

MEMORANDUM FOR Chief, Natural Resources Management (ATTN: CECW-O/George Tabb)

SUBJECT: Law Enforcement Services at Corps Water Resources Development Projects Under 42 U.S.C. § 1962d-5d

1. Background. On April 18, 2005, CECC-G and CECC-C were contacted by CECC-NWD and CENWO-OC requesting a determination from the Office of the Chief Counsel as to the proper interpretation of 42 U.S.C. § 1962d-5d(a). That subsection provides as follows: “The Secretary of the Army, acting through the Chief of Engineers, is authorized to contract with States and their political subdivisions for the purpose of obtaining increased law enforcement services at water resources development projects under the jurisdiction of the Secretary of the Army to meet needs during peak visitation periods.” The question posed was whether that provision may be implemented through the use of cooperative agreements as well as procurement contracts, as provided for in Chapter 7 of ER 1130-2-550, or whether the terms of the statute only allow for procurement contracts with States and their political subdivisions.

2. Discussion.

a. Though the Corps of Engineers retains the authority to regulate conduct on its lakes and other recreational facilities, police power over the facilities is traditionally exercised by State and local authorities, whose laws and ordinances remain in effect. E.g., H.R. Rep. No. 94-1702, at 101 (1976). These agencies have enforced their authorities in these areas on a routine basis, but have not been able to respond effectively to offenses committed during peak use of these areas. To alleviate the problem of crime surges at these facilities, Congress authorized the Corps of Engineers “to *contract* with States and their political subdivisions for...increased law enforcement services...during peak visitation periods.” 42 U.S.C. § 1962d-5d (2005) (emphasis added).

b. Chapter 7 of ER 1130-2-550 implements section 1962d-5d. The regulation authorizes district commanders to use contracts or cooperative agreements to obtain the required police presence during peak visitation periods. ER 1130-2-550, Project Operations – Recreation Operations and Maintenance Policies 7-2a (15 November 1996). The regulation also contemplates using cooperative agreements to obtain activities related to law enforcement, id. at 7-2b, and directs that the agreements be executed in accordance with the Federal Grant and Cooperative Agreement Act of 1977, id. at 7-2c.

c. Federal agencies have discretion in selecting the type of instrument to be used when engaging in transactions with non-Federal entities. Responding to a lack of guidance and consistency in Federal agencies’ practices regarding the use of contracts, grants, and cooperative agreements, Congress enacted the Federal Grant and Cooperative Agreement Act, Pub. L. No. 95-224, 92 Stat. 3 (1978) [hereinafter FGCAA]. The FGCAA outlined criteria for agencies to

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use in determining whether to employ contracts or assistance agreements (grants and cooperative agreements) when undertaking authorized transactions with non-Federal entities. Through the FGCAA, Congress sought to characterize the various Federal/non-Federal relationships, to eliminate misunderstanding, to establish Government-wide criteria, “to promote increased discipline in the selection and use of” the different instruments, and, where appropriate, to encourage competition. *Id.* § 2(b). In sections 4, 5, and 6 of the FGCAA, Congress defined when an agency should use a contract, grant, or cooperative agreement, respectively. Although Congress repealed the FGCAA while recodifying Title 31 of the United States Code, it preserved sections 4 through 6 of the FGCAA virtually identically in sections 6303 through 6305 of Title 31, United States Code.¹

d. The FGCAA provides that, in determining the appropriate instrument, the agency must look to the principal purpose of the relationship. In a nutshell, the FGCAA requires Federal agencies to use contracts to acquire goods or services for the benefit or use of the government, 31 U.S.C. § 6303 (2005), and assistance agreements to transfer money or value to an authorized recipient to accomplish a Federal purpose of stimulation or support, *id.* §§ 6304-6305. Within the category of assistance agreements, the determination of whether to use a grant or cooperative agreement depends upon the degree of Federal involvement with the recipient in carrying out the objective contemplated in the agreement—cooperative agreements contemplate substantial Federal involvement, while grants do not. *Id.*; see also *Matter of Xcavators, Inc.*, 59 Comp. Gen. 758 (1980).

e. Although the FGCAA establishes the criteria that agencies must follow in deciding the appropriate funding instrument, it does not create independent authority for the agency to enter into the various relationships. The authority to enter into either contracts or assistance agreements—if it exists at all—must come from other sources. Moreover, while it is well-settled that Federal agencies have inherent authority to enter into contracts, the Comptroller General has refused to acknowledge any comparable inherent power to enter into assistance agreements. General Counsel, U.S. Government Accountability Office, Principles of Federal Appropriations Law 10-11 (2d ed. 1992). Thus, section 1962d-5d must first be examined to determine whether cooperative agreements are authorized.

f. A careful reading of the text of the statute and its legislative history reveals no clear evidence that Congress intended USACE to enter into assistance relationships to implement section 1962d-5d. To the contrary, both the plain meaning of the statute and the legislative history are quite clear that a procurement, rather than assistance, relationship is authorized by

¹ The codification at 31 U.S.C. §§ 6301-6308 is still popularly referred to as the FGCAA, and will be referred to as such herein.

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this provision. The face of the statute itself authorizes USACE to “contract with” state and local governments. The legislative history of section 1962d-5d reveals that the primary purpose of the statute was to enable the Corps “to obtain...services necessary to protect visitors” to Corps projects. H.R. Rep. No. 94-1702, at 101 (1976) (emphasis added). As indicated above, the FGCAA provides that, if the primary purpose of the relationship is to obtain services, then a contract, and not an assistance agreement, is appropriate.

g. Further, there is no evidence suggesting that Congress intended anything other than the plain meaning of the term “contract.” Though the legislative history does mention that “State and local law enforcement agencies have generally cooperated in enforcing their authorities” on Corps recreation areas, *id.*, I interpret this to refer to intra-governmental relationships where no funds changed hands. In other words, the use of the term “cooperate” in the statute’s legislative history is the common usage of the term,² suggesting that local law enforcement and USACE will work together to maintain law and order on Corps lands, with USACE responsible for enforcement of Federal regulations and local law enforcement responsible for enforcing local ordinances. It is not intended to connote the legal relationship created by a cooperative agreement. I suspect that confusion over this point led certain USACE field offices to evolve from entering into agreements allowing cooperation between local law enforcement agencies where no funds changed hands to entering into agreements where USACE paid the local law enforcement agencies, without recognizing the constraints of section 1962d-5.

h. In my view, the Federal Acquisition Regulation (FAR) and the Defense, Army, and Engineer supplements thereto, should govern the contracts executed under section 1962d-5d. Compliance with the FAR is simplified due to the nature of the services and the language of the statute. Since the law only authorizes contracts for law enforcement services with “States and their political subdivisions,” the procurement will be exempt from the full and open competition requirements of the Competition in Contracting Act (CICA) and FAR.

i. Accordingly, I find that USACE has no authority to enter into an assistance relationship to obtain law enforcement services during peak visitation periods. Even though this office approved the use of cooperative agreements in the past, our understanding of the law as it has developed over the intervening years now mandates that we change our opinion.³

² “To work or act together toward a common end or purpose.” Webster’s II New Riverside University Dictionary.

³ See generally Memorandum from Lester Edelman, Chief Counsel, to CERD-ZA (Oct. 13, 1987), subject: Grant Authority Delegation in Support of Basic Research (discussing the effects of the 1982 repeal of the FGCAA in conjunction with the recodification of Title 31, United States Code).

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j. Though the only instrument appropriate when procuring law enforcement services under section 1962d-5d is a contract, not every relationship between the Corps and law enforcement is a procurement. It may be possible to enter into non-binding understandings with local law enforcement to cooperate consistent with the term's common usage. These relationships may be memorialized in a Memorandum of Agreement (MOA), Memorandum of Understanding (MOU), Partnership Agreement, or similar instrument. To avoid confusion, the term "Cooperative Agreement" should not be used to describe these arrangements. As noted above, it is not possible to enter into an assistance relationship, such as a cooperative agreement, without express statutory authority, and it is my view that section 1962d-5d does not provide such authority.

3. Conclusion. The agreements entered into by the Corps under 42 U.S.C. § 1962d-5d should be contracts rather than cooperative agreements. For relationships not governed by section 1962-5d, an instrument other than a contract should be used, though the term "Cooperative Agreement" should not be used to describe the instrument. Chapter 7 of ER 1130-2-550 should be revised consistent with this opinion. This office will be glad to provide any assistance necessary in that effort.


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