

# ADR LAW NOTES



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

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Defense Logistics Agency ADR Practice Group

February 2002

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### SOME ISSUES TO CONSIDER WHEN UTILIZING THE ADR TECHNIQUE OF MEDIATION

Mediation is an informal process designed to voluntarily bring disputants to the table with a trained neutral and without the necessity of court intervention. Although its purpose and design is to resolve conflict, issues of representation, access to information, and conflict of interest can be relevant, and if so, should be addressed prior to the actual mediation.

Mediation in DLA is designed to not require the use of any type of representative. However, disputants may want to use the services of an attorney, either before, during, or after a mediation session. Attorneys oftentimes can be available in person or by phone. Disputants utilizing the services of an attorney should discuss with the attorney ahead of time the issue of fees and payment. Given that management officials have no duty to pay the fees of a disputant's attorney, disputants should specifically address this matter with their attorney.

During mediations, information is often shared. At times, information is freely available to all parties. If information is not easily available to one or both parties, the parties may want to discuss this issue with the mediator to see if a remedy agreeable to both sides can be fashioned. Retention of documents and confidentiality are two of several issues that may need to be addressed.

DLA mediators are neutrals. They have no vested interest in the outcome of mediation. However, it is the duty of DLA mediators to disclose in writing any real or apparent conflicts of interest before beginning mediation. If all parties agree in writing to utilize the services of the mediator after being informed of any real or apparent conflict, then the mediator may proceed to mediate. Nevertheless, if the conflict casts serious doubt on the integrity of the process, the mediator must decline to proceed.

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### USE OF ADR HELPS RESOLVE PRE-AWARD PROTEST AT DSCR

ADR was employed effectively at DSCR in December 2001 to resolve a pre-award Agency-Level protest. In fact, the use of a third-party neutral, a mediator from DSCC, enabled the government and the protester to resolve the protest prior to expending any travel money.

This protest originated in September 2001 when the protester filed a pre-award contracting officer protest against a solicitation seeking offers on a quantity of 83 aircraft engine repair parts. The anticipated value of this contract was \$1 million. DSCR was procuring these engine parts for a repair depot. The protester offered reconditioned/overhauled parts purchased from DoD through its RILOP (Recovery in Lieu of Procurement) process. DSCR forwarded the protester's offer to the engineering support activity (ESA) responsible for engineering decisions on this part, for evaluation of technical acceptability. The ESA found the protester's offer of reconditioned/overhauled parts to be technically unacceptable. Based on this engineering decision, the DSCR contracting officer denied the protest in November 2001.

The protester then hired an attorney who filed an Agency-Level protest and requested to engage in mediation as a means to resolve the protest. In its Agency-Level protest, the protester complained that DSCR (1) failed to provide it with a copy of the Request For Proposals (RFP), (2) used procurement practices which unduly limited competition by arbitrarily limiting the procurement of these parts to newly manufactured parts, and (3) treated its offer inconsistently with the Original Equipment Manufacturer's (OEM's) offer who was also offering surplus material. Upon receiving the protest, DSCR contacted the protester's attorney, and inquired as to the manner in which she would like to conduct the mediation and the dates she was available to meet. The protester desired the mediation take place in a face-to-face manner and it was decided that the mediation would be conducted in Richmond, Virginia. DSCR contacted a DSCC mediator, who confirmed her availability to mediate, and a date for the mediation was tentatively established. DSCR sent the mediator a copy of the protest.

The mediator held a pre-mediation telephonic session and asked DSCR to go back to the ESA and clarify if (1) surplus

parts from the OEM were technically acceptable and (2) if the parts were still needed at all. DSCR queried the ESA, received an answer, and another telephonic session was held. The ESA had informed DSCR that surplus parts from the OEM were not technically acceptable and that these parts were no longer needed. The repair depot had retained over 50 of these parts from previous RILOP disassemblies and therefore had no need in the foreseeable future for any more. DSCR therefore cancelled the solicitation and the protester withdrew its protest. With two short phone calls a difficult protest was resolved.

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### JUSTICE CENTER OF ATLANTA CONDUCTS MEDIATION TRAINING AT DSCP

Twenty-one employees of Defense Supply Center Philadelphia recently received on-site mediation training from the Justice Center of Atlanta. Attending the Mediation of Workplace Disputes Course were six attorneys from the DSCP Office of Counsel, as well as employees from the EEO Office, Human Resources Office and Union representatives. The three-day course was an intensive introduction to mediation techniques. Each attendee was afforded five mediation experiences, including two role playing demonstrations by ADR professionals, and three role playing experiences for the students (once each as complainant, respondent and mediator).

The training was very structured and built upon a model for effective listening, communicating, and dispute resolution techniques that can be utilized when the trainees co-mediate in the future, and eventually mediate on their own. The trainers provided an analysis of each individual's communication and analytical styles so that the attendees could assess their own styles, strengths, and weaknesses. The active role playing scenarios afforded each attendee an opportunity to prepare for a mediation, greet the parties, introduce the process, set a neutral tone, have opening statements, summarize positions, caucus individually, and work towards crafting a mutually satisfactory settlement and written agreement. The three days were highlighted by real life mediation experiences of the trainers, who were led by the Justice Center's Director, Mr. Thomas Prince. Mr. Prince and his assistant trainers critiqued each student upon the completion of their mediation experience.

DSCP attorney Marc Peterson found the three days of training to be very enlightening. According to Marc, the real life experience of the training staff, including mediations in the Federal sector, domestic/divorce situations and special education environment, gave the students a real sense of how mediation works in practice. The troubleshooting tips, and legal and ethical considerations found in the training materials were also very good. Having

a mix of attorneys, EEO staff, personnel specialists and union representatives made for very realistic practice mediation sessions. Finally, having the training on site for such a large group was very convenient for the attendees.

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### GOVERNMENT-INDUSTRY TASK FORCE TARGETS DISPUTE AVOIDANCE AND EARLY DISPUTE RESOLUTION

A government-industry task force, sponsored by the ABA Public Contracts Law Section, is working to expand the focus of contract dispute resolution efforts. The task force believes that focus should shift from the traditional concept of "alternative" dispute resolution to early dispute resolution, and, better still, dispute avoidance. Surveys have been conducted to find out what dispute avoidance/dispute resolution processes exist; not surprisingly, results are scanty. The task force plans to prepare a monograph on some dispute avoidance/early dispute resolution "best practices," such as partnering, dispute review boards, and "issue escalation" provisions. It is also identifying newer processes, such as DLA's policy to address dispute avoidance and ADR at post award conferences, in a "Processes to Watch" section. For more information, contact Elizabeth Grant, a member of the task force. In the meantime, DLA lawyers and contracting personnel should include dispute avoidance and early dispute resolution as part of their ADR efforts.

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### NEW EEOC FEDERAL APPELLATE SETTLEMENT TEAM PROGRAM

The U. S. Equal Opportunity Commission has developed a new program to mediate appeals filed with the Office Of Federal Operation. The Federal Appellate Settlement Team (FAST) Program began in November 2001. Under the program, selected appellants are offered the opportunity to mediate their appeals either telephonically, or in person if the parties are in the Washington D. C. area. Presently, FAST is available only in appeals of final Agency decisions on the merits of a claim of discrimination. The FAST program manager can be reached at (202) 663-4616 for more information.

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