DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC 20330

Office Of The General Counsel

26 November 2002

MEMORANDUM FOR ALL MAJCOM STAFF JUDGE ADVOCATES

FROM: SAF/GC

SUBJECT: Legal Support of Privatization Activities

Summary. The Judge Advocate General has previously provided guidance regarding legal support for Air Force housing privatization projects (*see* TJAG Special Subject Letter 2001-09, dated 7 December 2001). This memorandum supersedes TJAG Special Subject Letter 2001-09 and provides new guidance regarding the provision of legal support related to privatization initiatives within the Air Force.

Background. The Air Force continues to reexamine many aspects of its installation-related responsibilities and has already embarked on several important initiatives. The requirements for legal support for those initiatives, such as the privatization of housing and utilities, are significant and challenging. While the Air Force General Counsel has primary responsibility for providing legal policy advice and assistance regarding real estate and privatization transactions, the provision of legal support to the Air Force requires a team effort by all Air Force lawyers and requires us to work together to develop the procedures necessary to implement this guidance. The delineation of responsibilities in this memorandum is provided for general guidance and clarity, recognizing it will not cover every situation. Questions regarding such responsibilities in specific cases should be addressed to the Deputy General Counsel (Installations and Environment) (SAF/GCN) or the Deputy General Counsel (Acquisition) (SAF/GCQ), as appropriate.

Privatization Activities. The Air Force Deputy Assistant Secretary (Installations) (SAF/IEI) is responsible for all installation-related activities. SAF/IEI has delegated to the MAJCOMs authority to solicit, evaluate and negotiate final agreements, to select an offeror for final award, and to carry out and administer certain housing projects. The MAJCOM commander or vice commander is the Source Selection Authority (SSA) for these activities. Pursuant to SAFO 715.4, the final authority to enter into such projects is retained by SAF/IEI.

Roles of SAF/GC and AF/JA in Privatization Activities. SAF/GCN is the Air Force office of primary responsibility for overseeing legal services associated with real estate and privatization transactions. That office is responsible for developing Air Force policy, Air Force legal positions, legislative proposals, process guides, training requirements and model instruments to support real estate transactions. SAF/GCN also will act as the Air Force clearinghouse for privatization and installation-related legal instruments and ensure the dissemination of such materials to Air Force attorneys practicing in this area. The General

Counsel's office will provide direct support for real estate and privatization transactions through its in-house staff and by counsel assigned to support the Air Force Real Property Agency (AFRPA) (formerly the Air Force Base Conversion Agency and Air Force Real Estate Agency) and the Air Force Center for Environmental Excellence (AFCEE). All attorneys, regardless of affiliation, supporting the privatization effort will receive legal policy guidance through SAF/GCN. The General Counsel's office will also provide dedicated attorney support for significant transactions, including the closure of real estate transactions, loan and loan funding transactions, and the legal services associated with the long-term management or administration of those transactions, and may delegate all or part of such responsibility to MAJCOM or field level attorneys. The decision as to whether a transaction is significant and whether support responsibility will be delegated rests with the General Counsel.

SAF/GCQ is the Air Force office of primary responsibility for providing source selection legal policy and guidance. This office is responsible for working with SAF/AQC to establish Air Force privatization source selection policy and procedures, and for providing source selection advice to the Executive Steering Group during the approval process for the award of each privatization project.

Air Force attorneys in the field are responsible for providing direct legal support for day-to-day installations-related issues at the MAJCOM and field levels. Such support is provided by MAJCOM and field legal offices, as appropriate, as assisted by other attorneys within the MAJCOM, the Air Force Legal Services Agency, and Reserve judge advocates possessing the appropriate expertise. MAJCOM and field level legal offices are primarily responsible for advising Source Selection Authorities (SSAs) on privatization initiatives unless SAF/GCQ directs otherwise. When a MAJCOM or field level legal office provides such support, it should coordinate closely with SAF/GCQ. Appropriate coordination also will be made with SAF/GCN, which has primary responsibility for the legal services associated with real estate and privatization transactions, including settlement of real estate transactions, loan and loan funding transactions, and the legal services associated with the long-term management or administration of those transactions.

The above guidance is not intended to address all issues at every level. SAF/GCN will be convening a working group of headquarters and field attorneys to prepare more detailed instructions as needed.

Outside Counsel. Effective immediately, all outside counsel engaged to represent the interests of the Air Force will be hired by and through the General Counsel. Such requests should arise only under exceptional circumstances and must be forwarded through the chain of command to the General Counsel. If the request to engage outside counsel is approved, a member of the General Counsel's office will serve as the contracting officer's technical representative and will supervise and be responsible for evaluating the quality of the work product and determining whether there is a continuing need for such services. As a general rule, approval of outside counsel will only be given for work that is not inherently governmental and for which special outside expertise is necessary and costs are deemed reasonable. To the extent there are currently any arrangements with private counsel in which the Air Force has obtained the assistance of outside counsel (for example, through a Privatization Support Contractor as

discussed further below) and which arrangements have not been previously approved by the General Counsel, those arrangements must be reported to the General Counsel and a copy of the documents memorializing such arrangement provided within 30 days of the date of this memorandum. The outside counsel must be notified in writing that the General Counsel's office will be overseeing such work and a copy of this provided to SAF/GCN.

In addition to the direct hiring of outside counsel, there are circumstances in which the Air Force indirectly hires counsel that shall be subject to the approval of the General Counsel. AFCEE, which has been designated as the Air Force Privatization Center of Excellence, supports privatization initiatives through the use of Privatization Support Contractors (PSCs). These PSCs have been tasked, among other things, with the obligation to ensure the successful completion of the real estate transaction with the selected offeror. Under current practice, PSCs request Air Force approval to hire outside counsel to assist them with this effort. In these circumstances, the use of outside counsel by PSCs requires the delivery of legal services for the direct benefit of the Air Force, with the costs of such services being passed directly to the Air Force. This practice differs from the ordinary practice under which Government contractors hire and use counsel in the performance of their contracts with the Air Force. Retention of counsel by contractors for the latter purpose does not require the delivery of legal services for the direct benefit of the Air Force and ordinarily is paid by the contractor as an overhead expense of the contract.

Although the PSC's counsel has no attorney-client relationship with the Air Force, such an arrangement may inappropriately supplant the duties and responsibilities of Air Force attorneys. Consequently, such arrangements must be thoroughly scrutinized in the same manner as if we were to hire them directly before they may be considered as a source of legal support for privatization projects.

Conclusion. The Air Force has made considerable progress in implementing housing and utility privatization and has developed significant legal expertise, both at Headquarters and in the field, and we must work together to ensure the success of our clients in this area. These efforts bear directly on the quality of life for thousands of our members and their families at Air Force installations, and merit the highest quality legal services at all levels.

//s// Mary L. Walker

MARY L. WALKER
The General Counsel

cc: AF/JA
SAF/GCN