The Professor's Forum

Resolving Disputes

Virtual Class March 19, 2024, 2:00pm – 3:30 pm (EDT)

Resolving disputes is one of the key jobs of an agency contracting officer and the contractor's business manager. In a well administered contract, this is done by negotiations between these two people. If they cannot resolve a dispute, the next course of action is to consider an alternative dispute resolution (ADR) technique. Alternatively, one of the parties can may elect to use the formal disputes process; however, they must recognize that moving up this chain increases the cost and the time needed to resolve the dispute. Furthermore, it demands that key personnel in the two organizations devote their time to dispute resolution at the expense of performing their primary jobs.

I. Resolving Disputes At The Working Level

FAR 33.204 clearly states that disputes should be resolved by negotiation between the CO and the contractor's business manager, stating:

> The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim.

COs have almost full authority to resolve disputes. *See* FAR 33.210 stating:

> Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to --
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> > (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
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> > (b) The settlement, compromise, payment or adjustment of any claim involving fraud.

See also FAR 33.205 stating that COs have the authority to settle claims for rescission or reformation because of mutual mistake in the contract formation process.

Most government contracts contain several clauses such as the Changes, Differing Site

Conditions and Government Property clauses that promise an equitable adjustment in the price when specified events occur and the Government Delay of Work or Suspension of Work clauses that promise a price adjustment when the government delays the work. COs should honor these clauses when a contractor demonstrates entitlement under the applicable clause.

In order to resolve such matters, the contractor must present a well-documented request for equitable adjustment (REA) to the CO. This requires a clear statement of the facts and a detailed presentation of the costs that have been or will be incurred as a result of the event that falls under one of the clauses. Without such documentation, resolution of the matter is virtually impossible.

Once the CO has fully analyzed the REA and has obtained whatever audit or field pricing assistance is deemed necessary, the parties should negotiate a settlement. Negotiation by email or telephone may be appropriate when small dollar amounts are involved, but face-to-face negotiation is recommended when any significant amount is involved.

If a government claim against the contractor is involved, the same procedures should be followed, with the CO presenting a well-documented assertion of a right to downward price adjustment to the contractor.

II. Alternative Dispute Resolution

FAR 33.214 explains alternative dispute resolution and its essential elements as follows:

> (a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include --
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> (1) Existence of an issue in controversy;
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> (2) A voluntary election by both parties to participate in the ADR process;
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> (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
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> (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

FAR 33.204 provides that COs should consider the use of ADR if they cannot resolve a matter through negotiation, stating:

> Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, *et seq.*), agencies

have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

Either party to the contract can propose the use of ADR at any time. If the other party rejects such a proposal, FAR 33.214 requires it to explain the reason for the rejection as follows:

> (b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

a. **Timing**. ADR can occur at any time during the processing of a request for equitable adjustment or the assertion of a CDA claim, but it should not be used until the parties have concluded that they cannot resolve the matter through negotiations. FAR 33.214 contains the following minimal guidance:

> (c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

This guidance deals with the use of ADR in three different periods – 1. before a formal CDA claim is submitted, 2. after the submission of a formal CDA claim, and 3. after a CO decision on a CDA claim. There are advantages and disadvantages to using ADR in each of these periods.

Use of ADR before the submission of a formal CDA claim is the least expensive procedure. However, this will require the parties to bear the cost of the ADR process, including the fee of a neutral (usually shared equally). It will also base the process on the least well developed record of the facts. Hence, it generally should not be used at this time unless the original REA is well documented or the parties agree to more thorough documentation prior to the ADR proceeding.

Use of ADR after the submission of a formal CDA claim will also require the parties to bear the cost of the ADR process, but it is likely that the documentation will be more complete. If the parties agree, limited discovery is possible at this time.

Use of ADR after a CO decision on a formal CDA claim will allow the parties to obtain the free services of the appropriate board of contract appeals or the Court of Federal Claims and

will likely be based on the most complete documentation. It may also be possible to obtain limited discovery using this procedure.

b. **Types of ADR**. The Administrative Dispute Resolution Act (ADRA), 5 U.S.C. § 571 e*t seq.,* lists the types of ADR as – "conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof." Appendix H of the Court of Federal Claims rules lists four types of ADR that can be conducted by a settlement judge or a third-party neutral – "mediation, minitrials, early neutral evaluation, and non-binding arbitration." Addendum II to the Armed Services Board of Contract Appeals rules suggest mediation and a summary proceeding with binding decision. Rule 54 of the Civilian .Board of Contract Appeals lists facilitative mediation, evaluative mediation, mini-trials, non-binding advisory opinions, and a summary binding decision. We will discuss the two most common types of ADR – mediation and arbitration.

1. **Mediation**. The most common type of ADR is mediation. It is available in the Court of Federal Claims and the appeals boards, or the parties can engage a third-party neutral as a mediator. Fundamentally, mediation is the use of a judge or third-party neutral to assist the parties in negotiating a settlement. In almost all cases, the parties are represented by an official above the level of the CO and the company business manager that have been unable to reach a settlement. These parties are expected to take a broader view of the matter in dispute and to focus more intently on the need to wrap up the problem short of litigation.

Mediation can involve a variety of procedures – depending on the agreement of the parties and the preference of the neutral. Some mediators prefer to consult with the parties independently, exchanging views on the merits of the case and providing suggestions as to areas of settlement. Other mediators prefer to assist the principals in negotiating a settlement by participating in the negotiation. My preference as a mediator in numerous cases was to conduct a preliminary joint fact-finding meeting addressing each issue in turn in a roundtable discussion and then meeting with the principals to assist them in negotiating a settlement. The roundtable discussion avoided the presentation of evidence through examination and cross examination of witnesses by attorneys which allowed the principals to learn all aspects of the facts in a way that was more like their normal briefing process.

The key to successful mediation is the selection of principals that can look at the dispute dispassionately and work together to seek a solution that meets the needs of both parties. Some commentators call this the "win-win" solution, but I prefer to see it as the "equal pain" solution.

2. **Arbitration**. In the commercial world, binding arbitration is a common form of ADR. However, it is restricted in government contracting by the ADRA (§ 575) as follows:

> (c) Prior to using binding arbitration under this subchapter [5 USCS §§ 571 *et seq*.], the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b) [5 USCS § 572(b)], shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.

FAR 33.214(g) repeats the need for agency guidelines to use binding arbitration. The ADRA contains extensive rules on arbitration in §§ 576-81. However, very few procurement agencies have issued guidance for the use of binding arbitration. Thus, the closest procedure to binding arbitration that is commonly used in government contracting is the appeals board summary proceedings.

In one case, I used a Mediation/arbitration procedure which called for an arbitration decision in the event the parties could not reach a settlement. The decision was agreed to be binding if neither party rejected it within 24 hours of its issuance. When neither party rejected it, it became binding by agreement.

Arbitration has very few advantages over litigation at the appeals boards. In both cases, the parties can agree to limited discovery, limited witnesses and other efforts to shorten the proceedings. In addition, after a case is filed with an appeals board, the parties can use the board's ADR procedures. This is beneficial because any amount found due a contractor can be paid from the Judgment Fund, which will facilitate payment of the amount due.

c. **Neutrals**. The ADRA gives agencies broad authority to hire neutrals to assist in an ADR proceeding. Section 573 states:

> (a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.
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> (b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.
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> (c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter [5 USCS §§ 571 et seq.]. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall–
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> > (1) encourage and facilitate agency use of alternative means of dispute resolution; and
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> > (2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.
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> (d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into

an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

Under these rules, agencies may employ third-party neutrals or obtain a neutral from one of the appeals boards prior to the filing of an appeal. In neither case is the settlement amount payable from the Judgment Fund. Selecting a competent neutral is a key element in ADR proceedings, and both parties should interview the neutral to ascertain his or her expertise and the procedure that will be used. Confidence in the ability of the neutral is critical to the successful conclusion of an ADR proceeding.

Section 574 of the ADRA contains a detailed provision on the confidentiality of ADR proceedings:

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to–

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or

through discovery or compulsory process be required to disclose any dispute resolution communication, unless--

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided

under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

III. Litigation

The Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq.*, requires a contractor to file a claim with the CO and to obtain a final decision from the CO (or appeal the absence of a timely final decision) before it can proceed to litigation. In the case of a government claim, it should be asserted by the issuance of a CO decision. In either case, the contractor has the choice of appealing to the appropriate board of contract appeals within 90 days of receiving the CO decision, or the Court of Federal Claims, within one year of receiving the CO decision. (§ 7104). If the appeal is not received within these periods, the CO decision becomes final and binding on the contractor.

The appeals boards have procedures for quick decisions on smaller claims – “expedited procedures” for claims of $50,000 ($150,000 for small businesses) or less and “accelerated

procedures" for claims of $100,000 or less. In larger cases the parties frequently engage in full discovery proceedings and a full trial. However, if there are no facts in dispute, the case can be resolved by summary judgment. The boards also allow either party to waive a hearing and ask for the case to be decided on the record. The contractor can also proceed without an attorney. Taking advantage of these procedures will significantly reduce the cost of the proceeding but make the possibility of success risky. In board proceedings a single judge conducts a hearing and writes the decision, but that decision must be agreed to by two other judges.

The Court of Federal Claims has more elaborate procedures than the appeals boards and a single judge conducts the hearing and writes the decision. A company must have an attorney to file a case in the court.

Most contract litigation occurs in the boards of contract appeals rather than the Court of Federal Claims. Appeals from the decisions of both can be taken by either party to the United States Court of Appeals for the Federal Circuit.