Recommendation 86-8

Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution

(Adopted December 4, 1986)

The Administrative Conference has repeatedly encouraged agencies to take advantage of mediation, negotiation, minitrials, binding arbitration and other alternative means of dispute resolution ("ADR").[1] While some agencies have begun to employ these methods to reduce transaction costs and reach better results, many disputes are still being resolved with unnecessary formality, contentiousness and delay. This Recommendation is aimed at helping agencies begin to explore specific avenues to expand their use of ADR services.

A key figure in the effective working of various modes of ADR, including negotiated rulemaking, is the "neutral"—a person, usually serving at the will of the parties, who generally presides and seeks to help the parties reach a resolution of their dispute. These neutrals, often highly skilled professionals with considerable training in techniques of dispute resolution, can be crucial to using ADR methods with success.[2] For agencies to use ADR effectively, they should take steps to develop routines for deciding when and how these persons can be employed, to identify qualified neutrals, and to acquire their services.

The diversity of roles played by neutrals and the uncertainty as to certain applicable legal requirements present complications for agencies considering uses of ADR. Neutrals may be specially trained and accredited, or may simply hold themselves out as having certain expertise, experience or credibility. They may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be

[1] In Recommendation 86-3, the Conference called on agencies, where not inconsistent with statutory authority, to adopt alternatives to litigation and trial-type hearings such as mediation, minitrials, arbitration and other "ADR" methods. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86:3. In the rulemaking sphere, Recommendations 82-4 and 85-5 have been instrumental in promoting agency experimentation with negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule. *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4 and 85-5. *See also Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2; and *Case Management as a Tool for Improving Agency Adjudication*, 1 CFR 305.86-7.

[2] *See* the Glossary in the Appendix for brief descriptions of the roles of neutrals in various proceedings.

reconciled, or they may simply render advice to the parties. Time may be of the essence in acquiring their services, as in many arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from a few thousand dollars (for the services of a minitrial advisor) to six figures (for convening and facilitating a large-scale negotiated rulemaking). These differences render specific advice difficult to give in advance. Agencies, Congress, courts, and others who employ ADR methods or review their use should nonetheless observe certain guidelines intended to accomplish the following goals:

■ *Supply*. Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services.

■ *Qualifications*. Insuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.

■ *Acquisition*. Identifying existing methods, or developing new techniques, for expeditiously acquiring the services of neutrals at a reasonable cost and in a manner which (a) insures a full and open opportunity to compete and (b) enables agencies to select the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.[3]

■ *Authority*. Minimizing any uncertainty under the "delegation" doctrine or similar theories that may adversely affect the authority of some neutrals to render a binding decision. This consideration, however, should not prove troublesome where neutrals merely aid the parties in reaching agreement (as in nearly all mediations, minitrials and negotiated rulemakings).

These proposals are intended to help agencies meet the challenge of reaching these goals in a time of reduced resources and in a milieu in which many affected interests may oppose change.

[3] While there may be situations in which agencies can obtain the services of a qualified outside neutral without following formal procurement procedures, acquisitions of neutrals' services are generally governed by the Competition in Contracting Act, Pub. L., No. 98-369, Title VII, 98 Stat. 1175, which mandates full and open competition for contracts to supply goods and services to the federal government, and the Federal Acquisition Regulation, 48 CFR Chapter 1, Parts 1-53, which sets forth detailed procedures for conducting competitive procurements.

Recommendation

A. Availability and Qualifications of Neutrals

1. Agencies and reviewing bodies should pursue policies that will lead to an expanded, diverse supply of available neutrals, recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance of the dispute. Agencies should avoid unduly limiting the pool of acceptable individuals though the use of overly restrictive qualification requirements, particularly once agencies have begun to make more regular use of ADR methods. While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"—*e.g.,* no prior affiliation with either the agency or the private industry involved, may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

2. Agencies should take advantage of opportunities to make use of government personnel as neutrals in resolving disputes. These persons may include agency officials not otherwise involved in the dispute or employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. The Administrative Conference, Federal Mediation and Conciliation Service ("FMCS"), the Department of Justice (particularly the Community Relations Service ("CRS")) and other interested agencies should work to encourage imaginative efforts at sharing the services of

Federal "neutrals," to remove obstacles to such sharing, and to increase parties' confidence in the selection process.

3. Congress should consider providing FMCS, CRS and other appropriate agencies with funding to train their own and other agencies' personnel in the particular skills needed to serve in minitrials, negotiated rulemakings, and other ADR proceedings.

4. The Administrative Conference, in consultation with FMCS, should assist other agencies in identifying neutrals and acquiring their services and in establishing rosters of neutral advisors, arbitrators, convenors, facilitators, mediators and other experts on which Federal agencies could draw when they wished. The rosters should be based, insofar as possible, on full disclosure of relevant criteria (education, experience, skills, possible bias, and the like) rather than on strict requirements of actual ADR experience or professional certification. Agencies should also consider using rosters of private groups (*e.g.,* the American Arbitration Association). The Conference, FMCS or another information center should routinely compile data identifying disputes or rulemakings in which neutrals have participated so that agencies and parties in future proceedings can be directed to sources of information pertinent to their selection of neutrals.

5. Agencies should take advantage of opportunities to expose their employees to ADR proceedings for training purposes, and otherwise encourage their employees to acquire ADR skills. Employees trained in ADR should be listed on the rosters described above, and their services made available to other agencies.

B. Acquiring Outside Neutrals' Services

1. In situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

(a) When authorized to employ consultants or experts on a temporary basis (e.g., 5 U.S.C. §3109), agencies should consider utilizing that authorization in furtherance of their ADR or negotiated rulemaking endeavors.

(b) Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation ("FAR") part 7,[4] periodically give notice in the *Commerce Business Daily* and in

[4] 48 CFR Part 7.

professional publications of their needs and intentions,[5] so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.

(c) Where speed is important and the amount of the contract is expected to be less than $25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the Federal Acquisition Regulation[6] in acquiring the services of outside neutrals, particularly minitrial neutral advisors, mediators and arbitrators.

(d) Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. Agencies should, where possible, seek contracts with more than one supplier. In fashioning such indefinite quantity contracts, agencies should take care to comply with the following:

(1) Agency contracts should specify a minimum quantity, which could be a non-nominal dollar amount rather than a minimum quantity of services.[7]

(2) Negotiation of individual orders under the contract is desirable, but should generally adhere to the personnel, statements of work, and cost rates or ceilings set forth in the basic indefinite quantity contract, so as to minimize "sole source" issues.

(e) Agencies should also consider:

(1) Entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles.

(2) Using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services.

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[5] Agencies are required to give *Commerce Business Daily* notice for all contract solicitations in which the government's share is likely to exceed $10,000. 15 U.S.C. 637(e); 48 CFR 5.201(a). For procurements between $10,000 and $25,000 in which the agency reasonably expects to receive at least two offers, no such notice is required. Pub. L., No. 99-591, October 18, 1986, Title IX, Section 922.

[6] 48 CFR Subpart 13.1. This subpart allows agencies to make purchases in amounts less than $25,000 without following all of the formalities prescribed in the FAR for ordinary procurements. If the procurement is for less than $10,000, the agency need not advertise it in advance in the *Commerce Business Daily*. 48 CFR 5.201(a). None of these provisions relieves the agency of its mandate to obtain competition.

[7] 48 CFR 16.504(a)(2).

(3) Proposing a deviation from the FAR or amending their FAR supplements, where appropriate.

(f) Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offeror, but cost alone should not be the controlling factor.[8]

2. The Civilian Agency Acquisition Council and Defense Acquisition Regulatory Council should be receptive to agency or Administrative Conference proposals for deviations from,[9] or amendments to, the FAR to adapt procurement procedures to the unique requirements of ADR processes, consistent with statutory mandates.

3. In the absence of appropriate considerations suggesting a different allocation of costs, in minitrials and arbitration the parties customarily should share equally in the costs of the neutrals' services.

Glossary

***Mediator*.** A mediator is a neutral third party who attempts to assist parties in negotiating the substance of a settlement. A mediator has no authority to make any decisions that are binding on either party.

***Convenor/Facilitator*.** Negotiated rulemakings generally proceed in two phases, one using a "convenor" and the other a "facilitator." In the first (convening) phase, a neutral called a convenor studies the regulatory issues, attempts to identify the potentially affected interests, and then advises the agency concerning the feasibility of convening representatives of these interests to negotiate a proposed rule. If the agency decides to go forward with negotiating sessions, the convenor assists in bringing the parties together. In the second (negotiating) phase, a neutral called a facilitator manages the meetings and coordinates discussions among the parties. When the parties request, a facilitator may act as a mediator, assisting the negotiators to reach consensus on the substance of a proposed rule. The roles of convenor and facilitator sometimes overlap, and often both functions are performed by the same person or persons. Neither a convenor nor a facilitator has authority to make decisions that are binding on the agency or on the participating outside parties.

[8] 48 CFR 15.605(c).
[9] 48 CFR 1.402.

***Neutral Advisor*.** A minitrial is a structured settlement process in which each party to a dispute presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. In this recommendation, it is presumed that the government is one party to the dispute. In some (but not all) minitrials, a neutral advisor participates by hearing the presentations of the parties and, optionally, providing further assistance in any subsequent attempt to reach a settlement. Typically, a neutral advisor is an individual selected by the parties. Duties of a neutral advisor may include presiding at the presentation, questioning witnesses, mediating settlement negotiations, and rendering an advisory opinion to the parties. In no event does a neutral advisor render a decision that is binding on any party to a minitrial.

***Arbitrator*.** An arbitrator is a neutral third party who issues a decision on the issues in dispute after receiving evidence and hearing argument from the parties. Arbitration is a less formal alternative to adjudication or litigation, and an arbitrator's decision may or may not be binding. Arbitration may be chosen voluntarily by the parties, or it may be required by contract or statute as the exclusive dispute resolution mechanism.

Citations:

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