

## APPENDIX B

### ASSORTED FISCAL LAW PROBLEMS

#### NOTES

#### FACTS

##### 1. THE SLINGSHOT

You are a legal advisor for the Army Materiel Command. On December 23, 2001, the Budget Officer for the Army's SLINGSHOT program comes to you and explains the following:

“As a result of our experiences in the Persian Gulf War, Congress became concerned about our missile defense capabilities. In FY 2001, Congress began appropriating money for the research and development of a low altitude, line-of-sight air defense weapon dubbed SLINGSHOT. We awarded an incrementally funded, cost-plus-fixed-fee contract to Scudbusters, Inc., for the work in November 2000. Army budget requests included \$100 million per year in FY 2001, FY 2002, and FY 2003 for this program.

The SLINGSHOT program has progressed smoothly, with few wrinkles, until this week. Due to veiled threats by the Chinese to launch a missile attack against Los Angeles, the Program Manager has directed that we substantially increase our missile defense effort. In fact, he wants us to turn the program into the development of a high altitude, long-range interceptor. The Program Manager has held extensive discussions with Scudbusters, Inc., and it has agreed to perform the additional work for an estimated additional cost not to exceed \$25 million.

I've got four funding options I need you to review. Please advise on the legality of each one. Also, I need to know the approval and notification requirements for each option in order to get the money I need to complete the modified SLINGSHOT contract.

(a) Option 1: Move \$25 million from the FY 1999 Blackhawk Helicopter procurement account into the SLINGSHOT program. The Blackhawk money is left over from cost underruns.

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(b) Option 2: Move funds from the Army's Armor Modernization program element. This advanced development program hit a few snags, and we terminated the contract for convenience, freeing up the needed \$25 million.

(c) Option 3: Move \$25 million from the Army's Patriot Missile program into the SLINGSHOT program. The Patriot Missile program is in the Army Missile Defense Systems Integration program element (PE), the same PE as the SLINGSHOT.

(d) Option 4: Move \$25 million from the B-2 Bomber R&D account. The Air Force owes me a favor, and has agreed to MIPR the money ASAP, "no strings attached!"

## **2. "AIM HIGH" & OTHER AERO-SPACE CONCERNS**

You are the local counsel for McChord Air Force Base, located in Tacoma, Washington. It's September 2002, and you are reviewing a number of contract actions. In your "in-basket" is a \$200,000 pre-award contract file to remove and inspect air traffic control (ATC) radar relay stations at three remote sites and to repair them as necessary. ATC radars assist aircraft in making ILS (instrument landing system) approaches and departures at the air base. These devices have experienced frequent voltage generation problems during the past several months and routine maintenance has not corrected them. The contract file does not contain a fund certification document and does not identify the funds proposed for obligation. You dash off a quick memo, then call the contracting officer, who responds to your concerns about the money with, "Well, what do you think I should do?"

After telling the contracting officer exactly what you think he should do, you go to the next file in the "in-basket." It is the routine maintenance contract for 27 remote solar monitor sites. The solar devices at these sites are used to monitor and detect atmospheric anomalies that might interfere with the ability of the Air Force to conduct distance-learning training (e.g., sun spots, meteoric activity, and other conditions that might cause interference). The back-up documentation indicates that the original manufacturer's warranty expires on 15 November 2002. The new contract is for 12 months of services, with service beginning on 16 November 2002 and ending on 15 November 2003. The contract file

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indicates that award will not occur until the FY 2003 appropriation is enacted. Again, you reach for the phone to say . . .

### **3. CORAL REEF AFB SUPPORT CONTRACT**

You are a contracting officer at Coral Reef Air Force Base, Florida. You are responsible for the contract with Acme Services, under which Acme provides base support services for \$1,000,000 per month during the current fiscal year (FY 2002). A separate contract line item is for janitorial services for a tenant activity, the Federal Marine Fisheries Agency, which funds that portion of the contract through an Economy Act order. The contract expires on 30 September 2002.

Colonel Felicia Flyer, the Base Commander, calls you on 30 September 2002. Colonel Flyer asks you how the base will fund its support services tomorrow because Congress has not passed an appropriations act or a continuing resolution authority statute to fund DoD during FY 2003. She reminds you that there are one-year, priced options (one option for services at Coral Reef AFB and a separate option for services for the tenant activity) for FY 2003 services in the Acme contract. The option clause in the contract requires the government to give the contractor a nonbinding notice of intent to exercise options 60 days prior to the expiration of the term of the contract. The contracting officer gave this notice on 15 July 2002. The option clause also provides that the government must exercise the options within 30 days of the receipt of appropriations for each new fiscal year. What do you tell Colonel Flyer?

A few days later, in a midnight session on 3 October 2002, Congress passes a joint resolution funding DoD for 30 days, from 1 through 30 October 2002. The phone is ringing as you arrive at work the next day. Colonel Flyer again asks about funding for Acme's contract. Colonel Flyer would like to renew the base services contract for FY 2003 immediately while DoD has funding. She would also like to exercise the additional option in Acme's contract for maintenance, clubhouse services, and operation of the pro shop at the newly opened Coral Reef Golf Course.

While reviewing the contract file, you discover that there is a FY 2003 option for base services at \$1,100,000 per month and a FY 2003 option for the Federal Marine Fisheries Activity. You also discover that

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the contract includes a separate one-year option for the Golf Course for FY 2003, priced at \$234,000.

You provide the Base Commander with the following advice . . . .

### **4. GETTING MIPR'D AT FORT TJAGSA**

You are the command counsel at beautiful Fort TJAGSA, an installation that never met a MIPR it didn't like. You have just returned from a long deserved two-week vacation at the Outer Banks, in North Carolina. As you go through the piles of documents and taskings in your in-box, you come across two MIPR issues requiring your legal opinion.

The 43d Area Support Group (ASG) is a tenant activity at Fort TJAGSA. The 43d ASG includes a Corps Support Battalion, whose primary mission is DS/GS-level maintenance and supply. While the ASG is constantly busy providing support and service support to combat units on post, it also performs a significant amount of reimbursable work. The 43d ASG recently processed a project order MIPR from the Air Force for one-time overhaul of a firefighting vehicle. The Air Force issued the MIPR on 19 September 2001, citing one-year FY 2001 O&M (AF) funds and, one week later, the 43d ASG accepted this MIPR in writing. Due to the late submission of the MIPR, however, the ASG performed no work on this order in FY 2001. In fact, due to an extensive backlog of work orders and other mission tasks, the 43d ASG did not begin work under this MIPR until March 2002, at which time the Air Force "extended" the MIPR expiration date so that it could still use the FY 2001 O&M funds.

The United States Special Operations Test and Evaluation Center (USSOTEC) is another installation tenant activity. This organization wants to purchase research work from the Department of Energy (DOE) on the development of innovative methods for disposing radioactive waste associated with an SF ammunition storage site. The Director, USSOTEC, states that the research work will be performed at a DOE government-owned, government-operated (GOGO) research laboratory. USSOTEC has submitted for legal review a MIPR requesting the above research work. As authority for this request, USSOTEC cites the Project Order Statute (41 U.S.C. § 23), which means that none of those bothersome "special determinations" otherwise required for Economy Act orders apply in this case.

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### **5. URBAN RENEWAL -- ARMY STYLE**

It is July, 2005 and you are just settling in to your new job as legal advisor in the Administrative Law Division, Office of the Staff Judge Advocate, Fort Jackson, when your new boss gives you your first project.

Three years ago (i.e. during FY 2002), the Army Inspector General (IG) noted several deficiencies in barracks number one (B1) and barracks number two (B2) on Fort Jackson. The barracks were not air-conditioned, there was no carpeting in certain common areas of the barracks, and senior non-commissioned officers (NCOs) lived in open bays. The IG stated that the command had to correct these three discrepancies to comply with current Army barracks standards. At the time of the IG report, the barracks were not in need of repair. Based on this IG report, the Commanding General (CG) of Fort Jackson directed the Garrison Commander to remedy all of the discrepancies identified by the IG.

Colonel Smithe, the Garrison Commander, immediately began to remedy the situation. In FY 2003, after a fire destroyed three-fourths of an installation training center, Colonel Smithe ordered the Director of Public Works (DPW) to remove the year-old air conditioning unit from the training center and install it in B1. The DPW removed and installed the air conditioner at a total cost of \$75,000. [The air conditioning unit had a depreciated value of \$300,000]. Using Operation and Maintenance (O&M) funds, the command also purchased and installed a new air conditioning system and installed it in B2 at a total cost of \$600,000.

Colonel Smithe attacked the carpeting problem during FY 2004. The job was more expensive than expected, however, because workmen had to replace some floorboards and moldings before they could install the carpeting. Colonel Smithe also decided to have the reception area carpeted, even though this was not required by the IG's report. The total cost to carpet B1 and B2 was \$700,000.

Finally, Colonel Smithe corrected the last IG deficiency in FY 2005 by creating 10 separate rooms for senior NCOs in each barracks building. This was the most challenging project of all due to a scarcity of funds. Due to congressional concerns over ballooning deficits, Department of Defense (DoD) budgets had been cut to the bone. Consequently, Colonel Smithe had only \$300,000 in O&M funds to perform this work, yet the lowest quote from a construction contractor was \$800,000. Colonel Smithe determined that the solution to this shortage of

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funds was to do part of the work “in house,” so he arranged for a company of engineer reservists to do the required carpentry work during their two weeks of active duty at Fort Jackson. As a result, COL Smithe was able to fully fund the project with the \$300,000 of available O&M funds and \$27,000 of Military Construction, Army (MCA) dollars. The latter funds had been left over from a recently completed mess hall construction project. The entire \$327,000 was enough to fund the purchase of building materials for the senior NCO room upgrade.

The culmination of the project was a stroke of genius. During the annual organizational day, soldiers, their spouses, and their children all chipped in to paint the rooms and clean-up the barracks.

The Army Audit Agency (AAA) has recently cited the command for possible violations of the Antideficiency Act in the funding of these projects. The Staff Judge Advocate tasks you to assess whether such violations occurred, and to determine what action, if any, the command can take to remedy any funding errors that occurred.

**APPENDIX B**  
**SEMINAR QUESTIONS**

**1. THE SLINGSHOT**

See problem for discussion questions.

**2. “AIM HIGH” & OTHER AEROSPACE CONCERNS**

- A. Assuming O&M funds will be used, what year funds should the contracting officer obligate when awarding the ATC Radar Relay Stations contract?
- B. What year funds should the contracting officer obligate when awarding the 12-month Solar Monitor Site contract?
- C. Is there an exception that would allow the Air Force to use current year funds to award a 12-month maintenance contract that crosses fiscal years?

**3. CORAL REEF AFB SUPPORT CONTRACT**

- A. Does the bona fide needs rule affect service contracts?
- B. Distinguish between severable and nonseverable services.
- C. What type of services are provided here?
- D. When may agencies incur or record obligations against appropriations?
- E. What happens if there is a funding gap (no appropriation or continuing resolution)?
- F. Which services must be shut down if there is a funding gap? What type of obligations can be made?
- G. Can the options be exercised from 1-3 October ?
- H. What about the Availability of Funds Clause?
- I. Must the contractor perform if the above clause is used?
- J. Does the passage of the continuing resolution change the Contracting Officer’s options?

- K. Are there any restrictions on procurement during a continuing resolution period?
- L. What about the golf course?
- M. What about the increase in services cost?

#### **4. GETTING MIPR'D AT FORT TJAGSA**

- A. Did the Air Force fund this MIPR properly?
- B. What difference would it make if the authority for this intragovernmental acquisition was the Economy Act and not the Project Order statute?
- C. Can the Air Force rely upon 10 U.S.C. § 2410a as authority to obligate FY 2001 O&M funds even though work on the firefighting vehicle did not commence until FY 2002?
- D. What remedy do you suggest to the Air Force regarding its MIPR?
- E. Did USSOTEC cite the proper authority for its MIPR?
- F. If the Project Order statute provides USSOTEC with the requisite authority, what special determinations are required?
- G. If USSOTEC must treat this request as an Economy Act order, what special determinations are required?
- H. If USSOTEC must treat this request as an Economy Act order, who is the approval authority here?

#### **5. URBAN RENEWAL -- ARMY STYLE**

- A. What funds should be used for military construction projects with a funded cost of \$750,000 or less? What funds should be used for military construction projects with a funded cost over \$750,000, but less than or equal to \$1.5 million? What funds should be used for military construction projects with a funded cost over \$1.5 million?
- B. What is the scope of the project? What additional facts should you know when determining the scope of the project?
- C. Was there any improper project splitting involved here?

- D. Should the work involved be classified as maintenance, repair, or construction?  
Explain.
- E. What are the funded and unfunded costs of the work done in Barracks 1? Barracks 2?
- F. What funds should have been used for this work? What are the appropriate approval levels?
- G. Has there been an Antideficiency Act violation?
- H. Does the use of spouses and children for cleaning and painting create any issues?
- I. What steps, if any, should be taken to correct problems related to the work done in the barracks?