



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
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March 5, 1997

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE
(INDUSTRIAL AFFAIRS AND INSTALLATIONS)

SUBJECT: Alternative Authority for Acquisition and Improvement
of Military Housing; Applicability of the Federal
Acquisition Regulation

You have asked for our assistance in providing guidance to the military departments as they move to implement the recent Military Housing Privatization Initiative Authorities included in Title 10 United States Code, Sections 2871-2885. You are particularly interested in the applicability of the Federal Acquisition Regulations (FAR) to agreements executed under the aforementioned authorities.

The authorities provided in 10 U.S.C. §2871-2885 are varied. They were enacted to provide the Department of Defense with a panoply of alternatives that could be used either individually or in combination to achieve the goal of providing family housing units, or military unaccompanied housing units, on or near military installations. Thus, for example, authority is provided to make direct loans, or loan guarantees; to make investments in nongovernmental entities engaged in carrying out projects for the acquisition or construction of housing units suitable for use as military housing units; to lease housing units to be constructed under these authorities; to provide rental guarantees; to lease government property to private parties to assist in accomplishing the purposes of the statutes, etc.

The applicability of the FAR to the use of any of these authorities depends on the specific authority used and the manner in which it is implemented. The key question should not be whether the FAR applies but rather whether the instrument used is appropriate in effectuating our participation in the particular housing privatization initiative. For example, while the use of authority to provide direct loans or loan guarantees pursuant to 10 U.S.C. §2873 certainly requires an appropriate loan or other financial instrument, it would not necessarily need to be



prepared as a FAR contract. On the other hand, if the government were to directly lease housing units from a developer in order to provide those units to service members, a FAR contract might very well be required.

The acquisitions to which the FAR normally applies are defined as those which involve "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. . . ." (FAR part 2.101). One would expect therefore, that the FAR would be used if a military department were to obligate funds appropriated to it by the Congress to buy goods or services for that Department. Where the Department is involved in a transaction that does not require the obligation of appropriated funds, or where the transaction does not involve the purchase of goods or services for that Department, the FAR would normally not apply, although a military department might choose to apply the FAR (more correctly, clauses in the FAR) to a particular transaction if it felt reliance on those provisions, in the circumstances, was in its best interest.

In the cases of Fort Carson, and Lackland AFB, the Army and Air Force were faced with similar although not exactly the same fact patterns with respect to their respective housing initiatives. The Army chose to apply the FAR while the Air Force chose to treat the transaction as primarily a real estate transaction based on the outleasing of property, which transactions have not been subject to the FAR.

Our review of both projects indicated certain notable similarities. The developer will construct the housing and lease the units directly to the service members; members pay rent directly to the developer; the government is not bound to an agreed occupancy rate; developers realize their payment stream from rentals received from the service member, not the government; the government makes no payments for the rental units to the developer; title to the housing units remains with the developer. On the other hand, the units will be built on government land; the units will be built to broad government requirements; the government will select the developer; appropriated funds may be provided to the developer in the form of a loan or guarantee; and there will be some government inspection of the property.

Neither the Fort Carson nor Lackland initiatives present a classic FAR contract situation. In each case the military department is serving as a "facilitator," marrying a private developer with prospective military housing occupants. Neither the Army nor the Air Force is directly buying or leasing housing for its service members, nor are they paying a developer to provide such housing. Accordingly, I do not conclude that use of the FAR is required. But, it is also recognized that the government is involved. While the degree of direct involvement could, in certain circumstances, lead to a conclusion that the government has constructively entered into a construction contract, it does not appear that such is now the case either at Fort Carson or at Lackland AFB. It would appear, rather, that the facts permit each service to exercise discretion in choosing the legal instrument that best fits its needs.

The Army elected to rely on the FAR because the project entails the conveyance to the contractor of existing housing and the Army believes that having a contractual instrument as the central element in their project, when combined with the land lease and financing, if any, stemming from the contract, will allow it to modify the project during the years of performance more easily and to administer the overall operation of the project more effectively. The Army also believes a FAR contract allows it to have a greater degree of oversight into the contractor's construction processes and property management. In addition, the Army noted that given the length of the arrangement, future developments might cause it to become more directly involved and having a FAR contract in place could facilitate that involvement. The Army has, however, eliminated many FAR clauses that it deemed unnecessary for this agreement.

The Air Force elected the use of a land lease because they view their role in the construction and operation of the privately owned and operated housing to be no greater than that of a commercial lessor of land, whose interests are defined and protected in the commercial sector by a land lease and operating agreement. Because the Air Force views their interests as primarily those of a land lessor, they do not expect to exercise extensive control over the construction contractors. For example, the Air Force's oversight of construction quality is limited to design approval and assuring building code compliance. Note, however, that the Air Force will be following competitive

procedures in determining which developer will be selected, and as included provisions in the lease and operating agreement that it considers necessary to protect its interests.

In conclusion, it is appropriate to advise the military departments that if their approach involves the direct obligation of appropriated funds to directly acquire military housing or services, the FAR would apply. In other instances, each proposal should be examined to determine if the scope of the government's direct involvement is such that it would be construed as an acquisition of goods and services by the government. Where it is not clear that the FAR applies, the military department could rely on FAR provisions if it determined such provisions were appropriate to protect their interests. I would also note that experience gained from the Fort Carson and Lackland initiatives could serve to provide a framework for future initiatives.

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cc:
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