



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G ST. NW
WASHINGTON DC 20314-1000

CECC-G

August 31, 2010

MEMORANDUM FOR CHIEF, VALUE MANAGEMENT/ ENGINEERING

SUBJECT: Legal Review of Value Engineering in the U.S. Army Corps of Engineers

This memorandum responds to your request for a review of whether we are in compliance with the legal requirements for value engineering (VE) on U.S. Army Corps of Engineers (USACE) military, civil works, and other projects. In addition, this memo addresses procedural requirements for management of the VE program.

Office of Management and Budget (OMB) Circular A-131 requires each agency, in this case the Army, to designate a senior management official responsible for the its VE program. The circular requires a VE study on each Corps project, whether civil works, military, or other, that exceeds \$1,000,000. Higher thresholds may be established by agencies and agencies may create categories of projects and programs with different thresholds. For projects exceeding \$1,000,000, a waiver may be granted by the senior management official responsible for the Army's VE efforts, or his delegatee. In addition, the Army has a statutory responsibility under 33 U.S.C. § 2288 to conduct a value engineering study during the design of each water resources project that has a total cost in excess of \$10,000,000. This requirement may not be waived, so waivers for civil works projects may only be granted if the project is between \$1,000,000 and \$10,000,000. OMB Circular A-131 also requires each agency to promulgate VE guidance and includes a number of required elements for that guidance. Namely, the guidance must address: 1) Measuring the net life-cycle cost savings from value engineering; 2) Dollar amount thresholds for projects/programs requiring the application of VE; 3) Criteria for granting waivers to the requirement to conduct VE studies, in accordance with the FAR 48.201(a); and 4) the application of VE to construction projects/programs and other projects/programs to include consideration of environmentally-sound and energy efficient considerations to arrive at environmentally-sound and energy efficient results.

While OMB Circular A-131 lays out a clear VE scheme that each agency is required to implement, AR 5-4, the Army's VE regulation, was written prior to the publication of OMB Circular A-131 and it does not reflect many of the circular's requirements. AR 5-4 assigns VE responsibilities to the Comptroller of the Army (now subsumed in Office of the Assistant Secretary of the Army (Financial Management and Comptroller)). Moreover, the Army no longer adheres to AR 5-4 in practice, even though it has never been rescinded or superseded.

The Army VE program is now handled by the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) (ASA(ALT)) as part of its acquisition policy responsibilities under General Order 2002-03. By memorandum dated April 19, 2004,

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USACE is delegated the authorities and responsibilities of the Army's senior management official responsible for VE related to engineering and construction. Once Army has clarified its VE policies, USACE should revise the USACE VE regulation to conform to those policies and implement the USACE VE program.

If you have any questions or concerns, please let me know. My office is available to assist in drafting any communications to Headquarters, Department of the Army and to review draft regulations.

A handwritten signature in black ink, appearing to read 'Rupert Jennings', with a large, stylized flourish extending to the right.

RUPERT JENNINGS
Assistant Chief Counsel for Legislation, Fiscal and
General Law

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In addition, the Army has a statutory responsibility under 33 U.S.c. § 2288 to conduct a value engineering study during the design of each water resources project that has a total cost in excess of \$10,000,000. This requirement may not be waived, so waivers for civil works projects may only be granted if the project is between \$1,000,000 and \$10,000,000. This requirement is clarified by USACE guidance dated XX. Since the PL 104-106 and most VE policies/procedures/ Regulations are procurement based requirements; and the development of the PM methodology after release of this Law; the USACE Chief, OVE (SMORVE) interpretation on the application of VE in this instance, is that VE is required to perform a VE study in order to award these projects on any "procurement". Additionally, the USACE Chief, OVE (SMORVE) determined that based on the Value Methodology (ASTM and VE Standard); as well as USACE CW policies and interpretations, VE is best applied early in the project development as possible—resulting in the long standing requirement for VE Study requirement in Feasibility and Plans and Specs. Once in the development of alternatives; and once during the design of that alternative. Upon acceptance of the position, the current USACE Chief, OVE (SMORVE) determined the PL 99-662 was not being adhered to, and that between FY05-10, over 290 projects met the requirement for VE study, and only 25 were studied. USACE Chief, OVE (SMORVE) briefed at each CW DMR after identifying the non-compliance, and sent backup data to each MSC VE PGM to validate, and continued to monitor for current FY. USACE Chief, OVE (SMORVE) staffed and issued ECB 2010-01, FY10 VE Annual Execution Guidance, signed by Chief's of both CW/MP PID, and the Chief of E&C, taking immediate corrective actions to ensure compliance. Issue of noncompliance was briefed to the Chief of E&C. At the CW FY10 Q4 DMR, and the FY11 Q1 DMR, the results of FY10 noncompliance was stressed again, 109 Projects over \$10M executed without a VE study. Information was sent to MSC VE PGM's and the HQ Chief of Planning (Tab Brown) per request of Chief, PM (Gary Loew). As of January 2011, 4 projects had been awarded (NWD/MVD) not in compliance. Briefed issues on VE to the MSC Chief's of E&C, and HQ Chief, E&C, and his Deputy on 15 March 11, the response from one MSC was "if we have not been in compliance for so long, with no penalty, who cares". ER 11-1-321 has required PM's to provide certification statement in all BCOE packages and major document phases, that states that the project has met all statutory and regulatory requirements for VE...when I spot checked with the MSC's and District VEO's, they indicated that this is not being followed. Contracting Officer's have been executing projects with known violations....which is against Warrant policies for KO's.

OMB Circular A-131 also requires each agency to promulgate VE guidance and includes a number of required elements for that guidance. Namely, the guidance must address:

- 1) Measuring the net life-cycle cost savings from value engineering;
- 2) Dollar amount thresholds for projects/programs requiring the application of VE;
- 3) Criteria for granting waivers to the requirement to conduct VE studies, in accordance with the FAR 48.201 (a) 4) the application of VE to construction projects/programs and other projects/programs to include consideration of environmentally-sound and energy efficient considerations to arrive at environmentally-sound and energy efficient results.

While OMB Circular A-131 lays out a clear VE scheme that each agency is required to implement, AR 5-4, the Army's VE regulation, was written prior to the publication of OMB Circular A-131 and it does not reflect many of the circular's requirements. AR 5-4 assigns VE responsibilities to the Comptroller of the Army (now subsumed in Office of the Assistant Secretary of the Army (Financial Management and Comptroller)). Moreover, the Army no longer adheres to AR 5-4 in practice, even though it has never been rescinded or superseded. **AR 5-4 was supplemented by an OCE Supplement that specifically modifies for USACE. Changes the application of VE for USACE. Army VE practice was divided into two, AMC and USACE based on mission areas. As such, VE Policies and Regulations for each were developed by each. USACE ER 11-1-321.**

The Army VE program is now handled by the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) (ASA(ALT)) as part of its acquisition policy responsibilities under General Order 2002-03. By memorandum dated April 19, 2004, ASA(ALT) delegated certain Army VE responsibilities to the Commander, U.S. Army Materiel Command (AMC). These responsibilities were further delegated to the AMC Deputy Chief of Staff for Business Transformation. The delegation included such **(administrative)** responsibilities as leading development of the Army's VE Strategic plan and compiling the annual VE report required by OMB Circular A-131. In practice, the USACE Chief, Value Management Engineering (VM/E) has collaborated with AMC to provide input on the aspects of the Army's VE program related to engineering and construction. In addition, the USACE Chief, VMIE has participated as a member of the Department of Defense (DoD) Management Advisory Group, a DoD VE committee. We are not aware of a similar delegation from ASA(ALT) (or any other member of the Army Secretariat) to the Commander, USACE concerning the responsibilities and authorities of the Commander, USACE for the Army's VE program with respect to engineering and construction **(OSD delegated responsibility directly)**. Since it appears that USACE executes its VE program as if it has a delegation from ASA(ALT), we recommend USACE seek such a delegation or clarification from the Army Secretariat. **(See OSD-ATL SMORVE Letter)**

In addition, the current USACE VE regulation is inadequate. For example, ER 11-1-321 applies the VE study requirement to construction projects exceeding \$2,000,000, rather than the \$1,000,000 required by OMB Circular A-131. It is my understanding that this higher threshold is based on a brief conversation approximately 20 years ago between our former Chief, VMIE and the OMB and DoD officials who were then responsible for VE. Unfortunately, there apparently is no documentation of that conversation, nor any ASA(ALT) endorsement of the resulting policy. AR 420-1 also mentions a \$2,000,000 threshold for military construction projects,

however the proponent of AR 420-1 is the Assistant Chief of Staff for Installation Management (ACSIM), not ASA(ALT). Thus, it is unclear whether the \$2,000,000 threshold for military construction projects was approved by the Army's senior management official for VE. (See OSD letter identifying the \$2M for Construction)

While it appears that agencies may set higher thresholds under OMB Circular A-131, in the absence of a decision by the appropriate Army official to do so, the \$2,000,000 threshold is questionable. Accordingly, if USACE desires to continue that policy, we recommend that you seek formal approval of that policy by ASA(ALT). ER 11-1-321 and AR 420-1 also purport to place VE study waiver authority in the hands of USACE Major Subordinate Command (MSC) and center commanders. While the waiver authority is delegable under Circular A-131 to "other appropriate officials," it is clear that the senior agency official responsible for VE has the primary waiver authority and is responsible for delegating that authority, if it is to be delegated. Since neither the Commander, USACE nor ACSIM (the proponent of AR 420-1) is clearly the senior agency official responsible for VE, or a delegatee, the purported delegation to USACE MSC commanders in this regulation is questionable. (Corrected per ER 11-1-321, Change-1)

In conclusion, OMB Circular A-131 lays out a VE scheme that the Army is required to implement, which includes designating a senior management official responsible for VE. Current Army regulations, however, are not adequate. USACE should seek implementation of OMB Circular A-131 from the Army. Requested clarification from Army VE (ASA-ALT delegated to AMC, delegated to Neubert) AMC SMORVE indicated that USACE has always been a separate element due to distinct mission assignments from OSD. AMC VE program focuses on their assigned mission areas only. USACE E&C mission areas are assigned to USACE per OSD and DA (GO 2002-03). Sought clarification from OSD (ATL) Senior Management Official Responsible for VE. OSD SMORVE clarified USACE VE SMORVE responsibilities for ensuring Chief of Engineers is compliant with OMB Circular A-131 through memorandum dated X. Per OMB Cir A-131, USACE Chief, OVE is the designated SMORVE (See Memo and Chiefs Policy Letter) for USACE assigned mission areas. These responsibilities are identified in the "Agency Responsibilities" section of A-131. This includes waiver authority and responsibility for interpretation of OMB Cir intention for the application of VE. USACE should seek confirmation that the Commander, USACE is delegated the authorities and responsibilities of the Army's senior management official responsible for VE related to engineering and construction. Once Army has clarified its VE policies, USACE should revise the USACE VE regulation to conform to those policies and implement the USACE VE program. (ER 11-1-321 Change-1)

If you have any questions or concerns, please let me know. My office is available to assist in drafting any communications to Headquarters, Department of the Army and to review draft regulations.

USACE Chief, OVE (SMORVE) is qualified and assigned to interpret OMB Cir A-131 and application of VE to USACE programs. (ie., "as appropriate"). Without the authority to make decisions for USACE on VE, managing compliance is not possible. I continue to get the same arguments from all parts of the organization, on Why do we have to do VE? Or it's not E&C's decision on how we provide services to our customers! Or "our customer doesn't want to pay for

VE!” or “that’s not how I interpret it”...everyone seems to be an expert on VE, except the designated and certified VE Specialist for USACE. Ensuring compliance is not possible from where I sit. Ensuring Chief of Engineers is covered, is not possible with middle management; Execution of VE is not possible within E&C, if PM does not sched or fund. If it’s important, there needs to be a Command knowledge and emphasis.

PMBP Manual sets VE as an inherent Business Process. Campaign Plan, I-plans, Consolidated Command Guidance, and other regulations set the environment for VE program and application.

VE Positions as required by long standing policies (40+ years) are to be Special Asst to the Commander, and at least a Primary duty; Allowing for access to any organizational element. VE Positions have been degraded over the years to “added duties” and buried in the lowest parts of the organizations, primarily within E&C. E&C is a Service Provider within USACE, and does not control corporate resources...Project Management is responsible for scheduling and resourcing projects, to include VE study. DDPM’s are responsible for ensuring PM’s compliance with regulations and CCG/PMBP. The Commander’s (District and Division) are held accountable for the performance of their VE Programs as presented at the DMR/CMR. Bottom line—E&C has no control over VE compliance, VEO positions need to be placed within the organization where they can ensure compliance for the Commander.

Based on the legal review, and follow-up actions that clarified intent, USACE Chief, OVE (SMORVE), through continuous coordination with the VEAC/MSV VE PgM’s, issued an ER Change-1 document to take corrective actions. However, E&C Community has taken exception to the Change (see my notes of responses to field over ER Change)...although, when I presented the facts that nothing has really changed with the exception of those items identified by legal, since 2003 (ER vs ER Change-1)...no one realized that they have been noncompliant with the existing regulation since 2003.