

Contract Litigation – Not Quite Gone, and Shouldn't be Forgotten!

Litigation between the Government and industry in the current defense acquisition environment is comparatively uncommon. The increased use of performance-based contracting, Alternative Dispute Resolution techniques and Partnering, and a general decrease in the industrial base have resulted in the reduction of litigation. The number of Government contract disputes between the Army and industry which have culminated in law suits has drastically decreased over the last ten years. This very positive development has a down-side, however.

When a dispute does end up in litigation, the Government personnel involved may feel that they are venturing into what seems like uncharted waters and the unfamiliarity of the process can be daunting. However, the Command has been a party to litigation on many occasions before with a great deal of success. The attorneys in the CECOM Legal Office are experienced subject matter experts in the area of contract litigation and are always ready to ensure that the Army's interests are protected. A short outline of what to expect follows:

The process starts when the Contracting Officer issues a final decision on a contractual matter in dispute in accordance with FAR 33.211. The contractor then has two options as to where to challenge the decision. It may appeal to the Armed Services Board of Contract Appeals (ASBCA) within 90 days, or file a complaint in the United States Court of Federal Claims (Claims Court) within 12 months. In cases before the Claims Court, CECOM counsel works with the U.S. Department of Justice (DOJ). In the ASBCA forum, CECOM counsel works with the Judge Advocate General's Office, Contract Appeals Division (CAD).

The litigation is commenced by the contractor with the filing of either a "Complaint" (if the case is at the Claims Court) or a "Notice of Appeal" followed by a Complaint (if the action is before the ASBCA). The Complaint is the document that outlines, paragraph by paragraph, the facts as the contractor would like the Judge to believe them to be and concludes with a request for remedy.

At this point, either CAD or DOJ have no idea what the case is actually about, beyond the papers filed by the contractor. It is up to the CECOM Team involved in the action (which usually includes the Contracting Officer and Specialist, the Attorney, the responsible technical personnel and/or the Government's auditors) to educate CAD or DOJ counsel, and that is accomplished largely through the compilation and distribution of documents. If the Complaint is filed with the ASBCA, two files are prepared and sent to CAD: the "Rule 4 File" (so called because it comes from Rule 4 of the ASBCA Rules) containing all documents pertinent to the issue in litigation, and the Trial Attorney's Litigation File (TALF), containing witness information, privileged documents, a legal memorandum and the Contracting Officer's analysis. The TALF contains any documentation relevant to the case which we do *not* want shared with the contractor. Copies of the Rule 4 are sent to the ASBCA, the contractor and CAD, while the

TALF is sent only to CAD. *The TALF must never be sent to either the ASBCA or the contractor!* If the case is filed in the Claims Court, the same information is sent to DOJ in the form of a Litigation Report in accordance with AR 27-40.

As can be imagined, these cases can involve thousands of documents and document management can be a burden. Still, it is essential that the preparation of the Rule 4 File and TALF or Litigation Report be completed correctly and rapidly if the Army's interests are to be protected. The Contracting Officer took a stand on the dispute in issuing his or her final decision and this step is key to making that decision withstand intense scrutiny. The CECOM Legal Office will ensure that this critical material is prepared correctly and in accordance with all requirements of the ASBCA or Claims Court.

Besides the Rule 4, TALF and/or Litigation Report mentioned above, the Government must prepare and file an "Answer" to the contractor's Complaint. This is prepared in coordination with either CAD or DOJ and states the Army's side of the story in response to the one outlined in the contractor's Complaint. (Both the Complaint and Answer are referred to as "Pleadings".) It is a paragraph by paragraph reply to the allegations made by the contractor and contains a detailed statement of how the Government sees the facts at issue. It is filed with the ASBCA or Claims Court and is provided to (or "served on") the contractor and its attorney.

Once the Pleadings are filed and served, the case moves into the "Discovery" phase. Discovery is the process by which each side gets to learn about the evidence supporting their adversary's position, thereby determining the strengths and weaknesses of each side of the case. Contrary to what is depicted on television, litigation, if pursued correctly, should not entail too many surprises. Each side may serve extensive questions on the other seeking to obtain copies of evidence, names of witnesses, and the details of their case, referred to as "Interrogatories". Witnesses for a party can be required to answer questions posed by the opposing counsel under oath and on the record transcribed as a "Deposition". The Discovery process is usually the longest portion of any litigation and can take years to complete. The idea behind Discovery is that, once both parties fully understand the relative merits of their respective cases, it is more likely that the dispute will settle without having to go to trial. In the event that the matter does proceed to trial, the case will go more smoothly because each side has a good idea of the evidence supporting their opponent's case.

The CECOM Team is heavily involved in the Discovery process, and can expect to spend a great deal of time working with the Legal Office in preparing or answering Interrogatories, and participating as witnesses or technical experts in Depositions.

The case will eventually culminate (assuming it is not settled beforehand) in a Trial. If the action is before the Claims Court, the Trial will be held in Washington, D.C. If pending at the ASBCA, it could be held at some local site, or at the ASBCA Headquarters in Falls Church, VA. Unlike the Claims Court, the ASBCA will often go on the road to a location near either the Agency or the contractor. CECOM personnel will almost certainly be called upon as witnesses to give

testimony in the case, and the Legal Office will work closely with CAD or DOJ to see that witnesses in support of the Government's position are fully prepared, know what to expect, and can tell their piece of the Army's side of the story effectively.

Litigation is demanding, time-consuming and expensive. Although some form of Alternative Dispute Resolution should be considered by the CECOM Team in all cases, when a case unavoidably goes in the direction of formal litigation, the Legal Office has the expertise and experience to defend the Contracting Officer's decision all the way through the process.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Cruz Febres-Ferrer, (732) 532-9807; DSN 992-9807.

KATHRYN T. H. SZYMANSKI
Chief Counsel