

## ADR Law Notes

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

Defense Logistics Agency ADR Practice Group February 1998

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### **MEDIATION ASSISTS DLA LAND AND MARITIME AND CONTRACTOR IN RESOLVING APPEAL**

The Defense Supply Center Columbus (DSCC) and Durodyne, Inc., resolved a contract dispute with the assistance of a Defense Personnel Support Center (DPSC) mediator. Durodyne had a contract from DSCC for delivery of non-metallic hose assemblies for a total price of \$118,000. Durodyne encountered difficulties in making the item to the specifications and claimed that the test procedures called out in the revised specification were internally inconsistent and defective. After Durodyne failed to proffer an unconditional revised delivery schedule, DSCC terminated the contract for default based upon anticipatory repudiation. Prior to termination, Durodyne submitted a claim for \$430,000 in excess costs that were related to its R&D efforts to make the item to the allegedly defective specification. Durodyne appealed the default termination to the ASBCA.

At the time of the mediation, trial was scheduled for September and the Government had pending a motion for summary judgment. Durodyne offered to settle the case for \$250,000, which included \$50,000 for attorney's fees. The Government offered to settle for \$5000. The mediation initially focused primarily on identifying the issues and resolving certain factual disputes. In caucus, the parties requested the mediator to evaluate their respective positions and to gauge the prospect for success or failure on each of the issues.

Following extensive caucus sessions and several joint sessions, lasting over 9 hours, the parties were able to reach a complete agreement. In exchange for Durodyne withdrawing its appeal, the Government agreed to convert the termination for default to a termination for convenience, pay \$10,000 to Durodyne for incurred costs, pay for the expenses of the mediation, and agreed not to assert any claim for excess procurement costs.

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### **DLA PROCUREMENT PARTNERING CONFERENCE**

On September 3, 1997, the DLA Office of General Counsel sponsored a conference on procurement partnering in Springfield, Virginia, which was attended by nearly 30 individuals representing 9 DLA activities. Conference attendees had the opportunity to learn more about procurement partnering and discuss its possible application to DLA procurements.

Partnering, a form of ADR, is a mutual commitment by the parties to facilitate improved contract performance through enhanced communications. The parties form a relationship based upon teamwork, cooperation and a shared vision for success. The process is focused on accomplishing common goals and objectives, and includes an agreement to avoid surprises and expeditiously resolve disputes at the lowest possible level. Through this commitment to improve communications between the procuring agency, the customer and the contractor, potential disputes are prevented from arising, or at least recognized at an early stage where satisfactory resolution is more attainable. The key to all partnering approaches is communication.

A principal speaker at the conference was Frank Carr, Chief Trial Attorney for the U.S. Army Corps of Engineers. The Corps of Engineers started using partnering with its construction contracts in 1988, and have been quite pleased with the results. Mr. Carr stated that partnering has resulted in controllable cost growth, less claims and litigation, increased value engineering savings, on schedule completion and increased organizational morale.

Mark Sagan, Deputy Chief Counsel for the Army Materiel Command (AMC-CECOM), who also spoke at the

conference, stressed the importance of partnering as part of AMC's alternative dispute resolution initiatives. AMC has successfully used its pilot program of partnering for procurement of a wide variety of supplies and services during the last 3 years. In 1996, the AMC established its Steering Committee to develop a Model Partnering Process for use throughout AMC. In his remarks, Mr. Sagan stated that AMC has used partnering largely as a preventive tool, which has proven particularly relevant to long term contracts for the procurement of technically complex critical items, where prior contract performance has been poor. AMC has established formal procedures to implement the partnering concept, including use of a partnering charter and agreement which are developed at a workshop attended by the partnering participants. The partnering agreements do not waive the parties' various legal rights, but they do contain a conflict escalation procedure which has been useful in resolving problems at an early stage, and avoiding litigation. AMC has found that the partnering arrangements have helped to prevent many of the performance and schedule problems encountered on past contracts which have typically resulted in the submission of claims and protracted litigation.

In the afternoon, DPSC and DSCC gave presentations on processes each of the offices use that have certain attributes of partnering. These DLA activities have been using the procedures chiefly in prime vendor and sole source situations. While the experience of DSCC is at a stage where the success rate cannot yet be measured, the experience of DPSC has been positive.

As a final matter, the conference attendees participated in a round-table discussion focusing on the opportunities and benefits available from partnering, and the types of contracts and procurements which might be prime candidates within DLA for partnering. Attendees widely agreed that partnering is particularly applicable to DLA with the agency's current focus on the use of ADR. The fact that the partnering concept provides for early identification and resolution of any potential conflicts through the use of ADR, whether addressed in a formal written document or agreed upon informally, was viewed as a definite plus. During the round-table discussion, attendees also talked about the next steps needed to start implementing a partnering program for widespread use within DLA, and the need for such a program to be flexible in the types of partnering options available.

The comments of the conference participants regarding the use of partnering were quite positive, and indicate that partnering is a tool which is here to stay. No doubt you will be hearing more about partnering, not only as an ADR tool, but as a tool for fostering more harmonious business relationships with our defense contractors, which should translate into improved efficiency in supplying our military customers.

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## **MEDIATORS WITHIN THE OFFICE OF GENERAL COUNSEL**

The number of mediators within the DLA legal offices has increased significantly over the last year. Over 40 associates have been trained to provide, at no cost, mediation and co-mediation opportunities for both personnel and contract disputes within the DLA organization. Their services can be requested by contacting any of the DLA Offices of Counsel directly or through other DLA organizations and offices.

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