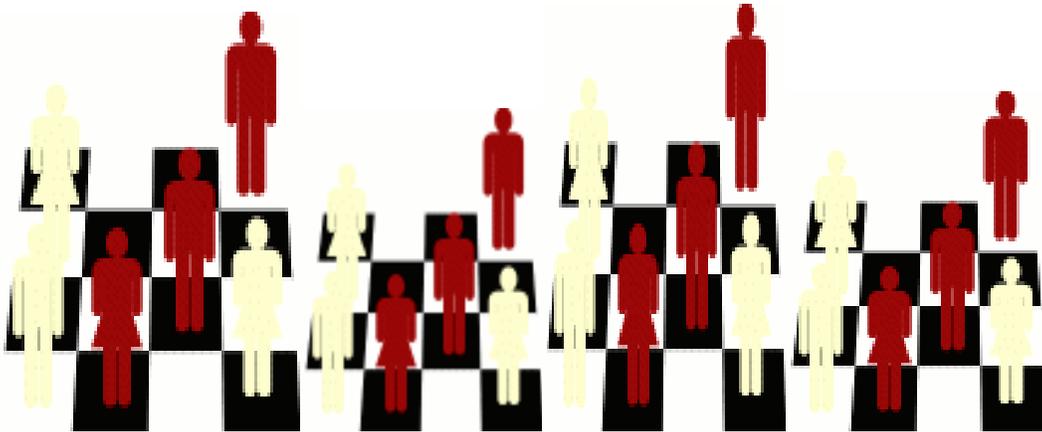


FINDING NEUTRALS

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Sub-Committee on Acquiring Neutrals

In coordination with the Interagency Alternative Dispute Resolution Steering Committee

This handbook applies to the internal management of the civilian executive branch. It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

INTRODUCTION

As the alternative dispute resolution (ADR) field has grown so has the need for the services of ADR neutrals (third parties who assist the disputants in resolving their issues). Federal agencies have developed and continue to develop ADR programs for internal workplace disputes, for environmental disputes and for contract disputes, to name a few. These programs range in size and sophistication; many use the services of government employees, and others hire private sector neutrals. Use of neutrals' services is affected by various federal laws and is guided by the Executive Branch's responsibility to operate in the public interest and with fairness.

This guide is aimed at providing basic information on the types of neutrals available to federal agencies, the various settings in which government employee neutrals operate, the pros and cons of each type of neutral, the primary vehicles for procuring private neutrals, and an overview of some of the related issues in federal procurement law.

At the end of this short guide, there is an appendix with factors to consider when selecting a neutral and a contact list of ADR government professionals who have expertise in the acquiring neutrals area and can provide further assistance.

GOVERNMENT NEUTRALS: COLLATERAL DUTY, STAFF NEUTRALS & SHARED NEUTRALS

There are two broad categories of neutrals: (1) government employee neutrals – government employees who serve as neutrals in a variety of settings and who generally serve without compensation (though some programs charge for travel or an administrative fee) and (2) private neutrals – neutrals agencies hire from the private sector. This chapter addresses the various ways in which government employee neutrals may be used by federal agencies.

Within the category of government neutrals are several sub-categories. There are staff neutrals (full or part-time), agency rosters (some of which share their neutrals with other agencies), and structured “shared neutrals” programs. Government neutrals may be full-time, part-time, or collateral duty neutrals and these neutrals are found working in all areas from workplace to procurement and environmental dispute resolution.

Many agencies have employees whose official job duty, either on a full-time or part-time basis, is to serve as a neutral or manage an ADR program or both. Many equal employment opportunity (EEO) offices charged with administering the various EEO laws have staff mediators. The Federal Aviation Administration (FAA) has a full-time mediator for workplace disputes occurring at that agency. Other agencies have ADR staff to serve as neutrals in contracting disputes in procurement, such as the FAA's Office of Dispute Resolution for Acquisition. The Department of Health and Human Service's Provider Reimbursement Review Board uses staff mediators to resolve Medicare cost disputes between health care providers and the United States. The Internal Revenue Service at the Department of Treasury has several ADR programs and uses appeals officers as mediators in certain tax disputes between citizens and IRS managers in a particular region. All of these neutrals are examples of what many in the field call internal neutrals or government employee neutrals.

Another type of government neutral is one whose primary job duties do not involve ADR but with the permission of their supervisors, and/or as part of their job description, serve as neutrals on a collateral duty basis. Collateral duty neutrals are typically federal employees, trained in mediation or other dispute resolution techniques, who provide services as a neutral. Many of these neutrals perform these duties within the context of "Shared Neutrals" programs.

Government neutrals interested in serving as a shared neutral can place their names on a roster. To be considered for roster membership in a Shared Neutral program, the applicant typically is asked to produce evidence of basic mediation skills training (between 20 and 40 hours); letters of support; and written approval by the applicant's supervisor. Many rosters use the co-mediation model, pairing a novice mediator with a more experienced one. In that way, rosters can provide a mechanism for professional development while creating a pool of potential lead mediators.

Some “shared” rosters are contained within a single large agency, such as the Agriculture Department, in order to have access to neutrals from other subordinate agencies, such as the

Food and Nutrition Service and the Foreign Agricultural Service. Another example is the Department of Defense Roster of Neutrals which is composed of DoD employees who offer their services as neutrals to DoD organizations on a collateral duty basis.

Since the mid-1990's, the numbers of shared neutrals programs and government collateral-duty rosters have mushroomed. The rosters grew out of a belief that federal agencies were more likely to use mediation if there were low or no cost sources of mediators. Not only have the numbers expanded, the rosters themselves are growing in size as are the number of participating agencies and the amount of cases handled. Some of these sharing arrangements involve not only federal government agencies, but State and local jurisdictions as well.¹ These increases signal a growing use of ADR, particularly in workplace disputes.

Some agencies provide their mediators on a collateral basis to other agencies. For instance, the Department of the Navy has a cadre of trained mediators that Navy has agreed to share with other agencies from time to time. This benefits the Navy mediators because it gives them additional case experience and it benefits the other agencies since it provides a free (other than travel) source of trained mediators. To access Navy's list of trained mediators go to adr.navy.mil and click on "Need A Navy Mediator?" which is a geographic search tool that sends an email to the regional coordinator. The regional coordinator will then contact you to provide names from which you may choose.

Other large agencies may also provide their mediators on a collateral basis for the same reasons. For instance, the Department of Veteran's Affairs (VA) maintains a list of mediators certified by the Department and who may be willing to mediate for another agency on an as available basis. The list of VA Certified Mediators is located at <http://www1.va.gov/adr/page.cfm?pg=11>. The list also includes the location and contact information for each listed mediator. The Department's certification requirements are at <http://www1.va.gov/adr/docs/Medcert.pdf>. Also VA employee mediators may sometimes be obtained by contacting the ADR Program Coordinator at a particular VA facility. The names and location for each ADR Coordinator may be obtained at: http://www1.va.gov/adr/docs/ADR_Coordinators.pdf.

Any time an Agency neutral is selected outside of a shared neutrals arrangement, it must be handled carefully because the process of obtaining the supervisor's approval may not be as established as in the case of the more structured shared neutrals programs. Anyone using this resource should discuss what approvals are necessary before using another agency's mediators. Additionally, you should investigate what training and background the Agency gives its neutrals so that you are comfortable using the services that Agency provides. If the Agency has a certification, try to find out what that means and what the neutrals must do to become certified.

The responsibility for managing the inter-agency rosters varies. In cities with a significant federal presence, the local Federal Executive Board may provide management support (see www.feb.gov). Some rosters rotate the management responsibilities among the participating

¹ The Administrative Dispute Resolution Act has authorized the use of volunteers, from outside the Federal sector, who provide neutral services. 5 U.S.C. 583.

agencies. The U.S. Department of Health and Human Services has managed the Washington-Baltimore roster since the Administrative Conference of the United States lost its funding in the mid-nineties (see www.hhs.gov/dab and click on 'Sharing Neutrals'). Good roster management can be challenging, time-consuming, and necessary to assure an effective, responsive, and professional shared neutral program.

For a number of years, most, if not all, of the various boards of contract appeals have made board judges available to serve as ADR neutrals to help contractors and contracting officers resolve contract controversies. Various types of ADR, as selected by the parties, are used to help resolve contract controversies both pre- and post-appeal. Typically, when using ADR at a board, a board neutral assists the parties in deciding what type of ADR method will work best for them, and s/he will work with the contractor and contracting officer to ensure they are satisfied with the ADR process selected. To use ADR at the boards, contact the board which would typically hear the appeal if it was to be, or is, filed. The various boards have also entered into an interagency sharing arrangement by which a judge from another agency's board may be obtained if for any reason one of the parties does not want to use the board of the agency in which the contract controversy is located. For an explanation of which agencies participate in the BCA-ADR Sharing Arrangement and how to use it see <http://www1.va.gov/adr/page.cfm?pg=58>.

Internal neutrals, whether they are staff neutrals or collateral-duty, have several advantages. Two prime considerations for selecting neutrals are cost and credibility with the users. Using internal neutrals meets both of these key criteria well. Both staff neutrals and collateral-duty neutrals are free of charge (except perhaps for travel or an administrative fee); and given that they are federal employees they are likely to be more familiar with federal agency cultures. Staff neutrals should perform at a high level of skill given that their job duties regularly entail neutral services.

There are some issues to keep in mind when using the services of government neutrals. In agencies with a small number of employees, parties may have more concerns about staff neutrals' impartiality and confidentiality. With respect to the Shared Neutrals' programs, many of them are quite extensive and have highly skilled neutrals. However, because the size and resources of the programs vary widely, the skill and experience level of shared neutrals (as well as other collateral-duty neutrals) also vary; particularly when these neutrals may only have the opportunity to mediate on an occasional basis. The availability of collateral-duty neutrals may also vary depending on the number of these neutrals in a region or agency. Availability is also an issue for these neutrals because they do this on a collateral basis in addition to their "regular" job duties.

PRIVATE NEUTRALS: FEDERAL PROCUREMENT

This chapter addresses one key source of neutrals: professional neutrals from the private sector, or "private neutrals." An agency's ability to retain the services of a private neutral is governed by federal procurement and dispute resolution laws. By way of background, the procurement of services and supplies for the federal government typically is subject to detailed statutory and regulatory requirements as well as public policy concerns. For example, contracting with the federal government typically requires open competition, public notice of contracts and consideration of socio-economic policies that allow and encourage agencies to restrict competition to small businesses and businesses deemed to be economically disadvantaged.

The purpose of this chapter is not to describe the detailed and complex rules of federal procurement, but rather to highlight some basic contracting techniques and vehicles, and the legal requirements governing procurement with respect to ADR neutrals. Most significant, procurement of ADR neutrals is flexible in that competition is not required. Of course, while competition is not required by law, full or partial competition is encouraged and may be appropriate or desirable in any given situation as a practical matter. You should consult with your agency's procurement officials on this point as well as on all other procurement procedures. Each agency has discretion in implementing procurement procedures; however, general rules apply.

The Federal Acquisition Streamlining Act of 1994 and relevant sections of the Federal Acquisition Regulation (FAR) govern the procurement of ADR neutrals. 10 U.S.C. 2304; 41 U.S.C. 253; FAR 5.202(14), 6.302-3(a)(2)(iii). These provisions exempt the procurement of ADR neutrals from several key requirements, namely open competition and public notice of contracts. Thus, the law provides that an agency is not required to use competitive procedures when it is "to procure the services of an expert or neutral for use in any part of an alternative resolution or negotiated rulemaking process, whether or not the expert is expected to testify." 10 U.S.C. 2304(c)(3). Moreover, the Administrative Dispute Resolution Act of 1996 also provides that agencies may enter into contracts for the services of a neutral at a price that is "fair and reasonable" to the government. 5 U.S.C. 573(e). The Act further allows an agency to use the services of neutrals "with or without compensation." 5 U.S.C. 583.

Federal contracting regulations require agencies to contract with small businesses when the contract amount is over \$2500 subject to some key exceptions. FAR 19.502-1(b). Most dispute resolution providers and individual neutrals will qualify as small businesses under the federal law. In addition, under current General Services Administration (GSA) interpretation, if an agency uses GSA's schedule contract vehicle, as described below, the small business set-aside rules do not apply. FAR 19.502-1(b).

Several contracting vehicles can be used to procure private sector neutrals: an agency-wide contract, a schedule contract or a simplified acquisition (formerly known as a small purchase). An agency-wide contract and a schedule contract can be handled through a blanket purchase agreement (BPA) or a task order. The BPA is a standing agreement with one specific organization through which an agency can procure its services. The BPA sets forth parameters of

the work and is not binding on the agency or the vendor. There is no obligation for the government to pay unless services are ordered and rendered. Likewise, there is no obligation for the vendor to provide services unless and until the government and the vendor agree (usually through a task order). A task order is usually for a discrete set of related services, for example hiring a neutral for one case or a series of related cases.

An agency-wide contract is a contract where all general terms have been negotiated by an agency to facilitate ease of use by agency personnel. Again, an agency can use either a BPA or a task order for supplies or services. One example of an agency-wide contract for ADR services is the Environmental Protection Agency's ADR contract, "US EPA Consensus and Dispute Resolution Services Contract".

A schedule contract is a pre-negotiated contract open to all federal agencies where an agency like GSA has negotiated all general terms of the contract, has a pre-approved vendor (contractor) list for each type of service, and most importantly pre-set, lower prices for services. For ADR services, there is a federal supply schedule list for EEO and work place disputes and a supply schedule for Management, Organizational & Business Improvement Services (MOBIS). In each of these areas, an agency is free to use either a BPA or task order for ADR services. There is no monetary limit on the amount of the services an agency may procure using a schedule contract. An agency may select the vendor directly from the supply schedule list or use that vendor to propose a list of subcontractors who meet the work requirements. Indeed, with either the BPA or task order, an agency may negotiate a further discount with the vendor.

A simplified acquisition relieves the agency from certain FAR requirements. This technique allows agencies to limit competition rather than requiring full and open competition (of course for procuring an ADR neutral there is no requirement for competition). A simplified acquisition can be used for services for \$100,000 or below. *See* FAR, Part 13. Simplified acquisitions at various monetary levels, however, have different requirements. For instance, a simplified acquisition of \$2500 or below, called a micro purchase, can be accomplished with no competition, using a credit card or a certified invoice. A simplified acquisition of \$2500 - \$100,000 can normally be accomplished after competition between three vendors.

Effective October 1, 2003, the FAR requires all contractors, including neutrals, to register with the Central Contract Registration (CCR), see www.ccr.gov. Contractors must submit basic business information and processing time for registration typically takes two days. There is no charge to register with CCR. For small businesses, like most neutral organizations or solo providers, registration in the CCR can add an additional administrative hurdle to being retained by federal agencies as a neutral. Some agencies have an exemption from this regulation such as the Department of Justice for its litigation activities.

Many agencies hire private professional neutrals for resolving disputes, training, and ADR systems design. Agencies have used all of the above procurement vehicles. Sometimes an agency may contract with one ADR provider to supply all the neutrals for a particular category of cases. For instance, the Air Force has done this with its workplace ADR program. The Environmental Protection Agency has contracted with a private provider to be the prime

contractor on the US EPA Consensus and Dispute Resolution Services Contract. Other agencies regularly hire individual neutrals on a case-by-case basis such as the Department of Justice and the National Archives and Records Administration.

There are many advantages to hiring a private neutral. The parties can select their choice of neutral. They also have a higher degree of control over the quality of the neutral by interviewing them, checking references, examining their résumés, etc. Parties can examine neutrals' experience, training, and style. Most successful private neutrals are highly skilled. The main disadvantage to hiring private neutrals is cost. Where agency budgets are extremely limited, hiring private neutrals to resolve cases may be too expensive. Of course, if an agency selects a neutral pursuant to a schedule contract (see above) the hourly rates are lower as they are already set pursuant to the schedule. Moreover, many neutrals will lower their rates for government agencies and will negotiate lower rates for particular disputes. Another disadvantage is in some areas of the country the private neutral community may be small and not provide the parties to the dispute sufficient candidates. In these circumstances, an agency may consider neutrals from other areas of the country but the cost then increases.

Where cost is a concern, agencies may decide to take a hybrid approach by hiring private neutrals for some matters and using government neutrals for other matters. Moreover with respect to training neutrals for an agency program (either internal or private neutrals), if cost is a concern, the agency could hire a private neutral, limit the scope of his/her functions in the training, and have the other functions filled by agency personnel. The same approach could be used with systems design. An agency could hire a private neutral or firm to design a program and train internal agency neutrals. Or, an agency could design its own program, hire trainers, and use a private firm to manage a roster of internal neutrals.

When an agency considers using a private firm for a range of ADR services or for providing mediators for a large volume of cases, agency personnel responsible for the ADR services may want to consider several other contract issues. For example, an agency may want to include contract terms addressing the following topics: geographic delivery points; what style of mediation the agency wants the neutrals to practice; what ethical standards the agency wants neutrals to follow; the process for identifying conflicts of interest, the evaluation and monitoring of the neutrals; how the neutral roster will be maintained; how ADR sessions will be scheduled; and compliance with the Administrative Dispute Resolution Act's confidentiality requirements. Moreover, the agency may want to include other contract terms regarding the procedures for cancellations and no-shows, and whether the price per mediation is hourly or based on a flat fee.

INTER-AGENCY AGREEMENTS

The Administrative Dispute Resolution Act of 1996 allows Federal agencies to use other agencies' neutrals through interagency agreements. 5 U.S.C. 573(d) Unlike the shared neutral programs, these agreements provide a mechanism for agencies to charge for the time and travel costs of the neutral's services. This statutory authority and the Economy Act provide an exception to the normal rule that an "unauthorized transfer of appropriations" violates the augmentation rules for both the paying and receiving agencies. (Vol. 2, Chpt. 6, Part E, Sect. 4 G.A.O. Red Book.)

Section 1535 of Title 31 of the United States Code states that the head of an agency may enter into an agreement with another agency to provide services if: the funding is available, it is in the best interest of the Government, and the services cannot be provided as conveniently or cheaply by an outside source.

Several agencies in the Government provide neutrals through interagency agreements. The Federal Mediation and Conciliation Service (FMCS) is an independent federal agency which employs a full time professional staff of 200 mediators across the country. They serve as neutrals, facilitators, trainers, and consultants on a variety of workplace, organizational, and public policy issues and disputes including facilitating negotiated rulemakings. The FMCS interagency agreement can be found on their web site at www.fmcs.gov.

The U.S. Institute for Environmental Conflict Resolution (USIECR) offers a roster of *private* mediators who specialize in environmental and transportation disputes. On the USIECR web site (www.ecr.gov) there is information on the roster of neutrals and special programs for Federal agencies such as the Federal Partnership Program.

The Federal Occupational Health (FOH - a component of the US Public Health Service in the Department of Health and Human Services) has recently created a roster of neutrals specializing in workplace issues. With this organization, the agency is charged an up-front fee based on the number of employees in the agency and then when each situation arises FOH provides a mediator; in this way the "contracting" is done at the beginning rather than for each individual case.

These are just a few of the programs that are offered in the Government. This option for acquiring neutrals provides the advantages of having Federal employees (except in the case of U.S. Institute who uses private neutrals), who understand the nature of federal disputes, serve as the neutral and the further benefit of lower negotiated costs between agencies. This mechanism, however, would likely be more expensive than using a shared program or an internal pool of mediators.

FREQUENTLY ASKED QUESTIONS

1. Can I use my own staff to serve as neutrals?

Yes, but only if your staff are trained as neutrals. See the Government Neutrals Chapter. This choice offers the least costly option and also provides neutrals that are the most informed about your agency's culture. If your agency does use your own staff, be careful to take extra precautions regarding neutrality and confidentiality. Even the perception of bias can limit a program's success.

2. Are there sources of free neutrals other than using internal staff?

Yes, in some circumstances and usually only for workplace disputes. For these types of disputes, Shared Neutrals (see Government Neutrals Chapter) are generally free to the requesting agency. However, some programs charge travel or an administrative fee. Depending on the region of the country you should contact your local Federal Executive Board or the Washington/Baltimore Shared Neutrals coordinator to see what they charge; or contact one of the Agencies identified as one that provides their own trained mediators for use by other Federal Agencies.

For disputes other than workplace, see the Government Neutrals Chapter. There are some agencies that provide free neutrals for disputes other than workplace disputes such as the Federal Aviation Administration, the Federal Energy Regulatory Commission, the Provider Review Reimbursement Board of the Department of Health and Human Services, etc.

3. Where do I find my local Shared Neutrals provider?

If your region has a shared neutrals coordinator it is likely within the Federal Executive Board office. Log onto www.feb.gov and note that each region has a separate web page that lists the services that FEB offers. For those in the Washington, DC area another option is the Shared Neutrals program operated by the Department of Health and Human Services (see www.hhs.gov/dab and click on 'Sharing Neutrals').

4. To use a collateral duty mediator do I have to negotiate the timing of the case with his/her supervisor?

Not usually. Most Shared Neutrals programs arrange permission from the mediator's supervisor when the mediator joins the roster. The supervisor's permission is for that mediator to be out of the office handling cases for other agencies. It is up to the mediator to only schedule cases when his/her office work allows. Check with your roster manager or local shared neutrals coordinator for any special circumstances in your area.

5. Can I accept voluntary services for mediation?

Yes. The Administrative Dispute Resolution Act allows for the use of neutrals with or without compensation. 5 U.S.C. 583 However, your agency may have policies regarding using volunteer neutrals, particularly neutrals from the private sector, so it is wise to consult your agency including any ADR office.

6. Do I have to go through all of the contracting steps to hire a private neutral?

No, not all of them. There are major exceptions to the normal rule for contracting when one is hiring neutrals. See the chapter on Private Neutrals. It is also wise to consult your Agency's procurement office as each Agency has some discretion in implementing the procurement rules. The Private Neutrals chapter should also help you think about the questions you need to ask your procurement officers.

7. What is the best source for neutrals?

That really depends on the specific agency's needs. All of the categories of neutrals have positive aspects but they also have some drawbacks. Consult Appendix A, Factors to Consider when Selecting a Neutral for advice in choosing the right source for your agency and the type of dispute.

8. How do I know about the quality of the neutral I select from any of these sources?

When hiring a neutral you should consider the training that neutral has received, his/her case experience (how many has s/he done and for whom), background, approach, and subject matter expertise (when necessary) just to name a few qualifying factors. Most Roster Managers will maintain that information so when you use a shared pool or private neutrals from a central roster, ask the Roster Manager for the experience and training history for the neutral you select.

9. If I am in a different forum such as before an Administrative Law Judge at the Equal Employment Opportunity Commission (EEOC) or a Board of Contract Appeals, will I be required to find my own mediator?

Usually the administrative tribunal has its own roster of mediators or judges who serve as mediators. If you are before the EEOC, and if you are sent to mediation, the EEOC contact person will provide a mediator.

10. If I am in federal court, will I be required to find my own mediator?

By law, each district court in the country offers a dispute resolution program for federal cases filed in the particular court. The courts of appeals offer mediation programs for federal appeals. These "court-connected" ADR programs have a variety of mechanisms for providing neutrals to help resolve court cases. Some district courts and all of the federal courts of appeals have court-employed mediators or staff neutrals. Some courts have rosters of approved neutrals while others provide a list of neutrals as a service to the litigants. All of these court-connected neutrals are another source for finding a neutral if your dispute is in federal court.

Court-employee neutrals are free of charge, while compensation for a private neutral selected from a court list varies from court to court. In some courts, the neutrals provide their services *pro bono*; others' fees are set by the court and still other neutrals may charge the market rate under the courts' rules. The neutrals who are court employees mediate full time and are often highly skilled and very experienced. For a discussion on the benefits and costs for private neutrals, see the Chapter on Private Neutrals: Federal Procurement.

11. Who can I contact for help when I am acquiring a neutral?

If you have not already done so, contact your Agency's dispute resolution specialist and any ADR office at your agency. You may also contact the persons listed in Appendix B for questions on acquiring neutrals.

APPENDIX A

Factors to Consider when selecting a mediator

The following lists a number of factors you might want to consider when selecting a mediator. Since every situation is different, not all of these considerations are applicable to every case.

What type of training has the mediator received and who has provided the training?

How many hours of training?

If a program refers a mediator, what credentials does the program require of its mediators?

If the mediator is “certified” how is that defined for that program, i.e. what does the mediator have to do to become certified?

How many cases has the mediator mediated?

Has the mediator been recommended by someone?

Do you want a mediator who is internal to the agency? A federal employee? A private mediator?

What style of mediation (e.g. evaluative, transformative, facilitative) does the mediator practice?

Do you need the mediator to have subject matter expertise?

How much, if anything, are you willing to pay for the mediator’s services?

Is the mediator acceptable to the parties?

Are there any special requirements? (For example, people with language barriers might need a bilingual mediator.)

APPENDIX B – LIST OF CONTACT PERSONS FOR ASSISTANCE

1. Deborah Kant: deborah.kant@usdoj.gov
2. Sarah Rudgers: sarah.rudgers@nara.gov
3. John Dietrich: adr@mail.navy.mil
4. Joan Calcagno: calcagno@ecr.gov
5. Lynda O’Sullivan: lynda.osullivan@pentagon.af.mil
6. Dave Emmerson: david_emerson@ios.doi.gov