



Recommendation 89-2

Contracting Officers' Management of Disputes

(Adopted June 15, 1989)

An increasing number of problems in the management of government contracts are now referred to lawyers, accountants, and judges for resolution. This accelerating trend has tended to deemphasize the responsibility of the agency contracting officers, who (in most agencies) have traditionally played a key role in the procurement process, including dispute handling.¹ Many contracting officers ("COs") today are subject to restrictive regulations and close oversight that can inhibit their willingness to negotiate settlements. For this and other reasons, many cases proceed to needless litigation that are in fact susceptible to prompt, direct resolution by COs at an early stage when parties are often less entrenched and more cognizant of program interests.²

Several Conference studies have demonstrated opportunities for improving agencies' resolution of contract disputes consonant with the Contract Disputes Act's³ goal of expeditious resolution without disrupting performance.⁴ While a few agencies have experimented with alternative means of dispute resolution at the appeal level, these methods are even more likely

¹ Conference Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR 305.87-11, describes one aspect:

"The dispute handling system established by the Contract Disputes Act 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, but 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 board of contract appeals or directly to the U.S. Claims Court, where proceedings become considerably more formal."

² This report addresses only dispute resolution during contract performance; it does not extend to controversies which arise during the contract formation process.

³ 41 U.S.C. 601-613; 5 U.S.C. 5108(c)(3); 28 U.S.C. 1346(a)(2), 149(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.

⁴ Section 33.204 of the Federal Acquisition Regulation, which guides agency procurement practices, includes the following possible inducement to ADR:

"In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences."

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation.



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to be useful prior to issuance of a contracting officer decision. This potential has been neglected. Current training for COs does not address ADR and gives minimal attention to negotiation skills. These methods⁵ serve the agency by helping to expedite dispute handling. They serve the parties by keeping outcomes in the control of the contracting parties, preserving cooperative business relations, avoiding litigation (and the concomitant loss of control as to results), and, most important, allowing the parties to return to concentrating on productive work rather than conflict.

This recommendation builds on an earlier one (87-11), in which the Conference focused primarily on possible uses for consensual means of resolving contract disputes at the appeal level. It identified the decreased authority of COs as a major factor contributing to the inefficiency and cost of resolving many conflicts. Recommendation 87-11 (in pertinent part) calls for (1) legislation, an executive order, by the Office of Federal Procurement Policy, policy statement, and Federal Acquisition Regulation changes to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to explore use of ADR to resolve their differences; (2) agency adoption of policies encouraging ADR and regular use of rules or notices to alert COs and other parties to ADR availability; (3) agency designation of an employee to serve as an ADR specialist in connection with contract disputes; and (4) agency attention to the need to offer training in negotiation and other ADR skills to COs and others involved in contract disputes.

The instant recommendation seeks to go further to enhance the CO's ability and authority in the resolution of contract disputes. Calling for CO training in negotiation and dispute handling, as well as increased use of ADR techniques as part of a CO's decisionmaking process, it supplements the prior recommendation by focusing on the integration of consensual dispute resolution into already existing dispute and training systems at the CO level, overcoming obstacles to ADR use, and practical guidance in improving CO-level dispute resolution.

Recommendation

1. Agencies with significant acquisition activity, acting in consultation with expert groups, should encourage COs, and other key personnel involved in the resolution of contract disputes, to make greater efforts routinely to consider and utilize ADR to help resolve claims. Since

⁵ They include arbitration, mediation, minitrial, factfinding, convening, facilitation and negotiation. These are defined in the Appendix to Conference Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3.



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dispute resolution at the CO level is very much a shared activity, these persons may include program and project managers, attorneys, auditors, engineers, specialists in pricing, packaging, production, maintenance and quality control, and other technical experts or contracting officials. These agencies should undertake comprehensive programs of promoting ADR at the CO level. The programs should include application of ADR techniques in specific test cases, conduct of training, case screening, and information and guidance for personnel and contractors.

2. Agency heads should direct senior officials within the acquisition hierarchy to act as proponents for dispute resolution, with the specific mission of developing more effective contract dispute resolution practices. Agencies with extensive acquisition activity should designate a senior official within the acquisition hierarchy with the specific mission of developing more effective contract disputes resolution practices. This official's mission would include challenging barriers to wider ADR use, educating disputants in industry and government, and improving understanding and use of ADR procedures at the CO level.

3. The Federal Acquisition Regulation should be amended to describe specifically the full range of dispute resolution methods available for consideration by the parties at or before the time a claim is presented to the CO for resolution under the Contract Disputes Act.

4. COs involved in the disputes process should be specifically evaluated, as part of the annual performance evaluation cycle, on their effectiveness in managing contract disputes.

5. In addition to those techniques set forth in Recommendation 87-11, agencies should be encouraged to use the following specific methods in CO-level disputes:

(a) Employing factfinding to offer an advisory decision, or designating a CO who was not involved in the disputed issues, or a particular distinguished government official or other knowledgeable person, to make an advisory decision;

(b) Employing minitrial or other processes to permit a structured presentation of facts and arguments to the CO or other government officer with authority to settle;

(c) Agreeing in advance that disputes arising under a particular contract will be voluntarily submitted to an expert or panel for nonbinding opinion as soon as a disagreement occurs; and

(d) Encouraging agency COs to employ the services of mediators or other neutrals to enhance negotiations to settle contract disputes.



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6. Board of Contract Appeals judges should take greater advantage of opportunities to suggest returning to the CO cases which evidently should be pursued more vigorously for settlement.

7. ADR training programs, for both industry and government personnel should be integrated into existing management training programs, as follows:

(a) Training should focus on the use of these techniques as tools to improve the contract formation and contract administration process, so as to abate conditions which later lead to disputes, and to expedite decisionmaking under the Contract Disputes Act.

(b) Training should reflect the fact that negotiation is a key dispute resolution method, and that most COs would become more effective professionals by devoting increased training and attention to these methods. The Federal Acquisition Institute and other government entities specializing in acquisition training should devote increased attention to listening and communications skills, use of "interest" and "principled" rather than "positional" bargaining, and systematic attention to negotiation techniques. The training should also enable a CO to engage in meaningful discussion with a contractor by first working as a "team builder" to develop a coherent intra-agency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others within the agency. Consistent with best management practice and the Packard Commission Report for greater efficiency in procurement,⁶ the training should encourage the CO, even without the assistance of a third-party neutral, to avert appeals by reducing the number of situations where disputes, encumbered by internal disagreements or incoherent positions, are passed on to boards of contract appeals.

(c) Professional organizations concerned with the public contract disputes process, such as the American Bar Association, Federal Bar Association, and National Contract Management Association, should develop and encourage increased learning opportunities in effective dispute resolution techniques for representatives of the government and private sector.

⁶ *A Quest for Excellence*, Final Report by the President's Blue Ribbon Commission on Defense Management (June 1986).



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Citations:

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