DEPARTMENT OF THE NAVY
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SECNAVINST 5800.15
OGC
05 March, 2007

SECNAV INSTRUCTION 5800.15

From: Secretary of the Navy

Subj: USE OF BINDING ARBITRATION FOR CONTRACT CONTROVERSIES

Ref: (a) Federal Acquisition Regulations Part 33.2
(b) DoD Instruction 4105.71, Nonappropriated Fund (NAF) Procurement Policy, 2 May 2001
(c) Administrative Dispute Resolution Act of 1996; codified at 5 U.S.C. 571, et seq.
(d) DoD Directive 5145.5, Alternative Dispute Resolution, 22 Apr 1996
(e) SECNAVINST 5800.13A
(f) Navy Marine Corps Acquisition Regulation Supplement, Chapter 5233, Nov 2003
(g) Armed Services Board of Contract Appeal "Notice Regarding Alternative Means of Dispute Resolution"
(h) Contract Disputes Act of 1978; codified at 41 U.S.C. 601, et seq.

Encl: (1) Department of the Navy Contract Arbitration Procedural Guidance

1. Purpose. To provide a comprehensive Department of the Navy (DON) policy for the use of binding arbitration for contract issues in controversy under references (a) and (b).

2. Background

a. Overview of Binding Arbitration. Contractors and contracting officers can use binding arbitration to resolve disputes quickly, conclusively and with minimum expense. Binding arbitration is a voluntary dispute resolution process in which the parties select a neutral decision-maker (arbitrator) to hear their dispute and resolve it by rendering a final and binding award. Like litigation, arbitration is an adversarial process designed to resolve specific issues submitted by the parties. Arbitration differs from litigation by reducing procedural and evidentiary rules, allowing flexibility in timing and choice of decision-makers, and resulting in awards with no

precedential value in other disputes. Also, there are very limited rights of appeal from a binding arbitration award. Arbitration may offer an advantage over the usual claims process under references (a) and (b) by allowing the parties to address an issue in controversy once, rather than repeatedly through claims followed by appeals.

b. References (a), (c), (d), and (e) encourage Federal agencies to use Alternative Dispute Resolution procedures, including binding arbitration, albeit subject to statutory restrictions. Prior to using binding arbitration authorized by reference (c), agency heads must consult with the Attorney General and issue guidance on the appropriate uses of the technique. This instruction is intended to meet that requirement.

3. Scope. This instruction applies to all contracting activities of the Department of the Navy. This instruction does not apply to grievance arbitrations under the Federal Service Labor Management Relations Act, 5 U.S.C. 7121 or the National Security Personnel System.

4. Policy. Contracting Officers are authorized to use binding arbitration procedures contained in enclosure (1) for issues in controversy as defined by Federal Acquisition Regulation (FAR) 33.201, subject to:

a. The limitations and requirements of references (a), (c) and (d), and enclosure (1);

b. The approval of the Associate General Counsel (Litigation) (AGC(L)) on a case-by-case basis in consultation with the Assistant General Counsel (Alternative Dispute Resolution) (AGC(ADR)), and;

c. The approval of appropriate contracting officers and other officials ordinarily required for approval of settlements, as measured by the maximum award cap identified for the proposed arbitration. See reference (f).

5. Relationship to Other ADR Methods. Arbitration under this instruction may be used in conjunction with other methods agreeable to the parties. For example, the parties may consider using combinations of mediation and arbitration (commonly called “Med-Arb”). Another option is to incorporate arbitration as a feature of a Dispute Resolution Board (DRB). One intent of this

instruction is to provide as many options to the parties as possible for cost-effective, collaborative dispute resolution.

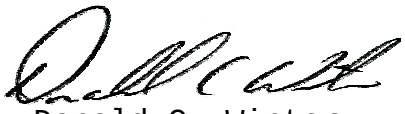
6. Action

a. The AGC(ADR) shall develop recommended procedures and forms to assist activities wishing to use binding arbitration.

b. All contracting activities shall consider the use of alternative dispute resolution methods, including arbitration, for pending and future claims and issues in controversy.

c. The AGC(ADR) shall provide training to OGC attorneys and other interested DON personnel in the effective use of arbitration under this instruction.

d. Parties rejecting offers of binding arbitration under this instruction shall provide written reasons in accordance with FAR 33.214. Contracting officers issuing or receiving such written statements shall forward them to the DON ADR Program electronically at adr@mail.navy.mil for the purpose of trend analysis.



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DEPARTMENT OF THE NAVY
CONTRACT ARBITRATION PROCEDURAL GUIDANCE

Issues in controversy resolved through binding arbitration under this instruction may differ greatly in complexity and level of risk. Accordingly, parties should tailor arbitration procedures to their particular needs, guided by the principle that binding arbitration should be quicker and less expensive than the standard administrative procedures found in the Contract Disputes Act (CDA), the Federal Acquisition Regulation (FAR), and supplements to the FAR. Further, such arbitration procedures must conform to the procedures described herein.

1. Parties

a. Under this instruction, the term “parties” is limited to the DoN and its contractors as defined in 41 U.S.C. 601. Subcontractors wishing to raise issues for binding arbitration are not parties, and must obtain sponsorship by the prime contractor.

b. The Office of the General Counsel (OGC) has sole authority to represent the DoN in arbitrations under this instruction. DoN attorneys who are not part of OGC may represent the DoN only with the approval of the AGC(L), after demonstrating sufficient background in government contract law. Similar to CDA claims and appeals processing under the Navy Marine Corps Acquisition Regulation Supplement (NMCARS), the contracting activity involved should ordinarily maintain the continuity of any DON contract team that might have investigated and evaluated the issue in controversy. Such teams should continue to function in an assisting capacity under the leadership of the OGC attorney assigned to handle the arbitration. However, no final settlement agreement will be made without the written approval and signature of the contracting officer. (See reference (f)).

2. The Decision to Use Binding Arbitration

a. Reference (e) encourages all DON personnel to use ADR techniques like arbitration to the maximum extent practicable. The decision to arbitrate must be voluntary on the part of all parties to the arbitration, and the DON shall not require anyone to consent to arbitration as a condition of award of a contract. (See 5 U.S.C. 575(a); FAR 33.214(f))). But ADR procedures are not right for all cases. Reference (a) calls for agencies to

consider not using any form of ADR, including binding arbitration, in a number of specified circumstances. See 5 U.S.C. §572(b). Accordingly, unless it can be established to the satisfaction of the AGC(L) that the use of binding arbitration for the resolution of a contract issue in controversy will be in the best interests of the Government, binding arbitration will not be used whenever:

(1) A definitive or authoritative resolution of the matter is required for precedential value, and binding arbitration is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and binding arbitration would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and binding arbitration would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations that are not parties to the proceeding;

(5) A full public record of the proceeding is important, and binding arbitration cannot provide such a record;

(6) The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and binding arbitration would interfere with the agency's fulfilling that requirement;

(7) Any related issues, claims, counterclaim, cross-claim or defenses which would require the arbitrator to rule on legal issues beyond the scope of contract dispute jurisdiction ordinarily provided by the Contracts Disputes Act of 1978; or,

(8) The claim involves fraud. (See reference (a) at FAR 33.209 and 33.210(b)).

3. The Arbitration Agreement

a. Prior to commencing binding arbitration, the contractor and the contracting officer must execute an arbitration agreement that defines the scope and procedures for the arbitration.

b. Subject to paragraph 4 above of this instruction, a DoN contracting officer who otherwise has authority to enter into a settlement concerning the matter may execute a binding arbitration agreement. (See 5 U.S.C. 575(b)(1) and (2)).

c. An arbitration agreement must be in writing, signed, and dated. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or "cap" that may be granted by the arbitrator. (See 5 U.S.C. 575(a)(2)). The issue of whether these agreements are contingent liabilities needs to be addressed. As a result, contracting officers should consult with the appropriate comptroller's office prior to execution. Further:

(1) All agreements to arbitrate shall explicitly exclude any award of punitive, consequential, special or exemplary damages by the arbitrator.

(2) All agreements to arbitrate shall explicitly state that the parties to the arbitration proceedings must each bear their respective arbitration costs, including all attorney fees and expenses. The agreement to arbitrate shall explicitly exclude any award of attorneys' fees or arbitration costs by the arbitrator.

d. The parties may limit the issues that they agree to submit to arbitration. (See 5 U.S.C. 575(a)(1)(A)).

e. In addition to the required cap under 3.b. above, the parties may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. (See 5 U.S.C. 575(a)(1)(B)).

f. To maximize the time and cost savings that arbitration offers, arbitration proceedings should not ordinarily exceed the claim processing times found in FAR 33.211(c). Accordingly, the following time parameters are recommended for inclusion in arbitration agreements:

(1) Claims of $100,000 or less. The record (as defined by the arbitration agreement) should close, and briefing should be completed, within sixty days of the execution of the agreement to use arbitration. Unless the parties agree in writing, no hearing should begin less than 40 days from the date of execution of the agreement to use arbitration.

(2) Non-monetary Claims and Claims Exceeding $100,000. The record should close, and briefing should be completed, within 180 days of the execution of the agreement to use arbitration. Unless the parties agree in writing, no hearing should begin until at least 60 days from the date of execution of the agreement to use arbitration.

(3) Docketed Appeals at the ASBCA and matters in court. Ideally arbitration should be used prior to appeal, but subject to the rules and orders of the Armed Services Board of Contract Appeals (ASBCA), binding arbitration may be used in appeals to the ASBCA in a manner consistent with the principles of this instruction. Counsel should consider whether the use of Summary Trial with Binding Decision (see reference (g)) offers appropriate benefits. Recognizing that actions in the United States District courts and the United States Court of Federal Claims are outside the scope of reference (a), this instruction does not authorize the use of binding arbitration in those fora.

g. The arbitration agreement shall establish 5 U.S.C. 574, “Confidentiality,” as the confidentiality standard for dispute resolution communications. Under that statute, neither the agreement to use binding arbitration nor an arbitral award will be confidential. Notably, except for those dispute resolution communications generated by the arbitrator, dispute resolution communications available to all parties are not deemed confidential under the statute. (See 5 U.S.C. 547(b)(7)).

h. The arbitration agreement should define and limit the scope of discovery needed to support the arbitration proceeding.

i. The arbitration agreement should specify whether the arbitration proceeding will involve a hearing or if the award will be made simply on a written record. Regardless of the procedures used, the parties retain the burden of proving the facts supporting their allegations or defenses. Affidavits, declarations, depositions, admissions, answers to interrogatories, stipulations and hearing testimony under oath may be employed to supplement other documentary evidence in the record.

j. The arbitration agreement should address any requirements or restrictions on briefs, expert reports or other expected filings.

4. Arbitrators

a. The selection of the arbitrator shall be upon mutual agreement of the parties. (See 5 U.S.C. 577(a)). The ASBCA has agreed to make administrative judges available to serve as arbitrators under this instruction. Requests for ASBCA administrative judges must be filed with the Chairman of the ASBCA. The parties also may elect to use a mutually acceptable arbitrator from another source if the parties agree as to how the costs are to be shared. In no event shall the arbitrator have an official, financial or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he/she may serve as the arbitrator. (See 5 U.S.C. 573 and 577(b)). The AGC(L) serves as the approving official for the DON in such matters.

b. The arbitrator may regulate the course and conduct of the arbitration hearing. (See 5 U.S.C. 578(1)).

c. The arbitrator may administer oaths and affirmations. (See 5 U.S.C. 578(2) and 18 U.S.C. 1621).

d. The arbitrator may order the attendance of witnesses and the production of documents under the control of the parties, for discovery or hearings within the scope of the arbitration agreement. Arbitrators may consider a party’s failure to comply when weighing that party’s evidence. An arbitrator may also draw an adverse inference against a party that fails to comply with an order requiring attendance of witnesses or production of evidence under its control. (See 5 U.S.C. § 578(1) and 580(a)(1)). For arbitration of issues in controversy that have been sponsored by prime contractors on behalf of subcontractors, such subcontractors are considered under the control of the prime contractor.

e. If the issues before the arbitrator are the subject of an appeal under the CDA, and the arbitrator otherwise has authority as an administrative judge sitting on the Armed Services Board of Contract Appeals, the arbitrator may compel testimony and production of evidence at the hearing using the authority conferred by 41 U.S.C. 610 and 5 U.S.C. 578(3).

f. An arbitrator may make awards. (See 5 U.S.C. 578(4)). An "award" is any decision by an arbitrator resolving the issues in controversy. (See 5 U.S.C. 571(4)).

g. The arbitrator shall set the time and place for the arbitration hearing and shall notify the parties at least ten business days before the hearing is to take place.

h. The arbitrator may hear sworn testimony and consider documentary evidence that is not irrelevant, immaterial, unduly repetitious, or privileged. (See 5 U.S.C. 579(c)(4)).

i. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents and policy directives. (See 5 U.S.C. 579(c)(5)).

j. No party shall have any unauthorized ex parte communication with the arbitrator. If a party violates this provision, the arbitrator may require that party to show cause why the issue in controversy should not be resolved against it for the improper conduct. (See 5 U.S.C. 579(d)).

5. Arbitration Hearings

a. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall: (1) make the arrangements for it; (2) notify the arbitrator and other parties that a record is being prepared; (3) supply copies to the arbitrator and the other parties; and (4) pay all costs, unless the parties have agreed to share the costs. (See 5 U.S.C. 579(b)(1)-(4)).

b. At any arbitration hearing, parties are entitled to be heard and present evidence. (See 5 U.S.C. 579(c)(1) and (2)). Parties are also entitled to cross-examine witnesses appearing at the hearing, but the parties may voluntarily waive this entitlement in the interest of providing an expeditious and informal proceeding, to conduct a hearing on written submissions, or for other reasons. Parties may agree to use affidavits or declarations for witnesses who do not appear. The arbitration agreement should address methods of cross-examination (or waiver) for such out-of-hearing statements. Parties should recognize that arbitrators have discretion regarding the weight to give statements that are not subject to advance notice and an opportunity for cross-examination. (See 5 U.S.C. 579(c)(1) and (3)).

6. Awards

a. Under 5 U.S.C. 579(e), the arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later.

b. An arbitration award shall include a brief informal discussion of the factual and legal basis for the award. Formal findings of fact and law are not required. (See 5 U.S.C. 580(a)(1)).

c. Arbitrators shall use formal service of process procedures to deliver the award to the General Counsel of the Navy and other parties. Under DoD Directive 5530.1 of 22 August 1983 (NOTAL), the Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy (see 32 C.F.R. 257.5(c). All process for such documents shall be served via certified mail or Federal Express upon the: General Counsel of the Navy, Navy Litigation Office, 720 Kennon Street SE, Bldg 36 Room 233, Washington Navy Yard, DC 20374-5013, (202) 685-7039, who will refer the matter to the proper delegate for action.

d. The award in an arbitration proceeding shall become final 30 days after it is served on all parties. The DoN may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period. (5 U.S.C. 580(b)).

e. Implicitly recognizing that arbitration under the statute would be worthless if unsuccessful parties could refile claims, final awards are binding on the parties, and confirmation is not required. Nevertheless, an award may be enforced using the confirmation procedures found in 9 U.S.C. 9. Awards also may be vacated, modified or corrected using the procedures found in 9 U.S.C. 10 to 13. (See 5 U.S.C. 580(c)).

f. Prior awards may be cited in factually related proceedings (arbitral, administrative or judicial) to raise the defense of res judicata, to serve as precedents, or otherwise. Although bounded by the terms of the contract at issue and the arbitration agreement, subsequent arbitrators have considerable discretion in how they use prior awards. The statute, however, does not permit using the prior award in factually unrelated

proceedings, or for issue preclusion under the theory of collateral estoppel. (See 5 U.S.C. 580(d)).

g. For the purposes of 6.f., above, proceedings are sufficiently "factually related" when they arise between the same parties (or their legal successors or assignees) under the same contract, basic agreement, basic ordering agreement, or other similar documents. Delivery orders under the same indefinite delivery, indefinite quantity contract are factually related. For other proceedings between the same parties (or their legal successors or assignees) that arise out of different contracts, the arbitrator has discretion in determining whether the proceedings are factually related. Factors to consider include, but are not limited to, whether the subsequent contract is a follow-on contract, the prior award provides evidence of the intent of the parties, or the parties conformed their pre-dispute behavior in the subsequent contract to the terms of the prior award.

h. Contractors may invoice for final awards in accordance with established contractual procedures, provided that the arbitration award has been made part of a formal modification of the contract. The modification should include an acceptable release of all claims that were the subject of the arbitration, as well as a release of all motions or actions to vacate, correct, modify or confirm the award. Awards in favor of the DoN can result in deductive modifications to the contract, and any necessary demands for payment and recoupment action under FAR Subchapter 32.6 or other methods. Awards regarding non-monetary issues may be incorporated into the contract as appropriate. Prior to modifying the contract, the government shall ensure that the proper funds are available and all of the required approvals have been obtained.

7. Review in the United States District Court

a. The decision to use binding arbitration is subject to judicial review under 9 U.S.C. 10(b) for awards or uses of arbitration that are inconsistent with 5 U.S.C. 572. (See 5 U.S.C. 581(b)).

b. Any action for review of an arbitration award must be made pursuant to 9 U.S.C. 9 through 13. (See 5 U.S.C. 581(a)). Under 9 U.S.C. 12, "a notice of a motion to vacate, correct or modify an award must be served on the adverse party or his attorney within three months after the award is filed or delivered." In order to ensure compliance with this provision,

DON activities seeking review must immediately consult with the AGC(L) and AGC(ADR) to ensure timely processing.