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MEMORANDUM FOR THE BUREAU CHIEF PROCUREMENT OFFICERS

FROM: Corey M. Rindner, Director
Office of the Procurement Executive

SUBJECT: Alternative Dispute Resolution

Purpose: This AB provides policy and guidance for the use of alternative dispute resolution techniques in connection with disputes that arise under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. sections 601-613.

Effective Date: December 17, 1999

Expiration Date: This AB remains in effect until cancelled or superseded.

Cancellation: PIM 99-16, dated December 17, 1999 is hereby cancelled.

Background: Alternative Dispute Resolution (ADR) refers to a range of procedures intended to resolve disputes at less cost, more quickly and with greater satisfaction for the parties involved than is possible through formal litigation. The techniques are feasible and adaptable to the particularities of each individual case and permit the parties to take into account their respective litigation risks. The employment of ADR is a consensual matter and cannot be instituted without the agreement of both the Department of the Treasury (Treasury) and the contractor. Additional detailed guidance concerning ADR is provided in the attached guide.

Policy: Treasury Order 107-06 and Treasury Directive 63-01 designates Treasury's General Counsel as the Dispute Resolution Specialist and establishes the Departmental policy regarding ADR. It is Treasury's policy to make maximum use of ADR as an alternative to formal litigation where it appears such an approach will facilitate disputed resolution. The goal is to resolve the dispute at the earliest stage feasible, preferably before the contracting officer's final decision, by the fastest and the least expensive method possible and at the lowest appropriate organizational level. A preference for the early application of ADR is reflected at Federal Acquisition Regulation (FAR) 33.204, which states, "The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level."

Additional guidance on ADR is provided at FAR 33.214, which specifies the objective, elements and appropriate general procedures for ADR. The attached guide is issued pursuant to the guidance provided at FAR 33.214.

The contracting officer is key to resolving contentious issues before they become unnecessary contract disputes. By exploring all reasonable avenues for a negotiated settlement with the contractors, the contracting officer can avoid most disputes. When all possibilities for negotiation have failed, the contracting officer should endeavor to move the potential dispute into ADR.

The Contract Disputes Act, as amended by the Federal Acquisition Streamlining Act of 1994, requires that, for small businesses, "In any case in which the contacting officer rejects a contractor's request for alternative dispute resolution proceedings the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572 (b) of Title 5, United States Code, the Administrative Dispute Resolution Act, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the issue(s) under dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request."

ADR should be considered for disputes that are before the General Services Board of Contract Appeal (GSBCA) and disputed claims before they have been filed with the United States Court of Federal Claims or district courts of the United States. Since the United States Court of Federal Claims and district court cases are under the control of the Justice Department (DOJ) rather than Treasury, Treasury needs to coordinate ADR in those actions with DOJ.

The attached guidance shall be considered for all contract claims pursuant tot he CDA or appeals before the GSBCA whether in advance of litigation or after litigation has commenced. If the parties are unable to satisfactorily resolve the dispute using ADR or cannot agree on it's application, they resume the formal litigation process. Attached at the end of the guide is a contract resolution clause that I encourage you to incorporate or use in appropriate contracts.

The Treasury ADR Working Group developed this guidance. We appreciate the efforts of the Working Group.

The Treasury Alternative Dispute Resolution Procurement Executive is Corey Rindner, Director, Treasury Office of the Procurement Executive. Any questions regarding this AB for the attached guide can be directed to Kevin Whitfield at (202) 622-0248. He may also be reached at kevin.whitfield@do.treas.gov.

Attachments

I. INTRODUCTION

Alternative Dispute Resolution (ADR) refers to a range of procedures used to resolve disputes and avoid formal litigation. Advantages of ADR include lower cost, quick resolution and greater satisfaction for the parties involved. ADR techniques are flexible and adaptable to each individual case and permit the parties to take into account their respective litigation risks. The use of ADR is a consensual matter.

The intent of this document is to provide the following:

! Legislative background on ADR;

! A framework for understanding the types of dispute resolution assistance offered by ADR;

! Factors to consider in deciding whether or not a particular dispute/protest is suited for ADR;

! Guidance on drafting ADR agreements; and

! Some lessons learned.

The intent is not to provide a definitive treatment of any of the foregoing subjects. For a number of the statements made, there are exceptions and opposing views. Simply put, ADR has many advantages in many situations.

II. LEGISLATIVE BACKGROUND

The Administrative Disputes Resolution Act (ADR Act), originally authorized in 1990 as Public Law 101-552 and re-authorized in 1996 as Public Law 104-320 (codified at 5 USC ' 571, et seq.), encourages Federal agencies to agree to use mediation, simplified or expedited procedures, or other mutually agreeable processes to resolve disputes arising under Federal administrative programs.

The ADR Act amends the Contract Disputes Act to encourage agency contracting officers and board of contract appeals (BCA) to use consensual methods to settle acquisition disputes and it specifically authorizes use of ADR in contract disputes. These changes greatly enhance the flexibility of contracting officers, BCAs and contractors to use mini-trials and other appropriate

means to better handle contract claims.

The ADR Act directs agencies to:

$ Designate a senior official as a dispute resolution specialist;

$ Establish policy on ADR;

$ Provide training for selected personnel; and

$ Review grants and contracts for inclusion of clauses encouraging use of alternatives.

Since the enactment of the ADR Act, the Federal Government is beginning to recognize the full potential of this process as an alternative means of resolving disputes.

III. ALTERNATIVE DISPUTE RESOLUTION (ADR): A COMMON-SENSE APPROACH TO DISPUTE RESOLUTION

ADR should be considered whenever a dispute arises as to the parties= rights or obligations under a Government contract and that dispute remains unresolved after exploration of the issues by the parties. An alternative method of resolving a claim is preferable to the expense, delay and risks associated with formal litigation. It should be remembered that ADR is in many cases risk free; if no resolution is reached, the parties retain all of their legal rights (although, if binding arbitration is used, it is, of course, final).

The contracting officer is key to resolving contentious issues before they become unnecessary contract disputes. By exploring all reasonable avenues for a negotiated settlement with contractors, the contracting officer can avoid most disputes. When all possibilities for negotiations have failed, the contracting officer should endeavor to move the potential dispute into ADR.

A. Continuum of Dispute Resolution Techniques

The following chart is intended to provide a simple model of the continuum of dispute resolution processes. ADR processes are

delineated in the middle three columns of the chart. As indicated in the shaded area at the top of the chart, ADR methods fall into three broad categories based on the type of assistance the disputant needs: 1) negotiation assistance; 2) outcome prediction; and 3) private adjudication.

NEGOTIATION	**ALTERNATIVE DISPUTE RESOLUTION**			LITIGATION
Unassisted Negotiation	Assisted Negotiation	Outcome Prediction Assistance	Private Adjudication	Public Adjudication
Negotiations	Mediation	Early Neutral Evaluation	Binding Arbitration	Court of Federal Claims
Settlement	Facilitation	Fact-Finding	Court-Annexed ADR Programs	Boards of Contract Appeals
	Structured Settlement Negotiations	Dispute Review Boards		Federal Circuit
		Mini-trial		Supreme Court

Most parties involved in a contract dispute face a stark choice: resolve your differences through unassisted negotiation (far left column) or endure the public adjudication system (far right column). Moving from left to right, the chart depicts increasingly adversarial, costly and time-consuming modes of dispute resolution. Equally important, moving from left to right, the parties find themselves losing their ability to control the outcome of the dispute resolution result. Because most contract dispute cases settle, at least some of the time, an effort expended in preparing for trial could have been avoided. These are the cases in which application of ADR techniques hold promise.

B. Assisted Negotiation

All too frequently, parties to a dispute simply cannot communicate between themselves and need a neutral third person to act as a conduit of communication. In such instances, mediation, facilitation, or a structured settlement offer a viable option to the formal public adjudication system. Mediation has shown to be especially effective when the dispute involves a clash of personalities between the parties. In such cases, a neutral third-party can keep the disputants focused on the issues involved and move them towards crafting an acceptable settlement.

(1) Mediation - Mediation is a process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and non-binding. It provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or could not be addressed by judicial action. The mediator has no power to impose a settlement. The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual chosen to mediate. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with party-generated proposals and try to help parties realistically assess their options. Some mediators work primarily in joint sessions with all parties present while others make extensive use of private caucuses. At a minimum, most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.

(2) Facilitation - This process is similar to mediation, except that the neutral avoids becoming involved in substantive issues, focusing instead on procedural matters and pacifying participants when necessary. Unlike the mediator, the facilitator=s goal is to foster communication and understanding between the parties.

(3) Structured Settlement (Settlement Judge) - An administrative judge (or GSBCA hearing officer) who is appointed by the Chair of the GSBCA for the

purpose of assisting the parties in reaching a settlement. The settlement judge will not hear or have any formal or informal decision-making authority in the case, but can promote settlement through frank, in-depth discussion of the strengths and weaknesses of each party=s position. The agenda for meetings will be flexible to accommodate the requirements of the individuals= case. The settlement judge may meet either jointly or separately with the parties to encourage settlement. The settlement judge=s recommendations are not binding on the parties.

If a dispute or appeal to the GSBCA is not resolved through use of the settlement judge, it will be restored to the GSBCA docket. This process is also available at many other tribunals, including the Federal Claims Court.

C. Outcome Prediction

If both parties need an evaluation of the dispute, then outcome prediction techniques of early neutral evaluation, fact finding (conducted by a credible subject matter expert), dispute review board or a mini-trial may serve both parties better than the conventional resolution system.

(1) **Neutral Evaluation** - Involves using a neutral fact finder, usually with substantive expertise, to evaluate the relative merits of the parties= cases. This process usually involves an informal presentation to the neutral of the highlights of parties= positions. The neutral provides a non-binding evaluation that can give the parties a more objective assessment of the positions, thereby increasing the chances that further negotiations will be productive.

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

(3) **Dispute Review Board** - The Board (usually comprised of two to three individuals) is selected by the disputing parties. The Board listens to both sides of the dispute and provides

an advisory opinion or non-binding decision.

(4) **Mini-trial** - This technique brings together an official from each of the contracting parties with authority to resolve the dispute. Neither official should have had responsibility for preparing the case for trial. They hear abbreviated, factual presentations from a representative from each party and then they discuss settlement. It is governed by a written agreement between the parties, which is tailored to the particular needs of the case. It generally has three stages, which can usually be completed within 90 days.

(a) The pre-hearing stage - Covers the time between agreement on written procedures and commencement of hearing. Parties, with assistance of a neutral, complete whatever preparation is provided for in the agreement, such as discovery and exchange of position papers.

(b) The hearing stage - Representatives present their respective positions to the designated officials. Each representative is given a specific amount of time with which to make the presentation. How that time is utilized is solely at the discretion of the representative. There may also be an opportunity for rebuttal and a question and answer period for the officials. **(Note: This stage usually takes 1 to 3 days.)**

(c) The post-hearing discussion stage - Officials meet to discuss resolving the dispute. The mini-trial agreement should establish a time limit within which officials either agree to settle the matter or agree

to resume the underlying litigation. These discussions are settlement negotiations and as such, may not be used by either party in subsequent litigation as an admission of liability or willingness to agree on any aspect of settlement.

D. Private Adjudication

The disputing parties can agree to hire a private judge to hear and decide their case. The procedure will be a matter of contract between the parties or it may be undertaken bacause of a statute authorizing the procedure. The parties can establish the ground rules within the limits of the private judge=s authority. Typically the decision is final and binding on the parties.

In summary, the three categories of ADR - assisted negotiation, outcome prediction assistance, and private adjudication - offer disputants a variety of flexible options between unassisted negotiation and public adjudication. In fact, many ADR innovations mix and match existing techniques to create hybrid methods to address disputants' needs more precisely.

E. Cases Appropriate for ADR

The best candidates for ADR are those cases in which only facts are in dispute, while the most difficult are those cases in which disputed law is applied to uncontested facts. However, the fact that resolution of the dispute may involve legal issues, such as contract interpretation, does not preclude the case from consideration. Likewise, the amount in controversy is a relevant, but not controlling, factor in the decision whether to use ADR. It is strongly suggested, however, that the parties give serious consideration to using ADR in all disputes where the amount in controversy is less than $100,000. ADR may also be particularly effective in large, complex multi-claim construction-related disputes.

As a general rule, and subject to the qualifications discussed above, the following factors should be considered when discussing whether to use ADR:

! Settlement discussions have reached an impasse;

! ADR techniques have been successfully used in the past

for similar situations;

- There is a significant disagreement over technical data, or there is a need for independent, expert analysis;
- The claim has merit but its value is overstated;
- There are multiple parties, issues, and/or claims involved that can be resolved together;
- There are strong emotions that would benefit from the presence of a neutral;
- Continuing relationships between the parties that the dispute adversely affects;
- Formal resolution requires more effort and time than the matter may merit;
- Case is primarily a factual dispute (in a well-settled area of the law);
- Reasonably clear entitlement exists and the real task is negotiating or agreeing to a reasonable amount of quantum;
- Parties desire to retain control and flexibility over relief obtained, e.g., cases in which the result is a business, not legal, decision.

ADR should also be considered for disputes that are before the General Services Board of Contract Appeals (GSBCA), and protests and disputed claims before they have been filed with the Federal Claims Court or District Court of the United States. Since the United States Federal Claims Court and district court cases are under the control of the Justice Department (DOJ) rather than Treasury, Treasury shall coordinate ADR in those actions with DOJ.

This is by no means an exhaustive list of issues to consider when determining whether or not to use ADR. Each case will have its own individual characteristics that might influence the official's decision to use ADR. Each case, therefore, should be evaluated on its own merit, with the caveat that it is the policy of Treasury to resolve disputes by ADR whenever feasible.

F. When Use of ADR is Less Likely

Although the use of ADR in any case should not be precluded, the following types of cases have generally proven to be less

likely candidates for ADR:

- Disputes controlled by clear legal precedent, making compromise difficult;

- Resolution will have a significant impact on other pending cases or on the future conduct of business.

In these cases, the value of a definite or authoritative resolution of the matter may outweigh the short-term benefits of a speedy resolution by ADR.

G. Cases Not Appropriate for ADR

Under the following conditions, a dispute is not considered appropriate for ADR and the parties should prepare for litigation.

- The dispute is primarily over issues of disputed law rather than fact;
- Case involves significant legal or policy issues and one of the parties desires a precedent;

- A full public record of the proceeding is important;

- Dispute significantly affects non-parties;

- Cost of pursuing an ADR procedure are greater (in time and money) than the cost of pursuing litigation; and

- The nature of the case is such that ADR might be used merely for delay.

H. Steps in the ADR Process

1. **Step One:** Unassisted negotiations. Parties try to work out disagreement among themselves.

2. **Step Two:** Before issuing a final decision (decision) on a claim, the contracting officer (CO) shall consult with the Treasury ADR Specialist (Office of Chief Counsel for Treasury) or designee, concerning whether the disagreement appears susceptible to resolution by ADR. Section 33.204 of the FAR recognizes the potential usefulness of ADR at this early stage in the process by encouraging the use of ADR procedures to the maximum extent

possible. In particular, the CO may want to propose to the other party, one, or a combination, of the following ADR techniques, and the parties may request the Chair of the GSBCA, or any other acceptable Federal or non-Federal neutral, to provide/conduct:

(a) Mediation

(b) Neutral Evaluation

(c) Settlement Judge

(d) Mini-trial

(**Note:** The role of the Treasury ADR Specialist may be delegated to the bureaus in the future.)

3. **Step Three:** If the claim cannot be settled by the parties at either Steps One or Two, the CO must prepare to issue a decision. If the claim involves a factual dispute, the CO shall send the contractor a copy of the proposed findings of fact and advise him that all supporting data may be reviewed at the CO's office. The contractor shall be requested to indicate in writing whether they concur in the proposed findings of fact and, if not, to indicate specifically which facts they are not in agreement with and submit evidence in rebuttal. The CO shall then review the contractor's comments and make any appropriate corrections in the proposed findings of fact.

4. **Step Four:** The CO shall issue a decision on each contract dispute claim within sixty (60) days from the receipt of the written request from the contractor, or within a reasonable time if the submitted claim is over $100,000. The decision is a written document furnished the contractor, which contains the final findings of fact and reasons upon which the CO's conclusion is based.

5. **Step Five:** The contractor may appeal the CO's decision to the GSBCA or to the United States Federal Claims Court. The GSBCA (Board) recognizes that resolution of the dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. The Board has several model procedures available. The Federal Claims Court also has ADR procedures available to the parties. The Justice Department is responsible for entering into such procedures, but ordinarily consults with Treasury before doing so. Treasury fully supports the use of ADR in appropriate cases before the Federal Claims Court.

6. **Step Six:** Treasury's decision whether to use ADR at this stage should be made by the CO in consultation with assigned legal counsel. If Treasury and the contractor agree that the claim is susceptible to resolution by ADR, then the next step is to consult with the contractor and attempt to reach agreement on an appropriate procedure from those in Step 2.

IV. DRAFTING AN ADR AGREEMENT

When drafting an ADR agreement (refer to sample) the following should be considered:

1. Process, procedures, schedule, and termination of the agreement.

2. Provisions for the appointment, role and payment of third party(ies). The role of the third-party(ies) as that of a facilitator, technical expert, mediator, or arbitrator, should be spelled out. It must also be determined whether and the extent to which the neutral should be disqualified as a witness in subsequent litigation. Decide whether communications with the neutral are permissible.

3. Whether and the extent to which to stay or suspend all litigation. Determine whether the stay period is indefinite or linked to specific event(s) or date(s).

4. An audit, if one has not already been completed, on all proposals or claims involved. Address what information or types of information and documents are to be provided and whether there are any restrictions on the use of pertinent information and documents provided.

5. Provisions to ensure confidentiality. Consider the following: Rule 408 of the Federal Rules of Civil Procedure; Exemptions (b)(4) and (b)(5) of the Freedom of Information Act; a confidentiality contract between the parties; a protective order by a board of contract appeals or the Court of Federal Claims; and the Administrative Dispute Resolution Act's confidentiality provisions.

6. How to obtain and/or limit discovery/factual exchange. How are limits to be imposed? By time? By relevance to particular issues/subjects? By types and number of discovery requests?; The retention and use(s) of furnished

information/data and its effect on future access/discovery.

7. The exchange of information or position(s) or both? Is the exchange of positions to be oral and/or written? What about page limit(s)? What other limits should you have, i.e., support for statements made in position papers? Should the exchange of positions be simultaneous or sequential? Do the parties have written or oral rebuttals (both or neither)? How, if at all, may positions be used for any purpose and to what extent? Consider requiring that at the conclusion of the ADR, all written submissions shall be returned to the party who provided them.

8. Who will be the representative(s) for each party? The number, type(s) and level? Attorneys (advisors of participants)? Business representatives? Technical representatives?

9. At what point should the parties begin their negotiations?

10. Provisions/preparations for a bilateral contract modification to be executed at or as soon as possible after the ADR process.

11. Payment of any settlement amount should be made subject to availability of funds. Availability of funds should be made prior to ADR.

Because of its ADR experience, ability to assist in developing ADR agreements and protocols, and cost effectiveness, the GSBCA is often an obvious choice to provide/conduct all forms of ADR services, whether prior to or after the issuance of a final decision by the contracting officer, so long as the contractor agrees. The GSBCA should be consulted by the contracting officer and/or the contractor in the earliest stages of ADR planning whenever the GSBCA may become a source of ADR services. GSBCA's general phone number is 202-501-0116.

Contracts for the services of third party neutrals are also authorized, the payment of which should be agreed upon by the parties. Other Federal agencies can also provide neutrals at no or minimal cost.

V. LESSONS LEARNED

1. Counsel should be consulted before clients enter into an ADR agreement and throughout the process.

2. Written ADR agreements are required to help prevent confusion about the ADR process.

3. Keep the ADR process and procedure simple.

4. Make the products of the ADR process and procedure usable in any ensuing litigation to the maximum extent practicable.

5. Be sure the ADR procedure provides for sufficient, but not excessive, information exchange--remember that the purpose of the information exchange is to facilitate and settle the issues in controversy.

6. Be sure to have a date for the submission of information that provides sufficient time to analyze the information provided before the parties begin to exchange their respective positions.

7. Business representatives and others involved in ADR must be willing to commit the time required and must coordinate and communicate with the team.

8. Access to business representatives by other ADR team members is essential.

9. In very large ADR cases of which the authors are aware, the parties have relied primarily on the use of documentary information.

10. Synopses of ADR cases should be submitted to the Treasury ADR Committee for future reference.

VI. SUMMARY

ADR IS NOT - **Mandatory**: The parties choose to participate in ADR or use traditional litigation processes.

Successful without total commitment: Top management must think long run.

A panacea: ADR should not be used in all cases. Traditional

litigation should be used when seeking to establish or preserve a case precedent or policy.

Contrary to Government Business Interests: The shared employer/employee and Government/ Industry interests are paramount in considering whether to use ADR and what specific form it should take.

A one-way street: Both parties must buy into the process.

ADR	**vs. Traditional Litigation**
Focuses on the parties real interests	Focuses on their litigation position
Requires the sharing of information early as part of the problem solving process	Sharing of information only as a required component of pre-trial or pre-hearing
Focuses on the business perspective of the dispute	Focuses on the legal theory of each party
Decision making is by the parties of the dispute	Decision making by a disinterested third party
Procedures and processes are designed by the parties	Procedures and processes by a rule-making tribunal
Concentrates on the informal presentation of facts	Concentrates on compliance with formal rules of evidence
Requires the parties to talk to each other	Parties talk to a judge or hearing examiner