



Office of Command Counsel Newsletter

February 1999, Volume 99-1

AMC Legal Community & the "Intranet Age": JAGCNet and AMC Counsel Join Forces

MG Walt Huffman, The Judge Advocate General of the Army, has extended an invitation to the AMC legal community to register and join with the Army legal community in using the Army Judge Advocate General's information repository, JAGCNet. The JAGCNet website contains the latest TJAGSA desk books or course material, as well as other valuable information from OTJAG, USARCS, AMC, and others.

Additionally, if you want to discuss hot legal issues with other AMC legal counsel, you will now be able to do so at our discussion site on the JAGCNet AMC Forum, which, as we go to press is in the development stage.

The Office of Command Counsel received two excellent briefings from JAGCNet Administrator **LTC Joe Lee**. Thereafter, **Ed Korte** asked the Office of Command Counsel Automation Team to de-

velop a Plan of Action. The AMCCC A-Team is chaired by **Steve Klatsky**, assisted by our WebMaster **Josh Kranzberg**, **Mike Wentink**, **Holly Saunders** and **Fran Gudely**.

At the 11 January Chief Counsel VTC, **Ed Korte** announced the decision to participate in the JAGCNet, and to develop an AMC Forum.

On 13 January **COL Demmon Canner** sent an E-Mail message to all AMC Legal Offices describing how to register for the JAGCNet.

That message also explained that **Ed Korte** wanted the A-Team to "construct" the AMC Forum by identifying initial discussion categories and determining what minimal operating procedures should guide operation of the Forum.

More information will be sent shortly via E-Mail to each legal office detailing the process that will lead to all having access to the AMC Forum. ©

CLE 1999: Program Planning Underway

The AMC Continuing Legal Education Program for 1999 will be held 24-28 May at the Grosvenor Hotel, Lake Buena Vista, Florida. **Steve Klatsky** is chair of the planning committee. Your ideas are welcome. Contact Steve at DSN 767-2304, sklatsky@hqamc.army.mil

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Principles of Conflict Resolution

1. Think Before Reacting

In order to resolve conflict successfully it is important to think before we react—consider the options, weigh the possibilities.

2. Listen Actively

Listening is the most important part of communication. Active listening means not only listening to what another person is saying with words, but also to what is said by intonation and body language.

3. Attack the Problem

When emotions are high it is much easier to begin attacking the person on the other side than it is to solve the problem. The only way conflicts get resolved is when we attack the problem and not each other.

4. Accept Responsibility

Every conflict has many sides and there is enough responsibility for everyone. Attempting to place blame only creates resentment and anger that heightens any existing conflict.

5. Look for Interests

Positions are usually easy to understand because we are taught to verbalize what we want. However, if we are going to resolve conflict successfully we must uncover why we want something and what is really important about the issue in conflict.

6. Focus on the Future

In order to understand the conflict, it is important to understand the dynamics of the relationship including the history of the relationship. However, in order to resolve the conflict we must focus on the future. What do we want to do differently tomorrow?

7. Options for Mutual Gain

Look for ways to assure that we are all better off tomorrow than we are today. Our gain at the expense of someone else only prolongs conflict and prevents resolution.

This is an excerpt from a NAVY ADR Office paper. The complete paper and list of principles is provided (Encl 1). ©

Newsletter Details

Staff

Command Counsel

Edward J. Korte

Editor

Stephen A. Klatsky

Layout & Design

Holly Saunders

Administrative Assistant

Fran Gudely

Typist

Billy Mayhew

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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

AMC Lead Partnering Champion Workshop: Reviewing Where We Are & Deciding What's Next... But First: Thanks!

Many thanks to the AMC Partnering Team for planning and executing the Lead Partnering Champion Workshop, held on 14-15 January.

This edition of the Newsletter will highlight several aspects of the Workshop.

The AMC Partnering Team under the leadership of **Ed Korte** is Chaired by **Mark Sagan**, CECOM. Members are **Steve Klatsky**, HQ AMC, **Dave DeFrieze**, IOC and **Ken Bousquet**, TACOM.

The Workshop relied on the open and frank communication and dialogue among the MSC Lead Partnering Champions and the AMC Partnering Team.

The LPC Workshop Agenda is enclosed (Encl 2).

Each of the MSC Lead Partnering Champions came well-prepared to actively par-

ticipate and contribute to a review of the AMC Partnering Program experience since AMC organized a Lead Partnering Champion network.

Attendees representing their commands at the Lead Partnering Champion Workshop were:

Pat Ruppe, CECOM

Lorraine Maynard,

TACOM-Warren

Jerry Williams,

TACOM-ARDEC

Kris Mendoza,

TACOM-ACALA

Marshall Collins, IOC

Fred Carr, AMCOM

Shirley Harvey, ARL

Helen Morrison, SBCOM

Richard Mobley,

SSC-Natick, and

Harlan Gottlieb,

STRICOM,

A special thanks to **Holly Saunders** for excellent administrative support. ©

List of Enclosures

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7. Protest Lessons Learned: IDIQ Contracting
8. Supreme Court on Civilians Lying--Lachance
9. Preventive Law Note: Americans with Disabilities Act
10. Jan 99 ELD Bulletin
11. Tax Advisory--state of legal residence
12. Gifts & More Gifts

AMC Lead Partnering Champion Workshop Recap

At the Lead Partnering Champion Workshop the following issues dominated the spirited dialogue.

Program Review

A review of the AMC Partnering Program since our March 1998 AMC Partnering Champion Workshop. Specifically, we held 18 Partnering Workshops, using the AMC Model, in conjunction with Roadshow VII, distributed over 15,000 AMC Partnering Guides throughout the command, to the contractor community and to other DA and DOD organizations, and trained “thousands” of AMC personnel in Partnering.

Partnering Profile

A discussion of the “profile” of the inventory of some 70 AMC Partnering arrangements.

1. Partnering is being used in production (28), R&D (21), services (17) and construction (6) contracting.

2. Facilitators were used in 45 contracts. A common conclusion is that the use of

a facilitator accelerates the benefits of Partnering.

3. Seven different contract types are represented in our Partnering Inventory: FFP (41), Cost Type (24), CPFF (10), CPAF (9), CPIF (5), T&M (8), and FPI (2).

Successes

A discussion of the Partnering successes that were reported. Among the regular and recurring comments are the following:

1. Enhanced communication that is open and frank.

2. Early identification and timely resolution of disputes.

3. Increased understanding of goals and expectations.

4. On time or accelerated performance.

5. Within budget/savings.

6. Increased cooperation and individual empowerment.

Impediments

A discussion of impediments to expanded use of Partnering. For each we identified a course of action and solution to overcome the impediment.

1. Need for follow-up to initial Partnering Workshop.

2. Holding the initial Partnering Workshop immediately after contract award.

3. Greater understanding by government/industry as to what Partnering is.

4. Sustaining Partnering when key personnel change during contract performance.

Partnering Guide Review

The AMC Partnering Guide was reviewed and substantive recommendations for change were adopted. We hope to publish the second edition around 1 June 1999.

LPC Mission Statement

The Development of an AMC LPC Mission Statement

Self-Assessment

Development of an MSC Partnering Self-Assessment, which will assist the MSC Commanders, their LPC and staff to determine the state of Partnering in their commands. ©

AMC Lead Partnering Champion Mission Statement

AMC Lead Partnering Champions are:

Committed to advocating, educating and implementing the AMC Partnering Program.

Representatives of MSC Commanders and their contract customers in the application of Partnering.

Sponsors of Partnering as an acquisition reform initiative.

Assessors of the effectiveness of AMC Partnering programs.

Coordinators of AMC Partnering Workshops using the AMC Partnering Model.

Leaders of the AMC MSC Partnering Champion Network.

Whether An Item is A Commercial Item--Looking Beyond What A Contractor Says

Former AMCOM Counsel **Bruce Crowe** provides an excellent paper on this issue of determining whether an item is deemed to be commercial (Encl 3).

Contractors are seeking to have noncompetitive items which are normally thought of as military equipment classified as commercial items based on minimal sales to nongovernmental customers for specialized applications, on direct sales to foreign governments, or on merely offering an item for sale to the general public with little, if any, real expectation that the item will be bought by any nongovernmental customer. Their actions shouldn't be surprising, given the stakes involved.

If the item is classified as a "commercial item" the contractor reaps several benefits. Among other things, the contractor is not required to submit cost or pricing data (FAR 15.403-1(b)(3)); the Government's rights to in-process inspection are lim-

ited (FAR 12.208); the Government's rights to obtain technical data which might support future competition are limited (FAR 12.211); and Cost Accounting Standards do not apply (FAR 12.214).

There are a number of GAO cases that have considered whether a particular product qualifies as a "commercial item," but they offer little insight into the exact meaning of terms in the definition. What is most notable about the cases is their statement of the settled standard of review: "Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable."

Any decision on whether something is a commercial item will likely turn on the precise meaning assigned to such key terms as "of a type," "customarily," and "nongovernmental purposes." ^c

Settlement Agreements-- Lessons Learned From the Court of Federal Claims

Vera Meza, Team Leader of the Protest Litigation Group, DSN 767-8177, recently chaired a VTC focused on settlements arising in the Protest arena but applicable regardless of legal discipline practiced.

The paper addresses issues such as: Are there limits? How do we craft them for whatever problem is being

solved to keep us out of hot water? Or, better yet, to be able to withstand hot water? When does corrective action go sour? (Encl 4).

The paper includes several court and administrative decisions under each issue, as well as a footnote to a case important for the issue of breaching a settlement agreement. ©

Sagan on Overarching Partnering Agreements

Check the January-February 1999 issue of Army RD&A magazine for an interesting article by CECOM Deputy Chief Counsel **Mark Sagan** entitled "Overarching Partnering Agreements--A Winning Business Strategy." The article defines OPAs and addresses the important components of this type of Partnering arrangement.

Ten Significant Issues for 1999

At the December 1998 Government Contract Law Symposium, held at TJAG School, GWU Law School Associate Professor of Government Contracts Law, **Steven L. Schooner**, gave an interesting lecture on his views of significant issues. Under each issue, he provides a complete bibliography and website for the practitioner (Encl 5).

10. Electronic Commerce (ES) Moves Into the Mainstream

9. Living in the World of

COTS (Commercial Off the Shelf)

8. Continued, Dramatic Reduction in Litigation (Is It Hibernation?)

7. Implementation of, and Litigation Stemming From, The FAR 15 Re-Write

6. Implementation of New Small Business (And Other Social) Programs

5. The Reality of Limits Upon Competition (Multiple Award Task Order and Delivery Contracts)

4. Evolution of Performance Based Contracting

(Specifically Performance Based Service Contracting [PBSC])

3. Maximizing the Use, and Minimizing the Abuse, of the Government Charge Card; Or Harnessing (Or Wasting) the Power of the Next Generation of Smart Card Technology

2. Change Management Following An Era of Rapid Acquisition Reinvention

1. The Balkanization of Federal Procurement (Or What Ever Happened To A Uniform Procurement System?) ©

US Patents and International Cooperative Projects

TACOM IP Counsel **David Kuhn**, DSN 786-5681, has provided a detailed paper outlining the issues related to the authority of the President to enter cooperative project agreements with NATO or members of NATO, pursuant to 22 USC Section 2767 (Encl 6).

Matters addressed include the question of whether patent infringement by a contractor working for a foreign Government falls within the scope of 28 USC §1498.

Infringement?

This issue can be broken down into three elements:

— Is there “manufacture or use” within the meaning of the statute?

— Is the manufacture or use “by or for” the United States?

— Has the US granted authorization and consent to such manufacture or use?

The paper discusses in detail each of these three elements.

In a given cooperative program one or more non-US participants may not, as a matter of their law, policy or discretion, want to authorize or consent the use of their patents.

As a result, the US may desire to reciprocate by withholding authorization and consent to utilize United States patents. Too, the participants may decide that a given patent, whether it is from the US or from another participant country, represents an unwarranted technical risk. That is, the participants may decide that the patent requires an avenue of research or development whose chance of success does not justify the time and money needed to pursue that avenue.

Finally, since participants generally share costs of claims in international cooperative agreements, the participants may agree to forego usage of a given patent due to anticipated costs of successful claims. ©

Howard Bookman, CECOM Counsel, DSN 992-3227, provides a protest lessons learned paper regarding the indefinite delivery, indefinite quantity (IDIQ) area (Encl 7).

It focuses attention on the need to retain pre-proposal information in IDIQ circumstances, where delivery or task orders often follow years later. Preservation of pre-award documents and occurrences can be crucial, since any future delivery or task order can be protested as “not within the general scope” of the underlying contract.

A pre-solicitation or pre-proposal conference should be conducted and could be very useful in defending a subsequent protest. The conference briefings and questions and answers should be given wide dissemination and preserved.

Likewise, an executive summary in the RFP is recommended. In addition the Statement of Work should also contain a general scope paragraph describing the general purpose and goals of the contract. ©

AMC A-76 Workshop: Scope, Coverage and Contributions by AMC Counsel

The AMC Legal Community participated in a far reaching program: the AMC A-76 Workshop, held at the Molly Pitcher Inn, Red Bank, New Jersey 15-17 December 1998. The issues of privatization, outsourcing and contracting-out require AMC counsel to actively participate in the identification of legal issues and managerial actions to solve problems.

CECOM Chief Counsel **Kathi Szymanski** volunteered to host the Workshop. Bill Medsger, Chief, Business Operations Law Division, DSN 767-2556, administered the program, which was held in an informal atmosphere to maximize the opportunity for attendees to share experiences and to ask questions.

The voluminous Deskbook will be a resource material for the practitioner. We are currently uploading the Deskbook to the Web so

that all AMC legal personnel can have access to the wealth of materials contained in the binder.

Agenda Highlights

The agenda was highlighted by an extensive look at the Office of Management and Budget (OMB) Circular A-76. In this section, the history and background was explored, the roles of the OMB and Office of Federal Procurement Policy (OFPP) were highlighted, and we were introduced to the concepts of privatization and Employee Stock Ownership Plan (ESOP).

Dissecting the A-76 Process

The A-76 process was dissected and discussed at length. This included an examination of the plan of action, establishing milestones, cost analysis, procurement planning and le-

gal and regulatory framework. Separate sessions were devoted to Performance Work Statements, legal issues, information available to counsel, quality assurance plans, management plans, independent reviews and analysis, protests and appeals, all critical aspect of the process.

AMC Counsel

Several AMC attorneys made major contributions by substantive presentations. **Diane Travers**, HQ AMC, DSN 767-7571, spoke on Agency Procedures & Statutory Requirements and **Cassandra Johnson**, HQ AMC, DSN 767-8050, Civilian Personnel Aspects of A-76. A Lessons Learned Panel consisting of **Peter Tuttle**, Natick, **Beth Biez**., AMCOM and **David Scott**, TECOM, described experiences of those who already are involved in AMC A-76 efforts. ©

Employment Law Focus

Workplace Disputes ADR: DOJ IAWP Strategic Plan Outlined

Three Track Approach to Deal With Large Showing of Interest

The Section held their first meeting on October 28, 1998 to explore ways to meet their 1999 goal. Over 150 individuals from 49 different agencies met in small, facilitated groups to identify what their needs and expectations were for 1999 and how those needs might be met. All of the ideas and suggestions were tabulated and then divided and organized into a 1999 Strategic Plan that sets forth the vision for this Section.

Given the large size of the group and the diversity in current use of ADR in workplace disputes for each agency, the needs of the group were divided into three tracks.

Three Tracks

Track 1 is for those agencies that are not currently using ADR and thus want to learn the basics about setting up an ADR workplace disputes program. The goal of

this track is to provide all the necessary information during the year to ensure those who attend the programs will learn how to create a successful ADR workplace disputes program.

Track 2 is for those agencies that currently have an ADR workplace disputes program. This track's goal is provide information to agencies to help them improve, market, implement and evaluate their current ADR workplace disputes program.

Track 3 is for those agencies whose interests lie in sharing their resources or exploring complex policy questions including impediments to a successful ADR program, incentives, rewards and resource issues. This track will provide agencies with an opportunity to explore a variety of policy issues and options to improve or change policies or systems that may currently restrain a successful ADR program. ©

Mediation & Formal Discussion = ULP

In **Luke AFB and AFGE Local 1547**, 54 FLRA No.75, Aug 13, 1998, the Federal Labor Relations Authority ruled that the agency committed an unfair labor practice by holding a formal discussion--a mediation, without giving the exclusive representative the opportunity to attend the meeting.

The meeting involved the bargaining unit employee, an investigator with the the Office of Complaints Investigation (OCI), the agency EEO counselor and agency counsel. OCI was acting in the capacity of a mediator.

The ALJ and the Authority agreed that the mediation session was a formal discussion.

The Authority used severely criteria to support this conclusion. One important factor was the active role of counsel. Although counsel did not speak directly to the employee, the attorney attempted to negotiate a settlement agreement with the employee through the EEO counselor. ©

Employment Law Focus

Misconduct, Lying and the Supreme Court: the Lachance Case

CECOM Counsel **Susan Harbort**, DSN 992-9803, provides an excellent paper outlining the important issue of the relationship between underlying acts of misconduct and lying about it when asked during an agency investigation (Encl 8).

Employees who have been charged with misconduct cannot lie to their supervisors when questioned about that misconduct, according to the United States Supreme Court. In Lachance v. Erickson, et. al., 118 S. Ct. 753 (1998), the Supreme Court addressed the issue of whether the Due Process Clause of the Fifth Amendment to the Constitution or the Civil Service Reform Act, 5 United States Code (5 U.S.C.) § 1101 et. seq., preclude a Federal agency from disciplining an employee for making false statements to the agency regarding employment-related misconduct. In holding that they do not, the Court reversed a line of cases, including **Walsh v. Veterans Affairs**, 62 M.S.P.R.

586 (1994), which, since 1994, had been controlling how agencies deal with employees who make false statements during investigations/inquiries into employee misconduct.

Since Walsh was decided in 1994 until it was overruled this year, an Agency could not discipline an employee charged with misconduct for making false statements with regard to that misconduct.

In Lachance, the Supreme Court addressed the rights of employees outlined in 5 U.S.C. § 7513(b), and found that the section contains no right to falsely deny charged misconduct. The Court then examined the Fifth Amendment of the Constitution, and found that an employee may remain silent in the face of an agency investigation, if answering the question could expose the employee to criminal prosecution. However, the employee does not have the right to make false statements during the investigatory process. ©

Primer on the ADA: Educating the Workforce

CECOM Counsel **Denise Marrama**, CECOM Counsel, DSN 992-9835, has written a paper entitled: "What Is the Americans with Disability Act and to Whom Does It Apply?" (Encl 9).

The paper was written to provide the Ft. Monmouth community with factual information and background on this well-known, misunderstood legislation.

One section addresses the definition of a disability and a Federal agency's responsibility to provide reasonable accommodation.

Under the ADA, a reasonable accommodation may include, but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring, to include part-time or modified work schedules or reassignment to a vacant position; acquisition or modification of equipment or devices; training; and the provision of qualified readers or interpreters.

A great way to educate the workforce. ©

Environmental Law Focus

After You've Gone Away and "Left" It, What Do You Do?

Maybe getting out of Ft Dodge is not going to be so easy after all ! The Department of Defense and the U.S. Environmental Protection Agency continue to struggle with exactly what responsibilities DoD will have for ensuring the effectiveness of institutional and land use controls, on property transferred

outside of Federal ownership. the Environmental Law Team has copies of the latest "draft" guidance, and we are trying to keep abreast of the latest development. Stay tuned. For instance feed back on the current land transfers you are working contact either **Stan Citron**, DSN 767-8043, or **Bob Lingo**, DSH 767-8082. ©

Whose's Got the Bucks for Old Buildings?

A former military member of our Command Counsel Office, **MAJ David P. Harney** has written an excellent legal analysis of National Trust for Historic Preservation v. Blanck, 938 F.Supp. 908 (D.D.C. 1996), a case which discusses the Army obligations under the National Historic Preservation Act (NHPA) to fund maintenance and repair of historic properties in a time of declining Army budgets.

In that case the court found that an alleged Army course of deferred maintenance amounting to "demolition by neglect" was not an undertaking under the NHPA which required section 106 consultation. Army lawyers must review Cultural Resource Management Plans, required under AR 200-4, to assure that they do not otherwise contain binding commitments to spend specific amounts of funds for preservation or maintenance of historic properties. Copies of MAJ Harney's article may be obtaining by contacting **Bob Lingo**, DSN 767-8082. ©

Planning for the Chemical Accident

The 1990 Clean Air Act Amendments added section 112r to provide for the prevention and mitigation of accidental chemical releases. Processes at stationary sources that contain a threshold quantity of a regulated substance, as listed by EPA, are subject to the accidental release prevention program. This program, 40 CFR Part 68, requires sources with more than a threshold quantity of a regulated substance to develop and implement a risk man-

agement program that includes a five-year accident history, offsite consequences analyses, a prevention program, and an emergency response program. If subject to the rule, the risk management plan must be submitted by June 21, 1999. The final program rule was published by EPA in the January 6, 1999 Federal Register, 64 FR 963. Installation environmental counsel should discuss with their engineers whether their installation is subject to the rule. <http://www.nara.gov/fedreg>. ©

Environmental Law Focus

Cutting the Total Cost of Army Weapon Systems

Maj Dave Harney, has provided an article: Program Managers & Their Environmental Responsibilities, which discusses the requirements for program managers under the National Environmental Policy Act (NEPA) and the Pollution Prevention Act of 1990 to consider environmental factors, and to integrate pollution prevention into their weapon systems. His article also considers Comptroller General protest decisions examining agencies use of life-cycle costs as an evaluation factor in the award of a contract. Copies may be obtained from **Bob Lingo**. ©

ELD Bulletin for Jan 99

The Jan 99 ELD Bulletin is provided for those who have not received an electronic version or who have a general interest in Environmental Law (Encl 10).

Two Tax Advisories for 1999

SUBJECT: W-2 questions (As a service to the Director of Military Pay) 1998 Federal tax and wage statements for DoD personnel:

SERVICE MEMBERS who have not received their 1998 Federal Tax and Wage Statements (Form W-2) by January 28, or those who think they need corrections to their W-2s, should contact their local finance offices. If the finance offices cannot help, contact:

ARMY	
Active Duty	1-888-729-2769 (PAYARMY)
Reserve	1-888-729-2769 (PAYARMY)

SUBJECT: DD 2058, State of Legal Residence Certificate and DD 2058-1, State Income Tax Exemption Test

PURPOSE: To discuss the requirement for soldiers to recertify their exemption from state income tax withholding.

FACTS:

a. Some local finance offices announced that soldiers would be required to recertify their exemption form state income tax withholding before 15 February 1999. Failure to do so would cause the

CIVILIAN EMPLOYEES should contact their local Customer Service Representative.

MILITARY RETIREES who do not receive IRS Form 1099R (Distributions From Pensions, Annuities, Etc.) should call 1-800-321-1080.

ANNUITANTS who do not receive IRS Form 1099R (Distributions From Pensions, Annuities, Etc.), should request a form through the automated system at 1-800-435-3396.

Additional tax information for all DFAS customers is available on the agency's website under "What's new" at www.dfas.mil.

soldier's withholding status to be reported as single with zero exemptions. This would cause finance to withhold the maximum amount required under state law from a soldier's military pay.

b. This information is incorrect. The paper discusses the requirements for certification (Encl 11).

Thanks to **Alex Bailey**, HQ AMC, DSN 767-8004

Annual AMC Ethics Report

The annual AMC Ethics Report is being compiled by HQ AMC Ethics Team Leader Mike Wentink, DSN 767-8003. Thanks to all AMC Ethics Counsel for their cooperation in providing the necessary material.

As always, the scope of the AMC Ethics challenge is apparent from an overview of some key data:

- O SF 278 Public Filers--104
- O Total 450 Confidential Filers--17,185
- O Total personnel attending Ethics training--17,000
- O Disciplinary actions taken for Ethics violations--84
- O Miuse of position, resources and information--54
- O Indebtedness--17
- O Conflicts of Interest--3

Gifts: Special Occasions and Those All-Important Exceptions

The *Standards of Ethical Conduct for Employees of the Executive Branch* has a “special, infrequent occasion” exception to the general rule that we should not give gifts to our official superiors. Re-assignment or transfer outside of the superior-subordinate chain and retirement are two examples of “special, infrequent occasions” where employees may honor another’s service to our organization and the Army with a gift appropriate to the occasion.

Also, this is one of the two situations when it is permissible to solicit other employees to contribute to a gift.

Restrictions

Among the most important restrictions are the following:

O The maximum value of any gift(s) from a donating group generally may not exceed \$300. Gifts that are also given to the spouse are included in the \$300 maximum. In addition, plaques and similar items for presentation purposes only and with no intrinsic

value (e.g. no sterling silver or gem encrusted engraved plates) are not considered to be gifts, and are not included in the \$300 limit.

O The maximum that may be solicited from other employees is \$10, although an employee may contribute more than \$10 on his or her own initiative.

O Employee participation and the amount of the contribution must be voluntary.

O We may not solicit from “outside sources.” For example, we may not solicit contributions from support contractors or their employees, and we may not accept contributions from them for this gift.

O If an employee contributes to the gift from two different donating groups (e.g., the CSM contributes to both the enlisted personnel gift and to the command group’s gift to the departing commander), the total value of the two gifts may not exceed \$300.

Mike Wentink, DSN 767-8003, provides an Ethics Advisory on this important issue (Encl 12). ©

AMC Legal Office Profile

Industrial Operations Command, Rock Island, Illinois

From the Desk of Chief Counsel **Tony Sconyers**:

As many of the AMC family have experienced, we at the U.S. Army Industrial Operations Command face an uncertain future and yet we know this must not interfere with our work ethics or support to those who depend on our legal expertise.

We provide legal support as a team within the AMC family. We remain focused and dedicated to our mission.

Mission

The mission of the U.S. Army Industrial Operations Command is: "Provide the Military Forces Timely and Quality Ammunition, Depot Maintenance, Manufacturing, and Logistics Support". The Law Center is a major player in the overall IOC Mission.

The mission of the U.S. Army Industrial Operations Command Law Center is:

"To provide legal advice to the Commanding General and staff on all legal matters arising within the Industrial Operations Command. To provide a full range of legal services/advice to all IOC on general law issues including

such areas as: employment, labor, EEO, ethics, fraud, antitrust, bankruptcy, tax, and administrative/military installation law. To represent and defend the command in tort/noncontractual litigation. To provide legal services on a full range of environmental, safety, surety, and land use issues for all IOC".

We live our mission on a daily basis. We live our mission with no expectations in return; more than the words, but the experience of performing well and with pride and determination. Making a difference! We are players on the team.

31 People

My Law Center is made up of 31 people. Thirty-one dedicated people who I have counted on for support for the past 4 years. Each one of them has an important role in the IOC Law Center family.

I came to the IOC (then known as ARRCOM) in 1981. A young attorney in the acquisition law area. In 1994 I was named Chief Counsel. This is a position I hold with respect for the responsibility and respect for the people.

Front Office

My secretary is **Lisa Nelson**. She's been with the Law Center for almost 18 years. My administrative officer is **Mary Ernat**. In one of the command "shuffles" Mary joined our team. Mary has been with the Government for close to 17 years.

Acquisition Law Division

Mike Patramanis has been the Chief of Acquisition Law since 1980. Mike is approaching the 35-year mark with the Command.

JoAnne Lieving is a Legal Assistant in the Acquisition Law area, with 18 years of Government service. JoAnne provides support to the attorneys in the acquisition law area.

Sandra Biermann has been with the Government since 1996. She joined our office with a focus on acquisition law. Particularly with chemical demilitarization, and small and medium caliber ammunition.

AMC Legal Office Profile

Industrial Operations Command, Rock Island, Illinois

Brad Crosson has been with the Government approaching 13 years. He's in the acquisition law area. He is heavily involved in the HYDRA 70 2.75" Rocket, 120mm Tank Training Ammunition, and XMAT. His specialties are best value source selection, contract formation and administration.

David DeFrieze has been in the IOC Law Center for 15 years. Dave provides support to the Army War Reserve Support Command. He is heavily involved with partnering, ARMS, chemical demilitarization, and whatever gets tossed his way.

Gail Fisher is a Paralegal Specialist, focusing mainly in the acquisition law area. Most recently she's dedicating much time to environmental law and general law matters. She's been an IOC Law Center team member since 1981.

Terese Harrison ("T") has been with our team in the acquisition law area since 1994. A former Captain in the U.S. Army, we rely heavily on T's expertise in the area of acquisition law. More specifically, direct sales related issues and CRADAs.

Marc Howze is our newest team member. A Captain in the U.S. Army, he joins the IOC Law Center specializing in acquisition law. He came to us last summer from Fort Lewis where he served as Chief, Legal Assistance Division.

Bernadine McGuire ("Bernie") has been with the IOC Law Center since 1984. The last 10 years she's concentrated in acquisition law and now provides legal advice to the Chemical Demilitarization Program.

John Seeck has been member of the IOC Law Center since 1974. He specializes in the Acquisition Law area. We rely on John's expertise with contract law and fiscal law issues.

Bridget Stengel has been with the office since 1985 and specializes in acquisition law. Bridget is getting involved in the general law area as well.

Sam Walker has 19 years with the Law Center. His concentrated areas of expertise are litigation and contract disputes. Sam is currently heavily involved with the A-76 studies.

Environmental/ Safety Law Division

Dennis Bates has been with the Government for 19+ years. He is the Chief of Environmental/Safety Law. His primary specialties are in installation legal issues on environmental, safety, and real estate matters.

Angela Davila has been with the Government for 15 years. She's been part of the law team since 1996 and is currently a Legal Assistant in the Environmental/Safety Law area.

Eugene Baime (Gene) has been at the IOC for a year. He's a Captain in the U.S. Army specializing in litigation and UCMJ. Captain Baime is currently involved in a project on environmental cost-recovery.

William Bradley has been with the IOC Law Center since 1987 and is specializing in the environmental law area. Bill, a retired combat arms Army officer, has extended experience in acquisition, adversary proceedings, labor law, administrative law, and criminal law as a former prosecutor.

AMC Legal Office Profile

Industrial Operations Command, Rock Island, Illinois

Environmental/ Safety Law Division (Continued)

Thomas Jackson has been with the IOC Law Center since 1989 specializing in environmental law. From 1979 - 1983 Tom was a U.S. Army Captain (Explosive Ordnance Disposal).

Janalee Keppy has been a Paralegal Specialist in the IOC Law Center since 1980. She is currently focusing on environmental law, but continues to support the general law area. She's been with the Government, in the legal office, for almost 31 years.

Geraldine Lowery has been with the Government since 1989. She joined the IOC Law Center in 1997 from the Corps of Engineers where her concentration was on real estate law matters. We continue to count on her expertise in that area, in addition to utilities issues.

Richard Murphy joined the IOC Law Center in 1996 as a military officer. Rick is specializing in environmental law, utilities privatization, and property disposal.

John Rock has been in the IOC Law Center since 1971. John's background specialties include labor and general law. John currently concentrates on environmental law and taxation issues.

General Law/ Installation Support Division

Sharon Lipes is the Chief, General Law/Installation Support. Sharon has been chief since 1995. Previously, she was assigned for 16 years as an Acquisition Law attorney. She currently provides her expertise in general law, congressional inquiries, and ethics.

Mary Lou Massa joined the IOC Law Center in 1996. Mary Lou is a Legal Assistant in the General Law/Installation Support area. Among the other countless support functions she provides, she handles congressional inquiries and visits received by the IOC and its installations.

Kathleen Allen is a Paralegal Specialist in the General Law/Installation Support area. Kathie has 19 years with the Law Center. She's our military income tax expert, handles congressional inquiries, real estate claims, and helps us all who have computer questions.

Amy Armstrong joined our legal team in 1996. Amy's concentrated area of expertise include administrative law/FOIA, employment/labor law, and legislative initiatives.

Steven Kellogg first joined our office as a Captain appointed as the military legal advisor. He's been with the Law Center since 1994 and now specializes in employment/labor law, law of military installations, and administrative law.

Thomas McGhee has been with the Law Center since 1979. He has extensive acquisition background, but currently focuses on congressional affairs, procurement fraud and installation issues. He is known as our "Web Master".

Marina Yokas-Reese has been with the Government since 1983, all in the IOCLaw Center. Marina's specialty areas include ethics, procurement fraud, A-76, and bankruptcy.

In sum...

I'm proud to be a part of the IOC Law Center Team and the AMC Legal Community. I couldn't have done it without my team. My thanks. I appreciate the dedication and support that you demonstrate through your daily mission. Our mission.

Anthony Sconyers

Faces In The Firm

Hello-Goodbye

CECOM

Ted Chupein joined the office as Chief of the Competition Management Division.

1LT Robert Paschall joined the SJA Division, and will practice environmental and ethics law.

AMCOM

Mike Lonsberry joined the Acquisition Law Division.

TACOM

Therese Novell joined the General Law Division from private practice.

Christine Kachan joined the Business Law Division.

Joseph Jecks also joined the Business Law Division.

Marriage

TACOM

Pat Jaques, ACALA legal office secretary, married ARDEC engineer Jerry Strahl on December 27.

TACOM

Dominic Ortisi retired in January after 34 years of government service. TACOM will now be without an "Ortisi" as Dominic follows his brother Frank into retirement.

AMCOM

Bruce Crowe resigned from government service to enter corporate legal practice in St. Louis.

Doris Lillard retired in January after almost 40 years of service--39 of those in the Redstone Law Library!

Nancy Forbes, Secretary to the Chief Counsel retired in December.

Aviation Applied Technology Directorate Ft. Eustis, Virginia

Larry Smail, Chief of the office retired in January with 36 years of service at Ft. Eustis.

HQ AMC

Larry Anderson has been named Deputy General Counsel for the Defense Security Cooperation Agency.

Births

TACOM

Joe Picchiotti, TACOM-ACALA counsel and his wife Laura became the proud parents of Daniel William and Michael Robert, born on November 23. The twins join their sister Katie.

AMCOM

CPT Martin White and his wife Tammy are the proud parents of Kathryn Ashley, who was born on January 21.

Awards and Honors

HQ AMC

Craig Hodge has been selected to be counsel to USA Security Assistance Command.

TACOM

Dominic Ortisi received the Meritorious Civilian Service Award.

SBCCOM

Peggy Gieseck received her LLM in Environmental Law from George Washington--graduating with honors.

PRINCIPLES OF CONFLICT OF RESOLUTION

1. Think Before Reacting

The tendency in a conflict situation is to react immediately. After all, if we do not react we may lose our opportunity. In order to resolve conflict successfully it is important to think before we react--consider the options, weigh the possibilities. The same reaction is not appropriate for every conflict.

2. Listen Actively

Listening is the most important part of communication. If we do not hear what the other parties are communicating we can not resolve a conflict. Active listening means not only listening to what another person is saying with words, but also to what is said by intonation and body language. The active listening process also involves letting the speaker know that he or she has been heard. For example, "What I heard you say is....."

3. Assure a Fair Process

The process for resolving a conflict is often as critical as the conflict itself. It is important to assure that the resolution method chosen as well as the process for affecting that method is fair to all parties to the conflict. Even the perception of unfairness can destroy the resolution.

4. Attack the Problem

Conflict is very emotional. When emotions are high it is much easier to begin attacking the person on the other side than it is to solve the problem. The only way conflicts get resolved is when we attack the problem and not each other. What is the problem that lies behind the emotion? What are the causes instead of the symptoms?

5. Accept Responsibility

Every conflict has many sides and there is enough responsibility for everyone. Attempting to place blame only creates resentment and anger that heightens any existing conflict. In order to resolve a conflict we must accept our share of the responsibility and eliminate the concept of blame.

6. Use Direct Communication

Say what we mean and mean what we say. Avoid hiding the ball by talking around a problem. The best way to accomplish this is to use "I-Messages". With an "I-Message" we express our own wants, needs or concerns to the listener. "I-Messages" are clear and non-threatening way of telling others what we want and how we feel. A "you-message" blames or criticizes the listener. It suggests that she or he is at fault.

7. Look for Interests

Positions are usually easy to understand because we are taught to verbalize what we want. However, if we are going to resolve conflict successfully we must uncover why we want something and what is really important about the issue in conflict. Remember to look for the true interests of the all the parties to the conflict.

8. Focus on the Future

In order to understand the conflict, it is important to understand the dynamics of the relationship including the history of the relationship. However, in order to resolve the conflict we must focus on the future. What do we want to do differently tomorrow?

9. Options for Mutual Gain

Look for ways to assure that we are all better off tomorrow than we are today. Our gain at the expense of someone else only prolongs conflict and prevents resolution.

AMC LEAD PARTNERING CHAMPION WORKSHOP

THURSDAY 14 JANUARY

0700-0800 REGISTRATION

0800-0845 INTRODUCTION (Mark Sagan)

Workshop purpose & goals
History of how we got here
Overview of AMC Partnering Contract Inventory
Workshop attendee introductions

Welcoming comments from Ed Korte and Kevin Carroll

0845-0945 BENEFITS OF PARTNERING (David DeFrieze)

General view of Partnering at your MSC
Specific comments on your command's Partnering experience
Specific results you have seen regarding your Partnered contracts
What methods are you using to assess the benefits (e.g. statistics, perceptions) described above?

0945-1000 Break

1000-1130 COMMON ELEMENTS OF A SUCCESSFULLY PARTNERED PROGRAM (Ken Bousquet)

What actions taken caused the benefits to occur?
Specifically, what made the Partnering Program successful? (e.g. follow-up, top management commitment, all stakeholders participated)

1130-1300 Lunch (on your own)

1300-1430 IMPEDIMENTS TO SUCCESSFUL PARTNERING (Steve Klatsky)

What inhibits the attainment of successful Partnering? (e.g. personnel changes during contract performance, participants not following the Partnering tools, resources limited)
Impediments experiences on specific programs
Impediments to using Partnering, generally, at your MSC
Is the lack of a Partnering regulatory or administrative framework an impediment?

1430-1445: Break

1445-1645 SOLUTIONS TO IMPEDIMENTS (Mark Sagan)

Propose specific approaches to overcome each identified impediment

Actions by Lead Partnering Champions, Command Group, AMC Partnering Team, etc.

1645-1700 Closing (Mark Sagan)

FRIDAY 15 JANUARY

0800-0830 PARTNERING GUIDE REVIEW AND UPDATE (Ken Bousquet)

As mentioned, please submit your written comments on the P-Guide at the beginning of the Workshop (Day 1). Ken Bousquet will review comments and report on it during this 30-minute block. The AMC Partnering Team will then revise accordingly and publish the new edition.

0830-1130 THE FUTURE

Partnering MSC Self Assessment (Mark Sagan)

LPCs will develop specific components of the 10 Self-Assessment items previously distributed to all attendees. Each LPC will then take this assessment back home and, working, with personnel of their choosing, complete the self-assessment and return to Steve Klatsky NLT _____. A memorandum will be sent to each MSC Commander explaining this self-assessment. The MSC Commander shall sign the completed form.

LPC Mission Statement (Steve Klatsky)

Similar to a Partnering Charter/Mission Statement, LPCs will develop a clear and concise statement.

Where should Partnering reside in your organization? (Ken Bousquet)

This brainstorming session will discuss organizational "ownership", roles and responsibilities, and future LPC activities.

Future Partnering Feedback Form Use (Dave DeFrieze)

Under the standard "minimal essential reporting", LPCs will discuss how this form will be used to provide important information and its relation to other forms and feedback.

1130-1200 Workshop Closing (Mark Sagan)

STANDARDS FOR DETERMINING WHETHER AN ITEM IS “COMMERCIAL”

Q: How do you know when an item used exclusively for military purposes is a “commercial item”?

A: When a sole source contractor tells you so.

While the answer given above may strain your credulity, a few contractors have not been embarrassed to claim that some such items fall squarely under the FAR 2.101 definition of “commercial item.” Contractors are seeking to have noncompetitive items which are normally thought of as military equipment classified as commercial items based on minimal sales to nongovernmental customers for specialized applications, on direct sales to foreign governments, or on merely offering an item for sale to the general public with little, if any, real expectation that the item will be bought by any nongovernmental customer. Their actions shouldn’t be surprising, given the stakes involved.

If the item is classified as a “commercial item” the contractor reaps several benefits. Among other things, the contractor is not required to submit cost or pricing data (FAR 15.403-1(b)(3)); the Government’s rights to in-process inspection are limited (FAR 12.208); the Government’s rights to obtain technical data which might support future competition are limited (FAR 12.211); and Cost Accounting Standards do not apply (FAR 12.214). One contractor has asserted that commercial prices can include amortization of developmental and nonrecurring costs already paid by the Government because the contractor’s “business model” used to determine prices offered to the general public includes those costs.

Although the stakes are high, detailed guidance is hard to come by. The Federal Acquisition Regulation defines “commercial item” (in pertinent part) to mean:

- (a) any item . . . that is of a type customarily used for nongovernmental purposes and that –
 - (1) Has been sold, leased, or licensed to the general public; or
 - (2) Has been offered for sale, lease, or license to the general public;
- (b) Any item that has evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
- (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for –
 - (1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter that nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

. . .

FAR 2.101 (June 1997).

There are a number of GAO cases that have considered whether a particular product qualifies as a “commercial item,” but they offer little insight into the exact meaning of terms in the definition. *See, e.g., Coherent, Inc.*, B-270998, 96-1 CPD 214 (May 7, 1996), *Canberra Industries, Inc.*, B-271016, 96-1 CPD 269 (June 5, 1996) (both cases considered a pre-FASA DFARS clause definition of “commercial item”). What is most notable about the cases is their statement of the settled standard of review: “Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable.” *Aalco Forwarding, Inc.*, B-277241.8, B-277241.9, 97-2 CPD 110 (Oct. 21, 1997) at 11 (citing *Canberra* and *Coherent*). A well-reasoned finding, then, that an item is or is not a FAR 2.101 commercial item will withstand GAO review. However, this begs the question of what will be considered well-reasoned.

Any decision on whether something is a commercial item will likely turn on the precise meaning assigned to such key terms as “of a type,” “customarily,” and “nongovernmental purposes.”

For the phrase “of a type” to have any meaning whatsoever, it will have to be read fairly narrowly, as a broad meaning will render the entire text meaningless: As four-legged, hay-burning equine vertebrates, both Shetland ponies and Thoroughbreds can safely be considered “of a type.” That similarity is not meaningful (or helpful) in determining whether Shetland ponies qualify as racehorses. Similarly, while it could be argued that all aircraft engines are “of a type,” this certainly does not mean that all aircraft engines are commercial. Any determination whether a particular engine is a commercial item will require a case-

by-case, fact-based inquiry; any well reasoned determination will necessarily define the meaning of “of a type” by limiting itself to factors that are meaningful in the context of the determination to be made.

In discussions over the nature of an end item, one contractor stressed that language requiring items to be “sold in substantial quantities to the general public” was eliminated in the revised definition of “commercial item” that came with FASA and its implementing regulations. With that change, the standard appeared to be loosened considerably; now merely *offering* for sale, lease, or license to the general public would satisfy that prong. The implication (and flaw) in the contractor’s position is that the change eliminated the necessity of use by the general public. That conclusion ignores the threshold language that the prong supplements: “any item . . . customarily used for nongovernmental purposes” If merely offering to sell to the general public were the whole standard for deciding whether an item was commercial, a printed catalog or web page from a legitimate defense contractor offering tactical nuclear weapons to the general public would render such weapons “commercial items” (and presumably, would also provide valuable pricing information for the contracting officer in determining a fair and reasonable price). The requirement that an item must first be “customarily used for nongovernmental purposes” prevents the definition from being ludicrously overbroad.

Without the word “customarily”, the phrase is similarly susceptible to manipulation: a single nongovernmental use would satisfy the requirement (would one appearance by a Harrier jet or an Apache helicopter in a Hollywood film make those aircraft commercial items?). Webster’s Third New International dictionary defines custom, in part, as “a usage or practice that is common to many.” The plain meaning of “customarily” in the FAR language is clear. Nongovernmental use must be far beyond isolated instances for an item to be considered commercial.

“Nongovernmental” is also a term subject to interpretation. Recent privatization efforts have altered the traditional perceptions of inherently governmental versus proprietary functions. The FAR definition recognizes that the mere fact that an item is used by the military will not prevent classification an item as commercial. No one would seriously argue that desktop personal computers, or the desk, or the paper aren’t commercial items, or that tactical nuclear weapons are.

Where an item is used *only* by the military, it’s a pretty good bet that the item is not commercial. However, there are further hurdles in the definition. It must be determined whether the item is only a “minor modification not customarily available in the commercial marketplace” or a commercially available modification away from being a “commercial item.” If an item available to the

Government but not yet in the commercial markets evolved from a commercial item, it qualifies as a FAR 2.101 commercial item.

Once the contracting officer has, in consultation with the appropriate technical personnel and subject matter experts, determined an item not to be a commercial item, the contractor may not accept the finding. Some of the reasons for this reluctance may be found at FAR 12.503, 12.504, and DFARS 212.503 and 212.504, which list laws not applicable to contracts and subcontracts for commercial items. Of particular note are those related to noncompetitive buys.

The benefits to be derived from streamlined methods of contracting for commercial items disappear when there is no competition in the marketplace. The Truth in Negotiations Act (TINA), 10 U.S.C. 2306a, has long been one of the strongest weapons in the Government's arsenal in negotiations with sole source contractors. Designed to help level the playing field, access to contractor's cost and pricing data and the ability to recover overpayment when disclosure of the data was inadequate kept some balance in the process. In a recent negotiation, one contractor insisted that the end item was commercial and refused to offer cost or pricing data. After protracted discussions, and a determination by the contracting officer that the item did not meet the FAR standards, data was submitted. The price eventually negotiated was \$26 million less than the "commercial" pricing documented by the contractor.

Even if an item technically meets the legal standard for treatment as a commercial item, the commercial demand for that item may be so small that it imposes no real restraint on the contractor's pricing, and provides no economy of scale to its production. In that event, while the contractor benefits from the classification, there is no corresponding benefit to the Government, and significant potential detriment.

Especially in sole source contracting above applicable threshold amounts, the determination of whether an item is commercial will be of great concern to both parties. It is in the interest of both the Government and the defense industry to ensure that standards are uniform throughout AMC, both to prevent "whipsawing" of contracting officers by contractors through claims of findings at other AMC commands, and to prevent inequitable and inconsistent treatment of contractors.

POC: Charles Blair DSN 788-0540

Author: Bruce F. Crowe, who has now left the Government and is working for
Mallinckrodt Specialty Chemical Company, St. Louis

Settlement Agreements

Vera Meza, AMC

One of the topics discussed in a recent Protest VTC dealt with settlement agreements. I like to pass on to all of you, regardless of what legal discipline you practice, some of our thoughts on settlement agreements learned at the Court of Federal Claims.

Are there limits? How do we craft them for whatever problem is being solved to keep us out of hot water? Or, better yet, to be able to withstand hot water? When does corrective action go sour?

In *FN Manufacturing, Inc. v. United States*, Fed Cl., No. 98-447C, 28 Oct 1998, the court asked whether the contracting agency has the authority to agree to a contract settlement that establishes a contractor's exclusive ownership of technical data, thereby restricting all future procurements involving the data to sole-source purchases. Does this settlement agreement violate the Competition in Contracting Act (CICA)? Luckily, no. The court does not read CICA as preventing the Government from achieving, through settlement, a result with regard to data rights that a court, faced the identical dispute, could itself reach as an adjudicated outcome.

THE PRACTICAL ASPECT: If a court or administrative agency could reach the same result as we reach in a settlement, then the settlement is ok.

Where have settlements gone wrong?

In *Executive Business Media v. U.S.*, 3 F.3d 759 (4th Cir. 1993), DOJ, to settle another case brought in the Court of Claims, accepted the offer of the plaintiff to dismiss its suit if DOD would modify a contract to expand it beyond what it was when it was competitively awarded. A potential offeror learned of the settlement and filed an action in district court seeking an injunction. The district court held that the settlement agreement was not reviewable. The circuit court reversed and remanded.

In *Earth Property Services*, B-237742, 90-1 CPD 273 (14 March 1990), the awardee on a family housing firm fixed-price contract was having problems. To resolve the problems, the awardee agreed not to file a claim and the Government agreed to let the awardee out of the old contract and award it a new sole-source cost-plus-award-fee contract. A potential offeror learned of the new contract action and filed a protest. The protest was sustained.

In both cases cited above it is unlikely that a court or an administrative body would have granted the results of the settlement agreements. It is hoped that this little tidbit will help in fashioning settlement agreements or corrective action that will withstand challenges by others.¹

¹ For guidance on other worrisome aspects of settlement agreements and corrective action, see *American Marketing Associates, Inc.* B-274454.4, 97-1 CPD 183 (where a protestor who alleged that the settlement agreement was breached) and *Rexon Tech Corp.*, B-243446.2, 81-2 CPD 262 (where corrective action resulted in a sustained case).

TEN SIGNIFICANT ISSUES FOR 1999

by

Steven L. Schooner
Associate Professor of Government Contracts Law
George Washington University Law School
(202) 994 3037
sschooner@main.nlc.gwu.edu

1998 GOVERNMENT CONTRACT LAW SYMPOSIUM
THE JUDGE ADVOCATE GENERAL'S SCHOOL OF THE ARMY
CHARLOTTESVILLE, VIRGINIA

DECEMBER 7, 1998

TEN SIGNIFICANT ISSUES FOR 1999

Few contracts attorneys predict that 1999 will be a year of dramatic change in terms of new statutory or regulatory initiatives. Conversely, many realize that rapid change will continue to dominate Federal procurement. At a fundamental level, the coming year brings little more than renewed emphasis upon continued implementation of major procurement reforms. Conversely, significant changes in fundamental business methodologies and technologies, as well as dramatic evolution (driven by, for example, workforce reduction) in procurement personnel issues and what is expected of these professionals (for example, heightened expectations regarding exercise of discretion and business acumen) will keep counsel busy.

Looking into the crystal ball for 1999, numerous trends compete for attention. Unfortunately, time, space, and the gimmick of a top-ten list squeeze out a number of other pressing issues, particularly privatization/outsourcing and past performance. Fortunately, the symposium will create other opportunities to examine these, and other, issues.

10. ELECTRONIC COMMERCE (EC) MOVES INTO THE MAINSTREAM.

No legislation, regulation, nor policy will change the way that we do business as much as the rapid development of electronic commerce. Fortunately, Congress has recognized (at least temporarily) that it cannot legislate technology evolution. Equally important, the Government seems intent on identifying, and willing to take advantage of, developments in the commercial sector. Look for increased efforts to address the issue of a government-wide single point of entry to Federal procurement.

General Information. Judith Gebauer, Carrie Beam, and Arie Segev, *Impact of the Internet On Procurement*, ACQUISITION REVIEW QUARTERLY, Spring 1998

Government-wide.Commercial Information Dissemination, Efforts

Acquisition Reform Network -- <http://w\vw.arnet.gov>; Federal Acquisition Jumpstation -- <http://nais.nasa.gov/fedprocihome.html>

Electronic Commerce Resource Center
<http://www.ecrc.ctc.com/inde.x.htm>

Electronic Processes Initiatives Committee (EPIC) of the President's Management Council March 1998 Report and Strategic Plan --
<http://policyworks.gov/org/main/me/epic/opendocs/>

Joint Electronic Commerce Program Office (JEPCO) --
<http://www.acq.osd.mil/ec/>

DoD Electronic Mall (E-MALL) -- <http://www.emall.dla.mil/Default.asp>; Electronic Catalogs -<http://www.arnet.gov/References/References.html#catalog>

Electronic Commerce Navigator -<http://www.acq.osd.mil/ec/navigator/index.html>

Electronic Government & Electronic Commerce
<http://policyworks.gov/org/main/me/smartgov/egec/egec.htm>

Navy Paperless Acquisition, Standard Procurement System (SPS) <http://www.abm.rda.hq.navy.mil/paperles.html>;
<http://www.peoarbs.navy.mil/>;
<http://www.abm.rda.hq.navy.mil/sps/index.html>

Electronic Tools

FAR-- <http://www.arnet.gov/far/>
DOD Deskbook -- <http://www.deskbook.osd.mil/>
Thomas -- <http://thomas.loc.gov/>
Federal Register-http://www.access.gpo.gov/su_docs/aces/aces_140.html
CBDNet -- <http://cbdnet.gpo.gov/>
Central Contractor Registration (CCR) --
<http://ccr.edi.disa.mil/ccragent/plsql/ccr.welcome>

Legitimate Concerns include *Year 2000* problems, e.g., Year 2000 Information and Readiness Disclosure Act of 1998 -- <http://www.y2k.gov/>; and *PKI/public key infrastructure* -- a system of digital certificates, Certificate Authorities, and other registration authorities that verify and authenticate the validity of each party involved in an Internet transaction. There is no single agreed-upon standard for setting up a PKI. See http://webopedia.internet.com/TERM/p/public_key_infrastructure.html;
<http://www.opengroup.org/public/tech/security/pki/cki>

9. LIVING IN THE WORLD OF COTS (COMMERCIAL OFF THE SHELF).

The pendulum has swung towards all things commercial, and there seems little gravity drawing it back. The commercial marketplace, however, is a jungle. Moreover, principles of the "marketplace" work best where there is a "market." Let's agree that the Government should apply commercial practices to procure commercial items. Can the Government leave well enough alone, or will we be forced to believe that everything is commercial?

See, e. g., <http://www.arnet.gov/References/fssciate.html>

Rocco J. Maffei & Jason J. Richter, *COTS -- Updating and the Government Contractor Defense*, 29 NAT'L CONT. MGMT. J. 1 (1998); Corey Rindner, *Can Government Really Contract Commercially?*, 38 CONT. MGMT. 3 (November 1998); Daniel R. Petersen, *Government Procurement and the UCC: How the Code Affects Federal Contracting*, 38 CONT. MGMT. 8 (November 1998); Joseph Summerill & Todd Bailey, *The Use of UCC-Implied Warranties in Public Contracts*, 38 CONT. MGMT. 12 (November 1998), Edward G. Elgart, *Buying Commercial Simply Makes Sense*, 38 CONT. MGMT. 44 (November 1998).

8. CONTINUED, DRAMATIC REDUCTION IN LITIGATION (IS IT HIBERNATION?).

There are fewer protests. There are fewer CDA disputes. Why? Are there fewer contracts? Are ADR and partnering reducing litigation? Has the specter of past performance chilled contractors' willingness to exercise their rights? Is there a backlash in waiting?

Protests, Fora. See generally, GAO -- <http://www.gao.gov>, http://www.access.gpo.gov/su_docs/aces/aces170.shtml; see also Court of Federal Claims -- <http://www.law.gwu.edu/>

Disputes CDA. Etc. Last year, the ASBCA reported a decrease in appeal activity for the sixth consecutive year. In fiscal year (FY) 1997, the ASBCA docketed 923 appeals, compared to 1712 new appeals in FY 1992.

The volume of contract litigation in the Court of Federal Claims remained steady during that period. In FY 1997, the CFC docketed 280 contract cases compared to 291 in FY 1992. See. CONFERENCE BRIEFS: THE FEDERAL PURCHASE AND TO GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE. COVERING 1997. Chapter 6. Disputes (1998) (see 1993 Conference Briefs for 1992 statistics). CFC cases now account for a greater percentage of the total numbers of CDA actions filed. See also. ASBCA -<http://www.law.gwu.edu/asbca/>

7. IMPLEMENTATION OF, AND LITIGATION STEMMING FROM, THE FAR PART 15 RE-WRITE.

After all of that attention and blood-letting, now, as they say, the proof is in the pudding. Will Contracting Officers exercise greater discretion? Will they engage in hard bargaining? Numerous issues will be litigated. Four key battlegrounds will be issues relating to: (1) Award based upon initial proposals; (2) Competitive range determinations; (3) Exchanges - will there be more clarifications, and fewer discussions; and (4) Oral presentations, see generally, <http://www.pr.doe.gov/oral.html>.

6. IMPLEMENTATION OF NEW SMALL BUSINESS (AND OTHER SOCIAL PROGRAMS)

How can we balance the objectives of our procurement system? Some suggest that the greatest threat to procurement reform or reinvention is the inevitable return of aggressive social programs imposed upon the system. Can these programs co-exist? Are these equally compelling concerns? Are they more or less important than saving money, customer satisfaction, etc.?

The system faces expanded demands (many of which derive from recent statutory changes) to provide opportunities for small business, such as: (1) Bundling; (2) Affirmative action; (3) HUBZones; (4) Goal increase(s). Minor details will impact the system, e.g., the SIC to NAICS transition - <http://www.census.gov/epcd/www/naics.html>.

The "other" social program: buying green. See generally, [http://www. Ofee.gov/](http://www.Ofee.gov/); Greening the Government: A Guide to Implementing Executive Order 12873; New E.O. --[http://w~vw.ofee.gov/eol3 101/ 13101.htm](http://w~vw.ofee.gov/eol3_101/13101.htm); *Recycling. . . for the Future* -[http://www.ofee.gov/html/ future.htm](http://www.ofee.gov/html/future.htm). ("Environmentally preferable" means products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose.)

5. THE REALITY OF LIMITS UPON COMPETITION (MULTIPLE AWARD TASK ORDER AND DELIVERY CONTRACTS).

The darling of acquisition reform -- and the scapegoat of small business advocates -- has attracted another band of critics. Unfortunately (for this flexible vehicle), the critics are competition advocates, and they have a legitimate gripe.

See generally. OMB Deputy Director For Management Memorandum: The Presidents Management Council. Subject: Competition Under Multiple Award Task and Delivery Order Contracts, dated April 21. 1998 --<http://www.arnet.gov/References/memopmc.html>; see also, OFPP Memorandum for The Federal Acquisition Regulations Council, Subject: Proposed Change to FAR Subpart 16.5 Relating to Competition Under Multiple Award Task and Delivery Order Contracts, dated April 21, 1998 -
<http://www.arnet.gov/References/compmac.html>. See also, The Multiagency/GWAC Program Managers Compact: A Consensus On Principles Applicable to the Acquisition of Services Under Multiagency Contracts and Government-wide Acquisitions --<http://www.arnet.gov/References/magycom.html>. See also the recent GAO Report.

4. EVOLUTION OF PERFORMANCE BASED CONTRACTING (SPECIFICALLY PERFORMANCE BASED SERVICE CONTRACTING(PBSC)).

Just because everyone agrees it's a great idea, that does not mean that anyone knows how it works, or how to use it effectively. Is there hope?

See generally, Practices
<http://www.arnet.gov/BestP/BestPract.html>. See also, the PBSC Solicitation/Contract/Task Order Review Checklist --<http://www.arnet.gov/>

References/Policy_Letters/pbsckkls.html; and draft statements of work, at <http://w~vw.arnet.gov/References/References.html#OFPP>

3. MAXIMIZING THE USE, AND MINIMIZING THE ABUSE, OF THE GOVERNMENT CHARGE CARD; OR HARNESSING (OR WASTING) THE POWER OF THE NEXT

Charge card usage (basically) has doubled each year since the Government introduced the IMPAC card. Early indicators point toward FY 98 charge card spending of almost SUB. Charge cards saves the Government time and money. The new smart card technology should make the credit card a more powerful tool for micro-purchases and as a payment vehicle. Specifically, the smart card technology may lead to greater insight into what is being bought with the charge card, and from whom. Do you think that information will be good or bad news? See generally, <http://www.gsa.gov/impac/>; <http://pub.fss.gsa.gov/fm/current/>; <http://policyworks.gov/org/main/me/smartgov/cards/cards.htm>.

2. CHANGE MANAGEMENT FOLLOWING AN ERA OF RAPID ACQUISITION REINVENTION

The current OFPP Administrator has identified "implementation" as the primary focus of her efforts. This properly reflects the chasm between the acquisition reforms achieved in legislation, regulation, and policy, and the day-to-day activities of procurement professionals. This chasm will close only with significant investments (both money and time) in training/learning, information dissemination, skills development, and commitment by senior leadership, etc.

Dr. Mark E. Nissen, Dr. Keith F. Snider, and Dr. David V. Lamm, *Managing Radical Change in Acquisition*; Nancy C. Roberts, *Radical Change by Entrepreneurial Design*; Dr. Kathleen K. Reardon, Dr. Kevin J. Reardon, and Dr. Alan J. Rowe, *Leadership Styles for the Five Stages of Radical Change*; Susan Page Hocevar and Walter E. Owen, *Team-Based Redesign as a Large-Scale Change*; *Applying Theory to The Implementation Of Integrated Product Teams*; Lauren Holland, *The Weapons Acquisition Process: The Impediments to Radical Reform*. ACQUISITION REVIEW QIARTERLY' Spring 1998 (Special Issue).

Steven L. Schooner, *Book Review Change, Change Leadership, and Acquisition Reform*, 26 PUBLIC CONTRACT LAW JOURNAL 467 (1997).

Robert A. Welch. *The Procurement Manager of the Future*. 37 CONTRACT MANAGEMENT 4 (December 1997); Ralph C. Nash, Jr. *Training the Contracting Officer of the Future*. 37 CONTRACT MANAGEMENT 13 (March 1997); Evelyn Layton. *The Defense Acquisition University' Changes Its Fundamental and Intermediate Contracting Courses*. 38 CONTRACT MANAGEMENT 27 (October 1998).

U.S. Office of Personnel Management. Qualification Standard for GS-1102 Contracting Positions -- <http://www.opm.gov/qualstd/html/1102qual.htm>

1. THE BALKANIZATION OF FEDERAL PROCUREMENT (OR WHAT EVER HAPPENED TO A UNIFORM PROCUREMENT SYSTEM?).

How far have we come from April 1, 1984, when the Federal Acquisition Regulation (FAR) became effective, and was intended to be a single, government-wide regulation? With micro-purchase authority, commercial practices, government-wide acquisition contracts, and other transactions authority, do we have something that we can call a procurement system? Does it matter if most of the government's procurements are not conducted by contracting officers?

FAA Life Cycle Acquisition Management System (AMS) -- see generally, the FAA Acquisition System Toolset (FAST) -- <http://fast.faa.gov/>; Office of Research and Acquisition -- <http://www.faa.gov/ara/arahome.htm>; Office of Disputes Resolution for Acquisition -- <http://www.faa.gov/agc/>

Is the Department of Veterans Affairs aiming to be the next FAA?
<http://www.va.gov/oa&mn/>

Other Transactions Authority -- <http://www.abm.rda.hq.navy.mil/bpot.html>; see also DoD IG, *Financial and Cost Aspects of Other Transactions*, (98191, Aug. 24, 1998); see also, Ralph C. Nash & John Cibinic, *Dateline November 1998* 12 NASH & CIBINIC REP. 161 (November 1998).

Allowing Use of US Patents in International Cooperative Projects

By David Kuhn, US Army Tank-Automotive and Armaments Command

Under the authority of 22 USC §2767, the President may enter cooperative project agreements with NATO or members of NATO. A cooperative project under §2767 is defined to include, *inter alia*:

“a jointly managed arrangement...which is undertaken in order to further the objectives of standardization, rationalization and interoperability of the armed forces of North Atlantic Treaty Organization and which provides--

“(A) for one or more of the other participants to share with the United States the costs of research on and development, testing evaluation, or joint production (including follow-on support) of certain defense articles;

“(B) for concurrent production in the United States and in another member country of a defense article jointly developed in accordance with subparagraph (A); or

“(C) for the procurement by the United States of s defense article or defense service by another member country or for procurement by the United States of munitions from the North Atlantic Treaty Organization or a subsidiary of such organization .”

Further, under 10 USC §2350b, it is recognized that the authority to enter cooperative projects may be delegated to the Secretary of Defense. The Secretary can also agree that a non-US participant in the project may make contracts for requirements of the US, if the Secretary determines that so doing will significantly further standardization, rationalization and interoperability. In at least one case where a non-US participant has entered the contract formation process, a potential contractor has asked that it be given authorization and consent to use US patents. This has happened in the program for the Future SCOUT reconnaissance vehicle, a cooperative project between the US and the United Kingdom managed for the US by TACOM. In the context of the SCOUT Program, a request for authorization and consent to use US patents is not surprising in view of the fact that the potential contractors are international consortia whose US members are accustomed to having such authorization and consent.

The authorization and consent to which US business entities are accustomed stems ultimately from 28 USC 1498. That statute provides remedies against the US Government when “an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same. “ Also, use or manufacture of a patented invention by a Government contractor or subcontractor, with the authorization and consent of the US Government, is deemed to be use or manufacture by or for the US Government itself. A benefit to Government contractors and subcontractors is that the Government is the only party sued and the only party liable. The benefit to the Government is that the manufacture or use of the patented inventions can not be enjoined, so that patent infringement suits will not interrupt important Government programs or acquisitions. The Government compensates patent holders under eminent domain for infringement of their patents.

The question of whether patent infringement by a contractor working for a foreign Government falls within the scope of 28 USC §1498 can be broken down into three elements:

- Is there “manufacture or use” within the meaning of the statute?
- Is the manufacture or use “by or for” the United States?
- Has the US granted authorization and consent to such manufacture or use?

As to the first question, any manufacture or use must be within the United States or its territories. The reason is that US patents or any other country’s patents have no effect outside the borders of the country issuing the patent. Consequently, acts that would constitute infringement of a US patent if performed within the United States are not acts of infringement if they are performed outside the United States. Aside from the territorial limitation, the phrase “manufacture or use” has been broadly interpreted in deciding whether 28 USC §1498 applies. In one case, for example, the defendant made an experimental infringing instrument which was used only once, to demonstrate the instrument to the US Government. The defendant successfully asserted 28 USC §1498 as

a defense against itself, in that the Government was the sole party to be sued. See *Ling-Tempero-Vought, Inc. v. Kollsman Instrument Corporation*, 152 U.S.P.Q. 446, 372 F. 2d. 263 (U.S. App. 1967). A similar case is *TVI Energy Corporation v. Milton C. Blane and Blane Enterprises, Inc.* 1 U.S.P.Q. 2d. 1071, 806 F 2d. 1057 (C.A.F.C. 1986).

In cases where an infringing item is not made in the United States, relatively little is required to find the appropriate degree of “use” for the purpose of applying 28 USC §1498. For example, see *Ollson v. United States*, 37 USPQ 767, 25 F. Supp. 495 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 621, 41 U.S.P.Q. 799. There the court found that the United States “used” imported howitzers that contained a patented invention even though the howitzers had never been fired and had been disassembled for storage. *Olsson* was followed in *Hughes Aircraft Co. v. U.S.*, 29 Fed Cl. 197, 29 U.S.P.Q. 2d. 1974 (Ct. Cl. 1993). In *Hughes*, the US Government tested and launched a British-made satellite without activating the satellite’s patented attitude control system while the satellite was in US territory or under US control. The US Government’s activities constituted “use” for the purpose of deciding to invoke 28 USC §1498.

If the relatively easy “use or manufacture” test is passed, then one may proceed to the second question, which is whether such use or manufacture is “by or for” the United States.” In considering the “by or for” question, the *Hughes* court *supra* stated that “United States involvement in a joint international space program will be sufficient to make any use of the spacecraft a use “by” or “for” the government within the meaning of §1498 if the project is a cooperative one with the potential of substantial benefit to the United States.” In reaching this conclusion, the court drew upon two earlier cases. Both cases also involved the Hughes Aircraft Company and both also involved international spacecraft programs. These were *Hughes Aircraft Co. v. United States*, 209 Ct. Cl. 446, 534 F. 2d. 889, 192 U.S.P.Q. 296 (Ct. Cl. 1976) and *Hughes Aircraft Co. v. Messerschmitt-Boelkow-Blohm GmbH* 625 F. 2d. 580, 208 U.S.P.Q. 23 (5th Cir. 1980) *cert. denied* 449 U.S. 1082 (1981). Though the *Hughes* series of cases all relate factually to spacecraft in a cooperative space project, it is clear that the principle of these cases

also applies to international cooperative projects where the US gains, or potentially gains, appreciable benefits. Thus the SCOUT/LANCER Program for a land reconnaissance vehicle, or a program to develop munitions or other military supplies would be considered as “by or for” the United States for purposes of §1498.

Assuming that the appropriate “use or manufacture” has been found and has been determined to be “by or for” the United States, the third of the three elements noted above needs to be considered. That is, one must determine whether the United States has authorized and consented to the infringing of a United States patent. In this vein, the 1976 *Hughes* case *supra* is quite instructive. There the Department of Defense had issued a letter to the government of the United Kingdom specifically authorizing the use of US patents by contractors or subcontractors. The court held that this letter was a valid authorization and consent under 28 USC §1498. The court also stated that the Department of Defense had the authority to issue the letter since the Department was responsible for coordinating the US’s activities under the Skynet II international cooperative program. See *Hughes* at 192 USPQ 304 and 305. It can be seen that the 1976 *Hughes* case is an example of how the US can grant authorization and consent in future cooperative projects. Namely, the US agency coordinating the US side of the project would issue a letter similar to that in the 1976 *Hughes* case.

The 1976 *Hughes* court made two further instructive statements regarding authorization and consent. First, the court noted that the United States need not be a direct party to the contract at issue where, as in the Skynet II program, the circumstances indicate that the United States is a principle beneficiary of the contract. Second the court noted that authorization and consent can be given in a variety of ways besides direct wording on the face of a contract or in a letter. These ways include contracting officer instructions, specifications or drawings which impliedly sanction or necessitate infringement, or *post hoc* US Government intervention in litigation against an individual contractor.

If the United State has the ability to grant authorization and consent under 28 USC § 1498 in a given instance, then one may ask whether, as a matter of policy or discretion, the United States *wants* to do so. There is some broad guidance bearing on this question. The first item of guidance is the purpose underlying 28 USC § 1498, which is to enable the US Government to purchase goods or services for the performance of its function without threat of having its supplier enjoined from selling patented goods. See, for example, *Coakwell v. US*, 372 F. 2d 508, 178 Ct.Cl. 654, 153 U.S.P.Q. 307 (Ct. Cl 1967) or *US v. McCool*, 751 F. 2d 1112 (C.A. 9 (Cal. 1985)). Presumably, goods or services ordered by a non-US participant in a joint project will be used by the US Government in the performance of its function. Presumably too, in the appropriate cases, the US Government would desire to avoid an injunction disrupting the supply of these goods and services. Hence the policy behind 28 USC § 1498 suggests that it would normally be desired for the US to grant authorization and consent in cases where a non-US participant makes the contract.

A second item of guidance is the US Government procedure when contracting under the Federal Acquisition Regulations (FAR). Under FAR 27.201-2, in all research and development contracts, and in all engineering contracts or construction contracts, the Government grants authorization and consent to use US patents. This is done by including contract clause FAR 52.227-1 or an alternate thereof in the contract. However, for goods which are sold by the contractor on the commercial open market, or such goods having only minor modifications, authorization and consent is not granted. By the terms of 22 USC §2767, goods or services acquired under a cooperative project will either be research and development or goods not commercially available on the open market. Hence, US contracting policy under the FAR would suggest that authorization and consent would normally be desired in cases where a non-US participant makes the contract in a cooperative project.

Another factor in deciding whether the US would desire to grant authorization and consent is the position of the non-US participant regarding authorization. In a given

cooperative program one or more non-US participants may not, as a matter of their law, policy or discretion, want to authorize or consent the use of their patents. As a result, the US may desire to reciprocate by withholding authorization and consent to utilize United States patents. Too, the participants may decide that a given patent, whether it is from the US or from another participant country, represents an unwarranted technical risk. That is, the participants may decide that the patent requires an avenue of research or development whose chance of success does not justify the time and money needed to pursue that avenue. Finally, since participants generally share costs of claims in international cooperative agreements, the participants may agree to forego usage of a given patent due to anticipated costs of successful claims.

Obviously, other policy considerations will arise in the context of specific cooperative projects. However, it is clear that the United States has the ability to exercise its discretion in favor of authorizing use of United States patents where a non-US participant is the contracting entity.

RAPID RESPONSE TO CRITICAL SYSTEM REQUIREMENTS PROTEST NO. 281114: LESSONS LEARNED

1. Issue: Scope of Indefinite- Delivery-Indefinite-Quantity (IDIQ) contracts.

2. Background: The basic IDIQ contract is a Time and Materials contract with a two year base period and three, one year options. The contract award was the result of a competitively negotiated best value solicitation for the Rapid Response to Critical System Requirements (R2CSR) program. Six prime contractors submitted proposals and three were awarded contracts on 29 July 1998. ARINC was one of the three successful offerors.

3. Facts: L-3 Communications Aviation Recorders, Inc. (L-3) protested the award of a delivery order placed against the ARINC IDIQ contract. L-3 was not one of the three awardees of the basic R2CSR contracts nor was it a subcontractor to any of the three awardees. The protest was denied.

4. Protester's Allegation: L-3's only allegation addressable by the GAO was that the delivery order issued was not within the scope of the basic ARINC contract. The delivery order required the acquisition and integration of flight data and voice recorders (black boxes) and emergency locator transmitters into the entire fleet (580) of C/KC-135 aircraft.

The protester argued that the basic contract was for engineering support services and that, while the IDIQ contract did allow for the acquisition or fabrication of "limited quantities" of hardware and software, the delivery order to equip the 580 aircraft was beyond the scope of the contract.

5. Key Points: An essential aspect of any case involving the scope of a delivery or task order under an IDIQ contract is whether the order or tasking is of a nature which potential offerors (of the original IDIQ solicitation) would reasonably have anticipated. Therefore, it is important to communicate to industry the purpose of the contract as well as the specific types of work that will be covered by it.

a. Pre-solicitation Conference: A key to the Government success in this case was the fact that there was a pre-solicitation conference open to all potential offerors and that the solicitation contained an executive summary explaining the purpose of the program.

The pre-solicitation conference allowed the Government to communicate to industry the purpose of the R2CSR program, the manner in which the Government expected to administer the contract, and to provide industry with specific examples of the types of systems where taskings were likely to occur. The pre-solicitation conference also included a question and answer session. The specific examples of potential systems and the question and answer session turned out to be of particular value in the protest. Fortunately, one of the examples of systems likely to need upgrading was the C/KC-135 aircraft. While no specific type of upgrade was discussed, the prior reference to this system aided the Government in its argument that fleet-wide upgrades to the C/KC-135 could have been anticipated. With respect to the question and answer session, again

fortuitously, a question was asked that directly related to the protest issue. The key issue in the protest was whether a quantity of 580 “black boxes” could be considered a “limited quantity” of hardware and software. At the pre-solicitation conference it was asked, “What is the definition of ‘limited production’? Does this mean only a prototype quantity?” The Government responded that “[t]he quantity required to fulfill an immediate contract requirement will be determined on an individual delivery order basis”. This clearly implied that “limited” did not mean only “prototypes” as the protester later argued.

b. Executive Summary: The executive summary in the Request for Proposals (RFP) was important in that it allowed the GAO to see that the Statement of Work (SOW) in the RFP, while broad, was consistent with the stated purpose of the contract, which was also broad.

c. Proportionality: The other key element of the decision was the dollar relationships between the cost of the hardware in the delivery order and the overall estimated contract value (\$19.7 million to \$1.5 billion). The GAO agreed with the Government argument that in light of an advertised contract value of \$1.5 billion, a hardware cost of \$19.7 million was “limited”.

6. Summary: Pre-proposal information is of particular importance in the IDIQ arena. In a typical source selection, if there is no protest within ten days of the award, much of the pre-award occurrences have little future affect on the contract. In the IDIQ situation, where delivery or task orders often follow years later, the importance and preservation of pre-award documents and occurrences can be crucial, since any future delivery or task order can be protested as “not within the general scope” of the underlying contract. A pre-solicitation or pre-proposal conference should be conducted and could be very useful in defending a subsequent protest. The conference briefings and questions and answers should be given wide dissemination (R2CSR published them on the CECOM website on the internet) and preserved. For the same reasons, an executive summary in the RFP is recommended. In addition the Statement of Work should also contain a general scope paragraph describing the general purpose and goals of the contract. While vagueness is not the goal, there are instances where flexibility is desired and strict definitions might hamper that desire. For example, in the R2CSR contracts “limited quantities” was referred to only in terms of that “needed to meet immediate operation and support needs” and “in accordance with applicable delivery orders”. No more explicit definition could be supplied. However, as noted above, the questions and answers at the pre-solicitation conference made it clear that “limited quantities of hardware” did not mean “prototypes” only. In those instances where the awarded contract is not clear or specific, the pre-award documents, executive summary, and general purpose statements will serve as a kind of legislative history for future challenges as well as guidance for the contracting and legal offices.

LACHANCE V. ERICKSON - THE SUPREME COURT OVERRULES WALSH AND ITS PROGENY

Employees who have been charged with misconduct cannot lie to their supervisors when questioned about that misconduct, according to the United States Supreme Court. In *Lachance v. Erickson, et. al.*, 118 S. Ct. 753 (1998), the Supreme Court addressed the issue of whether the Due Process Clause of the Fifth Amendment to the Constitution or the Civil Service Reform Act, 5 United States Code (iU.S.C.î) ß 1101 et. seq., preclude a Federal agency from disciplining an employee for making false statements to the agency regarding employment-related misconduct. In holding that they do not, the Court reversed a line of cases, including *Walsh v. Veterans Affairs*, 62 M.S.P.R. 586 (1994), which, since 1994, had been controlling how agencies deal with employees who make false statements during investigations/inquiries into employee misconduct.

Since *Walsh* was decided in 1994 until it was overruled this year, an Agency could not discipline an employee charged with misconduct for making false statements with regard to that misconduct. *Walsh* involved a GS-6 social services assistant with the Department of Veterans Affairs who was removed from the Federal service for engaging in an intimate sexual relationship with a patient, engaging in improper financial dealings with patients, and making false statements to the agency concerning the relationship. The Merit Systems Protection Board (iMSPBî) upheld the first two charges but determined that the charge of making false statements was improper and mitigated the penalty to a 90-day suspension. The MSPB relied on the decision of the U.S. Court of Appeals for the Federal Circuit in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), in which the court found that,

It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge.

In *Walsh*, the MSPB not only found the charge of making false statements to be an improper basis for discipline, but also held that false statements in response to an agency inquiry may not be considered by the agency in determining the appropriate penalty to impose.

The decision in *Walsh* was appealed to the U.S. Court of Appeals for the Federal Circuit. *King v. Erickson, et. al.*, 89 F.3d 1575 (Fed. Cir. 1996). The Court of Appeals held that charging an employee with misconduct and also charging falsification in the course of the agency's investigation of the misconduct deprives the employee of his/her right to due process as set forth in 5 U.S.C. ß 7513. The court distinguished between merely denying the charge and making up a false explanation. The court reasoned that an employee who was not permitted to deny a charge of misconduct might be coerced into admitting misconduct, whether guilty of the misconduct or not, in order to avoid more serious discipline, and therefore found such a denial not to be an actionable charge. Making up a false explanation, however, was found to constitute an actionable charge, independent of the charge of misconduct.

Subsequent to the *King* decision, the MSPB decided *Kirkpatrick v. U.S. Postal Service*, 74 M.S.P.R. 583 (1997). In *Kirkpatrick*, the MSPB once again addressed the issue of providing false information in an official investigation, this time in light of the decision in *King*. The MSPB found that the charge of providing false information in an official

investigation should have been sustained, citing the court's decision in King that false statements made during an investigation could be charged as additional offenses of misconduct as long as they went beyond mere denials. Mr. Kirkpatrick was found to have removed aluminum scrap from a maintenance facility and sold it to a recycling plant, although, during the agency investigation, he stated that a vendor with a contract to remove scrap from the facility had taken the aluminum. Subsequently, the appellant admitted that he had lied about the vendor picking up the aluminum. The MSPB found that the appellant's false story was more than a mere denial, and therefore the charge of obstructing an investigation should not have been dismissed.

In Lachance, the Supreme Court addressed the rights of employees outlined in 5 U.S.C. § 7513(b), and found that the section contains no right to falsely deny charged misconduct. The Court then examined the Fifth Amendment of the Constitution, and found that an employee may remain silent in the face of an agency investigation, if answering the question could expose the employee to criminal prosecution. However, the employee does not have the right to make false statements during the investigatory process.

The Supreme Court also addressed the issues raised by the Court of Appeals in King. The Court of Appeals distinguished Walsh and the other related cases from the Supreme Court's decisions in perjury cases [cases which involve making false statements while under oath], on the basis that the employees in Walsh and the other related cases were not under oath. The Supreme Court rejected the argument, finding that although the employees could not be charged with perjury, they were actually charged with making false statements during agency investigations, a charge which does not require the employees to have been under oath when the statements were made. Another assertion of the Court of Appeals was that employees might be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge. The Supreme Court rejected this argument as being frivolous.

The outcome of the litigation on this issue, which culminated in the Supreme Court's decision in Lachance, is that, when an agency is investigating possible misconduct by an employee and questions the employee about the misconduct, the employee may not provide false information, either in the form of an outright denial that the employee engaged in the misconduct, or in the form of a false explanation. To do so creates an independent charge of falsification for which the employee may be disciplined.

WHAT IS THE AMERICANS WITH DISABILITIES ACT AND TO WHOM DOES IT APPLY?

1. This article's intended purpose is to provide factual information about the Americans with Disabilities Act (ADA) to the Fort Monmouth community.
2. Prior to the enactment of the ADA, the provisions of the Rehabilitation Act bound Federal agencies when dealing with complaints of and providing accommodations to individuals with disabilities. The Rehabilitation Act of 1973 was the original statute that defined what a "handicapping condition" was and when a Federal agency had to provide a reasonable accommodation for that condition. Courts interpreted the Rehabilitation Act to include both alcohol and drug addiction as handicaps.
3. In 1990, Congress enacted the ADA. The majority of the ADA, at that time, affected only non-Federal employees. In 1992 the Rehabilitation Act was amended. In accordance with that amendment, Congress determined that the Rehabilitation Act would be interpreted under the standards of Title I of the ADA and the provisions of Sections 501 through 504 and 510 of the ADA. In accordance with the ADA, Federal agencies no longer will refer to individuals as handicapped; rather the term "person with a disability" will be used. In addition to the above change, the ADA has required Federal agencies to place a higher emphasis on supporting individuals with disabilities in the workplace as well as excluding a number of alleged disabilities from coverage under the ADA. Of significance was the provision that excluded individuals who were currently engaging in the use of illegal drugs.
4. The ADA defined an individual with a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." Moreover, to be protected by the Rehabilitation Act as interpreted under the ADA, an individual must not only have a disability but must also be qualified for the position for which s/he is applying for or encumbers.
5. Under the ADA, it is a Federal agency's responsibility to offer an individual with a disability "reasonable accommodation." A reasonable accommodation may include, but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring, to include part-time or modified work schedules or reassignment to a vacant position; acquisition or modification of equipment or devices; training; and the provision of qualified readers or interpreters. Supervisors as well as individuals with disabilities should explore different means of accommodation in order to enable the individual to overcome any impediment that interferes with the performance of his/her job.
6. As mentioned above, the ADA also excludes certain claimed disabilities from coverage. Some disabilities that are excluded from ADA coverage include: sexual behavior disorders, kleptomania, pyromania, compulsive gambling, as well as homosexuality and bisexuality.
7. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcement of the ADA. In accordance with that responsibility, the EEOC's role is to ensure that qualified individuals with disabilities understand their rights and facilitate and encourage compliance by Federal agencies with the ADA. For more information on the ADA and the EEOC's responsibility under the ADA, please refer to Volume 29 of the Code of Federal Regulations, Section 1630.

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Lower Courts Taste Bestfoods
Lieutenant Colonel David Howlett

In its Bestfoods case, the Supreme Court addressed whether a parent company can be held liable as an operator for clean up of sites owned by a subsidiary under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This article will focus on the decisions of two lower federal courts that recently applied Bestfoods to other situations involving derivative liability.

In Bestfoods, the Supreme Court faced the issue of whether a parent corporation can be held liable as either an owner or operator of a hazardous waste site owned by a subsidiary. The court found that CERCLA did not change the general principal of corporate law -- that a parent corporation is not liable for the acts of its subsidiaries merely because of

the control accorded them through stock ownership or by the duplication of officers. The Court found that the parent might be found derivatively liable only if the corporate veil may be pierced under applicable state law. On the other hand, the parent corporation may be held directly liable for its own actions as an operator of the facility; the question is not whether the parent operates the subsidiary, but whether it operates the site. The Supreme Court remanded the case for a determination of whether the parent corporations acted directly as operators.

In *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, a district court faced the issue of whether a corporate officer (Mr. Ter Maat) could be held individually liable under CERCLA. First, the court determined that under *Bestfoods*, the only way Ter Mat could be held directly liable would be derivatively in accordance with the Illinois corporate veil-piercing law. The court then examined Mr. Ter Maat's behavior under the Illinois veil-piercing factors. Although some actions supported removal of corporate protection, the court found that the plaintiffs did not meet their substantial burden of showing that a corporation is really a dummy or a sham protecting a dominating personality. Even though Mr. Ter Maat was President of two insolvent companies that were found to be operators of the CERCLA site, he was not held liable personally.

Bestfoods also dealt with "operator" liability under CERCLA. Another recent case concerns the derivative liability of entities that "arrange" for the disposal of hazardous waste.

In *AT&T Global Information Solutions Company v. Union Tank Car Company*, the district court considered whether a parent corporation could be held derivatively liable as a CERCLA arranger. Although there was no case law directly on this point, the court found that it was implicit in *Bestfoods* that a parent can be held derivatively liable as an arranger if the corporate veil can be pierced. The court also found that it is within the intent of CERCLA to impute derivative arranger liability upon a parent corporation if its corporate veil can be pierced and if its subsidiary can be adjudged an arranger. Applying Ohio's

corporate veil-piercing law, the court found the parent company's corporate veil should "be pierced to make certain that the entity who ultimately profited from arranging for the improper disposal of hazardous waste bears some of the burden for its cleanup. Any other decision would be circumventing the broad, expansive, and remedial purposes of CERCLA."

These cases show that attorneys involved in CERCLA cases should look carefully to see if there are any solvent parents lurking behind the dissolved or insolvent "orphan" CERCLA potentially responsible parties. If parents or grandparents are present, attorneys should examine their involvement and observance of corporate formalities carefully. (LTC Howlett/LIT)

Ecological Risk Assessments and Natural Resource Injuries Ms. Kate Barfield and Mr. Scott Farley

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), response authorities are required to address both adverse human health and environmental effects caused by a hazardous substance release. CERCLA response authority was delegated to the Department of Defense (DoD) services. This delegation includes a requirement to assess adverse environmental effects or natural resource injuries (NRIs) during the cleanup process. So, in 1996, the Army, Navy and Air Force produced the DoD Tri-Service Procedural Guidelines for Ecological Risk Assessments. Because more attention is being focused how to document adverse environmental effects, this article will examine how Ecological Risk Assessments (ERAs) may be used for this purpose.

Natural Resource Injuries: NRIs are the adverse environmental effects addressed during remediation by the CERCLA remedy. NRIs refer to a measurable adverse change in the chemical or physical quality or viability of a natural resource caused by the release or the threatened release of a hazardous substance. A primary tool for addressing NRIs is the ecological risk assessment. The ERA is used to evaluate the likelihood of ecological problems caused by hazardous substance exposure and is generally prepared by the Army during the Remedial Investigation/Feasibility Study phase of the cleanup process.

ERA Procedure: ERAs should tell the reader which environmental problems should be addressed and why. ERAs typically begin with assessment planning and problem formulation, proceeding to the development of exposure profiles, a characterization of ecological effects and a conceptual model, which provide the basis for risk communication. Here's what this jargon means:

(Assessment Planning: The primary purpose of the ERA is to translate scientific data into meaningful information about the risk of human activities to the environment. This information is then used by the risk manager to make informed decisions about the environment. Assessment planning is the first step towards "problem formulation."

(Problem Formulation: Problem formulation is meant to articulate the purpose behind an assessment. The ERA focuses on things that people care about, such as habitat, watersheds or scenic beauty. So, ERAs typically examine: (1) ecological susceptibility to known or potential stressors (such as specific contaminants); (2) the ecosystem at risk; and (3) the "ecological effects" of exposure. After basic issues have been sketched out, the ERA investigator generates "assessment endpoints" -- the environmental values to be protected. These endpoints are discussed in "conceptual models," which may focus on the relationships among different species, ecosystem functions and how a hazardous substance may be spread by multiple pathways.

(Analysis: Problem formulation is followed by the ERA's "analysis" phase. After evaluating the relevant data, an ERA investigator develops a "characterization of exposure" and a "characterization of ecological effects." The investigator then examines which contaminants are present, from what origin, and at what quantity. Specifically, s/he looks at how the contaminant moves through the environment, determining how it comes into contact with the species at risk and assessing how long that contact lasts. Often, this means delving into the unknown. For example, contaminants can be transported via many pathways. Likewise, a researcher may know of the human health effects of a contaminant, but no studies may exist on animals or habitat. So, the ERA must take the existing knowledge of a contaminant's impacts and project them onto selected species or habitat. Adding to the complexity, researchers should also consider latent effects -- impacts over the life-cycle process -- and cumulative effects, including breaks in the food cycle. Based on this data and analysis, the ERA investigator may develop an "exposure profile,"

a "characterization of ecological effects" and a "conceptual model." These documents show which species are at risk and the circumstances that cause risks to increase or decline. The analysis will also show the ways in which contaminants can cause a chain reaction, impacting the target species, related species and their habitat.

(Risk Characterization: At this stage, the ERA investigator characterizes the proposed risk to the environment to explain how exposure to a contaminant or related "stressor" could affect a species or habitat ("receptor"). The study tends to focus on vulnerable periods in the lifecycle, such as nesting times, to determine when a subject is at particular risk. This risk is often projected outward to involve many species -- particularly when the food chain is disrupted. Risks may also occur over time. For example, population reductions may occur years after exposure and may affect numerous species. In approaching risk, the ERA writer must come to grips with uncertainties at various levels. All of the resulting data -- including assumptions and conjectures -- should be added up. The appropriate conclusions will then be incorporated into an "exposure-response risk model."

(Risk Communication: Next, the risk assessment results are compiled into an "ecological risk summary" for use by the risk manager, and, if applicable, interested parties. It is important to note that risk assessment and risk management are distinct activities. Risk assessments concern a scientific evaluation of whether adverse effects may occur. Risk management involves selecting an action in response to an identified risk. Such identified risks may be based on social, legal, political or economic issues that are outside of the risk assessment's scope.

Back to Natural Resource Injuries: The ERA's data may be used to identify NRIs, while providing a baseline for addressing adverse environmental effects during cleanup. So at the beginning of the ERA process, the ERA investigator should be considering how to define and, possibly, mitigate NRIs. When defining NRIs, DoD Service representatives should talk to their own Army, Navy and Air Force conservation staffs. In addition, they should also speak with natural resource trustees, land managers, and the public to determine what issues they deem important. In particular, communication with federal, state and tribal trustees will help the lead agent meet its CERCLA Section 104 requirement to "coordinate" assessments and investigations.

To request the Tri-Service ERA Guidelines within DoD, contact the Defense Technical Information Center at (800) 225-3842. Requesters outside of DoD should contact the National Technical Information Service at [HYPERLINK http://ntis.gov](http://ntis.gov). Both should ask for publication #ADA322189. (Kate Barfield/RNR).

New DoD Policy for Range Management Lieutenant Colonel Jill Grant

Late last year, the Office of the Under Secretary of Defense for Acquisition and Technology requested that a new draft Department of Defense Instruction (DoDI) be forwarded for staffing among the DoD Services. This proposed DoDI would regulate environmental and explosives safety management of its active and inactive ranges that are owned, leased or operated by DoD, whether located in the United States or overseas.

The DoDI enunciates two purposes: ensuring sustainable use and management of these ranges and protecting all individuals from explosives hazards on these ranges. The DoDI will supersede DoDI 6055.14, Unexploded Ordnance (UXO) Safety on Ranges, while incorporating its explosives safety management principles. Among the DoDI's draft provisions are specific environmental requirements. As proposed, the Services would be required to: (1) assess the environmental impacts of munitions use on ranges, (2) conduct an inventory of their active and inactive ranges, (3) establish range clearance operations to permit sustainable use of their ranges, and (4) incorporate proposed DoDI procedures in local management plans.

The Services are currently drafting comments to the draft DoDI. The final DoDI should be effective no later than this summer. (LTC Grant/CPL)

United States v. Bestfoods, 118 S.Ct. 1876 (1998).

Id. at § 9613. CERCLA § 9613 provides that contribution may be sought from any person who is liable or potentially liable under § 9607. CERCLA § 9607 lists four groups of potentially responsible parties (PRPs). These are:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person ...shall be liable 42 U.S.C. § 9607(a)(1)-(4).

Bestfoods, 118 S.Ct. at 1884.

Id. at 1885-86.

Id. at 1186-87.

Id. at 1890.

13 F.Supp. 2d 756 (W.D. Ill. 1998).

Id. at 765. Prior to Bestfoods, however, the Seventh Circuit held that a corporate officer could be held directly liable as an operator under CERCLA irrespective of state veil-piercing law. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994).

Id. at 765-66.

No. C2-94-876, 1998 U.S. Dist. LEXIS 19316, (S.D. Ohio, Nov. 2, 1998).

Vermont American, the corporation in question, was actually a “grandparent,” since a dissolved subsidiary stood between it and the subsidiary that sent waste to the site.

AT&T Global Information Solutions Company v. Union Tank Car Company, 1998 U.S. Dist LEXIS at *16. The court also cited *U.S. v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 108 S. Ct. 146, 98 L. Ed. 2d 102, 484 U.S. 848 (1987).

AT&T Global Information Solutions Company v. Union Tank Car Company, 1998 U.S. Dist. LEXIS at *16.

Id. at *39.

42 U.S.C. §§ 9601; 9604(a)(1).

DoD’s authority is laid out in 42 U.S.C. §§ 9604; 9620; Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

For an overview of these issues, see, Wentsel, S. Randell, et. seq., *Army, Navy and Air Force, DoD Tri-Service Procedural Guidelines for Ecological Risk Assessments*, vol. 1, at 1-16 (1996). [Hereinafter cited as *Tri-Service ERA Guidelines*].

For example, the Environmental Protection Agency (EPA) is currently revising its guidelines on ERAs. See, *Ecological Risk: EPA Floats First-Ever Draft Ecorisk Management Guidance for Comment*, Superfund Report, Aug. 19, 1998, at 9-15.

43 C.F.R. § 11.14(v). This does not include the concept of natural resource “damages” which focuses on financial compensation for economic losses. See, 43 C.F.R. § 11.14(l).

Tri-Service ERA Guidelines at 17-19.

See generally, 40 C.F.R. § 300.430.

For more information on how the ERA works within the CERCLA context, see *id.* at 6-8.

Id. at 28-29.

Id. at 19-22.

Id. at 22-23.

Id. at 23-24.

Id. at 24-29.

Id. at 18; 31.

Id. at 32-47.

Adding to the complexity, fact-gathering may involve surrogates. For example, if a rare bird is at risk, a researcher may examine the effect of exposure on a similar bird.

Id. at 46-47.

Id. at 47-53; specific methods discussed at 53-77.

Id. at 90-96. For examples of “conceptual models,” see, *id.* at Appendix A, A1-A43.

For information on how to characterize ecological effects, see *id.* at 53-77.

For a discussion of “stressors,” see, *id.* at 19-22.

Id. at 78-101.

The *Tri-Service ERA Guidelines* provide specific ideas on how to deal with uncertainties. See, *id.* at 92-96.

Id. at 85-96.

Id. at 96-97.

Id. at 78-80; 100-101.

For a definition of the term “public trustees of natural resources,” see, 42 U.S.C. § 9607(f)(2).

42 U.S.C. § 9604(b)(2).

The proposed policy was originally drafted by the Range Management and Use Subcommittee of the Operational and Environmental Executive Steering Committee for Munitions.

TAX ADVISORY 99-1

AMCCC-LA

2 February 1999

SUBJECT: DD 2058, State of Legal Residence Certificate and DD 2058-1, State Income Tax Exemption Test

1. PURPOSE: To discuss the requirement for soldiers to recertify their exemption from state income tax withholding.

2. FACTS:

a. Some local finance offices announced that soldiers would be required to recertify their exemption from state income tax withholding before 15 February 1999. Failure to do so would cause the soldier's withholding status to be reported as single with zero exemptions. This would cause finance to withhold the maximum amount required under state law from a soldier's military pay.

b. This information is incorrect. This paper discusses the requirements for certification.

3. DISCUSSION:

a. The laws of the soldier's domicile govern the requirement for soldiers to pay state income taxes on their military pay.

b. Domicile is determined by a soldier's physical contact, either past or present, with a state and the soldier's intent to make that state his or her permanent home.

c. The laws of some states may excuse soldiers from the requirement to have state income taxes withheld from their military pay. To stop withholding, soldiers must file the DD Form 2058-1, or an approved state form. Unless otherwise stated in this paper, once a soldier certifies his or her exemption from state income tax withholding, that soldier has no requirement to recertify. The soldier would only file DD Forms 2058 and 2058-1 again, if that soldier changes his or her domicile.

d. The DD 2058, State of Legal Residence Certificate, is designed to obtain information with respect to a soldier's legal residence/domicile for the purposes of determining the State for which taxes are to be withheld from the soldier's wages. There is no requirement to file this form unless the soldier has changed his or her legal residence/domicile since entering service.

e. The DD 2058-1, State Income Tax Exemption Test, enables soldiers to terminate withholding of state income taxes when the laws of the soldier's legal residence/domicile do not require withholding. The form provides explanatory material designed to help the soldier determine if he or she qualifies to terminate withholding. However, the test provided applies only to New Jersey, New York, and Oregon. Also note that this is a 1980 form. These tests have not been updated since. The soldier should not blindly apply this

test to his or her circumstances. It is necessary for the soldier to look to the laws of his or her legal residence/domicile to determine if withholding is required.

f. Soldiers domiciled in Connecticut must recertify annually for the withholding exemption. The following statement will appear on their December 1998 through February 1999 LES: "RECERTIFY SITW EXEMPTION BY FEB USE CT-W4."

Therefore, Connecticut soldiers must recertify annually by filing a Connecticut (CT) Form W4. Once rectification has occurred, Connecticut soldiers will receive the following statement on his or her LES: "FORM W-4 OR 2058-1 RECEIVED, VERIFY INPUT." Although this statement indicates that a DD 20528-1 is acceptable for Connecticut soldiers to recertify, it is not preferred.

g. Soldiers claiming exemption from State income tax withholding from California, Idaho, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Vermont, will have the following remark displayed on their LES from December through February annually: "CURRENTLY YOU CAN CLAIM EXEMPTION FROM STATE TAXES, REVIEW YOUR EXEMPTION STATUS TO BE SURE IT IS CORRECT." This remark is provided as a reminder to review their status to ensure they are being taxed correctly. If their exemption is correct, then no further action is necessary. If incorrect, then the soldier must submit appropriate documentation (DD 2058 and/or DD 2058-1) to update their exemption status.

Questions may be directed to the AMC Tax Center located in room 7E18. Calls should be directed to the Chief of Legal Assistance at Commercial (703) 617-8004 or DSN 767 8004.

Alex Bailey
Associate Command Counsel
Chief, Legal Assistance
abailey@hqamc.army.mil

ETHICS ADVISORY 99-01 - Gifts for Departing and Retiring Personnel (Reminder - See EA # 98-09)

As we approach the season of reassignments and retirements, let's review the rules on giving gifts to our commanders, directors and supervisors.

The *Standards of Ethical Conduct for Employees of the Executive* Branch has a "special, infrequent occasion" exception to the general rule that we should not give gifts to our official superiors. Reassignment or transfer outside of the superior-subordinate chain and retirement are two examples of "special, infrequent occasions" where employees may honor another's service to our organization and the Army with a gift appropriate to the occasion. Also, this is one of the two situations when it is permissible to solicit other employees to contribute to a gift.

However, there are restrictions.

1. The maximum value of any gift(s) from a donating group generally may not exceed \$300. Gifts that are also given to the spouse are included in the \$300 maximum. However, this limit does not include the value of the food, refreshments and entertainment provided to the honoree and his or her personal guests at the event that marks the occasion. In addition, plaques and similar items for presentation purposes only and with no intrinsic value (e.g. no sterling silver or gem encrusted engraved plates) are not considered to be gifts, and are not included in the \$300 limit.

2. If an employee contributes to the gift from two different donating groups (e.g., the CSM contributes to both the enlisted personnel gift and to the command group's gift to the departing commander), the total value of the two gifts may not exceed \$300.

3. The maximum that may be solicited from other employees is \$10, although an employee may contribute more than \$10 on his or her own initiative.

4. Employee participation and the amount of contribution must be entirely voluntary.

5. We may not solicit from "outside sources." For example, we may not solicit contributions from support contractors or their employees, and we may not accept contributions from them for this gift.

What's a "donating group"? That depends on the situation. In deciding on "donating groups," consider the basic rule and the appearances. We want to avoid situations where employees feel compelled to participate because of a competitive atmosphere, with one organization wanting to outdo another, or other reasons. We want

to make sure that the person being honored is not embarrassed. Finally, as a very practical matter, the honoree has only so much wall space, places to put "things," and storage. A few years ago, a very senior officer retired, and, at his quarters, he had two garages full of gifts and plaques and momentos. The officer kept a very small fraction of what was in the two garages, and the rest was left either for Army museums or disposal.

Keep the "donating groups" to the minimum necessary to honor the departing employee.

When the situation arises where the employees of your organization want to collect money for a gift for a departing employee, it is best to seek the advice of your Ethics Counselor before you begin to solicit. What you want to avoid is the situation where the honoree must either return the gift, or pay you fair market value for it.

Mike Wentink Room 7E18, 617-8003
Associate Counsel & Ethics Counselor

Alex Bailey, Room 7E18, 617-8004
Associate Counsel & Ethics Counselor

Stan Citron, Room 7E18, 617-8043
Associate Counsel & Ethics Counselor