

## ACQUISITION LETTER

### **AUTHORITY**

This Acquisition Letter (AL) is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) subsection 901.301-70.

### **CONTENTS**

#### CITATION

DEAR Part 933

#### TITLE

Protests, Disputes, and Appeals

- I. Purpose. This AL establishes policy and provides guidance for the use of alternative dispute resolution techniques in connection with disputes that arise under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. sections 601-613.

This AL revision deletes references to "district court" which were incorrectly cited in paragraph four of the Policy section.

- II. Background. Alternative Dispute Resolution (ADR) refers to a range of procedures intended to resolve disputes at less cost, more quickly, and with greater satisfaction for the parties involved than is possible through formal litigation. The techniques are flexible and adaptable to the particularities of each individual case and permit the parties to take into account their respective litigation risks. The employment of ADR is a consensual matter and cannot be instituted without the agreement of both the Department of Energy (DOE) and the contractor. Additional detailed guidance concerning ADR will be provided in a guide being prepared at this time.

- III. Policy. It is DOE policy to make maximum use of ADR as an alternative to formal litigation where it appears such an approach will facilitate dispute resolution. The goal is to resolve the dispute at the earliest stage feasible, preferably before the contracting officer's final decision, by the fastest and least expensive method possible and at the lowest appropriate organizational level. A preference for the early application of ADR is reflected at Federal Acquisition Regulation (FAR) 33.204, which states, "[i]t is the Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation."

The contracting officer is key to resolving contentious issues before they become unnecessary contract disputes. By exploring all reasonable avenues for a negotiated settlement with the contractor, the contracting officer can avoid most disputes. When all possibilities for negotiation have failed, the contracting officer should endeavor to move the potential dispute into ADR.

The Contract Disputes Act, as amended by the Federal Acquisition Streamlining Act of 1994, requires that, for small businesses, "In any case in which the contracting

officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5, United States Code, the Alternative Means of Dispute Resolution Act, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request."

ADR should also be considered for disputes that are before the Energy Board of Contract Appeals (EBCA) and disputed claims before they have been appealed to either the EBCA or the United States Court of Federal Claims. Since United States Federal Claims Court cases are under the control of the Justice Department (DOJ) rather than DOE, DOE needs to coordinate ADR in those actions with DOJ.

The attached guidance shall be considered for all contract claims pursuant to the CDA or appeals before the Energy Board of Contract Appeals, whether in advance of litigation or after litigation has commenced. If the parties are unable to satisfactorily resolve the dispute using ADR or cannot agree on its application, they resume the formal litigation process.

IV. Effective Date. This Acquisition Letter is effective 30 days from the date of issue.

V. Expiration Date. This Acquisition Letter remains in effect until canceled or superseded.

## Guidance: Alternative Dispute Resolution

1. When should ADR be used:
  - a. Generally, ADR should be considered whenever a dispute arises as to the parties' rights or obligations under a government contract and that dispute remains unresolved after exploration of issues by the parties. The use of ADR represents a business decision on the part of the parties, divorced from the emotions surrounding a particular dispute, that an alternative method of resolving a claim is preferable to the expense, delay, and risks associated with formal litigation. It should be remembered that ADR is in many cases risk-free; if no resolution is reached, the parties retain all of their legal rights.
  - b. The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontested facts. However, the fact that resolution of the dispute may involve legal issues, such as contract interpretation, does not preclude that case from consideration. Likewise, the amount in controversy is a relevant, but not controlling, factor in the decision whether to use ADR. It is strongly suggested, however, that the parties give serious consideration to using ADR in all disputes where the amount in controversy is less than \$100,000. ADR may also be particularly effective in large, complex, multi-claim construction-related disputes.
  - c. As a general rule, and subject to the qualifications discussed in Paragraph 2 which follows, if the responsible agency official answers yes to one or more of the following questions, then ADR is the preferred way to resolve the dispute:
    1. Have settlement discussions reached an impasse?
    2. Have ADR techniques been used successfully in similar situations, so far as we know?
    3. Is there a significant disagreement over technical data, or is there a need for independent, expert analysis?
    4. Does the claim have merit, but is its value overstated?
    5. Are there multiple parties, issues, and/or claims involved that can be resolved together?
    6. Are there strong emotions that would benefit from the presence of a neutral?
    7. Is there a continuing relationship between the parties that the dispute adversely affects?
    8. Does formal resolution require more effort and time than the matter may merit?

This is by no means an exhaustive list of issues to consider when determining whether or not to use ADR. Each case will have its own individual characteristics that might influence the official's decision whether or not to use ADR. Each case, therefore, should be evaluated on

its own merits, with the caveat that it is the policy of DOE to resolve disputes by ADR whenever feasible.

- d. Because of its ADR experience, ability to assist in developing ADR agreements and protocols, and cost-effectiveness, EBCA is often an obvious choice to provide/conduct all forms of ADR services, as required, for DOE, whether prior to or after the issuance of a final decision by the contracting officer, so long as the contractor agrees. The EBCA should be consulted by the contracting officer and/or the contractor in the earliest stages of ADR planning whenever the EBCA may become a source of ADR services. Contracts for the services of third party neutrals are also authorized, the costs of which should ordinarily be shared by the parties. Other federal agencies can also provide neutrals at low cost.
2. When Use of ADR is Less Likely:
    - a. Although the use of ADR in any case should not be precluded, the following types of cases have generally proven to be less likely candidates for ADR:
      1. Those involving disputes controlled by clear legal precedent, making compromise difficult.
      2. Those whose resolution will have a significant impact on other pending cases or on the future conduct of business.

In these cases, the value of a definitive or authoritative resolution of the matter may outweigh the short-term benefits of a speedy resolution by ADR.

- b. In general, if an agency official answers yes to any of the following questions, then the dispute is not one that is appropriate for ADR, and the parties should prepare for litigation:
    1. Is the dispute primarily over issues of disputed law rather than fact?
    2. Is a decision with precedential value needed?
    3. Is a significant policy question involved?
    4. Is a full public record of the proceeding important?
    5. Would the outcome significantly affect nonparties?
    6. Are the costs of pursuing an ADR procedure greater (in time and money) than the costs of pursuing litigation?
    7. Is the nature of the case such that ADR might be used merely for delay?
3. The steps in the process:

The following six steps are associated with using ADR concepts:

1. Step One: Unassisted negotiations. Parties try to work out disagreement among themselves.

2. Step Two: Before issuing a final decision (decision) on a claim, the contracting officer (CO) shall consult with the DOE ADR specialist concerning whether the disagreement appears susceptible to resolution by ADR. Section 33.204 of the FAR recognizes the potential usefulness of ADR at this early stage in the process by recommending that "[i]n appropriate circumstances, the [CO], before issuing a [decision], 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." In particular, the CO may want to propose to the other party, one, or a combination, of the following ADR techniques, and the parties may request the Chair of EBCA, or any other acceptable federal or nonfederal neutral, to provide/conduct:
  - a. Mediation
  - b. Neutral Evaluation
  - c. Settlement Judge
  - d. Mini-trial
3. Step Three: If the claim cannot be settled by the parties at either Steps One or Two, the CO must prepare to issue a decision. If the claim involves a factual dispute, the CO shall send the contractor a copy of the proposed findings of fact and advise him that all supporting data may be reviewed at the CO's office. The contractor shall be requested to indicate in writing whether it concurs in the proposed findings of fact and, if not, to indicate specifically which facts it is not in agreement with and submit evidence in rebuttal. The CO shall then review the contractor's comments and make any appropriate corrections in the proposed findings of fact.
4. Step Four: The CO shall issue a decision on each contract dispute claim within sixty (60) days from the receipt of the written request from the contractor, or within a reasonable time if, the submitted claim is over \$50,000. (**Footnote 1**: Increases to \$100,000 under the Federal Acquisition Streamlining Act of 1994.) The decision is a written document furnished the contractor, which contains the final findings of fact and reasons upon which the conclusion of the CO is based.
5. Step Five: The contractor may appeal the CO's decision to the EBCA or to the United States Court of Federal Claims Court. EBCA recognizes that resolution of the dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. The Board has several model procedures available. The Federal Claims Court also has ADR procedures available to the parties. The Justice Department is responsible for entering into such procedures, but ordinarily consults with DOE before doing so. DOE fully supports the use of ADR in appropriate cases before the Federal Claims Court.
6. Step Six: DOE's decision whether to use ADR at this stage should be made by assigned counsel, in consultation with the CO. If DOE and the contractor agree that the claim is susceptible to resolution by ADR, then the next step is to select and consult with the contractor and attempt to reach agreement on an appropriate procedure from those in Step 2.

4. Examples of ADR Techniques:

- . Mini-trial. Brings together an official from each of the contracting parties with authority to resolve the dispute. Neither official should have had responsibility for either preparing the claim (in the case of the contractor), denying the claim (in the case of DOE), or preparing the case for trial. They hear abbreviated, factual presentations from a representative of each party and then they discuss settlement. It is governed by a written agreement between the parties, which is tailored to the particular needs of the case. It generally has three stages, which can usually be completed within 90 days.
  0. The prehearing stage. Covers the time between agreement on written procedures and commencement of hearing. Parties, with assistance of a neutral, complete whatever preparation is provided for in agreement, such as discovery and exchange of position papers. Consumes bulk of the time to complete the mini-trial.
  1. The hearing stage. Representatives present their respective positions to the officials. Each representative is given a specific amount of time within which to make the presentation. How that time is utilized is solely at the discretion of the representative. There may also be an opportunity for rebuttal and a questions and answer period for the officials. This stage usually takes 1 to 3 days.
  2. The posthearing discussion stage. Officials meet to discuss resolving the dispute. The mini-trial agreement should establish a time limit within which officials either agree to settle the matter or agree to resume the underlying litigation. These discussions are settlement negotiations and, as such, may not be used by either party in subsequent litigation as an admission of liability or willingness to agree on any aspect of settlement.

The agreement may provide for services of a neutral advisor. A potential source of a neutral advisor is the EBCA, which has substantive experience, established reputation for objectivity and cost effectiveness. Other federal agencies can provide neutrals at minimum cost. It should be noted that the employment of a neutral advisor from the private sector will necessitate cost-expenditure by DOE.

- a. Mediation. Mediation is a process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and nonbinding. It provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or could not be addressed by judicial action. The mediator has no power to impose a settlement. The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual chosen to

mediate. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with party-generated proposals and try to help parties realistically assess their options. Some mediators work primarily in joint sessions with all parties present while others make extensive use of private caucuses. At a minimum, most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.

- b. Settlement Judge. An administrative judge (or EBCA hearing officer) who is appointed by the Chair of the EBCA for the purpose of assisting the parties in reaching a settlement. The settlement judge will not hear or have any formal or informal decision-making authority in the case, but can promote settlement through frank, in-depth discussion of the strengths and weaknesses of each party's position. The agenda for meetings will be flexible to accommodate the requirements of the individual case. The settlement judge may meet either jointly or separately with the parties to further the settlement effort. Settlement judges' recommendations are not binding on the parties. If a dispute or appeal to the EBCA is not resolved through use of the settlement judge, it will be restored to the EBCA docket. This process is also available at General Services Board of Contract Appeals (GSBCA) and many other tribunals, including the Federal Claims Court.