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Response to OSHA's Multi-Employer Notices of Violation

CECC-K (27-40)

15 February 1996

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Response to OSHA's Multi-Employer Notices of Violation
for Federal Agencies

1. On 22 December, I furnished you a copy of the Chief Counsel's opinion reviewing OSHA's extension of its multi-employer policy to the federal sector. I stated that there would be no changes in the Corps' oversight functions of contractors' safety practices until the questions regarding OSHA's authority to implement this change have been addressed and resolved at the DoD level. That review has yet to be completed.
2. Guidance concerning compliance with OSHA inspections of contract job sites will be issued shortly by CECS. That guidance states in part that we will continue to work with OSHA to correct identified safety deficiencies found during inspection of Corps contractors.
3. I have attached a draft letter for your use in the event that your activity receives a notice of violation during the period while this matter is still under review. Please note that although we will respond to OSHA's identification of problems, we will continue to contest any inference that the Corps is a "controlling employer" within the meaning of 29 C.F.R. Part 1960.
4. We will keep you advised of our progress in resolving this issue.
5. POC for this action is Karlissa Krombein, who may be reached at (202) 761-0027.

FOR THE COMMANDER:

Encl

Martin R. Cohen
Assistant Chief Counsel
for Litigation

Enclosure

U.S. Department of Labor
Occupational Safety and Health Administration
[Include name and address of local OSHA
office you are responding to]

SUBJECT: [Subject title should be or reference subject of incoming
correspondence from OSHA]

Dear [Mr.] [Ms.]:

This is to provide you with our response to the Notice[s] of Unsafe or Unhealthful Working Conditions issued to the U.S. Army Corps of Engineers (USACE) as a "controlling employer" as a result of your inspection of our prime contractor [and his subcontractor[s]]. Reference your letter listed by OSHA inspection number xxxxxxxx issued on [date].

We recognize the hazards identified by OSHA during the subject inspection. We have addressed corrective action for each of the OSHA identified hazards with the prime contractor, [Name of prime contractor]. A description of contractor corrective action for each hazard is included as an ATTACHMENT for your review. Your presence onsite during the inspections and subsequent cooperation with Corps Field personnel is appreciated because it has contributed to an increased level of safety awareness and improved safety and health conditions on the project.

Please be advised that our headquarters has determined that OSHA does not have the statutory authority to issue a Notice of Unsafe or Unhealthful Working Conditions to the Corps of Engineers as a "controlling employer". Nevertheless, we will continue to carry out our quality assurance oversight of the terms of the contract. We will ensure that hazardous conditions however or by whomever identified will be brought to the attention of and corrected by the prime contractor as soon as possible. Safety remains integral to our mission accomplishment.

In conclusion, we would like to continue the cooperative relationship that has been established between the Corps and OSHA, and be as helpful and proactive as possible in resolving issues at the local level.

Sincerely,

[Commander Signature Block]

Editor's Note: The following e-mail message was received from OCE subsequent to the above guidance . . .

Subject: From Where I Sit - 2 AUG 96
Author: Robert Griffin HQ at X400
Date: 8/2/96 10:37 PM

1. OSHA's Multi-Employer Worksite Policy

Due to the diligent efforts of our Safety and Health Office, Office of Counsel, and the DoD Working Group on OSHA's Multi-Employer Worksite Policy, OSHA has agreed to relook the regulation they issued that would penalize Federal contract managers for the hazards created by Prime and subcontractors. By way of background, OSHA revised 29 CFR Part 1960, to have their private sector multi-employer policy apply to Federal agencies. In effect, Federal contract managers would be considered "controlling employers", responsible for the safety of their Prime or Subcontractor; i.e., if a Prime or Subcontractor is issued an OSHA citation, the Federal agency would also receive one even if they did not have employees exposed to the hazard. OSHA has agreed they did not evaluate their statutory authority to issue the regulation, did not consider potential tort liability to the Federal government, and did not consider significant contract differences between the private sector and the Federal government. They have formed an internal working group to reassess the need for this policy and in the interim will not recommend their field offices issue notices to Federal contract managers as "controlling employers".

*Send comments to: Webmaster
Revised: 15 July 1996*