



## DEPARTMENT OF THE ARMY

U.S. ARMY CORPS OF ENGINEERS

441 G ST. NW

WASHINGTON DC 20314-1000

REPLY TO  
ATTENTION OF

CECC-G

6 October 2011

### MEMORANDUM FOR DEPUTY OF SECURITY COOPERATION

SUBJECT: Legal Review of the Application of Value Engineering Principles to Foreign Military Financing (FMF) Projects.

#### 1. REFERENCES.

- a. Office of Management and Budget, *Value Engineering*, OMB Circular No. A-131 (May 21, 1993).
- b. Army Regulation 5-4, Army Productivity Improvement Program (AUG 1982).
- c. Engineer Regulation 11-1-321, *Value Engineering* (1 Jan 2011).
- d. National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106 § 4306 (FEB 1996).
- e. Arms Export Control Act, 22 U.S.C. §2751 *et seq.* (1976).

2. PURPOSE. The question of whether the requirements of Value Engineering (VE) apply to Foreign Military Financing (FMF) cases, under the Foreign Military Sales (FMS) program, was raised by e-mail by the Military Programs Directorate on 22 SEP 2011. This memorandum will explain how VE is implemented by the Corps' regulations and will clarify VE's role in FMF projects. This memorandum will also discuss the implications of applying VE to FMF projects.

3. SUMMARY. USACE's implementing regulation on Value Engineering, ER 11-1-321, by its terms, applies to FMF projects. However, there may be, in some circumstances, reasons to exclude a class of FMF projects from using Value Engineering standards, and thus, a waiver of the relevant Engineer Regulation may be appropriate. However, under the governing Office of Management and Budget regulations, this determination must be made by the Chief of Value Engineering.

#### 4. DISCUSSION.

- a. Office of Management and Budget (OMB) Circular A-131 lays the framework for establishing, within each Federal Agency, a system of value analysis, management, and control, more commonly known as Value Engineering (VE). OMB's guidance provides that a Federal agency shall, when appropriate, use VE to reduce costs and improve the quality of program and acquisition functions. *See Ref. 1a.* The Circular requires that a VE study be applied to any Federal project (for our purposes, civil works or military) that exceeds \$1,000,000. *Id.* However, for projects exceeding that

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limit, a waiver may be granted by the senior management official responsible for the agency's VE efforts, or his delegatee. *Id.*

- b. While OMB Circular A-131 provides the VE framework that each agency is required to implement, Army's guidance, Army Regulation 5-4, was crafted prior to the publication of the OMB Circular, and therefore does not reflect some of OMB's stated requirements. *See Ref. 1b.* On the other hand, the Corps of Engineers' regulation on VE, Engineer Regulation 11-1-321, updated in January 2011, implements Circular A-131's framework and expands upon it. In relevant part, under para. 2, VE will apply to "all procurement acquisitions that are federally-funded, managed, and/or executed by the Corps of Engineers [...] with a total project cost of \$1 million or more..." *Ref. 1c.* Additionally, ER 11-1-321 provides a waiver process as well, for "unusual cases." *Id.* at para. 8. By applying the VE program to all federally-funded projects over the \$1M floor, the regulation effectively places the vast majority of USACE's civil works and military programs activities under this regulation.<sup>1</sup>
- c. With the extensive reach of ER 11-1-321, an issue has been raised as to the applicability of the VE program to Foreign Military Sales (FMS) cases, and specifically, those FMS cases funded by Foreign Military Financing (FMF). FMF is the U.S. Government program for financing the procurement of defense articles, services, and design and construction services, through loans or grants to eligible foreign countries and international organizations. *See Ref. 1e.* Funding for the FMF program is provided by congressional appropriation, and usually from the annual State & Foreign Operations Appropriations Act. *See e.g., Consolidated Appropriations Act Fiscal Year 2008, P.L. 110-161.* FMF funds, even after they are deposited into the FMS Trust Fund, retain their fiscal identity as U.S. origin funds (they are identified by a U.S. Treasury Index identifier in the fund cite, they retain the Purpose Statute limitations on their use, etc). *See DoD FMR Vol. 15, Ch. 1, para 0102.*
- d. Given the above, we believe that the Value Engineering regulations, provided for in ER 11-1-321 apply to FMF projects. The language in para. 2 of the ER, *supra*, provides that VE applies to "all procurement acquisitions that are federally-funded, managed, and/or executed" by USACE that are over \$1 million. FMS cases that are funded through FMF plainly fall into the category of federally-funded projects. Accordingly, FMF-funded projects fall within the scope of the Corps' VE regulations.
- e. While ER 11-1-321, as written, applies to FMF-funded FMS cases, there may be certain classes of FMF projects where the application of VE may not achieve the aims of the VE program and Circular A-131. FMF-funded FMS cases are unique within the Corps of Engineers, and generally fall outside of the traditional military and civil works missions. The customer (the foreign country) will largely determine the

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<sup>1</sup> The Army also has a statutory responsibility under 33 U.S.C. § 2288 to conduct a value engineering study during the design of each water resource project that has a total cost in excess of \$10M.

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size/scope of the project, how the FMF funds will be allocated, and will be the sole beneficiary of the services that USACE provides. For the reasons stated below, we believe that the Chief of Value Engineering, USACE, may determine that certain classes of FMF projects are exempt from ER 11-1-321.

- f. The aim of OMB Circular A-131 is to implement Value Engineering where practicable, in an effort to reduce costs and increase efficiency, but by applying VE to some FMF projects, neither of these goals is accomplished. In some instances, customers operating under FMF funding provide USACE with complete design specifications prior to the award of a construction project. By requiring VE on a project that is scoped and, for all intents and purposes, financially managed by another government, this obligation would only serve to increase the total cost of the project and provide a service with little to no benefit for the customer, or the U.S. Government. As an example, in most FMF projects for Israel, their government provides 100% of the design specification. If we were to apply VE in these cases, the cost to Israel would increase, due to our need to review the specifications, make necessary changes, have additional inspectors/engineers on the ground, etc. With the increase in the total cost to the Israelis, however, there is no corresponding benefit. By providing a complete design for the project, Israel has signified its desire for a specific end-product; any deviation countermands that intent.
- g. Furthermore, continuing with Israel as an example, building standards and procedures differ from country to country, and it may be the case that USACE VE personnel are not completely versed in Israeli standards. So, by applying American VE principles on an Israeli-scoped project, the customer may receive an end product that does not comport to its own mandated standards.<sup>2</sup> Applying VE to these types of FMF projects may violate the intent of the FMS program (that is, to fund friendly nations for the military projects they desire).<sup>3</sup>
- h. Given the above, there may exist one or more classes of FMF projects where the application of Value Engineering principles may not be appropriate, if determined by the Chief of Value Engineering. While ER 11-1-321 provides for a case-by-case waiver process, this approach may be impractical on a number of levels. Applying for a waiver for each FMF project would take an inordinate amount of time and would become an unnecessary administrative burden on the reviewing party. Many FMF-funded cases are time-sensitive actions, and require review at a number of levels within DoD, and from the Department of State. Moreover, a case-by-case waiver seems unwarranted, given that certain classes of FMF-cases (such as FMF cases involving Israel) will likely present the same waiver issue (i.e., that VE principles will not result in a benefit to the U.S. or the customer).

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<sup>2</sup> While perhaps applying VE to a foreign project would make sense if the United States would be occupying/using the final project constructed pursuant to an FMF grant, this is an incredibly rare circumstance (e.g. Afghanistan).

<sup>3</sup> In a similar vein as the notion that fully-scoped projects may not benefit from the application of VE, a project where the customer-country specifically requests that Value Engineering not be applied may also warrant a waiver.

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- i. Accordingly, for those individual or groups of FMF cases where the Chief of Value Engineering determines that the benefits of Value Engineering will not be realized, we suggest two potential approaches. The first approach would be for the VE proponents to amend ER 11-1-321 to include a proviso stipulating that certain classes of FMF projects will not require a VE analysis. A second possible scheme would be to have the USACE proponent office for FMF cases seek a class-waiver from the Chief of Value Engineering, HQ USACE, which could be executed either through a Decision Memorandum or a Memorandum for Record, that acknowledges that his determination, ER 11-1-321 does not apply to a given class of FMF-projects.
5. CONCLUSION. USACE's implementing regulation on Value Engineering, ER 11-1-321, by its terms, applies to FMF projects. However, there may be, in some circumstances, reasons to exclude a class of FMF projects from using Value Engineering standards, but this determination must be made by the Chief of Value Engineering.
6. POC for this action is the undersigned, available at (202) 761-8782.



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