ADR LAW NOTES

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

Defense Logistics Agency ADR Practice Group **September 2000**

DLA EEO PROGRAM "RESOLVE" WINS OPM AWARD

RESOLVE, DLA's EEO ADR program, was selected as one of four recipients of the 2000 U. S. Office of Personnel Management Director's Award for Outstanding ADR Programs. The winners were announced on September 6, 2000. The DLA Director will accept the award on behalf of the agency during a public ceremony held at OPM on October 5, 2000.

RESOLVE is a collaborative effort of DLA's Equal Employment Opportunity Office and the Office of Counsel. RESOLVE provides the opportunity for employees to utilize mediation to resolve their EEO issues during all stages of the EEO process. According to the EEOC, an EEO case may take as long as 1300 days to go through all of the formal processes. On the other hand, mediation provides the opportunity to resolve matters in less than one day. For more information about RESOLVE, contact your local EEO office or the POC named below.

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ASBCA MEDIATES PRE FINAL DECISION CONTRACT CLAIM

Have you ever found yourself searching for a neutral party to mediate a contract claim - one with enough stature to command the respect of both parties? Well, the Armed Services Board of Contract Appeals (ASBCA), on a case by case basis, makes its judges available to mediate contract claims, even where there is no appeal pending before it.

The Defense Reutilization and Marketing Service (DRMS) had asserted an affirmative claim against one of its hazardous waste disposal contractors. The contractor had been paid over $150,000 for disposing of numerous containers of hazardous waste. Subsequently, the Government discovered that the containers had been ordered under the incorrect Contract Line Item Number, resulting in the contractor being overpaid by $115,000. The contractor denied that the containers were improperly identified and asserted that it was entitled to all of the money it had been paid.

Negotiations were at a standstill, with the contractor offering to pay no more than $25,000 and with the Government asserting that it was willing to accept no less than $90,000. Before issuing a final decision, the Government suggested mediating the dispute. The contractor was open to this suggestion, but expressed the desire to have an "authoritative" person mediate the dispute - somebody's views they could accept.

The DRMS Chief Trial Attorney made an exploratory call to the General Counsel for the ASBCA to explore the possibility of having an ASBCA judge act as the mediator, even though no final decision had been issued and there was no pending ASBCA Appeal. Ultimately, the Board agreed to have one of its judges mediate the dispute. Better yet, the judge agreed to conduct the mediation in Chatanooga, Tennessee, at no cost to the parties!

Prior to the mediation, the judge required the parties to submit succinct summaries of the claim and their respective positions, together with a jointly agreed upon set of exhibits for use in the mediation. The mediation opened with each side being given up to 90 minutes to present their positions. From there, a series of caucuses was held, with the judge expressing his opinion on many of the points made by the parties.

The one day mediation ultimately resulted in a settlement whereby the contractor agreed to repay the Government $60,000. Both parties agreed that it was extremely helpful to have the ASBCA judge's views on their positions.

While the ASBCA may not agree to mediate every contract dispute, consider exploring this option before issuing a final decision and commencing the litigation process. It can save huge amounts of time and money.

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ADR TRAINING CONTINUES

ADR training continues throughout the Agency. In May, Professor Steve Schooner of George Washington University Law School gave a presentation during DESC's and DLSC's Acquisition, Logistics and Reform Day. Highlights of his presentation included a discussion regarding the evolving role of ADR given recent acquisition reform initiatives, and the importance of viewing ADR as more than just a tool for the contracting community – it reflects a philosophy that emphasizes problem solving. Professor Schooner's presentation slides are located at www.desc.dla.mil/main/p/policy/news.htm.

In June, Beth Lagana and Marc Shepler of DOCCR provided contract and personnel ADR training at DRMS. During the two half-day sessions, they presented information about conflict management; ADR in general; mediation; federal ADR laws, orders, directives, regulations and policies; ADR within DLA; and guidelines for ADR usage. In August, Elizabeth Grant of the Office of General Counsel provided ADR training to contract personnel at DNSC. Her presentation included an overview of ADR, a discussion of its use in resolving contract disputes, an explanation of mediation, and an outline of how to work an issue using mediation. The presentation linked ADR to DLA's strategic goals and to current law and policy.

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DLA INTERNET TRAINING

The DLA ADR Homepage now includes an ADR internet training module ("ADR Training"). This work product of Elizabeth Grant (DLA OGC), Tom Dougherty (DSCP-G), Judith Gever (DSCP-G), Lynne Enfield (DDJC), and Pam Cooper (DOCCR), consists of four sections: Overview, Personnel, Contracts, and Frequently Asked Questions. Each section can be viewed independently of the others. The internet training module as well as other training tools are available at *www.dscc.dla.mil/Offices/DOCCR/adr/adr.html*.

COLLABORATIVE LAW: NEGOTIATION WITHOUT LITIGATION

Collaborative law is a new ADR technique that emphasizes resolving disputes collaboratively and without litigation. The process is especially useful for people who want legal counsel and advocacy, but do not want litigation.

The keystone to collaborative law is an agreement to forego litigation during negotiations. If a settlement cannot be reached, the lawyers (and any of their associates) for each side are disqualified from further representation of the parties. Further, if any collaborative lawyer or party takes formal legal action during negotiations (with a few exceptions), all of the collaborative lawyers are disqualified from further representation of the parties. Consequently, if the parties want to litigate, they will not be able to use their collaborative attorneys for the litigation. This term provides a strong disincentive to breach the agreement.

Typically, a collaborative agreement also includes the duty to disclose information crucial to negotiations as well as the duty to maintain confidentiality of the disclosures. Other provisions often address the possible use of experts and mediators and the transition from the collaborative process to litigation if the parties are unable to reach a settlement.

Although collaborative attorneys provide representation for settlement purposes only, their representational duties include advice of legal rights, and an assessment of the likely outcome of the case if it is litigated as well as the risks and costs of litigation.

The lawyer disqualification rule increases the likelihood of openness and cooperation while decreasing the use of threats and rudeness on the part of all participants in the process. The principal objective of the process is to satisfy the interests of all parties. The odds of achieving success increase when all of the participants treat each other with respect, openness, and a willingness to listen.

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