The Importance of Litigation Management

Stephen Rinehart

For the past 14-plus years, the U.S. government has been engaged in litigation stemming from a single program, putting more than a billion dollars' worth of Department of Defense funding at risk. The issue was finally resolved, as the supplier (plaintiff) withdrew its complaint as part of a quid pro quo settlement in which the government withdrew its own complaint (another potential significant litigation) on another issue.

Why was such litigation conducted in the first place? Primarily because the supplier incurred a significant loss of revenue as it attempted to fulfill the requirements of a mutually agreed fixed-price incentive fee-type contract. The company believed it could recoup all, or at least a significant part, of the loss through legal action. Initially, the supplier submitted claims to the government,

Rinehart, *a retired Army colonel, serves as the lead acquisition program management analyst for a major DoD litigation activity.*

arguing that the government was responsible for the loss. The government denied the claims, and the supplier submitted a complaint to the court.

The court's responsibility was to identify the relevant facts and to decide the outcome of the disagreement based on input presented by both the plaintiff and the defendant. In such a situation, it was fundamental that the relevant facts be identified and understood by the court and by both parties during the claim investigation process and court proceedings.

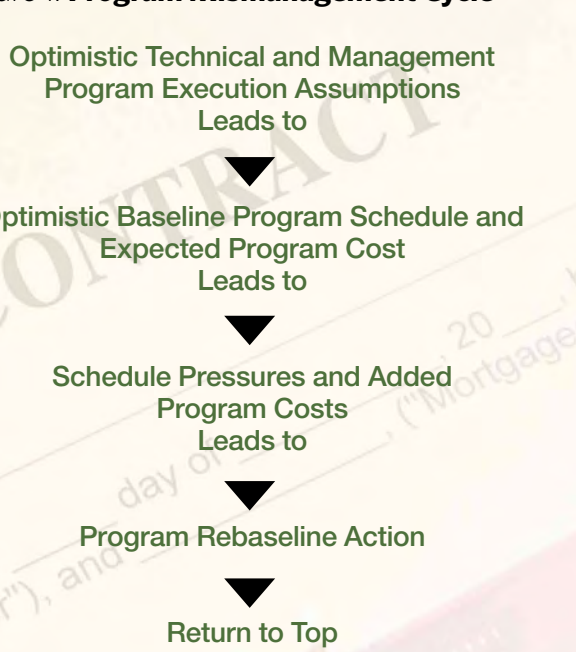
Putting Billions of Dollars at Risk

Litigations present a very serious problem for the military acquisition community. How is it that two parties—government and industry—can work together for years using management principles developed over decades, and at the termination of the project, argue who was responsible for hundreds of millions of dollars in program loss that occurred during the life of the program? The facts surrounding the issues should have been known and mutually understood by both parties long before program termination. What weaknesses in acquisition management practices allow such a disparity to occur?

Fundamental Truths

There are a number of fundamental truths when it comes to DoD materiel acquisition management practices. Firstly, companies address issues with other companies and customers as a normal basis of business. Government, as a customer of industry, should expect the same treatment and should expect requests for equitable adjustment (REAs), claims, and litigations. Program offices need to assume REAs and claims will happen and to manage accordingly, starting from the beginning of the program. The better prepared a program office is, the more effectively it can deal with such issues. If a program office is not prepared, then it could find itself spending money—lots of money—if a litigation occurs.

Figure 1. **Program Mismanagement Cycle**



Secondly, program execution activities normally focus on the status of today and where they will be tomorrow. REAs, claims, and litigations focus on yesterday and how the past affects an industry organization's profits today. Currently, program offices collect much of the relevant historical data needed to address REAs, claims, and litigations; however, the data are not maintained in formats conducive to properly addressing the types of issues that most likely will be found in REAs, claims, and litigations.

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Thirdly, the program baseline is composed of a baseline schedule, budgeted program expected costs to accomplish the baseline schedule, and a negotiated contract agreement that is aligned with the baseline schedule and budgeted costs. Those three components contain a set of interdependent parameters that need to be managed accordingly. For example, in a fixed-price incentive fee-type contract in a loss position, the relationship between the program's expected cost and the contract ceiling value identify the program loss. The "when and why" of the evolving relationship of those two parameters should be maintained.

Lastly, in litigation, absolute historical accuracy may not be relevant; rather, what the court understands the historical accuracy (facts) to be is relevant. Documentation, written and acknowledged contemporaneously by both parties as fact, is compelling information for the court. Accordingly, program offices should:

- Trust each other, but verify information
- Document, in real time, the ramifications of the evolving baseline parameters
- Maintain comprehensive historical records
- Develop procedures for establishing contemporaneous formal acknowledgement from both parties that the documented content is fact. If either party does not consider it fact, then that is the time to examine why (not when the problem is brought to court).

Management Enhancement Recommendations

The following lists a number of recommended management enhancements that could help a program office be better prepared to address REAs, claims, and litigations. Many of these recommendations also may help program offices better manage their ongoing programs.

Contract Change Management/Constructive Change Prevention Practices

If there is a change in a contract, here are some effective contract change management practices:

- Establish release clauses and ensure both parties formally agree that a release wipes the slate clean for all but formally identified exceptions
- Maintain a historical conformed contract that all parties can access, and be able to identify conveniently the complete contract for any day from contract award forward. This recommendation can be accomplished electronically. It can be a convenient aid to members of the program office as well as to attorneys.

Constructive change occurs when the customer requires the supplier to perform tasks that are outside the scope of the contract without issuing a formal change order. Constructive change is to be avoided. The two parties may have different ideas regarding whether or not a customer directive is constructive change because what construes a constructive change often is in the eye of the beholder and can change over time. That is especially true when both parties are faced with the potential for claims and or litigation.

Constructive change prevention practices must be comprehensive and effective. When seeking to prevent constructive change, address all activities: meetings, actions items, verbal and written communications, etc. Get documentation, which means you need to get real-time acknowledgement from the supplier that all activities (requested either verbally or in writing) are either in scope or not in scope. These recommendations also can help identify and manage activities that may be increasing the work effort but are considered within the general scope of the contract.

For a program in a loss position, the when-and-why details for the evolving loss should be available to both parties in a conveniently readable format.

Memorialize a Program Rebaseline

A program rebaseline occurs when the baseline schedule is not executable or when the operating schedule and baseline schedule are sufficiently different, leading to limited relevancy. The rebaseline activities normally include aligning the baseline schedule to the realities of the operating schedule, budgeting the expected program costs to the new baseline schedule, and aligning the contract with the new baseline schedule and expected cost—in essence, updating the program baseline (schedule, expected cost, and contract) to the current program conditions.

Issues generated during the previous baseline should be resolved to the fullest extent possible, and both parties should understand and acknowledge any resolutions identified in the contract change (i.e., release clause) or in a post-rebaseline activity summary. The intent should be that both sides agree that no claim/litigation activity is warranted for actions occurring during the previous baseline. Exceptions should be specifically identified in the contract change that memorializes the new program baseline.

For contract changes that memorialize a program rebaseline, the following actions can help prevent problems:

- Ensure the contract change identifies the specific baseline schedule and program expected cost (baseline schedule, program expected cost, and contract parameters should be viewed as a set of interdependent data)
- If aspects of the rebaseline activity need to be documented or if comments in the contract change need further explanation, then write a post-rebaseline activity summary and have it signed by both parties.

Schedule Tracking Management Practices

Program cost increases most often occur because the supplier is not able to maintain the program baseline schedule. In many cases, the fundamental reasons for the schedule increases are not known by the program office because they are inherent to supplier processes and procedures and/or are the result of issues occurring levels below the level of the program office management schedule oversight. For example, the program office may be led to believe that a specification change caused a three-month delay when, in fact, the supplier is late because he is not able to meet his internal drawing release schedule. Understanding, in detail, the supplier's ability to complete the schedule should help reveal the root causes for schedule delay, leading to effective corrective actions and a more reliable baseline schedule—helping a program to avoid the dreaded program mismanagement cycle. (See the figure

for an overview of the cycle.) The government needs to know such a level of detail when facing litigation.

Some tips that may help better manage a program and prevent litigation; or if litigation occurs, may help make the process easier:

- Establish independent schedule oversight capability
- Track top-level and key lower-level critical paths
- Evaluate, in detail, the supplier's ability to complete the schedule (e.g., the schedule can appear to be executable but still not be achievable by supplier).

Cost Tracking Management Practices

To better track the cost of a program, program offices should:

- Establish a historical baseline cost tracking ability
- Document the when and why for baseline changes
- Document the when and why for changes between the program's expected cost and the contract ceiling value relationship—this is very important!

Such information is available in the supplier's cost performance reports and other documentation provided to the program office; however, the information is often provided to the program office as separate data items and as point estimates for a specific moment in time. Understanding the significance of the data is similar to attempting to see the picture of a 1,000-piece puzzle while the pieces are scattered randomly on a tabletop. When collected over time and presented in a convenient, readable fashion, one can quickly understand the when and why of program cost increases; however, someone needs to take the time to review the data. For a program in a loss position, the when-and-why details for the evolving loss should be available to both parties in a conveniently readable format, and subsequent claims need to correlate with the data.

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Customer/Supplier Interface Management Practices

Some good customer/supplier interface management practices:

- All formal and informal communications should be summarized in writing.
- The customer and supplier must concur with the content of all written documents.
- The customer and supplier must have contemporaneous access to a library of all written documents.

E-mail can easily facilitate those practices. If e-mail is used efficiently, suppliers and customers can quickly and conveniently tap the historical documentation relevant to the issues at hand. Attorneys would have immediate access to documents, with content formally concurred by both parties, that can be the basis for addressing a claim or litigation issue. Additionally, there are many indirect program management benefits. For example, the supplier and customer would tend to be more careful with what they write, since the information would be available to subordinates, peers, and supervisors.

Proper Preparation

The recommendations in this article may appear cumbersome; however, REAs, claims, and litigations will happen. The better prepared a program office is to address such issues, the greater the opportunity for a positive outcome for both supplier and customer.

The recommendations have many secondary positive effects for current programs. For example, the sooner one understands the actual program schedule, the sooner the real costs for a program are known. Management at all levels can better plan activity and budgets with less turbulence. In the end, we may be able to more efficiently equip the warfighter with the tools that are needed.

The author welcomes comments and question and can be contacted at srinehart.dayton@sbcglobal.net.