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## **PRIVATIZATION OF MILITARY FAMILY HOUSING**

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## PRIVATIZATION OF MILITARY FAMILY HOUSING

### I. Introduction

In April 1997, I was sitting at my desk at Barksdale Air Force Base, Louisiana, daydreaming about my upcoming assignment at the Army Judge Advocate General's School (TJAGSA). At the time, I was the contracting attorney at the 2nd Bomb Wing Legal Office, but was scheduled to PCS to TJAGSA in July, hopefully to receive an LL.M. in Military Law, with a specialty in Government Procurement. As the clock crept toward my tee time, my peaceful daydream was shattered by the incessant ringing of my phone.

After considering the consequences of ignoring it, I reluctantly decided to answer the phone. My caller was the base Chief of Manpower, who requested an appointment with me at the earliest possible opportunity. Looking over my blank calendar, I debated suggesting a time late the following week, however, I decided to suggest a time late the next afternoon. At the end of our conversation, I thought to ask the nature of the appointment, and was told it had to do with outsourcing and privatization. Not wishing to reveal my ignorance, I simply said, "Ok, see you tomorrow."

The next afternoon, the Captain and her assistant, a Staff Sergeant, entered my office. Much to my chagrin, the Captain, instead of explaining outsourcing and privatization to me, wanted me to explain to her with how these programs would work and how they would impact Barksdale Air Force Base. At that time, I had never heard of outsourcing or privatization,

therefore, I was of little use to the Captain during our meeting. I was forced to learn a few things about these subjects before I left for TJAGSA, however.

After muddling my way through the next few months until my PCS, I thought I had seen the last of outsourcing and privatization. Little did I know that privatization of military family housing would be the subject of my research paper while at TJAGSA. This paper is designed both to familiarize base legal office attorneys with privatization, and to point out what I believe are some potential problems with privatization of military family housing as it is currently being implemented.

This paper examine how the Department of the Army and the Department of the Navy are currently implementing the Congressional authority for military family housing privatization. Enforcement mechanisms of the various projects in the event of default or failure to perform by the contractor will also be examined. The paper will discuss some potential issue areas that I believe should be considered before an installation undertakes a military family housing privatization project. Finally, I will conclude with some recommendations that hopefully will help with the privatization process.

It should be noted at the outset that this is not the first attempt by the DoD to privatize military housing. The Capehart and Wherry Housing programs<sup>1</sup>, attempted in the 1950's and 1960's, were similar to the housing initiative now under way. These efforts failed, and

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<sup>1</sup> 12 U.S.C.A. Section 1748 *et seq.* (West 1997)

eventually the government condemned and demolished such housing.<sup>2</sup> Any installation considering a privatization project would be well served to study the lessons learned from these past failed attempts.

## II. The Current Approaches to the Privatization of Military Family Housing<sup>3</sup>

### A. The Army Approach

The U.S. Army Corps of Engineers, Omaha District, solicited proposals for a contract to privatize the military family housing program at Fort Carson, Colorado.<sup>4</sup> The solicitation envisioned a business relationship outside the traditional military construction process between the Army and a private entity to meet the housing needs of Fort Carson soldiers.<sup>5</sup>

The solicitation cited the Military Housing Privatization Initiative (MHPI), which was enacted into legislation as part of the Defense Appropriations Act for 1996 (Title XXVIII,

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<sup>2</sup> "Capital Venture Initiative – Fort Carson: The Army's First Steps at the Privatization of Military Housing," Major Kaye Summerkamp

<sup>3</sup> This paper will examine and compare the approaches taken by the Department of the Army and the Department of the Navy. The author looked into the approach being used by the Air Force, but decided not to include it in this paper. Basically, the approach taken by the Air Force is very similar to the Army approach. See the internet site at [www.robins.contracting.af.mil](http://www.robins.contracting.af.mil) for a draft RFP of the Air Force privatization project at Robins AFB, GA.

<sup>4</sup> Memorandum for All Prospective Offerors, undated, Subject: Project Summary, Privatization of Military Family Housing, Fort Carson, Colorado, DACA45-96-R-0033

<sup>5</sup> *Id.* at 1.

Public Law 104-106, 10 U.S.C. 2371 et seq.) as the authority for this contract.<sup>6</sup> The Army believed the cited legislation provided flexibility in the privatization contracting process for DoD agencies, and allowed for various combinations of enhancements to promote construction of new military housing with private sector financed business partners.<sup>7</sup>

From the outset of the project to privatize Fort Carson housing, one of the central questions facing the Army was whether the Federal Acquisition Regulation<sup>8</sup> (FAR) applied to this contract. The FAR is a comprehensive set of rules and regulations that control the manner and method of government procurements. Each step of the acquisition process is controlled by detailed FAR provisions. The Office of the General Counsel, Department of the Army, initially stated that, “[the new housing initiative authority] is subject to application of both the Armed Forces Procurement Act and the Federal Acquisition Regulation.”<sup>9</sup> However, the Office of General Counsel, Department of Defense, concluded that, “the applicability of the FAR to the use of any of these [Military Housing Privatization Initiative Authorities] depends on the specific authority used and the manner in which it is implemented.”<sup>10</sup> Eventually, the Army decided the contract would be subject to the terms and conditions of the FAR.<sup>11</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 48 C.F.R. Sections 1.01, *et seq.*

<sup>9</sup> Memorandum, Tracey L. Van Meter, Assistant to the General Counsel, Office of the General Counsel, Department of the Army, subject: applicability of the Armed Services Procurement Act to new military housing legislation (14 May 1996) (copy on file with the author and the Contract Law Department, U.S. Army Judge Advocate General's School, Charlottesville, Virginia)

<sup>10</sup> Memorandum, Harvey J. Nathan, Deputy General Counsel (Acquisition and Logistics), Office of General Counsel, Department of Defense, subject: Alternate Authority for Acquisition and Improvement of Military Housing; Applicability of the Federal Acquisition Regulation (5 March 1997) (copy on file with the author and the Contract Law Department, U.S. Army Judge Advocate General's School, Charlottesville, Virginia)

<sup>11</sup> Standard Form 33, Solicitation, Offer and Award, dated 30 December 1996, Attachment 1, page 1-2 (copy on file with the author and the Contract Law Department, U.S. Army Judge Advocate General's School, Charlottesville, Virginia)

The Army settled upon a land lease contract with the purpose of the contract to be to provide, maintain, manage and own 840 new family housing units, and to revitalize, maintain, manage, and own the existing 1824 family housing units on Fort Carson.<sup>12</sup> This would result in an increase of military family housing on Fort Carson by over 40%. The RFP offered several enhancements not usually found in military family housing construction contracts. These included: (1) Government loan guarantee equal to the lessor of 80 percent of the value of the project; or the amounts of the outstanding principal of the loan, with this guarantee to be applicable in the event of base closure, downsizing, or major deployment; (2) require members of the Armed Forces to make lease payments pursuant to allotments of the pay of such members; (3) require newly assigned military personnel to process through the contractor prior to obtaining other housing; and (4) limited relief from the impact of high interest rates within the first five years of the contract.<sup>13</sup>

The lease was to be for a term of fifty years, beginning on the date of Contract award, with a government option for an extension of an additional term not to exceed 25 years.<sup>14</sup> The contract also called for the transfer of the real property consisting of the existing 1,824 housing units on Fort Carson at no cost to the contractor after award of the contract and after acceptable financing is obtained by the contractor. The contractor would then be responsible for

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<sup>12</sup> *Id.* at 1-1, 1-2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

construction of 840 new housing units within four years from the date of award of the contract.<sup>15</sup> This would bring the total number of housing units available to Fort Carson soldiers to 2,664.

The contractor is also required to use its good faith best efforts to keep each housing unit leased at all times other than when the structure is inhabitable due to construction or renovations work, including efforts to lease any available housing units to nonmilitary or non-DoD persons when circumstances allow such rental to civilians.<sup>16</sup> Basically, the contractor is required to attempt to rent to nonmilitary, non-DoD civilians when a unit or units have been vacant for a period of thirty (30) days and the government has failed to provide a sufficient referral. This could obviously lead to non-DoD affiliated civilians living on Fort Carson. Potential issues with this arrangement will be discussed in a later section of this paper, as will the provisions for default of the contract.

On 24 October 1997, the Army notified all offerors that they had eliminated all offerors other than Keller/Catellus Fort Carson, L.L.C. (K/C) from the competitive procurement.<sup>17</sup> Not surprisingly, this notification elicited a protest from one of the disgruntled offerors. The plaintiff, Hunt Building Corporation (Hunt), alleged that in July and October 1997, the Army had provided K/C with drafts of the Government's loan guaranty documents for the subject procurement and with sample Contract Management Procedures (CMP).<sup>18</sup> These CMP's allegedly provided much more detail about the contract process than disclosed in the RFP, and

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<sup>15</sup> *Id.* at 1-3.

<sup>16</sup> *Id.* at 1-5.

<sup>17</sup> Hunt Building Corporation v. United States of America (not published yet)

<sup>18</sup> *Id.* at 2.

the Hunt alleged that K/C was allowed to negotiate the terms and conditions of the Government's loan Guaranty for the procurement with Army in order to accommodate the type of financing proposed by K/C.<sup>19</sup> Finally, Hunt alleged that K/C was allowed to submit revised CMP's for the procurement, a right none of the other offerors was afforded.<sup>20</sup>

Hunt alleged that due to its extensive dialogue with the Army, K/C essentially rewrote the Government loan guaranty documents and made over one hundred changes.<sup>21</sup> Hunt alleged this violated the Army's internal planning documents which called for "discussions/clarifications" with offerors to begin on 23 May 1997 with the Army to receive best and final offers on 3 June 1997.<sup>22</sup> In addition to the planning documents requiring "full and open competition" through the use of "competitive proposals", the Army was to utilize "source selection procedures set forth in Federal Acquisition Regulation Part 15", and the internal planning documents also required the Army to establish a broad competitive range in this procurement."<sup>23</sup>

Hunt alleged that the Army's failure to engage in discussions with it and the other offerors was unlawful for at least four reasons. First, the National Defense Authorization Act for Fiscal Year 1991, Pub.L.No. 101-510, Section 802, 104 Stat. 1485, 1588 (codified as amended at 10 U.S.C. Section 2305), Congress severely limited the circumstances when an agency could make an award without first conducting discussions with offerors. Hunt alleged that the Army

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

did not follow the proper procedures to bypass these discussions.<sup>24</sup> Second, section 15.610(b) of the Army's internal selection plan provided for discussions with offerors, therefore, the Army allegedly violated its own plan. Third, Hunt alleged that the dialogues that took place between the Army and K/C constituted "discussions" under the FAR, thus the Army should have held discussions with it and the other offerors. Finally, Hunt alleged that K/C was improperly allowed to rewrite numerous terms and conditions for the procurement during its discussions, which would require amendments to the RFP under 48 C.F.R. Section 15.606(a).<sup>25</sup>

The court believed the crux of Hunt's argument was that the Army had failed to comply with the Armed Services Procurement Act, 10 U.S.C. Section 2300 et seq. and the FAR in connection with specified activities in this procurement.<sup>26</sup> The court held that neither the ASPA nor the FAR applied to this procurement, however.<sup>27</sup> Although the Army chose to apply FAR provisions to this transaction, it does not apply because this transaction did not involve the purchase of goods or services for the department of the Army.<sup>28</sup> In addition, the court found that Hunt could not challenge the propriety of the procedure used in the RFPs, because it did not make a timely protest, therefore, the challenge was barred by estoppel or waiver. Finally, the court held that Hunt lacked standing to challenge the procurement, in that it failed to establish that it had a substantial chance of receiving the award.

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<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Interestingly, the court seemed to conclude that the FAR did not apply to this contract, even though the Army had decided to apply the FAR to this procurement. In effect, this decision should allow the military departments to apply those portions of the FAR they deem desirable to their privatization efforts, and eliminate those provisions they do not feel are necessary or helpful. In any event, the Army has met and passed its first judicial scrutiny in the life of this long procurement. It is likely to not be the last, however, and time will only tell if the Army is able to prevail as easily in future challenges.

#### B. The Navy Approach

The Department of the Navy (Navy) took a different approach to its privatization of military family housing. The Navy chose to meet its privatization of military family housing needs through a limited partnership with a private company.

The Navy, citing Section 2803 of the Defense Authorization Act for Fiscal Year 1995, P.L. 103-337, 108 Stat. 3051, as amended by section 2802 of the National Defense Authorization Act for fiscal Year 1997, P.L. 104-106, 110 Stat. 551, as codified at 10 U.S.C. Section 2837, issued a Request for Proposals (N62467-95-R-0985) and amendments for Development of Private Sector Housing, Corpus Christi, Texas.<sup>29</sup> Landmark Residential, LLC (Landmark) was the successful offeror for the contract, and the Limited Partnership Agreement

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<sup>29</sup> Limited Partnership Agreement of Kingsville Townhomes, L.P., dated 16 July 1996, at page 1 (copy on file with the author)

of Kingsville Townhomes, L.P. was signed on 16 July 1996 with Landmark, as General Partner, and United States Navy, as Limited Partner.

The terms of the limited partnership agreement call for it to continue until termination or close-out of the partnership in accordance with the terms of the document. Unless the partnership is terminated for default, which will be discussed in another section of this paper, the partnership is scheduled to terminate on the fifteenth anniversary of the issuance of Certificate of Occupancy of the last housing unit.<sup>30</sup> However the contractor has the option at the eight year anniversary of the issuance of the Certificate of Occupancy of the last housing unit to terminate the partnership on the tenth anniversary of the Certificate of Occupancy of the last housing unit without penalty.<sup>31</sup> Therefore, absent default by one of the parties to this limited partnership, the LPA will last a minimum of ten years. Although this is a significant length of time, it is only a fraction of the length of the Army contract.

Essentially, the LPA calls for Landmark to design, construct, and manage a 102 unit residential complex.<sup>32</sup> The profits from this venture are to be distributed to the partners pursuant to the terms of the LPA.<sup>33</sup> Generally, the Navy holds a 32.6% interest in the project and Landmark holds a 67.4% interest.<sup>34</sup> Similar to the Army's agreement, the LPA also requires the

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<sup>30</sup> *Id.* at 14.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at Ex A.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at Ex B.

contractor to attempt to rent unoccupied premises to non-DoD civilians if the unit remains vacant for a particular length of time.<sup>35</sup>

Obviously, the Navy and the Army have gotten to the same point with two very different methods. While the Army has conveyed existing structures to the contractor, the Navy has simply required the contractor to construct new housing for its members. In my opinion, this entails less risk for the Navy, since the general partner is required to first construct the housing before they take any actions to manage the property. In contrast, under the Army method, the contractor takes over and manages existing property, with a resultant change of ownership, then later is also required to build new housing. Of the two methods, I prefer the Navy method, since they are requiring the contractor to build the housing up front.

### III. Enforcement Mechanisms

The methods of contracting used by the Navy and the Army to achieve privatization of military family housing were vastly different, as discussed above. Their enforcement provisions in the event of default by the contractors are also very different.

#### A. The Army Approach to Default

Under the terms of the contract,

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<sup>35</sup> *Id.* at 14.

The Government may terminate the Contract in the event the Contractor violates any of the terms and conditions herein contained or the terms and conditions of any required operations, management or maintenance agreements, and continues and persists therein for thirty (30) days after notice thereof in writing by the Government. If the Contract is terminated for default, the Contractor shall vacate the premises and all structures and facilities shall be abandoned in place and may, at the Government's option, become the property of the United States Government without compensation therefrom. In lieu of termination for violations of the terms and conditions of the Contract, the Government may, at its option, exercise any other remedy available to the Government at common law or equity, such as withdrawals from the Security Deposit escrow.<sup>36</sup>

The contract also provides that should the lease be revoked for cause or default of Lessee, the Lessee, in addition to vacating the premises, must remove any structure the Government deems uneconomically repairable, at no cost to the Government.<sup>37</sup> In effect, the lessee runs the risk of forfeiture of its property if it is in default of any contract provision for over thirty (30) days after notice from the Government. This is obviously a harsh result, and I question whether such a forfeiture of property would be enforced by a court. I believe such a forfeiture would be especially hard to enforce in the later stages of this contract. As mentioned above, this contract is for an initial term of fifty (50) years, with a government option for another

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<sup>36</sup> Standard Form 33, *supra* note 11, at 1-18.

<sup>37</sup> *Id.* at 1-4.

twenty-five (25) years. The longer this contract has been in effect with the contractor performing satisfactorily, the less likely I believe a court would be to enforce the drastic remedy of forfeiture of the property.

## B. The Navy Approach to Default

The LPA states

The following events shall be deemed to be "Events of Default"

(i) Failure of a Partner to meet the Project "Milestones" set forth in Exhibit

D.

(ii) Failure of a Partner to make any contribution or advance required to be made under the terms of this agreement, and the continuance of such failure for a period of thirty (30) days.

(iii) Violation of any of the other provisions of this Agreement, and the failure to remedy or cure such violation within thirty (30) days.

(iv) A Partner, or the parent or holding company of a partner, making an assignment for benefit of creditors or filing a petition under any section or

chapter of the U.S. Bankruptcy Act, as amended, or under any similar law or statute of the United States or any state.

Unlike the Army agreement, which allows for forfeiture of the contractor's property in the event of default, the Navy LPA allows the non-defaulting partner to sell, upon ten (10) days written notice to the Defaulting Partner, the Defaulting Partner's interest in the Partnership.<sup>38</sup> The proceeds of such a sale would then be used to pay off long-term debt and to satisfy other obligations, including interest, of the Defaulting Partner to the Partnership and to reimburse expenses reasonably incurred by the Non-Defaulting Partner in making such sale.<sup>39</sup> The remaining funds would then be distributed according to a formula in the LPA, however, the General Partner would be entitled to a portion of the proceeds, provided sufficient funds are available after the debt and sale expenses are taken out.<sup>40</sup> The LPA also states that any disputes under the LPA will be subject to the Contract Disputes Act of 1978, as amended, 41 U.S.C. 601-603.<sup>41</sup>

#### IV. Potential Issue Areas with Privatization of Military Family Housing

The following sections raise several issues that I believe should be considered before a military family housing privatization project is started. Although this section raises numerous issues, it does not provide answers to all of them. This section is designed to point out potential problem

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<sup>38</sup> Limited Partnership Agreement of Kingsville Townhomes, *supra* note 29, at 5.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 11.

areas, with each project deciding on an appropriate course of action to survive or avoid these problems, depending on the unique facts and circumstances of the project being contemplated.

A. Should the FAR apply or be applied to Privatization Projects?

The FAR applies to acquisitions, which are defined as

The acquiring by contract with appropriated funds of supplies and services (including construction) by and for the use of the Federal Government through purchase or lease.<sup>42</sup>

I believe that the conclusion reached by the court in Hunt is correct. The privatization of military housing utilizing either of the approaches currently being employed by the Army and the Navy does not fit into classic procurement situations. Basically, the services are providing some capital and/or property to the contractor and guaranteeing a “captive” audience of potential renters, in exchange for the contractor constructing new properties, renovating existing structures, and/or managing the rental of the properties. These appear to be closer to joint ventures, rather than typical procurement situations, and I believe the FASA and FAR are not required to be applied to these projects. However, I do believe it would be possible to structure a privatization project in such a way that both the FASA and FAR would apply, so each project will have to be evaluated to determine whether they fall within the purview of these statutes and regulations.

B. Are the amounts in the escrow accounts subject to the Miscellaneous Receipts Act<sup>43</sup>

The Army procurement requires the contractor to establish an escrow account until the satisfactory completion of the repair and renovation of the existing units, the satisfactory construction of the 840 new housing units, and the completion of all other improvements required by the contract.<sup>44</sup> This will be a dual signature account (with the Contractor and the Government as signatories), kept separate from all other accounts maintained by the Contractor, into which must be deposited all operating income of the project excess normal wear and customary operating expenses of the project as approved by the Contracting Officer or designated representative.<sup>45</sup>

The Miscellaneous Receipts Act provides that

(b) Except as provided in section 3718(b) [of the United States Code], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

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<sup>42</sup> 48 C.F.R. Sections 1.103, 2.101

<sup>43</sup> 31 U.S.C.A. Section 3302 (West 1997)

<sup>44</sup> Standard Form 33, *supra* note at 1-15.

<sup>45</sup> *Id.*

This statute, commonly referred to as the Miscellaneous Receipts Act, could require the deposit of the escrow fund into the Treasury. However, I would argue that this would not be required, since the money is not actually being received by the Government. The money is being deposited into a dual-signature account, which the Government does not have the right to use or withdraw without the joint signature of the contractor. Therefore, in my opinion, the Miscellaneous Receipts Act would not require the money deposited into this account to be deposited into the Treasury of the United States.

#### C. Are Children living in these units permitted to attend DoD schools

The Army project calls for the transfer of units as real property to the contractor, with a lease of the land on which they are sitting to the contractor.<sup>46</sup> This raises the interesting issue of whether the children occupying these units are eligible to attend DoD schools. Generally, DoD schools are attended by children living on DoD installations, however, does the situation change if the housing unit is owned by a private company?<sup>47</sup> Another potential problem involves the impact privatization will have on federal financial assistance to local school districts that have children from DoD installations attending them.<sup>48</sup>

#### D. Non-DoD civilians living on military installations

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<sup>46</sup> Standard Form 33, *supra* note 11, at 1-2.

<sup>47</sup> In addition, the Air Force method being used to privatize military family housing differs from the Army approach in that it calls for a transfer of both the land and the housing units to the contractor. Therefore, the land and housing units are situated on a military installation, but owned by a private company.

<sup>48</sup> For a scholarly review of this potential problem, see "Avoiding the Specter of Patriot Village: The Military Housing Privatization Initiative's Effect on Federal Funding of Education", Captain Joseph D. Lipchitz, *The Army Lawyer*, February 1998.

One of the biggest potential problem areas in my opinion is the potential for non-DoD affiliated civilians to live in these units. Although each area where privatization is occurring currently has a severe shortage of housing, these contracts are for extremely long periods of time. No one can accurately predict what the housing situation will be like in these areas in even five years, much less fifty years. Military units are transferred to other installations, large numbers of individuals are deployed for long periods of time, and installations are closed. Each of these situations, along with others not mentioned, can cause the occupancy of these units by military members to lessen. Nevertheless, each contract has a provision for rental of the units to non-DoD civilians if the units are not rented to military members for a certain length of time.

Civilians living on military installations raise numerous issues. How do they gain access? Are the civilians given special ID cards and stickers for their vehicles? Are the civilians allowed access to any military facilities, such as the hospital, PX/BX, shoppette/commissary, or other NAF activities? What kind of background checks will be conducted on these civilians to ensure they do not pose a security risk to the installation? How is on-installation misconduct by civilians living in these units handled?

Traditionally, relatively minor, on-installation misconduct by non-DoD civilians has resulted in debarment from the installation. However, the fact that the civilian now lives on base will complicate this process, since debarring the individual will have the resultant effect of also

evicting them from their residence. The question then becomes, does the government have to go through the formal process of evicting the civilian from the housing pursuant to state law?

In addition, there is the possibility of difficulty in prosecuting the civilians for serious crimes committed in the housing area. Under the methods being utilized by the Army and Navy, this probably will not be a significant problem, since they both retain ownership of the land where the housing units are situated. However, it is possible to have a privatization project where ownership of the land is transferred to the contractor. In this situation, it is as if there is a state enclave in the middle of a federal enclave. The jurisdictional issues could be a nightmare if a serious crime is committed by a civilian in this type of housing area.

I believe resolution of these issues is one of the most serious factors that should be considered when an installation is considering privatization of military family housing. There is a tremendous chance of a serious impact on the good order and discipline necessary to effectively run a military installation if civilians are committing misconduct on the installation, without the possibility of government reaction to the misconduct.

The answers to these and many other similar questions should be studied before a decision is made to allow non-DoD civilians to lease units on military installations. However, I recognize the practicality that potential contractors would be extremely reluctant to enter these types of privatization agreements, without the ability to achieve 100% occupancy in the event the eligible military members do not fill the units.

E. How does the contractor make money on the project?

Each of the privatization projects I reviewed is being undertaken, at least partly, as a result of a lack of adequate housing for military members in the local area. Although the contractor is limited by a rent cap for military renters in each of these projects, no such rent cap exists if the contractor rents to non-DoD civilian. In my opinion, this gives the contractor an incentive to rent to such civilians, whom he can charge the going rate for similar units in the local area. In addition, the contractor can boast to these civilians of the quiet neighborhoods and safety that comes from living on a military installation.

Although the contractor could not overtly favor non-DoD civilians when determining who to rent a unit to, I believe the potential is there for the contractor to “game the system” and achieve this result. This could result in an even greater housing shortage for military members than is currently occurring.

F. What type of checks are conducted for historic areas or property?

There are many environmental statutes that could affect the way a privatization of military family housing contract is conducted. The most serious of these, given the age of most military family housing units, may be the National Historic Preservation Act (NHPA).<sup>49</sup>

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<sup>49</sup> 16 U.S.C.A. Section 470-470w-6 (West 1997)

The NHPA requires a consultative process before any undertaking by a federal agency that might adversely affect a historic site; this includes the sale, transfer, or lease of a property that is a historic site.<sup>50</sup> A historic site is defined as "...any site, building, [or] structure...included in, or eligible for inclusion is, the National Register of Historic Places."<sup>51</sup> Therefore, it is extremely important, considering the age and possible historic significance of many DoD housing units, that a thorough review be undertaken by the installation to ensure that none of the housing scheduled to be privatized meets the definition of a historic property.

Other cultural-type statutes that could affect the privatization process include the American Indian Religious Freedom Act<sup>52</sup>, the Archeological Resources Protection Act<sup>53</sup>, and the Native American Graves Protection and Repatriation Act.<sup>54</sup>

## V. Recommendations and Conclusions

Although I must admit I entered the research of this project quite skeptical of the privatization process, I believe it is a viable method for relieving some of the critical housing shortages facing military members. It is not a process without potential serious problems however, and I believe a multi-disciplinary approach must be undertaken by an installation before attempting to privatize their housing. By this, I mean that members from several different military units should be involved in the planning process before a privatization process is began.

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at Section 470w(5).

<sup>52</sup> 42 U.S.C.A. Section 1996 (West 1997)

<sup>53</sup> 16 U.S.C.A. Sections 469-469(c) (West 1997)

<sup>54</sup> 25 U.S.C.A. Sections 3001-3013 (West 1997)

At the very least, input will be needed from the Contracting office, the JAG office, the Civil Engineering office, the Comptroller office, the environmental experts, and the housing office, as well as the command structure of the installation.

I will shortly PCS to my fifth assignment is just over eight years of active duty military service. At the four installations I have been stationed at that have military family housing available, I have had an average wait of almost two years for military family housing.<sup>55</sup> Since my average tour at these installations is just over two years, military family housing has not often been a privilege I have been able to enjoy. Although the lengths of my tours may be below the average of many other military members, the fact remains that it often takes a large percentage of a tour before a member can get base housing. Anything that can be done to help alleviate this problem for members should be explored to the fullest extent possible.

Obviously, the pot of money for new military family housing projects is shrinking, along with the rest of DoD money. Privatization, if structured carefully and correctly, could offer a method of meeting this critical need of military families without costing the military departments a large amount of up-front cash outlay.