

Chapter 32B
Air Force
Nonappropriated Fund
Contracting



2014 Contract Attorneys Deskbook

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CHAPTER 32B

AIR FORCE NONAPPROPRIATED FUND CONTRACTING

I.	INTRODUCTION	1
II.	REFERENCES	1
III.	DEFINITIONS AND STATUTORY CONTROLS.....	2
	A. Nonappropriated Fund Instrumentality (NAFI).....	2
	B. Nonappropriated Funds (NAFs)	2
	C. Statutory Controls on Nonappropriated Funds (NAFs)	2
	D. Regulatory Controls on NAFs	3
IV.	AUTHORITY TO CONTRACT.....	4
	A. General.	4
	B. Emergency purchase procedure exception	4
	C. Contracting Officers.....	5
	D. Responsibilities of the Staff Judge Advocate.....	7
	E. NAF Ratification Procedures.....	7
V.	SPECIAL NAF REQUIREMENTS	8
	A. Acquisition Regulations	8
	B. Performance Period.....	8
	C. Requirements Based on Type of Contract.....	9
VI.	COMPETITION, SOLICITATIONS, AND AWARD	9
	A. Competition	9
	B. Purchases of \$5,000 or less.....	10
	C. Purchases exceeding \$5,000 and up to \$100,000	10

D.	Purchases exceeding \$100,000	10
E.	Special Source Requirements	10
F.	Synopsis.....	10
G.	Solicitations	11
H.	Basis for Award	11
I.	Responsibility	11
J.	Debriefings	11
VII.	ACQUISITION METHODS.....	12
A.	DOD Policy	12
B.	Blanket Purchase Agreements (BPAs).....	12
C.	Delivery Orders.....	12
D.	NAF Government Purchase Card	12
E.	Purchase Order.....	13
F.	Special Contracts and Agreements	13
VIII.	LITIGATION INVOLVING NAF CONTRACTS.....	13
A.	Protests	13
B.	Claims.....	15
IX.	COMMERCIAL SPONSORSHIP	17
A.	Definition.....	17
B.	Key Players.....	17
C.	Types of Commercial Sponsorships	18
D.	General Considerations	18
X.	CONCLUSION	19

CHAPTER 32B

AIR FORCE NONAPPROPRIATED FUND CONTRACTING

I. INTRODUCTION

II. REFERENCES

- A. 10 U.S.C. § 8013(b)(9)
- B. 10 U.S.C. § 2783
- C. GAO, Principles of Federal Appropriations Law, 15-226 to 15-277 (3d ed., vol. III, 2008).
- D. DOD Regulations
 - 1. DODI 1015.10, Military Morale Welfare, and Recreation (MWR) Programs (6 Jul 2009, Change 1, 6 May 2011).
 - 2. DODI 1015.15, Establishment, Management, and Control of Non-Appropriated Fund Instrumentalities and Financial Management of Supporting Resources (31 Oct 2007, Change 1, 20 Mar 2008).
 - 3. DODI 1330.9, Armed Services Exchange Policy (7 Dec 2005).
 - 4. DODI 4105.67, Nonappropriated Fund Procurement Policy and Procedure (26 Feb 2014).
 - 5. DoD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy (Mar 2014).
- E. Air Force Regulations. There are several Air Force instructions, policy directives, and manuals that govern NAF contracting and commercial sponsorships available by departmental series on the Air Force electronic publishing website (www.e-publishing.af.mil) These include:
 - 1. 32 Series: AFI 32-1022, Planning and Programming Nonappropriated Fund Facility Construction Projects (20 May 09).
 - 2. 34 Series: AFD 34-2, Managing Nonappropriated Funds (21 Jun 2012); AFI 34-108, Commercial Sponsorship and Sale of Advertising (12 Oct 2011); AFI 34-201, Use of Nonappropriated Funds (17 June 2002); AFI 34-202, Protecting Nonappropriated Fund Assets (27 Aug 2004); AFI 34-205, Services Nonappropriated Fund Facility Projects (5 July 2011); AFI 34-275,

Air Force Nonappropriated Fund Government Purchase Card Program (23 June 2011).

3. 64 Series: AFPD 64-3, Nonappropriated Fund (NAF) Contracting System (1 Dec 2005); AFMAN 64-302, Nonappropriated Fund (NAF) Contracting Procedures (16 Nov 2011); and
4. 65 Series: AFI 65-106, Appropriated Fund Support of Morale, Welfare, and Recreation (MWR) and Nonappropriated Fund Instrumentalities (NAFIs) (6 May 2009); AFI 65-107, Nonappropriated Funds Financial Management Oversight Responsibilities (1 Dec 1999).

III. DEFINITIONS AND STATUTORY CONTROLS

- A. Nonappropriated Fund Instrumentality (NAFI). AFMAN 64-302, Atch 1, Glossary.

An integral DoD organizational entity that performs a government function. It acts in its own name to provide or assist DoD components in providing morale, welfare and recreational programs for military personnel and authorized civilians. As a fiscal entity, it maintains custody and control over its nonappropriated funds. It is not incorporated under the law of any state or of the District of Columbia and it enjoys the legal status of an instrumentality of the United States.

- B. Nonappropriated Funds (NAFs). AFI 34-201, para 1.1 and 1.2. NAFs are government funds but are separate and apart from funds that are recorded in the books of the US Treasury. They are not appropriated by the Congress. NAFs come primarily from the sale of goods and services to DOD military and civilian personnel and their families. The purpose of NAF funds is for the “collective benefit of military personnel, their families, and authorized civilians. These funds support morale, welfare, and recreation (MWR) programs, lodging, certain religious and educational programs, and other programs...”

- C. Statutory Controls on Nonappropriated Funds (NAFs). Congress has directed DOD to issue regulations governing the management and use of NAFs, and has made DOD personnel subject to penalties for their misuse. All NAFIs are created by DOD and its components, and all NAFs are government funds. However, NAFs are not appropriated by Congress or controlled by the U.S. Department of Treasury. NAFIs, as fiscal entities, control their NAFs. 10 U.S.C. § 2783. Nevertheless, Congress may control the use of NAFs. For example:

1. 10 U.S.C. § 2783

- a. “[T]he Secretary of Defense shall prescribe regulations governing—(1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and (2) the financial management of such funds to prevent waste, loss, or unauthorized use.”
 - b. Additionally, this statute contains provisions sometimes referred to as the “NAF Anti-Deficiency Act” wherein it states that a DOD civilian employee paid by NAF funds who commits a “substantial violation” of DOD NAF regulations “shall be subject to the same penalties” for misuse of appropriated funds (i.e. \$5,000 fine or two years confinement or both).
2. 10 U.S.C. § 8013(b)(9) states that the “Secretary of the Air Force is responsible for and has the authority necessary to conduct all affairs of the Department of the Air Force, including . . . [a]dministering (including the morale and welfare of personnel).”
 3. Alcohol. A NAFI in the United States may purchase/sell beer and wine only from sources doing business in the state in which the military installation is located. 10 U.S.C. § 2495(a)(2). NAFIs located on military installations outside the United States may purchase/sell wine from host-nation sources so long as the NAFI gives “appropriate treatment” to wines produced in the United States to ensure such wines are given “equitable distribution, selection, and price” when compared to wines produced by the host nation. 10 U.S.C. § 2495a.

D. Regulatory Controls on NAFs

1. DODI 1015.10, Programs for Military Morale Welfare, and Recreation, Enclosure 5. MWR activities are placed into three separate categories based on the purpose of the program. The category is also important for determining how the program is funded (i.e. the level of NAF to appropriated fund support).
 - a. Category A, Mission Sustaining Activities. Programs in this category promote the physical and mental well-being of the military member, a requirement that supports accomplishment of the basic military mission. *They are supported almost entirely by appropriated funds (APFs), with the use of NAFs limited to specific instances where APFs are prohibited by law or where the use of NAFs is essential for the operation of a facility or program.*

Examples are physical fitness facilities, libraries, unit-level sports, parks and picnic areas.

- b. Category B, Basic Community Support Activities. Programs in this category satisfy the basic physiological and psychological needs of the services members and families providing community support systems that make “DOD installations temporary hometowns for a mobile military population.” *They are supported by a “substantial amounts of APF support” but differ from category A programs in that they have an ability to generate some NAF revenue, but they lack the ability to support themselves and could not function without APF support.* Examples are automotive skills centers, youth activities, child development programs, arts and crafts centers, recreational swimming, riding stables, small (12 lanes or less) bowling alleys, and outdoor recreation centers.
- c. Category C, Revenue-Generating Activities. Programs in this category have the business capability to generating enough income to cover most of their operation expenses, but they lack the ability to sustain themselves based purely on operations expenses. *So, they receive limited APF support.* Examples are golf courses, clubs, boating activities, lodging, large (over 16 lanes) bowling alleys, commercial travel services.

- 2. AFI 65-106, Appropriated Fund Support of Morale, Welfare, and Recreation (MWR) and Nonappropriated Fund Instrumentalities, para. 2.1. discusses the categories and funding levels of MWR activities.

IV. AUTHORITY TO CONTRACT

- A. General. Only NAF warranted contracting officers are authorized to execute, administer, and terminate NAF contracts. The authority of these contracting officers is limited by their NAF warrants. The Director of NAF Purchasing, Headquarters Air Force Services Agency appoints NAF contracting officers and issues warrants commensurate with each applicant’s training and experience. There are limited and unlimited NAF contracting officer warrants. AFMAN 64-302, Chapter 3.
- B. Emergency purchase procedure exception.
 - 1. When unforeseeable events occur that are likely to cause a loss of NAFI property or assets if immediate action is not taken,

unwarranted individuals may incur obligations on behalf of a NAFI. AFMAN 64-302, para. 3.10.

2. Warrants are not required for Special Morale and Welfare (SM&W) purchases under the commander's SM&W expenditure authority, petty cash purchases, or purchases from other NAFIs. AFMAN 64-302, para. 3.11.
- C. Contracting Officers. The Air Force has three different offices responsible for NAF contracting - the installation NAF contracting office, the Air Force NAF Procurement Office (AFNAFPO), and the Servicing Contracting Office (SCO).
1. Installation NAF Contracting Officers
 - a. The Director of NAF Purchasing, Headquarters Air Force Services Agency (HQ AFSVA/SVC) appoints installation NAF contracting officers. There are two types of "limited" NAF contracting officer warrants—with dollar limits of \$5,000 and \$25,000. The higher dollar limit requires completion of additional contracting courses. The commander of the Force Support Squadron at the installation where the contracting officer is assigned recommends and provides justification for the appointment of a NAF contracting officer. AFMAN 64-302, paras. 3.6 and 3.7.
 - b. Additional limits on a NAF contracting officer's authority to contract. AFMAN 64-302, para 3.7.3.
 - (1) Nonpersonal services, interior design service, and concessionaire contracts for services: The NAF contracting officer may obligate up to \$2,500 when the Service Contract Act applies (NOTE: The Act applies in all 50 states, the District of Columbia and U.S. territories). For contracts performed both inside and outside the U.S., the Act only applies to the portion of the contract performed inside the U.S.).
 - (2) Education and Training Services: The NAF contracting officer may purchase education and training services with the NAF Purchase Card (NAF P-Card). Individual transactions may not exceed \$2,500. AFMAN 64-302, paras. 3.7.3.5 and 9.4.1. Vocational training and part-time college level education of NAF personnel in excess of \$25,000

- a. A base, central, or regional appropriated fund (APF) contracting office supporting one or more installations. AFMAN 64-302, Atch 1, Glossary.
 - b. The SCO coordinates with NAF contracting officers to ensure an effective NAF contracting program. AFMAN 64-302, para. 1.7.
 - c. The SCO purchases all NAF requirements other than those specifically assigned to the AFNAFPO or the NAF contracting officer. AFMAN 64-302, para. 1.7.1. For example, the SCO must solicit, award, and administer NAF construction contracts that exceed NAF contracting officer purchasing authority. AFMAN 64-302, para. 5.1.3.
- D. Responsibilities of the Staff Judge Advocate or Contract Attorney. AFMAN 64-302, para. 1.8. The SJA or Contract Attorney “shall provide legal oversight” of all NAF contracting activities and conduct annual ethics briefings or other authorized training. Additionally, the SJA will determine:
1. Whether NAF contracting actions comply with AFMAN 64-302 and AFPD 64-1.
 2. Whether proposed ratifications are legally sufficient.
 3. Whether a proposed resolution of a contract dispute is legally supportable.
 4. The legal sufficiency of proposed contracting actions.
- E. NAF Ratification Procedures. AFMAN 64-302, para. 12.7.
1. Personnel holding the following positions are authorized to approve or disapprove ratification of unauthorized commitments in the following amounts:
 - a. \$50,000 or less: Force Support Squadron Commander of the installation.
 - b. Over \$50,000: AFNAFPO.
 2. Procedures. AFMAN 64-302, para. 12.7.
 - a. The individual who committed the unauthorized act prepares a statement of all pertinent facts and a purchase request/contract and forwards to his/her supervisor.

- b. The supervisor reviews the statement and certifies whether the items were received and used for an authorized purpose; that proper funds were available at the time; and indicates what actions were taken to prevent recurrence. Supervisor forwards all documentation (employee's statement, supervisor's certification, invoice, and funded purchase request) to the NAF contracting officer.
- c. The NAF contracting officer then reviews the ratification package for adequacy, prepares the necessary contractual documents, and forwards to the servicing legal office for review.
- d. The legal office reviews the ratification package for legal sufficiency and then forwards to the ratification authority.
- e. The ratification authority reviews the ratification package and if approved, he/she forwards the package to the contracting officer who will sign the purchase request (officially binding the government) and forward for distribution.

V. SPECIAL NAF REQUIREMENTS

- A. The FAR, DFARS, and AFFARS do not apply to NAF procurements except as required by AFMAN 64-302. While FAR procedures are used as guidance in support of NAF purchasing processes, only those clauses required by law or otherwise stated shall be mandatory. For discussion of mandatory NAF contracting requirements, see AFMAN 64-302, para. 5.1.1. and Chapter 6.
 - 1. General Rule. NAF contracts shall contain only those clauses and certifications required for the purpose of complying with federal law, DOD requirements and protecting the interests of the NAFI. AFMAN 64-302, para. 6.1. General provisions and representations/certifications are available on-line at <http://www.afnafpo.com/>.
 - 2. For purchases made with both NAF and APF, the acquisition will be conducted by an *APF contracting office using FAR procedures.* AFMAN 64-302, para. 5.1.1.
 - 3. When FAR clauses are used in NAFI contracts, references to "Government" should be changed to "NAFI." AFMAN 64-302, para. 5.1.
- B. Performance Period. AFMAN 64-302, para. 6.12.

1. If the contract is subject to the Service Contract Act (SCA), then the performance period is restricted to 5 years.
2. If the contract is *not* subject to SCA, then the performance period will be determined by the contracting officer. Contracts exceeding 10 years duration must be supported by the contracting officer's determination that it is in the NAFI's best interest.
3. But, there is no restriction on the performance period regarding contracts for the lease of real property.
4. Blanket Purchase Agreements (BPAs) and Nonappropriated Fund Purchase Agreements (NPA) must state the beginning and ending dates of the basic period and may include option periods, but will not exceed 10 years.

C. Requirements Based on Type of Contract

1. Purchase request (PR) contracts. AFMAN 64-302, chap. 7. PRs are unilateral offers to buy items on the open market at specified prices. PR are binding on the government when the firm accepts the offer either by signing the PR or by initiating performance.
 - a. PRs requests shall at a minimum identify the requesting NAFI, the requirement, and the requested delivery date.
 - b. PRs for services should also have a Performance Work Statement (PWS) or Statement of Work (SOW). There are no prescribed forms for submitting the PR. The submission must be in a form determined acceptable by the contracting officer.
 - c. All PRs must contain certification of fund availability (signed by a fund certifying authority) before initiating purchasing action.
2. Construction contracts executed by the AFNAFPO may be executed using the FAR as a guideline. However, the acquisition process may be based on standard commercial practices if such practices are in the best interest of the NAFI. AFMAN 64-302, para. 6.2.

VI. COMPETITION, SOLICITATIONS, AND AWARD

- A. Competition. The Competition in Contracting Act (CICA) does not apply to NAFIs unless appropriated funds are obligated. 10 U.S.C. § 2303; Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121.

- B. Purchases of \$5,000 or less. Competition is not required; contracting officer's signature certifies prices are fair and reasonable. AFMAN 64-302, para. 6.6.1.
- C. Purchases exceeding \$5,000 and up to the Simplified Acquisition Threshold (SAT, generally \$150,000). At least two sources must be solicited. AFMAN 64-302, para. 6.6.2.
- D. Purchases exceeding the SAT. Written or electronic solicitations must be issued to a minimum of three qualified sources. If only one bid/offer is received, the contracting officer must include a written determination of price reasonableness. AFMAN 64-302, para. 6.6.2.
- E. Special Source Requirements
 - 1. Brand Name/Sole Source. Requesting activity must provide written justification for brand name/sole source purchases. Contracting officer determines if there is sufficient justification. AFMAN 64.302, para. 6.8.
 - 2. Activities are to be aware of and place orders for products on the mandatory "Procurement List" from the blind and severely disabled. AFMAN 64-302, para. 6.13.
 - 3. Contracting officers are encouraged to purchase products or classes of products/services provided by Federal Prison Industries to the maximum extent possible. AFMAN 64-302, para. 6.14.
 - 4. Orders/contracts that include the purchase of hazardous materials must be coordinated with the Hazardous Materials Pharmacy (see AFI 32-7086) and include FAR 52.223-3, Hazardous Material Safety Data, by reference or in full text. AFMAN 64-302, para. 6.15
 - 5. Controlled medical substances purchased for the base veterinarian must include the veterinarian's Drug Enforcement Agency (DEA) number. AFMAN 64-302, para. 6.16.
 - 6. Resale/Rental items. Competition is not required for resale or rental items. When competition is not obtained, the contracting officer will prepare a determination of price reasonableness for the file. AFMAN 64-302, para. 6.7.
- F. Synopsis. AFMAN 64-302, para. 8.3.
 - 1. Not required for NAF purchases.

2. NAF contracting officers may synopsize requirements when in the NAFI's best interest.

3. Solicitation and contract award notices for synopsized NAF purchases shall include special language regarding the purchase:

“This is a nonappropriated fund purchase and it does not obligate appropriated funds of the United States Government.

Nonappropriated funds are generated by the military community through the sale of goods and services and the collection of fees and charges for participation in military community programs.

This purchase does not involve federal tax dollars.”

G. Solicitations. AFMAN 64-302, para. 8.1.

1. May be *written or verbal* depending on the dollar value/complexity of the requirement.

2. Written solicitations must be used for open market purchases exceeding the SAT.

H. Basis for Award. AFMAN 64-302, para. 8.5.

1. If factors other than price alone are used as the basis for award, these factors shall be identified in the solicitation with their order of importance. AFMAN 64-302, para. 8.5.

2. Purchases up to and including the SAT. Using price and other factors as the basis of award, the contracting officer will document the file with the rationale for making the award to a particular contractor. AFMAN 64-302, para. 8.5.1.

3. Purchases over the SAT. Using price and other factors as the basis of award, the contracting officer will prepare a written summary of the analysis of all offers showing the results of the evaluation in relation to price, technical factors, and past performance. This document is marked “Source Selection Sensitive” and will not be released to the public. AFMAN 64-302, para. 8.5.2.

I. Responsibility. Before award of any contract, the contracting officer must determine the responsibility of the prospective awardee, using the responsibility standards in FAR 9.104-1. AFMAN 64-302, para. 6.10.

J. Debriefings. Debriefings to unsuccessful offerors will be conducted following award if determined appropriate by the contracting officer. The unsuccessful offeror must request in writing the debriefing within 3 days after receiving notice of contract award. AFMAN 64-302, para. 8.12.

VII. ACQUISITION METHODS

- A. DOD Policy. DoDI 4105.67, para. 4, provide that NAFIs shall conduct procurements:
 - 1. By competitive negotiation, to the maximum extent practicable;
 - 2. By trained procurement personnel;
 - 3. In a fair, equitable, and impartial manner; and
 - 4. To the best advantage of the NAFL.
- B. Blanket Purchase Agreements (BPAs) provide a method of purchasing supplies and services on a recurring basis when the use of the NAF P-card is not practicable. NAF contracting officers negotiate BPAs. AFMAN 64-302, Chapter 10.
- C. Delivery Orders are orders written against an existing contract or agreement. Terms and conditions set forth in the basic contract will apply to deliver orders issued. Competition is not required when issuing a delivery order. AFMAN 64-302, para. 8.9.
- D. NAF Purchase Card (P-Card). The NAF P-Card is the preferred method for acquiring standard commercial items within specified dollar thresholds. AFMAN 64-302, Chapter 9 (see also AFI 34-275, Air Force NAF Government Purchase Card Program).
 - 1. AFNAFPO establishes purchasing thresholds for use of the NAF government purchase card. Further limitations may be set at the installation or MAJCOM level. AFMAN 64-302, para. 9.4.
 - 2. NAF P-Card may be used to purchase supplies, equipment, and non-personal services. Individual transactions may not exceed \$2,500, except purchases for the education and training program and purchases from the Commissary, AAFES, NEX, Prime Vendor, and printing services from DAPS have a single purchase limit of \$25,000. AFMAN 64-302, para. 9.4.1.
 - 3. Warranted contracting officers may use the purchase card as a method of payment on purchase orders/delivery orders up to the limit of their warrant. AFMAN 64-302, para. 9.4.2.
 - 4. AFMAN 64-302, para. 9.4.3, provides that the purchase card shall not be used for the following:
 - a. Personal purchases.

- b. Use as a travel card for official government travel or cash advances.
 - c. Rental or lease of land or buildings.
 - d. Purchase of hazardous/dangerous items, such as munitions, toxin, and firearms. There is an exception for purchasing ammunition and firearms for resale in Rod & Gun Clubs and skeet ranges if authorized by local law.
 - e. Items designated for purchase with APFs.
- E. Purchase Order. AFMAN 64-302, para 8.6.
- 1. A purchase order is a unilateral offer to buy items on the open market at a specified price.
 - 2. Purchase orders are binding when the commercial business accepts the offer either by signing the order or by initiating performance.
- F. Special Contracts and Agreements. AFMAN 64-302, Chapter 11 provides details on the following special contracts/agreements:
- 1. Entertainment Contracts. Para. 11.2.
 - 2. Aircraft Lease Agreements. Para. 11.3.
 - 3. Aero Club Instructor and Mechanic Contracts. Para. 11.4.
 - 4. Individual Service Contracts. Para. 11.5.
 - 5. Nonpersonal Services Contracts. Para. 11.6.
 - 6. Concessionaire Contracts. Para. 11.8.
 - 7. Training and Education Contracts. Para. 11.9.
 - 8. Contracting with Government Employees. Para. 11.10.

VIII. LITIGATION INVOLVING NONAPPROPRIATED FUND CONTRACTS

- A. Protests. AFMAN 64-302, para. 12.5.
- 1. GAO Jurisdiction
 - a. NAFI procurements. Normally the GAO will not exercise jurisdiction regarding protests of NAFI contracts. The

GAO normally lacks jurisdiction over procurements conducted by NAFIs because its authority extends only to “federal agency” acquisitions. See 31 U.S.C. § 3551; 4 C.F.R. § 21.5(g) (GAO bid protest rule implementing its statutory jurisdiction). A NAFI is not a “federal agency.” See DSV GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468. Protests are resolved under agency “appeal” procedures set forth in AFMAN 64-302, para. 12.5.

b. Exceptions:

- (1) Procurements conducted by an APF contracting officer. The GAO has jurisdiction to consider protests involving procurements conducted “by or for a federal agency,” regardless of the source of funds involved. Barbarosa Reiseservice GmbH, B-225641, May 20, 1987, 87-1 CPD ¶ 529. See also Thayer Gate Development Corp., B-242847.2, Dec. 9, 1994 (GAO will assert jurisdiction if it finds the agency involvement so pervasive that the NAFI has become a conduit for the agency). APF activities may also provide “in-kind” support to NAFIs. APF contracting support to NAFIs may subject the action to the Competition in Contracting Act.
- (2) The GAO may consider a protest involving a NAFI if the protestor alleges the agency used a NAFI to avoid competition requirements. Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; cf. LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 (no evidence Exchange was acting as a conduit for Navy or that Navy participation was pervasive); Asiel Enters., Inc., B-406780, B-406836, Aug. 28, 2012, 2012 CPD ¶ 242 (protest challenging Air Force use of NAFI to provide mission essential food service supported with entirely appropriated funds sustained).

2. Court of Federal Claims (COFC) Jurisdiction. The COFC also normally will not exercise jurisdiction over protests involving a NAFI contract. But note that the COFC held in *Southern Foods* that because the NAFI did not meet all four prongs of the *AINS* test (specifically in that the Army NAFI did receive some appropriated funds), the COFC could exercise jurisdiction over the contractor’s

claim. *Southern Foods, Inc. v. United States*, 76 Fed. Cl. 769 (2007).¹

3. Agency Protest Procedures

- a. AFNAFPO makes determinations on protests for NAF contracts executed centrally. The contractor has **10 days** from the date of a decision to appeal to Contract Support, Deputy Assistant Secretary (Contracting). AFMAN 64-302, para. 12.5.
- b. The NAF contracting officer resolves protests filed at base level. The servicing legal office reviews all protests prior to the contracting officer's final decision. Appeals of the contracting officer's decision must be filed **within 10 days** and are forwarded to AFNAFPO. The Director of NAF Purchasing is the decision authority on appeals. AFMAN 64-302, para. 12.5.

B. Claims

1. The contracting officer is responsible for processing contract claims filed against the NAFI. AFMAN 64-302, para. 12.6.
2. Normally, courts and boards will not exercise jurisdiction over NAFI contract disputes. As instrumentalities of the United States, NAFIs are immune from suit. Congress has not waived immunity for NAFIs under the Tucker Act (28 U.S.C. § 1346(a)(2)), the Contract Disputes Act (CDA) (41 U.S.C. § 7102(a)), or the Administrative Procedures Act. See *Swift-Train Co. v. United States*, 443 F.2d 1140 (5th Cir. 1971); *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004);

¹ In *Southern Foods*, the COFC considered a post-award protest filed by Southern Foods arguing that the United States Army Community and Family Support Center's (a NAFI) decision to award a food service contract to United States Foodservice, Inc. was "arbitrary." *Southern Foods* at 770. The protester requested the COFC to set aside the award and to require that the NAFI re-solicit the requirement. While the NAFI argued that the COFC did not have jurisdiction over the protest under the *AINS* test, the COFC found that the NAFI did not meet all four prongs of the *AINS* test and therefore, the court did have jurisdiction in this matter. *Id.* at 775. See also *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (2003) (aff'd at 365 F. 3d. 1333, Fed. Cir. 2004). See *infra* the section in this outline concerning COFC jurisdiction in contract claims for additional discussion of the *AINS* case; *AINS* found that the COFC may not exercise jurisdiction if a NAFI meets the following: (a) it must *not* receive its monies by federal appropriations; (b) its funding must derive "primarily from [the entity's] own activities, services, and product sales"; (c) there "must be a clear expression by Congress that the agency was to be separated from general federal revenues"; and (d) absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity. *Id.*

Commercial Offset Printers, Inc., ASBCA No. 25302, 81-1 BCA ¶ 14,900.

- a. Exception. Express or implied-in-fact contracts entered into by DOD, Coast Guard, and NASA exchange services, which are NAFIs, nevertheless are contracts of the United States for purposes of determining jurisdiction under the Tucker Act and the CDA. 28 U.S.C. § 1491(a)(1).
- b. In *AINS*, COFC held it did not have jurisdiction over a contract dispute with the U.S. Mint because the Mint is a NAFI and, as such, there is no waiver of sovereign immunity. *AINS* at 543. To determine whether a federal entity is a “NAFI” and thus not subject to the CDA (so, federal courts are generally without jurisdiction), the *AINS* court used a four-part test:
 - (1) It must *not* receive its monies by federal appropriations;
 - (2) Its funding must derive “primarily from [the entity’s] own activities, services, and product sales”;
 - (3) There “must be a clear expression by Congress that the agency was to be separated from general federal revenues”; and
 - (4) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity. *AINS, Inc. v. United States*, 56 Fed. Cl. 522 at 533 (2003) (aff’d at 365 F. 3d. 1333, Fed. Cir. 2004)
3. The Armed Services Board of Contract Appeals (ASBCA) has jurisdiction over NAF contract disputes if:
 - a. The contract incorporates a disputes clause that grants such jurisdiction. *SUFI Network Services, Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606.
 - b. The contract contains no disputes clause, but DOD regulations require incorporation of a jurisdiction-granting clause in the NAF contract. *Recreational Enters.*, ASBCA No. 32176, 87-1 BCA ¶ 19,675.
 - c. Note that the Court of Appeals for the Federal Circuit has refused to hear appeals of ASBCA decisions concerning

NAFI contracts. Strand Hunt Constr., Inc. v. West, 111 F.3d 142 (Fed. Cir. 1997)(unpub); McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991); Maitland Bros. v. Widnall, 41 F.3d 1521 (Fed. Cir. 1994)(unpub).

IX. COMMERCIAL SPONSORSHIP

A. Definition

1. Commercial sponsorship is the act of providing assistance, funding, goods, equipment or services to support MWR activities, events or programs, by an individual, company or other entity (sponsor) for a specific limited time period, in return for public recognition or advertising promotions. AFI 34-108, Atch 1.
2. Only Force Support Squadron (FSS) MWR programs may use the commercial sponsorship program. AFI 34-108, para. 1.4.
3. The commercial sponsorship program cannot be used to offset expenses of programs or activities of other Air Force organizations, units, or private organizations. AFI 34-108, para. 1.4.

B. Key Players

1. Headquarters Air Force Director of Services (HQ USAF/A1S): Approves or disapproves any requests for sponsor corporate advertising benefits. Approves sponsorship offers valued at more than \$100,000. AFI 34-108, para. 1.6.1
2. MAJCOM Commanders: Approve or disapprove sponsorships of \$5,000 through \$100,000, and may delegate approval authority for up to \$50,000 to the MAJCOM Vice Commander, Chief of Staff, or Services Director. The MAJCOM Commander may delegate approval authority up to \$25,000 to an installation commander. AFI 34-108, para. 1.6.4.
3. Installation Commanders: Approve or disapprove sponsorship worth \$5,000 or less, or other values as delegated by the MAJCOM commander. The Installation Commander may delegate authority for approval or disapproval and acceptance or sponsorships worth up to \$5,000 to the Mission Support Group Commander or FSS Commander. AFI 34-108, para. 1.6.5.3.
4. FSS Commander: Appoints a commercial sponsorship program manager and reviews all proposals and agreements. AFI 34-108, para. 1.6.6.

5. Commercial Sponsorship Program Manager: Manages the agreements, and fosters program awareness among the installation and civilian sectors. AFI 34-108, para. 1.6.7.
6. Legal Officers. Review all sponsorship agreements at their respective levels. AFI 34-108, para. 1.6.8.
7. Supporting Contracting Officers. AFI 34-108, para. 1.6.10.
 - a. Both the NAF and APF contracting officers review agreements to ensure that offers are not accepted from barred contractors, do not conflict with existing contracts, memoranda of understanding, or other similar agreements.
 - b. The NAF contracting officer reviews and coordinates on sponsorship agreements for technical sufficiency, completeness, and content.

C. Types of Commercial Sponsorships

1. Unsolicited Commercial Sponsorships. AFI 34-108, para. 2.1.
 - a. Must be entirely initiated by prospective sponsors or their representatives.
 - b. FSS activities may generate sponsorship awareness using various means, such as brochures, advertisements, news releases, or information letters; however, they may not provide information about specific needs.
2. Solicited Commercial Sponsorships. AFI 34-108, para. 2.2.
 - a. The Solicited Commercial Sponsorship Program is the only authorized method for soliciting commercial sponsors for MWR events.
 - b. Announcements. All sponsorship solicitations must be announced to the maximum number of potential sponsors.
 - c. Restrictions. The MWR elements of Services may not solicit sponsorship from alcohol companies or military divisions of defense contractors under any circumstances. However, these companies may be allowed to provide unsolicited sponsorship at the discretion of the commanding authority. AFI 34-108, para. 2.2.2.2.

D. General Considerations. . Activities using commercial sponsorship procedures must ensure that:

1. Obligations and entitlements of the sponsor and the MWR program are set forth in a written agreement. See AFI 34-108, Attachment 2.
2. The activity disclaims endorsement of any supplier, product, or service in any public recognition or printed material developed for the sponsorship event. AFI 34-108, paras. 2.3 and 2.10.
3. The commercial sponsor certifies in writing that it shall not charge costs of the sponsorship to any part of the government. AFI 34-108, para. 2.11.
4. Officials responsible for contracting are not directly or indirectly involved with the solicitation of commercial vendors, except for those officials who administer NAF contracts.

X. CONCLUSION