

ADR LAW NOTES



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

Defense Logistics Agency ADR Practice Group

June 2000

DLA LAWYER SUCCESSFULLY MEDIATES DCMDW CONTRACT DISPUTE

After months of unassisted negotiations, a DCM San Francisco Administrative Contracting Officer (ACO) issued a final decision assessing a penalty against a small high-tech firm for including expressly unallowable financing charges in its indirect cost claims for FYs 95 and 96. In these circumstances, a penalty is required by 10 U.S.C. 2324. Although there appeared to be no basis for settlement, newly developed ADR boiler plate language was included in the final decision and the contractor requested ADR.

At first, the contractor resisted the recommendation of DCM San Francisco counsel, Mr. Stephen M. Wilson, to use a DLA attorney as a mediator since she wanted someone who would sympathize with her plight as a struggling entrepreneur. When DCMDW-G's attempts to secure a non-DoD mediator (who would be willing to mediate a contract dispute) turned out fruitless, Mr. Wilson was able to convince the contractor to talk to a couple of potential DoD mediators. After talking with Mr. Nikita Wharton of DSCR-G for only a few moments, the contractor was persuaded that he would be an excellent choice.

The contractor had informed the ACO that she was on her last dime and would probably have to file for bankruptcy protection if the penalty were not waived. The ACO had previously attempted to get the contractor to supply information on why a waiver might be appropriate, but had not received an adequate reply. The mediator was able to get the parties to dialogue in a way that ultimately enabled both sides to see room for resolution. The ACO recognized the value of the contractor's highly specialized product and through the discussions was able to learn that some of the costs

included in the claim may not have been expressly unallowable after all. On the other hand, the contractor was educated as to the hard realities of the penalty requirements. As a result, the parties reached a settlement that fully met the requirements of the law and also met the parties interests in keeping the company in business to continue providing its highly valuable product to the Government and the commercial industry alike.

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DLA REPORT ON ADR PROGRAM ISSUED JUNE 2000

At the request of the DLA General Counsel, OGC completed a report on DLA's ADR Program. The June 2000 report outlines the general components of the program and addresses specific areas such as workforce, contracts, and environmental issues. It summarizes accomplishments to date and future challenges for use of ADR in DLA. The report, which was mailed to senior clients of OGC and to each Chief Counsel, will be available on the DLA ADR Homepage at www.dsc.dla.mil/Offices/DOCCR/index.html.

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MEDIATION TRAINING AT DSCP

The DSCP Office of Counsel, in conjunction with Ms. Edith Primm of the Justice Center of Atlanta, conducted two mediation-training sessions for approximately 200 DSCP managers and supervisors. The training consisted of an overview

of mediation techniques as well as a mock mediation of a contract dispute and an EEO complaint. Attorneys from the Office of Counsel acted as the mediators in both disputes. DSCP employees played the roles of contracting officer, contractor, complainant and management official. The simulated mediations were designed to demonstrate the entire mediation process, from opening statements to resolution agreement. Following the mock mediations, Ms. Primm analyzed each step of the mediation process and explained to the audience how the mediators used various techniques to identify issues and reach consensus. The feedback from the attendees was overwhelmingly positive. After the training, several managers stated that they were interested in using mediation to resolve disputes in which they were currently involved. For more information concerning the DSCP Mediation Training, contact Thomas Dougherty at DSCP-G, DSN: 444-7179, Commercial: (215) 737-7179, Email: tdougherty@ogc.dla.mil.

DLA-OGC ADR IN CONTRACTING WORKSHOPS CONTINUE

The DLA Office of Counsel sponsored its third workshop for DLA lawyers on use of ADR in resolving contract disputes. The workshop, held March 8 for about 30 agency lawyers, supports the agency's three strategic goals. Former DLA lawyer Ted Hoffman gave a kick-off address on use of ADR from the private bar's perspective. Field offices reported on their ADR contracting initiatives, and a panel discussed ADR challenges ahead. Panel members Mary Massaro and Jim Cotton shared their perspectives as DLSC-P contracting officers.

A number of actions are likely to come out of the conference, including more teaming with procurement clients, and assisting procurement clients in becoming more advanced users of ADR.

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DLA PARTICIPATES IN ADR PANEL AT NCMA WORLD CONGRESS 2000

Elizabeth Grant served as a panelist on ADR at the NCMA World Congress 2000, held in Crystal City, VA on April 11. The panel addressed "The State of Federal Agencies ADR Approach to Federal Contracts Disputes." Peter Steenland from the Department of Justice discussed the origin and growth of ADR in the government. Ms. Grant highlighted key components of DLA's ADR in contracting program, and outlined upcoming challenges.

Bob Fryling, from the law firm of Blank, Rome, Cominsky and McCauley, spoke on the private sector perspective on ADR in contracting. Wayne Kissinger from the American Arbitration Association moderated the panel and fielded questions from the group of about 40 people. The panelists praised DLA's efforts in ADR in contracting, citing DLA as an agency with a strong and well-developed ADR program.

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DLA PROCUREMENT ADR "FOCAL POINTS" ESTABLISHED

Recently, ADR "focal points" have been established in the procurement offices of HQ and DLA field activities. These procurement focal points will team with ADR specialists in the legal office to advance ADR contracting initiatives and create a lawyer-client partnership. Procurement focal points include: DLA HQ Procurement, Mary Massaro, DSN 427-1366; DESC, William Latimer-Janer (DESC-CPA), DSN 427-8628; DSCR, Debbie Daniel, DSN 695-3873; DSCP, Mary Jo Pratt, DSN 444-7436; DSCC, Kathleen Cunningham (DSCC-PCB) DSN 850-2809; DRMS, Ron Bayes, DSN 932-7132; DDC, Joni Stephens, DSN 977-5912; DNSC, Rozelyn Durant, DSN 427-5518.

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