

# DLA Alternative Dispute Resolution

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

Defense Logistics Agency ADR Practice Group January 2000

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## THE VALUE OF ADR DEMONSTRATED AT DCMDW

The Armed Services Board of Contract Appeals rendered an adverse decision to the Government in the Appeal of Lockheed Martin Librascope (ASBCA No. 50508). This case proceeded through prolonged litigation, and has taken years to resolve. The contentious issue at hand was the reasonableness of partial termination for convenience costs. Both the Government and the Contractor were intractable.

ADR was not utilized in this case. The Administrative Contracting Officer and the Procuring Contracting Officer, clients of the Government, were strongly in favor of formally litigating this case. As a matter of fact, no settlement monies were authorized or approved for negotiation purposes. Accordingly, the case was litigated to the best of the Government's abilities. However, the Board sustained the contractor's appeal in the amount of \$769,935.00 plus interest. Although the Government believed they were correct, some difficult facts arose which could not be overcome.

The lesson learned by the Government is that utilization of ADR would have helped tremendously. If ADR was utilized in the form of a non-binding Board of Contract Appeals Settlement Judge and/or Mediator, the Government would have been able to get a "read" or "snapshot" from the neutral third party on how they perceived the case. This could have significantly improved the Government's bargaining position. ADR might have saved significant monies in a positive settlement, and since the ADR would have been non-binding nothing would have been lost.

As a reminder, it is the policy of the Defense Logistics Agency to consider ADR in EVERY dispute. Decisions not to use ADR must be made, in writing, by a management official one level above the deciding official.

ADR saves time, money, emotions and it works!

ADR – What have you got to lose? Not a thing!

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## REVISED EEO REGULATIONS EMPHASIZE THE USE OF ADR

The Equal Employment Opportunity Commission (EEOC) recently revised the EEO regulations at 29 Code of Federal Regulations Part 1614. Pursuant to the new amendments and related management directives, all Federal agencies are now required to establish or make available an ADR program for use during both the pre-complaint and formal complaint processes. Agencies may decide on a case-by-case basis whether or not to offer ADR to an aggrieved person; however, an agency may not eliminate an entire basis of discrimination from its ADR program.

Neutrals may be used from within, although agencies are also encouraged to use neutrals from other agencies. The key factor is the need for the ADR participants to perceive the neutral as completely impartial. The neutral cannot be an EEO counselor who has provided counseling in the dispute to the aggrieved employee.

As stated in the EEOC's introduction to the amendments, the EEOC's "...intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus(sic) any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil

Service Reform Act."

RESOLVE, the DLA EEO ADR program, has from its inception offered mediation to an aggrieved individual at any time during the EEO process. Through mediation, an employee can often settle all of their issues within one day. Otherwise, as stated in a GAO August, 1999 report, a case might take 38 months to travel the entire EEO process route.

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## **A CONNECTION BETWEEN ADR AND WORKPLACE VIOLENCE**

ADR can be utilized as a tool to prevent workplace violence as well as a tool to respond to acts of violence which have already occurred. For example, mediation can be used to provide an opportunity for an employee and a supervisor to clear up longstanding misunderstandings they might have of one another. Without the opportunity to discuss, in a facilitated setting, the roots of the misunderstandings, the parties could reach such a level of frustration that one or the other resorts to violence as a relief mechanism or a response to fear. If an act of violence has already occurred, ADR could be used as a restorative justice tool. For example, mediation could provide the opportunity for the victim and the offender to discuss responsibilities, restitution, and reconciliation.

A future special edition of the ADR Law Notes will explore in greater detail the use of ADR as both a preventative and response tool to workplace violence. For immediate questions, a point of contact is Beth Lagana at DOCCR, DSN: 850-3284, Commercial: (614) 692-3284, Email: blagana@ogc.dla.mil.

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## **DCMDE RECOVERS \$1.1M IN CONTRACT MEDIATION**

On November 22, 1999, DCMC East District engaged in contract mediation with Fairchild Industries, Inc. (FII) on a pension reversion issue. The mediator was Linda Singer of ADR Associates, Washington, D.C. Representatives for DCMDE at the mediation were Sue Wilson, the Corporate Administrative Contracting Officer (CACO); Lori Cohen, DCMC Baltimore Counsel; Brian Kingston, East District Contracts Counsel; and Bruce Krasker, East District Counsel. FII was represented by former and current VPs and a Hogan & Hartson attorney.

In the mid-1980s, FII reaped a multi-million dollar benefit when it terminated its pension plans and replaced them with identical plans. Since then, the Government had been attempting to recoup its fair share of the pension reversion.

At the time of the termination, generally accepted accounting principles allowed FII to amortize the pension reversion over fifteen years. After much internal debate, the Government agreed to allow FII to amortize the reversion for cost accounting purposes. What the Government did not bargain for was FII's closing of its largest segment, Fairchild Republic, less than two years later. FII argued that closing the segment eliminated its requirement to reimburse the Government for any portion of the pension reversion allocable to Fairchild Republic. The Government disagreed, asserting that FII had a continuing obligation under the "Credits" clause to reimburse the Government for that portion of the pension reversion allocable to flexibly priced contracts.

In May of 1996, the CACO issued a draft final decision to FII in an effort to trigger negotiations of the issue. Thereafter, between 1996 and 1999, the parties held numerous discussions about the possibility of using ADR to settle the issue, the types of ADR to use, and the selection of a neutral. At one point, DCMDE favored an evaluation of the respective positions in dispute by a subject matter expert such as a current or former ASBCA judge. Eventually, mediation, as a process-oriented non-evaluative technique was determined to be the best technique to use. The parties decided that if the issues could be sufficiently simplified and focused, they could settle the matter on

their own terms.

During the process of writing the Agreement to Mediate, the parties were able to narrow the issues. Preparations for and presentations during the mediation also helped in this regard. Prior to meeting for the mediation, the parties, at the mediator's request, provided her with written summaries of their positions and recommendations for settlement. The summaries were not exchanged between the parties. At the one-day mediation session, each party presented its views on the dispute. During joint discussions that followed, it was apparent that the parties had polarized views. Thereafter, Ms. Singer decided to caucus with each party for the remainder of the day, carrying settlement offers and counteroffers between FII and the Government.

At day's end, Ms. Singer presented the Government with a written, signed settlement offer by FII. After consulting with the three DCMDE attorneys assisting her, the CACO decided to accept the offer. According to the agreement, FII would deliver by January 10, 2000 a check for \$1.1M in settlement of the pension reversion issue. Because the Government representatives determined that there was considerable risk if the dispute proceeded to final decision and litigation, the settlement was considered to be sound and in the agency's best interests.

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