

ADR LAW NOTES



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

Defense Logistics Agency ADR Practice Group

September 1999

SUCCESSFUL DDC ADR ON GAO PROTEST CHALLENGE

On August 10, 1999, DDC concluded a successful mediation of a GAO protest. The GAO attorney on the case mediated the protest--a first for DLA. The protest filed by Raymond Corporation concerned a multi-million dollar acquisition for material handling equipment. DDC required a dual-mast lift which was challenged by Raymond as unduly restrictive. Raymond makes a single mast lift which DDC is currently using.

The Raymond single mast lift currently in use experienced structural cracking which a DDC-commissioned engineering report essentially attributed to design limitations. The engineering report concluded that the addition of gusset plates would enable the single lift to perform adequately. The gusset plate modification is essentially a simple retro-fit which can be done in the field at an estimated cost of about \$1,000.00 or less than 1/2 of 1% of the estimated lift vehicle cost. This retrofit is currently in process for DDC's existing Raymond single mast lifts.

Raymond also alleged that the dual-mast requirement effectively created an improper sole source procurement. DDC had no available evidence to contradict this. Another problem was that DDC faced funds expiration and project scheduling issues which served as additional incentives to find a viable bilateral resolution rather than await a GAO decision.

After extensive discussions, the parties agreed to a solution. DDC agreed to amend the solicitation to permit both dual and single mast lifts to be offered, to evaluate all lifts offered, and to discuss deficiencies. Raymond

understood that the original single mast design which is currently experiencing structural cracking does not in DDC's opinion meet their needs, and that DDC would ultimately reject any design evaluated as incapable of successfully performing the application.

The amendment also provided an opportunity to add additional carriage braking system requirements important to the application, but not addressed in the original solicitation, as well as clarifying evaluation factors. The mediation was conducted on-site at DDSP where the intended application would take place and where the single-mast lifts were currently in use. The ability to refer directly to the existing lifts was a useful part of the discussion process.

The assigned GAO attorney was quite familiar with the mediation process and significantly facilitated movement of the parties toward a bilateral solution. The GAO was very supportive of the mediation process in the sense of providing an attorney who traveled to the application site. Preparation for the mediation process was challenging given concurrent requirements to prepare an agency report.

We view this as an example of a win-win ADR.

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DLA LAWYERS CO-FACILITATE CONTRACTS ISSUES

Two lawyers for DLA successfully co-facilitated several contract issues relating to two DSCP contracts for jackets. The facilitation

focused on how the parties could better exchange information to improve contract performance. The Government needed to know how it could alter ordering priority with the least disruption to the production line as possible, and also needed information about the contractor's revised delivery schedules. The contractor had been focusing more on meeting continually changing orders than on telling the Government what would be useful to enhance smooth performance. The facilitation opened up a constructive dialogue between the parties; the parties also made specific commitments to exchange needed information.

The presence of the facilitators was helpful in several ways. First, the parties appeared "on their best behavior," trying not to interrupt the other and trying to present a positive approach in front of the facilitators. Second, Government representatives believed the contractor was more focused in addressing the issues than had been the case in the past. Third, toward the end of the facilitation, very unexpectedly, the contractor became hostile and combative; the facilitators were able to diffuse the outburst possibly more effectively than could have occurred without the presence of a neutral. The Government representatives were very positive about the facilitation (their second) and want to continue to use it in other areas.

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DLA ATTORNEY SELECTED AS CO-CHAIR FOR NCMA ADR SPECIAL TOPIC COMMITTEE

Elizabeth Grant, DLA-GC has been selected as a co-chair for the NCMA Special Topics Committee on ADR. One of her tasks will be to suggest ideas about how the committee can further ADR and act as a resource for NCMA members in the area. If you have any suggestions, please pass them onto her at **DSN: 427-6078, Commercial (703) 767-6078,**

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Y2K ACT ENCOURAGES ADR

The Year 2000 Readiness and Responsibility Act ("Y2K Act") was signed into law on July 20, 1999. The stated purpose of the Act is to: provide incentives to solve ahead of time year 2000 computer date-changes problems, encourage re-mediation and testing efforts to solve such problems, encourage the use of ADR to address year 2000 disputes, and lessen burdens on interstate commerce by discouraging insubstantial litigation.

To that effect, the Act includes provisions relating to limitations on foreclosures on real property and punitive damages; proportionate liability, pre-litigation notices and prospective defendant statements regarding willingness to use ADR; extension of 60 days from the 30 day notice period to complete a proposed remedial action or ADR before litigation can be commenced; pleading and mitigation requirements; special rules regarding contract and tort claims, proof issues; class actions; and first time violations of small businesses.

The Act, which was Enrolled Bill H.R. 775, may be cited as "Pub. L. No. 106-37; 113 Stat. 185 (July 1999); 15 USC 6601 et seq.

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DLA ADR HOMEPAGE NOW INCLUDES VISUAL AIDS

The DLA ADR Homepage now includes visual aids which can be used for ADR training. The site is located at

www.dscc.dla.mil/offices/doccr/adr/adr.html

under the heading of "DLA Publications." For more information, contact **Kristine Krueger, DOCCR, DSN: 850-3284, Commercial: (614) 692-3284, Email: kkruieger@ogc.dla.mil**