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# Government Contract Feuds Ended Faster With Mediation

by Brian Freeman and Jana Gordin Meisinger

**A** contractor wins a prized multimillion-dollar government contract. But almost immediately, things begin to go badly. Costs balloon, designs fail, and schedules slip. After assuring the government for months that the company can turn things around, the contractor finally concedes that the project is in serious trouble. Shortly thereafter, the government terminates the contractor for default.

The government wants its money back. The contractor, anxious to avoid a negative past performance rating, wants a termination for convenience and millions in extra funds to cover its additional expenses.

As recently as five years ago, this kind of dispute would likely have led to protracted litigation, taking many years to progress through exhaustive discovery and multiple appeals, and costing both sides tens of millions of dollars in legal fees.

"We've all been brought up in an inherently adversarial system," says Richard Busch, senior government contracts lawyer at the law firm of Faegre & Benson and a former general counsel for defense contractor Lockheed Martin Corporation. "Litigation isn't about managing conflicts. It's about winning," he adds. "But many businesses and agencies have begun to question the time, money, and risk involved in all-or-nothing litigation. More and more, they're turning to tools like mediation to resolve disputes."

## Mediation Technique

Mediation is one of many techniques under the alternative dispute resolution (ADR) approach. It's also the technique preferred by most federal agencies. Mediation relies on a trained neutral party, who helps the principals in the dispute negotiate a settlement that is acceptable to both sides. Like most forms of ADR, mediation is a voluntary process. Although it isn't intended to eliminate litigation, it can be effective in settling many disputes without the need for further legal action.

Congress and the White House have made ADR a top federal priority. Thanks to a series of executive orders since 1995, and

the Administrative Dispute Resolution Act of 1996, agencies have faced a series of mandates designed to increase the use of ADR, including:

- Requiring agencies to appoint a dispute resolution specialist to implement ADR policies

- Establishing an interagency ADR working group to promote development of ADR programs

- Requiring a written explanation citing specific statutory reasons whenever a contractor or contracting officer declines a request for ADR

- Amending the Federal Acquisition Regulations to encourage agencies to use ADR procedures to the maximum extent practicable

- Encouraging agencies and their contractors to adopt an ADR pledge, committing them to resolve disputes by ADR whenever possible

These efforts are paying dividends. According to retired Air Force Brig. Gen. Frank Anderson, past chair of the contracts and procurement section of the interagency ADR working Group, ADR "is quickly and quietly gaining momentum as the conflict management tool of choice for resolving contractual disagreements."

ADR techniques save time and money, says Brian Malone, director of contracts for the National Reconnaissance Office (NRO), the U.S. agency in charge of building spy satellites. "In the right circumstances, mediation can resolve a dispute faster and at a lower level. But it also allows us to work together to find a solution," Malone says. "This helps us preserve a cooperative, rather than a competitive, relationship with our contractors. And it's the relationships that make us go."

"The results can also be more equitable," says Busch. "Litigation is like a flip of a coin. Heads you win, tails you lose. In mediation, you have a greater opportunity to understand the perspective of the other party and negotiate an outcome that's fair and acceptable to both sides."

## Changing Cultures

There are significant challenges involved in reforming an adversarial system. Making ADR work means changing cultures throughout the defense community and

training contracting staff in both the government and private industry to implement techniques for managing conflict in the earliest stages of developing a contract.

Several agencies, including the Air Force and Federal Aviation Administration (FAA), already have developed sophisticated ADR programs and begun to realize the benefits. The Air Force has employed ADR in more than 60 contract disputes with a 90 percent settlement rate. The FAA, which operates a special acquisition management system that includes an office of dispute resolution for acquisition (ODRA), highlights a variety of success stories on its ADR web site.

Other agencies are moving quickly to implement their own ADR programs and to build partnerships with industry. The NRO, through its Acquisition Center of Excellence (ACE), launched a formal ADR program in 2000, and already has recruited more than a dozen contractors to sign on to its ADR pledge.

As part of the program, the NRO is promoting ADR among its executive staff, program managers, and contracting officers. In July, ACE sponsored the second in a series of ADR training programs designed to introduce the concept of conflict management and the use of ADR techniques. In a unique example of partnering, the training included members of the government and industry, as well as ADR professionals from an international law firm and a dispute resolution firm. The program featured a "mock mediation" that gave participants an up-close look at the mediation process and how government and business can put the tool to work.

To assist in the NRO's training course, Busch recruited George Bentley, a mediator with the Denver-based firm Beyond Dispute, as well as other participants from the contractor community and the government. Steve Post and Roger Israelson, of the Raytheon Company, volunteered to participate in the training program, serving as industry representatives in the mock mediation. Together with Rich Walters of FAA's ODRA and Dick Carroll of the NRO, the team staged a "live" mediation from the initial fact-finding through the final settlement negotiations. After each step in the mediation process, participants had the opportunity to critique both sides and ask questions.

"Making ADR a part of the culture of any organization takes leadership and commitment," said Post, vice president of legal affairs for Raytheon's Aircraft Integration Systems. "That's why we're so supportive of NRO and these kinds of training programs. You can't get industry or the government to

really buy into ADR without educating them about the nuts and bolts of the process. They need to understand how mediation can shape a different result than litigation without 'giving up the store.'"

Walters of FAA agrees. "It takes time to break down barriers. This is a whole new way of thinking about conflicts. But this kind of program works. You could see the participants become engaged in the mediation scenario. The program helped them see the possibilities of a cooperative process."

### The Mediation Process

In mediation, psychology is as important as facts. Most parties come to mediation with a heartfelt disagreement about the rights and wrongs of the dispute and often considerable emotion and professional pride invested in the issue.

The mediator is the key to the process. Unlike litigation or arbitration, the mediator's role is not to make a decision or strong-arm the parties into an agreement. Instead, a mediator serves as a catalyst to help parties resolve the dispute on their own.

"The most important principle in selecting a neutral is choosing someone who understands the psychology of settlement," says Bentley, of Beyond Dispute, who served as mediator in the NRO's mock scenario. "It must be a professional with a unique ability to relate to diverse personalities without becoming part of the problem."

Building confidence in the mediator and the mediation process is the first step. According to Bentley, "the greatest opportunity to set the stage for settlement is early in the dispute. That's also the riskiest period, because if it isn't handled properly, the parties can end up in an adversarial relationship that's extremely difficult to overcome."

To navigate this minefield of ego and emotion, a good mediator must rely on communication skills more than anything else. He or she must listen to the words and the body language of the participants, in order to identify the key factors underlying the dispute and the nuances that may open the door to agreement. And the mediator must also know when to speak up or ask probing questions, in order to clarify issues, defuse tension with humor, and nudge the parties in a common direction.

The process itself involves a series of joint sessions involving all the parties and separate "caucuses" where the mediator meets privately with each side.

"Each negotiating team, hopefully, gains trust in the mediator," Bentley says. "It's a transforming process. Unlike litigation,

where you get one-sided advocacy, the caucuses help each side gradually understand the perspectives and priorities of the other. Along the way, they may also begin to acknowledge their own role in creating the dispute. After all, conflict is rarely, if ever, one-sided."

Often, progress is slow and painstaking. There is no guarantee of success. But for parties that cannot resolve a dispute through direct negotiation, mediation is almost always the next best step.

ADR techniques, including mediation, are no panacea.

"There's still a lot of hard work that needs to be done to make mediation work and to effectively represent a client in resolving a procurement dispute without litigation," says Busch. "ADR is no substitute for a close examination of the risks and the facts. In some ways, it may even be harder than litigation. You can't just hand the dispute to the lawyers and walk away. Nor can you turn the responsibility for an effective resolution over to a judge or jury. You have to forge a solution collaboratively. That's often painful and uncomfortable. But in return, you preserve your relationships with the government or your sub-contractors and, hopefully, achieve a fair, cost-efficient result."

There are other obstacles, too. Some contractors fear that ADR, even though it is a voluntary process, is really designed to limit their options and tilt the playing field against them. That's particularly true when the mediator comes from within the government agency itself. After all, can an employee of the agency really be neutral?

"Naturally, that was one of industry's first questions," says Post, of Raytheon. "Industry associations monitored the results of early experiences with ADR and were pleased to find that neutrals, even from within an agency, were truly neutral. The results weren't skewed to the government."

Nonetheless, contractors may feel a lingering reluctance to use ADR out of concern that even a successful mediation may work against them the next time they compete for a contract. Israelson, of Raytheon, acknowledges that contractors need to get past that fear. But it helps when the government opens the door. "If the customer raises ADR, it's easier for the contractor to overcome their concerns," he says. "Most contractors will welcome ADR in that environment."

Even confidence in the fairness of the process, of course, is no substitute for a genuine belief in the value of ADR as a tool to manage conflict. For years, dispute resolution has meant one thing: coming out on

top. It takes a major shift in thinking among agencies and contractors alike to encourage and reward equitable solutions based on dialogue and compromise. Organizations need to audit their business practices and incorporate ADR as part of their strategic vision. That means taking steps to assure that disputes don't derail the completion of the contract.

"We don't know when disputes will arise," says Busch. "But we know they will happen. Conflicts are a normal part of doing business. That's why we need to anticipate disputes and build a process into our contracts for dealing with them. We also need to remember that the process of mediation assumes the importance of relationships. The little gestures, like the NRO and its industry partners working together to train the agency's staff, go a long way. It sends a message to the defense community as a whole: 'We're in this together.' ND

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