

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Use of Alternative Dispute Resolution

1. Although the traditional means of resolving disputes in the United States legal system has been to “fight it out” in court, the concept of Alternative Dispute Resolution (ADR) has become an increasingly popular means of settling disputes. This increasing use of ADR includes not only private party disputes, but disputes in which the Government is involved.

2. In 1990, Congress decreed, through the Administrative Dispute Resolution Act (ADRA), that the Federal Government should seek alternatives to litigation in resolving disputes in which it becomes embroiled. To promote the use of ADR in Government contract disputes, the ADRA amended the Contract Disputes Act to specifically provide that “a contractor and contracting officer may use any alternative means of dispute resolution . . . or other mutually agreeable procedures, for resolving claims.” In accordance with this statute, the Federal Acquisition Regulation (FAR) currently provides that “the Government’s policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level” and that “agencies are encouraged to use ADR procedures to the maximum extent practicable.” Furthermore, the FAR provides that if a contracting officer rejects a contractor’s request to use ADR procedures, the contracting officer “shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the disputes.”<sup>1</sup>

3. As outlined above, the use of ADR in Government contract disputes is strongly encouraged by statute and regulation. The FAR provides that the following four “essential elements” are required in order to use ADR:

(1) Existence of an issue in controversy;

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<sup>1</sup> The conditions outlined in 5 U.S.C. 572(b) include: 1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent; (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency; (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions; (4) the matter significantly affects persons or organizations who are not parties to the proceeding; (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

4. As these elements demonstrate, use of ADR for an existing Government contract dispute should be a voluntary decision by both parties. The type of ADR and the specific procedures to be used should also be mutually agreed upon by the parties. Finally, the officials of each party who participate in the ADR must possess the authority to resolve the dispute. If these essential elements can be met, then the parties may consider utilizing ADR to resolve a Government contract dispute.

5. There are several types of ADR available that may be considered for use in resolving contract disputes. Three of the most widely used types are as follows:

a. Neutral Evaluation

- Both parties to the dispute agree on a third-party neutral who investigates relevant facts and renders a report (oral or written)
- Informal process
- Useful when issues are complex and need to be narrowed or if resolution is likely if the facts can be agreed upon

b. Mediation

- Both parties to the dispute agree on a third-party neutral to serve as mediator
- Mediator actively assists parties in reaching resolution
- Informal and flexible process
- Particularly useful when parties have been contentious, emotionally vested, and/or lack objectivity regarding the issues involved

c. Mini-Trial

- More structured than other methods
- Each party presents its position to an official/senior manager of each party and usually a third-party neutral who facilitates the procedure
- Generally, attorneys for both sides present the case with narratives and witnesses but no cross-examination
- Useful when the case is complex and senior management is committed to participate in the process in an effort to resolve the dispute

6. There are many issues to consider when deciding on the appropriateness of ADR and the specific vehicle to be used. Such considerations include: the type of claim; the dollar value; the

complexity of the facts and legal issues; the existence of Government policy considerations; the need to compile a full record; the commitment of the parties to ADR; and the existence of peripheral issues to the dispute. The Legal Office can provide guidance to contracting and program personnel on the consideration of such issues and the ADR process in general.

7. The use of ADR to resolve contract disputes generally results in lower costs to the disputants and hastens the final resolution of the dispute. Furthermore, other benefits, such as preserving a continuing business relationship, may result from the use of ADR rather than litigation. Additionally, the use of ADR goes hand-in-hand with AMC's focus on Partnering with Industry. Although ADR is not appropriate for every Government contract dispute, it is a worthwhile process that should at least be considered in an ongoing Government contract dispute.

8. ADR is also very effective in the area of employee discrimination complaints in both the pre-complaint and formal stages of the Equal Employment Opportunity (EEO) process. The EEO Office at Fort Monmouth employs a pre-complaint mediation process, Resolving Employment Disputes Swiftly (REDS), which is a program designed to resolve complaints at the earliest possible stage in the complaint process. Upon the filing of an informal complaint, the REDS Team Members (EEO Office, Legal Office and Deputy Chief of Staff for Personnel) review the informal complaint to determine whether it is appropriate for mediation. Complaints involving criminal activity, waste, fraud, sexual harassment, or removal are inappropriate for mediation. If the complaint is considered appropriate for mediation, an opportunity to mediate will be offered to the complainant by the EEO Office. Mediation is then invoked at the complainant's election. Management cannot refuse to participate if the complainant chooses to attempt resolution of his or her complaint utilizing the REDS process. REDS mediation is an extremely informal proceeding in which the manager and the employee sit down with a mediator and attempt to resolve the issues between them. The Agency's attorney representative is not present at the mediation session unless the complainant is represented. If the complainant is represented, both the Agency's attorney representative and the complainant's representative may be present but neither representative is permitted to actively participate in the mediation session.

9. The mediation provides for a neutral third party to assist in developing solutions and negotiating agreements between the parties. The mediator does not render a decision. The parties themselves must achieve any settlement through the examination of all of the issues and communication of their real (vs. legal) interests.

10. If such pre-complaint mediation is unsuccessful, and the matter becomes the subject of a formal complaint, the Office of Complaint Investigations (OCI), DOD, also offers a more formal mediation opportunity. In order to invoke mediation after the filing of a formal complaint, both the complainant and management must agree to use the mediation process. The Agency has the right to refuse participation in mediation at the OCI level. If the parties elect formal mediation, an OCI ADR specialist is assigned as the mediator. In the OCI facilitated mediation, the Agency attorney is present whether or not the complainant is represented.

11. Use of mediation, at both the informal and formal complaint stages of the EEO complaint process, has many advantages to both the complainant and the Agency. Litigation is expensive, time-consuming, adversarial and resource intensive. Mediation focuses on resolving the existing

problems between the employee and the manager, and improving their future employment relationship through enhanced communication and the identification of the real issues by both of the parties. The parties devise their own solution to the issues and commit to a future joint course of action and behavior that will benefit both parties.

12. The CECOM Legal Office may be contacted for further information on all aspects of the ADR process. The Points of Contact in the CECOM Legal Office for the use of ADR are Ms. Kim Sawicki (contracts), (732) 532-1146 or DSN 992-1146, and Paula Pennypacker (EEO), (732) 532-3336 or DSN 992-3336.

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