

CECC-K

Regulation
No. 27-1-1

15 September 1996

Legal Services
CLAIMS, LITIGATION, AND PROCUREMENT FRAUD

Limited supplementation of this regulation is permitted but is not required. If supplements are issued, Division Commanders and Commanders of separate FOAs will furnish one copy of each to HQDA (CECC-K) Washington, D. C. 20314-1000, and District Commanders will furnish required copies to Divisions.

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CHAPTER 1

GENERAL

1-1. Purpose. This regulation establishes policy, responsibility, and guidance for processing claims and litigation involving the U.S. Army Corps of Engineers.

1-2. References.

- a. 32 C.F.R. 286
- b. 32 C.F.R. 505
- c. 32 C.F.R. 518
- d. 33 C.F.R. Part 209
- e. 33 C.F.R. Part 326
- f. 36 C.F.R. Part 327
- g. DoD Directive 5400.7R
- h. DoD Directive 7050.5
- i. DFARS 209.406-3(a)
- j. AR 25-55
- k. AR 27-20
- l. AR 27-40
- m. AR 37-60
- n. AR 37-103
- o. AR 55-19
- p. AR 340-21
- q. AR 405-15
- r. AR 735-5
- s. Engineer Federal Acquisition Regulation Supplement (EFARS)

1-3. Applicability. This regulation is applicable to all Corps of Engineers Offices of Counsel.

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1-4. Responsibilities.

a. District Counsels and Counsels of Laboratories and FOA's are responsible for the timely preparation of claims reports, litigation reports, and interim status reports. They are also responsible for ensuring that applicable claim and case data is entered promptly on the Case Management Information System (CMIS-II, or its successor), or, if applicable, on the U.S. Army Claims Service's automated claims data base. Additionally, they shall coordinate actions with the United States Attorneys and Division Counsels, and will forward recommendations as necessary through channels regarding prosecution, defense, or appeal strategies.

b. Division Counsels are responsible for monitoring and guiding the District Counsels' performance of the functions stated in paragraph *a*. Division Counsels are also responsible for reviewing the District's reports and recommendations, and including the Division position on a particular issue where appropriate. The Division Counsel has the overall command and control responsibility for the management of all claims for incidents occurring in his or her Division, its Districts, and in Laboratories or FOA's located within the geographical limits of his or her Division.

c. The Office of Chief Counsel is responsible for establishing legal policy and ensuring that claims and litigation are handled in conformity with that policy. The Office of Chief Counsel is responsible for maintaining liaison with the Justice Department, other DoD components, and the federal executive departments.

1-5. Objective. The purpose of this regulation is to provide standard policy and guidance concerning the handling of claims and litigation.

CHAPTER 2

CLAIMS AGAINST THE UNITED STATES

2-1. General. This part implements and supplements AR 27-20 relating to the investigation, processing and settlement of non-contractual claims.

2-2. Scope and Applicability. The provisions of AR 27-20, as implemented and supplemented by this regulation, apply to incidents arising from all activities of the Corps of Engineers which may give rise to non-contractual claims. This regulation does not apply to any real estate takings claim, which should be handled under AR 405-15.

2-3. Responsibilities.

a. Division and District Counsels. The Division and District Counsels have responsibilities equivalent to those of an area claims authority as defined in paragraphs 1-5*d*(3) and 1-8*b* of AR 27-20.

b. Claims Attorney Appointment. The Chief Counsel has authority to designate claims attorneys, pursuant to paragraph 1-6*a* of AR 27-20. Each Division and District Office of Counsel shall have a designated Claims Attorney. Requests for the designation of claims attorneys will be submitted through CECC-K to the Chief Counsel. A claims attorney shall be a civilian employee of the Army, in the Grade of GS-11 or above, a member of the bar of a state, territory, or the District of Columbia, and be performing primary duties as a legal advisor. This designation is personal and nondelegable.

c. Claims Officers have the responsibilities prescribed in paragraph 2-4*b* of AR 27-20. Each Division and District Commander and each Commander of a separate Corps of Engineers installation or activity will appoint, in writing, a commissioned officer or civilian who, by reason of experience or education, is qualified to conduct claims investigations. Claims officers will work under the immediate direction of the Division, District, Laboratory or FOA Counsel.

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2-4. Channels of Communication.

a. For claims resulting from civil works and military activities, normal communication will be directly with U.S. Army Claims Service (USARCS), Ft. Meade, MD 20755. Military Personnel and Civilian Employees Claims Act claims are to be forwarded directly to the nearest active military base for processing.

b. As soon as a claim against the United States is received which involves serious injury, death, or property damage in excess of \$25,000, USARCS will be notified in accordance with paragraph 2-5a of AR 27-20. All other claims and files will be sent to USARCS and will include copies (not originals) of all relevant documents.

2-5. Assistance to the Army Claims Service in Investigation of Non-Corps Claims.

The Claims Service occasionally requests Corps Districts to assist in investigating and processing claims which do not involve Corps activities. Such assistance shall be provided upon request, although the Claims Service should be notified that it must pay for necessary travel and per diem expenses incurred by the investigating employee(s). Salary expenses are not the proper subject of reimbursement, and should be charged to Departmental Overhead (for Real Estate or other technical element personnel) or General and Administrative Overhead (for Counsel and other administrative personnel.)

2-6. Tort Claims.

a. Under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2675(a), the failure of an agency to adjudicate a claim within six months after it is filed may be deemed a denial of the claim for purposes of that section. Because filing a claim tolls the statute of limitations, prompt investigation and adjudication of claims is imperative. Failure to do so may jeopardize the government's litigating position in any subsequent lawsuit by making evidence and witnesses more difficult to obtain.

b. Pursuant to AR 27-20, paragraph 4-12a.2., FTCA claims against the United States may be settled by claims attorneys for amounts of \$25,000 or less.

c. Claims up to \$2,500 in amount shall be paid out of Corps funds. Claims which are settled in amounts greater than \$2,500 shall be forwarded to GAO for payment in accordance with 28 U.S.C. 2672 and paragraph 4-10*b*, AR 27-20.

2-7. Maritime Claims.

a. AR 27-20 will be used in processing reports covering marine incidents. Since the period for settlement of such claims is limited, a copy of the report (or interim report if the investigation is not completed) for claims greater than \$100,000 will be forwarded within one year from the date of the casualty, or notice of such casualty, to the Chief, USARCS.

b. Investigation of marine incidents will be of a scope commensurate with the extent of the damage. The substantive provisions of AR 55-19 should be used as a guide in investigating and reporting on marine casualties. The report should indicate whether the site of the accident has been determined to be navigable or non-navigable, so that the claim may be properly processed under the applicable admiralty or tort statutes.

c. Claims against the United States for \$100,000 or less may be compromised and paid in accordance with paragraph 8-9*c*, AR 27-20, the Chief Counsel's 20 September 1995 delegation of authority (Appendix A), and any further redelegation by the Division. Payment of maritime claims should be made from civil works funds.

CHAPTER 3

CLAIMS IN FAVOR OF THE UNITED STATES

3-1. Scope of Section. This part implements and supplements AR 27-20 and AR 27-40.

3-2. Military Claims. Claims for damage to or loss or destruction of military property will be processed in accordance with AR 27-20 and AR 27-40. Admiralty claims will be processed in accordance with Chapter 8, AR 27-20, and AR 55-19. Property accounting documents (such as reports of survey) and actions will be handled under AR 735-5.

3-3. Civil Works Claims (Other than Admiralty). Investigations and reports will be conducted and prepared in accordance with AR 27-20. Upon completion of the report, the Division, District, Laboratory or FOA will:

a. Approve or disapprove the report and determine whether there is any legal liability owed to the United States arising out of the incident reported and, if so, the amount of such liability and the party responsible for the debt.

b. Demand for payment. When a determination of liability has been made, a letter demanding payment shall be sent by certified mail, return receipt requested, to the party found liable, unless the claim officer's report is accompanied by payment in full or by a compromise offer supported by tender of payment on which the District Counsel can recommend acceptance. In cases where the amount of liability is not readily determinable, demand will be made based upon the estimated damages. The demand for payment will incorporate a notice of the period within which a reply will be expected (30 days is suggested), and inform the debtor that the interest required under 31 U.S.C. 3717 will accrue if the amount is not promptly paid.

c. Payment. Tender of full payment on a government claim (other than an affirmative admiralty claim in excess of \$100,000) may be accepted by a Division,

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District, Laboratory or FOA Counsel, who shall, on request, execute and deliver to the debtor a release or receipt in accordance with paragraph 14-19 of AR 27-20. Funds received in payment of claims shall be transmitted to the appropriate disbursing officer for deposit to the proper account.

d. When litigation is required to enforce collection for non-maritime debts up to \$500,000, a report will be prepared in accordance with the Claims Collection Litigation Report Form (Appendix B.) The report should then be sent directly to the Department of Justice, Central Intake Facility, 1110 Bonifant Street, Suite 220, Silver Spring, MD 20910-3312. Litigation reports for claims in excess of \$500,000 shall be prepared in the format specified in paragraph 4-1 of this regulation and forwarded to CECC-K for referral to the Justice Department.

3-4. Affirmative Admiralty Claims.

a. Claims in favor of the United States for damage to a navigation structure are subject to the three-year statute of limitations established by 28 U.S.C. 2415. Claims reports on such incidents will be forwarded to USARCS within one year of the accident, unless repair efforts involve temporary gate removal. In the latter case, the claim report shall be filed within two years of the date of the accident.

b. Administrative jurisdiction for the acceptance and settlement of affirmative admiralty tort claims in excess of \$100,000 is vested in USARCS. Claims below that amount may be settled or compromised in accordance with paragraph 2-7 of this regulation.

c. Claims for wreck removal expenses do not involve damage to government property, and USARCS accordingly does not pursue collection of such debts. Claims for wreck removals will be sent instead to CECC-K for direct referral to the Department of Justice.

d. Direct referral of affirmative admiralty claims to the U.S. Attorney is not authorized.

CHAPTER 4

LITIGATION

4-1. Reports. Information regarding the filing of all lawsuits in which the Corps is involved shall be entered on CMIS-II (or its successor) within three days of filing or receipt of the complaint. In addition, a complete litigation report is required for all lawsuits arising from Corps of Engineers activities, unless the U.S. Attorney charged with defending or prosecuting the action does not find a report necessary, or has indicated that an abbreviated report or brief factual statement will suffice. The report should be prepared and assembled in the order indicated below, with each copy signed by the Division or District Counsel or his or her designee.

a. For cases involving nationally significant or precedential legal issues, or relief which exceeds the settlement authority of the U.S. Attorney (usually \$500,000), three copies of the report will be forwarded, through channels, to CECC-K for forwarding to the Department of Justice. If the case is one which does not present nationally significant or precedential issues, and is not monitored by the Main Justice Department, only one copy shall be forwarded to the Division if required by the Division. Nationally significant or precedential cases are those which present unusual or complex issues having the potential to impact Corps programs or policies, or those whose disposition may result in a new procedural or legal precedent or standard. Division, District, Laboratory or FOA Offices should strive to comply with the time deadline included in a request for a report, unless dictated otherwise by the U.S. Attorney's office or an impending court filing date. The report should be prepared in the following format, including the elements listed below:

b. Narrative statement of facts. All known facts and circumstances relating to the controversy should be provided. Copies of relevant correspondence and documents will be attached as exhibits ("core information" as required by Executive Order 12778), and references to them noted in the body of the report. If the litigation involves a government contract, one copy of the provisions relevant to the cause of action or defense will be furnished. To prevent unnecessary

duplication and conserve paper, only the relevant contract portions should be included, and not the entire contract unless required by the issues of the case. If an administrative claim, appeal or other action has previously been filed, the report will summarize the results of the proceeding, and include copies of all available evidence, findings, and decisions rendered in the prior proceedings. However, if the case involves review of an administrative record under the Administrative Procedures Act, 5 U.S.C. 557, that record need not be provided in the litigation report.

c. Suggested form of answer. A suggested answer to each and every allegation of a petition or complaint should be furnished, including admissions, denials, or statements that the government lacks sufficient information on which to admit or deny the allegation.

d. List of witnesses. A list of all witnesses is to be furnished, including present or last known addresses. Each fact to which a particular witness will testify should be listed under his or her name. If there are facts which cannot be proven by witnesses, the omission should be noted and any available documentary evidence relevant to that fact stated. Since there may be considerable delay before a case comes to trial, a statement of facts to which each witness will testify should be obtained from him or her. These statements can subsequently be used to refresh the witnesses' memory at trial, and should therefore be obtained as early as possible after the complaint or petition has been filed. Submission of the litigation report shall not be delayed while the statements are being obtained.

e. Legal analysis. The law applicable to the government's claim or defense should be discussed, unless the Department of Justice attorney or Assistant U.S. Attorney assigned to the case decides otherwise. It is imperative that local laws and regulations of other government agencies be cited in full, since sources of both local statutory and case law may be unavailable for use by Division or Headquarters attorneys.

f. Counterclaims and crossclaims. Information should also be supplied concerning any counterclaim, crossclaim, or other cause of action which may be asserted against the plaintiff or other parties by the government. The counterclaim

or other demand need not always arise out of the matter pleaded in the suit, but may exist because of an entirely separate transaction or incident. In contract litigation, the Department of the Army holdup list should be reviewed for possible set-offs.

4-2. Litigation in the United States Court of Federal Claims and the Court of Appeals for the Federal Circuit.

a. A litigation report prepared for cases in these two courts should take special cognizance of the jurisdictional and procedural rules governing the conduct of such lawsuits. In direct appeals to the Court of Federal Claims or cases appealing decisions by boards of contract appeals to the Federal Circuit, the Trial Attorney who handled the matter administratively should assume responsibility for preparation and/or review of the report. The attorney will be clearly identified so that the Department of Justice can readily contact him or her for assistance. However, a litigation report in the format set out in paragraph 4-1 of this regulation is not required for Contract Disputes Act appeals to the Federal Circuit. Instead, Section 71 of the EFARS provides the report format to be used in these cases.

b. In cases where the Federal Circuit remands a case to the Board of Contract Appeals, care should be taken to ensure that actions taken are coordinated with the procurement office.

4-3. Suits Against Government Officers and Employees in Their Official Capacities. Suits may be brought in state or Federal courts seeking declaratory or injunctive relief against government officers or employees in their official capacities. Such suits will be treated as suits against the United States, and litigation reports shall be prepared in accordance with the directions in this chapter. When the case is filed in state court, a twenty-day time limit for removal to Federal court exists, and the U.S. Attorney should promptly be notified. An abbreviated report outlining the facts of the incident will be forwarded directly to CECC-K within ten days following the first notice of the action. A copy of the report will also be sent to the Division Counsel. If such suits are filed in Federal court, the time limit set forth by the complaint or the letter requesting a litigation report will be observed.

4-4. Tort Litigation. Where a litigation report is requested in response to a tort suit against the government, it should first be determined whether the plaintiff has complied with 28 U.S.C. 2401 by first presenting its claim in writing to the appropriate Federal agency. If the requisite administrative claim has not been filed, the U.S. Attorney's office and CECC-K should be notified immediately. In such event, it shall not be necessary to furnish the requested litigation report unless further instructions requiring a report are received. Liability to the plaintiff shall not be admitted in the proposed answer, unless the U.S. Attorney has obtained prior approval to confess liability.

4-5. Tort Suits Brought Against Government Employees Personally.

a. Common Law Torts. 28 U.S.C. 2679 provides that the Attorney General shall defend all cases arising out of common law torts which are brought against government employees or their estates. All employees should be instructed that any complaint served upon them or their personal representatives in connection with an incident occurring within the scope of their employment should be immediately taken to the District Counsel. Upon receipt of the complaint, the District Counsel should in turn notify the U.S. Attorney's office, so that removal (if necessary) and substitution of the United States as the defendant may be accomplished. In all such cases, a litigation report shall be prepared and sent directly to the U.S. Attorney's office, along with a statement by the employee's supervisor that the employee was acting within the scope of employment at the time the accident or other incident occurred.

b. Constitutional Torts. Occasionally, employees or officers are sued personally for damages in state or Federal courts as a result of actions taken in the performance of their official duties. Government defense counsel will only be furnished where the government has a clear and direct interest in the suit, and the defendant and Attorney General must both consent to the use of government counsel. However, it is Department of Justice policy to furnish such representation if the incident arose out of activities which are within the defendant's scope of employment. The Attorney General has authorized the U.S. Attorneys to immediately enter an appearance as defense counsel upon the informal request of

Division or District Commanders, without the prior approval of the Attorney General. U.S. Attorneys are permitted to decline association with the case where circumstances permit delay or where only a minor charge is involved. Prompt notice by telephone, electronic mail, or fax is to be given to CECC-K concurrently with the informal request for interim representation by the U.S. Attorney. The notice shall contain all information necessary to determine whether or not the defendant was in fact acting within the scope of employment, so that the Chief Counsel may request the Attorney General to formally authorize Department of Justice representation for the employee. The report shall be accompanied by a written request for representation from the employee to the Chief Counsel, and a statement from the employee's supervisor that the actions complained of were within the scope of his or her official duties.

c. Service of Process. Under Rule 4 of the Federal Rules of Civil Procedure, service of process may be effected by first-class mail upon an individual defendant. If such service is not properly acknowledged by return mail within twenty days of the summons' mailing, the defendant may then be personally served. If this occurs, the defendant may be obligated to pay plaintiff the costs of personal service.

d. Acknowledgment. Before first-class mail service is acknowledged, the complaint must be analyzed to determine if the court has personal jurisdiction over the defendant. If personal jurisdiction is lacking, the individual should be instructed not to acknowledge service by mail. In any case where an acknowledgment is returned, it should contain a caveat to the effect that the defendant waives no Rule 12(b) defenses, and that these defenses are specifically preserved. The following format may be followed:

"This acknowledgment is returned solely in order to comply with Rule 4 of the Federal Rules of Civil Procedure. In so doing, the defendant does not admit or concede that the form or substance of service of process in this case is proper or sufficient or that the court has personal jurisdiction over the defendant. The defendant does not waive any defenses, including

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those provided by Rule 12 of the Federal Rules of Civil Procedure. Rather, all defenses are specifically preserved."

4-6. Prosecution for Violation of Laws and Regulations.

a. General. Where criminal violations of laws or regulations have occurred, a litigation report will be prepared in the format specified in paragraph 4-1 of this regulation. The report should contain recommendations regarding the advisability of seeking statutory fines or penalties, where applicable. Actions involving the regulatory program will be handled under 33 C.F.R. Part 326.

b. Section 301, Clean Water Act, and Section 12, Rivers & Harbors Act. District Counsels are authorized to refer civil cases arising out of violations of Section 301 of the Clean Water Act and Section 12 of the Rivers and Harbors (R&H) Act directly to the local U.S. Attorney for appropriate legal action. This authority applies to those violations involving unauthorized discharge of dredge or fill material into navigable waters and violations of R&H Act Sections 9, 10, and 13, and excludes those cases involving a significant question of law or fact. For this purpose, a "significant" issue of law or fact shall include all criminal cases involving discharges of dredged or fill material into waters of the United States. These cases shall be referred through Division to CECC-K with a report as specified in paragraph 4-1 of this regulation.

c. R&H Act and Section 404. In order to facilitate the handling of correspondence and pleadings concerning Rivers and Harbors Act and Section 404 civil cases which are handled under 33 C.F.R. Part 326 and referred directly to the U.S. Attorneys' offices, clearly mark "Direct Referral" on each letter or on the cover sheet of each pleading. In these cases, copies of the referral letter and the narrative statement of facts should be forwarded through Division to CECC-K if nationally significant or precedential issues develop in the case. Proposed settlements involving damages in excess of \$500,000 or which otherwise exceed the U.S. Attorney's authority to settle the case must be forwarded to CECC-K for approval

prior to settling the case. In addition, a short statement as to the disposition of each case will be entered on CMIS-II (or its successor.)

d. Wreck Removal. The United States is entitled under 33 U.S.C. 408 to recover the costs of wreck removals in navigable waters from the responsible parties, notwithstanding the fact that the owners may have attempted to abandon the vessel. The procedures in paragraph 4-1 of this regulation should be followed in removing a wreck and pursuing a claim for recovery of expenses against the owner or other responsible party. All actions should be preceded by the issuance of a mark and remove letter addressed to the sinking party, as specified under 33 U.S.C. 409. Wreck removal claims are not encompassed within the Army Claims Service's jurisdiction, and reports seeking collection of damages will be forwarded directly to CECC-K for referral to the Justice Department.

(1) In cases where emergency removal is determined to be necessary under 33 U.S.C. 415, the District Commander should nonetheless make demand for removal upon the owner before proceeding with Corps actions to remove the vessel. Establishment of abandonment is not a prerequisite to emergency removal. After the vessel has been raised or otherwise disposed of, the party responsible for the sinking should be billed for the costs. If the owner refuses to pay, a litigation report in the format specified under paragraph 4-1 of this regulation shall be prepared, and three copies of the report shall be forwarded to CECC-K for direct referral to the Department of Justice.

(2) In non-emergency removal cases under 33 U.S.C. 414, injunctive relief compelling the owner to remove the vessel should be sought before a determination is made in favor of removal at the Corps' expense. If the responsible party refuses to raise the vessel, or injunctive relief is not feasible, the Corps may remove it after abandonment has been legally established. When the Corps removes a vessel, a monetary claim in the government's favor arises. Upon the owner's failure to make reimbursement, a litigation report will be prepared under paragraph 4-1 of this regulation and three copies forwarded through Division to CECC-K for referral to the Justice Department.

e. Marine Accidents. Claims in favor of the government arising from marine casualties, damage to Corps waterway or harbor facilities, or any other matter falling under admiralty jurisdiction, will normally be handled in accordance with Chapter 3 of this regulation. As a general rule, claims in favor of the Corps for damage to government property may be asserted against the prospective defendant regardless of negligence when such damage or destruction is a violation of 33 U.S.C. 403.

f. Timber Trespass and Encroachments. In cases where timber is removed from federal land administered by the Corps, consideration will be given to whether prosecution under 18 U.S.C. 1852 or under local statutes should be sought in addition to the value of the timber destroyed. Where administrative action is inadequate to protect the interests of the government, a formal litigation report will be prepared in accordance with paragraph 4-1 above, and forwarded directly to the U.S. Attorney. Similarly, routine cases involving encroachments and holdover tenants may be referred directly to the U.S. Attorney after a formal demand has been made on the individual to voluntarily remove the encroachment.

g. Violation of Regulations Governing Corps Reservoirs. In cases where the regulations contained in 36 C.F.R. Part 327 have been violated, citations are handled by the U.S. Attorney's offices. In such cases, no litigation report will ordinarily be prepared. However, where the violation is serious or continuing in nature, as with encroachments on government boundaries, a litigation report should be prepared and forwarded directly to the U.S. Attorney. In cases where injunctive relief is requested, an information copy of the report shall be furnished to CERE-M. If nationally significant or precedential questions of law or fact are involved in the case, a litigation report should be prepared and two copies forwarded to CECC-K, as provided under paragraph 4-1 above.

4-7. Private Litigation.

a. Many private lawsuits are of interest to the government because of potential or existing collateral litigation, because property rights of the United States are involved, or because government policy is implicated. Such cases include water

rights disputes, suits for patent infringement where the defendant has also manufactured the same item under government contract, suits to quiet title or collect taxes where the result may possibly cloud the government's title to land, and suits to enjoin contractor operations on government property.

b. In such matters, the government may seek to intervene, may assist one of the original litigants, or may merely observe the litigation. An abbreviated report setting out the facts and legal issues involved, plus copies of appropriate pleadings, should be made for these cases. Specific notation regarding the government's interest and recommendations concerning participation in the case should be included in the report, which should then be forwarded through Division to CECC-K.

4-8. Bankruptcy Actions. Upon receiving notification that an individual or corporation which may owe the government money or be in possession of government property has filed for bankruptcy, the procedures set out in Chapter 16 of AR 37-103 shall be followed. Litigation reports will be sent directly to DFAS. In cases involving substantial legal issues, as with bankruptcies affecting multiple contracts, two copies of the narrative statement of facts only should be forwarded concurrently to CECC-K for referral to Office of The Judge Advocate General (OTJAG).

CHAPTER 5

ADMINISTRATIVE MATTERS

5-1. Liaison with U.S. Attorneys. District and Division Counsels will maintain close coordination with the U.S. Attorneys, and will furnish requested assistance as needed to defend or prosecute cases involving Corps activities. When a litigation report cannot be furnished in sufficient time to meet deadlines for filing answers to complaints, the U.S. Attorney's office should be contacted and an attempt made to provide sufficient information so that obtaining an extension of time for filing the answer will not be necessary.

5-2. Interim Status Reports for Lawsuits. Interim status reports on all significant or material developments in nationally significant or precedential lawsuits must be made through channels to CECC-K, and must also be entered on CMIS-II (or its successor) within three days of notification that an action has occurred. These reports will be made whenever pleadings or motions are filed; whenever trials or hearings are held; whenever judgments or opinions are entered; whenever settlements are proposed; whenever questions regarding rehearing, appeal or certiorari will be considered; whenever a suit is finally concluded; whenever special assistance is requested from the U.S. Attorney's office; and whenever an issue arises which might be of interest to the Chief Counsel in supervising the Corps' participation in the litigation. These interim reports may be brief, and should include a copy of any pertinent pleadings or other papers. One copy of the report shall be forwarded to CECC-K. In all other cases, timely entry of updated material on CMIS-II (or its successor) is sufficient.

5-3. Trials and Hearings. When litigation is of significant interest to the Corps, a representative from the Division, District, Laboratory or FOA Office of Counsel will attend hearings and make prompt status updates on CMIS-II (or its successor).

5-4. Settlements and Appeals. When a settlement exceeds the authority of the U.S. Attorney, or an adverse decision is rendered, a recommendation regarding settlement or appeal shall be forwarded through channels to CECC-K.

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The report will include a concise summary of the issues presented and recommendations as to any actions which should be taken by the Chief Counsel. While recommendations regarding settlements which are within the District, Laboratory or FOA Counsel's delegated authority may be sent directly to the U.S. Attorney, in no event will a District or Division recommendation regarding settlement, appeal, rehearing, or certiorari be sent directly to the Justice Department without authorization by the Chief Counsel.

CHAPTER 6

LITIGATION PROCEDURE UNDER COST REIMBURSABLE CONTRACTS

6-1. Litigation under Cost Reimbursable Contracts. In all lawsuits against Cost Reimbursable contractors, the defendant will immediately furnish a copy of all papers filed against it to the contracting officer. Immediate notification should then be given by the contracting officer to the responsible Office of Counsel, in order that a determination may be made as to whether the government will intervene or defend the suit on behalf of the contractor.

a. The government will not undertake to represent every contractor involved in litigation, but will defend only those cases where the government appears to have an interest in the outcome of the litigation, such as when a judgment entered against the contractor may be a reimbursable item under the contract. Pending a decision regarding what action the government will take with respect to the lawsuit, the contractor will enter an appearance in court and request a continuance of the action, unless there is clearly sufficient time for the local U.S. Attorney to file an answer to the action.

b. A notice of litigation will be prepared by the District or FOA, and will provide such information as is available concerning the case. It will contain the information required by AR 27-40, as well as an identification of the contract involved and the docket number of the case. The notice of litigation will be faxed directly to CECC-K, in order for the government to have as much time as possible to consider representing the contractor. Such notice will be followed as expeditiously as possible with a full report in the format specified by paragraph 4-1 of this regulation, three copies of which shall be sent to CECC-K. The report will be made regardless of whether the contractor has given the notice required under paragraph d below, or has met the two conditions identified in item (13) below as prerequisite to defense by the U.S. Attorney's office. This report will include the following information, in addition to that described above:

(1) Confirmation of the initial notice that suit was filed.

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- (2) The address of the parties involved.
- (3) A brief description of the prime contract involved.
- (4) Identification and a brief description of any subcontract, equipment rental agreement or collateral agreement between the parties involved, together with a copy of such agreement.
- (5) A complete statement of facts upon which the claim is predicated.
- (6) A complete statement of any facts or circumstances which might affect the liability of the government to the contractor, or which the government might employ in defending the litigation.
- (7) A list of the names and addresses of possible witnesses.
- (8) A statement as to the action already taken by the contractor or the contracting officer, if any.
- (9) Copies of all pleadings filed in connection with the suit.
- (10) Copies of reports of proceedings and findings by any Board of Inquiry which may have been convened to investigate any phase of the case.
- (11) Copies of any agreement for representation (paragraph d below).
- (12) In cases involving labor claims, a statement as to what law the plaintiff alleges has been violated.
- (13) A statement that the contractor desires or is willing to allow the action to be defended by the U.S. Attorney's office, and that the contractor has executed or agreed to execute an agreement for representation.

c. If the U.S. Attorney is not authorized to represent the contractor, the

contractor should be advised to retain private counsel to defend it in the proceedings. However, upon a determination that the government does have an interest in the lawsuit, the Chief Counsel will request the Justice Department to authorize the U.S. Attorney to represent the contractor, and will advise the contractor of that fact.

d. The contracting officer will advise the contractor to submit an Agreement for Representation, which should then be referred to both the U.S. Attorney and CECC-K. The contractor should be advised that if the agreement is executed before the U.S. Attorney has been authorized to provide representation and defend the case, it will not be binding upon either party until the Attorney General has approved the agreement.

e. The government will not undertake any defense on behalf of a contractor until the agreement for representation is executed, and a copy thereof received by the U.S. Attorney. The contractor will be advised that the agreement does not require him or her to waive any rights he or she may have under his or her contract with the Corps. One copy of the agreement will be furnished directly to the U.S. Attorney, and three copies will be forwarded to CECC-K.

f. Except where absolutely necessary, the filing of pleadings will await the U.S. Attorney's undertaking the defense of the suit. However, the contractor must assume the responsibility for procuring such extensions of time to answer the complaint as may be necessary to prevent a default judgment from being entered against the contractor.

g. Upon the settlement or conclusion of the lawsuit, a report will be submitted to the Chief Counsel, together with a recommendation regarding whether or not the contractor should be reimbursed, if it has been found liable.

6-2. Litigation Policy. When the U.S. Attorney undertakes the defense of a suit, he or she is in full charge of the case, subject only to coordination with, and approval by, the client agency. The contracting officer and the contractor will promptly

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consult with the U.S. Attorney after receiving instructions from the Chief Counsel, and will furnish all requested cooperation.

a. If a private attorney, previously retained by the contractor, remains in the case, his or her activity will thereafter be governed by the U.S. Attorney's decisions.

b. Fees of attorneys retained before the government is given an opportunity to defend, or retained by the contractor after the U.S. Attorney has undertaken to defend the case, will not be reimbursable items.

c. Whenever the employment of an attorney at a monthly salary on the contractor's regular payroll is authorized, his or her salary must not be affected by participation in such lawsuits, nor may it be increased by any fee for services in the case insofar as reimbursement is concerned.

d. Attorneys on the staffs of Division or District Commanders may, upon request by the U.S. Attorney, cooperate with the U.S. Attorney's office in obtaining evidence or drafting pleadings and briefs for the defense of a suit.

e. Contracting officers will not communicate with the local U.S. Attorney in connection with a suit filed against the contractor, nor will they advise the contractor to do so, until they have been so authorized in accordance with these instructions.

6-3. Suits Covered by Insurance. Whenever any legal action is fully covered by insurance and the insurance company agrees to accept full responsibility for the defense of the action and for payment of any judgment that may be rendered against the defendant, the following information will be furnished to the Chief Counsel, ATTN: CECC-K:

a. title of the action,

b. name of the insurer,

- c. the amount sought in the action,
- d. the amount of insurance coverage, and
- e. a statement to the effect that the insurer has agreed to accept full responsibility for the defense of the action and the payment of any judgment against the defendant.

In any case where there is doubt as to full insurance coverage, or when for other reasons government counsel may be desirable, a full report as required by paragraph 4-1 above will be made, together with explanations and recommendations of the District or Division Commander concerned.

6-4. Settlement or Appeal of Litigated Matters. In cases where the United States is a party, the U.S. Attorney in charge has the authority to settle the suit in the name of the government. However, as to suits by or against Corps contractors having cost reimbursable contracts, where the U.S. Attorney has been authorized to represent the contractor, the attorney will only transmit offers of settlement to the contractor and act in the role of private counsel, and the Attorney General will not review settlement questions. Accordingly, upon receipt of such offer and recommendation, the contractor will immediately refer the matter to the contracting officer and await instructions. The contracting officer will promptly submit a report and recommendation on the question to the Chief Counsel, ATTN: CECC-K, who will decide on acceptance or rejection of the settlement offer. Whenever an adverse judgment, in whole or in part, is entered in a suit, a special report and recommendation will be made promptly to CECC-K by the contracting officer as to the advisability of appeal. This report will be supported by recommendations of the U.S. Attorney and the contractor, if practicable. Questions of appeal or other review in this type of contract litigation will be considered and decided by the Solicitor General of the United States, upon recommendation of the U.S. Attorney, the Assistant Attorney General, and the Chief Counsel.

6-5. Reimbursement of Expenditures Arising from Litigation. Authorization to settle does not imply that reimbursement of the full amount will be made. In some

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cases, consent will be given with reservations as to the reimbursement only under the terms of the contract. For instance, if the amount owed is definite, no reimbursement will be made for any amount in excess thereof which may be agreed to by the parties; reimbursement in full of a settlement will only be authorized when the total amount is clearly owed to the contractor, or when a reasonable doubt exists as to the amount owing and the amount of the settlement is found to be just and reasonable. The item in question must be the proper subject of reimbursement under the contract, and litigation expenses, including attorneys fees, court costs, judgments and settlements, will be considered for reimbursement only upon a definite showing that such reimbursement is proper. Advice may be obtained from CECC-K as to the reasonableness of the attorney fees. However, this is primarily a matter for the contracting officer's determination under the terms of the contract. Among the factors to be considered are:

- a. The fees generally charged in the locality by attorneys of similar reputation and experience (state and local sources such as the U.S. Attorney, bar associations and local attorneys).
- b. The pecuniary value to the government, both in the instant case and as precedent for future cases.
- c. The substantive and procedural difficulty involved in the matter, including an evaluation of any special competence of counsel in the subject matter of the issue being litigated.
- d. Whether any reduction of the fee is in order either because of assistance or advice rendered by other attorneys (including government attorneys) or because of the failure to diligently advance the interests of the government.

6-6. Certificate of Contracting Officer Relating to Reimbursement for Claims, Settlements, and Litigation. Upon approval of an amount paid under a settlement, and proof of payment by the contractor, reimbursement may be made. The reimbursement voucher will be supported by a release from the claimant of all claims against the United States and the contractor in the matter involved. Such

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amount will be covered by a separate voucher on which the appropriate officer will certify as follows:

I certify that the above amount represents a settlement made with the written consent of the contracting officer and represents a loss or expense actually sustained by the contractor in connection with work under Contract No. _____, not compensated by insurance or otherwise, reimbursable under Article __, Paragraph __ of said contract, and the same is found to be just and reasonable.

For the contracting officer,

By _____

(Name, grade, office) Authorized Representative

6-7. Termination of Contracts. In connection with termination and final settlement of cost reimbursable contracts, caution will be exercised in the execution of any release or settlement agreement, in view of lawsuits against the contractor. The contractor's unliquidated liability as to any litigation arising in connection with his or her contract, pending at that time or which might be instituted in the future, will be reserved by a general exception for an unstated amount in any release he or she executes in favor of the government, and such liability should be excluded from that which the government might assume under a settlement agreement. Any other course of action is considered to be potentially detrimental to the government's interests in the conduct of the litigation, regardless of whether the defense of the case is handled by private counsel (such as when the Fair Labor Standards Act is involved) or by government counsel.

CHAPTER 7

PROCUREMENT FRAUD AND IRREGULARITIES PROGRAM

7-1. Purpose. This chapter provides guidance for the USACE Procurement Fraud and Irregularities (PFI) Program, and is applicable to all Corps of Engineers Offices of Counsel.

7-2. Policy.

a. Management and oversight of the Procurement Fraud and Irregularities Program are the responsibilities of the Chief Counsel for HQUSACE, and Division, District, Laboratory and FOA Counsel for their respective activities.

b. Procurement fraud is a crime which may affect all elements of the Command. Investigating and remedying procurement fraud require a multi-disciplinary team approach.

7-3. Scope of Section.

a. The Procurement Fraud Advisor (PFA) shall be an attorney appointed by the FOA Counsel. PFAs should have a working knowledge of procurement law, criminal law, civil law and administrative law.

b. The PFA shall be responsible for the operation of the PFI Program within his or her FOA. The PFA shall have decision-making responsibility for all procurement fraud cases at the FOA level.

c. PFI cases shall be handled expeditiously. The PFA shall telephonically advise the Division PFA and USACE PFI Coordinator of significant case developments at the earliest practicable opportunity.

7-4. Procurement Fraud Case Initiation.

a. The PFA shall assess all information available to determine if a crime may have been committed or if there are possible violations of law, regulations, policies or contractual obligations. Verbal information should be reduced to writing with as much specificity as possible. This assessment should be made as soon as possible to avoid any adverse effect upon a criminal investigation and the collection and safeguarding of evidence.

b. Suspected procurement fraud shall promptly be referred, through the Security and Law Enforcement Office, to the U.S. Army Criminal Investigation Command (CID) or the Defense Criminal Investigative Service (DCIS), as appropriate, for investigation. The PFA shall provide the preliminary assessment to the investigating agent.

c. The PFA shall assemble the Case Management Team (CMT), including the investigating agent, to discuss the need for and timing of necessary legal, contractual and administrative remedial actions. As appropriate, membership of the CMT shall include:

Audit	Information Management
Civilian Personnel	Labor Advisor
Contracting Officer	Operations
Construction	Resource Management
Counsel	Security and Law Enforcement
Engineering	

The CMT may also include personnel from other agencies, i.e., EPA personnel, if the procurement fraud also involves environmental crime.

d. The PFA shall initiate a Procurement Flash Report IAW AR 27-40, paragraph 8-5b. Copies shall be submitted simultaneously to the Division PFA, USACE PFI Coordinator and OTJAG (Procurement Fraud). The case shall be entered into CMIS-II (or its successor) at the time the Procurement Flash

Report is prepared and shall be updated to keep the information current.

e. Audit support for PFI cases should be requested from the Division Auditor.

f. Normally, the contracting activity shall pay for testing and other laboratory support for the investigation.

7-5. Procurement Fraud Case Management.

a. The PFA shall develop a Remedies Plan (AR 27-40, Figure 8-2) in each significant investigation involving fraud or corruption (See AR 27-40, paragraph 8-8).

b. As appropriate, the PFA shall develop a suspension/debarment report in accordance with DFARS 209.406-3(a).

c. As appropriate, the PFA shall prepare a litigation report (See AR 27-40, paragraph 3-9, for the contents of a civil litigation report). If both a suspension/debarment report and a civil litigation report are required, a single report, incorporating the requirements of both, will suffice.

d. The PFA shall inform the Division PFA and the USACE PFI Coordinator of contract related matters which may affect the ongoing fraud investigation or civil litigation, including:

- (1) Protests against contract award (GAO or Agency).
- (2) Actions before the Armed Services Board of Contract Appeals or the Engineer Board of Contract Appeals.
- (3) Pending contract claims.
- (4) Bankruptcy.

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(5) Terminations for default and unsatisfactory performance ratings.

e. The PFA shall review cases and update data in CMIS-II (or its successor) at least every 30 days.

f. Following referral of a case to the CID or DCIS, the PFA shall, to the extent requested by the investigating agent, provide legal advice and support, and assist in the presentation of the case to the Assistant U.S. Attorney.

g. Upon request, the PFA shall provide assistance to any organization pursuing criminal, civil, contractual or administrative remedies. Before any contractual or administrative action is taken on a matter where a DOJ attorney/AUSA is assigned, the PFA shall coordinate with the Division PFA, the USACE PFI Coordinator, DAJA-PF and the DOJ attorney/AUSA.

7-6. Training and Awareness.

a. The PFA shall be responsible for insuring that annual procurement fraud awareness training is conducted for all personnel involved in procurement activities.

b. Additional awareness measures may also be implemented, i.e., procurement fraud related articles in command newspapers/bulletins, fraud awareness posters, and distribution of DoD Inspector General fraud-related publications.

CHAPTER 8

RELEASE OF INFORMATION AND APPEARANCE OF WITNESSES

8-1. Scope of Section. This section sets forth procedures applicable to release of information and testimony of Corps of Engineers personnel in connection with litigation (also see Chapter 7, AR 27-40.) Requests for information in other situations will be handled under the Freedom of Information Act (FOIA) and the Privacy Act (5 U.S.C. 552a), as applicable. Questions concerning FOIA and Privacy Act issues should be addressed to CECC-T.

8-2. Requests from Private Parties. Requests for information will normally be processed following the procedures set out in the USACE FOIA Guidance Deskbook (hereinafter Deskbook), AR 25-55, and DoD Directive 5400.7R. If the material does not fall within a FOIA exemption, it should be released locally. If the records are classified, safeguarded, or are exempt from disclosure, the request should be forwarded, along with the documents exempt from release, to the appropriate Initial Denial Authority (IDA) with a recommendation that the request be denied in part or in full.

8-3. Restrictions on Release. It is Corps policy to comply with requests for access to or copies of records. Restrictions on the release of certain documents are prescribed by the Deskbook, AR 25-55, AR 340-21, and AR 27-40. The scope of these restrictions will be narrowly construed.

8-4. Requests from Other Federal Agencies. On occasion, another government agency may be furnished information or records not available to the public because they are exempt under FOIA. When another agency is given information which is considered to be exempt from public disclosure, that agency should be notified that the Corps considers the documents exempt, and that they should not be disclosed. The agency should be directed to forward all FOIA requests it receives for Corps records to the responsible office of counsel for review and a release determination.

8-5. Subpoenas and Court Orders. a. Orders or subpoenas issued by any Federal court for the production of documents will be promptly complied with in any suit involving the United States as a party. Compliance with orders in cases where the government is not a party will be handled under the guidelines set forth in AR 27-40, AR 25-55, and AR 340-21. If a subpoena requests classified information, the matter will be promptly referred to the Chief Counsel, ATTN: CECC-K, with a report which includes the following information: the case caption and brief summary of the parties and issues involved, the government's relationship, if any, to the parties making the request, a description of the document, information, or testimony sought, an opinion regarding the possible prejudice to the government's position if disclosure is allowed, and a recommendation about whether or not the information should be provided.

b. Pending instructions from the Chief Counsel, the official subpoenaed will appear in court and respectfully decline to produce records or give testimony as required by the subpoena, on the grounds that custody of all records is vested in the Secretary of the Army (10 U.S.C. 4831), and that disclosure of official information is prohibited by this regulation prior to express authorization from the Chief Counsel.

8-6. Justice Department Requests. All requests from attorneys with the Department of Justice or U.S. Attorneys Offices for information or assistance will be promptly honored, unless classified material is involved. Private counsel retained with the approval of the Chief Counsel, the Judge Advocate General, and the Attorney General to represent cost-plus-fixed-fee contractors in litigation will be given the same cooperation, as will private counsel representing the government under the Medical Care Recovery Act, 42 U.S.C. 2651.

8-7. Requests from Local Cooperating Agencies. In private litigation which involves obtaining or defending interests required for local flood protection works by local cooperating agencies, the United States has an interest in such litigation and will provide information, documents and personnel as needed to assist the local cooperating agency in these cases.

8-8. Testimony in Court. For instructions and restrictions relating to participation as a witness in court proceedings, see Chapter 7 of AR 27-40. District Counsels may authorize the appearance of Corps employees as fact witnesses or as expert witnesses on behalf of the United States in litigation where the government is a party in court proceedings within the same judicial district as the employee's office. Witness requests of an unusual nature, including private or local government requests for employees to testify as expert witnesses, should be discussed with CECC-K prior to authorizing an employee's appearance.

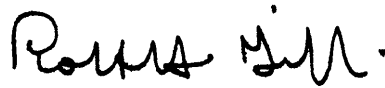
8-9. Authentication of Records for Court Use. Whenever copies of official documents are to be introduced as evidence in court, they may be authenticated under the Seal of the Department and the signature of the Secretary of the Army through the use of DA Form 4. (See page 8, AR 27-40). This makes the records admissible as originals, as provided for by 28 U.S.C. 1733. Unless exceptional circumstances are involved, it is contrary to the Chief Counsel's policy to furnish the originals of Corps records for court use. Appropriate copies of records may be submitted to the Army Correspondence and Records Center, Room 3D679, the Pentagon, for authentication, along with the certification of the actual custodian on DA Form 4. The Correspondence and Records Center will not reproduce copies of records. Since obtaining authentication is time-consuming, the requesting party should be asked to have the documents admitted in evidence by stipulation or by the use of certified true copies. Otherwise, unless a compelling interest of the United States is demonstrated, private party requests for authenticated records in litigation where the government is not a party will be denied.

8-10. Records for Use in Miller Act Cases, 40 U.S.C. 270a-e. The Miller Act provides that litigants or prospective litigants may apply to the Comptroller General for certified copies of the pertinent payment bond and prime contract. Whenever any person requests such documents, he or she will be provided with xerox copies of the documents, or advised of this provision and instructed to address a request for the records to the Comptroller General. Requests in connection with Miller Act cases for all information and documents other than those set forth above will be handled in accordance with paragraph 8-2 of this regulation.

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8-11. Cost of Reproducing Records. Whenever the request of a private person or firm for copies of official records is approved, the Division or District Commander involved will bill such person or firm for the cost of reproducing the records. The schedule of charges for search copying and certification of records is contained in AR 37-60. If the request for records has been made under the Freedom of Information Act then the search review and duplication costs as set out in AR 25-55 are applicable.

FOR THE COMMANDER:



ROBERT H. GRIFFIN
Colonel, Corps of Engineers
Chief of Staff

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