

CEMP-CR

Regulation
No. 405-1-19

29 May 2015

Real Estate
ACQUISITION BY CONDEMNATION PROCEEDINGS

1. Purpose. Engineer Regulation 405-1-12, Chapter 5, Acquisition, 5 Sept 78, was rescinded by Engineer Regulation 405-1-11, 28 Nov 2014. This publication is a rewrite/revision of the rescinded Chapter 5 of Engineer Regulation 405-1-12. This regulation describes USACE procedures for the acquisition of real property and interests in real property by condemnation for USACE Civil Works and military projects as well as for other agencies. The U.S. Army Corps of Engineers may deviate from any policy in this regulation as necessary unless required by law or another binding regulation.

2. Applicability. This Regulation applies to all Divisions and Districts having a real estate mission and real estate responsibilities.

3. Distribution Statement. This regulation is approved for public release; distribution is unlimited.

4. References.

- a. 10 U.S.C. Section 2662, Real property transactions: reports to congressional committees
- b. 10 U.S.C. Section 2663, Land acquisition authorities
- c. 10 U.S.C. Section 2664, Limitations on real property acquisition
- d. 10 U.S.C. Section 2696, Real property: transfer between armed forces and screening requirements for other Federal use
- e. 42 U.S.C. Section 4601 (Pub. L. No. 91-646), Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970
- f. 49 CFR 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs
- g. Department of Justice Title Standards, 2001
- h. Department of Defense Instruction 4165.71, January 6, 2005
- i. AR 405-10, Acquisition of Real Property and Interests Therein
- j. ER 405-1-11, Acquisition

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k. ER 405-1-16, Relocation Assistance

l. ER 405-3-10, Military Planning

FOR THE COMMANDER:



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CHAPTER 19

Acquisition By Condemnation Proceedings

19-1. General. This regulation describes USACE procedures for the acquisition of real property and interests in real property by condemnation for USACE Civil Works and military projects as well as for other agencies. The U.S. Army Corps of Engineers may deviate from any policy in this regulation as necessary unless required by law or another binding regulation.

19-2. Necessity for Filing Condemnation Proceedings. The filing of condemnation proceedings may be necessary under certain circumstances including, but not limited to:

- a. Title defects that are either too numerous or too complex to resolve through curative action;
- b. Inability to agree on price;
- c. Inability to locate the proper parties;
- d. A party or parties to an Offer to Sell (“Offer”), a military Option to Acquire (“Option”) or other agreement refuses to convey the property to the United States or refuses to comply with the terms and conditions of the Offer, Option or agreement;
- e. Owner(s) requests condemnation proceedings;
- f. Fiduciaries or states, cities, counties or other political entities lack legal authority to convey real property;
- g. Real property is owned by a Member of, or a Delegate to Congress or a Resident Commissioner, 18 U.S.C. §§ 431 and 432, as amended;
- h. The acquisition of real property from an owner that would create an appearance of impropriety or a potential conflict of interest such as acquiring land from a judge, a non-Federal sponsor or a USACE employee; and
- i. Deed restrictions and/or reservations or Conditions, Covenants and Restrictions (CCRs) running with the land that materially interfere with the intended use of the property and cannot be removed except through condemnation proceedings.

19-3. Types of Condemnation Actions.

- a. There are two types of condemnation actions: acquisition by Declaration of Taking and acquisition by the filing of a Complaint Only. Most condemnations are by Declaration of Taking. Rule 71.1 of the Federal Rules of Civil Procedure governs proceedings to acquire real property or interests in real property by condemnation. The United States Attorney for the area

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where the land is located prepares the complaint in condemnation and related documents and files the case. Title to the land passes to the United States when the Declaration of Taking is filed and the estimate of just compensation is deposited into the Registry of the Court. After the condemnation case is filed, a notice of lis pendens is filed in the local land records to give constructive notice to the general public. The form of the notice depends on the law of the state where the land is located, although it is typically the Declaration of Taking. The title evidence must be updated to the date of the filing of the notice of lis pendens in order to confirm that there are no additional parties that have, or may have, an interest in the land. The date of the filing in the land records is the effective date of the final title policy.

b. Condemnation of a cemetery requires a Complaint Only assembly. District Counsel will coordinate with the Office of the Chief Counsel on the filing of a Complaint Only for any other purpose.

19-4. Condemnation for Others.

a. Condemnation on Behalf of Non-Federal Sponsors for Civil Works Projects.

(1) USACE may acquire real property or interests in real property on behalf of a non-Federal sponsor in accordance with the requirements and conditions contained in the regulation for Real Estate Planning and Acquisition Responsibilities for Civil Works Projects. As noted in that regulation, any District that agrees to acquire real property or interests in real property on behalf of a non-Federal sponsor should provide Headquarters Real Estate (CEMP-CR) and the Office of the Chief Counsel (CECC-R) with prompt written notice of such a decision and the projected number of anticipated condemnations so that appropriate resources can be made available at both Headquarters and the Department of Justice (DOJ).

(2) No real property or interests in real property will be acquired on behalf of a non-Federal sponsor until the non-Federal sponsor and the Government have entered into a Project Partnership Agreement (PPA) for implementation of the project and a Memorandum of Agreement (MOA), or other writing, if appropriate, that fully addresses the terms and conditions for acquisition of real property or interests in real property on behalf of the non-Federal sponsor. For additional information regarding the necessity, and approval authority for the MOA, see guidance provided in the regulation for Real Estate Planning and Acquisition Responsibilities for Civil Works Projects.

(3) The non-Federal sponsor must pay such legal and administrative and other costs and expenses as may be required that are incident to filing and prosecuting the proceedings. District Chiefs of Real Estate, in consultation with District Counsel, will determine the amount of funds needed to assure continued availability of sufficient funds for processing and trying each case. Such funds will be made available by the non-Federal sponsor prior to the commencement of work by the Government.

(4) The non-Federal sponsor must furnish such sums of money to the District Chief of Real Estate as are necessary to pay any award that may be made in any such condemnation

proceedings, including any awards made pursuant to the Equal Access to Justice Act and any interest on the deficiency or the amount of the award that exceeds the deposit.

(5) In addition, the non-Federal sponsor must pay such legal, administrative and other costs and expenses of the DOJ, if required, that are incident to filing and prosecuting the proceedings.

(6) The project authority is cited as the authority of the United States to acquire title in its name and to reconvey title to the non-Federal sponsor following conclusion of the condemnation proceeding.

b. Air Force. Once the proposed acquisition is approved by the appropriate official in the Air Force, the condemnation is handled in the same manner as that for Army except that the Attorney General Letter and the Declaration of Taking are sent to the appropriate Air Force official for execution.

c. Other DOD Agencies. Once the proposed acquisition is approved by the appropriate DOD official, the condemnation is handled in the same manner as that for Army except that the Attorney General Letter and the Declaration of Taking are sent to the appropriate DOD official for execution.

d. Other Federal Agencies outside DOD. Once the proposed acquisition is approved by the appropriate official in the other Federal agency, the condemnation is prepared and handled in the same manner as that for Army, except the Attorney General Letter and the Declaration of Taking are sent to the other Federal agency for execution by the appropriate agency official.

19-5. Initial Processing of Condemnation Actions at the District. Once a District Chief of Real Estate recommends the filing of condemnation proceedings, the District shall prepare the condemnation assembly and the District's request for condemnation to the Director of Real Estate for action. The Condemnation Assembly must be reviewed and approved by the District Chief of Real Estate and the District Counsel before being sent through Division to HQ and shall include:

- (1) Transmittal memorandum to HQUSACE
- (2) Appraisal
- (3) Negotiator's Report
- (4) Title evidence
- (5) Legal description,
- (6) Maps

- (7) Declaration of Taking
- (8) Attorney's opinion of title (if required)
- (9) Any other documents

Title evidence must be prepared in accordance with the Department of Justice Title Standards and implementing policy guidance found in ER 405-1-11, Acquisition. Preliminary title evidence must not be more than six months old, and if it is a title commitment or binder, it must be valid for a period of no less than two years, although no expiration date is preferable. The legal description in the title evidence must be the same as that provided in other documents and must be checked against the Plat map provided.

19-6. Negotiator's Report. The Negotiator's Report should be current and indicate that contact has been made with the landowner or his/her representative no more than 90 days prior to the submittal of the assembly, and reflect that actual, practical and realistic negotiations were conducted in accordance with the procedures set forth in ER 405-1-11, Acquisition. The Negotiator's Report must contain all of the following information:

- a. A brief physical description of the property, including its present use and highest and best use claimed by both the Government and the landowner.
- b. A statement that the landowner was furnished a summary of the basis for the Government's valuation prior to negotiations as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act). Appraisal reports are not released unless an exception has been granted by HQUSACE Real Estate and the Office of the Chief Counsel.
- c. A statement of each offer made by the negotiator and any counteroffer from the landowner. The number of discussions and date and place of each discussion must be included in the report.
- d. If further negotiations would not be productive, a statement that the owner was told that condemnation is necessary, not in the sense of a threat, but in an effort to secure an impartial determination by the court of the differences of opinion as to value, and in order to make funds available to the landowner.
- e. The circumstances and unsuccessful efforts made to contact the property owner should be documented.
- f. A statement that the owner has access to any remaining property and it is an economic unit, or if it is an uneconomic remainder, that the Government has offered to acquire the remainder.
- g. A statement that no separate representations were made during negotiations in an attempt to acquire the real property or interests in real property.

- h. Copies of any Offer or Option.
- i. A statement as to why condemnation is recommended.

19-7. Transmittal Memo to HQUSACE for a Declaration. The transmittal memo to HQUSACE (CEMP-CR) with a Declaration of Taking assembly includes the following information.

a. The title and date of the Real Estate decision document requiring the acquisition of real property or interests in real property and copies of the appropriate sections of the authorization and appropriation acts which authorize and provide funds for the acquisition.

b. A description of the real property being acquired, and the purpose for which the real property is being acquired.

c. The property owner(s) names, aliases, and list of interested parties. Names of individuals and entities need to be consistent throughout all documentation, including but not limited to the title evidence, appraisal(s), Negotiator's Report(s), and the "just compensation" letter. If necessary identify other names that the parties are also known as (*aka(s)*). This will help in the preparation and review of the legal documents. If the owner(s) was represented by another person in the negotiations, provide a copy of the written item in the file indicating the owner's permission and the relationship with the owner.

d. A statement that funds are committed for the condemnation, including the reference to the line item in the pertinent appropriations act.

e. The reason for the condemnation proceedings such as, but not limited to, defective title or failed negotiations.

f. The estate to be acquired. If a non-standard estate is being condemned, a statement regarding the need for the non-standard estate and/or the date of approval and approving official of the non-standard estate. The estate to be acquired must be consistent throughout the documentation, including offers, appraisal(s), negotiator's report, and title report(s).

g. Any interests that will not be acquired such as minerals, easements for roads, rights-of-way and public utilities, and a statement that any excepted interests or any rights reserved will not interfere with the purposes for which the real property is being acquired.

h. If any of the real property or interests in real property to be acquired are held under voluntary lease or leasehold condemnation, include the annual rental, the period of time the leasehold interest has been held, and whether it is a voluntary lease or condemnation leasehold.

i. If the United States has previously acquired an easement interest (clearance easement, safety area easement, etc.) in any of the real property to be acquired, provide the approval

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document, the date the interest was acquired, and the acreage, cost and method of acquisition (including lease number, tract number, caption with civil action number as applicable). A negative report is required.

j. A summary of the appraisals and appraisal reviews of the tract(s) included in the assembly. Include a copy of every appraisal and review. All appraisals must have been performed in accordance with the Appeal Regulation, Appraisal and the 2000 Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book). Any complex appraisal actions should be discussed with the Division Chief Appraisal and the Chief Appraisal, HQUSACE, and if appropriate, further consultation with the Office of the Chief Counsel. If more than one approved appraisal exists for any tract, the deposit will generally be in the amount of the highest approved appraisal unless there has been a significant delay from the initial appraisal and the latest appraisal indicates that a lower purchase offer is warranted. Assure that the estate appraised and the description of the property matches the title evidence and the estate identified in the transmittal memo.

k. A statement on whether the value of growing crops is included in the amount recommended for deposit. If the crops have been harvested, or it is known or highly probable that the crops will be harvested by the landowner or tenant, no deposit will be made for the crops. The approved appraised value of crops will be included in the amounts to be deposited in all other cases.

l. A statement that all owners or purported owners have been notified in writing of the reason that condemnation will be recommended. The notice shall include the name and address of the United States Attorney who will advise and assist the owners or purported owners in the condemnation process, including withdrawal of the funds deposited in the registry of the court.

m. A statement concerning the date when possession is required for each tract included in the assembly. Also include when the 90-day notice was given to the lawful occupant of the land or business or farm operation, as required by 42 U.S.C. § 4651(5) of the Uniform Act, or an explanation why no notice was required.

n. The salvage value of any buildings or structures to be reserved to the owner or tenant.

o. The expected local resistance to the proposed acquisition and any efforts that have been made to respond to the local situation.

p. For those assemblies involving the first case in a particular project, information as to:

(1) When the initial land acquisition for the project took place; and

(2) The total acreage for the project and the estimated cost. If available, a copy of the project brochure and other information provided to landowners.

q. A statement of compliance with environmental laws such as the National Environmental Policy Act (NEPA) the National Historic Preservation Act (NHPA), the

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and other applicable laws. If the relevant NEPA document has not yet been signed, provide an anticipated date of filing.

r. Copies of any Congressional inquiries and responses regarding the acquisition.

s. Any conditions on the acquisition imposed by applicable statutes and a certification that such conditions have been satisfied and/or the acquisition will not exceed applicable limitations. If there are no limitations on acquisition, include a statement to that effect.

Examples of conditions include:

(1) the amount of acreage that can be acquired. Include a statement that this acquisition by condemnation will bring the acreage acquired to a total of _____ acres;

(2) the type of estate that can be acquired;

(3) monetary limits. Include a statement that this acquisition by condemnation should not exceed the monetary limits prescribed by law; and

(4) the geographic boundaries within which the property can be acquired.

t. A statement that any statutory reporting requirements to Congress have been met (e.g., 10 U.S.C. §§ 2662, 2663 for military property).

u. Information as to any unusual features of the acquisition, including comments as to the title.

19-8. Complaint Only Assembly.

a. A Complaint Only condemnation is used in very rare instances and only after coordination with Headquarters Real Estate (CEMP-CR) and the Office of the Chief Counsel (CECC-R). If a Complaint Only condemnation is approved, that assembly will include a transmittal memo and four Exhibits "A" through "D" (tract description, segment or project map, list of purported owners and addresses, and the estate, respectively). DOJ prepares the actual Complaint.

b. A Memo of Transmittal for a Complaint Only assembly will include as much information as is available and will note whether an appraisal has been prepared.

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19-9. Division Review and Action on Condemnations. Condemnation Assemblies will be staffed through the Division Office of Real Estate. The Division Real Estate and the Division Office of Counsel will review and make any required changes to the condemnation assembly, and will clarify and resolve all issues with the District before forwarding the condemnation assembly to the Director of Real Estate.

19-10. Headquarters Review and Action on Condemnations.

a. Headquarters Real Estate (CEMP-CR) reviews the condemnation assembly and assures that any additional required changes are made, prepares the Transmittal Memo, and sends the condemnation assembly and Transmittal Memo to the Office of the Chief Counsel (CECC-R). CECC-R will review the Transmittal memo, final condemnation package and prepare the final Declaration of Taking and Attorney General letter. Whenever possible, Headquarters Real Estate will provide CECC-R with the final condemnation assembly so that it may begin review of that assembly and prepare the final Declaration of Taking and Attorney General letter while the Headquarters Real Estate is preparing the Transmittal memo.

b. Once the Transmittal Memo, condemnation assembly, Declaration of Taking, and Attorney General Letter are complete, the package will be forwarded to the Director of Real Estate for appropriate action. If the Director signs the transmittal memo, Headquarters Real Estate will send those documents to the Deputy Assistant Secretary of the Army for Installations, Housing and Partnerships (DASA (IH&P)) or other appropriate office for review and consideration.

e. If USACE request for condemnation is approved by the DASA (IH&P) or other appropriate official, Headquarters Real Estate shall send the approved package to CECC-R who will provide the request to the DOJ for review and filing.

19-11. Continued Action on Condemnations. The District Office of Counsel will closely coordinate with District Real Estate on all aspects of condemnations (filing, order of possession, amendments, revestments, trial preparation, litigation support, settlements, court awards, appeals, etc.) and provide District support to the litigation. District Counsel will provide status reports as appropriate. After a Declaration of Taking has been filed, but before a Judgment has been obtained, it is possible to add additional real property to the Declaration of Taking or give back to the landowner part or all of the real property interests condemned. District Real Estate must immediately notify District Office of Counsel of any engineering changes that impact the real property required for the project so that District Office of Counsel can determine if it is in the best interests of the Government to either amend a Declaration of Taking to add property or to revest to the landowner some or all of the real property condemned. Such amendments are coordinated with the DOJ. Once a condemnation is filed, DOJ handles all communications with the landowner, including settlement discussions.

19-12. Leasehold Condemnation Requirements.

a. A leasehold condemnation is a temporary taking for a limited period of time. For military projects, the period of the condemned leasehold is limited to the period of availability of funds to be used, unless USACE is proceeding under GSA delegated authority in which case it may condemn a leasehold for multiple years. These instructions apply primarily to military projects; however, a leasehold may be condemned for Civil Works projects. For more information on inleases in general, see ER 405-1-15, Acquisition by Leasing.

b. The interest acquired in real property by a military leasehold condemnation proceeding terminates after a one-year term, unless notice to extend the term is filed and funds representing the Government's estimate of just compensation are deposited in the United States District Court. In all leasehold cases, the District Counsel, in coordination with the District Chief of Real Estate, will ascertain from the entity using the real property (using entity) whether the real property interests included in such condemnation proceedings will be required for an additional term. This should be done sufficiently in advance of the end of the current term to allow adequate time for the action necessary to extend the term.

c. If the using entity determines it requires an extension of the term of a leasehold, the extension of the term in a leasehold condemnation case must be accomplished through the Department of Justice which, upon request of the Office of the Chief Counsel in coordination with the Director of Real Estate, will issue instructions to its field representatives to prepare a notice of election to extend the term and file it in the United States District Court. The Director of Real Estate should be advised of the requirements of the using entity for extension of leasehold condemnation cases five months prior to the time that filing a notice of extension with the court is due.

d. Funds for the deposit for the initial leasehold condemnation or for an extension of the leasehold term must be committed prior to District Real Estate sending its request to condemn or request to extend the leasehold term to the Division. e. If the need for all or part of the real property included in a leasehold condemnation proceeding should terminate prior to the expiration of the term condemned in the case of fixed term estates, or prior to the expiration of the right to renew by filing notice of extension, the District Chief of Real Estate, upon notification by the using entity that the real property is no longer needed, shall promptly comply with the applicable requirements of ER 405-1-90, Disposal Programs, relative to screening real property excess to components of the Department of Defense and other Federal agencies.

e. When the term condemned has expired and all interests have been disposed of by final judgment, the District Chief of Real Estate will submit a report to Headquarters Real Estate and the Office of the Chief Counsel

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