



Office of Command Counsel Newsletter

December 1999, Volume 99-6

Revised EEOC Regulations Create New Challenges for AMC Labor Counselors

On 9 November 1999, the Equal Employment Opportunity Commission's (EEOC) regulations revising 29 CFR 1614 will go into effect.

According to the EEOC, all EEO matters, new and pending, will be processed under the new procedures on and after that date. Labor counselors must be prepared to face the new challenges posed by increased power being asserted by the EEOC and EEOC Administrative Judges.

Guidance is now available from a number of sources. Labor counselors have already been advised by e-mail and through the AMC Forum on JAGCNet that the EEOC is offering Technical Assistance Program Seminars (TAPS) designed especially for the Federal Sector throughout the country during November, December and January. Information and registration forms are available at <http://www.eeoc.gov/taps/fed.html>.

Labor counselors who were not able to attend OTJAG's 29 October 1999 VTC and who submit blank videotapes to AMCCC's Employment Law Team will receive a taped copy of the VTC as soon as it becomes available.

One of the most important changes to go into effect on 9 November will be that EEOC Administrative Judges will have the authority to issue decisions (including remedies and relief, if any) that will become final and binding if the Army does not issue a final order and file an appeal within 40 (forty) days.

Although only EEOCCRA will be authorized to file appeals, EEOCCRA will work closely with agency representatives, who will prepare draft versions of appeal briefs for review by MACOM legal offices and OTJAG as well as EEOCCRA.

Due to this need for increased coordination, **Ed Korte** announced in a memorandum dated 1 Novem-

ber (Encl 1), a requirement that any agency representative who is notified of an adverse decision from an EEOC Administrative Judge will notify the Employment Law Team within 24 hours. This can be accomplished by telephone or e-mail.

POC is **Linda B.R. Mills**, DSN 767-8049.

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Fair Use of Copyrighted Materials

The term “fair use” refers to a doctrine in copyright law in which certain limited copying of copyrighted material can occur without infringing the copyright. The fair use doctrine has gained importance in view of the increased ease with which copyrighted material can be, and is, accessed and copied. A particularly important factor in the increase in copying is the growing practice of downloading of material from the internet. Consequently, it is important for individuals to have a basic understanding of the fair use doctrine, and this article supplies a basic outline of that doctrine.

The doctrine of fair use has been codified at 17 USC §107. In fair use determinations, the statute favors certain purposes: criticism, comment, news reporting, teaching, scholarship and research. The statute clarifies that copying of an unpublished work does not automatically fall outside the scope of fair use. Finally the statute lists four factors to be considered when adjudging whether a given case of copying is fair use.

Purpose and Character of Use: whether the copier’s use is “productive”.

Nature of the Copyrighted Work: whether the work has been published.

Amount and Substantiality of the Portion Copied: for example, copying a 300 word paragraph from Tolstoy’s *War and Peace* would be fair use whereas copying a whole 300 word written joke would not.

Effect of Use on Copyright Owner’s Potential Market: to negate a claim of fair use, one only needs to show that if the challenged use were widespread, it would harm the potential market for copyrighted work.

The fair use factors are not exactly defined. Generally, a judicial decision in the fair use area of the law can be relied upon only for a very narrow, specific set of circumstances. Thus, it is impossible to set forth concise, clear, dependable and generally applicable rules pertaining to the doctrine. The local intellectual property counsel can assist in devising a copying strategy that falls within fair use parameters.

Thanks TACOM’s **David Kuhn**, DSN 786-5681 for providing this excellent resource (Encl 2).

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Check out the Newsletter on the Web at 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.

Contract Bundling Guidelines

Sallie Flavin, AMC's Assistant Chief of Staff for RDA provides for your information and widest dissemination the "HQ AMC Contract Bundling Guidelines" dated November 1999.

This document is a useful quick reference tool highlighting contract bundling in context of statutory/regulatory background, definition, required actions that need to be taken when faced with a bundling situation, and the aspects of justifying your bundling needs.

At the end of the document there are 12 common sense suggestions for you to consider and examine as alternatives in mitigating the impact on the small business community as a result of your bundling decision.

This document contains excerpts from SBA's Interim Rule on contract bundling dated 19 Oct 99, and should be used in conjunction with SBA's Rule and any internal procedural guidance.

For convenience and wider accessibility, we have also included the "HQ AMC

Contract Bundling Guidelines" within the respective websites of the HQ Small Business Office, RDA Acquisition Policy Division, and Command Counsel. The document can be retrieved at any one of the following sites: <http://www.amc.army.mil/amc/smlbus/index.html>

<http://www.amc.army.mil/amc/rda/rda-ap/contbund.html>

http://www.amc.army.mil/amc/command_counsel/newsletter.html (avail in Dec)

This document was produced in collaboration between the HQ Small Business Office and the RDA Acquisition Policy Division. Please keep in mind the information provided is subject to change upon issuance of SBA's final ruling.

Thanks to **Major Cindy Mabry**, DSN 767-2301, for providing the document to the AMC legal community (Encl 3).

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Acquisition Law Focus

A-76 Lessons Learned & Various Considerations in Commercial Activities Acquisition Efforts

The following lessons learned and information items were compiled based on discussions with Government representatives involved in recently completed and ongoing Commercial Activities (CA) acquisitions (Encl 4).

This information is being shared throughout the AMC community to assist those activities that are in the earlier phases of CA acquisitions.

We hope this document provokes critical thinking about the CA process, encourages productive discussion and information sharing, facilitates success in achieving CA objectives, and provides useful tips to help smooth some of the bumps in the CA road.

The nature of CA acquisitions makes them nearly universally contentious. However, planning, effective communications and the

commitment of adequate resources throughout the process will serve to reduce the occurrence of problems and better manage those problems and risks that can not be eliminated.

The enclosed document covers many areas. It divides the discipline into 5 separate major areas with several component parts to each:

Leadership & Teamwork

Ensure CA is a Priority
Early Preparation
Make it a Team Effort
from the Start
Team Composition
Key Players

Communications

It's a Two-Way Street
Keep the Lines of Communication Open
and Positive Security

Training

Timing Is Everything
Considerations
"CA 101" Training
Contractor Awareness
Conflicts of Interest

Process Considerations

Planning
Prioritize Work Efforts
Data Collection
Market Research
How many Solicitations?

Solicitation Phrase

90 Days is Probably Not Enough
Solicitation Document
Best Value Considerations Evaluation
Cost Realism Analysis and Most Probable Cost Adjustment
Conditional Award

POC is **Diane Travers**,
DSN 767-7571.

DOD FY 2000 Authorization & Appropriations Acts-- Summary

The enclosed summary was prepared by the HQ AMC Office of the Command Counsel and highlights many of the important provisions contained in the National Defense Authorization and Appropriations Acts for Fiscal Year 2000 (Encl 5).

Although both Acts consist of several hundred pages, we selected only those sections we believed would be of most interest to our clients.

The summary contains a brief explanation of each section; it is not intended as a detailed explanation of every requirement. If more information is desired about a section, HQ AMC personnel should contact the attorney listed at the end of the entry; other personnel should contact their supporting legal office.

POCs are **Bill Medsger, Lisa Simon, MAJ Ed Beauchamp, Diane Travers, Cassandra Johnson,** and **Dave Harrington.** Thanks as

well to **Elaine Timberlake** for her administrative efforts in bringing the paper together.

The paper is divided into 12 areas, with several components in each area:

- Military Benefits
- DOD Workforce Provisions
- Performance of Functions by Private Sector Sources
- Major Weapons Acquisition Programs
- Arsenals, Depots and Ammunition Plants
- Military Readiness Reports
- Acquisition Provisions
- Financial Management Provisions
- Research, Development, Test and Evaluation Provisions
- Chemical Agents and Munitions
- Real Property Provisions
- Miscellaneous

Fraud Update: New EO on Child Labor Use

AMC Procurement Fraud Advisor **Diane Travers**, DSN 767-7571, provides the latest DA PF Advisory (Encl 6). In addition to recent cases, the following EO is highlighted.

Executive Order 13126 restricts the Federal Government's purchase of goods made by forced or indentured child labor. The order resulted from evidence that use of child labor is steadily rising and concerns that child slavery remains a serious problem.

The order directs the Labor Department to publish within 120 days a list of products, identified by country of origin, for which there is a "reasonable basis to believe have been mined, produced, or manufactured by forced or indentured child labor."

Whenever a contracting officer determines that forced or indentured child labor has been used to produce one of the products the contracting officer must refer the matter for investigation.

The head of the agency may terminate a contract or suspend or debar a contractor that has furnished products that have been mined, produced, or manufactured using forced or indentured child labor.

Acquisition Law Focus

GAO Protest Statistics

Cases Filed FY 99: 1,268

Cases Filed FY 98: 1,566

Sustain Rate FY 99: 22%

Sustain Rate FY 98: 16%

ADR Cases Fy 99: 81

ADR Cases FY 98: 53

ADR Success FY 99: 93%

ADR Success FY 98: 83%

Hearings FY 99: 9%

Hearings FY 98: 13%

A-76 Lessons Learned Web Sites

<http://www.acqnet.sarda.army.mil/acqinfo/lsnlrn/index.htm>

<http://www.hqda.army.mil/acsimweb/ca/lessons/default.htm>

<http://www.hqda.army.mil/acsimweb/ca/lesson1.htm>

<http://www.afmc-mil.wpafb.af.mil/HQ-AFMC/XP/XP M/xpms/a76/lessons.htm>

GAO Protest Decision Highlights--12 Issue Areas

The AMC Protest Litigation Branch, headed by **Vera Meza**, DSN 767-8177, provides an excellent compendium of significant GAO Protest decisions (Encl 7).

Issues covered include:

Documentation of evaluation and source selection record:

Adequate documentation of evaluation and source selection decisions continues to be critical. GAO may give little weight to post-protest evidence unless it represents the memorialization of pre-protest analyses or judgments.

Evaluations and Tradeoffs

Agencies must evaluate proposals in accordance with the terms of the solicitation.

Past Performance evaluations

Downgrading an offeror's past performance rating simply because the offeror has filed claims or protests is impermissible.

Cost Realism Evaluations

Competitive Range

Even under the FAR 15 rewrite, a competitive range of one is permissible.

Discussions

Particularly in the context of enhanced oral and written communication **between** agencies and offerors, the legal requirements regarding discussions have become increasingly important.

Task and Delivery Orders

Must be within the scope of the contract.

Commercial item acquisitions

Simplified Acquisitions/Schedules

Other Ordering Issues

Bundling

A-76 Competitions

Three significant GAO decisions are reported, one addressing the right of private sector offerors to a debriefing if they are not selected for comparison with the in-house offer.

Prejudice

A protestor must demonstrate a reasonable possibility that it was prejudiced by the agency's actions.

Labor-Management Partnership Reaffirmed by the President

On October 28, 1999, President Clinton issued a Memorandum entitled, "Reaffirmation of Executive Order 12871 (Encl 8). It can also be viewed on the Web at

<http://www.whitehouse.gov/library/PressReleases.cgi?date=1&briefing=8>

The memo advises that the President is proud of the many labor-management partnership successes but is also convinced that we can do even more. He directs agencies to develop a plan with their unions at appropriate levels of recognition for implementing the memo and the Executive Order. The plans should help the agency and its employees deliver the highest quality service to the American people. The President again encourages parties to resolve disputes through consensus using interest-based problem solving techniques.

Additionally, agencies are directed to report to the President, through OMB, on the progress made toward achieving the goals of the memo and the Order. These reports must be submitted annually with the first due April 14, 2000.

The reports have to describe the nature and extent of efforts to comply with the Order, and identify specific improvements in customer service, quality, productivity, efficiency, and quality of worklife achieved through partnership.

OPM will analyze the reports and, in coordination with OMB, advise the President on further steps that might be needed to ensure successful implementation of the Order and this memo.

Undoubtedly, OPM, OSD and HQ DA will be issuing additional guidance once it is determined the type(s) of report(s) that will be generated from OSD.

FLRA Issues Negotiability Appeal Guide

The Federal Labor Relations Authority has issued the subject guide. For those interested in reading the steps of a negotiability appeal and the requirement of the various filings, this is the document for you. It is available at

http://www.flra.gov/reports/ng_guide.html

Keep in mind that activity representatives wishing to declare a proposal nonnegotiable should first coordinate with their MACOM.

Written declarations of nonnegotiability should only be provided in response to written requests by the union. These declarations must be issued within 10 days of receipt of the union's request.

AMCCC continues to work closely with the field and with HQ DA. With CPO regionalization reducing the CPAC staffs, AMC labor counselors are now more involved in all labor-management relations issues.

Employment Law Focus

MSPB Wants *You* to Know: the Consequences of Filing a Grievance or A Board Appeal on the Other

In a November 1, 1999 Federal Register notice, the Merit Systems Protection Board (MSPB) proposed to change its rules, and require agencies to notify employees of the consequences of choosing between grievance procedures and the MSPB appeal procedure.

Oftentimes, employees have the right to file a grievance or an MSPB appeal, but may not pursue both.

An example of this is when an employee challenges a conduct-based adverse action under 5 U.S.C. 7512, or an action based on unacceptable performance under 5 U.S.C. 4303.

The employee's choice of procedure is determined by which he files first. If she or he chooses to file a grievance, he may not later initiate an MSPB appeal, and vice versa.

The Board wants to make sure employees know all of their options, and the significance of choosing one over the other, by requiring agencies to state this explicitly in the notice letters they must provide to employees against whom they take an appealable action.

The Board's proposed rule is contained in the Federal Register, Vol. 64, No. 210, pp. 58798-99. Comments to the proposed rule are due by January 3, 2000.

FLRA GC on Developing a Labor-Management Strategic Plan

The Office of the General Counsel, the Federal Labor Relations Authority has made available to all an excellent document, "Guidance on Developing a Labor Relations Strategic Plan (Encl 9). This Guidance is divided into four parts:

- (1) What is a labor relations strategic plan and why is it necessary?
- (2) Assessing your current labor relations strategy: what is it and is it successful?
- (3) How do labor and management develop a strategy to meet their goals?
- (4) Approaches to implementing a successful labor relations strategic plan.

The Guidance also includes two appendices, which set forth agendas for an internal strategy development program and a joint strategy development program.

FSIP on Dispute Resolution

The Federal Service Impasses Panel has issued an excellent guide to their dispute resolution procedures, covering five different commonly used processes, but

also including a section on jurisdictional questions, and a narrative highlighting the responsibilities of the parties to participate in good faith (Encl 10).

Environmental Law Focus

Treatise: Mining, Mineral Leasing & Energy Production...On Army (and Surplus Army) Lands

IOC counsel **Geraldine Lowery**, DSN 793-5932, provides us an excellent case study on the issue of mining, mineral leasing and energy production on Army lands and surplus Army lands (Encl 11).

Enclosed is the Table of Contents and the Background and Conclusions sections of the opinion. Please contact Ms. Lowery if you wish for a copy of the detailed analysis.

The document contains an excellent summary of the two types of authority over Federal lands, and describes

the two types of Federal property. The various relevant statutes, Code of Federal Regulations, and DOD and DA implementing regulations are also addressed.

There are two principle questions addressed. The first question is under what circumstances may military controlled lands [non-civil works] be purchased for mineral exploration and extraction. The second question is under what circumstances may one use, without purchasing, military controlled land for mineral exploration and extraction.

AMC Forum: Where To Get Environmental Legal Documents

The Environmental Law Team has restructured the Environmental Document Repository, in the AMC JAGCNET Forum to establish fifteen subject matter subcategories.

A number of standard reference documents have already been posted, and more will follow. When you need environmental reference material, take a look in the AMC Document Repository. Also, if you have good reference documents to add, contact either **Bob Lingo** or **Stan Citron**.

ELD Bulletins: Sept & Oct 1999

Environmental Law Division Bulletins for September (Encl 12) and October 1999 (Encl 13) are provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

Environmental Law Focus

DOD FY 2000

Authorization Act: Seeking Congressional Approval to Pay Penalties \$\$\$\$\$\$\$\$

The Defense Authorization Act for FY 2000 includes a provision that requires the Department of Defense to request and receive Congressional authorization before using FY 2000 funds to pay fines and penalties, including Supplement Environmental Projects (SEPs).

This provision does not change the Army's requirement to comply with environmental statutes and regulations. However, Congress must specifically authorize payment of any agreed penalties or SEPs. DoD has recently issued guidance on seeking such authorization (Encl 14). Further Army implementing guidance will follow.

Improving Your Environmental Compliance

USEPA and the Chemical Manufacturers Association (CMA) have published the "EPA/CMA Root Cause Analysis Pilot Project Report." This examines the underlying causes of environmental violations in federal civil enforcement cases. The leading causes for non-compliance included individual responsibility and lack of awareness of regulatory requirements. Perhaps some of their findings and recommendations could help our compliance program. Can be downloaded at <http://www.epa.gov/oeca/ccsmd/>

The US Army Environmental Center Environmental Compliance Assessment Team (ECAS) publishes a series of 13 User's guides, which contain environmental compliance requirements assembled by function area. Guides can assist installation operators to perform self-checks on related to their activity. These are available on DENIX: <http://www.denix.osd.mil/denix/DOD/Library/Guides/series.html>

AMC Environmental Restoration Program Management Review Workshop

The AMC Environmental Office held an excellent Conference and Workshop on the environmental Restoration Program for active sites. Material from the Workshop will

be posted on the AMC Forum Environmental Documents Repository. Enclosed is a presentation by Mark Connor, of the Army's Office of General Counsel on Land Use Control (Encl 15).

Employee Holiday Celebrations

We are approaching that time of the year when AMC employees plan and prepare their office celebration during the holiday season.

Such celebrations raise ethics and related type of issues — there are some absolute rules... but, in many cases, the issues involve the application of “**Judgment!**”

”The AMC Ethics Team of **Mike Wentink**, **Alex Bailey** and **Stan Citron** contribute an excellent paper that addresses several important issues in planning and administering a holiday celebration (Encl 16).

Among the many issues covered are:

O Official Time: Brief times to plan a luncheon or to coordinate with a restaurant would be allowable.

O Fundraising: The general rule is no fundraising but there are exceptions. It is wrong to solicit outside sources or to raise money through a raffle. The paper addresses a course of action to meet one exception: the DOD JER permits an organization of employees to raise money among their own members when approved by the head of that organization

after consultation with an ethics counselor.

O Participation of Contractor Personnel: They can attend, Whether the contractors’ employees can take the time off to attend, and the nature of the time off (e.g., leave, personal day, administrative absence) are between the contractor and its employees.

When a contractor’s employee is absent, the contractor cannot bill for services not delivered, and may have concerns about such issues as contract schedules, delivery dates, and other matters.

Accordingly, it is the contractor that must decide if and under what conditions one or more of its employees may be absent.

O Exchanging Gifts: There can be a gift exchange, but there are several limitations.

We may have a gift exchange among employees. If it is an anonymous-type exchange, a reasonable value should be established for the individual gifts. If it is not anonymous, i.e., each employee knows for whom they are buying a gift, a value of not to exceed \$10 is the limit.

You Can Accept Official Travel Expenses From a Non-Federal Source, But...

Under certain conditions outlined in the GSA Travel Authority, 31 U.S.C. § 1353, and Government Employees Training Act, 5 U.S.C. § 4111, a DoD employee may accept payment from a non-Federal source for official travel and attendance at a meeting or training event.

The CECOM Legal Office provides an excellent preventive law memorandum outlining the specifics (Encl 17).

The paper discusses the general conditions whereby acceptance of payment is appropriate. Importantly, there is an important reporting requirement with which an employee must comply. If the traveling employee received more than \$250 worth of in-kind benefits or payments to the U.S. Army, the employee must complete and sign a report outlining the travel and payments through their travel approving authority to an ethics counselor in the Legal Office.

The paper includes a copy of the reporting form they use at CECOM.

Conflicts of Interest for SSEB Members:

In the spirit, and to show the benefits, of cross-discipline communication, Protest Litigation Branch chief **Vera Meza** sent the following case to Ethics Team chief **Mike Wentink**.

The protest is against the cancelation of an A-76 solicitation to perform civil operations and maintenance services at Wright AFB. The cancelation was after the SSEB reviewed initial technical proposals and revised technical proposals. The 16 evaluators concluded that the proposals were technically unacceptable, and accordingly the agency decided to implement the MEO.

Offerors Complaint

The offerors complained that the evaluation was not fair because 14 of the 16 agency evaluators held positions that were part of the A-76 study. The Comptroller General agreed that the evaluation process was fundamentally flawed and that there was a conflict of interest that could not be mitigated and sustained the protests!

Mr. Wentink does not note see a single reference to 18 U.S.C. Sec. 208 or 5 C.F.R.

Sec. 2635.402 that prohibits employees from participating in official matters in which they have a financial interest. Of course, the obvious financial conflict of interest here is waived by 5 C.F.R. Sec. 2640.203(d) which exempts financial interests arising from Federal Government employment as long as the employee does not make determinations that individually or specially affects his or her own salary and benefits... at least, Mike assumes this would have been the rationale for letting these employees participate in the evaluation.

GAO Focus

The Comp. Gen.'s focus and rationale is the FAR, specifically FAR Part 9 (Contractor Qualifications), Subpart 9.5 (Organizational and Consultant Conflict of Interest).

The Comp. Gen. starts out with the general FAR standards of conduct at 3.101-1 that transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct, and we must avoid any actual or appearance of a conflict of interest. But, since there are

nothing further that would address this type of situation (again, the Comp. Gen. does not address the law or OGE regulations), it turns to FAR subpart 9.5 that "addresses analogous situations involving contractor organizations... does not apply to government agencies or employees, we believe that in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR 3.101-1, FAR subpart 9.5 is instructive...".

An additional problem

Accordingly, it would seem that we have an additional problem here when looking for members of the SSEB or other evaluators. We have been concerned about the employees and their future job prospects, such as whether their participation in the A-76 process might interfere with their right of first refusal, and similar issues. Well, it seems that there is an even more basic issue, an issue that is going to be resolved under the Organizational Conflict of Interest standards as set out in the FAR.

Happy Holidays and a
Great New Year
to the
AMC Legal Community
from the
Office of Command Counsel

***...And remember: Only 1-year until
the new millenium!!***

Faces In The Firm

Hello &...

AMCOM

Kathryn R. Shelton joined Branch C, Acquisition Law Division on 12 October 1999. Kathy came to us from the City of Huntsville District Attorney's Office.

Wesley G. Smith joined Adversary Proceedings Division on 25 October 1999. Wes was previously employed with the UAW Legal Services Plan.

TACOM-Warren

Andrew Starr joined the staff of the Business Law Division at TACOM-Warren on 26 Oct 99. A member of the State Bar of Michigan, Andrew is a recent Cum Laude graduate of the Detroit College of Law at Michigan State University. In addition to a distinguished legal education, which included honors in Research, Writing and Advocacy, he is also a Magna Cum Laude graduate of Wayne State University.

CECOM

Michele L. Parchman will join Business Law Division C, Fort Belvoir Branch, in December 1999. She comes to us from the SJA Office, US Army Garrison, Fort Belvoir, Virginia, where she worked as a Labor Counselor since January 1997.

...Goodbye

AMCOM

CPT Erica Cain left the Office of Staff Judge Advocate on 19 November 1999 for her new assignment in San Antonio, TX.

CECOM

Margaret Gillen retired after more than 18 years of federal service at Fort Monmouth. The last eight years of Ms. Gillen's service were devoted to providing direct legal assistance services to soldiers, sailors, airmen, Marines, Coast Guardsmen and their family members. We wish Ms. Gillen the best in her future endeavors.

Don Hankins Retires after 30 years at Huntsville

Don Hankins, General Law Division, retired on 29 October 1999 after 30 years of government service. Don spent his entire government career in the AMC Huntsville legal office. Congratulations to Don and best wishes on his retirement.

You can not state in a few words what the loss of **Don Hankins** means to the AMC legal community. 30 years of dedicated service in the areas of employment law, ethics and the other general law and administrative law areas, covers an incredible era of change in AMC and in the law. Don met each challenge with intelligence, creativity and hard work. Best wishes Don.

Birth

AMCOM

Genevia Fontenot, Branch E, Acquisition Law Division, and her husband welcomed baby daughter, Maya Amaka, on 7 October 1999. Maya weighed in at 9 pounds and 11 ounces and was 21 inches long.

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Guidance on Implementation of Revised EEOC Regulations

1. On 9 November 1999, the Equal Employment Opportunity Commission's (EEOC) regulations revising 29 CFR 1614 will go into effect. According to the EEOC, **all EEO matters, new and pending, will be processed under the new procedures on and after that date.** Labor counselors must be prepared to face the new challenges posed by increased power being asserted by the EEOC and EEOC Administrative Judges.
2. Guidance is now available from a number of sources. Labor counselors have already been advised by e-mail and through the AMC Forum on JAGCNet that the EEOC is offering Technical Assistance Program Seminars (TAPS) designed especially for the Federal Sector throughout the country during November, December and January. Information and registration forms are available at <http://www.eeoc.gov/taps/fed.html>. Labor counselors who were not able to attend OTJAG's 29 October 1999 VTC and who submit blank videotapes to this office will receive a taped copy of the VTC as soon as it becomes available.
3. This memorandum transmits interim guidance issued by the EEOC on 15 October 1999. The EEOC's guidance does little more than emphasize EEOC's determination to immediately apply the new procedures to all new and pending cases.
4. On 26 October 1999, the EEO Compliance and Complaints Review Agency (EEOCCRA) faxed detailed implementation guidance to MACOM EEO Offices. A copy of that guidance, with a 22 October cover memo, is also attached. EEOCCRA's guidance was coordinated with OTJAG's Labor and Employment Law Division (DAJA-LE) and with Mr. Ernie Willcher, DA OGC. During the early days of implementation, EEOCCRA's guidance is likely to be of considerable importance as a quick and easy reference. Please note that Section VII emphasizes the role of the labor counselor.
5. EEOCCRA's guidance makes many references to the **draft** version of the new EEOC MD-110, a copy of which is attached. We have been advised that the EEOC views this draft as a "living document" subject to change. There are currently a number of provisions which are totally unacceptable to the Army legal community, including the concept that an attorney who provides advice on pre-complaint processing or settlements

at the informal stage cannot later serve as the agency representative on the same complaint. Even if this provision survives EEOC's next round of revisions, we would expect to resist implementation on the grounds that EEOC MD-110 does not have the force and effect of law, and there is no other legal basis for disqualifying the labor counselor.

6. Over the course of the next few months, my Employment Law Team will keep labor counselors advised of important developments related to the new regulations. At a minimum, we expect more teaming between labor counselors and EEO specialists, an increased emphasis on timely processing at the formal stage, a greater need for early discovery, and a new working relationship between agency representatives and EEOCRA analysts.

7. One of the most important changes to go into effect on 9 November will be that EEOC Administrative Judges will have the authority to issue decisions (including remedies and relief, if any) that will become final and binding if the Army does not issue a final order and file an appeal within 40 (forty) days. Although only EEOCRA will be authorized to file appeals, EEOCRA will work closely with agency representatives, who will prepare draft versions of appeal briefs for review by MACOM legal offices and OTJAG as well as EEOCRA. Due to this need for increased coordination, **I am immediately implementing a requirement that any agency representative who is notified of an adverse decision from an EEOC Administrative Judge will notify my Employment Law Team within 24 hours.** This can be accomplished by telephone or e-mail. Additional instructions will be issued to labor counselors during the coming weeks.

8. My POC for this matter is Linda B. R. Mills, DSN 767-8049. As usual, Linda will be issuing more detailed guidance directly to labor counselors via e-mail and the AMC Forum.

9. AMC -- Your Readiness Command . . . Serving Soldiers Proudly

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as

EDWARD J. KORTE
Command Counsel

FAIR USE OF COPYRIGHTED MATERIAL

The term “fair use” refers to a doctrine in copyright law in which certain limited copying of copyrighted material can occur without infringing the copyright. The fair use doctrine has gained importance in view of the increased ease with which copyrighted material can be, and is, accessed and copied. A particularly important factor in the increase in copying is the growing practice of downloading of material from the internet. Consequently, it is important for individuals to have a basic understanding of the fair use doctrine, and this article supplies a basic outline of that doctrine.

The doctrine of fair use has been codified as follows at 17 USC §107:

107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in a particular case is a fair use the factors to be considered shall include - -

- (1) the purpose and character of use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In fair use determinations, the statute favors certain purposes: criticism, comment, news reporting, teaching, scholarship and research. The statute clarifies that copying of an unpublished work does not automatically fall outside the scope of fair use. Finally the statute lists four factors to be considered when adjudging whether a given case of copying is fair use.

However, the statute is by no means a complete statement of the fair use doctrine. For one thing, it does not overrule or displace any judicial law, but is intended as a restatement of that law. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976). Further, Congress intended the courts to continue the judicial tradition of fair use adjudication. *Campbell v. Acuff-Rose Music*, 510 US 569 127 L Ed 2d 500, 29 USPQ 2d 1961 (1994, US). Additionally, the listed fair use factors are neither all-inclusive nor are they exactly defined. *Nimmer on Copyright § 13.05[A]*. For these reasons, knowing judicial law on fair use is necessary despite the existence of the statute. In fact, *Nimmer, at §13.05[A][5]* views the four factors as being so elastic as to be of doubtful value in resolving the more difficult fair use questions. Nonetheless, a discussion of the four fair use factors follows. This discussion gives a general background of fair use and hopefully alerts readers to cases where legal advice is needed before using copyrighted material.

First Factor – Purpose and Character of Use

A number of sub factors affect the character and purpose of copying, the first being whether the copier's use is "productive." Copying is productive if it adds value to the original work, whereas merely reproducing part of a work tends not to be fair use. Generally speaking, if the copied material is blended into a further work, there is a "productive use" that contributes favorably to a finding of fair use. A second sub factor is whether the copier's work performs the same function as the original work. If the copier's work performs a different function, there is a greater likelihood that the copier's work is fair use. For example, where the original work is a song sheet for use in musical performances, printing the song's chorus lyrics in a literary magazine article is not for the same purpose and is deemed fair use. See *Karll v. Curtis Publishing Co.* 39 F Supp 836, 51 USPQ 50 (ED Wisc 1941). A third sub factor is the propriety of the copier's purpose. If the copier is responding to unjustified behavior on the part of the copyright owner, then a finding of fair use is more likely. See *Key Maps v. Pruitt*, 470 F Supp 33, 203 USPQ 282 (1978 SD Texas). Additionally, if the copyrighted work contains inaccurate, unfair or derogatory information, the fair use doctrine tends to expand for the purposes of comment and critique. In contrast, is possible for a defendant's inappropriate behavior to defeat the fair use defense, as where a defendant obtains the copied material by foul means.

The aforementioned sub factors are to be considered in addition to the fact that 17 USC § 107 broadens the fair use defense where copying is for the purposes of criticism, comment, news reporting, teaching, scholarship and research. Another general rule is that commercial use of copyrighted material has a strong tendency to be outside the scope of fair use.

Second Factor – Nature of the Copyrighted Work

One key sub factor in the nature of a work is whether the work has been published. Generally, the author's right to control the first publication of a work overrides an attempt at a fair use defense. Another sub factor is whether the work is a factual work, as opposed to a work of fantasy or fiction. The scope of permissible fair use is greater with respect to factual works, which are considered normally to have less creativity than works of fantasy or fiction. Within a factual work, the scope of fair use is more limited as to analysis and conclusions than to purely informational statements. A third sub factor is whether the work is readily available. Generally, a fair use defense is less likely to succeed where the copied work is not out of print or is otherwise commercially available.

Third Factor – Amount and Substantiality of the Portion Copied

On aspect of this factor is simply the proportion of the copyrighted work that is copied. The outer limits of this aspect can be illustrated by noting that copying a 300 word paragraph from Tolstoy's *War and Peace* would be fair use whereas copying the whole of a 300 word written joke would not.

Generally, the proportion of a work that may be copied within fair use varies more with the nature of the work and the character of the portion that is copied, so that a purely quantitative analysis of copying is a poor predictor of what will be considered fair use. For example, copying about 1.4 % of a published magazine article was deemed fair use in *Consumers Union of the US v General Signal Corp* 724 F2d 1044, 221 USPQ 400 (2d Cir 1983), whereas copying about one-tenth this percentage of unpublished letters was not fair use in *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 85 L Ed 2d 588, 225 USPQ 1073 (1985, US). As another example, copying four “signature” bars of a song was not deemed fair use but copying 15 seconds of a song for a political advertisement was deemed fair use. See *Robertson v Batten, Barton, Durstine & Osborn, Inc.* 146 F. Supp 795, 111 USPQ 358 (1956 DC Cal) and *HustlerMagazine, Inc. v Moral Majority, Inc.* 606 F Supp 1526, 226 USPQ 721 (1985 CD Cal).

The proportion of an allegedly infringing work that is comprised of copied material can also be a factor in determining whether there is fair use. Thus, if this work is made up largely of copied material, there is evidence of the substantiality of the copied material and fair use is less likely to be found. However, the fact that copied material is a small proportion of the allegedly infringing work will not aid a claim of fair use. *Harper & Row, supra*.

Fourth Factor – Effect of Use on Copyright Owner’s Potential Market

General Rule: To negate a claim of fair use, one only needs to show that if the challenged use were widespread, it would harm the potential market for copyrighted work. One considers not only harm to potential marketing of the original work, but also harm to potential marketing of derivative works. *Harper and Row, supra*. “Potential” is a key word in that the copyright owner’s **opportunity** to profit is protected.

In considering the effect of the copier’s actions on the potential market, the law looks only to the copier’s use of copyrighted material, and not any associated uncopied material. The copier’s disparaging or unfavorable reference to the copyrighted work is not a factor in fair use determinations, although libel and slander may be a separate ground for relief.

Conclusion

As noted above, the fair use factors are not exactly defined. Generally a judicial decision in the fair use area of the law can be relied upon only for a very narrow, specific set of circumstances. Thus it is impossible to set forth concise, clear, dependable and generally applicable rules to discern when the fair use doctrine applies. Obviously though, the fair use doctrine does apply to many instances of copying, and your local intellectual property counsel can assist in devising a copying strategy that falls within fair use parameters.

HQ US ARMY MATERIEL COMMAND

“CONTRACT BUNDLING GUIDELINES”

NOVEMBER 1999

NOTE: This document contains excerpts from SBA’s Interim Rule dated 19 Oct 99. The information provided is subject to change upon issuance of SBA’s final ruling. This document was produced in collaboration between the AMC Small Business Office and the Acquisition Policy Division.

DEFINITION:

Public Law 105-135 (Small Business Reauthorization Act of 1997)

The term “bundled requirement” or “bundling” refers to the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern due to –

- The diversity, size, or specialized nature of the elements of the performance specified;
- The aggregate dollar value of the anticipated award;
- The geographical dispersion of the contract performance sites; or
- Any combination of the above.

GUIDANCE:

- Sections 411 – 417 of the Small Business Reauthorization Act (Public Law 105-135)
- Honorable John P. White, Deputy Secretary of Defense, Policy Statement Memo dated 28 Oct 96

The statutory amendments recognize that the consolidation of contract requirements may be necessary and justified, in some cases, but require that each Federal agency, to the maximum extent practicable, take steps to avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation as prime contractors as well as to eliminate obstacles to small business participation as prime contractors.

DECISION TO BUNDLE:

In accordance with AFARS 19.202-1(a)(1): “If circumstances dictate consolidation, written justification supporting this action shall be provided to the contracting officer by the program manager or requiring activity. The determination that a consolidated requirement cannot be placed under one of the preference programs must be approved by the Head of the Contracting Activity prior to release of the solicitation.”

An acquisition strategy that could lead to a contract containing two or more requirements with a combined average annual value, including options, is at least \$10M, is considered “substantial bundling”.

Acquisitions conducted as part of A-76 studies are exempt from the bundling rules.

COORDINATE EARLY WITH SBA:

Logic dictates that you need to coordinate early in the acquisition process with the SBA, when your acquisition strategy entails bundling. Involving SBA late in the game may substantially jeopardize acquisition lead-time.

You should submit the proposed procurement well in advance to the SBA PCR for review whenever the procurement includes “bundled requirements”. The SBA PCR is authorized to appeal to the Head of the Contracting Activity, and then to the head of the agency, when it is believed a “bundled requirement” is not necessary and justified.

MARKET RESEARCH:

In order to proceed with the bundled procurement, a procuring activity must conduct “market research” to determine if consolidation of requirements is necessary and justified. The market research should be performed as close to the date of release of the solicitation as practicable. The market research must quantify the identified benefits and explain how their impact would be substantial. The contracting officer must demonstrate “measurably substantial benefits” due to bundling. That means the benefits must be “measurable” **and** “substantial”. In order to be “measurable”, the benefits must be “quantifiable”. However, quantifiable benefits are not sufficient to justify bundling unless they are also “substantial”.

WRITTEN JUSTIFICATION:

You must justify why consolidating requirements is essential and identify the specific benefits to be derived from bundling.

The justification for bundling **must document in quantifiable terms the “measurably substantial benefits”** to be achieved which will be expressed as a percentage of the anticipated contract award value including options. For procurements of \$75M or less, the benefits must be at least 10% of the contract value, including options. For procurements in excess of \$75M, the benefits must be at least 5% of the contract value, including options. The benefits may include cost savings, price reduction, or quality improvements that will save time or will improve or enhance performance or efficiency, reduction in acquisition cycle times, and better terms or conditions. When the benefits **do not** meet the established thresholds and it is determined that a bundled contract is necessary and justified, only the USD(A&T) may waive this requirement. In these cases, the USD(A&T) must determine that bundling is “critical to the agency’s mission success” and the procurement affords maximum small business participation.

When “substantial bundling” is involved, at a minimum, you must: 1) compare the benefits that could be derived through separate small contracts; 2) assess specific impediments to participation by small business concerns as prime contractors; 3) describe your intentions for maximizing small business participation as prime contractors, including provisions for encouraging small business teaming; and, 4) describe your intentions for maximizing small business participation as subcontractors.

A reduction in Government administrative or personnel costs alone cannot be a justification for bundling unless the administrative or personnel costs are expected to be “substantial” in relation to the dollar value of the procurement to be consolidated. Such costs savings must be at least 10% of the contract value, including options, to be substantial.

NOTIFYING SMALL BUSINESSES CONTRACTORS OF GOVERNMENT’S INTENT:

All small businesses performing a contract requirement that is to be consolidated with one or more other requirements must be provided ample notification of the government's intent, at least 30 days, prior to the issuance of the solicitation for the bundled requirement.

This is a very important point and an area that could easily be overlooked when processing the solicitation. Always keep the small business contractors informed out of consideration and to avoid future problems.

BUNDLING CONSIDERATIONS:

After justifying the need to bundle, alternatives need to be examined to minimize or mitigate to the maximum extent possible, the impact on small business, small disadvantaged business, small woman owned business, and/or qualified HUBZone contractors. The following suggestions are offered as areas to consider when faced with bundling requirements:

- 1) Consider the maximum number of possible awards dependent upon the derived tangible benefits. Don't be too restrictive by consolidating all requirements into one or two contracts.
- 2) Solicit during the early planning phase for public comments and/or suggestions to potential alternative strategies that may enhance small business participation as prime contractors and subcontractors.
- 3) Breakout a discrete portion (percentage of man-hours) or a discrete functional component for small business set-aside, 8(a), and/or HUBZone contracting, where appropriate. A number of the contracting activities have already successfully consolidated down to one full and open, while simultaneously issuing a number of small business set-asides and 8(a) set-asides.
- 4) Reserve one or more awards for small business, 8(a)s, and/or qualified HUBZone contractors, where appropriate, when issuing multiple awards against a single solicitation,
- 5) Minimize the proposal requirement when competing orders after the award of IDIQ contracts. The cost of proposal preparation for the IDIQ awards and each of the orders is a substantial burden for small business.
- 6) Track the number and dollars awarded under the IDIQ multiple award contracts to assure that small business, small disadvantaged business, woman owned small business, 8(a)s, and/or qualified HUBZone contractors are getting their fair share.
- 7) Encourage small business joint ventures or teaming arrangements for large bundled procurements. SBA has provided flexibility for two or more small businesses to form a contract team for the purpose of competing for bundled requirements while still maintaining small business status even though the team as a whole would exceed the designated small business size standard for the procurement.
- 8) Ensure full and open solicitations contain evaluation criteria that place significant emphasis on subcontracting or teaming with small business, small

disadvantaged business, woman owned small business, and/or qualified HUBZone contractors, where appropriate. The offeror should not only be graded on their proposed commitment to use small business, but also on providing evidence that they will live up to their small business commitment.

- 9) Place emphasis on the offeror's past experience in teaming and subcontracting with small business, small disadvantaged business, woman owned small business, and/or qualified HUBZone contractors, where appropriate, when evaluating past performance. Look for actual dollars and percentages that were provided to small business through teaming or subcontracting. Look for proof with compliance to their subcontracting plans. Grade or penalize accordingly.
- 10) Specify in the solicitation the subcontracting goals, based on contract dollars, the contractor must meet for small business, small disadvantaged business, woman owned small business, and/or qualified HUBZone contractors.
- 11) Include meaningful incentives (award fee or incentive fee) for use of small business, small disadvantaged business, woman owned small business, and/or qualified HUBZone contractors, where appropriate. A few of the contracting activities have actually contractually mandated percentages of contract value to be subcontracted to small business, small disadvantaged business, and woman owned small business. These percentages, as a minimum, should reflect the national small business goals for those individual categories.
- 12) Acquaint yourself with the successes and lessons learned from other contracting activities by closely examining their procurement strategies of like or similar requirements. This information may be obtainable from the PARC office, the Small Business Office, or contained within their shared business opportunity websites.

Lessons Learned and Items to Consider in Commercial Activities Acquisition Efforts

The following lessons learned and information items were compiled based on discussions with Government representatives involved in recently completed and on-going Commercial Activities (CA) acquisitions. This information is being shared throughout the AMC community to assist those activities that are in the earlier phases of CA acquisitions. We hope this document provokes critical thinking about the CA process, encourages productive discussion and information sharing, facilitates success in achieving CA objectives, and provides useful tips to help smooth some of the bumps in the CA road.

The nature of CA acquisitions makes them nearly universally contentious. However, planning, effective communications and the commitment of adequate resources throughout the process will serve to reduce the occurrence of problems and better manage those problems and risks that can not be eliminated.

The information in this document is grouped by subject area to facilitate review. Questions or comments may be directed to any of the following individuals. DSN prefix: 767.

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Additional information on A-76 lessons learned is available at the following Internet addresses:

<http://www.acqnet.sarda.army.mil/acqinfo/lsnlrn/index.htm>

<http://www.hqda.army.mil/acsimweb/ca/lessons/default.htm>

<http://www.hqda.army.mil/acsimweb/ca/lesson1.htm>

<http://www.afmc-mil.wpafb.af.mil/HQ-AFMC/XP/XPM/xpms/a76/lessons.htm>

LEADERSHIP AND TEAMWORK

- **Ensure CA is a Priority.** Commercial Activities efforts must be a top priority. The activity's leadership must set the example for success. If managed properly, the CA process can result in great efficiencies with minimal disruption to operations. Conversely, a lack of leadership and focus can spell disaster. Although the CA

process timeline is measured in years, for those charged with its execution, CA can be a fast moving train. To help keep efforts on track, designate “emergency back-up” points of contact and encourage the scheduling of leave during times when the pace of study activity is low rather than during critical milestone periods. In addition, consider using a PERT chart or similar tool to actively manage plans and milestones.

- **Early Preparation.** Although CA studies cannot begin until after Congressional Notification has been made, planning for the study should begin as soon as possible due to the extensive work efforts required and the relatively short timelines involved. Work that can begin prior to notification includes beginning the process to select a support contractor to assist with the study, organizing the CA team, and identifying the scope of and methodology for conducting the study.
- **Make it a Team Effort from the Start.** Key players should be identified very early in the process. This seems obvious, but it is easy to overlook someone or accept a degree of team member participation that is less than adequate. To avoid surprises down the road, ensure that future information and documentation requirements are known well in advance of when they will be needed and plan accordingly. This is particularly important in the functional areas of contracting and personnel management. Early involvement of legal and resource management representatives may also be helpful. Early awareness of requirements will facilitate the production of quality products.
- **Team Composition.** With the number of teams that are formed during the A-76 process and their collective impact on the final outcome of the study/solicitation, it is imperative that the formulation of teams be carefully considered. Individuals should be appointed based on proven capabilities or potential, not because of their title or position. A team’s output is directly correlated with the caliber and attitudes of its members. Appointing officials should seek qualified members who are committed and have a positive outlook. Team members must clearly understand both the team’s objectives and their individual roles. In many cases (e.g. development of Most Efficient Organization (MEO) process improvements), the quality of team member input will directly influence the Government’s ability to prepare a competitive proposal.
- **Key Players.** In addition to early identification of key Government personnel, any contractor support should be available as soon as possible after study approval. Accordingly, early planning efforts should include the timing of support contract awards. Contractor support is available via three Blanket Purchase Agreements (BPAs) managed by the CECOM Acquisition Center. When selecting a support contractor, be mindful that corporate experience does not necessarily translate to individual experience or qualifications. Ensure that source selection criteria are structured to preclude the support contractor from using “green” employees for the effort. In addition, it is important to establish a mutual understanding as to exactly what the contractor is required to provide and, in some cases, how the

product/service will be provided. Regarding Government personnel, as a minimum, a point of contact from each functional area should be identified and held accountable for completing actions from day one. When feasible, teams of full-time members should be collocated to improve effectiveness. While it is recognized that the degree of individual member participation may, due to workload, shift over time, all members must accept the responsibility to stay engaged to the extent that they are aware of current action plans and schedules. Maintaining a central significant actions log and milestone schedule can help in this regard. For large efforts, activities should consider establishing an “operations center” type area where, in addition to space for the truly full time members, desks are available for team members to be collocated and fully dedicated to the effort on an as needed basis.

COMMUNICATIONS

- **It’s a Two-way Street.** Establishing multiple channels for both communicating information to, and receiving input from, the workforce throughout the A-76 process is absolutely critical to success. In addition, it is essential to clearly transmit Government requirements to industry and encourage input from potential offerors during the solicitation phase. Public announcements, Draft Requests for Proposals (DRFPs), preproposal conferences, site visits, discussions and debriefings should be used to clarify requirements and answer questions. Communications must not divulge information that could prejudice the MEO or offers, or jeopardize the integrity of the A-76 process.
- **Keep the Lines of Communication Open and Positive.** A variety of media can be used to effect communications including workforce briefings, information pamphlets, installation/local television, radio and newspapers, internet sites, telephone hotlines, email, surveys, counseling sessions, and other special programs. Installation public affairs and personnel offices can be of assistance in this regard. Take some time to plan the most effective way (and time) to make various public announcements. Also, take steps to keep the local congressional office informed and provide advance notifications when possible. Notify the Congressional Liaison Office at AMC so they can contact Congressional Members on Capitol Hill prior to the official notification to Members of Congress. Keep the union involved and gain the support of both formal and informal leaders by ensuring they understand the process and the importance of their contributions. The union can be one of the biggest communications conduits. Individuals on the management study team should encourage all organizational elements to work together to create cohesion and synergy. Fragmentation can severely limit overall performance. Make effective use of meetings with the commander for decisions and with core, large group, and functional teams to achieve objectives.
NOTE: Extensive sharing of information is encouraged, however, take actions necessary to preclude unauthorized release of procurement sensitive information. Also, give careful consideration to the nature and timing of information releases to

help prevent any possible confusion resulting from premature release or iterative versions of information.

- **Security.** OPSEC should be reviewed early and monitored throughout the acquisition process. Current on-site contractors, if eligible, may choose to compete for the CA award. Although we like to think of our support contractors as part of the Government team, when a CA competition is in process, relationships may change. Perform reviews to determine if, without impacting their performance under existing contracts, their access to certain areas and computer networks can/should be controlled. A significant amount of workload data can be gleaned by simply having access to an area (number of desks, personnel and vehicle sign in/out boards, etc.). If contractors provide LAN, email, or other computer system support, consider keeping sensitive A-76 study information on stand alone or otherwise secure systems to help protect against “hackers.” Finally, ensure that all personnel display badges at all times, properly mark and protect documents, and are advised of the need for increased security awareness.

TRAINING

- **Timing is Everything.** The timing of training is very important. Make reasonable attempts to provide “just-in-time” training so that the information learned can be applied most effectively. Plan to schedule training for core members of the CA study team so they can “hit the ground running” when study approval is granted.
- **Considerations.** Training in information collection techniques, process reengineering and overall Most Efficient Organization (MEO) development may be helpful and should be tailored to fit individual needs. Advance formal training will pay dividends immediately while on-the-job training really only helps for “next time.” Ideally, source selection board members should have prior experience and be knowledgeable about the many intricacies of the Service Contract Act (SCA) such as how conformance actions for applicable labor classes and uncompensated overtime can affect the contractor’s cost of contract performance. Advise evaluators to strictly adhere to the solicitation evaluation criteria. Evaluators should not be influenced by “slick” proposal formats or “read” anything into a proposal based on some prior knowledge they possess about the offeror. Seek training and general CA advice and assistance from other activities. Although there is a limited body of CA knowledge available, team representatives should balance the desire for installation “ownership” and the uniqueness of the situation with “reinventing the wheel.” When schedule and workload permit, consider the feasibility of having individuals serve on a team at another activity in order to gain valuable experience to apply at home.
- **“CA 101” Training.** Many employees at an activity may be unfamiliar with the A-76 process. Providing them with a basic understanding of the procedures to be followed, informing them of their rights, and answering their questions will help to

gain their support. The workforce should be informed that they have an opportunity to play a major role in determining the competitiveness of the Government's proposal. Their input, particularly regarding potential process improvements, can be invaluable. Active participation by the entire workforce will enable them to influence the process and outcome rather than simply falling victim to it. "CA 101" type training can serve as a catalyst for such participation.

- **Contractor Awareness.** While it is not the activity's responsibility to provide CA training to potential offerors, presentation of an information briefing on the A-76 process and SCA rules, as part of a preproposal conference, may help to reduce the numbers of procedural questions and protests based on a simple lack of understanding.
- **Conflict of Interest Reviews and Ethics Training.** CA team members, proposal evaluators, appeals board members and others as necessary should consult with ethics counselors as early as possible to identify any potential conflicts of interest and restrictions on seeking employment. The entire workforce should be reminded of the sensitivity of certain types of information and their responsibilities to both protect it from unauthorized disclosure and report questionable activities to their ethics counselor. Government and support contractor employees who are granted access to sensitive information should be required to sign non-disclosure statements. Also, any support contractors involved in the source selection process must have the permission of the applicable private sector offerors prior to accessing proprietary information that may be included in proposals.

PROCESS CONSIDERATIONS - (Study/Presolicitation Phase)

- **Planning.** The benefits of advance planning typically far outweigh the time invested. While there are restrictions on work that can be performed prior to study approval, a certain amount of preliminary planning is prudent and can be an effective streamlining/schedule compression technique. The most important initial decision is determining, with as much specificity as possible, the scope of the study. A firm scope will facilitate development of the Performance Work Statement (PWS) and minimize the extra work required to update documents because of late changes. Remember that support contractors cannot develop a PWS on their own, but will rely on the Government for substantial input. Another critical determination, that if changed later in the process can cause significant ripple effects, is identifying Government in Nature (GIN) positions. As with most decisions, it is preferable to get it right the first time and proper planning can help. Finally, consider limiting the number of separate support contractors. A single capable contractor may be better able to tie the whole process together than multiple contractors working to integrate their various pieces. Of course, when necessary, the single contractor should be encouraged to seek outside functional expertise to supplement its efforts.

- **Prioritize Work Efforts.** Time and resource constraints will typically make it necessary for the CA team to focus on the actions that are most important and provide the best payback. Significant actions that are required early in the CA process, such as preparation of the PWS and the management study, should normally take precedence over actions or documents required later in the process. Be aware that the marginal benefits associated with extra work efforts can vary considerably. Apply resources wisely. Also, schedule work efforts so they are most effective. For example, detailed cost calculations prior to completion of the management study will probably prove to be unproductive since staffing and work methods are not yet finalized.
- **Data Collection.** Planning for data collection should start as early as feasible because it is the basis for the Government's requirements and the PWS. Don't assume that a new system, process or form will be required. Many data requirements have already been captured or can be satisfied with existing systems. A key principle to remember -- keep it simple. If workload or other data will be gathered by individual functional elements, ensure that the resulting products will be compatible, perhaps by establishing a common format. Quality and timeliness standards are difficult to develop but will be critical for monitoring performance and are big cost drivers so it is important to take the time to "get it right." Regardless of who does the collection, everyone involved should understand the objective and focus on the data that is important. This collection/synthesis effort can be extensive and time consuming. Some false starts may be encountered before the type and amount of data that is relevant (and most important) is determined, however, it is critical since this data forms the very foundation for the rest of the CA process. The goal is to capture an accurate picture of the entire workload.
- **Market Research.** Market research is an important first step toward establishing an appropriate acquisition strategy. Failure to receive a technically acceptable proposal under a small business set aside could result in resolicitation (AR 5-20). Make every effort to establish the existence of two or more technically qualified and seriously interested sources in CA small business set-asides.
- **How many solicitations?** This decision is clearly one that must be made based on the individual circumstances of the study. Even when a single solicitation could be issued to cover an entire study effort, it may be prudent to segregate the work into more discrete units in order to enhance competition, encourage small business participation or for some other reason. However, one drawback to multiple solicitations for a single study is that a problem with one solicitation (e.g. appeal or protest) may also delay the others. The activity would then be faced with the choice of either delaying any Reduction In Force (RIF) pending resolution of the outstanding issues, or conducting separate RIFs for each solicitation. The later option would almost certainly be unacceptable from a schedule perspective since multiple RIFs can not be conducted concurrently. Given the impact to personnel and the costs of conducting RIFs in terms of both dollars and schedule, multiple

RIFs are clearly not desirable. While there is no proven strategy for avoiding this type of potential delay, when the acquisition strategy includes multiple solicitations, consider scheduling them to run in parallel so that at least when delays are not encountered, any RIF implementation plans can be executed immediately after approval of the final decisions.

PROCESS CONSIDERATIONS - (Solicitation Phase)

- **90 Days is Probably not Enough.** The milestone schedule in DA PAM 5-20 calls for a 3-month solicitation period. This may be unrealistic, especially when the requirements are numerous or complex or when substantial work on the management study remains. While a relatively aggressive solicitation period can be “tested” (the solicitation can be extended for valid reasons), the master schedule should allow for a longer timeframe. On large complex efforts, expect to receive a large number of questions. Consider using a DRFP to obtain industry comments and suggestions prior to a final solicitation and preproposal conference. Use of a DRFP may not shorten the process, however, it will probably result in a cleaner solicitation document and is an effective tool for gaining additional market research information to confirm initial decisions or make revisions (i.e. type of contract, small business set-aside, etc.).
- **Solicitation Document.** Format the solicitation document to easily accommodate changes, additions and deletions (e.g. Contract Line Item Number (CLIN) structure, page numbering, etc.). Make use of the Internet to simplify distribution and expedite posting of changes. Consider posting the basic document, amendments, and a conformed copy that incorporates and highlights all revisions. The Internet can also make it easy to provide digital copies of, or links to, reference documents and technical materials.
- **Best Value Considerations.** If employing best value techniques, take care to avoid the creation of inequities since the ultimate A-76 cost comparison will be based on cost alone. If the best value proposal offers a level of effort different from that required by the PWS, ensure that both the PWS and Government proposal are revised as necessary to reflect the changed level of effort so that both cost proposals are based on the same requirements.
- **Evaluation.** Although the contractor’s technical and cost proposals should initially be evaluated independently, at some point, the information should be reviewed as an integrated product to ensure the costs/prices are realistic given the proposed performance approach. This is particularly important in terms of labor. Again, evaluators should understand how application of the SCA could affect proposals. During the solicitation process, assure contractors that the activity is aware of the inherent conflict for the Government in evaluating proposals that will be used to compete against the workforce and it is taking steps to preserve the integrity of the process. Consider making arrangements with outside sources such as other activities or Commands to obtain individuals for appointments to Source Selection

Authority (SSA), Source Selection Advisory Council (SSAC) and Source Selection Evaluation Board (SSEB) positions.

- **Cost Realism Analysis and Most Probable Cost Adjustment.** DA Pam 5-20 states that “For a cost reimbursement-type contract, the ceiling price of the low negotiated offer and the fee, if applicable, to be earned if the contractor provides the minimum acceptable performance comprise the contract price” to be entered on line 7 of the cost comparison form. However, FAR 15.404-1(d)(2) states: “Cost realism analyses shall be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror” and “The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis.” While the FAR provides the AUTHORITY to make a most probable cost adjustment, the decision of whether one SHOULD make the adjustment without discussions is a matter of judgment and should be based on the specifics of the acquisition. A unilateral adjustment would likely be very difficult to defend. Conducting discussions would provide the Government the opportunity to get more information about the basis for the contractor's estimate and confirm that the contemplated most probable cost adjustment (based on the cost realism analysis) is sound. If, after discussions, the proposed cost is still unreasonably low and the basis for the most probable cost remains valid, the contracting officer should make the adjustment.

- **Conditional Award.** Ensure compliance with FAR 52.207-2, Notice of Cost Comparison (Negotiated), by timely awarding a conditional contract in situations where the initial decision is to “go contract”. Such a conditional award ends the solicitation/evaluation phase and preserves the terms on which the award decision was made. In negotiated procurements, many events can occur that necessitate the reopening of discussions. For CA acquisitions, reopening is particularly troublesome because the selected contractor's proposal prices and the complete MEO have been publicly disclosed. Such disclosure could create great inequities in the competitive positions of the parties if it became necessary to subsequently reopen negotiations. To preclude reopening discussions after the public disclosure of proposals, contracting officers should execute the conditional award as soon as practicable after the initial “contract” decision. Since DA PAM 5-20 does not currently address the FAR requirement for a conditional award, a change request to add clarifying language to the guide was submitted to DA on 15 Jul 97.

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**NATIONAL DEFENSE
AUTHORIZATION AND APPROPRIATIONS ACTS
FOR FISCAL YEAR 2000**



Prepared by

**Business Operations Law Division
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Introduction

This summary was prepared by the HQ AMC Office of the Command Counsel and highlights many of the important provisions contained in the National Defense Authorization and Appropriations Acts for Fiscal Year 2000. Although both Acts consist of several hundred pages, we selected only those sections we believed would be of most interest to our clients. The summary contains a brief explanation of each section; it is not intended as a detailed explanation of every requirement. If more information is desired about a section, HQ AMC personnel should contact the attorney listed at the end of the entry; other personnel should contact their supporting legal office.

Summary

1. Military Benefits.

a. Military Pay (Authorization Act, Sec. 601). Increases basic pay for active duty members and drill pay for reservists by 4.8 percent effective 1 Jan 00. Targeted basic pay increases will become effective 1 Jul 00. (Beauchamp, 617-9022)

b. Bonuses and Special and Incentive Pays (Authorization Act, Secs. 611-629). Authorizes and increases various bonuses and special and incentive pays to boost enlistment and retention of personnel, including, for the first time, continuation pay for judge advocate officers. (Beauchamp, 617-9022)

c. Retirement Pay (Authorization Act, Sec. 641). After 15 years of service, military members may choose between two retirement plans: (1) retired pay calculated at 50% of basic pay for the first 20 years of service (2.5% for each additional year up to 75%); or (2) a cash payment bonus at the 15th year of service and reduced retirement benefits (40% for first 20 years) with a promise to stay until retirement. (Beauchamp, 617-9022)

d. Thrift Savings Plan (Authorization Act, Sec. 661). Authorizes service members to participate in the Thrift Savings Plan. They may invest up to five percent of pay, with a maximum of \$10,000 per year. Implementation is contingent upon the development of regulations. (Beauchamp, 617-9022)

e. Dual Compensation (Authorization Act, Sec. 651). Repeals the requirement to cap federal employees' military retirement pay. (Beauchamp, 617-9022)

f. Deployments (Authorization Act, Sec. 991). Adds various General Officer management and approval requirements for deployment of individual service members where the deployment exceeds certain specified numbers of days. Authorizes additional per diem of \$100 per day where service members are deployed in excess of 251 out of the preceding 365 days. (Beauchamp, 617-9022)

g. Uniform Code of Military Justice (Authorization Act, Sec. 577). Increases the maximum punishment that Special Courts Martial may impose to confinement and forfeiture of pay from six months to one year -- pending the issuance of a Presidential Executive Order. (Beauchamp, 617-9022)

h. War College Degree (Authorization Act, Sec. 542). The U.S. Army War College may confer the degree of Master of Strategic Studies. (Beauchamp, 617-9022)

2. Department of Defense Workforce Provisions.

a. Major Department of Defense Headquarters Activities Personnel Limitation (Authorization Act, Sec. 921). Effective 1 Oct 02, the number of major DoD headquarters activities personnel (e.g., HQ AMC and most MSC military and civilian personnel) may not exceed 85 percent of the 1999 baseline number, with phased-in reductions for 1 Oct 00 (95 percent) and 1 Oct 01 (90 percent). Functions cannot be reassigned in order to evade the requirements of this section. (Johnson, 617-8050)

b. Defense Acquisition Workforce Reductions (Authorization Act, Sec. 922). Directs the Secretary of Defense to reduce the acquisition and support workforce during FY00 by a number not less than the number programmed for reduction in the President's budget, unless there are changed circumstances with national security implications. Also directs the Secretary to report to Congress on the proposed acquisition and support workforce reductions for FY00 and FY01. (Johnson, 617-8050)

c. Nondisclosure of Information on Personnel of Overseas, Sensitive, or Routinely Deployable Units (Authorization Act, Sec. 1044). Exempts from disclosure under the Freedom of Information Act personally identifying information regarding any member of the armed forces or a DoD employee assigned to an overseas, sensitive, or routinely deployable unit. (Medsger, 617-2556)

d. Emergency Essential Employees (Authorization Act, Sec. 1103). Allows the Secretary of Defense to designate any DoD employee as an "emergency essential employee" if it is necessary for the employee to perform combat support duties in a combat zone and it is impracticable to convert the employee's position to a military member position. (Medsger, 617-2556)

e. Civilian Work-Years Limitation (Appropriations Act, Sec. 8011). DoD cannot exceed 125,000 civilian work-years outside of the United States, its territories, and the District of Columbia. The Dependent Student Hiring Program for Disadvantaged Youths is not included in this limitation. (Johnson, 617-8050)

3. Performance of Functions by Private Sector Sources.

a. Reduced Threshold for Consideration of Effect on Local Community of Changing Defense Functions to Private Sector Performance (Authorization Act, Sec. 341). Modifies 10 USC 2461 to require an analysis of the impact on local economies when functions being performed by 50 or more federal employees (rather than 75) are changed to private sector performance. (Travers, 617-7571)

b. Congressional Notification of A-76 Cost Comparison Waivers (Authorization Act, Sec. 342). Requires that Congress be notified not later than 10 days after a decision is made to waive the cost comparison study required by OMB Circular A-76. Notification must include the rationale for the waiver, the total number of employees affected, a description of the competitive procedures used to award the contract, and the anticipated savings from the waiver and conversion to contract performance. (Travers, 617-7571)

c. Report on Use of Non-Federal Entities to Provide Services to DoD (Authorization Act, Sec. 343). Requires the Secretary of Defense to report to Congress on the use of non-federal entities providing services to DoD during the previous fiscal year. The report must include work-year equivalents by federal supply class or service code, the appropriation used to fund the services, and the major organizational element procuring the services. (Travers, 617-7571)

d. Sense of Congress Regarding LOGMOD (Authorization Act, Sec. 345). Describes the uncodified sense of Congress on the LOGMOD program, including that the goal should be sustainment of military readiness. Other recommendations are that any contract should require standard industry integration practices, that the proposed modernization solution should be tested prior to implementation, that implementation should be monitored by the government, and that partnering should be used on the contract. (Travers, 617-7571)

e. Requirement to Conduct Most Efficient Organization Analysis (Appropriations Act, Sec. 8014). Reenacts annual provision requiring certification to Congress of a most efficient and cost-effective organization analysis prior to converting a function being performed by

more than 10 DoD civilians to contractor performance, with limited exceptions. (Travers, 617-7571)

f. Time Limits on A-76 Studies (Appropriations Act, Sec. 8026). Reenacts annual provision that prohibits the use of appropriated funds to perform any OMB Circular A-76 cost study exceeding a period of 24 months for a single function study or 48 months for a multi-function study. (Travers, 617-7571)

g. Savings for Contracting-Out and Related Restrictions (Appropriations Act, Sec. 8108). Reduces appropriations by \$100,000,000 to reflect savings resulting from A-76 studies. Also prohibits contracting-out functions related to the award, oversight, or payment of DoD contracts. (Travers, 617-7571)

h. Report on OMB Circular A-76 Reviews (Appropriations Act, Sec. 8109). Requires the Secretary of Defense to submit a report of all A-76 studies performed since 1995, including whether they resulted in converting work to or from contractor performance. (Travers, 617-7571)

4. Major Weapons Acquisition Programs.

a. Multiyear Procurement Authority for Certain Army Programs (Authorization Act, Sec. 111 and Appropriations Act, Sec. 8144). Authorizes multiyear procurement contracts for: (1) the Javelin missile system and (2) AH-64D Apache Longbow attack helicopter. Additionally authorizes a multiyear procurement contract for the M1A2 Abrams main battle tank upgrade program; however the Appropriations Act requires that the Army first submit a report to Congress detailing efforts to reduce program costs -- prior to the use of FY00 funds for the contract. (Medsger, 617-2556)

b. Procurement Requirements for the Family of Medium Tactical Vehicles (Authorization Act, Sec. 112). Mandates the use of competitive procedures for the procurement of vehicles under the Family of Medium Tactical Vehicles program after completion of the current multiyear procurement contract. The second source certification requirement in last year's authorization act is repealed. (Medsger, 617-2556)

c. Army Aviation Modernization (Authorization Act, Sec. 113). Requires the Secretary of the Army to submit a comprehensive plan to Congress for the modernization of the Army's helicopter forces. The Army may not obligate more than 90 percent of

funds authorized for the procurement of Army aviation until 30 days after the Secretary of the Army submits the plan to Congress. (Medsger, 617-2556)

d. Multiple Launch Rocket System (Authorization Act, Sec. 114). Authorizes funds to complete the development of reuse and demilitarization tools and technologies for use in the demilitarization of Army Multiple Launch Rocket System rockets. (Medsger, 617-2556)

e. Starstreak/Stinger Competition (Appropriations Act, Sec. 8138). Directs the Army to conduct a live fire, side-by-side operational test of the air-to-air Starstreak and Stinger missiles from the AH-64D Longbow helicopter. Requires the use of full and open competition, which must include a live fire, side-by-side test as a source selection factor, for the development, procurement or integration of any air-to-air missile for the AH-64 or RAH-64. (Medsger, 617-2556)

5. **Arsenals, Depots, and Ammunition Plants.**

a. Extension of Pilot Program on Sales of Manufactured Articles and Services of Certain Army Industrial Facilities without Regard to Availability from Domestic Sources (Authorization Act, Sec. 115). Extends the current pilot program through FY01 that allows Watervliet Arsenal, Rock Island Arsenal, and McAlester Army Ammunition Plant to sell manufactured articles and services to private industry for incorporation into weapons systems being procured by DoD, regardless of the availability of a domestic commercial source for the articles or services. (Harrington, 617-7570)

b. Extension of Authority to Carry out Armament Retooling and Manufacturing Support Initiative (Authorization Act, Sec. 116). Extends the Army's Armament Retooling and Manufacturing Support Initiative (ARMS) through FY01. Under the ARMS Initiative, the Army may permit commercial firms to use facilities located at Army GOCO ammunition plants for commercial purposes. (Harrington, 617-7570)

c. Sales of Articles and Services of Defense Industrial Facilities to Purchasers outside the Department of Defense (Authorization Act, Sec. 331). Permits the Secretary of Defense to waive several statutory conditions for industrial facility subcontracts and for industrial facility sales to non-DoD customers. The waivers must be for reasons of national security, and Congress must be notified. (Harrington, 617-7570)

d. Contracting Authority for Defense Working Capital Funded Facilities (Authorization Act, Sec. 332). Broadens the authority of working capital funded activities to be subcontractors on defense contracts. Activities may now perform

engineering services, as well as manufacturing services. In addition, they may now act as a subcontractor at any tier, provided other legal requirements are met.

(Harrington, 617-7570)

e. Annual Reports on Expenditures for Performance of Depot Level Maintenance and Repair Workloads by Public and Private Sectors (Authorization Act, Sec. 333).

Requires the Secretary of Defense to submit an annual report detailing the percentage of funds spent for depot-level maintenance in the public and private sectors for the two previous years, as well as an annual report projecting similar percentages for the next five years. Also directs the GAO to review the reports. (Harrington, 617-7570)

f. Treatment of Public Sector Winning Bidders for Contracts for Performance of Depot-Level Maintenance and Repair Workloads Formerly Performed at Certain Military Installations (Authorization Act, Sec. 335).

Oversight and reporting requirements for depot-level maintenance and repair workloads previously performed by a depot closed under BRAC that are awarded to a public sector entity after competition with the private sector may not be substantially different than requirements for other maintenance workloads performed by the entity unless the solicitation states otherwise.

(Harrington, 617-7570)

g. Additional Matters to be Reported Before Prime Vendor Support Contract for Depot-Level Maintenance and Repair Is Entered Into (Authorization Act, Sec. 336).

Adds compliance with the depot maintenance 50/50 rule and core logistics policies of 10 USC 2464 as subjects to be included in the report to Congress required before a prime vendor support contract for depot-level maintenance may be awarded. (Harrington, 617-7570)

h. Public/Private Competition (Appropriations Act, Sec. 8037). Permits competitions, which must include comparable estimates of all direct and indirect costs, between DoD depot maintenance activities and private firms during FY00 for the modification, depot maintenance and repair of aircraft, vehicles and vessels as well as the production of components and other defense-related articles. Exempts these competitions from the requirements of OMB Cir. A-76. (Harrington, 617-7560)

i. Report on Recovering Costs at GOCO's (Appropriations Act, OM, A, p. 4).

Requires the Army to provide a report to Congress on recovering environmental restoration costs at GOCO facilities. (Harrington, 617-7570)

6. Military Readiness Reports.

a. Independent Study of Military Readiness Reporting System (Authorization Act, Sec. 361).

Directs the Secretary of Defense to conduct an independent study of the new DoD Readiness Reporting System established by the FY99 Authorization Act. This provision also increases the time period for reporting changes in the readiness status of

training establishments and defense infrastructure from 24 hours to 72 hours. Changes in the readiness of military units must still be reported within 24 hours.

(Medsger, 617-2556)

b. Independent Study of Department of Defense Secondary Inventory and Parts Shortages (Authorization Act, Sec. 362). Directs the Secretary of Defense to conduct an independent study of DoD spare parts and secondary item inventories, including wholesale and retail items. The study must also include a plan to address excessive inactive inventory and part shortages. (Medsger, 617-2556)

c. Report on Inventory and Control of Military Equipment (Authorization Act, Sec. 363). Directs the Secretary of Defense to prepare a report on inventory and control of military equipment as of the end of FY99. This is an extensive report that must include the quantity of each item on-hand at the beginning and end of the year and all acquisitions, disposals, and losses of each item during the year. (Medsger, 617-2556)

d. Comptroller General Study of Adequacy of Department Restructured Sustainment and Reengineered Logistics Product Support Practices (Authorization Act, Sec. 364). Directs the GAO to study the restructured sustainment and reengineered logistics product support practices within DoD. The purpose of the study is to determine whether current practices are adequate to provide sustainment supplies during execution of the National Military Strategy. (Medsger, 617-2556)

e. Comptroller General Review of Real Property Maintenance and Its Effect on Readiness (Authorization Act, Sec. 365). Directs the GAO to review the impact of real property maintenance funding shortfalls on readiness, quality of life, and infrastructure of military installations. (Medsger, 617-2556)

7. Acquisition Provisions.

a. Authority to Carry Out Certain Prototype Projects (Other Transactions) (Authorization Act, Sec. 801). Mandates that Section 845 Other Transactions over \$5,000,000 include a provision permitting the GAO to examine the records of any participant. (Medsger, 617-2556)

b. Streamlined Applicability of Cost Accounting Standards (Authorization Act, Sec. 802). Adds two categories of contracts and subcontracts to which cost accounting standards do not apply. Also permits agency heads to waive CAS, under certain circumstances, for contracts and subcontracts valued at less than \$15,000,000. (Simon, 617-2552)

c. Guidance on Task and Delivery Order Contract Use (Authorization Act, Sec. 804). Directs revision of the FAR to provide guidance on the use, award, and

administration of task order contracts, including guidance on information technology purchases, fairness of award criteria, and specificity of statements of work. Also tasks the GAO to report on the implementation of the guidance. (Beauchamp, 617-9022)

d. New Reporting Requirement for Certain Multiyear Contracts (Authorization Act, Sec. 809). Directs the Secretary of Defense to submit a funding report to Congress prior to entering into or extending a multiyear contract. In general, the report compares the amount of total obligation authority under the contract to applicable procurement accounts and agency procurement totals. Similar aggregate comparisons are required for all agency and DoD multiyear procurements. (Beauchamp, 617-9022)

e. Additional Notifications for Multiyear Contracts (Appropriations Act, Sec. 8008). Requires congressional notification for three things: (1) multiyear contracts (or an advance procurement leading to a multi-year contract) with an economic order quantity in excess of \$20,000,000 in any one year (or in the year of the contract); (2) multiyear contracts that include an unfunded contingent liability above \$20,000,000 and (3) all multiyear contract terminations. Additionally, prohibits multiyear contracts above \$500,000,000 unless specifically authorized by law, as well as multiyear contracts where the economic order quantity is not funded at least to the limits of the Government's liability. (Beauchamp, 617-9022)

f. Procurements from the Small Arms Production Industrial Base (Authorization Act, Sec. 815). Requires that all barrels, receivers, and bolts for M-2 and M-60 machine guns be purchased from certain designated firms, unless the Secretary of the Army determines otherwise. (Harrington, 617-7570)

g. Report on Options for Accelerated Acquisition of Precision Munitions (Authorization Act, Sec. 820). Directs the Secretary of Defense to prepare a report on current and required inventories of precision munitions and the dates on which the required inventories would be achieved at various funding levels and production rates. (Harrington, 617-7570)

h. Clarification of Definition of Commercial Services (Authorization Act, Sec. 805). Amends 41 USC 403 to clarify that services are commercial if they are procured in support of a commercial item and if the source of the services provides them contemporaneously to the general public under similar terms and conditions. (Travers, 617-7571)

i. Extension of Authority to Use Simplified Procedures for Purchases of Commercial Items up to \$5,000,000 Until 1 Jan 02 (Sec. 806). Requires GAO to submit an evaluation of the test program by 1 Mar 01. (Travers, 617-7571)

j. Pilot Programs for Commercial Services (Sec. 814). Authorizes the Secretary of Defense to conduct a pilot program to treat procurements of commercial services as procurements of commercial items in the areas of utilities and housekeeping services, education and training services, and medical services. (Travers, 617-7571)

k. Incremental Funding of Military Construction Projects (Authorization Act, Sec. 2807). Expresses the sense of Congress that DoD should not incrementally fund military construction projects, except, in limited circumstances, for large phased projects where consistent with previously established practices. (Simon, 617-2552)

l. Employee Penalties for Improper New Starts (Appropriations Act, Sec 8096). Prohibits compensating a DoD employee who initiates a new start program without first notifying OSD, OMB and congressional defense committees. (Johnson, 617-8050)

m. Registering IT Systems (Appropriations Act, Sec. 8121). Prohibits the use of FY00 funds for mission critical or mission essential information technology systems unless the system is registered with the DoD Chief Information Officer (CIO). No major automated information system may receive Milestone I - III approval during FY00 unless the DoD CIO certifies that the system is being developed in accordance with the Clinger-Cohen Act of 1996. (Medsger, 617-2556)

n. Foreign Source Waivers (Appropriations Act, Sec. 8093). Authorizes Secretary of Defense to waive limitations on the procurement of defense items from foreign sources. The Secretary must determine that: (1) the limitation would invalidate a cooperative program between DoD and a foreign country or would invalidate reciprocal trade agreements for the procurement of certain defense items; and (2) the country does not discriminate against the same or similar defense items produced in the United States. (Beauchamp, 617-9022)

o. NAF Funds and Alcoholic Beverages (Appropriations Act, Sec. 8132). Prohibits using appropriated funds to support NAF activities that use NAF funds to procure malt beverages and wine for resale on a military installation in the U.S. *unless* the malt beverage or wine is procured within the state(s) where the installation is located. For CONUS installations only, other types of alcoholic beverages shall be purchased from the most competitive source, price and other factors considered. (Beauchamp, 617-9022)

p. Progress Payment Timelines (Appropriations Act, Sec. 8175). Requires the DoD to make progress payments based on *progress* no less than 12 days after it receives a valid billing and to make progress payments based on *cost* no less than 19 days after it receives a valid billing. (Simon, 617-2552)

8. Financial Management Provisions.

a. Management of Credit Cards (Authorization Act, Sec. 933). Directs the DoD to establish regulations for improved management of Government-issued credit cards and convenience checks. The regulations must include certain safeguards and internal controls, including detailed record-keeping, prompt payment of credit card bills, and limited alteration of remittance addresses. (Simon, 617-2552)

b. Financial Management Improvement Plan (Authorization Act, Sec. 1007). Directs DoD to include the following information in its Biennial Financial Management Improvement Plan: (1) information about DoD finance systems, accounting systems, and data feeder systems; (2) plans for easy and reliable interface of those systems; and (3) a description of any major procurement action to replace or improve those systems. Also directs DoD to develop a "financial management competency plan," as well as a plan to improve certain DFAS processes. (Simon, 617-2552)

c. Waiver Authority for Electronic Funds Transfer (Authorization Act, Sec. 1008). Permits the Secretary of Defense to waive EFT payments to DoD employees in certain unusual circumstances. Previously this authority was limited to the Secretary of the Treasury. (Simon, 617-2552)

d. Working Capital Fund Investment Purchases (Appropriations Act, Sec. 8047). Establishes certain limitations for the purchase of investment items with working capital funds. Requires that the FY01 budget request fund equipment end items with procurement appropriations (not working capital funds) -- to the extent that those end items were funded with procurement appropriations in the FY00 Act. (Simon, 617-2552)

e. Negative Unliquidated Balances in Expired Funds (Appropriations Act, Sec. 8081). Provides that negative unliquidated or unexpended balances in expired or closed accounts may be charged to current appropriations under certain specified circumstances. (Simon, 617-2552)

f. Interest Penalties (Appropriations Act, Sec. 8088). Permits DoD to use operating funds during FY00 to pay interest penalties on an invoice or contract payment. (Simon, 617-2552)

g. Treatment of Credit Card Refunds (Appropriations Act, Sec. 8119). Permits DoD to credit travel card refunds to operating appropriations that are current when the refunds are received. Additionally permits DoD to credit IMPAC card refunds to

appropriations that are current when the refunds are received and that are available for the same purpose as the appropriation originally charged. (Simon, 617-2552)

h. Support to Delinquent Federal Agencies (Appropriations Act, Sec. 8122).

Prohibits DoD from using FY00 funds to support another agency that is more than 90 days late on its payment to DoD for goods or services. This prohibition does not apply where a law permits DoD to provide the goods or services on a non-reimbursable basis. Additionally, permits the Secretary of Defense to waive this prohibition with certification to Congress when in the interest of national security. (Simon, 617-2552)

i. Payment Timelines (Appropriations Act, Sec. 8176). Requires DoD to change payment procedures and policies so that all payments are made no less than 29 days after receipt of a proper invoice. (Simon, 617-2552)

9. Research, Development, Test and Evaluation Provisions.

a. Collaborative Program to Evaluate and Demonstrate Advanced Technologies for Advanced Capability Combat Vehicles (Authorization Act, Sec. 211). Establishes a collaborative Army/DARPA program for the evaluation and competitive demonstration of concepts for advanced capability combat vehicles for the Army. The program will identify the most promising technologies to develop combat vehicles significantly superior to the M1 Tank. (Medsger, 617-2556)

b. Sense of Congress Regarding Defense Science and Technology Program (Authorization Act, Sec. 212). Expresses the sense of Congress that the Services have under-funded their Science and Technology Programs. Congress suggests that the Services should increase their FY01-09 Science and Technology program budgets by at least two percent each year above the rate of inflation. (Medsger, 617-2556)

c. Micro-Satellite Technology Development Program (Authorization Act, Sec. 213). Authorizes funds for the continuation of the micro-satellite technology program. (Medsger, 617-2556)

d. Manufacturing Technology Program (Authorization Act, Sec. 216). Makes several changes to the Manufacturing Technology Program, including expanding the purpose of the program to focus on the development and application of advanced manufacturing technologies and processes for repair and re-manufacturing in support of the operations of systems commands, depots, air logistics centers, and shipyards. The provision also requires the Secretary of Defense to ensure the participation of the prospective technology users (i.e. program and project managers for defense weapon systems, systems commands, and depots) in establishing program requirements. (Medsger, 617-2556)

e. Efficient Utilization of Defense Laboratories (Authorization Act, Sec. 913). Requires the Secretary of Defense to analyze the resources and capabilities of defense laboratories and test and evaluation facilities in order to improve efficiency and reduce duplication of effort. Also requires the Secretary to develop a process to rate the quality and relevance of defense laboratory work. (Medsger, 617-2556)

10. Chemical Agents and Munitions.

a. Chemical Weapons Destruction (Authorization Act, Sec. 141). Individual states may now permit chemical weapons destruction facilities to be used for non-stockpile chemical materiel. After the weapons have been destroyed, the Army must dispose of the facilities in agreement with the governor of the state in which the facility is located. (Simon, 617-2552)

b. Reports: Chemical Weapons Destruction and Storage (Authorization Act, Secs. 141-142). The Secretary of Defense and the GAO are separately directed to assess the Chemical Demilitarization Program in order to reduce costs and meet the Treaty deadline. The GAO is directed to conduct an additional study on the impact of any workforce reductions and/or conversion to contractor performance at the chemical weapons storage sites. (Simon, 617-2552)

c. Additional Chemical Demilitarization Management Report (Appropriations Act, Sec. 8159). Directs the Secretary of Defense to assess the management structure of the chemical demilitarization program, including the management of the Assembled Chemical Weapons Assessment. Additionally directs the Secretary to assess the wisdom of appointing a management and oversight panel for the program. (Simon, 617-2552)

11. Real Property Provisions.

a. Enhancement of Utility Privatization Authority (Authorization Act, Sec. 2812). Permits DoD to enter into utility service contracts for up to fifty years as long as those contracts are in connection with a utility privatization effort. Additionally, under certain circumstances, DoD may contribute construction funds to a private entity to which a utility system will be transferred in order to facilitate the utility privatization. (Simon, 617-2552)

b. Economic Development Conveyances of Base Closure Property (Authorization Act, Sec. 2821). Authorizes the free transfer of certain BRAC property to a redevelopment authority if it agrees to use the proceeds from any sale or lease of the property to support the economic redevelopment of the installation. (Johnson, 617-8050)

c. Use of BRAC 1990 Funds (Authorization Act, Sec. 2822). Specifies that BRAC funds shall be the only funds available for environmental restoration, property management, or caretaker costs after 13 Jul 01 at any installation closed or realigned as a result of the BRAC 1990 legislation. (Johnson, 617-8050)

d. Land Conveyances at AMC Installations (Authorization Act, Secs. 2832, 2840, and 2842). Authorizes certain real estate transactions at Rock Island Arsenal (ramps for bridge), Twin Cities Army Ammunition Plant (town hall and maintenance facility), and Joliet Army Ammunition Plant (landfill). (Johnson, 617-8050)

e. Military Housing Maintenance and Repair Limitations (Appropriations Act, Sec. 8114). Prohibits using any funds other than those specifically appropriated for family housing accounts for repairs or maintenance to military family housing units -- even where

the units are used to conduct official DoD business (i.e., for Flag and General Officer quarters). Additionally requires the DoD IG to report on compliance with the funding rules for maintenance and repairs of Flag and General Officer quarters. (Beauchamp, 617-9022)

f. Prohibition on Payment of Environmental Fines (Appropriations Act, Sec. 8149). Prohibits using FY00 funds to pay any environmental fines or "supplemental environmental projects" unless the fine or project is specifically authorized by law. (Simon, 617-2552)

12. Miscellaneous.

a. Relocation into or within the National Capital Area (Appropriations Act, Sec. 8022). No more than \$500,000 can be used during a single fiscal year for a relocation of a DoD organization, unit, activity, or function into or within the National Capital Area. The Secretary of Defense can waive this restriction with Congressional notice and where in the Government's best interest. (Johnson, 617-8050)

b. Authority to Lend or Donate Obsolete or Condemned Rifles for Funeral and Other Ceremonies (Authorization Act, Sec. 381). Increases the number of M-1 rifles that the Secretary of the Army may lend to eligible organizations for ceremonial purposes from 10 to 15 and clarifies that the rifles, ammunition, and accoutrements *may* be provided without charge if they are used for funeral ceremonies of service members. Expands the list of eligible organizations to include law enforcement agencies and honor guards for national cemeteries. (Harrington, 617-7570)

c. Prohibition on Demilitarization of Certain Rifles (Appropriations Act, Sec. 8020). Prohibits the use of funds to demilitarize or dispose M-1 Carbines, M-1 Garand, M-14 rifles, .22 caliber rifles, .30 caliber rifles, or M-1911 pistols. (Harrington, 617-7570)

d. Prohibition on Transfer of Certain Armor-Penetrating Ammunition (Appropriations Act, Sec. 8126). Prohibits the transfer of armor penetrating or piercing ammunition to a non-governmental entity except for (1) demilitarization or (2) manufacturing under a DoD contract or for export. (Harrington, 617-7570)

e. Recruiting Materials (Authorization Act, Sec. 574). Authorizes the Secretary of Defense to use recruiting materials for public relations purposes. Requires the Secretary to establish conditions for their use. (Beauchamp, 617-9022)

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

SUBJECT: Procurement Fraud Advisors Update No. 40

1. **Message from the Chief, PFD:** It is indeed a pleasure to serve with the great team of investigators, special agents, contracting officers, attorneys, and support staff who constitute the Army's first line of defense against procurement fraud. I spent last year at the U.S. Department of Justice where I served as Special Counsel to the Assistant Attorney General for the Civil Division. That unique assignment, part of the U.S. Army's War College Fellowship Program, provided valuable insight into how well your efforts to counter fraud, waste, and abuse in the procurement process have succeeded in civil and criminal enforcement actions by the Justice Department. I was also impressed with just how big the business of fraud can be if the government procurement process is left unguarded.

All of the active duty military attorneys in the Army's Procurement Fraud Division (PFD) are new. LTC Dave Franke is the next senior military attorney in the office and is the Branch Chief for Litigation Branch - East. He came to PFD from Contract Appeals Division (CAD), and possesses a wealth of experience in contract law. He also previously served with the Criminal Fraud Section at the Justice Department. LTC Jeff Caddell arrived from West Point and served briefly with PFD this summer until TJAG personally selected him to fill a critical command judge advocate vacancy at PERSCOM. During his short tenure at PFD, LTC Caddell made significant contributions to the office and improved our automated database. Fortunately, his unexpected loss was quickly filled by the arrival of LTC Mike Fucci from the Army Chief of Staff's Technology Management Office. LTC Fucci is the new Branch Chief for Litigation Branch - West. MAJ Kary Reed came to PFD from the JAGC Graduate Course and replaced MAJ Paul DeAgostino, who is now working at CAD. Finally, CPT Daryl Witherspoon arrived from Fort Stewart, Georgia, and replaced MAJ Cheryl Lewis, who is now at Fort Hood, Texas.

Despite all the summer transitions of active duty military personnel, the wheels never fell-off the PFD train due to the outstanding efforts and expertise of our civilian attorneys and paralegals. Mrs. Chris McCommas, the senior civilian attorney in the office, has been with PFD since 1988, previously having served as an attorney advisor with the U.S. Army Materiel Command (AMC). Mrs. McCommas serves as the Army's representative to the Debarment, Suspension and Business Ethics Committee of the Defense Acquisition Regulatory Council, and the Suspension and Debarment Interagency Coordinating Committee. Mr. Gordon Bobell, who has been with PFD since 1990, "almost retired" last year to pursue the siren of private practice. Fortunately for PFD,

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this former police officer, high school teacher, deputy city and county district attorney, and retired Army signal officer saw some noneconomic value in his continued selfless service to the government and remained with PFD. We are certainly glad he did. Mr. Curt Greenway has been a litigation attorney with PFD since 1997. He is a former Army AG officer who engaged in private practice and served as an assistant county prosecutor in Ohio before returning to active duty and serving as a JAGC officer until his retirement in 1997. Ms. Sheryl Butler has been a litigation attorney with PFD since 1998. Previously, she worked as an attorney with the Virginia Department of Corrections, served five years on active duty with the Army JAG Corps, and spent four years as a trial attorney for the Army's Regulatory Law Office. Ms. Zetta Proffitt is the Paralegal Specialist for Litigation Branch - East. She has been with PFD since 1988, having served in both the private sector (abstract, title insurance, and real estate industry) and with the Government (AAFES, USMC, National Science Foundation, Department of Agriculture, and FAA). Ms. Proffitt has a B.S. degree in business. Mr. Greg Campbell is the Paralegal Specialist for Litigation Branch - West. He joined PFD in 1988, having previously served as a legal technician at the Armed Forces Institute of Pathology. Mr. Campbell has earned a law degree from Howard University School of Law. Finally, PFD's Legal Technician, Mr. Brian Thorpe, who had been with PFD since 1988, recently departed to accept a promotion and a position with the Contract Appeals Division. Mr. Thorpe's organizational skills, legal technician expertise, and automation talents will be sorely missed.

Having reintroduced the PFD team, I have two administrative announcements. First, all new PFAs and PFICs should register to attend the Army's Procurement Fraud Course at The Judge Advocate General's School in Charlottesville, Virginia. Reservations should be submitted through your personnel office using the Army Training Requirements and Resources System (ATRRS). The course was rescheduled from its less convenient time in the Fall for procurement fraud advisors (the end of the fiscal year), and it is now scheduled for 31 May to 2 June 2000. The 3-day course of instruction is geared for personnel assuming procurement fraud advisory responsibilities, rather than for those with substantial prior experience or those who have attended the course recently (in the past 3 years). Space is limited to 150 attendees; therefore, you should register early to reserve a space.

Second, please advise us if you are aware of a Procurement Fraud Irregularities Coordinator (PFIC) or a Procurement fraud Advisor (PFA) who did not receive a copy of this update. Please telephone or e-mail Mr. Gregory Campbell to receive a copy of the Update. Mr. Campbell's telephone number and e-mail address are listed in the PFD roster attached to this Update. Eventually, we plan to place the Update on the Army's reconstructed Judge Advocate General's Corps website (JAGCNET), which is replacing the LAAWS BBS. We also have plans to create our own webpage. Until these goals are realized, we will rely upon our e-mail transmissions to the MACOM addresses listed in our Procurement Fraud Advisor's Directory. Due to the transitory nature of personnel assigned to PFIC or PFA duties, some e-mail addresses may not be current. We have attached a copy of our current PFA Directory to the e-mail we send to the MACOM PFICs in order to assist them with further dissemination of this Update. We will fax our PFA Update to

those who do not have access to e-mail or to the JAGCNET.

2. Regulatory Developments: Executive Order 13126 Restricts the Federal Government's Purchase of Goods Made by Forced or Indentured Child Labor. On 12 June 1999, President Clinton issued an executive order titled "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor." The order resulted from evidence that use of child labor is steadily rising and concerns that child slavery remains a serious problem, particularly in South Asia and in Africa. The federal government purchases millions of dollars of products from industries that are known to rely on forced or indentured child labor. The order directs the Labor Department to publish within 120 days a list of products, identified by country of origin, for which there is a "reasonable basis to believe have been mined, produced, or manufactured by forced or indentured child labor." Whenever a contracting officer determines that forced or indentured child labor has been used to produce one of the products; the contracting officer must refer the matter for investigation. The head of the agency may terminate a contract or suspend or debar a contractor that has furnished products that have been mined, produced, or manufactured using forced or indentured child labor. The Federal Acquisition Regulatory Council has been tasked with issuing proposed regulations within 120 days to implement the order. (Mrs. McCommas)

3. Army Procurement Fraud Cases:

a. Government Employee Who Solicited a Bribe Debarred - John P. Seidler. On 19 January 1999, Mr. John P. Seidler pled guilty to one count of Bribery of Public Officials and Witnesses (18 U.S.C. § 201(b)(2)(B)). He was sentenced to six months home detention, three years probation and was ordered to pay a \$5,000 fine and \$100 special assessment fee. Mr. Seidler was the Chief of the Quality Assurance Section, Construction Branch, United States Army Corps of Engineers (COE) Jacksonville District, temporarily assigned to Puerto Rico to help in the disaster relief process after Hurricane George. Mr. Seidler solicited a bribe from Mr. Robert Isakson, managing Director of DRC, Inc., a company under contract with COE to remove hurricane debris. Mr. Isakson informed the FBI, whereupon he was wired for sound by the FBI and provided with \$15,000 in marked bills to deliver to Mr. Seidler. At their final meeting, Mr. Seidler gave Mr. Isakson unauthorized information to assist him in negotiating with the contracting officer, and in return, Mr. Isakson paid Mr. Seidler with the marked bills. Mr. Seidler was arrested by the FBI and admitted to soliciting the bribe from Mr. Isakson. Mr. Seidler was terminated from his employment with the COE and he was debarred for three years as a result of this misconduct.

Thanks to Special Agent Dave Brotherton, Florida Field Office, USACIDC, for bringing this case to the attention of PFD and providing all the pertinent information and documents in a timely manner. (Ms. Butler)

b. UniGroup, Inc. (UG), DoD Common Carrier, Enters Administrative Settlement Agreement

with Army. The Army has entered into a settlement agreement with UG, a common carrier providing freight and household goods moving services to DoD. UG recently purchased Mayflower Transit, Inc. (Mayflower), which provided transportation services to the Department of Defense (DoD) and its agencies during 1997 and 1998 for the movement of personal property, household goods, and freight for military personnel. Between 1 April 1997 and 31 May 1998, Mayflower submitted a significant number of duplicate SF 1113s, Public Voucher for Transportation Charges, to DFAS requesting payment for transportation services rendered to DoD. The submission of the duplicate SF 1113s by Mayflower resulted in overpayments totaling approximately \$1,142,562. UG subsequently discovered the overpayments and voluntarily refunded the full amount to the United States. The administrative settlement agreement ensures that procedures are in place to prevent double billing in the future. UG has also agreed to a civil settlement with the U.S. Attorney's Office for the Southern District of Indiana and will pay damages in the amount of \$765,000.

Thanks to Dan Rothlisberger, our PFA at the Military traffic Management Command (MTMC), for his assistance in bringing this case to our attention. (Ms. Butler)

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

a. New Professional Ethics Requirements for Special Assistant U.S. Attorneys and other Attorneys Acting with Justice Department's Authorization. As we reported in PFA Update #38, the "McDade Amendment," which took effect on 19 April 1999, subjects a government attorney to the state laws, professional ethics rules, and local federal court rules of the states in which the attorney *engages in his or her government duties* (28 U.S.C. § 530B). The statute is directed to Justice Department attorneys, but includes any attorney (1) appointed as a Special Assistant U.S. Attorney or (2) "employed" by the Department of Justice and authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States (28 CFR §77.2(a)).

The statute was enacted, in part, over a controversy regarding the Justice Department's contacts with persons represented by legal counsel. The ABA Model Rules of Professional Conduct state 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 other lawyer's consent or is authorized by law to do so. Most states and the District of Columbia have similar rules. The Army adopted the ABA rule verbatim (Rule 4.2, Army Regulation 27-26, Rules of Professional Conduct for Lawyers). A 1994 Justice Department regulation, however, attempted to exempt DOJ lawyers from state ethics rules that prohibit unauthorized contact with represented persons. The 8th Circuit invalidated the Justice regulation in a case involving DOJ contacts with employees of a defendant corporation, 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 (8th Cir. 1998)). The McDade Amendment seeks to codify O'Keefe. In response to the McDade Amendment, the Justice Department has established a Professional

Responsibility Advisory Office, which has provided training on the amendment for its attorneys, and has published an interim final ethics rule to replace the regulation O'Keefe invalidated (64 Fed. Reg. 19273, 20 April 1999). Army lawyers who are Special Assistant U.S. Attorneys or who litigate criminal or civil cases with the Justice Department need to be familiar with the new ethics requirements and should seek training and advice on the McDade Amendment from the Justice Department office they support.

The McDade Amendment does not specifically apply to investigative agents, although under the DOJ interim final rule agents *operating under the direction of a covered attorney* must conform their conduct to McDade to avoid creating ethical problems for the attorney. This rule will affect the way in which the Army Criminal Investigation Command and the other defense investigative organizations conduct their investigations. (Mr. Greenway)

b. Court Rules that *Qui Tam* Suits Cannot be Based upon Information Obtained via FOIA. The Third Circuit Court of Appeals ruled on 30 July that *qui tam* suits under the False Claims Act may not be based upon information that the plaintiff obtained through a Freedom of Information Act (FOIA) request. United States ex rel. Mistick PBT v. Pittsburgh Housing Authority, No. 97-3248 (3d Cir., 30 July 1999). The court stated that a FOIA disclosure is a “public disclosure” within the meaning of 31 USC§ 3730(e)(4)(A), which bars False Claims Act suits based upon such disclosures unless the plaintiff is the attorney general or an “original source” of the information. Because the *qui tam* relator learned of the allegedly misrepresented facts through its FOIA request, it was not an original source of the information, and its *qui tam* suit was barred, the court ruled. The majority cited a Ninth Circuit decision and three district court decisions in support of its holding.

The Chief Judge dissented, arguing that materials obtained through a FOIA request do not constitute a “public disclosure” because “a government agency’s act of locating and duplicating records for a single FOIA requester is fundamentally different from the disclosure of discovery material in civil litigation,” which the Third Circuit has held to be a public disclosure.

The dissent closely parallels a July 16 letter to Attorney General Reno from Sen. Charles Grassley and Rep. Howard Berman, the chief architects of the 1986 amendments for the False Claims Act which established the bar, and who complained that the courts have misinterpreted the public disclosure bar by applying it too broadly. (LTC Franke)

c. Conviction for Progress Payment Fraud Vacated. On 2 April 1999, in the case of United States v. Gatewood, 173 F.3d 983 (6th Cir., 1999), the court vacated a contractor’s conviction for violation of the false statement provisions of Title 18 U.S.C. § 1001, predicated on two separate false certifications under the Prompt Payment Act. The ultimate issue in the case centered on a general ambiguity in the required certification language. This brief note explains the ambiguity and offers revised certification language for use in construction contracts subject to FAR 52.232-5 and

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52.232-27.

Mr. Gatewood, the owner and operator of G & L Contractors, was awarded a Navy construction contract at the Naval Air Station in Millington, Tennessee. Pursuant to this contract, Gatewood signed two separate Prompt Payment Certifications stating in pertinent part as follows: “I hereby certify, to the best of my knowledge and belief, that . . . payments to subcontractors and suppliers have been made from previous payments received under the contract.”

Based on these certifications, Gatewood received two payments from the Government, totaling over \$23,228. In reality, some of Gatewood’s subcontractors had not been paid the full amount due under their subcontracts. A federal grand jury indicted Gatewood on two counts of making a false statement to the Navy in violation of 18 U.S.C. § 1001. Count 1 of the indictment alleged that Gatewood knowingly and willfully made a false statement,

in that he certified that he had made payments to subcontractors and suppliers from previous payments received under a contract with the United States Navy when in truth and in fact as he then well knew he had not made full payments to the subcontractors and suppliers from previous payments received

The court noted that a prosecution under Section 1001 for making a false statement cannot be predicated on an ambiguous question where the response may be literally and factually correct. Here, Gatewood had made some payments, although not full payments as the indictment alleged. Thus, the court saw a direct conflict between the language of the certification and the allegation of not making full payments. In the court’s view, “certifying that one has made payments to subcontractors is not inconsistent with having yet to pay the subcontractors in full.” The court vacated the conviction and remanded the case with orders that the indictment be dismissed.

The court suggested that the certification language should be changed if it were intended to ensure that all payments then due the subcontractors had been made. The court even offered by way of an example, the following language: “I hereby certify, to the best of my knowledge and belief, that . . . all payments due to subcontractors and suppliers at the time of the last payment received under the contract have been made.”

The certification language that Gatewood used in his two requests for payments came from FAR 52.232-5, which requires certification to accompany each request for a progress payment. Using the guidance provided in Gatewood, a revised certification form might look like the sample provided herein (Enclosure). The language that the court found inadequate is still mandated by the FAR. Unless or until the FAR requirements are altered to account for this decision, the suggested revised form should only be used with the knowledge and approval of a supervising contract attorney-advisor. (LTC Caddell)

5. Defense Industry Initiative: What is it and what does it do?

During June 1999, three attorneys from the Army's Procurement Fraud Division were invited to attend the Defense Industry Initiative (DII) "Best Practices Forum" in Washington, DC. We observed, first hand, the attitude of the major United States defense industry corporations in regard to ethical business practices. This article will explain the genesis of DII and the impact this type of program has on the defense industry in United States.

DII was created in the mid-1980s after the environment surrounding the defense industry had become, or at least had appeared to become, unhealthy and suspect in the eyes of the American public. Because of this public concern, President Ronald Reagan, in July 1985, asked a former Deputy Secretary of Defense and present Chairman of Hewlett-Packard Corporation, David Packard, to chair an independent Blue Ribbon Commission on Defense Management. Known as the Packard Commission, this group was tasked to study defense management and make recommendations for streamlining and improving that industry. Specific focus was placed upon the budget process, procurement, organization and operation, and legislative oversight.

On February 28, 1986, the Packard Commission released an interim report stating that federal regulation alone might have limited effect in achieving the recommendations it had set forth. Government regulation in conjunction with corporate self-governance might be the best way to effectively address "the unique problems and procedures incident to defense procurement. To accomplish effective self-governance, defense contractors must therefore create ethical codes of conduct and implement internal corporate controls to allow for monitoring the development and application of the codes."

As a response to the Packard's Commission's interim report, early in 1986, representatives from 18 major defense contractors met and drafted six principles that subsequently became known as the "Defense Industry Initiative on Business Ethics and Conduct." The signatory companies pledged to promote ethical business conduct through the implementation of policies, procedures, and programs that would focus on and create:

- (1) Codes of ethics;
- (2) Ethics training;
- (3) Internal reporting of alleged misconduct;
- (4) Self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities;

- (5) Responsibility to the industry through attendance at Best Practice Forums; and
- (6) Accountability to the public.

These six principles were considered essential by the signatories to restore public confidence in the defense industry. The Government had begun the process by forming the Packard Commission; defense industry commercial companies showed their desire to participate by carrying the initiative forward through the development of the DII. Twenty-four companies had become signatories to the DII by the time the Packard Commission had released its final report in June 1986. The number stood at 50 members by May 1999. This group includes nearly all of the top 25 defense contractors and represents nearly half of all major defense contract awards.

A steering committee of senior executives from the signatory companies established policy for the DII. The steering committee was supplemented by a "working group," which was tasked to analyze policy issues and to carry out the programs of the DII. The Best Practices Forum was created to promote defense industry-wide cooperation among the DII members, to allow them and invited guests to share experiences, and discuss business conduct and compliance with laws and regulations. The initial forum was held in Washington DC on October 30-31, 1986. Annual forums have been held every year since that date.

DII, through the annual Best Practice Forums, has attempted to establish an ethical environment in which its members conduct business. The attitude of its members during the 1999 Forum was one of genuine enthusiasm; they were not merely "going through the motions" with disingenuous concern. Ethical responsibility is good for business because it assists in supporting a healthy business environment. DII demonstrates that the leaders of the defense industry are committed to doing business in accordance with the highest standards of business conduct. Their present and future success will serve as an example for defense industry companies not yet involved with the DII and, as a result, the membership of the DII should show healthy growth. Ideally, each member of the DII will benefit from membership (thus encouraging membership growth); public confidence will be restored; and, most importantly, the industry upon which the national defense rests will remain strong, efficient, and effective. (Mr. Bobell)

6. PFD on the Web. As stated in Update #39, we were working to post useful procurement fraud program information on the Army Judge Advocate General's Corps website (www.jagcnet.army.mil). We intend to post the PFD staff directory, a directory of Army PFAs world-wide, recent issues of the Procurement Fraud Advisors Update, the Procurement Fraud Course deskbook, an outline for your use in teaching procurement fraud classes, procurement fraud references, and links to other sites of interest. While this effort has not progressed as quickly as we would like due to the JAG Corps' transition from the LAAWS BBS to JAGCNET, it is still a priority for this office.

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7. **Contacting PFD:** PFD's current office roster with telephone numbers and e-mail addresses is attached. Our e-mail addresses are new, reflecting HQDA's use of first and last names in all addresses. Mrs. Christine S. McCommas is the editor of the Update. Please contact her with questions regarding the content of articles appearing in the Update or with items for publication. Mr. Gregory Campbell, paralegal, is our POC for requests to receive the Update. Ms. Zetta Proffitt, paralegal, is our POC for changes to our PFA Directory.

Encls

ROBERT C. MCFETRIDGE
COL, JA
Chief, Procurement Fraud
Division

Enclosure

Prompt Payment Certification
I. Under Fixed-Price Construction Contract
[FAR PART 52, Section 52.232-5 & 52.232-27]

1. Contractor Name, Address & Phone: _____

2. Invoice Date: _____
3. Contractor Number: _____
4. Description of Work or Services Performed (e.g. see attached invoice):

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5. Delivery and Payment Terms (e.g. prompt payment discount terms):

6. Name, address, and telephone number of Contractor's Payment Recipient:

7. Name, address, and telephone number of Contractor's contact for defective invoice:

8. Certification: I hereby certify, under penalty of law, that to the best of my knowledge, and belief, that:

- a. The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
- b. All payments due to subcontractors and suppliers at the time of the previous payments received under the contract have been made, and timely payments due will be made from the proceeds of the payments covered by this certification, in accordance with sub-contract agreements and the requirements of chapter 39 Title 31, United States Code; and
- c. This request for progress payments does not include any amounts, which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

[False or fraudulent certification is subject to criminal & civil punishment, and administrative action.]

Signature: _____ Title: _____

Name: _____ Date: _____

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GAO BID PROTEST DECISIONS

The implementation of recent procurement reform legislation presents many challenges to those who participate in the government's acquisition of goods and services. This year's bid protest decisions again highlight common pitfalls.'

Documentation of evaluation and source selection record

- Adequate documentation of evaluation and source selection decisions continues to be critical.

Biosoherics Inc., B-278508.4 et al., Oct. 6, 1998, 98-2 CPD 11 96 (agency failed to document its evaluation of final revised proposals and, as a result, GAO was unable to assess the reasonableness of the selection decision).

GAO may give little weight to post-protest evidence unless it represents the memorialization of pre-protest analyses or judgments.

Intellectual Properties Inc., B-280803, Nov. 19, 1998, 98-2 CPD 1 115 (since GAO accords greater weight to contemporaneous materials rather than judgments made in response to protest contentions, agency's post-protest reevaluation was not accepted because it asserted a new basis for rejecting the protester's proposal and was not consistent with the agency's initial evaluation of proposals).

Evaluations and tradeoffs

- Agencies must evaluate proposals in accordance with the terms of the solicitation.

Beckman Coulter, B-281030, B-281030.2, Dec. 21, 1998, 99-1 CPD ~ 9 (offeror took exception to material solicitation requirements and, therefore, award was improper).

ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD it 102 (under a pass/fail evaluation scheme, agency unreasonably assigned a "pass" rating to the awardee's proposal where the firm failed to demonstrate required experience in

'Bid protest decisions can be accessed at GAO's web site: <http://www.gao.gov>.

each specified computing environment in accordance with the solicitation terms).

- Agency reliance on a purely mechanical/mathematical tradeoff methodology is problematic.

Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD 11 61 (tradeoff was unreasonable where agency mechanically compared total proposal point scores, but made no qualitative assessment of the technical differences in the proposals to determine whether it was worth paying a price premium for a technically superior proposal).

Past performance evaluations

- Downgrading an offeror's past performance rating simply because the offeror has filed claims or protests is impermissible.

AmClvde Engineered Prods. Co.. Inc., B-282271, B-282271.2, June 21, 1999, 99-2 CPD ~ 5.

- "Same or similar" past performance requirements and neutral past performance ratings continue to be troublesome.

ACS Gov't Solutions Group. Inc., B-282098 et al., June 2, 1999, 99-1 CPD 1 106 (agency unreasonably determined that the awardee's more limited experience, for example, in collecting delinquent auto loans or leases, was "the same as or substantially similar to" the comprehensive servicing of single family mortgages required by the solicitation)

National Aerospace Group. Inc., B-281958, B-281959, May 10, 1999, 99-1 CPD 1 82 (agency failed to make a meaningful tradeoff where it selected a significantly higher-priced vendor simply because the low-priced vendor lacked a prior, relevant performance history).

- An agency cannot ignore relevant information that is close at hand.

GTS Duratek. Inc., B-280511.2, B-280611.3, Oct. 19, 1998, 98-2 CPD 1 130 (where one of the technical evaluators was personally aware of the protester's performance under a prior, highly relevant contract, agency unreasonably failed to consider this information which was in its possession).

Cost realism evaluations

- Cost realism analyses continue to cause difficulties.

E. L. Hamm & Assocs. Inc., B-280766.3, Apr. 12, 1999, 99-1 CPD 11 85 (agency unreasonably accepted the awardee's low proposed overhead rate as realistic where the firm's cost proposal did not explain or justify why the proposed rate was significantly less than its rate as approved by the Defense Contract Audit Agency).

L-3 Communications Corp., Ocean Svs. Div., B-281784.3, B-281784.4, Apr. 26, 1999, 99-1 CPD ~ 81 (in determining the realism of an offeror's proposed indirect rates, agency unreasonably relied solely on an unaudited summary of indirect rate data).

Competitive range

Even under the FAR Part 15 rewrite, a competitive range of one is permissible.

Clean Serv. Co.. Inc., B-281141.3, Feb. 16, 1999, 99-1 CPD 1 36.

Discussions

Particularly in the context of enhanced oral and written communication **between** agencies and offerors, the legal requirements regarding discussions have become increasingly important.

Cotton & Co.. LLP, B-282808, Aug. 30, 1999, 99-2 CAD 11 (discussions not meaningful where agency failed to clearly identify deficiencies in the protester's proposal in either written or oral discussions and failed to respond when, in oral discussions, it became clear that protester had misunderstood agency's concerns).

Metro Machine Corp., B-281872 et al., Apr. 22, 1999, 99-1 CAD 1f 101 (agency engaged in misleading discussions by failing to make clear that a particular approach in the protester's proposal could not be modified or enhanced, but rather, rendered the proposal technically unacceptable).

MCR Fed.. Inc., B-280969, Dec. 14, 1998, 99-1 CPD 11 8 (no requirement that agency discuss every aspect of an otherwise acceptable proposal that received less than the maximum score).

Du & Assocs.. Inc., ~280283.3, Dec. 22, 1998, 98-2 CPD ~ 166 (no requirement that agency "spoon-feed" an offeror during discussions).

Task and Delivery Orders

- Task and delivery orders must be within the scope of the contract.

Makro Janitorial Servs.. Inc., B-282690, Aug. 18, 1999, 99-2 CPD 1 (task order for housekeeping services for medical facilities was out of scope where the original contract limited requirements to repair and maintenance of medical facilities).

GAO's jurisdiction over task and delivery orders under indefinite-delivery, indefinite-quantity contracts has been in dispute.

Teledvne-Commodore. LLC—Recon., B-278408.4, Nov. 23, 1998, 98-2 CPD 1 121 (while a protest is not authorized in connection with the issuance of a task or delivery order, except a protest alleging that the order increases the scope, period, or maximum value of the contract under which the order is issued, see 10 U.S.C. § 2304c(d) and 41 U.S.C. § 263j(d), where the nature of the procurement

- demonstrated that agency was essentially conducting only one competitive source selection, this competition was not subject to the statutory restriction).²

Commercial item acquisitions

- Commercial contracting presents challenging new issues.

Smelkinson Svscs Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD 1 57 (agency failed to conduct adequate market research regarding whether a disclosure requirement in the solicitation was consistent with customary commercial practice).

American Artisan Productions. Inc., B-281409, Dec. 21, 1998, 98-2 CPD 1 155 (exhibition booth modified to meet the agency's specific requirements was reasonably determined a commercial item since the modifications did not change the essential physical characteristics of the item).

2GAO decided this protest on a fully developed record after reversing on reconsideration a prior dismissal.

Simplified acquisitions/schedules

- Even in a simplified acquisition or schedule buy, agencies must treat vendors fairly and act reasonably.

Universal Bldg. Maintenance. Inc., B-282456, July 15, 1999, 99-2 CPD 1 (simplified acquisition selection decision was flawed where the record showed that the agency failed to qualitatively compare the technical differences between proposals to determine whether the technical superiority of the awardee's proposal justified the payment of a price premium)

Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD 11 161; Information Sys. Tech. Corn, B-280013.2, Aug. 6, 1998, 98-2 CPD 1 36; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD q 34 (where an agency requests proposals or conducts a competition before determining which Federal Supply Schedule (FSS) vendor will be issued the order, GAO will hear a protest concerning the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation terms).

Other ordering issues

- If an agency buys using the FSS, it must do so in accordance with schedule limitations.

Pvxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD 1 18 (agencies may no longer rely on the "incidentals" test to justify the purchase of non-FSS items; where an agency buys non-FSS items, it must follow applicable acquisition regulations).³

- Consideration is essential to awarding an enforceable contract.

Satellite Servs. Inc., B-280945 et al., Dec. 4, 1998, 98-2 CPD 1 125 (disclaimer of the government's ordering obligation renders illusory the consideration necessary to enforce the contract).

3GAO invoked the significant issue exception to its timeliness rules in this case.

Bundling

Bundling continues to raise competition concerns.

S&K Elecs., B-282167, June 10, 1999, 99-1 CPD ~ 111 (agency did not improperly bundle desktop computing requirements where such consolidation reflected a qualitatively different approach from earlier acquisitions and agency reasonably anticipated achieving substantial technical benefits from the use of a single contractor to acquire a broad range of computing requirements under one contract).

Accord The Urban Group. Inc.: McSwain and Assocs.. Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD 1 25.

A-76 competitions

GAO has issued a number of significant protest decisions involving procurements conducted pursuant to OMB Circular A-76.

BMAR & Assocs.. Inc., B-281664, Mar. 18, 1999, 99-1 CPD 1 62 (lump sum pricing scheme in an A-76 competition that provided no limitation on the amount of work that could be ordered under various tasks was improper because it placed an unreasonable risk on the contractor, thus unduly restricting the competition).

DZS/Baker LLC: Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD 11 19 (where 14 of 16 evaluators held jobs which, under the A-76 cost comparison study, were proposed to be contracted out, unmitigatable conflict of interest existed and potentially impaired the objectivity of the evaluation conclusion that all private contractors' proposals were unacceptable)

Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD 11 159 (private sector offerors whose proposals are not selected for comparison with the in-house offer are entitled to a debriefing on the results of the private sector competition; a protest may be filed in accordance with GAO's bid protest regulations after the debriefing).

Prejudice

- A protester must demonstrate a reasonable possibility that it was prejudiced by the agency's actions.

National Toxicology Labs.. Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ~ 5 (protester failed to show that it was prejudiced by the agency's evaluation).

Reaffirmation of Executive Order 12871 -- Labor-Management Partnerships

For Immediate Release October 28, 1999

October 28, 1999

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Reaffirmation of Executive Order 12871 -- Labor-Management Partnerships

When I became President, I believed that cooperation between Federal agencies and their unions could help create a Government that works better, costs less, and makes a positive difference in the lives of the American people. That is why I issued Executive Order 12871, Labor-Management Partnerships, and directed agencies to form partnerships with their unions; involve employees and union representatives as full partners in identifying and resolving workplace issues; provide training in consensual methods of dispute resolution; negotiate with unions over the subjects set forth in 5 U.S.C. 7106(b)(1); and evaluate bottom-line results achieved through partnership.

With your hard work and support, we have made great strides over the past 6 years. In many agencies, unions and management are working side by side on the tough challenges facing the Government and its employees. I am very proud of this success, but I am also convinced that we can do even more. I believe the time has come to redouble the Administration's efforts to create genuine labor-management partnerships. Therefore, I am taking new steps to reaffirm my strong commitment to partnership and to renew my call for agencies to work with their unions to achieve the important objectives of the Executive order.

First, I direct agencies to develop a plan with their unions at appropriate levels of recognition for implementing this memorandum and the Executive order. Every effort should be made to develop a plan that helps the agency and its employees deliver the highest quality service to the American people. Whenever possible, workplace issues should be resolved through consensus using interest-based problem-solving techniques. Agencies should aggressively seek training, facilitation, and mediation assistance that can help foster an environment where partnerships can succeed and thrive.

Second, agencies are directed to report to me, through the Office of Management and Budget (OMB), on the progress being made toward achieving the goals of this memorandum and the directives set forth in the Executive order. Reports must be submitted by April 14, 2000, and annually thereafter, and must be prepared with the involvement and input of the unions. Agencies shall describe the nature and extent of their efforts to comply with the Executive order and shall identify specific improvements in customer service, quality, productivity, efficiency, and quality of worklife that have been achieved as a result of partnership. These reports will not only help me assess our progress toward establishing successful partnerships, but will provide best practices that can assist unions and agencies in their efforts to develop effective partnership-building strategies.

Finally, I am directing the Office of Personnel Management to analyze the information contained in these reports and, in coordination with OMB, to advise me on further steps that might be needed to ensure successful implementation of this memorandum and Executive Order 12871.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to and does not create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON

Executive Summary of FLRA GC Guidance to RDs on Developing a Labor Relations Strategic Plan -- FLRAgc
UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20424
(202) 482-6600 FAX(202) 482-6608

September 24, 1999
MEMORANDUM

TO: Regional Directors

FROM: Joe Swerdzewski, General Counsel

SUBJECT: Guidance on Developing a Labor Relations Strategic Plan

See also: Executive Summary; Press Release

This Guidance Memorandum discusses the concept of developing a labor relations strategic plan designed to help labor and management successfully deal with each other in the workplace. It serves as guidance to the Regional Directors in informing union officials and agency representatives about effective approaches to fulfilling their responsibilities under the Federal Service Labor-Management Relations Statute (Statute). This Guidance also furthers the Office of General Counsel's Facilitation, Intervention, Training and Education Policy, which was recently incorporated into the General Counsel's Regulations [n1] as part of the Alternative Dispute Resolution (ADR) Services provided by the Office of General Counsel.

I am making this Guidance available to the public to assist union officials and management representatives in developing effective labor relations strategies. This Guidance is a continuation of my Office's commitment to provide the participants in the Federal Service Labor-Management Relations Program with my views on significant topics. [n2] This Guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.

The Labor Relations Strategic Planning process described in this Guidance can produce beneficial results for labor and management. Strategic labor relations plans can help parties achieve short-term goals, such as dealing with stalled

contract negotiations, significant backlogs of grievances and individual collective bargaining disputes. Strategic labor relations plans can also yield long-term improvements in parties' relationships, such as developing better communication practices, improving trust levels and increasing the use of collaborative processes like interest-based bargaining and pre-decisional involvement.

This Guidance is divided into four parts:

- (1) What is a labor relations strategic plan and why is it necessary?
- (2) Assessing your current labor relations strategy: what is it and is it successful?
- (3) How do labor and management develop a strategy to meet their goals?
- (4) Approaches to implementing a successful labor relations strategic plan.

The Guidance also includes two appendices, which set forth agendas for an internal strategy development program and a joint strategy development program.

EXECUTIVE SUMMARY

FLRA GENERAL COUNSEL JOSEPH SWERDZEWSKI'S MEMORANDUM TO REGIONAL DIRECTORS ON GUIDANCE ON DEVELOPING A LABOR RELATIONS STRATEGIC PLAN

See also: Memorandum (<http://www.flra.gov/gc/lrstpln1.html>); Press Release (<http://www.flra.gov/news/pr113-99.html>)

This Executive Summary of the General Counsel of the Federal Labor Relations Authority's Guidance Memorandum to Regional Directors discusses what a labor relations strategic plan is and how to develop one. Regional Directors frequently provide Alternative Dispute Resolution (ADR) services pursuant to section 2423.2 of the Regulations of the Federal Labor Relations Authority and the General Counsel of the Federal Labor Relations Authority. This memorandum serves as guidance to the Regional Directors in assisting the parties in understanding the value of a labor relations strategic plan and in preparing a plan for their own use. It is also intended to assist parties in improving their relationships and avoiding litigation. I am making this Guidance Memorandum available to the public to assist union officials and agency representatives in working together to develop productive labor-management relationships, to avoid unfair labor practices, and to obtain a clearer understanding of how to plan a successful approach to labor-management relations.

This Guidance is divided into four parts. Part 1 - What Is a Labor Relations Strategic Plan and Why Is It Necessary? - describes what a labor relations strategic plan is and its value to the parties. Part 2 - How Do Labor and Management Assess Their Current Strategies, and How Successful Are Those Strategies for Them? - explains the concepts of a collaboration strategy and a compliance strategy. It provides a list of questions to use in determining which strategy is currently being used by an organization. It also explains how the philosophy of managing an organization has an effect on its approach to labor relations. Part 3 - How Do Labor and Management Develop a Strategic Plan to Meet Their Goals? - describes the steps in a process which can be used to develop an individual or joint labor relations strategic plan. Part 4 - How Do Labor and Management Develop Approaches to Implementing a Successful Labor Relations Strategic Plan? - describes the need for a clear approach on how to implement a strategic plan. This part describes the kinds of questions which must be answered to successfully implement a plan.

Attached to the Guidance are two appendices. The first appendix is an agenda for an individual labor relations strategic plan development program for the use of either labor or management in developing their own internal plans. The second appendix is an agenda for a joint labor relations strategic plan development program. This program is for the use of both labor and management in developing a joint plan.

PART 1

WHAT IS A LABOR RELATIONS STRATEGIC PLAN AND WHY IS IT NECESSARY?

Q. # 1: What is a labor relations strategic plan?

A labor relations strategic plan is an effort to identify the goals in labor relations desired by labor or management, individually or jointly; to determine the strategy needed to reach those goals; and to develop the actions that are necessary to carry out that strategy.

Q. # 2: Why is a labor relations strategic plan necessary?

A labor relations strategic plan is necessary to change the conduct of labor relations from being reactive to being pro-active. Developing a strategic plan allows the parties to move away from simply reacting to each other, towards an approach where they have a clear understanding of the best way to operate effectively to accomplish the mission of the agency and achieve their labor relations goals.

Q. # 3: Who should have a labor relations strategic plan?

Labor and management that have problem relationships should have a plan to

start them moving in a positive direction. Partnerships that are struggling should develop a plan to gain some momentum and move forward. Relationships which are working well should have a plan to carry on their success through changes in leadership on either or both sides. The Guidance sets forth a series of questions which can be useful in deciding on whether to develop a labor relations strategic plan.

PART 2

HOW DO LABOR AND MANAGEMENT ASSESS THEIR CURRENT STRATEGIES, AND HOW SUCCESSFUL ARE THOSE STRATEGIES FOR THEM?

Q. # 1: What are labor relations strategies?

A labor relations strategy is the basic approach to how a union or management conducts labor relations. There are two basic strategies for conducting labor relations in the federal sector: collaboration and compliance. Each of these strategies, as well as a combination of these strategies, can be a viable approach to a successful labor relations program. A strategic plan helps to focus on the effective use of a strategy.

Q. # 2: What is a compliance strategy?

A compliance strategy relies on the enforcement of rights and obligations created by statute and by contract. This is the predominant strategy used in the federal sector, as well as in the private sector. The effectiveness of this strategy depends on the ability and skill to force the other party to do what the law or the parties' contract requires it to do.

Q. # 3: What are the advantages of a compliance strategy?

There are several advantages of a compliance strategy:

a.. This strategy is known to many parties since it has been in use for over 20 years. Although parties may not be thoroughly familiar with all aspects of each of the processes, they know what the processes are and are generally familiar with how they operate.

b.. There are clearly defined winners and losers. Compliance is beneficial to the party with greater staying power and with greater skill in the process. Having greater staying power and greater skill can equate to winning more frequently and thereby being more successful.

c.. There is no need to trust the other party. The normal arms-length interaction which characterizes adversarial relationships does not rely on the parties' commitment or mutual trust. The parties don't have to get along to be adversarial. The parties simply use the various legal processes to adjudicate

their rights, without relying on an effective relationship.

d.. Compliance may be quicker than other approaches. If a party has made a decision which it believes is within its legal rights, it does not have to spend time dealing with the other party. It simply does what it thinks is right and moves forward. Of course, if the party violates the law in taking this approach, the unfair labor practice process may slow down the implementation.

Q. # 4: What are the disadvantages of a compliance strategy?

There are several disadvantages of a compliance strategy:

a.. Litigation can be costly, both in terms of financial and other resources.

b.. Adversarial relations can result in continual escalation of warfare between the parties. Winning may become more important than the underlying issue. What otherwise may be trivial issues become significant to the parties and matters of principle that end up being litigated.

c.. To be successful, a party must have a high degree of knowledge of the law and skill at advocating its position. Lack of a high degree of knowledge and skill is a serious disadvantage to a party using a compliance strategy.

d.. A compliance approach does not improve the relationship between the parties. It can lead to irreparable damage to the ability of parties to communicate effectively concerning issues of mutual concern.

Q. # 5: What is a collaboration strategy?

A collaboration strategy relies on the use of an interest-based approach to solving problems that otherwise would be resolved through the enforcement processes provided by the Statute. It relies on both parties acknowledging that each brings value to the table. It requires a high degree of trust and commitment.

Q. # 6: What are the advantages of a collaboration strategy?

The advantages of a collaboration strategy are the following:

a.. A significant advantage is that labor and management use interest-based problem solving as the basic method of resolving disputes. In an interest-based approach, the parties attack the problem and not each other.

b.. A well-crafted collaborative solution improves the quality of the decision-making, as well as reduces subsequent problems arising from the actual implementation.

c.. Collaboration also tends to increase the level of trust between the parties, which can lead to increased communication, which in turn results in better understanding of each side's concerns and better resolution of disputes.

Q. # 7: What are the disadvantages of a collaboration strategy?

The disadvantages of a collaboration strategy are the following:

a.. It may have a negative effect on the respective constituencies of labor and management. Union members may perceive a collaborative union leadership as being "in bed" with management and only looking out for the leadership's personal interests and not the interests of the employees. Likewise, management may lose the support of lower-level management who may believe that upper management has "sold out" to the union.

b.. Collaboration can also take longer to bring about change because using an interest-based approach sometimes takes longer than traditional bargaining.

c.. Collaboration uses a new set of skills which are different from those required to be effective in a compliance environment. These new skills require changes in individuals' attitudes and approaches in how to deal with others.

Q. # 8: Is collaboration co-management?

No. Collaboration does not involve co-management of the agency by the union. Co-management involves joint decision-making, which is inconsistent with the role of the union as representative of employees. If co-management resulted in making the union a part of management, the employees would essentially have two sets of management, instead of a representative. They would lose the union's ability to represent their interests when they clashed with the interests of management.

Q. # 9: Why is the term "collaboration" used instead of "partnership"?

The term "collaboration" instead of "partnership" is used to define this strategy because Executive Order 12871 does not define what a partnership is, nor does it explain what is expected of the parties in such a relationship. A partnership relationship under the Executive Order may use a collaborative approach to labor relations, some combination of both collaboration and compliance, or may simply be some form of compliance. Collaboration is a way of dealing with each other which may or may not include an actual partnership agreement or relationship. It is a strategy which relies on greater involvement in management decision-making by employees through their exclusive representative but retains ultimate decision-making authority in management, as is the case in most partnership arrangements.

PART 3

HOW DO LABOR AND MANAGEMENT DEVELOP A STRATEGIC PLAN TO MEET THEIR GOALS?

Q. # 1: Who should develop the strategic plan?

For a labor relations strategic plan to be effective, it must be developed by a cross-section of the people who will be affected by it. It should not be a paper exercise, nor should all constituents participate in its development. A labor relations strategic plan cannot be carried out effectively if it is the sole creation of the labor relations staff of an agency or of the president of a union. To be effective, it must be developed by people who are responsible for achievement of the goals of the agency or union. They must buy in to the strategy and understand its advantages and disadvantages. The most effective process for the development of a strategy is to use a team approach. This approach is also the most effective at developing the buy-in needed to make the strategy work.

Individual strategy development teams generally should consist of at least 10 and no more than 20 members. Joint strategy teams consisting of union and management generally should have 20 - 30 members. The head of the organization and the president of the union are essential participants. The remainder of the participants should be leaders of their respective organizations.

Q. # 2: How do you develop an individual labor relations strategic plan?

There are six segments to the development of an individual plan: (1) a presentation and discussion of what a labor relations strategy is and the reasons for having one; (2) an assessment of the current labor relations strategy being used; (3) an analysis of the current state of the relationship between labor and management; (4) an assessment of whether the current strategy is helping the organization attain its goals; (5) a decision on the best strategy for the organization; and (6) the development of a labor relations strategic plan. Each of these segments is a building block towards the development of the plan itself. The Guidance outlines these steps and what is achieved by following them. Appendix A of the Guidance is an agenda for an internal labor relations strategic plan development program.

Q. # 3: How do you develop a joint labor relations strategic plan?

Many of the segments of this program are similar to the internal strategy development program. The purpose of a joint program is to provide labor and management an opportunity to develop a plan on how to conduct labor relations more effectively. If the parties are in partnership, the plan's purpose is to make the partnership more effective. If the parties are not in partnership, the plan seeks to improve how they conduct labor relations and provide opportunities to move in the direction of a more collaborative relationship.

Appendix B of the Guidance is an agenda for a joint labor relations strategic plan development program.

PART 4

Approaches to Implementing a Successful Labor Relations Strategic Plan

Q. # 1: How do you implement a collaboration strategy?

Changing the current approach to how labor relations is conducted is, in many respects, a cultural change for an organization. For an agency or union that has not been collaborative in the past to become more collaborative requires a significant change in the way each side thinks about the other. Many of the attitudes and myths associated with labor relations die hard for some people.

For those attitudes and myths to change requires leadership and training. Leaders from both organizations must send a clear message that there is a new approach to labor relations, what that approach is and that they firmly support it. Joint training is needed to inform management and union constituencies as to the reasons and value of the change. Training should also be done internally within each organization so the issues related to such a change can be fully explored.

Additionally, training must be provided to develop the skills necessary for working in a collaborative environment. Processes must also be developed which further a collaborative environment, such as pre-decisional involvement and ADR.

The Guidance outlines the steps for the implementation of a successful collaboration strategy.

Q. # 2: How do you implement a compliance strategy?

For an organization to be successful with a compliance approach, it must also change its attitude and approach to the conduct of labor relations. It requires a greater grasp of the law and more thorough understanding of the statutory processes. It requires an emphasis on being current on the state of the law and knowledgeable about various approaches to the settlement of disputes. The parties' collective bargaining agreement must be current and clearly reflect the needs of the parties. Developing an approach to doing litigation risk analysis is an important process to develop to determine the effects of litigation.

The Guidance outlines the steps for the implementation of a successful compliance strategy.

A GUIDE:

To Dispute Resolution Procedures Used by the Federal Service Impasses Panel

Federal Service Impasses Panel
Office of the Executive Director
607 14th Street, N.W., Suite 220
Washington, D.C. 20424-0001

Phone: (202) 482-6607

Fax: (202) 482-6674

This Guide is to inform employer and union representatives about the procedures used by the Panel to resolve impasses in negotiations. It is not to be considered an official interpretation of the Federal Service Labor-Management Statute, 5 U.S.C. § 7119, or the Panel's regulations, 5 C.F.R. § 2470, et.seq.

Revised November 1998

INTRODUCTION

The Federal Service Impasses Panel (Panel) has broad statutory authority to resolve negotiation impasses over conditions of employment in the Federal sector. Once it determines to assert jurisdiction in a dispute, the Panel may recommend or direct the use of procedures for resolving an impasse through any method it deems appropriate. If the procedure selected does not result in a settlement, the Panel may then take whatever final action is necessary to resolve the dispute, including the issuance of a *Decision and Order*. The *Order* is binding during the term of the parties' collective bargaining agreement unless the parties agree otherwise. Because the Panel believes that the voluntary resolution of impasses are superior to those imposed by a third party, after considering the parties' preferences, where circumstances warrant the Panel will select the procedure most likely to lead to a voluntary settlement. Consistent with this belief, the Panel encourages the parties to continue efforts to resolve the issues voluntarily at any stage of case processing.

The Guide is intended to describe those procedures most commonly used by the Panel, but does not include them all. Throughout its history, the Panel has been innovative in creating new procedures designed to meet the changing needs of Federal sector impasse

resolution. In conjunction with any procedure, the Panel may, on occasion, introduce variations as well. After consulting with the parties, for example, the Panel may determine that time and efficiency require conducting the selected procedure by telephone conference. When presented with special circumstances or a novel issue, as a second step, the Panel may issue a *Report and Recommendations for Settlement*. This additional procedural step gives the parties an opportunity to consider and comment on a recommended settlement before a final decision is issued. In some cases, the Panel may use "final-offer selection," which limits the decision-maker to selecting between the parties' final offers on an issue-by-issue, article-by-article, or package basis, insofar as they otherwise appear to be legal. Final-offer selection is intended to provide the parties with an incentive for making their proposals as reasonable as possible. If it is used in connection with any procedure, the parties will always be notified in advance.

THE PARTIES' RESPONSIBILITIES

The Panel's unique role as the Federal sector substitute for the strike and the lock-out requires it to bring finality to those disputes where jurisdiction is asserted. In turn, the parties bear the ultimate responsibility for ensuring that the Panel is fully informed when it deliberates over the merits of their case. During any procedure under the Panel's auspices, therefore, each party must be ready to explain how its proposal works, and to support its adoption by providing clear and complete statements of position, either orally or in writing. The most common criteria the Panel applies in assessing the merits of proposals are **demonstrated need** and **comparability**. For instance, when one party proposes to change the *status quo*, that party is obligated to demonstrate the need for the change. In addition, when other workplaces in the private, public, or Federal sector are currently governed by a practice which a party would like to see adopted, the existence of the practice should be documented and evidence should be produced to substantiate that the employees who would be affected are similarly situated. In sum, whenever a party participates in a procedure under the Panel's auspices, there is no substitute for thorough preparation and collection of data in advance to be used in persuading the Panel that its proposal should be imposed to resolve the dispute.

JURISDICTIONAL QUESTIONS

In the course of investigating a request for assistance, a party may claim that a matter is outside its duty to bargain. If subsequent research reveals that the claim appears to be frivolous, the Panel will not permit it to block the handling of an impasse. In certain circumstances such as a multi-issue impasse where the claim raises a serious question, the Panel may nevertheless determine to assert jurisdiction in an attempt to work around the matter, with the goal of assisting the parties in resolving the entire dispute.

PROCEDURES

The following is a description of some of the procedures the Panel uses after it asserts jurisdiction in a case. If a more thorough understanding of the procedures is necessary, Panel representatives may be contacted directly at **(202) 482-6670** for additional information. Moreover, the Panel representative initially assigned to investigate a case will provide a detailed explanation of various procedures when soliciting the parties' preferences. While such preferences are given serious consideration, the Panel ultimately selects the procedure that, in its view, is best designed to address the particular circumstances presented. From time to time the Panel meets with its customers around the country to provide training on the Panel's processes and to engage in a dialogue intended to elicit their concerns. Parties are encouraged to contact the Panel in advance when planning sizable training conferences to arrange for Panel participation.

1. Resumption of Negotiations on a Concentrated Schedule

- With Mediation Assistance, as Necessary or Required

When the Panel believes that further bargaining may resolve a dispute or at least serve to narrow the issues, it may send the parties back to the bargaining table on a specified, concentrated schedule, normally over a 15, 30, or 45-day period. In one variation of this procedure, during the resumed bargaining the parties may secure assistance from FMCS when they believe it is necessary. The parties will be asked to submit a status report to the Panel at the conclusion of the concentrated effort. If they do not reach a complete settlement, the Panel may then direct another procedure, which often results in the issuance of a binding decision. In another variation of the procedure, the Panel itself may arrange in advance a schedule of resumed negotiations with the

FMCS mediator who was previously involved in the case. Regardless of which variant is utilized, the Panel also sometimes informs the parties in the letter directing them back to the table that if a complete settlement does not occur during the specified period of negotiations, the Panel will be restricted to selecting from between their final offers on either an issue-by-issue, article-by-article, or package basis. This usually occurs in only the most difficult impasses where the Panel believes that maximum pressure should be brought to bear on the parties to assist the mediator in his or her efforts at voluntary settlement.

- With CADRO Intervention

The FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO) is part of an agency-wide initiative to help parties avoid formal litigation by using an interest-based approach in a variety of disputes. In selected cases, after consulting with and receiving the prior approval of the parties, the Panel may refer the parties to CADRO for assistance while retaining ultimate jurisdiction of the impasse. At the end of this process, however, should the dispute remain, CADRO lacks the statutory authority to impose a resolution on the parties. For this reason, if CADRO's interest-based intervention is unsuccessful, the Panel will select an appropriate procedure for resolving the impasse.

2. Informal Conference

To maximize the parties' opportunity to reach a voluntary resolution of the dispute, a Panel-appointed representative (usually a Panel or Staff member) explores settlement possibilities with the parties in a face-to-face setting. Discussions between the parties and the representative, who is well-versed in how the Panel has decided previous cases involving similar issues, take place across the bargaining table and in caucus sessions. Often these explorations result in a voluntary settlement of some or all of the disputed issues. Should such efforts prove unsuccessful, the procedure permits the Panel representative to gain a full understanding of the parties' justifications, demonstrated needs, and other evidence presented on the merits. The representative then reports to the full Panel at a subsequent Panel meeting; the report includes the parties' final offers, any statements of position the parties are required to submit by the representative, and his or her recommendations for settlement. The Panel then takes final action on the matter, which could include issuing a *Decision and Order*.

The informal conference historically has been the Panel's most effective, yet most misunderstood, procedure. It has permitted numerous parties to craft the resolution to their own dispute in

an interest-based, non-litigious setting. The interchange of ideas, with the guidance of a Panel representative, increases the possibility for a more satisfactory resolution than a decision imposed by the Panel. Where a voluntary settlement does not occur, the procedure preserves the Panel's discretion to resolve issues which it believes should be decided by the full Panel in plenary session.

3. Mediation-Arbitration ("Med-Arb")

- With A Panel Representative

To provide the parties with a final opportunity to resolve the dispute themselves at this late stage of the negotiation process, a Panel-appointed mediator-arbitrator begins by exploring possible areas of agreement. Often, the procedure leads to a settlement because the arbitrator's suggestions during mediation are not apt to be taken lightly. The procedure is normally less formal than grievance arbitration, but may vary depending upon the Panel representative involved and the nature of the issues. If a voluntary agreement does not occur during the mediation phase, an arbitration hearing then immediately follows. At his or her discretion, the arbitrator may swear witnesses, receive exhibits into evidence, or require the submission of pre- or post-hearing briefs. Regardless of the nature of the hearing, however, the arbitrator ultimately has the authority to render a binding arbitration decision on those issues not resolved during the mediation portion of the procedure. There is no charge for the arbitrator's services.

- With A Private Arbitrator (Private "Med-Arb")

The Statute authorizes the parties to voluntarily submit their dispute to a private mediator-arbitrator after a joint request from the parties to use the procedure has been approved by the Panel. These joint requests are investigated on an expedited basis, and generally approved, unless they involve matters which the Panel reserves to itself, such as issues of first impression for the Federal sector labor relations community. In other cases not involving joint requests, the Panel may recommend and/or direct the use of private med-arb or arbitration as well. Under either scenario, the parties select the arbitrator who will handle the case and share the arbitrator's fees and other associated expenses. In other respects, the procedure is similar to med-arb with a Panel representative.

The information the parties should submit in a joint request for Panel approval of private med-arb is outlined in the Panel's regulations. Of particular note, as part of their joint request, the parties are required to submit statements regarding: (1)

whether any of the proposals to be presented to the arbitrator contain questions concerning the duty to bargain, and (2) the arbitration procedure to be used or, in the alternative, those provisions of the parties' labor agreement which contain this information. Although the Panel does not recommend particular arbitrators, it will, upon request, direct the parties to FMCS for a list of arbitrators.

- Expedited Arbitration with a Panel Representative

When a quick resolution is a crucial factor in the circumstances of a case, and the issues are neither too numerous nor overly complex, the Panel may direct an expedited arbitration procedure. A Panel-appointed arbitrator meets with the parties to hear both sides of the dispute and, if a settlement is not reached, will issue a binding decision within 2 workdays of the close of the hearing. Given the short time-frame, the parties are not permitted to file post-hearing briefs, although they may be given permission to submit statements and documentary evidence in advance. These and other details of the proceeding are left to the discretion of the arbitrator. In other respects, the procedure is similar to med-arb with a Panel-appointed arbitrator.

- Arbitration with a Panel Representative or Private Arbitrator

This procedure gives the parties the opportunity to present the justifications and demonstrated needs, including documentary evidence, for their positions on the merits directly to the decision-maker. The parties, at the arbitrator's discretion, may have an opportunity to file statements, either before or after the proceeding. As opposed to the other varieties of arbitration listed in this Guide, traditional arbitration is normally recommended or directed where the Panel's initial investigation demonstrates that the parties are so entrenched in their positions that additional mediation is highly unlikely to produce any movement. Nevertheless, the parties should not be surprised if the arbitrator spends some time exploring settlement possibilities with them

4. Written Submissions

- Single Written Submissions/Initial Statements of Position and Rebuttals

On a schedule established by the Panel, the parties present the merits of their positions in writing, normally within specified page limitations. They also may submit supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes. The parties are to serve these materials on each other and the Panel (two copies). In addition to the initial filing, if so directed, they may submit rebuttal statements. Following

consideration of the parties' submissions, the Panel will take final action, which could include issuing a *Decision and Order*. Since the parties do not engage in a dialogue with a Panel representative, there is less opportunity for a voluntary settlement. Because there also is no opportunity for the Panel's representative to ask questions, it is essential that the parties explain their proposals and persuasive evidence clearly and completely. When the record requires clarification, the Staff may conduct a telephone conference call to resolve any uncertainties.

- Order To Show Cause

When the issues presented are substantively similar to those addressed in a previous Panel decision the Panel may issue an *Order to Show Cause*. Under this procedure, the parties are asked to show cause why specific wording or other solutions previously imposed by the Panel should not be applied to resolve the dispute in the case at hand. Once it has considered the parties' submissions, which may include supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes, and the parties' final offers, the Panel will take final action, normally the issuance of a *Decision and Order*, to resolve the impasse. This procedure is intended to focus the parties' attention on distinguishing the circumstances of their case from those the Panel has considered in the past.

5. Factfinding

- By a Panel Representative With Recommendations for Settlement

In important disputes involving issues of first impression, heightened public interest, or of a highly technical nature, a factfinding hearing creates a complete record of documentary evidence and expert witness testimony on which to base a decision. It is the most formal of the Panel's procedures. A pre-hearing conference is conducted to facilitate preparations for the hearing and to explore settlement possibilities. To expedite the process, the Panel asks parties to stipulate through joint exhibits to any facts that are not in dispute. During the factfinding hearing, the Panel representative (factfinder) in charge of the proceeding has the authority to issue subpoenas, and to allow the parties to call witnesses who are under oath. The parties may question the witnesses through direct and cross examination; the factfinder may also question the witnesses and the parties' representatives as necessary to ensure that a complete record is created. An official transcript of the proceeding is made; the parties make arrangements to purchase copies from the court reporting service for their own use. Afterwards, the parties are normally permitted to submit post-hearing briefs. The factfinder issues a report

summarizing the evidence and arguments presented, the parties' final offers and positions, and his or her recommendations for settlement. Copies of the report are sent to the parties, who have 30 days in which to reach an agreement or present their reasons, in writing, as to why the factfinder's recommendations should or should not be adopted. If the issues are not resolved as a result of the factfinder's recommendations, after considering the entire record, the Panel subsequently takes final action on the matter, usually by issuing a *Decision and Order*. For further information, the parties should refer to *A Guide to Hearing Procedures of the Federal Service Impasses Panel*.

- By a Panel Representative Without Recommendations for Settlement

This procedure is identical to factfinding with recommendations, except that the factfinder is not given the authority to provide the parties with his or her recommendations for resolving the dispute. In such cases, the factfinder's responsibility is complete upon the issuance of a factfinder's report within a period normally not to exceed 30 calendar days after the receipt of the transcript or post-hearing briefs, if any. The report summarizes the evidence and arguments presented, and the parties' final offers and positions. The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a *Decision and Order*.

- Private Factfinding (With or Without Recommendations for Settlement)

In certain circumstances, often but not always with their concurrence, the Panel may direct the parties to hire a mutually acceptable private individual to conduct a factfinding hearing. The parties share all of the expenses of the private factfinder they select to conduct the proceeding. Although the private factfinder is without authority to issue a binding decision to resolve the parties' impasse, he or she normally has latitude in determining scheduling and the manner in which the proceeding is conducted. As in those cases where one of its own representatives is designated to conduct a factfinding hearing, the Panel requires that an official transcript of the proceeding be submitted to it along with the private factfinder's report. In those instances where the private factfinder is granted the authority to make recommendations to the parties and the Panel for settlement of the dispute, the parties have 30 days in which to reach an agreement or present their reasons, in writing, as to why the private factfinder's recommendations should or should not be adopted. If the issues are not resolved as a result of the private factfinder's recommendations, after considering the entire record,

the Panel subsequently takes final action on the matter, usually by issuing a *Decision and Order*. If the private factfinder has not been given the authority to make recommendations for settlement, his or her responsibility is complete upon the issuance of the private factfinder's report summarizing the evidence and arguments presented, and the parties' final offers and positions. The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a *Decision and Order*.

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MINING, MINERAL LEASING AND ENERGY PRODUCTION
ON ARMY LANDS AND SURPLUS ARMY LANDS.

By
Geraldine R. Lowery

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LEGAL OPINION

MINING, MINERAL LEASING, AND ENERGY PRODUCTION ON ARMY LANDS AND SURPLUS ARMY LANDS.

BACKGROUND:

The Commanding General of this Major Subordinate Command (MSC) received a letter from a law firm proposing, on behalf of a Corporation:

to research, explore, develop, and produce minerals at certain AAPs with large land bases and associated underlying minerals with potential for oil, gas, and other mineral and/or aggregate development.

The letter added that "the concept could apply to installations that have been or will be closed or realigned."

The Corporation would provide the expertise and advance the initial capital to explore and develop the natural resources. From the proceeds of the developed resources, the Corporation would receive a share to recover its capital outlays and expenses, and the Army's share could help offset operations, maintenance, and environmental clean-up expenses.

There are two principle questions which must be addressed. The first question is under what circumstances may military controlled lands[non-civil works] be purchased for mineral exploration and extraction. The second question is under what circumstances may one use, without purchasing, military controlled land for mineral exploration and extraction.

CONCLUSIONS:

- The MSC has no authority to dispose of minerals on any property under its control, whether withdrawn from the public domain or acquired
- There is no statutory or regulatory authority for the removal of certain hardrock minerals known as locatables, such as diamonds or gold on acquired lands or lands withdrawn from the public domain for military use.

- The Bureau of Land Management of the Department of the Interior may issue leases at its discretion and with Army consent of a class of minerals known as leasables. The list of permissible leasables for acquired versus public domain lands is not precisely coextensive. Leasable materials include coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas. This list is not all inclusive. It should be noted that the Bureau of Land Management has 515 pages of regulations regarding leasable minerals in 43 CFR sections 3000-3873.3.
- A third class of minerals known as saleables have been removed from the list of leasable minerals and on Army lands may be purchased with installations consent through the Army Corps of Engineers. This includes common sand and gravel.
- Pursuant to 43 CFR 3153.3 agencies of the Department of Defense may issue permits for geophysical exploration.
- Surplus MSC public domain lands return to the public domain unless The Department of the Interior determines they are unsuitable due to improvements. Acquired lands may be disposed of under the General Services Administration Federal Property Management Regulation only after the Interior determines that there are no minerals suitable for disposition under the mining and mineral leasing statutes.
- The Department of the Interior is responsible for collecting the revenues and royalties from mineral leasing and mining activities. Half goes to the State, the other half to the U.S. treasury. Revenue from salesables or saleables is disposed of in the same manner as sales of public lands.
- Title 10 U.S.C. 2394, "Contracts for energy or fuel for military installations," provides that a Secretary of a military department may enter into contracts of up to 30 years for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities. Whether this includes mining for oil and gas is doubtful since there is no expressed intent to override the mineral laws.
- Section 2689 of Title 10, P.L. 97-214, promulgated in 1982, provides that the Secretary of a military department may develop, or authorize the development of, any geothermal energy resource within lands under the Secretary's jurisdiction for the use and benefit of the Department of Defense: however, AR 405-30 limits the authority to lease to BLM.

ANALYSIS:

PART ONE - FEDERAL LAND IN GENERAL

I. The two types of authority over Federal lands - jurisdiction and property law.

The first hurdle to overcome in analyzing the proposal is determining what law to apply. The starting point for analyzing any problem affecting Federal agencies is the Constitution. There are two independent provisions in the Constitution regarding Federal power over property. Article I, § 8, cl.17, the Enclave clause, grants Congress exclusive legislative jurisdiction over "all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." However, the Property, Clause Art. IV, §3, cl.2, governs the management and disposition of real property.

The Court in Commonwealth of Virginia v. Reno, 955 F.Supp. 571(1997), wrote, "Separate and distinct from the Enclave Clause, the Property Clause, on its face, permits the federal government to buy, sell, regulate, and manage all federally-owned real property, irrespective of state consent." The Property clause, Art. IV, §3, cl.2, provides, "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States;..."

II. Two types of Federal Property

Federal property falls into two classes, the public domain and acquired lands. Mineral law has developed along two lines depending upon whether the land is a part of the public domain or was acquired for specific purposes. The court in Texas Oil and Gas v. Department of the Interior, 683 F.2d 427(1982), stated, "Public domain lands, or public lands, means lands claimed by the United States as part of its national sovereignty" - land which has been in Federal ownership since the original colonization, treaty, or purchase from other sovereigns. As the name suggests acquired land is land which has been acquired from the state or private owners for a specific purpose.

The Code of Federal Regulations definitions are:

CITE: 43CFR3000.0-5

g) Public domain lands means lands, including mineral estates, which never left the ownership of the United States, lands which were obtained by the United States in exchange for public domain lands, lands which have reverted to the ownership of the United States through the operation

of the public land laws and other lands specifically identified by the Congress as part of the public domain. (h) Acquired lands means lands which the United States obtained by deed through purchase or gift, or through condemnation proceedings, including lands previously disposed of under the public land laws including the mining laws.

Patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain, absent legislation. They remain in the class of lands acquired for special uses, such as parks and national monuments. Rawson v. United States, 225 F.2d 855 (1955)

The distinction between the public domain and acquired land is important to the analysis of mineral purchase and mineral leasing. The Corporation has proposed to both purchase and lease. Though the legal opinion indicates that the Corporation inquired about purchase or lease of surplus property, the letter to our Commander suggests an interest in non-excess property as well.

The Court in Texas Oil & Gas Corp V. Andrus, 498 F. Supp. 668, 670 (1980) wrote concerning the distinction between the public domain and acquired lands:

[Acquired lands are] lands which are acquired by the United States through purchase or other transfer from a state or private individual, usually for dedication to a particular use. In contrast to such acquired lands are "public domain" lands, which are owned by the United States by virtue of its sovereignty. The distinction between these types of federal real estate is important in that, as a matter of historical perspective, it was the basis for the evolution of the present statutory scheme through which the Congress has delegated responsibility to the Secretary of the Interior for the leasing of federal lands for mineral development

A Department of the Interior Web site, <http://www.blm.gov/eso/pages/faqs.html>, states:

Public Land [the public domain] is undeveloped land with no improvements, usually part of the original Public Domain established during the western expansion of the United States. The BLM is responsible for **managing** the country's Public Lands, **mostly located in the 11 Western**

States and in Alaska. There are some scattered parcels in the East.

There are no Public Lands managed by the BLM in Connecticut, Delaware, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia and West Virginia. There are a few scattered parcels in Alabama, Arkansas, Florida, Illinois, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Ohio, and Wisconsin

Only public lands identified as excess to the public's and Government's needs, or more suited to private ownership, are sometimes offered for sale. According to BLM:

BLM does not offer much land for sale because of the congressional mandate in the Federal Land Policy and Management Act of 1976, which directs that the Federal Government will generally **retain** these lands in public ownership. However, the BLM does occasionally sell parcels of land where our land use planning finds disposal is appropriate.

PART TWO - THE PUBLIC DOMAIN

I. Laws pertaining to mineral exploration, extraction, and sale on the public domain.

A . The Mineral Acts - locatables.

As stated in Cameron v. United States, 252 U.S. 450, 460, the cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U. S. C. § 22(Mining Act), which provides in § 1 that citizens may enter and explore the public domain; and, if they find "valuable mineral deposits", they may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is "charged with seeing that valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved.

As Marathon Oil Co. V. Lujan, 751 F. Supp. 1454, (U.S. Dist. Ct. Dist. CO, 1990) made clear:

In enacting the Mining Law of 1872, Congress declared that "all valuable mineral deposits in lands belonging to the United States" are "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." *30 U.S.C. § 22*. Congress, however, provided that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim [is] located." *30 U.S.C. § 23*. The mining law sets up a legal blueprint by which private parties can discover, own, extract, and market valuable minerals including oil shale from public lands.

[The Federal Land Policy and Management Act of 1976 ("FLPMA"), as amended, also specifies conditions under which the Secretary of the Interior or an authorized delegate ("the Secretary") may withdraw or segregate lands from the operation of some or all of the public land laws, including mining laws. Kosanke V. United States DOI, 144 F.3d 873(1998)]

In American Colloid Co. V. Hodel, 701 F. Supp. 1537(U.S. Dist. Ct. Wyoming, 1988), the Court wrote, "Congress has clearly expressed its intention that the **Department of Interior** be vested with primary jurisdiction to resolve applications for mineral patents." Further more, in Marathon Oil Co. V. Lujan, 751 F. Supp. 1454, (U.S. Dist. Ct. Dist. CO, 1990) the court wrote,

" ...[T]he Secretary of Interior of the United States,...the Director, Bureau of Land Management of the Department of the Interior,...[and]Department of the Interior... a United States agency, are charged with administration of the laws relating to the possession, purchase, and patenting of mineral lands in the public domain 30 U.S.C. @@ 21 through 54."

The Mining Law of 1872 was based on two principles, that mineral rights and title to land could be acquired by making a discovery of valuable minerals thereon, and minerals on the land must be continually developed to retain title to the claim. This type of mineral category is called **locatable** minerals. Lands in national forests are locatable; however, except where specifically authorized by law, lands in national parks and national monuments are not.. Minerals found on military reservations, [See AR 405-30, 1.5C] and on acquired lands are not locatable. The Mining Law of 1872 allowed a miner to obtain title to the land and rights to all minerals including coal, oil, and gas. Royalties are not required from mineral production from locatable claims.

Title 30 USC Section 611 "was intended to remove common types of stone from the coverage of the mining laws and to place the disposition of such materials under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. @ 601 et seq., which provides for the sale of such materials without disposing of the land on which they are found." Coleman, 390 U.S. at 604.

B. The Materials Act of 1947 and salables (a.k.a salesables)

The Materials Act of 1947, as amended, established a type of mineral category, **salable** minerals. Under this Act, deposits of common varieties of sand, stone, gravel, pumice, pumicite, cinders, clay and petrified wood made subject to disposition through a sales process. Title 30 U.S.C. 603 states that moneys received from the sale of minerals under that Chapter [sand, stone, gravel, pumice, pumicite, cinders, and clay] shall be disposed of in the same manner as proceeds from the sale of public lands. Title 30 U.S.C. 602 provides that saleables are sold to the highest qualified bidder.

Title 43 CFR 3600 contains regulations regarding saleables. See 43 CFR 3600.0-4, "Policy":

It is the policy of the Bureau of Land Management to permit the disposal of mineral material resources under the Bureau's jurisdiction at **fair market value** while ensuring that adequate measures are taken to protect the environment and minimize damage to public health and safety during the authorized exploration for and the removal of such minerals. No mineral material shall be disposed of if the Secretary determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale or free use.

C. Legislation Affecting Military Lands withdrawn from the public domain.

1. The Surface Resources Act

The published Legislative History of the 1955 Surface Resources Act [amendment to the Mining Act which made common varieties of gravel and stone non-locatable] is available in the Law Library. Senate report No 857, dated August 13, 1955 gives a clear indication of the objectives of Congress in declaring that military lands would be subject to the jurisdiction of the Secretary of the Interior. The report states that two bills were pending. However:

In view of the urgent necessity of enacting legislation designed to control rapidly expanding military control of public lands, the

committee limited its consideration of withdrawal legislation to public lands use by the military departments. The committee fully intends to consider the more comprehensive type of withdrawal legislation during the next session of the 85th Congress.

Legislative History, page 2228.

The drafters of the Legislative History further stated:

[the bill] deals with defense agency acquisition and use of the public lands and associated resources of the United States for defense purposes. The broad purpose and objective of the bill is to return from the executive branch to the Congress - to the extent that such lands are involved - the responsibility imposed by the Constitution on the Congress for the management. ...[T]he bill's provisions would remove whatever doubts may exist, if any, as to the laws which govern the disposal of and exploration for any and all minerals, including oil and gas in public lands of the United States heretofore or hereafter withdrawn or reserved by the United States for the use of Defense agencies.

The Legislative History continues under the heading "Mineral Resources In Defense Lands:"

Finally the reported bill would accomplish the ... objective by declaring that all mineral in withdrawn or reserved public lands except lands withdrawn or reserved specifically as naval petroleum, naval oil shale or naval coal reserves - are **under the jurisdiction of the Secretary of the Interior**, and that no disposition thereof, or exploration therefor, shall be made except under the applicable public-land mining and mineral leasing laws...

2. Removal from Federal Property and Administrative Services Act of 1949.

There is a discussion of the promulgation of the Federal Land Policy and Management Act (FLPMA) amending the **Federal Property and Administrative Services Act of 1949 (FPASA)** in Sierra Club v. Watt, et al, 608 F. Supp. 305 (1985).

In 1976, Congress enacted the Federal Land Policy and Management Act [*309] (FLPMA), 43 U.S.C. §§ 1701-1784 (Supp. 1983), to provide "the first

comprehensive, statutory statement of purposes, goals and authority for the use and management of about 448 million acres n1 of federally-owned lands administered by the Secretary of Interior through the Bureau of Land Management." S. Rep. No. 583, 94th Cong., 1st sess. 24 (1975). n2 FLPMA reflected a major change in federal policy. Previously, the lands held by the Bureau of Land Management (BLM) (and its predecessor the General Land Office) were viewed as only temporarily within the custody of the United States and it was expected that their ultimate destiny was private ownership. n3 Under FLPMA, however, BLM lands [**3] were to be held in permanent federal ownership unless, as a result of land use planning, the disposal of a particular parcel would serve the national interest. FLPMA § 102(a)(1), *43 U.S.C. § 1701(a)(1)*.

The Legislative history for the Surface Resources Act documents the removal of minerals from the coverage of FPASA:

Section 5 would amend in two particulars the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended.

First, it would except from the real property-disposition provisions of the 1949 act, minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws.

Second, it amends the 1949 act to provide that only those withdrawn or reserved public domain lands surplus to the needs of Federal agencies found by the Secretary of the Interior - with the concurrence of the Administrator of General Services - not suitable for restoration to public land status by virtue of their having been substantially changed in character by improvements, or otherwise, would hereafter be subject to the real property disposition provisions of the amended 1949 act...

[O]nly when determined by the Secretary to be not suitable for mining or mineral leasing purposes

would the mineral estate pass with the title to the surface estate being disposed of **under surplus** property provisions; the other would reverse the roles of the Secretary and the Administrator so as to provide that the Secretary would make an initial judgment of the nature with which his Department is most familiar - suitability of lands for public land uses, a traditional Interior function - and if the Administrator concurs in a finding of nonsuitability, the lands would be disposed of as surplus.

3. United States Code, Title 43, Section 158.

In 1958, Congress acted again with a provision focused on Defense lands. United States Code, Title 43, Section 158, "Mineral Resources on withdrawn lands; disposition and exploration", states:

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the **jurisdiction of the Secretary of the Interior** and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: Provided, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

HISTORY: (Feb. 28, 1958, P.L. 85-337, § 6, 72 Stat. 30.)

D. The Army Regulation:

AR 405-30, Paragraph 5.c., states that "Exploration or extraction of certain hard rock minerals known as locatable is not allowed, because it could lead to a patent.

AR 405-30, 1.5D states "Salesables. These materials are disposed of under AR 405-90." Turning to AR 405-90, Paragraph 6-8, entitled gravel, sand, and stone, states the authorized office of the BLM will dispose of such materials on withdrawn public lands under 30 USC 601. This includes grants of free use permits to the Army under 43

CFR part 3620. If any Public Domain lands are deemed unsuitable for return, BLM will notify GSA of the mineral interests in such property which are not suitable for disposition under the mining and mineral leasing laws. Paragraph 5-5.a.

II. Leasing Minerals on the Public Domain - Leasables

A. Federal Statutes

Under the Mineral Leasing Act of 1920, lands previously open to location and patent became available solely on a lease basis. However, previously located valid claims which were in existence on February 25, 1920 are protected by *30 U.S.C. § 193*, which allows such claims to continue so long as in compliance with the laws under which they were initiated. Marathon Oil Company V. Lujan and Department Of The Interior, 751 F. Supp. 1454(1990). The Mineral Leasing Act of 1920, as amended(30 U.S.C. 181-287), established another type of mineral category, **leasable** minerals. Under this Act, deposits of coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas on the public domain were made subject to disposition through a leasing process. This leasing process allowed the United States to maintain title to the land and establish the type of lease, the duration of the lease, acreage limitation, and royalty and rental terms. Subsequent legislation also established reclamation standards and requirements on federal lease properties. This Act applied only to the public domain. See The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181-287), including the Act of February 7, 1927 (30 U.S.C. 281-287), the Act of April 17, 1926 (30 U.S.C. 271-276), and the Act of June 28, 1944 (58 Stat. 483-485),

Title 30 U.S.C. § 191 provides:

All money received from sales, bonuses, royalties, and rentals of the public lands under the Federal Oil and Gas Royalty Management Act of 1982[30 U.S.C. 1701 ET seq.] and rentals under the Geothermal Steam Act of 1970 shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury . . . to the State, 40 percent to the Reclamation fund, and the remainder to miscellaneous receipts.

B. DOD Implementing Regulations

DoDD 4700.3 contains some useful definitions:

Leasable Minerals. Minerals, such as oil and gas, that are owned by the United States and that have been authorized under statute as potential minerals for extraction under a mineral lease

Locatable Minerals. Minerals, such as gold and silver, that are owned by the United States, that are on public domain lands, that are subject to discovery and claim, and that are not leasable or saleable

Saleable Minerals. Common variety minerals, such as sand, clay, and gravel, that are sold under certain statutory authorities (30 U.S.C. 601 et seq. and 41 CFR 101-47.302-2,

DODD 4700.3 Mineral Exploration and Extraction on DoD Lands, September 28, 1983 establishes policy, assigns responsibilities, and provides procedures for making DoD lands available for mineral exploration and extraction. It applies to DoD-controlled lands **acquired or withdrawn** from the public domain (including Army civil works lands) within the United States and its territories and possessions for which the mineral rights are owned by the United States. There are some stated exceptions:

- a. Mineral leasing of lands situated within incorporated cities, towns, and villages (references (d) and (e)).
- b. Mineral leasing of tidelands or submerged lands (reference (d)).
- c. Certain hard rock minerals known as locatables (30 U.S.C. 22, reference(g)).
- d. A class of minerals composed of sand and gravel known as saleables (30U.S.C. 601 et seq. and 41 CFR 101-47.302-2, references(h) and (i)).

DOD lands should be made available for mineral exploration and extraction to the maximum extent possible consistent with military operations, national defense activities, and Army civil works activities. DODD 4700.3,D.

The Secretaries of the Military Departments are directed to "review and approve or disapprove requests from **the Department of the Interior (DoI), the federal mineral leasing agency**, to lease DoD lands under 43 U.S.C. 155 et seq., issue regulatory documents implementing this Directive to prescribe procedures relating to the issuance of permits and leases and the approval of plans of operations for mineral exploration and extraction, and formulate a system for maintaining records of land status to assist the DoI in mineral leasing. **The Military Departments may issue permits to parties interested in conducting seismic or other geophysical tests on DoD lands**

As the lead agency for leasing, the DoI is supposed to obtain all necessary cultural and environmental documentation. DoDD 4700.3(F)(2). DoI may request information from the Military Department. The Military Department concerned is directed to

provide title information for acquired lands. On the public domain, Interior records will be used. Id. After the lease is executed, the lessee submits a plan of operations (Application for Permit to Drill for oil and gas or Mining Plan for other minerals) to the DoI for technical review and coordination with the Military Department. However, the **DoI has the responsibility for the collection and disposition of proceeds derived from mineral leasing.**

The Secretary of the Army has been delegated the authority to redelegate "to the lowest possible organizational level" the authority contained in 30 U.S.C. 352 to grant consent to the Secretary of the Interior to lease mineral deposits on lands under the jurisdiction of the Army "subject to such conditions that will ensure the adequate use of lands for the primary purposes for which they were acquired or are being administered." See DoDD 5160.63, §. 4.

C. Army Implementing Regulations

AR 405-30 directs the installation commander to:

- (1) Prepare ROA or justifications for nonavailability for mineral leasing and exploration requests.
- (2) Furnish available environmental and cultural information, through channels, to the BLM on request.

MACOMs are directed to:

- 1) Review reports of availability for mineral leasing and exploration requests.
- (2) Furnish available environmental and cultural information to the Bureau of Land Management (BLM) on request.

Additionally, the Chief of Engineers -

- (1) Coordinates and approves availability determinations for mineral leasing on military lands, under ASA(IL&FM) guidance.
- (2) Issues instructions for mineral leasing.
- (3) Obtains Department of Defense Explosives Safety Board (DDESB) review and approval of plans for

exploration or extraction involving ammunition or explosives contamination.

The paragraph on mineral leasing offers the following:

a. Leasable minerals. ...The statute for public domain lands authorizes the BLM to lease coal, phosphate, sodium, oil, oil shale, native asphalt, solid or semisolid bitumen, and bituminous rock or gas owned by the United States within public domain lands. These authorities do not apply to Army-controlled property if the Army does not consent to exploration or extraction, or if the minerals are within an incorporated city, town, or village, or in tidelands, or submerged lands in acquired lands.

AR 405-30, 1.5.A

Paragraph 1.5.B states that the BLM may also issue leases for development, production, and use of geothermal resources on withdrawn public domain lands with the consent of the Army. However, "Exploration or extraction of certain hard rock minerals known as locatable is not allowed, because it could lead to a land patent." AR 405-30, 1.5C.

There are instances when leasing may be restricted such as classified activities, contamination, and operational incompatibility. Military installations with a nuclear or chemical surety mission will not normally be made available. But, " Exclusions of lands from exploration and extraction and any restrictions on exploration and extraction will be necessary, justified, and based on military or civil works considerations." AR 405-30, 1.6.A. There is a further caveat:

It is also possible, though expensive, to reach some oil and gas by directional drilling from a site off the installation. Since directional drilling involves no surface occupancy, it is normally impossible to justify withholding consent for leasing.

AR 405-30, 1.6.B

There are additional restrictions for separating from hazardous ammunition and explosive activities and contamination. Paragraphs 1.6.C & D. Because of the technical nature of oil and gas leasing, the installation should consult the BLM or the division or district commander in developing the ROA. The installation decides whether and under what conditions minerals may be made available, but the BLM actually leases. The Chief

of Engineers approves both the ROA or justifications for non-availability for military properties. Paragraph 1.7.B,C, &D.

Where surface occupancy is allowed under a lease for gas and oil, a separate procedure, detailed in 43 CFR 3160, is followed to approve the lessee's operations. For surface use:

Before applying to the BLM for approval, the lessee may contact the installation for information to develop a surface use program, which the installation will approve. The installation will provide available information on properties in, or eligible for, the National Register for Historic Places, threatened or endangered species, and critical habitats on the leased area.

The final paragraph states:

1.9 Other mineral leases

As explained in paragraph 5, the BLM may grant leases for other types of minerals. Leases for these minerals are less frequent and procedures are usually more complicated. This regulation also applies to such leases. However, **DAEN-REM will advise MACOMs on specific procedures on each case.**

PART THREE - ACQUIRED LAND

I. Mineral Sales on Acquired Lands

A. The Federal Land Policy and Management Act

As stated previously, the Mineral Act of 1872, creating locatable minerals did not apply to acquired lands. Acquired lands, including **military installations** may be disposed of under the Federal Property and Administrative Services Act of 1949 as amended. Title 40 - Public Buildings, Property, And Works; Chapter 10 - Management And Disposal Of Government Property; Subchapter I - General Provisions; Sec. 471. Congressional Declaration Of Policy states, "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (c) the **disposal of surplus property;**" The Federal Land Policy and Management Act (FLPMA) of 1976 (43 USC sec. 1701, 1761-1771) amends and supercedes the 1949 statute. It establishes public land policy and guidelines for its administration, and

provides for the management, protection, development, and enhancement of the public lands.

The Court has stated, "Condemned land acquired by General Services as surplus under Public Law 85-337, 72 Stat. 27, and successive amendments, simply is not land subject to the general land laws such as are covered by mining, homestead and grazing, and Indian allotment acts." Lewis v. General Services Administration, 377 F.2d 499(1967).

B. Base Realignment and Closure

A second type authority for the disposal of military installations on acquired lands is the collective Base Realignment and Closure laws. The property is first screened for use within the DOD. If there is no need it is declared excess. If it is not needed by any other federal agency, it is declared surplus. After screening under the McKinney act for use as housing for the homeless, it is offered to a local reuse authority and disposed of in accordance with an approved reuse plan. The emphasis is on revitalizing local communities.

C. The DoD regulations

DOD 4165.6 §. 3. Disposal of Real Property. Military Departments shall maintain aggressive review programs to ensure that, after screening with the other DoD Components, real property for which there is no foreseeable requirement is reported promptly to GSA or the Department of the Interior, in accordance with applicable regulations of those Agencies for disposal.

D. The Army Regulation

AR 405-30, 1.5D states "Salesables. These materials are disposed of under AR 405-90." Turning to AR 405-90, Paragraph 6-8, entitled gravel, sand, and stone, states that once disposal is approved in accordance with this regulation, the District Commander [COE] is authorized to dispose of embedded sand, gravel, and stone on acquired land. Presumably this disposal is without disposing of the parcel of land.

II. Mineral Leasing on Acquired Lands

A. Mineral Leasing Act for Acquired Lands.

In 1947, Congress enacted the Mineral Leasing Act for Acquired Lands. Leases on acquired lands are issued under the same conditions as contained in the Mineral Leasing Act of 1920. The Angelina Holly Corporation V. William P. Clark, Secretary Of The Interior, et al 587 F. Supp. 1152 (1984). This Act authorized leasing of coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas on lands acquired by the United States. It also **removed other minerals deposits** found on acquired lands like lead, zinc, fluorite, barite, uranium, limestone, clay, and quartz crystals from the locatable mineral category. This Act allowed the United States to maintain title to the land and establish lease terms for all minerals found on acquired land. See The Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359)

Lease holders competitively bid, initially pay a bonus and subsequently, rent for the right to develop these lands. If minerals are found, extracted and sold, the federal government is entitled to a certain percentage of, or royalty on the production. The Minerals Management Service's Royalty Management Program [Department of the Interior], is **responsible for management of all revenues associated with mineral leases**.

The Mineral Leasing Act and the Mineral Leasing Act for Acquired Lands leave to the discretion of the Secretary of the Interior the determination of what oil and gas deposits are to be leased 30 USC §. 352; Pease v Udall, 332 F.2d 62 (9th Cir. 1964).

Initially there was a military exclusion in the Mineral Leasing Act for Acquired Lands. In 1976 Congress removed the exclusion from the statute, making military lands subject to leasing at the Secretary's discretion. Federal Coal Leasing Amendments Act of 1975, @ 12(a), Pub. L. No. 94-377, 90 Stat. 1090 (codified at 30 U.S.C. @ 352 (1976)).

The leasing of these lands is done either on a competitive bidding basis within any "known geological structure of a producing oil and gas field ", 30 U.S.C. § 226(b), or on a noncompetitive basis to the first qualified applicant where the lands are not within a known geological structure ("KGS"). 30 U.S.C. § 226(c). The Angelina Holly Corporation v. William P. Clark, Secretary Of The Interior, 587 F. Supp. 1152(1984). A "known geological structure" is defined by regulation as "technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." 43 C.F.R. § 3100.0-5(a). The Secretary of the Interior is vested with discretion in determining the extent of geologic structures. 30 U.S.C. § 189.

According to the Court in *ARKLA EXPLORATION COMPANY v. James G. WATT*, Secretary of the United States Department of the Interior, and Texas Oil and Gas Corp:

The legislative history indicates that Congress, in enacting the Mineral Leasing Act, intended to encourage exploration and development of areas in which the exploration interest was then relatively small and the risk relatively high. Conversely, Congress intended to promote competition in those areas in which exploration interest was already present and the risks substantially smaller.

Oil and gas deposits which are within acquired lands which have been declared surplus are not subject to leasing under Mineral Leasing Act for Acquired Lands according to an Interior ruling in *Estate of P.A. McKenna*, 74 ID 133(1967).

Title 30 USC § 360, "Authority to manage certain mineral leases", provides that:

Each department, agency and instrumentality of the United States which administers lands acquired by the United States with one or more existing mineral lease shall transfer to the Secretary of the Interior the authority to administer such lease and to collect all receipts due and payable to the United States under the lease. In the case of lands acquired on or before the date of the enactment of this section [enacted Oct. 24, 1992], the authority to administer the leases and collect receipts shall be transferred to the Secretary of the Interior as expeditiously as practicable after the date of enactment of this section [enacted Oct. 24, 1992]. In the case of lands acquired after the date of enactment of this section [enacted Oct. 24, 1992], such authority shall be vested with the Secretary at the time of acquisition.

The provisions of section 6 of this Act [*30 USCS § 355*] shall apply to all receipts derived from such leases where such receipts are due and payable to the United States under the lease in the same manner as such provisions apply to receipts derived from leases issued under the authority of this Act [*30 USCS §§ 351 et seq.*]. For purposes of this section, the term "existing mineral lease" means any lease in existence at the time land is acquired by the United States. Nothing in this section shall be construed

to affect the existing surface management authority of any
Federal agency.

HISTORY: (Oct. 24, 1992, P.L. 102-486, Title XXV, § 2506(b), 106 Stat. 3106.)

B. DOD Implementing Regulations

DODD 4165.6 Real Property Acquisition, Management, and Disposal, September 1, 1987, states at paragraph 2.m "Energy Resources":

The Military Departments shall initiate formal programs to identify potential energy resources (e.g., coal, oil, gas, geothermal steam) on DoD lands.

(1) The Military Departments shall make their land available for mineral exploration and extraction to the maximum extent consistent with military operations, national defense activities, and Army civil works activities in accordance with DoD Directive 4700.3 (reference (z)).

(2) If a commercial oil and gas resource development is located near a DoD installation, the Bureau of Land Management, Department of the Interior, shall be contacted immediately to advise on potential drainage problems. To prevent exploitation of a Government asset and upon the recommendation of the Bureau of Land Management, oil and gas shall be leased by the Department of the Interior under conditions specified by the Military Department concerned.

As previously stated in Part Two, Section II. B., supra, DODD 4700.3, Mineral Exploration and Extraction on DoD Lands(32 CFR 189), provides procedures for making DoD lands available for mineral exploration and extraction on both **acquired or withdrawn** DoD-controlled lands.

C. The Army Regulations

The paragraph of AR 405-30 concerning mineral leasing offers the following concerning acquired lands:

a. Leasable minerals. The mineral leasing statute for acquired lands authorizes the BLM to lease coal, phosphate, sodium, potassium, oil, oil shale, gas, or sulfur owned by the United States within acquired lands.

According to Estate of P.A. McKenna, 74 I.D. 133 (1967) once the Secretary of the Army declares property Surplus, the Secretary of the Interior no longer has jurisdiction to lease the minerals. This case involved land declared Surplus at the former Camp Breckenridge Military Reservation.

30 U.S.C. § 191 provides:

All money received from sales, bonuses, royalties, and rentals of the public lands . . . shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury . . . to the State . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service; .

PART FOUR ENERGY PRODUCTION

I. AR405-30

IOC has no authority to enter into a joint venture or other contractual arrangement with a private corporation to produce and sell geothermal energy. AR 405-30, paragraph 5.B grants the Bureau of Land Management authority to **lease** lands withdrawn from the public domain with the consent of the Army for development, production, and use of geothermal resources:

5.B Geothermal resources.

b. Geothermal resources. The BLM may also issue leases for development, production, and use of geothermal resources on withdrawn public domain lands with the consent of the Army.

Since all Army actions must be in accordance with the Army Regulations, a waiver or amendment of the Regulation would be necessary.

II. Title 10 U.S.C. 2689

Section 2689 of Title 10, P.L. 97-214, promulgated in 1982, provides as follows:

§ 2689. Development of geothermal energy on military lands

The Secretary of a military department may develop, or authorize the development of, any geothermal energy resource within lands under the Secretary's jurisdiction, including public lands, **for the use or benefit of the** Department of Defense if that development is in the public interest, as determined by the Secretary concerned, and **will**

not deter commercial development and use of other portions of such resource if offered for leasing.

Section 2689 was originally enacted in the 1970's as P.L. 95-356, codified at 30 USC 1002a(a). This was later repealed and P.L. 97-214 was enacted. There is no legislative history for 95-356 and the legislative history for P.L. 97-214 reveals little about this provision. [The original enactment excluded public lands administered by the Secretary of the Interior and required submission to the Committees on Armed Services.]

Title 10 U.S.C. 2689, permits the Secretary of the Army to develop geothermal resources within lands under the Secretary's jurisdiction. However, the Secretary of the Army has not delegated this authority to the MACOMS or MSCs. Furthermore the Statute limits development to the "use and benefit of the Department of Defense." A second limitation is that the development not deter commercial development and use of other portions of such resource if offered for leasing. This limitation suggests that Congress still viewed profit making ventures for private corporations as a matter still under the jurisdiction of the Department of the Interior. The Army Regulation AR 405-30 does not reflect the Congressional authorization:

III. Title 10 U.S.C. 2394

Under 10 USC 2394, "Contracts for energy or fuel for military installations" :

(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years--

- (1) under section 2689 of this title; and
- (2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

(b) A contract may be made under subsection (a) only after the approval of the proposed contract by the Secretary of Defense.

(c) The costs of contracts under this section for any year may be paid from annual appropriations for that year.

There is no indication that Congress intended to overrule the last 150 years of mineral law. This provision does not grant authority for mineral, oil, and gas extraction. On its face, it does include geothermal production under 2689.

IV. Title 10 U.S.C. 2483

A third provision, 10 USC 2483 has been redesignated as 10 USC 2867. It was enacted as a part of P.L. 98-407 in 1984. The section states:

§ 2867. Sale of electricity from alternate energy and cogeneration production facilities

(a) The Secretary of a military department may sell, contract to sell, or authorize the sale by a contractor to a public or private utility company of electrical energy generated from alternate energy or cogeneration type production facilities which are under the jurisdiction (or produced on land which is under the jurisdiction) of the Secretary concerned. The sale of such energy shall be made under such regulations, for such periods, and at such prices as the Secretary concerned prescribes consistent with the Public Utility Regulatory Policies Act of 1978 (*16 U.S.C. 2601 et seq.*).

Alternate energy sources are those which have not been in common use over the past several years or which are derived from sources which have not been common such as various forms of solar energy, windpower, and biomass (organic materials), municipal solid waste (MSW) and industrial waste for combustion and composting, methane from anaerobic digesters, synthetic fuels such as alcohols from biomass and coal-derived fuels (gaseous, liquid, and solid), and ocean thermal energy conversion.

Cogeneration is the production, within a single system, of both electrical energy and thermal energy (energy that is produced by heat) with the same fuel source. With cogeneration, energy normally lost to the atmosphere is captured and used for a variety of purposes, such as home and water heating.

Though 10 USC 2867 grants the Secretary of a Military Department the authority to sell or authorize sale by a contractor of **electricity** from alternate energy or co-production facilities [geothermal is an alternate energy source] to a public or private utility company, it must be done under "regulations, for such periods, and at such prices as the Secretary concerned prescribes consistent with the Public Utility Regulatory Policies Act of 1978 (*16 U.S.C. 2601 et seq.*)."

The Secretary of the Army has not moved to promulgate such regulations. In fact the Department of Defense has issued Directives that the Military Departments divest of all utilities and utility production facilities if economically feasible. Therefore, it seems unlikely that the Secretary would promulgate such regulations.

V. Revenue

There is no indication that the funds generated under Section 2867 may be used for environmental remediation or disposal. The paragraphs concerning proceeds state:

(b) (1) Proceeds from sales under subsection (a) shall be credited to the appropriation **account** currently available to the military department concerned **for the supply of electrical energy**.

(2) Subject to the availability of appropriations for this purpose, proceeds credited under paragraph (1) may be used to carry out military construction projects under the energy performance plan developed by the Secretary of Defense under section 2865(a) of this title, including minor military construction projects authorized under section 2805 of this title **that are designed to increase energy conservation**.

(c) Before carrying out a military construction project described in subsection (b) using proceeds from sales under subsection (a), the Secretary concerned **shall notify Congress in writing** of the project, the justification for the project, and the estimated cost of the project. The project may be carried out only after the end of the 21-day period beginning on the date the notification is received by Congress.

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Industrial Operations Command
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DOCUMENTING THE DECISION NOT TO SUPPLEMENT

LTC David B. Howlett

The Third Circuit Court of Appeals recently affirmed a decision that approved the way a federal agency documented its decision that supplementation of an environmental analysis was not necessary.

In *South Trenton Residents Against 29 v. Federal Highway Administration*,¹ local residents protested against the building of a highway segment called the Riverfront Spur. The Federal Highway Administration (FHWA) had completed an environmental impact statement (EIS) in accordance with the National Environmental Policy Act of 1969 (NEPA)² for a complex of highways in 1981. By 1996, all portions of the project had been completed except the Riverfront Spur, but it became very obvious that the spur was needed to alleviate traffic problems.

The New Jersey Department of Transportation (NJ-DoT) held a series of public meetings and prepared an analysis of alternatives for the Riverfront Spur. The analysis, completed in 1997, recommended a four-lane highway, rather than the six-lane design analyzed in the EIS.

The EIS was now 16 years old. Recognizing this, NJ-DoT prepared an Environmental Reevaluation in accordance with FHWA regulations.³ The purpose of the Reevaluation was to determine whether a supplement to an EIS is needed.⁴ The Reevaluation incorporated the NJ-DoT alternatives study as well as new information on issues such as traffic, wetlands, hazardous waste, and air quality. The Reevaluation concluded that the impacts of the proposed four-lane project would be much less than the previously proposed six-lane project. FHWA adopted NJ-DoT's Reevaluation and published a Decision Document in which it found that EIS supplementation was not necessary because there were no significant new adverse impacts from the proposed action.

The plaintiffs brought suit, claiming that EIS supplementation was necessary and that the public meetings and alternatives analysis prepared by NJ-DoT were not adequate.

¹ 48 ERC 1808 (3rd Cir. 1999).

² 42 U.S.C. §4321 et seq.

³ 23 C.F.R. §771.129.

⁴ 23 C.F.R. §771.129(a). The regulation requires a written evaluation on the question of whether NEPA supplementation is necessary if the existing environmental document is more than three years old and the project has not begun.

The court began by stating the standard of review: that the agency's decision to revise an EIS must be reasonable under the circumstances.⁵ The court then reviewed the FHWA regulations, which require NEPA supplementation only when "substantial changes are made in the proposed action that will introduce new or changed environmental effects of significance to the quality of the human environment, or . . . significant new information becomes available concerning the action's environmental aspects."⁶ The key question, according to the court, is whether the proposed roadwork would have significant impact on the environment in a manner not previously evaluated and considered.⁷

The court considered that fact that there had been many changes to the affected environment since the EIS came out. Although this information could in one sense "very important or interesting, and thus significant in one context," supplementation would only be required if there would be a change in anticipated impacts to the action.⁸ In this case, the court determined that the worsening pedestrian safety conditions cited by plaintiffs did not require NEPA supplementation because they did not result in the creation of new environmental impact to the project. In fact, the overall impact of the scaled-back project was less than the impact anticipated when the EIS was prepared.

The court upheld the agency decision not to supplement because, through the Environmental Reevaluation, it had taken a hard look at the new information and reasonably determined that there was no significant new environmental information.

In one respect, the decision is troublesome. Plaintiffs had contended that the agency did not adequately consider alternatives to the project, some of which were not known at the time of the original EIS. The court referred to the fact that the NJ-DoT looked at twelve alternative plans in its Environmental Reevaluation and reasonably selected the design it chose. The raises the question of whether the existence of new alternatives itself constitutes significant new information, thus requiring NEPA supplementation. Consideration of these alternatives in a document without the public participation components of a NEPA analysis does not seem sufficient. The court did not consider this question. It would appear that the length and thoroughness of the Environmental Reevaluation led the court implicitly to treat it as if it had been a NEPA document.

The Army NEPA regulation does not have a specific document to memorialize a decision on supplementation. A Record of Environmental Consideration (REC) is required when a determination is made that a proposed action is adequately covered by an existing environmental assessment or EIS.⁹ In some sense, this is a decision that supplementation is not necessary, but there is no guidance as to what the REC should contain. To fill this gap, the Army has occasionally produced very large RECs, constituting thorough reviews of all new information and its significance.¹⁰ Without the detailed regulations such as those published by the FHWA, however, the Army runs the risk that a court could find that new information requires NEPA supplementation, even when there is ultimately no new significant impact. The current review of the Army NEPA regulation presents an opportunity to provide this

⁵ The court compared this standard to the "arbitrary and capricious" standard of review, but concluded that in terms of deference to the agency, the distinction between the two is not that great. *South Trenton Residents Against 29 v. Federal Highway Administration*, 48 ERC at 1811, fn. 2.

⁶ 23 C.F.R. §771.130. The regulation states "Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA [environmental assessment] to assess the impact of the changes."

⁷ 48 ERC at 1812, citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987): "The new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."

⁸ 48 ERC at 1813. The quoted language comes from the publication of the FHWA rules in 1987. 52 F.R. 32646, 32656.

⁹ Army Regulation 200-2, Environmental Effects of Army Actions, 23 December 1988, ¶2-3d.(1).

¹⁰ These are often referred to as "Mayfield RECs" after the Army lawyer who pioneered their use in the mid-1990s.

guidance and to improve on the FHWA regulations by taking into account newly available alternatives to proposed actions. (LTC Howlett/LIT)

STRANGE JUSTICE

Mike Lewis

This updates the earlier article¹¹ reporting that the U.S. Court of Appeals for the Ninth Circuit (hereinafter "9th Circuit") was deciding whether section 120¹² of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case was *Fort Ord Toxics Project v. California Environmental Protection Agency et al.*¹³. On 2 September 1999, the 9th Circuit held that Section 120 was in fact an independent authority to conduct remedial action.¹⁴

As you may recall, the former Fort Ord is on the National Priorities List¹⁵. The Army was conducting a CERCLA remedial action that involved designating a landfill as a Corrective Action Management Unit ("CAMU")¹⁶ after coordination with the California Environmental Protection Agency ("CAL EPA"). The Fort Ord Toxics Project ("FOTP") sued CAL EPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")¹⁷. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army's remedy.

The Army immediately removed this challenge to U.S. District Court¹⁸, and citing CERCLA section 113(h)¹⁹ sought to have it dismissed. CERCLA section 113(h) provides that:

No Federal court shall have jurisdiction under Federal law . . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title,

FOTP responded that, among other arguments²⁰, the cleanup activities on federal facilities are selected under CERCLA section 120 and not section 104. Therefore, FOTP reasoned that the Army could not avail itself of CERCLA section 113(h) which was limited to actions taken under section 104 or ordered under section 106.

FOTP argued that remedies on federal facilities are not selected under section 104, but under 120(e)(4)(A) of CERCLA. This section is entitled "Contents of Agreement" and states that "Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following: A review of alternative remedial actions and selection of a remedial action by the head of the relevant

¹¹ *Under What Authority Do Federal Facilities Perform CERCLA Cleanups*, ELD Bulletin Vol. 6, No. 7 (Jul 99).

¹² 42 U.S.C. § 9620 (1998).

¹³ *Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al.*, No. 98-16100 (9th Cir. 1999).

¹⁴ 1999 U.S. App. LEXIS 20951 (9th Cir., Sept. 2, 1999).

¹⁵ The National Priorities List ("NPL") is the prioritized list of sites needing clean up, updated annually, called for in accordance with 42 U.S.C. § 9605(a)(8)(B).

¹⁶ California state law generally prohibits disposal on the land of all hazardous waste. Cal. Code Regs. Tit 22, § 66264.552(a)(1), however permits the designation of a CAMU into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition.

¹⁷ CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

¹⁸ The basis for the Army's removal was 28 U.S.C. § 1442(a) which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

¹⁹ 42 U.S.C. § 9613(h).

²⁰ FOTP also claimed that CERCLA 113(h) does not bar challenges brought under state laws such as CEQA that are not applicable or relevant and appropriate requirements (ARARs), and if it does, this challenge must be remanded to state court.

agency. . . .” FOTP said that when Congress passed CERCLA section 120 in 1986 to create a special program to address hazardous substance remediation at federal facilities. This separate program, reasoned FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. The exclusion of section 120 clean ups from the section 113(h) jurisdictional bar was thus, consistent with Congress’s efforts to enhance public oversight of federal facility clean ups. In further support of its position, FOTP pointed out that other sections of CERCLA distinguish between sections 104 and 120, such as section 113(g)²¹ and section 117.²²

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of section 120 constituting an independent remedial authority for federal facilities outside the reach of section 113(h) has been examined by a number of courts and rejected. See *Hearts of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (W.D. Wash 1993); *Werlein v. United States*, 746 F. Supp 887, 892 (D. Minn. 1992); vacated in part, 793 F. Supp. 898 (D. Minn. 1992); see also, *Worldworks, Inc. v. United States Army*, 22 F. Supp. 2d 104 n.6 (D. Co. 1998). The Army argued that FOTP’s interpretation was directly at odds with the judicially recognized purpose of section 113(h) to expedite clean ups by insulating from judicial review until they have been implemented.

The District Court agreed with the Army. It found that the Fort Ord remedy was selected under section 104 as delegated to the Secretary of Defense and that section 120 “establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities.”²³ The court adopted the logic of *Werlein* that section 120 “provides a road map for the application of CERCLA.”²⁴ The court specifically rejected FOTP’s reliance on CERCLA section 113(g) as misplaced. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army’s case.²⁵

FOTP appealed the District Court’s order arguing that the lower court erred in not finding that section 120 was a separate authority for remedy selection. FOTP argued that by creating section 120, Congress moved the authority for the selection of remedial action from section 104 to section 120 to prevent the President from delegating authority to select a remedy. It argued that the language and structure of CERCLA demonstrate a clear distinction between actions taken under section 120 and those taken under 104. The Army reiterated its successful district court position.

In its opinion, the 9th Circuit found FOTP’s other two claims to be without merit, stating that “[w]e do not believe that Congress intended, nor do we believe that statutory language mandates such an absurd rule of law.” Regarding the argument that section 120 was a separate cleanup authority falling outside of the protections of section 113(h), the 9th Circuit said that this argument “like the preceding two, would lead to a rule that is intuitively unappealing.” The 9th Circuit then found this issue to be one of first impression. Though the 9th Circuit had twice previously applied the protections of section 113(h) to remedial actions at federal facilities,²⁶ it determined that it was not bound by such *sub silentio* holdings on jurisdictional issues.

²¹ 42 U.S.C. § 9613(g)(1).

²² 42 U.S.C. § 9617.

²³ Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8.

²⁴ *Id.*, at 10.

²⁵ *Id.*

²⁶ *McCellan Ecological Seepage Situation v. Perry*, 47 F. 3d 325, (9th Cir. 1995), *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F. 3d 1469 (9th Cir. 1998).

The 9th Circuit noted that those district court decisions that had analyzed section 120 supported the Army's interpretation, as did some legislative history.²⁷ Having said that, the 9th Circuit then found that the Army's position was not supported by the statutory text.

The 9th Circuit opined that CERCLA, section 120(g)²⁸, seemed to "create a grant of authority separate from sections 104 and 106." The 9th Circuit found that other sections of CERCLA identified section 120 as a separate authority for performing cleanups. It cited the sections identified by FOTP, section 113(g)²⁹ and section 117³⁰. The problem with relying on these two sections is that they refer to the President as taking the action. Section 120 does not have the President acting, only the Administrator. The President acts under the authority of section 104 alone. Adding to the strangeness of this opinion is that the 9th Circuit then determined that it could find no authority under section 120 for CERCLA removal actions³¹ and held that they were performed under section 104 and therefore fall within the timing of review limitations of section 113(h). The 9th Circuit cited to a Tulane Law Review article³² to support this interpretation, though the court said that "[w]hether the legislators who voted for section 113(h) subjectively intended this distinction is unclear to us." So here, the 9th Circuit strangely abandoned examining the intent of Congress in analyzing section 120, after performing such an analysis for FOTP's other two arguments.

The Army, Navy, Air Force, Department of Energy, and Department of Agriculture have asked the DOJ to petition the 9th Circuit for a rehearing *en banc* in this case. You will be notified of DOJ's decision in future article in the ELD bulletin. Please notify the author if this strange case is offered as authority to challenge one of your cleanups. (Mr. Lewis/LIT)

ISSUES REGARDING PERCHLORATE SAMPLING

Ms. Kate Barfield

Recently, certain installations -- particularly some located in the Western States -- have been approached by regulators requesting that their facilities sample water for the presence of Ammonium Perchlorate. Perchlorate is an oxygen-adding component in solid fuel propellant for rockets, missiles and fireworks. The substance is highly soluble and has been found in isolated drinking water sources in California, Texas and Nevada. Questions have been raised about whether Perchlorate can affect thyroid function, but the issue is still being researched. Some State regulators have indicated that they may request Perchlorate sampling at specific military installations.

At present, there are no promulgated standards for Perchlorate testing, though interim levels have been suggested. Normally, testing is not required for chemicals that have no promulgated standard. The Environmental Protection Agency (EPA) has placed Perchlorate on a Contaminant Candidate List, but the agency also acknowledges that further study is required to determine if Perchlorate requires regulation. As a result, DoD has formed an action team to gather scientific data regarding Perchlorate. In the meantime, installation

²⁷ In keeping with the strange justice of this opinion, the court, using a form of citation never seen before, "See P.L. 99-499 at 2877", quotes a passage pertaining to CERCLA section 121 and not section 120.

²⁸ CERCLA section 120(g) states that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise...".

²⁹ CERCLA section 113(g) states that ". . . if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120. . .".

³⁰ CERCLA section 117 states that "[B]efore adoption of any plan for remedial action undertaken by the President, by a state, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall . . .".

³¹ CERCLA sections 101(23) defining removal actions is distinguished from section 101(24) defining a remedial action in that remedial actions are actions consistent with a permanent remedy.

³² Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 Tul. Envtl. L.J. 353 (1995).

technical staff should obtain guidance from their respective MACOMs if they are asked to conduct Perchlorate sampling. (Barfield/RNR).

EPA'S PENALTY POLICIES: GIVING FEDERAL FACILITIES "THE BUSINESS"

LTC Rich Jaynes

Introduction

Last year, the Environmental Protection Agency (EPA) directed³³ Regional Offices to recover from federal facilities the economic benefits of noncompliance in Clean Air Act (CAA)³⁴ enforcement actions. EPA also instructed Regions to treat federal agencies "just like" large private businesses, by increasing fines based on the ability to cash in assets to pay penalties. An EPA Region recently used these business-based factors to multiply penalties a hundred-fold beyond the penalty amounts that are normally used to reflect the seriousness of violations. This article comments on EPA's rationale behind these two types of penalties based on business economics, and why EPA Regions simply have no business using them to give federal facilities "the business."

EPA's revolutionary CAA directive states that federal agencies are liable for civil penalties, "including capturing economic benefit,"³⁵ and instructs EPA Regions to apply a penalty policy that addresses penalty calculations exclusively for private entities.³⁶ Moreover, EPA's directive requires Regions to apply this private sector penalty policy to federal facilities as if they were "just like any other person."³⁷ This use of "any" is all-inclusive and invites Regions to equate federal facilities with the largest profit-making corporate empires, with all their assets in bank accounts, stock portfolios, physical inventories, and real estate holdings. The absurdity of this penalty policy is exacerbated by EPA's instruction to also employ a size-of-business penalty factor that assumes federal facilities have almost limitless assets for paying fines, and this justifies Regions in jacking up fines by an additional 50%.³⁸ This fudge factor is used to guarantee that the errant "deep pocketed" federal agency feels the pinch of the fine sufficiently to deter any future noncompliance.

³³ Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA), Office of Enforcement and Compliance Assurance, 9 October 1998 (hereinafter "Penalty Memo"). *Included in:* U.S. Environmental Protection Agency, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities*, EPA 315-B-98-011, **Error! Bookmark not defined.**, at Appendix B (Feb. 1999) (hereinafter "Yellow Book").

³⁴ 42 U.S.C. §7401-7671q. Prior to its 1998 guidance, EPA Headquarters had no written policy on the topic of applying EPA's penalty policies based on economic aspects of businesses to federal facilities. EPA Regions, however, have pursued these types of economic-based fines in a few RCRA enforcement actions against Army facilities. Historically, economic-based penalties have generally been minor components of RCRA penalties.

³⁵ Penalty Memo, *supra* note 1.

³⁶ U.S. Environmental Protection Agency, Clean Air Act Stationary Source Civil Penalty Policy, 25 October 1991, **Error! Bookmark not defined.** (hereinafter "CAA Penalty Policy"). This penalty policy makes no mention of federal facilities, and all discussions of economic-based penalties are couched in terms of private commercial enterprises.

³⁷ Penalty Memo, *supra* note 1. In adopting this policy, EPA appears to have taken a strained view of CAA § 118(a), which requires federal facilities to comply with the CAA "in the same manner, and to the same extent as any nongovernmental entity." 42 U.S.C. § 7418(a). This statutory text, however, was not a mandate from Congress to force fit economic-based penalty criteria to federal agencies, and thereby create a unique type of fine that effectively ignores the significant differences between federal agencies and the private sector. The fallacy of this approach is compounded by EPA's directive to apply penalty policies that make no attempt to tailor applications to the unique financial aspects of federal facilities. The CAA's § 118(a) was not an open invitation by Congress for EPA to mechanically treat federal facilities "just like" private industry across the board, but a requirement to give equal treatment after making appropriate adjustments for the significant differences between federal facilities and the private sector. The net effect of EPA's policy directive is discriminatory, because there are no regulated commercial entities that are created by, funded by, and accountable directly to Congress.

³⁸ *Id.* The Penalty Memo states: "Regions should consider the size of violator when determining the appropriate penalty against a Federal agency. In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula...."

Army installations should not pay penalties based on these business considerations because they are legally and factually relevant only to the private sector. Army objections to these fines are threefold:

1. Applying recapture of economic benefit and size-of-business penalty assessment criteria to federal facilities is contrary to the plain language of the CAA and the intent of Congress;
2. No factual basis exists for recovering these types of fines from federal agencies; and,
3. Pursuit of fines based on economic benefit and size of business from federal facilities effects bad public policy by unduly interfering with the missions and appropriations prescribed by Congress.

The discussion below examines the use of the economic benefit and size-of-business penalty assessment criteria under the CAA. Although EPA has authority to assess fines against federal facilities under the Safe Drinking Water Act (SDWA)³⁹ and the Resource Conservation and Recovery Act (RCRA),⁴⁰ the penalty assessment criteria in the CAA are more extensive than in these other statutes. The focus here is on the CAA also because it is only with respect to fines under the CAA that EPA has published specific guidance directing EPA Regions to recover these penalties from federal facilities. As for the discussion regarding the second and third objections noted above, EPA's use of business-based penalty criteria against Army installations under any of these three statutes is without factual basis and effects bad public policy.⁴¹

1. Contrary to Statutory Authority.

Congressional amendments to the CAA in 1990 added several penalty assessment criteria in §113(e)(1). Those criteria include penalties that reflect the "seriousness of the violation,"⁴² a factor that the Army agrees is relevant to assessing penalties against federal facilities. The statutory penalty criteria also include two business-related factors that have no relevance to federal facilities: "economic benefit of noncompliance," and "the size of the business."⁴³ With these business-related criteria, Congress was telling EPA to carefully weigh all economic consequences of enforcement actions on a business that may have violated the CAA. The first "business" factor is the economic benefit of noncompliance, a consideration targeted to assist companies that comply with the CAA by taking away the competitive advantage gained by those businesses that chose not to invest the money necessary to achieve timely compliance. The second factor (i.e., "size of business") seeks to make a penalty proportional to a company's ability to pay a fine, and is based on the company's net worth. Neither penalty criteria has anything to do, however, with the underlying seriousness of the any environmental violations. Instead, both economic factors are equitable in nature, designed to either remove financial gains or to make penalties proportional to a company's stash of assets available to pay fines.

The CAA's legislative history augments a plain reading of the statute with respect to the economic benefit of noncompliance. After the 1990 CAA amendments were approved by the

³⁹ 42 U.S.C. § 300h-2(c)(4)(B). The penalty assessment criteria listed in SDWA allow EPA to assess penalties as follows: "In assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require."

⁴⁰ The civil penalty authority established in RCRA does not contain any penalty assessment criteria. See, 42 U.S.C. § 6928(g).

⁴¹ This article does not address state fines under the CAA because the lack of a waiver of sovereign immunity prevents states from legally imposing any fines under the CAA. While this article focuses on EPA's use of economic-based penalty assessment criteria, the second and third objections would also apply to state-imposed penalties under RCRA or SDWA. To date, however, EPA has been the only regulatory authority to make extensive use of business-based penalties against Army installations.

⁴² 42 U.S.C. §7413(e)(1).

⁴³ *Id.*

joint House-Senate conference committee, the Senate Managers to the conference committee made the following statement about the penalty assessment criteria of §113(e):

"This section requires the [EPA] Administrator and the courts to consider a number of factors when arriving at an appropriate penalty, including, in particular, the economic benefit gained as a result of the violation. **Violators should not be able to obtain an economic benefit vis-a-vis their competitors** as a result of their noncompliance with environmental laws."⁴⁴ [emphasis added]

Congress clearly intended to authorize EPA to only recover economic benefit from business entities that compete commercially with other businesses. Indeed, a common thread throughout many of EPA's economic benefit penalty policies reflects Congress' admonition that the target is competition among businesses in the private sector, and the removal of competitive advantages from noncompliance.

EPA's policy to seek "size-of-violator"⁴⁵ penalties from federal facilities is also contrary to the intent of Congress because it expands the application of the CAA's "the size of the business"⁴⁶ penalty factor to all non-business violators. That is, Congress specifically defined a penalty assessment criterion as "the size of the business." By renaming this "size of violator" and applying this penalty factor federal agencies, EPA's CAA directive impermissibly expands this part of the statute.

2. No Factual Basis.

EPA's Rules of Practice⁴⁷ for administrative litigation require EPA to use only statutory criteria for determining penalties.⁴⁸ Further, in administrative hearings on penalties, these rules require in all cases that EPA has "the burdens of presentation and persuasion that a violation has occurred as set forth in the complaint and that the relief sought is appropriate."⁴⁹ When it comes to business-based penalty criteria, however, EPA will come up empty when it tries to sustain its burden of proof.

Seeking to recover economic benefit from federal agencies is factually insupportable because of the fundamental legal and practical differences between federal facilities and the private sector. In order for there to be a tailored application of economic-based penalty assessment criteria to federal facilities, EPA Regions must account for the "special institutional characteristics of federal agencies -- their political accountability and the unique role of Congress in setting, with the Executive, their missions and budget," that make them factually incomparable to the private sector.⁵⁰ Indeed, for over a decade, EPA's own federal facilities enforcement strategy highlighted the following three inherent distinctions between federal facilities and the private sector:

⁴⁴ Congressional Research Service of the Library of Congress for the Committee on Environment and Public Works, U.S. Senate, in A Legislative History of the Clean Air Act Amendments of 1990, P.L. 101-549, 104 Stat. 2399, 1990 CAA Leg. Hist. 731 (Oct. 27, 1990).

⁴⁵ Penalty Memo, *supra* note 1.

⁴⁶ 42 U.S.C. § 7413(e)(1).

⁴⁷ 40 CFR Part 22, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits. See, rule revisions at 64 Fed. Reg. 40138 (July 23, 1999).

⁴⁸ *Id.*, at § 22.19(a)(4).

⁴⁹ *Id.*, at § 22.24(a).

⁵⁰ A few months before becoming EPA's Deputy Administrator, Mr. F. Henry Habicht testified before Congress in his role as an Assistant Attorney General on the issue of federal facility compliance with environmental laws. See, Statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Congress, 1st Session concerning "Federal Facility Compliance with Environmental Laws," at 1 (April 28, 1987). This was included as Appendix H of: U.S. Environmental Protection Agency, Federal Facilities Compliance Strategy (Nov. 1988).

(1) Congress creates a federal agency after determining that "the underlying mission is a special one which cannot be entrusted to the private sector;"⁵¹

(2) Congress is the sole means of financial support for federal agencies, and accountability to Congress as "an integral partner" in the environmental compliance process is a "compelling enforcement tool;"⁵² and,

(3) federal agencies are also accountable to the Executive for their performance in assisting the President, whom the Constitution holds accountable "for their missions and actions."⁵³

These three essential characteristics effectively preclude any factual basis for seeking penalties for economic benefit or hiking up fines based on federal assets. Commanders and managers of Army installations are only able to look to appropriations from Congress to fund all their mission-essential operations, including environmental compliance. Consequently, numerous fiscal law requirements regulate how and when a federal facility can obligate its funds. Funding flexibility is particularly rigid in the case of large construction projects, which require line-item approval from Congress. Aside from military construction projects, normal operating expenses are funded through Operations & Maintenance appropriations.

The inapplicability of economic benefit to federal facilities, in light of these distinct differences with the private sector, is readily apparent in view of the assumptions upon which the recovery of economic benefit is based. The discussion below reviews the typical methodology for calculating economic benefit to illustrate the difficulty EPA Regions will encounter in seeking to recover economic benefit from federal facilities. Although EPA's policies on economic benefit contain no discussion of federal facilities and provide no guidance to EPA Regions in tailoring enforcement actions to reflect the unique aspects of federal facilities, EPA's 1998 CAA directive appears to instruct EPA Regions to simply find some way to calculate economic benefit for federal facilities "just like" they would for the private sector.

The problems with seeking recapture of economic benefit from federal facilities arise primarily from two assumptions that the penalty calculation methodology makes:⁵⁴

1. Business Competition. The purpose of recovering economic benefit is to "capture the actual economic benefit of noncompliance"⁵⁵ by targeting the recovery of "illegal profits."⁵⁶ This seeks to "remove" the unfair financial advantages that inure to a violator through noncompliance vis-a-vis the violator's competition who comply with environmental requirements.⁵⁷ The economic benefit component of a fine does not seek to punish the seriousness of the violation in any way, but is an equitable penalty that is designed to

⁵¹ *Id.* at 3.

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ See, 64 Fed. Reg. 32947, Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases (June 18, 1999) (hereinafter "1999 BEN Notice"). EPA uses its "BEN" computer model to calculate the economic benefits of noncompliance from business entities. One of the purposes of the 1999 BEN Notice was to provide comments submitted in response to a notice published in 61 Fed. Reg. 53026, Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases (Oct. 9, 1996) (hereinafter "1996 BEN Notice"). Note that the 1996 BEN Notice, at 53026 and 53028, invited comments on the BEN model's calculation methodology as well as the basic assumptions. Although DoD representatives on several occasions have voiced concerns about EPA's application of the BEN model to federal facilities, so far EPA has maintained the position that BEN applies to federal facilities. and U.S. Environmental Protection Agency (EPA), Office of Regulatory Enforcement, BEN User's Manual (April, 1999) (hereinafter "BEN Manual").

⁵⁵ CAA Penalty Policy, *supra* note 4, at 11.

⁵⁶ *Id.* at 12.

⁵⁷ 1996 BEN Notice, *supra* note 22, at 53026. A virtually identical statement is in the 1999 BEN Notice, *supra* note 22, at 32948.

"remove or neutralize"⁵⁸ an actual financial gain to a business. This component represents that amount of money that must be taken back from the business to place the business in the same position financially as competitive businesses that achieved timely compliance.⁵⁹

2. Net Financial Gains from Noncompliance. Economic benefit recaptures the measurable "savings" or "net gain" from delayed compliance and avoided costs during the period of noncompliance.⁶⁰ Fundamental to this assumption is that "all resources not spent on achieving compliance are spent on alternative profitable ventures."⁶¹ This means that delayed and avoided costs always result in the yield of monetary return⁶² at a presumed rate,⁶³ and that this return of net gain inures to the financial benefit of the business until an enforcement action is brought.⁶⁴

Neither assumption is appropriate as applied to federal facilities. Army installations do not have the means to acquire, save, or invest "profits." All funds available to federal agencies come from Congress, and any money that is not programmed for environmental compliance is applied toward other mission-related requirements. Environmental noncompliance at an Army installation does not cause it to realize any financial gain that can then be saved or invested to augment the appropriations of Congress. There is simply no economic benefit to recover.

EPA's CAA Civil Penalty Policy uses its size-of-business factor to effect an increase in the overall fine "in proportion to the size of the violator's business."⁶⁵ Application of this factor depends on an analysis of a corporation's "stockholder's equity or 'net worth'" as "calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings."⁶⁶ The policy provides a table for arriving at a "size of violator" fine, which is based on the "net worth (corporations); or net current assets (partnerships and sole proprietorships)."⁶⁷ Larger net worth automatically adds larger fines to the gravity-based and economic benefit components already calculated. For extremely large corporations, Regions are to simply add

⁵⁸ 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32950.

⁵⁹ BEN Manual, *supra* note 22, at 1-2.

⁶⁰ 1996 BEN Notice, *supra* note 22, at 53027.

⁶¹ 1999 BEN Notice, *supra* note 22, at 32966. Federal case law underscores the importance of this assumption to the assessment of economic-based penalties. See *United States v. Dean Dairy Products, Inc.*, 150 F.3d 259 (3d Cir. 1998), where the court, citing *United States v. Smithfield Foods*, 972 F. Supp. 338 (E.D. Va.1997), stated that "the goal of the economic benefit analysis is to prevent a violator from profiting from its wrongdoing." In explaining what it means to "profit from wrongdoing", the court elaborated by focusing on concepts relevant primarily to business enterprises, such as "leveling the economic playing field"; "preventing violators from gaining an unfair advantage"; and "earning a return on funds that should have been spent to purchase, operate, and maintain appropriate pollution control devices." *Id.* at 263.

⁶² 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32940-50.

⁶³ 1996 BEN Notice, *supra* note 22, at 53027 and 53029. See also, 1999 BEN Notice, *supra* note 22, at 32950.

⁶⁴ 1996 BEN Notice, *supra* note 22, at 53027. See also, 1999 BEN Notice, *supra* note 22, at 32949.

⁶⁵ CAA Penalty Policy, *supra* note 4.

⁶⁶ *Id.* at 16. The policy states: "Size of violator: A corporation's size is indicated by its stockholder's equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets." *Id.*

⁶⁷ *Id.* at 21. The table assesses a fine amount for this factor of \$2,000 if net worth/current assets are under \$100,000. For businesses with larger assets, the fines are shown in parentheses: net worth/current assets of \$100,001-\$1 million receive (\$5,000 fine); \$1,000,001-\$5 million (\$10,000); \$5,000,001-\$20 million (\$20,000); \$20,000,001-40 million (\$35,000); \$40,000,001-\$70 million (\$50,000); \$70,000,001-\$100 million (\$70,000); if net worth/current assets exceed \$100 million, the fine is \$70,000 + \$25,000 for every additional \$30 million in assets, or fraction thereof.

in an additional 50% to the fines already tabulated,⁶⁸ which results in the fines based on seriousness of the violations and economic benefit to be multiplied by a factor of 1.5.

Simply stated, the size-of-business factor assumes that corporations with large financial assets are in a better position to draw upon those assets to pay for fines. Consequently, larger fines are necessary to make them feel the regulatory bite with sufficient financial "pain" to effect deterrence. Obviously, this penalty factor is only appropriate when a penalty based on the seriousness of the violation (i.e., gravity component) is small in proportion to a company's ability to pay. Even as applied to the private sector, however, EPA has been taken to task by its own administrative law judges for acting arbitrarily and contrary to statutory authority when "automatic consideration of the size of violator's business" becomes "a major factor in determining the violation's extent level and gravity based penalty...."⁶⁹

Even though the size-of-business logic may work in some instances for the business community, applying this factor to Army facilities achieves absurd results. This is because it assumes that installations can raise additional revenues by selling tanks and helicopters, by laying off employees, by mortgaging real estate, or by passing the costs of doing business on to our customers. In a recent case, application of this penalty factor led an EPA Region to conclude that an installation had billions of dollars in assets that it could sell or mortgage to get into compliance and to pay penalties. This approach completely ignores the fact that Army installations must get their funding for large environmental projects from Congress as a line-item military construction projects, and are not at liberty to have a yard sale of their tactical equipment to raise the money either pay the costs of compliance or pay fines. As with economic benefit, there is simply no evidence available that would support EPA's assumption that Army installations can cash in their "net worth" to augment Congressional appropriations.

3. Effects Bad Public Policy.

In the context of federal facilities, the purpose of a fine based on the seriousness of a violation is to get the federal facility manager to request from Congress the necessary funds for capital improvements and operating expenses to comply with environmental requirements. By Executive Order 12088,⁷⁰ the heads of federal agencies are required to ensure they request sufficient funds to carry out environmental compliance. When this fails to occur, the foremost enforcement objective is to get a federal facility that is in violation to rearrange priorities and bring the facility into compliance. Indeed, EPA's own federal facilities policy echoes this enforcement goal.⁷¹

In cases involving federal facilities, assessing punitive fines based on the seriousness of the violations adequately addresses the enforcement purpose of deterrence by focusing on the nature of the violation and the conduct of the alleged violator. Such gravity-based penalties reflect legitimate factors that are tailored to the offense such as the risk of environmental harm from the violations, the extent of deviation from regulatory requirements, length of violation, and the violator's history of noncompliance. This is the penalty factor that

⁶⁸ In situations "[w]here the size of the violator figure represents over 50% of the total preliminary deterrence amount" (i.e., the economic benefit and gravity components), then EPA "may reduce the size of the violator figure to 50% of the preliminary deterrence amount." *Id.* at 22.

⁶⁹ In the Matter of Troy Chemical Corp., Docket No. II-EPCRA-98-0101, U.S. EPA, 1999 EPA ALJ LEXIS 7 (Jan. 28, 1999).

⁷⁰ Executive Order 12088, Federal Compliance with Pollution Control Standards, 43 Fed. Reg. 47707 (Oct. 13, 1978).

⁷¹ The Yellow Book, *supra* note 1, at V-12, contains guidance on the "impact of fund availability" for federal agencies. The EPA policy quotes Executive Order 12088 that requires the head of each agency to "ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget." *Id.* The Yellow Book observes that the objective of EPA regional enforcement authorities should be to simply "require that the responsible Federal official seek any additional funds necessary to correct violations." *Id.* This policy correctly notes that the goal of an EPA enforcement action against a federal facility should be to capture the attention of federal facility managers and give them incentive to reorder priorities in order to achieve environmental compliance.

Congress allows EPA to use to get the attention of a federal facility to ensure an expeditious compliance schedule and to deter the facility from future violations. Deterrence in the federal facility context means using penalties only to the extent necessary to ensure that the facility's agency complies with Executive Order 12088, by requesting sufficient funds from Congress to construct necessary pollution control devices and operate those devices. Because of the unique nature of federal facilities, penalties that stretch beyond gravity-based factors erode the ability of the agency to fulfill the mission given to it by Congress.

Dollar for dollar, punitive fines have a disproportionate impact on federal facilities as compared to private industry. Although federal facilities have significant assets, those assets are "invisible" in terms of assisting in any way to satisfy a fine. While private industry has options to raise money to satisfy a fine without interfering with its operations, this is much more complicated for the federal facility. In an era of austere budgets, there is never enough money at military installations to attend to all the bona fide requirements. Installation commanders must carefully balance available resources against the missions mandated by Congress and the President, and work within the allocations available. To pay a fine, the installation commander must look to operating funds that are earmarked for other uses, such as fuel for vehicles or maintenance of training ranges. Simply put, every dollar paid for a penalty is a dollar's worth of mission degradation somewhere else. There are no savings accounts, no carried over surpluses, and very little budget flexibility. As the result of Executive and DoD policies, the funds for paying penalties for environmental violations must come from agency mission O&M accounts. While DoD has significant assets and budgets, they are subject to careful Congressional scrutiny, and the size of those assets and budgets does not equate with the proverbial corporate "deep pocket."

Any time that Congress authorizes payment of penalties by federal facilities to EPA, it implicitly authorizes the passing of some appropriated funds, intended to support an agency's mission, directly back to the U.S. Treasury. This deters future noncompliance by requiring the federal facility manager to experience the discomfort that accompanies a requirement to rearrange priorities and forego some planned mission-related purchases or actions. It is not implicit, however, that Congress ever intended to authorize fines that go beyond deterrence. Economic benefit fines, imposed to recover a net financial gain that does not exist, serve only to degrade federal missions.⁷² The same applies to size-of-business fines that are based on an assumption that federal facilities have access to investments or property that could otherwise be used for commercial purposes. Any payment of these business-based fines needlessly diverts dollars Congress appropriated in support of the military mission back to the U.S. Treasury. A policy that seeks this result does not serve the goal of assuring compliance, unnecessarily prevents agencies from carrying out other Congressionally mandated missions, is contrary to the letter and spirit of the law, and simply effects bad public policy.

Inherent in EPA's charter as an enforcement agency is the understanding the EPA will not ignore the unique nature of federal agencies' funding and missions. Contorting these business-based penalties so as to apply them to federal facilities improperly interferes with the missions assigned and funds allocated by Congress. In addition, these penalties impose a type of punishment on federal facilities that is unique and discriminatory, because there are no businesses in the private sector that have the same missions and funding characteristics as federal agencies. Thus, applying EPA's business-based policies to federal facilities serves no legitimate public purpose.

Summary

In light of the special institutional characteristics of federal agencies, it is clear that EPA enforcement authorities must strike a delicate balance when bringing an enforcement action against a federal facility. On one side of the scale, Congress has given EPA enforcement tools, including penalty authority, to get the attention of the alleged violator and achieve

⁷² Imposing economic benefit also effectively precludes the use of supplemental environmental projects (SEPs) as a means of settling enforcement actions, because EPA's SEP policy directs that the economic benefit component of a fine cannot be offset by SEPs. See, 63 Fed. Reg. 24796, Final EPA Supplemental Environmental Projects Policy (May 5, 1998).

compliance. In the context of federal facilities, this means that Congress has authorized the use of punitive fines based on the seriousness of violations as an "attention getter" where it is necessary. On the other end of the scale, however, overloading a federal facility with a large penalty inherently interferes with some aspect of a Congressional mission that the President is required to manage within the funds allocated by Congress. Achieving this balance requires EPA to approach federal facility enforcement with tools that are carefully tailored for that purpose. In contrast, adopting a philosophy that treats federal facilities "just like" private industry, and implementing the procedures that ignore fundamental differences between the two sectors, allows unauthorized intrusion into the funds Congress entrusts to government agencies for their missions. Applying business-based penalty criteria to federal facilities serves only to multiply penalties far beyond deterrence and inflicts damage to federal agency missions. This form of "hyper-deterrence" has no analog in the private sector, and Army installations should not enter into settlement agreements that require payment of these penalty components. (LTC Jaynes/Compliance)

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SHOW ME THE FINES! EPA's HEAVY HAND SPURS CONGRESSIONAL REACTION

Major Robert J. Cotell

On 25 October 1999 the President signed the Defense Appropriations Bill for FY 2000 (Public Law 106-79). The bill will have a dramatic effect on how the Army processes and approves the settlement of environmental fines. Section 8149 of the bill directs that none of the funds appropriated for FY 2000

"may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of **the** fine or penalty has been specifically authorized by law." [emphasis added]

The section further provides that funds expended to perform supplemental environmental projects (SEPs) pursuant to a settlement agreement are considered "payment of the penalty." Although some attorneys have pointed out that this section may simply restate the age-old requirement for explicit authorizing language in media statutes before federal agencies can pay penalties, in fact the bill's mandate for "the" fine to be specifically authorized is controlling. Environmental Law Division (ELD) interprets Section 8149 to require specific congressional approval for the use of FY 2000 funding to pay for any fines or SEPs.

This interpretation of Section 8149 also tracks with the general understanding of its origin and purpose. The main catalyst for including this provision in the appropriations bill was EPA's proposal to issue a massive fine at Fort Wainwright, Alaska. Although the installation has not yet received a formal complaint for alleged Clean Air Act violations, EPA opened preliminary negotiations with a proposed penalty of over \$16 million. This single penalty would equal the total for nearly 200 assessed penalties received throughout the Army from all environmental regulators under all media statutes over the past seven years.

Even more alarming than the sheer magnitude of EPA's settlement offer, however, is the basis for it. Over 99% of the proposed fine is based on two types of "business" penalty assessment criteria that have no relevance to federal agencies. First, EPA proposes to recover \$10.5 million for alleged "economic benefits" received by the installation for non-compliance. Second, EPA is seeking an additional nearly \$5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that EPA presumes the Army can sell or mortgage to raise money to pay for penalties. The inapplicability of these considerations to federal facilities was the topic of an article in last month's bulletin. It is understood that EPA's attempt to extend these business-based concepts to federal facilities in such a dramatic fashion caused Senator Stevens from Alaska (who is also Chairman of the

Senate Appropriations Committee) to press for adding Section 8149 to the appropriations bill while it was being considered by a House-Senate conference committee.

At present, nearly all fines are settled through consent agreements between installation commanders and federal or state regulators, after receiving concurrence by ELD. The new legislation will require the Army and DoD to maintain strict centralized scrutiny of all such agreements and obtain prior approval by Congress of any penalty payments with FY 2000 funds. The method by which the Army/DoD will attain congressional approval is in the process of being developed. However, Section 8149 is not expected to alter the basic aspects of negotiating settlement agreements. That is, installation environmental law specialists (ELs) will continue to negotiate consent agreements with federal or state regulators, and installation commanders will continue to be the Army's signatories for those agreements.

Two significant changes are likely: (1) all consent agreements will need to include a provision indicating that any payment of fines or SEPs is subject to congressional approval; and, (2) the installation will be required to prepare a settlement memorandum that explains why any payments for fines and SEPs are appropriate. The settlement memorandum will be necessary for DoD to pursue receiving a line-item budget authorization from Congress. In cases where the value of a SEP exceeds the reduction in fine amount, particular care must be given to point out whether regulatory agencies are giving penalty offset credit for SEPs that were already programmed into environmental budgets prior to the enforcement action.

In addition to affecting future settlement agreements, Section 8149 may also place restrictions on installation settlements that are already concluded. Presently ELD has identified five installations that: (1) negotiated SEPs to settle enforcement actions in previous fiscal years; and, (2) will need to use FY 2000 funding to complete the SEPs. The installations are: Walter Reed Army Medical Center; Fort Campbell; Fort Gordon; Pueblo Chemical Depot; and Deseret Chemical Depot. If any other installations have projects that fit into this category, the ELS should contact ELD as soon as possible.

ELD will prepare instructions to Staff Judge Advocates, to include proposed additional language for consent agreements, as soon as the DoD procedures are completed. In the interim, it is essential for each ELS to ensure that installations do not spend any FY 2000 funding to pay for penalties or SEPs. As enforcement actions arise, negotiations to achieve compliance should proceed as normal, as well as negotiations regarding penalties and SEPs. It will be important, however, to emphasize to the regulator throughout any negotiations that all fines and SEPs must be approved by Congress before they can be paid or implemented. (MAJ Cotell/CPL)

Fun With Removal Actions

Ms. Kate Barfield¹

Removal actions are undertaken to deal with contamination as required by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² CERCLA defines a removal action as: "...the cleanup or removal of released hazardous substances from the environment, [and] such actions as may be necessary taken in the

¹ The author would like to thank Mr. Joe Donovan, EPA Region 3, for his helpful assistance on the requirements of removal actions.

² CERCLA, 42 U.S.C. § 9601, *et. seq.*

event of the threat of release of hazardous substances into the environment..."³ Removals include actions required to: (1) monitor, assess or evaluate a release or threat of a release; (2) the disposal of removed material and (3) other actions taken prevent or mitigate damage to public health or the environment.⁴ Removals may be undertaken as independent actions or, if warranted, as part of an ongoing remedial action.⁵ The Army, as CERCLA Lead Agent,⁶ is authorized to conduct removals and may choose to undertake such actions when remediating installations subject to Base Realignment and Closure (BRAC).⁷ Accordingly, this article examines different types of removal actions and how they are documented at both DoD's active and BRAC remediation sites.

Types of Removal Actions: There are three types of removal actions -- emergencies, time-critical removals and non-time critical removals. In practice, the distinctions among the three groups can become vague, so here is a general breakdown of their requirements:

Emergencies: Removal should begin right away. Emergency removals include actions that must be taken within hours or days after a serious threat to human health or the environment has been substantiated.⁸ These removals, by definition, involve a sense of urgency. Examples include a fire in a chemical warehouse, a hazwaste tanker accident or the need to address leaking tanks filled with an explosive substance.

Time Critical: This type of removal concerns a release that should be addressed within six months.⁹ Time-critical removals tend to involve less acute circumstances than an emergency, yet prompt action is still warranted. Important factors are the nature and extent of the release and its possible impact on nearby populations or a particularly sensitive environment. Examples of time-critical removals could encompass the need to address open tanks of hazardous substances located near a residential area or an action taken to deal with a waste dump containing leaking chemical drums.

Non-Time Critical: Here, both the process of planning and the actual removal is expected to take more than six months.¹⁰ Generally, this approach is reserved for situations that require the removal of a contaminant, but there is time for more advance planning. Examples could include: (1) a response to deal with the contamination that, though isolated from public access, could eventually pose a threat to groundwater or (2) the removal of hazardous chemical containers that will likely begin to leak before the year is out.¹¹ Because more planning time is allotted for these actions, non-time critical actions generally involve more up-front documentation and public notice.¹²

³ CERCLA, 42 U.S.C. § 9601(23).

⁴ *Id.*

⁵ 40 C.F.R. § 300.420(b)(3).

⁶ CERCLA, 42 U.S.C. § 9604(a); Exec. Order 12580, 52 Fed. Reg. 2923, January 23, 1987.

⁷ *See generally*, 10 U.S.C. § 2687.

⁸ CERCLA Section 9604(a)(1) authorizes removal actions "[w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or a substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare..."

⁹ 40 C.F.R. § 300.415(b)(3).

¹⁰ 40 C.F.R. § 300.415(b)(4).

¹¹ *See, EPA Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, EPA 540/R-93/057, OSWER 9360.0-32, August, 1993.

¹² *EPA Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, EPA 540/R-93/057, OSWER 9360.0-32, sec. 1.2, August, 1993.

Time Critical and Non-Time Critical Removal Actions: It's all in the timing. If action must be taken within six months, it is time-critical. If a longer planning period is appropriate, a non-time critical removal can be initiated. When distinguishing between the two, facts are key -- such as the likelihood of spillage, contamination migration, fire, explosion, and the potential for human exposure or damage to the food chain.¹³

One common misconception is that a time-critical removal must take place within six months or it will devolve into a non-time critical action. This is not so. Should funding or personnel shortage delay a time-critical action, its status does not change. Instead, the Lead Agency would be expected to take reasonable steps to resolve the delay.¹⁴

Conducting a Removal -- The Basics:

- Ensure that the on-scene coordinator is notified of the release in question.¹⁵
- Conduct a site evaluation.¹⁶
- Prepare the necessary decision documents or action memoranda.
- Undertake all required public participation.
- Conduct the removal.
- Ensure that appropriate documentation is included in the administrative record.¹⁷

How To Decide if a Removal Action is Needed: The NCP provides the following considerations to help you decide if a removal action is appropriate. Again, these are fact-specific. Relevant factors include the extent of contamination, the likelihood of contamination migration and the human or environmental impacts anticipated:

- Exposure (actual or potential) to humans, animals, or the food chain from hazardous substances, pollutants or contaminants.
- Actual or potential contamination of drinking water supplies and the presence of particularly sensitive eco-systems.
- Bulk containers of hazardous substances, pollutants or contaminants that pose a threat of release.
- The potential for migration of high levels of hazardous substances, pollutants or contaminants in soils that are at or near the surface.
- Weather conditions that may cause hazardous substances, pollutants or contaminants to be released or dispersed.
- Threat of fire or explosion.

¹³ The NCP provides a list of response activities that may be appropriate for removal, which also provides examples of these "ranking" factors. See, 40 C.F.R. § 300.415(e).

¹⁴ This could include appropriate interim measures, such as containing the contamination or beefing up environmental monitoring. See, Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 6, Spring, 1997.

¹⁵ 40 C.F.R. § 300.405(a).

¹⁶ 40 C.F.R. § 300.415(a)(1).

¹⁷ CERCLA's overarching requirement for an administrative record can be found CERCLA, 42 U.S.C. § 9613(k). For more assistance on how to prepare your administrative record, see, U.S. EPA, Solid Waste and Emergency Response, *Superfund Removal Procedures Action Memorandum Guidance*, EPA/540/P-90/004, OSWER 9360.3-01, p. 7-25, December, 1990.

- Availability of another appropriate response to deal with the situation and other factors indicating a threat to human health or the environment.¹⁸

Documentation Requirements: Each type of removal action has slightly different documentation requirements. Only the non-time critical removal involves a specific format (discussed below). For emergencies and time-critical removals, the decision document need not match a specific template, but must show that the action was reasonable and in compliance with the law.

Documenting an Emergency Removal Action: Because of the urgency involved with emergencies, fewer planning documents are required. But, at the time of the removal, the Lead Agency should have identified the type and gravity of the threat to human health or environment and assessed the proximity of affected populations.¹⁹ The administrative record should justify the need for an emergency action.²⁰ Decision documents should be made available for public inspection no later than 60 days after initiation of the removal.²¹ The Lead Agent should provide written responses to significant public comments.²²

Documenting the Time-Critical Removal Action: The administrative record should contain a decision document that describes the site's history, current activities and any health or environmental threats.²³ Specifically, this record provides the following:

- Documentation that the Lead Agent reviewed the site evaluation and the levels of risk to determine that a removal action was appropriate.
- A discussion as the possible courses of action, their level of urgency and the reasoning behind the decision to select a removal action.
- A discussion of relevant federal, State or local environmental laws, regulations or guidance, including federal and State applicable or relevant and appropriate requirements (ARARs).²⁴ These ARARs should be met "to the extent practicable considering the exigencies of the situation..."²⁵
- Other action memos, decision documents and pertinent records.²⁶
- The Lead Agent's compliance with public participation requirements.²⁷

¹⁸ See, 40 C.F.R. § 300.415(b)(2)(I)-(viii).

¹⁹ 40 C.F.R. § 300.410(c)(1); U.S. EPA, Solid Waste and Emergency Response, *Superfund Removal Procedures Action Memorandum Guidance*, EPA/540/P-90/004, OSWER 9360.3-01, p. 12-16, December, 1990. In emergencies involving contaminated soil and drinking water, it may be advisable to contact the Agency for Toxic Substances and Disease Registry.

²⁰ 40 C.F.R. § 300.410(c);(e).

²¹ 40 C.F.R. § 300.820(4)(b)(1). See also, 40 C.F.R. § 300.415(n)(2).

²² 40 C.F.R. §§ 300.820(4)(b)(2); 300.415(n)(2).

²³ For assistance, see, *EPA Final Guidance on Administrative Records for Selection of CERCLA Response Actions*, OSWER Directive 9833.3A-1, December 3, 1990.

²⁴ States should be consulted during this process. 40 C.F.R. § 300.525(d),(e). See also, U.S. EPA, OSWER Publication 9360.3-02, *Superfund Removal Procedures: Guidance on the Consideration of ARARs During Removal Actions*, August, 1991.

²⁵ 40 C.F.R. § 300.415(j). Note that because of the time-critical nature of this type of removal, it may not be possible to identify more obscure ARARs, though the cleanup authority would identify the most relevant and significant ARARs. These ARARs and other relevant federal, State or local environmental laws, regulations or guidance would then be listed in the appropriate decision documents. This list should be as complete as possible, considering the exigencies of the removal. Remember that your documentation is intended to show that the agency made a goodfaith effort to identify applicable requirements.

²⁶ This record should include documents that were considered or relied upon when making the decision to proceed with a removal action -- even discussions that oppose the decision.

Even after the decision document has been formalized, the Lead Agency may continue to add documents to the administrative file. These additional documents may include discussions of response actions not addressed in the initial removal action or modifications to the final decision.²⁸ Note that changes to a signed decision document will likely trigger additional public comment requirements, as well as the need for a formal response to those comments.²⁹ Likewise, should this form of removal action be delayed beyond 120 days from initiation, additional public participation requirements come into effect.³⁰

Documenting a Non-Time Critical Removal: Because a non-time critical removal allows for at least six months of planning, more documentation is required. The factors that go into the decision to conduct a non-time critical removal are outlined in an Engineering Evaluation and Cost Analysis (EE/CA)³¹ which should:

- Document the contamination at the site and any threats that may be posed to human health and welfare or to the environment.
- Identify and compare removal action alternatives.
- Provide a recommended removal action alternative.
- Identify federal and State applicable or relevant and appropriate requirements -- ARARs -- or other relevant advisories, criteria or guidance, which are to be met to the extent practicable.³²
- The Lead Agent's compliance with public participation requirements.³³

These EE/CAs are then made available for public comment and the Army will then provide its response to significant comments received.³⁴ If the removal action will then not proceed within 120 days, the NCP requires extra public notification and opportunity to comment.³⁵ Again, changes to the response action set forth in the EE/CA will trigger additional documentation and public comment requirements.³⁶

Documenting BRAC Removals: Removals conducted at Base Realignment and Closure (BRAC) properties involve the same requirements stated above and are conducted in accordance with the removal authority provided under Section 104 of CERCLA.³⁷ This authority would permit emergency removals, as well as time-critical and non-time critical removals. Such removal actions can be initiated at any time during the investigation or

²⁷ 40 C.F.R. §§ 300.820(a)(3); 300.415(n)(1),(2).

²⁸ 40 C.F.R. § 300.825(a).

²⁹ 40 C.F.R. § 300.825(b),(c).

³⁰ 40 C.F.R. §§ 300.415(n)(3).

³¹ 40 C.F.R. § 300.415(b)(4)(i); 40 C.F.R. § 300.820(a)(1).

³² 40 C.F.R. § 300.415(j). Given that this form of removal action allows for more time to plan and prepare, the list of ARARs and other relevant federal, State or local laws, regulations or guidance will likely be more expansive. Other criteria or guidance that does not rise to the level of a promulgated standard required of an ARAR may also be considered. See also, U.S. EPA, OSWER Publication 9360.3-02, *Superfund Removal Procedures: Guidance on the Consideration of ARARs During Removal Actions*, August, 1991.

³³ 40 C.F.R. §§ 300.820(3); 300.415(n)(4).

³⁴ 40 C.F.R. §§ 300.820(a)(2); (3); 300.415(n)(1); (4). See also, Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 3-4, Spring, 1997. This guidance contains a handy chart tracking the community-relations requirements for all removals.

³⁵ 40 C.F.R. § 300.415(n)(3).

³⁶ 40 C.F.R. § 300.825(b),(c).

³⁷ CERCLA, 42 U.S.C. § 9604(a).

cleanup phase at a BRAC site -- if data reveals that such response actions are warranted.³⁸ Note that a single BRAC site may involve more than one type of removal action. For example, in the event of a hazardous chemical release, an emergency or time-critical action could be employed to quickly install a containment system. Then, a non-time critical removal could be used to deal with the contained chemicals.³⁹

With BRAC removals, the BRAC Environmental Coordinator (BEC) does much of the legwork. S/he is responsible for working with the appropriate regulators, as well as the BRAC cleanup team members, to investigate the need for a removal and ensure that all necessary documentation is prepared.⁴⁰ When approaching non-time critical removals, the BEC will document this decision in the EE/CA. The BEC will also give the involved federal, State and local agencies an opportunity to review and comment on the proposed removal actions. One good way to begin this process is to provide the draft action memorandum to the relevant agencies and other members of the BRAC cleanup team.⁴¹ The BEC will also make the EE/CA available for a 30-day public comment period and will also hold a public meeting regarding the proposed action. After considering the comments received, the BEC may proceed with the removal.⁴²

Conclusion: Hopefully, this article helps clarify the differences among various removal actions or at least it allows for more educated confusion. Should you need more guidance, the EPA/DoD documents referenced here are available on the Web. (Barfield/RNR)

EPA publications can be found at:

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Superfund Removal Procedures: EPA Action Memorandum Guidance
EPA Guidance on Conducting Non-Time Critical Removals under CERCLA
EPA Guidance on the Consideration of ARARs During Removal Actions
EPA Final Guidance on Administrative Records for Selection of CERCLA Response Actions

Guidance for DoD properties subject to BRAC can be found at:

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Expediting BRAC Cleanups Using CERCLA Removal Authority

" FY 2000 " AIR FORCE ENVIRONMENTAL LAW COURSES

Mary F. Nixon

The following is a list of Environmental Law Courses to be conducted at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Alabama during FY 2000. At present the Army has ten positions reserved for the Advanced Environmental Law Course and 25 positions each for the Basic and Update Courses. Installation Environmental Law Specialists who wish to attend the Advanced Course must send a request through their MACOM ELS to Army Environmental Law Division, Ms. Mary Nixon, 703-696-1230, mary.nixon@hqda.army.mil. ELSs interested in attending the Basic or Update Courses should contact Ms. Nixon at ELD directly. The number of authorized

³⁸ Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 2, Spring, 1997.

³⁹ *Id.* at p. 4; 7.

⁴⁰ *Id.* at p. 1; 7.

⁴¹ *Id.* at p. 5.

⁴² *Id.* at p. 3-4; 5.

positions is subject to change. Funding for those selected to attend will come from installation budgets.

MAFJAG740 -- Advanced Environmental Law Course (20 hours). This course is an advanced seminar covering complex and specialized areas of environmental compliance for DOD installations. Its purpose is to enhance the effectiveness of military and civilian attorneys whose practice is primarily focused on advising and assisting commanders in resolving environmental law problems. Because the course focuses on current developments and trends, the curriculum varies significantly from year to year. Examples of currently taught topics include impacts of fiscal law on payment of fines and penalties under the Federal Facilities Compliance Act, litigation trends, ecosystem management (including proposed amendments to the Endangered Species Act), environmental issues in base closure, spent munitions regulations, the executive order pertaining to environmental justice, Clean Air Act developments, environmental ethics, shipboard pollution, and the regulator's perspective on DOD compliance.

Dates: 6-8 Dec 99

Target Audience: Attorneys in policy making positions at the MACOM (or equivalent) or higher levels.

MAFJAG750 -- Environmental Law Update Course (20 hours). This intermediate-level course is for environmental law practitioners who have been to the basic Environmental Law Course or equivalent, have a moderate amount of environmental law experience, and spend at least 50 percent of their time on environmental law matters. Ultimately, its purpose is to enhance the effectiveness of military and civilian attorneys in advising and assisting commanders in resolving environmental law problems. Because the course focuses on current developments and trends as they impact DOD and the component services, the curriculum varies significantly from year to year. Examples of current topics include payment of fines and penalties under the Federal Facilities Compliance Act; litigation trends; ecosystem management (including proposed amendments to the Endangered Species Act); environmental issues in base closure; spent munitions regulations; the executive order pertaining to environmental justice; Clean Air Act developments; environmental ethics; shipboard pollution; the regulator's perspective on DOD compliance; and practical considerations in conducting the Installation Restoration Program, environmental audits, and environmental analyses prepared under the National Environmental Policy Act.

Dates: 14-16 Feb 00

Target Audience: Installation-level Attorneys.

MAFJAG670 -- Environmental Law Basic Course (35 hours). The Environmental Law Course was established to provide specialized instruction to attorneys who have primary responsibility at installation or major command levels for addressing and resolving environmental problems. The course objectives are to familiarize attorneys with the range of potential environmental law problems, potential liability of DoD and its employees, procedures for obtaining permits, and responding to notices of violation. Because the Air Force is DoD's Executive Agent for environmental law training, the course brings together a total of 116 students. There is a continuing, current need for this course because of the high rate of turnover due to rotation and separation, as well as the complex and rapidly developing statutory, regulatory and case law under the multitude of federal and state environmental statutes.

Dates: 17-21 Apr 00

Target Audience: Installation-level Attorneys.

SHEDDING SOME LIGHT ON TRITIUM EXIT SIGNS

Major Ken Tozzi

The U.S. Army has used tritium exit signs on Army installations for a number of years. Legal requirements apply to the installation, servicing, removal, and transfer of tritium exit signs.⁴³ This article outlines the legal requirements and issues installation environmental law attorneys should be aware of in this admittedly obscure but important area of law.

Tritium is defined as a rare radioactive hydrogen isotope with atomic mass.⁴⁴ The radioactive properties of tritium are useful in the production of a continuous light source. A continuous light source can be produced by mixing tritium with a chemical that emits light in the presence of radiation (a phosphor). Typically such continuous light sources are useful where dim light conditions require illumination without the use of electricity or batteries. Exit signs are an example of the practical use of tritium to produce a continuous light source that is reliable in the event of power outages and blackouts, where generator or battery power is unavailable as a backup power source.⁴⁵

Tritium exit signs are regulated by the Nuclear Regulatory Commission, which issues a general license to federal government agencies (among others) to "[A]cquire, receive, possess, use or transfer, ... byproduct material contained in devices designed and manufactured for the purpose of ... producing light or an ionized atmosphere."⁴⁶ The Army is considered a general licensee by definition, and no application for a general license is required. As a general licensee the Army must comply with certain requirements regarding tritium exit signs.

Among the requirements applicable to the Army regarding tritium exit signs are a requirement to assure that labels affixed to the sign stating that removal of the sign is prohibited are maintained;⁴⁷ a requirement that installation, servicing, or removal of tritium exit signs be performed by a person holding a specific license to perform such activities;⁴⁸ a requirement to maintain records of the performance of installation, servicing, and removal from the installation of tritium exit signs;⁴⁹ a requirement to maintain such records for a period of three years;⁵⁰ and a requirement not to abandon a device containing byproduct material (tritium).⁵¹ The requirements to test devices containing byproduct material do not apply to devices containing only tritium,⁵² so the exit signs do not have to be tested.

⁴³ See generally 10 C.F.R. § 31.5 (1993).

⁴⁴ THE AMERICAN HERITAGE DICTIONARY, Based on the Second College Edition of the American Heritage Dictionary, Dell Publishing Co., Inc., 1983, p. 723.

⁴⁵ University of Michigan School of Public Health Homepage (last modified Oct. 7, 1999)

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⁴⁶ 10 C.F.R. § 31.5(a).

⁴⁷ 10 C.F.R. § 31.5(c)(1).

⁴⁸ 10 C.F.R. § 31.5(c)(3)(ii).

⁴⁹ 10 C.F.R. § 31.5(c)(4). See also Army Regulation (AR) 11-9, The Army Radiation Safety Program, para. 1-4(k)(4), requiring each commander to maintain an inventory of radiation sources in accordance with the requirements of NRC licenses, and AR 11-9, para. 2-7(b) for radioactive waste disposal guidance.

⁵⁰ 10 C.F.R. § 31.5(c)(4)(iii).

⁵¹ 10 C.F.R. § 31.5(c)(6).

⁵² 10 C.F.R. § 31.5(c)(2)(ii).

The above requirements should not present major problems for installations that currently use tritium exit signs in their buildings. Environmental law attorneys should ensure that appropriate installation personnel (local Radiation Safety Officers and Directorates of Public Works personnel) are aware of the above requirements so that compliance can be assured. Particular attention should be paid to situations where demolition of buildings is contemplated. If the Army is demolishing buildings, tritium signs should be removed and disposed of prior to demolition in accordance with Army Regulation 11-9.⁵³ It is important to note that the Nuclear Regulatory Commission recently cited an Army installation for failure to maintain records for generally licensed devices, and for unauthorized disposal of licensed materials, illustrating the importance of compliance with the above requirements.

Perhaps the more challenging situation occurs where the Army attempts to transfer buildings containing tritium exit signs to a third party through the Base Realignment and Closure (BRAC) process. Army real property is often transferred through the BRAC process to a third party called a Local Reuse Authority (LRA). Typically the LRA then develops the property pursuant to a reuse plan. In this situation the Army, as a general licensee, may only transfer tritium exit signs to another general licensee where the signs remain in use at the transferred building.⁵⁴ General licenses are issued to “[C]ommercial and industrial firms and research, educational and medical institutions, individuals in the conduct of their business, and Federal, State or local government agencies...”⁵⁵ Local Reuse Authorities are sometimes local government agencies or quasi-governmental entities. In cases where the LRA is a government entity, the restriction on transfer only to another general licensee poses no legal impediment to the transfer. Where the transferee is quasi-governmental or private in nature, however, an analysis as to whether the transferee is considered a general licensee under 10 C.F.R § 31.5(a) is required.

There are other additional requirements in transferring tritium exit signs in intact buildings to a third party. Assuming that the transferee is a general licensee, the Army must provide the transferee with a copy of 10 C.F.R § 31.5 and safety documents identified in the label of the device (exit signs) within 30 days of the transfer.⁵⁶ The Army must also report to the Nuclear Regulatory Commission the manufacturer’s name and model number of the device transferred, the name and address of the transferee, and a point of contact between the Commission and the transferee.⁵⁷ Individuals working on BRAC transfers of buildings containing tritium exit signs must be aware of the above legal requirements. Model language for transfer documents providing notice of the presence of tritium signs is currently under development.

The foregoing information will hopefully aid the environmental law attorney in analyzing legal issues involving tritium exit signs. POC at ELD is MAJ Ken Tozzi at (703)696-1562, kenneth.tozzi@hqda.army.mil. (MAJ Tozzi/RNR)

⁵³ Army Regulation 11-9, *supra* note 7.

⁵⁴ 10 C.F.R. § 31.5(c)(9)(i).

⁵⁵ 10 C.F.R. § 31.5(a).

⁵⁶ 10 C.F.R. § 31.5(9)(i).

⁵⁷ *Id.* The report should be made to the Director of Nuclear Material Safety and safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

General Conservation Permitting Policy May Cut Much Red Tape

MAJ James H. Robinette II

On 28 October 1999, the Fish and Wildlife Service (FWS) published a proposed policy⁵⁸ on general conservation permits which may offer efficiencies in how Army activities are permitted by FWS to conduct natural resource research, management and conservation activities. FWS is accepting comments on the proposed policy until 27 December 1999.

The policy will test the concept of a permit similar to State scientific collecting permits. Under the proposed policy, a single general conservation permit could be issued in lieu of a number of individual permits, with the permitted activities reflecting those whose benefits outweigh their risks to the resource (species or habitat) in question. Under the policy, a general conservation permit would only be available to individuals and institutions that have outstanding professional credentials and that are conducting scientific, management, and conservation activities. The scope of the policy is virtually all activities for which FWS currently issues permits.

Although the policy does not directly address federal agencies, neither does it exclude federal agencies from applying for permits under the policy. Conceivably, an installation natural resource manager could obtain a permit for all research, management, and conservation activities on an installation for up to five years. (MAJ Robinette/RNR)

⁵⁸ Proposed Policy on General Conservation Permits, 64 Fed. Reg. 58,086 (1999) (proposed Oct. 28, 1999).



ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

NOV. 23 1999

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT & SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DIRECTOR, DEFENSE LOGISTICS AGENCY, DLA-CAAE

SUBJECT: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act

The Defense Appropriations Act includes a provision that requires the Department to request and receive statutory authorization before use of FY2000 funds to pay for fines and penalties, including Supplemental Environmental Projects (SEPs) (attachment 1). The President has directed the Department to seek this authorization (attachment 2). This provision does not change the Department's requirement to comply with environmental statutes and regulations.

Implementation of this provision will be as follows:

- If an installation receives a proposed fine or penalty, they must negotiate with the regulator in good faith in an attempt to reach an administrative settlement.
- Final administrative agreements shall include a clause stating that the installation cannot pay the final fine or penalty nor execute a SEP with FY2000 funds unless specifically approved by Congress.
- DoD Components shall submit legislative proposals to this office within two weeks of final agreement between the installation and the regulator quantifying the fine, penalty, or SEP.
- This office will consolidate the submittals and present them to Congress according to Department policy on such proposals.

The provision does not prohibit nor inhibit negotiations with regulators, nor does it eliminate the Department's liability for fines and penalties. The provision only adds a step between settlement and payment – Congressional authorization — and we are committed to requesting Congressional authorization as quickly and efficiently as possible. Furthermore, we remain committed to achieving administrative settlement of proposed fines and penalties whenever possible. If your staff has questions about this policy, my point of contact is Ms. Maureen Sullivan, 604-0519.

Gary D. Vest

Acting Deputy Under Secretary of Defense
(Environmental Security)

2 Attachments:
as stated

Environmental Security



Defending Our Future

LAND USE CONTROLS

LTC MARK J. CONNOR
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(703) 695-3024
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Outline

- References
- Definitions
- Legal Framework
- Current Policy
- The Future?

References

- OSWER Dir. 9355.0-30, Role of Baseline Risk Assessment in SUPERFUND Remedy Selection Decisions (22 APR 99)
- OSWER Dir. 9355.7-04, Land Use in the CERCLA Remedy Selection Process (25 May 95)
- GSA Memo, Restrictive Covenants on Non-Excess Property (16 OCT 98)
- ACSIM Memo, Army Guidance on using Institutional Controls (Ics) in the CERCLA Process (4 SEP 98)

Definitions

- Land Use Control (LUC)
 - Generic term for any restriction on the use of real property -- in the CERCLA context LUCs are Institutional Controls (ICs) + Engineering Controls (ECs)

Definitions

- Institutional Control (IC)
 - In the CERCLA context, the legal mechanism incorporated into a remedy to ensure that land use does not change or that are ECs are altered

Definitions

- Engineering Control (EC)
 - In the CERCLA context, the physical mechanism used to implement a remedy

Legal Framework

- Statutory Drivers
 - CERCLA is in the major driver
 - RCRA?
- CERCLA baseline risk assessment
 - Carcinogenic risk
 - Non-carcinogenic risk
 - Risk based ARARS
 - ICs do not = risk reduction

Legal Framework

- Major factor in risk assessment -- LAND USE
 - “[T]he assumption of future residential land use may not be justifiable if the probability that the site will support residential use in the future is small.” 55 Fed. Reg. at 8710
 - Major exception -- groundwater

Legal Framework

- Future land use prognosticators
 - Current uses
 - Surrounding Uses
 - Zoning
 - Environmental Justice issues
 - Environmentally sensitive areas (e.g., wetlands, ESA critical habitat)

Legal Framework

- LUC or IC?
- Types of ICs
 - Land use planning (e.g., zoning)
 - Property law

Legal Framework

- Major IC considerations
 - Effectiveness
 - Permanence
 - Type of installation (active, excess and BRAC)
 - GSA Memo
 - Role of regulators
 - Selecting
 - Enforcement

Current Policy

- Army policy
 - IC for risk = CERCLA remedy
 - High degree of certainty (mandated use) IC
 - Document with NFA DD or ROD
 - Capture in FOST/FOSTL/ Installation Master Plan
 - Consider cleaning to unrestricted use as an alternative to NFA or IC
 - Include IC maintenance in cost estimates

The Future?

- Near Term
 - Fort McClelland
- DOD Guidance
 - Active installations
 - BRAC/Excess installations
- State law trends
- Army organizational issues

ETHICS ADVISORY #99-05 - Employee Holiday Celebrations

We are approaching that time of the year when AMC employees plan and prepare their office celebration during the holiday season. It's a time when groups of employees get together in some way to enjoy each other's camaraderie and teamwork, which might involve songs, games, sharing a meal, pictures, and a good time. Such celebrations raise ethics and related type of issues -- there are some absolute rules... but, in many cases, the issues involve the application of **"Judgment!"**

Before we actually get to the issues, I must point out the need for each of us to be sensitive to the fact that not all of us celebrate the same holidays. What we call the celebration, how we refer to the season, and our greetings to one another should take this fact into account. Unless we know for sure whether and what holidays our colleagues celebrate, we should be somewhat generic in our references.

The first, and perhaps most obvious issue, is whether we can partake in this employee celebration on Government time. Yes, but only up to a point. The issues usually don't arise with the time taken for the actual event -- perhaps a "pot luck" in the office, or a more formal luncheon event at a restaurant. The issue usually comes about with the preparations. The key to resolving these issues is **"Judgment!."** Certainly, our supervisors, directors and commanders can permit us to use some duty time for the preparations... some things must of necessity be done during the duty day. However, preparing the holiday celebration should not become a significant part of any employee's duties. Examples:

It would be wrong to have a committee of five employees spend two duty days visiting potential restaurants to explore facilities and menus, followed by another two days worth of time to inform the group, obtain votes, and develop consensus, followed by another trip to make final arrangements. On the other hand a few short telephone calls during the day requesting fax'es from some restaurants, a couple of short planning discussions in the office, and visiting one or two during lunch, maybe even a "long" lunch with supervisory approval, would be permissible. **Judgment!**

It would be wrong for the decorations and games committee to spend a duty day visiting party shops to get ideas, followed by another work day of organizing the games and making the decorations. However, a brief planning session on Government time, followed by a few short telephone calls to party shops, with visits and purchases made after duty hours, assignment of responsibilities and delivery of purchased items to volunteers during the duty day, with the decorations made during lunch periods or after the duty day, would be permissible. **Judgment!**

Another issue is fundraising. Let's look at a fictional organization called the Technical Directorate (TD). The TD employees want to have this wonderful celebration of their working relationship and teamwork during this holiday season at an upscale restaurant. The cost will be \$50 a piece! A lot of money, but the employees decide that they will try to raise money to pare down the cost. Can they?

The general rule is no fundraising. But, there are exceptions and, in this type of situation, the TD employees may do so. But, there are limits. A couple of common mistakes are as follows:

It is wrong to solicit outside sources (local restaurants, car dealerships, department stores, professional associations, contractors, and other businesses) for donations, to include door prizes, for the function. Even in a situation where the "gift" might fit one of the gift exceptions, that exception cannot be used if the gift was solicited in the first place.

It is wrong to raise money by running a raffle.

The DoD Joint Ethics Regulation permits an organization of employees to raise money among their own members for benefit of their own members when approved by the head of that organization after consultation with the Ethics Counselor. Therefore, the TD employees could run a bakesale (or some other event like a silent auction) in the AMC HQ building to raise money to reduce the cost of tickets for the employee celebration. They can even solicit from other employees in the AMC family in the HQ building. However, the Director needs to approve the plan after consultation with the Ethics Counselor. Here is what the EC will advise:

Keep it low key. This fund-raiser should not begin to look like the sole occupation of the TD employees in the week leading up to the event, and the day of the sale. Do not use official Government e-mail to announce the bakesale (i.e., do not send an e-mail to HQAMC-All-Personnel, which is addressed to 1,400 people here, the Pentagon, and elsewhere).

Use minimal Government time. No duty time should be used to bake or purchase cakes, cookies, etc. However, some minimal time during the day could be used to plan and decide who would bring what. The employees actually conducting the sale should do so primarily on their personal time, although the Director might also permit the use of a minimal amount of duty time. This effort should not become a significant part of anyone's duties. **Judgment!**

It would be permissible for an employee to use the Government computer and printer to print a few flyers to post on the elevator hall bulletin boards, or to use office "butcher paper" to announce the sale, and borrow the office easel to post the "butcher paper" announcement at the entrance to the building. (However, this

should be first coordinated with the building management). It would not be permissible to order placards and other announcements of the event from the audio-visual office. Use of Government resources requires **Judgment!**

Do not solicit outside sources to contribute baked goods.

Contractor employees, cafeteria workers and other visitors to the building who become aware of the bake sale may purchase items. The important thing is that we do not personally solicit them, or engage in other solicitation that targets them.

A common question is whether the employees of the contractors that support our DCS may attend our celebratory gathering. Of course they can. However:

There should be no official encouragement of someone else's employee's to leave their workplace. However, we can let it be known that they may attend and will be a welcome part of the event.

Whether the contractors' employees can take the time off to attend, and the nature of the time off (e.g., leave, personal day, administrative absence) are between the contractor and its employees. When a contractor's employee is absent, the contractor cannot bill for services not delivered, and may have concerns about such issues as contract schedules, delivery dates, and other matters. Accordingly, it is the contractor that must decide if and under what conditions one or more of its employees may be absent.

Contractor employees should not be tasked or asked to volunteer to organize the event.

A final common issue has to do with gifts. May we exchange gifts among ourselves during the holiday season? Yes! But again, there are limits.

The highest value of any gift that we can give to a superior in this type of situation is \$10. And, we may not solicit contributions from other employees.

We may not accept a gift from anyone who makes less money than we do as a Federal employee, unless there is no superior-subordinate relationship, and there is a personal relationship that would justify the gift. Again, the exception would be for a gift where the value does not exceed \$10, with no soliciting of contributions from other employees.

We may have a gift exchange among employees. If it is an anonymous-type exchange, a reasonable value should be established for the individual gifts. If it is

not anonymous, i.e., each employee knows for whom they are buying a gift, a value of not to exceed \$10 is the limit.

In summary, it is permissible for us, as employees, to plan and participate in an event during the holiday season. However, be careful of the pitfalls, some of which are set out above. And, while some limited use of Government resources and time is permissible, we must be careful and apply reason, common sense and **Judgment!** Finally, remember that Government funds may not be used for decorations, greeting cards, and other elements of our holiday festivities.

If you have any questions, please contact one of us.

Mike Wentink, 617-8003, Room 7E18
Ethics Counselor

Alex Bailey, 617-8004, Room 7E18
Ethics Counselor

Stan Citron, 617-8043, Room 7E18
Ethics Counselor

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

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

1. Under certain conditions outlined in the GSA Travel Authority, 31 U.S.C. § 1353, and Government Employees Training Act, 5 U.S.C. § 4111, a DoD employee may accept payment from a non-Federal source for official travel and attendance at a meeting or training event.

2. **General Conditions.** The following guidelines cover acceptance of such payments:

a. DoD personnel may not solicit a non-Federal entity for payment of travel expenses;

b. The employee must be on official travel away from the duty station, not permissive TDY, leave, or pass;

c. The employee's travel approving authority must determine prior to the travel that acceptance under the circumstances would not cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of Army programs or operations. Travel approving authorities must get written concurrence from an ethics counselor in the Legal Office.

3. **Method of Payment.** If the travel payment is made under the GSA Travel Authority for attendance at a meeting or similar function, the employee may accept only in-kind payment or checks made payable to the U.S. Army. If the travel payment is made by certain non-profit organizations under the Government Employees Training Act for attendance at a training event or similar meeting, the employee may personally accept the travel or reimbursement.

4. **Reporting Requirements.** After the travel is completed, the employee may have several important reporting requirements:

a. If the traveling employee received more than \$250 worth of in-kind benefits or payments to the U.S. Army, the employee must complete and sign a report outlining the travel and payments through their travel approving authority to an ethics counselor in the Legal Office. Attached to this memorandum is a form for employees to use for this reporting requirement.

b. If the traveling employee personally accepts payment from certain non-profit organizations under the Government Employees Training Act, the employee will have to report any amount over \$250 on his or her annual Confidential Financial Disclosure

AMSEL-LG

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

Report, OGE Form 450, Part V, or Public Financial Disclosure Report, SF 278, Schedule B, Part II.

5. If you have any questions concerning accepting or reporting travel payments from non-Federal entities, contact an ethics counselor in the Legal Office at 532-4444.

Encl

KATHRYN T. H. SZYMANSKI
Chief Counsel

DISTRIBUTION:
M, O & R

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

Employee's Name: _____
Command/Organization: _____
Employee's Position: _____
Spouse's Name (if applicable): _____

**EVENT
(for which more than \$250 in travel and related expenses were accepted)**

Nature/Title of Event: _____
Sponsor: _____
Location: _____
Dates: From: _____ To: _____

TYPE OF DONATION

Donating Organization: _____
Total Amount: _____
Amount of Payments In-Kind: For Employee: _____ For
Spouse: _____
(pre-paid conference fees, hotel costs, airline tickets, pre-paid meals, etc.)
Amount of Payments by check: For Employee: _____ For Spouse: _____
(Check must be made to "Department of the Army." Submit to your travel office.)

Itemized Expenses:

Hotel: _____
Airline: _____
Meals: _____
Other: _____

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

Signature of Traveler

Date of Signature

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

Ethics Counselor Printed Name and Signature

Date of Signature
