Subpart 633.2—Disputes and Appeals

Parent topic: PART 633—PROTESTS, DISPUTES, AND APPEALS

633.203 Applicability.

(b) The Procurement Executive is the agency head for the purposes of FAR 33.203(b).

(c) The Agency Board of Contract Appeals for the Department of State is the United States Civilian Board of Contract Appeals (CBCA). See *http://www.cbca.gsa.gov*.

633.214 Alternative Dispute Resolution (ADR)

633.214-70 DOS ADR program.

(a) *Policy.* The Department's goal is to resolve contract disputes before the issuance of a contracting officer's final decision under the Disputes statute (41 U.S.C. chapter 71). Contracting officers shall consider all possible means of reaching a negotiated settlement, consistent with the Government's best interests, before issuing a final decision on a contractor claim under the process outlined in FAR 33.206 through 33.211.

(b) *When to use ADR—*

(1) *Factors favoring ADR.* Contracting officers should consider using ADR in those cases where:

(i) Only facts are in dispute;

(ii) The facts are clearly not favorable to the Government;

(iii) The anticipated costs (in time and money) are less than the anticipated costs of litigation;

(iv) Settlement attempts have reached an impasse;

(v) ADR techniques have been used successfully in similar situations;

(vi) There is a need for independent expert analysis; or,

(vii) The claim has merit but its value is overstated.

(2) *Factors disfavoring ADR.* The following circumstances do not favor use of ADR:

(i) Cases involving disputes controlled by clear legal precedent, making compromise difficult;

(ii) The resolution will have a significant impact on other pending cases or on the future conduct of Department business;

(iii) The dispute is primarily over issues of law;

(iv) A decision of precedential value is needed;

(v) A significant policy question is involved;

(vi) A full public record of the proceeding is important;

(vii) The outcome could significantly involve persons who are not parties to the contract;

(viii) The costs of pursuing an ADR procedure (in time and money) exceed the cost of litigation;

(ix) The nature of the case may cause ADR to be used merely for delay or discovery; or,

(x) The case involves criminal violations.

(3) *Initial action.* Immediately upon receipt of a claim, the contracting officer shall send a letter acknowledging receipt of the claim and soliciting the contractor's views on submitting this claim for ADR. In every dispute, the first step toward resolution shall be unassisted negotiations, in which the parties try to work out the disagreement among themselves. If this fails, before issuing a final decision, the contracting officer shall consult first with the head of the contracting activity, and contact the Office of the Legal Adviser and A/OPE to determine whether the disagreement appears susceptible to resolution by ADR. Consideration shall be given to pursuing additional fact-finding or designating a neutral expert in the disputed issue to provide an advisory opinion.

(c) *Methods of ADR.* If the initial action to resolve the dispute fails, and the contracting officer issues a final decision which is appealed, ADR may still be feasible. The CBCA issues a notice regarding ADR to all contractors who file appeals under the Contract Disputes Act. This notice describes the following ADR techniques, which contracting officers are urged to discuss with contractors at any time:

(1) *Settlement judge.* A settlement judge is either an administrative judge or hearing examiner who is appointed by the parties in dispute for the purpose of facilitating settlement. The agenda is flexible and based on the specifics of the individual dispute. By holding a frank, in-depth discussion of the strengths and weaknesses of each party's position, the settlement judge may be able to foster a settlement of the dispute. The settlement judge may meet with the parties jointly or individually, and the settlement judge's recommendations are not binding. Typically, the settlement judge's opinions, based on his or her experience in handling prior disputes, will help the parties realize whether their arguments have merit or not.

(2) *Minitrial.* A minitrial is not an actual trial but rather a flexible, expedited, but structured procedure in which each party presents an abbreviated version of its position both to a neutral advisor (who may be appointed by the CBCA) and to principals of the parties who have full contractual authority to conclude a settlement. The parties mutually decide on the form of presentation without regard to traditional judicial proceedings or rules of evidence. An advance agreement by the parties specifies the procedure to be followed in making presentations, as well as the role of the neutral advisor. Upon conclusion of the presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating settlement, including making non-binding recommendations.

(3) *Summary trial with binding decision.* A summary trial with binding decision is a procedure in which the scheduling of an appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. The length of the trial and the time for presentation and

decision are tailored to the needs of the particular case. Trial procedures and rules applicable to appeals are modified or eliminated to expedite resolution of the appeal. The parties must agree, however, that all decisions, rulings, and orders by the judge(s) are final, conclusive, and not appealable, and may not be set aside, except for fraud. A summary “bench” decision is issued at the conclusion of the trial or a summary written decision will be issued within ten (10) days of either the trial's conclusion or receipt of a trial transcript.

(4) *Mediation.* Mediation is a process in which a neutral and impartial third party assists the Government and the contractor in conflict to negotiate an acceptable settlement of contested issues. The mediator is jointly selected and is asked by the disputing parties to assist them to reach a voluntary agreement. The mediator has no decisionmaking authority and cannot impose a decision. Mediation assistance involves working with the parties to improve their communications, clarify or interpret data, identify key issues to be discussed, design an effective negotiation process, generate settlement options, or help to identify or formulate areas of agreement. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(5) *Arbitration.* Non-binding arbitration is a process in which a dispute is jointly submitted by the Government and a contractor to an impartial and neutral person or panel who provides a written, non-binding opinion used as a guide for negotiations toward a settlement. Although the Administrative Dispute Resolution Act of 1990 (Pub. L. 101–552) allows agencies to use binding arbitration, the law provides that the agency head may vacate any arbitration award within 30 days after it is served on all parties. For this reason, non-binding arbitration is preferable. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(6) *Partnering.* Partnering involves an agreement in principle to share the risks involved in completing a project, and to establish and promote a partnership environment. Partnering itself is not a contractual agreement and it does not create any legally enforceable rights, but instead partnering seeks to create a new cooperative attitude in completing Government contracts. The three basic steps in partnering are:

(i) Establish the new relationship through personal contact among the principals for the Government and the contractor before the work begins;

(ii) Prepare a joint statement of goals establishing common objectives in specific detail for reaching the goals; and,

(iii) Identify specific dispute prevention processes designed to head off problems, evaluate performance, and promote cooperation. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(d) *ADR procedures.* The ADR method shall be selected voluntarily by both the Government and the contractor. Both parties shall agree on the procedures to be followed, including the agenda and amount of time allowed for each party to present its case. The parties may choose not to have a written transcript or hearing on the record, as this might inhibit settlement. Also, the decision rendered, if any, should not be considered to establish any precedent for future litigation unless the parties agree otherwise. In cases where the parties agree to pay jointly for a third-party neutral advisor, it is recommended that the parties and the advisor agree on a fair and reasonable price. The Government would then issue a simplified acquisition (if the dollar amount does not exceed the simplified acquisition threshold) for 50% of the agreed price, and the advisor would submit separate invoices (each for 50% of the price) to the Government and the contractor.