

Capturing Discretion to Thwart Possible Court Challenge  
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Many, many decisions made by contracting personnel during the solicitation process involve the exercise of discretion based on advice received from supporting personnel. When those decisions are challenged at either the agency, GAO or court, one generally thinks that the challenge will fail; for we are given lots of leeway in exercising our discretion.

I'd like to suggest, though, that we not be lulled into thinking that when we exercise our discretion that it will always be judged to be reasonable. Why won't it be judged to be reasonable? Because the contemporaneous documentation in the contract file does not always adequately capture the thought process behind the exercise of discretion. This makes it easy for opposing counsel to argue that discretion was exercised in an arbitrary or capricious manner. This note concerns withstanding challenges to our discretionary decisions filed at a district court or the Court of Federal Claims by following an arbitrary, practical rule.

If the contemporaneous documentation in the record isn't enough to make the government's case, then we will request permission from the court that the record (i.e. contract file or GAO Administrative Report) be supplemented. If we ask for supplementation then we have opened the door to discovery by the opposing side. Of course, the opposing side is going to want to have access to the same government personnel that are supplementing the record for the government. The opposing side will want to depose them. This happened in *Cubic Applications, Inc. v. U.S.*, 37 Fed. Cl. 345 (1997). Yech, yech, yech. I see the ball of string unraveling.<sup>1</sup>

Here is an example of the exercise of discretion involving denial of a waiver for first article test and the contemporaneous documentation problem about which I am concerned. The quality specialist provided a memo to the contracting officer stating:

Generally we do not recommend PCO waive the FAT requirement, unless the contractor has been in continual or recent production or has successfully passed FAT on the item in approximately a year or so. Since X does not meet either of these criteria, I do not recommend that you waive FAT requirement.

For this particular item, X received FAT approval three years ago. There were no changes to the technical data nor reports of quality deficiencies in the items provided by X. Of course, if FAT had been waived, X would have been the awardee.<sup>2</sup>

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<sup>1</sup> I am not worried about GAO cases because we do supplement the record without unraveling the string; depositions are not taken in GAO cases. I also do not believe that GAO hearings necessarily cause unraveling because, again, the opposing side has not been able to depose our witnesses.

<sup>2</sup> Has the government ever lost a protest involving denial of a waiver for FAT? Yes, the government has. *See Airline Instruments, Inc.*, B-223742, November 17, 1986, 86-2 CPD 564.

The advice given by the quality specialist to the contracting officer appears to be unbending and automatic. Nevertheless, I suspect that there are valid reasons behind the quality specialist's advice to the contracting officer. The thoughtful aspect of the quality specialist's advice might have shown up in the next couple of sentences.

We might think that the record could be easily supplemented by getting an affidavit from the quality specialist or contracting officer to show the reasonableness of the decision. But what if we open the door to depositions by us and the opposing side of the quality specialist or contracting officer. As I said before, yech, yech, yech.

The current view of the Court of Federal Claims on what constitutes the administrative record and discovery is that

the parties must be able to suggest the need for other evidence, and possibly limited discovery, aimed at determining, for example, whether other materials were considered, or whether the record provides an adequate explanation to the protester or the court as to the basis for the agency's action. It follows that discovery as well as the breadth of the court's review has to be tailored in each case.<sup>3</sup>

How can we limit the need to supplement the record? My first rule is to require the main paragraph<sup>4</sup> in the document conveying advice to the contracting officer to be at least four sentences long. The intent of this simplistic, arbitrary rule is to trigger the real reason behind the advice given to the contracting officer. The contracting officer should receive more than a summary decision as advice. She has to knowingly exercise her discretion.

My hope is that by applying an arbitrary rule--four sentence explanations for advice given--that we will eliminate or at least minimize the need to supplement the record should we wind up in the Court of Federal Claims. This will also help at the GAO because we could file more summary judgment-like motions and try to get the cases dismissed.

I haven't come up with a second practical rule yet that might minimize the need to supplement the record. Try the first practical rule. It may help improve the tons of advice that the contracting officer receives and must act upon.

Feedback is welcomed. I'll pass all comments on to the protest pod here at HQ, AMC.

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<sup>3</sup> *GraphicData LLC v. U.S.*, COFC, No. 97-256C, May 9, 1997, citing *Cubic Applications, Inc. v. U.S.*, 37 Fed. Cl. 345 (1997).

<sup>4</sup> I define the main paragraph as the one with the bottom line recommendation to the contracting officer; the one that an opposing party would question.