

ADR LAW NOTES



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

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SPECIAL EDITION: Below is a reprint of a J-7 article written by Elizabeth Grant, DLA Associate General Counsel

Case-In-Point: Alternative Dispute Resolution and Contract Administration

Alternative Dispute Resolution (ADR) involves the use of a third party neutral to help avoid and effectively resolve disputes. It is one of contract administration's most effective tools for creating a constructive environment for contract performance, and for effectively resolving problems that may arise. Numerous FAR sections address and encourage use of ADR, but in addition, DLA has its own ADR requirements that can help accomplish your objective of contract completion with the least amount of aggravation possible. I want to touch on four key points here.

First, all DLA contracts are required to have an ADR clause in them. DLAD 52.233-9001. We encourage tailoring the standard clause as appropriate. In fact, it surprises me we do not do this more often for our high-viz acquisitions, since tailored ADR clauses can play a critical role on a "no fail" acquisition. One "best practice" for dispute avoidance and early dispute resolution is an "issue escalation clause." This type of clause specifies, in advance, a tiered hierarchy for raising and resolving disputes, designed for the particular acquisition. Imbedded timelines help force issues to resolution rather than have them fester, or get raised indirectly via Congressional inquiries and the like. Or, rather than use an issue escalation clause, other tailored clauses can be crafted. Despite the benefits of DLA's standard clause, no one size truly fits all.

Second, DLA has a policy that ADR be addressed in post-award orientations. DLAD

42.501. The post-award orientation may take place at the "honeymoon" phase of the acquisition, but anyone who approaches the honeymoon with the hope there will be no issues or differences of opinion later is in for a shock. Contractors need to know about DLA's aggressive ADR policy, that DLA will be receptive to them asking for ADR, and understand that DLA expects the same attitude from them. By addressing ADR at post-award orientations, if problems surface later, there is a core, common philosophy for proceeding.

Third, one of my personal pet peeves is how contract disputes can disintegrate into ineffective letter-writing campaigns. Whether the contractor goes to his Congressman or to the Director, the result produces responses more oriented to explaining our own position rather than trying to resolve the issue. The problems need to be resolved by the direct parties involved, the players with the facts. A simple type of ADR to help in these cases is telephone facilitation. No one feels threatened by having a DLA ADR specialist on the line to help facilitate a dispute, it is easy to set up, and of course, neither party has to agree to anything they don't want to. Having a neutral party "referee" the discussion helps the parties focus on the true underlying issues and explore effective compromises, rather than pre-judge the dispute by assuming there is no common ground. Telephone facilitations in DLA have a surprisingly high success rate, with virtually nothing to lose.

Fourth, if you actually get to the stage where you have to issue a CO's final decision on a claim, it still is not too late to suggest ADR (though of course, the earlier the better). So, DLA also requires that ADR be addressed in CO final decisions. DLAD 33.211(a)(4)(v). Specifically, a

sentence is added to the appeal rights section of the decision noting that ADR is an option in addition to appealing to the ASBCA or the COFC. That ADR language can prompt a contractor or his lawyer to consider ADR when they did not think about it before, or when perhaps they thought about it earlier but initially rejected it. Even if the matter goes to litigation, the judge will note the ADR language, and will likely encourage a more streamlined approach than full scale litigation.

In sum, the more time we spend cleaning up spilled milk, the less time we have to focus on customer requirements and new initiatives. ADR saves time, money and aggravation, and gives the parties more control over their dispute, with more options for resolution. If you haven't had recent ADR training, now may be the time. If you need help with crafting a clause or working a dispute, contact the ADR specialist in your local Office of Counsel. Please also see our ADR web page for other good information. <http://www.dla.mil/adr>