

ADR LAW NOTES



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

DLA ADR Homepage at:

<http://www.dsccl.dla.mil/offices/legal/adr/adr.html> or
www.dla.mil/dg/Links.asp

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DLA MEDIATORS

DLA associates serve as collateral duty mediators. These associates mediate workplace, EEO, discipline, union/management, and procurement issues. Some also use their mediation skills to facilitate discussions concerning a variety of matters. The mediators are ranked according to their experience and skill level. Recently, sixteen of the mediators attended a three-day advanced mediation course, and twenty-one DLA employees attended a four-day basic mediation course in order to join the ranks as collateral duty mediators. Presently, approximately ninety DLA associates are on the "mediator list." If you would like to use mediation services, you can contact the ADR Specialists in the legal offices at DRMS, DSCP, DSCR, DSCC, DDC, and DESC; your local DLA EEO office for EEO issues; or your union representative for union issues. You can also contact the DLA ADR Associate Counsel, Beth Lagana at beth.lagana@dlamail, (614) 692-1859.

REGAINING TRUST MEDIATING CIVIL FRAUD CASES

By

Christine L. Poston, Fraud Counsel, DESC &
Heather J. LoPresti, Assistant Counsel, DESC

Behind every civil fraud case, there is the truth. However, the truth is subject to perception. The government perceives a set of facts one way, and the contractor can perceive a set of facts another way, in which case, the government feels cheated and the contractor feels the Government is attacking its integrity. Add to this mix, the torturous path of litigating and/or settling civil fraud allegations, and the result is years during which neither side trusts the other.

Mediation is a way out of this quagmire by providing a forum for regaining each other's trust. Each party has an opportunity to vent grievances and hear the other side's perception of the facts surrounding the alleged fraud. A good mediator will help the parties put their perceptions on the table, and let the parties know that it is perfectly okay to never reach agreement (on each other's perception) of the facts. The mediator will help the parties move beyond the emotion, find a way to settle the alleged civil fraud, and keep open the possibility to do business together in the future.

To achieve this end, it is very important to use a mediator who can remain non-judgmental. In addition, make sure the mediator understands the subtleties of the Civil False Claims Act. A mediator with little understanding of the Act could convey incorrect reality checks regarding the strength or validity of the case throughout the process, resulting in less than acceptable settlements.

One of the key elements to regaining trust is teaming with the contractor during the mediation process to create a corporate ethics compliance program as part of a settlement. By working together on a compliance program, the contractor is asserting their commitment to ethical standards and to implementing processes for enforcement. This will go a long way toward helping the government continue to find the contractor a responsible business partner.

You should also be careful that the mediation process itself does not stymie trust at the agency level. Participants sign a confidentiality agreement that prevents them from fully discussing the mediation. In addition, mediating civil fraud cases is very complex and can take months. This secrecy combined with the time involved to mediate, leaves agency decision makers in limbo about how to proceed in situations where the agency relies heavily on the contractor's

product and services to fulfill its mission. Leaders are left to wonder: Why is it taking so long? Why can't they settle? Will I be able to count on this contractor? Is my Government team doing a good job or do I need to worry about a possible debarment down the road? To avoid this pitfall, adapt the mediation confidentiality agreement accordingly. If rumor control within your agency is a concern, an alternative is to have a select number of decision makers sign the confidentiality agreement even though they may not attend mediation sessions.

However, care needs to be taken when determining who within the agency should be added to the mediation confidentiality agreement, regardless of their leadership status. Civil fraud cases often involve a complex fact pattern that occurred over a period of time, involving various people. In some cases, individuals involved in the fact pattern may have "worn multiple hats." For instance, an individual could have been detailed to the DOD combat support agency as a military member, then retired from the military service, then worked for the contractor(s) under investigation, and subsequently returned to work for the combat support agency as a federal civil servant. Not only does counsel have to confront the issue of represented parties and have concerns about the need to consult with corporate counsel for the corporation for whom the individuals may have worked, but it is also difficult for the mediation participants to remember with whom one is entitled to share information.

Even if a tentative settlement is reached and the agency feels confident in continuing to find the contractor a responsible business partner, it may be difficult to finalize settlement. An interesting twist to mediating civil fraud suits is that the Department of Justice (DOJ) limits the agency's authority to settle. Normally, DOJ requires at least double damages in value to settle civil fraud. In order for DOJ to consent to settle for less, sound and convincing reasons must be presented. The reasons may involve the necessity for the goods and services, other available suppliers or lack thereof, or the stage of the program.

Nevertheless, mediation can be a very successful method to regain trust and provide a way forward with the business relationship. Use the opportunity to the fullest extent to resolve all of the problems that may have led to the alleged fraud in the first place. This is a unique opportunity to spot problems in your

contracts and contract administration, and to clean up any business issues that might lead to litigation down the road. If the parties can settle those issues and combine the resolution with an Ethics Compliance Agreement, both parties can come out of the mediation stronger and in position to achieve their business needs.

*POC: Christine Poston, DESC-G,
Christine.Poston@dla.mil, 703-767-5001, DSN 427-5001; Heather J. LoPresti, DESC-G,
Heather.LoPresti@dla.mil, 703-767-5010, DSN 427-5010*

READING SUGGESTION

The following book was recommended as a good ADR resource:

You Just Don't Understand: Women and Men in Conversation; Deborah Tannen; New York: William Morrow, 1990.

"NUGGETS OF GOLD" **(i.e., ADR tidbits)**

Mediation settlement documents should be "SMART": The terms should be specific, measurable, achievable, realistic, with the times listed for action.