ADR LAW NOTES

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

DLA ADR Homepage at: www.dla.mil/adr

Defense Logistics Agency ADR Practice Group

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DLA ADR POLICY

As stated by the DLA Director and as reflected in The DLA One Book, DLA has an "ADR first" policy. The policy is as follows: When unassisted negotiations are unsuccessful, an ADR process must first be considered. A management decision not to use ADR shall only be made after its possible use has been fully evaluated and discussed. At a minimum, discussions shall take place between the deciding official and the activity ADR Specialist. A decision not to use ADR must be documented in writing by an official at least one level above the deciding official.

The earlier ADR is used, the better. Pursuing ADR should never be considered a sign of weakness; rather, it reflects good judgment as well as compliance with Departmental and Agency policy. ADR Specialists are located in the Offices of Counsel.

References: DLA Director July 7, 2004 Memorandum, Subject: Use of Alternative Dispute Resolution; http://www.dscc.dla.mil/downloads/legal/adr/DLA_July04_memo.pdf; The DLA One Book, Legal Matters Chapter, Subparagraph 3.3.1. https://today.dla.mil/onebook/

OFPP ACQUISITION ADR AWARD FOR 2005 PRESENTED TO NAVFAC

On March 29, 2006, the Office of Federal Procurement Policy (OFPP) presented the 2005 Acquisition ADR Award to the Naval Facilities Engineering Command (NAVFAC) for its facilitated partnering program. Facilitated partnering involves use of a neutral facilitator to prevent and resolve issues through a structured process, and is required for all NAVFAC construction projects. OFPP praised NAVFAC for institutionalizing this program and producing demonstrated results. One such result was the successful completion of the $100 million addition to the Defense Intelligence Agency building at Bolling AFB in Anacostia, Washington D.C. This project was completed on schedule despite a 20% increase in requirements due to major changes in the intelligence world since the project was originally designed.

ADR can be used effectively in non-traditional areas as well as in acquisition, as explained by keynote speaker Kenneth Feinberg, Special Master of the 9/11 Victims' Compensation Fund. Mr. Feinberg noted that he mediated 120 disputes over who should be considered the eligible beneficiary to receive money from the fund. Of these disputes, 108 were resolved through ADR, a major accomplishment given the intense level of emotion inherent in the 9/11 cases.

DLA and other past winners of the award were mentioned for their successes in advancing acquisition ADR. OFPP concluded the program by urging those involved in federal acquisition to continue their focus on ADR, with special emphasis on dispute avoidance and on achieving demonstrated results.

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LITIGATION RISK ASSESSMENT AT GAO

GAO has conducted ADR on bid protests for years. The most well-known types of ADR are Outcome Prediction ADR and Negotiation Assistance ADR, but recently GAO has noted the rise of a third type of ADR, "Litigation Risk Assessment (LRA)." With LRA, the GAO attorney advises the parties of the litigation risks in proceeding with the protest. This assessment, while not constituting an "outcome prediction," gives the parties a good flavor for the strengths and weaknesses of specific parts of their cases, and as a result, a good flavor for their chances of winning the protest. For example, the GAO attorney may advise that, for the protester to prevail, they must show three things, and there is nothing in the record to support the second element of the case. This assessment does not actually constitute outcome prediction, but it clearly serves to put the protester on notice that a key element of their case is missing, and that in consequence, the litigative risk in proceeding is very high.

LRA has been a popular form of ADR used at GAO over the past 2 years. GAO attorneys are often more comfortable in agreeing to LRA ADR than Outcome Prediction ADR, because their assessment is not an actual prediction of the result of the case. The parties of course retain control over the decision to proceed or not, but now the decision can be more informed, based on the input from GAO. DLA lawyers should consider asking for this form of ADR in all their protests that proceed to the agency report stage, as part of their assessment of protest resolution.

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MEDIATION PROGRAM IN U.S. DISTRICT COURT

Starting January 2006, The U.S. District Court for the Western District of New York began a pilot mediation program. Under the one year pilot program, almost all new and pending civil cases on the docket of the judge overseeing the program

are automatically referred for mediation. Parties can opt out, but only for good cause. To opt out, a party must establish why an ADR process has no reasonable chance of being productive. Inconvenience, travel costs, attorney fees or other costs do not constitute good cause. Other judges can order cases to mediation, and parties can request an ADR process other than mediation. The program is designed to provide quicker, less expensive, and potentially more satisfying alternatives to the litigation process. http://www.nywd.uscourts.gov/adr/index.php

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