

ADR Law Notes - February 1997

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

Defense Logistics Agency ADR Practice Group

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

The Administrative Dispute Resolution Act of 1996 was signed into law on October 19, 1996 by the President. The new ADRA, Public Law 104-320, includes the following significant changes from the 1990 version:

1. The law is permanently reauthorized.
2. ADR is defined as procedures which can be used as a companion with, and not just in lieu of adjudication.
3. An agency may enter into a contract with any person for services as a neutral or for ADR training, and not just those listed on a roster.
4. An agency may accept donated ADR services from state, local and tribal governments and not just from other federal agencies and public and private organizations and individuals.
5. Confidential dispute resolution communications made between a party and a neutral or a neutral and a party are now exempt under FOIA. (Note: this exemption does not apply to communications made between parties.) Dispute resolution communications generated from a neutral are also protected from discovery and from disclosure under FOIA.
6. The Government may enter into binding arbitration, but with limitations and guidelines.
7. If using ADR to resolve a contract claim, a contractor need only certify the claim as required by the Contract Disputes Act (or as otherwise required by law).
8. Expedited hiring procedures can be used to procure the services of an expert or neutral for use in any part of an ADR process.
9. Exemptions for application of ADR to certain types of workplace disputes are eliminated.
10. The Negotiated Rulemaking Act of 1990 was permanently reauthorized.
11. Bid protest jurisdiction of district courts of the United States will terminate on January 1, 2001 unless extended by Congress. (This issue of the judicial jurisdiction over procurement protests is unrelated to ADR. It originated from an amendment to S. 1224, the Senate bill for the new ADRA.)

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DOES ADR REALLY WORK WITH GOVERNMENT CONTRACTS DISPUTES?

ONE OPINION:

For the last two years, the Government has been encouraging agencies to use ADR practices to resolve Government contract disputes. As a Government contracts litigator, my initial attitude towards the application of ADR to Government contract disputes was one of skepticism. The ASBCA was originally established as an informal means of resolving Government contract disputes. Why is some other mechanism necessary? However, I am now willing to admit that in the appropriate cases, ADR can and should be used to bring about a speedy and successful resolution of contract disputes.

During the past two years, DCMDW has used ADR on four ASBCA appeals. Two of these cases involved summary trials with a binding decision before an ASBCA judge. The other two cases involved mediation/ arbitration with the mediator rendering a nonbinding decision if the parties were unable to achieve a settlement. The first summary trial was not very successful. The appeal involved complex issues concerning termination settlement expenses and claims for equitable adjustment. The ASBCA judge held a four day entitlement hearing at two different locations. After the judge issued his decision, the Appellant filed a Motion for Reconsideration. The Board ordered the Government to file a response. The Board then held a two day hearing on quantum. The Board's decision on quantum did not appear to be supported by the facts. After the Board issued its decision on quantum, the Appellant filed a Motion for

Correction. Once again, the Government was required to file a response. Finally, the Appellant filed a Motion for EAJA fees. The Government filed its Reply. Almost two years after the initial hearing on this appeal, the parties are still awaiting the Board's decision on EAJA fees. In this case, ADR did not bring about a successful, speedy resolution of the dispute.

The second summary trial was much more successful. This appeal involved a small contractor who felt it was entitled to additional settlement expenses resulting from a termination for convenience. The Board held a two day hearing on both entitlement and quantum. In the ADR Agreement, the parties agreed to bear their own fees and expenses. The Board judge issued her decision within 43 days of the hearing. A successful speedy resolution of the dispute.

The two mediation/arbitration cases were also successful. One ended in a settlement of the case without the ASBCA judge rendering a decision. The other case eventually did go to an ASBCA hearing. However, the judge's nonbinding decision clearly helped the parties clarify the disputed issues.

Our experience with ADR has taught us some valuable lessons. First, ADR appears to work best with straight forward legal issues. If a case involves complex legal issues, it should be resolved through summary judgment motions, or a Board decision supported by detailed findings. Second, it is critical to get the parties' to sign a detailed ADR Agreement. The ADR Agreement should clearly spell out the length of the parties' presentations. The parties presentations should cover all issues including both entitlement and quantum. If the arbitrator/judge's decision will be binding, the ADR Agreement should indicate that the decision is final with no reconsideration or appeal. Finally, the ADR Agreement should spell out who will bear the fees and expenses.

In the appropriate cases, ADR can bring about the speedy resolution of contract disputes. ADR can also save the Government time and money when it is used correctly. However, ADR is not a magical formula to be applied to every case. However, it should always be considered as an option and used when appropriate.

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ANOTHER OPINION:

DLA attorneys learned more about the nuts and bolts of ADR in contracting at the DLA Contract Initiatives Law Symposium on September 12, 1996 in Philadelphia. Kay Bushman organized a panel to discuss lessons learned from actual ADR cases. Kathleen Murphy from DFSC discussed her experience with Rowe, Inc. in a summary trial before the ASBCA. She advocated this type of ADR in a small case with no precedential value where the contractor wants "his day in court." Portia BonavitaCola from DPSC educated the audience on the pros and cons of using an ASBCA settlement judge in her case with McRae Industries. She concluded that an attorney needs to understand even the smallest matter such as the setting, conference room vs. Court rooms, and the role of the settlement judge. Captain Michael Welsh, USAF, from DCMC-E Baltimore discussed his use of an early neutral evaluation with Westinghouse. He noted that hammering out the agreement took two months and was the hardest part. He concluded that it is important to learn as much as you can about the person you are hiring.

Two good ideas came out of this panel discussion: 1) The ADR practice group should act as a clearing house for sample ADR agreements. 2) The ADR practice group should develop some policies, practices and standard agreements for agencies to hire private neutrals. In all, participants at the Symposium enjoyed hearing the ADR "war stories" and learned some valuable lessons through the experiences of other attorneys.

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ADR POLICY PARTNERSHIP AGREEMENTS WITH UNIONS

DSCC and DSDC recently entered into agreements with unions which encourage bargaining unit members to use ADR to resolve personnel disputes. The American Federation of Government Employees (AFGE) Local No. 1148 entered into agreements with both DSCC and DSDC which allows for bargaining unit members, within the time frame permitted for the filing of a grievance, to first request the use of ADR to resolve their dispute. If the alternative

method does not resolve the problem, the bargaining unit member retains the right to file a grievance within 10 working days after the conclusion of the alternative method. The International Federation of Professional and Technical Engineers (IFPTE) Local No. 7 entered into a similar agreement with DSCC and a similar agreement is also in the works between AFGE Local 601 and DSCC. The agreements are subject to review in six months.

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