



# Office of Command Counsel Newsletter

April 1999, Volume 99-2

## AMC CLE 99 Coming in May

The 1999 Continuing Legal Education (CLE) Program announcement and draft agenda was sent to each AMC legal office in early March. The CLE will be held 24-28 May at the Grosvenor Hotel, Lake Buena Vista, Florida. We are looking forward to the annual meeting that brings together 150 of our counsel to discuss current legal developments, share experiences and recognize achievements during our awards ceremony.

This year we offer a series of electives on important issues including: **Public-Private Partnership, Environmental Guns & Butter, Affirmative Action in Selection Actions, Contractors on the Battlefield, Software Patents, Resource Stewardship, Foreign Access to Technology, Partnering, Settlement Agreements, Competitive Sourcing and Privatization, Army Working Capital Fund, JAGCNet, REDS, Protests by the Government, and LEXIS/NEXIS.**

Plenary sessions will address Y2K Legal Issues, Fiscal Law and Ethics updates, the JAGCNet, and presentations by AMC Chief of Staff **MG Norman E. Williams, MG John D. Altenburg, Jr.** The Assistant Judge Advocate General, and the Honorable **William T. Coleman III**, General Counsel of the Army.

There will be four hours of Legal Focus sessions devoted to Acquisition Law, Employment Law, Environmental Law and Intellectual Property Law. These sessions provide a rare opportunity for AMC practitioners to meet and discuss in detail the important legal issues of the day.

The annual CLE Awards Luncheon will highlight the significant achievements of AMC counsel with the announcement of the Attorney of the Year, Preventive Law Award, Managerial Award, Achievement Award, Team Project Award and the AMC Newsletter Editor's Award.

**General Johnnie E. Wilson** has sent a memorandum to subordinate commanders

encouraging them to send their lawyers to the program.

The CLE Planning Committee in the Office of Command Counsel is **Steve Klatsky, COL Demmon Canner, Bill Medsger, Vera Meza, Ed Stolarun and Holly Saunders.** They are receiving outstanding support from field counsel who have been very responsive to requests for topics and participation as speakers.

**We hope to see you in May.**

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# ADR: Resources for Drafting Dispute Resolution Clauses

1. A Drafter's Guide to CPR Dispute Resolution Clauses at:  
<http://www.cpradr.org/adrscrn.htm>

2. Lex Mundi College of Mediators - Mediation Agreement Form at:  
<http://www.lexmundi.org/med-agreement.html>

3. Appendix B: CPR Model Mediation Agreement: Europe at:  
<http://www.cpradr.org/medeuapb.htm>

4. Mediation Agreement at: <http://www.mediate-net.org/agreement.html>

5. Mediation Clauses and Rules at:  
<http://www.law.murdoch.edu.au/teach/units/L367/medclaus.htm>

6. Court-Annexed Mediation Agreement at:  
<http://www.law.murdoch.edu.au/teach/units/L367/medag.htm>

7. Model Mediation Agreement for Business Dis-

putes in Europe — Commentary at  
<http://www.cpradr.org/medeucom.htm>

And here is a list of some articles on the subject of drafting ADR agreements:

a. Mediation, Arbitration & Exp. Arb Rules at:  
[http://www.wipo.org/eng/arbit/rules/mediatio/med\\_rule.htm](http://www.wipo.org/eng/arbit/rules/mediatio/med_rule.htm)

b. Mediation Pitfalls and Obstacles at: <http://www.adrr.com/adrr1/essayc.htm>

c. Negotiation Styles in Mediation at <http://www.adrr.com/adrr1/essayb.htm> ©

**Deadline for the June Newsletter is the last work day of May**

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

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

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

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

# Acquisition Law Focus

## Indemnifying Contractors and PL 85-804

IOC's **Bridget Stengel**, DSN 793-8431 has prepared an article describing the history, nature and scope of Public Law 95-804, the statute that offers to indemnify contractors performing especially hazardous work (Encl 1).

A contractor requesting indemnification must submit a request to the contracting officer. This request must comply with Federal Acquisition Regulation (FAR) 50.403-1.

The request must identify and define the unusually hazardous or nuclear risks for

which indemnification is requested, together with a statement indicating how the contractor is exposed to these risks. It must also include a statement of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous. The contractor must furnish information regarding the availability, cost and terms of additional insurance or other forms of financial protection.

The indemnification process and approval authority and examples from the experience of the IOC are all part of this fine work. ©

## Protest: Composition of A-76 Eval Boards

The General Accounting Office recently upheld a bid protest in an Air Force case over the composition of the Evaluation Board that was reviewing contractor proposals in an A-76 cost comparison. GAO accepted protesters' arguments that a board in which 14 of the 16 evaluators held jobs that were being studied in the cost comparison had an inherent conflict of interest which could only be remedied by reconstituting the entire board and re-

evaluating the proposals. The Evaluation Board eliminated all of the proposals as being technically unacceptable. Many Army MACOMs follow similar procedures for selecting at least some of their board members. It is not uncommon for members of the evaluation board to hold jobs that will go away if the contractor wins the cost comparison. DZS Baker, et al, B-281224, 12 January 1999. Thanks to **Mike Wentink** for taking note of the case. ©

## List of Enclosures

1. Indemnifying Contractors & PL 85-804
2. Business Cards Update
3. Contractors on the Battlefield
4. Contractor Non-Disclosure Agreements
5. Y2K Liability
6. REDS@TACOM Fact Sheet
7. SOELR Index
8. 59 Minutes & Other Incentive Awards
9. Charges!
10. Feb 99 ELD Bulletin
11. March 99 ELD Bulletin
12. Fraud Update
13. A-76 & Conflict of Interest
14. Conferences & Meetings
15. Contractors in the Workplace

**See You At  
CLE**

**In Florida**

**24-28 MAY 1999**

## Business Cards Update

HQ AMC fiscal law counsel **Lisa Simon**, DSN 767-2552, provides a status report on the issue of Business Cards (Encl 2).

Employees who regularly deal with members of the public or with organizations outside of their office may print business cards on their computers and printers using Government-purchased card stock.

There are four Army policy restrictions to this authority:

We cannot customize the business cards

We must print business cards in black and white only

We should print business cards in batches of fifty or less.

We cannot purchase new software to print the cards

In addition, as a matter of DA policy, investigators and recruiters may purchase business cards from a commercial printer.

The Army made a conscious decision to implement a restrictive business card policy. They concluded, as a matter of policy, that money spent on commercially-printed business cards could be better spent elsewhere.

The rules on business cards will be included in an upcoming change to AR 25-30, "The Army Integrated Publishing and Printing Program." ©

## FMS Customer Participation in Contract Preparation & Negotiation

John J. Hamre, Deputy Secretary of Defense, issued a memorandum dated 23 March 1999, concerning customer participation in FMS contract preparation and negotiations. Currently, when a country buys through the FMS program, the country (or "customer") is not allowed to participate in the negotiation of the contract to fill that country's needs. The new policy encourages the FMS customer to participate in

discussions with offerors, and for the contracting officer to provide explanation of price reasonableness when requested. However, even with this new policy, the contracting officer remains the sole government negotiator, the FMS customer must agree to the participation, and proprietary information must be protected. DFARS 225.7304 will be amended to reflect the new procedure. POC is **Craig Hodge**, DSN 767-8940. ©

## Contractors on the Battlefield

CECOM's **John Reynolds**, DSN 992-9780, provides an excellent preventive law note on this very important issue (Encl 3).

With the downsizing of active duty military forces and the increased use of technically complex military equipment and weapons systems has come an increasing reliance on contractor support, to include the battlefield arena.

The types of contractor battlefield support provided generally fall under two main categories. The first is system support type contracts which are designed to provide sustainment, maintenance and item management. The second is contingency contracting wherein contractors provide a variety of logistics and engineering/construction services for both peacekeeping and wartime operations. The use of contractors under battlefield conditions brings with it a multitude of considerations and problems which need to be addressed in all phases of the acquisition process (Requirements Planning, Solicitation, Source Selection and Post-Award Administration. ©

## Contractor Non-Disclosure Agreements

CECOM's **John Metcalf**, DSN 654-2229 and **Patrick Terranova**, DSN 992-3210, have authored an article on Contractor Non-Disclosure Agreements, describing what these agreements are, how they are used and when it is appropriate for Government employees to sign these agreements (Encl 4).

Increasingly, particularly in the Research and Development community, Government personnel are being asked to sign documents called non-disclosure agreements before contractors will enter into discussions about their capabilities. The purpose of these agreements is

to protect the contractor's trade secrets and proprietary data that may be revealed during the discussions. Government employees may also be requested to sign non-disclosure agreements in conjunction with plant visits where manufacturing processes are considered trade secrets.

Before signing such an agreement, Government employees should coordinate the request that a non-disclosure agreement be signed with legal counsel. Additionally, they must be prepared to abide by the terms and conditions of such a non-disclosure agreement. Government employees are bound by the

Trade Secrets Act, which makes them subject to criminal penalties if they reveal a contractor's trade secrets or proprietary data. Furthermore, civil actions may be brought against the Government, its employees and support contractors and may result in monetary damages being assessed for violations of a non-disclosure agreement. The document the employee signs will be considered evidence of the fact that the data they received was considered proprietary and that they personally agreed not to reveal it. ©

## DOD and Personal Liability for Y2K Problems

HQ AMC counsel **Steve Klatsky**, DSN 767-2304 has prepared an article for the AMC Y2K team addressing several issues related to Y2K liability. The first section addresses the immunity-liability inherent to government officials, describing the theory of "acting within the outer perimeter of official duties" (Encl 5).

There is also a section that addresses potential DOD liability.

One important area involves certification that computer systems are Y2K compliant. The Army legal position is that certifications made in good faith as part of an official's job duty would not subject the official to personal liability. The law pro-

vides immunity from personal liability for those actions of federal officials acting within their "scope of duties". The Army Y2K Program requires certification whenever an entry is made in the database that a specific computer is Y2K compliant. Thus, certification is part of the official duties of AMC personnel who perform that act. ©

# Employment Law Focus

## REDS--ADR in the Workplace to be Exported to You

The AMC Model Alternative Dispute Resolution Program REDS (Resolving Employment Disputes Swiftly) is being revised for exporting throughout AMC. The REDS pilot conducted at TACOM, ARL and Anniston Army Depot during 1998 has been completed.

The REDS Team members from the three pilot sites and the HQ AMC REDS Team met 16-18 March to review the experiences at the three sites, revise the REDS brochure and Action Plan, and to develop an agenda for a REDS training program.

The test results appear quite promising: participants comment favorably on their experiences, with a resolution rate of over 75%. Litigation is being avoided as REDS focuses on the future employment relationship.

The REDS Team approach, with EEO in the lead with support from legal and civilian personnel is working well. Cooperative working relationships are accelerating the benefits of ADR and REDS.

The REDS Model has been approved by the DA Equal Employment Opportunity Compliance and Complaints Review Agency as fitting the EEO regulatory requirements of offering ADR as an alternative to traditional EEO complaint's processing.

Each Test side presented a briefing on their experiences. The workforce education process has been successful. We enclose a copy of a REDS Fact Sheet from TACOM (Encl 6).

Much more information about the future of REDS will be provided shortly. ©

## Supreme Ct. to Decide EEOC Comp Damages Power

The Supreme Court has agreed to decide whether the EEOC has authority to order federal agencies to award their employees compensatory damages for violations of Title VII of the Civil Rights Act of 1964, West v. Gibson, U.S. No. 98-238, cert granted January 15.

In March 1998, the Seventh Circuit ruled that EEO lacked the authority to order compensatory damages. In part, that decision was based on the view that to allow compensatory damages to be awarded without a jury trial would push Title VII's waiver of sovereign immunity for federal employees too far. Gibson v. Brown, 137 F.3rd 992 (7th Cir. 1998). The Eleventh Circuit agreed with the Seventh in Crawford v. Bab-bitt, 148 F.3rd 1318 (11th Cir. 1998).

This ruling conflicts with that of Fitzgerald v. Secretary of Veteran's Affairs, 121 F.3rd 203 (5th Cir. 1997), which held that administrative agencies may offer compensatory damages for emotional injuries to federal employees pursuing a Title VII claim. ©

## SOELR Materials for the Labor Counselor Library

The Index of materials from the recent OPM Symposium on Employee and Labor

Relations is provided. They will be provided to AMC labor counselors (Encl 7).

## Union Lobbying May Violate the DOD Appropriations Act Charges-- Four Basic Steps

In New Hampshire National Guard, 54 FLRA No. 38 (1998), the Authority found a proposal calling for official time to lobby Congress violated the 1996 DoD Appropriations Act which provides at Section 8015, "None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."

Identical language is also contained in the 1999 Defense Appropriations Act at Section 8012. As such, proposals for official time to

lobby Congress on any legislation or appropriation matters pending before the Congress would be nonnegotiable.

If you presently have such language in your contract, or are authorizing official time for union officials to lobby Congress "...directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress" you need to stop it. (Of course, you'll have to offer appropriate I&I bargaining.)

Keep in mind that this applies only to appropriated fund bargaining units. ©

When an employee challenges an adverse action before a third party, the single most important issue in determining the outcome is the agency's ability to prove the facts it gave as a reason for action in the notice of proposal.

Many, many actions are overturned, not because the agency failed to prove there was a reason for disciplinary action, but rather because the agency failed to prove the specific reason it gave.

If your actions are to stand, it is critical that you take time for careful, objective analysis before you ever begin to draft the proposal notice.

The enclosed paper from SOELR walks the practitioner through the important analytical process, including four important steps: evaluating evidence, developing alternative charges, case law, and refining charges (Encl 9). ©

## 59 minutes & Other Incentive Awards

SBCCOM Counsel **Bob Poor**, DSN 584-1290 provides an excellent overview of the civilian incentive awards program, including both monetary and non-monetary recognition (Encl 8). Specifically

the paper addresses the use of 59 minutes administrative leave as a non-monetary incentive award. There are some excellent citations to law, CFR and DOD regulations. ©

## Five ADA Cases Set For Supreme Court Hearing

A record five Americans with Disabilities Act disputes will be heard over the next two months, beginning with the case of a stroke victim in Texas who says her boss refused to provide retraining, her colleagues mocked her speech impediment and she was fired after being told she would never be able to do anything again.

The question is whether an individual who has applied for Social Security disability benefits, but then returned to work, can claim in an ADA lawsuit that she was “qualified” for the job and discriminated against. A federal appeals court said the application for benefits creates a presumption that the person is not qualified.

The case, Cleveland v. Policy Management Systems Corp., is being closely watched by a variety of advocates, including those representing the mentally retarded, elderly and people with AIDS, and by employers, which argues that courts should presume that once someone has applied for Social Security benefits she is not “qualified” for the job.

A larger issue to be addressed by the justices is how

to define “disabled”—the foundation of any ADA claim. If bad eyesight can be corrected, can it be the basis for a job discrimination lawsuit? If medicine can reduce high blood pressure, can a mechanic claim a trucking company fired him because of his hypertension?

In Sutton v. United Air Lines, plaintiff sisters were denied pilot positions with United Airlines because of nearsightedness. They argue that it should not matter whether the disability can be corrected by drugs, glasses or something else. But United points to the ADA’s language specifically covering people whose impairment “substantially limits one or more major life activities,” and says the availability of glasses and contact lenses means the sisters’ myopia is not substantially limiting. “

Ruling for the airlines in Sutton v. United Air Lines, the 10th U.S. Circuit Court of Appeals declared that if plaintiffs are “disabled” because their uncorrected vision substantially restricts their ability to see, they cannot be qualified for pilot jobs. And if they are qualified be-

cause their vision is correctable, the court said, they cannot be limited in “the major life activity” of seeing and are therefore beyond ADA protection. Other federal courts have ruled the opposite, that disabilities should be determined without any mitigating measures, and it will now fall to the Supreme Court to resolve the conflict.

The sisters contend that not everyone who wears glasses should be considered disabled, but the severity of their bad vision (about 20/200 in the right eye, 20/400 in the left) qualifies them. The two other related cases involve a truck driver who is blind in one eye (Albertson’s v. Kirkingburg) and a mechanic with high blood pressure (Murphy v. United Parcel Service).

In a fifth case, Olmstead v. L.C., the justices will address states’ responsibility for providing treatment and rehabilitation in the community, rather than in institutions, for the mentally disabled.

It has taken nearly a decade for core questions of disability rights to advance to the court.

Stay tuned. <sup>c</sup>  
CC Newsletter

# Environmental Law Focus

## We Don't Pay State CAA Fines and We're Sticking to It

Recent state enforcement actions proposing fines against Army installations for alleged Clean Air Act (CAA) violations renew the need for a common approach by Army installations to inform and instruct state regulators that sovereign immunity prevents the payment of such fines. The Environmental Law Division has drafted a sample letter for use by installations faced with a potential state CAA fine. It is included in the March Environmental Law Division Bulletin, as above, but deserves special mention and attention. <sup>c</sup>

## ELD Bulletins

The February and March 1999 Environmental Law Division Bulletins are provided (Encl 10, Encl 11) for those who have not received an electronic version or who have a general interest in Environmental Law.

## Applying NEPA to Your Installation's Operations and Testing

The Army Corps of Engineers, through a contractor, has prepared a Guidance NEPA Manual for Installations Operations and Training, June 1998. Looks like a great source of NEPA reference material and practical advice on how to apply NEPA to these activities. It covers such areas as NEPA considerations in master planning; real property acquisition, leasing, or disposal; military construction,

operation and maintenance, and military training. At press time, we are not sure whether this Guidance Manual has been approved by the Army for distribution. However, we will be providing information through our environmental legal channels as to its status, and if anyone would like more information from it on the above subject areas, contact **Bob Lingo, DSN 767-8082.**

## Green Construction— Something for the Army too

**T**he Air Force has put together a comprehensive Guide for designing, constructing, using, and demolition of facilities in a responsible, sustainable manner. As they say, "Sustainable Development is Green Construction." Something our instal-

lation managers and planners might consider. The Environmentally Responsible Facilities Guide may be obtained from the Air Force Center for Environmental Excellence, at the following: <http://www.afcee.brooks.af.mil/green/greenform.htm>. <sup>c</sup>

## Taking the Broad Look at Your Environmental Management

In December 1998, the EPA Office of Enforcement and Compliance Assurance issued its final Environmental Management Review (EMR) Policy for Federal Facilities. An EMR is composed of many environmental management system audits conducted over a one to three day period. The EMRs are based on a combination of the code of environmental Management Principles (CEMP) and the seven areas in the EPA phase III Environmental Management Systems audit protocol.

EMRs conducted by EPA are free and are not an inspection, an audit or a Pollution Prevention assessment. It is a review of a facility's overall program and includes recommendations from EPA. The 1996 interim policy is posted at the EPA's Office of Enforcement and Compliance Assurance Web page, under policies for Federal Facilities, <http://es.epa.gov/oeca/polguid/polguid6.html>. It is expected that the final policy should be posted there soon. For additional information, contact **Bob Lingo, DSN 767-8082.**

## Is Your Environmental Compliance Y2K Compliant?

It seems that the Y2K bug has affected everything as we near the next millennium. EPA has even issued an enforcement policy designed to encourage prompt testing of computer-related equipment to ensure that environmental compliance is not impaired by the Y2K computer bug. Under the policy, <http://www.epa.gov/year2000>, EPA stated its in-

tent to waive 100% of the civil penalties that might otherwise apply, and to recommend against criminal prosecution for environmental violations caused by specific tests that are designed to identify and eliminate Y2K related malfunctions. The entire policy can also be obtained in 64 *Federal Register* 11881, March 10, 1999. ©

## Fraud Update

HQ AMC Fraud Advisor, **Diane Travers**, DSN 767-7571, provides a copy of the OTJAG Fraud Division Update #38 (Encl 12).

The paper addresses statutory developments:

a. The International Anti-Bribery and Fair Competition Act of 1998. Pub.L. 105-366, 112 Stat. 3302 (10 November 1998).

b. The Department of Defense Appropriations Act for Fiscal Year 1999. Pub.L. 105-262, 112 Stat.2279 (17 Oct. 1998).

c. Ethical Standards for Federal Prosecutors. Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Pub. L.105-277, 112 Stat. 2681 (21 Oct. 1998).

Additionally, there is a section on recent developments in procurement fraud cases:

a. Release of Information in *Qui Tam* Cases

b. DOJ Contacts with Represented Persons

c. Recovery of Funds under Army Contracts in Fraud Cases

d. Reporting Old Misconduct – An Obstacle to Debarment

e. Considerations in Debarment.

## Ethics Focus

# Conflicts of Interest Issues & the A-76 Process

The increased use of competitive sourcing, makes it imperative that all employees be aware of the conflict of interest issues that may arise in the course of conducting an A-76 Study and the corresponding source selection. Moreover, a recent General Accounting Office (GAO) decision makes it clear that an inadequate appreciation for this area can be the death knell for an A-76 competitive sourcing effort.

CECOM's **Jim Scuro**, DSN 992-9801, has written an excellent paper on this vital issue (Encl 13).

The purpose of the

memorandum is to provide guidance regarding potential conflicts of interest in the performance of Commercial Activities Studies. This guidance provides general information to be used to avoid conflicts of interest and the appearance of any conflicts of interest in the conducting of a Commercial Activities Study.

The paper addresses the legal and regulatory framework, FAR coverage, DA Pamphlet 5-20, all sorts of GAO case law, the right of first refusal issue, and, of course, the revised supplemental handbook, OMB Circular A-76. ©

# Commanders Support to Civil

# Authorities re the Y2K Problem

The Deputy Secretary of Defense issued a 22 February memorandum with guidance regarding what support commanders may give to civil authorities for requests related to the Y2K problem. The memo is available on line at [http://army./mil/army-y2k/depsecdef\\_dod\\_civil\\_support.htm](http://army./mil/army-y2k/depsecdef_dod_civil_support.htm). ©

## Army Reorganizes IL&E and RDA

Secretary of the Army **Louis Caldera** announced Feb. 16, 1999, that he is moving the Army logistics missions from the Assistant Secretary of the Army for Installations, Logistics, and Environment (ASA-IL&E) to the Assistant Secretary of the Army for Research, Development, and Acquisition (ASA-RDA).

This move will consolidate acquisition and logistics policy and oversight for greater efficiency. The involved assistant secretaries are coordinating all necessary administrative actions to complete the formal transfer of the logistics function as soon as possible. The new organizations are adopting new names.

The Assistant Secretary of the Army for RDA is now the Assistant Secretary of the Army for Acquisition, Logistics, and Technology, ASA-ALT.

The Assistant Secretary of the Army for IL&E is now the Assistant Secretary of the Army for Installations and Environment, ASA-IE. ©

# Conferences & Meetings: No Pro Forma Approvals Please

Recently at the Army Research Laboratory, confusion of the requirements for obtaining conference approvals resulted in an IG complaint and scores of extra hours of work for both conference sponsors and reviewing attorneys. Although well below usual review thresholds, legal review of conference approvals is required by AMC-R 1-12, para 6b. As we shall see, the issues involved are complex enough to justify this review.

ARL's **Bob Chase**, DSN 290-1599, has prepared a fine preventive law note covering several issues related to the issue (Encl 14).

Mention of the FAR brings up another issue. FAR 19.502-2 provides that all acquisitions between \$2500 and \$100,000 are reserved for small business unless the contracting officer is unable to obtain offers from two or more small business concerns competitive with market prices and with regard to the quality and delivery of the goods and services being purchased.

This can be tricky in practice. You might think that most hotels would fit the definition of a small business. Most of those which meet our requirements, however, tend to be owned by large-business parents. If owned by franchise holders, a given hotel may yet be a small business. The point is that one must be aware of the requirement and document the disposition.

The regulation further deals with issues such as mementoes, social activities, guest speakers and registration fees.

You should study both the AMC regulation and your own local implementation to fully understand your coordination and approval procedures. The perception, whether by an IG or the Washington Post, of government waste is always a cause for concern. By fully understanding the relevant regulations and educating your clients concerning them, you may be able to save them severe embarrassment. ©

# Preventive Law Note: Contractors in the Workplace

The TACOM-ACALA Legal Office, DSN 793-8414, prepared an outstanding preventive law item on contractors in the workplace, covering many important and timely issues, including:

1. The normal employee-supervisor relationship doesn't exist.
2. The work is governed by the contract.
3. Contractor employees are not covered by the same rules, regulations, or bargaining agreements as Government employees.
4. We can't accept gifts from contractor personnel.
5. We can't solicit gifts from contractor personnel.
6. Restrict access to proprietary data.
7. Restrict access to procurement integrity information.
8. Restrict access to information covered by the Privacy Act.
9. Always identify contractor personnel (Encl 15). ©

# ***AMC Legal Office Profile***

**Communications-Electronics Command, Fort Monmouth, NJ**

## **CECOM Command History**

### **Early History**

The U.S. Army Electronics Command (ECOM) was first established at Fort Monmouth as a component of AMC in August 1962. As a result of the Army Materiel Acquisition Review Committee (AMARC) recommendations which were designed to separate the research and development and readiness functions within AMC, in 1978, ECOM was divided into the Communications-Electronics Materiel Readiness Command (CERCOM), the Communications Research and Development Command (CORADCOM) and the Electronics Research and Development Command (ERADCOM). This three pronged configuration was used until 1981 when CORADCOM and CERCOM merged to form the Communications-Electronics Command (CECOM). In 1985, ERADCOM ceased to exist.

### **Goldwater-Nichols**

#### **Impact**

With the passage of the Goldwater-Nichols Reorganization Act of 1986 and the implementation of the Program Executive Officer (PEO)

concept, three PEO organizations were established at Fort Monmouth: PEO, Communications Systems (PEO-COMM); PEO Command and Control Systems (PEO-CCS) and PEO, Intelligence and Electronic Warfare (PEO-IEW). In July 1995, PEO-COMM merged with PEO-CCS to form PEO, Command, Control and Communications Systems (PEO-C3S).

### **Signal Reorganization**

As a result of the Signal Organization and Mission Alignment (SOMA)/Information Management Functional Area Assessment (IMFAA) decisions, in October 1996, the Information Systems Command (ISC), headquartered at Fort Huachuca, AZ, was redesignated as the Army Signal Command (ASC). At that time, significant portions of ISC's information management, acquisition and engineering elements were realigned under CECOM. Additionally, the Information Systems Selection and Acquisition Activity (ISSAA), Alexandria, VA, formerly part of the Directorate for Information Systems for Command, Control, Communications, and

Computers (DISC4), was transferred to CECOM and renamed the CECOM Acquisition Center-Washington (CAC-W). CECOM also assumed operational control, and then command and control, of Tobyhanna Army Depot (TYAD), Tobyhanna, PA, in October 1997 and October 1998, respectively.

### **1997 to the Present**

In early 1997, PEO-IEW was redesignated PEO, Intelligence, Electronic Warfare and Sensors (PEO-IEW&S).

Also in 1997, as a result of Base Realignment and Closure (BRAC) decisions, the Army Research Laboratory (ARL) relocated from Fort Monmouth to Adelphi, MD, and CECOM Headquarters, along with the Logistics and Readiness Center, the Acquisition Center and several other Directorates (including the Legal Office) relocated from a leased facility in Tinton Falls, NJ, onto the main post of Fort Monmouth. Additionally, CECOM assumed responsibility for several of the Aviation and Troop Support Command's (ATCOM's) business areas.

# ***AMC Legal Office Profile***

## **Communications-Electronics Command, Fort Monmouth, NJ**

### **CECOM's Mission**

CECOM's mission is "(t)o develop, acquire and sustain superior information technologies and integrated systems, enabling battlespace dominance for America's warfighters." Its principal business areas encompass communications, command and control, electronic sensors and combat, software and information warfare. The total CECOM population is presently 10,146 (9,597 civilians and 549 military) with fewer than 50% of that total located at Fort Monmouth.

### **Legal Office Staffing**

The CECOM Legal Office has personnel stationed in five separate geographic locations: Fort Monmouth, NJ; Fort Belvoir, VA; Alexandria, VA; Fort Huachuca, AZ; and Tobyhanna, PA. There are a total of 73 people employed by the CECOM Legal Office: 28 civilian attorneys, 4 acquisition and 13 administrative/paraprofessional personnel, 7 officers and 2 enlisted personnel at Fort Monmouth; 3 attorneys, 3 patent agents and 2 administrative/paraprofessional personnel at Fort Belvoir; 3 attorneys and 1 administrative employee at CAC-W; 1 attorney at Fort Huachuca; and 4 attorneys and 2 administrative/paraprofessional personnel at TYAD.

### **Awards & Recognition**

CECOM attorneys have been selected for the following honorary awards:

AMC Attorney of the Year - 1985, 1989, 1993, 1996

AMC Award for Managerial Excellence - 1995

AMC Team Project Award - 1990, 1994, 1995, 1997, 1998

AMC Preventive Law Award - 1990, 1997

AMC Achievement Award - 1989, 1993, 1997

CECOM Leadership Award - 1997

CECOM 10 Outstanding Personnel of the Year - 1997

CECOM Employee of the Year - 1991

Secretary of the Army's Award for Outstanding Achievement in Materiel

Acquisition - 1987, 1988, 1996

The David Packard Excellence in Acquisition Award - 1996

Army Chief of Staff's Award for Excellence in Legal Assistance - 1989-1997

TJAG's Award for Excellence in Claims Support - FY96

### **Legal Office Objectives**

In furtherance of CECOM's mission, the critical objectives for the Legal Office are as follows:

1. Serve as an ethics and values-based professional organization.

2. Provide timely, independent and effective legal advice, counsel and advocacy for our clients.

3. Serve as the advocate for effective competition throughout the acquisition process.

4. Provide world class quality legal services to soldiers and their family members.

5. Understand and anticipate our clients' needs and exceed their expectations.

6. Maximize innovation to create and facilitate acquisition/logistics/technology reform.

7. Sustain a diverse, professional workforce committed to equal employment opportunity, mutual respect and teamwork.

(Part II of the CECOM Legal Office Profile will appear in Newsletter 99-3, June 1999.)

# Faces In The Firm

## Hello-Goodbye

### CECOM

Welcome to **Jignasa Desai** who began working as a general attorney in Business Law Division A on 16 February 1999. Ms. Desai graduated from Rutgers College and Rutgers Law School. Upon her graduation, she served a judicial clerkship and subsequently worked several years as a litigation associate for a private law firm in New Jersey.

**CPT Frances Bajada Martellacci** arrived in March after a tour in Korea. She was a trial counsel and the Engineer Brigade judge advocate. Prior to her tour in Korea, CPT Martellacci was assigned at White Sands Missile Range. She received her undergraduate degree from City College of New York and her JD from New York Law School. CPT Martellacci is working in the Military Law Branch.

**Linda Cooper** recently joined the Legal Office and is assigned as the receptionist in the Legal Services Branch. Previously, she was a procurement technician in the Acquisition Center.

### IOC

**Bart L. Howell** has joined the McAlester Army Ammunition Plant Legal Office. Mr. Howell has been at McAlester since January 1999. He was formerly with the Stipe Law Firm. We welcome Mr. Howell to the IOC/AMC family and look forward to working with him.

### AMCOM

We welcome back **Brian E. Toland**, who joined the Acquisition Law Division effective 14 February 1999.

**LT Chin-Zen Plotner** joined the Office of Staff Judge Advocate on 5 April after completing the Basic Course at TJAGSA.

### AMCOM

**Tina M. Pixler**, Acquisition Law Division, and her husband Chris Wood, are the proud parents of Sara Michelle Wood, who was born on February 21 and weighed 7 pounds and 6 ounces.

### SBCOM

**Vicky Upchurch**, Patent program gave birth to Taylor Annie Nicole Upchurch on

### AMCOM

**CPT David M. Dahle** has left this office to accept a full time AGR position with the Army National Guard in Boise, Idaho.

### IOC

**CPT Dean Andrews**, counsel at Tooele Army Depot, is leaving the Army and heading to beautiful Colorado where he will be practicing law as a civilian. We wish him the best of luck!

### ARL

IP Counsel **Frank Dynda** has taken a position with the U.S. Army Legal Services Agency.

## Births

Feb 10. She will have a work at home program before returning in May.

### IOC

**Sam Walker** (Acquisition Law, IOC) is a grandpa again! Alice Walker was born in late February. The beautiful baby girl is the first child of Joseph and Sarah Walker.

# Faces In The Firm

## Promotions Awards and Recognition

### HQ AMC

**Holly Saunders** has been promoted to Office of Command Counsel Executive Officer.

### AMCOM

**Fred W. Allen** was promoted to GS-15, Chief, Acquisition Law Division,

**Carl Ray Stephens** was promoted to GS-15, Branch B, Acquisition Law Division on 14 February 1999.

### TACOM

Promotion of **Susan Lewandowski** (GS-15) to assume the duties of Chief, Business Law Division, TACOM-Wrn. Her promotion was effective 14 Mar 99. Sue has replaced Dominic Ortisi who retired in January.

**CPT Karin Wiechmann** (currently of the TACOM-Wrn Business Law Division) has been selected to fill the civilian General Attorney (GS-12) vacancy in the General Law Division, TACOM-Wrn. She officially comes on-board on 26 April.

### IOC

Mr. William G. Bradley is part of the New Mexico Hazardous Waste Fee Project (Team) that has been nominated to receive Vice President Al Gore's Hammer Award. The group's (Central Regional Environmental Office; White Sands Missile Range; NASA; TRADOC; USAF Regional Environmental Office; NM Environmental Department; Montgomery & Andrews (representing NM Oil and Gas Association); DOE; USAF Legal Services Agency; and IOC) informal partnership developed an improved hazardous waste regulation.

The team's effort on which the award is based is the more efficient manner in which remediation and prevention techniques are devised, reviewed, and subsequently employed. We extend our congratulations on your nomination and wish the Team the best of luck!

### AMCOM

On 1 April 1999 **Dayn T. Beam** was presented Outstanding Achievement in Value Engineering for FY98.

### HQ AMC

**COL Bill Adams** received the Legion of Merit, in recognition of his four years as AMC Deputy Command Counsel/Staff Judge Advocate. During the 25 March ceremony, AMC Commander, **General Johnnie E. Wilson**, presented the award to COL Adams. Nancy Adams, Bill's wife looked pleased, too.

**Bob Lingo** was recognized in the 25 March AMC Command Counsel awards ceremony with the Department of the Army Achievement Medal for Civilian Service. Mr. Lingo performed his duties as a member of the Tooele Army Depot BRAC Transfer Team in an exceptionally meritorious manner. COL Gary Dinsick BRAC Office, OACSIM initiated the medal for Bob's hard work.

**See You At  
CLE**

**In Florida  
24-28 MAY 1999**

## Public Law 85-804 Indemnification

### The History of Act

Shortly after the bombing of Pearl Harbor, Congress addressed the need to speed up the procurement of war materials. In 1941 Congress enacted the first War Powers Act. The Act permitted the President to enter into contracts “without regard to the provisions of law relating to the making, performance, amendment or modification of contracts” if it would “facilitate the prosecution of the war.”

While the Act did not specifically address indemnification of contractors, the Attorney General interpreted the above grant of authority as being without any limitation whatsoever. Consequently, the Attorney General discerned that indemnification of a contractor against loss by enemy action was within the Secretary of War’s authority under the War Powers Act.

The authority of the Act was limited to World War II. As a result, when the Korean Conflict began, President Truman asked for legislation like the War Powers Act, which would improve the acquisition of war materiel for a general mobilization. Notably, one of the reasons President Truman requested the legislation was to be able to indemnify contractors performing especially hazardous work. In the event these contractors suffered damage to their facilities or equipment, the facilities or equipment could be replaced right away. Losses resulting from personal injury were not the focus. As there had been no declaration of war, it was no longer necessary to show that it would facilitate the prosecution of war. The revived War Powers Act required that before action was taken it would be necessary to show that such action would “facilitate the national defense”.

After many renewals, this legislation continued to be in effect until 1958. Industry lobbied Congress heavily to make the indemnity offered by the War Powers Act permanent. Now industry was concentrated on its losses. It was concerned not only about damage to facilities, but also damage to the company shareholders if even an unsuccessful suit was filed against the company. In its deliberations, Congress considered the enormous claims a company might incur in the event of an accident and the fact that liability insurance was generally inadequate for government contractors.

Ultimately Congress decided that the United States would assume the risk of loss in these instances to the extent private insurance was not reasonably available. In 1958, Public Law 85-804 was enacted. It provided,

“Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the President may authorize any department or agency of the Government which exercises function in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.”

## Executive Orders

A series of Executive Orders implemented PL 85-804. Most noteworthy is Executive Order 11610, issued in 1971 by President Nixon. Essentially, this Executive Order had three purposes. First, it limited indemnity to those situations in which the contractor is exposed to risks that are “unusually hazardous or nuclear in nature.” Second, it required that the indemnification be approved in advance by an official at a level not below that of the secretary of a military department. Third, it required that the approving official take into account the availability, cost, and terms of private insurance.

## The Request for Indemnification

A contractor requesting indemnification must submit a request to the contracting officer. This request must comply with Federal Acquisition Regulation (FAR) 50.403-1. The request must identify and define the unusually hazardous or nuclear risks for which indemnification is requested, together with a statement indicating how the contractor is exposed to these risks. It must also include a statement of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous. The contractor must furnish information regarding the availability, cost and terms of additional insurance or other forms of financial protection. This permits the agency to comply with the third requirement of Executive Order 11610.

## Action on the Indemnification Request

The contracting officer may deny the request, so long as this is done after consideration of all the facts and evidence and so long as the contractor is promptly notified together with the reasons for the denial. If the contracting officer recommends approval, the contracting officer forwards the request through channels to the approval authority. According to FAR 50.403-2, the contracting officer must prepare a submission which includes, among other things, a definition of the unusually hazardous risks involved in the proposed contract together with a statement that the parties have agreed to it. The submission must also contain a statement that the contract will involve unusually hazardous risks that could impose liability upon the contractor in excess of financial protection reasonably available and a statement by the responsible authority that the indemnification action would facilitate the national defense.

## Approval Authority

The approval authority for the Army is the Secretary of Army (FAR 50.201(d)), who approves indemnification by a Memorandum of Decision (MOD). The MOD authorizes the contracting officer to include the indemnification clause in the contract and defines the “unusually hazardous” risk for which the contractor is indemnified. The MOD may also authorize the extension of indemnity to subcontractors.

## Inclusion in the Contract

After the contracting officer receives approval through the MOD, the contracting officer modifies the contract to include the indemnification clause, FAR 52.250-1, “Indemnification Under Public Law 85-804,” and the definition of unusually hazardous risks.

The clause indemnifies the contractor against claims by third persons for death, personal injury, or loss of, damage to, or loss of use of property. "Claims" includes reasonable costs of litigation or settlement. This indemnity also covers loss of, damage to, or loss of use of contractor and government property. However, it applies only to the extent that the claim or loss results from the risk defined in the contract as "unusually hazardous" and when the claim or loss is not covered by insurance.

Importantly, the clause excludes loss or damage caused by willful misconduct or lack of good faith on the part of the contractor's principal officials. If the MOD permitted and the contracting officer gives prior written approval, the indemnity may also be extended to subcontractors at any tier. Even if the contract is terminated, expires or is completed, the rights and obligations of the parties under the indemnification clause will survive.

### Examples of Unusually Hazardous Risks

At the Industrial Operations Command, contractors requesting and receiving approval of indemnification are those who operate Government Owned, Contractor Operated (GOCO) plants and those performing chemical demilitarization efforts. The Secretary of Army has approved the use of the Public Law 85-804 indemnification clause in certain GOCO contracts since 1972. What constitutes an unusually hazardous risk at these munitions facilities has evolved since that time (especially as the sensitivity to environmental issues has increased), but generally covers two types of risk: explosive and environmental.

The most recent definition of the unusually hazardous explosive risk is the risk of detonation, explosion, or combustion of explosives, propellants or incendiary materials, or munitions containing explosives, propellants, or incendiary materials (collectively, Products during the course of their manufacture, assembly, shipment, storage, treatment, use, disposal, generation, transportation, remediation, or other handling (collectively, Handling).<sup>1</sup>

The environmental risk to which the GOCO contractors are exposed is currently defined as the risk of release, including threatened release, whether on-site or off-site, sudden or nonsudden, of any substance or material (including Products) the Handling of which is or becomes regulated under law, during the course of their Handling, provided such substance or material was either: (a) present at or released from the facility prior to the contractor's operation of, or Handling at, the facility, whether known or unknown by the Government or Contractor at such time; (b) obtained by or provided to the contractor for incorporation into Products; (c) required by or designated in Government specifications or other relevant technical documentation to support the Handling of products; (d) otherwise reasonably required to enable the Contractor to perform its functions and responsibilities at the facility; (e) generated by the contractor's Handling of products or provided to the contractor by the Government or its agents for Handling; or (f) introduced onto the facility as a result of action by a party other than the contractor or the contractor's agents.

For chemical demilitarization efforts, the unusually hazardous risks are typically defined as the risks of: (a) sudden or slow release of, and exposure to, lethal chemical agents during the disposal of stockpiles of chemical munitions, mines, or other forms of weapons-related containerization and during facility decommissioning and closure; (b) explosion, detonation or combustion of explosives, propellants or incendiary materials during the course of disposal of stockpiles of chemical munitions, mines or other forms of weapons-related containerization; (c) contamination present at or released from an installation prior to the contractor's construction or operation of the chemical

demilitarization facility (CDF), whether known or unknown by the Government or contractor at such time; (d) contamination resulting from the activities of third parties when the contractor has no control over such activities or parties; and (e) contamination resulting from the placement of components and materials from decommissioning and placement of wastes and residues from demilitarization, destruction, or closure in accordance with the contractual requirements and all applicable laws and regulations

There has been some criticism of the use of these indemnification provisions over the years. It has been suggested that insurance to cover these risks may be available. It has also been suggested that the definition of unusually hazardous risk is too broad, covering materials that are routinely used by industry without connection to the national defense. Some risks defined as “unusually hazardous” are assumed every day by commercial contractors operating their own facilities.

However, the contractors consistently report that insurance for environmental tort or cleanup costs is unavailable at any price. Furthermore, the GOCO operating contractors maintain that while they or others may operate commercial facilities without insurance for risks of environmental releases, they do so earning a higher rate of profit than under a GOCO contract.

Despite this criticism, the Secretary of Army continues to approve requests to include the indemnification clause in Industrial Operations Command contracts (issuing a GOCO MOD as recently as October 1998). While the risks considered to be “especially hazardous” or “unusually hazardous” have evolved greatly since the War Powers Act of 1941, it appears that the Army policy remains to be that the use of Public Law 85-804 serves a valid purpose and should be continued.

Author: Bridget A. Stengel, Attorney-Advisor, Industrial Operations Command

This information was obtained from an article entitled “Government Indemnification of Contractors” written by Richard A. Smith in the NCMA Journal, Fall 1984.

SUBJECT: Business Cards

PURPOSE: To Update AMC Staff On The Rules For Printing Business Cards

FACTS:

O Employees who regularly deal with members of the public or with organizations outside of their office may print business cards on their computers and printers using Government-purchased card stock.

O There are four Army policy restrictions to this authority.

oo We cannot customize the business cards.

ooo This means that each organization should use a reasonably standard format.

ooo We can put our name, address, telephone numbers, and e-mail address on the cards without violating this restriction.

oo We must print business cards in black and white only.

ooo This applies even where offices have access to a color printer.

oo We should print business cards in batches of fifty or less.

ooo This is to conserve resources and to avoid violating a fiscal law principle known as the "bona fide needs rule."

oo We cannot purchase new software to print the cards.

ooo However, many commercial word processing systems have business card templates built into them.

O In addition, as a matter of DA policy, investigators and recruiters may purchase business cards from a commercial printer.

oo These purchases must be approved by a General Officer or member of the Senior Executive Service.

oo The business cards must be necessary to facilitate investigators' and recruiters' mission-related business communications.

oo As above, the cards must be in black and white and cannot be customized.

oo "Commercial printer" means either the Government Printing Office or the Defense Printing Service. It may also mean an "outside" printer, such as a local office supply store, if permitted by AR 25-30, "The Army Integrated Publishing and Printing Program."

O The Army made a conscious decision to implement a restrictive business card policy. They concluded, as a matter of policy, that money spent on commercially-printed business cards could be better spent elsewhere.

O The rules on business cards will be included in an upcoming change to AR 25-30, "The Army Integrated Publishing and Printing Program."

O This policy does not apply to business cards purchased at personal expense. Employees using their personal funds may purchase any type of business cards, as long as the cards do not reflect poorly on the Army.

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UNCLASSIFIED

## CONTRACTORS ON THE BATTLEFIELD

1. With the downsizing of active duty military forces and the increased use of technically complex military equipment and weapons systems has come an increasing reliance on contractor support, to include the battlefield arena. The types of contractor battlefield support provided generally fall under two main categories. The first is system support type contracts which are designed to provide sustainment, maintenance and item management. The second is contingency contracting wherein contractors provide a variety of logistics and engineering/construction services for both peacekeeping and wartime operations. The use of contractors under battlefield conditions brings with it a multitude of considerations and problems which need to be addressed in all phases of the acquisition process (Requirements Planning, Solicitation, Source Selection and Post-Award Administration). The following focuses on these considerations with some recommended actions that may mitigate potential problems. It must be recognized from the outset, however, that many of these considerations/problems are currently under review at the highest levels within DOD. Until such time as revised regulations and/or statutory guidance are enacted, there are limitations on what may be accomplished at the local command level.

2. REQUIREMENTS PLANNING. The first issue to be addressed is whether a particular function should be performed by Government personnel. The retention of an organic capability brings with it significant advantages in assuring mission accomplishment notwithstanding the increased pressure to downsize. As will be discussed later in this memorandum, there presently are significant restrictions on the Government when it comes to the enforcement of support contractor contractual requirements. There may be instances when, in a battlefield scenario, a contractor either refuses or is unable to perform. In such instances, there may be no immediate alternative available to provide the needed services within the required timeframe. In those cases where the Government currently performs a task, such as the maintenance of front line weapons systems, careful consideration should be given to retaining the capability versus contracting out. In those instances where the function has already been contracted out, the requirements package for any follow-on contractual effort should mandate that the contractor address, in detail, contingency planning. If problems have been encountered with previous contractor support, then consideration should be given to the possibility of re-establishing a Government capability.

3. SOLICITATION. Any Statement of Work (SOW) involving a contractual effort with the potential for the use of contractor personnel in hostile situations must specify in detail the required duties and responsibilities of those contractor personnel. Information must be provided on possible areas of deployment. Specific training and/or qualification requirements must be set forth. Applicable Status of Forces Agreements should be cited as well as what Government services, facilities, security, equipment, etc., will be provided and any limitations thereon. In response to such a solicitation, the contractor must address its plan for maintaining contractor support during wartime conditions, personnel shortages, labor actions, employee turnover, etc. Presently, in trying to define what role contractor personnel may be asked to perform on the front lines, there has been, and continues to be, considerable debate over such basic concepts as whether the contractor support personnel should wear uniforms, whether they may be allowed to carry weapons, and what the contractor's responsibilities should be in situations where contractor personnel are killed or captured. Much of this debate centers on concerns about how contractors may be treated if captured by enemy troops (rules of engagement, Geneva Conventions, etc.). Government personnel drafting such solicitations must keep abreast of the constantly evolving guidance in this area as, more and more, the use of contractor personnel in this manner brings these and other performance issues to the forefront.

4. SOURCE SELECTION. Two areas that must be emphasized in developing any Basis for Award and in carrying out the ensuing evaluation and source selection for a contractual effort that involves deployment to hostile sites are: 1) an in depth evaluation of the contractor's plans for compliance with SOW requirements and its strategy for avoiding any disruption in performance and; 2) a thorough review of the contractor's Past Performance involving similar efforts. As discussed in paragraph 3, above, the contractor must explain in its proposal how it will ensure performance in potentially hostile environments. This includes what training, expertise and credentials its personnel will have and what plan of action it will have in place to ensure performance and minimize any negative impact on the warfighter. Consistent emphasis on the evaluation of Past Performance for this type of contractual effort will enable the Government to assess the contractor's demonstrated ability to overcome these deployment-unique problems in the past.

5. POST-AWARD ADMINISTRATION. Theatre Commanders are the senior military commanders responsible for the completion of the mission and safety of all deployed military personnel. As such, the Theatre Commander maintains command and control over active duty military. The Theatre Commander can also direct DA civilian employees to perform specific task assignments and initiate and effect special recognition or disciplinary actions over these personnel. For contractor employees, however, command and control is tied to the terms and conditions of the contract between the respective prime contractor and the Government. The Government is not a party to the relationship between the prime contractor and its employees. Therefore, the Theater Commander has no direct control over these personnel in his/her area of command. The Uniform Code of Military Justice (UCMJ) sets forth criminal sanctions applicable to the military. Contractor employees are subject to the UCMJ only in times of Congressionally declared war. As such, the UCMJ has not had any application to contractors in

any of the engagements involving U.S. forces since World War II. Therefore, from Korea to Viet Nam and from the Middle East to Bosnia, control over contractor employees has remained with the contractor. Standard remedies for poor contractor performance such as termination for default and convenience remain with the Government. As always, the Government may seek consideration for any delays or failures to meet contractual requirements. In addition, a contract may include liquidated damage provisions. Note, however, that the use of liquidated damages has led to substantial judicial intervention in the past because federal contracts are subject to the common law rule that liquidated damages will not be enforced if they are determined to be a penalty. Liquidated damages can be used when the time of performance is of such importance that the Government may justifiably expect to suffer damage if performance is delinquent. The amount of the liquidated damages to be assessed must also be reasonable and established on a case-by-case basis. Damages fixed without any reference to actual damages would thereby be held to be a penalty and thus unenforceable. Consideration may also be given to the development of special clauses that would assist the Government in re-establishing an organic capability in light of contractor non-performance. For example, a clause might require the contractor to place the necessary data in escrow. The Government could then access this data if certain specified conditions occurred. It is clear that the traditional Government remedies for poor performance and/or non-performance fall well short of guaranteeing performance in the face of hostilities or of providing a methodology for the quick implementation of an alternative capability. It is imperative, therefore, that acquisition personnel be creative in seeking ways to overcome these shortcomings.

6. Until such time as there is implementation of specific all-encompassing guidance from DOD, it is incumbent upon those involved in the acquisition process at the command level to recognize the problems inherent in the use of contractors on the battlefield. Using the tools currently available, as well as original concepts such as the placing of data in escrow method described above, they may be able to effectively lessen the potential for the disruption of the needed services.

7. Should you have any questions or require any additional information regarding this subject, the point of contact in the Legal Office is Mr. John Reynolds, DSN 992-9780.

KATHRYN T. H. SZYMANSKI  
Chief Counsel

## **CONTRACTOR NON-DISCLOSURE AGREEMENTS**

The purpose of this memorandum is to discuss the use of non-disclosure agreements by contractors when dealing with Government employees and support contractors. It will describe what these agreements are, how they are used and when it is appropriate for Government employees to sign these agreements.

Increasingly, particularly in the Research and Development community, Government personnel are being asked to sign documents called non-disclosure agreements before contractors will enter into discussions about their capabilities. The purpose of these agreements is to protect the contractor's trade secrets and proprietary data that may be revealed during the discussions. Government employees may also be requested to sign non-disclosure agreements in conjunction with plant visits where manufacturing processes are considered trade secrets.

Before signing such an agreement, Government employees should coordinate the request that a non-disclosure agreement be signed with legal counsel. Additionally, they must be prepared to abide by the terms and conditions of such a non-disclosure agreement. Government employees are bound by the Trade Secrets Act, which makes them subject to criminal penalties if they reveal a contractor's trade secrets or proprietary data. Furthermore, civil actions may be brought against the Government, its employees and support contractors and may result in monetary damages being assessed for violations of a non-disclosure agreement. The document the employee signs will be considered evidence of the fact that the data they received was considered proprietary and that they personally agreed not to reveal it.

When is it in the best interests of the Government for its employees to sign such a document? When such data cannot be obtained in any other way and the terms of the non-disclosure agreement are reasonable and appropriate under the circumstances.

What might be considered reasonable terms and conditions? The scope of the agreement should clearly be defined, that is, the information to be provided should clearly be specified and identified as being "proprietary." The standard of care deemed necessary to protect the disclosed information may be set forth in the agreement; however, it should be no more rigorous than the terms of a non-disclosure agreement used by the Government to protect similar information.

The term of the non-disclosure agreement should be identified; two years would be reasonable under most circumstances. It should be clearly stated that nothing in the agreement shall be construed as creating an obligation by either party to enter into a contract or other business relationship. The agreement should also state that it contains the entire understanding of the parties and that it supersedes all prior agreements.

Additionally, circumstances under which there would be no liability for the disclosure of information identified in the non-disclosure agreement should also be clearly specified. For example, a clause similar to the following could be used:

The Disclosing Party (the contractor) acknowledges that the Receiving Party (the Government employee) shall not be liable for the disclosure or use of information which: (i) is already known to the Receiving Party at the time of disclosure; (ii) becomes publicly known through no wrongful act of the Receiving Party; (iii) is received from a third party free to disclose it to the Receiving Party; (iv) is independently developed by the Receiving Party without using information provided by the Disclosing Party; (v) is communicated to a

third party with the express prior written consent of the Disclosing Party; or (vi) is lawfully required to be disclosed to any Governmental agency or is otherwise required to be disclosed by law, provided that before making such disclosure the Receiving Party shall give the Disclosing Party an adequate opportunity to object or to assure confidential treatment of the information.

In conclusion, signing a non-disclosure agreement is appropriate under most circumstances, but its scope should be well defined and limited as to time and the parties should clearly understand their respective obligations under the terms of the agreement.

If you have any questions regarding this subject, the points of contact in the Legal Office are John Metcalf, DSN 654-2229 and Patrick Terranova, DSN 992-3210.

KATHRYN T. H. SZYMANSKI  
Chief Counsel

## INFORMATION PAPER

### PERSONAL LIABILITY RELATED TO Y2K

#### 1. Introduction:

As part of AMC efforts to address issues related to the Year 2000 (Y2K) problem, this paper addresses the potential liability of AMC officials for claims filed by those individuals or entities harmed by AMC computer systems that are not Y2K compliant.

#### 2. General Legal Position:

a. Federal government managers, supervisors, and employees enjoy a broad grant of immunity for actions they take as government employees. The key is whether the action taken (or the omission) falls "within the outer perimeter of the employee's scope of duties".

b. In reaction to a 1988 Supreme Court decision that seemed to narrow the granting of immunity, the Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4563. This legislation set forth a broad grant of immunity for executive branch employees, stating that for actions taken within the scope of duties, the United States, and not an individual employee, is the proper defendant.

c. There are three exceptions:

o Constitutional violations--you are not immune from personal liability if you violate the constitutional rights of another.

o Criminal activity--you are not immune from personal liability if you commit a crime.

o For statutes that specifically permit suits against the individual--you are not immune from personnel liability if a law states that those who violate the statute are personally liable (for example, pursuant to specific provisions of the Privacy Act, those who violate that law are subject to personal liability).

d. The reason for this broad grant of immunity is: To protect Federal employees from being "harassed" through threats of lawsuits, and to encourage employees to make decisions without the fear that they are personally liable for their decisions.

### **3. Immunity and Liability Related to Y2K:**

a. The general rule described above applies to Y2K. That is, Federal officials enjoy immunity for actions they take as part of their official duties related to Y2K matters, such as certifying that a system is Y2K compliant.

b. Y2K Compliance Certifications:

The Army legal position is that certifications made in good faith as part of an official's job duty would not subject the official to personal liability. The law provides immunity from personal liability for those actions of federal officials acting within their "scope of duties". The Army Y2K Program requires certification whenever an entry is made in the database that a specific computer is Y2K compliant. Thus, certification is part of the official duties of AMC personnel who perform that act. We should ensure that responsible officials are free to declare their doubts as to compliance, and that no action is taken to require certification in circumstances of doubt. As we get closer to the critical date we must still make good faith judgments as to compliance. In other words, you must act with "due diligence", in executing these responsibilities.

c. You may be subject to personal liability if you have certified a computer system as Y2K compliant when you knew it was not in compliance.

### **4. DOD As A Defendant In Y2K Claims: DOD *Not* Individual Employees:**

a. Claims against the government can arise out of virtually any aspect of Federal operations. The following list of possible claims is not intended to be all-inclusive.

b. Certification of Information Technology Products as Year 2000 Compliant. If DOD incorrectly certifies vendor equipment as Year 2000 compliant, it might be liable for the improper certification under the tort theory of misrepresentation. Although there is an exemption from liability in the Federal Tort Claims Act (FTCA) for misrepresentations, the facts of the particular situation must be reviewed to determine whether the exemption will apply. 28 U.S.C. § 2680(h). Certifying officials should act with "due diligence" in executing Y2K responsibilities. Never make official certifications or any other assertions that you know are not true. Similarly, your decision making process should be consistent with the information you had available. It is a good idea to keep a proper paper "trail" and records of the information used in making decisions.

c. Providing Items That Are Not Year 2000 Compliant As Government Furnished Property (GFP). If the government provides a contractor defective GFP, the contractor may be entitled to compensation and schedule adjustments. *Celesco Industries*, ASBCA 21928, 81-2 BCA ¶ 15,260 (1981). Similarly, if a vendor receives GFP that is not Year 2000 compliant and modifies it for another government customer, the vendor might be relieved from liability for its failure to provide a Year 2000 compliant product. Additionally, the “wronged” government customer could not generally assert a damage claim against the originating government activity. 65 Comp. Gen. 464 (1986).

d. Electronic Funds Transfer. If DOD fails to make a deposit, the government must pay the intended recipient what was actually owed, but is not normally liable for any overdraft or other charges that the recipient may incur. 31 C.F.R. § 210.10(a). However, there is a significant exception to this normal rule that DOD is not liable. Both military and Federal civilian employees enrolled in the direct deposit program are entitled to be reimbursed for any charges imposed by the financial institution where government error caused the pay to be deposited late or in an incorrect amount. 10 U.S.C. §§ 1053, 1594.

e. Prompt Payment Act, 31 U.S.C. §§ 3901 - 3907. If DOD fails to make timely payment for goods or services acquired from a business concern under a contract, the government is liable for interest on the payment.

f. Federal Tort Claims Act. Claims for personal injury or loss of property may be payable when the injury or damage is caused by negligent or wrongful acts of DOD personnel acting within the scope of their employment. There are innumerable types of such claims, including improper patient care, air traffic control failures, and motor vehicle accidents. These types of claims might result in liability for DOD, and the possible consequences from failures of embedded systems are difficult to predict.

## **5. What To Do If You Are Sued:**

a. If you are ever sued because of actions you take as a Federal employee the first step you should take is to seek advice from your legal office.

b. A preliminary determination will be made as to whether the actions that caused the lawsuit were those "within the scope of your employment."

c. Most often, your legal office will work with you to complete a document signed by your Commander stating that you were acting as a Federal official.

d. This document is staffed through DA and DOD with the Department of Justice. If DOJ rules that you were indeed operating within the scope of your duties, then they will take actions to represent you and to have the United States named the

defendant, dropping you from the lawsuit.

**6. Contact Your Legal Office:**

For further information on the issues of personal liability and immunity from suit contact your local legal office

## **REDS FACT SHEET**

Resolve Employee Disputes Swiftly (REDS) is an alternative dispute resolution (ADR) process used to resolve workplace problems. The process may be used to settle communication problems, disputes between employees/management, EEO complaints, or grievances. The employee or management official involved in the dispute may suggest REDS as an ADR process. Employee use of the program is voluntary. If an employee wants to use REDS and management is involved in the dispute, management must participate.

### **BENEFITS**

Reach a solution quickly  
Focus on the interest of the parties  
Improve future working relationships  
Parties speak directly to each other  
Win-Win situation

### **METHODS UTILIZED**

Mediation - Both parties meet with a neutral that facilitates conversation and assists the parties to reach a mutually agreeable solution. The solution is drafted into an agreement that is binding on both parties.

Peer Review - Both parties select a representative that sits on the panel with a neutral. After the parties present their issues, the panel reaches a binding agreement that both parties will honor.

### **PROCESS**

1. Employee raises problem through the chain of command/supervision.
2. Employee contacts REDS POC (EEO) or member of the REDS team (EEO, CPAC, Legal, or Union).
3. REDS POC refers issue to panel to determine if issue is appropriate and REDS should be offered.
4. POC will notify employee of panel decision.
5. If REDS is offered, parties agree to resolve issue(s) in good faith and by full and open communication.
6. Participants should come prepared to negotiate and/or compromise on points of interest in order to obtain a workable resolution of the issues.

REDS Team consists of:

- EEO - Kathleen V. Buttrey, AMSTA-CS-CQ, x46400
- Legal - Paul Vitrano, AMSTA-LA, x48576
- CPAC - Mark Reed, AMSTA-RM-P, x47891
- Union - Charles Case, AMSTA-IM-DR, x45685
- POC - Elizabeth Bruton-Pollard, AMSTA-CS-CQ, x48991

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## MEMORANDUM FOR DIRECTOR SRS

SUBJECT: Use of 59 Minutes Administrative Leave as a Non-Monetary Incentive Award

1. AGPR 690-9 Civilian Personal Leave Administration, par. 9-3, provides for a Commander or delegatee to authorize an employee's absence from her or his normal duty assignments without charge to personal leave in a broad range of circumstances. The language can be reasonably interpreted to include subject purposes. In particular the regulation states in the cited paragraph:

...In other situations where the activity commander [or designee] makes a determination that the absence would further an agency function, brief periods may be excused.

2. In view of the fact that the leave will be specifically granted as an honorary incentive award, it is my opinion that the statutory and regulatory requirements for incentive awards must also be met. The 59 minutes of administrative leave award is not significantly different from use of Commander's coins or other non-monetary awards in that such awards must be documented so as to comply with the OPM regulation and to avoid the perception that gifts [there is no circumstance in which we can give gifts to employees using appropriated funds] are being given to employees. The documentation need not be extensive. I see no reason for it to be processed through CPAC or DFAS since there is no taxable event, it is intended to be a minor award not to be entered into an individual's personnel folder, and there is no requirement to post the leave to the time keeping system.

3. You should insure that this new award is not inconsistent with any existing labor agreements. It is also advisable to clarify existing local incentive award regulations and SOPS respecting processing of awards and change existing provisions which may technically provide for a review of all awards by an incentive awards committee. This award can be made administratively simple and of instantaneous benefit. It is my understanding that a certificate will be presented to the individuals receiving the 59 minute administrative leave award and that guidance standards will be issued in an incentive awards policy statement or through changes to local regulations.

4. There follows a more detailed legal analysis of the incentive awards authority and the use of non-monetary awards:

a. The relevant incentive awards program is based on general statutory authority in 5 USC 4502, 4503, and 4506. Awards are limited to cash awards, time off awards, and honorary awards (the statute authorizes incurring expense for honorary awards). OPM is charged by the statute to promulgate regulations; said regulations are in 5 CFR Part 451.

b. 5 CFR Part 451.104(a) permits three types of awards: (a) cash, (b) honorary, or informal recognition award, or (c) time-off awards. This language thus equates honorary with informal recognition awards but does not define the terms honorary or informal recognition. 5 CFR 451.103(c)(2) requires the Agency program to provide for documenting justification for awards that are not based on a rating of record.

c. DOD 1400.25-M subchapter 451, Awards, Dec 96, implements DOD policies and requirements for awards and award programs for civilian employees within the DOD. This manual is based on the OPM regulations before they were revised in Aug 95, as it has no references to 5 CFR Part 451. The manual is more restrictive than the OPM guidance in

effect at the time (see GAO case discussion below). In C.4 non-monetary award is defined as:

An award in which the recognition device is not a cash payment or time-off as an award but rather an award of a honorific value, e.g. a letter, certificate, medal, plaque or item of nominal value. [emphasis added]

The key in this definition is the word honorific. To comply with the DOD policy the non-monetary award must be honorific in nature. This definition does not limit cost or utility of an awarded item provided that it is of honorific value. I view this to mean that the primary value of an item, as seen by some third party, must be honorific; that is, the items honors the individual in some manner for some action.

c. AR 672-20, Incentive Awards, 1 June 1993, Chapter 8 lists specific civilian honorary awards authorized by DA. These honorary awards all consist of a certificate, medal, lapel button, or cash in various combinations. There is no provision for any other type of non-monetary award such as jackets, mugs, or commander's coins; however, the regulation does not explicitly prohibit other forms of honorary award except through a general prohibition on supplementation without approval. Use of items of relatively low intrinsic value or nominal value has apparently evolved across the Army and other agencies under the statutory authority to incur expenses to honor personnel for service performance and the permissiveness of OPM regulations and GAO opinions.

d. The General Accounting Office has recognized the giving of non-monetary awards. The most recent case involving non-monetary awards follows:

B-256399

June 27, 1994

#### DIGEST

Under the Government Employees Incentive Awards Act, > 5 U.S.C. Sec. 4501-> 4507 (1988), and the implementing regulations in 5 C.F.R. Part 451, our Office advises an agency that we see no legal objection to the use of non-monetary awards, such as tickets to local sporting events or amusement parks, as part of an agency's awards program.

Dear Ms. Bell: [Navy case]

This is in response to your letter to the Comptroller General dated January 31, 1994 (Reference 12451 NADEP-11000).

You indicate that your naval facility will soon be implementing a non-monetary awards program and would like to use, as a form of recognition, items such as tickets to local sporting events or local amusement parks. You ask for guidance on whether such award items are appropriate under the Government Employees Incentive Awards Act, > 5 U.S.C. Sec. Sec. 4501-> 4507 (1988).

The Office of Personnel Management (OPM) has promulgated regulations and policy guidance on incentive awards. The regulations specifically provide for non-monetary awards for superior accomplishment, including a medal, certificate, plaque, citation, badge, or similar item that has an award or honor connotation. See, > 5 C.F.R. Sec. 451.103 (1993). In subchapter 7 of chapter 451, of the Federal Personnel Manual (FPM), (Inst. 265, Aug. 14, 1981) (Non-Monetary Recognition), OPM emphasizes that

the range and variety of non-monetary incentives is almost limitless and that each organization should design incentive programs that will motivate high levels of accomplishment.

Our decisions have also recognized the appropriateness of non-monetary items or merchandise-type items as awards. See e.g., Federal Aviation Administration, B-243025, May 2, 1991 (jackets with FAA insignia); > 67 Comp. Gen. 349 (1988) (coffee mugs, pins, and telephones of nominal value); (copies of decisions cited enclosed). In both cases, we held that the purchase of the items for use as awards to employees is a proper expenditure of appropriated funds. The same funding should be used for the non-monetary awards as is used for cash awards under the Act. See > 5 U.S.C. Sec. 4502(d) (1988).

We have not placed a dollar limit on these awards items, but have limited them to nominal cost. We note that the value of occasional sporting and entertainment tickets would appear to be excludable from an employee's income as de minimis fringe benefits, under > 26 U.S.C. Sec. 132(a)(4) and > 132(e)(1) (1988). See > 26 C.F.R. Sec. 1.132-6(e)(1) and (e)(2) (1993). Since this is an income tax matter, you may wish to consult with the Internal Revenue Service.

Based on the foregoing, we see no legal objection to an award of tickets of nominal value to a sporting or entertainment event as part of a non-monetary awards program within the sound discretion of management.

Sincerely yours,

Seymour Efros for  
Robert P. Murphy  
Acting General Counsel

e. OPM has changed its regulations and no longer explicitly recognizes non-monetary awards. The 5 C.F.R. Sec. 451.103 (1993) language which the GAO relied on no longer exists. The FPM was abolished and the awards language cited in the GAO case has apparently not been incorporated into any of the current OPM regulations or guides. A review of the Federal Register notices respecting the changes by OPM revealed that the changes were made as part of the National Performance Review with the intent of providing each Department or Agency more flexibility in operating its personnel programs. The DOD manual cited above was issued subsequent to the above CFR changes and the most recent GAO decision on the subject of non-monetary awards.

f. I read the GAO case as saying that an Agency may give non-monetary awards of virtually any type, if its awards program permits, and not be in violation of OPM regulation or the statutory authority for civilian awards provided the awards are of nominal value. It then proceeds to say sporting or entertainment event tickets are of nominal value. This easily places nominal value in the greater than \$20 and perhaps less than \$100 range. This reasoning is not out of line with what the Office of Government Ethics sets at the permissible gift exclusion of \$20 (\$50 cumulative per source) as being de minimus. Since the revised OPM rules are intended to be more flexible, I see no inconsistency with the GAO decisions based on the older presumably less flexible regulations. Therefore, non-monetary awards are governed by DOD and Army policies not with standing a possibly more flexible position being taken by OPM. There is nothing in the OPM regulation prohibiting agencies from taking a more restrictive approach to their awards program (unlike the ethics regulations issued by the Office of Government Ethics).

g. The Army incentive awards regulation permits only a very narrow listing of honorary awards; however, accepted policy appears to be different. For example, the use of Commander's coins is extremely wide spread and appears to have become an accepted deviation to the regulation. I have no doubt that the coins would be perceived as honorific by any outside observer. The question for this opinion thus becomes is whether the 59 minutes administrative leave awards are or will be perceived as honorific in nature. It is my understanding that a certificate will be presented to the individuals receiving the 59 minute administrative leave award and that guidance standards will be issued in an SSBCOM incentive awards policy statement. I believe this will satisfy the honorific requirements of the Army regulation.

h. All non-monetary awards are explicitly required by OPM regulation to be documented. The DOD and Army regulations and policies can not waive this requirement. Therefore, all honorific awards such as Commander's coins, plaques, framed works of art with presentation inscriptions, jackets, 59 minutes administrative leave or what ever else one may select to use for awards must have documentation supporting the award. See 5 CFR 451.103(c)(2). I see no objection to after the fact preparation of such documentation. It is not unexpected that a Commander will present a coin or leave award to an individual or multiple team members on the spot with out advanced planning. However, the Commander should then promptly prepare the documentation presenting the basis for the award after the fact. Government operations are replete with examples of such after the fact documentation or ratification such as that exercised by Contracting Officers respecting informal commitments where not otherwise illegal.

Robert W. Poor  
Business Law Team Leader  
Office of Chief Counsel  
SBCCOM

## ***Charges--Four Basic StepsPRIVATE To Charging What You Can Prove***

When an employee challenges an adverse action before a third party, the single most important issue in determining the outcome is the agency's ability to prove the facts it gave as a reason for action in the notice of proposal. Many, many actions are overturned, not because the agency failed to prove there was a reason for disciplinary action, but rather because the agency failed to prove the specific reason it gave. If your actions are to stand, it is critical that you take time for careful, objective analysis before you ever begin to draft the proposal notice. This is a systematic approach that may work for you.

### **1. Evaluate the evidence you have**

What kind of evidence do you have? Some kinds of evidence are given more weight by third parties than others. What does the evidence prove? Where are the holes? Do you have the employee's explanation? How would you attack the evidence if you were the employee's representative? Is there additional evidence you can readily get that will make a difference? Try to get to the bottom of any conflicting accounts. Where it's simply one person's word against another's, evaluate their relative credibility.

### **2. Develop alternative charges**

Stick to plain language that fits the evidence. As case law now stands, it is wise to avoid terms with specific meanings in criminal law, like "assault" or "theft," unless your legal staff are confident they can prove all the criminal law elements. Try to think of all the plausible approaches that fit the evidence. For instance, a person who has (allegedly) shot 15 people may be unavailable for duty because he's in jail. As long as management disapproves leave, AWOL is a very plausible approach that fits your evidence! If the type of behavior that forms the basis for your action is specifically discussed in the agency standards of conduct, in the disciplinary policy, or in a negotiated agreement, you will want to be aware of the language and policy approach and consider a charge that cites the policy. However, don't use a charge from any policy document if it doesn't fit your facts.

### **3. Look at current, relevant case law**

Once you have some optional approaches in mind, consult your references and look at a few cases with similar fact patterns. Some charges you are considering may carry specific burdens of proof that have been defined in case law from the courts or the Board. You need to show that your action meets those burdens or write a statement of reasons that avoids them. For instance, if you are considering a charge of "insubordination," review the case law and your evidence and determine whether you can prove intent. Could the employee's failure to perform the duties in question have been negligence rather than willful disobedience? Might the employee be able to prove mental or emotional problems that explain the failure? If the duties are important to management, you can show that an action for failure to perform them promotes the efficiency of the service without taking on the "intent" burden inherent in the "insubordination" charge. You will, however, want to be sure you are not attempting to penalize an employee for performance that actually meets the established performance standards for the position.

In the example given of the employee who is in jail, using the alleged criminal activity as your charge will raise some very specific burdens, and the independent activity of the court system may affect the agency's ability to meet them. The AWOL charge, on the other hand, raises much lower burdens if the agency can show it is not applying its attendance policy to the employee in a disparate way.

#### **4. Refine the charges, in clear language that distinguishes charges from specifications.**

Your letter of proposal should tell the employee clearly what charge is going to be proved, for instance: "Disorderly conduct." If this statement contains more than one element, for instance: "Disorderly, threatening conduct," you must prove each element or your charge will fail. However, you can provide information that describes the relevant incidents, explains their impact, or gives any other details you think are relevant to your reasons for action, without making that information part of the charge and raising higher burdens of proof for your action. This supporting information is sometimes called "specifications" in the case law.

Distinguish the specifications from the charge by putting them in a separate sentence or paragraph with language such as: "The agency bases this charge on the following information..." The specific incidents, allegations, etc. that support the charge may then be described in enough detail to tell the employee what you are talking about and/or why the agency considers the behavior serious. If a third party finds you have proved some specifications and not others, the charge as a whole can still be sustained.

It is unwise to use terms associated with specific burdens of proof, like "threat," "assault," or "hostile environment" in your supporting information, since an adjudicator may find you have changed the nature of your charge and raised your burden of proof. It is also unwise to throw in an undifferentiated profusion of facts and allegations that forces a reader to interpret what will be proved. If the charge is open to interpretation, the employee's representative has an opportunity to fashion an interpretation that is favorable to the employee and unfavorable to the agency. Administrative judges have also been known to interpret and/or summarize confusing or inartful reasons for action in ways that affected the agency burden of proof. If the agency representative feels an administrative judge has mischaracterized the charge, it is essential that the agency place an objection on the record, thereby preserving the opportunity to seek review by the full Board of any adverse decision that may result from the mischaracterization.

*U.S. Office of Personnel Management, Employee Relations and Health Services Center  
January, 1999*

## THE ENVIRONMENTAL LAW DIVISION BULLETIN

February 1999

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Fourth Circuit Looks at NEPA Cost Benefit Analysis  
Lieutenant Colonel David Howlett

In a recent decision, *Hughes River Watershed Conservancy v. Johnson*, the Fourth Circuit Court of Appeals looked at the adequacy of a cost and benefit analysis in an environmental impact statement (EIS). The case provides guidance on the level of detail required for economic benefit information in an environmental analysis prepared under National Environmental Policy Act of 1969 (NEPA).

In this case, federal agencies prepared an EIS for construction of a dam in West Virginia. That EIS came under scrutiny in a 1996 decision, *Hughes River Watershed Conservancy v. Glickman*, where it was asserted that the agencies had not provided fair consideration of the project's adverse environmental effects because they had overestimated the economic benefits to be gained from the dam's recreational use. The court of appeals disagreed and determined that the agencies had not violated NEPA. The court remanded this case for the agencies to reevaluate their estimates of recreational benefits. Subsequent EIS analysis was to be based upon net benefits, rather than gross benefits.

The federal agencies obtained a new economic study of the project. This study evaluated all additional recreational benefits provided by the proposed dam, changes in activity mix and considered non-use values. The study showed an overall positive benefit-cost ratio for the dam, which supported the project's economic feasibility. The agencies incorporated the study's conclusions into a supplemental EIS, which was again challenged.

In *Hughes River Watershed Conservancy v. Johnson*, the court reviewed Supreme Court cases that addressed NEPA analyses of economic issues. It concluded that an agency is first vested with discretion to determine that certain values -- such as recreation --

outweigh environmental costs. The court also determined that NEPA requires agencies to balance a project's economic benefits against its environmental effects. Although an agency could choose to go forward with a project that does not make economic sense, it must nevertheless take a "hard look" at the issue.

Looking at the supplemental EIS, the court found that the federal agencies, "in making their economic recreational benefits determinations, considered the total number of visitors to the Project, the number of visitors who would be diverted to the Project from existing facilities, the consumer surplus figure, and non-use values." Such a non-use value would include the value that a person places on knowing the river exists in its free-flowing state and knowing the river will be protected for future generations. The agencies' weighing of these factors led the court to determine that the agencies' decision to implement the project was not arbitrary or capricious.

This case demonstrates that economic benefit information in a NEPA document must be thorough and even-handed. The fact that certain factors are imprecise or unquantifiable will not render the result inadequate. (LTC Howlett/LIT)

#### Environmental Guidance for Overseas Facilities Formally Staffed MAJ Mike Egan

The Deputy Under Secretary of Defense (Environmental Security) has released for coordination a final draft copy of the Overseas Environmental Baseline Guidance Document (OEBGD). The product of over 18 months of work, the OEBGD lays out implementation guidance, procedures, and criteria for environmental compliance. The OEBGD's compliance requirements will apply to overseas facilities, such as DoD installations outside the United States, its territories and possessions.

In particular, the OEBGD is to be used by authorized DoD Environmental Executive Agents who will work with representatives of the host nations where our significant DoD

installations are located. These Environmental Executive Agents are responsible for developing final governing standards for all DoD installations in the host nations concerned. In carrying out this task, they will look to the OEBGD's specific DoD environmental criteria. This OEBGD baseline guidance will apply to DoD installation activities unless it is inconsistent with: (1) the law of an applicable host nation; (2) base rights and/or Status of Forces Agreements; (3) other international agreements or (4) practices established pursuant to such agreements. In addition, the guidance will regulate DoD component operations in foreign countries that lack their own environmental standards. Likewise, the new requirements will also apply if existing national standards provide less protection for human health and the environment than would be granted in the OEBGD's baseline guidance.

After formal coordination, the approval and distribution of the OEBGD guidance is anticipated by the third quarter of fiscal year 1999. (MAJ Egan/CPL)

#### EPA Proposes New Rules for Lead-based Paint Debris MAJ Mike Egan

EPA has proposed a new rule on lead-based paint (LBP) demolition debris. Under the latest proposal, LBP demolition debris that fails the Toxicity Characteristic Leaching Procedure (TCLP) would no longer be subject to regulation under RCRA. The trade-off, however, is that all LBP demolition debris, regardless of hazard, would be subject to regulation under TSCA.

The TSCA regime would require the following: (1) LBP debris would be stored for up to 180 days in an inaccessible container (or 72 hours if it is accessible) and; (2) that the LBP debris be disposed in construction/demolition waste landfills (not municipal landfills) or hazardous waste disposal facilities, and; (3) that disposal facilities be notified that the waste contains LBP demolition debris with information on the date the debris was generated. The generator and the landfill would have to keep records for 3 years.

The proposed rule includes a household waste exemption. So, wastes from a resident's home renovations would not be included in the rule's purview. Army, as Executive Agent, is currently coordinating comments from all of the services for a single DoD submittal. (MAJ Egan/CPL)

AEC Complete OB/OD Facility Guide  
MAJ Mike Egan

Pursuant to the new DoD Open Burn/Open Detonation (OB/OD) Optimization Program, the Army and DoD have been actively attempting to reduce the number of sites that require a RCRA permit for OB/OD activities. Open burning and open detonation are the most commonly used methods for disposing of conventional weapons that cannot be recycled or resold. Open burning is the combustion of explosive material and propellants, while open detonation involves a controlled process of exploding munitions. OB/OD operations are regulated as hazardous waste treatment units in accordance with RCRA, and so are often subject to RCRA permits. RCRA B permits are required for facilities -- including federal facilities -- that treat, store and dispose of hazardous waste. The RCRA Subpart X regulations cover miscellaneous units, among which are the OB/OD units that deal with propellants, explosives, pyrotechnics and thermal treatment.

To assist the individual installation in determining the value of maintaining its RCRA Subpart X permit, the Army Environmental Center will be issuing an OB/OD facility guide. This guide provides an evaluation package to assist an installation Commander in any future decisions on maintaining a permit. Expected distribution date for this guide is March 99. (MAJ Egan/CPL)

Contraste

Las torres se derrumban y no se vuelven a alzar.  
El humilde hormiguero siempre regresa.

Contrast

Castle towers tumble and will never rise again.  
The humble anthill always returns.

Jose Emilio Pacheco (translated by LTC Howlett, LIT)

Hughes River Watershed Conservancy v. Johnson, No. 98-2134, 1999 U.S. App. Lexis 397 (4th Cir. Jan. 13, 1999).

42 U.S.C. 4321 et seq.

Id. at 447.

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at \*7.

Id. at \*11, citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989).

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at \*15; citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989).

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at \*17.

Id. at \*17-18.

Id. at \*16-17, quoting *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974).

The OEBCG was prepared by an interservice committee, comprised of representatives of the Military Departments, the Chairman of the Joint Chiefs of Staff and the Defense Logistics Agency, pursuant to DODI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996.

Environmental Executive Agents are appointed by the Office of the Secretary of Defense.

See, DoDI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996, Para. 3.c. (1).

Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 FR 70233 (Dec. 18, 1998).

42 U.S.C. § 6900 et seq.

15 U.S.C. § 2601 et seq.

Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 FR 70233; 70235 (Dec. 18, 1998).

Id. at 70241.

Id. at 70241-2.

15 U.S.C. § 2601 et seq.

To fall under RCRA, the munitions in question must be clearly slated for disposal and fall under RCRA specifications for hazardous waste found in 40 C.F.R. Part 261.

For a general overview of RCRA B permit requirements for treatment, storage and disposal operations, see, 40 C.F.R. § 270.10 - § 270.29.

See, 40 C.F.R. § 264.600, Subpart X, "Miscellaneous Units." Permit requirements for OB/OD units are found at 40 C.F.R. § 270.23.

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## ELD Fines and Settlements Report Major Robert Cotell

In January, ELD published its Fines and Settlements Report for the First Quarter FY 1999. This report indicated that Army installations received two new fines and settled seven cases during the quarter. In addition, for the first time, the report deemed five other cases closed due to the failure of states to pursue fines after installations had raised a sovereign immunity defense.

Each of the sovereign immunity cases deemed closed in the ELD Quarterly Fines and Settlements Report involved asserted violations of the Clean Air Act (CAA). Sovereign immunity has been waived for CAA enforcement by state regulators, but not for payment of state punitive fines. In each of the closed cases discussed in ELD's Report, Army installations had invoked sovereign immunity under the CAA, but then heard nothing further from their respective state regulators.

The decision to close these pending cases was made on an individual basis. Accordingly, it does not mean that all cases involving sovereign immunity are deemed resolved. The decision to close each case was made on a variety of factors. Such factors include the length of time that has passed since the violation, lack of contact from the state and the likelihood the state will revive the action in the future.

A number of installations are currently facing uncertainty in determining closure for specific cases that may involve sovereign immunity. In most of these cases, the installation has sent a letter to state regulators informing them that sovereign immunity precludes payment of fines, but the states have simply not responded. In general, the best practice under these circumstances is to maintain contact with state officials and attempt to receive official acknowledgment (by letter, motion, or otherwise) that the fine is no longer pending.

In some cases, however, it may be wise to “let sleeping dogs lie.” Over time, the failure of the state regulators to pursue an outstanding Notice of Violation may be deemed acquiescence to the United States’ position on sovereign immunity. (MAJ Cotell/CPL)

### Invoking Sovereign Immunity in Clean Air Act Issues Major Robert Cotell

As the previous article has discussed, States have failed to close Clean Air Act (CAA) cases pending against installations -- even though the sovereign immunity defense has been raised. The reason for the States’ failure varies. Sometimes they are unfamiliar with the concept of sovereign immunity, believing that dismissal of a case will somehow affect their “rights.” Other times, the States believe that they may be able to resurrect an action if the CAA cases currently under appeal are decided in their favor. There is some truth to these assertions.

One invalid reason States keep cases open, however, results from the installation’s failure to adequately explain the scope of sovereign immunity. Once a state is told that the federal government is invoking “immunity” from State action, some regulators experience undue panic. States often, incorrectly, jump to the conclusion that they are powerless to regulate an installation. This issue becomes particularly dangerous when State regulators believe that their only regulatory recourse is to deny CAA permits after an installation invokes sovereign immunity.

In light of the above, it is important that the installation ELS adequately explain the sovereign immunity issue when an installation receives a CAA Notice of Violation from a state regulator. The ELS should stress to the regulator that, under the CAA, sovereign immunity applies only to the imposition of fines. In all other areas of the CAA, immunity has been waived. States may require corrective action and other measures to compel immediate compliance. It is in the best interest of the installation to acknowledge these requirements and express a willingness to cooperate. In addition, it is important to note that the installation is powerless to effect a waiver of sovereign immunity. This power rests only with Congress. Accordingly, a diplomatic letter can express to the State that this issue is beyond an installation’s control -- this is likely to have a positive effect on future dialogue with the regulators. Here is a sample letter that should be used by installations to invoke sovereign immunity. Obviously, the letter must be tailored by each installation to address the specifics of its case. (MAJ Cotell/CPL)

Sample Letter to State Regulators Invoking Sovereign Immunity for Cases Concerning the Clean Air Act

Date

Address of state regulatory agency

Dear \_\_\_\_\_,

This is in response to a Notice of Violation (NOV) issued from your office on (date) to (Installation) for violations of (cite state reference) pursuant to the Clean Air Act (CAA) and for demand of a fine in the amount of (amount).

The (Installation) takes very seriously its obligation to maintain compliance with environmental laws and regulations. In the area of environmental law, Congress has frequently waived sovereign immunity to require federal agencies to comply with state, interstate, and local pollution control laws. Indeed, the CAA's federal facilities provision (42 U.S.C Section 7418(a)) contains a partial waiver of sovereign immunity that directs federal agencies to comply with air pollution control programs "to the same extent as any non-governmental entity." In addition, it subjects federal facilities to administrative fees or charges to defray the costs of air pollution control programs, as well as the "process and sanctions" of air program regulatory agencies.

In light of the above, to the extent that (Installation) has violated the CAA, it has a duty and obligation to correct the deficiencies expeditiously and in accordance with all applicable state laws. The violations in the above noted NOV are being handled by (Director of Installation Environmental Program) and specific action is being taken to bring (Installation) into immediate compliance and to correct deficiencies.

Please note that although the waiver of sovereign immunity in the CAA includes subjecting federal facilities to "process and sanctions," the precise meaning of these words has been the subject of litigation in federal courts. Indeed, the position of the United States taken in pending litigation on this matter will prevent (Installation) from paying the fines requested in the NOV in this case. The terms "process and sanctions" were first interpreted by the United States Supreme Court when it examined the federal facilities provision of the Clean Water Act (CWA) in *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992). The Court found that this aspect of the CWA's waiver of sovereign immunity, which is virtually identical to the waiver in the CAA, did not subject federal facilities to "punitive fines" imposed as a penalty for past violations. This was based on a finding that the CWA did not contain a clear and unequivocal congressional waiver of sovereign immunity on that point.

The Supreme Court's decision in *DoE v. Ohio* was formally extended to the CAA in *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995), holding that the CAA does not authorize Federal agencies to pay punitive fines. More recently, a federal district court in California similarly held that the CAA does not authorize federal agencies to pay punitive fines. *Sacramento Metropolitan Air Quality Control District v. U.S.*, 29 F. Supp. 652 (E.D. Cal. 1998). Although a contrary result was reached in

another federal court case where a district court judge deviated from the model analytical approach of the U.S. Supreme Court, that case is currently pending appeal before the Federal Court of Appeals for the 6th Circuit. *U.S. v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M.D. Tenn. 1997), appeal pending, No. 97-5715 (6th Cir.). The position of the United States, as articulated by the Department of Justice in defense of litigation on this matter, is that Congress has not waived sovereign immunity under the CAA for the payment of punitive fines imposed by states.

(Installation) is bound by this position. No individual installation may waive sovereign immunity. Indeed, not even an agency such as the Army or the Department of Defense may waive sovereign immunity. Only Congress has that power, and, until Congress exercises it, (Installation) cannot legally pay the fines requested in the NOV.

The lack of a waiver of sovereign immunity for punitive fines in no way exempts federal agencies from full compliance with the CAA. Federal agencies are bound to comply with all laws and regulations for air pollution control, and are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a federal facility's air pollution control activities, the facility has the same obligation as non-governmental entities to expeditiously correct all infractions. Again, (Installation) remains firmly committed to environmental compliance and will work closely with your agency to assure all compliance issues related to this matter are quickly resolved.

Sincerely,

Installation Commander/Staff Judge Advocate

Puerto Rican Case Explores CERCLA Jurisdictional Limit  
Lieutenant Colonel David Howlett

A recent case in the Federal District Court in Puerto Rico explores the jurisdictional limits of Section 113(h) in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In *M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc.*, the plaintiffs sued both private defendants and the United States Environmental Protection Agency (EPA), alleging that these parties were responsible for solvent contamination in plaintiffs' water supply. In addition to bringing CERCLA claims and a variety of tort claims against private defendants, plaintiffs also used CERCLA's citizen suit provision, CERCLA §310(a)(1), to challenge the EPA. This precedent is important to the Army since we have been delegated the same authority exercised in this case by the EPA.

Here are some of the facts behind this case. The EPA had ordered the private defendants to implement a remedial action in 1988. The EPA modified its remedial approach several times over the next ten years, although the remedial action was still underway. So, plaintiffs brought suit to compel the private defendants to carry out the agency's remediation order, under the CERCLA's citizen suit provision, CERCLA §310(a)(1). In addition, plaintiffs sued the EPA under CERCLA §310(a)(2), alleging that EPA had not selected an adequate remedy, had not implemented selected remedies, and had failed to perform required five-year reviews. Plaintiffs also sued the EPA under the Administrative Procedure Act.

The Court began its discussion of the citizens' suit claims by stressing that CERCLA's grant of federal jurisdiction is limited by CERCLA §113(h). As for the claim against the private defendants, the Court found that it was allowable since that claim sought to enforce an EPA order issued under CERCLA §106.

Regarding the claim against the EPA, the District Court began by examining CERCLA's legislative history. The Court determined that, according to CERCLA §113(h)(4), it had no jurisdiction over the plaintiffs' challenge to an ongoing response action, stating:

Plaintiffs wish to require the EPA immediately to (1) initiate control of soil contamination by use of certain technologies, (2) initiate extraction and treatment of contaminated groundwater, and (3) conduct and act upon the findings of a remedy review. In order to provide this type of relief, we could not avoid interfering with the EPA's cleanup efforts and running afoul of the mandate of section 113(h).

The Court also found that the Administrative Procedure Act claim was barred since CERCLA §113(h) refers to "any challenges" to a removal action -- not just those brought under CERCLA.

On the other hand, the Court found that the request for a five-year review did not constitute a challenge to the ongoing response action. On this matter, the Court stated: "[r]equiring the EPA to produce a five-year review in accordance with CERCLA § 121(c), 42 U.S.C. § 9621(c), would not affect the remedial action or unduly compromise the EPA's limited resources, in contravention of congressional policy behind section 113(h)."

Under the logic of this case, a challenge can be brought to compel CERCLA procedural requirements as long as there is no interference with the implementation of the remedy. This could require an inquiry into whether requested relief interferes with a remedy and is not preferable to a "bright-line" rule that would bar all CERCLA challenges to an ongoing remedy. This decision represents an erosion of CERCLA §113's protections.  
(LTC Howlett/LIT)

#### Longhorn Pipeline Settlement Reached Major Silas DeRoma

On 5 March 1999, the United States District Court for the Western District of Texas approved a settlement among the parties to the Longhorn Partners Pipeline (LPP) dispute. Originally, the plaintiffs sued to stop the operation of a proposed 700-mile pipeline, claiming that the project violated the requirements of the National Environmental Policy Act. The

suit named several federal defendants: the Army, the Environmental Protection Agency (EPA), the Department of Transportation (DOT), and the Federal Energy Regulatory Commission. Among other things, the plaintiffs alleged that Army involvement in the case stemmed from an LPP application for a six-mile right-of-way across Fort Bliss, Texas and from actions by the plaintiffs that fell within the jurisdiction of the Army Corps of Engineers.

The District Court granted the injunction in August 1998 and ordered the EPA “and/or” DOT to prepare an Environmental Impact Statement addressing the construction and operation of the pipeline. Under the terms of the settlement, the plaintiffs have agreed to accept preparation of an Environmental Assessment (EA) by EPA and DOT. This EA will include an analysis of the affected environment and a consideration of alternatives to construction (such as re-rerouting the pipeline around environmentally sensitive areas), as well as alternative measures to mitigate any identified impacts. EPA and DOT expect the EA to be completed in a seven-month period. The Army will be a cooperating agency under the agreement. (MAJ DeRoma/LIT)

Environmental Law Division, U.S. Army Legal Services Agency, Quarterly Fines and Settlements Report, (1st quarter, 1999). This report is available upon request by emailing the author at: cotelrj@hqda.army.mil.

42 U.S.C. §7401, et. seq.

The Supreme Court first articulated this view in *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992), where it interpreted a congressional waiver of sovereign immunity for the Clean Water Act, 33 U.S.C. §1251, et. seq., which was similar to the CAA. The Supreme Court’s decision was formally extended to the CAA in *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).

One recent case required a detailed letter from the DoD Deputy General Counsel (Installations and Environment) explaining the concept of sovereign immunity to state regulators and addressing their erroneous assumptions about the immunity’s scope.

*M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc.*, 31 F. Supp. 2d 226 (D.P.R. 1998); 1998 U.S. Dist. LEXIS 19863 (Dec. 3, 1998).

42 U.S.C. §§ 9601-9675.

Plaintiffs were represented by Ms. Margaret Strand, a Washington D.C. practitioner familiar to many Army lawyers, through her educational activities.

42 U.S.C. § 9659(a)(1); CERCLA §310(a)(1). This note does not discuss the private defendant claims or the Federal Tort Claims Act count against the EPA.

See, Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

The EPA is required to review all remedial actions that result in hazardous substances remaining on the site no less than every five years after the remedial action is initiated. Such review is meant to assure that human health and the environment are being protected by the remedial action being implemented. 42 U.S.C. § 9621(c); CERCLA § 121(c). See also, 40 C.F.R. § 300.430(f)(4)(ii).

5 U.S.C. § 706.

42 U.S.C. § 9613(h); CERCLA §113(h) states:

No Federal court shall have jurisdiction under Federal Law . . . to review any challenges to removal or remedial action . . . , or to review any order . . . , in any action except one of the following:

- (1) An action under section 9607 of this title [CERCLA] to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- 3) An action for reimbursement under section 9606(b)(2) of this title.
- (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this [Act]. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

See, 42 U.S.C. § 9613(h)(2); CERCLA § 113(h)(2), *supra*, note 12.

M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc., 1998 U.S. Dist. LEXIS 19863 at \*22-23.

*Id.* at \*23, quoting, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995).

*Id.* at \*23.

*Spiller v. Walker*, No. A-98-CA-255-SS (W.D. Tx. 1999).  
42 U.S.C. §§ 4321-4370d.

MEMORANDUM FOR COMMAND COUNSELS  
CHIEF COUNSELS  
STAFF JUDGE ADVOCATES  
PROCUREMENT FRAUD IRREGULARITIES COORDINATORS  
PROCUREMENT FRAUD ADVISORS

SUBJECT: Procurement Fraud Advisors Update No. 38

1. **Message from the Chief, PFD:** On the personnel front, COL Robert C. McFetridge has been selected to be the Chief of Procurement Fraud Division (PFD) beginning in late June. COL McFetridge is currently in the senior service school position as the Department of Justice Fellow. The decision to fill this position with a senior service school graduate sends a positive message that the JAGC leadership is intent on maintaining a strong procurement fraud program. It is also a positive reflection on the job all you PFAs are doing in the field. The bottom line is, we are getting important results in important cases and it pays to invest in placing excellent people at PFD. Speaking of excellent people, we also received word that MAJ Kary B. Reed will be joining the PFD staff. MAJ Reed is currently a student in the 47<sup>th</sup> Judge Advocate Officer Graduate Course. She will be replacing MAJ Cheryl R. Lewis, who is awaiting word on her next assignment.

2. **Statutory Developments:**

a. The International Anti-Bribery and Fair Competition Act of 1998. Pub.L. 105-366, 112 Stat. 3302 (10 November 1998) amended the Foreign Corrupt Practices Act (FCPA), 15 USC § 78dd-1 *et seq.*, to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions negotiated last year. The FCPA was amended to expand the illicit purposes covered for giving anything of value to a foreign official or political party. The definition of foreign official was expanded. Coverage was also expanded to apply the prohibited conduct to foreign as well as domestic concerns. (Mrs. McCommas)

b. The Department of Defense Appropriations Act for Fiscal Year 1999. Pub.L. 105-262, 112 Stat. 2279 (17 Oct. 1998) contains a provision at Section 8052 which requires compliance with the Buy American Act in using appropriated funds. Firms violating the provision shall be debarred. Implementing regulations are being drafted by agencies.

c. Ethical Standards for Federal Prosecutors. Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Pub. L. 105-277, 112 Stat. 2681 (21

Oct. 1998) added a new provision at 28 USC § 530B stating that an attorney for the Government shall be subject to state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties to the same extent and in the same manner as other attorneys in that state. (See article in paragraph 5 of this *Update* for a complete discussion.)

### 3. Recent PFD Cases:

a. Computer Firm and Employees are Convicted and Debarred. Computer Systems Development Corporation (CSDC), Jose Luis Hernandez, Araselia Hernandez, Jose Jesus Hernandez, and Comtel International Corporation (Comtel) were convicted in the U.S.D.C., E.D. Va., and debarred by the Army for defrauding the Government under a CECOM contract for automation and telecommunications support. On 9 October 1998, Jose Jesus Hernandez pled guilty to one count of obstruction of proceedings before a government agency (18 U.S.C. § 1505) and was sentenced to probation and a fine. On 16 October 1998, each of the remaining three defendants was found guilty of all counts of the indictment to include: one count of conspiracy, 36 counts of major fraud against the Government, and one count of obstruction of proceedings. CSDC was sentenced to pay an assessment of \$10,200; a fine of \$10,000; and restitution of \$100,286. Mr. Martinez was sentenced to 27 months imprisonment to be followed by three years probation. Mrs. Martinez was sentenced to 21 months imprisonment to be followed by three years probation. The convictions were based upon inflated invoices for computer components. Special Assistant United States Attorney Major Denise Council-Ross served as trial counsel, together with AUSA Tom McQuillan. She received excellent support from NCIS Agent Alma Peterson, CECOM's Contracting Officer's Representative, Andrea Montedoro, and Senior DODIG Auditor Steve Silverstein.

b. Update on FMC Case: (See *PFA Update 35* for original report on the FMC case). During FY 1998, Army civil, criminal, and administrative recoveries, including judgments entered but under appeal, exceeded \$167 million. Approximately one half of the total resulted from a single case -- the Bradley Fighting Vehicle (Bradley) litigation. In 1986, Mr. Henry Boisvert (Relator) filed a *qui tam* lawsuit against FMC Corporation (FMC), his former employer. The complaint alleged that FMC knowingly misrepresented that the Bradley complied with contract specifications concerning its swim capability. After a four-month trial, in April 1998, a federal jury returned a verdict against the company for \$125 million in damages. Statutory penalties raised the judgment to over \$300 million. On 24 December 1998, the court reduced amount of the verdict and entered a judgment of slightly over \$87 million. In January 1999, FMC filed a notice of appeal. Subsequently, Mr. Boisvert filed a notice of cross appeal. (LTC Hoffman)

c. Tank Removal Contractor Debarred, Paul Calvo and LandRec, Inc. (LandRec). DA debarred Mr. Paul Calvo, president and owner of LandRec, for taking fuel without proper authorization and making false statements to CID concerning the theft. DA debarred LandRec based on imputation of

the misconduct of Mr. Calvo and affiliation with Mr. Calvo. LandRec sub-contracted with J.C. Construction Company (JCCC) to do some fuel tank removal work at Fort Jackson, South Carolina. LandRec was under contract to remove fuel and the fuel tanks adjacent to tank 1700 but was not contracted to remove any fuel from tank 1700. However, LandRec removed the remaining 10,000-gallons of fuel from fuel tank 1700, a 250,000-gallon fuel tank, without proper authorization or supervision, from Fort Jackson's Petroleum Oil Lubricants area. LandRec was also required to have someone from JCCC on hand to supervise all work LandRec performed. However, the fuel was removed from tank 1700 without any supervisory representative from JCCC on site. On several occasions government officials asked Mr. Calvo/LandRec to return the fuel. However, Mr. Calvo did not return the fuel until JCCC informed Mr. Calvo that he would not be paid \$10,000 until the fuel was replaced. Upon questioning by CID agents, Mr. Calvo repeatedly falsely claimed that individual government employees authorized him to remove the additional fuel. PFD thanks to PFA Robert Gay of Fort Jackson who assisted in preparing the case. (MAJ Lewis)

#### 4. Developing Issues in Procurement Fraud Cases:

a. Release of Information in *Qui Tam* Cases. The Procurement Fraud Division is currently involved in several cases in which a *qui tam* suit has been filed with the court and the United States has elected not to intervene as a party to the suit. This raises the question of what the Government's responsibility is in regard to the release of official information and the appearance of present and former DA personnel as witnesses in these cases. AR 27-40 is DA's regulation governing litigation, and Chapter 7 specifically addresses these issues.

The general policy is that the involvement of present or former DA personnel in private litigation is a personal matter, unless (1) the testimony involves official information (2) the witness is to testify as an expert or (3) the absence of the witness from duty will interfere seriously with the completion of a military mission. Present DA personnel will refer all requests for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser. Former DA personnel need only advise the appropriate SJA or legal adviser in instances involving official information or concerning expert testimony.

In instances concerning official information, the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested. If that individual is unable to resolve the matter, it will be referred for approval or action to HQDA, the Litigation Division. Matters involving procurement fraud, including *qui tam* cases, will be submitted to the Procurement Fraud Division. If the deciding official determines that the information may be released, the individual will be permitted to comply. Note that a JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army.

The general rule regarding expert testimony is that present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in

which the United States has an interest for a party other than the United States. Additionally, former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. There is an exception to the general rule if a requester can demonstrate exceptional need or unique circumstances and the anticipated testimony will not be adverse to the interests of the United States. Then Litigation Division may grant special written authorization. There are exceptions for medical personnel as well (Chapter 7-paragraph 10c).

Remember that even if the United States isn't a party to the suit, our responsibilities have not ended. (Sheryl Anne Butler)

b. More on DOJ Contacts with Represented Persons. The controversy continues between the American Bar Association, Congress, and the Justice Department on the issue of when DOJ attorneys may contact represented persons (and in particular, when DOJ attorneys may contact contractor employees without the knowledge of corporate counsel).

Rule 4.2 of the ABA Model Rules of Professional Conduct states that in representing a client, a lawyer may not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Most states and the District of Columbia have adopted similar rules. The Army follows ABA Rule 4.2 verbatim (*see* Rule 4.2, Army Regulation 27-26, Rules of Professional Conduct for Lawyers).

In 1994, the Justice Department issued its own regulation stating that DOJ attorneys could, in a number of circumstances, contact people they know to be represented by counsel (28 C.F.R. Part 77). In a case involving DOJ contacts with contractor employees, the 8<sup>th</sup> Circuit invalidated the Justice Department regulation, putting federal prosecutors in that circuit squarely under state ethics rules. U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (1998).

The Citizens Protection Act, supported by the ABA, the American Corporate Counsel Association, and the National Association of Criminal Defense Lawyers, seeks to codify the result in O'Keefe. The Act, which is due to become effective 19 April 1999, simply says that "an attorney for the government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State" (P.L. 105-277 § 801; 28 U.S.C. § 530B). On 19 January 1999, Senator Orrin Hatch introduced legislation (S.250) that would exempt federal prosecutors from complying with state ethics provisions that interfere with federal law enforcement. Time will tell whether Senator Hatch will be successful in derailing the Citizens Protection Act. The Act, if it becomes effective, is likely to make it more difficult to investigate procurement fraud cases. (Mr. Greenway)

c. Recovery of Funds under Army Contracts in Fraud Cases: Normally, restitution of funds, whether civil or administrative, are payable to the U.S. Treasury and deposited in the general fund, as required by Congress. Most funds are now electronically transferred to the U.S. Treasury and the Army is given credit for the funds, *if* the appropriate Army fund code is provided. Over the past ten years, PFD has made several unsuccessful attempts to get this process changed so the funds are returned direct to the losing installation.

One exception - where the contract is still open! Funds can be returned directly to the installation, *if* the required fund codes and accounting classifications are provided. This requires an Electronic Fund Transfer (bank wire code), installation bank account number, and the contract number under which the loss occurred. When funds are returned, the funds may have to be de-obligated for the FY in which they were spent and re-obligated for the current FY.

In one particular case, the AUSA sought PFD approval of a civil settlement. PFD approved the settlement, provided the funds would be returned direct to the losing installation, instead of the U.S. Treasury. When the AUSA was ready to distribute funds, PFD was unable to obtain and provide the bank wire code, bank account number, and accounting classification in order to return the funds to the installation.

It appears there may not be a consistent system and each installation may differ in the handling of these matters. Please work with PFD and your installation resource managers in finding ways to lawfully get funds back to defrauded commands. If you want money returned to the installation, not the U.S. Treasury, you need to provide PFD with bank wire code, account number, and accounting classification. (Ms. Proffitt)

d. Reporting Old Misconduct – An Obstacle to Debarment: In one case, the investigation took five years. Criminal prosecution was declined. Finally, in January 1999 (10 years later), a civil settlement was reached with the parent company which will pay about \$500,000. PFD may not be able to take any administrative action. The subsidiary, division, or branch, which did the misconduct, is no longer operating. The Suspension and Debarment Official is not likely to sign off on a case that old, or cases where the Army continues to do business with the firm. In such cases, contractors can claim they are presently responsible because Army continued to do business with them.

To assure the prompt completion of administrative actions, as soon as fraud is suspected, the contracting officer (CO) must notify the PFA who must provide a flash report to PFD. Second, the CO and PFA should coordinate, prepare and forward to PFD the report required by the Defense Acquisition Regulation Supplement (DFARS) 209.406-3. Documents substantiating evidence of misconduct must be attached to the report. Don't wait to see if criminal or civil action will be taken. PFD coordinates with the Assistant United States Attorney (AUSA) before any action is taken to insure the action won't interfere with AUSA's case. When the PFA or PFD requests an

investigation, the PFA must stay in the loop with all pertinent parties. PFAs should go with investigator to present case to criminal and civil AUSAs. The PFA must keep abreast of the current status and keep PFD informed on the case status. If any of you encounter a problem with coordination or cooperation, please let PFD know. (Ms. Proffitt)

e. Considerations in Debarment. Well, the investigation discovered fraud. The contracting command has pursued the available contract remedies. The U.S. Attorney's office has reviewed the case for criminal and civil prosecution. What's left to do? Should we debar the contractor from future government contracting? What factors do we consider when deciding whether to propose a contractor for debarment? Why do we sometimes decline to pursue debarment when we have clear evidence of fraud? Why do we need so much information about your case?

We need a "contractor". The FAR's debarment provisions define a "contractor" as a person or organization that 1) submits offers for a government contract or subcontract, 2) is awarded a government contract or subcontract, 3) *reasonably may be expected* to submit offers for a contract or subcontract, 4) *reasonably may be expected* to be awarded a contract or subcontract, or 5) conducts business with, or *reasonably may be expected to conduct business with*, the government on behalf of another contractor. Therefore, we need evidence that the person or business meets the definition before debarment is appropriate.

Debarment is not punishment. It is frustrating to spend time and money on an investigation, only to find that contract, criminal, and civil remedies are not available. It is tempting to view debarment as a means to avenge a wrong when nothing else can be done. But debarment is not designed to punish the wrongdoer; its sole purpose is to *protect the Government from contractors who are not presently responsible*.

Present responsibility. We look at several factors when considering whether a contractor, despite its wrongdoing, is one the Government should do business with in the future. How serious was the misconduct? How frequent was it and how long did it last? Does the contractor have a history of wrongdoing? Has the contractor accepted responsibility for its actions? Did the contractor voluntarily disclose the wrongdoing to the government? Did the contractor cooperate with the Government during the investigation and beyond? Has the contractor "made things right", by making restitution and by paying fines and penalties? Has the contractor disciplined the people involved? Has the contractor changed its organizational structure or taken remedial measures to prevent future misconduct? Did the Government continue to do business with the contractor long after learning of the misconduct (making it hard to argue that the contractor is not presently responsible)?

We need proof. A debarment proposal requires clear, documented proof of the misconduct. If we can't understand what happened, it is unlikely that others will. Sworn statements, relevant documents, and confirming/supporting evidence are best. Speculation or summary reports are not enough. Even with a conviction or a civil judgment, we need information about the facts of the case

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so the debarment official can make an informed decision. In some cases, debarment may not be possible when crucial evidence is tied up in grand jury proceedings. Finally, *the contractor gets a copy of all evidence supporting the debarment*; if you have evidence you do not want to disclose to the contractor, we cannot use that evidence for the debarment.

If we don't do it right, the Army can be sued. The contractor can ask a federal court to review the debarment decision. The debarment decision can be overturned if we have not followed the required procedures or if the decision is found to have been arbitrary or an abuse of discretion. If we lose in court, the Army may be liable for the contractor's legal fees. (Mr. Greenway)

5. **Contacting PFD:** PFD's current office roster with telephone numbers and e-mail addresses is attached. Mrs. Christine S. McCommas is the editor of the Update. She may be contacted at DSN 426-1542, at (703) 696-1542, or at [MccomCS@hqda.army.mil](mailto:MccomCS@hqda.army.mil).

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## **CONFLICT OF INTEREST ISSUES UNDER AN OMB CIRCULAR NO. A-76 STUDY**

1. With the increased use of competitive sourcing, it is imperative that all employees be aware of the conflict of interest issues that may arise in the course of conducting an A-76 Study and the corresponding source selection. Moreover, a recent General Accounting Office (GAO) decision makes it clear that an inadequate appreciation for this area can be the death knell for an A-76 competitive sourcing effort.

2. The purpose of this memorandum is to provide guidance regarding potential conflicts of interest in the performance of Commercial Activities Studies. This guidance provides general information to be used to avoid conflicts of interest and the appearance of any conflicts of interest in the conducting of a Commercial Activities Study.

### 3. Authority

- a. Office of Federal Procurement Policy Act, 41 U.S.C. 423
- b. FAR Part 3 – Improper Business Practices and Personal Conflicts of Interest
- c. FAR Part 7 – Acquisition Planning
- d. FAR Part 9 – Contractor Qualifications
- e. OMB Circular No. A-76 – Revised Supplemental Handbook, dated March 1996
- f. Department of the Army (DA) Pamphlet 5-20

### 4. Regulatory Guidance on Conflicts of Interest

#### A. FAR provisions:

1. FAR 3.101-1 – “Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.” (Emphasis added)

2. FAR 3.104-4 – Statutory and related prohibitions, restrictions and requirements

This provision incorporates 41 U.S.C. 423, the Procurement Integrity Act, into the FAR. FAR 3.104-4 sets forth prohibitions on disclosing procurement information, actions required when a Federal employee is contacted by a bidder or offeror and prohibitions on former Government employees from acceptance of compensation, including job offers, from a contractor under certain circumstances.

3. FAR 9.504 – Contracting officer responsibilities

- (a)(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
- (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

4. FAR 7.304 – Procedures

This section of the FAR provides at subsection 9(c)(3) that “(p)ersonnel who have knowledge of the cost figures in the cost estimate for Government performance shall not participate in the offer-evaluation process unless the contract file is adequately documented to show that no other qualified personnel were available.”

B. DA Pamphlet 5-20

1. Restrictions relating to possible conflict of interest

a. Source Selection Evaluation Board (SSEB)

(1). Members of the SSEB are precluded from performing activities related to the Management Study or the in-house cost estimate (Section 2-3c(4)).

(2). Employees who may be directly affected by the cost comparison decision cannot be a member of the SSEB.

(3). Members of the Management Study Team, the preparer of the in-house cost estimate, the preparer of the Independent Government Estimate (IGE) and members of the functions being studied cannot be a member of the SSEB (Sections 4-8(c) and 6-20(c)).

(4). The DA Pamphlet states that the individuals listed in the preceding paragraph can serve on the Source Selection Advisory Council (SSAC) but recommends that representatives from the MACOM serve on the SSAC in lieu of the listed individuals. This recommendation is based on the fact that participation on the SSAC usually would be considered “personal and substantial” if the participation involves ranking proposals and would, therefore, fall within the restrictions and prohibitions of the Procurement Integrity Act.

Providing general technical information about a functional area to the SSEB, however, may not be considered “personal and substantial” involvement. This would have to be decided on a case by case basis (Section 6-20(e)).

b. Administrative Appeal Board (AAB)

(1). Anyone involved or who took part in the cost study under appeal or directly associated with the function that is the subject of the cost study under appeal cannot be a member of the AAB.

(2). Anyone working in the activity or anyone having a spouse, children, parents, siblings or household members working in the activity in the cost study under appeal cannot be a member of the AAB.

(3). Anyone working for the command or organization having direct jurisdiction or control over the activity, which is the subject of the cost study, cannot be a member of the AAB (Section 7-6).

5. Statute – Restrictions on Conflict of Interest

A. Office of Federal Procurement Policy Act, 41 U.S.C. 423 (hereinafter referred to as the “Procurement Integrity Act”)

1. 41 U.S.C. 423(a) and (b) prohibit Government employees from disclosing or obtaining contractor bid or proposal information or source selection information prior to award. This applies to all Government employees participating in the preparation of a Performance Work Statement (PWS) or the development of a Most Efficient Organization (MEO). This section of the statute is implemented at FAR 3.104-5.

2. 41 U.S.C. 423(c) provides that an agency official who is participating “personally and substantially” in a procurement action in excess of the simplified acquisition threshold (currently \$100,000) and is contacted by a bidder or offeror involved in that procurement action regarding possible employment must:

- a. Promptly report the contact in writing to the official’s supervisor, and
- b. Reject the possibility of employment, or
- c. Disqualify himself/herself from further involvement in the procurement

This section of the statute is implemented at FAR 3.104.

3. 41 U.S.C. 423(d) addresses prohibitions on former Government employees from accepting compensation, including post-award employment, from contractors and will be addressed below with regard to the Right of First Refusal. This section of the statute is implemented at FAR 3.104(d).

#### 4. FAR 3.104-3 – Definitions

FAR 3.104-3 states at subparagraph (4)(iv) that an individual will not be considered to have participated “personally and substantially” in a procurement solely by participating in certain activities. Among the listed activities are procurements conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of the MEO analysis, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work or specifications. Based on the FAR definitions, these individuals would not fall under the restrictions of 41 U.S.C. 423(c), however, they may fall under the restrictions of 41 U.S.C. 423(d) regarding post-award employment.

B. Other relevant statutes are 18 U.S.C. 201 and 5 CFR 2635, which preclude a Government employee from participating personally and substantially in any particular matter that would affect the financial interest of any person from whom the employee is seeking employment.

6. In addition to the limitations and restrictions set forth in the statute and regulations set forth above, a recent GAO decision, DZS/Baker LLC; Knudsen Corporation, B-281224; B-281224.2; B-281224.4; B-281224.5; B-28122.6, dated 12 January 1999, held that the evaluation process was fundamentally flawed in a cost comparison study because 14 of

the 16 evaluators occupied positions that were subject to the study. In so holding, the GAO found that the precautions taken by the Government to ensure the integrity of the evaluation process were not sufficient to eliminate the inherent conflict of interest.

## 7. Right of First Refusal – Post-Employment Restrictions

a. FAR 7.305(c) requires the inclusion of the clause at 52.207-3, Right of First Refusal of Employment, in all solicitations which may result in a conversion from in-house performance to contract performance.

b. 41 U.S.C. 423(c) requires that Government employees who are “personally and substantially” involved in a procurement and are contacted by an offeror regarding possible employment, to report the contact and either reject the offer or disqualify themselves from the procurement. This statute does not affect the employee’s Right of First Refusal under the A-76 procedures as that right arises only after the contract has been awarded.

c. 41 U.S.C. 423(d) sets forth post-employment restrictions for Government employees who participate in procurements in excess of \$10 million in the following positions:

1. Procuring Contracting Officer
2. Source Selection Authority
3. Member of the Source Selection Evaluation Board
4. Chief of a financial or technical evaluation team
5. Program Manager
6. Deputy Program Manager
7. Administrative Contracting Officer

The restrictions set forth in this statute also apply to Government employees who make the following decisions:

1. To award a contract over \$10 million
2. To award a subcontract over \$10 million
3. To award a modification of a contract or subcontract over \$10 million
4. To award a task order or delivery order over \$10 million
5. To establish overhead or other rates for a contract valued over \$10 million
6. To settle a contract claim over \$10 million

These individuals are precluded from accepting compensation from the winning contractor on that procurement for a period of one year after performing such duties. There is no exception to this one year bar under the A-76 procedures.

Therefore, these Government employees lose their Right of First Refusal provided for under the A-76 procedures. This section of the statute is set forth at FAR 3.104-4(d).

This statute also sets forth restrictions on the ability of a former Government employee to represent a contractor in any action before a Government entity concerning any matter pending under the former employee's official responsibility during the last year prior to leaving Government employment.

d. Individuals who participate on a cost comparison review resulting in the award of a contract in excess of \$10 million fall within the restrictions set forth in 41 U.S.C. 423(d) and are barred for a period of one year after performing such duties from accepting any offer of employment from the contractor. This prohibition includes employment opportunities pursuant to the Right of First Refusal under the A-76 procedures.

Participation on either a MEO Development Team or a PWS Development Team would not, therefore, by itself, fall within the post-Government employment restrictions of 41 USC 423(d) and would not affect an employee's Right of First Refusal under the A-76 procedures.

e. OMB Circular No. A-76 – Revised Supplemental Handbook

The OMB Circular states at Chapter 3 – Cost Comparisons, subparagraph B(3) – The Cost Comparison Team, that:

“Procurement restrictions prohibit Federal procurement officials from subsequently working for a contractor on a procurement in which the procurement official was involved. “Procurement Official” in this sense includes personnel in the commercial activity who are directly and substantially involved in preparing or approving the PWS, management plan, the in-house estimate, or supporting the source selection evaluation process. (See FAR 3.104-4(h)(3) and 41 USC 423)”

At subparagraph B(3)(a), the OMB Circular states that:

“Employees who participate or provide data to support the development of the various study elements, but do not review, approve or have direct knowledge of the final PWS, performance standards, MEO, or in-house or contract cost estimates are not considered “procurement officials” and are not affected by this restriction.”

According to OMB, at a minimum, the following personnel are considered to be “procurement officials”:

1. certifying officials for the PWS and Management Plan
2. the Independent Review Officer
3. the individual who signs the Cost Comparison form
4. the Administrative Appeal Authority

It should be noted that the reference in the OMB Circular to FAR 3.104-4(h)(3) cited above is incorrect, as there is no such section in the FAR. The prohibition against post-Government employment is set forth at FAR 3.104-4(d) and incorporates the restrictions in 41 U.S.C. 423(d). The restrictions on post-Government employment included in the OMB Circular are broader in scope than those set forth in the statute or the FAR. As discussed previously, the statute and FAR restrictions apply only to individuals, in certain specific positions, involved in procurements in excess of \$10 million. The OMB Circular extends these restrictions to “procurement officials” who are not involved in the procurement process such as the individuals who certify the PWS and Management Plan, the Independent Review Officer, the individual who signs the Cost Comparison form and the Administrative Appeal Authority. None of these individuals would be prohibited from post-Government employment under the statute or the FAR unless they became involved in the procurement. However, these individuals clearly fall within the conflict of interest restrictions discussed previously and their involvement, if any, in actions related to the PWS or Management Plan would be limited by those restrictions.

f. Post-employment restrictions are also addressed at 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641. These provisions prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated “personally and substantially” while employed by the Government.

8. The point of contact in the Legal Office for this subject is Mr. James V. Scuro, DSN 992-9801.

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## Conferences and Meetings

Recently at the Army Research Laboratory, confusion of the requirements for obtaining conference approvals resulted in an IG complaint and scores of extra hours of work for both conference sponsors and reviewing attorneys. Although well below usual review thresholds, legal review of conference approvals is required by AMC-R 1-12, para 6b. As we shall see, the issues involved are complex enough to justify this.

What is a conference? Change 2 of the regulation defines conferences in the following manner:

...the term conference is defined as any formally constituted gathering to conduct, discuss, or exchanged opinion/ideas on a particular subject. This includes all symposiums, colloquia, meetings, workshops, seminars, and training conferences for which a program of instruction or a DD Form 1556 has been prepared. It does not include informally constituted gatherings to conduct, discuss, or changes opinions/ideas on a particular subject when the cost of per diem and travel of all participants is less than \$3000.

There are some several points of interest about this definition which should be considered.

- 1) What is meant by “formally constituted?” The regulation does not say. As a practical matter, I define it in terms of the program of instruction or DD Form 1556.
- 2) An informal meeting costing \$3000 or more would be covered.
- 3) Many of my clients, when dealing with costs, automatically think of contract costs. That is not the case here. We are dealing with per diem and travel. For the purposes of the definition, any contract costs are irrelevant.
- 4) Note that it is the per diem and travel of all participants, not just those of the sponsoring organization.

How to plan a conference. Most problems with conferences arise when the sponsor attempts to ram through an approval at the last minute. Para 5d of the regulation states that “No later than 1 September, activities will submit to the conference manager a schedule of all planned conferences for the next fiscal year. Individual justification statements will also be provided at that time.” Para 5c notes that approval may be requested for more than one conference at a time.

How to hold a conference. Change 1 to the regulation requires that use of the VENUS system always “be the first consideration when planning any conference.” If VENUS cannot be used, “the conference sponsor will provide (a) Justification for non-use of the VENUS...Network...[and] Conference attendees with the reason(s)...VENUS...is not being used for inclusion in block 16 of the attendees” travel orders.

Where to hold a conference. The regulation requires that the Conference Site Selection Model (CSSM) be used “for choosing the most cost-effective conference site...” the Army Research Laboratory has had this requirement waived as part of LabDemo. You will want to check your own guidance on this and other issues to determine what exactly applies to your command. Of course, even if you do not utilize the CSSM, you must demonstrate that the price you are paying for the conference is reasonable under the usual FAR standards.

Mention of the FAR brings up another issue. FAR 19.502-2 provides that all acquisitions between \$2500 and \$100,000 are reserved for small business unless the contracting officer is unable to obtain offers from two or more small business concerns

competitive with market prices and with regard to the quality and delivery of the goods and services being purchased.

This can be tricky in practice. You might think that most hotels would fit the definition of a small business. Most of those which meet our requirements, however, tend to be owned by large-business parents. If owned by franchise holders, a given hotel may yet be a small business. The point is that one must be aware of the requirement and document the disposition.

Coordination. In addition to the Legal Office, coordination is required with public affairs and security/intelligence staff elements (C2, para 4). I have noted a tendency for sponsors who are pressed for time to get the conference approved first, and then to do the coordination. This should be strongly discouraged. When changes are required to the package, it wastes time and puts the approving official in the embarrassing position of having approved an unsatisfactory package.

The regulation further deals with issues such as mementoes, social activities, guest speakers and registration fees. You should study both the AMC regulation and you own local implementation to fully understand your coordination and approval procedures. The perception, whether by an IG or the Washington Post, of government waste is always a cause for concern. By fully understanding the relevant regulations and educating your clients concerning them, you may be able to save them severe embarrassment.

## Contractors in the Workplace

Contractors are common in our Government work environment now - they may have offices in our building, work on our teams, and go on travel assignments. But they are contractors, not Government employees ñ and that creates some very practical differences in how we work and how we relate to these contractual partners.

### Avoiding Personal Services Contracts

Some background information on “personal services” contracts may be helpful. In general, we can’t award contracts that, either by their terms or in the way they’re administered, make the contractor personnel appear to be, in effect, Government employees. In addition, we can’t award contracts for performing functions that are considered to be “inherently governmental.” When a contract is awarded, a review process has taken place through acquisition and legal channels to ensure that the contract is appropriate, but it’s still important to administer the contract in such a way that it doesn’t turn into a personal services contract . (If it does, the results for the agency as well as the employees involved can be unfavorable indeed.)

1. The normal employee-supervisor relationship doesn’t exist. Although there may be Government personnel and contractor personnel working side by side, the Government supervisor does not supervise the contractor personnel. (Nor should contractor personnel supervise Government people.) Work assignments and taskings should go from the Government’s point of contact - usually a contracting officer, or contracting officer’s representative in some instances - to the contractor’s point of contact, not from a Government supervisor.
2. The work is governed by the contract. All taskings to a contractor must be “within the scope” of the contract - that means that we cannot ask the contractor to do anything that is not provided for in the Statement of Work. Government personnel have to be very careful not to make additions or changes to the Statement of Work without involving the contracting officer, who will negotiate those changes with the contractor. (Not only can this result in claims and litigation, but in severe legal and/or disciplinary action against the Government employee.) And concerns about how the work is performed are contract matters, not supervisory matters -- we cannot impose discipline on a contractor employee.
3. Contractor employees are not covered by the same rules, regulations, or bargaining agreements as Government employees. This can create a lot of confusion and hostility, so it’s important to understand. Frequently, contractors are paid to complete tasks or projects, not by time - so they do not necessarily have to keep the same working hours as Government people, nor do they have to account for their time on a Government timesheet. Sometimes contractors are paid for a certain number of hours of effort; in that case, contractor employees account for their time to their boss, and they might work a tour of duty that is different from that of Government people.  
In general, contractors and their employees have their own agreements and rules that govern their working relationship, not the bargaining agreements that Government people work under - for example, contractor employees may not be entitled to breaks when Government people are, or might be able to work flexitime or flexiplace in ways that Government people can’t. For the same reason, we should not ordinarily include contractor employees in office social functions or events (be sure to talk to your legal advisor first).

It's also important to understand that contractor employees aren't necessarily bound by DoD and Army regulations. For example, our Joint Ethics Regulation applies only to Government people, so we may need to have language in our contracts relating to conflicts of interest and gratuities, as circumstances dictate. Rules that prohibit the release of proprietary data only affect Government employees, so we either have to consider what data is available to contractors, or have provisions in their contracts relating to use and release of materials (more on this later).

On the other hand, some local installations have rules and regulations that apply to all people on the installation - such as traffic rules, or drug-free workplace rules, or zero-tolerance rules. In those situations, it's important that someone put the contractor on notice of all applicable regulations that will govern their behavior. (Remember, too, that some contracts provide that contractor personnel will visit other installations.)

### Preventing Ethics Problems

Although Government ethics rules don't apply to contractor personnel, they still apply to the Government people who interface with them, so it's important to have a good understanding of ethics rules. Most ethics questions in this area deal with gratuities and gifts.

4. We can't accept gifts from contractor personnel. By definition, contractors are "prohibited sources" - that is, they are entities that do business with the Government - so the rules concerning acceptance of gratuities apply. Food and refreshments that are not a meal (e.g. coffee and donuts) may be accepted. You may also accept presentation items, such as a commemorative coin, or items worth less than \$20. The \$20 limitation may also permit you to accept an occasional gift of travel (for example, a ride to the airport). But you may not accept more than \$50 worth of gifts from any one source in a year. Consult your ethics counselor advisor when something other than a nominal gift is offered.

There is an exception to the gift restrictions when the gift is based upon a personal relationship. In order for that exception to apply, that relationship should pre-exist the contract, and be outside the workplace context. If the relationship developed out of the contract relationship and responsibilities related to the contract, then the prohibition on gifts still applies. Nor does reciprocity justify the acceptance of a gift that is otherwise prohibited!

5. We can't solicit gifts from contractor personnel. The ethics rules permit Government employees to solicit contributions among themselves and give gifts to official superiors on special, infrequent occasions, like retirement. (Even here there are restrictions -- we can't solicit more than \$10 per employee, contributions must be entirely voluntary, and the value of the gift generally should not exceed \$300.) But we cannot solicit from contractor employees.

### Access to information

Contractors frequently need information in order to perform their job, and we have to consider ahead of time what kind of information they will need. We must be concerned about both purposeful and accidental disclosure of information they should not have access to. With contractors in our midst, we have to be sensitive to the kind of information we leave on our desks, talk about within earshot of contractor personnel, and discuss in meetings. An improper disclosure may violate federal law, with severe consequences to the person who released the information. Even when a law is not violated, improper disclosure can result in reduced competition, unfair competition, the appearance that the

process lacks integrity, protests and litigation, and even disqualification of the contractor for further awards.

Typically, access to classified information will be determined and cleared ahead of time. Other types of protected information generally fit into three categories: proprietary information; procurement integrity information; and personal information.

6. Restrict access to proprietary data. Many of us are familiar with technical data that is subject to license restrictions or proprietary legends; there may be problems with providing this technical data to contractors. We need to look at the agreement that the Government entered into when we acquired the proprietary TDP from the company that created it. For example, if the TDP was created by XYZ Corporation and is still proprietary to them, then XYZ is only allowing us to use it. If there are restrictions on viewing the data, then we must honor those restrictions. Even if we have the right to show the data to people outside the Government, we need to ensure that the contractor and its employees have signed nondisclosure agreements that will prevent them from passing that information to anyone else.

Technical data is not the only kind of information that can be proprietary. In general, we cannot give a support contractor access to information relating to the trade secrets, processes, operations, style of work, subcontractors, or other confidential statistical or financial data of some other person or firm, where the person or firm providing the information did not agree to the disclosure.

7. Restrict access to procurement integrity information. In general, we cannot release information that is

\*\*procurement sensitive (for example, how a source selection is done, who the Government's testers and evaluators are, how testing is performed and what the results are, how competitors were scored in evaluation, details about technical proposals, prices)

OR

\*\*"pre-procurement" -- the kind of information which, if given in advance, could result in a competitive advantage to a competitor. (examples: specific information about future requirements, what quantities the Government is going to buy, what type of performance the Government is looking for, what prices are expected) Remember, "advantage" can accrue simply by knowing these facts earlier and having more time to prepare a proposal.

We can "release" information in many ways - by including contractors in meetings in which acquisition plans are discussed, by giving the contractors information to prepare visual aids or briefing charts, even by simply permitting access to the information by failing to protect it. Be sensitive to whether a specific meeting, an action, or release of information would give a competitive advantage to a contractor. All similarly situated contractors should receive equal treatment.

8. Restrict access to information covered by the Privacy Act. Consider carefully what kind of access contractors will need to material subject to the Privacy Act (such as social security numbers and personnel files). A contractor's need for this kind of information poses an interesting dilemma for the Army. Under Army regulations, we may not disclose information protected by the Privacy Act without the prior written consent of the subject, except in limited circumstances.

One of those exceptions is that disclosure may be made to "officers and employees of DOD who have a need for the record in the performance of their duties." However, as we've discussed, a contractor employee is not an "officer or employee" of the Army. We cannot rely on this exception to justify disclosure of protected information to a contractor, even if the contractor needs the information to perform the contracted tasks.

Another exception to the general rule is that disclosure may be made when permitted by a routine use published in the Federal Register. To apply this exception, first identify the system of records. Then, refer to the published routine use statement to see if it's broad enough to permit disclosure to the contractor under existing circumstances.

There are several other exceptions that may apply in limited situations. Your Privacy Act Coordinator or attorney will be able to assist you with this. As a last resort, remember that a Privacy Act violation can be avoided if you obtain prior written consent for the disclosure from the employee.

#### Identification of Contractor Personnel

In meetings at which Government business is discussed, the government people need to know who is speaking to them, so that they avoid release of restricted data. They also need to know who the contractor people are so that they can take into account any potential bias when assessing what is being said, and to prevent an organizational conflict of interest for the contractor. Be alert to the potential for such a conflict - is the contractor proposing something for which it could receive a contract? Participation in some decision-related discussions can result in disqualifying the contractor's company for later awards. This is an area that needs to be discussed with your legal advisor.

9. Always identify contractor personnel. To prevent any improper disclosure of information, you should get into the habit of asking who is in the room at the beginning of meetings when sensitive information is going to be discussed.

#### Conclusion

Contractors are frequently crucial to the accomplishment of our mission, and can be valuable partners. But if we use the contractor's employees as if they were our employees or direct them to do various tasks without regard to the actual scope of work, we run the risk of running afoul of the rule against personal services, and the contractor might well have valid claims against us for equitable adjustments or even breach of contract. We also have to ensure that our contracts, task orders, and contract administrators don't put contractor employees into positions of performing inherently governmental functions, and that we don't provide access to Government or private information they shouldn't have. Consult your legal advisor/ethics counselor when you have questions or concerns!

TACOM-ACALA Legal Group, DSN 793-3998