaint.

In *Harmon Industries, Inc. v. Browner*,¹⁴ the plaintiff ("Harmon") was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon's employees used organic solvents to clean equipment at one of its plants. Every one to three weeks, unknown to Harmon, maintenance employees would throw used solvent residues out the back door of the plant. Over the years about thirty gallons were dumped on the grounds. The discarded solvents were hazardous wastes under RCRA.

In 1987, Harmon discovered what the employees were doing and ordered the practice to cease. Harmon then hired consultants to investigate the effects of the disposal. The report of the investigation concluded that contaminants were in the soil but there was no danger to human health. Harmon then reported the disposal to the Missouri Department

⁸ 10 U.S.C. § 2692(b)(9), Authorization Act § 343(d).

⁹ 10 U.S.C. § 2692(b)(10), Authorization Act § 343(e).

¹⁰ Memorandum, Secretary of the Army, OSA, 4 Aug 1998, subject: Delegation of Authority under Title 10 U.S.C. § 2692.

¹¹ 10 U.S.C. § 2692(b)(9).

¹² Memorandum, Assistant Secretary of the Army (Installations, Logistics, and Environment), ASA (I, L, and E) 3 Sep 1998, subject: Delegation of Authority under Title 10 U.S.C. § 2692.

¹³ 42 U.S.C. § 6901, *et. seq.*

¹⁴ 47 ERC (BNA) 1229, 1998 U.S. Dist. LEXIS 13751 (W.D. Mo., August 25, 1998).

of Natural Resources (MDNR). EPA had authorized MDNR to administer its own hazardous waste program under RCRA. Since first being authorized to administer a program EPA had never withdrawn the State's authority.

After meeting with Harmon, MDNR oversaw the investigation and clean up of the Harmon facility. The State approved a variety of investigations by Harmon concerning the health risks of the contamination. The costs of the studies were over \$1.4 million. Ultimately, the State approved a post-closure permit for the facility, which anticipated additional costs of over \$500,000 during a period of over thirty years.

In 1991, the State filed a petition against Harmon in the State court, along with a consent decree signed by both Harmon and MDNR. The court approved the consent decree that specifically provided that Harmon's compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, EPA had notified the State of its view that fines should be assessed against Harmon. After the petition had been filed and approved by the State, EPA filed an administrative complaint against Harmon seeking over two million dollars in penalties. In its complaint, EPA did not allege that the State had exceeded its authority. In addition, the complaint did not assert that the site posed a health risk, but merely demanded a fine. Harmon demanded a hearing. The administrative law judge (ALJ) found for EPA on the substantive counts of the complaint but reduced the fine to \$586,716. Harmon appealed to the Environmental Appeals Board (EAB), who affirmed the ALJ. Harmon then brought the case to Federal District Court on the issue of the authority of EPA to take an enforcement action where the State had already entered into a consent decree.

The court found for Harmon. The court concluded that the plain language of Section 3006(b) of RCRA provides that State enforcement programs operate instead of Federal programs. As such, the concept of co-existing powers is inconsistent with EPA's delegation of authority. Such a division of power was also anticipated in the memorandum of understanding (MOU) between EPA and the State that defined each party's responsibilities. The MOU required EPA to provide notice to the State prior to taking an enforcement action, even if the State elects not to act. Likewise, under the MOU, if the EPA recommends an assessment of fines, it must refer the matter to the State Attorney General. However, according to the court, neither the agreement, nor RCRA, gives EPA authority to override the State once it determines an appropriate penalty. Section 3006(e) of RCRA gives EPA only the option of withdrawing authorization of a State RCRA program. The EPA does not possess the option to reject part of a State program or to censor a State's course of action on an incident-by-incident basis.

Although the case reflects the view of only one Federal District Court and is presently subject to appeal, it may prove quite useful for an installation ELS responding to an EPA complaint. The case should be cited as the basis for an affirmative defense in all enforcement actions where the State has taken any administrative action and EPA subsequently files a complaint. Furthermore, although the case involved only the imposition of additional fines, it is not limited to these facts. Any action taken by the State to coerce

compliance on the part of an installation should preclude similar enforcement by EPA. Unless EPA specifically withdraws the State authorization to administer the program, EPA should not take independent action. Otherwise an installation does not know with whom it should negotiate during a State enforcement action. As the Court pointed out in *Harmon* such independent action by EPA would be “schizophrenic” and result in uncertainty in the public mind. (MAJ Cotell/CPL)

The CERCLA Permit Exclusion – a Reminder

Ms. Kate Barfield

This is a quick reminder – *you should not pursue permits for on-site CERCLA remediation activities*. Permits are specifically excluded from CERCLA, which states that no “...federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite...”¹⁵ This exclusion is based on Congress’ recognition that CERCLA cleanups should be spared the delay, duplication, and additional costs involved in acquiring permits for remediation. If you are uncertain as to whether an activity is considered “onsite” or if you have a question regarding CERCLA’s permit exclusion, contact your ELS. (Kate Barfield/RNR)

¹⁵ 42 U.S.C. § 9621(e). See *also*, the NCP provisions regarding permits at 40 C.F.R. § 300.4000(e).

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Will Federal Agencies Stand Alone on CERCLA Liability?

Lieutenant Colonel David Howlett

According to a recent Supreme Court case, retroactive application of a statute may be unconstitutional. This holding could affect interpretations of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ and create havoc for federal agencies responsible for cleanup expenses under CERCLA. In *Eastern Enterprises v. Apfel*,² the Supreme Court invalidated the Coal Industry Retiree Health Benefits Act of 1992 as it applied to a company that had ceased mining operations before passage of the law. Justice O'Connor wrote for four Justices that the law's retroactive application was an unconstitutional taking of property. A fifth justice found a violation of due process.

According to the opinion, legislation could be found unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."³ As Justice O'Connor noted, it did not matter that the mining company could seek indemnification from other companies or through insurance. Since such reimbursement was not conferred as a matter of right, the unconstitutional taking was still effective.

It is easy to see the parallels between the Coal Industry Retiree Health Benefits Act of 1992 and CERCLA.⁴ CERCLA imposes strict liability for activities involving hazardous waste that occurred long before its enactment in 1980. The liability can be both severe and disproportionate to experience; millions of dollars in liability can arise from the disposal of small amounts of material. This liability can be completely unexpected since the methods of disposal were often completely legal and even occurred pursuant to regulatory permits. As in *Eastern Enterprises*, the liability assessed in CERCLA seems like it was "made in a vacuum."⁵ Although CERCLA also offers an opportunity to seek contribution against other parties, reimbursement is not guaranteed.⁶

¹ 42 U.S.C. § 9601, *et. seq.*

² ___ U.S. ___, 118 S. Ct. 2131 (1998).

³ *Id.* at 2149.

⁴ See, Alfred R. Light, "Taking" CERCLA Seriously: *The Constitution Really Does Limit Retroactive Liability*, 13 *Toxics L. Rep.* 238 (1998).

⁵ 118 S. Ct. at 2150 (referring to the calculation made under the Coal Industry Retiree Health Benefits Act of 1992).

⁶ 42 U.S.C. § 9613(f).

CERCLA is mentioned only by the dissent in *Eastern Enterprises*. Citing CERCLA, the dissenting opinion stated “Congress has sometimes imposed liability, even ‘retroactive’ liability, designed to prevent degradation of a natural resource, upon those who have used and benefited from it.”⁷ The dissent compared the Benefits Act under review to CERCLA, apparently viewing the latter as a law in which retroactivity was proper. The plurality opinion and the concurring opinions do not mention CERCLA. This could be taken as an ominous sign that these justices might find some applications of CERCLA unconstitutional and were therefore not rising to the statute’s defense. As a recent commentator puts it, “The conservatives’ silence in this respect is deafening.”⁸

In two other recent cases,⁹ parties found liable for pre-1980 disposal practices have asked courts to find retroactive application of CERCLA unconstitutional, relying on *Eastern Enterprises*. If successful, this approach would be widely repeated and would eliminate CERCLA liability for many potentially responsible parties.

This development has important implications for the federal government. Although federal agencies are treated as any other nongovernmental entity under CERCLA,¹⁰ the government does not have Fifth Amendment taking or substantive due process rights. Federal agencies would therefore be unable to take advantage of the *Eastern Enterprise* retroactivity defense to CERCLA liability.

At a long-closed site, federal agencies could be the only responsible parties remaining once others escape retroactive liability. This could lead to interesting results. Because the Environmental Protection Agency (EPA) cannot sue the United States under the unitary executive theory, there is no possibility of a court judgment against the federal agency. Therefore, the Judgment Fund would not be available to satisfy the agencies’ CERCLA liability.¹¹ The EPA, which could still proceed administratively, would likely demand that agencies use installation restoration funds to make payment. If the agencies did so, their ability to clean up their facilities would be disrupted.

For these reasons, we should watch closely if private parties use *Eastern Enterprises* to invalidate retroactive application of CERCLA. (LTC Howlett/LIT)

⁷ 118 S.Ct. at 2164-65 (Breyer, J. dissenting).

⁸ Light, *supra*, note 4 at 242.

⁹ See, *Asarco Seeks Dismissal of \$1 Billion Suit Relying on Eastern Enterprises Decision*, 13 Toxics L. Rep. 586 (1998) and *Aluminum Firm Calls on District Court to Dismiss Liability Based on Recent Ruling*, 13 Toxics L. Rep. 587 (1998).

¹⁰ 42 U.S.C. §§ 9620, 9659.

¹¹ 31 U.S.C. §1304. This statute authorizes funds to pay “final judgments, awards, compromise settlements, and interests and costs specified in the judgments...” 31 U.S.C. §1304(a). The statute does not now apply to settlement of administrative actions brought by the U.S. Environmental Protection Agencies or other regulatory agencies. The only administrative settlements authorized for payment are Federal Tort Claims Act awards and awards by Boards of Contract Appeals. See, United States Treasury Financial Manual, Part 6, Chapter 3100, §3130.40.

Clean Air Act Enforcement Alerts

Lieutenant Colonel Richard Jaynes

This note provides the latest on the doctrine of sovereign immunity as it relates to the Clean Air Act (CAA).¹² It is also an update on the Environmental Protection Agency's (EPA) efforts to implement its authority to impose punitive fines on other Federal agencies.

No Waiver of Sovereign Immunity – A Correction: The Army's Central Regional Environmental Office (CREO) recently published an article in its quarterly newsletter¹³ erroneously stating that the Army had "waived" sovereign immunity in settling a CAA dispute with state regulators in Arkansas. The CREO based its article on a news item in the *Defense Environment Alert*.¹⁴ The *Alert* article had presented a State of Arkansas spokeswoman's perspective of a consent order reached with Pine Bluff Arsenal (PBA). She believed that the Consent Order was equivalent to a waiver. The Army does not agree. Rather, the PBA settlement represents an agreement to disagree on the sovereign immunity issue and does not obligate PBA to pay punitive fines. Unfortunately, the CREO's effort to inform readers about the PBA matter resulted in the incorrect statement that the Army had changed its policy regarding the payment of punitive CAA fines. While the CREO will print a retraction of the article in its next issue, this error is being pointed out here to avert confusion that the CREO article may cause in the interim.

No Waiver of Sovereign Immunity – the Latest: The Air Force recently scored a significant CAA victory in a case decided by the U.S. District Court for the Eastern District of California.¹⁵ In *Sacramento Metropolitan Air Quality Management District v. United States*, the Sacramento District sought to enforce a punitive fine of \$13,050 against McClellan Air Force Base for violations of the base's permitted natural gas usage limits. In granting the Air Force's motion for summary judgment, the court closely followed Supreme Court precedent,¹⁶ finding that the CAA does not waive sovereign immunity for punitive fines. Hopefully, the *Sacramento* case signals a positive Federal court trend toward resolving what has been a somewhat contentious issue for years.

No Waiver of Sovereign Immunity – Legal Terms: The CAA's Federal facilities provision¹⁷ contains a limited waiver of sovereign immunity with respect to state, interstate, and local air pollution control laws. It requires Federal agencies to comply with air pollution control programs "to the same extent as any nongovernmental entity."¹⁸ It also subjects Federal agencies to payment of administrative fees and "process and sanctions" of air

¹² 44 U.S.C.A. §§ 7401-7671q (West 1998).

¹³ *Army Waives Sovereign Immunity in CAA Issue in Arkansas*, Environmental Monitor, (Army Central Regional Environmental Office, Kansas City, MO), Fall 1998, at 5.

¹⁴ *Army, Arkansas Sidestep CAA Sovereign Immunity Issues with Consent Agreement*, Defense Environment Alert, Vol. 6, No. 17, Aug. 26, 1998 (see <http://denix.cecer.army.mil/denix/DOD/News/Pubs/DEA/26Aug98/05.doc.html>).

¹⁵ *Sacramento Metropolitan Air Quality Management District v. United States*, CIV S-98-437 (E.D. Cal. Nov. 13, 1998).

¹⁶ *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992).

¹⁷ 42 U.S.C.A. § 7418(a) (West 1998).

¹⁸ *Id.*

program regulatory entities.¹⁹ The precise meaning of the terms "process and sanctions" has been the subject of litigation in the Federal courts for several years. The United States Supreme Court interpreted these terms when it examined the Federal facilities provision of the Clean Water Act (CWA)²⁰ in *U.S. Department of Energy (DoE) v. Ohio*.²¹ The Court found that this aspect of the CWA's sovereign immunity waiver, which is virtually identical to the CAA's waiver, did not subject Federal facilities to "punitive fines" imposed as a penalty for past violations. This was based on a finding that the CWA did not contain a clear and unequivocal waiver of sovereign immunity. In contrast, the Court found that the CWA waived sovereign immunity for court-ordered "coercive fines" imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively.

The Supreme Court's decision in *DoE v. Ohio* was formally extended to the CAA in a Georgia Federal District Court case, *U.S. v. Georgia Department of Natural Resources*.²² The *Georgia* case held the CAA does not authorize Federal agencies to pay punitive fines. A contrary result, however, was reached in another Federal case, *U.S. v. Tennessee Air Pollution Control Board*, where a District Court deviated from the analytical approach of the U.S. Supreme Court.²³ The *Tennessee* case is currently pending appeal in the 6th Circuit, where the United States recently presented its position in writing and oral argument. The U.S. maintained that the CAA's partial waiver of sovereign immunity does not authorize Federal agencies to pay punitive fines. In making its argument, the U.S. relied on *Sacramento Metropolitan Air Quality Management District v. United States* -- the second case to find that the CAA did not contain a waiver of immunity. (This was the McClellan A.F.B. case discussed above).

Sovereign Immunity – EPA View: In contrast to the U.S. position on sovereign immunity, last year, the Department of Justice opined²⁴ that EPA has authority under the CAA to impose punitive fines against Federal agencies. Since then, EPA has been pursuing regulatory changes²⁵ that will formally extend existing administrative hearing procedures to

¹⁹ *Id.*

²⁰ 33 U.S.C.A. §§ 1251-1387 (West 1998).

²¹ 503 U.S. 607 (1992).

²² *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).

²³ *U.S. v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M.D. Tenn.1997), *appeal pending*, No. 97-5715 (6th Cir.).

²⁴ Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, Re: Administrative Assessment of Civil Penalties Under the Clean Air Act (July 16, 1997)

²⁵ Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pt. 22 and 59) (revisions to existing rules proposed Feb. 25, 1998). EPA has also resumed its CAA field citation program rulemaking, which was interrupted when EPA asked the Department of Justice to resolve the DoD-EPA dispute over EPA's authority to assess penalties. Field Citation Program, 59 Fed. Reg. 22776 (1994) (to be codified at 40 C.F.R. pt. 59) (proposed May 3, 1994).

EPA's CAA enforcement actions. EPA recently published guidance²⁶ that instructs its regional counsels and air program directors to provide the same administrative procedures to Federal agencies as apply to private entities. The EPA policy discusses the hearing and settlement procedures available, as well as EPA's policies on compliance orders, criteria for penalty assessments, and its press release practice. The policy also indicates that Federal agencies will have the opportunity to consult with the EPA Administrator prior to a CAA penalty becoming final, and explains how that right may be exercised. To date, EPA has not exercised its new-found penalty authority against an Army facility, nor has it initiated an enforcement action acting as the surrogate of a state air program regulatory agency.

No Waiver of Sovereign Immunity – A Caution: It is important to emphasize that the availability of sovereign immunity as a defense against punitive fines should only serve as a shield to fine payment -- never as a sword against CAA compliance. Federal agencies are bound to comply with all laws and regulations for air pollution control. As such, they are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a Federal facility's air pollution control activities, the facility has the same obligation as nongovernmental entities to expeditiously correct all infractions. Such facilities are not exempted from these responsibilities because they lack the authority to pay punitive fines.

Despite the foregoing, we have observed that some state regulatory agencies insist that they cannot effectively regulate the various military Services unless they are able to impose punitive fines. This, coupled with a view that Congress waived sovereign immunity for CAA fines, can make for contentious negotiations. It is not surprising that installations that have established a poor track record with regulatory agencies can find it very difficult to resolve even minor infractions. The state may insist on the payment of a fine as a matter of principle, so it is incumbent on Army installations to diligently follow the CAA. The existence of sovereign immunity makes vigilance in CAA compliance essential to maintaining peace with the regulatory community. (LTC Jaynes/CPL)

Restoration and Natural Resources Topics of Interest

Lieutenant Colonel Allison Polchek

Withdrawal of Lead Based Paint (LBP) Guidance: On 30 Oct, the Assistant Chief of Staff for Installation Management withdrew the LBP Guidance previously issued on 26 Aug 98. The guidance was withdrawn, in response, to a request by the Principal Assistant Deputy Under Secretary of Defense (Environmental Security). The DoD request cited the on-going discussions between DoD and EPA regarding resolution of the LBP controversy as the reason for the withdrawal request, and anticipated completion of those discussions within the next sixty days.

²⁶ Memorandum from Steven Herman, Assistant Administrator, to Regional Counsels and Air Program Directors, Environmental Protection Agency, Re: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (Oct. 9, 1998) (see <http://es.epa.gov/oeca/fedfac/policy/caagui8.pdf>).

Native American Policy: On 20 Oct 98, the DoD issued the Department of Defense American Indian and Alaska Native Policy. Most significantly, this policy establishes a requirement to consult with Native American tribes, on a government-to-government basis, regarding DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands. The new policy has the potential to impact many areas of installation activities, including restoration and clean-up activities and range operations. This policy can be obtained through the internet by contacting this address: <http://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html> (LTC Polchek/RNR)

OPERATIONAL AND ENVIRONMENTAL EXECUTIVE STEERING COMMITTEE FOR MUNITIONS

Lieutenant Colonel Jill Grant

Over the last few years, both regulators and the public have expressed increased interest in the use of munitions on active ranges. This may lead to additional regulation and changes in environmental laws to include requirements for cleanup of unexploded ordnance (UXO) and other contaminants. The potential for non-Department of Defense (DoD) regulation of active ranges energized the operational community to become more involved in range management and munitions' use issues. In addition, DoD articulated the need for "sustainable range use" to protect the use of military ranges for training. Accordingly, the DoD chose an existing organization, the Ordnance Environmental Executive Steering Committee (OEESC), to look into this matter. (The OEESC was organized in the late 1980's to address environmental issues involving ordnance for DoD.) The OEESC was directed to revise its charter and reorganize its membership to include a more operational "warfighter" representation.

In September 1998, OEESC was rechartered and renamed the Operational and Environmental Executive Steering Committee for Munitions (OEESCM). Its mission is to "develop overarching DoD policies, positions, and action plans related to the lifecycle management of munitions to support readiness by balancing operational needs, explosives safety, and environmental stewardship throughout the acquisition, management, use and disposal of munitions." The primary goal is readiness support in the lifecycle management of munitions.

The OEESCM will bring a Joint Service, multi-disciplinary approach to the management of ranges and munitions. The Deputy Assistant Secretary of the Army, Environment, Safety and Occupational Health, Mr. Raymond Fatz, is a permanent co-chair. The other co-chair will serve a twelve month term and will rotate between the three other Services. Currently, Brigadier General Huly, the Director, Operations Division, Headquarters Marine Corps (Plan, Policies, and Operations) is the co-chair. In addition to the Service operators, the OEESCM membership includes representatives from the following communities of the Services and Office of the Secretary of Defense: logistics (to include ordnance); environmental; installation management; safety and explosives safety; research, development, testing and evaluation and legal.

The OEESCM will include five subcommittees, chaired by an O6 or GS/GM 15, to address issues relating to the lifecycle of munitions. These subcommittees are: (1) munitions acquisition; (2) munitions stockpile management; (3) range and munitions use; (4) munitions demilitarization; and (5) range response actions. Each Service will chair a subcommittee, with the Army chairing the Range Response Subcommittee and co-chairing, with the Air Force, the Range and Munitions Use Subcommittee (RMUS).

The subcommittee most relevant to training on our military installations is the RMUS, which has been operating for about two months. Its first order of business is drafting a DoD Instruction governing environmental and explosives safety management on DoD active and inactive ranges. The RMUS will also wrestle with such contentious issues as Emergency Planning and Community Right-To-Know Act toxic release inventory reporting for munitions fire on ranges, the status of UXO under CERCLA, UXO clearance requirements, as well as environmental monitoring, and range scrap.

Clearly, the manner in which the RMUS, the OEESCM, and ultimately DoD, choose to resolve the issues involved in range management and munitions' use could have an enormous impact on training - both in terms of availability of active ranges for training and of money for training. It is critical that our operators - those responsible for ensuring our soldiers are trained and ready - weigh in on the resolution of these issues. The OEESCM will ensure their voices are heard. (LTC Grant/CPL)

26 October 1998

SUBJECT: The AMC Partnering Program

PURPOSE: To brief the ESC On the Status of the AMC Partnering Program--Roadshow VII and FY 99 Partnering Program Initiatives

FACTS:

During Roadshow VII 18 Partnering Workshops, two at each MSC Roadshow stop, were conducted. These Partnering Workshops utilized the AMC Partnering Model, were facilitated by experts using the AMC Model, and supported General Wilson's goal of expanding Partnering throughout AMC during FY 98.

AMC Partnering Champions and the AMC Partnering Team were instrumental in designating acquisition programs, organizing and administering the Workshops.

The Partnering programs that used Partnering during the Roadshow include research and development, materiel acquisition, base operations, and engineering and support services contracting. We have a wide inventory of many different kinds of contracts.

At each Workshop, government and industry, users and subcontractors were represented. Included are some of the largest AMC contractors, and PMs for whom AMC MSCs provide matrix support.

Evaluation sheets were completed by each Partnering Workshop participant. Both government and industry participants report that the enhanced communication leads to early identification of potential problems and a mutual commitment to resolve these issues promptly.

A Roadshow VII Partnering Program After-Action Report is being distributed to attendees at the ESC.

In January 1999, the MSC Lead Partnering Champions will meet in a 1 day Workshop to review AMC MSC Partnering success stories, discuss Partnering developments since the Roadshow, revise the AMC Partnering Guide to reflect lessons learned, and to gauge the progress of Partnering.

In February 1999, the AMC Partnering Team will begin making site visits to each AMC MSC to assess and evaluate the use of Partnering.

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Contracts and Procurement Subgroup Report: Vera Meza

Report on 14 Oct 98 Meeting of the Contracts and Procurement Section of the Interagency Alternative Dispute Resolution Working Group.

0900-1200, Key Bridge Marriott.

Meeting chaired by **BG Frank Anderson**, USAF. Approximately 50 people in attendance from about 40 agencies.

BG Anderson's goal is to help all interested federal agencies identify the best practices to devise and implement appropriate ADR practices in the contracting arena. This is a revolution in business affairs; the systematic analysis, re-thinking and re-design of our business practices and programs. He views ADR as an efficiency concept. The Air Force contract ADR vision is to de-litigate the process. He urged us to think ADR when in the Acquisition Strategy phase. He pushed for open contract communication and early dispute resolution. He assumes that there is no perfect contract so that collaboration and partnering are needed for a structured conflict management process. The value of ADR is that it facilitates open discussion and information exchange.

The Air Force has a five year ADR plan to build a support infrastructure (multi-functional team of experts, ADR process design, resource support), provide tiered training (awareness), and measure and track usage and success stories. The Air Force has corporate agreements and program specific agreements. His preference is to resolve Air Force-Contractor issues within the Air Force. This allows the Air Force to maintain control over the issues. The Air Force uses nonbinding ADR. He believes it provides leverage. One technique is for each side to develop a notebook of the facts and issues. Then the parties develop a Onebook to resolve the issue. The primary focus of BG Anderson was on claims resolution and not bid protests. I think that we should consider re-energizing our ADR disputes resolution program. AMC could handle a number of contract administration problems in-house as we handle the contract formation ones.

There were also speakers from the ASBCA, GAO (Tony Gamboa), GSBICA, NAVFAC and DOJ.

This group expects to publish guidance materials and model program designs. There is also a plan to have a conference, possibly in conjunction with the ABA in April. BG Anderson thinks that the ADR concept has renewed energy because it has the full endorsement and commitment of the executive branch: the 1998 Presidential Memorandum, Attorney General Reno's letter to 60 agencies, and the Interagency Working Group.

Next meeting is scheduled for December.

Workplace Disputes Minutes: Steve Klatsky

I attended the first meeting on the Workplace Dispute group meeting on 28 Oct, and thought I would report to you what occurred and some specifics.

1. Generally:

Over 140 attendees from 45 agencies, with at least 10 folks from DOD elements. The acquisition and claims meetings apparently had about 40 people each. The group was divided into about 12 small groups to discuss what participants needed in the way of assistance, and what they thought the working group should and should not do. While they tried to put all the DOD people together in the same group they did not. The small group facilitators, who seemed to all be from FDIC, seemed to try to view all of DOD as monolithic. All of us DOD folks described that we had to be treated separately. After the small group session ended, each group gave a report out, from which the para 2 specifics come.

By the way, per yesterday's DOD meeting: At no point did any of the co-chair even hint that they would be dealing with policy matters--directives, binding or coercive in nature, nor did they mention future Attorney General activities with respect to government-wide initiatives. I certainly will look out for that in future sessions.

2. Specifically:

The following are items that were reported out to the entire group by the 12 small group facilitators, and some of my thoughts on a few.

1. Federal Employee Unions: The IAG (interagency group) will consider inviting Federal employee union representatives to future sessions. SAK: makes sense to me, especially, you need buy in from union on ADR programs and processes that deal with issues covered by the negotiated grievance procedure. In the AMC REDS (Resolving Employment Disputes Swiftly) program, our three pilot sites all report union support for ADR.

2. Evaluating/ Assessing/Measuring ADR Success: Several groups expressed the need for assistance from other agencies who have tried re determining how to measure ADR success, so that management will continue to support and devote resources. SAK: The August 1997 GAO study: Employers' Experiences with ADR in the Workplace concluded that one overriding problem with ADR is the lack of metrics or methods to measure savings and benefits.

3. Recognition: There is a need to recognize individuals whose ADR work has been beneficial to agencies.

4. Management Acceptance of ADR: There is concern that although top management may express support for ADR, it is the middle managers and first-line supervisors who must be convinced on a day-to-day basis.

5. Role of EEO Counselors as Mediators: The basic question here is whether there is an ethics issue when counselors in an EEO office act as third-party neutrals. SAK: This is a multi-faceted issue. I participated as an adjunct faculty member for the Defense Equal Opportunity Management Institute Mediation Course in September. Most of the students were EEO counselors, managers, officers. They are very confused as to the relationship between ADR and the traditional counseling role played by EEO. This is especially so, since EEOC has long stated that the fact-finding process of USACARA and OCI is a form of ADR. I taught from the draft EEOC 1614 ADR section and noted that the EEOC management directive may address this. A section of the draft 1614 on ADR states that " (it is open as to) whether the mediator or counselor will complete the counselor's report if mediation or other means of ADR fails." This has EEO professionals very nervous, and may cause EEO to view ADR as a threat to their future.

6. Mediation--Ethics: Concern raised about confidentiality of mediation process; that is, what aspects of the transactions occurring during mediation can or can not be revealed. SAK: The reenacted ADR legislation added a narrow confidentiality provision. Lots of unanswered questions.

7. Sharing Insights: The IAG Web Site has forums to discuss issues. SAK:great!

8. ADR Options beyond Mediation: What are other possible ADR processes for workplace disputes? SAK: Our REDS program offers a menu that includes mediation, peer review panels and factual discovery. I personally think using mediation is great. But, it is important to view ADR as an opportunity to improve workplace environment, and not just to resolve actual or potential disputes. Mediation only does not do this.

9. Budget: A problem? Obviously, yes. SAK: Management must accept the start-up costs inherent to beginning ADR. They have to trust that this will be beneficial as against long range cost of litigation.

10. Managers View ADR as a "give away". Hurts use and expansion of ADR. SAK: Management is the barrier to expanded use of ADR. ADR requires active participation of managers--they can not hide behind technicalities or be protected by an agency representative. One of our local union Presidents said to our REDS review team that his union likes ADR because it requires "poor managers" to explain themselves, and "exposes" poor management.

11. Data on cost comparisons between ADR and traditional dispute resolution means: Necessary to maintain top management commitment to ADR. SAK: One of my reasons for participating in the IAG. We will need this as we move from REDS pilots to AMC-wide use.

12. SES ADR Performance Evaluation for ADR: Mentioned that SES personnel should have supporting ADR as a performance rating. SAK: This might turn into a policy issue that OSD would be interested in.

SUMMARY OF GENERAL ACCOUNTING OFFICE
CASES ON GIFTS AND MEMENTOS

APPROPRIATED FUNDS: INCENTIVE AWARDS

B-271511: Agency can give employees food or food vouchers as a non-monetary award under the Government Employees' Incentive Awards Act. Agency must comply with awards regulations and make certain determinations as discussed further in the case.

B-257488: Agency can purchase and distribute mugs and pens to employees under the Government Employees' Incentive Awards Act. Agency must comply with awards regulations.

B-256399: Agency can purchase and distribute tickets to local sporting events or amusement parks to employees under the Government Employees' Incentive Awards Act. Agency must comply with awards regulations.

B-243025: Agency can purchase jackets for employees pursuant to the Government Employees' Incentive Awards Act. Agency must comply with awards regulations.

B-247687: Agency can purchase and distribute belt buckles to regional military winners of a military skills competition. (10 USC 1125) Agency must comply with awards regulations.

B-227559: Agency can purchase telephones of modest value as honorary awards for employees pursuant to the Government Employees Incentive Awards Act. Agency must comply with awards regulations.

Appropriated Funds: Direct Contribution To Authorized Mission ("Necessary Expense")
B.257488: Agency can purchase "No Red Tape" buttons for employees to wear during normal duty hours to serve as visible reminders of the agency's customer focus. The buttons had no intrinsic value and were designed solely to emphasize legitimate agency goals.

B-247686: Agency can purchase and distribute buttons and magnets, imprinted with information about air quality, to people attending a pollution prevention conference, where agency has an explicit statutory requirement to increase understanding of the environment and improve awareness of environmental problems among the broader public.

B-242391: Agency can make modest cash payments and/or provide baseball caps to fishermen who return "fish tags". Apparently, the fish tags give the agency important information about fish migration (an authorized agency mission), which information they could not get otherwise.

B-206273.2: Agency can purchase and distribute, on an occasional basis, free commemorative coins for promotional purposes, where the agency has statutory authority to market and sell coins (agency = U.S. Mint). Agency must also meet a three-part test to do this, as discussed in the case.

B-234241 and B-230062: Agency can purchase military recruiting posters to give away at a job conference - in order to attract potential military recruits to the agency's booth. Agency has statutory authority to conduct "intensive recruiting campaigns to obtain [military] enlistment."

B-211477: Agency chaplain's office can purchase and distribute modest calendars to military personnel and their families, where the calendar indicates religious service schedules. The chaplain's statutory mission includes notifying military members about religious services.

APPROPRIATED FUNDS: NO CONTRIBUTION OR INDIRECT CONTRIBUTION TO AUTHORIZED MISSION (PERSONAL GIFTS -- NOT "NECESSARY EXPENSE")

B-247563.3: Agency cannot purchase and distribute pens, folding scissors, or shoe laces for potential recruits. The items were favorable reminders of the agency and did not contain information which is not otherwise commonly available.

B-247563.3: Agency cannot purchase and distribute clothing patches for a local scouting group. The link to recruiting efforts was too attenuated.

B-247563.3: Agency cannot purchase and distribute restaurant vouchers and a silk plant in recognition of Women's Equality Week.

B-247563.3: Agency cannot purchase and distribute t-shirts to employees who participate in a local athletic event. Agency cannot pay a sponsorship fee to the athletic event.

B-260260: Agency cannot purchase and distribute baseball caps for potential recruits. Agency claimed that the caps, which had "DOE -- Valuing Diversity" printed on them, helped them to recruit a diverse workforce. The GAO disagreed. They concluded that the caps were personal gifts, because the link between the caps and a recruiting a diverse workforce was tenuous.

B-223608: Agency cannot purchase ice scrapers imprinted with the safety slogan, "Please Don't Drink and Drive".

B-257488: Agency cannot purchase and distribute mugs and pens for conference attendees -- as a pleasant reminder of the conference.

B-240001: Agency cannot purchase and distribute Combined Federal Campaign T-shirts. The agency argued that the t-shirts were incentive awards pursuant to the Government Employees Incentive Award Act; however, awards regulations do not permit recognizing an employee's CFC contributions.

B-201488: Agency cannot purchase and distribute winter caps to volunteers in a weather observation program. The purpose of the caps was to create esprit de corps among the volunteers, to increase their motivation, and to encourage them to continue volunteering for the program.

B-195896: Agency cannot purchase and distribute commemorative photographs to thank visiting dignitaries for participating in an agency dedication ceremony.

B-195247: Agency cannot purchase and distribute jackets and sweaters to job corps participants. The purpose of the items was to increase morale for those participants who could not return home for Christmas.

B-192423: Agency cannot purchase and distribute "Sun Day" buttons to the public in order to advertise the agency's commitment to energy conservation.

B-191155: Agency cannot purchase and distribute small plastic garbage cans filled with candy shaped like solid waste -- in order to generate conversation about the Resource Recovery Conservation Act.

B-184306: Agency cannot purchase and distribute marble paperweights and walnut plaques to recognize individuals' support for the agency (i.e., to enhance community relations).

B-182629: Agency cannot purchase and distribute decorative key chains in order to enhance favorable relations between the agency and certain conference attendees.

B-175434: Agency cannot purchase and distribute decorative ash trays in order to generate conversation about the agency and to remind conference participants about the agency and conference goals.

B-151668 (1970): Agency cannot purchase and distribute boots, gloves, paperweights, gift boxes of convenience foods, or agricultural research products to visiting dignitaries in order to enhance foreign and domestic relations.

B-151668 (1963): Agency cannot purchase and distribute cuff links and bracelets.

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Purchasing Mementos

1. Over the last year we have uncovered questionable practices regarding the use of government funds to purchase "mementos". In one case we identified a fiscal violation. This Resource Management/Command Counsel memorandum provides guidance about purchasing mementos. By "mementos", we mean things like plaques, trophies, caps, jackets, tote bags, pencils, stickers, mouse pads, coasters, magnets, jar openers, and knives that we give to employees, customers, or other people. The basic rule is that we cannot use appropriated funds to purchase these types of items. The General Accounting Office (GAO) has consistently told us that they do not want us to use our program funds for mementos because they consider them to be personal "gifts". That said, there are several exceptions to the basic rule, each of which we have listed below. The rules for these exceptions vary depending on the type of funds, the recipient, and the purpose of the purchase.

2. Appropriated Funds - Authorized Promotional Materials:

a. Under limited circumstances, we can use appropriated funds to purchase modest promotional items. Generally, we have to show that the items are a necessary expense for the fulfillment of our mission. This means that the mementos must make a "direct contribution" to carrying out our mission. In order to meet this standard, we must be able to point to a law or regulation that allows us to purchase and distribute mementos.

b. Sometimes this means that the law or regulation explicitly permits us to purchase and distribute mementos. For example, AR 5-17 permits the purchase of certain promotional items in support of the Army Ideas for Excellence Program and AR 420-90 and AR 385-10 permits the purchase of certain fire prevention and safety-related promotional items, respectively.

c. In other cases, this means that the law or regulation, while silent on the purchase of mementos, nevertheless explicitly authorizes education, outreach, or other activities with customers or members of the public. In that situation, a memento can sometimes make a direct contribution to our mission. For example, if our mission is to prepare local communities for an emergency, we could probably distribute a modest item, such as a refrigerator magnet, provided it had the local emergency telephone numbers on it or other important information which met the goals of our mission - i.e., preparing local citizens for an emergency. On the other hand, if our mission is to develop and produce the next-generation of weapons systems, we could not distribute the refrigerator magnets to people (including to Government employees), even if the magnets contained our telephone number and web site address. The reason? The magnets do not make a direct contribution to producing the weapon system.

d. Some people feel that distributing mementos can enhance community relations, improve employee morale, or build team esprit de corps. While these are all worthy goals, the GAO has consistently held that these do not meet the legal standard. Instead of making a direct contribution to our mission, these goals make an indirect contribution. This means that we cannot purchase and distribute mementos even though they educate people about

us, generate conversation about us, improve the surrounding community's views about us, enhance employee morale, or serve as a favorable reminder about us. Again, these are all-important goals, but the GAO has told us that this is not the way they want us to spend our program funds.

3. Appropriated Funds - Awards:

a. In addition to certain authorized promotional materials, we can also use appropriated funds to purchase mementos when they are given as awards for exceptional service or achievement. In order to do this, we must first establish an officially approved awards program. This means that we must establish the criteria and procedures for issuing the awards, as well as maintain documentation in accordance with applicable awards regulations. Since these regulations vary for military members, civilians, and private citizens, we have summarized each below.

b. Appropriated Funds - Military Members. We may present modest mementos, including plaques, trophies, or other items, to recognize accomplishments which clearly contribute to the increased effectiveness or efficiency of a military unit. Generally, the awards should be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness. The military awards regulations contain other requirements, including that MACOM Commanders approve awards programs; that commanders avoid the presentation of duplicate awards; and that the cost of the award not exceed \$75.00 for an individual or \$250.00 for a team award. AR 600-8-22.

c. Appropriated Funds -- Civilian Employees. We may present modest items to recognize superior accomplishment through the Incentive Awards Program. Generally, these items must be centrally purchased through HQDA, although we may locally purchase command-unique presentation items. The civilian awards regulations also contain other requirements, such as the criteria for issuance of an award. AR 672-20.

d. Appropriated Funds ñ Private Citizens. In addition, we can occasionally (i.e., not routinely) present plaques and medallions to private citizens. There, we have to consider the significance and merits of the citizen's contributions and determine that those contributions warrant an honorary award. However, the rules are different if we want to give an award to a person or organization with a business relationship with us or with another DoD component - i.e., contractors. There, we cannot give a plaque or medallion unless the contractor's contribution is substantially beyond that specified in the contract and the recognition is clearly in the public interest. DoDD 1432.2.

e. Appropriated Funds -- Commanders' Coins. Finally, these same rules apply for the distribution of Commanders' coins to military, civilians, and private citizens respectively. Commanders should distribute coins only when recognizing exceptional service or achievement, as above.

4. Non-Appropriated Funds - Awards: In addition to the above, Commanders can use non-appropriated funds to purchase modest mementos for distinguished military and other visitors who have contributed to the Army's MWR program; or for participants who show excellence in certain athletic or non-athletic competitions and events. AR 215-1, paragraph 4-6 contains additional details about the criteria for these awards. Also, AR 215-3 contains additional details about incentive awards programs for non-appropriated fund employees.

5. Appropriated Funds - Gifts for Distinguished Guests: "Contingency Funds" are the only authorized category of appropriated funds for the purchase of gifts. This is a special, separately controlled sub-account of funds, sometimes known as ".0012" funds. We can

purchase gifts using these funds provided that we meet the criteria in the contingency fund regulation, AR 37-47. Generally, the gifts must be for "authorized guests" - that is, for certain high-level government officials, certain foreign guests, and certain prominent citizens who make a substantial contribution to the Nation or the Army. In addition, the gift cannot be more than \$200, and it must be given in connection with an official ceremony or function. Finally, prior to using these funds, there are certain documentation and review requirements.

6. Personal Funds -- Everything Else:

a. Assuming our purchase does not fall into any of the categories, as above, we must use personal funds to purchase mementos and gifts. In some offices, this is referred to as a "cup and flower fund" -- where employees voluntarily contribute a modest amount to purchase gifts and/or mementos for employees leaving a position or experiencing an important personal event, such as a marriage, birth, or adoption. As an example, we should use personal funds to present flowers or a corsage to a retiring employee or their spouse. Similarly, we should use personal funds to present the retiring employee with a gift, a guest book or other favorable reminder of the retirement ceremony or event.

b. Of course, gifts between employees are covered by other laws and regulations, especially the Standards of Ethical Conduct for Employees of the Executive Branch. Before we take up a collection or offer a personal gift, we should consult with our Ethics Counselor to ensure we remain on solid legal ground.

7. Finally, we encourage you to contact your Resource Management Office or your Legal Office for any questions about specific purchases. Within HQ, AMC those points of contact are AMCRM-P, Mr. Pete Rodenbaugh, DSN 767-9038, and AMCCC-B-BI, Ms. Lisa Simon, DSN 767-2552.

8. AMC--America's Arsenal for the Brave.

FOR THE COMMANDER:

(signed)
EDWARD J. KORTE
Command Counsel

(signed)
BARBARA A. LEIBY
Deputy Chief of Staff
for Resource Management

DISTRIBUTION: H, B, B-1

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POINT PAPER

1 October 1998

SUBJECT: Contractor Employees in the Federal Workplace -- Practical Advice

PURPOSE: Summarize the principles derived from the CY 1998 AMC Ethics Training Program, "Contractor Employees in the Federal Workplace -- Confronting the Challenges!"

FACTS:

- Remember that contractor employees are *not* Federal employees.
- Identify contractor employees as such with distinctive security badges, by including their company's name in their e-mail address, and otherwise ensuring that our employees and members of the public understand their status.
- Respect the employer-employee relationship between contractors and their employees and do not interfere with it by inviting their employees to leave their assigned work station, pressuring the contractor to use "favorite" employees, or insisting on particular personnel actions.
- Be aware of intellectual property rights consequences of contractor employee work products created in the Federal workplace. Generally, the contractor will be able to commercially exploit software or inventions that it creates in the Federal workplace.
- Avoid giving incumbent contractor unfair competitive advantage by including its employees in meetings to discuss aspects of the re-competition, or by accidentally allowing the contractor's employees to overhear or gain access to planning information.
- Identify possible conflicts by contractor employees. If it would be a crime (conflict of interest) or violate the Standards of Ethical Conduct (appearances of partiality) for a Federal employee to participate in an official matter, we should insist that the contractor provides employees free of the same conflicts or appearances.
- Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information. Release of certain types of information to contractor employees to analyze, create charts and graphs, enter into databases, etc., could violate the procurement integrity law, the trade secrets act, the Privacy Act, or other law or regulation that could subject the releaser to civil and/or criminal penalties to include mandatory removal.
- Beware of gifts from contractor employees. Even if they work in the Federal workplace, they are "outside sources" and the rules for their gifts are very different than

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the rules for gifts between employees. One major difference is that contractors and their employees may not be solicited to provide or contribute to gifts where we might be able to do so from other Federal employees for a retirement gift for another Federal employee.

- Don't require "out of scope" work, personal services, or "inherently governmental functions." The services that the contractor is required to provide through its employees are set out in the contract... there are no "and other duties as assigned." When we contract, we give up control and flexibility.

- Resolve inappropriate appearances created by close relationships between Federal and contractor employees. For example, if a Federal employee develops a close personal relationship with the contractor's site manager, that Federal employee probably should not be assigned or continue as the Contracting Officer Representative (COR).

- Set the example -- as leaders, establish and maintain high ethical standards.

- Address ethical issues promptly and confer with legal counsel.

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UNCLASSIFIED

SUBJECT: Frequent Flyer and Other Travel Benefits

PURPOSE: Provide information about frequent flyer miles, bumping benefits, and other credits, rebates and benefits earned while on official travel (TDY).

FACTS:

Frequent flyer miles earned while TDY belong to the Government. They may not be used for personal travel, donated to a charity, or given to anyone else, even if the Government cannot use them, e.g., the employee is about to retire or the points are about to expire.

DOD policy is to use "official" frequent flyer miles to reduce the cost of future TDY travel. However, they also may be used to upgrade the traveler to premium class, but less than first class, on a future TDY. In a multiple class aircraft, the upper class is considered to be first-class, no matter what it is called; this means that "official" frequent flyer miles may not be used to upgrade to a premium seat in an aircraft with only two classes.

On-the-spot type upgrades to first-class may be accepted, if they are not offered because of the traveler's position. For example, you may accept an upgrade to a first-class seat offered to you because the aircraft is overbooked; or, if a traveler in first class insists on an aisle seat and you, sitting in the first aisle seat in coach are asked to switch with the traveler in first-class, you may do so (true story!). Even if one of these situations apply, military personnel should not fly first-class while in uniform.

If you travel so frequently on an airline that you become a member of its Ambassador, Gold Card, or similar club, you may use the upgrade coupons you might receive to upgrade to first class as long as you did not use "official" frequent flyer miles to buy your way into the club, and using the coupon does not forgo some other benefit, such as a discount on the purchase of a future ticket. Again, military personnel should not fly first-class in uniform.

You may use your personal frequent flyer miles or funds to upgrade to first-class air travel. However, military personnel should not do so while in uniform.

If you are involuntarily "bumped" from your flight while TDY, any compensation that you receive (e.g., round-trip ticket to wherever the airline flies, free companion ticket, \$500 coupon toward a ticket), belongs to the Government. If, however, you volunteer to be "bumped," then whatever compensation you receive, you keep. However, the delay that you incur is on your time (must not interfere with mission and no per diem for the period of delay).

If you use a personal credit card to pay for meals, hotel rooms, rental vehicles, and other expenses while TDY and your credit card gives you "miles," rebates, credit toward the purchase of a new car, or other benefits, they belong to you. However, there is pending legislation that would require TDY travelers to use the contractor-issued individually billed credit card (currently the Government Nation's Bank Visa Card).

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