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RESOLVING CONTRACT DISPUTES

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OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
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RESOLVING CONTRACT DISPUTES

by
Arthur J. Mandler

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OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
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EXECUTIVE SUMMARY

A. BACKGROUND. In the majority of contract claims litigation cases, the Office of the Chief Trial Attorney (CTA) assumes the role as the Army's advocate. That office is concerned over the increasing percentage of claims cases that result in negotiated settlements once they enter the litigation stage. This has led them to question whether attempts to settle contractor claims at the contracting officer level are being adequately pursued.

B. STUDY OBJECTIVE. The main objective of this study was to review the contract claim handling techniques and procedures at selected Army purchasing offices in order to determine the efficacy of the system and, if applicable, provide suggestions that may lead to a lower percentage of claims reaching the litigation stage.

C. STUDY APPROACH. The approach included interviewing contracting officers and legal advisors having recent claims handling experience at four of the Army's major purchasing offices within the Army Materiel Command (AMC). Additionally, literature was examined and interviews were conducted with personnel from the Office of the Chief Trial Attorney.

D. CONCLUSIONS AND RECOMMENDATIONS. Generally, the system seems to be working properly, however individual and command philosophies relative to claim settlement can and do impact the settling of claims at the contracting officer level. The greatest influencing factor, other than the facts surrounding the claim itself, is the advice given by the legal advisor. In a de facto manner, the AMC legal advisors (at least at the sites surveyed) often seem to have the final word in whether an attempt will be made to secure a settlement prior to litigation. Variations in the claims processes at the sites examined show more evidence of philosophical differences than clearly identifiable problems. However, the CTA's office may take some steps to influence philosophy. The common thread of these steps centers around increased communication between the CTA's office and contracting legal advisors.

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CHAPTER I

INTRODUCTION

A. BACKGROUND.

Federal Acquisition Regulation (FAR) 33.204 states that Government policy is to try to resolve all contractual issues by mutual agreement at the contracting officer level [11]. That FAR guidance goes on to suggest that before issuing a decision on a claim that may result in litigation, "the contracting officer should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute..." When these efforts fail to resolve the differences, a final decision is rendered by the contracting officer. This decision may be appealed by the contractor. Those appeals become the concern of the Office of the Chief Trial Attorney (CTA).

The CTA's office represents the Army before the Armed Services Board of Contract Appeals (ASBCA) when contractual disputes result in claims that are not resolved at the contracting officer level. That office is concerned about increases in the number of appeals being made as well as the increasing frequency with which those appeals are being disposed of prior to an ASBCA hearing. Currently, that frequency has increased from approximately 60% to 70%. The CTA believes that negotiated settlements account for the bulk of those cases disposed of without the need for a trial.

The high frequency of settlements (many facilitated by the CTA's office) after the appeal of a final decision has led the CTA's office to suspect that FAR guidance is not being fully implemented and, consequently, their resources, and others, are being expended on disputes that could have been successfully settled before the onset of litigation. The CTA's office also

believes that some contracting officers may do a better job than others in resolving disputes, and the techniques of those doing a better job could be identified and made available for broader usage. The Army Procurement Research Office (APRO) was tasked to examine this area.

B. SCOPE.

This study attempted to focus on the techniques and procedures used by Army contracting personnel to resolve disputes with contractors before they evolved to a stage that necessitated an ASBCA hearing. The main study efforts were centered on AMC since that command's appeals account for a high percentage of the litigation caseload. Limited contact was made with the U.S. Army Forces Command (FORSCOM) and the U.S. Army Training and Doctrine Command (TRADOC). Because of observed differences (to be discussed later) between AMC and the other two commands, this study was oriented toward AMC. FORSCOM and TRADOC are included only when specifically noted. This study did not consider disputes handled by the Army Corps of Engineers since their cases are tried by their own attorneys.

While significant input from the Army legal community was necessary, the study was oriented toward the activities of the contracting personnel. In that regard, issues of only legalistic interest were purposely avoided.

Because of the difficulty in specifically defining when a dispute actually begins, the study focused on those points in time that fall between the filing of a formal claim and the rendering of a judicial decision. Major emphasis was placed on resolution attempts just before and immediately following a contracting officer's final decision.

C. STUDY OBJECTIVES.

The study had four main objectives. The first two were concerned with the reality of the current dispute handling process. The third was to develop quantitative guide posts that could aid in settlement cost-benefit-risk analyses. The fourth was to suggest improvements, if deemed necessary. Specifically, those objectives were to:

1. Determine the efforts expended and the techniques being employed to try to resolve contractual disputes at the contracting officer level.
2. Determine if there are "institutional inhibitors" (or other factors) that influence dispute resolution at the contracting officer level.
3. Determine the average cost to the Government of litigating a contract dispute.
4. Suggest improvements, if applicable, in dispute handling procedures that may lead to a lower percentage of disputes reaching the litigation stage.

D. STUDY APPROACH.

The study approach examined dispute resolution from a broad perspective that considered business judgement, contracting policies and practices, and the concerns of the Army legal community, including the concerns of the CTA's office. Because of the limited literature available on this subject, on-site interviews were relied upon extensively. Input was provided primarily by Army contracting officers (and their legal advisors in the local command's legal office) who have had recent experience with claims. These claims ranged from ones that had been settled early in the process to ones on which the ASBCA had been required to render a decision. Also included were many claims that were currently active.

After some initial data gathering, the study sponsor and the project officer met and discussed which of the AMC Major Subordinate Commands (MSC)

would be examined. Initial plans were made to sample three AMC MSC's, however the sponsor requested an additional examination of a fourth AMC MSC. Extensive on-site interviews were conducted at the U.S. Army Armament, Munitions and Chemical Command (AMCCOM), Rock Island, IL; the U.S. Army Missile Command (MICOM), Redstone Arsenal, AL; the U.S. Army Communications and Electronics Command (CECOM), Fort Monmouth, NJ; and the U.S. Army Tank and Automotive Command (TACOM), Warren, MI. Because the number of potential interviewees was low at TRADOC and FORSCOM purchasing offices (given their lower number of disputes), only telephone interviews were conducted. Those interviews were primarily with contracting officers.

Interviews were also conducted with personnel in the Office of the CTA to get a broader picture of the perceptions presented by their management and to obtain an understanding of the thinking processes of those trial attorneys.

An independent effort to identify the average cost of litigation to the Government was also initiated. This effort was based on data furnished by the Office of the CTA. For reasons to be discussed later, the effort was unsuccessful.

The procedural techniques listed in the respective regulations of the Air Force, the Navy, the Defense Logistics Agency (DLA), and selected civilian agencies were reviewed. Also reviewed was the dispute resolution course material presented as part of the required training for Army contracting personnel. Specifically, these were courses in contract administration and contract law offered by the Air Force Institute of Technology (AFIT) and contract management offered by the Army Logistics Management College (ALMC).

At the conclusion of data collection and after an initial analysis, a meeting with representatives of the Office of the CTA was held. That meeting resulted in suggestions that may serve to improve the process. Those suggestions are included in the final chapter of this report.

E. ORGANIZATION.

This report is organized into five chapters. Chapter I is the introduction and presents the background and objectives of this report. Chapter II explains the dispute and appeal process, elaborates on the problems perceived by the sponsor, and details the methods used to examine the perceived problems. Chapter III discusses the results of interviews conducted at AMCCOM, MICOM, CECOM, and TACOM. It also contains observations and draws insights from the interview data. Chapter IV presents conclusions and provides some suggestions the sponsor can pursue.

CHAPTER II

THE CLAIMS PROCESS AND SPONSOR PERCEIVED PROBLEMS

A. INTRODUCTION.

The purpose of this chapter is threefold. First, it will explain the basics of contractual disputes and appeals. Second, it will discuss possible problems in this process as perceived by the Office of the CTA. Finally, it explains the study methods used to examine the validity of the perceived problems.

B. BASIC EXPLANATION OF DISPUTES AND APPEALS.

To perform their missions, Government agencies must purchase certain goods and services from commercial firms. Examples include radar equipment for the Federal Aviation Administration, hospital items for the Veterans Administration, and aircraft, tanks and ships for the Department of Defense (DOD). To make these purchases, the Government agency with the need normally enters into a contract with a firm that will provide the goods or services. The resulting contract should clearly explain the responsibilities of both the Government (buyer) and the commercial firm (contractor, seller).

While these responsibilities are often spelled out in great detail, the basic obligations are simple. The contractor has promised to provide a specific item(s) of a specific quality at a specific time and place. In exchange for the contractor's promise, the Government has agreed to pay a specific amount of money. If one party does not believe the other party is honoring the agreement, a dispute can occur.

It is the responsibility of the contracting officer to attempt to settle these disputes as they arise. However, the contracting officer is an agent of the Government and cannot agree to a settlement unless it is judged to be in

the best interest of the Government. Sometimes there are situations in which the disagreements between the contractor and the Government cannot be readily resolved. When that happens, the contractor presents the Government with a formal claim. If the dispute continues to remain unresolved, the contracting officer is required to write a formal "final decision" denying the claim.

For the purposes of clarity, it is important to define the terms dispute, claim and appeal as used throughout this report. A dispute is a disagreement between the parties to a contract. A claim is a written request (from the contractor) for some form of contractual relief or consideration, often monetary. A claim is a formalization of the dispute. An appeal is a formal request to the ASBCA to review the merits of the claim and the final decision made by the contracting officer. A claim or an appeal continues to be considered a dispute, but a dispute can only become a claim or appeal if the actions to make it so have been taken. More detail on claims and appeals appears later in this chapter.

The contractor is free to appeal the contracting officer's final decision. Depending on certain variables, this decision is normally appealed to the Board of Contract Appeals of the Government agency involved. For contract disputes concerning the Army, these appeals are made to the ASBCA. It is at this point that the Office of the CTA assumes responsibility for most appeals as advocate for the Government's interest.

Once a dispute is appealed to the ASBCA, it is normally resolved in either one of two ways. One way is a negotiated settlement while awaiting a hearing (or even after the hearing, while awaiting a decision) and the other way is for the the ASBCA to direct a specific resolution of the dispute. The following section provides a more detailed overview of the appeals process.

C. PROCEDURAL STEPS IN APPEALS PROCESS.

1. Introduction.

Depending on the exact nature of a claim (termination for default, defective pricing, unauthorized direction, defective specifications, etc.), some of the claim handling procedures may slightly differ. For the purposes of a generalized discussion of the procedural steps involved in a "typical" dispute resolution process, it is necessary to construct a fictitious example. The following will serve that purpose.

2. Example.

Assume that a contractor requests a payment of a disputed \$100,000. He alleges that the Government refused to accept items manufactured in accordance with Government furnished specifications. The Government rejected those items stating they failed to meet the acceptance criteria. Because the items are not considered acceptable, the Government has refused to pay the contractor a previously agreed price of \$95,000. The additional \$5,000 of the contractor's request (total \$100,000) represents unanticipated storage cost of the items. The contractor believes that he has complied with the contract specifications. He reasons that if the acceptance criteria is not met, it is because the Government's specifications are defective.

At this point, the disagreement between the contracting officer and the contractor has been clearly established. The contractor has manufactured the items but they have not been accepted and payment has not been made.

The following section takes this fictitious example and uses it as a basis for an explanation of the claims process. An article entitled "Contract Claims and the Disputes Process" written by LTC Alan W. Beck, USAF and published in the January-February 1983 issue of the Program Manager, served as a model [1].

a. Contractor Submits Claim.

In this example, the contractor believes that continuing informal discussions with the contracting officer will not lead to a resolution. He submits a formal claim (detailing the position he held during earlier discussions) and in it requests a decision of the contracting officer within the time specified (60 days) in the Disputes clause of the contract. In accordance with that clause (FAR 52.233-1), the claim is submitted in writing, and since it is over \$50,000, the contractor must include a certification that it is made in good faith, that the supporting data are accurate and complete and the amount requested is what the contractor believes the Government owes him.

According to the disputes clause, the contracting officer must either decide the claim within 60 days or notify the contractor when the decision will be made. If the claim were \$50,000 or less, the contracting officer would be required to reach a decision within 60 days.

b. Claim is Evaluated.

During the earlier "informal" disagreement period, before the submission of the formal claim, the contractor's contention that Government specifications were faulty had not been fully substantiated. Thus, the contracting officer was not able to thoroughly examine the entire situation. With the filing of the formal claim, the contractor submitted complete supporting data. Now, the contracting officer has the level of detail needed for a thorough evaluation. Additional information needed to develop and support a final contracting officer decision must be gathered. Engineers and other responsible technical personnel are contacted and asked to respond to the detailed allegations of the contractor. These personnel could include those who developed the specification, draftsmen who made the drawings,

quality personnel who developed the acceptance criteria, and any others whose knowledge could help. Perhaps a contract price analyst would assist in evaluating the storage costs portion of the claim.

If the nature of the claim was other than the example, audits might be necessary. Audits would normally require more than 60 days for completion and evaluation of the results. In those cases, the contracting officer would estimate the length of time necessary to collect and analyze the information necessary to reach a decision. The contractor must then be notified when the Government expects to reach a decision.

An important and often pivotal member of the contracting officer's team is the legal advisor. There normally is a legal basis upon which the merit of a claim must be decided.

In the claim being used as an example, all involved Government personnel (engineers, draftsmen, quality personnel) agree that the specifications were not defective. The legal advisor's opinion is that the claim has no merit and the contractor is not entitled to any monetary consideration. The rationale is that the specifications are adequate and the item's failure to meet the acceptance criteria was caused by the contractor's failure to adhere to the Government's specifications.

c. Contracting Officer's Final Decision.

FAR 33.211 states that when a claim cannot be settled by mutual agreement, the contracting officer shall review the pertinent facts, get assistance from legal and other advisors, coordinate with other offices as appropriate, and prepare a written decision. That decision must include a description of the claim or dispute, reference to the pertinent contract

terms, a statement of the factual area of agreement and disagreement, and a statement of the contracting officer's decision with supporting rationale. Also, the final decision must notify the contractor of his right of appeal.

In the example used, the final decision was to deny the claim of the contractor in its entirety since the advice of the all Government team members led the contracting officer to determine the claim to be without merit.

d. Contractor Appeals Final Decision.

If the contractor is not satisfied with the contracting officer's final decision he notifies the ASBCA that he intends to appeal. At that time the case is docketed. This is the point when the litigation process formally begins and the stage when the CTA's office becomes responsible for advocating the best interest of the government. The contracting officer (or members of his team) must prepare a detailed "Rule 4" file (see appendix A, DOD FAR Supplement (DFARS)) containing the final decision, all relevant correspondence, statements, and other relevant information [6].

Within 30 days of the appeal being docketed, the contractor must provide the Board with a simple, concise and direct statement of its claim(s) which is called the "complaint." The Board forwards the complaint to the CTA and, from receipt of the complaint, the CTA has 30 days to provide the Board with an answer to the claim addressing the statements made by the contractor.

The discovery process then begins where either or both parties collect information. This information can be depositions, documents, or answers to written questions. This process can become lengthy and expensive as the attorney's seek out more and more information. During this time, or any other time during the entire appeal process, it remains possible for the parties to agree to settle the claim without a formal hearing.

In the example used, the discovery process is assumed to provide information to the Government that there are some "minor" problems with the specifications and that the acceptance criteria may be more stringent than necessary to assure the items perform adequately. Since this information tends to weaken the Government's position, the possibility of arriving at a negotiated settlement with the contractor is now considered and explored. The contractor, seeing his position strengthened, is assumed to decline to settle for less than the full amount of his claim, plus interest.

e. ASBCA Hearing and Decision.

Some time after the original claim is submitted, perhaps measured in years, the case is heard by the ASBCA. During this passage of time, continuing negotiations between the parties to the dispute may result in many claims being resolved and withdrawn before a final hearing. In the situation used in the previous example, it is likely a settlement could be reached prior to the hearing.

The hearings, while considered administrative, are much like court hearings. However, sometimes the cases are decided based on record submittals without a formal hearing being held. Whether hearings are conducted or records are reviewed, the Board will issue a written decision. The decisions can be appealed to the Court of Appeals for the Federal Circuit.

D. PERCEIVED PROBLEMS.

As explained in the Introduction in Chapter I, the Office of the CTA is responsible for representing the Army before the ASBCA. There are 28 attorneys in that office. Only the Deputy Chief Trial Attorney is a civilian; the Chief Trial Attorney and the remaining 26 trial attorneys are all active duty military officers.

Over the course of the past few years, that office has seen an increase in the number of appeals to the ASBCA. However, an increasing percentage of those appeals are disposed of through methods other than a formal ASBCA hearing (or record submittal) and decision. For example, some are disposed of through various types of legal motions, while others are settled through some form of negotiated agreement at various stages in the appeals process.

The central problem perceived by the Office of the CTA is best understood by asking the following question. "If more than 70% of an increasing number of appealed cases can be disposed of by trial attorneys without a trial, why couldn't some of these cases have been disposed of (i.e., through negotiated settlements by the commands involved) at an earlier point in time, before entering the appeals process?"

Information based on the experiences of individual trial attorneys lends validity to the need to answer this question. Some of their experiences reveal a biased evaluation of contractors' claims by contracting officers (or other agency personnel), sometimes described as the "we will teach them a lesson" philosophy. Other experiences indicate a lack of thoroughness by the contracting officer (or his team members) when evaluating the initial claims. Restated, the perceived problem is that, in the aggregate (for an unquantified number of appeals), Army acquisition personnel are not giving contractor claims reasonable consideration.

E. STUDY METHODOLOGY.

At the inception of the study, the problem stated by the Office of the CTA was perceptual in nature and data was not available to document its existence. Therefore, it was somewhat difficult to devise an approach that could determine if the perceptions of the CTA's office could be verified (and thus precipitate corrective action).

An ideal approach to assess the problem would be to develop criteria that was capable of measuring the number of claims that should have been settled by the contracting officer, but were not. By identifying those claims and computing the ratio between them and all appeals, it would be possible to know the extent of the perceived problem. However, the decision to settle or not to settle is judgemental, based upon the facts and the law at the time the judgement was reached. Any methodology that would require the review of previous judgements (to reveal the extent to which contracting officers should have settled earlier), would require the laborious efforts of a team of attorneys and contracting officers.

An alternative approach would be to look at the procedural environment in which claims and disputes are handled. Understanding the thinking process of the Government principals, their interactions, and the procedures they use during dispute resolution might reveal the adequacy of, the differences in, and the success of the efforts being expended to resolve disputes at the contracting officer level. This was the approach selected.

A set of structured questions was developed. These were used primarily as a tool for conducting "informal conversations" with the interviewees. Differing questions were used for contracting personnel and for the MSC legal advisors that are normally involved in claims. While the questions underwent refinement each time another MSC was visited, the broad areas covered remained the same. Those areas in the contracting interviews included:

1. Independence and Authority of Contracting Officer
2. Efforts to Settle
3. Legal Support
4. Impediments to Settlements

5. Training

6. General

The broad areas covered in the legal interviews included:

1. Influences on Contracting Officers
2. Thinking Differences Between MSC Legal Advisors and Trial Attorneys
3. Degree of Involvement in the On-Going Process
4. Philosophy (Personal and Office)

On-site interviews were conducted at the four AMC MSC's identified in Chapter I. There were approximately 12 contracting interviewees at each of the MSC's. All had some personal experience with claims. About 40% had experience with claims that were settled before it became necessary to issue a final decision. About 60% had experience with claims on which the final decision was appealed to the ASBCA. Some had experience in both categories. Additionally, there were some general discussions held with supervisory and management personnel. It must be recognized that many contract disputes are settled without a claim ever being filed. The absence of centralized record keeping for those disputes did not permit identification, and the later interviewing, of that population of contracting personnel who had resolved disputes without formal claims ever being filed.

There were approximately five legal advisor interviewees at each AMC MSC. This included the chief of the group of attorneys with responsibility for claims. Most of these attorneys have had extensive experience dealing with claims. The value of individual interviews were dependent upon the interviewees' experience, knowledge, ideas and openness.

CHAPTER III

FINDINGS AND OBSERVATIONS

A. INTRODUCTION.

The "findings" segment of this chapter presents information that is fairly objective in that it reports what the project officer saw or was told without colorations. It concerns itself only with the current methods by which claims are handled. The "observations" segment of this chapter is more subjective in nature since it attempts to provide some of the project officer's insights. It discusses the different "personalities" and claim philosophies of the commands and addresses training, the cost of litigation and the dispute regulations of other services and selected civilian agencies.

B. FINDINGS.

1. AMC MSC Claim Processing.

Once a potential (or actual) contractual problem develops, the responsible contracting person (contract specialist or contracting officer), consults with their legal advisor. An example of such a problem is a contractor notifying the contracting officer that a Government engineer's interpretation of a drawing has proved to be incorrect, after the contractor manufactured the part. Another example is a contractor's contention that a Government engineer's specification interpretation is outside the scope of the contract. These examples are the result of a contractually based disagreement; one that cannot be rectified without some degree of investigation and analysis.

The legal advisor may be a member of either a procurement law or an adversary proceedings group. Depending on the internal structure of the command legal office, an attorney responsible for dealing with contract claims

is assigned to the matter. For the purposes of consistent, yet anonymous, identification, the AMC MSCs visited will be referred to as MSC #1, #2, #3, and #4. At MSCs #2, #3, and #4, the claims attorney is other than the attorney that had pre-claim responsibility for that particular contract. At those MSC's, a claim is handled by someone theoretically specialized in adversary matters. At MSC #1, the procurement law attorney with pre-claim responsibility for the contract continues as the responsible legal advisor for the claim. There are arguments for and against the different methods of providing legal advisors for claims. One argument for "claim only" contract responsibility cites the value of specialization. An argument for "total contract and claim" responsibility addresses the value of the legal advisor's total knowledge of the situation. However, regardless of the method employed, a legal advisor is always responsible and available to provide guidance to the contracting officer/contract specialist.

Once a claim is filed, or earlier if the matter of contention has been ongoing, an examination of the situation is conducted. Engineering or other personnel that may possess relevant knowledge are queried. If considered useful, contract audits and/or pricing reports are requested. But, usually the first step is performed by the legal advisor. This involves an examination of all relevant facts and law upon which to base an opinion as to whether the contractor's claim, or any part of it, has merit.

Those claims considered to be without merit are consistently denied. Those claims with merit undergo further analysis where an attempt is made to quantify their value (if the claim is for financial relief). At MSCs #1, #2, and #3, claims with some degree of merit are considered "settlement candidates." Often, legal advice and judgement play a large role in determining the value of settlements offered by the Government, because

business judgement (as opposed to purely legal opinion) is often part of the "legal advice" given to the responsible contracting person. Many attorney respondents stated that (in claim situations) the line between legal opinion and business judgement is sometimes unclear. The relationship between the two types of advice is often so close that it is difficult to segregate them into their respective categories. A legal risk analysis, described below, is an example of the difficulty encountered when trying to segregate legal opinion and business judgement.

MSCs #1, #2, and #3 normally conduct a claim risk analysis assessment. This assessment takes into account the win/loss probabilities of different claim issues and assigns a dollar value to a settlement, if one is deemed appropriate. This value, while not always acknowledging a clear entitlement due the contractor, is believed to serve the best overall interests of the Government. In addition to the win/loss probabilities, consideration may be given to the economic and noneconomic cost of litigation. These costs may include such factors as the direct cost of litigation (trial attorney costs, travel, depositions), work disruption, personnel utilization, and contractor-Government business relationships.

At MSC #4, a contractor's claim is normally not a "settlement candidate" unless there is clear and convincing evidence that the contractor is due a specific entitlement. If the contractor were to accept that clear and specific entitlement (as perceived by MSC #4), the claim would be settled; if not, the contractor would either drop the claim or file an appeal with the ASBCA. On-site interviews indicated that MSC #4 did not conduct a claim risk analysis similar to those conducted by the other commands.

The quantification of the value of the claim serves as the basis for holding settlement negotiations with the contractor. Almost all the

contracting respondents expressed that claim settlement negotiations are (conceptually) conducted using the same general standards and procedures that would apply for any negotiation.

If a contractor's claim cannot be settled by mutual agreement at the contracting officer level, a contracting officer's final decision will be prepared. This document is the Government's point by point response to the allegations made by the contractor's claim. While this decision must be the independent decision of the contracting officer, the actual document is normally a joint product of the legal advisor and the contracting officer. In some instances, the final decision may be almost totally drafted by the legal office, in other instances it may be almost totally drafted by the contracting office. But in all cases, the final decision must bear the signature of the contracting officer.

MSC #1 highly valued those drafts actually written by the contracting officer since they could sometimes add information to the perspective held by the legal advisor. That MSC also saw a value in providing the contractor a "draft" of the final decision so the contractor could clearly understand the exact position the Government was taking if a settlement could not be reached. The Federal Publications Government Contracts Claims text believes this can be a valuable approach. That publication states,

"Some contracting officers utilize a technique of showing the contractor their final decision before it is actually issued and requesting comments in appropriate circumstances. That is often a good idea. It allows the Government to gain the benefit of the contractor's view as to what is right or wrong with the decision. It also, on some occasions, prompts settlements." [13]

If claim settlement negotiations are conducted and the Government's final settlement offer is not accepted, any resulting final decision would normally not acknowledge offers made solely for settlement purposes. Only those allegations of the contractor that are supported by clear and convincing evidence of a specific entitlement would be recognized for payment in the final decision.

The preceding section has presented a view of the claims process at the AMC MSC's surveyed. There are slight variations but the essentialities of the process have been accurately described.

2. AMC MSC Involvement After Final Decision Appeal.

If a contractor appeals a final decision to the ASBCA, the AMC MSC's continue to have varying degrees of involvement with the claim. The Rule 4 File and the Trial Attorney's Litigation File (TALF) must be prepared within 30 days. The preparation of these files is normally a joint task of the legal advisor and the contracting office. However, depending on the MSC, one or the other of those offices takes the lead. Queries of persons who had constructed these files led the project officer to believe 80-160 man-hours of effort would be an average range for the tasks to retrieve, review, collate, copy and construct these files. Less complex or more complex claims would fall outside this estimated average. Included in this estimate are the efforts to gather and draw up some of the documents that could include witness statements, the contracting officer's analysis of the appeal, and legal memorandums.

All the MSC's performed the above processes. But at this point their involvement begins to vary. Normally the trial attorney coordinates with the MSC legal advisor when contemplating any action on a case. While variable by individual command and attorney, continued involvement runs from an insistence of the legal advisor to stay totally involved in every aspect of the case, to

an attitude of "I will be available if the trial attorney asks for my help." For the most part, it appeared that the continued active involvement of the legal advisor (assisting the trial attorney in discovery, drafting interrogatories, taking depositions) was often a function of the desire of the trial attorney. However, there are exceptions where the MSC legal advisors appear to be aggressive in their insistence to remain fully involved as a team member. The study officer could not garner a clear picture of the contracting officer's continued involvement. It appeared that at this point the contracting officer was more interested in attending to what are considered his primary duties (awarding contracts) than to closely following the status of a claim. His preference was to leave the matter to the legal advisor and trial attorney, except when called upon.

Aside from responding to the needs of the attorneys, the contracting officer's role was often a nonparticipatory one, except if settlements were being seriously considered. In those cases the contracting officer was a principal since he continues to maintain overall responsibility for any settlement of the claim. However, again there are exceptions where the contracting officer continues to try to actively settle the claim even while the case proceeds through the ASBCA process. It is the belief of the project officer that these exceptions are with cases that hold some reasonable promise of a mutually agreeable settlement.

C. OBSERVATIONS.

1. Command "Personalities".

As the study progressed, it became clear that each command had its own "personality" when it came to dealing with claims. Differing philosophical approaches were evident. While the internal structure of the commands

(contracting, legal, etc.) and the general claim handling procedures followed were similar, there were differences in these philosophies. They can be described as being more flexible or less flexible.

For the purposes of discussion, a more flexible philosophy is characterized by a greater willingness to negotiate some type of settlement where there may be some merit to a contractor's claim. A more flexible philosophy does not mean "giving away money to settle a claim." Holders of this philosophy will still deny claims that have no merit.

A less flexible philosophy is characterized by an MSC's need for the contractor to present clear and convincing evidence of an entitlement in order for a settlement to be negotiated. The examined commands were not totally at one extreme or another but they did lean more toward one philosophy than another. The Office of the CTA holds to the more flexible philosophy.

Either approach has its own set of supporting and critical arguments. For example the more flexible approach, while holding down litigation, is open to criticism as being too generous with taxpayers' money. The less flexible approach, while being less generous (in the short term) can be criticized as short sighted. It can be argued that Government resources are unnecessarily utilized on claims that could have been settled. With current laws that allow successful contractors interest payment on claims and sometimes attorney fees, the cost of a total Government loss in an ASBCA hearing would normally exceed the cost of any settlement that could have been reached earlier.

The text provided with the Federal Publications course in "Government Contract Claims" states that, "Claims techniques and their utilization are at best a highly subjective area." [13] Taking an overview of all Government agencies, not just the Army as this study does, the text goes on to state that:

"Every agency has its own personality, its own system for resolving claims, its own procedures and unique personnel who work in the claims area. There are some agencies that historically have been more willing to resolve claims informally at a fair price to each side. There are other agencies who rightly or wrongly have decided that almost no claims will be settled, and all will be passed on to the board of contractor appeals...Arguments can be made as to which approach is proper." [13]

Donald C. Holmes and Joseph D. West are the authors of the Government Contract Claims text quoted from above. The text is used for a course on claims sponsored by Federal Publications, Inc. Holmes and West are partners in the law firm of Jones, Day, Reavis & Pogue, and both have extensive experience in claims. In part of the text they present some very valuable thoughts and suggestions on the evaluation, processing, and negotiating of contractor claims. The text also provides information on final decisions.

2. Trial Attorney Ideal Versus Reality.

Under ideal conditions, the Government trial attorneys would like to settle cases that do not have some reasonable chance of being successful and invest litigation resources in the trials of those cases that are most likely to be winners. From a logical perspective, this approach appears valid. It places resources where they are thought to be most effective and does not place resources where they are likely to be ineffective.

To use this approach, an informal screening process categorizes the cases. Likely winners (do not settle) and likely losers (do settle) are relatively easy to categorize and deal with. Cases that do not lean clearly toward being a likely winner or loser are more difficult to deal with and must normally undergo extensive analysis, particularly if they are complex and have multiple, interrelated issues.

It appears that the trial attorneys would like to see the MSC legal advisors influence the contracting officers to settle cases that the Government was likely to lose and convince contractors to withdraw their claims in cases where the Government was likely to win. In short, they would like the legal advisors to do a screening process. Effectively, it appears that this is the case (but to varying degrees) at MSCs #2, #3, and #4. MSC #1 held to a less flexible settlement philosophy, and accordingly, did not screen in the same manner as the other commands. This screening process is a technique to exclude from litigation (normally by some form of settlement between the Government and the contractor), those appeals that should not require an ASBCA decision for resolution.

3. Other Observations.

a. Training.

At the outset of this study, contracting officer training was a consideration deemed worthy of examination, but as the study progressed it became clear that this training issue was not very relevant for a number of reasons. First, the claims process is more highly controlled and influenced by the legal advisors than the contracting officers. Second, almost all the contracting personnel interviewed believed that an ability to deal adequately with claim situations is one that is developed through experience in all aspects of contracting, i.e., contract administration, negotiation, etc., and they did not believe that any specific training would be of much assistance. Third, since it cannot be predicted who would receive a claim at the time training candidates were selected, the respondents wondered who would be trained. Additionally, they questioned the value of specific training if the

student did not encounter a claim situation for a long time (if ever) after the training. Would the training still be relevant? Would the student retain much of the knowledge gained?

An examination of the material and texts for selected courses presented by AFIT and ALMC shows that the instructional material is not intended to provide guidance on handling dispute resolution. The ALMC material for their basic and advanced contracting courses was more focused on the overview of the process. It discussed the history and the laws relevant to the dispute process and the legal jurisdiction of courts and boards. The process itself was discussed in very general terms.[7] The AFIT Government Contract Law Course concerns itself with legal concepts, not claim processing.[4] The text for the AFIT Contract Administration Course, aside from the general discussion, included a relevant reprint of a 1982 article from the Federal Contracts Report entitled "Planning for the Negotiated Settlement of Claims." [5] Based on the responses of the interviewees concerning the value of claim resolution training for contracting personnel, recommending changes to the material presented in the above courses is unlikely to have any measurable impact.

The training given to legal personnel was not examined, however, if there could be a meaningful benefit from structured training in the claims area, it should be given to those who exercise the most influence in the process prior to the involvement of the trial attorneys. Those are the legal advisors to the contracting officers.

b. Costs of Litigation.

An independent effort was initiated to calculate the average cost of litigation of claim cases that were not settled and required an ASBCA judgment. The purpose of this effort was to develop an average cost figure

for a claim that could be used as one of the considerations that are weighed when calculating the reasonable settlement value of a claim. Unfortunately, an analysis of available data from the Office of the CTA did not result in the development of the desired cost figures.

If there is a repetitive need for cost data of this nature, the CTA should consider developing a data base and keeping statistics in areas such as the number of hours used per appeal, direct costs associated with each appeal, and the specific reasons for resolution, i.e., negotiated settlement, dismissed on motion, etc.

In addition to knowing all the facts and law of a particular claim case and conducting a risk analysis, a knowledge of the possible/probable Government litigation cost would be another factor to consider when exercising business judgement. Consider the following hypothetical example:

A contractor's claim for \$12,000 is assumed to have a 50% chance of winning. Defending that claim would cost the Government \$14,000 in litigation costs. In this simplistic example, ignoring all other considerations, a Government win would cost \$2,000 more than if there were a settlement for the full amount of the contractor's claim.

Government Litigation Costs	\$14,000
Government Loss	0
Government Cost if Contractor Loses	\$14,000
Government Cost if Claim Paid	\$12,000
Additional Cost if Litigated and Government Wins	\$2,000

A total Government loss would cost at least \$26,000 (excluding accumulated interest and possible contractor attorney costs).

Government Litigation Cost (win or lose)	\$14,000
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Contractor Claim	\$12,000
Total Government Cost if Contractor Wins	\$26,000+

Perhaps a settlement could even be negotiated for less than the \$12,000 claimed by the contractor. In this example, the knowledge of the cost of the claim could allow the exercise of good economic business judgement and motivate the Government to attempt to settle.

As noted earlier, the attempt to develop an "average claim cost" for claim evaluation purposes was not possible. However, even if those costs were evaluated, there are numerous arguments for and against the inclusion of some of those specific costs in such an estimate. Costs directly related to a specific claim and that would have not been incurred had it not been for that claim present no problems. In accounting terms, these would be considered variable costs. Such costs include claim related travel and the costs associated with deposition taking.

Arguable costs include trial attorney salaries and benefits, contracting personnel, legal advisor salaries and benefits, copying costs, etc. Some interviewees viewed these specific costs as fixed costs that would be incurred regardless of whether or not a specific claim was being worked upon. Those holding this view would not include those costs in economic settlement considerations. Costs that become even more arguable and troublesome to some persons are the support costs (clerical, utilities, rent) associated with the attorneys and contracting personnel. Those who argue against the inclusion of other than direct claim related outlays in any estimate stress that salaries and support costs would not be less if a specific claim was or was not pursued. Those who argue for the inclusion of the fixed costs in the analysis make the point that the inefficient use of Government resources is a valid cost consideration.

c. Other Services Approach to Claims.

A review of the other services and selected civilian agencies' regulations concerning claims was conducted to see if the Army could adapt any of the techniques currently in use. Among the regulations reviewed were the Air Force FAR Supplement (AFFARS), the Navy Acquisition Regulation Supplement (NARSUP), and the Defense Logistics Acquisition Regulation (DLAR). Also reviewed were the applicable sections of the General Services Administration Acquisition Regulation (GSAR), the Department of Energy Acquisition Regulation (DEAR), and the National Aeronautics and Space Administration FAR Supplement (NASA FARS).

The AFFARS mostly provides administrative procedural guidance, the most noteworthy of which is the requirement that contracting officers provide a draft copy of any proposed final decision (with backup data) to the Air Force's equivalent of the Army's Office of the CTA. That Air Force office then provides review and comment.[3]

The NARSUP provides a policy statement, informational guidance, and administrative procedural and reporting requirement guidance. There are no special techniques identified, however the policy statement itself may be a value. It states, in part,

"....activities at all levels are expected to face claim situations squarely...take prompt action to get the facts, make an objective analysis, and seek prompt resolution. Dealings will be fair and open with the expectation of equal consideration from contractors. Delay of resolution of claims by and against contractors can produce a serious impact upon the business relationship between the Navy and its contractors. Thus, resolution of claims must receive a high priority and degree of attention at all levels."[10]

The DLAR provides little supplementing guidance, almost wholly administrative, similar to that provided by AFARS.[2,6] The DEAR and the NASA FARS were consistent with the DLAR and AFARS in coverage.[9,14] The GSAR, while more detailed than the other civilian agencies, was basically administrative.

d. FORSCOM and TRADOC.

The FORSCOM and TRADOC activities that were contacted were found to have too much variability to fall into a generalized description. Also, it appeared that the contracting officer had more independent responsibility in the claims decision-making process. The influence of the legal advisors may be much less than that found at the AMC MSC's. This study did not delve deeply enough into the operations of TRADOC and FORSCOM to confidently assess the reasons for the observed differences from AMC. However, it can be speculated that the strong emphasis on contracting at AMC coupled with the relatively stable cadre of specialized contracting legal advisors has given rise to a more highly structured (and perhaps more influencing) legal operation at AMC.

A follow-on project providing for an in-depth examination of the claims process at FORSCOM and TRADOC may prove to be of some value to the sponsor since those commands did not appear to operate in the same manner as the AMC MSCs. However, pursuing such a project is likely to be rather costly in time and travel expense since, compared to AMC, FORSCOM and TRADOC activities are more widely dispersed geographically and their lesser volume of contracting would yield few potential interviewees at each location.

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS.

The Office of the CTA had asked if the high percentage of negotiated settlements of contractor claims (after the final decisions were appealed to the ASBCA) was an indicator of problems related to the dispute resolution procedures at the contracting officer level. On an AMC-wide basis, this study could not find evidence to unequivocally answer that question either in the affirmative or negative.

While there are variations in the claim handling philosophies between the trial attorney's and some of the AMC MSC's surveyed, no factual information was found that indicates the existence of a systemic problem in this area. Aside from the less flexible approach to negotiated settlements that exists at AMC MSC #1, the interviews suggested that, for the most part, the MSCs approached claim resolution in a fairly open-minded manner. Therefore, the sponsor's central question, "Are resources being expended on disputes which could have been successfully settled prior to the onset of litigation?", must be answered by saying, "Perhaps sometimes, but not routinely."

1. Claims Handling.

Generally, the system seems to be working properly. At the time a dispute is developing, contracting personnel coordinate with their legal advisors. Typically, a legal advisor with knowledge and experience (and some degree of specialization in contractor claims) provides guidance and counsel. The legal advisor exercises a strong influence on the contracting officer. Subject to a degree of variation in thoroughness, legal and/or contracting

personnel investigate the contractor's allegations, communicate with the contractor (if deemed appropriate), then determine a reasoned course of action and proceed.

Systemic problems in claims handling are probably more perceptual than real. Nonetheless, the Office of the CTA would like the MSC's to be more sensitive to their views on handling claims. That is the more flexible approach discussed in Chapter II. Those not sensitive to that point of view and who hold to a less flexible approach, have a perception that the trial attorneys are overly generous insofar as they influence negotiated settlements.

Some personnel involved in claims may not be investigating the facts as thoroughly as others. This is unfortunate because a more thorough investigation can sometimes provide the facts needed to settle issues. Occasionally, fully developed, clearly established and verified facts can influence a contractor to withdraw (or substantially modify) his original claim, in favor of the Government. Or conversely, yet still to the potential benefit of the Government, it may be established that a contractor's claim does have substantial merit. This would permit the Government the opportunity to attempt to settle on terms more favorable than those the ASBCA may decide.

Both trial attorneys and MSC legal advisors have stated that facts uncovered during formal discovery proceedings can often be pivotal in determining the strength or weakness of a claim and sometimes the uncovering of these facts facilitate a negotiated settlement. However, the costs associated with the discovery process dictate that it not be used as a substitute for a reasonably thorough investigation to determine whether or not a case has merit and should be considered for settlement.

The trial attorneys believe that thorough claim evaluation by the MSC's can enhance the likelihood of earlier settlement in those claims that are settlement candidates. However, they do recognize that with the more complex, larger claims, the discovery process is often required to uncover information that will hopefully prove favorable to the Government's position.

In the final analysis, most everyone would agree that claims are not really a positive influence on the DOD contracting environment. However, they do occur and a common-sense approach to dealing with them has some use. Simplistically, those claims that have merit and are likely to result in a ruling unfavorable to the Army should be settled on as favorable terms as possible. Conversely, those claims without merit that are likely to result in a ruling favorable to the Army, should not be settled. As always, there may be reasons (e.g. the fear of establishing an unfavorable precedent) for exceptions in individual cases.

The FAR guidance referenced at the beginning of this report, stated that the "contracting officer should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute..." During this study it was found that the MSC legal advisors almost always can and often do perform this function.

2. Policy Considerations.

The FAR policy statement on claims is to try to resolve all contractual issues by mutual agreement at the contracting officer level. Neither the DFARS, the AFARS, nor the AFFARS contain a dispute/claim policy statement. The Navy regulations (NARSUP) do contain a policy statement that addresses claims. Some of the variability in approaches to claims by the various MSC's could become more uniform if an Army policy statement on claims were developed.

3. Resolution Efforts.

Significant efforts are expended at the AMC MSC's when a contractor submits a claim. Three of the four MSC's queried place a strong emphasis on settling contractor claims if at all possible. The remaining command places less emphasis on settling claims unless there is clear and convincing evidence that the contractor is due an entitlement. Measuring the quantity and quality of these efforts was not possible, however the interviewees estimated that the "average" claim required a minimum of a full 2-4 weeks of combined legal and contracting effort to perform the duties associated with issuing a final decision and compiling the Rule 4 File and the TALF.

4. Influences.

The greatest influence, other than the specifics of the claim itself, were the MSC legal advisors. Typically, the contracting personnel were somewhat restricted in their ability to use "claim resolution techniques" once a formal claim had been submitted. At that point the legal office began to play a very active role. Any resolution "techniques" at this stage were within the control of the legal advisors, and if used, were often initiated by them.

5. Cost of Litigation.

An attempt to develop the "average cost" of litigation was unsuccessful because the available data did not include enough cases that had been through the entire process, i.e., from appeal of a contracting officer's final decision through a final ASBCA hearing and decision. Nonetheless, the trial attorneys and some of the legal advisors at three of the four commands surveyed develop their own rough estimates of these costs and include them in their "risk analysis" when deemed appropriate.

B. RECOMMENDATIONS.

Since the aspects of the claims process examined at the AMC MSC's show more evidence of philosophical differences than those of objective problems, no improvement recommendations can be made. However, this study has some suggestions that can influence philosophy and improve the process.

The sponsor could initiate greater communication between the trial attorneys and the legal advisors responsible for contractor claims. This communication can be in many forms. Possibilities include newsletters, seminars, and continuing education sessions for attorneys that handle claims. Perhaps developing more formal institutional lines of communication would be helpful. If deemed feasible, exchange programs of trial attorneys and AMC MSC legal advisors could aid this communication process.

Finally, the development, coordination and publication of a specific policy statement in the AFARS (along the lines of the Navy's NARSUP policy statement) should be considered. Some of the variability in approaches to claims by the various MSC's could become more uniform if an Army policy statement on claims were developed.

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