

ADR LAW NOTES



Legal Developments, Issues and Other Matters of Interest Concerning Alternative Dispute Resolution

DLA ADR Homepage at:

<http://www.landandmaritime.dla.mil/offices/legal/adr/default.asp>

or

www.dla.mil/adr

Defense Logistics Agency ADR Practice Group April 2012

ASBCA MEDIATION

Two years after an extensive trial on entitlement, the Armed Services Board of Contract Appeals ("Board" or "ASBCA") issued a decision in favor of a contractor, deciding that the Government's actions had increased its cost of performance under the contract ("Board Decision"). The Board remanded the matter to the parties to reach agreement on the issue of quantum.

Because the parties were unable to reach a settlement on the quantum portion of the claim, the Board listed the matter for trial on the quantum issue. A multi-week, multiple location trial was scheduled. Consistent with a history of difficult interactions between the Government and opposing counsel, the parties were only able to reach an agreement on the terms of an ADR on the eve of trial. The ASBCA scheduled a multi-day mediation, including an in person pre-mediation conference with the attorneys involved to determine which issues would be discussed and potentially settled through an ADR.

The multi-day mediation included sessions that ran late into the evenings, and resulted in a resolution of the claims arising out of the Board's decision – as well as additional multi-million dollar claims the contractor had asserted and potential claims the contractor had not formally asserted.

As a result of the multi-day mediation process, any and all claims were resolved for a fraction of the originally stated value.

Importantly, the Agreement included specific creative and resourceful provisions that not only resolved all claims whether formally asserted or not – but assisted in freeing up Agency resources which had been stymied by the actions of the Appellant and its agents. It was agreed that there would be a cessation of delineated specific

activities that had pointlessly impeded the Agency's resources in meeting its stated mission.

POC: Keith Levinson and Kristin Bray, DLA Counsel-Troop Support, DSN 444-5806 and DSN 444-8008

DLA IN-HOUSE CONTRACT MEDIATION

In August 2011, a contractor filed a claim for \$438,783.78, alleging that DLA Energy constructively terminated a requirements type contract when it failed to order 15,849 barrels of pre-blended fuel. The requiring activity, DLA Distribution – Susquehanna, had informed DLA Energy in January 2011 that a new heating facility had been constructed. The new facility used a different fuel specification, but was not scheduled to go online until the next heating season. Due to an EPA air quality issue, the activity switched over to the new facility earlier than expected and no longer needed the pre-blended fuel under DLA Energy's contract. The contractor filed a claim for the market value of the fuel it expected DLA to order during the remaining six weeks of its contract and the parties agreed to mediate the dispute. As a result of the mediation, the contractor agreed to submit a revised claim in accordance with FAR procedures to support any allowable costs. On March 15, 2012, DLA Energy and the contractor held a second (telephonic) mediation to discuss the revised claim. The revised claim was still for expectation damages and DLA Energy will not consider the claim. The contractor indicated that it may be unable to even approximate the actual cost it paid for the fuel. The parties have agreed to work together to determine what the actual cost of fuel may have been to aid the contractor in submitting a claim that DLA Energy will evaluate. A third telephonic mediation is planned.

POC: Sara Thompson, DLA Counsel-Energy, DSN 427-5173.