



Recommendation 87-11

Alternatives for Resolving Government Contract Disputes

(Adopted December 18, 1987)

Government procurement is a major component of federal spending. It now comprises an important part of the nation's economy. The recent expansion of government contracting has been matched, perhaps exceeded, by the rise in disputes between agencies and contractors. Increasingly, management problems are handed over to lawyers and accountants to be resolved contentiously by criteria that are often only marginally relevant. Causal factors include increased regulatory requirements; reduced authority of agency contracting officers; a greater willingness among contractors to resort to litigation; an expanding government contracts bar; broadened notions of due process; enhanced congressional oversight that can discourage settlement; and the establishment (or expansion) of offices of inspector general and intra-agency audit offices.

Most knowledgeable government officials, contractors and attorneys agree that government contract appeals have become too onerous, too expensive and too time-consuming. Despite Congress' goals in enacting the Contract Disputes Act of 1978 ("CDA") to provide an expeditious alternative to court litigation and to encourage negotiated settlements, most appeals are not now resolved either promptly or inexpensively. Agency boards of contract appeals ("BCAs"), originally intended to be alternatives to courts, have become "judicialized," with depositions, discovery and lengthy opinions common.

The system established by the CDA¹ begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, and also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not amicably resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency BCA or directly to the United States Claims Court. The proceedings become considerably more formal at this stage. While agency boards and their rules are hardly uniform, they typically involve written notice of appeal and complaint,

¹ 41 U.S.C. 601-613; 5 U.S.C. 5108(c)(3); 28 U.S.C. 1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517; 31 U.S.C. 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95- 563. 92 Stat. 2383.



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discovery, depositions, subpoenas, hearings that result in transcripts, and board decisions signed by three-member panels. "Accelerated" procedures are available for claims under \$50,000, and a more streamlined "expedited" process for claims under \$10,000.

A variety of remedies have been prescribed for the growing cost, delay, and other problems encountered in federal disputes. They range from marginal revisions of the boards (e.g., enlargement of BCA resources), to increased professionalization of COs, to structural changes in the ways agencies do business. While a number of these proposals have merit, the Conference is focusing herein only on the cluster of methods that have come to be known as alternative means of dispute resolution ("ADR").² These methods are consistent with the CDA's goals, and have proven efficient and fair. They serve to involve decisionmakers, rather than their representatives, in the conflict resolution process. ADR methods have regularly aided private parties to resolve disputes similar to those decided by BCAs.

Several ADR methods are particularly appropriate to resolving many government contract claims, and a few agencies have begun to experiment successful with them. The Conference urges all major contracting agencies, and persons who deal with them, to explore seriously the potential uses for ADR and to begin creating an atmosphere in which these methods can be readily employed.³ This recommendation offers advice on the application of commonly used ADR methods to post-award contract disputes before agency boards of contract appeals.

Recommendation

1. Agencies' ADR Policies and Practices

a. Congress should amend the Contract Disputes Act (1) to make indisputably clear that the contractor and the government may agree to use arbitration⁴ or any other mutually agreeable

² These include arbitration, factfinding, minitrial, mediation, facilitation, convening, conciliation, and negotiation.

³ The Conference has repeatedly recommended that agencies employ ADR. Recommendation 86-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3. The Conference has previously called for using mediation, negotiations, informal conferences and similar innovations to decide certain kinds of disputes more effectively. E.g., *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2.

⁴ Such arbitration authority should be consistent with the procedures and safeguards set forth in Conference Recommendations 86-3, *id.*, and 87-5, *Assuring the Fairness and Acceptability of Arbitration in Federal Programs*, 1 CFR 305.87-5.



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ADR procedures for resolving claims relating to agency contracts and (2) to encourage COs to make all reasonable efforts to resolve a claim or dispute consensually, either prior to issuance of a CO decision or subsequently.

b. The President should promulgate an Executive Order that encourages voluntary use of ADR procedures to resolve contract disputes at the CO and BCA levels.

c. The Office of Federal Procurement Policy should issue a policy statement, and the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council should amend the Federal Acquisition Regulation,⁵ to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to recommend to the parties and their representatives that they seek to explore the use of ADR to resolve their differences. The policy statement and FAR should also encourage agencies to adopt policies or rules concerning ADR, as set forth below.

d. Agencies should adopt policies encouraging voluntary use of ADR in contract disputes. The policies should place the responsibility for implementing ADR with contracting officers, government counsel, and BCA judges. These policies should make clear that superior agency officials will support reasonable settlements reached by means of properly selected ADR methods. The policy should also provide for systematic review of all cases for susceptibility to ADR, specify who has authority to approve the selection of case for ADR, and set forth guidance on documenting the negotiation processes or justifying settlements. Agencies should also consider, as a matter of general policy, offering certain forms of ADR to contractors in specified kinds of disputes (e.g., those involving less than a stated maximum amount).

e. Agencies should adopt regulations that (1) authorize agency officers to make use of ADR in contract disputes; (2) make provisions for automatically alerting the parties, both at the CO level and as soon as an appeal is filed, that one or more ADR methods is available; (3) authorize BCA judges to encourage ADR use and to require the attendance, at any conference held for the purpose of proposing or implementing ADR, of at least one representative of each party who has authority to negotiate concerning the resolution of all issues in controversy; (4) briefly describe the alternative procedures; (5) authorize the parties to agree to vary any procedural rule in their case; and (6) insure confidentiality of communications made during use of ADR methods.

⁵ 48 CFR Part 7.



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f. Agency boards of contract appeals should:

(1) Routinely include in docketing notices an announcement indicating the availability of ADR, describing the available methods; and telling how interested persons can follow up to explore potential ADR use in their cases.

(2) Amend their procedural rules to provide explicitly for conferences to consider the possible use of ADR in each case to help dispose of any or all issues in dispute.

g. Presiding and chief judges at BCAs should regularly review their dockets and suggest use of a settlement judge, mediation, minitrial, or other ADR methods whenever appropriate.

2. Employing Alternatives in Contract Disputes

a. Finding Neutrals⁶

(1) To facilitate the parties' choice of appropriate neutrals, the Administrative Conference, in consultation with the Federal Mediation and Conciliation Service and other knowledgeable groups, should establish a central roster of minitrial advisors and other neutrals available to help resolve government contract disputes. Use of the list, however, should not be mandatory. The list should include, at a minimum:

(a) All persons who have experience as neutral advisors in government contracts minitrials;

(b) Any BCA judges and administrative law judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both. (Some safeguards to ensure interagency reciprocity and to assure no other involvement with the dispute may be necessary); and

(c) Any retired federal or state court judges, BCA judges, and administrative law judges who are interested.

(2) Each BCA should take steps to make available its judges to serve as settlement judges, minitrial advisors, or other neutrals to help resolve disputes before other agencies' BCAs.

⁶ In Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR § 305.86-8, the Conference addressed issues involving neutrals' availability, qualifications and acquisition. The present Recommendation seeks to elaborate on 86-8 in the specific context of contract appeals.



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b. Minitrials

(1) Agencies should develop and distribute minitrial guidelines that include sections dealing with criteria for identifying appropriate cases; contents of minitrial agreements; rules as to any discovery; roles of the participants, including any neutral; authority of the principals; exchange of position papers, audit reports, quantum submissions, and other documents and exhibits; procedure and format of the hearing; possible time limit on the negotiations; fees and expenses; and procedures for ensuring the confidentiality of the proceedings. The guidelines, which should be used only as procedural suggestions, should also give each party the right to terminate the minitrial procedure at any time for any reason. Any guidelines acceptable to the parties, together with other provisions relevant to the resolution of the dispute, should be incorporated.

(2) In selecting principals to represent the agency in a minitrial, agencies should ensure that principals in the minitrial agreement:

(a) Are of sufficient rank in the agency to negotiate, and successfully defend, a binding settlement.

(b) Have authority to bind their organizations in the dispute at hand, or at least to make recommendations that will be accorded substantial weight.

(c) Ideally have little prior involvement with the case so as to be able to evaluate objectively the issues and the agency's potential liability.

(d) Have enough background to grasp the main issues quickly.

(e) Not be at such a high level that his or her involvement will detract in a major way from the agency's operations.

Agencies should meet the concerns by, among other things, tailoring the rank of the principal to suit the magnitude of the case and by encouraging ADR use earlier in the case (e.g., the CO level).

(3) Agencies should take steps to make participation as a principal an attractive career step and encourage or provide training in negotiation and mediation skills among groups of potential principals.



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(4) Principals should generally have access to technical, legal, accounting, or other advice from agency staff during the hearings and negotiations so as to produce a more well-informed, defensible resolution, enhance accountability, and build intra-organizational support for any settlement. Unless secrecy is especially important, it will ordinarily be unwise to sequester most minitrial witnesses, particularly experts, since a looser format may encourage dialogs or exchanges that can help focus issues and sometimes promote agreement.

(5) Once the principals have had a chance to assess the strengths and weaknesses of both sides' positions, their negotiations should take place promptly and should be final and binding. The responsible principals ordinarily should have authority to resolve all issues before them without seeking further agency approval following the close of negotiations.

(6) While the "neutral advisor" who helps the principals at a minitrial assess the merits of a case can be quite useful, the parties should consider foregoing such aid in cases where the principals already have a good working relationship, where issues are simple or amounts small, or, conversely, where complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral. Neutrals probably will also be less needed where the minitrial occurs early on—for instance, at the CO level—when positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency involved. In those cases, the CO might well serve as a sort of presider-principal.

(7) A neutral advisor's role should be defined by the parties (at least tentatively) prior to the hearing by the principals. Any shift during the proceeding should be only with the concurrence of the principals.

(8) Where minitrial neutral advisors are used, the parties should consider whether to seek their assistance in any of the following ways:

(a) Presiding over the hearing;

(b) Serving as a source of information, responding to technical legal questions, or offering insights and observations on issues in controversy;

(c) Posing questions at the hearing so as to ensure that the basic facts are ascertained;

(d) Suggesting novel approaches to presenting relevant information;



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(e) Working actively during the principals' negotiation sessions to aid settlement, as by advising each side on the strengths and weaknesses of its case, relevant legal principles, and how the law might apply to the facts established;

(f) Serving as a mediator;

(g) Suggesting that certain advisors or staff members be brought into the negotiations or briefed; or

(h) Providing a written, nonbinding opinion to the principals, or helping them prepare a justification for the settlement agreed on.

c. Mediation

Agency boards of contract appeals should establish mediation programs in which parties can be required to attend an initial session with a mediator. The boards should require parties to be represented at the session by a person with authority to negotiate concerning the resolution of all issues in controversy. The boards may wish to exclude from these programs certain kinds of cases. Counsel should be required, where appropriate, to provide specified documents to the mediator, and to prepare short position papers.

d. Settlement Judges

(1) Agency boards of contract appeals should institute a procedure under which a settlement judge—not the presiding judge in the case—may be appointed to preside over settlement conferences or negotiations, assess settlement potential, and work with the parties to explore possible settlement of a dispute. The settlement judge device should be capable of being invoked at the discretion of the chief judge on his or her own motion or that of any participant or the presiding judge. An order appointing a settlement judge should specify whether, and to what extent, the proceeding is suspended during the settlement negotiations and may define the scope of any negotiations to specified issues. The order may also expressly limit the period for settlement negotiations and require a brief report from the settlement judge. Each party should have the right to refuse to use the process, or to withdraw at any time.

(2) The settlement judge should be deemed to have the power to suggest privately what concessions a party should consider, to confer privately as to the reasonableness of each party's case or settlement position, and to require that representatives with authority to negotiate concerning resolution of all issues in controversy be present at the settlement



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conference. The settlement judge shall be prohibited from discussing the merits of a case with any other BCA judge or other person, and shall not be called as a witness in the case.

3. Documentation and Oversight

a. Agencies should offer guidance to their personnel on the degree of documentation that is appropriate to justify settlements that have been reached via ADR; the guidance should emphasize the needs for flexibility without undermining accountability. For instance, the guidance could require the principal representing the agency in negotiations or his advisor to set down cost and other factors taken into consideration, the principal elements of the negotiation, likelihood of success at trial, and other significant facts or considerations justifying any significant differences between pre-negotiation objectives and negotiated result; in short, a reflection of the thought process or rationale of officials who agreed to the settlement. This documentation should not exceed what would ordinarily be used to justify negotiated settlements of contract disputes, and should generally be written after the fact so that ongoing negotiations are not jeopardized or delayed. A neutral advisor who has helped the parties resolve a potentially serious case may be asked to help draw up the justification memo, or offer a brief advisory decision.

b. Since the effectiveness of expanded reliance on ADR will depend in part on the degree of support or opposition from congressional committees and offices of inspector general, agencies should seek to document, and furnish periodically to relevant committees and oversight offices information on, the relative costs and benefits of ADR methods in cases where they have been used. Documentation should include case results, estimated savings, identities of principals and advisors, and nature of processes used.

4. Training and Outreach

a. Agencies should give priority attention to offering training in negotiation and other ADR skills to BCA judges, government attorneys, COs, and others involved in contract appeals. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for contractors and their representatives, and seek to incorporate materials on ADR into the training curricula for COs and project managers.



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b. Agencies should designate an employee to serve as an ADR specialist in connection with contract disputes, and should consider retaining the services of a trained mediator or similar professional to review cases for susceptibility to ADR, advise BCA judges, and mediate selected cases.

Citations:

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