

CHAPTER 5

ADVANCE OPTIONING PROCEDURES

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CHAPTER 5

ADVANCE OPTIONING PROCEDURES

SECTION I - GENERAL

1. PURPOSE AND SCOPE

a. This chapter establishes policies and procedures, assigns responsibilities and delegates authority relating to the acquisition of advance options.

b. The judicious use of advance options may be of significant benefit to the Navy's acquisition of real property for follow-on military construction projects. However, there are a few caveats to bear in mind in approaching the procurement of advance options. On the positive side, using advance options seals the land purchase price, stops land development or sale, and aids Navy planning. Alternatively, the funds paid for the option are not recoverable, and the option term may expire before appropriations to purchase the land are received. In this event, the Navy would not receive any benefit from the option, and would lose any possible use of the land as well.

2. REFERENCES

- (a) [10 U.S.C. § 2663](#)
- (b) [SECNAVINST 11011.47A 26 Feb 2006](#)
- (c) [SECDEF Memorandum 17 Nov 2002](#)
- (d) [Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4605](#)

The term "property" used in this chapter refers to "real property," unless otherwise noted.

3. AUTHORITY

a. [Reference \(a\)](#) grants the Secretary of a military department authority to acquire an option in land before or after its acquisition is authorized by law.

b. However, [reference \(a\)](#) authority applies only to land that is "suitable and likely to be needed" for DON military projects. This authority does not apply to options expressly authorized for acquisition elsewhere by law. Further, this authority is limited to the acquisition of an option only. It does not authorize the acquisition of the property or the execution of a purchase contract that would obligate the Navy to buy the property.

c. By [reference \(b\)](#), the Secretary of the Navy delegated the authority to acquire options on real property to the Commander, Naval Facilities Engineering Command (COMNAVFACENGCOM). That authority, in turn, has been re-delegated to the Commanders/Commanding Officers of the FECs by memorandum dated 19 April 2007.

4. MAJOR LAND ACQUISITION MORATORIUM

a. The Secretary of Defense (SECDEF) by a Memorandum dated 17 November 2002, revised, expanded, and superceded the existing land moratorium policy issued by the Deputy Secretary of Defense (DEPSECDEF) in memoranda dated 13 September 1990, and 1 December 1994. Accordingly, no major land acquisition proposals within the Washington, DC area may be made public through (1) a request for proposals; or (2) a notice of intent to perform environmental analysis; or (3) request for legislation or budget line item; or (4) press release; or (5) other official notice without the approval of the SECDEF or the DEPSECDEF. All previously approved or announced major land acquisitions within the Washington, DC area for which binding documents have not been executed, as of 17 November 2002, may not proceed until approved by the SECDEF or the DEPSECDEF, after review by the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (AT&L)). In addition, no major land acquisition proposals outside the Washington, DC area may be made public, in the manner stated above, without the approval of the USD (AT&L).

(1) Additionally, no proposals for relocating into or within the Washington, DC area that exceed \$500,000 in relocation costs may be made public in the manner stated above without approval by the SECDEF or the DEPSECDEF. All previously approved or announced relocations that have not

occurred as of 17 November 2002 may not proceed until approved by the SECDEF or the DEPSECDEF, after review by the USD (AT&L).

(2) The memorandum defines a major land acquisition as the purchase, withdrawal from public domain, lease, or permit from individuals or governmental entities, or any other type of use agreement involving more than 1,000 acres, or land whose estimated purchase price or annual lease price exceeds \$1,000,000. The Washington, DC area is defined generally as the geographic area within 100 miles of the Pentagon.

(3) Exceptions.

(a) Since an option is not an interest in land but simply the first right to enter into a sale and purchase contract, signing it does not constitute an acquisition under [reference \(c\)](#), irrespective of the consideration paid for it or of the prospective purchase price contained in it. However, when the Government desires to exercise the option, it must comply with the restrictions of [reference \(c\)](#) because exercising the option by notice according to its terms, or by executing a separate purchase agreement, does constitute an acquisition of real property.

(b) By memorandum dated 28 Jul 2005, the Under Secretary of Defense stated that the acquisition of a negative, non-possessory easement pursuant to 10 USC §2684a does not constitute a major land acquisition as herein defined. Also, renewal of existing withdrawals, leases, permits or other use agreements other than those at bases being closed or realigned are not subject to the moratorium.

SECTION II - ADVANCE OPTIONING PROCEDURES

5. DETERMINATION BY THE FACILITIES ENGINEERING COMMAND

a. Facilities Engineering Commands (FECs) may

determine that specific parcels of land are "suitable and likely to be needed" and that advance optioning is desirable and in the best interest of the Government. Factors the FEC shall consider and evaluate in making such determination shall include:

(1) The need for that land for the proposed construction in which the siting is firm.

(2) Definite indications of price increases or market escalations, enhancement of values and/or changes in land use or zoning.

(3) The probability of private construction on the land is high.

(4) The likelihood that an option will be obtained at an acceptable price.

6. PROCEDURES BY THE FACILITIES ENGINEERING COMMAND TO OBTAIN AN ADVANCE OPTION UPON APPROVAL AND RECEIPT OF FUNDS

a. Obtain and review, as necessary, required title evidence and land appraisals. This is needed to confirm the identity of the parties in interest with whom negotiations will be conducted and may assist in fixing the option's consideration.

b. Review the need for all land in identical ownership to determine if only part of it is sufficient for project purposes. In these cases, the property may be appraised on this contingency. Also attempt to include in the option a provision giving the United States the right to exercise the option for all or only part of the land covered by it. The option will describe each parcel individually, and will state a separate purchase price for each, inclusive of severance damage, if any. It should also specify an agreed price for the entire ownership.

c. Determine the required term of the option based on the current project status, considering:

(1) Status of any required legislation.

- (2) Any Department of Defense clearances, and
- (3) Submission of any required acquisition reports to the Armed Services Committees of the Congress.

d. Prepare an Option to Purchase Real Property following the example in Appendix A Option to Purchase Real Property. Prepare the option in sufficient quantity for distribution as set forth in this Chapter. Also prepare it for execution in triplicate by all necessary vendors and in a manner that will satisfy local legal and recordation requirements. Instructions for preparation of the option are contained in Appendix C Instructions for Use of Option to Purchase Real Property.

e. Conduct negotiations for the option in accordance with requirements of law, particularly [reference \(d\)](#), and as prescribed by the policies and procedures contained in **P-73, Chapter 8**. As noted below, the consideration to be paid for the option rights may not exceed 12% of the appraised fair market value of the property covered by the option.

7. REVIEW BY FACILITIES ENGINEERING COMMAND

a. Before requesting the issuance of a check to pay for the option, the FEC will carefully review the option to assure that it is correct and adequate, and will also determine that:

(1) When applicable, legislation authorizing acquisition of the land in the option has not been enacted.

(2) The purchase price agreed upon and stated in the option is consistent with the appraised fair market value of the property.

(3) There has been no change in the land requirements of the property to be obtained.

(4) The amount to be paid for the option does not exceed twelve percent (12%) of the appraised fair market value of the property covered by the option; and,

(5) Funds are available for payment of the consideration.

8. DISPOSITION OF OPTIONS

a. Upon receipt of an acceptable option executed by all requisite parties, the FEC will complete the review procedures specified in paragraph 7, and will assign a number to the option. The FEC will then make distribution as follows:

(1) A signed copy to the vendor(s). This delivery will be either by certified mail, return receipt requested, or by personal delivery. If by personal delivery, a signed receipt should be obtained for the FEC files.

(2) The original to FEC files.

(3) A signed copy to the appropriate FEC Finance Office delivered with the request for issuance of the check for payment of the option amount. See **P-73, Chapter 7**, paragraphs 6 and 7 for detailed procedures.

9. CLOSING OPTION TRANSACTIONS

Before delivering the check for the option amount to the owner, the FEC will first assure the validity of the option, and record it in the appropriate land records in accordance with the applicable closing procedures prescribed in **P-73, Chapter 6**. Those procedures, at a minimum, will include an examination of the title records to assure that no adverse change in the title status has occurred since the date of the latest certification. They will also include an inspection of the premises to assure that no adverse claimant is in possession. Also an Attorney's Report on Title and a Certificate of Inspection and Possession will be prepared and inserted in the parcel record file.

10. POST-CLOSING PROCEDURES

a. When the FEC has obtained an advance option under the authority of [reference\(a\)](#), it will forward the complete assembly of data and materials used in the optioning to NAVFACENCOM. NAVFACENCOM will use the data for justifying the land acquisition and for obtaining necessary approvals.

b. Where a Land Planning Report has been previously submitted, forward to NAVFACENGCOM only the additional data used for the optioning.

11. EXERCISE OF OPTION

a. Upon enactment of authorizing legislation, appropriation of funds, and issuance of required approvals, NAVFACENGCOM will notify the FEC that it may exercise the option under its delegated authority when acquisition funds are assigned.

b. To exercise the option, the FEC will prepare a Notice of Exercise of Option to Purchase Real Property. See [Appendix B](#) for a sample notice. The notice will bear the same RP number assigned to the option being exercised. The FEC will distribute it in the same manner, except that it will send the original to the vendor and retain a signed copy.

APPENDIX A

OPTION TO PURCHASE REAL PROPERTY

PROJECT _____
TRACT NO. _____
CONTRACT NO. _____

VENDOR _____

In consideration of the sum of \$_____ and other valuable considerations, paid by The United States of America to the undersigned Vendor in hand, the receipt and sufficiency of which are hereby acknowledged (the "purchase price"), the Vendor, who represents that he is the owner of the land described below, hereby, for himself and his heirs, personal representatives, and assigns (itself and its successors and assigns), gives and grants unto The United States of America or its assigns ("the United States") the exclusive right and option to elect on or before _____ to purchase at and for the price of \$_____, in accordance with the terms and conditions set forth below, that parcel of land, with any buildings and improvements and all rights, hereditaments, easements, and appurtenances (collectively, the "Property"), located in

(District) (Lot) (Township)
County of _____,
State of _____,

bounded and described as follows:

The Vendor shall convey to the United States a valid, indefeasible fee simple title to the Property, subject only to the following rights outstanding in third parties, namely:

and the following rights and interests to be reserved by the Vendor, namely:

The terms and conditions of this option are as follows:

(1) The purchase price is payable as soon as the United States has exercised this option and has had a reasonable time within which to obtain and examine the evidence of title to the Property and to obtain the necessary approval of title; provided, that the Vendor can execute and deliver to the United States a good and sufficient general warranty deed conveying the Property to the United States of America in fee simple, free from all liens and encumbrances, except those approved in advance by the United States. The Vendor shall quitclaim to the United States all right, title, or interest that the Vendor may have in the banks, beds, and waters of any streams opposite to or fronting upon the Property, and in any alleys, roads, streets, ways, strips, gores, or railroad rights-of-way abutting or adjoining the Property, and in any means of appurtenant ingress and egress appurtenant. The conveyance, however, will be made subject only to outstanding rights in third parties and reservations by the Vendor that may be set forth above; provided, however, that conveyance by states, municipal corporations, fiduciaries, and persons acting solely in a representative capacity need not contain general warranty covenants if otherwise acceptable and satisfactory to the United States.

(2) It is the intention of the Vendor, and he hereby agrees, that this option may be exercised by the United States through any duly authorized representative, by delivering, mailing, or telegraphing notice thereof to the Vendor at the address stated below, on or before the date set forth below.

(3) It is understood that the United States will defray the expenses incident to the preparation of the deed to it and the abstract or certificate of title; provided, however, that the Vendor will deliver to the representatives of the United States any abstracts or certificates of title available or in his possession.

(4) The Vendor agrees that all taxes, assessments, and encumbrances that are a lien against the Property at the time of the conveyance to the United States shall be

satisfied of record by the Vendor at or before the transfer of title, and if the Vendor fails to do so, the United States may pay any taxes, assessments, and encumbrances that are a lien against the Property; that the amount of those payments shall be deducted from the purchase price of the Property; that at the request of the United States by its authorized representative and without prior payment or tender of the purchase price, he will execute and deliver the required general warranty deed; that the Vendor will pay documentary revenue stamp taxes and obtain and record other evidence of title that may be required by the United States; and that the Government will pay the fee for recordation of the deed to the United States.

(5) The Vendor agrees that it will assume the risk of loss or damage to the Property by fire or acts of God until the title to the Property and deed to the United States have been accepted by it through its duly authorized representative, or until the right of occupancy and use of the Property, as stated below, has been exercised by the United States; and in the event that such loss or damage occurs, the United States may, without liability, refuse to accept conveyance of title, or it may elect to accept conveyance to title to the Property, in which case there shall be an equitable adjustment of the purchase price.

(6) The Vendor agrees that the United States may, at its election and notwithstanding the prior exercise of this option, acquire title to all or any part of the Property or any interest in it by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States in the prosecution of those proceedings, and also agrees that the stated consideration shall be the full amount of the award of just compensation inclusive of interest for the taking of the Property; that any and all awards of just compensation that may be made in the proceeding to any defendant shall be payable and deductible from that amount; and that the consideration shall also constitute full satisfaction of all claims of the Vendor for the payment of the right of occupancy and use stated in Paragraph (7).

(7) As additional consideration for the payment of the purchase price, the Vendor hereby grants to the United States the right of immediate occupancy and use of the Property for any purpose whatsoever from and after the

exercise by the United States of this option until the Property has been conveyed to the United States by the Vendor, and upon demand the Vendor will immediately vacate the Property and deliver possession to the United States.

(8) It is agreed that the spouse, if any, of the Vendor, by signing below, agrees to join in any deed to the United States and to execute any instrument deemed necessary to convey to the United States any separate or community estate or interest in the Land to relinquish and release any of his or her dower, curtesy, homestead, or other rights or interest.

(9) The description of the Land is subject to any modifications that may be necessary to conform to survey (if any) made by the agents of the United States.

(10) The Vendor represents and it is a condition of exercise of this option, that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to or share any part of this option, or to any benefits that may arise from it, but this provision shall not be construed to extend to any contract if made with a corporation for its general benefit.

(11) Wherever the context requires, the singular number shall be read as plural, and the masculine gender as feminine or neuter.

(12) It is agreed that, if the United States shall fail to exercise this option on or before the date set forth above, by close of business unless a more specific time is specified, the amount paid to the Vendor for this option shall be forfeited to the Vendor.

(13) All terms and conditions regarding this option are expressly contained in this agreement, and the Vendor agrees that no representative or agent of the United States has made any representation or promise, oral or written, regarding this option not expressly contained in this agreement.

(14) All notices and correspondence required under the terms of this OPTION AGREEMENT from the Government to the Vendor shall be served or mailed as follows:

(a) If to the vendor, at the following address:

(Name)

(Address)

with a copy to:

(Name)

(Address)

(b) If to the bank, at the following address:

(Name)

(Address)

with a copy to:

(Name)

(Address)

SIGNED, SEALED AND DELIVERED as of the _____ day of _____, 20____.

WITNESSES:

Vendor (SEAL)

Spouse of Vendor (SEAL)

Vendor (SEAL)

Spouse of Vendor (SEAL)

Vendor (SEAL)

Spouse of Vendor (SEAL)

(Space for acknowledgment, in the form in general use in the jurisdiction in which the land is located, to permit recordation)

APPENDIX B

NOTICE OF EXERCISE OF OPTION TO PURCHASE REAL PROPERTY

PROJECT _____

TRACT NO. _____

CONTRACT NO. _____

_____ (Date)

TO: _____

(Name)

(Address)

In accordance with the terms of an Option to Purchase Real Property executed as of the _____ day of _____, 20____, which options bears the Project Name, Tract Number, and Contract Number set forth above, notice is hereby given that the United States of America hereby exercises and accepts the option.

Contracting Officer for the
United States of America

APPENDIX C

Instructions for Use of Option to Purchase Real Property
(APPENDIX A)

(1) Insert amount to be paid for the option privilege. In accordance with [10 U.S.C. §2663](#), consideration to be paid shall not exceed twelve per centum (12%) of the appraised value of the land.

(2) Since this document will normally be used to option real property not yet authorized for acquisition by law, the date to be inserted in this blank should be far enough in advance to permit the insertion of a land acquisition line item in the next available budget, enactment of legislation, apportionment of funds, clearance with the Department of Defense and the committees on Armed Services of the Congress, issuance of a Real Estate Directive, and allotment of funds to the contracting officer.

(3) The purchase price of the base land or option to be inserted in the "Option to Purchase" will be the price agreed upon during negotiations with the landowner, and the amounts paid for option privileges shall not be deducted therefrom. Negotiations for this "Option to Purchase" will be conducted in accordance with established procedure for negotiating a "Contract to Purchase."

