

**Prepared Remarks of FAA ODRA Administrative Judge Anthony
N. Palladino Delivered at DOJ / ACUS Dispute Resolution
Symposium on March 19, 2012**

INTRODUCTION

Mr. Attorney General, representatives of ACUS, Members of the Interagency ADR Working Group, and Guests, I am very pleased to be here representing the Department of Transportation's Federal Aviation Administration to speak about dispute resolution in government contracting. Every year, the United States Government contracts with thousands of commercial entities for goods and services vital to the missions of federal agencies. Government contracts, grants and cooperative agreements represent, according to the Office of Federal Procurement Policy, approximately 12 percent of the Nation's gross domestic product and the government spent just over one trillion dollars in FY11 on contracts, grants, and cooperative agreements.

When viewed in that context, the number of government contracts-related disputes formally litigated and actually decided by courts and administrative tribunals is relatively small. I suggest that one reason for this is that collaborative dispute resolution efforts are made on a daily basis, informally by Contracting Officers and Program Office personnel, and more formally in meditative and other processes, to either resolve existing disputes or avoid disputes between agencies and their contracting partners.

I submit that the term "alternative" in ADR is a little outdated and something of a misnomer when it comes to government contracting. It implies that non-binding, non-litigative methods are not the mainstream or normal way that contracting disputes are settled. In fact, informal and

formal voluntary dispute resolution processes are well established in several agencies and I believe that in government contracting it would be more appropriate to replace the “A” in ADR with a “C” and refer to collaborative dispute resolution or “CDR”, as more reflective of what typically occurs. While I am not the first to suggest this term, I believe that CDR has proven its value, not only as a method to resolve disputes that inevitably occur, but also as a valuable contract management tool. Collaborative dispute resolution helps to preserve and in some cases improve business relationships between the agency and its contracting partners; whereas litigation by its nature is inherently destructive of such relationships, particularly when conducted during contract performance.

While there are many consensual dispute resolution models used in procurement, most involve some form of neutral evaluation, often combined with facilitative mediation, or more rarely, binding arbitration. The general approach employed in non-binding dispute resolution involves joint problem solving, cooperative information exchanges, identifying interests and options, and examination of facts and positions in a less adversarial setting. The emphasis is on attempting to identify the interests of the parties and developing possible solutions to address those interests.

FAA ODRA

Collaborative dispute resolution processes have been an integral part of the FAA’s Acquisition Management System since its beginning. Through the early and proactive encouragement of voluntary dispute resolution efforts, FAA has been able to resolve 90 percent of all contract disputes that have been filed with my office, the ODRA, as well as close to two thirds of all bid protests filed. The FAA disputes process is readily available to both represented and unrepresented parties. From the time a matter is filed, parties are actively encouraged, but not

required, to attempt some form of dispute resolution. FAA policy expressly calls for the use of voluntary dispute resolution “to the maximum extent practicable.” We take that policy very seriously and have designed our process around it.

The ODRA does not wait for the parties to initiate discussion of possible collaborative dispute resolution; rather, at the initial scheduling conference immediately after the case is filed an administrative judge of the ODRA is appointed to discuss available dispute resolution options, explain how the process works and offer his or her services as a neutral to the parties or assist them in securing another neutral. Interestingly, in almost all cases parties have chosen to use the appointed ODRA administrative judge. In our experience, only very rarely does a case proceed into adjudication without some attempt at CDR.

Collaborative dispute resolution is used in many types of disputes at the FAA. These range from simple payment disputes in small contracts to large procurements related to the modernization of the nation’s air traffic control system. One example illustrates the value of CDR to the Agency, its contracting partners and the public we serve. The FAA process recently was used to resolve a longstanding land use dispute. The Agency had leased a mountaintop property that was ideal for housing an aviation-related radar and communication facility. The location, which was adjacent to the US border, also was of interest to other federal agencies, who had subleased portions from the FAA. The physical characteristics of the site and adjacent property also were ideal for the development of a wind farm, and the owners of the property, as well as the developers with whom the owners had agreements, were eager to proceed with the erection of wind turbines. The FAA had a strong interest in ensuring that such development would not interfere with its

ongoing operations at the facility and the Government's other existing uses of the property.

In addition there is a strong governmental interest in promoting development of clean, alternative energy. The multiple parties involved agreed to use a non-binding mediation process with Administrative Judge Marie Collins of my office. They agreed to jointly identify technical interference issues material to negotiating a resolution. The parties then jointly selected a technical expert to produce a report addressing those issues, based on instructions that the Parties they themselves jointly developed. Using the expert's report, the Parties negotiated a voluntary settlement that protected the Government's interests, while allowing for wind farm development at the site.

OTHER AGENCIES

Such dispute avoidance processes are not limited to the FAA. There are many examples of collaborative dispute resolution techniques employed by many agencies; and several agencies have established both policies and programs designed help avoid and resolve disputes with the potential or existing contracting partners, as early as possible. A few examples include:

- “Enhanced debriefing” in agency-level bid protests at the Army and Air Force;
- The use of “tiered discussion” clauses in many transactions, including contracts, grants, and cooperative agreements issued by the National Institutes of Health and the Office of Naval Research; and
- Internal mediation programs such as the one created by the Defense Logistics Agency.

GAO AND THE BOARDS

In addition to procurement dispute resolution policies and programs at the agency level, for several years the assistance of experienced and trained administrative judges and other neutrals has been available to agencies across the government. For example, with respect to bid protest challenges to contract awards, the GAO has for years been offering a form of early outcome prediction in bid protests filed there. It reports that 85% of the 448 matters using that process in the last three fiscal years were resolved without the need for a Comptroller General decision.

For disputes that develop in existing contracts, the judges of the Armed Services Board of Contract Appeals and the United States Civilian Board of Contract Appeals have unrivaled experience at resolving them and have been successfully offering dispute resolution services for many years. Both Boards report repeatedly, year-after-year, high resolutions rates for cases that proceed to voluntary dispute resolution processes.

I have provided in handout materials, available on the table, information about the dispute resolution services available at both the Armed Services Board and the Civilian Board. The Civilian Board in every case informs parties of the wide variety of ADR options available there. Chairman Stephen Daniels of the Civilian Board reports that in 2011, the Civilian Board conducted 42 non-binding dispute resolution proceedings and achieved settlements in 40 of those cases. Also, the Board provides ADR services in matters that are not yet formally before it for adjudication or that may be pending elsewhere.

Chairman Paul Williams of the ASBCA reports that a high percentage of all case dispositions on the merits involve alternative dispute resolution. Chairman Williams also told me that dispute resolution was used

successfully by the Board recently to resolve a 2 billion dollar contract dispute. One particularly interesting aspect of that case was that approximately one-half of the issues resolved had been pending on the appeal docket at the Board, while the other half of the issues involved that had not yet been formally filed with the Board as appeals.

The Armed Service and Civilian Board processes illustrate two important, related things about CDR. The first is its flexibility to address issues that are of interest to the parties, even where such issues are not yet before the tribunal for adjudication. The second characteristic is the ability to address issues earlier and potentially more efficiently than traditional formal adjudication processes. Resolving additional issues not originally present in a dispute is sometimes referred to as “expanding the pie.” It is an approach that we at the FAA, and I am sure others, have used successfully and that normally would not have been achievable in an adjudicated decision.

DISPUTE AVOIDANCE

Generally, we have found that earlier is better when attempting to resolve a dispute or address a disagreement before it becomes a formal dispute. Efforts have been made to develop processes that assist agencies and private parties avoid disputes in the first place, or resolve them as they are first developing. The Army Corps of Engineers pioneered the use of partnering clauses in its agreements. The Air Force also has worked with its contractors to develop an “ADR First” approach. Both of these involve mutual commitments to explore methods of dispute avoidance and early resolution, without precluding either side from pursuing litigation.

The FAA has been offering dispute avoidance services for several years through our pre-disputes process. In the FAA process, an Agency party

or a private contractor can seek non-binding dispute avoidance or early resolution by requesting assistance from the ODRA. Where such a request is filed, the ODRA will contact the opposing party and determine whether it is interested in attempting CDR. If both parties are interested, a voluntary dispute resolution agreement is negotiated that describes exactly the services that will be provided. Of the 112 predisputes that have been filed to date since we began the process a few years ago, only 2 have ultimately moved into adjudication.

Pre-dispute resolution at the ODRA can include small disputes over invoices, major construction disputes, and even multi-million dollar disputes. In large disputes, particularly for ongoing programs, the parties frequently do not agree on the law or facts, if the issues are narrowly stated in the form of legal pleadings. CDR, however, allows the parties to broaden the discussion beyond the legal pleadings, and consider other challenges facing them as they work together to fulfill the complex requirements of large federal acquisition programs. In our cases, we find that refocusing the parties on the Agency's mission, the need for business certainty, and the opportunities for mutual success more-often-than-not will result in a resolution of the dispute.

We recently completed a pre-dispute mediation that involved a large construction contract between a small business and one of the FAA's regional air traffic control facilities. The issues centered on multiple questions of delay, disruption, and stoppage of work during the project. As most government contracts attorneys know, reasonable minds frequently differ regarding causes of delay, quantification of the damages, and allocation of the risk. In this case, the ODRA provided the parties with a neutral experienced in construction litigation, to mediate the dispute. In two long days of mediation the parties completely analyzed the facts, the law, and their respective *business*

interests to reach a reasoned settlement. In the process, they avoided the significant possibility of numerous depositions, extensive document production, costly experts, and ultimately, a lengthy hearing. A key aspect of this process is that unlike litigation, it returned the parties to considering business interests and remedies, not just the outcome available from the adjudicatory process. This type of efficient dispute resolution is advantageous for any party; but particularly for small businesses that typically can ill afford to engage in protracted litigation with the government. As we seek to provide more opportunities for small, disadvantaged, woman-owned and veteran-owned small businesses to contract with the government, it is also important that we provide dispute resolution processes that are readily accessible to them.

Similarly, while some agencies, notably HHS, have incorporated a dispute resolution process for grants, more can and should be done to offer CDR services in expanding areas such as grants, cooperative agreements and other transactions. These represent significant and expanding portions of contract-related expenditures and readily accessible CDR processes need to be developed and offered for these matters.

OTHER RESOURCES

In addition to the programs and processes I have mentioned, there are many other resources available to you if you are contemplating, creating, or enhancing a dispute resolution policy or process for procurement matters in your agency. One such resource is the interagency ADR working group itself. The contracts and procurement section of that group is chaired by Administrative Judge John Dietrich of my office. The Section continues to co-sponsor a series of free brown bag lunch seminars on timely procurement ADR topics, such as confidentiality, breaking the impasse, and the like. In addition, Section leadership has,

upon request, provided mentoring and conducted presentations for agencies seeking to develop their procurement ADR policies and approaches. Should you be interested in possibly arranging for such presentation at your Agency, please feel free to contact Administrative Judge Dietrich or me at any time.

Finally, we have provided a handout with a number of links to useful ADR resolution websites and programs in various agencies in the government. These materials will give you an idea of dispute resolution programs that are being used every day to resolve procurement-related disputes across the government.

CONCLUSION

To be sure, there always will be cases that must and will be litigated, and litigation, or at least the threat of it, provides a backdrop for many dispute resolution efforts. Studies consistently have shown, however, that only a very small percentage of filed law suits ever reach a trial before a court or administrative tribunal. By institutionalizing collaborative dispute resolution and incorporating it into agency culture, and taking advantage of dispute resolution processes that already exist, the chances of resolving disputes at an early stage are greatly enhanced.

In a time of constrained resources, collaborative dispute resolution provides the potential both for cost savings as well as for promoting better working relationships between agencies and their contracting partners, in support of the Agency's mission. It is not a panacea, but rather a contract management tool that is available and can and should be employed by every agency. Thank you.