A Contracting Officer in King Arthur's Court

Practical Guidance for Contracting Officers/ Specialists Venturing Through the Legendary "King Arthur's Court" of the Contract Appeals Process

DENNIS LONGO

"And this isn't an asylum? I mean, it isn't a place where they cure crazy people?"

He said it wasn't.

"Well, then," I said, "either I am a lunatic, or something just as awful has happened. Now tell me, honest and true, where am I?"

'IN KING ARTHUR'S COURT."

I felt a mournful sinking at the heart, and muttered: "I shall never see my friends again — never, never again."

—Mark Twain
A Connecticut Yankee in
King Arthur's Court

Actually, I'm not a Contracting Officer. I'm a Procurement Analyst, and this article is written from my point of view based on my experiences and observations while on a developmental assignment at the Office of the Chief Trial Attorney, U.S. Army Litigation Center, Contract Appeals Division. I'm offering practical guidance through this article to Contracting Officers and Contract Specialists venturing through the legendary "King Arthur's Court" of the contract appeals process. This is not legal advice.

First I'll discuss Alternative Dispute Resolution (ADR) and suggest some ADR methods, considerations on when to use ADR, and ADR resources. Then I'll point out the types of various government documents that a contractor may use to support a claim, the matter of a reasonable Contracting Officer's actions, and how a Contracting Officer or Contract Specialist can demonstrate reasonableness.

A discussion on the proceedings of an appeal will follow, offering suggestions on how to prepare a good "Rule 4" file, or Appeal File; Trial Attorney's Litigation file; the Contracting Officer's statement; as well as the discovery process, litigation risk, and what to expect at the appeal hearing.

I conclude the article with a discussion on the importance of maintaining a professional and responsive relationship with the Army Trial Attorney, an organizational description of the Contract Appeals Division, and how I was selected for assignment to the division. Please make yourselves comfortable and enjoy the ride....

Examining Issues From a Broad Perspective

"There was a dispute under the contract. I thought we were making progress resolving it. I thought I was being reasonable. Then came the claim. I made my decision and now it's before the Board of Contract Appeals."

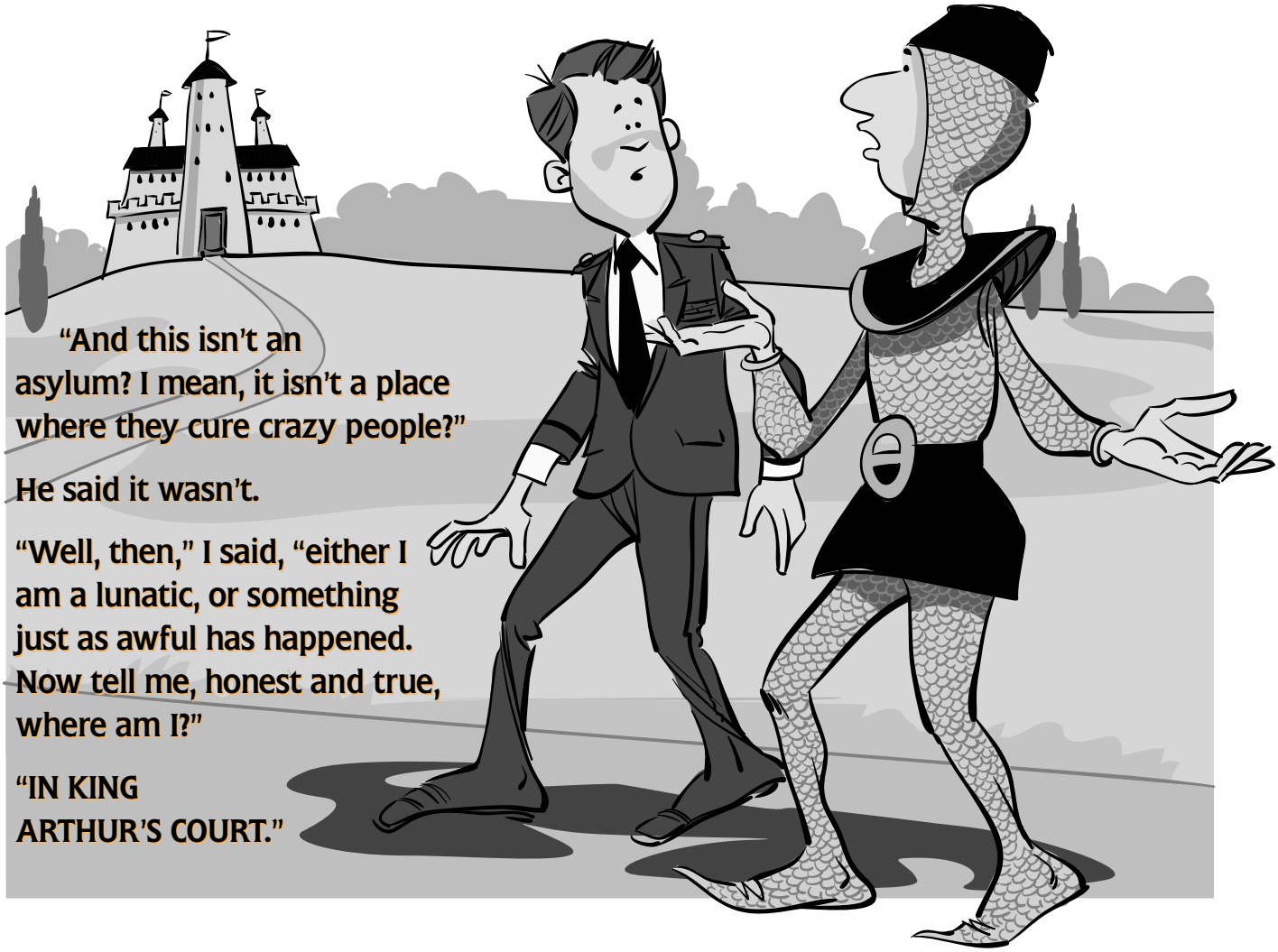
How many times do you read the pronoun "I" in that monologue? If it's more than once, this fictional Contracting Officer may have a vision problem. Working so intimately on our contracts we sometimes lose the ability to see clearly enough to examine issues from a broad perspective. We become so engaged that we view our work as one of our own offspring – emulating our personality, dreams, and aspirations. OK, maybe I went too far on that. But inevitably, a part of *you* is in your work, which has a somewhat subjective effect on your vision. Maybe it's time to take a step back, make some observations, and discuss how we should consider the approach to contract litigation.

"Inherited ideas are a curious thing, and interesting to observe and examine. I had mine, the king and his people had theirs. In both cases they flowed in ruts worn deep by time and habit, and the man who should have proposed to divert them by reason and argument would have had a long contract on his hands."

Alternative Dispute Resolution

The Federal Acquisition Regulation (FAR) points out that Contracting Officers should consider ADR as a first ap-

Longo is a Procurement Analyst at the Robert Morris Acquisition Center, Aberdeen Proving Ground, Md., and completed his assignment at the U.S. Army Litigation Center in March 2001. He is Level III–certified in Contracting and Acquisition.



proach toward resolving any formal claim.[1] As depicted in the chart on the following page, ADR (FAR 33.214) offers both sides a variety of non-judicial options to resolve disputes from a business perspective.[2]

Things to Consider When Involved in an ADR Proceeding

Be aware of some things you just do not want to do during a process that makes an attempt to settle a controversy through reconciliation. These suggestions were made by an administrative judge who is now involved as a full-time mediator:

- You do not gain by making the other side angry. Watch your words, actions, and body language. Demonstrate professionalism and courtesy at all times.
- Know your facts. Refer to contemporaneous documentation to substantiate to your facts, and speak truthfully.
- Develop an appreciation of the other side's complaint. During ADR, issues may be exposed that you didn't know about.
- Try to diffuse anger. Anger will affect how settlement is reached.
- The mediator is there to assist in resolving the dispute, not to judge. So talk to the other side, not the mediator.
- Most people want to settle. So when describing events or circumstances, use clear and simple language keeping that objective in mind.

Excellent resources are available on the Internet to learn more about ADR and assist you in selecting a course of action for your particular circumstances.

Air Force Resources

The Air Force maintains a Web site at *http://www.adr.af.mil* as a comprehensive resource for ADR by creating a library of links and ADR information from this site to other Federal Government Agencies,and private organizations. Their *ADR Reference Book* discusses factors to consider in assessing whether ADR is appropriate; how to engage in ADR; choosing appropriate ADR techniques, neutrals, and elements of an issue-specific ADR agreement; fiscal/monetary considerations; and best practices. The Web site also features ADR products and services, links to ADR associations, legal research links, statutes, regulations, sample contract clauses, and memoranda of agreements.

OPM Resources

The Office of Personnel Management (OPM) posts its *Resource Guide* online at *http://www.opm.gov/er/adrguide/ adr home.html-ssi* to provide an overall picture of how the most common forms of ADR are being implemented in Federal Agencies. Summarizing a number of current ADR programs (including alternative discipline programs), it also includes descriptions of shared neutrals programs

Alternative Dispute Resolution Methods

Negotiation
Communication between parties to a suit. The parties seek resolution by listening to each other's viewpoint.

Mediation
Negotiation facilitated by a neutral third party that does not have power to issue a decision. The parties decide the outcome themselves.

Fact Finding
An impartial third party collects information on the dispute and makes a report about relevant data or issues recommendations.

Arbitration
The parties choose a neutral person to hear their dispute and to resolve it by issuing a decision, which can be advisory or binding. Although adjudicative arbitration differs from litigation in that rules of evidence are not applicable, the timing is flexible and the process is expedited.

Early Neutral Evaluation
An impartial third party hears the issues in controversy and predicts what the outcome would be if the dispute were to be heard in litigation. Sometimes referred to as outcome prediction.

Mini Trial
Summary presentation of the case is presented to key the principal of each party and a neutral who is chosen by the parties to preside and render a decision.

where agencies have collaborated to reduce the costs of Alternative Dispute Resolution. In addition, it provides a listing of training and resources available from federal and non-federal sources. It also provides selected ADR-related Web sites.

U.S. Army Litigation Center Resources

The Office of the Chief Trial Attorney, U.S. Army Litigation Center, also publishes a *Guide to ADR Policies and Procedures* in their "Toolbox" at *http://www.jagcnet.army.mil/cad*. This guide provides suggestions on how to analyze a particular dispute for its ADR potential and provides a ready ADR reference guide. Designed primarily for use by members of the Army Contract Appeals Division, others outside of the division are welcome – and encouraged – to use it as a definitive guide whenever they are considering ADR as a tool for disputes resolution.

"Sir Kay would have me in and exhibit me before King Arthur and his illustrious knights seated at the Table Round, and would brag about his exploit in capturing me, and would probably exaggerate the facts a little, but it wouldn't be good form for me to correct him, and not over safe, either; and when I was done being exhibited, then ho for the dungeon."

Contractor vs. Contracting Officer Square-off

The objective of a claim is to persuade the Contracting Officer that the contractor deserves relief. The claim probably was written by an opposing attorney who has reviewed all the facts and is bringing out those that are most favorable to the contractor, and not to the government. By describing those facts and their impact on contract cost or performance, the contractor may support its claim through a variety of persuasive data that were most likely generated by the Contracting Officer or the Contracting Officer's representatives. For example:

Contract Specifications. Many claims involve performance based on interpreting contract specifications. Specifications have been described anywhere within the spectrum of ambiguous[3] to commercially impossible.

Pre-Solicitation or Pre-Proposal Conferences. Questions and responses – information announced before, during, and after conferences either by the government or prospective offerors – may be incorrectly worded or recorded, or misunderstood. Claims of this nature may result from failure to disclose proper information, a contradiction with contract specifications, or inferred or implied expectations of contract performance.

Correspondence. Data of this type include electronic mail (e-mail) among acquisition team members as well as electronic media issued among administrative, procuring, and quality personnel.

Inspection Records and Logs. Such records and logs can be an important source of information because they are typically written at the same time an event occurs. The Armed Services Board of Contract Appeals (ASBCA) frequently uses contemporaneous documents, particularly inspection records and logs, to confirm or disprove allegations in a claim.[4]

Memoranda of Meetings and Discussions. Meetings and discussions among parties to a contract are never "off the record" and should be documented. Inferences and implications often lead to changes that may have an adverse impact on contract cost, performance, or schedule.[5] The Contracting Officer's price negotiation memorandum or other administrative records must be accurate

and written contemporaneously. The appearance of a single document may be significant in determining the facts at the time of agreement.[6]

Engineering Notebooks. Engineers, technicians, and scientists are often required to record their daily activities in some notebook form. These activity records may become extremely helpful during discovery to identify or substantiate the source of controversy in a dispute.

No Contracting Officer is an Island

There may be circumstances where Alternative Dispute Resolution is not appropriate. But in all cases, the Contracting Officer must be reasonable. The FAR says that the Contracting Officer must apply reasonable efforts to resolve all disputable matters by mutual agreement prior to submission of a claim (FAR 33.204).

“”I was not the only prisoner present. There were twenty or more. Poor devils ... they were suffering sharp physical pain, of course; and weariness, and hunger and thirst, no doubt; and at least none had given them the comfort of a wash, or even the poor charity of a lotion for their wounds; yet you never heard them utter a moan or a groan, or saw them show any sign of restlessness, or any disposition to complain.”

In deciding initial matters of a contract claim, the role of the Contracting Officer may be a type of judge,[7] and his or her final decision cannot be an isolated one.

A reasonable person, for example, may obtain and evaluate the advice of legal, customer, and subject matter experts[8] prior to making a final decision on a claim. And if your efforts are not successful in resolving the dispute, the contractor may submit its claim against you to the agency Board of Contract Appeals[9] or the Court of Federal Claims for resolution, despite your reasonable efforts to resolve the matter.

“In half a minute I was as naked as a pair of tongs! And dear, dear, to think of it: I was the only embarrassed person there. Everybody discussed me; and did it as unconcernedly as if I had been a cabbage. Queen Guenevere

was as naively interested as the rest, and said she had never seen anybody with legs just like mine before. It was the only compliment I got — if it was a compliment."

As Contracting Officer, you can take significant measures to demonstrate that an action was reasonable. Put into practice, these measures will help you administer your contract, assist you in making informed decisions, and support your position in matters of protest or appeal.

Contemporaneous Documentation

The greatest contribution you can make to any contract file is contemporaneous documentation. A small e-mail or daily log entry that was written near the time of the event can have far greater influence than a mountain of depositions and sworn affidavits. Contract specialists who keep all the documents, notes, and modifications in an organized system as events occur are invaluable. Contracting officers and specialists should make a habit of documenting all their conversations with both government and industry. A pad of paper and pen should have a regular place at your workstation for this purpose.

Professional Relationships

Keep all relationships with contractors on a professional, and not personal, level. Personal relationships are characteristically more relaxed and unguarded, leaving a person prone to say more than what should be said, rather than maintaining an appropriate business posture.

Keep the Language and Process Simple

When writing a statement of work, evaluation plan, or performance criteria, use plain English. See if someone in your office can figure out a way to meet the criteria in a manner you or your customer do not desire. When writing instructions to offerors and proposal evaluation plans, ensure the offeror will produce something of his or her own independent thinking – lead the reader to form his or her own response. Also, watch out for unnecessary obligations we place on the government when writing contract specifications. Many specifications, for example, require the government to review a document or perform some other function within a specified period of time. Often, we can't meet that requirement or the time period is unrealistic.

"I was not the only prisoner present. There were twenty or more. Poor devils, many of them were maimed, hacked, carved, in a frightful way; and their hair, their faces, their clothing, were caked with black and stiffened drenchings of blood. They were suffering sharp physical pain, of course; and weariness, and hunger and thirst, no doubt; and at least none had given them the comfort of a wash, or even the poor charity of a lotion for their wounds; yet you never heard them utter a moan or a groan, or saw them show any sign of restlessness, or any disposition to complain."

Use Your Experts

If there is disagreement within the activity on a particular contracting action, the Contracting Officer should get written input from all disciplines and stakeholders involved. Then the Contracting Officer should write down the reason for his or her decision (contemporaneous documentation) based on expert opinion. Those who will review your decision tend to suspect unreasonableness when the Contracting Officer did not solicit appropriate information or advice from appropriate entities, or when the Contracting Officer cannot write up a cogent rationale supporting the decision. Maintain a good working relationship with your local counsel. Get a legal review of your justification prior to issuing a Contracting Officer's final decision on a contract claim.

"Wherefore, being a practical Connecticut man, I now shoved this whole problem clear out of my mind till its appointed day and hour should come, in order that I might turn all my attention to the circumstances of the present moment, and be alert and ready to make the most out of them that could be made. One thing at a time, is my motto."

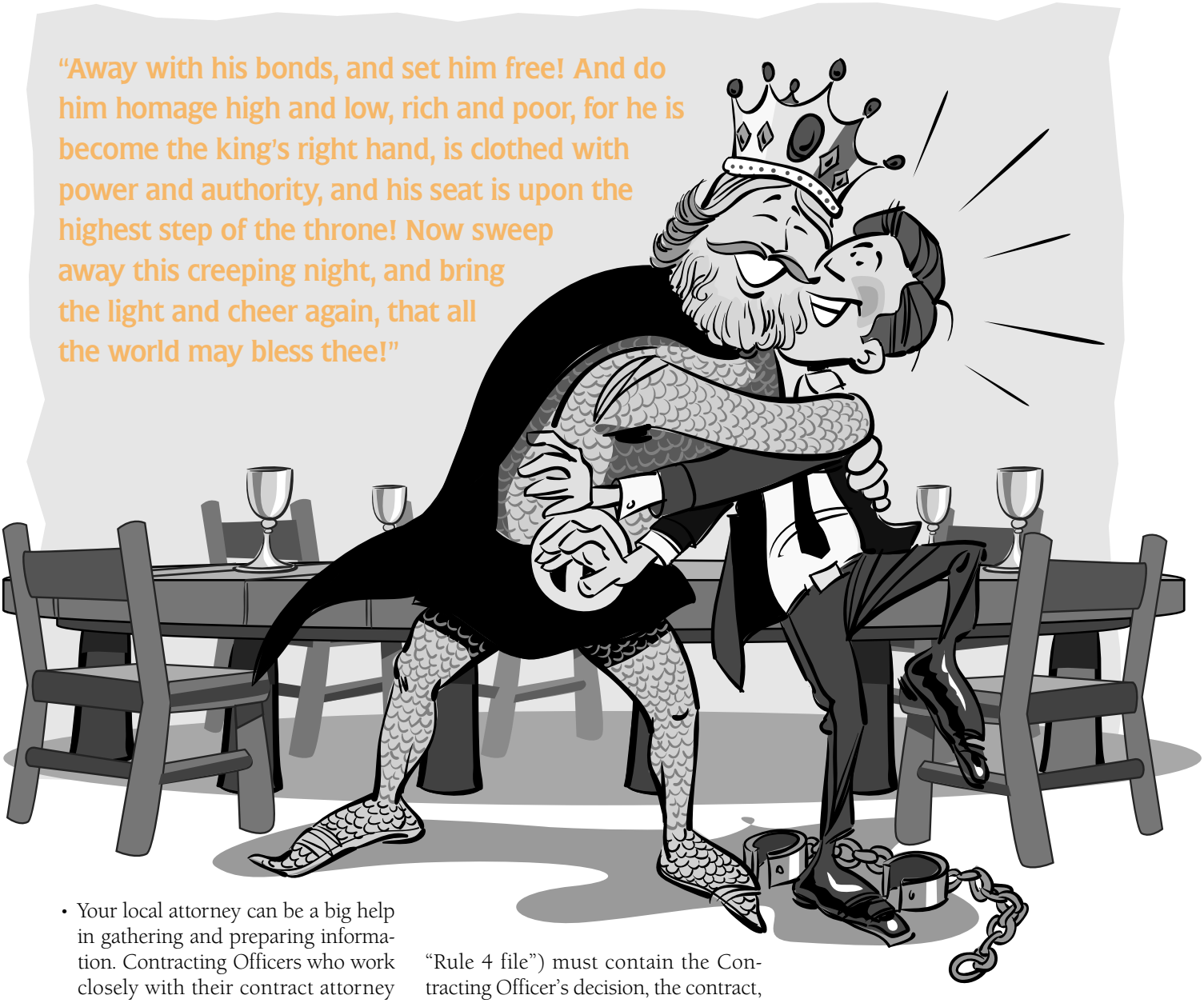
Issue Final Decision When Warranted

Avoid a deemed denial.[10] Our Yankee friend's actions may have been appropriate in his particular circumstances, but when procedures allow or require a Contracting Officer to make a final decision, as in deciding a claim, the Contracting Officer must do so. Do not refrain from making such a decision and properly informing the contractor. Contracting Officers who do not respond and allow the contract to proceed without a final decision in the matter waive a good opportunity to frame the issues in a positive way and appear reasonable. And do not forget to obtain the legal review.

How Can I Present Credible Evidence Supporting Reasonable Action?

Glad you asked. Remember that the claim probably was written by an opposing attorney who has reviewed all the facts and is bringing out those that are most favorable to the contractor, and not to the government. Your government Trial Attorney reviewing these facts knows nothing about the government's case and is depending on you to get your side of the story. Your actions, knowledge, responsiveness, and the quality of contract management will help your Trial Attorney present credible evidence supporting that your actions were reasonable. In so doing, remember these criteria:

- A well-organized Contracting Officer or specialist will know the members of the acquisition team having specific knowledge in the technical, funding, safety, and engineering aspects of the acquisition. Know who the major players are in the decision-making process. Even though the Contracting Officer has the authority, to whom was the Contracting Officer giving deference? The customer? The Principal Assistant Responsible for Contracting,, or PARC?
- Lost documents = lost credibility = appears unreasonable. Facts will change when people and documents cannot be found. The Contracting Officer must maintain the whereabouts of experts, witnesses, and documents because lost information cannot prove or disprove a point.



- Your local attorney can be a big help in gathering and preparing information. Contracting Officers who work closely with their contract attorney usually present a very focused statement on their side of the issues in a manner that a judge will find easy to comprehend.

"Now Sir Kay arose and began to fire up on his history–mill with me for fuel. It was time for me to feel serious, and I did."

Pre-Hearing Procedures for Appeals

Rule 4

When a contract appeal is filed with the ASBCA, the Contracting Officer must prepare an Appeal File. Its contents will vary depending on the claim. ASBCA Rule 4 requires that the Appeal File (or "Rule 4 file") must contain the Contracting Officer's decision, the contract, all correspondence between the parties relevant to the appeal, affidavits or statements of witnesses, and any additional information considered to be relevant to the appeal.[11] (See DFARS Appendix A, Part 2, Preliminary Procedures, Rule 4.)

The Rule 4 file is another chance to appear reasonable. A poorly documented Rule 4 file will immediately make the government appear unprepared and unreasonable. A well-documented Rule 4 file is the ASBCA's first impression of the government's opinion of the claim. The Contracting Officer should obtain a legal review of the Rule 4 file and concurrently send copies to the ASBCA, Appellant, and Trial Attorney as soon as possible.

Suggestions on How to Put Together a Good Rule 4 File

- Start working on the Rule 4 file immediately. A list of documents required in the record for contract appeals is specified in the Defense Federal Acquisition Regulation Suplement (DFARS), Appendix A.[12] Coordinate your response with your legal and technical experts and task administrative personnel to make copies, compile, and tab the Rule 4 file.
- Look for a protected material legend. Make sure protected material is clearly marked with an approved legend.
- Some of the documents you intend to include in the Rule 4 file may be privileged material. Privileged material

may be attorney/client work products and communications, and must not be included in the Rule 4 file.

- Some of the documents you intend to include in the Rule 4 file may be proprietary information such as cost and pricing information, trade secrets, or proposal information. Before including any material of this type, you need to call the document's author for permission.
- Release only a redacted or "sanitized" version of the Rule 4 file after obtaining a legal review.
- Arrange documents in the Rule 4 file chronologically, making sure all pages are legible.
- Include relevant documents – exclude irrelevant documents. Throwing all the contract clauses, drawings, and specifications into the Rule 4 file without trying to decide which documents are relevant makes the agency look unfocused and unreasonable.
- Make frequent use of tabs. Important documents should be identified individually, rather than identifying the contract as "Tab 1" and contract correspondence as "Tab 2." The incongruity is obvious when an agency claims professional competence while asking the opposing counsel and judge to refer to unnumbered page 506 of the miscellaneous documents.
- Mark tabs numerically – not alphabetically.
- Number each page in each tab.
- Use reasonably sized binders. Do not try to put 1000 pages into one binder. Make sure binders aren't falling apart and binder rings do not overlap or tear pages.
- Three-ring binders should not be falling apart and tabs should be securely fastened.
- Make extensive use of CDs for recording and storing data that are available in some type of electronic media. Inform your Trial Attorney if you intend to include electronic media instead of paper in the Rule 4 file.
- Ask your major command for good examples of previously submitted Rule 4 files.
- File a complete, accurate, and descriptive index of documents at the beginning of each binder.

"Well, I liked the king, and as king I respected him..."

Not surprisingly, Administrative Judges at the ASBCA want R4s to be legible, orderly, and professional. Contracting activities often keep the best copies of documents for their own files leaving poorly copied and illegible documents in the ASBCA binders.

The Trial Attorney's Litigation File

In addition to the Rule 4 file, regulations require that the Army Contracting Officer also prepare a Trial Attorney's Litigation File (TALF) for submittal to the Army Chief Trial Attorney (Army Federal Acquisition Regulation Supplement [AFARS] 33.212-90-3(a)(2)). This file should include a Contracting Officer's statement of facts, a legal memo, witness list, and any additional information considered relevant to the claim. Do not send the TALF to the appellant or the Board, but be sure your local attorney reviews it. The Contracting Officer's statements and responses to the appellant's complaint should be expressed in clear, concise, simple language referring to tabbed contemporaneous documents in the Rule 4 file.

"Stay where you are. If any man moves — even the king — before I give him leave, I will blast him with thunder, I will consume him with lightnings!" The multitude sank meekly into their seats, and I was just expecting they would. Merlin hesitated a moment or two, and I was on pins and needles during that little while. Then he sat down, and I took a good breath; for I knew I was master of the situation now. Yes, I was in King Arthur's court, and I might as well make the most out of it I could."

Tips on How to Write a Good Contracting Officer's Statement

- Use plain English! Talk through the entire story using simple terms. Keep sentences short and concise.
- Do not expect glowing reviews of your Rule 4 file by sending a truckload of documents without a coherent story.
- Do expect to create a new Rule 4 file if you send a truckload of documents without a coherent story.
- Reference tabs frequently in the Rule 4 file.
- Keep your Contracting Officer statement "user friendly."
- Do not cite case law in the Contracting Officer statement unless you are explaining that a decision you made was based on case law. Case law belongs in the legal memo.
- Read the claim carefully. Make sure the contractor is asserting a claim and not merely requesting discussions on the controversy.
- Respond to each allegation in the claim thoroughly. Provide an accurate, factual description of what occurred and then make your rebuttal. Do not miss the point of the claimant's allegation.
- A rebuttal is most useful when tied directly to documents included in the Rule 4 file – and least useful when it doesn't.
- Recognize that the contract file may not contain all relevant or contemporaneous documentation. Documents related to your contract may be scattered all over the installation – at different offices of various responsibilities. Brief your acquisition team on the claim and establish which of them may have relevant documentation.
- Responsive documents include e-mail.

The Answer

Based on reviewing the Rule 4 file and TALF, the Trial Attorney will "Answer" the "Complaint" in two "Parts" within 30 days. Part One of the Answer will respond directly to the complaint either paragraph-by-paragraph or sentence-by-sentence. Part Two of the Answer will provide a factual analysis of the Army's[13] side of the story.

To file an answer, your Trial Attorney needs to know whether the agency agrees or disagrees with each part of the complaint, and your version of the facts. In a very short amount of time, your Trial Attorney will need to know the entire story from a few key people who were involved with, or aware of, the circumstances.

Discovery

Discovery is a fact-finding mission by either side to obtain additional evidence to support their case. Discovery may request inspection of documents or sworn out-of-court testimony referred to as a deposition (DFARS Appendix A, Part 2, Preliminary Procedures, Rule 14). After the answer is filed, each side is allowed to review the other side's documents, evidence, and witnesses. This usually starts with requests for documents and "interrogatories," or written questions, in an attempt to get written answers to factual questions or seek an explanation of either party's contentions. An interrogatory may request a party to answer questions in writing, or may request a party to produce additional documents (DFARS Appendix A, Part 2, Preliminary Procedures, Rule 15).

"I hasted the message to our liege the king, and straightway he had me to his presence. He was frighted even to the marrow, and was minded to give order for your instant enlargement, and that you be clothed in fine raiment and lodged as befitted one so great; but then came Merlin and spoiled all; for he persuaded the king that you are mad, and know not where of you speak."

Discovery must be planned and, based on the complexity of the case, may require numerous, lengthy actions. Since discovery may require either side to depose witnesses, search government files (perhaps at various government locations), and visit subcontractor facilities and former employees, the Contracting Officer's assistance to the Trial Attorney in this process is vital.

Contracting Officers should expect to:

- Identify and locate expert witnesses.
- Assemble the team of individuals that planned and managed the acquisition.
- Locate and remove contract files from records holding.
- Review contract documents for relevancy.

"Don't put all your eggs in the settlement basket." If the other side is concerned enough to file an appeal, they probably will not settle on the activity's terms for the mere sake of making life easy for the Contracting Officer.

- Search internal paper and electronic correspondence for relevancy and establish communication with the author.
- Provide facilities for document research and conferences.

Interrogatories must be developed. Contracting Officers, members of the acquisition team, and other government witnesses must be prepared to construct probing questions that will assist the Trial Attorney's search for evidence to support the government's case. The Contracting Officer may also assist the Trial Attorney in forming responses to the appellant's interrogatories by identifying witnesses, documents, or other evidence to support the government's response.

Additionally, if you believe other areas may yield interrogatories or requests for documents that may prove fruitful, you should make those recommendations to your Trial Attorney. Keep in mind that the U.S. Army Litigation Center, Contract Appeals Division, only pays for the Trial Attorney's time and travel-related costs. All other costs associated with an appeal such as court reporter services, copies of transcripts, and other documents are borne by the customer; that is, the Program or Project Manager.

Trial Attorneys may request the Board to schedule the discovery process. Some Board Judges will set a discovery schedule, and others will allow the parties to establish their own discovery schedule.

The discovery process is clearly a lengthy one. A pre-hearing conference may be a good way to streamline the discovery process, resolve some issues, and may possibly be a method to avoid further litigation. Holding a pre-hearing conference may be of mutual benefit where both sides:

- Come to an understanding of the pertinent issues of the claim.
- Establish some common ground on the claim.
- Agree on facts or proceedings (stipulations).
- Clarify positions, facts, or assertions.

It may not be unreasonable to expect a pre-hearing conference to lead to changes in the contractor's claim, the government's defense, or lead to ADR. A Contracting Officer should expect to walk away from a pre-hearing conference with a better understanding of the contractor's side of the story and how to arrive at a resolution.

Current practice at the ASBCA is not to immediately assign a judge to the appeal. Initially, appeals are assigned to an attorney who reports to a judge. Judges will, however, be assigned when needed such as for preliminary motions or to resolve discovery problems.

Optimistic Contracting Officers sometimes say that they do not need to prepare for litigation since they have ongoing settlement talks with the other side that will end soon. This is not necessarily the case. As one attorney phrased it, "Don't put all your eggs in the settlement basket." If the other side is concerned enough to file an appeal, they probably will not settle on the activity's terms for the mere sake of making life easy for the Contracting Officer.

When a settlement is not reached, the agency may do a half-effort rush job the day before a filing is due instead of creating a well-thought-out report. It's nice to know that settlement talks are ongoing, but keep in mind that the litigation

will continue on its separate track until the settlement is signed, sealed, and delivered.

Litigation Risk

Decision makers must consider the likelihood of the government losing the claim if it were to be adjudicated. Litigation risk is the probability that the contracting activity will suffer a loss under a claim. Litigation risk analysis is an exercise performed by your Trial Attorney to calculate the possible outcome of the claim based upon the contractor's allegations and evidence weighted against the government's defense. The litigation risk analysis is usually provided to the Contracting Officer in writing so that he or she may make an informed decision on what the claim is actually worth, based on available evidence, and what course of action should be taken to resolve the claim. Using this analysis, the Contracting Officer should confer with the customer, Program Manager, or Project Officer to decide on a planned approach toward resolving the claim.

Contracting Officer's Business Plan

Results of the conference between the Contracting Officer and Program Manager or Project Officer must be documented in a business plan prepared by the Contracting Officer. The purpose of the business plan is to document the Contracting Officer's actions with regard to the claim that takes into account the litigation risk, customer input, and final course of action to resolve the claim.

Beginning with a case synopsis describing the facts of the case to date, the plan should also include a summary of the claim and related allegations, the government's position as to the allegations, and a summary of the litigation risk. It should follow with a discussion of the Contracting Officer/Program Manager conference detailing the issues under consideration, a discussion of the analysis of those issues, and the final course of action.

The ASBCA Hearing

The Contracting Officer and members of the acquisition team must be available to appear before the ASBCA for a hearing. Hearings are "reasonably informal" but will generally adhere to the Federal Rules of Evidence involving examination of witnesses, entering documents into evidence, and administrative motions. Your Trial Attorney will prepare you as to what to expect at the hearing or at any conference before the ASBCA, and will instruct you above all else to be truthful and to know the facts.

"Well, you know, when you perspire that way, in rivers, there comes a time when you — when you — well, when you itch. First it is one place; then another; then some more; and it goes on spreading and spreading, and at last the territory is all occupied, and nobody can imagine what you feel like, nor how unpleasant it is. And when it had got to the worst, and it seemed to me that I could not stand anything more..."

Cross-examination by opposing counsel may take on unfamiliar methods, and as a government witness you must not answer any question that you do not understand. If this happens, ask that the question be restated — it almost never comes out the same the second time around.

Opposing counsel may also approach you during cross examination with questions through characterizations — "Isn't it fair to say that it was impossible to keep the tolerance within the drawing's requirements?" Be aware of characterizations, and if you do not agree with them, say so and state the facts as you understand them. Finally, you should only testify to matters of which you have personal knowledge, unless you are asked to express an opinion.

"I was in a bad enough plight: seedy, drowsy, from want of sleep; weary from thrashing around, famished from long fasting; pining for a bath."

Professional Relationships

It's important to recognize a few things about your association with the Trial Attorney assigned to your case — whether under an appeal or protest. Your relationship with the Trial Attorney must exhibit professionalism, diligence, and respect.

- Although the Trial Attorney is an advocate for the government, he or she must remain objective. Recognize that you have been living with this procurement for weeks — perhaps months, and you may have become emotionally involved with the issues. Keep an open mind. Your responsibility at this point is to cooperate and support the Trial Attorney.
- A claim may be submitted within six years after its accrual, except for contracts awarded prior to Oct. 1, 1995. (See FAR 33.206[a].) So if you inherited the contract, or weren't around when the contract was awarded, be aware that you are responsible as Contracting Officer to administer the appeal. Regardless of whether the contract was transferred to you for administration, the government's interests are at stake. It's your case, and judgments on the appeal are the responsibility of the contracting activity.
- Also recognize that it's not your responsibility to convince the Trial Attorney that your action was reasonable. Your Trial Attorney is trained to look at a protest or claim from different perspectives. Do not become threatened when asked to justify your actions, and do not become impatient or annoyed when your Trial Attorney disagrees with your assessment, position, or rebuttal. There may be more important legal issues at stake not immediately apparent to a layperson.
- Do not procrastinate. Be responsive to your Trial Attorney. Whenever he or she requests something from you, it's important that you provide an accurate, timely, and complete response.
- The Trial Attorney will want to incorporate all actions — right or wrong — into the government's case. If you have made a wrong decision along the way, let the Trial Attorney know ahead of time. Weaknesses need to be dealt with, not hidden.
- Be understanding with your Trial Attorney. Although he or she may not possess the same technical expertise

held by you or members of your acquisition team, you are all on the same team. Relate your expertise factually and impartially so your Trial Attorney may form the government's best defense.

- Recognize that the Trial Attorney is also a litigation manager. There are litigation risks that need to be evaluated that may have an effect on how the case will proceed. The Trial Attorney may suggest alternative methods of resolution.
- Communicate your level of authority to the Trial Attorney. How much authority do you have under the project or program? Do you or the Program Manager have ultimate decision authority in matters that relate to settling a claim? Conducting business with the ultimate decision authority rather than having a Contracting Officer act as a "go between" is much more efficient.

"Away with his bonds, and set him free! And do him homage, high and low, rich and poor, for he is become the king's right hand, is clothed with power and authority, and his seat is upon the highest step of the throne! Now sweep away this creeping night, and bring the light and cheer again, that all the world may bless thee."

But I said:

"That a common man should be shamed before the world, is nothing; but it were dishonor to the KING if any that saw his minister naked should not also see him delivered from his shame. If I might ask that my clothes be brought again ..."

Your Law Firm

The U.S. Army Litigation Center, Contract Appeals Division is "your law firm" for all contract appeals and, for most organizations,[14] bid protest litigation. The Chief Trial Attorney is a colonel supported by two GM 15-level deputies; one deputy is a general law practitioner, and the other deputy specializes in bid protest litigation.

The Contract Appeals Division consists of three branches or trial teams, each headed by a lieutenant colonel. Teams are composed of five to six Trial Attorneys at the captain and major level, one secretary, and four paralegals. Within the division are two branches: Administrative Support and Docket Management. The phone number for the Chief Trial Attorney at the Contract Appeals Division is (703) 696-1511; DSN 426-1511.

I suggest you visit the Contract Appeals Division Web site at *http://www.jagcnet.army.mil/cad* and review their "Toolbox" for ASBCA lessons learned, General Accounting Office (GAO) lessons learned, the *GAO Bid Protest Guide*, ADR, the *Contract Law Deskbook,* and much more.

At GAO's Web site (*http://www.gao.gov*), you may obtain recent Comptroller General Procurement Decisions on bid protests or search for decisions related to a specific subject. The ASBCA Web site at *http://www.law.gwu.edu/asbca/* features a search capability for the text of decisions rendered by the Board since 1996.

A Word to All Contracting Officers/Specialists

My developmental assignment at the Army Litigation Center, U.S. Army Legal Services Agency was made possible through the Army Civilian Training, Education, and Development System (ACTEDS) long-term training program. (See the ACTEDS training catalog at *http://www.cpol.army.mil/*.)

The assignment afforded me the opportunity to gain a first-hand understanding of protest and dispute litigation. I highly recommend that any 1102 contracting officer or specialist take advantage of the unique opportunity offered through this program of working at the Contract Appeals Division.

Editor's Note: For a complete list of the 14 endnotes referenced in this article, or to question the author or comment on this article, contact him at ***dennis.longo@sbccom.apgea.army.mil***.

DAU Vice President/DSMC Commandant Nominated for Promotion to Brigadier General

Secretary of Defense Donald H. Rumsfeld announced June 5, 2001, that the President has nominated 40 Army Competitive Category colonels for promotion to the grade of brigadier general. Army Col. James R. Moran, Vice President, Defense Acquisition University/Commandant, Defense Systems Management College (DAU-DSMC), Fort Belvoir, Va., was among the 40 colonels selected for promotion. Moran was assigned to DAU-DSMC April 1, 2001.

DLAMP Applications Due by August 31

The solicitation period for submission of applications for the Defense Leadership and Management Program (DLAMP) Class of 2002 is now open. Applications must be received no later than Aug. 31, 2001.

DLAMP, a joint program of civilian leader training, education, and development across the Department of Defense (DoD), provides the framework for developing civilians with a DoD-wide capability from which selection may be made to fill approximately 3,000 key leadership positions. These key positions are at grade GS/GM-14 and above and require a Department-wide perspective.

For application procedures or more information about the program, visit the DLAMP Home Page at *http://dlamp.dfas.mil/info.html*.