

ADR LAW NOTES



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

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PERSISTENCE CAN YIELD POSITIVE RESULTS

On June 29, 2005, I was fortunate to conduct at Defense Supply Center Philadelphia (DSCP) a mediation between a DSCP Subsistence Acquisition Team and a contractor. The contractor (Protestor) filed an Agency level protest, protesting the award of a food distribution contract which had an estimated dollar value of \$25 million for the base year, plus four one-year options. The awardee, which was also the incumbent, was located more than 300 miles from the customer base. The Protestor alleged that it should have received the award because the source selection authority failed to reasonably assess some of the technical factors in the source selection decision.

At the mediation, the Protestor went through the various technical factors it felt the source selection authority failed to adequately review. It also revealed that the awardee had recently constructed a distribution facility much closer to the customer base than its other facility. The Protestor was concerned that the awardee would be allowed to use its new facility in executing this contract. Because the awardee's overall price was higher than the Protestor's price, the Protestor felt the awardee would receive undue profit if it were allowed to make deliveries from its new facility as opposed to its other facility.

The parties were unable to reach a resolution at the end of the first session, but agreed to have legal counsel submit settlement proposals within 14 days. I asked counsel for both parties to provide me with a copy of their resolution proposals and counter proposals. Because of factors beyond the control of both parties, the settlement proposal process exceeded the original 14 day time frame.

Nearly two months after the first mediation session, the parties were able to reach an accord on the issues. At various times before resolution was finally reached,

I made sure I was engaged with the parties and understood where they were in the settlement process. I could have tried to have a more hands-on approach, but I did not feel that was the proper way to handle this particular conflict. Because both parties were represented by counsel, I felt it best to allow the lawyers to have as much control as possible, without allowing them to take full control over the process. I wanted to maintain a presence and keep the dialogue flowing, even when it appeared the parties wanted to give up and proceed with answering the protest issues.

In his book, *The Mediator's Handbook*, John W. Cooley described some of the qualities of an effective mediator. Cooley cited neutrality and impartiality as the most important qualities of a mediator. He also cited the attributes of patience, flexibility, optimism, motivation without coercion, and good judgment as other important qualities. If we try to develop the attributes cited by Cooley, I am sure we will find that our persistent mediation efforts will be rewarded with positive results.

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THE IMPORTANCE OF PRE-MEDIATION PLANNING

Recently, Defense Supply Center Philadelphia (DSCP) successfully utilized mediation to resolve two thorny bid protests. Both cases involved the Subsistence Directorate. In one case, the incumbent contractor protested when it failed to win the award of the follow-on Prime Vendor contract. In the second case, the protester claimed that its unsuccessful offer represented the best value to the Government. In each case, the Office of Counsel and the Contracting Team engaged in substantial pre-mediation planning, practiced and scripted the roles for each team member

in the mediation, and patiently followed the lead of the skillful DLA mediator. The results were impressive. Both protests were resolved by the parties through settlement agreements. A review of the importance that pre-mediation planning played in this process may be instructive for future contract mediations.

Once the decision to use mediation was made, the pre-mediation planning stage became the most important part of the process. In each case, the ADR advisor and the contracting attorney met several times with the DSCP Contracting Team in order to analyze the protest, to evaluate the strengths and weaknesses of the Government's position, consider who should be the mediator, and to brainstorm options for possible settlement of the dispute. The team used a technique called "red-shirting" whereby one member of the team is designated to play the role of the contractor. This person will consider what interests the contractor has in the protest, present arguments on behalf of the contractor, and poke holes in the Government's position. The red-shirting technique allows the Contracting Team to better understand the contractor's case and to come to the mediation fully prepared for the contractor's arguments. At that point, the Government Team is capable of analyzing realistic options for settlement.

Compiling options for settling bid protests presents a challenge to contracting officials, especially in cases where the Contracting Officer believes that the correct award decision has been made and that the protester has not raised serious flaws in the procurement process. If the Government cannot offer the protester an award, which is presumably the primary relief that the protester is seeking, how can the protest be successfully mediated? In the two cases at issue here, the Contracting Team faced that situation. A review of the file, however, revealed certain latent business interests that could be explored.

In the case of the protester which had been the incumbent contractor, it surfaced that this contractor would have to sell or dispose of its excess inventory, which consisted of many military-unique items. Offering to assist the contractor in this process became a potentially useful bargaining chip. Additionally, a review of the contractor's performance history showed that it was experiencing significant delays in receiving timely payments on its invoices. Offering to dedicate DSCP personnel to assist the contractor in its interfacing with the payment office proved to be an attractive option.

In the second protest, the contractor raised numerous

complaints about the lack of clarity in the solicitation and the methodology use in the evaluation process. When the Contracting Team analyzed the complaints, it concluded that while the award decision was correct, the language in future solicitations could be revised and clarified. Offering to work with the protester and industry as a whole in reviewing the methodology proved to be an option for possible settlement. In addition, it became apparent that the protester may be more concerned about winning future awards than it was about fighting over the just-issued contract. By focusing on possible improvements to the procurement process, the Contracting Team could address the protester's business interests instead of merely countering its legal arguments.

Despite the extensive planning, the mediations in both cases were lengthy and, at times, contentious. Following the face to face mediations, the parties continued to negotiate with the mediator's assistance. The fact that both cases settled was due, in large part, to the skill and patience of the mediator, Niketa Wharton of DSCR, and the perseverance of the parties. Yet, at the end of the day, pre-mediation planning played a significant role in the resolution of these complex disputes.

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