



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
OFFICE OF THE CHIEF COUNSEL  
WASHINGTON DC 20314-1000

REPLY TO  
ATTENTION OF

CECC-G

5 December 2012

MEMORANDUM FOR RECORD

SUBJECT: Updated Legal and Regulatory Requirements for Value Engineering on Corps of Engineers Projects.

1. PURPOSE. This memorandum responds to a request for written guidance, from the Office of the Value Engineer, on the statutory and regulatory framework governing the Corps' implementation of Value Engineering (VE) on USACE projects. While this Directorate has previously opined on the subject, the request for further guidance comes in the face of changes to the governing documents. This memorandum will focus on the roles and responsibilities of the senior management official (SMO) responsible for VE, the rules governing when VE must be applied to a procurement or project, and the VE waiver process and approval authority.

2. DISCUSSION.

- a. The statutory basis of Federal VE programs derives from 41 U.S.C. §1711.<sup>1</sup> In relevant part, this statute requires each executive agency to "establish and maintain cost-effective procedures and processes for analyzing the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of the agency." It is on this basis that the Office of Management and Budget (OMB) issued Circular A-131, which governs Value Engineering.<sup>2</sup>
- b. OMB Circular A-131 is the implementing regulation for each executive agency's Value Engineering program.<sup>3</sup> The aim of the VE program is to achieve the "best value" or the best relationship between worth and cost. The Circular requires that all Federal agencies use VE, where appropriate, and that senior agency management ensure VE is used on "all appropriate programs, including appropriate projects and acquisition programs that are supported by performance based and service contracts."
- c. Circular A-131 further provides that each agency shall establish a VE program, and lays out a set of minimum criteria that each agency must meet. Agencies must, in relevant part:

<sup>1</sup> With the re-codification of Title 41, §1711 replaces the former VE provision found at 31 U.S.C. §1111.

<sup>2</sup> As of the publication of this MFR, OMB Circular A-131 is currently being revised, and has not yet been officially promulgated. However, OMB has circulated a draft version (dated 24 July 12) for Notice and Comment. This MFR uses this Draft version as a basis for its analysis, but recommends a secondary review once the final revision is submitted to the Federal Register.

<sup>3</sup> Note that for the purposes of the statutory and regulatory framework, VE applies only to "agencies". For our purposes, the Department of the Army, not USACE, is the "agency".

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- a. Designate a senior management official for all VE efforts;
  - b. Develop policies and procedures to indentify projects/programs with the most potential savings yield from the application of VE;
  - c. Develop criteria and guidelines that address the use of VE on all appropriate contracts, and how to measure net life-cycle cost savings;
  - d. Establish guidelines on the minimum dollar threshold where VE would apply;
  - e. Identify a senior management official authorized to grant VE waivers, and establish criteria for granting such waivers; and
  - f. Develop guidance for implementing VE studies.
- d. There are a few points worth noting in paragraph (8) of draft version of OMB Circular A-131. First, an agency's VE guidelines are required to address "the consideration and use of VE on all appropriate contracts, including contracts supporting major acquisitions as well as service and performance based contracts." This Office has received numerous questions as to whether VE requirements apply to service contracts – the draft Circular indicates that they can. Second, this updated Circular changes the minimum threshold for when a VE study is required. Under the old OMB Circular A-131 (dated May 1993), a VE study was required for any Federal project that exceeded \$1M. By way of the updated draft version of the Circular, the "minimum threshold for agency projects and programs which require the application of VE is \$2 million." The draft Circular goes on to provide that "agencies may, at their discretion, establish lower thresholds for *major acquisitions or projects that have a signification impact on agency operations*" (emphasis added). Finally, the draft Circular requires that an agency's VE regulations "include criteria for granting waivers", but waiver responsibility still remains with the senior management official in charge of the VE program (this responsibility may be delegated, as was the case in the previous Circular).
- e. While what is discussed, *supra*, establishes each Federal agency's responsibility for VE, the Corps has a specific mandate for VE on Civil Works projects. Under 33 U.S.C. §2288, the Corps has a statutory responsibility to conduct a VE study during the design phase of each water resources project that has a total cost in excess of \$10M. This requirement cannot be waived, and so accordingly, only Civil Works projects with a total cost above the agency minimum threshold, but below \$10M, are eligible for a VE waiver.
- f. While OMB Circular A-131 provides for the minimum requirements that each agency must implement, it is incumbent on the agencies to draft regulations addressing when and how VE will be executed. The Department of the Army had previously issued guidance on VE in Army Regulation (AR) 5-4, entitled *Value Engineering*. However, it appears that within the past year, the Army has rescinded this regulation.<sup>4</sup> It is our understanding that the Army's VE program is executed through the ASA(ALT), under his acquisition policy responsibilities under General Order 2012-01 (which replaced the

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<sup>4</sup> Note that the old AR 5-4 was promulgated prior to the 1993 OMB Circular on VE, thus making much of its guidance obsolete.

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old General Order 2002-03 (Gen. Order #3)). Via memorandum dated 19 APR 2004, ASA(ALT) delegated certain Army VE responsibilities to the Commander, U.S. Army Material Command (AMC). However, ASA(ALT) has also unequivocally delegated the Army's responsibilities under Circular A-131 to the Chief of Engineers, which he is to execute in concert with the Commander for AMC. See Memorandum from Malcolm O'Neill, ASA(ALT), Subject: *Delegation of Authority*, dated 1 SEP 2010. Accordingly, the Chief of Engineers maintains responsibility of the Army's implementation of the VE program for engineering, construction, real property, and technical policy.

- g. While the Army lacks standing published guidance on VE, USACE has published Engineering Regulation (ER) 11-1-321 that implements VE for the Corps. Given the forthcoming changes to the governing OMB Circular, the current VE regulation will soon be out of date. Accordingly, addressed below are some suggestions to ensure the Corps' guidance tracks with the new Circular A-131.<sup>5</sup>
- h. The current version of the ER provides that OMB Circular A-131 *requires* VE studies on all federal projects/programs over \$1M in total cost. This provision is no longer supported by the Circular. Instead, the Circular A-131 now holds that VE is required for agency projects and programs at or above \$2M. The Corps may, as a matter of policy, choose to keep the \$1M threshold as a VE requirement, but must make a program/project-specific determination that the application of VE is warranted because the program/project is a "major acquisition or project that [has] a significant impact on agency operations." Any agency program or project, however, at or above \$2M will require a VE study (unless a waiver is granted). If a program/project does in fact meet the threshold for the application of VE, ER 11-1-321 requires that the PM certify compliance with VE procedures, as per Section 12 of the Engineering Regulation. The Contracting Officer assigned to the project must ensure this certification is in the contract file prior to advertising and award.
- i. Another area of recent contention stems from the authority to approve, and the procedures to grant, waivers from the VE requirements. This Office has written on the subject, most recently in a 6 OCT 2011 Memorandum (Subject: *Legal Review of the Application of Value Engineering Principles to Foreign Military Financing (FMF) Projects*). While the OMB Circular sets forth procedures on when the application of VE is required, the guidance also allows for some flexibility with the granting of waivers, where a VE study would otherwise be required. The use of waivers for some programs/projects makes good policy sense, as programmatic intent can be stifled (as is the case with FMF-funded construction by foreign governments) or cost-savings not realized, if VE applied across the board.

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<sup>5</sup> Again, the thrust of this MFR is when VE should apply, and what the process is for receiving a waiver for VE. Some of the OMB reporting requirements have changed, as have some of the statutory and regulatory citations, all of which will need to be corrected and/or updated in the ER.

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- j. The draft OMB Circular A-131 holds that the senior management official responsible for VE is the approval authority for waivers from VE requirements – per ER 11-1-321, this is the Chief of the Office of the Value Engineer (OVE). The delegation from the ASA(ALT) to the Chief of Engineers, for all the VE requirements provided for in the Circular, allows the SMO to set criteria for granting waivers, which may be delegated to appropriate officials. By regulation, the Chief of OVE has delegated waiver approval to of projects less than \$10M, but greater than \$1M, to MSC VE Program Managers. For non-Civil Works projects at or greater than \$10M, approval authority lies with the Chief of the OVE.
  - k. Waiver approval authority when USACE is executing work for others has also been a point of contention. When USACE is executing engineering and construction work for another Federal agency, the Corps, as the construction agent, is responsible for compliance with the VE requirements. Accordingly, it is the Corps' senior management official for VE (which by delegation is the Chief of the OVE) that is responsible for granting a potential waiver from the VE requirements. When USACE is acting as the construction agent for another DoD component's project, waiver approval authority, per DoDI 4245.14, lies with the "construction agency VE senior management official," which is the Chief of the OVE. When USACE is executing non-construction work for another DoD component, waiver authority from the requirements of VE lies with the "Component VE senior management official" per DoDI 4245.14.
3. The POC is the undersigned, available at 202.761.8782.

/s/

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