

DEFENSE LOGISTICS AGENCY

ALTERNATIVE DISPUTE RESOLUTION

PROGRAM



OFFICE OF GENERAL COUNSEL

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I. INTRODUCTION

The Defense Logistics Agency (DLA) program for alternative dispute resolution (ADR) reflects a philosophy of interest-based, cooperative, efficient dispute resolution. DLA policy mandates that ADR be considered in all disputes, regardless of subject matter. Responsibility for DLA's ADR program rests in the Office of Counsel.

DLA's ADR program consists of policy direction, training, outreach, marketing, data collection, and programmatic changes to turn ADR theory into practice. This report highlights the principal elements of the DLA ADR program and outlines future endeavors.

II. GENERAL

A. Policy

DLA policy advocating ADR is reflected in The DLA Instruction, Alternative Dispute Resolution (formerly the ADR One Book Chapter, and presently unnumbered). When unassisted negotiations are unsuccessful, an ADR process must first be considered. A management decision not to use ADR shall only be made after its possible use has been fully evaluated and discussed. At a minimum, discussions shall take place between the deciding official and the activity ADR Specialist, located in the Offices of Counsel. A decision not to use ADR must be documented in writing by an official at least one level above the deciding official. The DLA ADR policy is endorsed by the DLA Director and by senior agency officials.

B. DLA ADR Resources: Office of General Counsel (OGC)

DLA ADR resources are both centralized and decentralized. The General Counsel serves as the agency Dispute Resolution Specialist. An Associate General Counsel serves as the overall ADR Program Manager, and two other Associate General Counsel serve as ADR program advocates for personnel and acquisition disputes. Each field activity legal office is also responsible for advancing use of ADR at that activity. This is done through the leadership of the field Chief Counsel and ADR Specialist. Further, the DLA OGC ADR Practice Group advances ADR by sharing information through emails, newsletters, and periodic conference calls. Other Practice Groups also address ADR in their specific subject areas, such as acquisition, personnel, and business integrity. DLA OGC also participates actively in intra-Government organizations that focus on ADR, such as the DOD ADR Coordinating Committee.

DLA has an ADR web site (Homepage) with extensive information on ADR. www.dla.mil/adr. This web site contains various laws and policy directives, DLA publications, news items, resources for conducting ADR, university programs, other Government resources, and links to other useful internet sites.

C. Training

All DLA attorneys are required to be trained in ADR, with an emphasis on mediation, and all clients are to receive overview ADR “awareness” training. New attorneys are scheduled to take ADR training in their first year on the job. Updated attorney ADR training is provided individually, through the ADR Practice Group, and at OGC programs such as the DLA Counsel Seminar. Client awareness training is an on-going initiative, usually conducted by the local ADR Specialist. More extensive client “user training” is also conducted, although on a more selective basis due to the fact more time is required for such training. Examples of ADR training for 2009 include in-person general ADR training at the Defense Supply Center Columbus, and in-person mediation training at the Defense Supply Center Richmond and the Defense Supply Center Philadelphia.

In addition to in-person presentations, other training avenues are used. All new supervisors are required to take an on-line ADR training course. Training videos for both contract and personnel disputes are available for use by field offices. The DLA ADR Homepage includes in both captioned and non-captioned form, a seven minute mock mediation as well as other training tools.

D. Publicity

DLA has a number of ways to ensure ADR is publicized throughout the agency. The ADR Program Manager issues a periodic publication called *ADR Law Notes*, provided electronically to all legal offices (and others), who in turn disseminate it to their principal clients. The *ADR Law Notes* contain articles on ADR policies, recent ADR successes, ADR issues in the news, training opportunities, and other ADR matters of interest. Copies of back issues are available on the DLA ADR Homepage.

DLA further publicizes the ADR program in articles for the magazine *DLA Dimensions*, the internet site *DLA Today*, and through the use of posters and business cards. Field offices also provide information on local ADR matters to their clients, speak at client conferences and programs, and publicize efforts and programs in local magazines and newspapers. Additionally, DLA works with the contractor community to advance interest in ADR. For EEO disputes, several other publicity mechanisms are available, such as information brochures, and a guidebook which is available in paper and electronically.

E. DLA Neutrals

DLA employees, on a collateral duty basis, serve as the primary source of neutrals for ADR processes. Minimum requirements to be a mediator include classroom attendance of at least 32 hours at mediator training, approval by their supervisor to be a mediator, and acceptance of the DLA Standards of Conduct for DLA Mediators. Newly approved mediators initially co-mediate at least 3 cases with more experienced mediators, and are evaluated by their co-mediators, the participants and the ADR Program Manager before doing solo mediations. Mediators mediate at least 10 cases before achieving a high mediator ranking.

DLA mediators have diverse subject matter expertise in such areas as personnel, EEO, and contract law. Some DLA mediators also serve in other neutral capacities such as an ombudsman or a facilitator. DLA mediators receive periodic training through advanced mediator classroom training, conference calls, e-mails, and one-on-one guidance from the ADR Program Manager. DLA employees who are not mediators have also been used in some neutral capacities.

DLA mediators are also available for other organizations. For example, the Defense Reutilization and Marketing Service has a “shared neutral” program with another nearby Government office (Battle Creek Veteran’s Administration Medical Center). A Defense Supply Center Richmond mediator has frequently been requested by other agencies to mediate cases.

F. Data Collection

DLA OGC has an automated database that enables tracking of all ADR cases, whether or not the matter has been docketed at a forum. Statistics from this database, the Case Management System (“CMS”), are reported annually to DOD and to the Agency Senior Acquisition Executive for acquisition ADR. Field offices also use CMS for local reporting to their Commanders. For Fiscal Year 2009, 139 cases were reported which resulted in more than 76,000 days saved, approximately \$3,034,000 in saved or avoided costs, and a 79% resolution rate.

III. ACQUISITION

A. General

DLA’s Acquisition ADR Program has two broad components, Protests and Contract Administration, with various aspects to each. In addition to the overall program elements common to all subject matter areas, the Acquisition ADR Program contains a Procurement/Contract ADR Program Design Implementation Plan (October 2003). Although leaving flexibility to field offices to flesh out details, the document outlines key elements of an ADR plan required by the agency for acquisition matters. These include: policy direction, training, publicity, data collection, and program design and implementation.

With regard to individual cases, statistics reflect continued use of ADR to resolve contract disputes. For example, in FY 2009, DLA completed 18 ADR events on acquisition

issues, with an 83% complete resolution rate.

DLA's Acquisition ADR Program received the 2004 award from the Office of Federal Procurement Policy for Outstanding Acquisition ADR Programs.

B. Protests

The DLA policy on use of ADR in connection with bid protests requires that every protest be reviewed to see if it can be resolved by ADR. This policy is stated in the DLA OGC Bid Protest Procedures Manual (2009). This direction is also captured in fax cover sheets to field offices that transmit the incoming protests. DLA OGC and field legal offices have developed worksheets to document consideration of ADR and justification for rejection if it is not used.

DLA offers facilitation and mediation on protests, both in person and through telephone conferences. Mediations have been held at the GAO with GAO personnel as the neutral, and at field activities in response to local and Agency level protests with DLA personnel as the neutral. Telephone conferences have been held in response to local, agency and GAO protests. The conferences involve a DLA attorney serving as a mediator who facilitates one or more conference calls between DLA, the contractor, and other interested parties. Facilitation of a GAO protest by an agency neutral has often resulted in the protester withdrawing its case.

As a DLA OGC "Best Practice," DLA protest attorneys should also request outcome prediction ADR from GAO in all cases for which an agency report is filed. With this process, GAO notifies the parties of the probable outcome of the protest before officially ruling on the protest. When outcome prediction has been used, DLA has been able to avoid several decisions that otherwise would have gone against the agency, thereby reducing costs, disruption to the acquisition, and adverse exposure. The outcome prediction process also serves to temper the advocacy role of agency attorneys and help focus on an independent assessment of the case. DLA has also used outcome prediction to obtain protest withdrawal, once the protester was advised by GAO of the strength of the DLA position. As an alternative, attorneys may request GAO's "Litigation Risk Assessment," a process where GAO outlines the strengths and weaknesses of each party's case and highlights the extent and degree of litigation risk. Field counsel should request ADR in all merits cases, and especially in those cases with a questionable degree of risk.

Protests under the Alternative Agency Protest Procedures established by Executive Order 12979 must be resolved in a manner that allows for the independent decision-maker to review input from both sides. (DLAD 33.103(d)(4)). Some field activities have further integrated ADR into the Alternative Agency Protest Procedures; for example, the Defense Supply Center Richmond has adopted a process where these protests are handled through local mediation.

C. Contract Administration

In the area of contract administration, in addition to trying to increase use of ADR

individual cases, DLA has also looked for ways to “institutionalize” ADR to ensure it becomes the routine, or preferred dispute resolution process. In this regard, DLA has provided guidance in several areas:

1) DLA requires an ADR clause go in all acquisitions (optional for the contractor), that if agreed to, commits the parties to use ADR except in narrow circumstances. Specific clauses can be crafted for specific acquisitions, but this general clause ensures at least some ADR coverage in all DLA acquisitions. (DLAD 52.233-9001).

2) DLA contract policy strongly encourages that when post award orientations are held with contractors, the issue of dispute avoidance, early dispute resolution, and ADR are addressed. (DLAD 42.501(e)(90)).

3) DLA has added language about ADR as part of the “appeal rights” section in contracting officer final decisions. Certainly ADR should be addressed, and hopefully used before this stage, but adding this language helps institutionalize ADR as a process. (DLAD 33.211(a)(4)(v)).

4) DLA has provided guidance on offering ADR early in ASBCA litigation. Field legal counsel should first write the appellant, setting forth DLA’s general preference for ADR. Shortly thereafter, a specific offer of ADR should be sent to the appellant. Sample letters have been provided, and field counsel have been advised to include these steps in the preliminary litigation process.

D. Broadening the ADR Horizon

DLA is also looking to expand the use of ADR in handling contract disputes beyond the traditional context of the disputes process. For example, DLA has offered ADR in response to Congressional inquiries, to be sure the questions raised can be fully addressed between the parties with maximum flexibility. Using ADR in these situations can be very fruitful in resolving the dispute, and in reducing political tensions that may accompany the issue. Other opportunities may be available for ADR between Government organizations, such as SBA, or in response to requests for information under the Freedom of Information Act.

DLA has used ADR, facilitation in particular, at internal agency meetings and at meetings with contractors and other Government activities. In this role, the neutral assists the parties in structuring the conference, capturing decisions, and assigning future actions. Neutrals have served effectively as facilitators at high-visibility meetings involving sensitive procurement issues on several occasions.

Changes have also been made in office structure at certain field activities to advance ADR. For example, at the Defense Supply Center Columbus, the Chief Trial Attorney (Contracts) position was abolished, and a new position created entitled Contract Conflict Resolution. This change acknowledged the shift from a solely adversarial role to a role that

recognizes the ADR philosophy of constructive problem-solving.

IV. WORKFORCE

A. Equal Employment Opportunity (EEO) Complaints

ADR has been effective in resolving workplace disputes in the agency. DLA's EEO mediation program is designed to provide employees with quick, cost-effective, and fair resolution of EEO complaints. Known as the RESOLVE program, which stands for Reach Equitable SOLutions Voluntarily and Easily, it was jointly developed by DLA OGC and the DLA Office of Equal Employment Opportunity. Beginning initially as a pilot program at a few DLA activities, RESOLVE was implemented agency-wide in January 1997 and is available to associates in addition to all their current rights and entitlements under existing EEO procedures.

Under RESOLVE, employees on a voluntary basis have the option of using a skilled mediator to help them try to resolve their allegations of employment discrimination. Mediation is available at any stage of the complaint process. The EEO Managers select the mediator from a list of DLA mediators maintained by the DLA ADR Program Manager. DLA mediators are available to travel throughout DLA. Using RESOLVE, complaint processing times are reduced, and costly and protracted litigation is avoided. Resolution rates throughout the years have consistently been between 70 and 80%. DLA's RESOLVE program was one of four recipients of the Office of Personnel Management Award for Outstanding ADR Programs in 2000.

B. Other Matters

DLA also effectively uses ADR for disputes besides those involving equal employment opportunity issues. For example, ADR processes are used to address disciplinary matters, disputes between associates, disputes between supervisors and employees, and disputes between offices. In their Master Labor Agreement, DLA and The American Federation of Government Employees and its agent, AFGE Counsel 169 of DLA Locals, agree that ADR processes are the preferred means to resolving disputes. In selected violence in the workplace cases, DLA uses mediation to address conflicts that arise between associates who continue to be at the work site.

V. CONCLUSION

The DLA ADR Program, begun in 1990 and accelerated in 1995, is now part of the "mainstream" of DLA. Future efforts will include emphasizing the use of ADR processes to the maximum extent possible when addressing conflicts, as well as encouraging the use of ADR processes for dispute avoidance.