

ADR LAW NOTES



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

Defense Logistics Agency ADR Practice Group

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DLA SENIOR PROCUREMENT EXECUTIVE ISSUES THREE CONTRACT ADR INITIATIVES

Two new policies have been added to DLA's Procurement Directive concerning ADR. One focuses on avoiding litigation and the other on avoiding disputes. Further, a new rule requires the addition of an ADR provision in DLA solicitations.

Procurement Letter 01-05, issued April 12, 2001, requires ADR language to be included in contracting officers' final decisions unless the proper official has determined in writing that ADR is inappropriate or not practicable in accordance with DLAD 5145.1, Alternative Dispute Resolution, section E3. The language provides that subject to appeal time frames, a contractor can request the use of alternative dispute resolution procedures to try to resolve the matter.

Procurement Letter 01-07, issued May 10, 2001, states that as part of post award orientations, the subject of dispute avoidance, early dispute resolution, and alternative dispute resolution should be addressed and specifically listed on the agenda for the parties' consideration. Post award orientations are held in a number of situations outlined in FAR 42.502 where the contract is likely to have more performance risk than more straightforward contracts. These types of contracts are exactly those where it is important to discuss ways to avoid disputes, and ways to promptly resolve them if they do arise.

A new rule requiring an ADR provision in DLA solicitations was published in the May 17, 2001 Federal Register. The provision requires the use of alternative dispute resolution procedures in an attempt to resolve contract disputes that have not been resolved through unassisted negotiation. The provision is optional for offerors; however, if they agree to the provision, both the contractor and DLA will be committed to first use ADR except in limited circumstances.

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GAO UTILIZES ADR TECHNIQUES OF OUTCOME PREDICTION, NEGOTIATION ASSISTANCE, AND LITIGATION RISK ASSESSMENT

Although the GAO's bid protest procedure can itself be thought of as an alternative to litigation, the GAO utilizes three types of ADR techniques in an attempt to resolve bid protests more promptly than through the issuance of a written decision. Each are non-binding, can be requested by a party in writing or in a conference call, and can be raised by the GAO on its own initiative. The three techniques are Outcome Prediction, Negotiation Assistance, and Litigation Risk Assessment. Below is information about Outcome Prediction.

With Outcome Prediction, the GAO attorney provides, in person or in a telephone conference, an opinion regarding the likely outcome of a case or of one or more issues in a multi-issue case. Consequently, this technique offers the benefits of saving time as well as the opportunity for the "predicted loser" to resolve the matter prior to a written decision. Outcome Prediction is usually used after all of the facts have been presented, and therefore, after the government has provided its written report. However, in a multi-issue case or with a protest that on its face looks like it has merit, the GAO attorney might ask the agency to provide information on an expedited basis in order to use the technique. Parties are not required to negotiate after receiving the prediction. They can instead opt for a written decision that may or may not be consistent with the GAO attorney's opinion.

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RESTORATIVE JUSTICE INITIATIVES

ADR can be a useful tool to prevent workplace violence. In addition, ADR can be used as a restorative justice tool if an act of violence has already occurred. For example, mediation could provide the opportunity for the victim and the offender to discuss

responsibilities, restitution, and reconciliation. Two programs intended to help with the restoration process are Victim Offender Mediation, and Victim Offender Conferencing. These mediation services fall under the concept of Restorative Justice.

Restorative Justice is a process where all the parties affected by a wrongdoing collectively seek ways to recover from a resulting trauma. Restorative Justice focuses on the following:

- The harm done rather than on the rule/law that was broken;
- Providing opportunities for dialogue, direct, or indirect, between victims and offenders as appropriate (mediation/facilitation);
- Working toward the restoration of victims, empowering them and responding to the needs as they see them;
- Supporting offenders while encouraging them to understand, accept, and carry out their obligations; and
- Establishing a need for ownership of the process by those directly impacted by the wrongdoing.

Victim Offender Mediation (VOM) emphasizes building relationships between parties and establishing trust with a mediator. A mediator, trained in the process, will schedule separate pre-mediation sessions with each party to assess the nature of the claim and determine if VOM is the right method to use. If agreed to by all parties, a scheduled face-to-face meeting will take place between the victim and the offender in the presence of the mediator. Generally only the victim and offender participate because of concern that others may inhibit the offender from genuinely expressing him or herself. In the meeting, the offender and the victim can talk to each other about what happened, the effects of the offense on their lives, and their feelings about it.

They may choose to create a mutually agreeable plan to repair any damages that occurred as a result of the wrong. Most mediation sessions result in a signed restitution agreement. However, this agreement is secondary to the initial dialogue between the parties. The goal of VOM is to enhance the problem-solving skills of the parties so they can resolve future disputes through direct negotiations, if possible.

Another effective tool to utilize in workplace situations is Victim Offender Conferencing (VOC). VOC is a voluntary process that allows all individuals directly affected by a wrong to actively participate in dealing

with the consequences of the wrong. Before a conference, a mediator, trained in the process, meets with all parties separately, listens to how each person was affected by what happened, explains the program, and if everyone agrees, arranges for a conference. During the conference, the mediator sets the rules, ensures the process is safe and fair for all involved, and when necessary, helps the parties work out a restitution agreement. The objective of the process is for the parties most affected to have an opportunity to safely meet to discuss:

- What happened;
- How it felt when it happened;
- Why it happened;
- How it feels now; and
- What is needed to make things right.

Victims and offenders decide what can be done to repair the harm. Restoring harmony, discovering truth, or ending intolerable behaviors are often the goals. Agreements focus on peacemaking behavior.

Both VOM and VOC could provide the opportunity for a victim and an offender to discuss responsibilities, restitution, and reconciliation. These methods of ADR can help to bring a peace of mind and a sense of restoration for all parties.

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DLA HQ LECTURE SERIES FEATURES ADR

As part of the DLA HQ Lecture Series Program, DLA HQ Complex tenants had the opportunity to hear Ms. Edith Bailey Primm speak on ADR on June 13, 2001. Ms. Primm, formerly the Executive Director of the Atlanta Justice Center, serves as a mediator for both Government and private parties. Although she addressed all types of ADR, Ms. Primm emphasized that non-adversarial types of ADR, such as conciliation, facilitation, and mediation, foster long-term working relations with parties, with the expenditure of minimum cost and time. Her presentation was dynamic and entertaining, illustrated with real life examples.

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