

Acquisition Planning in the United States Army Reserve

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Introduction

Managers in the United States Army Reserve (USAR) must exercise skill in acquisition planning as they support the global war on terrorism while they simultaneously restructure in function and relocate command elements.¹ Increasing operational tempo,² end strength caps,³ and public policy requirements⁴ act in concert to assure an unprecedented level of reliance on government contractors by the USAR. By way of example, the primary contracting organization supporting the USAR, the USAR Contracting Center (ARCC), Fort Dix, New Jersey, reports an increase in the dollar amount of contracting actions in the USAR from \$399.8 million in fiscal year 2004, to \$688 million in fiscal year 2007.⁵

In spite of the large increase in workload, the increased complexity of contacts, and the increased tempo required, there has been a dramatic reduction in the capability of the Army to meet this challenge This combination represents a ‘perfect storm’ in Army contracting.⁶

The Army’s Judge Advocate General (TJAG) has identified contract law capability as a Judge Advocate core legal discipline.⁷ However, the Gansler Commission observations strike a chord with even a casual observer of the state of the current USAR contract law Judge Advocate capability. While contract law capability exists in the USAR, dedicated uniformed USAR contract law positions are rare.⁸ To accomplish necessary legal reviews of contracting actions, USAR contracting at the Regional Readiness Commands must rely on part-time legal support from government civilian attorneys at the USAR organizations it supports.⁹ This approach does little to assure that USAR develops and maintains a core capability of trained and deployable contract law Judge Advocate assets.

Dedicated contract law positions that support real-world USAR contract functions would foster the development of USAR contract law expertise in the Judge Advocate General’s Corps. The USAR force structure is not there yet. The responsibility for the development of the contract law core discipline currently rests squarely on the shoulders of every USAR Judge Advocate senior leader.¹⁰ Accordingly, it is of vital importance to the mission of the USAR that USAR Judge Advocate leaders understand the function and best practices of acquisition planning for USAR procurements.

The purpose of this article is twofold. First, the article acts as a primer and ready reference for Judge Advocates, senior leaders, and USAR lawyers advising requiring activities at USAR Command (USARC) staff directorates, subordinate commands, and functional organizations. Second, the article identifies and presents resolutions for common legal issues encountered by attorneys, organizational clients and contracting officers supporting acquisition functions in the USAR.

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¹ See Press Release, U.S. Army, Army Reserve Chief Predicts Large Changes in Future (Feb. 15, 2005).

² See JOINT CHIEFS OF STAFF, RESERVE COMPONENT EMPLOYMENT STUDY 2005 annex G (1999) (providing analysis of issues related to increased operational tempo in the Reserve components).

³ P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 211 (2003).

⁴ See U.S. OFFICE OF MGMT. & BUDGET, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter OMB CIR. A-76] (requiring increased privatization of government functions).

⁵ E-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: Input for Your Advanced Acquisition Planning Article (5 May 2006, 16:09:00 EST) (on file with author); e-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: Army Lawyer Article (21 Mar. 2008, 09:50:00 EST) (on file with author).

⁶ JACQUES S. GANSLER ET AL., URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING, REPORT OF THE “COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS” (2007).

⁷ Memorandum, The Judge Advocate General, to Judge Advocate Senior Leaders, subject: Training Guidance (29 Oct. 2007) [hereinafter OTJAG Memo];

⁸ E-mail from Lieutenant Colonel John Gohl, to Colonel Kathryn Stone, Army OTJAG, subject: Contract Law Billets Data Call (8 Feb. 2008, 15:57:00 EST) (on file with author).

⁹ *Id.*

¹⁰ OTJAG Memo, *supra* note 7.

Active component contract law attorneys will benefit from learning the unique organizational acquisition planning model successfully employed in the USAR, and can duplicate this success by carrying elements of the USAR model to their active component organizations.

The Requirement for Acquisition Planning

Anyone who clips a coupon from the Sunday newspaper, or shops for the best prices by visiting several department stores, conducts acquisition planning. Some military managers have no more expertise in government acquisitions than the average Sunday newspaper reader, but must plan for the acquisition of goods and services valued from hundreds of thousands up to millions of dollars.

Acquisition planning is required by statute. The statutory requirement to “use advance procurement planning and market research,”¹¹ is implemented by Federal Acquisition Regulation (FAR) Part 7, *Acquisition Planning*.¹² The minimum level of formality for acquisition planning within the Department of Defense (DOD) is further spelled out in Defense Federal Acquisition Regulation Supplement (DFARS) Part 207. The DFARS requires formal, written acquisition plans only for acquisitions in the multi-million dollar range.¹³ Further, DFARS Part 207, *Acquisition Planning*, recently increased the dollar thresholds for required preparation of written acquisition plans.¹⁴

At the same time, the Secretary of the Army has called for increased acquisition planning for thousands of low-level acquisitions by imposing a requirement that the major commander (usually a lieutenant general) approve all service contracts, whether new acquisition or exercise of option periods.¹⁵

The USARC headquarters has more stringent planning requirements for its acquisitions than most active Army activities require for acquisition actions. Before an acquisition action is sent to the supporting contracting office, the Chief of Staff must approve a written acquisition plan, also called a “requirements packet.”¹⁶ The dollar threshold for written acquisition planning at the USARC headquarters is only \$2500.¹⁷ The planning documents required for low-dollar acquisitions are a simplified version of the FAR requirements for larger acquisitions. An Army contracting officer would likely observe that the approved requirements packet resembles a “purchase request on steroids.”

Acquisition Planning at the USARC Headquarters

Acquisition planning in the USARC Headquarters is accomplished through the use of a consultative process with Army Acquisition Corps Contracting Officers at the USAR Contract Administration Support Office (CASO). The USARC CASO is a first-of-its-kind organization in the United States military. The CASO contract analysts are certified Acquisition Corps officers; most are fully (level II) certified. Their role at the USARC does not include making purchases on behalf of the government. The CASO contract analysts are consultants for the requiring activities of the USAR, including action officers at the Office of the Chief, Army Reserve (OCAR) and USARC Headquarters.

¹¹ 41 U.S.C. § 253a(a)(1)(B) (2000), 10 U.S.C. §2305(a)(1)(A)(ii).

¹² See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 7.105(a), (b) (July 1, 2007) [hereinafter FAR] (providing a detailed list of acquisition planning considerations).

¹³ U.S. DEP'T OF DEFENSE, FEDERAL ACQUISITION REG. SUPP. subpt. 207.103 (May 19, 2006) [hereinafter DFARS] (requiring written acquisition plans for: (a) development acquisitions valued at \$5 million or more; (b) production or services acquisitions valued at \$30 million or more for all years or \$15 million or more for any fiscal year; and (c) any other acquisition considered appropriate by the agency).

¹⁴ 48 C.F.R. § 207 (Sept. 2006); see also worksheet, *infra* App. C.

¹⁵ Memorandum, Secretary of the Army, U.S. Army, to HQDA Principles, MACOM Commanders and the Superintendent, USMA, subject: Army Policy for Civilian Hiring and Initiation/Continuation of Contracts for Service Personnel (23 Feb. 2006) [hereinafter Sec'y of the Army Memo] (establishing new requirements for approval of service contracts).

¹⁶ Contract Administrative Support Office Standing Operating Procedures, available at <https://usarcintra/caso/SOP/CASO%20SOP.htm>.

¹⁷ Memorandum, Chief of Staff, U.S. Army Reserve Command, to Directors, Chiefs, Coordinating and Personal Staff Agencies, subject: Contract Funding Vehicles (5 Dec. 2005) [hereinafter Contract Funding Vehicles Memo].

The CASO review process assures that the requiring activities structure their requirements to provide for maximum competition and economically efficient product or service packages. For example, the process saved the USARC millions of dollars in administrative fees by enforcing Army contract offloading policies that resulted in contracts awarded through the Army Contracting Agency.¹⁸ As another example, the review process identified and resolved a fiscal law issue which eliminated a cost to the government of \$1 million each time the contract expired.¹⁹

A well-drafted USARC Headquarters acquisition plan provides a 90% solution for the Army Contracting Agency supporting contracting office. The plan also serves as an audit trail for acquisition decisions and facts supporting the decisions. On completion of the acquisition plan by the requiring activity, the CASO contract analyst obtains a legal review from the USARC Office of the Staff Judge Advocate (OSJA), ensures OSJA recommendations are carried out by the requiring activity, staffs the action to coordinate for funding and approval by the USAR Chief of Staff, and submits the acquisition plan to the appropriate supporting contracting office.

The written acquisition plan consists of up to eight documents. The document requirements vary depending on the proposed level of competition and whether the acquisition is for a new requirement, a modification to an existing contract, or the exercise of a contract option.²⁰ The chart at Appendix A summarizes which documents are required. The following discussion addresses the acquisition planning documents which frequently contain issues of legal significance. The purpose of the discussion is to identify common, avoidable legal problems, and to suggest best practices to resolve those issues.

Legal Issues in the Acquisition Strategy Memorandum (ASM)

The ASM is the cornerstone document of the acquisition plan.²¹ The ASM is less formal than the written “acquisition strategy” required by DFARS Subpart 207.103 for some high-dollar acquisitions. The ASM provides a summary of the key points of the acquisition to the approving authority, contracting analyst and contracting officer. The key points include: a description of the project, identification of key contact persons within the command, funding resources, proposed methods of competition, and any issues or concerns peculiar to the acquisition. The importance of the ASM is underscored by the requirements for written review by a CASO contract analyst and legal review by the USARC OSJA contract law attorney.²²

Exercise of Contract Options

In cases involving the exercise of a contract option, the FAR requires contracting officer determinations as a condition precedent to exercising the option.²³ Accordingly, the USAR ASM must provide adequate support for the required contracting officer determinations. The organizational acquisition planner uses the ASM to support the contracting officer’s exercise of sole discretion to determine that the exercise of the option is the “most advantageous method of filling the government’s need, price and other factors considered.”²⁴ For example, the drafter of the ASM may use the “other considerations” paragraph of the ASM for a discussion of the government’s need for continuity of operations and potential costs of disrupting operations. These are significant factors in supporting the contracting officer’s determination.²⁵

¹⁸ Memorandum, OCAR, to Subordinate Commanders and USAR Staff Directorates, subject: Proper Use of Non-DOD Contracts (31 May 2005) [hereinafter OCAR Memo] (requiring determination and finding (D&F) certifying proposed offload is in the “best interest of the government” including handwritten note from Lieutenant General (LTG) Helmly, stating “use in house contracting resources.”) (on file with author).

¹⁹ Memorandum, USARC OSJA, to CASO, subject: Review of Acquisition Planning Materials for Regional Training Site–Medical (RTS-MED) Acquisition (13 Mar. 2006) (on file with author).

²⁰ Contract Funding Vehicles Memo, *supra* note 17.

²¹ See *infra* App. B for a sample ASM.

²² See Contract Funding Vehicles Memo, *supra* note 17.

²³ See FAR, *supra* note 12, at 17.207(c)–(f).

²⁴ *Id.* at 17.207; see also C.G. Ashe Enters., B-188043, 56 Comp. Gen. 397, Mar. 7, 1977 (stating that where options are exercisable at the sole discretion of the government, board will not consider a bid protest by incumbent asserting agency should have exercised option provisions).

²⁵ See FAR, *supra* note 12, at 17.207(e).

Period of Performance Issues

The period of performance (POP) defines the length of the contract as well as the start and end dates for contract performance. These dates appear in the ASM and in the performance work statement (PWS). Acquisition plans developed over a period of time may contain differing POPs in the various acquisition planning documents which is problematic because it does not clearly communicate the agency's requirements to the supporting contracting office. The POP dates must be consistent in all documents of the acquisition plan.

The period of performance for a new acquisition typically includes a base year plus up to four option years.²⁶ This set-up is the traditional method for contracts which use single-year funds, such as Operations and Maintenance USAR (O&M) funding, which are also referred to as category "2080" funds. Multi-year contracts²⁷ are relatively uncommon at the USAR Headquarters because most of its contract acquisitions require the use of single-year O&M funds.²⁸

Requiring Activity Advocacy For-or-Against Small Business Set-Aside Decisions

The USAR requiring activity may use the ASM to communicate information that informs and advocates for the requiring activity position concerning the contracting officer's evaluation of whether to set aside certain acquisitions for small businesses. In the "competition" or "other considerations" paragraphs of the ASM, the requiring activity may discuss the reasons why the requiring activity believes a small dollar-value acquisition is, or is not, appropriate for a small business set-aside.

The requiring activity discussions must have a basis in the FAR requirements for small business set aside recommendations. For example, the FAR requires a total small business set-aside for most contracts not exceeding \$100,000.²⁹ The total contract price is determined by adding the value of the base year plus all option years.³⁰ Thus, the requiring activity may point out whether the small business set-aside is or is not required and validate whether the value of the base year plus all option years exceed \$100,000.³¹

As another example, if the acquisition qualifies for the total small business set-aside, then each business solicited by the contracting officer must qualify as a "small business" within the meaning of the FAR, "unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery."³² The contracting officer is not required to use any particular method of assessing the availability of small businesses.³³ Thus, prior procurement history, market surveys, and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set-aside an acquisition for small business.³⁴ However, the assessment must be based on sufficient facts to establish its reasonableness.³⁵ Input from the USAR requiring activity in the ASM assists the contracting officer in reaching the required determination.

²⁶ See *id.* at 17.204(e).

²⁷ Contracts with a base period of two or more years.

²⁸ Exceptions include information technology acquisitions, which may require the use of multiple-year procurement funds, and contracts under the GSA multi-year contract authority (codified at 40 U.S.C. § 322 (2000)), which feature lengthy base periods as an exception to the requirements of FAR 17.204.

²⁹ FAR, *supra* note 12, at 19.502-2. But see *id.* at 8.404(a), 16.5 (exempting Federal Supply Schedule orders and orders under Indefinite Delivery Indefinite Quantity contracts).

³⁰ *Id.* at 1.108.

³¹ Analysis of option years for purpose of determining total contract price under FAR 1.108 differs from the analysis of option years to determine obligation of funds, which treats the exercise of an option as a separate contract under FAR 2.101 and DEFENSE FIN. & ACCOUNT. SERV. -INDIANA MANUAL 37-1, ch. 8, para. 080603(B) (Mar 2004) [hereinafter DFAS-IN 37-1].

³² FAR, *supra* note 12, at 19.502-2; see also NJCT Corp., Comp. Gen. B-219455, July 22, 1985, 85-2 CPD ¶ 170 (holding that the actual number of offers received does not establish that the expectation of receiving more offers was not reasonable).

³³ Mktg. & Mgmt. Info., Inc., B-283399.2, B-283399.3, 1999 U.S. Comp. Gen. LEXIS 223 (Nov. 30, 1999).

³⁴ *Id.*

³⁵ *Id.*

If the requiring activity feels the purchase is not appropriate for the use of the small business set-aside, he can support the required contracting officer's determination by using the ASM to communicate the reasons to exempt the acquisition from the required set-aside. For example, if the acquisition is for a commercial item or service which is not available from a small business, the requiring activity uses the "other considerations" paragraph of the ASM to discuss why the need could not be filled using a small business. The requiring activity should never use the ASM to communicate a mere statement of preference, such as "we have had trouble with small business contracts in the past and we prefer a large business for this requirement."

The requiring activity can also use the ASM to recommend a small business set-aside if the value of the acquisition does not mandate the set-aside. In some cases a set-aside may be desirable to avoid potential litigation based on an organizational conflict of interest (OCI)³⁶ or perceived anti-competitive behavior. The three most common causes of OCI are "unequal access to information," "impaired objectivity," and "biased ground rules."³⁷

In cases where the USAR requiring activity anticipates the performance of the contract would give a contractor access to non-public information, which could give the contractor a competitive advantage in other acquisitions, the requiring activity avoids the resulting "unequal access to information" problem³⁸ by recommending award of the contract to a small business that is unlikely to compete for the other acquisitions.

Similarly, a USAR requiring activity recommendation to award to a small business avoids potential protests by large businesses in cases that otherwise may require exclusion of some, but not all, large businesses as sources, because of an "impaired objectivity" problem. Impaired objectivity occurs when an incumbent contractor is likely to compete for a new requirement, even though the award of the new contract would likely result in conflicting obligations under the incumbent contract and the new contract.³⁹ In these cases the requiring activity may use the ASM to recommend the contracting officer award to a small business that does not have other contacts with the Command.

The USAR acquisition planner avoids a "biased ground rules" problem—in which the new acquisition could allow the new contractor to write a statement of work or otherwise set the ground rules for another government contract⁴⁰—by recommending that the contracting officer award the new contract to a small business that is unlikely to compete for the contract that would be impacted by the work of the new contractor.

Contract Bundling

The ASM is an appropriate document to communicate to the contracting officer how the organization has satisfied the rules related to contract bundling. As the government strives for greater efficiencies in contract acquisitions, requiring activities frequently identify similar types of small contracts within their organizations which can be consolidated into smaller numbers of larger contracts.

Contract bundling occurs when two or more functions previously performed under separate smaller contracts are consolidated into a solicitation for a single contract that is likely to be unsuitable for small business, due to the specialized nature of the elements of the consolidated acquisition, geographic dispersion of the new requirement, or the aggregate dollar value of the resulting contract.⁴¹ For example, contract bundling occurs if two contracts, which previously qualified for a mandatory small business set-aside, a discretionary small business set aside, or could have been performed by small businesses individually, are consolidated into a new single acquisition which, due to its dollar value, does not qualify for the mandatory set-aside.⁴²

³⁶ See FAR, *supra* note 12, at 9.5.

³⁷ See, e.g., *Axiom Res. Mgmt. Inc. v. United States*, 78 Fed. Cl. 576 (2007).

³⁸ See, e.g., *id.*

³⁹ See, e.g., *id.*

⁴⁰ See, e.g., *id.*; see also e.g., *J&E Assoc. Inc., B-278771*, 1998 U.S. Comp. Gen. LEXIS 64 (Mar. 12, 1998) (holding that the agency required to address organizational conflicts where university was contracted to provide education counselors and the counselors could recommend Soldiers enroll in classes offered by the university)

⁴¹ FAR, *supra* note 12, at 2.101.

⁴² *Id.* at 19.502-2; see also *id.* at 2.101; *Sigmattech, Inc., B-296401*, 2005 U.S. Comp. Gen. LEXIS 140 (Aug. 10, 2005); see also U.S. DEP'T OF DEFENSE, OFFICE OF SMALL BUSINESS PROGRAMS, BENEFIT ANALYSIS GUIDEBOOK fig.1-1 (2007).

Attorneys reviewing acquisition planning products must ensure that their agencies avoid unnecessary and unjustified bundling of contract requirements that preclude competition by small businesses.⁴³ However, bundling is permissible if the agency documentation shows that the agency adhered to the rules in the FAR related to contract bundling.⁴⁴ The contracting officer uses the information contained in the USAR acquisition plan to reach the required contracting officer determinations with regard to the proposed bundling.

Contract bundling is necessary and justified for most acquisitions if the command will realize a 10% or greater cost savings as a result of the bundling.⁴⁵ The ASM is an appropriate document to communicate the efforts of the command in meeting the following special requirements to justify contract bundling under the FAR.

First, the head of the agency must conduct market research to determine whether bundling is necessary and justified—i.e., that a cost savings of at least 10% will be realized.⁴⁶ Market research, which is already a requirement for all acquisitions, including USAR acquisition plans, is used by the agency head in making the determination. Thus, a statement in the ASM referring to the cost savings shown in the market research assists in meeting this requirement.

Second, the contracting officer must make a statement as to why bundling is justified.⁴⁷ If the requiring activity adequately states his case in the ASM and provides supporting documentation in the acquisition plan, the contracting officer need do little more than refer to the acquisition planning documents to support the required finding.

Management Decision Document (MDD) Requirement Is Suspended

If the proposed solicitation is for the acquisition of services which support or improve agency policy development, decision making, management or administration,⁴⁸ then the acquisition is for Contracted Advisory and Assistance Services (CAAS). The regulatory requirement for an MDD for CAAS contracts is temporarily suspended,⁴⁹ but this will not significantly reduce the level of acquisition planning at the USARC headquarters. An ASM will still be required at the USARC headquarters in the place of an MDD. The key differences between the ASM and the MDD are that the MDD contains more detail than the ASM in the areas of quality control and contract administration planning,⁵⁰ and the MDD has differing levels of approval in some cases.⁵¹

Legal Issues in the PWS

The PWS is important to the acquisition both during contract formation and during contract administration. A well-written PWS supports a solicitation which provides the largest possible number of potential contractors with opportunity to compete. At contract award, the PWS is incorporated into the contract. Mistakes in the PWS during the acquisition planning phase surface to cause problems post-award during contract administration.

⁴³ 15 U.S.C. §631(j)(3) (2000).

⁴⁴ FAR, *supra* note 12, at 7.107; *see, e.g.*, B.H. Aircraft Co. Inc., Comp. Gen. B-295399.2, July 25, 2005, 2005 CPD ¶ 138 (affirming agency bundling of 2454 individual requirements under a single contract, where the provisions of FAR 7.107 were adequately carried out by the agency).

⁴⁵ FAR, *supra* note 12, at 7.107(b) (requiring a cost savings of at least 10% to justify bundling a contract valued at \$75 million or less, including all option years).

⁴⁶ *Id.* at 7.107.

⁴⁷ *Id.* at 19.202-1.

⁴⁸ U.S. DEP'T OF THE ARMY, REG. 5-14, MANAGEMENT OF CONTRACTED ADVISORY AND ASSISTANCE SERVICES para. 1-4 (15 Jan. 1993) [hereinafter AR 5-14].

⁴⁹ Memorandum, Deputy Under Secretary of the Army, to HQDA Principal Officials, Subordinate Commanders and Directors, subject: Suspension of Requirement to Prepare a Management Decision Document (22 May 2006).

⁵⁰ AR 5-14, *supra* note 48.

⁵¹ *See* U.S. ARMY FORCES COMMAND SUPP. 1 TO AR 5-14 (1 Dec. 1994) [hereinafter FORSCOM SUPP. 1 to AR 5-14] (providing delegation of authority to the Major Subordinate Commander to approve CAAS for studies, analysis, and evaluation in the amount of \$250,000, and for management support services or engineering and technical services in the amount of \$500,000).

The intent of this section is not to provide instruction on how to complete a PWS. The DOD provides a handbook to guide the preparation of PWSs.⁵² Neither does this section provide an exhaustive analysis of all possible PWS issues leading to legal problems. The following discussion highlights examples of PWS issues encountered when reviewing acquisition planning products prepared by USAR requiring activities and suggests appropriate preventative measures.

Avoid Ambiguities in Duty Descriptions or Deliverables Descriptions

The requiring activity must specifically state in the PWS exactly the requirements that exist and cannot leave “wobble room” to imagine that the contract will also cover functions he may have ‘forgotten’ in the planning process. If some of the requirements for the contract are anticipated for a later time, but are not needed immediately, or are not yet fully developed, the requiring activity is in a unique position to build-out the scope of the contract to accommodate the later requirement. The requiring activity must state in the PWS that the contracting officer may later modify the contract to include the additional subject matter. Since the PWS is an essential element of the solicitation and becomes part of the contract, the statement of intent in the PWS to later modify the contract for the new subject matter is also part of the solicitation and contract. In this way, the acquisition planner builds the scope of the acquisition in a broad enough manner to include the anticipated but presently excluded subject matter.⁵³

When drafting duty descriptions and descriptions of deliverables in the PWS, agencies must “rely on the use of measurable performance standards.”⁵⁴ Ambiguous language in duty descriptions or deliverables descriptions leads to potential costly legal problems involving contract interpretation during contract performance.⁵⁵ The following are common examples of ambiguous descriptions PWSs in USAR acquisitions.

Descriptions which use the phrases “including but not limited to. . .” or “additional duties as assigned by (insert title of military person)” result in costly and time-consuming *scope of contract* and *unauthorized commitment* issues, as well as the potential for an illegal *personal services contract*.⁵⁶ For example, the contractor may demand additional funding for work which the government directed under the “including but not limited to” language when the work was not adequately described in the PWS.⁵⁷ Such a contract is also subject to litigation by the vendor’s competitors for assigning the vendor work that is outside the scope of the contract.⁵⁸ The potential result is an acquisition which was not properly competed.⁵⁹

Use of the word “should” or the phrase “should be able to” to describe personnel qualifications or deliverables results in ambiguous contract terms that lead to difficulty in enforcing performance standards. The word “should” does not provide a “measurable performance requirement.”⁶⁰ Qualifications and performance criteria are either mandatory or discretionary. For example, a requirement that contractor personnel *should* possess Master’s degrees does not amount to a requirement under the contract. If a requirement is subject to waiver, the contracting officer is the only approval authority. The PWS must state any departure from this rule, for example, contracting officer representative authority to make recommendations to the contracting officer for waivers, other procedures or unusual circumstances related to waivers of contract requirements.

⁵² U.S. DEP’T OF DEFENSE, HANDBOOK FOR PREPARATION OF PERFORMANCE WORK STATEMENT (PWS), MIL-HDBK-245D (3 Apr. 1996).

⁵³ See, e.g., *CWT/Alexander Travel, Ltd. v. United States*, 78 Fed. Cl.486 (2007) (ruling in favor of Government where contract contained provisions indicating changes of the type involved in the case were expected during the performance of the contract).

⁵⁴ FAR, *supra* note 12, at 37.602(b)(3).

⁵⁵ See, e.g., *Philco – Ford Corp.*, ASBCA No. 16198, 73-1 BCA ¶ 9,860.

⁵⁶ See FAR, *supra* note 12, at 37.104.

⁵⁷ *Id.* (stating that PWS required engineering calculations “including but not limited to” those specified in contract. Contractor entitled to equitable adjustment when government required additional calculations to add margin of product safety not specified in contract.).

⁵⁸ See, e.g., *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90 (2000) (holding that a prospective bidder may use the Tucker Act, 28 U.S.C. § 1491(b) to protest a contract modification, if the modification violates a statute); see also *CWT/Alexander Travel, Ltd.*, 78 Fed. Cl. 486 (out-of-scope changes violate the Competition in Contracting Act); *HG Props. A, LP, B-290416, B-290416.2*, 2002 U.S. Comp. Gen. LEXIS 106 (July 25, 2002) (providing that the Comptroller General will review a protest by a third party alleging that a contract modification is outside the scope of the vendor’s contract and therefore should have been a new procurement);

⁵⁹ See *CWT/Alexander Travel, Ltd.*, 78 Fed. Cl. 486.

⁶⁰ FAR, *supra* note 12, at 37.602(b)(3).

Quantity, Time, and Place of Delivery

The guidance in the FAR for descriptions of deliverables in the PWS is general in nature: requiring description of work in terms of the required results, or assessment of work performance against measurable performance standards. In acquisitions for CAAS services, Army Regulation 5-14 imposes more specific requirements; the listing of deliverables by “quantity and place and time of delivery and schedule of delivery.”⁶¹ Whether or not the acquisition is for CAAS services, it is difficult to produce a “measurable performance requirement” in the absence of listing deliverables in the PWS by quantity and time and place of delivery. For example, if the deliverable is the production of reports, list daily reports as “daily,” and list flash reports as “immediately.” Clear identification of contract deliverables in the acquisition planning stage will save money by avoiding contract performance problems in the contract management stage of the acquisition.

“Brand Name or Equal” Descriptions

In some acquisitions, such as information technology purchases, the description of a certain brand and model of product in the PWS is the best solution to meet the needs of the government—but not the only solution available. The use of “brand name” descriptions in acquisitions is closely managed⁶² because contract specifications which are not vendor-neutral do not provide for full and open competition, regardless of the number of sources solicited.⁶³ “Brand name” descriptions require justification and approval documents, no matter how small the purchase.⁶⁴

Full and open competition is satisfied if the PWS includes a “brand name or equal” purchase description⁶⁵ to describe the product to be acquired. Under the “brand name or equal” purchase description, the PWS includes the brand name and model followed by the phrase “or equal” and a general description of those “salient physical, functional, or performance characteristics” of the brand name item that an “equal” item must meet to be acceptable for award.⁶⁶ When using a “brand name or equal” purchase description, the agency must evaluate the proposals, including product literature submitted by the competitors to determine compliance with the requirements of the solicitation.⁶⁷

The reviewing attorney must assure that the requiring activity does not merely cut-and-paste from the product literature to develop the PWS. The PWS may only describe deliverables in the broadest possible terms to meet the minimum needs of the government.⁶⁸ For example, in a hypothetical information technology acquisition of a computer network switching device, the command may recommend the use of an ACME brand Coyote 2006 model device, or equivalent.

The PWS must list the characteristics that make the ACME Coyote 2006 device meet the needs of the government, for example: 100% compatibility with all identified hardware and software already in use within the system; numerical statement of historical reliability; numerical expression of processing speed; number of ports or expansion slots; compatibility with existing expansion modules; physical dimensions to fit existing electronics racks; electricity-saving features; heat output; operating noise; etc. The PWS must not describe characteristics of the Coyote 2006 that are not necessary to meet the needs of the government for the computer network switching device, for example: standard features of the Coyote 2006 that will be unused in the needed application; the color of the keyboard; or the level of operating noise, if the device will be installed in a location where noise is not a factor. When using a “brand name or equal” purchase description, only describe the attributes needed to satisfy the requirement for the acquisition.

⁶¹ AR 5-14, *supra* note 43, at fig.4-1.

⁶² See Memorandum, Office of Management and Budget, to Chief Acquisition Officers, Chief Information Officers, Senior Procurement Executives, subject: Use of Brand Name Specifications (11 Apr. 2005); see also Memorandum, Office of Management and Budget, to Chief Acquisition Officers, Senior Procurement Executives, subject: Publication of Brand Name Justifications (17 Apr. 2006); FAR, *supra* note 12, at 11.105.

⁶³ FAR, *supra* note 12, at 6.302-1(c).

⁶⁴ See *id.* at 5.102(a)(6); see also *id.* at 6.302-1(c), (d).

⁶⁵ *Id.* at 6.302-1(c), 11.104.

⁶⁶ *Id.* at 11.104.

⁶⁷ See, e.g., Elementar Americas, Inc., Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20 (holding the protest sustained where agency did not correctly apply information in literature of competitor to evaluation for simplified acquisition using brand name or equal product description).

⁶⁸ See, e.g., Mossberg Corp., Comp. Gen. B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189 (requirement for steel receiver on shotguns is not necessary to meet minimum needs, when aluminum receivers provide the same desired characteristics).

After 20 January 2008, a PWS for the purchase of office computer equipment meets the requirements of the Energy Policy Act of 2005⁶⁹ if it includes the following statement: “All products must be registered with the Electronic Product Environmental Assessment Tool (EPEAT).”

The Energy Policy Act of 2005 requires that acquisition planning documents for energy consuming products contain “Energy Star” or “Federal Energy Management Program” (FEMP) criteria for energy efficiency.⁷⁰ The statutory requirement to include energy savings in acquisition plans also applies to product specifications and evaluation criteria, and requires the actual purchase of “Energy Star” or FEMP products.⁷¹

By including the above-recommended statement in PWS, requiring activities also satisfy the requirements of the presidential mandate that electronic products purchased by federal agencies must be EPEAT-registered.⁷² After January 2008, all EPEAT-registered products will also be “Energy Star 4.0” certified.⁷³ Accordingly, the use of the above recommended statement avoids potential contract delivery problems resulting from the receipt of obsolete “Energy Star 3.0” technology when ordering generic “Energy Star compliant” devices.⁷⁴

The DOD instruction implementing the statutory requirement to purchase energy efficient devices also directs contracting personnel to consolidated contract instruments for purchases of approved products.⁷⁵ In the USAR, the Army Small Computer Program is the service contract for the acquisition of approved energy-efficient user-level computer products.

Market Research Documentation

Requiring activities conduct market research when they obtain information concerning prices and products available from competing vendors. Broadly speaking, the USAR uses market research to collect information in three areas: technical, pricing, and terms and conditions.⁷⁶ The degree of market research required depends on the circumstance of the procurement.⁷⁷ In some cases, market research leads to a clear indication of the best solution. In other cases, market research leads to the reevaluation of agency needs to accommodate the use of less costly commercial items. An USAR written acquisition plan which includes a document trail showing market research efforts by the requiring activity could mean the difference between success and failure in litigation.⁷⁸

When preparing a commercial item acquisition, Army Contracting Agency (ACA) contracting personnel need the input, guidance, and support of their USAR customers to identify possible commercial components and technologies.⁷⁹ Market

⁶⁹ Pub. L. No. 109-58, 119 Stat. 594.

⁷⁰ § 104(a).

⁷¹ *Id.*

⁷² See Exec. Order 13,423, 3 C.F.R. 3919 (2007).

⁷³ See *Answers to Frequent Questions: ENERGY STAR® 4.0 and EPEAT™*, <http://www.energystar.gov/ia/partners/fedagencies/estar40.pdf> (last visited Mar. 24, 2008).

⁷⁴ *Id.*

⁷⁵ U.S. DEP’T OF DEFENSE, INSTR. 4170.11, INSTALLATION ENERGY MANAGEMENT para. 5.2.2.2 (22 Nov. 2005).

⁷⁶ U.S. DEP’T OF DEFENSE, COMMERCIAL ITEM HANDBOOK version 1.0, at 6 (Nov. 2001), available at <http://www.acq.osd.mil/dpagp/Docs/cihandbooks.pdf> [hereinafter DOD HANDBOOK].

⁷⁷ See, e.g., SHABA Contracting, Comp. Gen. B-287430, June 18, 2001, 2001 CPD ¶ 105 (holding that informal market research supported agency position during litigation).

⁷⁸ See, e.g., Encompass Group LLC, B-296602, B-296617, U.S. Comp. Gen. LEXIS 142 (Aug. 10, 2005) (denying protest where agency market research supported government position).

⁷⁹ DOD HANDBOOK, *supra* note 76, at 6.

research documentation conducted by the requiring activity also becomes a time-saver to assist the contracting officer in meeting documentation requirements for commercial item procurements.⁸⁰

Supporting Contracting Organizations

The USAR Contracting Center—ACA Assets Aligned with USAR Units

The ACA is the contracting authority for the USARC.⁸¹ The USARC commander has designated ACA Fort Dix as the USAR Center of Excellence for Contracting.⁸² The Assistant Secretary of the Army for Acquisition, Logistics and Technology has given the Director, ARCC, Fort Dix, full authority to carry out the contracting mission in the USAR, as well as operational control over contracting assets needed to accomplish the mission.⁸³

Over the course of more than a decade, USAR contracting has transformed from a decentralized model, with little command and control over individual acquisition actions, to an increasingly centralized model with clear lines of authority and high levels of approval for individual contract actions. The three charts at Appendix D show the transformation of the USAR contracting model.⁸⁴

The ARCC provides geographically localized, or otherwise specialized, contracting support for USAR organizations. The ARCC has recently realigned to provide pre-positioned corresponding support as shown at Appendix D, Illustration 3, so that the Army Reserve will not experience an interruption in support as it transforms to its post-Base Realignment and Closure (BRAC) Regional Support Command (RSC) structure. The Human Resources Command, St. Louis, Missouri, and the USAR Medical Command, Tampa, Florida, will continue to receive direct support from the contracting branch at ARCC, Fort Dix.⁸⁵

The role of the ARCC in USAR contracting is monumental and still growing. During fiscal years 2005 through 2007, 127 ARCC employees processed 11,376 actions, 13,865 actions, and 13,196 USAR acquisition actions, respectively. The total combined dollar value for these acquisitions increased each year, from \$443.4 million, to \$519 million, to \$688 million, respectively.⁸⁶ However, these figures do not present a complete picture of the enormity of the acquisition function in the USAR. The USAR organizations also receive support from ACA assets outside the ARCC, as discussed below.

ACA Support to the USAR from Outside the ARCC

Although USAR contracting is undergoing an ongoing process of centralization, a number of exceptions result in pockets of decentralized contracting support to the USAR. For example, the Headquarters, USARC, Fort McPherson, Georgia, and the Office of the Chief of the USAR, Alexandria, Virginia, receive direct support from the contracting branch at ARCC, Fort Dix, and from other ACA organizations outside the ARCC.⁸⁷ Contract support from ACA organizations not specifically aligned with the USAR organizations may be based on geography or specialization of pre-competed contract subject matter.

ACA Assets Located Near USAR Organizations

The convenience of colocation may determine the support relationship between an organization of the ACA outside the ARCC and the supported USAR organization. For example, the Headquarters, USARC receives contracting support from the

⁸⁰ See FAR, *supra* note 12, at 13.501.

⁸¹ Headquarters, Dep't of Army, Gen. Order No. 6 para. 8 (26 Sept. 2003); Headquarters, Dep't of Army, Gen. Order No. 6, para. 8 (24 Aug. 2002).

⁸² Memorandum, USARC Commander, U.S. Army, to Subordinate Commanders, subject: Contracting Center of Excellence Centralization in the United States Army Reserve (22 Dec. 1999).

⁸³ Memorandum, ASA (AL&T), to Mr. Kastberg, subject: Designation as the Director, Army Reserve Contracting Center (1 Oct. 2002).

⁸⁴ See *infra* App. D (containing charts from: e-mail from Pamela Lutz, ARCC Deputy Director, to the author, subject: FW: ARCA Brief Feb 07.ppt (19 Mar. 2008, 12:05:00 EST) (on file with author)).

⁸⁵ *Id.*

⁸⁶ See *id.*

⁸⁷ *Id.*

ACA Southern Region Contracting Center-East. The organizations are collocated at Fort McPherson, Georgia. Likewise, the Office of the Chief of the Army Reserve receives contracting support from the Center for Contracting Excellence, D.C. The organizations are collocated near Washington D.C. Similarly, the United States Army Civil Affairs and Psychological Operations Command (USACAPOC), located at Fort Bragg, North Carolina, receives contracting support from the Fort Bragg Directorate of Contracting. The use of collocated contracting assets results in less centralized acquisition management in the pre-award stage, but more efficient contract management in the post-award stage of an acquisition.

Specialized Pre-Competed Contracts

The availability of pre-competited contracts may also determine the support relationship between an organization of the ACA outside the ARCC, and the supported USAR organization. For example, information technology products or services may be available through: the ACA Information, Technology, E-Commerce and Commercial Contracting Center (ITEC4) program, administered by ACA, Alexandria, Virginia and Directorate of Contracting, Fort Huachuca, Arizona; the U.S. Army Forces Command (FORSCOM) Operations, Planning, Training and Resource Support Services (OPTARSS) contract, administered by the ACA Southern Region Contracting Center-East, Fort McPherson, Georgia; and the Army Small Computers Program, Fort Monmouth, Virginia. The use of ACA pre-competited contracts administered by a distant ACA contracting office satisfies competition requirements and leverages the efficiencies of the Army's pre-competited contract instruments.

Cryptographic Systems Acquisition Support

The Army has consolidated the acquisition of cryptographic systems under the Communications Electronics Command (CECOM)-Communications Security Logistics Agency (CSLA). The CECOM-CSLA maintains pre-competited blanket purchase agreements (BPAs) for the purchase of approved cryptographic devices. The use of a CECOM-CSLA BPA is mandatory for the acquisition of Army cryptographic systems.⁸⁸ If a USAR organization places an order under a CECOM BPA, the requiring organization coordinates directly with the CSLA in placing the order.⁸⁹ The CECOM does not charge an administrative fee for use of their BPAs.

Contract Offloading—Use of Non-DOD Contracts

Contract offloading in the USAR occurs when an USAR organization fills a requirement using contracting support provided by an organization outside the DOD. The DOD,⁹⁰ Department of the Army,⁹¹ and the Chief of the USAR⁹² have each published policies officially discouraging the practice.

Contract offloading in the USAR is discouraged for four important reasons: First, offloading costs the USAR significant amounts of money in administrative fees charged by the non-DOD organization which administers the contract. Second, the practice is viewed as anti-competitive.⁹³ Third, quality control, contract supervision and management processes inherent in non-DoD contracts may be well-suited to the agency which possesses the contract, but may be ill-suited for use across agency

⁸⁸ U.S. DEP'T OF ARMY, REG. 25-2, INFORMATION ASSURANCE ch. 6-1a(4) (14 Nov. 2003).

⁸⁹ Telephone Interview with Julia Lucero, CSLA Logistics Management Specialist (6 Jan. 2006). Ms. Lucero stated that she is the Army point of contact for Information Assurance logistics. *Id.* She further stated purchase orders under a CECOM-CSLA pre-competited BPA may only be issued by the CECOM contracting office. *Id.* Ms. Lucero stated that USAR transactions under a CECOM-CSLA BPA should be conducted directly with her, and she will coordinate the order with the CECOM contracting officer. *Id.*

⁹⁰ Memorandum, OSD (AT&L), to Secretaries of the Military Departments, subject: Proper Use of Non-DoD Contracts (29 Oct. 2004) (requiring procedures for non-DOD contract vehicles on or after 1 January 2005); Memorandum, OSD (AT&L), to Secretaries of the Military Departments, subject: Proper Use of Non-DoD Contracts (20 July 2005).

⁹¹ Memorandum, DA (ASA-AL&T), to Secretaries of the Military Departments, subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (12 July 2005).

⁹² OCAR Memo, *supra* note 18 (under revision at date of this publication to more closely align USAR specific requirements with Army-wide requirements) (on file with author).

⁹³ See, e.g., *An Oversight Hearing on Iraq Contracting Abuses: Hearing Before the S. Dem. Policy Comm.*, 108th Cong. (2004) [hereinafter *Policy Committee*] (testimony of Professor Steve Schooner describing interagency fee-for-service programs allowing program managers to avoid competition requirements and contract administration responsibilities), available at <http://democrats.senate.gov/dpc/hearings/hearing17/transcript.pdf>.

lines.⁹⁴ Fourth, contract offloading short-circuits agency-required acquisition planning processes which are intended to address agency-specific issues, rules and challenges.⁹⁵ Thus, the end result of contract offloading is often a contract which is more expensive, as well as unwieldy from a quality management and contract administration perspective.

For some purchases, an “offload” acquisition is the most desirable, or only, method available. For example, General Services Administration (GSA) has been designated by the Office of Management and Budget⁹⁶ as the executive agent for government-wide acquisitions for fifteen government-wide information technology programs.⁹⁷ Some of these programs are routinely used in the USAR.

Contract offloading is not prohibited in the USAR, but the USARC Commander closely manages the practice. In addition to Army-wide requirements⁹⁸, the Chief of the USAR guidance⁹⁹ requires that a determination and finding (D&F)¹⁰⁰ be prepared by the requesting agency and certified by the Chief of Staff, USAR. The D&F must certify consideration of five broad categories of acquisition planning, present documentation of contract data, and include a statement by a warranted contracting officer of the ACA indicating concurrence or non-concurrence.¹⁰¹ Thus, the procedures are designed to assure the offload is in the best interest of the government, not merely for the convenience of the requiring activity.

Economy Act Orders

Some USAR acquisitions involve the delivery of products or services by other governmental organizations, inside or outside the DOD. The Economy Act¹⁰² authorizes the head of a major organizational unit within the USAR to place an order with another major organizational unit within the government.

Centralized approval authority for funding, and review by an Army contracting officer, effectively manages the use of Economy Act transactions. These measures also assure that Economy Act transactions are not used to avoid sound acquisition planning measures, or short-cut full and open competition, to fill requirements. Centralized approval authority for funding, and contracting officer review, are the model for Economy Act transactions at the USARC headquarters.¹⁰³ Economy Act transactions are managed within the USARC headquarters by the use of a D&F.¹⁰⁴ The ACA retains involvement in the analysis of whether to execute an Economy Act transaction, because the D&F requires the signature of a contracting officer of the ACA before the USARC Chief of Staff will approve funding for the transaction.¹⁰⁵

Federal Acquisition Regulation Part 17.5 governs the exercise of intra-agency Economy Act authority by simply stating that intra-agency transactions are addressed within agency regulations. Economy Act transactions are governed within the DOD by DOD Instruction¹⁰⁶ and Army regulations.

⁹⁴ See *id.*; see also *Some U.S. Prison Contractors May Avoid Charges*, BALTIMORE SUN, May 24, 2004, available at <http://www.baltimoresun.com/news/> (commentator P.W. Singer describing the use of an interior Department contract to fill need for interrogators in Iraq by exclaiming “You’re placing a military interrogation task under Smokey the Bear . . . You can’t have good oversight.”).

⁹⁵ See *Policy Committee*, *supra* note 93.

⁹⁶ See Clinger-Cohen Act of 1996, 40 U.S.C. § 11302(e) (2000).

⁹⁷ Letter from Office of Management and Budget, to Administrator, General Services Administration (9 Aug. 2006) (designating GSA as executive agent for government-wide acquisitions for the following programs: Access Certificate for E-Services (ACES), Alliant, Alliant Small Business, Applications and Support for Widely-diverse End User Requirements (ANSWER), Disaster Recovery Services for Federal Computer Systems and Networks, STARS, FAST, HUBZone, Information Technology Omnibus Procurement II, Millennium, Millennium Lite, Seat Management Services, Smart Card, Veterans Technology Services and Virtual Data Center).

⁹⁸ Memorandum, DA (ASA-AL&T), to Administrative Assistant to the Secretary of the Army et al., subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (12 July 2005).

⁹⁹ OCAR Memo, *supra* note 18.

¹⁰⁰ See FAR, *supra* note 12, at 1.7 (providing D&F format).

¹⁰¹ *Id.*

¹⁰² 31 U.S.C. § 1535 (2000).

¹⁰³ *Supra* note 18.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ U.S. DEP’T OF DEFENSE, INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (9 Aug. 1995).

One example of an intra-agency Economy Act transaction that is sanctioned by Army regulation involves USAR medical organizations that carry Army radiation authorizations for radiation-producing equipment. Army Regulation 40-5, *Preventive Medicine*, states that the *Army Installation and Occupational Health Program*, via the U.S. Army Medical Command, surveys Army radiation authorization holders.¹⁰⁷ Thus, the regulation establishes an intra-service support mechanism, with cost reimbursement carried out under the Economy Act.

Legal Issues Common to USAR Acquisitions

Each written acquisition plan at the USARC headquarters requires a legal review by the OSJA prior to approval of funding for the acquisition.¹⁰⁸ Contract law attorneys who review acquisition planning materials for the USAR must exercise broad issue-spotting skills. A one-page review worksheet, such as the example provided at Appendix C, provides a useful start-point for legal analysis of a written acquisition plan. However, no worksheet can take the place of careful issue spotting and thorough analysis by a contract law attorney. The following discussion highlights some of the more common legal issues which are addressed in the legal review of USAR acquisition plans.

Special Rules for Service Contracts

On 23 February 2006, the Secretary of the Army published new requirements calling for the approval of the major commander—normally a three-star general—before initiating the acquisition or exercising option periods for service contracts.¹⁰⁹ The USARC Commander has delegated approval authority to the Chief of Staff, USAR to approve service contracts.¹¹⁰ The requirement for approval of service contracts applies to every service contract in the USAR.¹¹¹ A completed USAR acquisition planning packet for a service contract is not legally sufficient if it does not include the required approval.

The point of contact for the request for approval for service contracts is the USARC CASO. The requesting organization completes a request for approval which contains a summary of the information the organization will later place in the ASM as part of the USAR acquisition plan.¹¹² The organization sends the request for approval via email to usarcscconapproval@usar.army.mil. The CASO consolidates the requests for the USAR and presents the requests to the USARC Commander for approval.

Commercial Items—FAR Subpart 13.5 Simplified Acquisitions

The confluence of public policy, calling for the government acquisitions of commercial items,¹¹³ and the needs of the USAR, results in many USARC acquisitions which involve the purchase of commercial items.¹¹⁴ Some common examples of commercial item purchases in the USAR include hotel conference facilities, office equipment, computer network equipment, certain vehicle leases, and “extended warranty” agreements for certain commercial items. Each commercial item mentioned in this paragraph is discussed further in this article.

The value of most commercial item acquisitions at the USARC headquarters is within the dollar limits¹¹⁵ for the use of the Commercial Item Test Program.¹¹⁶ The Commercial Item Test Program provides contracting officers with procedural

¹⁰⁷ U.S. DEP'T OF ARMY, REG. 40-5, PREVENTIVE MEDICINE ch. 1 (25 May 2007)

¹⁰⁸ *Supra* note 17.

¹⁰⁹ Sec'y of the Army Memo, *supra* note 15.

¹¹⁰ Memorandum, Chief, Army Reserve, to Deputy Chief, Army Reserve, DCG, USARC, CoS, Army Reserve and CXO, Army Reserve, subject: Delegation of Authority—Army Policy for Civilian Hiring and Initiation/Continuation of Contracts for Service Personnel (1 July 2006).

¹¹¹ *See* Sec'y of the Army Memo, *supra* note 15.

¹¹² Form available at the USARC CASO.

¹¹³ Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, tit. VIII, 108 Stat. 3243.

¹¹⁴ FAR, *supra* note 12, at 2.101 (defining commercial items to include products and services).

¹¹⁵ *See id.* at 13.500 (\$5 million, including all option periods or \$10 million for contingency operations or recovery from nuclear, biological, chemical or radiological attack against the United States).

discretion and flexibility to solicit, offer, evaluate, and award commercial item contracts using special simplified acquisition procedures.¹¹⁷ The result for the USARC is maximum efficiency and economy, and minimal burden and administrative costs for both the government and industry.¹¹⁸ Congress has extended the authority for contracting officers to use the special procedures of the Commercial Item Test Program through January 1, 2010.¹¹⁹

When the USARC acquisition plan is approved, CASO forwards the documentation to the ACA contracting officer to complete the acquisition. Acquisitions conducted under the simplified acquisition procedures of FAR Subpart 13.5 are exempt from the full-and-open competition requirements of FAR Part 6. However, the contracting officer must provide competition and meet the requirements of FAR Part 13.501 by documenting the following steps.

First, the contracting officer must draft a brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR Subpart 13.5 were used.¹²⁰ The procedures may include examination of the market research procedures used by the USARC for this acquisition, and use of the market research documentation provided in the acquisition plan.

Second, the contracting officer must record the number of offers received.¹²¹ The market research provided in the USARC acquisition plan is a resource to assist the contracting officer in completing the required market research.

Third, the contracting officer must draft an explanation of the basis for the contract award decision.¹²² Much of that basis will likely come from the considerations discussed by the requiring activity in the ASM.

The contracting officer is the approval authority for justifications and approvals for sole-source acquisitions under the Commercial Item Test Program up to \$550,000.00.¹²³ Thus, the contracting officer may require the requiring activity to provide a draft justification and approval document, or other additional documentation from the USARC, if the contracting officer elects to pursue a sole-source acquisition.

Vehicle Leases

Some acquisition plans in the USARC include the requirement to lease specialized vehicles or to meet surge capacity needs, when the required vehicles are not available in the Army supply system. One such example is a homeland defense mission which requires the unit to haul a civilian 5th-wheel trailer, and no available Army vehicle has a 5th-wheel trailer hitch. Another example is the use of rental vehicles to meet surge capacity needs for non-tactical vehicles during exercises or operations, when an adequate supply of GSA fleet vehicles is not available.

Short Term Leases for Several Days or Weeks

The cost of a short term lease of a non-tactical vehicle to fill a mission requirement, for a period of days or weeks,¹²⁴ most often does not exceed the micro-purchase threshold of \$3,000.00.¹²⁵ Thus, the use of the government purchase card is authorized¹²⁶ and the vehicle lease does not require a written acquisition plan.¹²⁷

¹¹⁶ *Id.* at 13.5.

¹¹⁷ *Id.* at 13.500.

¹¹⁸ *Id.*

¹¹⁹ Pub. L. No. 110-181, § 822(a), 122 Stat. 3 (2008).

¹²⁰ FAR, *supra* note 12, at 13.500.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ This discussion does not address the short term lease of a vehicle while on a temporary duty assignment.

¹²⁵ FAR, *supra* note 12, at 2.1 (defining “micropurchase threshold” as \$3,000.00, with noted exceptions).

¹²⁶ *Id.* at 13.2.

¹²⁷ *Supra* note 12.

However, when the required number of vehicles or the length of time necessary for the leases, results in a cost which exceeds the micro-purchase threshold, the lease becomes a commercial item acquisition—which most often qualifies for simplified acquisition.¹²⁸ If the total cost of the lease exceeds \$150,000.00 or the total number of vehicles exceeds twenty-five, the requiring activity must seek special approval from Headquarters, Department of the Army.¹²⁹

Vehicle Leases in Excess of Twelve months, Twenty-five Vehicles or \$150,000.00

Some vehicle leases in the USAR address recurring requirements which result in the need for vehicle leases in excess of twelve months, twenty-five vehicles or \$150,000.00. However, fulfilling a large-scale or multi-year requirement for lease vehicles is limited by regulation.¹³⁰ The rules require the major command to secure prior approval from Department of the Army Logistics (DALO-TSP)¹³¹ before executing a long-term lease when leasing requirements exceed twelve months.¹³² Further, if an acquisition involves a lease of vehicles for a term of eighteen months or more, a D&F must be prepared by the head of the supporting contracting activity.¹³³

Some long term vehicle lease requirements in excess of twelve months may be satisfied by using a GSA Federal Supply Schedule (FSS) contract. However, the use of a GSA FSS contract for a motor vehicle lease does not qualify the motor vehicle as part of the Interagency Fleet Management System (IFMS). Thus, the leased vehicle is not considered a GSA-owned vehicle¹³⁴ and the acquisition plan must include the required approval by DALO-TSP.¹³⁵ Further, the use of a GSA contract for a vehicle lease exceeding eighteen months requires two D&Fs be prepared: one is required by the Chief of the USAR for an “offload” contract¹³⁶ and the other is required by the DFARS.¹³⁷

Intellectual Property Issues

The USAR is a large purchaser of computer software applications. In addition to commercial off the shelf applications, such as Microsoft Office or Delrina FormFlow, some organizations within the USAR contract for the development of customized computer software applications to support their data processing, time management, or logistics tracking functions.

When planning an acquisition for the development, operation, or maintenance of customized computer software application, the requiring activity must be aware of the respective rights of the government and the software developer. The acquisition plan must include documents to justify the departure from standard DOD practices with regard to rights in developmental software applications.

The DFARS contains standard contract clauses related to the management of intellectual property considerations in government contracts.¹³⁸ The following clauses address the most common intellectual property issues in developmental software contracts in the USAR.

¹²⁸ FAR, *supra* note 12, at 13.5

¹²⁹ U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION AND USE OF MOTOR VEHICLES para. 3-11(b) (10 Aug. 2004) [hereinafter AR 58-1].

¹³⁰ *Id.*

¹³¹ Telephone Interview with Mr. David J. Fuchs, Non-Tactical Vehicle Manager, DAIM-FDF (3 Aug. 2006) [hereinafter Fuchs Interview]. Mr. Fuchs stated that his office, DAIM-FDF, is the successor organization to DALO-TSP. *Id.* He further stated that streamlined processes at DAIM-FDF provide for fast turn-around on approvals required by AR 58-1. *Id.*; see AR 58-1, *supra* note 129, para. 3-11(b).

¹³² AR 58-1, *supra* note 129 (requiring activity must seek the required approval by memorandum to HQDA (DALO-TSP), 500 Army Pentagon, Washington D.C. 20310-0500).

¹³³ See DFARS, *supra* note 13, at 207.470.

¹³⁴ AR 58-1, *supra* note 129, at 3-12(b).

¹³⁵ *Id.*

¹³⁶ *Supra* note 18.

¹³⁷ See DFARS, *supra* note 13, at 207.470.

¹³⁸ See OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS, HANDBOOK 1.1, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS, ISSUES AND SOLUTIONS WHEN NEGOTIATING INTELLECTUAL PROPERTY WITH COMMERCIAL COMPANIES App. D (Oct. 15, 2001) (providing a summary of DFARS clauses related to intellectual property).

First, DFARS 252.227-7014 allows the government to take unlimited, nonexclusive rights in noncommercial software developed at government expense, which means the contractor has the right to resell computer scripts developed at government expense, on the commercial market.¹³⁹ If the requiring activity does not want the software developed under the contract to be resold on the commercial market, this requirement must be included in the acquisition plan. The acquisition plan must include documentation, such as a memorandum from the commander, directorate chief or organizational head, to support a request to the contracting officer to depart from this DOD standard practice.

Second, through DFARS 252.204-7000, the contractor may not release unclassified information pertaining to any program related to the contract absent prior written approval by the contracting officer, unless the information is otherwise in the public domain before the release.¹⁴⁰ The clause also requires the contractor to place a similar clause in any subcontracts.¹⁴¹ This clause is especially important in light of DFARS 252.227-7014 because it prohibits the contractor from disclosing information concerning the internal business practices of the USAR organization, in the event the contractor elects to resell the computer software developed under the contract. The requiring activity performs a quality control function when he assures the contacting officer includes this standard clause in the developmental software contract.

Fiscal Law Issues—Purpose/Time/Amount

Every acquisition plan in the USAR involves fiscal law analysis to assure compliance with the three basic mechanisms of fiscal control imposed by Congress. The fiscal controls mechanisms are: (1) obligations and expenditures must be for a proper purpose; (2) obligations must occur within the time limits applicable to the appropriation (e.g., O&M funds are available for one fiscal year); and (3) obligations must be within the amounts authorized by Congress. One or more statutes implement each fiscal control mechanism. This section discusses issues related to some of the statutes of frequent applicability to USAR acquisitions.

The Army uses an accounting system of “fund citations” (fund cites). Each acquisition plan is accompanied by a *Purchase Request and Commitment* form,¹⁴² which contains a fund cite to indicate the source of funding. Knowledge of the source of funding is essential to the determination of whether an acquisition meets the requirements of purpose, time, and amount. Below are examples of the most common fund cites used for USARC Headquarters acquisitions:

<u>CODE</u>	<u>PURPOSE</u>	<u>APPROPRIATION</u>	<u>TIME</u>
21-2031 through 21-2035	Procurement	Procurement	3 Years
21-2080	O&M	USARs	1 Year

Violations of the fiscal control statutes are frequently also violations of the Antideficiency Act.¹⁴³ The Antideficiency Act provides penalties designed to deter government employees from making or authorizing an expenditure or obligation in excess of the amount contemplated and authorized by Congress.¹⁴⁴ Thus, avoiding violations of the fiscal controls of purpose, time, and amount during the acquisition planning phase may avoid mandatory reporting and investigation procedures, as well as potential penalties under the Antideficiency act in the contract administration phase.

Purpose

The purpose statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”¹⁴⁵ One practical application of the purpose statute in an USAR acquisition is the investment/expense threshold for information technology systems.

¹³⁹ DFARS, *supra* note 13, at 252.227-7014.

¹⁴⁰ *Id.* at 252.204-7000.

¹⁴¹ *Id.*

¹⁴² U.S. Dep’t of Army, DA Form 3953, Purchase Request and Commitment (Mar. 1991).

¹⁴³ 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–19 (2000).

¹⁴⁴ § 1341(a)(1)(A).

¹⁴⁵ § 1301(a).

Congress has delineated between a “system” purchased at a cost of greater than \$250,000.00, called an “investment” and a “system” purchased at a cost of less than \$250,000.00, called an “expense.”¹⁴⁶ The investment/expense threshold determines the type of funding used for the acquisition. Expenses must be paid for using Operational funds, such as O&M funds.¹⁴⁷ These funds expire at the end of each fiscal year. Investments costing more than \$250,000.00 must be paid for using procurement funds.¹⁴⁸ These funds typically remain available for three years or more.

It is essential to identify the estimated dollar values of the separate components and systems to be purchased under an acquisition plan so that the proper funds will be applied to the purchase. For example, a detailed analysis may be required for the life-cycle replacement of network-connected desktop computers, with a total combined value exceeding \$250,000.00. The use of USAR computer networks to interconnect computer equipment complicates the analysis of whether the purchase of a compilation of equipment, for connection to the network, amounts to a “system” purchase with a unit cost exceeding the investment/expense threshold, or a series of small purchases not amounting to a “system.”¹⁴⁹ Life-cycle replacement of equipment presents similar complexities.¹⁵⁰ When the computers connect to a common network; share e-mail, calendar, and print servers; and otherwise interact using the network, they may appear to operate as a “system.”

The analysis of whether this acquisition consists of many small purchases or the replacement of a “system” relies upon the “primary function” analysis required by the Defense Finance and Accounting Service.¹⁵¹ Using the “primary function” analysis, it is easy to conclude that desktop computers connected to the network are not a “system” if the “primary function” of each computer is to operate as an independent work station. Thus, the network enhances the value of the independent work stations but network operation is not the “primary purpose” of the computer work stations. Under those facts, the use of O&M funds does not violate the purpose statute.¹⁵²

The OSJA will provide legal advice in helping to define whether a compilation of equipment, such as interconnected information management or video telecommunications devices, amounts to a “system” for purpose of the investment/expense threshold.

Time Limits and Crossing Fiscal Years

A majority of acquisitions at the USARC Headquarters are funded using single-year O&M funds. Thus, it is important to understand the rules for the use of single-year funds when planning an acquisition which is projected to fill a need over a period of more than one year. With limited exceptions, the use of current-year funds is prohibited to pay for future-year needs. This is called the *bona fide needs rule*.¹⁵³ The discussion below addresses two exceptions to the *bona fide needs rule* and addresses issues peculiar to extended warranty contracts as related to the *bona fide needs rule*.

Severable Service Contracts Crossing Fiscal Years and the Bona Fide Needs Rule

When a requirement for a severable service contract crosses fiscal years, the general rule is that severable service contracts are funded with appropriations for the year in which the services are performed.

A common example in the USAR involves janitorial contracts. If a twelve-month contract for building cleaning services runs from July 2006 through July 2007, it is a severable services contract which crosses fiscal years. The contract is for severable services because each instance of building cleaning amounts to a complete, separate delivery of services. The contract crosses fiscal years because part of the contract is before the end of fiscal year 2006, on 30 September 2006, and part

¹⁴⁶ Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11 (2003).

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.*, 10 U.S.C. § 2245a (2000) (prohibiting the use of operations and maintenance funds to purchase any item, including a replacement item, that has an investment item unit cost that is greater than \$250,000.00).

¹⁵¹ DEFENSE FIN. & ACCOUNT. SERV.-INDIANA, MANUAL 37-100-06, ARMY MANAGEMENT STRUCTURE para. D.2.a [hereinafter DFAS-IN 37-100-06].

¹⁵² 31 U.S.C. § 1301(a).

¹⁵³ § 1502(a).

of the contract is after the start of fiscal year 2007, on 1 October 2006. The services performed on or before 30 September 2006 would normally be paid with fiscal year 2006 funds, and the services performed after 1 October 2006 would normally be paid using fiscal year 2007 funds.

However, the command may also elect to fund a severable services contract entirely with funds from the current fiscal year if the contract does not exceed twelve months. FAR Part 32.703-3(b) implements 10 U.S.C. § 2410a, and provides the necessary authority to entirely fund a severable service contract that does not exceed twelve months, using current funds.

Option years are not counted in the determination of whether a contract exceeds twelve months for the purpose of the election to use current-year funds for a service contract that crosses fiscal years. An option year is treated as a new contract.¹⁵⁴ Thus, the command should focus on the current period of performance, even if additional option years are available.

Materials Contracts—Stock Level Exception to Bona Fide Needs Rule

Materials ordered near the end of the fiscal year may be paid for using current-year funds, even if the materials ordered will not be consumed until the next fiscal year, using the *stock level exception* to the *bona fide needs rule*.¹⁵⁵ However, the materials may only be ordered using the *stock level exception* for common-use items in sufficient amounts to maintain established stock levels.¹⁵⁶

The requiring activity must include documents in the acquisition planning materials to establish the normal stock level and justify the use of the *stock level exception*. For example, the normal stock level for repair parts for equipment is frequently established in technical manuals. Thus, the ASM should refer to the paragraph in the technical manual which establishes the normal stock level and justifies the use of the *stock level exception*.

As another example, if the normal stock level for multi-purpose photocopier paper is a three-month supply, the use of FY 2006 funds during the last week of the fiscal year is authorized to purchase a supply of paper that will not be exhausted until the first quarter of FY 2007. However, the requiring activity should include an excerpt from the standing operating procedures for the organization, or a separate memorandum in the acquisition planning documents, which establishes the normal stock level and justifies the use of the *stock level exception*.

Extended Warranty Issues

Manufacturers' extended warranties usually involve an up-front payment for several years of warranty coverage. At first glance, the purchase of extended warranties appears to expose a disconnect between government procurement policy and fiscal law requirements. On the one hand, the government is required, to the maximum extent possible, to use manufacturer's extended warranties when it purchases commercial items.¹⁵⁷ On the other hand, neither the Code of Federal Regulations, nor the FAR provide an exception to the bona-fide needs rule, which is codified at 31 U.S.C. § 1502(a), and which prohibits the use of current year-funds to pay for future-year needs. However, the Defense Finance and Accounting Service has adopted the position that an extended warranty is considered to be a whole "product" and not a service covering a specific fiscal year need; thus there is no conflict with the bona-fide needs rule when purchasing this product in one fiscal year for a potential benefit which might accrue in a future year.¹⁵⁸

Conclusion

Careful acquisition planning results in monetary and manpower gains for the USAR. When requiring activities structure purchases in an efficient and legally sufficient manner, the government gets the most appropriate products and services while

¹⁵⁴ DFAS-IN 37-1, *supra* note 31, at ch. 8, para. 080603(B).

¹⁵⁵ U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. vol. 3, ch. 8, para. 080303A (Mar. 2008) [hereinafter DOD-FMR].

¹⁵⁶ See Betty F. Leatherman, Dept. of Comm., B-156161, 44 Comp. Gen. 695 (1965).

¹⁵⁷ Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 264; see also FAR, *supra* note 12, at 12.404(b).

¹⁵⁸ DFAS-IN 37-100-06, *supra* note 151, at App. A, para. D.1.e.

it avoids legal pitfalls that have the potential to sap the administrative capacity of the organization and interfere with the performance of the contract. Judge Advocate senior leaders in the USAR should use this guidebook as they organize their approaches to their contract law core discipline development responsibilities.¹⁵⁹ Attorneys who support requiring activities in the USAR should use this guidebook as a handy reference to assist in structuring purchases and otherwise adding clarity to any unclear issues in the acquisition plan. Requiring activities, contracting consultants and reviewing attorneys should carefully consider information contained in the ASM, PWS, and other acquisition planning materials to assure the requirement and the proposed methods of meeting the requirement are clearly stated and legally supported. Keen attention to fiscal law rules, recurring legal issues in USAR acquisition planning materials, and USAR-specific procedures saves time and money, and becomes a multiplier for the accomplishment of the mission of the USAR.

¹⁵⁹ OTJAG Memo, *supra* note 151.

Appendix A

Chart of Required Acquisition Planning Documents

	New Requirement	Modification	Option
	Yes	Yes	Yes
Acquisition Strategy Memorandum (ASM); or Management Decision Document (MDD) if Contracted Assistance and Advisory Services	Yes	Yes	Yes
Chief of Staff Briefing Slides (for acquisitions exceeding \$25,000.00.)	Yes	Yes	Yes
Request for Service Contract Approval (for service contracts over \$2,500.00)	Yes	Yes	Yes
Performance Work Statement (PWS) or Statement of Objectives (SOO)	Yes	Yes	No
Market Research Documentation	Yes	No	No
Independent Government Cost Estimate (IGCE)	Yes	No	No
Copy of Current Contract or Task Order	Usually N/A	Yes	Yes
Draft Justification and Approval if Sole-Source Purchase	If applicable	If applicable	If applicable
DA Form 3953 Purchase Request and Commitment	Yes	Yes	Yes
DD Form 448 Military Interdepartmental Purchase Request (MIPR) (if applicable)	Yes	Yes	Yes

Appendix B

Sample Acquisition Strategy Memorandum

AFRC-JA

MEMORANDUM FOR Chief of Staff, USAR

SUBJECT: Acquisition Strategy Memorandum

1. Description of project:
2. Contracting Officer Representative (COR) or Task Monitor (TM):
3. Estimated total cost:
4. Delivery or performance date:
5. Competitive or non-competitive nature of the proposed procurement:
6. Type/source funding:
7. Special approvals:
8. Issues affecting procurement:
9. Date the contract office must receive the acquisition package:
10. Statement of why work cannot be done in-house or by another government agency:
11. Statement that the proposed procurement is not a duplication of effort:
12. Statement that contract off-loading procedures were followed when dealing with non-DOD activities:
13. State anticipated benefits:
14. Indicate method used to measure anticipated benefits:
15. Statement that the requiring office considers the deliverables to fully address the government's need for feedback from the contractor, if applicable:

SIGNATURE OF DIRECTOR
RANK, BRANCH
Name of Requiring Organization

Appendix C

Worksheet for Legal Review

Worksheet for Legal Review of Project: _____

FAR 7.102 - Policy - Agencies shall perform acquisition planning and conduct market research for all acquisitions in order to promote and provide for: (a) acquisition of commercial items; (b) full and open competition.

DFARS 207.103 - Written acquisition plans required for: (a) development acquisitions \geq \$10mil; (b) production or services acquisitions \geq \$50 mil for all years or \geq 25 mil for any FY; (c) any other acquisition considered appropriate by the agency.

USAR Command Chief of Staff Memorandum, SUBJECT: Contract Funding Vehicles, 5 Dec. 2005 (formerly USARC Administrative Memo number 4) - Requires written acquisition plans for any contract funding vehicle exceeding \$2,500.00

FAR 7.105 contents of written acquisition plans

(a) Background and objectives

1. Statement of need
2. Conditions
3. Cost
4. Capability or performance
5. Delivery or performance period
6. Trade-offs
7. Risks
8. Acquisition streamlining

(b) Plan of Action

1. Sources
2. Competition
3. Source selection procedures
4. Acquisition considerations
5. Budgeting and funding
6. Product or service descriptions
7. Priorities, allocations, and allotments
8. Contractor v. govt. performance
9. Inherently governmental functions
10. Management info required - monitoring the contractor's efforts
11. Make or buy
12. Test and evaluation
13. Logistics considerations
14. Government furnished property
15. Government furnished information
16. Environmental and energy conservation objectives
17. Security considerations
18. Contract administration
19. Other statutory and program considerations
20. Milestones for the acquisition cycle

Cryptographic Systems (IT hardware/software): Use of Communications Electronics Command (CECOM) Communications Security Logistics Agency (CLSA) may be mandatory, under the provisions of AR 25-2, chapter 6-1, which requires the use of CSLA for the acquisition of cryptographic systems. The Army point of contact at CECOM-CLSA for Information Assurance Logistics is Logistics Management Specialist Julia Lucero ((520) 538-8259).

Software Intellectual Property Considerations: See summary of DFARS clauses in *Navigating Commercial Waters*, App D. Most common clauses in software system maintenance and development Ks are:

- DFARS 252.204-7000 - Disclosure of information
- DFARS 252.227-7014 - Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation
- DFARS 252.227-7025 - Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

Appendix D

ARCC Geographic Alignment

Illustration 1
"The Way it Was"
(prior to consolidation in 1996)

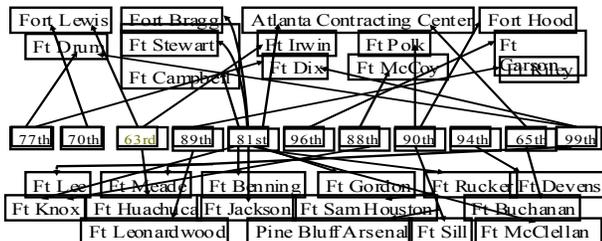
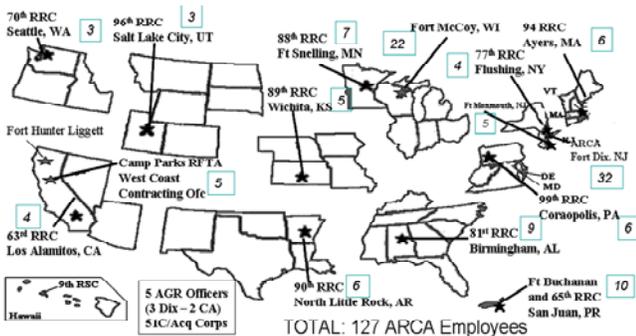


Illustration 2

ARCA
Recent Legacy Support based on USAR RRC
Command Structure



New ARCC Support Structure based on USAR Post-BRAC
RSC Command Structure

