

Sarkar, Rumu, CIV, WSO-BRAC

From: Cirillo, Frank, CIV, WSO-BRAC
Sent: Friday, June 10, 2005 6:54 AM
To: Sarkar, Rumu, CIV, WSO-BRAC
Cc: Wasleski, Marilyn, CIV, WSO-BRAC; Epstein, David, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: RE: Privatized Housing for Navy/Marine Corps

I agree. Bob and Marilyn - sort out with David and see if an issue remains

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Thursday, June 09, 2005 3:57 PM
To: Epstein, David, CIV, WSO-BRAC; Wasleski, Marilyn, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Robertson, Kathleen, CIV, WSO-BRAC; Small, Kenneth, CIV, WSO-BRAC; Saxon, Ethan, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Combs, David, CIV, WSO-BRAC; Tran, Duke, CIV, WSO-BRAC; Hanna, James, CIV, WSO-BRAC; Dinsick, Robert, CIV, WSO-BRAC; Van Saun, David, CIV, WSO-BRAC; Abrell, Timothy, MAJ, WSO-BRAC; 'carol.schmitt@wso.whs.mil'; Hall, Craig, CIV, WSO-BRAC
Cc: Hall, Craig, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC
Subject: RE: Privatized Housing for Navy/Marine Corps

Without belaboring this issue this further, let me advise you of my further discussions re: the possibility of penalties, premiums or other percentage point changes when the bonds supporting privatized housing projects may be bought back before the maturity dates. First, and foremost, I have been advised that there is no anticipated need for the Navy/MC to exit the limited partnerships that support privatize housing, and there are no potential legal or other liabilities of the Navy/MC that stem from these financing arrangements.

If the private developer who is usually the managing member of the LLC (and please note that the Navy is NEVER the managing member) faces the possibility that the occupancy for the housing in questions may fall below the 50% rate, then a decision will be made on whether to buy back some of the bonds before maturity to lower the overall debt liability of the private developer. However, the Navy does not buy back the bonds, nor can the Navy be penalized in any way for an early buy-out. This arrangement differs from most bond finance structures insofar as the Navy does not actually purchase an equity position as a member of the limited partnership (i.e., invest funds), and no underlying construction loan is entered into by the private developer (so please disregard my earlier description of this particular sliver of the transaction). Most bond financings actually start with a bank loan, and institutional investors agree to purchase bonds as evidence of the borrowers' indebtedness. Here, the Navy's Northeast Project involving 8 installations in five states, including New London, Portsmouth, and Brunswick, all of whom are affected by the BRAC process, is currently under consideration by the private developer(s) to decide on whether early bond buy-backs will be initiated.

Please note that the fixed rate bond financing arrangement is entered into through one LLC with one operating agreement (i.e., one debt instrument). The private developer issues the bonds that are then bought by institutional investors. The cash is deposited in a construction escrow account managed by a trustee, and the income stream generated by existing housing being refurbished by the private developer is deposited into the escrow account. That income stream pays back principal and interest to the bondholders as well as to the construction contractor(s) for work performed on the housing units.

The "no penalty" clause is tied to the bond docs., and I have been assured that even if there were a penalty assessed, it would not be against or payable by the Navy. The Navy does give a 50-year lease to the private developer and, as discussed below, may decide to sell the underlying realty to a third party at its discretion. However, as mentioned above, there is no anticipated need for the Navy/MC to exit these private partnerships or the leaseholds that support privatized housing. Thanks, Rumu

From: Epstein, David, CIV, WSO-BRAC
Sent: Thursday, June 09, 2005 8:20 AM
To: Sarkar, Rumu, CIV, WSO-BRAC; Wasleski, Marilyn, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Robertson, Kathleen, CIV, WSO-BRAC; Small, Kenneth, CIV, WSO-BRAC; Saxon, Ethan, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Combs, David, CIV, WSO-BRAC; Tran, Duke, CIV, WSO-BRAC; Hanna, James, CIV, WSO-BRAC; Dinsick, Robert, CIV, WSO-BRAC; Van Saun, David, CIV, WSO-BRAC; Abrell, Timothy, MAJ, WSO-BRAC; 'carol.schmitt@wso.whs.mil'; Hall, Craig, CIV, WSO-BRAC
Cc: Hall, Craig, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC
Subject: RE: Privatized Housing for Navy/Marine Corps

Rumu:

In your explanation of the non-liability of the Navy for privatized housing, you wrote that "in the event of the need to terminate the Navy's limited partnership, then the bonds are bought back before their maturity date without any penalty to the Navy. My limited knowledge of the way in which bonds work is that if the Navy is no longer going to stand behind a project, the interest rate that investors demand will rise by at least one percent and probably more. When interest rates rise on a long term bond, the value of the bond will plummet and bond-holders would probably sue the Navy and the developer unless the documentation that made the offering made this eventuality clear. Furthermore, the Navy (and possibly the other Services) would likely decide that they had better pay off the partners and bond holders or they will be unable to do future public-private ventures. In short, I am not comfortable with the apparent conclusion that there is no liability on the part of the Navy.

Please pass this up the chain if you think that it has any merit. You might want to get Duke, as an economist, or someone who really understands bonds to review this and/or to rewrite it more eloquently and correctly.

David

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Wednesday, June 08, 2005 2:56 PM
To: Wasleski, Marilyn, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Robertson, Kathleen, CIV, WSO-BRAC; Small, Kenneth, CIV, WSO-BRAC; Saxon, Ethan, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Combs, David, CIV, WSO-BRAC; Tran, Duke, CIV, WSO-BRAC; Hanna, James, CIV, WSO-BRAC; Epstein, David, CIV, WSO-BRAC; Dinsick, Robert, CIV, WSO-BRAC; Van Saun, David, CIV, WSO-BRAC; Abrell, Timothy, MAJ, WSO-BRAC; 'carol.schmitt@wso.whs.mil'; Hall, Craig, CIV, WSO-BRAC
Cc: Hall, Craig, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC
Subject: FW: Privatized Housing for Navy/Marine Corps

Just closing the loop on Navy/Marine Corps' position re: privatized housing. At the present time, the Navy (and Marine Corps) have about 15 privatized projects that are organized as either limited partnerships or limited liability companies. This means that the Navy is an investor in the private partnership, and any liability is limited to the actual investment. The private developer takes out a construction loan that is securitized by the issuance of private taxable bonds that are purchased by institutional investors. In the event of the need to terminate the Navy's limited partnership (for BRAC or other reason), then the bonds are bought back before their maturity date without any penalty to the Navy. Moreover, the Navy/MC do not issue performance guarantees for the performance of the private builder/developer, and are not required to invest more money than the original amount. The limited partnerships also have a tenant waterfall arrangement, as described in the message below. However, the Navy is not required to provide tenants to the private developer. There are no BRAC "closure clauses" as such but, as described above, in the event of a facility closure (for BRAC or other reason), the Navy/MC will simply buy back the outstanding bonds before their respective maturity dates.

All such privatized facilities are subject to 50-year leases, and the Navy/MC does not necessarily sell the underlying land to the private developer in the event of a facility closure. The land may be sold, at the Navy's option, to third parties. The assets (i.e., the housing facility or improvements made to the land) are owned by the limited partnership, and the Navy/MC makes a determination on a case-by-case basis on whether to terminate their limited partnerships. In sum, there are no anticipated outstanding legal or other associated liability or costs in relation to privatized housing facilities that the Navy or MC may have a limited partnership interest in.

Please let me know if you have questions concerning this discussion. Thanks, Rumu

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Monday, June 06, 2005 10:34 AM
To: Hall, Craig, CIV, WSO-BRAC
Subject: FW: OSD Housing Privatization website

Hi Craig: Thanks for working with me on the Alaska trip. I will appreciate your getting me the name of a lawyer in Elmendorf or Richardson who may be familiar with the cross basing privatized housing issue and whether transfers of privatized housing contracts/ground leases creates potential legal liabilities (see note below). Moreover, many thanks for getting me a copy of the base site visit briefing book. Rumu

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Saturday, June 04, 2005 1:46 PM
To: Wasleski, Marilyn, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Robertson, Kathleen, CIV, WSO-

BRAC; Small, Kenneth, CIV, WSO-BRAC; Saxon, Ethan, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Combs, David, CIV, WSO-BRAC; Tran, Duke, CIV, WSO-BRAC; Hanna, James, CIV, WSO-BRAC; Epstein, David, CIV, WSO-BRAC; Dinsick, Robert, CIV, WSO-BRAC; Van Saun, David, CIV, WSO-BRAC; Abrell, Timothy, MAJ, WSO-BRAC; 'carol.schmitt@wso.whs.mil'

Cc: Hague, David, CIV, WSO-BRAC
Subject: RE: OSD Housing Privatization website

I regret that another meeting prevented me from attending the meeting with Mr. Sikes on Friday, but for the record, I just wanted to give you a summary of what I discovered re: potential legal, cost and other liabilities that may arise from terminating privatized AF and Army housing projects through the BRAC closure process. The good news is that it is negligible. Mark Frazier, Deputy Chief Counsel at the AF Office of Housing Privatization in St. Antonio, TX, spoke to me at length about privatized housing projects, and there are two separate financing roles that the military can play. First, a (50-year) ground lease is entered into with the base and the private developer. If the developer can get 100% private commercial financing to build, own and operate the housing unit(s), then there's no financial role for the military to play. If a full construction loan is not available, the AF can provide a second mortgage for partial funding of the private project (e.g., 60% financing is made available by a private bank and 40% financing is made available by the AF). A second role for the military is to issue a loan guarantee, disfavored in principle, to enable the private developer to get the construction loan and at a lower interest rate, or better financial terms based on the USG guarantee. (The Army, for example, has outstanding guarantees, as I understand it, at Fort Carson and Fort Polk.)

If the occupancy of the leased facility drops below 95% occupancy for 90 consecutive days, this triggers a "tenant waterfall" arrangement whereby eight categories of persons may be approached to fill the unoccupied units, starting with members from other service branches and ending with members of the general public. If the privatized housing project fails for any reason (e.g., the fault or non-performance of the developer) and the mortgage of the private developer is foreclosed, the developer does NOT have recourse against the USG. The USG does not guarantee performance of the developer. If the USG or the developer wish to terminate the ground lease, then the first option will be to negotiate a purchase option with the developer (even if such a clause does not exist in the original lease) for the sale of the underlying land (at fair market value) to the developer by the military. Thus, the developer may continue to own, operate and profit from the facility for the full remaining term of the 50-year ground lease. Further, if the private developer does not conform to the terms of the ground lease, then the USG can terminate the lease at no cost or legal penalty to the AF or Army.

If the lease is terminated because a BRAC closure has been scheduled, this is considered to be a termination "without clause." So-called "BRAC termination clauses," at least for the most part as far as I could determine, do not exist in such ground leases. The underlying reason for this is that military installations would not be able to attract private developers if the lease can be terminated within a few years because of BRAC closure issues. The costs of building and operating privatized housing are high enough so that such costs can only be recouped over an extended period of time. Thus, should a military installation terminate the ground lease without cause, then this would expose the USG to liability under the lease and possibly under underlying financial agreements. However, as mentioned above, the installation will seek to enter into a purchase agreement with the developer so that the project can run the length of the lease and (hopefully) generate a profit for the developer/operator.

Thus, in conclusion, there are no real anticipated costs or legal exposure from privatized housing projects in the AF and Army which explains why it was not factored into the BRAC analysis for those services. (This summary does not include the Navy.) Please let me know if you have any questions, Rumu

From: Wasleski, Marilyn, CIV, WSO-BRAC
Sent: Friday, June 03, 2005 3:23 PM
To: Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Robertson, Kathleen, CIV, WSO-BRAC; Small, Kenneth, CIV, WSO-BRAC; Saxon, Ethan, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Combs, David, CIV, WSO-BRAC; Tran, Duke, CIV, WSO-BRAC; Hanna, James, CIV, WSO-BRAC; Epstein, David, CIV, WSO-BRAC; Dinsick, Robert, CIV, WSO-BRAC; Van Saun, David, CIV, WSO-BRAC; Abrell, Timothy, MAJ, WSO-BRAC; 'carol.schmitt@wso.whs.mil'; Sarkar, Rumu, CIV, WSO-BRAC
Cc: Wasleski, Marilyn, CIV, WSO-BRAC
Subject: OSD Housing Privatization website

For those in need of information on DoD's housing privatization initiative such as where they currently have privatization projects, please visit the following website:

OSD's housing privatization website is: <http://www.acq.osd.mil/housing/mhpi.htm>

If you missed this morning's meeting with the Director of OSD's Privatization Office (and the write up I prepare does not answer your questions), please call the director--Joe Sikes at (703) 602-3669.

Regards,

Marilyn
x2925



FOR IMMEDIATE RELEASE
April 25, 2002

Contacts: Dana Johnson
Chris Mathey

**HOUSE BILL WOULD GIVE ARMY SECRETARY NEW
AUTHORITY
TO LEASE EXISTING MILITARY HOUSING
*Change Could Solve Problems Associated with
Expiring 801 Housing Leases***

WASHINGTON — At the request of Rep. John M. McHugh (R-NY), the House Armed Services Committee's Military Installations and Facilities Subcommittee today approved a legislative provision that would give the Secretary of the Army new authority to lease existing housing from a developer. The change is essential to give the Department the flexibility necessary to resolve the problem of expiring Section 801 leases at installations nationwide.

"Fort Drum has nearly 2000 units of Section 801 housing and those leases will begin to expire in just a few years," Rep. McHugh said. "We need to give the Secretary of the Army more flexibility in order to preserve the full range of options necessary to deal with the expiring leases. Without this change, there would be no practical way for the Department to extend the leases beyond the initial lease period."

When scores of new soldiers were stationed at Fort Drum following the buildup of the installation in the late 1980s, the Army entered into leases with private developers (under Section 801 of the Military Construction Authorization Act of 1984) to provide housing to soldiers and their families in various North Country communities. Section 801 is essentially a "build-to-lease" guarantee to a private property developer. The 20-year leases will begin to expire in 2007.

The Department of Defense Authorization bill will be considered by the full House Armed Services Committee next week.

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*Numerous mentions
of Elmendorf, especially
in footnotes*

Military Housing Privatization Initiative: a guidance document for wading through the legal morass

Stacie A. Remy Vest

"The air-conditioning and heating vents are completely clogged. The only air or heat [they] get is from a narrow opening in a window frame between the kitchen and the dining room. To keep cool during the summer, they sleep on a fold-out futon downstairs in the family room. [Trish] has given up trying to scrub away the mold in her bathrooms....In their kitchen, the doors to the cupboards have been painted over so many times they no longer shut. They've given up trying to open a patio door in the kitchen because it's so clogged with paint." (1)

I. INTRODUCTION

A. How to House the Families?

This news article describing the family housing conditions at Fort Meade, Maryland, typifies the problem with much of the military family housing across the Services. The problem is significant with nearly two-thirds of the Department of Defense's (DoD) housing inventory needing repair or complete rehabilitation. (2) The severity of the problem motivated the DoD to seek new ways to remedy the problem of old and dilapidated housing. In 1996, Congress stepped in and enacted the Military Housing Privatization Initiative (MHPI) as part of the National Defense Authorization Act for Fiscal Year 1996. (3) The MHPI gave the DoD a number of special authorities aimed at eliminating its aging, dilapidated and unsafe family housing. (4)

The DoD claimed that the new housing privatization authorities would allow it to repair, replace and rehabilitate over 200,000 inadequate family housing units by fiscal year 2006, three to four times faster than with traditional methods. (5) In 1996, DoD projected it would award eight to ten MHPI projects for 2,000 housing units within a year of the authority being passed.

Nearly six years after MHPI was passed, DoD has discovered that providing housing under MHPI is not as fast as it anticipated. As of March 2002, the military services have awarded only fourteen housing projects, with thirty more in various stages of solicitation. (7) The DoD claims implementation of the MHPI program has been slower than anticipated because it is a new way of doing business for the military and the private sector, with a significant learning curve. (8)

B. Policy Promulgation is Needed

The MHPI has left a wake of new and unique issues in its path for policy makers, commanders, and Judge Advocates at all levels to resolve. These issues arise in both the contract formation and contract administration stages. Housing privatization impacts many facets of installation operations, and the resulting issues cross legal functional areas involving contract and fiscal law, installation control and criminal jurisdiction, ethics and environmental law. Only a few installations have MHPI projects in the

occupancy phase, but based on their experience, MHPI changes the traditional way installations do business. There is little formal guidance from DoD or the Service Secretaries, so each installation is resolving issues that arise on an ad hoc basis. The Services and DoD have failed thus far to formally capture and disseminate the information or lessons learned from installations with privatized housing. (9) Consequently, installation attorneys across the Services, and even within Services at different installations, are "re-inventing the wheel" each time an issue arises. Complicating matters further, installations are using different legal and contractual structures that may affect the resolution of any given issue.

This article will attempt to reduce the information void surrounding MHPI projects by exposing key legal issues and providing some guidance for those working MHPI issues in the field. First, the military family housing problem, the new legislation, and MHPI projects completed to date will be addressed to provide the backdrop for later discussion of MHPI legal issues. (10) Second, the article will identify issues arising out of the MHPI process at the contract formation stage. It will focus on legal issues regarding the applicability of traditional procurement policies, procedures and other laws, such as labor and contract laws, to MHPI projects. (11) Third, the article will examine issues arising during contract performance. (12) In the area of installation control, this paper will examine how MHPI affects the installation commander's ability to authorize searches and bar individuals from the installation. (13) Next is a discussion of the fiscal law questions installation attorneys are fielding regarding the use of appropriated funds on MHPI projects. (14) This article will then examine several ethics issues related to MHPI projects. (15) Finally, it will briefly address the applicability of the National Historical Preservation Act, an environmental issue that has impacted a MHPI project and has the potential to impact others. (16) Overall, this article exposes a lack of guidance for the field, demonstrating an obvious need for the Services to develop a formal program for gathering and disseminating information, providing guidance and setting policies.

II. BACKGROUND

A. How We Have Housed Our Families -- Traditional Military Family Housing

The DoD owns, operates, and maintains an inventory of over 300,000 family housing units. (17) Approximately one-third of all military families live in these Government-owned or Government-leased units. (18) Unfortunately, the conditions at Fort Meade, Maryland, described in the opening quote are typical of DoD's aging family housing on military installations across the country. The problem is twofold: dilapidated housing on the installations and insufficient affordable housing for service members off the installation. (19) Nearly two-thirds of DoD housing units require renovation or replacement. (20) The DoD estimates it will cost approximately \$20 billion over thirty to forty years to complete the work using traditional military construction dollars. (21) The military Services recognize that the housing situation has a significant impact on the quality of life and retention of active-duty service members. (22)

Resolving this issue is more complex than simply moving service members off the installation into private sector housing. (23) Although all Services prefer to rely on the private sector for housing, many young airmen, soldiers, sailors and marines, cannot afford suitable private sector housing. (24) It is financially impossible for some young service members to afford civilian housing offering them a decent standard of living, and dilapidated military housing is their alternative. (25) This contributes to the decision by many service members to leave the military to seek a better quality of life in the civilian

sector. (26)

The deterioration of military housing did not happen overnight. Shrinking budgets and the increasingly rigid procurement processes together have made major repair, renovation and replacement of houses virtually impossible. (27) Although defense budgets have increased in recent years, the scope of the problem cannot be resolved using traditional military construction funding and procurement methods. (28) Traditional methods of replacing and repairing military family housing are expensive, slow and cumbersome. (29)

The standard method of funding the repair and replacement of military family housing is through military construction dollars. (30) The Government owns houses built with military construction dollars, and is responsible for their operation and maintenance. (33) Since 1989, declines in defense budgets have impaired the ability of the Services to make needed repairs to deteriorating military housing. (32)

The costs to repair, replace, operate and maintain military family housing are significant. In fiscal year 1997 alone, DoD spent \$3 billion to operate and maintain Government-owned and Government-leased housing. (33) Congress authorized an additional \$976 million that same year to construct and renovate family housing units. (34) Although a significant amount of money, it is woefully inadequate considering that it costs the Government an estimated \$123,550 to construct one new housing unit using military construction dollars. (35) Renovation of each existing unit costs the Government approximately \$65,700. (36) With over 300,000 family housing units in the DoD inventory, it is clear that traditional military construction dollars alone will not solve DoD's housing problem at anything faster than a snail's pace.

Traditional methods for acquiring family housing, as mentioned, are slow and cumbersome. Depending on the size of the project, it can take four or more years from conception to occupancy of units. (37) Government procurement processes require significant amounts of time to design the project, solicit potential contractors, negotiate, award the contract and construct the houses. (38)

Until recently, rigid statutory limitations also prescribed the type and quality of military family housing units provided to service members. For example, a member's pay grade controlled the number of bedrooms and square footage authorized. (39) Too, the individual Services have been free to add additional limitations, requirements and constraints on the construction or renovation of military family housing. (40)

As a result of this highly regulated system, many contractors refuse to compete for contracts to build or renovate family housing. (41) Those that do compete often raise their prices to cover the higher costs associated with the Government procurement process and the statutory and regulatory requirements applicable to military family housing construction. (42) By 1995, it was clear that the military services needed new ways of doing business to reduce the cost to the Government and the time involved in acquiring acceptable housing for service members.

B. The Military Housing Privatization Initiative -- Slow Beginnings In Different Directions

By means of the National Defense Authorization Act for Fiscal Year 1996, Congress reacted to DoD's housing problem by enacting the MHPI. (43) In order to salvage military family housing, Congress

provided DoD a variety of temporary authorities (44) to obtain private sector financing, expertise and management to repair, renovate, and construct military family housing. (45) In hearings on the legislation, DoD hailed it as a virtual panacea, providing a faster and cheaper method to obtain modern, affordable military family housing. (46) The MHPI authorizes direct loans and loan guarantees, (47) rental occupancy guarantees, (48) conveyance or lease of existing properties and facilities, (49) differential payments to supplement service members' housing allowances, (50) and investments such as limited partnerships and stock/bond ownership. (51) These authorities provide flexibility in structuring agreements with private developers to provide acceptable housing for service members. They enable the Services to draw up on private sector investment capital and housing construction expertise. (52) By using available Government assets, DoD seeks to entice the private sector to use its capital to invest in construction or renovation of military housing. (53) The Government can reduce the initial cost of construction, repair and renovation using MHPI authorities. (54)

In addition, the legislation exempts MHPI projects from many of the statutory and regulatory limitations applicable to military construction projects. (55) The MHPI houses must simply conform to similar housing units in the local community, allowing DoD to use commercial specifications, standards and construction practices rather than the traditional rigid requirements. (56) The hope is that this flexibility will streamline the process making houses available faster than under traditional methods.

The flexibility of MHPI has resulted in housing privatization projects with a variety of unique structures using one or a combination of authorities under the statute. The projects awarded so far demonstrate the range of possibilities. The MHPI project at Lackland Air Force Base (AFB), Texas, was awarded in August, 1998. (57) The project provided for 420 new housing units on the base by replacing 272 existing units and adding 148 new units. (58) The Government leased the land to the developer for a nominal rent, made a direct loan to the developer for \$10.6 million, and provided a guarantee for a private sector loan against base closure, downsizing and deployment. (59) The developer owns, operates and maintains the units for the fifty-year term of the lease. (60) Eligible service members referred to the developer by the Government rent directly from the developer. (61)

The Army's first MHPI project was at Fort Carson, Colorado, an installation in desperate need of housing rehabilitation, repair and new construction. In September 1999, the Army awarded the Fort Carson project for construction of 820 new units and renovation of 1,823 existing housing units, all situated on the installation. (62) Fort Carson executed an outright conveyance of the 1,823 existing units, signed a fifty-year lease of the land to the developer, and provided a loan guarantee for a private-sector loan. (63) Similar to the Lackland project, the developer owns, operates and maintains housing units and rents them directly to eligible soldiers. (64)

In 1996, the Navy entered into a ten-year limited partnership with a private housing developer to construct 404 units off the installation at Corpus Christi, Texas. (65) The Navy provided \$9.5 million, and the developer financed the remainder of the \$32 million project. (66) At the end of the partnership, the Navy anticipates it will be repaid its equity share and receive one-third of the net value of the development. (67)

The military Services are also considering other types of arrangements for installations in the process of developing and awarding MHPI projects. (68) Although the flexibility to enter into these MHPI agreements was part of the legislation, the legislation left a large gap in terms of implementation guidance. It also left a variety of legal issues unanswered, and since implementation, the Services have

been struggling to identify and resolve these issues.

III. CONTRACT FORMATION ISSUES

Before any MHPI projects could commence, even before the first solicitation could be issued, the Services had to resolve a number of contract formation issues. This new MHPI authority appeared to offer the Services significant flexibility, but the Services were slow in deciding how to structure the projects. (69) Fundamental questions of how to structure a solicitation, what kind of transaction, what kind of contract, what type of legal documents are required and what laws apply had to be resolved before the Services could move forward. (70)

Philosophically, the Services diverged on many of these issues. Perhaps not surprisingly, each Service attempted to exploit the flexibility of the new authorities and commercialize the acquisition process. The result was a partial divergence from the traditional procurement documents and procedures, with movement toward contractual arrangements and hybrid procedures. This section will examine the Army and Air Force approaches to contract formation in the new era of the MHPI. (71)

A. FAR or Non-FAR Acquisition

1. Initial Assessments

The Services initially struggled with whether the Federal Acquisition Regulation (FAR), with all its limitations, restrictions and procedures, applied to MHPI transactions. By definition, the FAR applies to all "acquisitions." (72) An acquisition is "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether supplies or services are already in existence or must be created, developed, demonstrated and evaluated." (73)

The Air Force concluded that the FAR did not necessarily apply to a MHPI project. (74) The Air Force makes determinations as to its applicability on a case-by-case basis. (75)

The Army concluded, however, that MHPI transactions were subject to the FAR. (76) As a result, the Army's first MHPI project was treated as a FAR transaction. (77)

In 1997, the Department of Defense General Counsel's office (DoD/GC) issued a memorandum providing guidance on whether MHPI initiatives are subject to the FAR. The memorandum stated that the applicability of the FAR to the use of the MHPI authorities depended on the specific authority used and the manner it was implemented. (78) The DoD/GC recommended that the Services determine whether each project involves the direct obligation of appropriated funds to directly acquire military housing or services, or direct involvement such that it constitutes an acquisition for goods and services by the Government. (79) If either of these criteria exists, then the FAR applies. (80) If not, the Services have the discretion to use any structure that is appropriate to carry out the intent of the project. (81) The Services have used their discretion to creatively structure the necessary procurement documents and processes.

The solicitations for the first two MHPI projects (at Lackland Air Force Base, Texas and Fort Carson, Colorado) were similar to traditional FAR-type solicitations. (82) Competitive procedures were used,

and both proceeded through a source selection process similar to a traditional FAR procurement. (83) However, after these initial solicitations, both Services varied the processes for soliciting and selecting a developer.

2. The Air Force Three-Step Negotiation Process

The Air Force continued to use a FAR-type solicitation, and this process is now the standard in the Air Force. For example, a later solicitation at Elmendorf Air Force Base utilized a streamlined non-FAR solicitation for maximum flexibility in proposal development. (84) The first step was submission of the offeror's proposal containing the proposed legal and financial structure; design and development plan for individual units and housing community; real estate management plan, to include facility maintenance and capital repair and replacement; and past performance information. (85) The proposals were then evaluated and ranked in accordance with the criteria outlined in the solicitation. (86) Only the highest ranked offeror proceeded to step two of the process, negotiations with the Government. (87)

If the parties had failed to reach an acceptable agreement within a reasonable period of time, the Government would have terminated negotiations with that offeror and commenced negotiations with the next highest ranked offeror. (88) This would have been repeated until an acceptable agreement was reached.

Step three consisted of finalizing the financing and implementing the agreement. (89) This three-step solicitation and other unique processes to "commercialize" traditional procurement processes are likely to undergo continued exploration as the Air Force develops MHPI projects. (90)

3. The Army Three-Step Request for Qualification Process

Following the project at Fort Carson, the Army has engaged its own creative tools to attempt to commercialize and streamline the traditional FAR process. Fort Hood was the first to use the Request for Qualification (RFQ) process in lieu of the traditional Request for Proposals (RFP). (91) The benefits of the RFQ over the traditional RFP are that it is simpler and less expensive for developers, allows flexibility in project development, maximizes opportunities for innovation, and enables the Army to achieve the best financing and highest return on investment. (92)

The RFQ is fundamentally a three-phase process. (93) During the first phase, developers submit a Statement of Qualifications that contains sufficient detail to enable the Government evaluators to reach a reasoned judgment as to the developer's experience and overall capability to perform. (94) The Statements are evaluated according to specified criteria. The developer demonstrating a capability to perform whose submission is most advantageous to the Government is selected. (95)

The selected developer then moves into phase two, working closely with the Army to develop a Community Development and Management Plan (CDMP). The CDMP sets forth the details of the project, including scope, design, management and legal and financial structure. (96) If the developer completes this phase, the Army pays it \$350,000 and receives unlimited rights to use the CDMP. (97) If the Army is dissatisfied with the CDMP, it releases the developer following the \$350,000 payment. (98) If the Army accepts the CDMP, the developer implements it under the third phase. (99) Fort Hood has entered this latter stage and will be the first Army installation to complete the entire process using an

RFQ. (100)

The RFQ process is unique and, because it has not yet been tested on many projects, its effectiveness and usefulness are still unknown. (101) In addition to practical questions regarding the RFQ's effectiveness, questions about its legal permissibility remain unanswered. The Army has largely structured its MHPI projects as FAR transactions. More recent RFQ's state that the FAR applies only to phase one of each project, which is when the selected developer works with the Army to create a CDMP. The RFQ contains FAR numbered clauses, further indicating a FAR transaction. (102)

If the Army has determined the FAR applies because MHPI is an acquisition of goods and services using appropriated funds, then the FAR would apply to the solicitation and source selection process as well. (103) There are no explicit provisions in the FAR for the RFQ process. The FAR clauses in the RFQ indicate it is being treated as a commercial item acquisition. (104) Commercial acquisitions should be made competitively and may be accomplished through the use of negotiated procedures. (105)

The RFQ process appears to be a hybrid between a sole source acquisition and a negotiated procurement with a competitive range of one. Developers compete in the first qualification phase based on a virtually nonexistent statement of Government needs and non-specific evaluation factors. It is difficult to understand how effective competition can be achieved using the very general requirements and evaluation criteria as in the Fort Hood RFQ. (106) In addition, after this initial competition, only one developer is selected to negotiate with the Army for the right to be awarded the contract. (107) This appears to be nothing more than selecting a competitive range of one, a process subject to close judicial scrutiny when challenged. (108)

Although the Army's RFQ process has not been challenged to date, there is some question as to whether it would be found legally permissible if challenged. The simple solution would be an Army determination that the FAR is not applicable to future MHPI projects, but that inclusion of language from FAR provisions is permissible where in the Army's best interests. If MHPI projects are properly conducted outside of the FAR, new and flexible processes such as the RFQ can be further developed with a reduced risk of legal challenge.

B. Applicable Procurement Statutes

One of the more difficult tasks in moving from traditional procurement processes to new processes instituted under the MHPI authority is the application of various statutes to MHPI projects and contractual arrangements. (109) Whether or not the FAR applies, there are a number of federal statutes that form the basis of most of the FAR provisions. It is a separate inquiry for each project as to which statutes apply to the project. The Davis-Bacon Act and the Contract Disputes Act of 1978 (CDA) have received considerable attention: there is a general consensus that Davis-Bacon applies to MHPI agreements, or at least the current policy is to include Davis-Bacon in the agreements; (110) there is no consensus regarding the applicability of CDA to MHPI agreements. (111)

1. Davis-Bacon Act

The Davis-Bacon Act requires that every contract (to which the United States is a party) in excess of \$2,000 for construction, alteration, and/or repair of public buildings or public works shall state the prevailing wage rate to be paid laborers and mechanics as determined by the Secretary of Labor. (112)

The Act itself does not define "public building" or "public work"; however, Department of Labor regulations define a "public work" as a "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 public regardless of whether title thereof is in a Federal agency." (113) This language has been broadly construed to apply Davis-Bacon to a number of contractual arrangements that appear to be clearly outside the plain language of the statute. Indeed, it has been held that Davis-Bacon applies to work done on property belonging to the United States and to all fixed work constructed for public use at the expense of the United States. (114)

In a bid protest decision addressing the applicability of Davis-Bacon to Section 801 privatized housing, the General Accounting Office (GAO) found that Davis-Bacon applied to Section 801 contracts. (115) Specifically, the GAO found that Davis-Bacon applied because the housing was for a public purpose (to house military families) and the construction costs were essentially being reimbursed through lease payments. (116)

While the MHPI projects are different from Section 801 housing in that, under MHPI, the Government does not provide direct lease payments to the contractor, the Government does nonetheless provide MHPI contractors funding through direct loans or loan guarantees to finance construction. (117) This appears to fall within the scope of Davis-Bacon. Moreover, Davis-Bacon has been interpreted to encompass any construction that would not have been accomplished by the private developer but for its contract with the agency. (118) Applying the same reasoning to MHPI projects, the private developers would not engage in the housing construction and renovation but for the Federal authority and direction. Therefore, it appears compliance with the Davis-Bacon Act will be required in MHPI projects unless a unique contractual or financial arrangement takes it outside the purview of the statute.

2. Contract Disputes Act

The second statute for which applicability is in question is the Contract Disputes Act of 1978 (CDA). (119) The CDA applies to express or implied contracts entered into by an executive agency for procurement of property, services, construction, alteration, repair or maintenance of real property or disposal of personal property. (120) The CDA does not apply to procurement of real property in being, but the Act is silent regarding the disposal of real property. (121) The Army has specifically made its MHPI contracts subject to the CDA through insertion of a CDA clause in the MHPI contract. (122)

In contrast to the Army's inclusion of the CDA in its solicitations, Air Force solicitations issued to date do not contain such provisions. The Air Force position is that MHPI agreements are not subject to the CDA because the agreement is for the disposal of real property. (123) While the CDA specifically covers disposal of personal property, it is silent regarding disposal of real property. (124) The only case directly addressing the applicability of the CDA to a federal agency's disposal of real property to a private party is *Korman Corporation*, (125) out of the Housing and Urban Development Board of Contract Appeals.

In that case, Housing and Urban Development (HUD) entered into a contract with a private contractor for the bulk sale of 120 houses. (126) The contract required the contractor to rehabilitate all of the houses within 180 days, in accordance with the repair specifications in the contract. (127) Once HUD inspected and approved the repairs, it was to issue a commitment to insure the mortgage of each of the properties, which would be sold to lower income citizens. (128) The contract did not contain the CDA disputes clause or any other indication the contract was subject to the CDA. (129)

The Board of Appeals found the contract was a dual purpose contract covering both the sale of 120 houses and the repair of the houses. (130) The repair portion of the contract was found to be directly encompassed within the CDA. The Board then considered the CDA's silence with respect to its applicability to the sale or disposal of real property (131) and concluded the primary purpose of the contract was for rapid repair of the houses to enable them to be sold to low income families. (132) The sale of the units to the private contractor was incidental to the repair. (133) In reaching this conclusion, the Board noted the contractual control reserved by the Government over the inspection and approval of the repairs even after the conveyance. (134) Finding repair to be the primary purpose of the contract, the Board concluded the CDA applied to the contract, and that it had jurisdiction to hear the dispute. (135)

In the case of MHPI projects, the primary purpose is to provide financial incentives to developers to repair and construct houses for occupancy by active-duty service members. (136) The conveyance of the houses and lease of the land to the developer are largely incidental to the construction and repair portions of the agreement. In addition, under most MHPI agreements, the Government continues to exercise approval authority over designs and specifications and provides inspections during construction. (137) Thus, under the reasoning in *Korman*, the CDA applies to MHPI agreements, and a board of appeals would likely assume jurisdiction over any disputes arising under the agreements. (138)

IV. ISSUES DURING CONTRACT PERFORMANCE

Once the MHPI project is finalized, and the developer begins performance, the installation takes over administration of the agreement. (139)

The installation is then responsible for ensuring developer performance over the term of the agreement, typically fifty years. The installation inspects construction/renovation, and is expected to enforce the agreement's requirements for long-term operation and maintenance. A number of issues may arise in performance as a result of actions taken, or not taken, in the formation phase.

A. Installation Control Issues

The majority of MHPI projects either in progress, or in the planning stages, will be located on military installations. (140) The developer will own, operate and maintain the houses, and lease the underlying land from the agency for a term of fifty years. (141) Unlike housing owned and operated by the Government, occupancy of MHPI units is not initially restricted to active-duty military members. (142) Occupancy rates may drop such that civilians will occupy the MHPI housing units, raising a number of questions regarding their status on the installation, and the ability of the commander to exercise control over the installation. This section will address two specific concerns regarding civilian tenants in MHPI housing. First, does the installation commander have authority to authorize searches of civilian-occupied homes on the installation for evidence of criminal misconduct? Second, if civilian tenants engage in misconduct on the installation, what are a commander's boundaries in taking action involving or impacting those civilians?

I. Search Authorization

The question of whether the installation commander may legally authorize searches of civilian-occupied privatized housing on the installation is a concern for the Services because it goes to the very heart of a

commander's traditional responsibility for and authority over the installation. Presently, the Army and the Air Force have MHPI housing projects occupied by military families. Although no civilians currently occupy installation housing, and long active-duty waiting lists for housing indicate it may not happen for some time, a split in the Services on this issue indicates a need for discussion and eventually formal guidance. (143)

The critical question is whether a search conducted pursuant to a commander's search authorization is a violation of a civilian's Fourth Amendment rights. (144) Installation commanders have the inherent authority and obligation to ensure good order and discipline on the military installation. It has long been recognized that military commanders have the power to search military persons and property within their jurisdiction. (145) The Military Rules of Evidence recognize the power of the commander to authorize searches of military property and "property situated on or in a military installation or any other location under military control" (146)

In MHPI housing, the issue is whether houses owned by a private developer on Government land leased to the private developer, but physically located within the confines of the installation, are property under military control. If a commander-authorized search of civilian-occupied privatized housing was challenged, the outcome of the case might depend more on the language in the agreements than traditional notions of military authority.

No court has yet addressed the search issues presented by MHPI housing projects on the installation. However, the U.S. District Court for the Eastern District of Virginia has upheld search of a civilian employee's apartment on the installation. (147) The facts of the case do not indicate whether the Government owned the housing, but because the installation was in Cuba, the court held it was clear that the military had control over all the property within the confines of the installation. (148) In another case, a military commander's search of a civilian-occupied home that was part of a military compound overseas was held to violate the civilian's Fourth Amendment rights. (149) However, in that case, the court's analysis focused on the unreasonableness of the search and lack of probable cause rather than the authority of the military commander to direct the search. (150)

Courts have upheld a commander's ability to search off-base apartments leased by the military and occupied by military personnel. (151) In those cases, the courts focused on lease language specifically stating that the apartments were under the control of the military. (152)

Notably, there is a judicial reference relating to privatized housing projects (known as "Wherry" or "Capehart" housing) from the 1950s. The Court of Military Review noted that the Judge Advocate General of the Air Force had "expressed doubt whether a base commander could lawfully order a search of a Wherry Housing unit situated on the base occupied by a military person and recommended that in such a case, the search should be conducted in accordance with the authority granted by a lawful search warrant." (153)

In the case of MHPI housing, the potential exists that civilians completely unaffiliated with the military may be occupying housing units on the installation. Although it may seem unlikely that this possibility will occur, it should be addressed with the developer before an agreement is signed. The Services can address it in a number of different ways.

First, the Service could anticipate the possibility prior to determining which installations will receive

MHPI housing. The Air Force considers the severability of the MHPI housing project from the installation as a mandatory factor in selecting installations to receive MHPI housing projects. (154) If civilians begin occupying the units in increasing numbers, the Air Force may simply sever the project from the base, putting it outside the installation fences. (155)

Fort Carson has attempted to deal with the problem a second way, inserting a provision in the lease between the developer and the tenant stating that MHPI houses are in an area of exclusive federal jurisdiction and the premises are under military control. (156) The agreement between the developer and the Government contains no such specific language, however, and the effect of inserting it into the tenant lease is questionable. The case law suggests that clear language in the agreement between the Government and the developer may be sufficient to extend the commander's authority to search property not owned by the Government. (157)

Ultimately, it is also clear that to have any chance of being upheld, searches of civilian occupied houses by military authorities must comply with the basic requirements of the Fourth Amendment. (158) This may require new training for commanders and military law enforcement personnel to enable them to effectively and correctly handle situations involving the civilian occupants of MHPI housing on the installation.

The fact of exclusive or concurrent jurisdiction is another factor to consider in determining the exercise of search authority in MHPI housing on the installation. (159) If civilians occupy housing units on the installation, installations may choose to convert the housing areas to areas of concurrent, rather than exclusive jurisdiction. (160) This permits local civilian law enforcement to handle problems, investigations, searches and seizures when civilians are involved. It would mitigate the potential uncertainty regarding a commander's search authority by allowing civilian law enforcement to deal with problem civilians. It may also alleviate the potential for Bivens (161) suits against military law enforcement officers.

2. Barment

Another issue related to a commander's authority to control activities on the installation is the ability to bar individuals from entering the installation. If a civilian rents an MHPI house and engages in misconduct on the installation, can the installation commander bar the individual from the installation?

The power of an installation commander to exclude individuals, including civilians, from the installation has traditional, historical and statutory bases. (162) The Services view this authority as necessary for the installation commander to protect personnel and property and to maintain good order and discipline on the installation. (163)

Courts have upheld the authority of installation commanders to bar civilians from the military installation in numerous cases. (164) However, the power to exclude civilians from military installations is not without limitation. (165) The courts look to the area where the civilian was ordered not to enter to determine if it was an area sufficiently under the military commander's control. The courts also balance the interests of the civilian in entering the installation against the military's interest in preventing entry.

Commanders can only exercise barment authority in areas where the United States has absolute ownership, or an exclusive right to the possession of the area where the civilian is barred from entering.

(166) Criminal jurisdiction over the area alone is insufficient. (167) What does and does not constitute absolute ownership or exclusive right to possession is a factual determination.

In *United States v. Watson*, the installation commander for the Marine barracks at Quantico, Virginia, barred a civilian from using a road that linked Quantico, a military reservation, to the outside community. (168) The road was on land the United States had acquired in fee. (169) However, the road had traditionally been used as a public thoroughfare to provide ingress and egress to Quantico. (170) The Court found that the United States had ownership of and criminal jurisdiction over the road, but it did not have exclusive right to possession because it was not the exclusive user of the road. (171) Therefore, the conviction of the civilian under 18 U.S.C. [section] 1382 was overturned. (172) However, in another case, a different court found ownership and exclusive right of possession in a housing area that was owned by the United States and part of the military reservation, but was outside the gates of the installation. (173)

In the case of MHPI housing, it is unclear whether the installation commander has the authority to bar civilians residing in those houses from the installation. The MHPI houses located on the installation sit on Government-owned land, but that land is leased to the developer. (174) Further, the houses themselves are conveyed in fee to the developer, and are therefore owned, operated and maintained by the developer. (175) Although law enforcement typically patrols these housing areas, the developer shares possession with the Government, perhaps exercising a greater presence and control in these areas than the Government. (176) It is unlikely that in such circumstances the United States has the requisite exclusive right to possession of these housing units and housing areas to enable the commander to bar civilian occupants from that portion of the installation. Clearly, civilians could be barred from any areas on the installation other than those leased to the developer in an MHPI project, but barment from the MHPI housing area will likely exceed the installation commander's authority in that area. (177)

Indeed, barment of civilians from MHPI installation housing has potential constitutional implications. Courts have balanced the interests of the civilian against those of the military in determining the extent of the military commander's authority to bar civilians from the installation. (178) Constitutional implications may affect a commander's ability to unilaterally bar an individual from the installation if the civilian's interest in entering the installation is so great that it brings with it the Fourteenth Amendment's protection of due process.

Barring a civilian occupant of MHPI housing from the installation would result in a de facto eviction from the housing unit. (180) The Supreme Court has stated that the Constitution does not require a trial-type hearing in every conceivable case of Government impairment of a private interest. (181) However, the procedures due process may require will depend on the nature of the Government function involved and the private interest affected. (182) Where a private individual's interest can be characterized as a "mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." (183)

An individual's ability to enter a military installation is generally viewed by the courts as a privilege, not a right, and therefore not subject to due process requirements. (184) The Government's interest in barring individuals from the installation is in managing the internal operation of the military installation. (185) To outweigh this interest, the civilian's interest in entering the installation has to rise to one that is constitutionally protected, such as a liberty or property interest. (186) Whether access to a

home currently rented by the civilian in the MHPI housing area rises to the level of a liberty or property interest that would outweigh the Government's interest is uncertain.

The courts have held that a civilian's interest in employment with a Government contractor on the installation does not rise to a level requiring barment due process. (187) Similarly, the interests of a military dependent in entering the installation to use the recreational facilities and the base exchange is a privilege and does not amount to a constitutionally protected interest requiring due process. (188)

In contrast, outside of the context of the military installation, the courts have held that the expectation of individuals to utility services rises to the level of a property right such that the Fourteenth Amendment requires due process before deprivation of that right. (189) If receiving utility services rises to the level of a constitutionally protected property interest, it is difficult to see how a court could find otherwise regarding access to a home. If a civilian tenant's interest in access to the rented home rises to the level of a constitutionally protected property interest, it is likely an installation commander could not bar the person without, at a minimum, notice and an opportunity to be heard.

As previously stated, barring a civilian from the installation would be the equivalent of an eviction, raising a number of contractual issues regarding the Government's right to preclude civilian tenants from the housing area. The Government would essentially be interfering in a contractual relationship between the developer and a civilian tenant. (190) It would disrupt the developer's income stream, and may constitute a Government breach of its contract with the developer. These issues should be considered before executing the agreement between the Government and the developer.

The agreement should be drafted to preclude the problems discussed above. The agreement between the developer and the Government should expressly set forth that the premises remain under military control. The agreement should further recognize the ability of the installation commander to bar civilians engaged in misconduct on the installation.

The Air Force has included a statement in the Operating Agreement that is part of the lease with the developer stating that the commander's rights are not impaired and that the commander has the right to bar anyone from the installation. (191) This wording may alleviate concerns about breach of contract, but it will not impact the problems of exclusive control or constitutional issues.

In order to address these latter issues, the agreement should set forth the circumstances that would be grounds for a barment action and require that notice of the installation commander's decision to bar a civilian tenant be provided to the developer, who must then initiate eviction action against the tenant. In the meantime, the installation commander should tailor a barment order for the civilian tenant excluding him from the installation except for the purpose of accessing the MHPI housing unit. In this way the installation commander can exercise authority over areas clearly within military control, and continue to protect Government personnel and property by keeping the problem civilian out of most of the installation. It also avoids the potential constitutional issues because the civilian would still be able to access the home, thereby avoiding allegations that the Government interfered with a constitutionally protected property right. More importantly, it provides a contractual basis for the installation commander to ensure the eviction of the tenant in a manner consistent with law and the contract.

B. Fiscal Law Issues

A unique challenge, and perhaps the most difficult one for attorneys at MHPI installations, is educating commanders, service members, and even the developers that the rules that used to apply to "Government housing" do not necessarily apply to MHPI housing. (193) This is particularly true in the fiscal law arena.

Congress annually enacts public laws appropriating funds for the support of traditional military family housing. When the Government owns the housing, the Government is responsible for upkeep of common grounds, maintenance of the houses, landscaping, playgrounds, sports areas, and pest control, all of which are provided through the expenditure of appropriated funds (APFs).

There are a number of specific types of APFs used to develop and support traditional military family housing, and the purpose of an expenditure controls whether a particular type of APF is properly available for obligation. (194) Generally speaking, Operations and Maintenance (O&M) funds are available for the daily expenses of operating a traditional military family housing area.

Once the Government conveys the houses to the private developer, the ability of the Government to use APFs for anything related to the housing project is severely limited. (195) This section will examine fiscal law issues that may be encountered by installation attorneys, including whether APFs can be used for the following purposes once the award is made: moves of Government personnel into MHPI houses, resident relations programs, facilities improvements and repairs, and services such as pest control and landscaping.

1. Personnel Moves

The first fiscal law issue likely to arise in the MHPI context is who pays to move personnel into MHPI housing from their current residences. Generally, absent a Government direction to move, service members who choose to move from one house to another house, off or on the installation, must pay for the move themselves. (196) However, the MHPI program and applicable regulations allow the Government to use APFs to move service members into MHPI houses in most circumstances. (197)

There are four primary circumstances under which moves into MHPI housing might occur. First, intra-installation moves may be required to move families from one MHPI house to another as a result of the contractual obligations of the Government under MHPI agreements to vacate houses slated for rehabilitation or demolition. Second, families in houses that will be conveyed to the developer under MHPI agreements may not wish to continue living in those houses, preferring to live in Government-owned quarters or commercial housing off the installation. Third, individuals living off the installation, and formerly on waiting lists for Government housing, may wish to rent MHPJ housing and want to be moved into MHPI housing at Government expense. Finally, individuals living in Government-owned housing or newly conveyed MHPI housing may request to move into newly constructed or renovated MHPI housing.

The MHPI legislation allows MHPI housing to be considered "Government quarters" and authorizes the Service Secretaries to assign members to MHPI housing. (198) The Joint Federal Travel Regulation (JFTR) authorizes the Government to fund local moves when moving to or from Government quarters. (199) Recent changes to the JFTR specifically address assignment to privatized housing. (200) With regard to intra-installation moves, the Government may be contractually obligated to vacate houses conveyed to the contractor that are designated for rehabilitation or demolition. (201) In some cases

units may be unfit for occupancy. (202) The Government may pay for local moves when the member is directed by competent authority to vacate quarters because they are unfit or to meet some other unusual operational requirement. (203) Regardless of the condition of the units, the contractual requirement to vacate would constitute an unusual operational requirement. Thus, the Government may use APFs to move occupants from houses requiring renovation or demolition into other housing on the installation, whether MHPI or Government-owned. (204) Similarly, service members may be moved into MHPI housing based on reassignment by the Service after conditions in the units are rectified or once they become available for occupancy following construction. (205) Accordingly, there is authority for Government funded moves of personnel dislocated by MHPI repairs or demolition to be moved to other quarters during repair/construction and then back into newly repaired or constructed MHPI houses.

Service members currently living in Government-owned housing set for conveyance to the developer under an MHPI agreement may not wish to continue living there. Similar to the above analysis, if the houses are unfit or set for major rehabilitation, then the JFTR allows the Government to move their occupants to other quarters at Government expense upon the direction of competent authority. (206)

It is more difficult to justify using APFs in the third type of personnel move where individuals living off the installation in civilian housing want to move into MHPI housing. (207) The JFTR allows the Government to pay for personnel moves "directed by competent authority on the basis of a Service requirement such as... assignment to privatized housing." (208) The problem with using this as authority to fund "volunteer" moves is that the Services have specifically declined to "direct" service members into MHPI quarters, allowing (209) them instead to choose whether to occupy the quarters. Thus, in addition to lack of direction, it would appear that there is also a lack of any service requirement given that such moves are based on members' personal preference or convenience. Use of APFs to fund such moves is prohibited. (210)

The moves described above are similar to the fourth type of personnel move possible in the MHPI context. These include requests by service members to move from Government-owned quarters, or older (newly conveyed) MHPI houses on the installation, into newly constructed or rehabilitated MHPI units. Absent some health or safety concern regarding the habitability of the member's current house, these are typically going to be convenience moves. As noted, the JFTR specifically prohibits Government funding of any moves purely for the convenience of the individual member. (211)

2. Spending APFs on the MHPI Project

Service members may be motivated to move to a MHPI housing area because of the "extras" it may offer. Most MHPI projects contemplate more than just a conveyance of houses to the developer. They envision an entire community, complete with playgrounds, sports facilities, and common gathering areas, all owned, operated, maintained, and managed by a private developer. (212) There may be instances when housing residents or installation authorities wish to make improvements or repairs not provided for in the original agreement. These situations present fiscal law problems.

For example, may the installation commander use APFs to purchase new equipment for the playgrounds? If the Government wants all MHPI housing on the installation to display the rank and name of the service member occupying the houses, may the commander use APFs to purchase nameplates or signs? Who funds purchases for the traditional resident relations programs? Many of the

answers will be determined by the contractual agreement between the Government and the developer, and the applicable fiscal law principles.

The Fort Carson legal office has fielded a number of questions that implicate fiscal law issues. This section will use them as examples of the fiscal law issues that may arise at the installation level and will describe a method for analyzing them.

a. Signs

Among the issues a new MHPI project may encounter is the proper use of APFs to fund traffic signs and resident name signs. Responsibility for various types of signs may be set forth in the contract between the Government and the developer. (213) To the extent that the MHPI agreement has exercised MHPI statutory authority to confer responsibility for an expenditure to the contractor, then the Government cannot use APFs for the purchase because APFs may only be applied to the objects for which the underlying appropriation was made. Funds appropriated for maintenance of traditional military family housing cannot be applied to MHPI requirements without violating the purpose of the family housing O&M appropriation. (214) Such expenditures are the developer's responsibility under the MHPI agreement, and use of APFs constitutes a violation of the Purpose Statute. (215) It is no longer a necessary expense of the Government as the expense is assigned to the developer.

If the contract is silent regarding signs in the housing area, and the installation wants to use APFs to fund the purchase, then fiscal law principles should be examined to determine whether this use of funds is for a proper purpose. (216) For example, if the agreement is silent on responsibility for street signs, but the agreement indicates the developer is responsible not only for the renovation/construction of houses, but also for roads, utilities, area lighting and other infrastructure, then perhaps the developer's responsibility for street signs can be inferred. (217) If it can, then the use of APFs to purchase the signs and install them is improper. However, if the agreement is silent and no inferences can be drawn regarding responsibility, as might be the case with name signs for each unit, then the installation attorney must determine whether use of APFs to provide signs is for a proper purpose. For example, if the installation has a legitimate need to have the occupant's name and rank on the unit, such as for security reasons, then use of APFs may be appropriate. (218)

b. Resident Relations Programs

Recognition for yard-of-the-month and other resident relations programs may be the most problematic in terms of fiscal law issues. Resolution of this issue will depend heavily on the terms of the individual MHPI agreements. Traditionally, installations used APFs to fund resident relations programs, such as yard-of-the-month signs, free move-out cleaning for five-time yard-of-the-month winners and housing "mayors," and free landscaping to "best village" winners. (219)

MHPI agreements may shift responsibility to develop, finance, and operate resident relations programs to the developer. (220) Although such agreements may not contain an itemized listing of what is included in the developer's program, the program as a whole is the contractual responsibility of the developer. (221) More specifically, the MHPI agreements do typically shift responsibility for landscaping in the MHPI housing area to the developer. (222) Thus, as explained in the immediately preceding subsection, any expenses associated with yard-of-the-month signs or awards would no longer be a proper expenditure of APFs under the Purpose Statute. (223)

c. Housing Upgrade, Maintenance, and Repair

As previously explained, the installation can no longer expend APFs for anything that is the developer's contractual responsibility. Generally, MHPI agreements shift responsibility for services traditionally provided by the Government in Government-owned housing to the developer, including housing maintenance, grounds maintenance, landscaping and pest control. (224) The developer assumes responsibility for the construction and upkeep of playgrounds, common areas and sports areas, community centers or other ancillary facilities included in the MHPI agreement. (225) This means that if the residents want a new piece of equipment for the playground in the MHPI housing area, the installation cannot purchase it with APFs. Similarly, if the developer is responsible for pest control in the MHPI housing area, the Government cannot provide that service using a Government contractor or using the installation's pest control shop from civil engineering. (226) The same analysis applies to repair of buildings. Repair and maintenance is generally the responsibility of the developer, as are upgrades to the units such as garage door openers or ceiling fans. (227)

The fiscal law issues addressed in this section do not represent a comprehensive listing of all the issues that have arisen or may arise in the future in the context of MHPI housing. (228) However, these examples serve three purposes. First, they evidence significant fiscal law implications in MHPI housing that did not exist with Government-owned housing. Second, they show the need for installation attorneys to work closely with the drafters of MHPI agreements to ensure the obligations of the parties are clearly defined. Third, armed with knowledge of fiscal law issues that may arise, installation attorneys can examine the MHPI agreements affecting their installations, assess the potential effect on the way their installation has been doing business and begin the process of educating commanders, contracting personnel and future tenants. Hopefully, early education will prevent surprises once the units are occupied and operational under the MHPI developer.

C. Ethics Issues

The previous section discussed the fact that the ability of the Government to spend APFs on resident relations programs will generally be precluded or severely curtailed in MHPI projects because the developer will usually be contractually responsible for these programs. It might logically follow that the developer can now fund these programs without limitation or further inquiry. However, the fact that the developer is contractually responsible for the program does not preclude the need for installation attorneys to ensure that the developer's actions under such a program do not violate the Standards of Ethical Conduct regulations (SOC) (229) and the Joint Ethics Regulation (JER). (230) In fact, a number of initiatives a developer may want to institute on the MHPI project, initiatives that would be considered normal commercial practice in a typical commercial housing development in the private sector, must first be examined for compliance with the SOC and the JER. (231) This section addresses the ethics implications of MHPI resident relations programs.

Developers may wish to provide MHPI housing tenants with special items as part of their resident relations programs. These might include welcome baskets upon move-in, free turkeys at Thanksgiving, block parties, tickets to local sporting events, and free house cleanings at move out for yard-of-the-month winners. (232) Currently, all tenants in MHPI projects are exclusively active-duty military members and their families. (233) Military members are federal employees subject to the ethics regulations regarding gifts from outside sources. (234) Absent an exception, regulations prohibit employees from directly or indirectly accepting a gift from a prohibited source or one given because of

the employee's official position. (235) The developer would appear to have the same status as any other Government contractor and is, by definition, a prohibited source. (236) "Gift" is broadly defined, and would appear to encompass all the items listed above and any number of other items a developer might wish to give tenants in the context of a resident relations program. (237) Therefore, unless the item is excluded from the definition of a gift or falls into one of the exceptions, the tenants could not accept it without violating the JER. (238)

1. Move-in Incentives

Developers of MHPI housing are commercial entities and, like other commercial housing providers, may want to provide incentives to entice tenants to occupy certain units. (239) This is particularly likely on installations where large numbers of housing units will be newly constructed or renovated. As the newly constructed or renovated units become available, it may be difficult to rent the older, as-yet unrenovated units.

Developers may wish to provide incentives for these hard-to-rent units in the form of reduced rent for the first month or free cable for a specified number of months. (240) The incentives are provided by a prohibited source, making the threshold issue whether the incentive is a gratuity or gift under the SOC and therefore prohibited from employee acceptance. (241)

The definition of "gift" includes any discount having monetary value. (242) However, not every discount is a gift. (243) Specifically excluded from the definition of a gift are "opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations." (244) In the case of MHPI move-in incentives, assuming they are available to anyone eligible to occupy the houses, they may fall under this commercially available discount exclusion. (245)

Another possible exclusion that would permit incentives as part of MHPI resident relations programs is the exclusion for items paid for by the Government or secured by the Government under contract. (246) This exclusion has been applied to items secured under lease agreements. (247) In a situation similar to move-in incentives in the MHPI context, the exclusion allows employees to accept discounted memberships to a health club built during the lease term in a building where the agency leases space. (248) The Office of Government Ethics (OGE) has stated that it is largely within the agency's discretion to determine whether a benefit is "secured by Government contract." (249) When a determination is made that the discount or benefit was secured under Government contract, that determination allows employees to accept such discounts without running afoul of the gift prohibition. (250) In the case of MHPI projects, where a resident relations program is the developer's responsibility under the MHPI agreement with the Government, the Government may determine that move-in incentives are part of the resident relations program and therefore secured by the Government under the MHPI agreement. This determination would exclude such incentives from the definition of a gift and allow employee tenants to accept them.

In the alternative, if such incentives were found to be gifts, employees might accept them under the commercial discounts exception to the gift prohibition. (251) This exception provides that in addition to the opportunities and benefits excluded from the definition of gifts, employees may accept opportunities and benefits, including favorable rates and commercial discounts offered to members of a

group or class in which membership is unrelated to Government employment. (252) The analysis here is focused on who is being offered the discount or benefit and the purpose or motive of the offeror. (253) In the case of MHPI housing, the developer is offering incentives to eligible tenants, typically a subgroup of military members. The question is whether the offer is related to Government employment.

The OGE has developed a three-part test to determine whether a discount or benefit is unrelated to Government employment. First, being a federal employee must not be a pre-requisite to be included in the group to which the discount is offered. (254) Under a resident relations program in an MHPI housing area, assuming that anyone eligible to occupy the houses is eligible for the incentives, then this prong is met. (255)

Second, it must not appear that federal employees are being targeted. (256) Again, assuming that the incentives are available to all tenants in the MHPI housing area, this prong is met. (257)

Third, the employee seeking to accept the discount or benefit is not in a group or class that has some perceived or actual power, influence, or status associated with their jobs or positions in Government. (258) In the case of MHPI projects, the motivation of the developer in providing move-in incentives is purely commercial: to ensure that all units are rented, even those that are in undesirable locations within the project, or those that have yet to be rehabilitated. In addition, eligible tenants will be varied in their occupation and status, and will not generally be in a position to influence the business of the developer. (259) Thus, the third part of the test is met, and in most cases move-in incentives will qualify under the commercial discount exception, and may be offered by MHPI developers and accepted by MHPI tenants.

2. Resident Relations "Perks"

In addition to move-in incentives, MHPI developers may want to provide any number of "perks" as part of its resident relations program, such as welcome baskets, yard-of-the-month awards, and other benefits to tenants. The exclusions and exception discussed above are applicable to these extras as well as to the move-in incentives. In addition, some of these items may fall under the de minimus exception to the prohibition against accepting gifts from outside sources. (260) This exception permits the developer to give, and tenants to accept, gifts with an aggregate market value of \$20 per occasion, with a \$50 limit for the calendar year. (261) This would allow the developer to provide the tenants some "perks" as part of the resident relations program, but would limit the scope of the developer's program if that was the only applicable exception. (262)

If OGE determines the above exclusions and exceptions to the gift prohibition are inapplicable, the result will be a tenuous situation where the developer is required to provide a resident relations program for MHPI housing tenants, but as a practical matter is precluded or limited by the SOC and JER from carrying out those obligations. To date, neither OGE nor the Services have issued ethics opinions or guidance regarding the applicability of the SOC and JER to MHPI projects. This uncertainty may cause installations to err on the side of caution, advising developers against carrying out resident relations programs, regardless of the fact that they are to be permissible under the exclusions and exceptions discussed above. (263)

If installations wish to provide more certainty regarding the permissibility of various resident relations programs, there are three possible methods of doing so. The first is to request an exception to SOC and

JER prohibitions for resident relations programs in the context of MHPI projects. (264) This would allow MHPI developers to provide gifts and incentives, and tenants to accept them, without violating the gift prohibitions. This solution will take time to forward through the appropriate agencies for approval and may not be implemented expeditiously, if at all.

The second method can be implemented immediately but will only be useful for installations whose MHPI projects have not yet been finalized by award or closing. Using the Government contract exclusion to the gift prohibition, (265) the MHPI agreement can specifically define the nature, scope and extent of the resident relations program the developer will provide. (266) It should be clear that it is part of the Government's benefit of the bargain and part of the consideration for its financial participation. Although not necessary, ideally the solicitation should include a resident relations program as one consideration in the overall evaluation of the proposal. Thus, by contracting for the resident relations program as part of the MUPI project and defining its scope, it becomes more difficult to argue that it does not fall under the Government contract exclusion. (267)

The final solution is an interim fix for installations whose MHPI projects were finalized without the inclusion of a resident relations program. As discussed above, installations should take advantage of the various exclusions and exceptions that are applicable to a particular benefit, discount or gift developers may wish to provide to tenants. In addition, the developer may be able to co-sponsor events with DoD components or organizations that MHPI tenants could attend, along with the rest of the community. (268) For example, Fort Carson co-sponsored a groundbreaking ceremony with its MHPI developer as a community event under the JER provisions authorizing co-sponsorship and logistical support of non-federal entities. (269)

If the developer wants to contribute to community events or participate in installation celebrations such as open houses or air shows, two possible authorities exist to accommodate such requests. First, each of the Services has regulations governing Morale, Welfare and Recreation (MWR) programs and Non-Appropriated Fund Instrumentalities (NAFI). Depending on the specific Service regulations, the developer may be able to participate in MWR programs by providing items of support for the program. This is an ideal way for the developer to contribute to annual MWR programs and support the installation community as a whole. (270)

Commercial sponsorship is the second way a developer might participate in community events on the installation. Commercial sponsorship programs differ in each Service, but generally permit commercial entities to help finance enhancements for MWR events, activities and programs. (271) Commercial sponsors are typically permitted to advertise, distribute literature, display signs and are recognized as a commercial sponsor of the event. (272) Commercial sponsorship is an appropriate way for an MHPI developer to support the installation community at open houses, air shows, and other large events hosted by the installation.

Although the ethics regulations may limit what a developer can do in terms of resident relations programs, particularly if such programs were not included in the MHPI agreement, there are a variety of ways to resolve these complications. The preferable resolution is a long term one in the form of a general exception to the stringent SOC and JER limitations for MHPI developers when performing resident relations programs. This exception should apply regardless of whether the resident relations program is specifically included in the agreement between the parties, or can be inferred from the developer's overall responsibility for the operation and maintenance of the MHPI housing area.

However, even in the short-term, MHPI developers can legally initiate resident relations programs and participate in community events with a little careful planning and attention to the SOC, JER and other Service regulations.

D. Environmental Law Issue -- Historic Preservation

The DoD has been dealing with environmental compliance issues throughout its history, especially since the 1970s and 1980s when the country witnessed an explosion of environmental legislation. (273) With a number of installations on the National Priority List for environmental clean-up, environmental awareness and monitoring of installation operations and of actions taken on and off the installation are routine. The Services have learned to deal with environmental issues associated with common activities such as construction and equipment maintenance as part of their daily responsibilities. (274) However, when a new process, procedure or activity is introduced, the Services must step back and determine the applicability of the environmental statutes and potential liability for failing to comply.

The MHPI authority, whereby the Government conveys houses to a developer, leases land to the developer and contributes financially to the project, has given rise to a new way of doing business. (275) The Services need to assess how different environmental statutes apply to MHPI transactions. As was illustrated, for example, by the Fort Carson project, the applicability of the National Historic Preservation Act should be considered. (276)

The National Historic Preservation Act of 1966 (NHPA) is a procedural statute similar to the National Environmental Policy Act (NEPA). (277) It requires federal agencies to consider the effect of any federal or federally assisted undertaking on any district, site, building, structure or other object included in, or eligible for inclusion in, the National Register. (278) If the NHPA applies to the agency's activity, then a consultation process referred to as the Section 106 process is triggered. (279) In order to comply with the law, the agency must identify properties or areas that are eligible for inclusion on the National Register, determine whether the proposed activity may adversely affect the property or area, and consult with the State Historic Preservation Officer (SHPO). (280)

To determine whether NHPA applies to MHPI projects, the agency must first determine whether MHPI is a federal or federally assisted undertaking. (281) Second, the agency must determine whether the houses, or any areas encompassed by the MHPI project, are eligible for inclusion in the National Register. (282)

As is the case with NEPA and other environmental statutes, the NHPA is broadly written to maximize its protections. NHPA defines, for example, a federal or federally assisted undertaking as any -

project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. (283)

Based on the financial structure of MHPI projects, with the Government providing direct loans and loan guarantees, it is difficult to argue MHPI projects are exempt from the definition of a federal or federally assisted undertaking. (284) Courts have found Federal undertakings to include building leases, (285) direct financial assistance for housing projects, (286) and loan guarantees. (287)

Additionally, MHPI projects do not proceed without agency approval regarding the details of the housing construction/renovation, community design, and other aspects of the project. (288) It is likely that this agency approval is sufficient to qualify MHPI projects as a federal undertaking under NHPA.

The second prerequisite for NHPA applicability to MHPI projects is that the houses, or areas involved in the project, are eligible for inclusion in the National Register. (289) The criteria used in determining whether buildings, districts, sites, structures or other objects are eligible for inclusion in the National Register include the quality of their significance in American history and culture. (290) It can include structures and areas associated with events that have made a significant contribution to the broad patterns of our history, or property achieving significance within the past 50 years if it is of exceptional importance. (291)

Many current MHPI projects require the demolition or renovation of houses that were built in the Cold War Era (1949-1989). (292) The Cold War was exceptionally important in American history and was significant in the development of the American culture. Military installations were central in the Cold War; consequently various buildings, structures, sites and objects, including housing areas located on military installations may meet the eligibility criteria for inclusion on the National Register. (293)

Even if the houses themselves are not eligible, the agency must use caution if the houses are in the area of any listed or eligible structures or districts. Housing alteration, new construction or demolition could have an adverse effect on other eligible or listed structures or districts. (294) In that case, the MHPI project would be subject to the Section 106 process even though the houses themselves were not eligible properties.

Fort Carson considered whether the NHPA applied given that houses had been transferred to the developer. (295) The "undertaking," however, is the commencement of the MHPI project, the awarding of the contract, or closing of the real estate transaction; and the NHPA requires consideration of the effect of federal undertakings that may result in changes to eligible or listed buildings or areas before approval of the undertaking. (296) Thus, the relevant time period for determining applicability of the NHPA is necessarily prior to the conveyance of the houses and lease of the land.

Fort Carson faced one other NHPA challenge that deserves mention as a lesson learned for other installations. Under its agreement with the developer, Fort Carson agreed to provide the developer a Government building as a base of operations for the first two years of the project. (297) The building selected was part of a listed Historic District under a preservation plan between the installation and the SHPO. (298) The developer wished to make modifications to the building that could not be made because of the building's status. (299) Fort Carson had to comply with the Section 106 consultation process and work with the SHPO to get agreement regarding the modifications after the building had already been selected and turned over to the developer. (300)

Prior to commencement of any MHPI project, the installation must consider the impact of the NHPA on the proposed project. It should examine the houses and other areas projected to be part of the MHPI project, as well as any surrounding eligible structures or areas potentially affected by MHPI. The exact terms of the MHPI financial structure should be considered to determine if it qualifies as a federal undertaking. If the NHPA is applicable, the Section 106 process must be followed, including notification to and consultation with the SHPO regarding any adverse effects. In addition, if the Government provides Government buildings to the developer as part of the MHPI arrangement, they should be ones

not subject to NHPA requirements. If that is not possible or practical, then the developer must be notified and the installation should begin coordination with the SHPO early in the process to minimize delays and frustration.

V. CONCLUSION

This article addresses only a very small fraction of the MHPI-related issues that challenge policy makers, attorneys, commanders, contracting personnel, MHPI tenants and developers. The issues encompass the entire spectrum of law, requiring examination of contract, fiscal, criminal, ethical, and environmental law implications. If recognized early in planning an MHPI project, they can be squarely and effectively addressed. It is important for legal advisors to understand that, at present, what MHPI guidance does exist is both informal and non-centralized, coming from diverse activities across the DoD. While this environment may make effective planning difficult for Air Force organizations, it represents an opportunity for legal counsel to serve an indispensable role in identifying and resolving issues, thereby significantly contributing to the success of MHPI projects.

(1.) Ellen Sorokin, *At Home, A Losing Battle; Military Personnel Leaving Service Over Poor Housing*, THE WASHINGTON TIMES, July 23, 2000, at C1.

(2.) This represents approximately 200,000 housing units across all branches of the military. *Military Housing Privatization Initiative: Hearings Before the Subcomm. on Military Installations and Facilities of the House Comm. on National Security, 102nd Cong. (1996)* [hereinafter 1996 Hearings] (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations), accessible through the Congressional Testimony 1997 page of the congressional testimony link at the Military Housing Privatization web site of the Office of the Deputy Under Secretary of Defense (Installations and Environment) (DUSD(I&E)), <http://www.defenselink.mil/acq/installation/hrso/>.

(3.) National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, [section] 2801(a)(1), 110 Stat. 186 (February 1996), amended chapter 169 of title 10, United States Code, to add a new subchapter entitled Alternative Authority To Construct and Improve Military Housing (codified as amended at 10 U.S.C.A. [section][section] 2871-2885 (West 2001).

(4.) *Id.*

(5.) GENERAL ACCOUNTING OFFICE, *MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE*, GAO/NSIAD-00-71 (Mar. 30, 2000), <http://www.gao.gov> (GAO Reports, Fiscal 2000, National Defense) [hereinafter 2000 GAO REPORT]. The DoD revised this estimate to fiscal year 2010. *Id.*

(6.) 1996 Hearings, *supra* note 2 (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations). The DoD also anticipated MHPI projects would cost the Government less than using traditional military construction funds for building and repairing housing units. *Id.* The DoD planned to leverage Government construction dollars, with a goal of spending no more than \$1 for every \$3 of private capital invested in MHPI projects. GENERAL ACCOUNTING OFFICE, *MILITARY HOUSING: PRIVATIZATION OFF TO A SLOW START AND CONTINUED MANAGEMENT ATTENTION NEEDED*, GAO/NSIAD-98-178 at ch. 1:2.1 (Jul. 17, 1998), <http://www.gao.gov>, link to GAO Archive at GPO (GAO Reports, Fiscal 1998, National Defense) [hereinafter 1998 GAO REPORT].

(7.) Office Of The Under Secretary Of Defense For Acquisition, Technology And Logistics, Competitive Sourcing and Privatization Office, Military Housing Privatization Web Site, at <http://www.defenselink.mil/acq/installation/hrso/index.htm> (last visited Jun. 24, 2002). The projects awarded to date represent renovation or construction of 17,478 housing units. *Id.* The projects in solicitation consist of 47,802 housing units. *Id.* Across the Services, there are an additional thirty projects in the planning stages, consisting of an estimated 47,448 units. *Id.* Lackland AFB, Texas and Fort Carson, Colorado were the first two installations to award MHPI projects. *Id.* The Navy has projects near Naval installations in Texas and Washington. *Id.* Camp Pendleton, California, will be the first use of the MHPI authority by the Marines. Military Housing Privatization Initiative: Hearings Before the Subcomm. on Military Installations and Facilities of the House Comm. on Armed Services, 106th Cong. (2000) [hereinafter 2000 Hearings] (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations), <http://www.defenselink.mil/acq/installation/hrso/>.

(8.) 2000 GAO REPORT, *supra* note 5.

(9.) In 2002, the Air Force Judge Advocate General School and Air Force Material Command jointly hosted a family housing privatization workshop. As of early 2002, the Army's housing privatization web site contained links to current housing privatization solicitations, but provided little information or guidance for attorneys in the field regarding MHPI issues. See Office of the Assistant Secretary of the Army for Installations and the Environment, The Army's Residential Communities Initiative, at <http://www.rci.army.mil>. The Army's Office of General Counsel and Judge Advocate General web sites are similarly without guidance. See, e.g., Army Judge Advocate General's Corp, at <http://www.jagcnet.army.mil/databases>; General Counsel of the Army, at <http://www.hqda.army.mil/ogc>. The Navy's housing privatization web site contains a few of the guidance documents developed by the Department of Defense relevant to MHPI projects concerning utilities and property taxes. See Public Private Ventures, Navy & Marine Corp Housing, at <http://ppv.hsgnavfac.com/policy/index.htm>. However, it contains little of direct relevance to an installation level attorney attempting to develop an MHPI agreement. *Id.* MHPI related information can be found at a number of Air Force organizational web sites, as there presently is not any central organization responsible for MHPI related information. See, e.g., Air Force Center of Environmental Excellence, Housing Privatization, at <http://www.afcee.brooks.af.mil/dc/dcp/news/>; Air Force Deputy Chief of Staff for Installations and Logistics, Office of the Civil Engineer, at <http://www.il.hq.af.mil/ile/>. The Air Force Judge Advocate General has designated the Air Force Material Command Law Office Real Estate Division (AFMC LO/JAVR) as the Office of Primary Responsibility for all legal matters in the area of housing privatization. TJAG Special Subject Letter 2001-09 (7 Dec. 2001). The JAVR website is the most detailed and potentially helpful Air Force web site. It provides a listing of the various statutes, regulations, and DoD memoranda related to MHPI projects. See Wright Patterson AEB, Privatization Legal Issues, at <https://www.afmcmil.wpafb.af.mil/HQ-AFMC/JA/lo/lojav/privatization/using/index3.htm>. It also contains a variety of informal point papers, background papers and memoranda addressing issues that may arise at the installation level. See *id.* However, these resources raise more questions than they answer and fail to provide specific guidance that would help the attorney in the field effectively analyze issues that arise on the installation.

(10.) See *infra* Part II.

(11.) See *infra* Part III.

(12.) See *infra* Part IV.

(13.) See *infra* Part IV.A.

(14.) See *infra* Part IV.B.

(15.) See *infra* Part IV.C.

(16.) See *infra* Part IV.D.

(17.) 1996 Hearings, *supra* note 2 (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations). The Air Force alone operates and maintains approximately 110,000 housing units at military installations in the United States and overseas. Draft Air Force Housing Privatization Policy and Guidance Manual, section 2.1 (HQ USAF/ILEHM, 10 Oct. 2001)(on file with author).

(18.) 1996 Hearings, *supra* note 2 (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations).

(19.) Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, The Privatization of Military Housing, at <http://www.acq.osd.mil/installation/hrso/hrsohome.htm>. The Air Force indicated it would take 24 years at current funding levels to accomplish the major renovation and replacement required for 60,000 of their 114,000 family housing units. 1996 Hearings, *supra* note 2 (statement of Jimmy Dishner, Deputy Assistant Secretary of the Air Force). It now is estimated that approximately 59% of the Air Force military family housing does not meet standards and will require either major improvement or replacement. Draft Air Force Housing Privatization Policy and Guidance Manual, *supra* note 17. The Navy stated that housing allowances provided to members who live off the installation are grossly inadequate, leaving significant out-of-pocket expenses for military members. 1996 Hearings, *supra* note 2 (statement of Duncan A. Holaday, Deputy Assistant Secretary of the Navy, Installations and Facilities).

(20.) This represents approximately 200,000 housing units across all branches of the military. 1996 Hearings, *supra* note 2 (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations).

(21.) *Id.* In addition, approximately 62% of 400,000 unaccompanied housing spaces require repair estimated at \$9 billion. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, The Privatization of Military Housing, at <http://www.acq.osd.mil/installation/hrso/about.htm>.

(22.) Military Housing Privatization Initiative: Hearings Before the Subcomm. on Military Installations and Facilities of the House Comm. on Armed Services, 105th Cong. (1999) [hereinafter 1999 Hearings] (statement of Randall A. Yim, Acting Deputy Under Secretary of Defense, Installations), <http://www.acq.osd.mil/installation/hrso>.

(23.) 1996 Hearings, *supra* note 2 (statement of Duncan A. Holaday, Assistant Secretary of the Navy, Installation and Facilities).

(24.) Service members who choose to live off the installation, those who are not eligible for military housing and those who cannot get military housing due to unavailability receive a Basic Allowance for Housing (BAH) each month to pay for housing. GENERAL ACCOUNTING OFFICE, MILITARY FAMILY HOUSING: OPPORTUNITIES EXIST TO REDUCE COSTS AND MITIGATE INEQUITIES, GAO/NSIAD-96-203 at ch. 1:1 (Sept. 13, 1996). By law, BAH rates are based on the costs of adequate housing for civilians of comparable income in the same area, but cannot fall below rates based on the national average monthly housing costs. 37 U.S.C.A. [section] 403(b) (West 2001). Using these statutory factors, the DoD seeks to set BAH rates that cover 85% of a service member's housing costs, but they currently only cover 80.5%, leaving members to pay an average of 19.5% of their housing costs out-of-pocket. 1996 Hearings, supra note 2 (statement of Duncan A. Holaday, Assistant Secretary of the Navy, Installation and Facilities). The DoD estimates that 15% of military families living in housing in the civilian community are considered unsuitably housed because the cost of their housing is significantly higher than their BAH. 1998 GAO REPORT, supra note 6, at ch. 1:1. A DoD-sponsored initiative would increase BAH for service members each year and eliminate the gap between actual housing costs and the housing allowance by 2005. 2000 Hearings, supra note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations).

(25.) 1996 Hearings, supra note 2 (statement of Paul W. Johnson, Deputy Assistant Secretary of the Army, Installations and Housing).

(26.) 1999 Hearings, supra note 22 (statement of Randall A. Yim, Acting Deputy Under Secretary of Defense, Installations).

(27.) 1996 Hearings, supra note 2 (statement of Paul W. Johnson, Deputy Assistant Secretary of the Army, Installations and Housing).

(28.) 1996 Hearings, supra note 2 (statement of Duncan A. Holaday, Assistant Secretary of the Navy, Installation and Facilities).

(29.) 1998 GAO REPORT, supra note 6, at ch. 1:2.1.

(30.) Each year Congress appropriates funds for military housing construction for each of the armed services. See, e.g., Military Construction Appropriations Act for Fiscal Year 2002, Pub. L No. 107-64, 114 Stat. 474 (Nov. 2001) (providing specific appropriations for family housing operation and maintenance and construction). In that Act, Congress appropriated funds for each department to use for construction of military family housing, to include its acquisition, replacement, addition, expansion, extension and alteration.

(31.) 1998 GAO REPORT, supra note 6, at ch. 2:2.

(32.) 1996 Hearings, supra note 2 (statement of Duncan A. Holaday, Assistant Secretary of the Navy, Installation and Facilities).

(33.) 1998 GAO REPORT, supra note 6, at cb. 1.

(34.) Id.

(35.) Id. at app. IV.

(36.) Id. Operations and maintenance costs between \$6,000 and \$8,000 each unit, each year. Id. GAO also estimates that at year 25 after construction, every unit will require renovation costing \$65,700 per unit. Id.

(37.) 1996 Hearings, supra note 2 (statement of Duncan A. Holaday, Assistant Secretary of the Navy, Installation and Facilities).

(38.) In procurements for military family housing, the Government uses the methods set forth in the Federal Acquisition Regulation to acquire the housing needed. Title 48, C.F.R, hereinafter "FAR." The FAR applies to all acquisitions conducted by Government agencies for construction. FAR. 2.101 (Jan. 1, 2001). Traditionally, the Government conducts an acquisition to retain an architect and engineering firm to develop designs and specifications for housing units, indicating exactly how they are to be built. The Government then conducts another negotiated acquisition, issuing a solicitation structured under FAR Part 36 to obtain offers from construction contractors. Once received, the Government will negotiate with the offerors regarding the specifications of the project, price, and other factors, make a selection decision and award a contract to the offeror whose proposal represents the best value to the Government. The contractor then builds the houses on the installation.

(39.) Prior to amendment on October 30, 2000, by section 2803(a)(1) of Public Law No. 106-398, 10 U.S.C. [section] 2826 provided that an O-6 (Colonel or equivalent) was entitled to a four bedroom home with a maximum of 1,700 square feet. An E-2 (junior enlisted) was entitled to two to five bedrooms depending on the number of children or other dependents, with square footage ranging from 920 square feet for a two-bedroom home to 1550 square feet for a five-bedroom home. Id.

(40.) See, e.g., U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. (AFI) 32-6002, FAMILY HOUSING PLANNING, PROGRAMMING, DESIGN AND CONSTRUCTION (27 May 1997) (limiting how funding may be used for amenities, renovations and repairs of family housing).

(41.) 1998 GAO REPORT, supra note 6, at app. IV (Jul. 17, 1998).

(42.) Id.

(43.) 10 U.S.C.A. [section] 2871 (West 2002). Each Service has its own name for its housing privatization program under the 1996 authorities. The Army calls it the Residential Communities Initiative (Rd), formerly the Capital Venture Initiatives (CVI). 1999 Hearings, supra note 22 (statement of Mahlon Apgar, IV, Assistant Secretary of the Army, Installations and Environment). The Navy's program is the Public/Private Ventures (PPV) program. Id. (statement of Duncan Holaday, Deputy Assistant Secretary of the Navy, Installations and Facilities). The Air Force refers to it as the Military Housing Privatization Initiative (MHPI). 1996 Hearings, supra note 2 (statement of Jimmy Dishner, Deputy Assistant Secretary of the Air Force, Installations).

(44.) The MHPI authority was initially given for a five-year test period ending February of 2001. 10 U.S.C. [section] 2885. In October 2000, Congress extended the authority until December 31, 2004. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, [section] 2806, 114, Stat. 1654 (2000). In 2002, it was further extended until December 31, 2012. National Defense Authorization

Act for Fiscal Year 2002, Pub. L. No. 107-107, [section] 2805, 115 Stat. 1012 (2001). The extension of authority is codified at 10 U.S.d.A. [section] 2885 (West 2002).

(45.) Id. The conference report for the 1999 Appropriations Act for Military Construction, Family Housing, and Base Realignment and Closure for the Department of Defense makes clear that Congress intended the 1996 authorities to complement, not replace, traditional methods of providing adequate, safe and affordable family housing. H.R. REP. 105-647, 105th Cong 2nd Sess., (1998). The committee stated specifically that [t]he conferees strongly believe that the Department needs to use all available tools to address the family housing program in an optimum manner. This includes the traditional construction program, privatization, and adequate use of existing private sector housing. The conferees remind the Department that Congress approved the new privatization authorities as a pilot project, and that these authorities will expire on February 10, 2001. It was never the intent of the House and Senate Appropriations Committees for this program to become a substitute for the traditional housing construction program. Id.

(46.) 1996 Hearings, supra note 2 (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations). Mr. Bayer stated that he believed that MHPI would "...result in faster construction of more housing built to market standards.... Commercial construction and operation is not only faster and less costly than military construction, but private sector funds will also significantly stretch and leverage the Department's limited housing resources, achieving more improved housing from the same funding level." Id.

(47.) 10 U.S.C. [section] 2873.

(48.) Id. [section] 2876.

(49.) Id. [section] 2878.

(50.) Id. [section] 2877.

(51.) Id. [section] 2875. The legislation limits the Government's investment in an eligible private developer to 33 1/3% of the capital cost of the project, or 45% if the Government conveys land or facilities to the private developer. Id. [section] 2875(c). Government funding for investments in privatization projects comes from the Family Housing Improvement fund, created by the 1996 legislation. Id. ?? 2883. Military construction dollars appropriated to the Services may be transferred to this fund and used to fund the Government's contribution to the projects. Id.

(52.) 2000 GAO REPORT, supra note 5.

(53.) Id. Available assets may include existing housing units and land. 10 U.S.C. [section] 2878. It may also include BAH members are authorized to receive when renting MHPI housing units. Id. [section] 2882.

(54.) 2000 GAO REPORT, supra note 5.

(55.) For example, under 10 U.S.C. [section] 2880(b), the now-repealed limitations on space by pay grade that had been set forth in 10 U.S.C. [section] 2826 applied to all military construction projects for

military housing, but were inapplicable to MHPI housing. *Supra*, note 39. The MHPI authority specifically exempts MHPI projects from the requirements of 10 U.S.C. [section] 2627 dealing with leases of non-excess Government property. *Id.* [section] 2878(d). In addition, MHPI projects are exempt from the provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. [section] 471, regarding the management and disposal of Government property, and Section 501 of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. [section] 11411, requiring the use of suitable excess federal buildings and real property to assist the homeless. *Id.*

(56.) *Id.* [section] 2880(a). See also 1998 GAO REPORT, *supra* note 6, at ch. 1:2.1.

(57.) 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations).

(58.) *Id.* See also 1998 GAO REPORT, *supra* note 6, at app. II.

(59.) 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations).

(60.) *Id.* See also Lackland AFB Solicitation No. F41689096-R0025, <http://www.afcee.brooks.af.mil/dc/dch/hypdata/hydata.asp> (last visited Aug. 21, 2000) [hereinafter Lackland solicitation].

(61.) Lackland solicitation, *supra* note 60. Rent for service members is capped at BAH. *Id.* at sec. 3.1.10. The Government does not provide any rental guarantees to the developer, and service members are not obligated to rent from the developer. *Id.* at sec. 1.0. It is possible for families other than active-duty families to occupy the houses, even members of the general public. *Id.* at sec. 3.1.9. The lease contains a priority list regarding who may occupy the houses if certain vacancy levels are reached. *Id.*

(62.) 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations).

(63.) *Id.*

(64.) Telephone Interview with Major (Maj) Dru Brenner-Beck, Chief, Administrative and Civil Law, Fort Carson, Colorado (Nov. 17, 2000) (notes on file with author). The Government provides no rental guarantees and rent is capped at BAH. *Id.*

(65.) 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations). It should be noted that the Corpus Christi project was not constructed under MHPI authority, but under the limited partnership authority codified at 10 U.S.C. [section] 2837 that initially applied exclusively to the Navy, but was extended to all the Services in 1996. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, [section] 2803(a)(1) (October 1994), as amended by Pub. L. No. 104-106, [section] 2802 (1996). See 2000 GAO REPORT, *supra* note 5. However, the Navy is now classifying those projects as MHPI projects. See Public Private Ventures, Navy & Marine Corp Housing, at <http://ppv.hsgnavfac.com/policy/>. The Navy is also now using Limited Liability Companies in place of the limited partnerships used in earlier projects. *Id.*

(66.) 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations).

(67.) *Cf. id.*

(68.) For example, the MHPI project at Elmendorf AFB, Alaska, includes an arrangement for repair, replacement and new construction resulting in 828 housing units owned, operated and maintained by the developer. Telephone Interview with Mr. Ted Franklin, Leased Housing Office Manager, Elmendorf AFB, Alaska (Jan. 5, 2001) (notes on file with author). The units currently needing no work will provide an immediate rental income stream for the developer. *Id.* They will also provide an available inventory for relocating families presently in units designated for renovation or demolition. *Id.* Elmendorf will convey 208 units needing no work and 200 units needing mid-level renovation to the developer. *Id.* The developer will demolish 56 existing units and construct 300 new units. *Id.* The project awarded at Dyess AFB, Texas in September of 2000, will be the first Air Force project located off the installation. The Dyess AFB project consists of a 402 housing unit complex located off the installation on land owned by the developer. Telephone Interview with Captain (Capt) Craig Crimmons, Chief, Contract Law, Dyess AFB, Texas (Feb. 7, 2001) (notes on file with author). The Navy has projects located off the installation in Texas and Washington. 1999 Hearings, *supra* note 22 (statement of Duncan Holaday, Deputy Assistant Secretary of the Navy, Installations and Facilities). The Navy projects did not use the MHPI authority, but were built pursuant to the 1995 authority at 10 U.S.C. [section] 2837 for the Navy to enter into limited partnerships. *Supra*, note 65.

(69.) 2000 GAO REPORT, *supra* note 5.

(70.) *Id.*

(71.) The Navy's projects have by and large utilized limited partnership agreements under their special 1995 legislation. 2000 GAO REPORT, *supra* note 5. Although the Navy has awarded new projects under the MHPI authority consisting of phase II of the Corpus Christi, TX, and Everett, WA, projects, they will not be examined in this section.

(72.) FAR, *supra* note 38, at 1.104.

(73.) *Id.* at 2.101.

(74.) Interview with Dorothy Loeb, Attorney, SAF/GCN, in Washington D.C. (Feb. 7, 2001) (notes on file with author).

(75.) *Id.* In fact, the Air Force determined its first MHPI project at Lackland AFB was a real estate transaction not subject to the FAR. *Id.* FAR procedures and clauses generally are not applicable to but often are used in structuring real estate transactions. *Cf.* 48 C.F.R. Part 570. The Air Force concluded that this was a real estate transaction rather than a FAR transaction because the Air Force's role in the project was nothing more than a commercial lessor of land. *Id.* This is distinguishable from a 1984 Air Force legal opinion from the Air Force General Counsel's office that concluded privatization projects constructed under Section 801 of the FY84 Military Construction Authorization Act were subject to the FAR, and should comply with the FAR. Memorandum from Grant C. Reynolds, Assistant General Counsel to AF/RDC, subject: Hanscom AFB Build/Lease Housing Project (Nov. 27, 1984) (on file with

author) (hereinafter Reynolds Memo]. That opinion was based on the specific language in the Act and the financial and contractual structure of those projects. *Id.* The same reasoning cannot be extended to the MHPI legislation.

(76.) Memorandum from Harvey J. Nathan, Deputy General Counsel (Acquisition & Logistics) to the Deputy Under Secretary of Defense (Industrial Affairs & Installations), subject: Alternative Authority for Acquisition and Improvement of Military Housing; Applicability of the Federal Acquisition Regulation (Mar. 5, 1997) (on file with author) [hereinafter Nathan FAR Memo].

(77.) Fort Carson was the Army's first MHPI project. The Army concluded the FAR was applicable and preferable because the project involved conveyance of existing units to the developer and a contractual instrument was the central element of their project. *Id.* The Army also felt that having a FAR contract would simplify modifications over the term of the agreement and provide greater oversight of the developer's performance. *Id.*

(78.) *Id.* In discussing the Lackland and Fort Carson projects, the DoD/GC recognized that they were nearly identical in their overall structures. *Id.* In both projects, the developer would construct and/or rehabilitate the housing units and lease them directly to service members. *Id.* The developer is conveyed title to existing houses and has title in newly constructed units. *Id.* The Government leases land to the developer for the housing project. *Id.* In both projects, tenants pay rent directly to the developer, and the Government does not provide occupancy guarantees. *Id.* The units are built to broad Government requirements and the Government conducts inspections. *Id.* Appropriated firms are provided to the developer in the form of a loan or loan guarantee. *Id.* The DoD/GC characterized the role of the military department as that of a "facilitator" marrying a private developer with prospective military housing occupants. *Id.* The DoD/GC concluded that use of the FAR was not required in either project. *Id.*

(79.) *Id.*

(80.) *Id.*

(81.) This is not to say that if the FAR does not apply, the Services must abandon the FAR structure entirely. In fact, the Air Force routinely uses language from FAR clauses, but not the actual FAR clause itself, in their MHPI solicitations. See, e.g., Lackland solicitation, *supra* note 60. In addition, the Lackland project used a competitive source selection procedure that mirrored those contemplated under the FAR. *Id.*

(82.) Unlike the solicitations used at Fort Carson and another early Army MHPI project at Fort Hood, FAR clauses are notably absent from the Lackland solicitation. See *id.*

(83.) See E-mail from Major Dru Brenner-Beck, Chief, Administrative and Civil Law, Fort Carson, Colorado to author (Feb. 1, 2001, 11:23 AM) (on file with author); Lackland solicitation, *supra* note 60, at sec. 2.0(d). Generally this includes an evaluation of proposal received in response to the solicitation, with an initial evaluation determining which proposals are in the competitive range. Offerors in the competitive range then engage in discussions with the Government and submit Best and Final Offers. The contract is awarded to the offeror who represents the best value to the Government based on the evaluation criteria. The Lackland project added an initial qualification step that required potential offerors to submit documentation showing they had the requisite financial capacity and technical

expertise to develop, own, finance and operate a large housing community. Lackland solicitation, supra note 60, at sec. 2.0(d). The Fort Carson project proceeded as a typical FAR procurement source selection. Irregularities in the source selection process, deviations from stated criteria and an eventual competitive range of one offeror resulted in a protest of the solicitation. *Pikes Peak Family Hous. v. United States*, 40 Fed. Cl. 673 (1998).

(84.) Elmendorf AFB, Solicitation No. FXSB2001-00-01, at sec. 5.1.1, <http://www.eps.gov> (last visited Jan. 15, 2001) [hereinafter Elmendorf solicitation].

(85.) *Id.* at sec. 5.2. This initial submission contains all the information that is required in a typical FAR proposal.

(86.) *Id.* at sec. 5.1.2.1.

(87.) *Id.* at sec. 5.1.2.2.

(88.) *id.*

(89.) *Id.* at 5.1.2.2, 5.1.2.3.

(90.) The more recent Air Force MHPI solicitations contemplate a slightly modified procedure. There is an initial pre-qualification of offerors and no more than five are selected to compete for the project. Those pre-qualified offerors then compete for the final award.

The Air Force is currently developing a template Request for Proposals document as well as standardizing all the documents used in MHPI transactions. The Air Force has also engaged the assistance of outside consultants in the MHPI process. The Air Force Center for Environmental Excellence (AFCEE) has been designated as the Housing Privatization Center of Excellence. Distribution Memorandum from Gary M. Erickson, Director, AFCEE, subject: Final Charter, Air Force Center for Environmental Excellence (AFCEE), Housing Privatization Center of Excellence (Worldwide Action Item 98-6) (Jul. 7, 1999) (on file with author). AFCEE is analogous to the Army Corps of Engineers in that it is a DoD organization chartered to provide advisory and assistance services on a reimbursable basis, in AFCEE's case to Air Force organizations concerning a number of environmental, utility and housing privatization issues. An installation involved in a MHPI project can choose to use AFCEE or hire outside consultants if expertise is not available at the installation or Major Command. AFCEE has developed a Privatization Support Contractor (PSC) program. Telephone Interview with Gordon Tanner, Legal Counsel, Air Force Center for Environmental Excellence (Jan. 23, 2001) (notes on file with author).

PSCs are companies with real estate and commercial development expertise that can provide consultant services to installations slated for MHPI projects. *Id.* Each PSC is selected through FAR competitive procedures and has a FAR contract with AFCEE. *Id.* These PSCs are designed to be the arms and legs of the Air Force in privatization projects. *Id.* Once the Air Force decides and specifies what it needs, the PSC ensures that plan is compatible with base and local community standards and is provided to the public in language that is easy for the commercial sector to understand. *Id.* The PSC can assist, recommend or review financial structures and debt transactions. *Id.* The PSC will then seek out capable and interested developers. *Id.* The Air Force supervises the PSC and makes the ultimate selection

decision, but the process is significantly more flexible and streamlined than anything the Air Force has done previously. *Id.*

(91.) See Fort Hood, Request for Qualifications, <http://www.rci.army.mil/rfq/> [hereinafter Fort Hood RFQ].

(92.) 1999 Hearings, *supra* note 22 (statement of Mahlon Apgar, IV, Assistant Secretary of the Army, Installations and Environment).

(93.) Fort Hood RFQ, *supra* note 91, at pt. I, sec. 1.1. Note that the RFQ is organized into two phases, a project planning phase and a project implementation phase. In the discussion that follows, the initial project planning phase is conceptually described as consisting of two phases: submission of a Statement of Qualifications and development of a Community Development and Management Plan.

(94.) *Id.* at pt. I, sec. 4.1. The RFQ requires the Statement to demonstrate the developer meets the minimum experience requirements set forth in the RFQ. *Id.* at pt. I, sec. 4.2. In addition, it requires a detailed listing of relevant experience, preliminary concept statement, documentation of financial capability, background and structure of the developer's organization, past performance information, statement of expected financial return on the project and information regarding the developer's use of small business concerns as subcontractors. *Id.* at pt. I, sec. 4.3. This information is similar in type to the information required in an RFP, but is significantly less detailed and therefore less expensive for developers to prepare. An RFP details explicitly the project requirements, and the Government selects the contractor based on what is contained in the developer's proposal. 1999 Hearings, *supra* note 22 (statement of Mahlon Apgar, IV, Assistant Secretary of the Army, Installations and Environment). In contrast, the idea of the RFQ is to formulate explicit criteria for selecting the developer and then work jointly with the developer to devise the best plan for project execution. *Id.*

(95.) Fort Hood RFQ, *supra* note 91, at pt. I, sec. 4.0.

(96.) *Id.* at pt. I, sec. 1.1.

(97.) *Id.*

(98.) *Id.*

(99.) *Id.*

(100.) E-mail from Mike Finn, Staff Judge Advocate, Fort Hood, Texas to author (Nov. 30, 2000, 4:36 PM) (on file with author). The project status page at the DUSD(I&E)'s Military Housing Privatization web site reports that transfer of operations to the private developer took place on October 1, 2001. *Supra*, note 2.

(101.) The RFQ process unquestionably saves the potential offerors time and money initially, but the selected developer is taking significant risks. Judging from Fort Hood's experience, the selected developer spends many times the \$350,000 sum to prepare the CDMP, so if an agreement cannot be reached, the developer suffers a significant loss. E-mail from Mike Finn, *supra* note 100. That has not happened at Fort Hood, but the selection of the developer in June of 2000 failed to immediately yield a

final acceptance of the CDMP, which did not occur until some months later. E-mail from Mike Finn, Office of the Staff Judge Advocate, Fort Hood, Texas, to author (Nov. 14, 2000, 5:34 PM) (on file with author); project status page at the DUSD(I&E)'s Military Housing Privatization web site, *supra*, note 2. This raises questions regarding whether the RFQ process is any faster or more streamlined than the traditional FAR process. Fort Lewis and Fort Meade MHPI projects were solicited using the RFQ process. See Office of the Assistant Secretary of the Army for Installations and the Environment, The Army's Residential Communities Initiative, at <http://www.rci.army.mil>. In addition, the Army is combining projects into a large multi-project RFQ that allows developers to submit offers for one or more of the projects included in the RFQ. *Id.* For example, several projects for the northeast were wrapped into one RFQ that included MHPI projects at Fort Detrick, Maryland; Fort Hamilton, New York; Picatinny Arsenal, New Jersey; and Walter Reed Army Medical Center, District of Columbia. *Id.*

(102.) Fort Hood RFQ, *supra* note 91, at Pt. II, app. E. For example, the RFQ includes FAR clause 52.212-1, Instructions to Offerors -- Commercial Items; and FAR clause 52.212-2, Evaluation Commercial Items. *Id.*

(103.) See *supra* Part III.A.

(104.) Fort Hood RFQ, *supra* note 91, at pt. II, app. E.

(105.) FAR, *supra* note 38, at 12.203.

(106.) Competing developers on the Fort Hood project referred to the RFQ process as a beauty contest. E-mail from Mike Finn, *supra* note 101.

(107.) Fort Hood RFQ, *supra* note 91, at pt. I, sec. 4.0.

(108.) *Pikes Peak Family Hous. v. United States*, 40 Fed. Cl. 673, 678 (1998); *Birch & Davis Int'l Inc. v. Christopher*, 4 F.3d 970, 974 (Fed. Cir. 1993).

(109.) For example, Fort Hood grappled with the applicability of Housing and Urban Development statutes requiring comprehensive lead paint abatement procedures upon the sale of Federal housing. E-mail from Mike Finn, Fort Hood Office of the Staff Judge Advocate, *supra* note 100. They determined that as long as the conveyance was not a "sale" the statutes did not apply. *Id.* A number of environmental and other statutes are potentially applicable to MHPI projects, and their impact on MHPI projects may not be known until litigation is initiated.

(110.) The Air Force has not provided a written legal opinion indicating that Davis-Bacon applies to MHPI agreements, but as a matter of policy, it has included Davis-Bacon in all MHPI solicitations to date. Interview with Dottie Loeb, *supra* note 74.

(111.) The Contract Disputes Act of 1978 is codified at 41 U.S.C.A. [ss][ss] 601-613 (West 2001). The Army has consistently included the CDA clause in its RFQ. See, e.g., Fort Hood RFQ, *supra* note 91, at pt. II, app. E, FAR clause 52.2 12-4(d). The Air Force policy is that the CDA is not applicable to MHPI projects. Interview with Dottie Loeb, *supra* note 74.

(112.) 40 U.S.C.A. [section] 276a (a) (West 2001).

(113.) 29 C.F.R. [section] 5.2(k) (2001).

(114.) Peterson v. United States, 119 F.2d 145 (6th Cir. 1941).

(115.) Fischer Eng'g. & Maint. Co., Comp. Gen., B-223359, Sep. 26, 1986, 86-2 CPD [paragraph] 359. Section 801 housing projects were typically a build/lease arrangement. Military Construction Authorization Act for Fiscal Year 1984, Pub. L. No. 98-115 [section] 801, 97 Stat. 757, 782-83 (codified at 10 U.S.C. [section] 2828) (repealed 1991). Generally, the Government leased the land to the developer and the developer built new units that the developer owned. *Id.* The Government then leased the houses directly from the developer at a set rate and used the houses for military families. *Id.* Appropriated funds were used to pay rent. *id.*

(116.) *Id.*

(117.) The Government provided a direct loan to the developer in the Lackland MHPI project, in addition to loan guarantees. 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations). The Fort Carson MHPI project utilized a loan guarantee. *Id.* The Navy projects, although constructed under a different authority, required the Navy to provide an equity contribution to the projects of \$9.5M on the Corpus Christi, Texas, project and \$5.9M on the Everett, Washington, project. *Id.*

(118.) Comp. Gen., B-234896, (Jul. 19, 1989)(available through FLITE database)(holding development agreements under the Judiciary Building Act were subject to Davis-Bacon wage rates because the building would serve the general public and it would not have been built by the developer on federal land without the authority). The GAO has recognized the cases indicating a broad construction for applicability of Davis-Bacon Act (DBA) to a number of contracts involving some type of construction. While the U.S. Department of Justice's Office of Legal Counsel initially believed the DBA was per se not applicable to any lease contract (regardless of whether such a contract also called for construction of a public work or building), it has since concluded that the applicability of the DBA to any specific lease contract depends upon the facts of the contract at issue. Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities, 18 op. Off. Legal Counsel 109 (May 23, 1994)("determination whether a particular lease-construction contract is a 'contract... for construction' of a public work or building within the meaning of the Davis-Bacon Act will depend upon the details of the particular agreement"), available at <http://www.usdoj.gov/olc/1994opinions.htm>.

(119.) 41 U.S.C.A. [section] 601-613 (West 2001). The CDA provides a framework for resolving disputes between Government agencies and Government contractors following award of a contract. See FAR, *supra* note 38, at subpt. 33.2. One key feature is its procedural requirements prior to allowing contractors to seek redress at a Board of Contract Appeals (BCA) or the Court of Federal Claims. 41 U.S.C. A. [section] 605. In addition, the CDA vests jurisdiction in the agency BCAs to resolve disputes between the parties to the contracts. *Id.* at [section] 607.

(120.) *Id.* at [section] 602(a).

(121.) *Id.*

(122.) See, e.g., Fort Hood RFQ, *supra* note 91, at pt. II, app. E, FAR clause 52.212-4(d). The only

question is when the CDA becomes applicable in the context of the RFQ. Generally, the CDA only applies to disputes arising after award. *United States v. John C. Grimberg, Inc.*, 702 F.2d 1362 (Fed. Cir. 1983). The phased method under the RFQ, where one developer is selected and proceeds into further negotiations resulting in a final agreement, may constitute two different awards and therefore two different contracts. The first award and contract occurs when the developer is selected and awarded the right to develop the CDMP and to receive consideration for doing so. This first award appears to fall squarely within the act as procurement of services. 41 U.S.C. [section] 602(a)(2). The Army is procuring a CDMP for \$350,000 that the Army has the full right and title to use if it terminates negotiations with the developer. That being true, any disputes that may arise during the CDMP development phase, including the Army's decision to terminate the negotiations, would appear to be subject to the CDA procedural requirements and ultimately to jurisdiction of the Armed Services Board of Contract Appeals (ASBCA). The second award and contract occurs when the Army accepts the developer's completed CDMP and proceeds to phase three to implement the plan. As is typical in traditional procurement contracts, any disputes that arise during the term of the contract will be subject to CDA requirements and will fall under the jurisdiction of the ASBCA.

(123.) Interview with Dottie Loeb, *supra* note 74. Interestingly, the Elmendorf solicitation contained a unique disputes clause that varies significantly from the CDA. Elmendorf solicitation, *supra* note 84, at app. I, para. 23. It provides that disputes under \$10,000 will be decided by the Commander whose decision is final and conclusive and not otherwise appealable or subject to challenge. *Id.* at app. I, para. 23.1. For disputes over \$10,000, the developer must exhaust its administrative remedies. *Id.* at app. I, para. 23.2. Exhaustion of administrative remedies includes submission to the Commander for a decision that is final unless appealed to the Secretary of the Air Force within 30 days of the date the developer receives the Commander's written decision. *Id.* at app. I, para. 23.2.1. If timely appealed to the Secretary, the Secretary's decision is final unless appealed to a court of competent jurisdiction in a timely manner. *Id.* at app. I, para. 23.2.2. What is "timely" and what is a "court of competent jurisdiction" are not defined anywhere in the MHPI agreement. Once the developer exhausts its administrative remedies, it may "pursue any remedy available to it under the law" and/or submit to alternative dispute resolution with the Government. *Id.* at app. I, para. 23.3. This is now the standard clause used by the Air Force in MHPI projects. Air Force Generic RFP, Operating Agreement to the Lease, Condition 24, <http://www.afcee.brooks.af.mil/dc/dcp/news/downloadIgenericri.pdf> (last visited April 1, 2002). Unlike the provisions of the CDA, the process set forth under this clause leaves a number of questions unanswered, such as timing, jurisdiction, and procedure.

(124.) 41 U.S.C. [section] 602(a)(4).

(125.) *Korman Corp.*, HUD BCA No. 81-563-C5, 82-2 BCA [paragraph] 16,044 (Sep. 26, 1982).

(126.) *Id.*

(127.) *Id.*

(128.) *Id.*

(129.) *Id.*

(130.) *Id.*

(131.) Id.

(132.) Id. The board also noted that other agency boards of contract appeals had considered their jurisdiction over hybrid contracts involving elements of CDA covered and non-covered matters. Id. (citing *Lea Co.*, GSBICA No. 5697, 81-2 BCA [paragraph] 15,207 (Jun. 25, 1981); *Sierra Pacific Indust.*, AGBCA No. 79200, 80-1 BCA [paragraph] 14,383 (Apr. 11, 1980)). In those cases, the boards determined the contracts were subject to the CDA. In *Lea Company*, the board determined that a Government lease of an interest in real property was a contract and that the board had jurisdiction to hear the dispute under the CDA. *Lea Co.*, 81-2 BCA [paragraph] 15,207. In *Sierra Pacific Industries*, the contract at issue involved the sale of timber and the construction of a road. Although the board decided the case based on a determination that the sale of timber constituted disposal of personal property therefore subjecting the contract to the CDA and the board's jurisdiction, the board suggested that the road construction portion of the contract may have been sufficient to subject it to the CDA. *Sierra Pacific Indust.*, 80-1 BCA [paragraph] 14,383; see also *Forman v. United States*, 767 F.2d 875 (Fed. Cir. 1985) (holding that even if lease is not subject to CDA, lease was part of larger contract with private party to construct a building for the Post Office making the entire contract subject to the CDA).

(133.) *Korman Corp.*, 82-2 BCA [paragraph] 16,044.

(134.) Id.

(135.) Id. The board noted that the CDA is sufficiently broad to encompass contracts that have one or more of the enumerated procurement purposes that are specifically covered by the CDA. Id. But see *Bonneville Assocs. v. United States*, 43 F.3d 649 (Fed. Cir. 1994) (suggesting that the CDA may be applicable to dual purpose contracts only if the dispute arises under the purpose covered by the CDA).

(136.) The statute authorizing MHPI indicates the purpose of the statute is to provide for the acquisition or construction of family housing units on or near military installations in the United States, its territories and possessions by private developers. 10 U.S.C. [ss] 2872.

(137.) For example, under the Elmendorf solicitation, the developer and the Government participate in a 35%, 65% and 100% design review conference, with the Government retaining the right to accept or reject the final plans. Elmendorf solicitation, *supra* note 84, at sec. 3.2.6.1. In addition, the developer must receive a Certificate of Occupancy from the Government before occupying the units. Id. at sec. 3.2.6.5. The Government will only provide the Certificate once it is satisfied the developer has complied with all applicable codes, standards, regulations, drawings, plans and specifications. Id. The Lackland solicitation sets forth pervasive mandatory Government inspection requirements. Lackland solicitation, *supra* note 60, at app. A, exhibit G. In the Fort Hood MHPI project, the Army works with the developer to plan the project including its design, and reserves the right to accept or reject the developer's plan. Fort Hood RFQ, *supra* note 91, at pt. I, sec. 2.1.

(138.) By way of analogy, this conclusion is similar to that regarding the applicability of bid protest jurisdictional provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. (ss) 3551, to dual purpose contracts. In a 1999 bid protest before the GAO, the GAO determined that a contract for privatization of government utilities was a dual purpose contract. *Government of Harford County, Maryland*, B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD (n) 81. The contract in that case was for the sale of Aberdeen Proving Ground's water and wastewater treatment facilities and the provision of

potable water and wastewater services. Id. The Army argued that GAO had no jurisdiction to resolve the protest because the RFP was for the sale or transfer of government property, not for the procurement or award of a contract for property or services. Id. Therefore, the Army argued, the contract was not subject to CICA, and because CICA was the source of the GAO's bid protest jurisdiction, the GAO had no authority to hear the protest. Id. The GAO stated that CICA conferred it with authority to review procurements or awards of contracts for property or services. Id. It found that the Army's procurement had a dual purpose, that is, to transfer ownership of the water and wastewater facilities and to contract for water and wastewater treatment services for 10 years. Id. The GAO concluded that it had jurisdiction under CICA to hear the protest because one of the main objectives of the procurement was to obtain water and wastewater services. Id. It would appear that whenever there is a dual purpose procurement or contract, if a statute conferring jurisdiction to hear protests or disputes is applicable to one or the other purpose, the GAO, courts and boards will find jurisdiction to consider the entire protest or dispute.

(139.) Although representatives from the installation may participate in some aspects of the formation stage, much of the initial policy decisions, document formation, financial structure of the agreement and even the negotiations and selection of a developer are handled at the level of the Service Secretaries and the Major Commands. The financial instruments are usually Service or Major Command-level documents and generally controlled from that level for modification purposes. Telephone Interview with Gordon Tanner, *supra* note 90. The Lackland AFB project had a significant amount of involvement from the Air Staff, as it was the first MHPI project. Telephone Interview with Gregory Petkoff, Attorney, SAF/GCQ (Feb. 1, 2001) (notes on file with author). The Elmendorf AEB project has been handled by attorneys, contracting personnel and hired consultants at the Pacific Air Forces, Elmendorf's Major Command. Telephone Interview with Captain (Capt) Jennifer Bell-Towne, Chief, Contract Law, Elmendorf AEB, Alaska (Dec. 5, 2000) (notes on file with author). Contract and solicitation and award on the Fort Carson project was done by the Corps of Engineers and then transferred to the installation for administration. E-mail from Maj Dru Brenner-Beck, *supra* note 83.

(140.) Currently, the Dyess AFB project and the Navy projects at Kingsville, Texas and Everett, Washington, are located off the military installation.

(141.) See Lackland solicitation, *supra* note 60, at sec. 1.0; Elmendorf solicitation, *supra* note 84, at sec. 1.3.2; Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64.

(142.) 2000 GAO REPORT, *supra* note 5. Each agreement contains a priority list of unit occupancy, with the highest priority given to active-duty military members referred to the developer by the installation housing office. In most agreements, if occupancy drops below a certain percentage for a set period of time, the developer is allowed to rent the units to nonactive-duty members. For example, in the Air Force solicitations for Lackland and Elmendorf, military families referred through the installation's housing office are given priority for the developer's units. If the occupancy rate drops below 95% for more than three months, vacant units are available to other tenants in order of the priority set forth in the solicitation. See Lackland solicitation, *supra* note 60, at sec. 3.1.9; Elmendorf solicitation, *supra* note 84, at sec. 3.3.4.6. Fort Carson's contract also has a priority list under which civilians could occupy the housing units. Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64. The agreements will generally include a list of occupant priorities that include federal civil service employees, military retirees, military reservists, armed forces veterans, and members of the public. The Elmendorf list prioritizes in descending order of priority, beginning with active-duty Air Force

members referred by the base housing office and continues with other active-duty Air Force members, other active-duty military members, federal civil service employees, military retirees, military Reserve and Guard, military veterans and the general public. Elmendorf solicitation, *supra* note 84, at amend. 2. Lackland is similar, beginning with military families referred by the base housing office and then to federal civil service employees, military retirees, Lackland AFB contractors, and the public. Lackland solicitation, *supra* note 60, at sec. 3.1.9. As a result of long waiting lists for housing at the installations, the services are doubtful occupancy rates will drop low enough that civilians will occupy the units. See Memorandum for Record, Lieutenant Colonel (Lt Col) Daniel K. Poling, Deputy Staff Judge Advocate, Fort Carson, Colorado, para. 7(b) (Apr. 5, 2000) (on file with author); Telephone Interview with Maurice Deaver, Chief, Contract Law, Lackland AFB, Texas (Feb. 9, 2001) (notes on file with author).

However, none of the projects completed to date require military families to accept the MHPI housing. See Elmendorf solicitation, *supra* note 84, at sec. 3.3.4; Lackland solicitation, *supra* note 60, at 1.0(c); Fort Hood RFQ, *supra* note 91, at pt. I, sec. 3.2. They are free to accept the houses, seek private sector houses, or remain on the waiting list for Government-owned housing on the installation. Depending on how MHPI houses compare to houses in the local community in terms of size, amenities, upkeep and costs, it is conceivable that military families may choose not to occupy MHPI houses. 1998 GAO REPORT, *supra* note 6, at ch. 2:3.3. In addition, if DoD is successful in its program to close the gap between BAH and actual housing costs, more military families may choose to live off base rather than in MHPI housing. A 1999 Rand study found that the strong demand for military housing is primarily due to the benefit gap. An Evaluation of Housing Choices Among Military Families, Study MR-1020-OSD (Rand, 1999), <http://www.rand.org/publications/MR/MR1020/index.html> (last visited Feb. 5, 2001). (The benefit gap is the financial difference between living in a Government-owned house where rent and utilities are at no cost to the member, versus the out of pocket expenses involved with living in the civilian community. *Id.* This is the result of the difference between housing allowances and actual costs. *Id.*) The study found that very few military families would prefer to live in Government-owned housing on base if this benefit gap was eliminated. *Id.*

(143.) The Fort Carson legal office concluded that the installation commander has authority to authorize searches of civilian-occupied privatized housing on the installation. Memorandum for Record, Lt Col Daniel K. Poling, *supra* note 142. In contrast, at least one legal opinion from the Air Force concluded that once the property is conveyed to the developer, the installation commander may no longer authorize searches of MHPI housing, but may continue to authorize searches of individuals subject to the UCMJ. Overview of Legal Authorities and Issues Associated with Housing Privatization, Lt Col Steve Hatfield, AFMC LO/JAV, Wright Patterson AFB, Ohio (undated), <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/lo/lojav/privatization/housing/index3.htm>.

(144.) *Saylor v. United States*, 374 F.2d 894, 898 (Ct. Cl. 1967).

(145.) *United States v. Walsh*, 21 C.M.R. 876, 883 (1956).

(146.) MANUAL FOR COURTS-MARTIAL [hereinafter MCM], UNITED STATES, MIL. R. EVID. 315(b) (1998).

(147.) *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975).

(148.) *Id.* at 301.

(149.) Saylor, 374 F.2d 894.

(150.) Id.

(151.) See *United States v. Reppert*, 76 F. Supp. 2d 185 (D. Conn. 1999); *Donnelly v. United States*, 525 F. Supp. 1230 (E.D. Va. 1981).

(152.) In one case, the lease provided that the apartments were under the control of the Navy, even to the exclusion of the owner. *Donnelly*, 525 F. Supp. at 1232.

(153.) *United States v. Walsh*, 21 C.M.R. 876, 884 (1956) (citing Op JAGAF 88-11.2, 6 August 1952; Op JAGAF 88-11.2, 5 April 1955). Wherry and Capehart housing were privatized housing projects prevalent in the 1950s. Private businessmen constructed, operated and maintained these housing projects on or near military installations, and military families could rent the houses using their housing allowance. William C. Baldwin, Wherry and Capehart: Army Family Housing Privatization Programs in the 1950s, ENGINEER MAGAZINE, available at <http://www.wood.army.mil/ENGRMAG/PB5961/PB5962/pastview.htm> (last visited Jun. 28, 2000).

(154.) Telephone Interview with Lieutenant Colonel (Lt Col) Brian Huizenga, AF/ILEIP (Feb. 2, 2001) (notes on file with author). See also Draft Air Force Housing Privatization Policy and Guidance Manual, *supra* note 17, at section 5.2.1.

(155.) Id. It should be noted, however, that this contingency has not been listed in the solicitations, and if not set forth in the agreement itself, could constitute a breach of contract. Whereas the contractor bargained for houses on the installation, complete with the conveniences and reduced costs associated with that location, moving the fences could be viewed to change the bargain entirely. In most of these projects, the installation provides fire protection, law enforcement, and the security and convenience of the installation itself. Moving the housing project outside the gates may change the costs to the developer and the willingness and desire of military members to occupy the units.

(156.) Fort Carson Tenant Lease, para. 13 (on file at the Fort Carson Legal and Housing Offices). One potentially complicating factor is that the tenant lease specifically states that the Army retains the ability to authorize and conduct inspections in all areas leased or owned by the developer on Fort Carson. Id. It does not, however, specifically reference searches for the purpose of investigating criminal activity rather than mere inspections of the premises. See *id.*

(157.) See *supra* notes 147-153 and accompanying text.

(158.) See *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975); *Saylor v. United States*, 374 F.2d 894, 898 (Ct. Cl. 1967).

(159.) In areas of exclusive federal jurisdiction, such as Fort Carson's housing project, individuals committing crimes in housing will be prosecuted in federal, rather than state court. Additionally, only federal law enforcement authorities have jurisdiction in areas of exclusive federal jurisdiction. In areas of concurrent jurisdiction, however, both the state and the federal Government have law enforcement and prosecutorial power. See U.S. DEP'T OF AIR FORCE, HANDBOOK (AFHB) 31-218, LAW ENFORCEMENT MISSIONS AND PROCEDURES, para 3.3 (1 Sept. 1997).

(160.) "Notwithstanding any other provision of law, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished (1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide." 10 U.S.C.A. [section] 2683(a) (West 2001). The complicating factor under this alternative is that the state must consent and accept the change in jurisdiction for something other than exclusive jurisdiction. If the houses are not providing any income to the state in terms of property taxes and the like, the state may be reluctant to accept a change in jurisdiction that will increase the burden on its services without providing income to offset the increased demand.

(161.) *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that a federal law enforcement agent may be held personally liable if he violates an individual's Fourth Amendment rights. *Id.* The agent can be held personally liable even if he was acting within the scope of his employment and under color of his authority. *Id.* *Bivens* has application to MHPI housing in that military law enforcement officials may be subject to personal liability if they violate the Fourth Amendment rights of civilian occupants. If military police conduct a search of a civilian-occupied MHPI house pursuant to the installation commander's search authorization that is later found to be a violation of the civilian's constitutional rights, the individual law enforcement officers and the commander could be held personally liable for monetary damages. This is a particularly significant concern because of the absence of case law indicating the boundaries of the commander's authority to authorize searches of civilian occupied privatized housing on the installation. As a result, it may be prudent for commanders to exercise restraint where civilians are concerned and allow federal magistrates or civilian judges to authorize searches, depending on jurisdiction in the MHPI housing areas.

(162.) *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (stating a military commander's ability to exclude persons from the installation at will was recognized as early as 1837 in an Attorney General's opinion). The commander's authority also arises from 18 U.S.C. [section] 1382, which sets forth criminal penalties for entering military installations after being previously ordered not to reenter by the installation commander. See also *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969).

(163.) *Barment*, Op JAGAF, Air Force, No. 188 (12 Dec 1996).

(164.) *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *United States v. Packard*, 236 F. Supp. 585 (N.D. Ca. 1964).

(165.) *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948); *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969).

(166.) *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948); *United States v. Packard*, 236 F. Supp. 585 (N.D. Ca. 1964); *Holdridge v. United States*, 282 F. 2d 302 (8th Cir. 1960).

(167.) Watson, 80 F. Supp. at 651.

(168.) Id.

(169.) Id. at 650.

(170.) Id. at 651.

(171.) Id.

(172.) Id

(173.) Packard, 236 F. Supp. 585. In this case, a salesman violated the commander's order not to re-enter a military housing area located just outside the gates of the installation. Id. at 586. The court found that signs indicating United States ownership of the area, coupled with regular military patrols of the area, were sufficient to constitute exclusive possession so that the salesman's conviction under 18 U.s.c. [section] 1382 was proper. Id.

(174.) The Elmendorf AFB project, for example, included conveyance of 504 housing units in three housing areas on the installation, with an accompanying lease of 128 acres of land on which the houses are situated. Elmendorf solicitation, supra note 84, at sec. 1.3. The Lackland project leased 30 acres of land to the developer, upon which 272 housing units were situated that were conveyed to the developer. Lackland solicitation, supra note 60, at sec. 1.0(b).

(175.) See Lackland solicitation, supra note 60, at sec. 1.0; Elmendorf solicitation, supra note 84, at sec. 1.3.2; Fort Hood RFQ, supra note 91, at pt. I, sec. 1.1.

(176.) The Lackland solicitation explicitly states that military security forces personnel will provide law enforcement for the MHPI housing development. Lackland solicitation, supra note 60, at sec. 3.1.4. Similarly, the Operating Agreement in the Elmendorf solicitation provides that Elmendorf Security Forces personnel will provide law enforcement and security assistance in MHPI housing area. Elmendorf solicitation, supra note 84, at app. I, exhibit E, para. 5(c). It also specifically states that Elmendorf will provide fire protection services. Id. at app. I, exhibit E, para. 6. The Fort Carson tenant lease states that the Landlord, United States Government, Army, and Fort Carson military authorities all have the right to enter the premises to make repairs or to inspect. Fort Carson Tenant Lease, para. 13, supra note 156.

(177.) An Air Force Judge Advocate General's Opinion concluded that in the case of non-DoD personnel residing in on-base family housing privatization projects, the installation commander's authority under 18 U.S.C. [section] 1382 to bar those civilians from the installation is unaffected. OpJAGAF 1996/188, supra note 163. The opinion provided no discussion of how the structure of the MUPI program might affect a court's determination of Government ownership or exclusive possession of such housing areas on the installation. Id. Additionally, it contained only brief mention of the interests of the civilian residents in remaining in their rented home, another factor that may impact the ability or methodology of an installation commander seeking to bar a civilian resident from the installation. Id. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

(178.) *Id.*; *United States v. Jelinski*, 411 F.2d 476,478 (5th Cir. (1961).

(179.) *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

(180.) An "actual eviction" is defined as "[a]n actual expulsion of the tenant out of all or some part of the demised premises." *BLACK'S LAW DICTIONARY* 35 (6th ed. 1990). "Eviction" is defined as "the act of depriving a person of the possession of land or rental property which he has held or leased." *Id.* at 555. If a civilian renting a home on the installation cannot access the installation, then he can no longer live in the house. This is tantamount to an eviction. In addition, the Supreme Court held that depriving a person of access to his mobile home in the absence of a lawful eviction order was an unlawful seizure of property in violation of the Fourth Amendment. *Soldol v. Cook County*, 506 U.S. 53 (1992).

(181.) *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

(182.) *Id.*

(183.) *Id.*

(184.) *Id.* at 891.

(185.) *Id.* at 896.

(186.) *Id.* at 894.

(187.) *Id.* at 896. The Court held that Government employment can be revoked at will, absent legislation to the contrary. It found that the barment did not deprive the civilian of the ability to work, only the opportunity to work at the one installation. She was free to obtain employment anywhere else.

(188.) *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969).

(189.) *Memphis Light, Gas & Water Div. v. Croft*, 436 U.S. 1 (1978). Water service to residences has been found to be a property right requiring due process before denial of service. *Ransom v. Marrazzo*, 848 F.3d 398 (3rd Cir. 1988).

(190.) Pursuant to the MHPI agreements, service members enter into lease agreements with the developer, pay rent directly to the developer, and the Government is not a party to the tenant lease agreement. See *Fort Carson Tenant Lease*, *supra* note 156.

(191.) Air Force Generic RFP, Operating Agreement to the Lease, Condition 28, <http://www.afcee.brooks.af.mil/dc/dcp/news/download/genericrfp.pdf>. This provision specifically states "[n]othing in this Lease shall be construed to diminish, limit or restrict any right, prerogative, or authority of the commander as established in law, regulation, military custom or elsewhere." *Id.* It further provides that the "Commander has the right at all times to order the permanent removal and barment of anyone from the installation, including but not limited to tenants, if he or she believes, in his or her sole discretion, that the continued presence on the installation of that person represents a threat to the security or mission of the installation, poses a threat to the health, welfare, safety or security of persons occupying the installation or compromises good order and/or discipline on the

installation." Id.

(192.) These grounds should then be inserted in the lease between the developer and the civilian tenants as grounds for eviction. The Elmendorf solicitation contains a debarment provision that is helpful, but does not go far enough to require the developer to initiate eviction action. It states that the "Commander has the right at all times to order the permanent removal and debarment of anyone from Elmendorf AFB, including but not limited to tenants, if he or she believes in his or her sole discretion that the continued presence of that person represents a threat to the security or mission of Elmendorf AFB, poses a threat to the health, welfare, safety or security of persons occupying Elmendorf AFB or compromises good order and/or discipline on Elmendorf AFB." Elmendorf solicitation, *supra* note 84, at app. I, para. 29.2.

(193.) See Telephone Interview with Capt Craig Crimmons, *supra* note 68. See also Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64.

(194.) The Military Construction Appropriations Act contains separate appropriations for each of the Services for family housing operations and maintenance and for family housing construction. E.g., Military Construction Appropriations Act for Fiscal Year 2002, Pub. L No. 107-64, 114 Stat. 474 (Nov. 2001) (provides specific appropriations for family housing operation and maintenance and construction); cf the Department of Defense Appropriations Act for Fiscal Year 2001, Pub. L No. 106-259, 114 Stat. 656, [section] 8098 (Aug. 2000) (explicitly prohibiting expenditure of funds appropriated by the act for the purpose of performing repairs or maintenance to military family housing). In addition to the annual appropriations acts, the annual DoD authorization acts set forth enumerable and often program-specific conditions and authorizations that specify the purposes for which the individual appropriations may be expended. See National Defense Authorization Act for Fiscal Year 2002, *supra*, note 44. Any resident relations programs the installation may offer are typically funded with APFs. For example, most installations sponsor a yard-of-the-month program with the winner receiving a sign to display in their yard, sometimes coupled with a small prize for winning a specified number of times. At Fort Carson, if someone won yard-of-the-month five times, they received a free cleaning of their quarters upon vacating them. Memorandum from Maj Dru Brenner-Beck, Chief, Administrative and Civil Law, Fort Carson, to Harrison Cole, Contracting Officer, Fort Carson, subject: Use of Appropriated Funds (APFs) for Housing Purposes and the Capital Venture Initiative (CVI) Contract (19 Jul. 2000) (on file with author) [hereinafter Brenner-Beck APP Memo]. See also U.S. DEPT OF AIR FORCE, HANDBOOK (AFHB) 326009, CIVIL ENGINEERING (1 June 1996).

(195.) Appropriated funds are limited in their use by the Purpose Statute. 31 U.S.C.A. [section] 1301(a) (West 2001). The Purpose Statute limits the use of appropriated funds to those objects for which the appropriation was made. Id.

(196.) 1 Joint Fed. Travel Reg. (n) U5355 (1 Jan. 2001).

(197.) The Army and the Air Force have made similar conclusions. See Memorandum from Lieutenant Colonel (Lt Col) Kathryn Stone, Chief, General Law Branch, Administrative Law Division to Lana Swearingen, Office of the Asst. Chief of Staff for Installation Management, subject: Payment of Local Moves UP Military Housing Privatization Initiative (28 Jan. 1998) (on file with author) [hereinafter Stone Memo]; Memorandum from Jackson A. Hauslein, Jr., Associate General Counsel, SAF/GCA to Col. Smith, AF/ILEH, subject: Drayage and Storage of Household Goods in Connection with Moves into

Privatized Housing (9 Jun. 1999) (on file with author) [hereinafter Hauslein Memo]. The Army has also concluded that APFs may be used to fund telephone and cable TV disconnect and reconnect costs in local moves between Government housing units due to MHPI construction or maintenance and repair projects. Stone Memo, supra (citing U.S. DEPT OF ARMY, REG. (AR) 210-50, HOUSING MANAGEMENT, paras. 2-8, 2-9 (26 Feb 1999)). Additionally, the Air Force concluded that while certain personnel moves may be funded with APFs, there was no authority to fund storage of household goods in connection with MHPI project moves. Hauslein Memo, supra (finding that JFTR authorization for Government funded storage only applies in very limited circumstances).

(198.) Specifically, the statute provides that MHPI housing "shall be considered as quarters of the United States..." 10 U.S.C. [section] 2882(b)(1). It should be noted that although the authority exists to assign members into MHPI housing, the current projects have not taken that approach. Service members are being given the choice to move into MHPI houses or to choose other housing, either on or off the installation. See Elmendorf solicitation, supra note 84, at sec. 3.3.4 (the Government will not guarantee occupancy of the units and freedom of housing choice for members shall be preserved); Fort Hood RFQ, supra note 91, at pt. I, sec. 3.2 (Army does not intend to use mandatory housing assignments).

(199.) 1 Joint Fed. Travel Reg. [paragraph] U5355(A)(2) (1 Mar. 2001), available at <http://www.dtic.millperdieni/jftr.html>.

(200.) Id at [paragraph] U5355(C)(1)(d)..

(201.) For example, the Lackland project required the demolition of 272 units on a 30-acre site and the construction of new housing units on a 66-acre unimproved site. Lackland solicitation, supra note 60, at sec. 3.1.2. The agreement specifically required new construction on the 66acre site begin first so that the 272 units on the 33-acre site could be vacated into the new units. Id. This required the Government to move personnel in the units set for rehabilitation into the newly constructed units so the Government could give the developer possession of that 30 acre improved site. Id.

(202.) The Elmendorf project contained a number of units it deemed uninhabitable and had identified for demolition as part of the MHPI solicitation. Elmendorf solicitation, supra note 84, at sec. 2.4.2.

(203.) 1 Joint Fed. Travel Reg. [paragraph][paragraph] U5355(C)(1)(b), U5355(C)(2).

(204.) Id. at [paragraph] U5355(C).

(205.) Id.

(206.) Id.

(207.) The Army and Air Force guidance does not specifically address this difficult issue. The Army opinion states that provided "local moves are directed by competent authority JAW the JFTR [Joint Federal Travel Regulation], paragraph U5355. . .there are no legal objections to the Government paying for such moves." Stone Memo, supra note 197. Similarly, the Air Force memo indicates "...the Air Force may approve on a case-by-case basis government funding for a member's move from local economy quarters to privatized housing when competent authority ... determines such a move is for the

convenience of the Government." Hauslein Memo, supra note 197.

(208.) Joint Fed. Travel Reg. (n) U5355(C)(1)(d)

(209.) See Elmendorf solicitation, supra note 84, at sec. 3.3.4 (the Government will not guarantee occupancy of the units and freedom of housing choice for members shall be preserved); Fort Hood RFQ supra note 91, at pt. I, sec. 3.2 (Army does not intend to use mandatory housing assignments).

(210.) See 1 Joint Fed. Travel Reg. (n) U5355(c)(1)

(211.) Id The Air Force has indicated it will be Air Force policy that the developer is responsible for funding local moves when moves are for the convenience of the developer. See Draft Air Force Housing Privatization Policy and Guidance Manual, supra note 17, at section 5.4.2.

(212.) For example, the Elmendorf AFB solicitation sets forth "desired enhancements" including a self-help store, snow sled hill, outside ice skating area, and community recreation hall. Elmendorf solicitation, supra note 84, at sec. 3.2.2. The Fort Hood solicitation indicates its evaluation factors will include ancillary supporting facilities (child care centers, tot lots, community centers, dining facilities, schools, unit offices) and the extent to which they are incorporated into the overall development vision for the project. Fort Hood, RFQ, supra note 91, at pt. I, sec. 4.5.2. The MHPI legislation specifically allows ancillary facilities as part of MHPI projects, with some limitations. 10 U.S.C. [section] 2881.

(213.) In Fort Carson's case, responsibility for signs was set forth in the contract, with the developer assuming responsibility for particular types of signs. Brenner-Beck APF Memo, supra note 194.

(214.) The Purpose Statute. 31 U.S.C. A. [section] 1301(a)(West 2001). Congress does not detail each and every item the Government is authorized to use an appropriation for, but rather leaves the agencies some discretion in use of a particular appropriation. See HUD Gun Buyback Initiative, B-285066 (May 19, 2000). An expenditure is for a proper purpose if it meets a three-part test. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954). First, the expenditure of an appropriation must be for a particular statutory purpose, that is, it is necessarily incident to accomplishing the purpose. Id. See also, Secretary of State, B 150074, 42 Comp. Gen. 226, 228 (1962). Second, the expenditure must not be prohibited by law. Secretary of Interior, 34 Comp. Gen. 195. Third, the expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation. Id. To the extent that operation and maintenance and construction of traditional military family housing continues to be the purpose of O&M funds appropriated by the annual military construction appropriations acts, see note 194, supra, applying such funds for MHPI housing requirements would be for purposes other than those for which the O&M appropriations were made. But see 10 U.S.C. 2872a, infra at note 226, which allows the Government to use APFs to furnish utilities and enumerated services for MHPI housing on a reimbursable basis.

(215.) 31 U.S.C. [section] 1301(a).

(216.) For a discussion of the Purpose Statute and basic fiscal law principles, see The Army Judge Advocate General School, 62nd and 63rd Fiscal Law Course Deskbook, ch. 2 (2002) available at <https://www.jagcnet.army.mil/TJAGSA>.

(217.) The Elmendorf solicitation does not appear to directly address responsibility for street signs, but it does transfer responsibility for essentially all of the housing area infrastructure and common areas, including covered bus stops, parks, sports areas, street lighting, and roads, to the developer. Elmendorf solicitation, *supra* note 84, at sec. 2.5. Although street signs may not be at issue in the Elmendorf project, it is illustrative of how responsibility can be inferred when an agreement is silent on a particular issue.

(218.) In most MHPI agreements where the housing units are situated on the installation, the agreement will provide that the Government is responsible for providing security and fire protection services in some form and to some extent. See Lackland solicitation, *supra* note 60, at sec. 3.1.3, 3.1.4; Elmendorf solicitation, *supra* note 84, at app. I, exhibit E, paras. 5-6. The installation may argue that having the name and rank of the current occupant of each housing unit is essential for security reasons. In the event of a security or potential criminal matter, such as an emergency response to a domestic disturbance or a search, nameplates may be necessary to ensure security personnel have the right house to reduce the possibility of an error in the house number. The installation may also argue that, because it no longer controls who occupies the houses, it has a legitimate security interest in ensuring name identification is on the houses, particularly with the possibility of non-military tenants. In these cases, use of APFs to purchase letters and nameplates for individual housing units, even when owned by a private party, would likely be for a proper purpose.

(219.) Fort Carson funded these programs pursuant to U.S. DEP'T OF ARMY, REG. (AR) 210-50, HOUSING MANAGEMENT, ch. 8 (26 Feb 1999). See Brenner-Beck APE Memo, *supra* note 194.

(220.) It may be explicit or implicit in the agreement. Fort Carson's MHPI agreement specifically shifted responsibility for resident relations programs to the developer. Brenner-Beck APE Memo, *supra* note 205. The Air Force MHPI solicitations and agreements, although clearly turning over all responsibility for operating and maintaining the MHPI housing development, indicate no specific requirement for the developer to provide a resident relations program for tenants. See Lackland solicitation, *supra* note 60; Elmendorf solicitation, *supra* note 84.

(221.) This is the case with the Fort Carson MHPI agreement. E-mail from Maj Dru Brenner-Beck, Chief, Administrative and Civil Law, Fort Carson, to Maj Holly Cook, Army Judge Advocate General School (Jan. 9, 2001, 3:18 PM) (on file with author).

(222.) Fort Carson's agreement is typical in requiring the developer to assume responsibility for all operations and maintenance in the MHPI housing area, including what the Government previously provided as part of the installation's grounds maintenance contract. Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64. The Lackland project also shifted the responsibility for landscaping to the developer, and that provision is typical in the Air Force agreements. See Lackland solicitation, *supra* note 60, at sec. 3.3.7.

(223.) See *supra* note 214.

(224.) Fort Carson is one example of a contract that shifted all responsibility for the housing area's operation and maintenance to the developer. Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64. See also Elmendorf solicitation, *supra* note 84, at sec. 3.2. The Lackland and Elmendorf projects make it clear that operation and maintenance of the housing areas are the responsibility of the

developer. Lackland solicitation, *supra* note 60, at sec. 1.0(b); Elmendorf solicitation, *supra* note 84, at sec. 1.3.2. Specifically, Elmendorf's solicitation required perspective developers to submit as part of their proposals, a Facilities Maintenance Plan addressing how they would handle grounds maintenance and pest control, among other maintenance issues. Elmendorf solicitation, *supra* note 84, at sec. 3.2.4.3.

(225.) See Fort Hood RFQ, *supra* note 91, at Pt. I, sec. 4.5.2; Elmendorf solicitation, *supra* note 84, at sec. 3.2.

(226.) This question arose at Fort Carson. The legal office issued a legal opinion finding that pest control was the developer's responsibility under the terms of the contract. Memorandum from Phillip J. Wolf, Attorney-Advisor, Administrative and Civil Law Division, Fort Carson to Director of Environmental Compliance and Management, Fort Carson, subject: Use of Government Resources in the Privatized Housing Area -- Tree Pruning/Removal and Pest Control (24 Apr. 2000) (on file with author). The opinion concluded that allowing the installation's Directorate of Environmental Compliance and Management office to spray for mosquitoes in the MHPI housing area would be an improper use of APFs and a violation of the Purpose Statute. *Id.* Interestingly, the Fort Carson developer suggested the possibility of using the Government's pest control office as a subcontractor. *Id.* The legal memo stated that this would also be impermissible for a variety of reasons, most importantly the lack of authority for the Government to be a subcontractor in this type of situation. *Id.* The opinion also concluded that APFs could not be used to remove or prune trees at the Commanding General's quarters because they were part of the MHPI housing area and the developer was contractually responsible for grounds maintenance. *Id.* Grounds maintenance under the contract specifically included tree pruning and removal/replacement. *Id.* The specific terms of the agreement must be reviewed before a determination is made on any fiscal law question. The MHPI statute was amended in 2000 to allow the Government to furnish utilities and enumerated services for MHPI housing located on the installation, and it now provides a mechanism for reimbursement for those services. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114, Stat. 1654 (2000) (codified at 10 U.S.C. (ss) 2872a). Specifically, the Government may furnish pest control and snow and ice removal, services that the Government typically provides in military family housing areas .

(227.) See Lackland solicitation, *supra* note 60, at sec. 1.0(b); Elmendorf solicitation, *supra* note 84, at sec. 1.3.2.

(228.) Fort Carson's legal office has compiled a list of lessons learned from its MHPI project. See E-mail from Maj Dru Brenner-Beck, Chief, Administrative and Civil Law, Fort Carson, to author (Nov. 9, 2000, 6:58 PM) (on file with author). Although this author has contacted other installations with current MHPI projects, it does not appear that similar efforts have been made to capture lessons learned at other MHPI installations. It is possible that other installations have not experienced fiscal law issues, or perhaps these issues were not identified as such and therefore were not coordinated with the legal offices. The Air Force has, a growing collection of point papers and background papers identifying possible fiscal law and other issues associated with MHPI projects at its Wright-Patterson Air Force Base web site. Unfortunately, they generally provide little detail and little analysis, and so they are of differing levels of usefulness. Wright Patterson AFB, Privatization Legal Issues, <https://www.afmcmi1.wpafb.af.mil/HQ-AFMC/JA/lo/lojav/privatization/housing/index3.htm>.

(229.) Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. [section] 2635

(2001).

(230.) U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, (Aug. 30, 1993) [hereinafter JER]. The JER is essentially a code of ethical conduct for Department of Defense employees, expanding upon and including the Standards of Conduct regulations. JER, Foreword (Aug. 30, 1993). It is grounded in the basic obligation of public service, which requires that "each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain." 5 C.F.R. [section] 2635.101. It sets forth a number of tenants Government employees must adhere to based on the notion that public office is a public trust. Id.

(231.) Particularly relevant are the rules regarding gifts from outside sources. Id. [section] 2635.201-2635.204.

(232.) Although not a complete list of the types of items a developer might wish to provide, these were actually proposed by the developer at Fort Carson. Telephone Interview with Maj Dru Brenner-Beck, supra note 64. It might be difficult to imagine why a developer would be interested in providing these "extras" when they have a ready-made tenant pool with significant waiting lists in most MHPI installations. They are provided for purely commercial reasons. First, the items might be the type of incentives the developer provides to other commercial developments it owns in the local community and it may want to provide them to military tenants so there is no perceived unequal treatment. More likely, however, because no MHPI contracts to date have provided rental guarantees, the developer may want to attract military tenants to ensure maximum occupancy in the units to maximize income to the developer.

(233.) Telephone Interview with Maj Dru Brermer-Beck, supra note 64; Telephone Interview with Maurice Deaver, supra note 142.

(234.) The JER defines a DoD employee as any DoD civilian officer or employee of any DoD component, active-duty Regular or Reserve military officer (including warrant officers), active-duty enlisted member of the Army, Navy, Air Force or Marine Corps and any Reserve or National Guard member on active duty under orders issued pursuant to title 10 of the United States Code. JER at 1-211. This definition includes a number of individuals eligible to occupy MHPI projects according to the priority lists set forth in the MHPI agreements. See, e.g., Lackland Solicitation, supra note 60, at sec. 3.1.9; Elmendorf solicitation, supra note 84, at sec. 3.3.4.6.

(235.) C.F.R. [section] 2635.202(a).

(236.) Prohibited sources include, among others, any person who does business with the employee's agency. Id. at [section] 2635.203(d)(2). Nothing in the regulations indicates housing privatization developers are exempt from the definition of a prohibited source.

(237.) "Gift" is defined as a "gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred." Id. at [section] 2635.203(b).

(238.) There are a number of exceptions to the definition of a "gift." *Id.* at [section] 2635(b). Most relevant to the MHPI developer's resident relations program are the exceptions for commercially available discounts and benefits at 5 C.F.R. [section] 2635.203(b)(4) and items secured by Government contract at 5 C.F.R. [section] 2635.203(b)(7).

(239.) For example, the Fort Carson MHPI developer requested permission to provide move-in incentives for hard-to-rent housing units. These included units in undesirable locations, such as units near street intersections and those next to units with multiple dogs. Telephone Interview with Maj Dru Brenner-Beck, *supra* note 64.

(240.) Fort Carson's developer requested the ability to provide similar incentive programs. *Id.*

(241.) Office of Government Ethics, Opinion 99 X 1, Memorandum from Stephen D. Potts, Director, to Designated Agency Ethics Officials, subject: Employee Acceptance of Commercial Discounts and Benefits under the Standards of Ethical Conduct 5 C.F.R. Part 2635(Jan.5, 1999), http://www.usoge.gov/papers/advisory_opinions/advop_files/1999/99x1.txt [hereinafter OGE Opinion 99 X 1].

(242.) 5 C.F.R. [section] 2635.203(b) (2001).

(243.) OGE Opinion 99 X 1, *supra* note 241.

(244.) 5 C.F.R. [section] 2635.204(b)(4).

(245.) The pool of people eligible for the incentives may change depending on occupancy rates and priority lists, and this may change the analysis. At one extreme it would include military members eligible for Government housing; at the other extreme it would be open to the public. There is no question that discounts in the form of move-in incentives available to the general public are excluded from the definition of a gift. *Id.* at [section] 2635.203(b)(4); see also OGE Opinion 99 X 1, *supra* note 241. However, if the incentives were available only to a subgroup of military members, such as only those eligible for Government housing, the exclusion may not apply. See Office of Government Ethics, Informal Advisory Letter 92 X 26 (Dec. 10, 1992), http://www.usoge.gov/papers/advisory_opinions/advop_files/1992/92x26.txt (indicating that the commercially available discount exclusion does not cover discounts or benefits to subgroups of employees).

(246.) 5 C.F.R. [section] 2635.203(b)(7). The rationale for this exclusion is that items secured under a Government contract accrue to the employee from the Government, and therefore are not gifts from an outside source. OGE Opinion 99 X 1, *supra* note 241).

(247.) Acceptance of discounted parking fees or concierge services provided for in an agency's lease agreement for building spaces would fall under this exclusion. *Id.*

(248.) *Id.*

(249.) *Id.* Agencies have considered whether cellular phone service discounts offered to employees in their personal capacities by companies seeking to provide cellular service to the agency fall under the

Government contract exclusion. Id. Some agencies have allowed such discounts, others have not. Id. However, the agency's determination is what authorizes the exclusion. Id.

(250.) Id. In making such a determination, the agency is responsible for ensuring that the determination is otherwise appropriate under law, including procurement law and fiscal law regarding augmentation of appropriations. Id.

(251.) C.F.R. [section] 2635.204(c) (2001). If an employee accepts a gift that meets the criteria of a commercial discount or similar benefit under this section, it is deemed not to violate the gift prohibition, including those dealing with appearances. Id. at [section] 2635.204.

(252.) Id. at [section] 2635.204(c)(2)(i).

(253.) Note that gifts under this exception can be accepted even if the offeror of the gift is a prohibited source. OGE Opinion 99 X 1, supra note 241. See also Office of Government Ethics, Opinion 85 X 13, Memorandum from David H. Martin, Director, to Designated Agency Ethics Officials, subject: Acceptance of Commercial Discounts (Sept. 17, 1985), http://www.usoge.gov/advisory_opinion/advop_files/1985/85x13.txt [hereinafter OGE Opinion 85 X 13].

(254.) Id. This prong focuses on the criteria for inclusion in the group.

(255.) The priority lists contained in the MHPI agreements authorize other than federal employees to occupy the MHPI housing units, so a tenant does not necessarily have to be a federal employee. See, e.g., Lackland Solicitation, supra note 60, at sec. 3.1.9; Elmendorf solicitation, supra note 84, at sec. 3.3.4.6. Thus, the group being offered the incentive is the pool of eligible tenants, who may or may not be federal employees.

(256.) OGE Opinion 99 X 1, supra note 241.

(257.) In the case of MHPI housing, if the incentives are targeted to the entire pool of eligible tenants, federal employees or civilians, then regardless of who the tenants are in actuality, federal employees are not being targeted.

(258.) Id. This part of the test focuses on the offeror's perceived motivation for offering the discount or benefit. Id. It attempts to prevent appearances of impropriety.

(259.) Caution may still be needed regarding appearances, which may preclude certain tenants from accepting incentives even if all prongs are met. Concerns about the appearance of impropriety may preclude a particular employee from accepting an incentive or a gift that is offered to the general public or would otherwise be appropriate as a technical matter under the regulations. OGE Opinion 85 X 13, supra note 253. For example, military members working on contract administration or inspection for the MHPI contract should not take advantage of such incentives simply because of the appearance problems. See OGE Opinion 99 X 1, supra note 241 (indicating that even though federal employees are not being targeted, and even if there is no improper motive, employees should not accept discounts or benefits that appear to be offered because of the employee's official job or position).

(260.) C.F.R. [section] 2635.204(a).

(261.) Id

(262.) It would also create a need for tenants to be educated on the details of the ethics regulations to ensure they do not run afoul of the law. Additionally, it could become a record-keeping nightmare for the developer as well as the tenants to police the yearly limit.

(263.) Fort Carson has addressed its ethics concerns by using other methods for its MHPI developer to participate in the community, such as commercial sponsorship and co-sponsorship, rather than using the exclusions and exceptions to the gift prohibition that would allow a substantially more robust resident relations program. See, Memorandum from Captain (Capt) James A. Barkei, Administrative Law Attorney, Fort Carson to McDonald Kemp, Directorate of Community Activities, Fort Carson, subject: Proposed Joint Events with Directorate of Community Activities and J.A. Jones (5 Apr. 2000) (on file with author) [hereinafter Barkei Joint Events Memo].

(264.) The exception should apply whether the resident relations program is specifically defined in the MHPI agreement or simply part of the developer's overall responsibility for the operation and maintenance of the housing project. Fort Carson has requested a JER exception for privatized housing projects, which has been forwarded to the Department of the Army's General Counsel's office for review. Id.

(265.) 5 C.F.R. [section] 2635(b)(7).

(266.) If a resident relations program is part of the MHPI agreement from the outset, and if it is defined broadly, it would seem to fall within the exception as something secured by the Government under contract. Id. Fort Carson is exploring the possibility of defining the scope of the resident relations program that was part of the original contract. E-mail from Maj Dru Brenner-Beck, supra note 221. Although Fort Carson may have bargained for a resident relations program, the contract provided no detail regarding what it included. Id.

(267.) Installations may want to consider placing limits on the resident relations program rather than allowing the developer's initiatives to go unchecked. The Government must still be conscious of appearances of improper or unethical conduct by its employees. However, as long as the resident relations program at the MHPI project is similar to what this or other commercial developers provide to tenants of private sector housing projects, there should be no perception problems.

(268.) JER at 3-206.

(269.) Id. and at 3-211. The groundbreaking was a community focused celebration and was unrelated to the construction business of the developer. Memorandum from Captain (Capt) James A. Barkei, Administrative Law Attorney, Fort Carson to Garrison Commander, Fort Carson, subject: CVI Groundbreaking Ceremony (25 Feb. 2000) (on file with author) [hereinafter Barkei Groundbreaking Memo].

(270.) The MHPI developer at Fort Carson donated Easter eggs to the NAFI for an MWR sponsored Easter egg hunt that was open to MWR eligible patrons, not just the developer's tenants. Barkei Joint

Events Memo, *supra* note 263.

(271.) U.S. DEP'T OF AIR FORCE, INSTR. (AFI) 34-407, AIR FORCE COMMERCIAL SPONSORSHIP PROGRAM, para. 1.1 (17 Feb. 1999).

(272.) U.S. DEP'T OF ARMY, REG. (AR) 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, para. 7-47 (25 Nov. 1998).

(273.) See, e.g., National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C.A. [section] 4321 (West 2000)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C.A. [section] 1531 (West 2000)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. [section] 9601 (West 2000).

(274.) See, e.g., U.S. DEP'T OF AIR FORCE, INSTR. (AFI) 40-201, MANAGING RADIOACTIVE MATERIALS IN THE U.S. AIR FORCE (Sept. 1, 2000); U.S. DEP'T OF AIR FORCE, PAM. (AFPAM) 32-7043, HAZARDOUS WASTE MANAGEMENT GUIDE (Nov. 1, 1995); U.S. DEP'T OF AIR FORCE, INSTR. (AFI) 21-202, COMBAT AMMUNITION SYSTEM PROCEDURES (July 1, 1995); U.S. DEP'T OF ARMY, PAM. 200-1, HANDBOOK FOR ENVIRONMENTAL IMPACT ANALYSIS (July 4, 2000); U.S. DEP'T OF ARMY, REG. (AR) 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT (Feb. 21, 1997); U.S. DEP'T OF ARMY, REG. (AR) 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (Dec. 23, 1988).

(275.) 10 U.S.C. [section] 2871.

(276.) Telephone Interview with Maj Dru Brenner-Beck, Chief, *supra* note 64.

(277.) 16 U.S.C.A. [section] 470 (West 2000).

(278.) *Id.* at [section]470(f). The "National Register" is the National Register of Historic Places that is maintained by the Secretary of the Interior. 36 C.F.R. [section] 800.16(q) (2001).

(279.) 36 C.F.R. [section] 800.16(f).

(280.) 16 U.S.C. [section] 470(f).

(281.) *Id.*

(282.) *Id.*

(283.) 36 C.F.R. [section] 800.16(y) (2001).

(284.) On the Lackland project, the Government provided a direct loan to the developer for \$10.6 million. 2000 Hearings, *supra* note 7 (statement of Randall A. Yim, Deputy Under Secretary of Defense, Installations). Fort Carson's MHPI agreement included a loan guarantee to the developer for a private sector loan. *Id.* The Navy provided its developer with \$9.5M as capital for its joint venture to build housing in Corpus Christi, Texas. *Id.*

(285.) Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980).

(286.) Wicker Park Historic Dist. Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. 1982).

(287.) Carson v. Alvord, 487 F. Supp. 1049 (N.D. Ga. 1980).

(288.) See, e.g., Fort Hood RFQ. supra note 91, at pt. I, sec. 2.1 (requiring completion of CDMP acceptable to the Government); Lackland solicitation, supra note 60, at app. A, exhibit G (setting forth requirements for substantial Government inspection and oversight of construction and renovation); Elmendorf solicitation, supra note 84, at sec 3.2.6.5 (requiring Government to issue a Certificate of Occupancy to developer when developer has complied to Government's satisfaction with all applicable codes, standards, regulations, drawings, plans and specifications).

(289.) 16 U.S.C.A. [section] 470(f) (West 2000).

(290.) 36 C.F.R. [section] 60.4 (2001).

(291.) Id

(292.) Lackland AFB project included demolition of 272 Wherry housing units constructed under 1950s privatization legislation. Lackland solicitation, supra note 60, at sec. 3.1.1. The Elmendorf AFB MHPI project contemplates conveying 176 units built in 1965 to the developer, 24 of which would be demolished. Elmendorf solicitation, supra note 84, at sec. 2.4.2. Fort Hood and Fort Carson both have significant numbers of housing units that involved in MHPI projects that were constructed during the Cold War. Fort Hood RFQ, supra note 91, at pt. II, app. A, sec. 1.2.

(293.) Ronald Forcier and David Hoard, The National Historic Preservation Act Environmental Law Primer, para. 3, at https://aflsa.jag.af.mil/groups/air_force/envlaw/primers/nhpaprim.htm . See also Hatfield Memo, supra note 143 (indicating Cold War resources may be eligible for inclusion on the National Register).

(294.) Pursuant to regulation, adverse effects include the introduction of visual or audible elements that diminish the integrity of the property's significant historic features. 36 C.F.R. [section] 800.5(a)(2)(v). It also includes any change of the character of the property's use or of physical features within the property's setting that contributes to its historic significance. Id. [section] 800.5(a)(2)(iv).

(295.) Telephone Interview with Maj Dru Brenner-Beck, supra note 64.

(296.) 16 U.S.C. [section] 470(f).

(297.) Telephone Interview with Maj Dru Brenner-Beck, supra note 64.

(298.) Id

(299.) Id.

(300.) Id.

Captain Stacie A. Remy Vest *

* Captain Stacie A. Remy Vest (B.A., University of Denver; J.D., Drake University, LL.M., The Army Judge Advocate General School) is a trial attorney assigned to the Alternative Dispute Resolution Division, Directorate of Contract Dispute Resolution, Air Force Material Command Law Office, Wright-Patterson AFB, Ohio. She is a member of the Colorado and New Mexico State Bars.

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