

## CHAPTER 6

### LITIGATION PROCEDURE UNDER COST REIMBURSABLE CONTRACTS

6-1. Litigation under Cost Reimbursable Contracts. In all lawsuits against Cost Reimbursable contractors, the defendant will immediately furnish a copy of all papers filed against it to the contracting officer. Immediate notification should then be given by the contracting officer to the responsible Office of Counsel, in order that a determination may be made as to whether the government will intervene or defend the suit on behalf of the contractor.

a. The government will not undertake to represent every contractor involved in litigation, but will defend only those cases where the government appears to have an interest in the outcome of the litigation, such as when a judgment entered against the contractor may be a reimbursable item under the contract. Pending a decision regarding what action the government will take with respect to the lawsuit, the contractor will enter an appearance in court and request a continuance of the action, unless there is clearly sufficient time for the local U.S. Attorney to file an answer to the action.

b. A notice of litigation will be prepared by the District or FOA, and will provide such information as is available concerning the case. It will contain the information required by AR 27-40, as well as an identification of the contract involved and the docket number of the case. The notice of litigation will be faxed directly to CECC-K, in order for the government to have as much time as possible to consider representing the contractor. Such notice will be followed as expeditiously as possible with a full report in the format specified by paragraph 4-1 of this regulation, three copies of which shall be sent to CECC-K. The report will be made regardless of whether the contractor has given the notice required under paragraph d below, or has met the two conditions identified in item (13) below as prerequisite to defense by the U.S. Attorney's office. This report will include the following information, in addition to that described above:

(1) Confirmation of the initial notice that suit was filed.

ER 27-1-1  
15 Sep 96

- (2) The address of the parties involved.
- (3) A brief description of the prime contract involved.
- (4) Identification and a brief description of any subcontract, equipment rental agreement or collateral agreement between the parties involved, together with a copy of such agreement.
- (5) A complete statement of facts upon which the claim is predicated.
- (6) A complete statement of any facts or circumstances which might affect the liability of the government to the contractor, or which the government might employ in defending the litigation.
- (7) A list of the names and addresses of possible witnesses.
- (8) A statement as to the action already taken by the contractor or the contracting officer, if any.
- (9) Copies of all pleadings filed in connection with the suit.
- (10) Copies of reports of proceedings and findings by any Board of Inquiry which may have been convened to investigate any phase of the case.
- (11) Copies of any agreement for representation (paragraph d below).
- (12) In cases involving labor claims, a statement as to what law the plaintiff alleges has been violated.
- (13) A statement that the contractor desires or is willing to allow the action to be defended by the U.S. Attorney's office, and that the contractor has executed or agreed to execute an agreement for representation.

c. If the U.S. Attorney is not authorized to represent the contractor, the

contractor should be advised to retain private counsel to defend it in the proceedings. However, upon a determination that the government does have an interest in the lawsuit, the Chief Counsel will request the Justice Department to authorize the U.S. Attorney to represent the contractor, and will advise the contractor of that fact.

d. The contracting officer will advise the contractor to submit an Agreement for Representation, which should then be referred to both the U.S. Attorney and CECC-K. The contractor should be advised that if the agreement is executed before the U.S. Attorney has been authorized to provide representation and defend the case, it will not be binding upon either party until the Attorney General has approved the agreement.

e. The government will not undertake any defense on behalf of a contractor until the agreement for representation is executed, and a copy thereof received by the U.S. Attorney. The contractor will be advised that the agreement does not require him or her to waive any rights he or she may have under his or her contract with the Corps. One copy of the agreement will be furnished directly to the U.S. Attorney, and three copies will be forwarded to CECC-K.

f. Except where absolutely necessary, the filing of pleadings will await the U.S. Attorney's undertaking the defense of the suit. However, the contractor must assume the responsibility for procuring such extensions of time to answer the complaint as may be necessary to prevent a default judgment from being entered against the contractor.

g. Upon the settlement or conclusion of the lawsuit, a report will be submitted to the Chief Counsel, together with a recommendation regarding whether or not the contractor should be reimbursed, if it has been found liable.

6-2. Litigation Policy. When the U.S. Attorney undertakes the defense of a suit, he or she is in full charge of the case, subject only to coordination with, and approval by, the client agency. The contracting officer and the contractor will promptly

ER 27-1-1  
15 Sep 96

consult with the U.S. Attorney after receiving instructions from the Chief Counsel, and will furnish all requested cooperation.

a. If a private attorney, previously retained by the contractor, remains in the case, his or her activity will thereafter be governed by the U.S. Attorney's decisions.

b. Fees of attorneys retained before the government is given an opportunity to defend, or retained by the contractor after the U.S. Attorney has undertaken to defend the case, will not be reimbursable items.

c. Whenever the employment of an attorney at a monthly salary on the contractor's regular payroll is authorized, his or her salary must not be affected by participation in such lawsuits, nor may it be increased by any fee for services in the case insofar as reimbursement is concerned.

d. Attorneys on the staffs of Division or District Commanders may, upon request by the U.S. Attorney, cooperate with the U.S. Attorney's office in obtaining evidence or drafting pleadings and briefs for the defense of a suit.

e. Contracting officers will not communicate with the local U.S. Attorney in connection with a suit filed against the contractor, nor will they advise the contractor to do so, until they have been so authorized in accordance with these instructions.

6-3. Suits Covered by Insurance. Whenever any legal action is fully covered by insurance and the insurance company agrees to accept full responsibility for the defense of the action and for payment of any judgment that may be rendered against the defendant, the following information will be furnished to the Chief Counsel, ATTN: CECC-K:

a. title of the action,

b. name of the insurer,

- c. the amount sought in the action,
- d. the amount of insurance coverage, and
- e. a statement to the effect that the insurer has agreed to accept full responsibility for the defense of the action and the payment of any judgment against the defendant.

In any case where there is doubt as to full insurance coverage, or when for other reasons government counsel may be desirable, a full report as required by paragraph 4-1 above will be made, together with explanations and recommendations of the District or Division Commander concerned.

6-4. Settlement or Appeal of Litigated Matters. In cases where the United States is a party, the U.S. Attorney in charge has the authority to settle the suit in the name of the government. However, as to suits by or against Corps contractors having cost reimbursable contracts, where the U.S. Attorney has been authorized to represent the contractor, the attorney will only transmit offers of settlement to the contractor and act in the role of private counsel, and the Attorney General will not review settlement questions. Accordingly, upon receipt of such offer and recommendation, the contractor will immediately refer the matter to the contracting officer and await instructions. The contracting officer will promptly submit a report and recommendation on the question to the Chief Counsel, ATTN: CECC-K, who will decide on acceptance or rejection of the settlement offer. Whenever an adverse judgment, in whole or in part, is entered in a suit, a special report and recommendation will be made promptly to CECC-K by the contracting officer as to the advisability of appeal. This report will be supported by recommendations of the U.S. Attorney and the contractor, if practicable. Questions of appeal or other review in this type of contract litigation will be considered and decided by the Solicitor General of the United States, upon recommendation of the U.S. Attorney, the Assistant Attorney General, and the Chief Counsel.

6-5. Reimbursement of Expenditures Arising from Litigation. Authorization to settle does not imply that reimbursement of the full amount will be made. In some

ER 27-1-1  
15 Sep 96

cases, consent will be given with reservations as to the reimbursement only under the terms of the contract. For instance, if the amount owed is definite, no reimbursement will be made for any amount in excess thereof which may be agreed to by the parties; reimbursement in full of a settlement will only be authorized when the total amount is clearly owed to the contractor, or when a reasonable doubt exists as to the amount owing and the amount of the settlement is found to be just and reasonable. The item in question must be the proper subject of reimbursement under the contract, and litigation expenses, including attorneys fees, court costs, judgments and settlements, will be considered for reimbursement only upon a definite showing that such reimbursement is proper. Advice may be obtained from CECC-K as to the reasonableness of the attorney fees. However, this is primarily a matter for the contracting officer's determination under the terms of the contract. Among the factors to be considered are:

- a. The fees generally charged in the locality by attorneys of similar reputation and experience (state and local sources such as the U.S. Attorney, bar associations and local attorneys).
- b. The pecuniary value to the government, both in the instant case and as precedent for future cases.
- c. The substantive and procedural difficulty involved in the matter, including an evaluation of any special competence of counsel in the subject matter of the issue being litigated.
- d. Whether any reduction of the fee is in order either because of assistance or advice rendered by other attorneys (including government attorneys) or because of the failure to diligently advance the interests of the government.

6-6. Certificate of Contracting Officer Relating to Reimbursement for Claims, Settlements, and Litigation. Upon approval of an amount paid under a settlement, and proof of payment by the contractor, reimbursement may be made. The reimbursement voucher will be supported by a release from the claimant of all claims against the United States and the contractor in the matter involved. Such

amount will be covered by a separate voucher on which the appropriate officer will certify as follows:

I certify that the above amount represents a settlement made with the written consent of the contracting officer and represents a loss or expense actually sustained by the contractor in connection with work under Contract No. \_\_\_\_\_, not compensated by insurance or otherwise, reimbursable under Article \_\_, Paragraph \_\_ of said contract, and the same is found to be just and reasonable.

For the contracting officer,

By \_\_\_\_\_

(Name, grade, office) Authorized Representative

6-7. Termination of Contracts. In connection with termination and final settlement of cost reimbursable contracts, caution will be exercised in the execution of any release or settlement agreement, in view of lawsuits against the contractor. The contractor's unliquidated liability as to any litigation arising in connection with his or her contract, pending at that time or which might be instituted in the future, will be reserved by a general exception for an unstated amount in any release he or she executes in favor of the government, and such liability should be excluded from that which the government might assume under a settlement agreement. Any other course of action is considered to be potentially detrimental to the government's interests in the conduct of the litigation, regardless of whether the defense of the case is handled by private counsel (such as when the Fair Labor Standards Act is involved) or by government counsel.