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APPELLANT'S BRIEF

2011-5063

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESOURCE CONSERVATION GROUP, LLC

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of
Federal Claims in Case No. 08-CV-768
Judge Susan G. Braden

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT, RESOURCE CONSERVATION GROUP, LLC

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Resource Conservation Group v. US

No. 2011-5063

CERTIFICATE OF INTEREST

Counsel for the ~~(petitioner)~~ (appellant) ~~(respondent)~~ ~~(appellee)~~ ~~(amicus)~~ ~~(name of party)~~ Resource Conservation Group certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Resource Conservation Group, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Warren K. Rich, Partner; Anthony G. Gorski, Partner, Rich and Henderson, P.C.

3/22/11
Date

Signature of counsel

Anthony G Gorski
Printed name of counsel

Please Note: All questions must be answered

cc: Christopher A. Bowen

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STATEMENT OF RELATED CASES

This case was previously on appeal before the United States Court of Appeals for the Federal Circuit in *Resource Conservation Group, LLC v. United States*, Case No. 2009-5091. This earlier appeal was decided on March 1, 2010 by a panel consisting of Circuit Judges Lourie and Dyk and District Judge Kendall. The citation of the opinion rendered in the earlier appeal is *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010).

JURISDICTIONAL STATEMENT

The U. S. Court of Federal Claims ("CFC") had original subject matter jurisdiction of this action pursuant to 28 U.S.C. §1491(a) (1) (2008). This section provides the CFC with jurisdiction to render judgments upon claims against the United States ("U.S.") founded upon an express or implied contract with the U.S. *Id.* Judgment was entered pursuant to RCFC 12(b)(6) granting a motion to dismiss filed by the U.S. and dismissing the Complaint filed by the Resource Conservation Group ("RCG") on January 11, 2011. A timely appeal was filed from that decision on March 8, 2011.

The United States Court of Appeals for the Federal Circuit has jurisdiction over this appeal of a final judgment of the United States Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (2000).

STATEMENT OF THE ISSUES

The U. S. Court of Federal Claims erred by granting the Motion to Dismiss filed by the U.S. finding that the Department of the Navy ("Navy") correctly rejected RCG's bid as non-responsive. The U.S. Court of Federal Claims erred in finding that the Navy correctly interpreted 10 U.S.C. § 6976 (1999) to prohibit the Navy from entering into a lease with RCG to mine the Naval Academy dairy farm property relying upon the definition of "real property" in 41 C.F.R. §102-71.20 (2006).

The U.S. Court of Federal Claims also erred by granting the Motion to Dismiss filed by the U.S. finding that the Navy did not breach an implied contract of good faith and fair dealing with RCG by failing to advise RCG that mining on the Naval Academy dairy farm property would render the prospective bid non-responsive and disqualify RCG while at the same time actively soliciting a bid from RCG to mine the property and authorizing RCG to enter the property for the purpose of investigating the mineral resources on the property. RCG advised the Navy it would bid to lease the subject property for mining purposes, obtained the Navy's specific permission to drill the property to evaluate the sand and gravel reserves and expended significant sums of money in preparing its bid. The Navy acknowledges that it was aware of the intent and activities of this prospective bidder but maintains it had no duty or obligation to advise that mining on said property would render the prospective bid non-responsive and disqualify RCG. RCG contends that the Navy provided no rational basis for its action in response to its bid and further that the Navy's interpretation that 10 U.S.C. § 6976 (1999) does not permit the leasing of said property for mining purposes is wrong. These facts as alleged in RCG's Complaint are illustrative of a failure to act in good faith, fairly and honestly prior to the award of a lease of government property. Section 1491(a) encompasses the contractual obligation to act in good faith.

STATEMENT OF THE CASE

On January 11, 2011, the U.S. Court of Federal Claims granted a Motion to Dismiss filed by the U.S. pursuant to RCFC 12 (b) (6) and dismissed RCG's Complaint with prejudice finding that the Navy correctly rejected RCG's bid as non-responsive and that the Navy did not breach an implied contract of good faith and fair dealing with RCG. Judgment was entered dismissing the Complaint on January 11, 2011. The citation of the decision of the U.S. Court of Federal Claims is *Resource Conservation Group, LLC v. United States*, 96 Fed. Cl. 457 (2011). A timely appeal was filed on March 8, 2011.

STATEMENT OF FACTS

In 2005, Congress enacted 10 U.S.C. § 6976 expressly authorizing the Navy to lease the real property containing the Naval Academy dairy farm consisting of approximately 875 acres ("the Navy Dairy Farm"). The Navy Dairy Farm was no longer being used by the U.S. Naval Academy. A6. On December 28, 2005, the Navy issued a Request of Interest (ROI) LO-10019 and thereafter in 2006, the Navy received an Expression of Interest from prospective bidders to lease the Navy Dairy Farm. A6. RCG expressed interest to mine a portion of the Navy Dairy Farm and thereafter to reclaim the property by establishing various wetlands and bogs leaving the property in a natural state. A6, A11. A notice of availability

for lease was issued on January 16, 2007. A18-A30.

To determine the amount of sand and gravel reserves on the property, RCG entered the property on February 27, 2007 with the Navy's written approval to perform drilling exploration tests. Thereafter, RCG prepared a site analysis and designed a mining plan for the property. A6. RCG submitted a formal proposal to lease the property for mining prior to the March 19, 2007 deadline. *Id.* At all times prior to the submission of its bid, RCG was encouraged to submit its proposal to lease the property by the Navy. A6.

On April 30, 2007, RCG was notified by the Navy that its proposal did not fall within the scope of the solicitation because the Navy determined that RCG's proposal would effect a "disposal" of real property. A6-A7. The Navy reasoned that the because the term "real property" in the Federal Management Regulations in 41 C.F.R. 102.71 (2005) includes embedded sand and gravel that 10 U.S.C. § 6976 did not authorize the Navy to lease the property to RCG for mining because it would amount to a "disposal" of real property. A6-A7. A formal debriefing was held on or about September 13, 2007 at which time the Navy asserted it had no obligation during the pre-bid preparatory process to advise RCG that its bid would be unauthorized; that the contracting officer of the Navy had received an Opinion of Counsel sometime prior to March 19, 2007, but neither the date of such Opinion

of Counsel or the contents would be provided to RCG. A7.

On October 24, 2008, RCG filed a Complaint in the U. S. Court of Federal Claims basing jurisdiction upon 28 U.S.C. § 1491(a)(1) claiming a violation of the implied obligation to act in good faith. RCG sought reimbursement of its costs and fees incurred in the preparation and submittal of its responsive bid and for any and all relief the CFC deemed appropriate. A9-A10. RCG also sought a determination that the actions of the Navy were arbitrary, capricious and illegal in violation of the implied contract of fair and honest consideration; and further a determination that the bid should not have been rejected as non-responsive because it was not a bid for the "disposal" of land. A8, A10.

The Navy submitted a Motion to Dismiss based on the jurisdictional issue on the 23rd day of December, 2008 and Plaintiff, RCG, responded on the 23rd day of January, 2009. After hearing oral arguments on the 12th day of March, 2009, the CFC issued an Opinion and Order dated March 31, 2009 dismissing the subject action on jurisdictional grounds as stated above. Pursuant to Rule 58, judgment was entered dismissing the Complaint on April 6, 2009. An appeal was filed from that decision on June 3, 2009.

On March 1, 2010, the Unites States Court of Appeals for the Federal Circuit issued an Opinion in *Resource Conservation Group, LLC v. United States*,

597 F.3d 1238 (Fed. Cir. 2010) which reversed the U.S. Court of Federal Claims. This Honorable Court found that 28 U.S.C. § 1491 (a) (1) survived the enactment of the Administrative Dispute Resolution Act ("ADRA"), that the implied contract to deal in good faith provided a jurisdictional basis, and remanded the matter to the Court of Federal Claims. On remand, the Court of Federal Claims allowed the parties to file supplemental memoranda regarding the Motion to Dismiss filed by the U.S. On January 11, 2011, the Court of Federal Claims issued a Memorandum Opinion and Order dismissing RCG's Complaint with prejudice finding that the Navy correctly rejected RCG's bid as unresponsive pursuant to 10 U.S.C. § 6976 and that RCG failed to state a cause of action for breach of an implied contract of fair and honest consideration.

SUMMARY OF ARGUMENT

It is RCG's position that in rejecting RCG's bid non-responsive, the Navy mis-interpreted 10 U.S.C. § 6976 as prohibiting the Navy from entering into a lease with RCG to mine the Naval Academy dairy farm property. 10 U.S.C. § 6976 gives the Navy broad authority to lease the real property containing the dairy farm and does not expressly prohibit the Navy from leasing the property to RCG for mining. Moreover, the definition of the term "real property" in 41 C.F.R. §102-71.20 (2006), as relied upon by the Navy, is not applicable to 10 U.S.C. §

6976.

It is RCG's position that its Complaint sets forth sufficient facts to state a cause of action against the Navy for breach an implied contract of good faith and fair dealing and that the U.S. Court of Federal Claims erred in finding otherwise. Among other facts, the Navy failed to advise RCG that mining on the Naval Academy dairy farm property would render their prospective bid non-responsive and disqualify RCG while at the same time, the Navy was actively soliciting a bid from RCG to mine the property and authorizing RCG to enter the property for the purpose of evaluating the mineral resources on the property. RCG advised the Navy it would bid to lease the subject property for mining purposes, obtained the Navy's specific permission to drill the property to evaluate the sand and gravel reserves and expended significant sums of money in preparing its bid. The Navy was aware of RCG's intent to mine the property but maintains that it had no duty or obligation to advise RCG that mining on said property would render the prospective bid non-responsive and disqualify RCG. RCG contends that the Navy provided no rational basis for its action in response to its bid.

ARGUMENT

I. Standard of Review

When reviewing a dismissal for failure to state a claim upon which relief

can be granted, the court must accept as true all the factual allegations in the complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir. 1991). The court must indulge all reasonable inferences in favor of the non-movant. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Perez v. United States*, 156 F.3d 1366, 1370 (Fed.Cir.1998); *Highland Falls-Fort Montgomery Cent. Sch. Distr. v. United States*, 48 F.3d 1166, 1169-70 (Fed.Cir.1995). The question that the court must answer in reviewing a dismissal order in such a case is whether the trial court was correct in concluding that the facts asserted by the plaintiff do not entitle him to a legal remedy. *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed.Cir.2000). A trial court should not dismiss a complaint for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414 (Fed.Cir.1989).

II. The U.S. Court of Federal Claims Erred in Granting the Motion to Dismiss Finding that the Navy Correctly Rejected RCG's Bid as Being Unresponsive.

The CFC erred in accepting the Navy's erroneous interpretation of 10 U.S.C. § 6976 and the Navy's erroneous conclusion that because the definition of the term "real property" as set forth in the Federal Management Regulations in 41

C.F.R. § 102-71.20 includes "embedded gravel, sand, or stone," that therefore, the Navy could not lease the property to RCG for mining purposes because such use would amount to a "disposal" of real property prohibited by 10 U.S.C. § 6976. Despite the express authority given to the Navy in 10 U.S.C. § 6976 to lease the real property containing the dairy farm under such terms as the Navy considers to be appropriate, subject only to the restriction that any lease be subject to the condition that the rural and agricultural nature of the property be maintained, the CFC accepted the Navy's conclusion that the Navy's broad authority under 10 U.S.C. § 6976 to lease the dairy farm was limited by the definition of "real property" in the Federal Management Regulations. The analysis of this issue by the Court below was simplistic. The Court failed to consider the clear and unambiguous language of 10 U.S.C. § 6976 that provides the Navy broad authority to lease the real property containing the dairy farm and failed to consider that 41 C.F.R. § 102-71.20 (2006) application is limited to the real property "policies" of the General Services Administration ("GSA").

10 U.S.C. § 6976, Operation of Naval Academy dairy farm states:

(a) Discretion regarding continued operation.

(1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.

(2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting approximately, 875 acres) –

(A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

(B) shall be maintained in its rural and agricultural nature.

(b) Lease authority.

(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

(2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

Pursuant to the clear and unambiguous language of this statute, the Navy has broad authority and discretion to lease the real property containing the dairy farm to such persons and under such terms as the Secretary of the Navy considers appropriate. The only restriction placed upon the Navy's broad authority to lease the dairy farm in 10 U.S.C. § 6976 is that any lease be subject to the condition that the lessee maintain the rural and agricultural nature of the leased property. There is no restriction on leasing the property for mining purposes and the CFC's interpretation of 10 U.S.C. § 6976 is contrary to the express language of the statute.

Here, the Navy did not declare the property to be excess and attempt to transfer

or dispose of the property as prohibited by 10 U.S.C. § 6976 (a) (2) (A). The Navy was exercising its broad discretionary authority to lease the property as provided by 10 U.S.C. § 6976 (b) (1), which authority is not limited by 41 C.F.R. § 102-71.20 (2006).

Congress initially enacted Section 6976 as part of the 1968 Military Construction Authorization Act. Pub. L. No. 90-110, 81 Stat. 279, 309 (1967). Section 810(a) of the 1968 Act stated the property "shall not be determined excess to the needs of the holding agency, nor shall any action be taken by the Navy to close, dispose of or phase out the Naval Academy Dairy Farm unless specially authorized by Congress." *Id.* Due to objections over the dairy farm's high operation costs and the potential to generate income by permitting non-Navy activities at the property, the Navy was interested in evaluating alternative uses. The local community was concerned that potential development would change the rural nature of the property. As a result, Congress revised the statute in 1997 to allow the Navy to terminate or reduce the operation of the dairy farm with the requirement that any activity to take place on the property must maintain the rural and agricultural nature of the property. National Defense Authorization Act for 1998, Pub. L. No. 105-85, 111 Stat. 1629, 2014-2015 (1997); *Naval Academy to Close Its Money-Guzzling Dairy,* The Washington Post, April 10, 1997.

The bid solicitation highlights the goal of Section 6976 by emphasizing that the

proposals should indicate how the bidder would maintain the property's rural and agricultural characteristics in Section 1.0 (Executive Summary), Section 3.4 (Use Restrictions), and Section 4.3.1B (Technical submission, Master Plan). Government's Motion, Exhibit 1 at 3, 5-6, 9. While the Navy could have restricted the bid proposal to just rural and agricultural activities, it explicitly stated that the Navy would consider all uses or activities other than rural and agricultural ones, "provided that the nature of the leased property remains rural and agricultural." Government's Motion, Exhibit 1 at 5.

The purpose apparent in both 10 U.S.C. § 6976 and the bid solicitation to maintain the rural and agricultural nature of the property illustrates that the "non-disposal" language is intended to prevent fragmentation of the 875 acre property. The prohibition in Section 6976 seeks to prevent the type of disposal that would cause the property to be divided and sold to different owners, such as development of a subdivision or commercial park. Leasing the property to a mining operation is not the type of disposal contemplated by Congress. A mining operation would simply extract the minerals and then reclaim the property, which would not disturb the rural character of the dairy farm by increasing the population or commercial and residential buildings in the area. The operation of a mine would ensure that the property maintains its rural and agricultural characteristics and leave the 875 acres intact as

one cohesive stretch of land. The Navy has the option of separating the mining interest from the surface interest within the limits of 10 U.S.C. § 6976.

Property rights in real estate form a "bundle" of interests and these interests may include the right to sell and lease, easements, covenants, right-of-ways, mineral rights, and surface rights. Some interests are possessory, some include the right to use for certain purposes, and others include a right to take away something of value from the soil or products of its soil. Gerald Korngold, *Comparing the Concepts of "Property" and "Value" in Real Estate Law and Real Estate Taxation,* 25 Real Est. L.J. 7, 9-10 (1996). Despite the differences in the types of interest, any transfer of interest could be made independent of the other and be considered "disposal" of "Real Property," meaning that certain rights are transferred to another for a term or permanently and the interest no longer belongs to the transferor. *Id.*

The Navy cites to 41 C.F.R. § 102-71.20 for the definition of "Real Property," which includes timber, sand and gravel. Section 102-71.20 is located in Part 102-71, the general regulations on the real property policies of the General Services Administration ("GSA"). GSA real property policies cover the "acquisition, management, utilization, and disposal of real property by Federal agencies . . . ." 41 C.F.R. § 102-71.5. Plaintiff does not dispute that this definition of "Real Property" includes "timber, embedded gravel, sand or stone," but "Real Property" is also

defined as "any interest in land, together with the improvements, structures, and fixtures . . . ." *Compare* 41 C.F.R. § 102-71.20 "Real Property" (1) and 41 C.F.R. § 102-71.20 "Real Property" (3). The GSA acknowledges that a property owner may "dispose" of interests such as "leases, licenses, permits, easements, and other real estates interests . . . ." 41 C.F.R. § 102-75.298.

As such, if Section 6976 is interpreted as literally as the Navy asserts, then the very leasing of the dairy farm would be prohibited by the Navy's interpretation. 41 C.F.R. § 102-71.20; *see* 41 C.F.R. § 102-75.298; Government's Motion, Exhibit 1 at 3-4 (1.0, Executive Summary and 2.0 Existing Conditions, both sections stating that property was leased for organic crop production and residential use). Instead, real property law and GSA regulations confirm the general understanding of real property rights as a "bundle" of interests, which can be severed and conveyed alone or transferred together.

Relevant to the case at hand, transfer of mineral rights can occur separately from surface rights. *Cochran v. United States*, 19 Cl. Ct. 455, 461 (Cl. Ct. 1990) (finding that gravel was part of the mineral estate and separate from the surface estate); *Yoss v. Markley*, 68 N.E.2d 399, 402 (Ohio Misc. 1946). Where minerals under lands have been conveyed or severed from the surface, the owner of the surface holds possession of the minerals as trustee for the grantee of the minerals. *French v.*

Chevron, U.S.A., Inc., 896 S.W.2d 795, 797 (Tex. 1995) (stating that a mineral estate consists of five interests: 1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals, and 5) the right to receive royalty payments) (internal citations omitted). In addition to the GSA regulations, the Army regulations also recognize that real property rights are composed of different interests, such as mineral rights. 32 C.F.R. § 644.502 not only requires compliance with Army Regulations, AR 405-90, titled "Disposal of Real Estate," the procedure for "excessing and disposal" of sand and gravel, it also states that excess sand and gravel may be "designated for disposition with the land or by severance and removal from the land." AR 405-90 at Chapter 6 (DA Disposal of Real Property) (May 10, 1985). Section 6-1 of AR 405-90 states that GSA has designated agencies responsible for the disposal of "(1) Improvements without the underlying land. (2) Standing timber without the underlying land. (3) Embedded gravel, sand, and stone without the underlying land." *Id.* at 6. Again, these regulations show that the Navy has the option to "dispose" of mining rights or other types of interests, without engaging in a disposal of the underlying land, consistent with 10 U.S.C. § 6976.

Section 6976 should be and can be interpreted to prohibit only the disposal of interests that would cause the fragmentation of the property. *Id.* Transfer of mineral

rights are within the ambit of section 6976 because the land would remain as one parcel under the ownership and control of the Navy and maintain its rural and agricultural characteristics. In addition, severing mineral rights from surface rights is accomplished as a matter of course by the Army and the GSA. *See* 41 C.F.R. § 102-71.20; 32 C.F.R. § 644.502; AR 405-90, at 6 (May 10, 1985).

Given the above stated reasons, Plaintiff's proposal was responsive to the Navy's bid solicitation because the Navy has express authority to lease the dairy farm, because mining is not precluded by 10 U.S.C. § 6976 and because mining would advance the goal of maintaining the rural and agricultural character of the property. By refusing to consider a responsive proposal and misinterpreting the law, the Contracting Officer breached the implied contract of fair and honest consideration. The CFC's granting of the Navy's Motion to Dismiss based on failure to state a claim must be reversed because RCG's Complaint sets forth facts upon which relief in the form of bid preparation and proposal expenses should be awarded.

III. The U.S. Court of Federal Claims erred in finding that the Navy's Conduct Was not a Breach of the Implied Contract of Fair and Honest Consideration, in Violation of the Administrative Procedure Act.

In large part, the CFC's analysis of this issue was premised on its earlier finding that the Navy correctly interpreted 10 U.S.C. § 6976 as prohibiting the Navy from leasing the dairy farm to RCG for mining. The CFC reviewed the

following four factors identified by the court in *Southfork Systems, Inc. v. United States*, 141 F.3d 1124 (Fed. Cir. 1998) for determining whether an implied-in-fact contract was breached:

> (1) subjective bad faith on the part of the [G]overnment; (2) absence of a reasonable basis for the administrative decision; (3) the amount of discretion afforded to the procurement officials by applicable statutes and regulations; and (4) proven violations of pertinent statutes or regulations.

Id. at 1132.

With regard to the second and fourth factors above, the CFC simply relied on its finding that the Navy correctly interpreted 10 U.S.C. § 6976 to prohibit mining on the property, which as shown in the first argument of this brief, is in error.

With regard to the first factor, whether there was bad faith on the part of the Navy, the CFC focused on only two paragraphs in RCG's Complaint and concluded that the allegations were not sufficient to establish bad faith. While it is true that RCG did not specifically use the words "bad faith" in their Complaint, RCG did allege sufficient facts, as discussed below, to state a cause of action for breach of an implied contract of fair honest consideration.

With regard to the third *Southfork* factor, the CFC correctly found that the Secretary of the Navy had the discretion to reject RCG's proposed use, but failed

to recognize that is not what occurred in this case. The Navy did not reject RCG's proposed used based on an exercise of discretion. RCG's bid proposal was rejected based on the Navy's erroneous legal interpretation of 10 U.S.C. § 6976 and its determination that RCG's bid was unresponsive.

The CFC erred in granting the Navy's Motion to Dismiss pursuant to RCFC 12(b)(6) because RCG's Complaint alleged sufficient facts to "raise a right to relief above the speculative level" due to violations of the implied contract of fair and honest consideration. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). The United States implicitly promises in its bid solicitations that it will consider all responsive proposals fairly and honestly. *Keco Indus., Inc. v. United States*, 203 Ct. Cl. 566 (Ct. Cl. 1974); *Keco Indus., Inc. v. United States,* 192 Ct. Cl. 773 (Ct. Cl. 1970); *Heyer Products Co. v. United States*, 135 Ct. Cl. 63 (1956). In this very matter, the U.S. Court of Appeals for the Federal Circuit has ruled that implied-in-fact contract jurisdiction under 28 U.S.C. § 1491(a)(1) survived the 1996 adoption of the ADRA. *Resource Conservation Group, LLC v. United States Dept. of the* Navy, 597 F.3d 1238, 1245-46 (Fed. Cir. 2010). Further, the Court of Appeals held that the ADRA did not alter or restrict the Court of Federal Claims' existing jurisdiction in cases such as this. *Id.* Accordingly, this Court will evaluate whether the Navy's action in the handling of RCG's proposal was

arbitrary, capricious, illegal or without rational basis. *Keco Industries, Inc. v. The United* States, 203 Ct. Cl. 566, 492 F.2d 1200, 1203 (1974). If the soliciting party withheld the knowledge that it had no intention to consider the bidder's proposal, but continued to encourage that bidder to apply, then the soliciting party should bear the consequences of its misleading representations and actions. *See, e.g. Owen of Georgia, Inc. v. Shelby County,* 648 F.2d 1084, 1096 (6th Cir. 1981); *City of Cape Coral v. Water Services of America, Inc.*, 567 So. 2d 510, 512-13 (Fla. Dist. Ct. App. 1990); *State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 477 N.E. 2d 509, 512 (Ill. App. Ct. 1985).

In addition to the allegations in the Complaint, in RCG's Opposition to the Department's 12(b)(6) Motion filed in this Court on January 23, 2009, RCG outlined why the Navy's conduct was a breach of the obligation to fairly, honestly and reasonably deal with this prospective bidder. The facts plead in the Complaint, and those admitted by the Department set forth a scenario which illustrates that the notices/solicitation information package, the revisions and the responses to questions all authorize a mining activity on the property. No flag is raised questioning the efficacy of mining in any documentation. Furthermore, the actions taken by the Department of Navy to authorize geological investigation of the

subject property explicitly demonstrate knowledge of RCG's plans for bidding a mining activity and implicitly sanction a mining activity.

As noted, the obligation (or contractual requirement) to provide accurate representations within the solicitation documents and in its communications with potential bidders includes the obligation to disclose pertinent, material information. *D.F.K. Enter.'s, Inc. v. United States*, 45 Fed. Cl. 280, 284 (Fed. Cl. 1999). This is the essence of the implied contract. Furthermore, the Complaint illustrates a factual pattern which points out the failure on the part of the Navy to apprise RCG of limitations imposed upon the response to the RFP, known only to the Navy. The Navy's actions, at the very least, border on misrepresentation. The Navy's superficial response is that they are under no duty to advise all bidders of all authorized uses; consequently, there is no duty. In fact, the Navy provides no legal support for its actions in this case. It asks the Court to adopt a rule that under the given circumstances there would be no duty to advise RCG that its proposal will be non-responsive, despite the terms of this solicitation, the authorization of geological investigation and the general encouragement provided by Navy personnel.

The record illustrates a very limited number of potential bidders and recognizes an implicit sanctioning of a proposed mining activity. Under these

circumstances, there was an obligation for the Navy to disclose its hidden interpretation of 10 U.S.C. § 6976 prior to expenditure of substantial dollars to submit a response to the RFP.

The Court of Federal Claims' conclusion that RCG should have been aware of and able to discern the Navy's interpretation of 10 U.S.C. § 6976 is flawed. First, it presumes that the Navy's interpretation is correct and that the Navy's interpretation is readily apparent by reference to the applicable statute (i.e., U.S.C. § 6976), neither of which is true. As explained here, the Navy's interpretation is not correct and depends on the incorporation of a definition in the Federal Management Regulations. Secondly, the Court's conclusion fails to consider the Navy's active participation in the bid protest and its involvement in RCG's evaluation of the site for mining.

In reality, the Navy is purposely avoiding disclosure of the entire record. Simply put, a *prima facie* showing in the pleadings of arbitrariness is sufficient to entitle Plaintiff to a hearing. *See Keco Industries, Inc. v. U.S.*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970). It is only after the complete record is examined that the Court can determine if the Navy's actions had an appropriate basis or that they were unreasonable. *Id.*

A. Honest Consideration of RCG'S Bid Required That the Navy Disclose its Interpretation of 10 U.S.C. § 6976.

The Department of the Navy has asserted there was no obligation to advise RCG that its proposed use would be prohibited. It cites a few cases which support the proposition that the Navy has no obligation to provide information that is reasonably available to a proposed contractor. *John Massman Contracting Co. v. United States,* 23 Cl. Ct. 24(1991); *see also L. W Matteson, Inc. v. United States,* 61 Fed. Cl. 296 (Fed. Cl. 2004). In these cases, the information that was not provided by the government agency was readily available and could be found and researched by a prospective bidder for a government contract. *Id.* The Navy cites this Court to no case such as this; where an internal agency determination or opinion interpreting an application of a provision of law to a set of facts would constitute information "readily available" to bidders. In this case, at some unknown point in time, the Navy interpreted 10 U.S.C. § 6976 in conjunction with 41 C.F.R. 102-71.20 and determined that a lease to a sand and gravel company intending to mine, process and sell the aggregate would be a "disposal" of the Naval Academy Dairy Farm. Only the Navy knew it had made this determination and only the Navy knew that it was interpreting the definition of the terms "real

property" in 41 C.F.R. § 102-71.20 as limiting its broad authority under 10 U.S.C. § 6976 to lease the dairy farm property.

As pointed out repeatedly, the Department of Navy refuses to even indicate whether it came upon this interpretation before or after the submission of the bid. If the Department of Navy had this interpretation, which RCG believes is contrary to 10 U.S.C. § 6976, prior to the submission of proposals, they withheld information which was not readily available to RCG. There was no reason for RCG to even suspect that the Department of Navy had adopted this interpretation of the law and regulations. The Notice of Availability for Lease for the Bid Solicitation provided an outline of the lease provisions. Appendix F contained a list of prohibited uses.[1] (Exhibit 1, Plaintiffs Opp. to Def. Motion to Dismiss.) Not

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[1]The list prohibited:

Any use that adversely affects the health, safety, morals, welfare, morale, and discipline of the Armed Forces, such as the sale or use of drug paraphernalia, illicit gambling, or prostitution on the leased property.

- Any use that requires an environmental permit for storage, treatment, transportation, disposal, or manufacture of hazardous materials, hazardous substances, or hazardous wastes on the lease property and is incompatible with Government objectives.
- Any use that allows partisan political activities on the leased property.
- Any use by entities advocating the overthrow of the United States on the leased property.

In accordance with Department of Navy policy; consumption, sale or distribution of alcoholic beverages is and shall be prohibited on the property, except within private residential quarters, or except as approved in advance by the Government.

only was mining not listed as a prohibited use, as noted, the Navy actually licensed the physical drilling of the property by RCG to determine the amount of aggregate reserves on site.[2] RCG had no reason to doubt or investigate the efficacy of its proposed use.[3] At a minimum, the Navy could have advised prospective bidders that it was applying 41 C.F.R. § 102-71.20 to 10 U.S.C. § 6976.

Alternatively, if the Department of Navy came upon this interpretation only after the submission of bids, it adopted an after the fact rationalization to turn down RCG's submission (even though RCG would have provided more compensation than any other bidder). This would be tantamount to an act of bad faith, clearly arbitrary and capricious towards RCG as well as inconsistent with the terms of its own solicitation. At a minimum, such action would entitle RCG to recover its bid preparation expenditures.[4]

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[2]It is noteworthy that in responding to questions posed by bidders concerning natural resources, the Navy noted no other restrictions beyond the invitation to bid and in fact advised that the proposals would control how natural resources were to be managed and that the existing management plan could be amended based upon a successful bidder's uses. Gov't. Appendix, pp. 1-3 (Question 5).

[3]Furthermore, the Navy was made aware of the public opposition to the proposed mining and still encouraged RCG's proposal. *See The Capital*, February 28, 2007.

[4]Assuming, *arguendo* that the Navy is correct that it cannot lease for mining, if the facts were to show that the Department of Navy did not know or did not believe that mining would be a proscribed use under the proposed lease, at the very least there would be a mutual mistake of law by both parties which would require a re-solicitation of the proposed lease. Under these circumstances, it would be appropriate for the Navy to reimburse the costs incurred in the solicitation since there was an alternative award of the property.

This Honorable Court has indicated that the Government may be held liable for a breach of contract for non-disclosure when (1) the contractor undertakes to perform without vital knowledge of a fact that could affect performance, cost, or direction; (2) the Government is aware that the proposed contractor had no knowledge and had no reason to obtain such knowledge; (3) the contractor solicitation specifications do not put the contractor on notice to inquire regarding this issue, and (4) the Government fails to provide the relevant information. *See Northrop Grumman Corp., Military Aircraft Div. v. United States*, 63 Fed. Cl. 12 (2004) *citing AT&T Communications, Inc. v. Perry,* 296 F.3d 1307 (Fed. Cir. 2002); *see also Helene Curtis Indus. v. United States,* 312 F.2d 774 (Ct. Cl. 1963). RCG meets these tests.

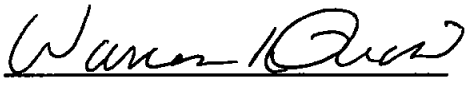
First, the RCG undertaking was to lease the property for mining purposes; second, the Government was aware of this purpose and understood that RCG believed it to be legal; third, the solicitation documents and the Navy's conduct in allowing RCG to conduct extensive exploration on the Dairy Farm as part of preparing its proposal misled RCG into believing that it could achieve its purpose; and, finally, the Government failed to provide any relevant information regarding the RCG's proposed use prior to the submissions. As stated above, the determination of whether there is a duty to disclose is in part a factual

determination which has never been addressed by a review of the record in this case.

CONCLUSION

The decision of the United States Court of Federal Claims should be reversed. The matter should be remanded for a full evaluation of the record in this matter.

Respectfully submitted this 6th day of May, 2011.



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ADDENDUM

ing the cost of completing the project by reason of a failure to obtain from other donors or sources funds or other resources in amounts sufficient to pay the cost of completing the project; and

(D) is accompanied by—

(i) an irrevocable and unconditional standby letter of credit for the benefit of the Naval Academy that is in the amount of the guarantee and is issued by a major United States commercial bank; or

(ii) a qualified account control agreement.

(3) QUALIFIED ACCOUNT CONTROL AGREEMENT.—The term "qualified account control agreement", with respect to a guarantee of a donor, means an agreement among the donor, the Secretary of the Navy, and a major United States investment management firm that—

(A) ensures the availability of sufficient funds or other financial resources to pay the amount guaranteed during the period of the guarantee;

(B) provides for the perfection of a security interest in the assets of the account for the United States for the benefit of the Naval Academy with the highest priority available for liens and security interests under applicable law;

(C) requires the donor to maintain in an account with the investment management firm assets having a total value that is not less than 130 percent of the amount guaranteed; and

(D) requires the investment management firm, at any time that the value of the account is less than the value required to be maintained under subparagraph (C), to liquidate any noncash assets in the account and reinvest the proceeds in Treasury bills issued under section 3104 of title 31.

(4) MAJOR UNITED STATES COMMERCIAL BANK.—The term "major United States commercial bank" means a commercial bank that—

(A) is an insured bank (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(B) is headquartered in the United States; and

(C) has net assets in a total amount considered by the Secretary of the Navy to qualify the bank as a major bank.

(5) MAJOR UNITED STATES INVESTMENT MANAGEMENT FIRM.—The term "major United States investment management firm" means any broker, dealer, investment adviser, or provider of investment supervisory services (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) or section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2)) or a major United States commercial bank that—

(A) is headquartered in the United States; and

(B) holds for the account of others investment assets in a total amount considered by the Secretary of the Navy to qualify the firm as a major investment management firm.

(Added Pub. L. 106-65, div. B, title XXVIII, § 2871(b)(1), Oct. 5, 1999, 113 Stat. 873; amended Pub. L. 106-398, § 1 [[div. A], title X, § 1087(a)(17)], Oct. 30, 2000, 114 Stat. 1654, 1654A-291; Pub. L. 108-136, div. A, title X, § 1031(a)(56), Nov. 24, 2003, 117 Stat. 1603.)

PRIOR PROVISIONS

A prior section 6975, added Pub. L. 103-337, div. A, title V, § 556(b)(1), Oct. 5, 1994, 108 Stat. 2774, related to position of athletic director of Naval Academy and to administration of nonappropriated fund account for athletics program of Naval Academy, prior to repeal by Pub. L. 104-106, div. A, title V, § 533(b), Feb. 10, 1996, 110 Stat. 315; Pub. L. 105-85, div. A, title X, § 1073(d)(1)(C), Nov. 18, 1997, 111 Stat. 1905, effective Oct. 5, 1994.

AMENDMENTS

2003—Subsec. (c). Pub. L. 108-136 inserted before period at end "or, if earlier, the expiration of 14 days following the date on which a copy of the report is provided in an electronic medium pursuant to section 480 of this title".

2000—Subsec. (e)(5). Pub. L. 106-398 inserted a closing parenthesis after "80b-2)" in introductory provisions.

§ 6976. Operation of Naval Academy dairy farm

(a) DISCRETION REGARDING CONTINUED OPERATION.—(1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.

(2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting of approximately 875 acres)—

(A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

(B) shall be maintained in its rural and agricultural nature.

(b) LEASE AUTHORITY.—(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

(2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

(c) LEASE PROCEEDS.—All money received from a lease entered into under subsection (b) shall be retained by the Superintendent of the Naval Academy and shall be available to cover expenses related to the property described in subsection (a), including reimbursing nonappropriated fund instrumentalities of the Naval Academy.

(d) EFFECT OF OTHER LAWS.—Nothing in section 6971 of this title shall be construed to require the Secretary of the Navy or the Superintendent of the Naval Academy to operate a dairy farm for the Naval Academy in Gambrills, Maryland, or any other location.

(Added Pub. L. 105–85, div. B, title XXVIII, § 2871(a)(1), Nov. 18, 1997, 111 Stat. 2014; amended Pub. L. 106–65, div. B, title XXVIII, § 2814, Oct. 5, 1999, 113 Stat. 851.)

AMENDMENTS

1999—Subsecs. (c), (d). Pub. L. 106–65 added subsec. (c) and redesignated former subsec. (c) as (d).

§ 6977. Grants for faculty research for scientific, literary, and educational purposes: acceptance; authorized grantees

(a) ACCEPTANCE OF RESEARCH GRANTS.—The Secretary of the Navy may authorize the Superintendent of the Academy to accept qualifying research grants under this section. Any such grant may only be accepted if the work under the grant is to be carried out by a professor or instructor of the Academy for a scientific, literary, or educational purpose.

(b) QUALIFYING GRANTS.—A qualifying research grant under this section is a grant that is awarded on a competitive basis by an entity referred to in subsection (c) for a research project with a scientific, literary, or educational purpose.

(c) ENTITIES FROM WHICH GRANTS MAY BE ACCEPTED.—A grant may be accepted under this section only from a corporation, fund, foundation, educational institution, or similar entity that is organized and operated primarily for scientific, literary, or educational purposes.

(d) ADMINISTRATION OF GRANT FUNDS.—The Secretary shall establish an account for administering funds received as research grants under this section. The Superintendent shall use the funds in the account in accordance with applicable regulations and the terms and conditions of the grants received.

(e) RELATED EXPENSES.—Subject to such limitations as may be provided in appropriations Acts, appropriations available for the Academy may be used to pay expenses incurred by the Academy in applying for, and otherwise pursuing, award of a qualifying research grant.

(f) REGULATIONS.—The Secretary of the Navy shall prescribe regulations for the administration of this section.

(Added Pub. L. 105–261, div. A, title X, § 1063(b)(1), Oct. 17, 1998, 112 Stat. 2130.)

§ 6978. Mixed-funded athletic and recreational extracurricular programs: authority to manage appropriated funds in same manner as nonappropriated funds

(a) AUTHORITY.—In the case of a Naval Academy mixed-funded athletic or recreational extracurricular program, the Secretary of the Navy may designate funds appropriated to the Department of the Navy and available for that program to be treated as nonappropriated funds and expended for that program in accordance with laws applicable to the expenditure of nonappropriated funds. Appropriated funds so designated shall be considered to be nonappropriated funds for all purposes and shall remain available until expended.

(b) COVERED PROGRAMS.—In this section, the term "Naval Academy mixed-funded athletic or recreational extracurricular program" means an athletic or recreational extracurricular program of the Naval Academy to which each of the following applies:

(1) The program is not considered a morale, welfare, or recreation program.

(2) The program is supported through appropriated funds.

(3) The program is supported by a nonappropriated fund instrumentality.

(4) The program is not a private organization and is not operated by a private organization.

(Added Pub. L. 108–375, div. A, title V, § 544(b)(1), Oct. 28, 2004, 118 Stat. 1906.)

EFFECTIVE DATE

Section applicable only with respect to funds appropriated for fiscal years after fiscal year 2004, see section 544(d) of Pub. L. 108–375, set out as a note under section 4359 of this title.

§ 6979. Midshipmen: charges and fees for attendance; limitation

(a) PROHIBITION.—Except as provided in subsection (b), no charge or fee for tuition, room, or board for attendance at the Naval Academy may be imposed unless the charge or fee is specifically authorized by a law enacted after October 5, 1994.

(b) EXCEPTION.—The prohibition specified in subsection (a) does not apply with respect to any item or service provided to midshipmen for which a charge or fee is imposed as of October 5, 1994. The Secretary of Defense shall notify Congress of any change made by the Naval Academy in the amount of a charge or fee authorized under this subsection.

(Added Pub. L. 108–375, div. A, title V, § 545(b)(1), Oct. 28, 2004, 118 Stat. 1908.)

§ 6980. Policy on sexual harassment and sexual violence

(a) REQUIRED POLICY.—Under guidance prescribed by the Secretary of Defense, the Secretary of the Navy shall direct the Superintendent of the Naval Academy to prescribe a policy on sexual harassment and sexual violence applicable to the midshipmen and other personnel of the Naval Academy.

(b) MATTERS TO BE SPECIFIED IN POLICY.—The policy on sexual harassment and sexual violence prescribed under this section shall include specification of the following:

(1) Programs to promote awareness of the incidence of rape, acquaintance rape, and other sexual offenses of a criminal nature that involve midshipmen or other Academy personnel.

(2) Procedures that a midshipman should follow in the case of an occurrence of sexual harassment or sexual violence, including—

(A) if the midshipman chooses to report an occurrence of sexual harassment or sexual violence, a specification of the person or persons to whom the alleged offense should be reported and the options for confidential reporting;

(B) a specification of any other person whom the victim should contact; and

(C) procedures on the preservation of evidence potentially necessary for proof of criminal sexual assault.

(13) Seed orders—in the circuit where violator resides or has his principal place of business;

(14) Wage orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(15) Foreign Trade Zones Board orders—in the circuit where the Zone is located;

(16) Customhouse broker licenses—in circuit where applicant or licensee resides or has his principal place of business.

ORDERS ENFORCEABLE

(1) Antitrust and unfair trade orders—in the circuit where unlawful act occurred or person allegedly committing unlawful act resides or carries on business;

(2) National Labor Relations Board's final orders—in the circuit where unfair labor practice occurred or violator resides or transacts business;

(3) Seed orders—in the circuit where violator resides or has his principal place of business.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1292 of this title.

Changes were made in phraseology.

By Senate amendment, this section was renumbered "1294", and subsec. (b), which related to the Tax Court, was eliminated. Therefore, as finally enacted, section 1141(b)(1)(2)(3) of Title 26, U.S.C., Internal Revenue Code 1939, was not one of the sources of this section. The Senate amendments also eliminated section 1141 of the Internal Revenue Code 1939 from the schedule of repeals. See Senate Report No. 1559.

AMENDMENTS

1982—Pub. L. 97-164 substituted "Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions" for "Appeals from reviewable decisions" in introductory provisions.

1978—Pub. L. 95-598 directed the amendment of section by substituting "district, bankruptcy, and territorial" for "district and territorial" and by adding pars. (5) and (6) relating to panels designated under section 160(a) of this title and bankruptcy courts, respectively, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pars. (4), (5). Pub. L. 87-189 redesignated par. (5) as (4) and repealed former par. (4) which provided that appeals from the Supreme Court of Puerto Rico should be taken to the Court of Appeals for the First Circuit. See section 1258 of this title.

1959—Pars. (4) to (6). Pub. L. 86-3 redesignated pars. (5) and (6) as (4) and (5), respectively, and repealed former par. (4) which provided that appeals from the Supreme Court of Hawaii should be taken to the Court of Appeals for the Ninth Circuit. See section 91 of this title and notes thereunder.

1958—Par. (2). Pub. L. 85-508 redesignated par. (3) as (2) and repealed former par. (2) which provided that appeals from the District Court for the Territory of Alaska or any division thereof should be taken to the Court of Appeals for the Ninth Circuit. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Pars. (3) to (7). Pub. L. 85-508 redesignated pars. (4) to (7) as (3) to (6), respectively.

1951—Par. (7). Act Oct. 31, 1951, added par. (7).

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-3 effective on admission of State of Hawaii into the Union, see note set out under section 91 of this title. Admission of Hawaii into the Union was accomplished Aug. 25, 1959, on issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96-70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of—

(A) the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the

United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1));

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b)). The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

(Added Pub. L. 97–164, title I, §127(a), Apr. 2, 1982, 96 Stat. 37; amended Pub. L. 98–622, title II, §205(a), Nov. 8, 1984, 98 Stat. 3388; Pub. L. 100–418, title I, §1214(a)(3), Aug. 23, 1988, 102 Stat. 1156; Pub. L. 100–702, title X, §1020(a)(3), Nov. 19, 1988, 102 Stat. 4671; Pub. L. 102–572, title I, §102(c), title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4507, 4516; Pub. L. 106–113, div. B, §1000(a)(9) [title IV, §§4402(b)(2), 4732(b)(14)], Nov. 29, 1999, 113 Stat. 1536, 1501A–560, 1501A–584.)

REFERENCES IN TEXT

The Harmonized Tariff Schedule of the United States, referred to in subsec. (a)(7), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

Section 211 of the Economic Stabilization Act of 1970, referred to in subsec. (a)(11), is section 211 of Pub. L. 91–379, title II, as amended, formerly set out as an Economic Stabilization Program note under section 1904 of Title 12, Banks and Banking.

Section 5 of the Emergency Petroleum Allocation Act of 1973, referred to in subsec. (a)(12), is section 5 of Pub. L. 93–159, as amended, which was classified to section 754 of Title 15, Commerce and Trade, and was omitted from the Code.

Section 506(c) of the Natural Gas Policy Act of 1978, referred to in subsec. (a)(13), is classified to section 3416(c) of Title 15.

Section 523 of the Energy Policy and Conservation Act, referred to in subsec. (a)(14), is classified to section 6393 of Title 42, The Public Health and Welfare.

AMENDMENTS

1999—Subsec. (a)(4)(A). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(A)], inserted "United States" before "Patent and Trademark".

Subsec. (a)(4)(B). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(B)], substituted "Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office" for "Commissioner of Patents and Trademarks".

Subsec. (a)(4)(C). Pub. L. 106–113, §1000(a)(9) [title IV, §4402(b)(2)], substituted "145, 146, or 154(b)" for "145 or 146".

1992—Subsec. (a)(3). Pub. L. 102–572, §902(b)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(11) to (14). Pub. L. 102–572, §102(c), added pars. (11) to (14).

1988—Subsec. (a)(1). Pub. L. 100–702 inserted ", exclusive rights in mask works," after "copyrights".

Subsec. (a)(7). Pub. L. 100–418 substituted "U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States" for "headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States".

1984—Subsec. (a)(4)(A). Pub. L. 98–622 substituted "Patent Appeals and" for "Appeals or the Board of Patent".

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by section 1000(a)(9) [title IV, §4402(b)(2)] of Pub. L. 106–113 effective on date that is 6 months after Nov. 29, 1999, and, except for design patent application filed under chapter 16 of Title 35, applicable to any application filed on or after such date, see section 1000(a)(9) [title IV, §4405(a)] of Pub. L. 106–113, set out as a note under section 154 of Title 35, Patents.

Amendment by section 1000(a)(9) [title IV, §4732(b)(14)] of Pub. L. 106–113 effective 4 months after Nov. 29, 1999, see section 1000(a)(9) [title IV, §4731] of Pub. L. 106–113, set out as a note under section 1 of Title 35, Patents.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by section 102(c) of Pub. L. 102–572 effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102–572, set out as a note under section 905 of Title 2, The Congress.

Amendment by section 902(b)(1) of Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-418 effective Jan. 1, 1989, and applicable with respect to articles entered on or after such date, see section 1217(b)(1) of Pub. L. 100-418, set out as an Effective Date note under section 3001 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-622 applicable to all United States patents granted before, on, or after Nov. 8, 1984, and to all applications for United States patents pending on or filed after that date, except as otherwise provided, see section 106 of Pub. L. 98-622, set out as a note under section 103 of Title 35, Patents.

Amendment by Pub. L. 98-622 effective three months after Nov. 8, 1984, see section 207 of Pub. L. 98-622, set out as a note under section 41 of Title 35.

EFFECTIVE DATE

Section effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

ABOLITION OF TEMPORARY EMERGENCY COURT OF APPEALS

Section 102(d), (e) of Pub. L. 102-572 provided that:

"(d) ABOLITION OF COURT.—The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 [Pub. L. 91-379, formerly set out as a note under section 1904 of Title 12, Banks and Banking] is abolished, effective 6 months after the date of the enactment of this Act [Oct. 29, 1992].

"(e) PENDING CASES.—(1) Any appeal which, before the effective date of abolition described in subsection (d), is pending in the Temporary Emergency Court of Appeals but has not been submitted to a panel of such court as of that date shall be assigned to the United States Court of Appeals for the Federal Circuit as though the appeal had originally been filed in that court.

"(2) Any case which, before the effective date of abolition described in subsection (d), has been submitted to a panel of the Temporary Emergency Court of Appeals and as to which the mandate has not been issued as of that date shall remain with that panel for all purposes and, notwithstanding the provisions of sections 291 and 292 of title 28, United States Code, that panel shall be assigned to the United States Court of Appeals for the Federal Circuit for the purpose of deciding such case."

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96-70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1296. Review of certain agency actions

(a) JURISDICTION.—Subject to the provisions of chapter 179, the United States Court of Appeals for the Federal Circuit shall have jurisdiction over a petition for review of a final decision under chapter 5 of title 3 of—

(1) an appropriate agency (as determined under section 454 of title 3);

(2) the Federal Labor Relations Authority made under part D of subchapter II of chapter 5 of title 3, notwithstanding section 7123 of title 5; or

(3) the Secretary of Labor or the Occupational Safety and Health Review Commission, made under part C of subchapter II of chapter 5 of title 3.

(b) FILING OF PETITION.—Any petition for review under this section must be filed within 30 days after the date the petitioner receives notice of the final decision.

(Added Pub. L. 104-331, §3(a)(1), Oct. 26, 1996, 110 Stat. 4068.)

PRIOR PROVISIONS

A prior section 1296, added Pub. L. 97-164, title I, §127(a), Apr. 2, 1982, 96 Stat. 39, related to precedence of cases in United States Court of Appeals for the Federal Circuit, prior to repeal by Pub. L. 98-620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359.

EFFECTIVE DATE

Section 3(d) of Pub. L. 104-331 provided that: "The amendments made by this section [enacting this section and sections 1413 and 3901 to 3908 of this title and amending sections 1346 and 2402 of this title] shall take effect on October 1, 1997."

CHAPTER 85—DISTRICT COURTS; *JURISDICTION*

(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(Added Pub. L. 109–2, §5(a), Feb. 18, 2005, 119 Stat. 12.)

EFFECTIVE DATE

Section applicable to any civil action commenced on or after Feb. 18, 2005, see section 9 of Pub. L. 109–2, set out as an Effective Date of 2005 Amendment note under section 1332 of this title.

[CHAPTER 90—OMITTED]

CODIFICATION

Chapter 90, consisting of sections 1471 to 1482, which was added by Pub. L. 95–598, title II, §241(a), Nov. 6, 1978, 92 Stat. 2668, and which related to district courts and bankruptcy courts, did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

TRANSITION TO NEW COURT SYSTEM

Pub. L. 95–598, title IV, §409, Nov. 6, 1978, 92 Stat. 2687, as amended by Pub. L. 98–249, §1(d), Mar. 31, 1984, 98 Stat. 116; Pub. L. 98–271, §1(d), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98–299, §1(d), May 25, 1984, 98 Stat. 214; Pub. L. 98–325, §1(d), June 20, 1984, 98 Stat. 268; Pub. L. 98–353, title I, §121(d), July 10, 1984, 98 Stat. 346, which provided for transfer to the new court system of cases, and matters and proceedings in cases, under the Bankruptcy Act [former Title 11] pending at the end of Sept. 30, 1983, in the courts of bankruptcy continued under section 404(a) of Pub. L. 95–598, with certain exceptions, and cases and proceedings arising under or related to cases under Title 11 pending at the end of July 9, 1984, and directed that civil actions pending on July 9, 1984, over which a bankruptcy court had jurisdiction on July 9, 1984, not abate, but continuation of such actions not finally determined before Apr. 1, 1985, be removed to a bankruptcy court under this chapter, and that all law books, publications, etc., furnished bankruptcy judges as of July 9, 1984, be transferred to the United States bankruptcy courts under the supervision of the Director of the Administrative Office of the United States Courts, was repealed by Pub. L. 98–353, title I, §122(a), July 10, 1984, 98 Stat. 343, 346, eff. July 10, 1984.

[1] So in original. Probably should be "77p(f)(3)".

CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

HISTORICAL AND REVISION NOTES

1949 ACT

This section inserts in the analysis of chapter 91 of title 28, U.S.C., item 1505, corresponding to new section 1505.

AMENDMENTS

2006—Pub. L. 109–284, §4(1), Sept. 27, 2006, 120 Stat. 1211, substituted "chapter 37 of title 40" for "Contract Work Hours and Safety Standards Act" in item 1499.

1992—Pub. L. 102–572, title IX, §902(a)(1), Oct. 29, 1992, 106 Stat. 4516, substituted "UNITED STATES COURT OF FEDERAL CLAIMS" for "UNITED STATES CLAIMS COURT" as chapter heading.

1984—Pub. L. 98–369, div. A, title VII, §714(g)(3), July 18, 1984, 98 Stat. 962, added item 1509.

1982—Pub. L. 97–248, title IV, §402(o)(18)(B), Sept. 3, 1982, 96 Stat. 669, added item 1508.

Pub. L. 97–164, title I, §133(e)(2)(B), (f), (h), (j)(2), Apr. 2, 1982, 96 Stat. 41, substituted "UNITED STATES CLAIMS COURT" for "COURT OF CLAIMS" in chapter heading, substituted "Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act" for "Penalties imposed against contractors under eight hour law" in item 1499, and struck out items 1504 "Tort Claims" and 1506 "Transfer to cure defect of jurisdiction".

1978—Pub. L. 94–455, title XIII, §1306(b)(9)(B), Oct. 4, 1978, 90 Stat. 1720, added item 1507.

1960—Pub. L. 86–770, §2(b), Sept. 13, 1960, 74 Stat. 912, added item 1506.

Pub. L. 86–726, §4, Sept. 8, 1960, 74 Stat. 856, substituted "Patent and copyright cases" for "Patent cases" in item 1498.

1954—Act Sept. 3, 1954, ch. 1263, §43, 68 Stat. 1241, inserted "; actions involving Tennessee Valley Authority" in item 1491 and struck out item 1493 "Departmental reference cases".

1949—Act May 24, 1949, ch. 139, §86, 63 Stat. 102, added item 1505.

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judg-

ment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites[1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(a), (b), 68 Stat. 1241; Pub. L. 91–350, § 1(b), July 23, 1970, 84 Stat. 449; Pub. L. 92–415, § 1, Aug. 29, 1972, 86 Stat. 652; Pub. L. 95–563, § 14(l), Nov. 1, 1978, 92 Stat. 2391; Pub. L. 96–417, title V, § 509, Oct. 10, 1980, 94 Stat. 1743; Pub. L. 97–164, title I, § 133(a), Apr. 2, 1982, 96 Stat. 39; Pub. L. 102–572, title IX, §§ 902(a), 907(b)(1), Oct. 29, 1992, 106 Stat. 4516, 4519; Pub. L. 104–320, § 12(a), Oct. 19, 1996, 110 Stat. 3874; Pub. L. 110–161, div. D, title VII, § 739(c)(2), Dec. 26, 2007, 121 Stat. 2031; Pub. L. 110–181, div. A, title III, § 326(c), Jan. 28, 2008, 122 Stat. 63; Pub. L. 110–417, [div. A], title X, § 1061(d), Oct. 14, 2008, 122 Stat. 4613.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(1) (Mar. 3, 1911, ch. 231; § 145, 36 Stat. 1136).

District courts are given concurrent jurisdiction of certain claims against the United States under section 1346 of this title. (See also reviser's note under that section and section 1621 of this title relating to jurisdiction of the Tax Court.)

The proviso in section 250(1) of title 28, U.S.C., 1940 ed., relating to claims growing out of the Civil War, commonly known as "war claims," and other claims which had been reported adversely before March 3, 1887 by any court, department, or commission authorized to determine them, were omitted as obsolete.

The exception in section 250(1) of title 28, U.S.C., 1940 ed., as to pension claims appears in section 1501 of this title.

Words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action. In any event, the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act, sections 741–752 of title 46, U.S.C., 1940 ed., Shipping, vests exclusive jurisdiction over suits in admiralty against the United States in the district courts. *Sanday & Co. v. U.S.*, 1932, 76 Ct.Cl. 370.

For additional provisions respecting jurisdiction of the court of claims in war contract settlement cases see section 114b of Title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

REFERENCES IN TEXT

Sections 6 and 10(a)(1) of the Contract Disputes Act of 1978, referred to in subsec. (a)(2), are classified to sections 605 and 609(a)(1), respectively, of Title 41, Public Contracts.

The Tennessee Valley Authority Act of 1933, referred to in subsec. (c), is act May 18, 1933, ch. 32, 48 Stat. 58,

[1] So in original. Probably should be "United".

as amended, which is classified generally to chapter 12A (§831 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 831 of Title 16 and Tables.

AMENDMENTS

2008—Subsec. (b)(5). Pub. L. 110–417 struck out par. (5), as added by Pub. L. 110–161, which read as follows: "If a private sector interested party commences an action described in paragraph (1) in the case of a public-private competition conducted under Office of Management and Budget Circular A–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an official or person described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action."

Pub. L. 110–181 added par. (5).

2007—Subsec. (b)(5). Pub. L. 110–161 added par. (5).

1996—Subsec. (a)(3). Pub. L. 104–320, §12(a)(2), struck out par. (3) which read as follows: "To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security."

Subsecs. (b), (c). Pub. L. 104–320, §12(a)(1), (3), added subsec. (b) and redesignated former subsec. (b) as (c).

1992—Subsec. (a)(1). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(2). Pub. L. 102–572, §907(b)(1), inserted before period at end ", including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act".

Pub. L. 102–572, §902(a)(2), substituted "Court of Federal Claims" for "Claims Court".

Subsec. (b). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Subsec. (a)(1). Pub. L. 97–164 designated first two sentences of existing first undesignated paragraph as subsec. (a)(1) and substituted "United States Claims Court" for "Court of Claims".

Subsec. (a)(2). Pub. L. 97–164 designated third, fourth, and fifth sentences of existing first undesignated paragraph as par. (2) and substituted "The Claims Court" for "The Court of Claims" and "arising under section 10(a)(1) of the Contract Disputes Act of 1978" for "arising under the Contract Disputes Act of 1978".

Subsec. (a)(3). Pub. L. 97–164 added par. (3).

Subsec. (b). Pub. L. 97–164 designated existing second undesignated paragraph as subsec. (b) and substituted "United States Claims Court" for "Court of Claims", "conduct of, the Tennessee Valley Authority, or" for "actions of, the Tennessee Valley Authority, nor", "Tennessee Valley Authority Act of 1933" for "Tennessee Valley Authority Act of 1933, as amended,", and "actions by or against the Authority" for "suits by or against the Authority".

1980—Pub. L. 96–417 substituted "Court of Claims of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action" for "in suits" in second par.

1978—Pub. L. 95–563 provided that the Court of Claims would have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

1972—Pub. L. 92–415 inserted provisions authorizing the court to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records and to issue such orders to any United States official and to remand appropriate matters to administrative and executive bodies with proper directions.

1970—Pub. L. 91–350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1954—Act Sept. 3, 1954, inserted "; actions involving Tennessee Valley Authority" in section catchline and altered the form of first par. to spell out the general jurisdiction of the Court in paragraph form rather than as clauses of the par.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" near beginning of section, and inserted last par.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title III, §326(d), Jan. 28, 2008, 122 Stat. 63, provided that: "Subparagraph (B) of section 3551(2) of title 31, United States Code (as added by subsection (a)), and paragraph (5) of section 1491(b) of title 28, United States Code (as added by subsection (c)), shall apply to—

"(1) a protest or civil action that challenges final selection of the source of performance of an activity or function of a Federal agency that is made pursuant to a study initiated under Office of Management and Budget Circular A–76 on or after January 1, 2004; and

"(2) any other protest or civil action that relates to a public-private competition initiated under Office of Management and Budget Circular A–76, or to a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, on or after the date of the enactment of this Act [Jan. 28, 2008]."

EFFECTIVE DATE OF 2007 AMENDMENT

Paragraph (5) of subsec. (b) of this section applicable to protests and civil actions that challenge final selections of sources of performance of an activity or function of a Federal agency that are made pursuant to studies initiated under Office of Management and Budget Circular A–76 on or after Jan. 1, 2004; and to any other protests and civil actions that relate to public-private competitions initiated under Office of Management and Budget Circular A–76, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, on or after Dec. 26, 2007, see section 739(c)(3) of Pub. L. 110–161, set out as a note under section 501 of Title 31, Money and Finance.

Amendment by Pub. L. 110–161 applicable with respect to fiscal year 2008 and each succeeding fiscal year, see section 739(e) of Pub. L. 110–161, set out as a note under section 501 of Title 31, Money and Finance.

EFFECTIVE DATE OF 1996 AMENDMENT

Section 12(b) of Pub. L. 104–320 provided that: "This section [amending this section and section 3556 of Title 31, Money and Finance, and enacting provisions set out as notes under this section and section 3556 of Title 31] and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date."

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by section 902(a) of Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

Section 907(b)(2) of Pub. L. 102–572 provided that: "The amendment made by paragraph (1) [amending this section] shall be effective with respect to all actions filed before, on, or after the date of the enactment of

this Act [Oct. 29, 1992], except for those actions which, before such date of enactment, have been the subject of—

"(A) a final judgment of the United States Claims Court, if the time for appeal of that judgment has expired without an appeal having been filed, or

"(B) a final judgment of the Court of Appeals for the Federal Circuit."

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96–417, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95–563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

EFFECTIVE DATE OF 1972 AMENDMENT

Section 2 of Pub. L. 92–415 provided that: "This Act [amending this section] shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment [Aug. 29, 1972]."

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–350 applicable to claims and civil actions dismissed before or pending on July 23, 1970, if the claim or civil action was based upon a transaction, omission, or breach that occurred not more than six years prior to July 23, 1970, notwithstanding a determination or judgment made prior to July 23, 1970, that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States, see section 2 of Pub. L. 91–350, set out as a note under section 1346 of this title.

SAVINGS PROVISION

Section 12(e) of Pub. L. 104–320 provided that:

"(1) ORDERS.—A termination under subsection (d) [set out below] shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(2) PROCEEDINGS AND APPLICATIONS.—(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

"(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination."

SUNSET PROVISION

Section 12(d) of Pub. L. 104–320 provided that: "The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) [set out above] shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection."

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

STUDY ON CONCURRENT JURISDICTION

Pub. L. 104–320, § 12(c), Oct. 19, 1996, 110 Stat. 3875, required that, no earlier than 2 years after Dec. 31, 1996, the General Accounting Office was to undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction was necessary, which study was to be completed no later than Dec. 31, 1999, and was to specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

§ 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Court of Federal Claims for a report in conformity with section 2509 of this title.

(June 25, 1948, ch. 646, 62 Stat. 941; Pub. L. 89–681, § 1, Oct. 15, 1966, 80 Stat. 958; Pub. L. 97–164, title I, § 133(b), Apr. 2, 1982, 96 Stat. 40; Pub. L. 102–572, title IX, § 902(a)(1), Oct. 29, 1992, 106 Stat. 4516.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 257 (Mar. 3, 1911, ch. 231, § 151, 36 Stat. 1138).

This section contains only the jurisdictional provision of section 257 of title 28, U.S.C., 1940 ed. The procedural provisions are incorporated in section 2509 of this title.

Changes were made in phraseology.

AMENDMENTS

1992—Pub. L. 102–572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1982—Pub. L. 97–164 substituted "chief judge of the United States Claims Court" for "chief commissioner of the Court of Claims".

1966—Pub. L. 89–681 substituted provisions allowing any bill, except a bill for a pension, to be referred by either House of Congress to the chief commissioner of the Court of Claims for a report in conformity with section 2509 of this title for provisions giving the Court of Claims jurisdiction to report to either House of Congress on any bill referred by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill was one over which the court had jurisdiction under other Acts of Congress.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

§§ 644.498–644.500 [Reserved]

DISPOSAL OF STANDING TIMBER, CROPS, AND EMBEDDED GRAVEL, SAND AND STONE

§ 644.501 Authority.

(a) *Crops.* Crops are defined as personal property in FPMR 101–47.103–12 and are disposed of under FPMR 101–45.309–1 (Sale, Abandonment, or Destruction of Personal Property). The Corps of Engineers does not dispose of crops on military lands. However, when lands are in the custody of the Corps for construction purposes, the Corps will dispose of crops thereon.

(b) *Standing timber, embedded gravel, sand or stone.* These are defined as real property (FPMR 101–47.103–12(c)). The holding agency is designated as disposal agency for standing timber and embedded gravel, sand, and stone to be disposed of without the underlying land. (FPMR § 101–47.302–2).

(c) *Small lots of standing timber.* In accordance with AR 405–90, installation commanders are authorized to sell small lots of standing timber with a value not more than $1,000 that are in conformity with the installation Forest Management Plan. Public notice is required of the availability of the timber for sale. The total of such sales in any one calendar year will not exceed $10,000.

(d) *Restriction on removal of sand, clay, gravel, stone and similar material.* The Army is without authority to remove such products from public domain land located within the military installation where the material is to be used off the installation. With permission of the Secretary of the Interior, such material may be removed pursuant to 30 U.S.C. 601. In such cases, DAEN-REM will obtain the necessary permission.

§ 644.502 Determination of excess status.

(a) *Military.* The procedure for excessing and disposal of standing timber and embedded gravel, sand and stone is outlined in AR 405–90. The procedure for the determination of availability of timber for disposal is outlined in AR 420–74.

(b) *Civil works.* (1) When the DE believes that standing timber, embedded gravel, sand or stone (whether designated for disposition with the land or by severance and removal from the land) is excess to requirements, he will submit a recommendation to DAEN-REM for approval. The DE is authorized, however, to dispose of standing timber or other forest products required to be removed incident to construction and operational requirements of the project; that which is generated incident to recreational development or the management of public park and recreational areas or wildlife management areas; or that which is generated in accordance with approved forest management supplements to the approved Master Plan (ER 1130–2–400). As far as practicable, high grade species in short supply will not be disposed of, but will be retained for possible defense requirements. When the amount for sawtimber under the above criteria available for disposal exceeds 5,000,000 board feet, request will be made to DAEN-REM, for determination of whether there are any defense requirements for the timber. The request will include an estimate of the amounts by species and the range in sizes. All timber disposals, except those involving timber below the project clearing line or in construction sites, will be compatible with the planned use of the areas for the purpose to which they are allocated in approved Master Plans and such disposals will be incidental to that use. The DE may authorize the disposal of growing crops when their disposal is deemed necessary to prevent waste.

(2) Under the provisions of section 5 of the act of 13 June 1902, as amended, (33 U.S.C. 558), proceeds from disposal of these items on civil works property may be returned to the appropriation.

§ 644.503 Methods of disposal.

Standing timber, crops, sand, gravel, or stone-quarried products, authorized for disposal in accordance with the foregoing, will be disposed of by transfer to another Federal agency or by sale.

§ 644.504 Disposal plan for timber.

The DE take appropriate action to assure that construction contractors are not authorized, in the clearance of

SUBCHAPTER C—REAL PROPERTY

PART 102–71—GENERAL

Sec.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 70 FR 67786, Nov. 8, 2005, unless otherwise noted.

§ 102–71.5 What is the scope and philosophy of the General Services Administration's (GSA) real property policies?

GSA's real property policies contained in this part and parts 102–72 through 102–82 of this chapter apply to Federal agencies, including GSA's Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services. These policies cover the acquisition, management, utilization, and disposal of real property by Federal agencies that initiate and have decision-making authority over actions for real property services. The detailed guidance implementing these policies is contained in separate customer service guides.

§ 102–71.10 How are these policies organized?

GSA has divided its real property policies into the following functional areas:

(a) Delegation of authority.
(b) Real estate acquisition.
(c) Facility management.
(d) Real property disposal.
(e) Design and construction.
(f) Art-in-architecture.
(g) Historic preservation.
(h) Assignment and utilization of space.
(i) Safety and environmental management.
(j) Security.
(k) Utility services.
(l) Location of space.

§ 102–71.15 [Reserved]

§ 102–71.20 What definitions apply to GSA's real property policies?

The following definitions apply to GSA's real property policies:

Airport means any area of land or water that is used, or intended for use, for the landing and takeoff of aircraft, and any appurtenant areas that are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

Alteration means remodeling, improving, extending, or making other changes to a facility, exclusive of maintenance repairs that are preventive in nature. The term includes planning, engineering, architectural work, and other similar actions.

Carpool means a group of two or more people regularly using a motor vehicle for transportation to and from work on a continuing basis.

Commercial activities, within the meaning of subpart D, part 102–74 of this chapter, are activities undertaken for the primary purpose of producing a profit for the benefit of an individual or organization organized for profit. (Activities where commercial aspects are incidental to the primary purpose of expression of ideas or advocacy of causes are not commercial activities for purposes of this part.)

Cultural activities include, but are not limited to, films, dramatics, dances, musical presentations, and fine art exhibits, whether or not these activities are intended to make a profit.

Decontamination means the complete removal or destruction by flashing of explosive powders; the neutralizing and cleaning-out of acid and corrosive materials; the removal, destruction, or neutralizing of toxic, hazardous or infectious substances; and the complete removal and destruction by burning or detonation of live ammunition from contaminated areas and buildings.

Designated Official is the highest ranking official of the primary occupant agency of a Federal facility, or, alternatively, a designee selected by mutual agreement of occupant agency officials.

Disabled employee means an employee who has a severe, permanent impairment that for all practical purposes precludes the use of public transportation, or an employee who is unable to operate a car as a result of permanent impairment who is driven to work by another. Priority may require certification by an agency medical unit, including the Department of Veterans Affairs or the Public Health Service.

Disposal agency means the Executive agency designated by the Administrator of General Services to dispose of surplus real or personal property.

Educational activities mean activities such as (but not limited to) the operation of schools, libraries, day care centers, laboratories, and lecture or demonstration facilities.

Emergency includes bombings and bomb threats, civil disturbances, fires, explosions, electrical failures, loss of water pressure, chemical and gas leaks, medical emergencies, hurricanes, tornadoes, floods, and earthquakes. The term does not apply to civil defense matters such as potential or actual enemy attacks that are addressed by the U.S. Department of Homeland Security.

Executive means a Government employee with management responsibilities who, in the judgment of the employing agency head or his/her designee, requires preferential assignment of parking privileges.

Executive agency means an Executive department specified in section 101 of title 5; a military department specified in section 102 of such title; an independent establishment as defined in section 104(1) of such title; and a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

Federal agency means any Executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his or her direction).

Federal agency buildings manager means the buildings manager employed by GSA or a Federal agency that has been delegated real property management and operation authority from GSA.

Federal Government real property services provider means any Federal Government entity operating under, or subject to, the authorities of the Administrator of General Services that provides real property services to Federal agencies. This definition also includes private sector firms under contract with Federal agencies that deliver real property services to Federal agencies. This definition excludes any entity operating under, or subject to, authorities other than those of the Administrator of General Services.

Flame-resistant means meeting performance standards as described by the National Fire Protection Association (NFPA Standard No. 701). Fabrics labeled with the Underwriters Laboratories Inc., classification marking for flammability are deemed to be flame resistant for purposes of this part.

Foot-candle is the illumination on a surface one square foot in area on which there is a uniformly distributed flux of one lumen, or the illuminance produced on a surface all points of which are at a distance of one foot from a directionally uniform point source of one candela.

GSA means the U.S. General Services Administration, acting by or through the Administrator of General Services, or a designated official to whom functions under this part have been delegated by the Administrator of General Services.

Highest and best use means the most likely use to which a property can be put, which will produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social and environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (e.g., zoning, physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access, roads, location,

and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural.

Indefinite quantity contract (commonly referred to as *term contract*) provides for the furnishing of an indefinite quantity, within stated limits, of specific property or services during a specified contract period, with deliveries to be scheduled by the timely placement of orders with the contractor by activities designated either specifically or by class.

Industrial property means any real property and related personal property that has been used or that is suitable to be used for manufacturing, fabricating, or processing of products; mining operations; construction or repair of ships and other waterborne carriers; power transmission facilities; railroad facilities; and pipeline facilities for transporting petroleum or gas.

Landholding agency means the Federal agency that has accountability for the property involved. For the purposes of this definition, accountability means that the Federal agency reports the real property on its financial statements and inventory records.

Landing area means any land or combination of water and land, together with improvements thereon and necessary operational equipment used in connection therewith, which is used for landing, takeoff, and parking of aircraft. The term includes, but is not limited to, runways, strips, taxiways, and parking aprons.

Life cycle cost is the total cost of owning, operating, and maintaining a building over its useful life, including its fuel and energy costs, determined on the basis of a systematic evaluation and comparison of alternative building systems; except that in the case of leased buildings, the life cycle cost shall be calculated over the effective remaining term of the lease.

Limited combustible means rigid materials or assemblies that have fire hazard ratings not exceeding 25 for flame spread and 150 for smoke development when tested in accordance with the American Society for Testing and Materials, Test E 84, Surface Burning Characteristics of Building Materials.

Maintenance, for the purposes of part 102-75, entitled "Real Property Disposal," of this chapter, means the upkeep of property only to the extent necessary to offset serious deterioration; also such operation of utilities, including water supply and sewerage systems, heating, plumbing, and air-conditioning equipment, as may be necessary for fire protection, the needs of interim tenants, and personnel employed at the site, and the requirements for preserving certain types of equipment. For the purposes of part 102-74, entitled "Facility Management," of this chapter, maintenance means preservation by inspection, adjustment, lubrication, cleaning, and the making of minor repairs. *Ordinary maintenance* means routine recurring work that is incidental to everyday operations; *preventive maintenance* means work programmed at scheduled intervals.

Management means the safeguarding of the Government's interest in property, in an efficient and economical manner consistent with the best business practices.

Nationally recognized standards encompasses any standard or modification thereof that—

(1) Has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby those interested and affected by it have reached substantial agreement on its adoption; or

(2) Was formulated through consultation by appropriate Federal agencies in a manner that afforded an opportunity for diverse views to be considered.

No commercial value means real property, including related personal property, which has no reasonable prospect of producing any disposal revenues.

Nonprofit organization means an organization identified in 26 U.S.C. 501(c).

Normally furnished commercially means consistent with the level of services provided by a commercial building operator for space of comparable quality and housing tenants with comparable requirements. Service levels are based on the effort required to service space for a five-day week, one eight-hour shift schedule.

Occupancy Emergency Organization means the emergency response organization comprised of employees of Federal agencies designated to perform the requirements established by the Occupant Emergency Plan.

Occupant agency means an organization that is assigned space in a facility under GSA's custody and control.

Occupant Emergency Plan means procedures developed to protect life and property in a specific federally occupied space under stipulated emergency conditions.

Occupant Emergency Program means a short-term emergency response program. It establishes procedures for safeguarding lives and property during emergencies in particular facilities.

Postal vehicle means a Government-owned vehicle used for the transportation of mail, or a privately owned vehicle used under contract with the U.S. Postal Service for the transportation of mail.

Protection means the provisions of adequate measures for prevention and extinguishment of fires, special inspections to determine and eliminate fire and other hazards, and necessary guards to protect property against thievery, vandalism, and unauthorized entry.

Public area means any area of a building under the control and custody of GSA that is ordinarily open to members of the public, including lobbies, courtyards, auditoriums, meeting rooms, and other such areas not assigned to a lessee or occupant agency.

Public body means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any political subdivision, agency, or instrumentality of the foregoing.

Public building means:

(1) Any building that is suitable for office and/or storage space for the use of one or more Federal agencies or mixed-ownership corporations, such as Federal office buildings, post offices, customhouses, courthouses, border inspection facilities, warehouses, and any such building designated by the President. It also includes buildings of this sort that are acquired by the Federal Government under the Administrator's installment-purchase, lease-purchase, and purchase-contract authorities.

(2) Public building does not include buildings:

(i) On the public domain.

(ii) In foreign countries.

(iii) On Indian and native Eskimo properties held in trust by the United States.

(iv) On lands used in connection with Federal programs for agricultural, recreational, and conservation purposes.

(v) On or used in connection with river, harbor, flood control, reclamation or power projects, or for chemical manufacturing or development projects, or for nuclear production, research, or development projects.

(vi) On or used in connection with housing and residential projects.

(vii) On military installations.

(viii) On Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(ix) Excluded by the President.

Real property means:

(1) Any interest in land, together with the improvements, structures, and fixtures located thereon (including prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers with or without undercarriages), and appurtenances thereto, under the control of any Federal agency, except—

(i) The public domain;

(ii) Lands reserved or dedicated for national forest or national park purposes;

(iii) Minerals in lands or portions of lands withdrawn or reserved from the public domain that the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws;

(iv) Lands withdrawn or reserved from the public domain but not including lands or portions of lands so withdrawn or reserved that the Secretary of the Interior, with the concurrence of the Administrator of General Services, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; and

(v) Crops when designated by such agency for disposition by severance and removal from the land.

(2) Improvements of any kind, structures, and fixtures under the control of any Federal agency when designated by such agency for disposition without the underlying land (including such as may be located on the public domain, on lands withdrawn or reserved from the public domain, on lands reserved or dedicated for national forest or national park purposes, or on lands that are not owned by the United States) excluding, however, prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers (with or without undercarriages).

(3) Standing timber and embedded gravel, sand, or stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition.

Recognized labor organization means a labor organization recognized under title VII of the Civil Service Reform Act of 1978 (Pub. L. 95–454), as amended, governing labor-management relations.

Recreational activities include, but are not limited to, the operations of gymnasiums and related facilities.

Regional Officer, within the meaning of part 102–74, subpart D of this chapter, means the Federal official designated to supervise the implementation of the occasional use provisions of 40 U.S.C. 581(h)(2). The Federal official may be an employee of GSA or a Federal agency that has delegated authority from GSA to supervise the implementation of the occasional use provisions of 40 U.S.C. 581(h)(2).

Related personal property means any personal property—

(1) That is an integral part of real property or is related to, designed for, or specially adapted to the functional or productive capacity of the real property and the removal of which would significantly diminish the economic value of the real property (normally common use items, including but not limited to general-purpose furniture, utensils, office machines, office supplies, or general-purpose vehicles, are not considered to be related personal property); or

(2) That is determined by the Administrator of General Services to be related to the real property.

Repairs means those additions or changes that are necessary for the protection and maintenance of property to deter or prevent excessive or rapid deterioration or obsolescence, and to restore property damaged by storm, flood, fire, accident, or earthquake.

Ridesharing means the sharing of the commute to and from work by two or more people, on a continuing basis, regardless of their relationship to each other, in any mode of transportation, including, but not limited to, carpools, vanpools, buspools, and mass transit.

State means the fifty States, political subdivisions thereof, the District of Columbia, the Commonwealths of Puerto Rico and Guam, and the territories and possessions of the United States.

Unit price agreement provides for the furnishing of an indefinite quantity, within stated limits, of specific property or services at a specified price, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the lessor by activities designated either specifically or by class.

Unusual hours means work hours that are frequently required to be varied and do not coincide with any regular work schedule. This category includes time worked by individuals who regularly or frequently work significantly more than 8 hours per day. Unusual hours does not include time worked by shift workers, by those on alternate work schedules, and by those granted exceptions to the normal work schedule (e.g., flex-time).

Upon approval from GSA means when an agency either has a delegation of authority document from the Administrator of General Services or written approval from the Administrator or his/her designee before proceeding with a specified action.

Vanpool means a group of at least 8 persons using a passenger van or a commuter bus designed to carry 10 or more passengers. Such a vehicle must be used for transportation to and from work in a single daily round trip.

Zonal allocations means the allocation of parking spaces on the basis of zones established by GSA in conjunction with occupant agencies. In metropolitan areas where this method is used, all agencies located in a designated zone will compete for available parking in accordance with instructions issued by GSA. In establishing this procedure, GSA will consult with all affected agencies.

§ 102–71.25 Who must comply with GSA's real property policies?

Federal agencies operating under, or subject to, the authorities of the Administrator of General Services must comply with these policies.

§ 102–71.30 How must these real property policies be implemented?

Each Federal Government real property services provider must provide services that are in accord with the policies presented in parts 102–71 through 102–82 of this chapter. Also, Federal agencies must make the provisions of any contract with private sector real property services providers conform to the policies in parts 102–71 through 102–82 of this chapter.

§ 102–71.35 Are agencies allowed to deviate from GSA's real property policies?

Yes, see §§ 102–2.60 through 102–2.110 of this chapter to request a deviation from the requirements of these real property policies.

PART 102–72—DELEGATION OF AUTHORITY

Subpart A—General Provisions

Sec.

Subpart B—Delegation of Authority

controlled by the Government that has been or will be reported to GSA, or

(b) Government-owned machinery and equipment being used by a contractor-operator will be sold to a contractor-operator.

§ 102–75.298 Can agencies request that GSA be the disposal agency for real property and real property interests described in § 102–75.296?

Yes. If requested, GSA, at its discretion, may be the disposal agency for such real property and real property interests.

§ 102–75.299 What are landholding agencies' responsibilities if GSA conducts the disposal?

Landholding agencies are and remain responsible for all rental/lease payments until the lease expires or is terminated. Landholding agencies are responsible for paying any restoration or other direct costs incurred by the Government associated with termination of a lease, and for paying any demolition and removal costs not offset by the sale of the property. (See also § 102–75.965.)

APPRAISAL

§ 102–75.300 Are appraisals required for all real property disposal transactions?

Generally, yes, appraisals are required for all real property disposal transactions, except when—

(a) An appraisal will serve no useful purpose (e.g., legislation authorizes conveyance without monetary consideration or at a fixed price). This exception does not apply to negotiated sales to public agencies intending to use the property for a public purpose not covered by any of the special disposal provisions in subpart C of this part; or

(b) The estimated fair market value of property to be offered on a competitive sale basis does not exceed $300,000.

§ 102–75.305 What type of appraisal value must be obtained for real property disposal transactions?

For all real property transactions requiring appraisals, agencies must obtain, as appropriate, an appraisal of either the fair market value or the fair annual rental value of the property available for disposal.

§ 102–75.310 Who must agencies use to appraise the real property?

Agencies must use only experienced and qualified real estate appraisers familiar with the types of property to be appraised when conducting the appraisal. When an appraisal is required for negotiation purposes, the same standard applies. However, agencies may authorize other methods of obtaining an estimate of the fair market value or the fair annual rental when the cost of obtaining that data from a contract appraiser would be out of proportion to the expected recoverable value of the property.

§ 102–75.315 Are appraisers authorized to consider the effect of historic covenants on the fair market value?

Yes, appraisers are authorized to consider the effect of historic covenants on the fair market value, if the property is in or eligible for listing in the National Register of Historic Places.

§ 102–75.320 Does appraisal information need to be kept confidential?

Yes, appraisals, appraisal reports, appraisal analyses, and other predecisional appraisal documents are confidential and can only be used by authorized Government personnel who can substantiate the need to know this information. Appraisal information must not be divulged prior to the delivery and acceptance of the deed. Any persons engaged to collect or evaluate appraisal information must certify that—

(a) They have no direct or indirect interest in the property; and

(b) The report was prepared and submitted without bias or influence.

INSPECTION

§ 102–75.325 What responsibility does the landholding agency have to provide persons the opportunity to inspect available surplus property?

Landholding agencies should provide all persons interested in acquiring available surplus property with the opportunity to make a complete inspection of the property, including any available inventory records, plans,

imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under RCFC 26 through 37.

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008.)

Rules Committee Notes
2002 Revision

The changes to RCFC 11 reflect the corresponding revision of FRCP 11 that was introduced in December 1993. For a detailed explanation of the reasons for revision of FRCP 11, see 28 U.S.C.A. Rule 11 Advisory Committee Notes (West Supp. 2001).

2008 Amendment

The language of RCFC 11 has been amended to conform to the general restyling of the FRCP.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General*

(A) The United States must file an answer to a complaint within 60 days after being served with the complaint.

(B) If the answer contains a counterclaim, offset, or plea of fraud, a party must file an answer to the counterclaim, and may file a reply to the offset or plea of fraud, within 21 days after being served with the answer.

(C) If a reply to an answer or a responsive pleading to a third-party complaint or answer is ordered by the court, a party must file the reply or responsive pleading within 21 days after being served with the order, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** [Not used.]

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** [Not used.]

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule or RCFC 56 alters these periods as follows:

(A) if the court denies the motion, in whole or in part, or postpones its disposition until trial, or if a party withdraws the motion, the responsive pleading must be filed by the later of:

(i) 14 days after notice of the court's action or the motion's withdrawal; or

(ii) the date the response otherwise would have been due.

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue [not used];
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under RCFC 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a

claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **Result of Presenting Matters Outside the Pleadings.** If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) **Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) **Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
  (1) on its own; or
  (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**
  (1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.
  (2) ***Limitation on Further Motions.*** Except as provided in RCFC 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**
  (1) ***When Some Are Waived.*** A party waives any defense listed in RCFC 12(b)(2)-(5) by:
    (A) omitting it from a motion in the circumstances described in RCFC 12(g)(2); or
    (B) failing to either:
      (i) make it by motion under this rule; or
      (ii) include it in a responsive pleading or in an amendment allowed by RCFC 15(a)(1) as a matter of course.
  (2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by RCFC 19(b), or to state a legal defense to a claim may be raised:
    (A) in any pleading allowed or ordered under RCFC 7(a);
    (B) by a motion under RCFC 12(c); or
    (C) at trial.
  (3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial.** If a party so moves, any defense listed in RCFC 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under RCFC 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, Jan. 11, 2010.)

Rules Committee Notes

2002 Revision

To more closely parallel FRCP 12,

subdivisions (b) and (h) of the court's rule have been enlarged by adding the defense of "insufficiency of service of process" and the defense of "failure to join a party indispensable under RCFC 19." Further, as an aid to practitioners, most of whom are familiar with practice in the district courts, the enumeration of defenses in subdivision (b) has been brought into conformity with the corresponding subdivision of the FRCP. Finally, subdivision (i) ("Suspension of Discovery") has been deleted. That subdivision is not part of the comparable FRCP, and its subject matter is more appropriately dealt with as a case management matter.

2008 Amendment

The language of RCFC 12 has been amended to conform to the general restyling of the FRCP.

In addition, former paragraph (a)(1) (the text of which is unique to our court) has been reworded to provide that while a reply to an answer containing a counterclaim is mandatory, a reply to an answer containing an offset or a plea of fraud is not (unless ordered by the court). This rewording, although a departure from past practice, was deemed advisable in order to avoid the consequences of an unintended admission caused by a party's inadvertent failure to respond to a defense of offset or plea of fraud that was not clearly designated as such in the answer.

2010 Amendment

The time periods of 10 and 20 days formerly set forth in RCFC 12 have been changed to 14 and 21 days, respectively, in accordance with the corresponding changes to FRCP 12 that became effective December 1, 2009.

Rule 13. Counterclaim

(a) Compulsory Counterclaim.

(1) ***In General.*** A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) ***Exceptions.*** The pleader need not state the claim if, when the action was commenced, the claim was the subject of another pending action.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) Crossclaim Against a Coparty. [Not used.]

(g) Joining Additional Parties. [Not used.]

(h) Separate Trials; Separate Judgments. If the court orders separate trials under RCFC 42(b), it may enter judgment on a counterclaim under RCFC 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, Jan. 11, 2010.)

Rules Committee Notes

2002 Revision

Subdivision (d) has been changed to add the language of FRCP 13(d) in recognition of the fact that there is no statutory bar to third-party defendants filing counterclaims against the United

Headquarters
Department of the Army
Washington, DC
10 May 1985

*Army Regulation 405–90

Effective 10 May 1985

Real Estate

Disposal of Real Estate

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

History. This UPDATE printing publishes a revision, which is effective 10 May 1985. Because the structure of the entire revised text has been reorganized, no attempt has been made to highlight changes from the earlier regulation dated 29 July 1974.

Summary. This revision updates the policy of disposing of Army controlled real estate.

Applicability. This regulation applies to the Active Army, the U.S. Army Reserve, and the Army National Guard. Chapter 6 does not apply to the Army National Guard. This regulation does not apply to Army civil works real estate.

Army management control process.

Supplementation. Supplementation of this regulation is prohibited without prior approval from HQDA(DAEN–REM–C), WASH DC 20314–1000.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The proponent agency of this regulation is the Office of the Chief of Engineers. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA(DAEN–REM–C), WASH DC 20314–1000.

Distribution. Active Army, ARNG, and USAR: D

Contents (Listed by paragraph and page number)

*This regulation supersedes AR 405–90, 29 July 1974.

UNCLASSIFIED

Contents—Continued

other Federal agency jurisdiction claims and any encumbrances under public land laws for transmittal with the excess report.

Chapter 6
DA Disposal of Real Property

6–1. Authority

a. GSA has delegated authority to determine surplus and dispose of real and related personal property with an estimated value under $1000. The GSA Administrator may also designate executive agencies to dispose of other surplus property.

b. GSA has designated agencies accountable for the following real property interests as disposal agencies in FPMR 101–47.302–2:

(1) Improvements without the underlying land.

(2) Standing timber without the underlying land.

(3) Embedded gravel, sand, and stone without the underlying land.

(4) Ingrants unless GSA or the accountable agency determines that it is in the best interest of the Government to dispose of the ingrant with other property reported excess.

c. GSA has excepted growing crops from real estate disposal, when the disposal agency designates such crops for disposal by severance and removal from the land. (See also agricultural and grazing lease and license authority in AR 405–80.)

d. Also, DA has disposal authority under specific laws. (See app C for partial listing.)

e. Authority to sell Federal property is a governmental function which may not be delegated to non-Federal entities.

6–2. Competition

a. Bidding. DA policy requires competitive bidding before any sale. This gives all potentially qualified bidders an equal opportunity to compete for the property, secures the benefits of competition for the Government, and prevents charges that the Government employees have shown favoritism in selling Government property. Surplus property may be auctioned when considerable local interest is probable and when approved by the COE and GSA (FPMR 101–47.304–7). Normally, sale is to the highest responsive and responsible bidder after advertisement in conformance with GSA regulations (FPMR 101–47.304).

b. Negotiated sales. Sales may be negotiated with a particular party if DAEN–REM determines competition is impracticable or a negotiated sale is in the public interest or promotes the national defense. Such sales for property with a fair market value in excess of $1000 must be reported through GSA to the congressional committees on Government Operations, unless excepted (FPMR 101–47.304–9 and 101–47.304–12).

6–3. *Sales to civilian and military personnel*

When duties of civilian and military personnel include any functional or supervisory responsibility for disposal of real property under Army control, the personnel, their agents, employees, and immediate family members may not bid for or purchase surplus property interests.

6–4. Predisposal clearances

In addition to screening and clearances required in chapter 2, the following clearances must also be obtained:

a. $1,000,000 property. Real property and related personal property that cost $1,000,000 or more will not be disposed of to any private interest until the U.S. Attorney General advises whether the proposed disposal would tend to create or maintain a situation inconsistent with antitrust laws (FPMR 101–47.301–2).

b. Improvements at industrial installations. The Office DSCRDA must concur with proposed disposal of improvements that will affect the productive capacity of an industrial installation.

c. Rail equipment. The Office of the Deputy Chief of Staff for Logistics must approve proposals to dispose of DA rail equipment (AR 56–3 and AR 420–72).

d. Hospital and medical facilities. The U.S. Army Health Services Command must concur in the disposal of all hospitals and medical facilities under its control. (See AR 40–2.) Disposal of such facilities not under the U.S. Army Health Services Command must have prior approval of the appropriate MACOM.

e. Morale, welfare, and recreation facilities. HQDA(DAAG–ZX), WASH DC 20310–2101, must be notified of proposals to dispose of morale, welfare, and recreation facilities.

f. Chapel facilities. HQDA(DACH–AML) must concur in the disposal of chapel facilities. (See AR 165–20.)

6–5. Improvements

Improvements without underlying land involve special considerations. Priority attention will be given to disposal of structures used as justification to Congress for new construction to avoid prejudicing future construction programs. Active Army structures committed on DD Form 1391 will be promptly disposed of on acceptance of new construction for beneficial occupancy in accordance with AR 415–13.

a. Conditions necessary for excessing. Buildings and improvements (including barracks) on nonexcess land may be declared excess when—

(1) There is no current use and there is no mobilization requirement;

(2) They have deteriorated or been damaged to the point of being nuisances or hazards to life and property and cannot be repaired or maintained at justifiable cost (75 percent of replacement costs for barracks);

(3) They have served the purpose for which they were constructed and cannot be economically or practicably adapted to other beneficial use;

(4) They occupy or interfere with sites for new construction that have been approved for funding and execution (AR 415–13); or

(5) They are movable and will satisfy a current requirement of a military department.

b. Excess findings.

(1) The installation commander prepares DA Form 337 (Request for Approval of Disposal of Buildings and Improvements) (app B) and sends it through command channels to obtain approval to dispose of the excess property. The office approving the DA Form 337 will be approving the method of disposal. Upon completion of disposal the DA Form 337 will provide supporting documentation to remove the property from accountability records. The DA 337 should identify major items of installed building equipment that are to be disposed of with buildings and improvements. It should also show consideration given to using the equipment elsewhere. Such equipment will be physically marked to indicate its excess status.

(2) When new construction is involved, prior approval of the DA Form 337 may be obtained to prevent delays. However, all approvals for construction will be obtained before taking disposal action. Construction contracts will allow reasonable time for orderly disposal. The district commander will assure disposal is completed when improvements were scheduled to be disposed of as part of a new construction contract, except for relocatable structures or those to be disposed of by troop labor.

(3) As an exception, the district commander will prepare DA Form 337 for disposal of buildings and improvements acquired incidentally to land acquisition; the installation commander must first confirm there is no installation requirement for them, and then recommend disposal.

(4) In all cases, the commander having approval authority will sign the DA Form 337. Intermediate headquarters will make comments and recommendations only on forwarding correspondence. The original DA Form 337 will be returned through the same channels after approval to the accountability property officer.

(5) OASA(I&L) will approve the DA Form 337 for family housing with an estimated value of $50,000 or more per project or $5,000 or more per dwelling unit.

(6) HQDA(DAEN–REM) will approve the DA Form 337 for—

(a) Any property with a total estimated current fair market value over $50,000 (before submission to the Army Secretariat), except for family housing.

(b) Chapels (before submission to the Chief of Chaplains).

(c) Troop housing when such housing proposed for disposal during a 1 year period exceeds 5 percent of the total installation housing.

(d) Permanent buildings with a current real property inventory cost over $100,000 for any single item or improvements with a total current real property inventory cost over $200,000.

(e) A historical site or property that would affect a historical site.

(f) Contaminated or hazardous excess property.

(g) Buildings and improvements acquired for Army use and transferred less than 2 years before to the using command.

(7) MACOMs are authorized to approve other DA Forms 337. Except for family housing, this authority may be delegated to installation commanders with accountability for the property if the current real property inventory cost of any item is less than $25,000 or if *c*(4),(5), or (6) below apply. The installation commander may redelegate this authority, but not below the director of engineering and housing. MACOMs will approve disposal of family housing with an inventory cost of less than $50,000 per project or $5,000 per dwelling unit.

(8) Facilities committed for new construction on a DD Form 1391 must also be approved on a DA Form 337. Notify HQDA(DAEN–ZCP–MB), WASH DC 20314–1000, of completed disposal related to a Military Construction Authorization (MCA) Act. Notify the MACOM of such disposal approved by the installation commander.

c. Disposal. On receipt of the approved DA Form 337, the installation or the district commander will complete the disposal, note completion on the form, and forward it to the accountable property office. he district commander will complete disposal and site restoration, but may request the installation commander for assistance. GSA will dispose of machinery and equipment to be sold to a using contractor-operator.

(1) There are several methods of disposal:

(a) Demolition and use of salvage material in the Army construction and maintenance program.

(b) Transfer to another Federal agency as authorized by law and regulation.

(c) Negotiated sale to State or local government body or tax supported institution for fair market value under authorities named in FPMR 101–47.4905. Proposals for such disposals will be submitted to DAEN–REM for further guidance on the conditions of disposal.

(d) Donation to a public body under FPMR 101–47.501–2 when the property has no commercial value or the estimated sales proceeds are less than the estimated cost of continued care and handling. GSA must approve in advance a proposed donation of improvements which cost more than $250,000. The donee must pay disposal costs incident to the donation.

(e) Sale as authorized by law and regulation.

(f) Abandonment as authorized by law and regulation.

(2) Frequent inspections of disposal contract activity are encouraged to ensure compliance with contract terms and early resolution of problems.

(3) Installation commanders will ensure that disposal plans conform with present and future building sites designated on the installation master plan (AR 210–20).

(4) If the improvements have no commercial or salvage value, the installation commander should promptly dispose of the property within available resources (AR 420–70), such as troop exercises, fire training, and similar activities. Material may also be recovered for training stocks. Do not spend funds to dispose of such improvements. If no resources are available to dispose of the improvements, maintain a record of the location, existence, and cost of the property and list its condition as nonusable (AR 405–45).

(5) If the improvements have no commercial value or the estimated costs of continued care and handling would exceed estimated sale proceeds, the division or district commander may abandon or destroy improvements on private property or donate the improvements to a public body. The installation commander may destroy such improvements wherever they are located. Such improvements may not be abandoned on Federal land. (See (3) above and FPMR 101–47.5.)

(6) If the improvements have questionable value, the installation commander will consult the district commander. If the district commander determines that a successful sale or other disposal will not occur promptly, retain the DA Form 337, and promptly dispose of property by troop labor, demolition contract, or in-house demolition (AR 415–10, AR 420–17, AR 420–70).

(7) If improvements have sale or salvage value, the installation commander will transmit the approved DA Form 337 to the district commander for screening and disposition. The installation commander will assure that installed equipment is not removed and that facilities are not occupied or cannibalized. The district commander will advise the installation commander and return the DA Form 337 after completion of disposal by the district commander. The district commander will return the DA Form 337 for disposal by the installation commander if advertisement is unsuccessful and the district commander is not assured that successful sale or other disposition can be accomplished promptly. In such cases, installation commanders will consider the concerns of Federal and local governments and zoning authorities as to disposal. Purchasers of excess property will not use the installation as a headquarters for resale and will not erect signs of any kind on Federal property.

(8) If a relocatable building is excess, the installation commander will check whether the building is accounted for as Army personal property or Army real property before proceeding with disposal. When an Army building is accounted for as personal property, see AR 700–112. If a building is accounted for as real property, prepare a DA Form 337.

(9) Where facilities were constructed with other than appropriated funds, the sale proceeds are normally returned to the reimbursable fund in accordance with GSA regulations.

6–6. Installed building equipment

After meeting the requirements of paragraphs 2–2, 2–5, and 6–4 and after obtaining legal review if anyone has a security interest in the equipment, these fixtures may be converted into personal property using a certificate as shown at figure 6–1.

6–7. Timber

Unless otherwise agreed, the BLM disposes of timber on withdrawn public lands. Other standing timber without the underlying land is excessed and approved for disposal in accordance with AR 420–74. Sales for export of unprocessed timber from installations west of the 100th meridian in the contiguous 48 states will not be made. In general, installations are responsible for forestry management and the district commander for selling timber. The district commander will prepare a memorandum of understanding with each installation that has a forestry program to provide for mutual and reciprocal support as to these responsibilities to increase effectiveness, eliminate duplicate effort, and reduce costs.

a. Advance planning and coordination. To facilitate work planning requirements, installations will furnish districts pertinent parts of forestry management plans and updates. Ninety days in advance of each fiscal year, installations will provide general declarations of availability to divisions through MACOMs. Declarations will state the volume and type of timber and provide a map of general harvest areas. Installations will coordinate specific reports of availability in advance with districts to maximize market potential for timber. Sales of metal-contaminated timber will be segregated from other sales.

b. Maximizing proceeds. Districts will aggressively market timber, including metal-contaminated timber. In all cases administrative costs will be minimized, including travel. Unit or lump sum sales will be used, as appropriate, to maximize proceeds.

c. Timely disposal. Districts will award contracts within 90 days after receipt of specific reports of availability unless otherwise

agreed by the installation and the district. COE will be advised of the reasons for delay in other cases.

d. Additional sites. Additional forestry program sites may be recommended in accordance with AR 420–74.

e. Delegation of sale authority. After informal coordination with the district commander and public notice of availability, installation commanders or their delegates (but not below the director of engineering and housing) are authorized to sell standing timber with an estimated value under $1,000, in conformity with the forest management plan. This authority should be used whenever possible to improve the efficiency and economy of the timber sales program. Timber may not be given away. The total of such sales in any fiscal year will not exceed $20,000 at each installation.

f. Monitoring. Performance of disposal contracts will be monitored frequently by authorized local personnel to maximize proceeds, ensure compliance with contract terms, and preclude the development of problems, such as unsatisfactory restoration. HQDA(DAEN) will also monitor the timber sales program annually to ensure efficiency and compliance with forestry management policies. HQDA(DAEN) will examine specific programs if the percentage return on gross proceeds declines or is not approaching 40 percent over a 5-year period. (See AR 420–74 for criteria on monitoring implementation of forest management plans.)

6–8. Gravel, sand, and stone

After disposal is approved in accordance with this regulation, the district commander is authorized to dispose of embedded sand, gravel, and stone (including clay and spoil) on acquired land. GSA screening and determination of surplus if the estimate value exceeds $1,000 is required. The using command will define conditions of removal to prevent interference with the Army mission and degradation of the environment. Disposal will be by sale or other authorized method under COE procedures. The authorized officer 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 for use of the materials on the installation under 43 CFR Part 3620.

6–9. Ingrants

The using command will check the notice provision of any ingrant to be terminated. In the case of typical notice provisions, the command will advise the district commander at least 120 days in advance of the date of vacation. In other cases, it may be necessary to advise the district commander further in advance. This is essential to prevent payment of unnecessary rental and give the district commander maximum flexibility for screening, notifying the grantor and settling any restoration claims. The district commander may arrange for the using service to perform surveys of these properties when the grantor has a minor restoration claim as defined by COE regulations.

a. Industrial. The using command will recommend excessing of an ingrant for industrial purposes in the same manner as fee owned land.

b. Family housing. The using command will determine whether leased family housing is excess to the needs of the using command and advise the district commander, who will promptly terminate the grant without screening.

c. Command installations and recruiting offices. Normally, the using command will excess ingrants for command installations and recruiting offices, will approve disposal, and will report property to the district commander for disposal. When termination will adversely affect continuing operations of the installation or the annual rental is $50,000 or more, the using command will report the property excess through command channels to COE.

(1) The using command is responsible for rental and care and custody until the lease is canceled or another party agrees to assume these responsibilities.

(2) The district commander will cancel ingrants in accordance with their terms after screening and when it is not necessary to report the property to a disposal agency.

(3) The COE will provide instructions for the disposal of Government owned improvements in accordance with FPMR 101–47.309.

(4) The COE or designee will return permitted property to the control of the loaning Federal agency.

d. GSA space. GSA administers disposal of GSA leases and reassignment of GSA assigned space. The district commander must notify GSA in writing at least 30 days in advance of the date GSA must issue a termination notice under the terms of a GSA lease. Therefore, the MACOM or designee must notify the district commander at least 30 additional days in advance of a requirement to terminate. In the case of release of GSA assigned space, it is recommended that the MACOM or designee advise the district commander 150 days before the date that the space will no longer be needed. Notification must include a description of the area involved, its location, and the estimated date of release. Space to be released must be consolidated and accessible for GSA reassignment to another party. MACOMs will fund any alterations required to consolidate space or to make it accessible.

Chapter 7
DA Disposal of Excess Foreign Real Estate

7–1. Real estate disposal program objectives

Real estate disposal program objectives are to—

a. Ensure compliance with international agreements affecting the real estate in question. Such agreements normally control the disposal of real estate in foreign countries.

b. Ensure compliance with DA real estate disposal policies contained in chapters 1, 2, 4, and 6 insofar as practicable.

c. Give full force and effect to the real estate laws, customs, and disposal policies and procedures of the host country, insofar as it is consistent with the U.S. mission, requirements, and operations.

d. Keep foreign real estate holdings to the minimum necessary.

e. Clearly define United States and host country obligations (e.g., restoration).

f. Protect the United States against unreasonable claims.

g. Use host government agencies as much as possible, particularly in handling real property matters with citizens of host country.

7–2. Program oversight

The COE—

a. Supervises disposals of real estate in foreign countries.

b. Issues instructions governing such disposals.

c. Approves proposed MACOM regulations on real estate disposal.

7–3. Major Army command program execution

The real estate element of the MACOM located in a foreign country—

a. Plans and executes disposal of real estate in foreign countries in accordance with real estate program objectives.

b. Furnishes real estate disposal advice.

c. Recommends real estate disposal policies.

d. Maintains a real estate office of record.

e. Issues regulations on disposal policies and procedures, which should include the following:

(1) Information about the requirements of international agreements and established implementing precedents.

(2) Information about applicable real property laws, customs, policies, and procedures of the host country.

(3) Summary of DA real estate disposal policies.

(4) Explanation of approved day-to-day disposal policies and procedures including—

(a) The authority for disposal actions and the extent of permissible delegation.

(b) The nature of permissible real estate contacts with agencies and individuals of the host country.

(c) Methods of disposal considering, among other things, the

Public Law 90-110

AN ACT

To authorize certain construction at military installations and for other purposes.

October 21, 1967
[H. R. 11722]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Military Construction Authorization Act, 1968.

TITLE I

Army.

SEC. 101. The Secretary of the Army may establish or develop military installations and facilities by acquiring, constructing, converting, rehabilitating, or installing permanent or temporary public works, including site preparation, appurtenances, utilities, and equipment for the following projects:

INSIDE THE UNITED STATES

UNITED STATES CONTINENTAL ARMY COMMAND

(First Army)

Fort Belvoir, Virginia: Operational and training facilities, and research, development, and test facilities, $3,210,000.

Fort Devens, Massachusetts: Maintenance facilities, and utilities, $1,304,000.

Fort Dix, New Jersey: Hospital facilities, $2,585,000.

Fort Eustis, Virginia: Training facilities, maintenance facilities, and utilities, $976,000.

Fort Hamilton, New York: Operational facilities, $127,000.

A. P. Hill Military Reservation, Virginia: Training facilities, supply facilities, troop housing, and utilities, $4,893,000.

Fort Holabird, Maryland: Administrative facilities, $588,000.

Indiantown Gap Military Reservation, Pennsylvania: Training facilities, $581,000.

Fort Knox, Kentucky: Training facilities, and utilities, $3,325,000.

Fort Lee, Virginia: Maintenance facilities, medical facilities, and utilities, $1,646,000.

Fort George G. Meade, Maryland: Hospital facilities, and administrative facilities, $4,510,000.

Camp Pickett, Virginia: Training facilities, maintenance facilities, and supply facilities, and ground improvements, $329,000.

(Third Army)

Fort Benning, Georgia: Troop housing and utilities, $3,759,000.

Fort Bragg, North Carolina: Operational and training facilities, maintenance facilities, supply facilities, troop housing, and utilities, $15,019,000.

Fort Campbell, Kentucky: Hospital facilities and utilities, $312,000.

Fort Gordon, Georgia: Training facilities, supply facilities, utilities, and real estate, $4,364,000.

Fort Jackson, South Carolina: Hospital facilities, $11,412,000.

Fort Rucker, Alabama: Training facilities and troop housing, $2,118,000.

(Fourth Army)

Fort Bliss, Texas: Training facilities, supply facilities, and utilities, $1,693,000.

Fort Hood, Texas: Maintenance facilities and utilities, $3,075,000.

Fort Polk, Louisiana: Supply facilities, $954,000.

the Secretary of Defense or his designee has consulted with the Federal Water Pollution Control Administration of the Department of the Interior and determined that the degree and type of waste disposal and treatment required in the area in which such military installation is located are consistent with applicable Federal or State water quality standards or other requirements and that the planned system will be coordinated in timing with a State, county, or municipal program which requires communities to take such related abatement measures as are necessary to achieve area-wide water pollution cleanup.

Fort DeRussy, Hawaii. Land disposition, prohibition.

SEC. 809. Notwithstanding any other provision of law, none of the lands constituting Fort DeRussy, Hawaii, may be sold, leased, transferred, or otherwise disposed by the Department of Defense unless hereafter authorized by law.

Naval Academy Dairy Farm.

SEC. 810. (a) The Naval Academy Dairy Farm is a self-supporting operation, an economic and morale-building asset to the Department of the Navy, and shall continue in its present status and function.

63 Stat. 377.

(b) Notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.) or any other provision of law, the real property located in Gambrills, Anne Arundel County, Maryland, and comprising the Naval Academy Dairy Farm shall not be determined excess to the needs of the holding agency or transferred, reassigned, or otherwise disposed of by such agency, nor shall any action be taken by the Navy to close, dispose of, or phase out the Naval Academy Dairy Farm unless specially authorized by an Act of Congress.

Citation of titles.

SEC. 811. Titles I, II, III, IV, V, VI, VII, and VIII of this Act may be cited as the "Military Construction Authorization Act, 1968."

TITLE IX

RESERVE FORCES FACILITIES

Reserve Forces Facilities Authorization Act, 1968. 70A Stat. 120. 10 USC 2231-2238.

SEC. 901. Subject to chapter 133 of title 10, United States Code, the Secretary of Defense may establish or develop additional facilities for the Reserve Forces, including the acquisition of land therefor, but the cost of such facilities shall not exceed—

(1) for Department of the Army:

(a) Army National Guard of the United States, $10,000,000.

(b) Army Reserve, $10,000,000.

(2) for Department of the Navy: Naval and Marine Corps Reserves, $4,500,000.

(3) for Department of the Air Force:

(a) Air National Guard of the United States, $9,800,000.

(b) Air Force Reserve, $4,000,000.

Construction authority. Waiver of restrictions. 70A Stat. 269; 590.

SEC. 902. The Secretary of Defense may establish or develop installations and facilities under this title without regard to section 3648 of the Revised Statutes, as amended (31 U.S.C. 529), and sections 4774(d) and 9774(d) of title 10, United States Code. The authority to place permanent or temporary improvements on land includes authority for surveys, administration, overhead, planning, and supervision incident to construction: That authority may be exercised before title to the land is approved under section 355 of the Revised Statutes, as amended (40 U.S.C. 255), and even though the land is held temporarily. The authority to acquire real estate or land includes authority to make surveys and to acquire land, and interests in land (including temporary use), by gift, purchase, exchange of Government-owned land, or otherwise.

Public Law 105–85
105th Congress

An Act

To authorize appropriations for fiscal year 1998 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Nov. 18, 1997
[H.R. 1119]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

National Defense Authorization Act for Fiscal Year 1998.

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 1998".

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) DIVISIONS.—This Act is organized into three divisions as follows:

(1) Division A—Department of Defense Authorizations.

(2) Division B—Military Construction Authorizations.

(3) Division C—Department of Energy National Security Authorizations and Other Authorizations.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

(2) the fair market value of the property sold as determined without taking into account any improvements to such property by the City.

(d) DESCRIPTION OF PROPERTY.—The exact acreage and legal description of the real property conveyed under subsection (a) shall be determined by a survey satisfactory to the Secretary. The cost of the survey shall be borne by the City.

(e) ADDITIONAL TERMS AND CONDITIONS.—The Secretary may require such additional terms and conditions in connection with the conveyance under subsection (a) as the Secretary considers appropriate to protect the interests of the United States.

SEC. 2867. STUDY OF LAND EXCHANGE OPTIONS, SHAW AIR FORCE BASE, SOUTH CAROLINA.

Section 2874 of the Military Construction Authorization Act for Fiscal Year 1996 (division B of Public Law 104–106; 110 Stat. 583) is amended by adding at the end the following new subsection:

"(g) STUDY OF EXCHANGE OPTIONS.—To facilitate the use of a land exchange to acquire the real property described in subsection (a), the Secretary shall conduct a study to identify real property in the possession of the Air Force (located in the State of South Carolina or elsewhere) that satisfies the requirements of subsection (b)(2), is acceptable to the party holding the property to be acquired, and is otherwise suitable for exchange under this section. Not later than three months after the date of the enactment of the National Defense Authorization Act for Fiscal Year 1998, the Secretary shall submit to Congress a report containing the results of the study.".

Reports.

Subtitle E—Other Matters

SEC. 2871. REPEAL OF REQUIREMENT TO OPERATE NAVAL ACADEMY DAIRY FARM.

(a) OPERATION.—(1) Chapter 603 of title 10, United States Code, is amended by adding at the end the following new section:

"§ 6976. Operation of Naval Academy dairy farm

"(a) DISCRETION REGARDING CONTINUED OPERATION.—(1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.

"(2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting of approximately 875 acres)—

"(A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

"(B) shall be maintained in its rural and agricultural nature.

"(b) LEASE AUTHORITY.—(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of

the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

"(2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

"(c) EFFECT OF OTHER LAWS.—Nothing in section 6971 of this title shall be construed to require the Secretary of the Navy or the Superintendent of the Naval Academy to operate a dairy farm for the Naval Academy in Gambrills, Maryland, or any other location.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"6976. Operation of Naval Academy dairy farm.".

(b) CONFORMING REPEAL OF EXISTING REQUIREMENTS.—Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90–110; 81 Stat. 309), is repealed.

(c) OTHER CONFORMING AMENDMENTS.—(1) Section 6971(b)(5) of title 10, United States Code, is amended by inserting "(if any)" before the period at the end.

(2) Section 2105(b) of title 5, United States Code, is amended by inserting "(if any)" after "Academy dairy".

SEC. 2872. LONG-TERM LEASE OF PROPERTY, NAPLES, ITALY.

(a) AUTHORITY.—Subject to subsection (d), the Secretary of the Navy may acquire by long-term lease structures and real property relating to a regional hospital complex in Naples, Italy, that the Secretary determines to be necessary for purposes of the Naples Improvement Initiative.

(b) LEASE TERM.—Notwithstanding section 2675 of title 10, United States Code, the lease authorized by subsection (a) shall be for a term of not more than 20 years.

(c) EXPIRATION OF AUTHORITY.—The authority of the Secretary to enter into a lease under subsection (a) shall expire on September 30, 2002.

(d) AUTHORITY CONTINGENT ON APPROPRIATIONS ACTS.—The authority of the Secretary to enter into a lease under subsection (a) is available only to the extent or in the amount provided in advance in appropriations Acts.

SEC. 2873. DESIGNATION OF MILITARY FAMILY HOUSING AT LACKLAND AIR FORCE BASE, TEXAS, IN HONOR OF FRANK TEJEDA, A FORMER MEMBER OF THE HOUSE OF REPRESENTATIVES.

The military family housing developments to be constructed at two locations on Government property at Lackland Air Force Base, Texas, under the authority of subchapter IV of chapter 169 of title 10, United States Code, shall be designated by the Secretary of the Air Force, at an appropriate time, as follows:

(1) The eastern development shall be designated as "Frank Tejeda Estates East".

(2) The western development shall be designated as "Frank Tejeda Estates West".

SEC. 2874. FIBER-OPTICS BASED TELECOMMUNICATIONS LINKAGE OF MILITARY INSTALLATIONS.

(a) INSTALLATION REQUIRED.—In at least one metropolitan area of the United States containing multiple military installations of

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Real Estate Law Journal

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Comparing the Concepts of "Property" and "Value"

COMPARING THE CONCEPTS OF "PROPERTY" AND "VALUE" IN REAL ESTATE LAW AND REAL PROPERTY TAXATIONCOMPARING THE CONCEPTS OF "PROPERTY" AND "VALUE" IN REAL ESTATE LAW AND REAL PROPERTY TAXATION

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This article first explores property law's model for addressing split ownership of land so that its relevance to real estate taxation can be examined. It then discusses the public policies and pragmatic concerns that influence the judicial definitions of "property" and "value" in real estate taxation. Finally, four areas of property law are examined that raise questions of "property" and land "value" that are analogous to those in real estate taxation. Each of these four areas of property law teaches an important lesson about the comparative meanings of "property" and "value."

"*Value is a word of many meanings.*" Justice Louis D. Brandeis [1]

State and local governments impose ad valorem taxes on real estate.[2] These taxes provide the major source of revenue to these governmental entities.[3]

Real estate taxes are calculated by multiplying the legislatively imposed tax rate by the value of the land as determined by a governmental assessing authority.[4] The valuation of the property is a critical part of the system. The collective valuations of properties in the jurisdiction will determine the amount of revenue available to government for public activities. Moreover, important tax equity issues *8 emerge, as each owner is concerned that the valuation of his or her property compares favorably with those of neighboring properties.[5]

Two issues complicate the valuation of real estate for tax purposes. First, there is the fundamental question of what is the "property" that is being taxed. Second, the method or methods for computing the "value" of the property must be determined.[6] These questions become especially difficult when the property being valued is split among several owners, such as property subject to a long-term lease or land subject to an encumbrance (such as an easement or restrictive covenant).

"General" property or real estate law--terms used here to encompass the areas of property law outside of real estate taxation--has also wrestled with the definitions of "property" and "value."[7] For centuries, judges, lawyers, and legal theoreticians have struggled to answer the question "what is property?"[8] This leads to a fundamental inquiry: do the concepts of "property" and "value" in general property law mesh with those same ideas in real estate taxation?

At first glance, it would seem to be a fairly easy task to define "property" and to find the "value" of real estate for taxation purposes. After all, the market is constantly and efficiently setting prices *9 for various types of land. Moreover, it would also seem to a person unfamiliar with this area that "property" is "property" and "value" is "value," so that the determination

of "property" and "value" for real estate taxation purposes should be consistent with the meanings of these terms in other legal contexts.

However, determining "property" and "value" for real estate taxation purposes is a difficult task, because of different variables and calculation methods. Moreover, different public policies and practical concerns are at work in the real estate taxation area as compared with other property law contexts. These differing policies and realities lead decision-makers to definitions of "property" and "value" that vary depending on the context. This article argues that the benefit of context-based meanings of these terms must be weighed against the systemic and social costs of clashing definitions. The advantages of a comparative law approach to understanding "property" and "value" will be discussed.

The Bundle of Sticks Analogy

Defining "property" and "value" raises special problems in real estate taxation when ownership of the land is split among two or more persons, such as when the land is leased or subject to an encumbrance. To address similar issues of multiple ownership, general property law has over many years used the metaphor that owning "property" is like having a "bundle of sticks." [9] Each stick represents a right or privilege, and when all sticks are held together they comprise maximum ownership. The metaphor is helpful in that it underscores that some of the sticks may be transferred to another person, thus splitting rights in the property among various people. Although the "bundle of sticks" analogy has been described by one ostentatiously modern court as "hoary and simplistic," [10] it continues to be a useful method to conceptualize ownership. For example, one court recently employed this model to determine ownership of property for the purpose of applying a drug forfeiture statute. [11]

**10* Moreover, property law has recognized that the concept of "property" entails more than a physical and tangible relationship between the owner and the object. Rather, as one court stated:

In contemporary jurisprudence, "property" refers to both the actual physical object and the various incorporeal ownership rights in the res [thing], such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res. [12]
Land, thus, is valuable not just for the right of physical possession by the owner but for its income potential.

Some initial links to real estate taxation come to mind. The "bundle of sticks" metaphor, for example, might suggest the separate identification, valuation, and perhaps the taxation of the various sticks. [13] Moreover, the view that ownership entails more than a right of physical possession might explain the income method of real estate valuation.

Policies and Realities in Real Estate Taxation

Before concluding that general property law definitions of "property" and "value" should be applied in the area of real estate taxation, the various public policies and realities that shape the meanings of these terms in the taxation field must be examined. As will be shown, these factors may cause unique or even idiosyncratic definitions.

Legislative and constitutional source. Real estate taxation is authorized by state legislation or a state constitutional provision. Typically, the rule is that the tax is to be assessed against the "fair market value" of the property or some similar formulation. [14] There is usually little or no explanation in the statutory language as to what "property" means in that context or how "value" is set. [15]

Courts defining "property" and "value," therefore, are not engaged in common-law decision making where their views of precedent, policies, and equity control. Rather, the courts must do statutory or constitutional interpretation to give meaning to these terms. Traditional **11* statutory interpretation requires the court to find the *legislature's* meaning, in light of the goals underlying the text. [16]
Revenue enhancement. Real estate taxation is the essential source of funds for the activities of local governments. One court acknowledged this by noting the following: "real property ad valorem taxes are inherently public in character: they are statutorily

authorized taxes raised to serve the needs of the community as a whole.[17] Such taxes "are intended to raise revenue to defray the general expenses of the taxing entity."[18] Courts, therefore, might factor in the revenue goal in determining the meanings of "property" and "value." More generous definitions mean increased revenue.

Tax equity. The courts emphasize equality of treatment of taxpayers.[19] This stems from general societal norms of fair and equal treatment,[20] *12 but it is also rooted in the Equal Protection clause of the federal Constitution and similar state constitutional provisions. While the equality goal in the real estate tax context does not require all landowners to pay the same dollar amount of taxes, it requires uniform standards for all owners of the same type of property.[21]

Moreover, courts do not want some landowners to avoid payment at the expense of others.[22] This influences definitions of "property" and "value." As one court observed:

[A]n underlying aim of valuation is to assure that, in providing for public needs, the share reasonably to be borne by a particular property owner is based on an equitable proportioning of the fair value of his property vis-a-vis the fair value of all other taxable properties in the same tax jurisdiction.[23]

System concerns. In defining "property" and "value" for real estate taxation purposes, the courts must consider the effect that these definitions will have on the property tax assessment and collection apparatus, as well as on the taxpayers' relationship to the system. Judicial declarations must be readily understandable and easily applied by the government officials administering the system. Vague standards invite litigation and may lead to inefficiencies and added expense to the system.

Judicial standards must also be predictable for taxpayers, so that they can forecast their expenses. Moreover, if the rules are clear, taxpayers are more likely to feel confident that they are being treated fairly and that other owners are not receiving inapropriate advantages. Clear standards also may reduce court challenges by owners. Certainly they make it easier for judges and administrative adjudicators to decide the cases that are actually brought before them.

*13 One would also expect a significant degree of judicial deference to particular determinations of "property" and "value" by taxing agencies and officials. Court typically defer to administrative agencies because of their expertise in the particular matter and their direct familiarity with the facts, as well as for judicial economy concerns. Although there are jurisdictional differences in degree,[24] courts usually show deference to administrative valuations of land.[25]

Complexity. For a population that is all too often uncomfortable with numbers, there is a high "degree of difficulty" in tax evaluation cases for the courts and the litigants. As one court noted, "mathematical calculations in appraisals, though made in the best of faith, can lead to divergent results."[26] Another observed that "the word 'value' almost always involves a conjecture, a guess, a prediction, a prophecy."[27]

This numerical complexity often leads to confusion and unclear, or even bad, results. In one case, the dissenting judge chided his colleagues for affirming a decision of the Board of Tax Appeals that set a value for the property that differed from the four figures submitted by the parties. The judge asserted that the Board "contrived a Solomon-like solution. Rather than find the facts, [the Board] decided to split the difference. Regrettably, this [court's decision] is also a Solomon-like result--neither reasonable nor lawful."[28]

Other concerns. Finally, the property tax systems in various jurisdictions reflect other policies--for example, exemptions for nonprofit *14 organizations; favorable tax treatment for residents as opposed to nonresidents; and tax relief concerns, whether general, or based on a narrower classification (e.g., inability to pay), or in order to protect certain land uses (e.g., agricultural land).[29]

General Property Law

Do the concepts of "property" and "value" in real estate taxation mesh with those of general property law? An examination of four areas of property law teaches important lessons about the comparative meanings of these terms.

"Value" Does Not Mean "Value"--Eminent Domain Awards

A strong line of cases in the eminent domain area provides a stark, and ironic, example of how the meaning of "value" shifts depending on the context. Although there are some exceptions,[30] courts generally refuse to admit valuations for real estate tax as evidence to establish the value of property taken by eminent domain.[31]

Courts have offered various reasons for this reluctance: assessments based on an "actual" value standard are not relevant to find *15 "market" value as required by eminent domain;[32] tax assessments have historically been below the market value and so are not useful;[33] different policies control, with equality, uniformity, and proportionality of assessments being the key in the tax area, while an exact market value is needed in eminent domain to compensate an owner for lost property;[34] the taxpayer does not have a voice in the tax assessment process and fears of retaliation by assessors may limit protest;[35] the date of the tax valuation may make it irrelevant;[36] and there may be hearsay problems.[37]

Some of these reasons are not compelling. It is not clear, for example, that there is a meaningful difference between the terms "actual value" and "market value."[38] Moreover, with the shift to full-value assessment in land taxation,[39] undervaluation should not be as great a problem. Timing issues can be addressed by limiting the vintage of tax assessments that can be admitted,[40] and hearsay objections can likely be overcome with the admissions doctrine.[41]

Perhaps the greatest obstacle, however, to a unified concept of value in tax assessments and eminent domain awards is the landowner's temptation to manipulate the definition of "value" depending on the circumstances. As one court observed, "owners prefer low assessment rates for tax purposes and high evaluations for condemnation purposes."[42] Thus, even though courts might feel that *16 the tax "value" is irrelevant to eminent domain, they also want to prevent owners from manipulating the process by in effect keeping two sets of books. Some courts, as a result, bar statements of the owner in prior tax assessment disputes as affirmative proof of value for eminent domain purposes; however, they permit the prior statements as admissions against interest for the purpose of impeaching the owner's credibility as a witness in the eminent domain action.[43]

One is left with an uneasy feeling that "value" is a slippery concept indeed. As one court observed:

A certain degree of cynicism is no doubt warranted by the very general practice of landowners who have applied for [realty tax reductions] of putting down estimates that vary widely from the claims that they make when the property is about to be condemned. As these figures cannot be reconciled, the conclusion is inescapable that one estimate or the other, and possibly both, bear little relation to the true opinion of the owner, and his statement that the estimate represents his opinion is false.[44]
The eminent domain cases show, therefore, that "value" may not mean the same in all situations, not only because of legitimate differences in the policy contexts but also because of improper behavior.

The Importance of Context--Long-Term Leases

One example from property law presents a problem of defining "property" and the "value" that is analogous to real estate taxation.

A landlord making a long-term lease seeks to provide for increases in rent in future years to reflect appreciation in the value of the leased premises as well as general inflationary rises.[45] There are various methods used to accomplish this.[46] The preferred approach, however, *17 is to provide for a new valuation of the property at certain intervals and a recalculation of rent based on a set percentage of return on the adjusted value of the property.[47] The difficulty with this technique, of course, is the determination of the "value" of the property. More specifically, courts have faced the question of whether the value of the land should be calculated as being encumbered by the lease and use restrictions or based on the land's "highest and best use," free

and clear of the lease and any use restrictions. The tenant generally prefers a calculation based on the presence of the lease and its restrictions because that will lower the value of the property and the new rent, while the landlord favors the "free and clear" valuation.

In some ways, this is similar to an issue in tax valuation where an assessor must find the "value" of land subject to a "disadvantageous" long-term lease (i.e., a lease with below-market terms, such as low rent). Should "value" be determined based on the land being free of the lease or encumbered by it?[48] Most courts in the tax context find value based on the *un*encumbered fee.[49]

*18 This treatment in the tax context can be compared to how the courts define "value" for the purpose of rent escalation clauses. There is a split among the courts. Most prefer to calculate "value" free and clear of the lease;[50] a few, however, find "value" based on the fee encumbered by the lease and its restrictions.[51]

Does this mean that there is consistency, and that "value" in land taxation means "value" in property? Unfortunately, it does not--the *19 similar results are coincidental rather than congruous. As will be shown, there is no abstract meaning of "value" that compels the results in the rent escalation and tax cases; rather the correct meaning depends on the particular context.[52] Moreover, if the courts paid better attention to the lease escalation situation they should conclude that the minority rule--that is, calculating value with the encumbrance in place--is the better meaning.

The tax cases that find "value" based on the land being free of the lease are in harmony with the policies underlying real estate taxation.[53] Taxing the owner for the full value of the property will maximize collections by the sovereign; equity among owners will be respected because an owner will not be allowed to escape his tax burden and shift it to his neighbors by making an imprudent lease; and the calculation of a hypothetical fair-market value of the property free of the lease, while not simple to do, may be less complicated and easier to administer than finding value and assessing tax on separate interests.

When defining "value" in rent escalation provisions in leases, however, the tax policies--revenue enhancement, tax equity, and administrative concerns--are not relevant. Rather, there should be a different agenda. Determining "value" for rent escalation should not be governed by per se rules of law; instead, the determination should be an intent-based inquiry. In this commercial exchange, the expectations of the parties--not an absolute rule of law--should control. The question should be whether the parties intended for valuation to be made with the lease or without it.

As a result, the minority position in escalation cases appears correct; unless the lease provisions clearly indicate otherwise, courts should not assume that the parties intended valuation free of the lease and use restrictions that they were clearly agreeing to elsewhere in the document. "Value" should be calculated based on the land encumbered by the lease.[54] As one minority rule court stated:

*20 There is no suggestion in the language ... that, in valuing the land, the restrictions to hotel use imposed by the lease were to be disregarded and the land valued as if it were vacant and available for the highest and best use. ... That valuations of land must take into consideration all encumbrances thereon, including restrictions as to its use, unless there is a clear provision to the contrary, is well settled.[55]>

Thus, it is the particular context that gives meaning to the term "value." Reference to legal dictionaries for general definitions of value and the use of meanings developed to solve different legal problems is not satisfactory.[56] While that may yield consistent definitions, it ignores the policies and expectations of the particular situation.

The Costs of Disharmony--Servitudes

The differing meanings of "property" and "value," although compelled by context, sometimes create confusion. The costs of disharmony should be considered by the courts when defining these terms. A comparison of the concept of "property" in the

law of servitudes--that is, the law of easements and covenants--and real estate tax illustrates the potential harms of diverging definitions.[57]

Property law's bundle-of-sticks model is especially useful to explain allocation of ownership through servitudes. Adjacent owners can agree to exchange a portion of their property rights. This could take the form of an easement, granting an affirmative right over the neighbor's land, such as a roadway; or it could be created as a restrictive covenant, giving the owner of the covenant the right to veto activities on the burdened land, such as a building and use restriction. *21 The benefits and burdens of these arrangements automatically transfer to the successor owners of the land.[58]

The law has favored such consensual exchanges of property rights for various reasons.[59] Servitudes encourage efficient allocation, allowing people to divide land interests as demanded in the market. Servitudes also are enforced, like other contracts, because of the moral obligation of the promisor. Additionally, servitudes permit parties free choice--people can employ servitudes to create the living arrangements that they desire.

The law has recognized the economic reality that the presence of a servitude *usually* increases the value of the benefitted land and decreases the value of the burdened property.[60] The courts also quantify the "value" of a servitude, in various situations.[61] For example, an owner of an easement is entitled to damages for permanent interference with her right. The value of the lost easement if found by comparing the fair market value of the benefitted land with and without the interest.[62]

*22 Does this property-law analysis help in making a tax assessment of land subject to a servitude?[63] Most courts dealing with taxation of land subject to a servitude adopt the "additive approach." They find that since the value of the benefitted parcel is increased by the servitude, the burdened property should be assessed with the encumbrance in place.[64] With the easement added to the assessment of the benefited lot and deducted from the burdened parcel, the courts maintain that there will be neither double taxation nor revenue loss. This analysis parallels the bundle-of-sticks model of property law.

This analogy, however, may not be wholly appropriate for tax assessments. Some commentators reject the assumption that the increase of value of the benefited land is equal to the decrease of value of the burdened land.[65] Indeed, the additive approach may at times underestimate the total land value of the two parcels being taxed after the servitude has been created, leaving some value untaxed.[66] The bundle *23 -of-sticks concept is thus an oversimplification in this situation--the value of the stick to the benefited land is not necessarily the same as the value of the loss of the stick to the burdened land.

Still, the bundle-of-sticks analogy of property law is important in the taxation context for several reasons. First, it may be useful to resolve the ongoing issue of valuing land in subdivisions that is restricted for recreational use for the benefit of surrounding homeowners. One case, for example, held that there was no value whatsoever to a golf course that was subject to use restrictions. The court would actually have done well to remember the bundle of sticks from first-year property in law school.[67] The fact that some sticks have been transferred from the golf course bundle to the surrounding lots does not mean that all sticks have been removed from the golf course.[68] *24 The remaining sticks have some value and should be valued and taxed accordingly.[69] Poor application of the bundle-of-sticks analogy, not the concept itself, is the problem in these cases.

Second, the recent steps toward unifying easements and covenants into a single law of servitudes can be instructive in the real estate tax area.[70] Whatever method of valuation is chosen--the "additive" approach or the "summation of interests" view or a hybrid--it should be applied equally to easements and covenants. Both interests, after all, are consensual transfers of nonpossessory property rights and should be treated the same. Consider this example: under classic doctrine, a landowner could limit the height of buildings on his neighbor's land either by purchasing an *easement* of view or by entering into a height-restriction *covenant*. Although these have been viewed as different legal interests with different ramifications, they serve the identical function. It would be illogical to have different real estate tax valuations based on a meaningless distinction between the legal form that is used.[71] That would be especially ironic in the taxation area, where substance, not form, is said to control.[72]

The intersection of servitudes law and real estate taxation teaches an even more important lesson. In choosing the real estate taxation definition of "property" and "value" for land burdened by a servitude, the law should avoid unnecessary adverse effects on the general law of servitudes. The law of servitudes has struggled mightily to establish the appurtenance principle--the concept that the benefit and burden of the servitude move automatically with the properties to the next purchasers. The theoretical hurdle of binding a person who did not specifically agree to a burden had to be overcome. [73]

*25 Moreover, the subtlety of the appurtenance rule had to be learned not just by lawyers but by general citizens. The law assumes that consumer buyers of homes in common-interest communities (whether they are condominiums or subdivision developments) understand that they are bound by the recorded scheme of servitudes and related rules and regulations. Given that assumption, the purchasers are bound to the scheme.

Courts, therefore, should be careful not to undermine the appurtenance principle by creating exceptions, such as "you will be bound and benefited by matters of record *except* for real estate tax purposes, where different rules might apply." Consumer buyers of housing, unlike sophisticated ground lessors with experience and access to counsel, may not appreciate such complexities.

There is an even larger societal concern. Every time lawyers and judges say that "value" here does not mean "value" there, there is a risk of fostering cynicism in the general public about the legal system. People might view this as legal chicanery and twisting of words, a way for lawyers to maintain an unfair power over the legal system. Therefore, the costs of clashing definitions of "property" and "value" in different areas of the law must be balanced against the benefits of varying the meanings of words to accommodate different contexts.

Lessons to Be Learned--Regulatory Takings

Despite differences that have been suggested, general property law can still learn a great deal from real estate taxation about the meaning of "property" and "value." Consider the example of regulatory takings.

During the past eight years, the courts--led by the U.S. Supreme Court-- have been increasingly willing to recognize that land use regulations may create a regulatory taking. [74] Moreover, the Supreme Court held, for the first time, that monetary damages are available for such a deprivation. [75]

*26 One of the key issues in these cases has been defining the quantum of property rights that has been disturbed. The Court has indicated that if the owner is denied an "economically viable" use of her land because of regulation, then a taking may be found. [76] In *Lucas v. South Carolina Coastal Commission*, [77] for example, the Court held that a taking occurred, since the regulation barred any permanent structure on the land. Additionally, several states as well as Congress have considered enacting statutes requiring that compensation be paid if land use regulation reduces the value of a property by a specified percentage. [78]

Thus, defining and finding the "value" of land is critical in the new takings jurisprudence. The change in "value" of the land before and after the land use regulation must be calculated precisely for two purposes: to see whether too much value has been lost so that a taking will be found, and, if a taking is declared, to find the amount of monetary damages due the owner. The courts have been wrestling with the difficult issue of quantifying the amount of loss and damages. [79] The large body of real estate taxation law defining and calculating value could be a helpful resource in this effort. [80]

***27 Conclusion**

The meanings of "property" and "value" in general property law and real estate taxation diverge at times because of the flexibility of language and differing policy goals. Care must be taken not to borrow definitions from inappropriate contexts. Yet, if a careful comparative law approach is used, property law and real estate taxation can teach important lessons to each other about the meaning of "value" and "property."

Footnotes

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1 Southwestern Bell Tel. Co. v. Public Service Comm'n, 262 US 276, 310 (1923). See also BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1766 ("But what is the 'value'?").

2 For an overview of real estate taxation, see P. Rohan, Real Estate Tax Appeals § 2.01 (1988).

3 See infra notes 17-18 and accompanying text.

4 See P. Rohan, supra note 2, § 3.02.

5 See infra notes 19-23 and accompanying text.

6 See J. Bonbright, Valuation of Property (1937) (the seminal work on the theory, philosophy, and realities of valuation); See generally Levmore, "Self-Assessed Valuation Systems for Tort and Other Law," 68 Va. L. Rev. 771 (1982); Browning, "Land Value Taxation: Promises and Problems," J. Am. Planning Ass'n 301 (Nov. 1963).A statute might indicate the methods for assessment. See, e.g., Colo. Rev. Stat. § 39-1-103(5)(a) (1994) (describing the cost approach, market or comparable sales approach, and capitalization of income method). For more on these methods, see Brooks & Schultz, "Market Theory: An Approach to Real Property Valuation for State and Local Tax Purposes," 45 Tax Law. 339 (1992); C.F. Sirmans, Real Estate Finance ch. 5 (2d ed. 1989). Other statutes might describe value more generally. See, e.g., Ariz. Rev. Stat. § 42-201(4) (1994) (market value is "that estimate of value that is derived annually by the use of standard appraisal methods and techniques"); County of Maricopa v. Sperry Rand Corp., 112 Ariz. 579, 581, 544 P2d 1094, 1096 (1976) (approving the cost, comparable sales, and income capitalization methods).

7 Economists have also struggled with defining "value." See M. Dobb, Theories of Value and Distribution Since Adam Smith (1973).

8 See, e.g., Demsetz, "Toward a Theory of Property Rights," 57 Am. Econ. Rev. 347 (Pap. & Proc. 1967); Grey, "The Disintegration of Property," XII NOMOS 69-77 (1980); M. Horwitz, The Transformation of American Law 31-62 (1977) (illustrating the evolution of concept of property over time); S. Munzer, A Theory of Property (1990); Reich, "The New Property," 73 Yale LJ 733 (1964); Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," 53 U. Chi. L. Rev. 711 (1986).

9 See, e.g., Bedortha v. Sunridge Land Co., Inc., 312 Or. 307, 822 P2d 694 (1991); Day v. Day, 896 SW2d 373 (Text. Ct. App, 1995).

10 International Business Machines Corp. v. Comdisco. Inc., 602 A2d 74, 76 (Del. Ch. 1991) (despite the court's criticism, it applied the bundle-of-sticks analogy to leased equipment).

11 United States v. Ben-Hur, 20 F3d 313 (7th Cir. 1994). See also City of Milwaukee v. Greenberg, 163 Wis. 2d 28, 471 NW2d 33 (1991) (determining ownership to allocate the liability of a vendor and purchaser of land for demolition of a deteriorated building).

12 First Charter Corp. v. Fizgerald, 643 F2d 1011, 1014-1015 (4th Cir. 1981). See also Petition of Boyertown, 77 Pa. Commw. 357, 466 A2d 239 (1983).

13 Consider, for example, the different jurisdictional views on whether land subject to a restriction should be valued for taxation purposes with or without the restriction, with the majority of jurisdictions calculating the value of the fee subject to the casement. Youngman, "Defining and Valuing the Base of the Property Tax," 58 Wash. L. Rev. 713, 775 (1983).

14 See Kittery Elec. Light Co. v. Assessors, 219 A2d 728 (Me. 1966) (equating just value, market value, real value, true value).

15 See supra note 6, describing statutory definitions of terms.

16 When looking for the intent of the legislature, traditionally courts look to legislative history such as committee reports. In recent years, however, some have argued for a return to the plain-meaning rule in lieu of looking at legislative history:
Contrary to the remarkable "legislative history first" method of statutory construction pursued in Gingles, however, I had thought it firmly established that the "authoritative source" for legislative intent was the text of the statute passed by both houses of Congress

and presented to the President, not a series of partisan statements about purposes and objectives collected by Congressional staffers and packaged into a Committee Report. Holder v. Hall, 114 S. Ct. 2581 (1994) (Scalia, J., concurring). See generally Eskridge, "The New Textualism," 37 UCLA L. Rev. 621 (1990); Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. Cal. L. Rev. 845 (1992).The legislation is, of course, subject to constitutional review. See, e.g., WV Grant Evangelistic Ass'n v. Dallas Cent. Appraisal Dist., 900 SW2d 789 (Tex. Ct. App. 1995) (striking down statutory provision requiring that owner must prepay taxes as condition to bringing tax appeal).

17 County of Lenoir v. Moore, 114 NC App. 110, 116, 441 SE2d 589, 592 (1994).

18 Zelinger v. City and County of Denver, 724 P2d 1356, 1358 (Colo. 1986). See P. Rohan, supra note 2, Section 3.02[1] (describing formulas for funding through property tax).

19 In order to prevent discrimination between owners, many states that require land assessment at its "full value" have imposed equalization boards to prevent different assessments between districts. See Podell, Banfield, & Schuller, "Requirement for Equal Assessment of Real Estate: Myth or Reality," 205 NY LJ 48 (1991); Note, "Tax Assessments of Real Property: A Proposal for Legislative Reform," 68 Yale LJ 336, 339 (1958); see also U.S. Advisory Commission on Intergovernmental Relations, The Property Tax in a Changing Environment 236-242 (1972) (describing reforms to property tax administration); P. Rohan, supra note 2, Section 3.04[1] (discussing policies underlying full valuation); MacDougall & Jaffee, "Prospects for Assessment Reform: An Overview," in Property Tax Reform: The Role of the Property Tax in the Nation's Revenue System (Nat'l Assoc. of Assessment Officers, 1973).

20 "Uniformity and equality ... is ... the just and ultimate purpose of the law." Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 US 23, 29 (1931).

21 See, e.g., Colo. Const. Art. X, sec. 8 ("all taxes shall be uniform upon each of the various classes of real and personal property").

22 For cases discussing importance of proportional contributions, see City of Jefferson v. Missouri Dep't of Nat. Resources, 863 SW2d 844 (Mo. 1993); City of River Fall v. St. Bridget's Catholic Church of River Falls, 182 Wis. 2d 436, 513 NW2d 673 (Wis. Ct. App. 1994).

23 In re Merrick Holding Corp., 45 NY2d 538, 544, 382 NE2d 1341, 1344, 410 NYS2d 565, 568 (1978). See Recreation Ctrs. of Sun City, Inc. v. Maricopa County, 162 Ariz. 281, 782 P2d 1174 (1989) (cautioning that courts should not extend tax exemptions beyond constitutional text since that would shift tax burdens to other taxpayers).

24 Compare Ariz. Rev. Stat. § 42-178(B) (1994) ("The valuation or classification as approved by the appropriate state or county authority shall be presumed to be correct and lawful"); Recreation Ctrs. of Sun City, Inc. v. Maricopa County, 162 Ariz., 281, 285, 782 P2d 1174, 1178 (1989) (trial court may not make independent evaluation of value until taxpayer presents evidence to rebut statutory presumption that valuation is correct); LaSalle Nat'l Bank v. County of Cook, 57 Ill. 2d 318, 312 NE2d 252 (1974) (requiring a showing of willful or arbitrary behavior for court to impose its view over assessor); Aetna Life Ins. Co. v. City of Newark, 10 NJ 99, 89 A2d 385 (1952) (presumption of validity unless overcome by substantial evidence); Sibley v. Town of Middlefield, 143 Conn. 100, 120 A2d 77 (1956) (requiring court to set valuation); NY Real Prop. Tax Law § 702(1) (1995) (allowing de novo review by the trial court).

25 For criticism of the quality of tax assessment, see D. Paul, The Politics of the Property Tax 7- 8 (1975). For an earlier, and critical, view of the tax assessment process and standards, see Note, "Tax Assessments of Real Property: A Proposal for Legislative Reform," 68 Yale LJ 336 (1958).

26 Aetna Life Ins. Co. v. City of Newark, 10 NJ 99, 106, 89 A2d 385, 388 (1952).

27 Andrews v. Commissioner of Internal Revenue, 135 F2d 314, 315 (1943).

28 Youngstown Sheet & Tube Co. v. Mahoning County Bd. of Revision, 66 Ohio St. 2d 398, 408, 422 NE2d 846, 852 (1981) (Lochner, J., dissenting) (valuation of steel manufacturing facility closed due to loses), discussed in Brooks & Schultz, supra note 6.

29 See, e.g., Ark. Const., Art. 16, § 5(b) (exempting public property used for public purposes); Warman v. Tracy, 648 NE2d 833 (Ohio 1995) (exemption for charitable institution applies to house used as residence for nuns that is owned by nonprofit hospital at which the nuns work). See Durchslag, "Property Tax Abatement for Low-Income Housing: An Idea Whose Time May Never

Arrive," 30 Harv. J. Legis. 367 (1993); Buchele, "Justifying Real Property Tax Exemptions in Kansas," 27 Washburn LJ 252 (1988); Myers, "The Legal Aspects of Agricultural Districting," 2 Agricultural LJ 627 (1981); Pantaleoni, "New York's Real Property Tax Exemption for Religious, Educational, and Charitable Institutions: A Critical Examination," 44 Alb. L. Rev. 488 (1980); Morris, "Historic Preservation and the Law: Appraisals of Realty for Taxation," 3 Pace L. Rev. 673 (1981).

30 For cases permitting the use of tax valuations, see New Castle County v. 16.89 Acres of Land, 404 A2d 135 (Del. 1979); Vine Street Corp. v. City of Council Bluffs, 220 NW2d 860 (Iowa 1974); City of Muskegon v. Berglund Food Stores, Inc., 50 Mich. App. 305, 213 NW2d 195 (1973); Ransey County v. Miller, 316 NW2d 917 (Minn. 1982). See also City of Blue Springs v. Central Dev. Ass'n, 831 SW2d 655 (Mo. Ct. App. 1992) (permitting use of government tax form since witness was asked about property's fair market value, not assessed value).

31 See, e.g., State v. Griffith, 292 Ala. 123, 290 So. 2d 162 (1974); Cook v. City of Indianapolis, 559 NE2d 1201 (Ind. Ct. App. 1990); Mettee v. Urban Renewal Agency, 213 Kan. 787, 518 P2d 555 (1974); State ex rel. State Highway Comm'n v. Koziatek, 639 SW2d 86 (Mo. Ct. App. 1982); Holman v. Papio-Missouri River Natural Resources Dist., 246 Neb. 787, 795, 523 NW2d 510, 517 (1994). See P. Rohan, supra note 2, Section 11.03[3]; Nichols, The Law of Eminent Domain § 22.1 (rev. 3rd ed. 1995).

32 See Vine St. Corp. v. City of Council Bluffs, 220 NW2d 860 (Iowa 1974) (indicating that legislation changed inquiry in both areas to market value); Morley v. Jackson Redev. Auth., 632 So. 2d 1284 (Miss. 1994) (method of valuation for ad valorem taxes is different from fair market value inquiry in eminent domain).

33 See, e.g, Housing Auth. v. Republic Land & Inv. Co., 127 Ga. App. 84, 192 SE2d 530, 531 (1972).

34 See Hetherington Letter Co. v. City of Cedar Rapids, 207 NW2d 800 (Iowa 1973); Holman v. Papio-Missouri River Natural Resources Dist., 246 Neb. 787, 795, 523 NW2d 510, 517 (1994).

35 See State v. Griffith, 292 Ala. 123, 290 So. 2d 162 (1974).

36 See Stewart v. Town of Burlington, 2 Mass. App. Ct. 712, 319 NE2d 921 (1974).

37 See United States v. Anderson, 447 F2d 833 (8th Cir.), cert. denied, 405 US 918 (1971); United States v. Certain Parcels of Land, 261 F2d 287 (4th Cir. 1958).

38 These terms do not have clear meanings in assessment statutes. Youngman, supra note 13, at 721-725.

39 See supra notes 19-23 and accompanying text.

40 See Mass. Gen. Laws ch. 79, § 35 (1995) (valuation assessments within the three years preceding the taking are admissible).

41 See, e.g., New Castle County v. 16.89 Acres of Land, 404 A2d 135 (Del. 1979).

42 City of Muskegon v. Berglund Food Stores, Inc., 50 Mich. App. 305, 213 NW2d 195, 198 (1973).

43 See, e.g., Alabama Power Co. v. Hamilton, 342 So. 2d 8 (Ala. 1977); Morley v. Jackson Redev. Auth., 632 So. 2d 1284 (Miss. 1994) (allowing tax assessor's prior valuation to be used to impeach the government's appraiser in eminent domain action); Housing Auth. of Atlanta v. Republic Land & Inv. Co., 127 Ga. App. 84, 192 SE2d 530 (1972).

44 In re Lincoln Square Slum Clearance Project, 15 AD2d 153, 222 NYS2d 786, 795 (1961).

45 See N. Hecht, Long Term Lease Planning and Drafting (1974).

46 First, the lease may simply set a schedule of rents for the entire lease, including increases over time. The problem with this approach is that the parties can make only a rough guess as to the future value of the premises and general economic conditions. Alternatively, the lease may provide for a readjustment of the initial rent at set periods based on changes in the Consumer Price Index (CPI). Technical problems result, however, if (as was done in the late 1970s) the Bureau of Labor Statistics changes the method of calculation for the CPI. Moreover, a CPI adjustment at best reflects general inflation in the economy, and it does not indicate the upward or downward

changes in value of the specific property in question. On rent escalation in general, see M. Friedman, Friedman on Leases Section 5.4 (3d ed. 1990).

47 See, e.g., Loyalty Dev. Co. v. Wholesale Motors, Inc., 61 Haw. 483, 605 P2d 925 (1980) (new rent equals value of property multiplied by the interest rate of a lender).

48 The issue of "value" in rent recalculation cases is also similar to, and in some analytical ways even closer to, the effect of restrictive covenants on the value of land being valued for tax purposes.The long-term leases cases in the tax context involve leases with *disadvantageous* terms (i.e., submarket rent). If the leases were at market price, then the value of the land would not be depressed by the lease since, under a capitalization-of-income approach, the property would be throwing the appropriate amount of rent for such a property. It is only when the rent is below market and that rent amount is used with a capitalization-of- income approach that there is a problem with undervaluing the property.Even in the cases (e.g., Plaza Hotel Assocs. v. Wellington Assocs., Inc., 55 Misc. 2d 483, 285 NYS2d 941, aff'd, 28 AD2d 1209, 285 NYS2d 267, aff'd, 22 NY2d 846, 239 NE2d 736 (1968)) that presume that the lease and its restrictions should be considered in calculating value for rent escalation purposes, the courts do not consider the *amount of rent* required by the lease in setting value. Indeed, if they did, there would be a circular result--that is, the amount of rent in the lease would be used to calculate the value of the land using the income capitalization approach, and then, on the basis of that value, the "new' rent would be set (which could turn out to be exactly the same as the rent in the original lease, if the multiplier for the amount of return was the same in the escalation clause as the return contemplated in the original rent). See Hirt v. Hervey, 118 Ariz. App. 543, 578 P2d 624, n.1 (1978) ("Some judges have persuasively pointed out the circularity inherent in attempting to establish rent based on rent already fixed."); Cotati Alliance for Better Hous. v. Cotati, 148 Cal. App. 3d 280, 287, 195 Cal. Rptr. 825, 829 (1983) ("The process of making individual rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular: value is determined by rental income, the amount of which is in turn set according to value;" involving calculations under a rent control ordinance). Thus, the real issue in the rent escalation cases is the depression of the value of the land due to the effect of the *use restriction* in the lease which limits the use of the land below its "highest and best use" for the period of the lease. In this way, the better analogy may be to use restrictions. Still, the use restriction can be viewed as creating a "disadvantageous" long-term lease, which is precisely the valuation issue in the tax cases.

49 See, e.g., Recreation Ctrs. of Sun City, Inc. v. Maricopa County, 162 Ariz. 281, 782 P2d 1174 (1989) (noting that sometimes the presence of a lease makes the property more valuable, so that valuation without the lease may benefit the taxpayer); Schultz v. TM Florida- Ohio Realty Ltd. Partnership, 577 So. 2d 573 (Fla. 1991) (requiring assessment against all interests in the land); Valencia Ctr., Inc. v. Bystrom, 543 So. 2d 214 (Fla. 1989); Swan Lake Moulding Co. v. Department of Revenue, 257 Or. 622, 480 P2d 713 (1971) (basing value on potential not actual income); Cherokee Water Co. v. Gregg County Appraisal Dist., 773 SW2d 949 (Tex. Ct. App. 1989). See Youngman, supra note 13 at 718-746 (showing that this result is consistent with goals of the real estate tax system).Other courts take a more flexible approach, not requiring that potential income be used but instructing the assessor to consider both actual and potential rental. See, e.g., City and County of Denver v. Board of Assessment Appeals, 848 P2d 355 (Colo. 1993); Folsom v. County of Spokane, 106 Wash. 2d 760, 725 P2d 987 (1986). One court stated:

Placing a value on real property is not an exact science. When relying on the income capitalization method to determine value, the factfinder necessarily has some discretion to decide what weight will be given to actual rent, as opposed to potential market rent, in reaching its decision. Where the lease was prudent when entered into, the Commission is quite correct to consider actual rent as a factor in determining the value of the property under the income capitalization method. Missouri Baptist Children's Home v. State Tax Comm'n, 867 SW2d 510, 513 (1993).

50 See, e.g., First Nat'l Bank v. Duckworth, 502 So. 2d 709 (Ala. 1987); Eltinge & Graziado Dev. Co. v. Childs, 49 Cal. App. 3d 294, 122 Cal. Rptr. 369 (1975); cf. Humphries Inv. Inc. v. Walsh, 202 Cal. App. 3d 766, 248 Cal. Rptr. 800 (1988) (requiring value to be calculated subject to zoning restrictions). See M. Friedman, supra note 46, at 800-803.

51 See, e.g., Plaza Hotel Assocs. v. Wellington Assocs., Inc., 55 Misc. 2d 483, 285 NYS2d 941, aff'd, 28 AD2d 1209, 285 NYS2d 267, aff'd, 22 NY2d 846, 239 NE2d 736 (1968).

52 There is another difference as well. When a valuation for real estate taxation is low, the taxpayer likely will not challenge it. Thus, litigated cases mostly involve attempts to overturn the higher value of land set by the taxing authority. Since the higher valuation of the taxing authority receives some degree of deference from the courts, there is less attention paid to the arguments for lower value. In a dispute between private parties over value, however, there is no bias for the higher value, and thus the judicial determination of standards of value may be more evenhanded. See supra note 24.

53 See text accompanying supra notes 15-29.

54 But see Bullock's, Inc. v. Security-First Nat'l Bank, 160 Cal. App. 2d 277, 283, 325 P2d 185, 189 (1958) (adopting the contrary position: "if the parties had intended anything other than market value, they would have said so expressly").

55 Plaza Hotel Assocs. v. Wellington Assocs., Inc., 55 Misc. 2d 483, 487, 285 NYS2d 941, 945, aff'd, 28 AD2d 1209, 285 NYS2d 267, aff'd, 22 NY2d 846, 239 NE2d 736 (1968).

56 See, e.g., Bullock's, Inc. v. Security-First Nat'l Bank, 160 Cal. App. 2d 277, 325 P2d 185 (1958) (using dictionary and eminent domain cases; "the term cannot be given a limited or special meaning, as distinguished from its usual definition").

57 The term "servitudes" reflects the recent drive for unification of the law of easements and the law of covenants, with common rules to bind both interests wherever possible. This unification is being effectuated in the current drafts of the Restatement of Property (Third)--Servitudes. See French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," 73 Cornell L. Rev. 928 (1988). See also C. Berger, "Some Reflections on a Unified Law of Servitudes," 55 S. Cal. L. Rev. 1323 (1982); L. Berger, "Integration of the Law of Easements, Real Covenants and Equitable Servitudes," 43 Wash. & Lee L. Rev. 337 (1986); Winokur, "Ancient Strands Rewoven, or Fashioned Out of Whole Cloth? First Impressions of the Emerging Restatement of Servitudes," 27 Conn. L. Rev. 131 (1994).

58 See Korngold, "Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination," 1990 Wis. L. Rev. 513. For a discussion of servitudes benefits, see Alexander, "Freedom, Coercion, and the Law of Servitudes," 73 Cornell L. Rev.883 (1988); Browder, "Running Covenants and Public Policy," 77 Mich. L. Rev. 12 (1978); Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls," 40 U. Chi. L. Rev. 681 (1973); Sterk, "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions," 70 Iowa L. Rev. 615 (1985).

59 Korngold, "Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination," 1990 Wis. L. Rev. 513; Korngold, "Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements," 63 Tex. L. Rev. 433 (1984).

60 Reciprocal restrictions in a residential subdivision may increase the values of all properties. See Adult Group Properties, Ltd. v. Imler, 505 NE2d 459 (Inc. Ct. App. 1987) (recognizing that the value of the subdivision lots is increased by the restrictions). Still, if one lot in a 1,000 lot subdivision were freed from the restrictions, it would likely have a premium value since it would have a monopoly on providing commercial services in the area.

61 Value of a servitude is found by the courts on various occasions. When an easement is taken by eminent domain, compensation is paid, with the easement usually valued as the difference in the fair market value of the benefitted property with and without the easement. G. Korngold, Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes § 6.14 (1990). When a restrictive covenant is taken by eminent domain, damages may be calculated in one of two ways: the difference between the fair market value of the benefitted or burdened property before and after the violation. Id., § 11.11. If a restrictive covenant is violated by the owner of the burdened land, damages are also calculated as the difference in the fair market value of the benefitted property before and after the breach. Id., § 10.11.

62 See, e.g., Crabbe v. Verve Assocs., 549 A2d 1045 (Vt. 1988) (roadway easement obstructed, resulting in decrease of market value of two benefitted lots in the amounts of $10,000 and $7,000 respectively); see Hall v. Robbins, 790 SW2d 417 (Tex. Ct. App. 1990); G. Korngold, supra note 61, § 4.17.

63 Youngman, supra note 13, at 774- 811.

64 See, e.g., District of Columbia v. Capital Mortgage & Title Co., 84 F. Supp. 788 (DDC 1949) (easement); Recreation Ctrs. of Sun City, Inc. v. Maricopa County, 162 Ariz. 281, 782 P2d 1174 (1989) (recreational use restriction); Liddell v. Mimosa Lakes Ass'n, 6 NJ Tax 417 (1984); Almogordo Improvement Co. v. Predergast, 43 NM 245, 91 P2d 428 (1939) (restrictive covenant); People ex re. Poor v. O'Donnel, 139 AD 83, 124 NYS 36, aff'd mem. sub nom. People ex re. Poor v. Wells, 200 NY 519, 93 NE 1129 (1910) (perhaps the initial declaration of the rule). See Nichols, Real Property Taxation of Divided Interests in Land, 11 Kan. L. Rev. 309, 320 n.94 (1963). See Menikoff, "The Taxation of Restricted- Use Property: A Theoretical Framework," 27 Buffalo L. Rev. 41 (1978) (criticizing the early New York cases).

65 Youngman, supra note 13, at 777.1 J.C. Bonbright, The Valuation of Property 497 (1937) gives examples to criticize the additive approach:

An easement of passage over A's forest land to the road may greatly enhance the value of B's hotel property without correspondingly depreciating A's land; while on the other hand an easement of light over C's lot may merely make D's backyard slightly pleasanter while preventing C from building an apartment house.> The second of Bonbright's hypotheticals is questionable, however. Assuming rational actors, rather than people acting for idiosyncratic reasons, it is hard to understand how the situation of *C* and *D* continues. A rational *C* would not have accepted the burden in the first place if it was against her economic interest; or if this is a matter of changed circumstances, *C* would have brought the servitude back from a rational *D* who would have accepted an amount more than the slight benefit to him (and less than the gain that *C* would have by removing the servitude).

66 The concept supporting the additive theory--that is, that the value of the benefited lot is increased by the same amount as the value of the servient lot is decreased (see People ex. rel. Poor v. Wells, 200 NE 519, 93 NE 1129 (1910))--may actually *undervalue* the total property interests of the two owners. Under an economics principle known as "gains from trade" theory, the total value of the two parcels of land typically increases when a servitude is place on one for the benefit of the other, assuming that we are dealing with rational actors. Suppose that *A* seeks a servitude (e.g., a right of way) over *B*' s land. If *B* valued the burden on his land at the same amount that *A* valued the benefit of that easement to *A*'s land (e.g., $10), then the transaction would never take place--neither would want to go through the bother (i.e., the transaction costs) to simply exchange $10 for $10. The transaction will occur only when *A* values the benefit of the easement at a higher amount (e.g., $15) than *B* values the burden of the easement (e.g., $10); *B* will make the deal at some amount between $10.01 and $14.99, with the exact amount depending on how they negotiate. In any case, *A* will be happy, having paid something less than the $15 that the easement was worth to him, and *B* is also happy having received compensation greater than the $10 worth of burden caused to him by the easement. Assuming both lots were worth $100 before the transaction, *A*'s lot is now worth $115 and *B*'s lot is worth $90; the total land values have increased by $5 to $205. If land is valued subject to the existing benefits and burdens, that would bring additional revenue to the taxing entity and reflect the increased values brought by servitude arrangements. Moreover, valuing land with the servitudes in place may bring administrative benefits in that the assessor can look to actual comparable sales, especially if this is a subdivision setting with other houses, rather than having to calculate value based on a hypothetically unrestricted land. Finally, as with any change in method, if we were to suddenly switch to a system of assessing property free and clear of restrictions, we would be redistributing wealth between *A* and *B* because *B* would be paying higher taxes than he thought.

67 See, e.g., Twin Lakes Golf & Country Club v. King County, 87 Wash. 2d 1, 548 P2d 538 (1976) (holding that course subject to zoning and restrictive covenants had no fair market value); but see Sahalee Country Club, Inc. v. State Board of Tax Appeals, 108 Wash. 2d 26, 735 P2d 1320 (1987) (finding residual value on the burdened land). See generally Schultz, "The Real Property Taxation of Common Areas in Planned Unit Developments: Advocating the Rights of Homeowners Associations," 1983 Utah L. Rev. 825.

68 See Lake County Bd. of Review v. Property Tax Appeal Bd., 91 Il. App. 3d 117, 46 Ill. Dec. 451, 414 NE2d 173 (1980) (although the property benefits others, it still has some value).

69 See Recreation Ctrs. of Sun City, Inc. v. Maricopa County 162 Ariz. 281, 782 P2d 1174 (1989) (although land was not marketable, it still had value to the owner and should be taxed accordingly).

70 See supra note 57.

71 The value of a home is increased because it is located next to undeveloped parkland even though the homeowner has no legal right to prevent development. If the owner holds a servitude over the park, the value of the home should be increased even more because the continuation of the park benefit is guaranteed for the owner and for future buyers.

72 See Lock Lake Colony v. Town of Barnstead, 126 NH 136,489 A2d 120 (1985) (treating use restrictions in homeowners' association like easements). The actual increase or decrease in value must be shown, however. See Recreation Ctrs. of Sun City, Inc. v. Maricopa County, 162 Ariz. 281, 782 P2d 1174 (1989) (no evidence presented to show that restriction of use of community facilities benefited lot owners; cost of dues could outweigh the benefits, depending on the facts).

73 See Korngold, supra note 59, 63 Texas L. Rev. at 448.

74 See, e.g., Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) ("rough proportionality" required between impact of the development and dedication of easement); Nollan v. California Coastal Comm'n, 483 US 825 (1987) (finding lack of nexus between exaction and the harm government sought to prevent). See Michelman, "Takings 1987," 88 U. Colo. L. Rev. 1600 (1988).

75 First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US 304 (1987). Where government withdraws the ordinance after a taking is found, the land owner receives only interim damages (i.e., for the period between the passage of the regulation and its withdrawal). Id. See Peterson, "Land Use Regulatory Takings Revisited," 39 Hastings LJ 335 (1988).

76 See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470 (1987); Penn Cent. Transp. Co. v. City of New York, 438 US 104 (1987).

77 112 S. Ct. 2886 (1992).

78 See Lund, Property Rights Legislation in the States: A Review (PERC Policy Series, 1995); Jacobs & Ohm, "Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals," 2 Wis. Envt. LJ 173 (1995).

79 See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 911 F2d 1331 (9th Cir. 1990), cert. denied, 499 US 943 (1991); Wheeler v. City of Pleasant Grove, 833 F2d 267 (11th Cir. 1987); Monroe County v. Gonzales, 593 So. 2d 1143 (Fla. Dist. Ct. App. 1992).

80 In calculating value for real estate taxation, the land must be assessed subject to the burden of land use regulation. See, e.g., Security Management Corp. v. Markham, 516 So. 2d 959 (Fla. Dist. Ct. App. 1987); Devoe v. Dept. of Revenue, 233 Mont. 190, 759 P2d 991 (1988).Moreover, the recent regulatory takings debate has led courts and commentators to reevaluate the nature of property itself and the extent to which property is free from governmental interference. For example, Chief Justice Rehnquist has asserted in dissent that if governmental action removes just one of the many sticks of the ownership bundle, then government must pay for that particular stick. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 517 (1987); see R. Epstein, Takings 93-104 (1985). It is argued that the fact that the owner is left with 98 percent of his land's value does not mean that a taking did not occur as to the other two percent. In dealing with these issues, we can learn from real estate taxation law's flexible meaning of "property," and we can approach the issue creatively.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY, under the penalty of perjury that on this 6th day of May, 2011, an original and eleven copies of the foregoing Brief and Appendix of Appellant was sent via Federal Express to the Office of the Clerk, United States Court of Appeals for the Federal Circuit and further certify that I served, via first class mail, postage prepaid two copies to the following:

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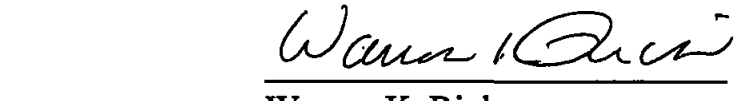
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 28(a)(14) and Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Appellant hereby certifies that the foregoing Brief of Appellant complies with the type-volume limitation proscribed in Federal Rule of Appellate Procedure 32(a)(7)(b) and also typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief was prepared in proportionally spaced typeface using the Word Perfect 12 word processing program in Times New Roman, 14 point typeface.

Appellant's counsel has relied on the word count function of the word-processing program used to prepare this Brief of Appellant, which indicates that this brief contains 6303 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

APPEAL, CLOSED, ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:08-cv-00768-SGB

RESOURCE CONSERVATION GROUP, LLC v. USA
Assigned to: Judge Susan G. Braden
Demand: $500,000
Case in other court: 11-05063
Cause: 28:1491 Tucker Act

Date Filed: 10/24/2008
Date Terminated: 01/11/2011
Jury Demand: None
Nature of Suit: 122 Contract - Bid Preparation Costs
Jurisdiction: U.S. Government Defendant

Plaintiff

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Date Filed	#	Docket Text
10/24/2008	1	COMPLAINT against USA (NAV) (Filing fee $250, Receipt number 068818) (Five copies to Department of Justice), filed by RESOURCE CONSERVATION GROUP, LLC. **Answer due by 12/23/2008.** (Attachments: # 1 Civil Cover Sheet)(hwl,) (Entered: 10/28/2008)
10/24/2008	2	NOTICE of Assignment to Judge Susan G. Braden. (hwl,) (Entered: 10/28/2008)
10/24/2008	3	NOTICE of Designation of Electronic Case. (hwl,) (Entered: 10/28/2008)
11/19/2008	4	NOTICE of Appearance by Christopher Andrew Bowen for USA. (Bowen, Christopher) (Entered: 11/19/2008)
12/23/2008	5	MOTION to Dismiss pursuant to Rule 12(b)(1), MOTION to Dismiss pursuant to Rule 12(b)(6), filed by USA.**Response due by 1/23/2009.** (Attachments: # 1 Exhibit Government Exhibit 1)(Bowen, Christopher) (Entered: 12/23/2008)
01/23/2009	6	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6) MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6) *Plaintiff's Opposition to Defendant's Motion to Dismiss*, filed by RESOURCE CONSERVATION GROUP, LLC.**Reply due by 2/6/2009.** (Zhang, Zhen) (Entered: 01/23/2009)
01/23/2009	7	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6) MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6) *Plaintiffs Opposition to Defendant's Motion to Dismiss*, filed by RESOURCE CONSERVATION GROUP, LLC.**Reply due by 2/6/2009.** (Attachments: # 1 Exhibit Exhibit 1) (Zhang, Zhen) (Entered: 01/23/2009)
01/23/2009	8	MOTION for Hearing *Plaintiff's Request for Hearing*, filed by RESOURCE CONSERVATION GROUP, LLC.**Response due by 2/9/2009.**(Zhang, Zhen) (Entered: 01/23/2009)
01/29/2009	9	Unopposed MOTION for Extension of Time until February 13, 2009 to Reply In Support of Motion to Dismiss, filed by USA.**Response due by 2/17/2009.** (Bowen, Christopher) (Entered: 01/29/2009)
02/02/2009	10	ORDER granting 9 Motion for Extension of Time. **Brief due by 2/13/2009.** Signed by Judge Susan G. Braden. (dd) (Entered: 02/02/2009)
02/13/2009	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12 (b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6) MOTION to Dismiss pursuant to Rule 12(b)(1) MOTION to Dismiss pursuant to Rule 12(b)(6), filed

		by USA. (Bowen, Christopher) (Entered: 02/13/2009)
02/23/2009		Minute Entry for proceeding held in Washington, DC on 2/23/2009, ended on 2/23/2009, before Judge Susan G. Braden: Scheduling Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(dd) (Entered: 02/23/2009)
02/23/2009	12	ORDER granting 8 Motion for Hearing. **Hearing set for 3/12/2009 at 02:00 PM in National Courts Building before Judge Susan G. Braden.** Signed by Judge Susan G. Braden. (dd) (Entered: 02/23/2009)
03/13/2009		Minute Entry for proceeding held in Washington, DC on 3/12/2009, ended on 3/12/2009, before Judge Susan G. Braden: Oral Argument. [Total number of days of proceeding: 1]. Official record of proceeding taken by court reporter. (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(dd) (Entered: 03/13/2009)
03/17/2009	13	Notice Of Filing Of Official Transcript for proceedings held on March 12, 2009 in Washington, DC. (dwl) (Entered: 03/17/2009)
03/17/2009	14	TRANSCRIPT of Proceedings (pages 1-28) held on March 12, 2009 before Judge Susan G. Braden. Procedures Re: Electronic Transcripts and Redactions. For copy, contact Heritage Court Reporting, (202) 628-4888. Forms to Request Transcripts. Notice of Intent to Redact due 3/24/2009. Redacted Transcript Deadline set for 4/17/2009. Release of Transcript Restriction set for 6/15/2009. (dwl) (Entered: 03/17/2009)
03/31/2009	15	PUBLISHED MEMORANDUM OPINION AND FINAL ORDER granting 5 Motion to Dismiss - Rule 12(b)(1). The Clerk is directed to enter judgment. Signed by Judge Susan G. Braden. (dd) (Entered: 03/31/2009)
04/06/2009	16	JUDGMENT entered, pursuant to Rule 58, that the complaint is dismissed. (lld) (Entered: 04/06/2009)
06/04/2009	17	NOTICE OF APPEAL, filed by RESOURCE CONSERVATION GROUP, LLC. Filing fee $ 455, receipt number 069668. Copies to judge, opposing party and CAFC. (hwl,) (Entered: 06/08/2009)
03/01/2010	18	Decision of the Court of Appeals for the Federal Circuit. Mandate should issue in use course (approx. 52 days) by 4/26/2010. (hwl,) (Entered: 03/24/2010)
06/01/2010	19	MANDATE of CAFC affirming in part and reversing in part Published Opinion/Order directing the Clerk to enter judgment and Remanding back to US Court of Federal Claims. (hwl,) (Entered: 06/03/2010)
06/11/2010	20	NOTICE of Appearance by Warren K. Rich for RESOURCE CONSERVATION GROUP, LLC. (Rich, Warren) (Entered: 06/11/2010)
09/20/2010		Minute Entry for proceeding held in Washington, DC on 9/16/2010 before Judge Susan G. Braden: Status Conference. [Total number of days of

		proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(rr2) (Entered: 09/20/2010)
09/30/2010	21	*Supplemental Memorandum in Opposition to Defendant's 12(b)(6) Motion to Dismiss*, filed by RESOURCE CONSERVATION GROUP, LLC.(Rich, Warren) Modified on 10/20/2010 to edit docket text. (dls). (Entered: 09/30/2010)
10/18/2010	22	SUPPLEMENTAL REPLY to 21 Supplemental Memorandum in Opposition to Defendant's 12(b)(6) Motion to Dismiss, filed by USA. (Bowen, Christopher) Modified on 10/20/2010 to edit docket text. (dls). (Entered: 10/18/2010)
10/21/2010	23	First MOTION for Leave to File Sur-reply Memorandum of Law, filed by RESOURCE CONSERVATION GROUP, LLC.**Response due by 11/8/2010.** (Rich, Warren) (Entered: 10/21/2010)
10/21/2010	24	RESPONSE to 23 First MOTION for Leave to File Sur-reply Memorandum of Law, filed by USA.**Reply due by 11/1/2010.** (Bowen, Christopher) (Entered: 10/21/2010)
10/22/2010	25	REPLY to Response to Motion re 23 First MOTION for Leave to File Sur-reply Memorandum of Law, filed by RESOURCE CONSERVATION GROUP, LLC. (Rich, Warren) (Entered: 10/22/2010)
10/22/2010	26	ORDER granting 23 Motion for Leave to File Sur-Reply. **Sur-Reply due by 10/29/2010** Signed by Judge Susan G. Braden. (rr2) (Entered: 10/22/2010)
10/28/2010	27	SUR-REPLY re 21 *Supplemental Memorandum in Opposition to Defendant's 12(b)(6) Motion to Dismiss*,, filed by RESOURCE CONSERVATION GROUP, LLC. (Rich, Warren) (Entered: 10/28/2010)
01/11/2011	28	Memorandum Opinion and Final Order granting 5 the Government's Motion to Dismiss. The Clerk is directed to enter judgment. Signed by Judge Susan G. Braden. (rr2) (Entered: 01/11/2011)
01/11/2011	29	JUDGMENT entered pursuant to Rule 58, that the complaint is dismissed, with prejudice, pursuant to RCFC 12(b)(6). (lld) (Entered: 01/11/2011)
03/09/2011	30	NOTICE OF APPEAL, filed by RESOURCE CONSERVATION GROUP, LLC. Filing fee $ 455, receipt number 072035. Copies to judge, opposing party and CAFC. (hwl) (Entered: 03/09/2011)
03/11/2011		CAFC Case Number 2011-5063 for 30 Notice of Appeal filed by RESOURCE CONSERVATION GROUP, LLC. (hwl) (Entered: 03/11/2011)

PACER Service Center
Transaction Receipt

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RESOURCE CONSERVATION
GROUP, LLC
1 Church View Road
Millersville, Maryland 21108

Plaintiff

v.

08-768 C

No. _____

UNITED STATES DEPARTMENT
OF THE NAVY

Defendant

COMPLAINT

Plaintiff Resource Conservation Group, LLC ("RCG"), by and through its attorneys, Zhen Zhang and Rich and Henderson, P.C., hereby sues the United States Department of the Navy ("Navy") and for cause thereof state as follows:

PARTIES

1. Plaintiff, RCG, 1 Churchview Road, Millersville, MD 21108, is comprised of two Maryland corporations, Reliable Contracting and Chaney Enterprises.

2. Defendant, is U.S. Department of the Navy at Naval Facilities Engineering Command Washington, 1314 Harwood Street, S.E., Washington Navy Yard, D.C. 20374-5018.

JURISDICTION

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1491(a)(1) in that Plaintiff seeks to recover damages as a result of an implied contract with the United States via the U.S. Department

of the Navy.

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) as the damages claimed exceeds Ten Thousand Dollars ($10,000.00) where the United States is the defendant.

FACTS

5. In 2005, the Navy was authorized to lease an 875 acre Dairy Farm after it was no longer used by the U.S. Naval Academy. On November 28, 2005, the Navy issued the Request of Interest, (ROI) LO-10019. In early 2006, the Navy received expressions of interests from several groups to lease the Dairy Farm, one of which was RCG. RCG expressed an interest in a limited mining activity at the Dairy Farm and later reclaiming the property by establishing natural areas including wetlands and bogs. The expression of interest is attached as Exhibit 1.

6. On February 27, 2007, with the Navy's explicit written approval, RCG entered the Dairy Farm to survey and test the area for the presence of sand and gravel. Based on the findings, RCG subsequently prepared a site analysis and produced mining plans for the property. RCG submitted a formal proposal to lease on or before the March 19, 2007 deadline.

7. The Navy was aware at all times that RCG's primary interest in the Dairy Farm was based on leasing it for mining purposes. RCG's intent on using the Dairy Farm as a sand and gravel mine was also well documented by area newspapers. At all times, RCG was encouraged to submit a bid for its use, this is evidenced by the Navy's authorization of a license to RCG to investigate and take drill borings on the property.

8. On April 30, 2007, Joan M. Markley, the Contracting Officer for the Navy wrote to RCG stating that RCG's proposal "does not fall within the scope of the solicitation" because disposal of real property is prohibited. The April 30, 2007 letter is attached as Exhibit 2. Ms. Markley

explained that 10 U.S.C. § 6976 only permits the leasing of the Dairy Farm and since embedded sand and gravel constitute real property, permitting the removal of sand and gravel would constitute disposal of real property. Ms. Markley then stated that the bid will not be considered. During the entire period of interactions between RCG and the Navy involving the Dairy Farm, the Navy had knowledge or should have had knowledge of such a prohibition. The Navy's implied assurances caused RCG to suffer financial harm by inducing RCG to uselessly incur costs to submit the formal bid proposal.

9. RCG requested a debriefing and the parties met on September 13, 2007. At the meeting RCG reiterated that it had clearly communicated to the Navy that RCG intended to use the property for sand and gravel mining. The Navy responded two fold: (1) that the "disposal" of real property was not authorized in Section 6976 of Title 10, and (2) that the Navy was under no obligation to tell a proposed "bidder" that its bid would not qualify for review or evaluation.

10. The Navy's failure to inform RCG that its bid would not be considered caused RCG to incur economic detriment due to expenditures on a proposal that the agency would never consider. In fact, the Navy's Notice of Availability for Lease # N4008007RP00005 did not prohibit mining on the property. The Notice of Availability required the bids to contain detailed technical information including proposed design and construction, anticipated environmental impacts, mitigation taking into account the environmental impacts, technical aspects of implementation, and identification of assets and resources to finance the proposed undertaking. Appendix F of the Notice, "List of Prohibited Uses," did not prohibit the leasing of the Dairy Farm to a mining company as the activity does not "adversely affect[] health, safety, morals, welfare, morale, and discipline of the Armed Forces, such as sale or use of drug abuse paraphernalia . . ." or "require[] an environmental

permit for the storage, treatment, transportation, disposal, or manufacture of hazardous materials."

11. The Navy erroneously interpreted 10 U.S.C. § 6976 to mean that a leasehold to a mining operation is outside its authority because "mining" is the equivalent of the "disposal" of property. Nothing in section 6976 states that the Dairy Farm could not be leased to a mining operation. The mineral rights may be leased to RCG without disposing of the property or violating section 6976. The prohibition in section 6976 contemplates the sale of a portion or all of the 875 acre Dairy Farm, which would cause fragmentation of the property and endanger the goal of maintaining the "rural and agricultural nature" of the property, not leasing the property to a mining operation.

12. The Navy not only erroneously interpreted 10 U.S.C. § 6976, but the Navy had an obligation to communicate its interpretation to potential bidders before the Notice of Availability for Lease was issued. The Navy's conduct caused RCG to expend time and incur fees and expenses in preparing a bid that it was never going to consider.

13. RCG's proposal to lease the Dairy Farm for mining purposes should have been considered for the bid because it met the requirements set out in the Notice of Availability, especially in that it satisfied the Navy's objectives such as entering into a long-term business relationship with a responsible party, maximizing value to the U.S. Naval Academy, and responsible management of environmental and cultural resources. If the proposal had been considered, it would have had a substantial chance of being selected because the plan would have reclaimed mined areas with wetlands and bogs and maintained the "rural" nature of the property. By erroneously finding Plaintiff's bid as nonresponsive, the Navy made an inappropriate award decision because it failed to fairly consider all bid submission.

COUNT I
Breach of Implied Contract

14. Plaintiff hereby incorporates by reference the allegations of paragraphs one (1) through thirteen (13) of the Complaint.

15. 10 U.S.C. § 6976 does not prohibit a leasehold to a mining operation; therefore, Plaintiff's bid should have been considered. The Navy created an implied contract of honest and fair consideration of RCG's bid by inducing RCG to prepare a bid and by inviting RCG to bid, knowing the substantial requirements of its bid proposal, knowing that RCG would propose a sand and gravel mine operation, and it must be necessarily implied that the Navy promised to give RCG's bid a fair and impartial consideration. If the Navy had given RCG's bid such consideration, RCG would have had a substantial chance in winning the bid.

16. The Navy breached the implied contract to judge honestly and fairly all bids submitted in response to the solicitation by disqualifying RCG with information that it knew or should have known, but failed to disclose to RCG, before RCG incurred the expenses of composing and submitting the formal proposal. Further, the Navy had the obligation of fair dealing to apprise all potential bidders of its interpretation regarding the merits of the bid.

WHEREFORE, Plaintiff requests Five Hundred Thousand Dollars ($500,000.00) in damages associated with costs and fees incurred during the bid and proposal preparation and any other relief this Court finds appropriate.

COUNT II
Violation of the Administrative Procedure Act

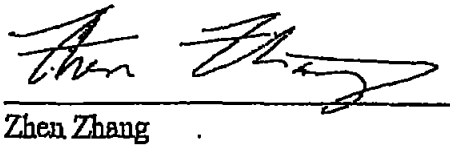
17. Plaintiff hereby incorporates by reference the allegations of paragraphs one (1) through sixteen (16) of the Complaint.

18. Defendant's actions were arbitrary and capricious, in violation of the implied contract of fair and honest consideration and the Administrative Procedure Act. 5 U.S.C. § 706.

19. Defendant's actions were arbitrary and capricious and in violation of the Administrative Procedure Act in that Plaintiff conformed to the requirements of the invitation for bids and should not have been rejected as nonresponsive. 5 U.S.C. § 706.

20. Defendant's actions were arbitrary, capricious, an abuse of discretion and in violation of the Administrative Procedure Act which resulted in an inappropriate bid award as RCG would have had a substantial chance of winning the bid if RCG's bid was given fair and impartial consideration. 5 U.S.C. § 706.

WHEREFORE, Plaintiff requests Five Hundred Thousand Dollars ($500,000.00) in damages associated with costs and fees incurred during the bid and proposal preparation and any other relief this Court this appropriate.



Zhen Zhang
RICH AND HENDERSON, P.C.
51 Franklin Street, Suite 300
P.O. Box 589
Annapolis, MD 21404-0589
Phone - (410) 267-5900
Facsimile - (410) 267-5901

Attorneys for Plaintiff
Date: October 24, 2008

CHANEY ENTERPRISES

CHANEY-RELIABLE JOINT VENTURE

RELIABLE CONTRACTING CO., INC.

1 Church View Road ~ Millersville ~ MD ~ 21108

Jan. 16, 2006

Ms. Joan Markley
Department of the Navy
Real Estate Contracting Officer
Naval Facilities Engineering Command Washington
1314 Harwood Street, SE Building 212
Washington Navy Yard, DC 20374

RE: ROI LO – 10019
Proposed Outlease of the U.S. Naval Academy
Dairy Farm in Gambrills, MD

Dear Ms. Markley:

We are pleased and proud to offer our formal Expression of Interest (EOI) in Outleasing U.S. Naval Academy Dairy Farm in Gambrills, Maryland for your perusal. Our Expression of Inte (EOI) provides a unique proposal to enhance the ultimate use of this property while simultaneous maximizing the current income potential of The U.S. Naval Academy Dairy Farm.

Chaney Enterprises and Reliable Contracting are both family owned and operated busines which are recognized as the leaders in their industry in Maryland. They have a combined history success of over one hundred and twenty years. Chaney Enterprises and Reliable Contracting also recognized as industry leaders on the National level. The principals of these companies e have a lifetime of experience in the industry with proven records of success and impeccable integr of character which permeates throughout the companies.

Chaney Enterprises and Reliable Contracting both use leading edge processes procedures to operate their business. Each places their primary emphasis on people through hi internal and external customer satisfaction standards and goals. Safe operation in environmentally responsible manner is the primary concern of all of the people employed with th companies. We are welcome members of the communities we serve and are committed to retaini and enhancing this status.

Thank you for the consideration you have given our Expression of Interest in our Prop *Outlease of the U.S. Naval Academy Dairy Farm in Gambrills, Maryland. We fully understand a* agree to the terms stated in the (ROI) LO-10019 as modified in our Expression of Interest (submittal. We look forward to meeting with you at your convenience to discuss our Expressic Interest submittal.

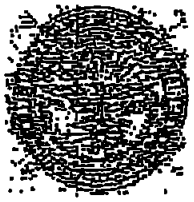
William F. Childs IV
President and CEO
Chaney Enterprises, LP.

P.O. Box 548
Waldorf, MD 20604

Joseph G. Baldwin
President and CEO
Reliable Contracting Company, Inc,

1 Church View Road
Millersville, MD 21108

EXHIB
1



DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND WASHINGTON
1314 HARWOOD STREET SE
WASHINGTON NAVY YARD DC 20374-5018

IN REPLY REFER TO

LD-10019/Ser REB 248
April 30, 2007

Attn: Mr. William H. Natter, Jr.
Resource Conservation Group, LLC
1 Church View Road
Millersville, MD 21108

Subj: SOLICITATION N40080O7RP00005

Ladies and Gentlemen:

The Government has received your response to the subject solicitation, and has determined that the activities and transactions proposed do not fall within the scope of the solicitation because they constitute the disposal of real property.

The Government solicited for offers to lease certain property, under the authority codified at 10 U.S.C. 6976. In accordance with the Federal Property Management Regulations (41 C.F.R. 102-71 et seq.), embedded sand and gravel constitute real property. The authority under which the solicitation was made does not grant authority for the disposal of real property.

Your response to the solicitation is appreciated, and I regret that it cannot be granted further consideration. If you have any questions, please contact Paul Stewart at (202) 685-3068.

Sincerely,

JOAN M. MARKLEY
Director of Real Estate
Real Estate Contracting Officer

EXHIBIT
2

NO. 08-768C
(Judge Braden)

IN THE UNITED STATES COURT OF THE FEDERAL CLAIMS

RESOURCE CONSERVATION GROUP, LLC,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Defendant.

DEFENDANT'S MOTION TO DISMISS

GREGORY G. KATSAS
Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK MANHARDT
Assistant Director

Christopher A. Bowen
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street N.W.
Washington, DC 20530
Tele: (202) 305-7594
Fax: (202) 514-8624

Attorneys for Defendant

December 23, 2008

STATEMENT OF THE CASE

I. Nature Of The Case

RCG brings this case pursuant to 28 U.S.C. § 1491(a)(1) and 28 U,S.C. § 1346(a)(2). Cmpt. at ¶ 3. RCG alleges that the Navy erroneously interpreted 10 U.S.C. § 6976 in disqualifying its bid to lease the land of the United States Dairy Farm. RCG seeks its bid preparation costs under the APA and an implied contract of fair and honest consideration.

II. Statement Of Facts[1]

Pursuant to Section 6976 at Title 10 of the United States Code, the Secretary of the Navy had the option to terminate the operations of the United States Naval Academy Dairy Farm. 10 U.S.C. § 6976(a)(1). The Secretary of the Navy could not, however, dispose of any of the real property, but could only lease it. 10 U.S.C. § 6976(a)(2)(A), (b)(1).

Pursuant to Section 6976, on November 28, 2005, the Navy issued a Request of Interest, number LO-10,019, asking for expressions of interest in leasing the property. Cmpt. at ¶ 5. On January 16, 2006, RCG[2] responded with an Expression of Interest, which stated that RCG had an interest in leasing the land and had a history of safe and successful operation. Cmpt. Exhibit 1. Later, RCG told the Navy that it intended to mine sand and gravel from the site, and would later reclaim the site as a bog or wetland. Cmpt. at ¶ 7. The Navy, after collecting the expressions of interest, issued Notice of Availability for Lease #N4008007RP00005, and requested that all bids

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[1]For purposes of a motion under Rules 12(b)(1) and 12(b)(6), the defendant assumes without admitting the facts of the complaint.

[2] According to Exhibit 1 of the complaint, the expression of interest was sent by the Chaney-Reliable Joint Venture, representing a venture between Chaney Enterprises and Reliable Contracting Company. Cmpt. Exhibit 1. Chaney-Reliable Joint Venture later became Resource Conversation Group, LLC.

be submitted by March 19, 2007. Cmpt. at ¶ 10. Gov. Exhibit.

On February 6, 2007, representatives of the interested bidders entered the property for a tour, as Section 6.1 RFP had invited them to do. Gov. Exhibit at pp. 13, 15. On February 27, 2007, with the written permission of the Navy, representatives of RCG entered the property a second time, this time to do more extensive testing for the presence of sand and gravel. Cmpt. at ¶ 6. RCG then submitted a formal bid on March 19, 2007, outlining its desire to lease the land to mine the sand and gravel underneath it. Cmpt. at ¶ 6.

On April 30, 2007, Joan Markey, the Director of Real Estate for the Department of the Navy, wrote to RCG, stating that RCG's bid would not be considered further, because it was non-responsive. Cmpt. Exhibit 2. Ms. Markey explained that RCG's proposal to mine sand and gravel from the property did not fall within the scope of the solicitation, because that would constitute a disposal of real property under 41 C.F.R. 102-71.20 which 10 U.S.C. § 6976 forbade. Id.

At the RCG requested de-briefing on September 13, 2007, RCG stated that it had let the Navy know prior to the submission of the bid that it intended to lease the land so it could mine sand and gravel. Cmptl. at ¶ 9. The Navy reiterated that it could not permit the mining of sand and gravel of the property under 10 U.S.C. § 6976 and 41 C.F.R. § 102-71, because Section 6976 expressly forbade the disposal of the land, and 41 C.F.R. § 102.71.20 included "embedded gravel, sand, or stone" within the definition of real property. Id. The Navy also stated that it had no obligation to tell RCG that its bid would be non-responsive prior to the Navy actually receiving the bid. Id.

On October 24, 2008, RCG filed suit against the Department of the Navy, seeking to

although RCG alleges that the Navy "failed to disclose" the information that it would use to disqualify RCG prior to RCG's incurring bid preparation costs, the Navy could not and did not do anything to prevent any bidder from examining the statute and the applicable regulations.

RCG also alleges the Navy "had the obligation of fair dealing to apprise all potential bidders of its interpretation regarding the merits of the bid.". Cmpt. at ¶ 16. The Navy did exactly this, however, when it responded to RCG's bid with a letter on April 30, 2008, telling RCG that its bid was non-responsive. Cmpt. Exhibit 2. Prior to the submission of bids, however, the Navy had no duty, as it could not possibly tell every potential bidders about what would and would not be acceptable.

Assuming the Navy's interpretation of the statute and the regulations is correct, RCG's claim under a breach of implied contract for failing to disclose its decision amounts to a claim of mistake of law. As the Court of Appeals for the Federal Circuit has observed in another context, "[c]orrection is not possible if the error is one in the construction of law. . . . Mistakes of law occur where the facts are known but their legal consequences are not, or are believed to be different than they really are." Century Importers, Inc. v. United States, 205 F.3d 1308, 1313 (Fed. Cir. 2000); see also Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994) ("The market from which a fair market value may be ascertained need not contain only legally trained (or advised) persons who fully investigate current land use regulations; ignorance of the law is every buyer's right.") Accordingly, RCG's claim for its bid protest costs under a theory of an implied contract with the Navy to inform the bidders of the state of law must be dismissed pursuant to RCFC 12(b)(6).

Government Exhibit 1

NOTICE OF AVAILABILITY FOR LEASE
#N40080O7RP00005

U. S. NAVAL ACADEMY DAIRY FARM

GAMBRILLS, MARYLAND

U.S. DEPARTMENT OF THE NAVY
Naval Facilities Engineering Command Washington
1314 Harwood Street SE
Washington Navy Yard, DC 20374-5018

CONTENTS

APPENDICES

1.0 EXECUTIVE SUMMARY

The Department of the Navy (the "Government") is offering for lease an approximately 856.63 acre parcel of federally-owned land in Gambrills, Maryland (hereinafter "property"). The property is known locally as the Naval Academy Dairy Farm. The property is offered as-is, and includes residential and agricultural structures. Currently, the property is primarily used for organic crop production, organic grazing, and residential use.

The Government's primary objective for this lease is to enter into a long-term business relationship with a responsible party who will provide good stewardship over the property while maximizing its value to the U. S. Naval Academy.

The property is offered for lease pursuant to the authority codified at 10 U.S.C. § 6976. Among other provisions, the legislation requires that the property be maintained in its rural and agricultural nature. Proposals must conform to this requirement, and offerors are encouraged to demonstrate and highlight in their proposal how the rural and agricultural nature of the property will be maintained.

This is an open notice; all parties are invited to submit proposals. The Government will review proposals and may request oral presentations from those whose proposals are most highly rated. The Government intends to then enter into exclusive negotiations with one selected offeror to establish detailed terms and conditions of the lease.

Section 2 of this notice describes the existing conditions of the property. Section 3 outlines the Government's requirements and objectives for the lease, and the anticipated business arrangements between the prospective lessee and the Government. Section 4 provides instructions for responding to this notice. Section 5 includes special terms and conditions applicable to the notice, and Section 6 provides the Government point of contact and information on visiting the property.

2.0 EXISTING CONDITIONS

This section describes existing conditions of the property. Information and/or documents pertaining to the property and provided to offerors is believed to be correct; however the Government does not warrant this information. This property is offered for outlease "as is, where is". The Government does not warrant the condition of any of the structures, equipment, etc.

2.1 Land. The property consists of approximately 856.63 acres of land. At present, the majority of the land is used for organic crop production. The remainder of the land includes grazing, residential, wetlands, and forested areas. See Appendix C for a legal description of the lands available for lease.

2.2 Improvements. See Appendix E for a list of buildings and site improvements. Offerors are encouraged to perform an on-site inspection; refer to Section 6 for details.

2.3 Infrastructure and Utilities. Refer to Appendix J, Environmental Condition of Property Report, for available information on existing infrastructure and utilities.

2.4 Community Services.

2.4.1 Police and Fire. Upon retrocession of legislative jurisdiction from exclusive Federal jurisdiction to concurrent jurisdiction with the State of Maryland (see 2.5.4 below), local police and fire departments are anticipated to be the primary first responders.

2.4.2 Refuse and Recycling. The Government does not provide refuse removal or recycling collection at the property. Local government or other third party refuse and recycling services may be available.

2.5 Development Considerations.

2.5.1 Environmental. An Environmental Condition of Property (ECP) report is provided at Appendix J, and will be made part of the lease agreement. The ECP sets forth the existing environmental conditions of the premises proposed for outlease. Furthermore, it sets forth the basis for the Government's determination that the premises are suitable for leasing. Offerors are hereby made aware of the notifications contained in the ECP, and any lessee shall be required to comply with any restrictions set forth therein.

2.5.2 Historical, Cultural, and Archeological. The Dairy Farm is included on the Maryland Inventory of Historic Properties, and eligible for listing on the National Register of Historic Places (NRHP) as a historic district. Several archeological sites have been identified on the property, as outlined in Appendix J. A comprehensive archeological survey is being undertaken, the results of which may impact final lease negotiations.

2.5.3 Regulatory. State and local zoning regulations do not apply to the leased premises. Anne Arundel County zoning maps indicate that a majority of the leased premises would be zoned as Rural Agricultural, if the county zoning were to apply.

2.5.4 Legislative Jurisdiction. The Federal Government currently exercises exclusive legislative jurisdiction over the property. The Government anticipates that concurrent jurisdiction may be acquired by the State of Maryland prior to or during the lease term. Such a change would make state law apply to the property, and enable enforcement of such by state (and county) officials.

2.5.5 Easements and Encumbrances. The Leased Premises are encumbered with four existing easements on record with the Department of Navy. See Appendix D for details.

3.0 LEASE REQUIREMENTS & OBJECTIVES

Section 3 identifies the Government's primary objectives, requirements, and anticipated business arrangements associated with the prospective Lease. NOTE: Refer to Section 4 for specific items to be addressed in proposals.

3.1 The Government's primary objectives for the lease contemplated under this notice include:

- Entering into a long-term business relationship with a responsible party who will provide good stewardship over the property.

- Maximizing value to the U. S. Naval Academy and the surrounding community. In particular, the Government seeks a partner who can yield the best value from the property in terms of rental consideration or other value.

- Successfully integrating activities at the property with responsible management of environmental and cultural resources.

- Successfully blending any improvements to the property into the existing setting with as little impact upon the surrounding community as practicable.

- As required, collaborate with Anne Arundel County to effect any service upgrades needed to support activities at the property (such as utilities or road improvements).

3.2 Lease Rent Consideration. Consideration to the Government shall be no less than the fair market value of the premises, based upon the proposed use. The Government may consider accepting percentage rents or similar contingent payments. Rent shall be paid in monetary form. In-kind consideration for repairs or improvements to the leased property will not be accepted, however other forms of in-kind consideration at the site or at other locations may be considered at the sole discretion of the Government. The proposed lease must show how rent or other in-kind consideration will benefit the U. S. Naval Academy over the term of the lease.

3.3 Lease Commencement and Duration. The effective date of the lease is anticipated to be no earlier than February 1, 2008. The duration of the lease shall be for a term not less than five (5) years. Offerors are encouraged to propose a lease duration appropriate to the individual characteristics of their proposal.

3.4 Use Restrictions. The use of the property shall be in compliance with 10 USC § 6976 (see Appendix A). Specifically, any lease of property shall be subject to a condition that the lessee maintains the rural and agricultural nature of the leased property. This provision does not automatically preclude all uses or activities other than rural and agricultural ones, provided that the nature of the leased property remains rural and agricultural. In assessing a proposal's compliance with this requirement, the Government will consider the scope and location of any proposed capital improvements,

as well as the compatibility of the proposed use with the property's rural and agricultural setting. Additional use restrictions are identified at Appendix F.

3.5 Design. Any proposed changes to current land uses or facilities shall be consistent with good land use planning and design practices, and in accordance with 10 USC § 6976. Any improvements or alterations shall promote compatibility of activities and design within and surrounding the property, and shall provide for efficient vehicular and pedestrian ingress and egress.

3.5.1 Design and Construction Standards. Unless otherwise agreed to in writing by the Government, any improvements to the property must comply with the Government's design and construction criteria.

3.5.2 Accessibility. To the extent that new or substantially renovated facilities, or new uses are proposed, facilities must comply with applicable accessibility standards set forth in Federal law.

3.6 Environmental. Any proposed use shall limit and mitigate any adverse environmental impact to the greatest extent practicable. Prior to awarding a lease, the Government will be required to comply with environmental planning statutes and regulations, including but not limited to the National Environmental Policy Act (NEPA); the Government has funded and initiated a limited-scope Environmental Assessment in anticipation of a lease. The prospective lessee must demonstrate a full understanding of the potential environmental consequences associated with its proposal, take into account the time and cost implications of applicable environmental compliance activities, and be willing to fund any necessary studies and reviews beyond those already funded by the Government as may be required to ensure adequate review of environmental consequences.

3.7 Historic Preservation. Any proposed use shall preserve and enhance the historic nature and elements of the property to the greatest extent practicable. The prospective lessee shall take into account the Government's responsibilities for historic preservation, including those outlined in Section 106 of the National Historic Preservation Act. Section 106 is a consultative process carried out by the Navy with state historic preservation offices (the Maryland Historical Trust in this case) and other participants on undertakings which have the potential to affect National Register of Historic Places eligible resources.

3.8 Conservation. Any proposed use shall incorporate pollution prevention, energy, and water conservation initiatives into all facilities and activities where practicable or as required by local or State regulations or guidelines. Such initiatives shall include provisions for: waste reduction and waste management; energy efficiency and energy conservation; water resource conservation and management; and recycling and reuse.

3.9 Financing Terms and Conditions. Proposals should take into account the unique nature of financing improvements or operations on leased land, and the unique aspects

of Federal ownership of land, which may preclude certain financing methods or types of security interest. The prospective lessee may secure public or private sector financing appropriate to the proposed use. Any financing which encumbers the lessee's interest in the lease or in improvements upon the leased premises shall be subject to prior Government approval. The proposal should "stand alone" financially; the lessee's interest in the lease or operations on the property may not be cross collateralized or subject to cross-default with any other assets or activities outside the property.

3.10 Taxes. The prospective Lessee shall be independently responsible for any and all taxes or assessments that may be levied against its leasehold interest or against its activities or operations on the property.

3.11 Insurance Requirements. The selected Lessee shall ensure appropriate insurance is in place for the property as described in Appendix G.

3.12. Operating Agreement. At its discretion, the Government may require that an Operating Agreement be enacted in order to implement the terms and conditions of the Lease Agreement, and to govern improvement, operation and management of the property. The agreement shall be subject to Government approval and, as required by the Government, may include but not be limited to a Business Plan, an Improvements Plan, and an Operations and Management Plan.

3.12.1 Business Plan. The Business Plan shall address the financial structure, relationships, terms, and reporting requirements associated with the operation of the property, and other matters agreed upon by the Government and Lessee. As required by the Government, the plan shall include, but not be limited to:

- Sources of capital, including debt and equity, and applicable terms and conditions.
- Overall schedule, development plans and timelines.
- Detailed project budget and life-cycle Financial Pro Forma reflecting all sources and uses of funds.
- Record keeping and financial reporting requirements.
- Roles and responsibilities of the Lessee and the Government, and address any anticipated partnership or joint ventures by the Lessee.
- Default and contingency provisions.

3.12.2 Improvements Plan. As required by the Government, the Improvements plan shall address the methodology and scope of design and construction of any proposed capital improvements on the property during the lease term, including provisions for obtaining necessary regulatory approvals. The plan shall demonstrate means for ensuring compliance with all applicable laws, regulations, codes, standards, and criteria. The plan shall establish procedures for coordinating, updating, and implementing design and construction plans and schedules, and for executing, overseeing, and approving work.

3.12.3 Operations and Management Plan. As required by the Government, the plan shall establish provisions for management of operations on the property, including property management, facilities maintenance, capital repair and replacement, environmental management, historic preservation, community relations, and any commercial activities. The plan shall describe the approach to day-to-day operations and long-term stewardship of the property, and shall demonstrate means for ensuring compliance with all applicable laws, regulations, codes, standards, and criteria.

4.0 INSTRUCTIONS TO OFFERORS

4.1 GENERAL

The statutory authority for the lease contemplated by this notice is codified at 10 U.S.C. 6976. There will be no public opening of proposals and all proposals will remain confidential until the lease has been awarded. All proposals will remain confidential. Proposals must conform to the requirements and specifications set forth below. Proposals that are incomplete may be rejected. Proposals received after the time and date specified below will be rejected and returned to the offeror unopened.

4.2 SUBMISSION OF PROPOSALS.

One (1) original, five (5) hard copies and one (1) electronic copy of the proposal prepared in response to this notice must be received no later than:

2:00 p.m. Eastern Daylight Time on March 19, 2007, at the following address:

Commanding Officer
Naval Facilities Engineering Command Washington
Attn: Ms. Joan M. Markley (Code RES)
1314 Harwood Street SE
Washington Navy Yard, DC 20374-5018

Submissions shall be sent in an envelope marked in the lower left corner as follows:

"OFFER: N4008007RP00005"

Electronic, telegraphic, or facsimile offers and modifications will not be considered.

All proposals received shall be deemed to be continuing offers from the date and time set for receipt of proposals until award by the Government.

4.3 Proposal Requirements.

Proposals are limited to thirty five (35) pages total, including the required cover page as shown in Appendix H. The page size of the application shall not exceed 8 ½" by 11"

with a minimum 10-pitch font. A page is defined as the single-spaced, single side of one 8 ½" by 11" sheet of paper. Proposals must be separated into two volumes, and should include information on the following:

4.3.1 Volume One, Technical.

A. Qualifications & Experience.

- Provide information on the history, mission, and vision of the offeror's organization, and the relation of the proposal to the long-term goals and interests of the organization.

- Provide information on the legal and business form of the offeror (including joint ventures, partnerships, public-private ventures, subcontracts, or similar multi-party arrangements), and the appropriateness of such organization to the successful management and operation of the undertaking proposed. Provide relevant information on personnel to fill key positions in negotiating, implementing, and managing the lease and proposed undertaking.

- Provide information on offeror's past performance in at least two undertakings within the last ten years similar in kind, scope, and scale to that proposed, including applicable experience in property management, business, obtaining financing, government relations / contracting, public relations, and as applicable, design and construction management. Describe the offeror's role in the undertaking's success, and provide contact information for a sufficient number and type of third party references to verify the offeror's performance.

B. Master Plan.

- Provide information on how the proposal satisfies the legal requirement to maintain the property in its rural and agricultural nature.

- Document and explain any proposed substantive changes to existing land uses. Provide information on how proposed changes are consistent with the physical characteristics of the site and complement the surrounding area. Provide information on the approach to any proposed design and construction.

- Provide information on any environmental implications associated with the proposed undertaking, and the approach to ensuring compliance with laws and regulations applicable to the undertaking. Describe the approach to environmental care and maintenance of the property, including management of cultural resources. Discuss any anticipated or potential adverse environmental impacts of the proposal, and the approach to mitigating or otherwise taking into account such impacts.

C. Operations & Schedule.

- Describe the approach to managing and maintaining the property. Include supporting information on meeting the organizational, workload, and technical aspects of successfully implementing and operating the proposed undertaking.

- Describe the approach to fulfilling responsibilities under the lease and any anticipated operating agreement, including coordination with and oversight by the Government. Indicate the proposed lease duration and proposed terms for renewal.

- Describe the approach to executing the lease documents, to include obtaining financing or financial guarantees the Government may reasonably require to be in place prior to or concurrent with the transactional closing. Include a schedule detailing any proposed planning, capital improvements, or other necessary activities prior to stabilized operations. Discuss the potential for delays and provisions for mitigating or minimizing their impact.

D. External Relations.

- Discuss the approach to communicating with the general public, and coordinating activities at the property with relevant private and public sector parties.

- Discuss any planned or anticipated benefits of the proposal to the surrounding community or other stakeholders as applicable, and the approach to any potential conflicts arising from the proposal.

4.3.2. Volume Two, Financial.

- Describe the approach to meeting the capital requirements relevant to a business undertaking and land holding commitment of the complexity and magnitude as the one proposed. Identify the assets, resources, institutional relationships, and/or bonding capacity necessary to properly finance the proposed business and property management undertaking.

- Provide information sufficient to assess the financial viability of the proposal, including information on relevant market and economic conditions and trends. Provide information supporting assumptions about the project's costs (including cost of capital) and performance. As applicable, discuss the financial and business risks to the offeror, lenders, the Government, and other parties, and provide information on how financial returns to the parties are commensurate with their exposure to risk. Include proformas or similar financial schedules clearly identifying projected sources and uses of funds throughout the proposed lease period. As applicable, include electronic copies of proformas with fully functional cell formulae and internal linkage in place, or other financial schedules or means to enable the Government to conduct sensitivity testing of the financial aspects of the proposal.

- Provide information on the proposed rental consideration. If projected, estimated, or contingent rental payments are proposed as part of the consideration, include

Information to support any assumptions about the value, timing, and sensitivity to market conditions of such payments.

4.4 Source Selection Evaluation. An evaluation team will evaluate each proposal. The team will determine the overall value of the proposal to the Government and the potential of the proposed undertaking to represent the best value to the Government. Proposals will be evaluated on their own merit, independently and objectively. While the Government does not intend to meet with offerors regarding revisions to their proposals prior to any oral presentations, the Government may contact offerors to clarify certain aspects of their proposal or to correct clerical errors. The Government reserves the right to eliminate from further consideration those proposals not considered highly rated before or after any oral presentations.

4.5 Notice of Oral Presentations. Offerors might be required to present their proposals orally to the Government. If any oral presentation is required, it shall be limited to 90 minutes, to include a period of questions and answers. Any oral presentations will be evaluated on the same basis as written proposals.

4.6 Final Evaluation. After the final evaluation of the proposals, including revisions if applicable, the Government will select for exclusive negotiations the offeror whose proposal is determined to represent the best overall value to the Government.

4.7 Negotiations. The Government intends to select one offeror for exclusive negotiations. During the period of exclusive negotiations, the offeror, in cooperation with the Government, will work towards: finalizing the lease agreement and any required operating agreement, environmental documentation, due diligence, and any other pre-award documentation. The Government intends to reach agreement on all material terms and conditions to be included in the Lease and any operating agreement within four months of notification of selection. If at any time during the negotiation period, the Government and the selected offeror are unable to make satisfactory progress as determined by the Government, the Government, at its sole discretion, has the right to continue negotiations, or terminate negotiations and select another offeror for negotiations.

5.0 SPECIAL CONDITIONS AND LIMITATIONS

5.1 Mandatory Clauses. Offerors shall consider the Mandatory Clauses Required by Federal Law (Appendix I) during the preparation of their proposal. These clauses shall become part of the lease.

5.2 No Obligation. While the Government intends to enter into a Lease with an offeror selected through this acquisition process, it is under no obligation to do so. The Government reserves the right to cancel this notice at any time, or to reject any and all submissions prepared in response to this notice. The Government is not responsible for

any costs incurred in order to participate in this process, including any "bid and proposal" costs.

5.3 Waiver. The Government reserves the right to waive informalities and minor irregularities in offers received if it is determined that it is in the best interest of the Government to do so.

5.4 Acquisition Requirements. This notice and any subsequent lease are not governed by the Federal Acquisition Regulations (FAR). However, certain FAR provisions have been incorporated into this notice for administrative convenience.

5.5 Rights Reserved. The Government reserves any and all rights in connection with this notice of availability for lease, including but not limited to the right to hold exclusive negotiations with a selected offeror which may result in terms and conditions that differ from those specified in this notice and/or from terms and conditions originally proposed by the offeror. Furthermore, the Government reserves the right to terminate negotiations with the selected offeror, and initiate negotiations with another suitable offeror if the Government, at its sole discretion, determines that a timely agreement will not be reached with the selected offeror. The decision to execute a lease and any operating agreement will be made by the Government at its discretion. In no event will the Government be responsible for the payment of any fees or have any liability to any offeror for fees or expenses incurred in connection with work under this notice or during negotiations.

5.6 Government Furnished Information. The Government does not warrant the accuracy of any site-related information provided. Site-related information furnished by the Government and/or its representatives in support of this notice shall be considered as informational only. Such information may include historical utilities usage quantities, locations and capacities of existing utilities systems, technical reports and studies, building condition reports, or other technical information intended to support the offerors' development of applications. Offerors are expected to verify all site related information provided by the Government to avoid unforeseen costs.

5.7 Davis-Bacon Wages. Davis Bacon wage requirements may apply depending on the nature of work on the property. The Lessee will be responsible for compliance. Davis Bacon prevailing wage requirements usually apply to public buildings and public works. The term public building or public work includes building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title is in a Federal agency.

5.8 Disputes. Any dispute concerning a question of fact or procedure arising under this application, which is not disposed of by agreement, shall be decided by the Government, who shall mail or otherwise furnish a written copy of the decision to the offeror.

6.0 SITE INSPECTION & POINT OF CONTACT

6.1 SITE VISIT

Offerors are encouraged to inspect the property, with the following restrictions. The property is currently leased by the Government to a private party. Visitors to the property are not allowed without prior coordination and approval of the Government. Visits must be coordinated with the Government in advance. The property is tentatively scheduled to be available for inspection at 1:00 pm on February 5, 2007. Confirmation will be provided by formal notice.

6.2 POINT OF CONTACT

Requests for clarification or further information regarding the RFP shall be referred to:

Commanding Officer
Naval Facilities Engineering Command Washington
Attn: Ms. Joan M. Markley (Code RES)
1314 Harwood Street SE
Washington Navy Yard, DC. 20374-5018

or

Email address: joan.markley@navy.mil
With a copy to: paul.b.stewart1@navy.mil

All comments and questions will be reviewed for appropriate action. Individual responses may not be provided.

In the United States Court of Federal Claims

No. 08-768C
Filed: January 11, 2011
TO BE PUBLISHED

RESOURCE CONSERVATION GROUP, LLC, Plaintiff, v. UNITED STATES, Defendant.	Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b); Bid Protest; Breach of Duty of Fair and Honest Consideration; Defense Authorization Act for Fiscal Year 1998, 10 U.S.C. § 6976(a), (b)(2); Department of the Navy Regulation, 32 C.F.R. § 736.1; Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 101-1315; Federal Management Regulations, 41 C.F.R. §§ 102-2.10, 102-71.5, 102-71.20; Implied-In-Fact Contract; Motion to Dismiss, RCFC 12(b)(6); Naval Dairy Farm, 10 U.S.C. § 6976; Notice of Federal Regulations, 44 U.S.C. § 1507; Tucker Act, 28 U.S.C. § 1491(a)(1).

Warren K. Rich, Rich & Henderson, P.C., Annapolis, Maryland, Counsel for Plaintiff.

Christopher Andrew Bowen, United States Department of Justice, Civil Division, Washington, D.C., Counsel for Defendant.

MEMORANDUM OPINION AND FINAL ORDER

BRADEN, *Judge.*

I. RELEVANT FACTS.[1]

In 1910, a typhoid fever epidemic swept through Annapolis, Maryland, affecting several United States Naval Academy ("Naval Academy") midshipmen. *See* Michael Janofsky, *Midshipmen To Get Milk Through Middleman*, N.Y. TIMES, July 19, 1998, Section 1, at 16.

[1] The facts herein previously were discussed in *Resource Conservation Group, LLC* v. *United States Department of Navy*, 86 Fed. Cl. 475 (2009) ("*RCG I*").

The epidemic was traced to a local milk distributor. *Id.* In response, the United States Congress authorized the Naval Academy to establish and operate a dairy. *Id.* In 1913, the Naval Academy purchased land in Gambrills, Maryland ("the Dairy Farm Property"), fifteen miles from the Naval Academy. *Id.* Over time, the Naval Academy dairy operation expanded, and consumption reached almost 1,000 gallons of milk per day. *Id.*

In the 1990's, the Naval Academy determined that it would be less expensive to purchase milk commercially. *Id.*; *see also* Defense Authorization Act for Fiscal Year 1998, 10 U.S.C. § 6976(a) (codifying the Naval Academy's authority to "terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland[,]" so long as its "rural and agricultural nature" is maintained). From 2000 to January 2005, the Naval Academy leased the Dairy Farm Property to Horizon Organic Holding Corp., a Boulder, Colorado-based milk producer. *See* Elizabeth Leis, *What's in Farm's Future? Organic Maryland Sunrise Farm Wants to Stay*, MD. GAZETTE, April 15, 2006, at C1.

On November 28, 2005, the United States Department of the Navy ("the Navy") issued a Request of Interest, No. LO-10019, to solicit proposals to lease the Dairy Farm Property. Compl. ¶ 5. On January 16, 2006, Resource Conservation Group, LLC ("Plaintiff" or "RCG") expressed an interest in leasing the Dairy Farm Property.[2] Pl. Ex. 1. Thereafter, the Navy issued a Notice of Availability for Lease, No. N4008007RP00005 ("the Solicitation"), requesting all bids be submitted by March 19, 2007. Gov't Ex. at 1, 8.

On February 6, 2007, RCG and other interested bidders were invited to tour the Dairy Farm Property. Gov't Ex. at 13, 15. On February 27, 2007, RCG again inspected the Dairy Farm Property "to survey and test the area for the presence of sand and gravel." Compl. ¶ 6; *see also* Joshua Stewart, *Soil Surveyed at Former Dairy*, THE CAPITAL, Feb. 28, 2007, at B1 (local newspaper article discussing RCG's site survey). Thereafter, RCG prepared a site analysis, produced mining plans, and submitted a formal lease proposal prior to the March 19, 2007 deadline. Compl. ¶ 6. The proposal stated that RCG planned to mine the Dairy Farm Property for sand and gravel. *Id.*

On April 30, 2007, the Navy's Contracting Officer for the Solicitation ("CO") informed RCG that its proposed "activities and transactions . . . do not fall within the scope of the [S]olicitation because they constitute the disposal of real property," prohibited by section 6976(a)(2)(A) of Title 10 of the United States Code. Pl. Ex. 2; *see also* 10 U.S.C. § 6976(a)(2)(A) (providing that "the real property containing the dairy farm . . . may not be declared to be excess real property . . . or otherwise disposed of by the Navy"). In addition,

[2] The Expression of Interest was made on behalf of the Chaney-Reliable Joint Venture, comprised of Chaney Enterprises and the Reliable Contracting Company. Pl. Ex. 1. Subsequently, the Chaney-Reliable Joint Venture was organized as the Resource Conservation Group, LLC. *See* Gov't Mot. at 2 n. 2.

federal regulations specify that "embedded sand and gravel constitute real property."[3] Pl. Ex. 2. Therefore, RCG's proposal could not be considered. *Id.*

On June 4, 2007, Anne Arundel County, the county where Dairy Farm Property is located, announced that the Navy had selected the county "for exclusive lease negotiations for the U[nited] S[tates] Naval Academy Dairy Farm." Anne Arundel County website, accessible at http://www.aacounty.org/News/Archive2007/DairyFarmDeal.cfm (last visited Jan. 7, 2011).

RCG requested a debriefing that was held on September 13, 2007. Compl. ¶ 9. At the debriefing, RCG reiterated the intention to "use the property for sand and gravel mining." *Id.* The Navy responded that, because disposal of real property was prohibited by 10 U.S.C. § 6976, "the Navy was under no obligation to tell a proposed 'bidder' that its bid would not qualify for review or evaluation." Compl. ¶ 9.

On January 17, 2008, the Navy and Anne Arundel County signed a "30-year lease agreement for the county's use and preservation of the U.S. Naval Academy Dairy Farm." Anne Arundel County website, accessible at http://www.aacounty.org/RecParks/parks/dairyfarm/news/lease.cfm (last visited Jan. 7, 2011).

II. RELEVANT PROCEDURAL HISTORY.

A. Before The United States Court Of Federal Claims.

On October 24, 2008, RCG filed a Complaint in the United States Court of Federal Claims alleging two causes of action: breach of an implied contract of fair and honest consideration and violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Compl. ¶¶ 14-20.

On March 31, 2009, the court issued a Memorandum Opinion And Final Order that dismissed the October 24, 2008 Complaint, pursuant to RCFC 12(b)(1). *See RCG I*, 86 Fed. Cl. at 480-87. As to the allegations in Count I regarding breach of an implied contract, the court held that the United States Court of Federal Claims did not have jurisdiction to adjudicate this claim under either section 1491(a)(1) or section 1491(b)(1) of Title 28 of the United States Code. *Id.* at 483-86. The court determined that the United States Court of Federal Claims' jurisdiction to review bid protests as implied-in-fact contracts under section 1491(a)(1) did not survive the enactment of the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104–

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[3] Section 102.71.20 of the Federal Management Regulations provides:

> Real Property means . . . [s]tanding timber and *embedded gravel, sand, or stone* under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition.

41 C.F.R. § 102-71.20 (2006) (emphasis added).

320, § 12, 110 Stat. 3870, 3874–76 (1996). *RCG I*, 86 Fed. Cl. at 483-85. In addition, the court determined that "28 U.S.C. § 1491(b)(1) does not authorize the adjudication of bid protests concerning land leases where the Government is the lessor." *Id.* at 486.

As to Count II of the October 24, 2008 Complaint, alleging a violation of the APA, the court determined that "the only forum that can adjudicate [RCG's] challenge . . . is a United States District Court." *Id.* at 487. Since the court held that it did not have jurisdiction to adjudicate the claims alleged in the October 24, 2008 Complaint, the court did not address the Government's Motion To Dismiss pursuant to RCFC 12(b)(6). *Id.*

B. Before The United States Court Of Appeals For The Federal Circuit.

On March 1, 2010, the United States Court of Appeals for the Federal Circuit issued an Opinion, affirming that the United States Court of Federal Claims does not have jurisdiction under 28 U.S.C. § 1491(b)(1) to adjudicate Count I of the October 24, 2008 Complaint. *See Resource Conservation Group, LLC* v. *United States*, 597 F.3d 1238, 1247 (Fed. Cir. 2010) ("*RCG II*"). Our appellate court held that "Congress intended the [Section] 1491(b)(1) jurisdiction [provided by ADRA] to be exclusive where 1491(b)(1) provided a remedy (in procurement cases)." *Id.* at 1246.

In nonprocurement bid protests, however, where section 1491(b)(1) does not provide a remedy, the United States Court of Appeals for the Federal Circuit held that the United States Court of Federal Claims' "implied-in-fact jurisdiction [under 28 U.S.C. § 1491(a)(1)] . . . survived the enactment of [section] 1491(b)(1)." *Id.* at 1246.

Therefore, our appellate court "conclude[d] that the [United States] Court of Federal Claims . . . had jurisdiction [to adjudicate Count I of the October 24, 2008 Complaint] under section 1491(a)(1)[,] because the implied-in-fact contract jurisdiction in nonprocurement cases that existed prior to 1996 survived the enactment of the ADRA." *RCG II*, 597 F.3d at 1247. Accordingly, the case was remanded for further proceedings. *Id.* On June 1, 2010, the mandate issued.

C. Remand Proceedings Before The United States Court Of Federal Claims.

On September 16, 2010, the court convened a status conference to ascertain whether the parties wanted to submit any supplemental briefing regarding the Government's pending Motion To Dismiss, pursuant to RCFC 12(b)(6). On September 30, 2010, Plaintiff filed a Supplemental Memorandum ("Pl. Supp.").

On October 18, 2010, the Government filed a Supplemental Reply ("Gov't Supp."). On October 21, 2010, Plaintiff filed a Motion For Leave To File Sur-Reply Memorandum. On that same date, the Government filed a Response. On October 22, 2010, Plaintiff filed a Reply. On that same date, the court issued an Order, granting Plaintiff's Motion For Leave. On October 28, 2010, Plaintiff filed a Sur-Reply ("Pl. Sur-Reply").

III. DISCUSSION.

A. Standard For Decision On A Motion To Dismiss, Pursuant to RCFC 12(b)(6).

Although a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citations omitted). In order to survive a motion to dismiss, however, the court "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the court "must accept as true all the factual allegations in the complaint, and . . . indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co.* v. *United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted); *see also Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

B. The Government's December 23, 2008 Motion To Dismiss Pursuant To RCFC 12(b)(6).

Count I of the October 24, 2008 Complaint alleges that the Navy "created an implied contract of honest and fair consideration of RCG's bid by inducing RCG to prepare a bid and by inviting RCG to bid, knowing the substantial requirements of its bid proposal [and] knowing that RCG would propose a sand and gravel mine operation[.]" Compl. ¶ 15. Therefore, it must be "necessarily implied that the Navy promised to give RCG's bid a fair and impartial consideration." *Id.* Count I also alleges that "[t]he Navy breached the implied contract to judge honestly and fairly all bids submitted in response to the solicitation[,] by disqualifying RCG with information that [the Navy] knew or should have known, but failed to disclose to RCG, before RCG incurred the expenses of composing and submitting the formal proposal." *Id.* ¶ 16.

The gravamen of Count I is that the Navy misconstrued 10 U.S.C. § 6976,[4] by interpreting it to prohibit sand and gravel mining at the Dairy Farm Property. Compl. ¶ 15.

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[4] Section 6976 of Title 10 of the United States Code, titled "Operation of Naval Academy dairy farm," states:

> (a) Discretion regarding continued operation. --
>
> (1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.
>
> (2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting of approximately 875 acres) –
>
> (A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

Even if 10 U.S.C. § 6976 prohibited these activities, RCG is entitled to bid preparation costs, because the Navy violated the "obligation of fair dealing," by failing to apprise all potential bidders of its interpretation of 10 U.S.C. § 6976. Compl. ¶ 16.

1. **The Government's Argument.**

The Government argues that the October 24, 2008 Complaint failed to state a claim upon which relief may be granted. The Navy was required under 10 U.S.C. § 6976 to reject RCG's bid as non-responsive, because the Navy "could not legally lease the property to a contractor [that] intended to dispose of the embedded sand and gravel." Gov't Mot. at 12.

In addition, the Navy had no legal duty to inform RCG, prior to the submission of its bid, that its proposed use was non-responsive, "as it could not possibly tell every potential bidders [sic] about what would and would not be acceptable." Gov't Mot. at 14. Under the implied contract of fair and honest consideration, the Navy only had the duty to fairly and honestly consider RCG's bid. Gov't Supp. at 7. In this case, "the Navy correctly interpreted [10 U.S.C. § 6976], [and] fulfilled its obligations pursuant to the implied contract by fairly and honestly reviewing RCG's bid and rejecting it for being impermissible under the statute." *Id.*

Likewise, RCG's claim that the Navy breached an implied contract with RCG under the doctrine of superior knowledge must fail, because RCG "could have discovered" applicable regulations governing the Navy's disposal of real estate that were publically available. Gov't Mot. at 13. In *John Massman Contracting Co.* v. *United States*, 23 Cl. Ct. 24 (1991), the United States Claims Court held:

> The government must disclose superior knowledge which is vital to performance of the contract, but which is unknown and reasonably is not available to the contractor. But there is no duty to disclose where the information reasonably is available.

Id. at 32 (internal citations omitted).

(B) shall be maintained in its rural and agricultural nature.

(b) Lease authority. --

(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

(2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

10 U.S.C. §§ 6976 (a), (b).

In addition, the Solicitation "provided a means through which potential bidders could submit questions to the Navy for a response." Gov't Mot. at 13; *see also* Gov't Ex. at 16-22 (amendments to the Solicitation establishing the procedure for questions posed by potential bidders to be answered by the Navy). Therefore, even assuming that the Government had superior knowledge about the Dairy Farm Property and the law governing its use, that knowledge readily was available to RCG. Gov't Mot. at 13.

2. Plaintiff's Response.

RCG responds that the Navy violated the duty to consider all responsive proposals fairly and honestly because the Navy knew RCG intended to use the Dairy Farm property for sand and gravel mining, "but . . . waited to inform [RCG] that its bid would not be considered until after [RCG] submitted the bid proposal and incurred bid preparation and proposal costs." Pl. Opp. at 4 (citation omitted).

Moreover, the Navy "active[ly] misrepresent[ed] . . . the uses the Navy would allow on the property." Pl. Opp. at 4. Specifically, Section 3.4 of the Solicitation, titled "Use Restrictions," did not mention that mining was a prohibited use of the Dairy Farm Property. Gov't Ex. at 5-6. Likewise, the Appendix to the Solicitation listed specific prohibited uses, but mining was not listed as a prohibited use. Pl. Opp. Ex. Therefore, at the time the Navy issued the Solicitation, it knew, or should have known, "that leasing the [Dairy Farm P]roperty for sand and gravel mining would be contrary to the law[.]" Pl. Opp. at 4. But the Navy did not inform RCG of its interpretation of 10 U.S.C. § 6976 until after it incurred bid preparation costs. *Id.*

The Navy, however, "refuses to even indicate whether it came upon this interpretation [of Section 6976] before or after the submission of the bid." Pl. Supp. at 5. If the Navy interpreted 10 U.S.C. § 6976 prior to the submission of RCG's bid, it "withheld information which was not readily available to RCG." *Id.* at 6. In the alternative, if the Navy "came upon this interpretation only after the submission of bids, it adopted an after the fact rationalization to turn down RCG's submission[.]" *Id.* Of course, any post-hoc rationalization by the Navy "would be tantamount to an act of bad faith, clearly arbitrary and capricious towards RCG as well as inconsistent with the terms of its own [S]olicitation." *Id.* at 6-7.

RCG further argues that it "could not have discovered the Navy's interpretation from simply reading the laws and regulations." Pl. Opp. at 5. To the contrary, RCG "had no reason to suspect sand and gravel mining was prohibited or submit a question as to this specific issue[,] because in all of its interactions with the Navy, the Navy encouraged it to submit a bid." *Id.* at 6.

RCG concedes, however, that the Navy did not have a duty to inform every potential bidder about what would be acceptable. Pl. Opp. at 6. On the other hand, because the Navy had "numerous communications with [RCG] regarding [its proposed] use," the Navy's duty arose by virtue of the nature and number of these communications. *Id.*

Finally, RCG argues that the Navy "erroneously interpreted 10 U.S.C. § 6976 to exclude mining." Pl. Opp. at 7. The Solicitation only requires potential bidders to "[p]rovide information on how the proposal satisfies the legal requirement to maintain the [Dairy Farm

Property] in its rural and agricultural nature."[5] Gov't Ex. at 9. Therefore, RCG reasons that "[t]he protective purpose apparent in both 10 U.S.C. § 6976 and the bid solicitation to maintain the rural and agricultural nature of the property shows that the non-disposal language is only intended to prevent fragmentation of the 875 acre [Dairy Farm Property]." Pl. Opp. at 9. RCG's proposed use "would simply extract the minerals and then reclaim the property, which would not disturb the rural character of the dairy farm by increasing the population or commercial and residential buildings in the area." *Id.* Therefore, RCG's bid proposal was consistent with 10 U.S.C. § 6976. Pl. Opp. at 9-10.

Although RCG concedes that "timber, embedded gravel, sand, or stone" are recognized as "real property" under 41 C.F.R. § 102-71.20, "real property" is also defined as "any interest in land, together with the improvements, structures, and fixtures[.]" 41 C.F.R. § 102-71.20 (2006). Therefore, if the Navy's interpretation of section 6976 is correct, then leasing the Dairy Farm Property for any purpose would be considered disposal of real property. Pl. Opp. at 11. Therefore, RCG concludes that since the Navy has the authority to lease the Dairy Farm Property, logically, it must also have the right to "'dispose' [of] mining rights or other types of interests consistent with 10 U.S.C. § 6976." *Id.* at 12.

3. The Government's Reply.

The Government replies that, if the Navy's interpretation of 10 U.S.C. § 6976 is correct, RCG cannot recover bid preparation costs, because none of "[t]he precedents cited by [RCG] . . . support the extraordinary principle that an agency which correctly interprets its statute to exclude a bid is liable for the bid preparation costs of a non-responsive bid." Gov't Reply at 5. In fact, none of the cases cited by RCG in support are precedential. *Id.*; *see also* Pl. Opp. at 3-6 (citing *D.F.K. Enter., Inc.* v. *United States*, 45 Fed. Cl. 280 (1999); *City of Cape Coral* v. *Water Servs. of America, Inc.*, 567 So. 2d 510 (Fla. Dist. Ct. App. 1990); *State Mech. Contractors, Inc.* v. *Village of Pleasant Hill*, 477 N.E.2d 509 (Ill. App. Ct. 1985)). Each of these cases is cited for the proposition that a government agency is liable for an unsuccessful bidder's bid preparation costs, if the agency made a crucial mistake in connection with the bid. *See, e.g.*, *D.F.K.*, 45 Fed. Cl. at 282-83 (holding an agency provided incorrect information in response to a bidder's question during the solicitation process); *see also City of Cape Coral*, 567 So.2d at 512 (holding a city erroneously interpreted a statute, inducing a bid from plaintiff, who was not eligible for the contract award under the statute); *State Mech. Contractors*, 477 N.E.2d at 511-13 (holding an unsuccessful bidder that submits the best responsive bid may recover preparation costs, even if a non-responsive bidder won the award). In this case, however, the Navy did not make a mistake in rejecting RCG's bid as non-responsive, because the proposed use did not comply with 10 U.S.C. § 6976. Gov't Reply at 9.

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[5] Section 6976(b)(2) provides:

> Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

10 U.S.C. § 6976(b)(2).

The Navy's interpretation of 10 U.S.C. § 6976 was correct, as the statutory language "prohibits the Navy from disposing of the real property in any way outside of a lease." Gov't Reply at 10. Nothing therein supports an interpretation that the statute seeks to prevent subdivision of the Dairy Farm Property. *Id.* at 9. In addition, applicable federal regulations support the Navy's interpretation of 10 U.S.C. § 6976. *Id.* at 10. Likewise, federal property management regulations specifically define "embedded sand and gravel," as real property. *See* 41 C.F.R. § 102-71.20. RCG "does not dispute the applicability of these regulations." Gov't Supp. at 3.

4. The Court's Resolution.

a. The Department Of The Navy Correctly Rejected Plaintiff's Bid As Non-Responsive.

The primary issue is the reasonableness of the Navy's interpretation of 10 U.S.C. § 6976, that in relevant part, provides:

> [T]he real property containing the dairy farm (consisting of approximately 875 acres) -- may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency.

10 U.S.C. § 6976(a)(2)(A).

Title 10 of the United States Code does not define the term "real property." *See* 10 U.S.C. § 101 (providing definitions of certain terms for Title 10); 10 U.S.C. § 5001 (providing definitions of certain terms for Subtitle C of Title 10 (10 U.S.C. §§ 5001-7913.0) -- "Navy and Marine Corps"). Regulations issued by the Department of the Navy, however, provide:

> Real and personal property under the jurisdiction of the Department of the Navy . . . may be disposed of under the authority contained in the . . . Federal Property Act [40 U.S.C. §§ 101-1315]. The Federal Property Act places the responsibility for the disposition of excess and surplus property located in the United States . . . with the Administrator of General Services. . . . Accordingly, in disposing of its property, the Department of the Navy is subject to applicable regulations of the Administrator of General Services[.]

32 C.F.R. § 736.1 (2006).[6]

The Federal Management Regulations,[7] implicated by 32 C.F.R. § 736.1 (2006), were issued by the General Services Administration ("GSA") to "[prescribe] policies concerning

[6] Since 2006, the Code of Federal Regulations ("CFR") has been updated annually. On April 30, 2007, the Navy informed RCG of its interpretation of 10 U.S.C. § 6976. Therefore, the court must adjudicate the Navy's interpretation of 10 U.S.C. § 6976, as of the July 1, 2006 revision of the CFR, applicable on April 30, 2007.

[7] The Federal Management Regulations can be found at 41 C.F.R. §§ 102-1 – 102-94.

property management and related administrative activities." 41 C.F.R. § 102-2.10 (2006); *see also* 41 C.F.R. § 102-71.5 (2006) ("GSA's real property policies contained in . . . parts 102–72 through 102–82 of this chapter apply to Federal agencies . . . operating under, or subject to, the authorities of the Administrator of General Services. These policies cover the acquisition, management, utilization, and disposal of real property by Federal agencies[.]").

Federal Management Regulations define "real property" as follows:

> Standing timber and embedded gravel, sand, or stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition.

41 C.F.R. § 102-71.20 (2006).

Therefore, the Navy correctly determined that the embedded gravel and sand on the Dairy Farm Property site were "real property," and that leasing the Dairy Farm Property to mine embedded gravel and sand would dispose of "the real property containing the dairy farm." 10 U.S.C. § 6976(a)(2)(A).

RCG's contention that 10 U.S.C. § 6976 is intended to prevent "fragmentation" of the Dairy Farm Property has no support in the statutory language, legislative history, applicable regulations, or the record. In addition, RCG's argument that the RCG's proposed use would maintain the land's rural and agricultural nature is irrelevant. Section 6976 requires that "[a]ny lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property." 10 U.S.C. § 6976(b)(2). RCG's proposal, however, was not rejected for failing to maintain the rural and agricultural nature of the property, but because the Navy "determined that the activities and transactions proposed [by RCG] do not fall within the scope of the [S]olicitation[,] because they constitute[d] the disposal of real property." Pl. Ex. 2. For this reason, the Navy's letter notifying RCG that its bid was non-responsive does not mention the requirement that the "rural and agricultural nature" of the Dairy Farm Property be maintained.

For these reasons, the court has determined that the Navy correctly rejected RCG's bid as non-responsive for failing to comply with 10 U.S.C. § 6976.

2. The Department Of The Navy Did Not Breach An Implied Contract With Plaintiff.

The October 24, 2008 Complaint alleges that, even if the Navy correctly interpreted 10 U.S.C. § 6976 and properly rejected RCG's bid as non-responsive, nevertheless, the Navy breached an implied-in-fact contract by not complying with the "obligation of fair dealing to apprise all potential bidders of its interpretation regarding the merits of the bid." Compl. ¶ 16.

In *Southfork Systems, Inc.* v. *United States*, 141 F.3d 1124 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit held:

> The ultimate standard for determining whether an unsuccessful bidder is entitled to relief on the ground that the [G]overnment breached the implied-in-fact contract to consider all bids fairly and honestly is whether the [G]overnment's conduct was arbitrary and capricious.

Id. at 1132 (citation omitted).

In adjudicating whether an implied-in-fact contract was breached on these grounds, the following four factors were identified for the trial court to consider:

> (1) subjective bad faith on the part of the [G]overnment; (2) absence of a reasonable basis for the administrative decision; (3) the amount of discretion afforded to the procurement officials by applicable statutes and regulation; and (4) proven violations of pertinent statutes or regulations.

Id. (citations omitted). Importantly, "there is no requirement . . . that each of the factors must be present in order to establish arbitrary and capricious action by the [G]overnment." *Prineville Sawmill Co., Inc.* v. *United States*, 859 F.2d 905, 911 (Fed. Cir. 1988).

As to the first factor, the October 24, 2008 Complaint does not allege, nor has the court otherwise found in the record, any evidence of bad faith on the part of the Navy. *See Galen Medical Associates, Inc.* v. *United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) ("[W]hen a bidder alleges bad faith, in order to overcome the presumption of good faith on behalf of the [G]overnment, the proof must be almost irrefragable. Almost irrefragable proof amounts to clear and convincing evidence.") (internal quotations and citations omitted). As a matter of law, the allegations in the October 24, 2008 Complaint that the Navy "erroneously interpreted 10 U.S.C. § 6976" (Compl. ¶ 11) and failed to disclose "information that it knew or should have known" (Compl. ¶ 16) are not sufficient to "overcome the presumption of good faith on behalf of the [G]overnment." *Galen Med. Assocs.*, 369 F.3d at 1330.

With respect to the second factor, the court has determined that the Navy's interpretation of 10 U.S.C. § 6976 was correct and that the Navy had a reasonable basis for the rejection of RCG's bid as non-responsive.

Regarding the third factor, the predecessor to our appellate court has held that "the greater the discretion granted to a contracting officer, the more difficult it will be to prove the decision was arbitrary and capricious." *Burroughs Corp.* v. *United States*, 617 F.2d 590, 597 (Ct. Cl. 1980). Section 6976(b)(1) provides:

> [T]he Secretary of the Navy *may* lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and *under such terms* as the Secretary considers appropriate.

10 U.S.C. § 6976(b)(1) (emphasis added). Therefore, the Secretary had complete discretion to reject RCG's proposed use.

Finally, since the court has determined that the Navy's interpretation of 10 U.S.C. § 6976 was correct, Plaintiff cannot prove that the Navy violated any statutes or regulations in connection with the Solicitation.

In the alternative, RCG argues that the Navy breached the implied-in-fact contract by withholding knowledge of its interpretation of 10 U.S.C. § 6976. *See* Compl. ¶ 16; *see also* Pl. Opp. at 4-6; Pl. Supp. at 7. The United States Court of Appeals for the Federal Circuit, however, in *AT&T Communications, Inc.* v. *Perry*, 296 F.3d 1307, 1312 (Fed. Cir. 2002), has held that to prevail on such a claim, a plaintiff must

> produce specific evidence that it (1) undertook to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the [G]overnment failed to provide the relevant information.

Id. at 1312 (citation omitted).

RCG claims the Navy withheld its interpretation of 10 U.S.C. § 6976, that prohibited the mining of embedded sand and gravel on the Dairy Farm Property, from RCG. The Solicitation, however, in section 3.4 -- "Use Restrictions," provides: "The use of the [Dairy Farm Property] shall be in compliance with 10 U.S.C. § 6976[.]" Gov't Ex. at 5. In addition, Appendix A to the Solicitation provides the text of 10 U.S.C. § 6976 (Gov't Ex. at 2), and Appendix F identifies "[a]dditional use restrictions" (Gov't Ex. at 6).

As a matter of law, "[t]he parties [in a government contract action] are charged with knowledge of law and fact appropriate to the subject matter, and reasonable professional competence in reading and writing contracts is presumed." *Turner Const. Co., Inc.* v. *United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004) (citation omitted). Although the Navy did not cite the specific applicable regulations nor the Navy's internal interpretation of the statute in the Solicitation, RCG is held accountable for "knowledge of law . . . appropriate to the subject matter" and "reasonable professional competence in reading" the contract. *Id.* The Navy, therefore, provided RCG with all the relevant information required to prepare a bid. *See* 44

U.S.C. § 1507 ("Unless otherwise specifically provided by statute, [the] filing of [an Executive order or a rule or regulation issued by a federal agency in the Federal Register] . . . is sufficient to give notice of the contents of the document to a person subject to or affected by it."); *see also Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.") (citation omitted). Moreover, if RCG had any question as to the applicable regulations, RCG could have asked the Navy for clarification prior to submitting its bid. *See* Gov't Ex. at 16-22 (Amendments 2-4 to the Solicitation, containing questions by bidders concerning the Solicitation and the Navy's responses to those questions). RCG did not do so.

Accordingly, since RCG has failed to establish the requirements of a breach of implied contract with the Navy, the court has determined that the Navy did not breach an implied contract of good faith and fair dealing.

IV. CONCLUSION.

For the aforementioned reasons, the Government's December 23, 2008 Motion To Dismiss is granted. The Clerk of the United States Court of Federal Claims is directed to dismiss the October 24, 2008 Complaint, pursuant to RCFC 12(b)(6), with prejudice.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Judge