

ADR LAW NOTES - JULY 1997

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

Defense Logistics Agency ADR Practice Group

DPSC UTILIZES ADR TO RESOLVE ENVIRONMENTAL CLEAN UP DISPUTES

DPSC, in conjunction with DLA, and the Pennsylvania Department of Environmental Protection, entered into a Consent Order and Agreement with the Sun Oil Company whereby the parties agree to use a multi-tiered Alternative Dispute Resolution procedure to resolve issues surrounding the clean up of an oil plume under the base. The ADR procedures were tailored to address the special needs of the parties and the legal limitations imposed upon the Agency.

Under the framework of the Agreement, the parties will establish an Oversight Committee, a Technical Oversight Committee, and a Fiscal Allocation Panel. Issues that cannot be satisfactorily resolved by those committees will be forwarded to a Dispute Resolution Panel (DRP). The DRP will consist of senior level representatives from all of the concerned parties. The DRP may resolve issues or request technical support from neutral experts, mediators, or facilitators. Issues that cannot be resolved by an unanimous decision of the DRP would be forwarded to an Arbitration Tribunal. The Arbitration Tribunal, whose membership would be selected by the parties, would resolve any outstanding disputes and issue a written decision. Either party could appeal the Arbitration Tribunal's decision within 30 days after receipt of the award. The agreement also provides for a mechanism whereby the parties agree to share the costs associated with the dispute resolution process.

Questions or comments concerning the Agreement may be addressed to either Thomas Dougherty, Assistant Counsel, DPSC, at DSN 444-7179, Commercial (215) 737-7179 or E-mail: tdougherty@ogc.dla.mil; or Stanley Braverman, Attorney-Advisor, DPSC, at DSN 444-2634, Commercial (215) 737-2634; or E-mail: sbraverman@ogc.dla.mil

EXECUTIVE BRIEFING AT DoD

Secretary of Defense William Cohen and Attorney General Janet Reno spoke on the subject of ADR at an Executive Briefing held at the Pentagon on June 23, 1997. The top civilian and military leadership of the Services, Defense Agencies and DoD were present. The Attorney General praised DoD's efforts in expanding the use of ADR and urged the Department to do even more. She pledged the support of the Department of Justice in fully utilizing the Alternative Dispute Resolution Act (ADRA) of 1996 by expanding the use of ADR to resolve disputes more quickly, less expensively, while preserving good working relationships between the parties. A series of working level seminars are planned as a follow up to this briefing.

The Secretary of Defense distributed a memorandum in which he stated:

"I strongly support the voluntary use of ADR to facilitate resolution of disputes. ADR encompasses a variety of processes, such as mediation, conciliation, and fact finding, used in lieu of traditional adversarial means to settle disputes. The emphasis in ADR is on seeking a mutually acceptable resolution of issues. Experience in both the public and private sectors has shown that ADR works. Not only are parties typically able to settle disputes more quickly and at less expense than through traditional dispute resolution processes, but also with less disruption to their working relationship."

"In October 1996, the Administrative Dispute Resolution Act was reauthorized. The ADR Act and our internal issuance, DoD Directive 5145.5, require the establishment of capabilities to handle disputes using ADR processes and encourage broader use of ADR. While some disputes do not lend themselves to resolution through ADR, many conflicts could be settled by using these processes. Every DoD component must have an ADR program."

"I encourage you to become familiar with ADR and make the best possible use of it in your organization."

POC: George Sisson at DSN 427-6064, Commercial (703) 767-6064 or E-mail: gsisson@ogc.dla.mil

DLA GENERAL COUNSEL ENCOURAGES THE USE OF MEDIATION

At a recent chief counsel meeting, the DLA General Counsel urged chief counsel to make a substantial effort to increase the use of mediation to resolve bid protests, contract and personnel disputes, as well as environmental issues. Mr. Baird also suggested that at a minimum, 20% of all DLA attorneys receive mediation training over the next 12 months. The training would help to meet two objectives established by Mr. Baird: 1) effective advice and assistance to clients in a mediation and 2) development of mediation as a program service or function of DLA Office of General Counsel.

ASBCA SAMPLE ADR AGREEMENTS

The ASBCA has provided sample ADR Agreements (which can be modified) as an aid for parties interested in using ADR procedures at the Board. Samples for Summary Trial with Binding Decision, Settlement Judge, and Minitrial Procedures can be requested through the Board and are also located on the DLA ADR Homepage at '<http://www.LandAndMaritime.dla.mil/legal/adr/default.asp>'.

POC: Beth Lagana at DSN 850-3284, Commercial (614) 692-3284 or E-mail: blagana@ogc.dla.mil

DOD ADR COORDINATING COMMITTEE AND WORKING GROUPS

A more formal structure has been put in place for the meetings and actions of the DoD ADR Coordination Committee and Working Groups. The newly appointed Deputy General Counsel (Legal Counsel) Douglas Dworkin will chair the future meetings of the ADR Coordinating Committee. More regular meetings will be held, minutes kept and agendas set. The next meeting is set for August 27, 1997. Issues being addressed include: drafting guidelines for use of binding arbitration in DoD in light of the ADRA; writing a position paper for the DoD General Counsel on the "settlement authority" in arbitration; gathering ADR information for the new Deputy General Counsel; looking at what sort of ADR reporting requirements should be in place in DoD; and ensuring the DoD ADR Working Groups (e.g. Acquisition, Personnel, Environmental, etc.) are fully staffed and meeting regularly.

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ADR SPECIALIST GIVES PRESENTATION

Thomas Dougherty recently gave a presentation on DPSC's ADR Program to the Health Industry Federal Advisory Council (HIFAC). HIFAC is an organization consisting of Government officials and industry representatives interested in health care procurement issues. Feedback from the presentation was very positive. Surprisingly, a number of the industry representatives were not aware of the Government's increased use of ADR. They were very interested in obtaining more information about ADR.

Another speaker at the meeting was Judge William Thomas of the VA Board of Contract Appeals. His speech indicated that the BCA Judges are available to act as mediators for contract and personnel cases. Judge Thomas has been involved in a number of these cases and said that the success rate has been 100%.

ADR ENTRIES IN LIS

Presently, all ADR efforts on cases must be made directly in the "ADR" selection of the Litigation Information System (LIS). The present design does not allow for a toggle from "Case" input to "ADR" input. Consequently, entry of both "case" information and "ADR" information is required for cases utilizing ADR procedures.

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