

*TOOLS FOR  
IMPROVING INDUSTRY/GOVERNMENT  
COMMUNICATIONS DURING THE  
PROCUREMENT PROCESS*

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*U.S. Department of Energy  
Office of the Associate Deputy Assistant  
Secretary for Headquarters Procurement  
Operations*



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## INTRODUCTION

The U.S. Department of Energy, Office of Procurement and Assistance Management, Office of the Associate Deputy Assistant Secretary for Headquarters Procurement Operations has developed this guide to be utilized by its professional contracting personnel to provide guidance on a number of communications tools that may be employed during the procurement process to facilitate improved communications with industry. This guide specifically identifies various communications tools that can be employed during the pre-solicitation, solicitation/award and post-award phases of the acquisition process.

The tools set forth in this guide have been developed from the principles for improving industry/government communications contained in General Services Administration publications Improving Industry/Government Communications in Major Information Technology Acquisitions, June 1994, KAP-94-8-I, and Communications Between Government and Industry, A Reference Guide for Federal Information Processing (FIP) Resources Acquisitions, April 1994, KMP-94-4-P. The communications tools incorporated into this guide include a description of the potential benefits of using the tool, as well as best practices for employing the tool.

It is anticipated that utilization of the tools contained herein will facilitate improvements to the overall acquisition process by promoting more open and straightforward communications between the Government and industry. Accordingly, contracting personnel should determine which tool(s) can be properly and beneficially utilized for individual procurement transactions on a case-by-case basis.

## **I. PRE-SOLICITATION PHASE**

### **ISSUANCE OF PRE-SOLICITATION DOCUMENTS**

#### **Potential Benefits:**

May assist Department in obtaining preliminary information from industry and identify prospective contractors. The early release of information (i.e., specifications/work statements, evaluation criteria) permits industry to raise concerns and seek early resolution prior to the formal solicitation of offers.

This may help the Department (a) avoid protests during the formal procurement process; (b) incur lower costs for procuring required goods and services; and (c) avoid future delays by permitting industry adequate lead-time to prepare proposal. Process may also result in more innovative solutions and higher quality proposals received by the Department.

Particularly valuable for acquisitions involving new concepts, advanced technology, complex specifications/work statements, or best value type acquisitions.

#### **Best Practices:**

- o Draft Requests for Proposals (RFPs) - issuance of draft specifications/work statements; proposal preparation instructions; evaluation methodology (factors, subfactors, and their relative importance); performance validation and capability demonstration requirements; and key terms and conditions.
- o Requests for Information (RFIs) - typically solicits preliminary information from industry on potential sources as well as offeror capabilities;
- o Request for Comments (RFCs) - requests for industry comment on general or specific issues associated with a solicitation (including specifications/work statements and evaluation criteria), proposed courses of action or potential solutions.
- o Requests for Quotations (RFQs) - solicitation of non-binding price, delivery, or other market information from industry.
- o Prospective contractors may assist the agency in obtaining preliminary information from industry and identify prospective qualified offerors.

## **CONDUCT OF PRE-SOLICITATION CONFERENCES**

### **Potential Benefits:**

Permit the Department to explain the particulars of an acquisition to, solicit questions/input and gather market information from prospective offerors prior to the formal solicitation of offers.

Conversely, pre-solicitation conferences afford prospective offerors an opportunity to learn the status of an acquisition, as well as the Department's priorities associated with a particular acquisition.

### **Best Practices:**

- o Conducted in a public forum following publication of a conference notice in the Commerce Business Daily.
- o Pre-solicitation documents, the anticipated acquisition schedule and key aspects of the solicitation are reviewed with prospective offerors.
- o The Contracting Officer identifies all information available to prospective offerors concerning the proposed acquisition and answers questions received either during or in advance of the conference.
- o For questions that are not able to be answered during a conference due to lack of available information, the Contracting Officer can provide responses via hard-copy or electronic bulletin board to all conference attendees.
- o The Department may request industry representatives to provide available market information on products and capabilities.
- o Following the conference, the Department releases the attendance list to facilitate communications between potential prime and subcontractors.

## **II. SOLICITATION/AWARD PHASE**

### **ISSUANCE OF REQUEST FOR PROPOSALS**

#### **Potential Benefits:**

The solicitation describes the Department's needs and/or explains a problem the Department intends to resolve through the anticipated acquisition. Specifically, the solicitation identifies the Department's requirements, establishes the terms and conditions of the anticipated contract, instructs offerors how to prepare and submit proposals, and sets forth how the Department will evaluate proposals submitted.

By clearly defining the Department's needs, proposal preparation instructions and the criteria against which offerors will be evaluated, the Department's needs will likely be fulfilled in a cost effective manner.

#### **Best Practices:**

- o Availability of solicitation, anticipated date of issuance and brief description of the Department's requirements are published in the Commerce Business Daily.
- o The solicitation contains all information necessary to accurately describe the Department's needs that are to be satisfied by the resultant contract award, as well as the required end products or results of the resultant contract award.
- o The solicitation either contains, or explains how prospective offerors can obtain essential Government data related to the acquisition.
- o Solicitation clearly states the evaluation factors and significant subfactors, and the relative importance thereof, that the Department will consider in evaluating offers.
- o Solicitation includes cross-references between specifications/work statements; terms and conditions; evaluation factors/subfactors; proposal preparation and submission instructions; and descriptive documents, exhibits and other attachments, as appropriate.

#### **Restrictions:**

During the period between release of a solicitation and contract award, the Department shall restrict disclosure of information including:

- o Proposal information; the number and identity of offerors and information

gathered to determine offeror responsibility.

- o Source selection information, including proposed costs/prices; source selection plans; technical evaluation plans; technical and cost/price evaluation of proposals; competitive range determinations; ranking of proposals/competitors; reports and evaluations of source selection panels, boards, committees or advisory councils.

The Contracting Officer or other specifically authorized individual may release the following types of information to prospective contractors upon request:

- o General information not prejudicial to others.
- o Non-proprietary information otherwise available without restriction.
- o Information which is not source selection information and may otherwise be released.

### **CONDUCT OF PRE-PROPOSAL CONFERENCES/TRAINING SESSIONS**

#### **Potential Benefits:**

Verbal discussions and explanations during a pre-proposal conference or training session can reinforce and clarify the Department's objectives and the solicitation's requirements. Instructions for prospective offerors can also be reviewed to ensure compliance with the requirements of the solicitation, promoting higher quality proposals and avoidance of successive future clarification discussions and delays.

#### **Best Practices:**

- o Following the issuance of a solicitation, the Contracting Officer may conduct either a pre-proposal conference, or training session to (a) highlight the most important aspects of the solicitation; (b) explain new or complex solicitation requirements; (c) review and discuss the anticipated acquisition schedule; (d) address questions and concerns of prospective offerors, advising that such remarks or explanations do not qualify the terms of the solicitation.
- o Pre-proposal conferences are typically conducted in a public forum when the Department anticipates a large number of offerors and the requirements of the acquisition are complex.
- o Training sessions may be held with individual prospective offerors when the Department anticipates a relatively small number of offerors to a solicitation. These sessions enable offerors to ask questions pertaining to proposal preparation

which may not be asked in a public forum, but which may have great significance for a timely and successful acquisition.

- o Notices of planned pre-proposal conferences or training sessions are published in the Commerce Business Daily. Such notices can include requests for questions to be addressed at the conference/session be submitted in advance.
- o A record of the pre-proposal conference and/or each training session conducted is maintained to ensure that identical information is disseminated and that all potential offerors are afforded equal treatment. For pre-proposal conferences, all prospective offerors receive a complete record.

## **CONDUCT DISCUSSIONS WITH OFFERORS**

### **Potential Benefits:**

Unless the solicitation specifically authorizes award without discussions, the Contracting Officer must conduct meaningful discussions with all offerors in the competitive range for an acquisition. Such discussions help ensure that the maximum number of proposals meet the Government's requirements, and that the Government considers the most advantageous of those offers.

Moreover, to avoid potential protests a senior contracting authority may be designated to assist in the resolution of problems that the Contracting Officer cannot resolve. Creating opportunities for listening and mutual understanding supports the principle of fairness in the procurement process.

### **Best Practices:**

- o Prior to the conduct of discussions, the Contracting Officer determines which proposals have a reasonable chance of selection for award and which are therefore in the competitive range. Those offerors determined to not be in the competitive range are notified, in writing, at the earliest practicable time following the competitive range determination. Written and oral discussions are then conducted by the Contracting Officer with the offerors in the competitive range, as necessary.
- o For discussions to be meaningful, the Contracting Officer shall disclose deficiencies (i.e., areas where proposal does not meet the Government's minimum stated requirements), resolve uncertainties or apparent mistakes, and provide offerors an opportunity to revise their proposals.
- o Pertinent Departmental officials, at the discretion of the Contracting Officer (e.g.,



evaluation team members, source selection official, legal counsel, etc.) should conduct an internal coordination meeting prior to conducting oral discussions with offerors.

- o Government participants shall not (a) engage in technical leveling; (b) reveal technical information pertaining to another proposal; (c) indicate a cost/price an offeror must meet; (d) disclose relative price standings or information about other offerors' costs/prices.
- o Contracting Officer may provide written notice to an offeror of deficiencies, uncertainties and suspected mistakes prior to meeting with the offeror to provide an offeror time to consider the issues in advance of the meeting.
- o Contracting Officer may request offerors to submit written changes to their proposals resulting from discussions prior to requesting best and final offers to permit the Department to conduct further discussions if necessary; particularly if a number of significant issues require resolution.
- o Upon completion of discussions, the Contracting Officer advises all offerors that discussions are concluded and requests best and final offers. Discussions are not reopened unless clearly in the Government's interests.

## **ISSUE ACQUISITION STATUS REPORTS**

### **Potential Benefits:**

Periodic reporting on the status of an acquisition helps reduce industry costs because it allows offerors to assign proposal preparation teams alternative responsibilities while the Department evaluates offeror's proposals. Lower industry costs benefit the Department by (1) promoting lower proposal costs that result in more responsible offerors competing for contracts; and (2) promoting the proposal of, and actual incurrence of lower costs/prices for acquired goods and services.

### **Best Practices:**

The Contracting Officer may periodically post the status of the acquisition in a public place, updating major milestones as necessary. Initially, the Contracting Officer may identify the tentative schedule for the acquisition via the sources sought synopsis published in the Commerce Business Daily. The Contracting Officer may also issue acquisition status information directly to offerors following receipt of proposals, or via electronic means (i.e., electronic bulletin board). Milestones are announced at the discretion of the Contracting Officer, and will vary by the type of acquisition.

## ISSUE NOTICES AND CONDUCT DEBRIEFINGS

### **Potential Benefits:**

Notices of award and debriefings provide information to unsuccessful offerors necessary information to determine whether a protest may be warranted for an acquisition.

Meaningful and prompt award notices and debriefings may help the Department avoid protests by providing information which assures unsuccessful offerors of a valid, proper, fair and equitable award.

### **Best Practices:**

- o Upon contract award, the Contracting Officer promptly notifies the successful offeror and unsuccessful offeror(s) of the award in writing, and issues a public notice of the award (e.g., in the Commerce Business Daily, issuance of a press release).
- o Notices to unsuccessful offerors need to include (a) the number of offerors solicited; (b) the number of proposals received; (c) the offeror(s) receiving the award; (d) the items, quantities, and unit prices of the award(s); and (e) the reason for not accepting the unsuccessful offeror's proposal -- in general terms.
- o Notices shall not disclose information on cost breakdowns, profit, overhead, trade secrets, manufacturing processes, or other confidential business information.
- o Debriefings should be conducted as soon as possible after award to provide timely responses to an offeror's concerns. Debriefings permit an offeror to learn the weaknesses of its proposal in order to strengthen its next offer, and help an unsuccessful offeror understand why its proposal was not selected under the selection procedures established for the acquisition.
- o The Contracting Officer may encourage an unsuccessful offeror to submit questions in advance of the debriefing. This can assist the Department in addressing the offeror's specific concerns.
- o Cognizant Departmental personnel (i.e., Contracting Officer, Legal Counsel, and Technical personnel) prepare the debriefing and conduct a "dry run" prior to meeting with any offeror.
- o During the debriefing, the Contracting Officer should provide an overview of the source selection process and evidence that established procedures were followed and that the offeror's proposal received an impartial and thorough evaluation. The strengths, weaknesses and deficiencies of an offeror's proposal in relation to the evaluation factors and significant subfactors should be discussed. The offeror

should be informed of where their offer stood in the evaluation without disclosing the identity or ratings of the other offerors.

- o Debriefings should not disclose (a) a point-by-point comparisons with other offeror's proposals; (b) the relative merits or technical standing of competitors; (c) evaluation scoring; (d) trade secrets; (e) privileged/confidential manufacturing processes, techniques or information; (f) privileged/confidential commercial and financial information.

### **III. POST-AWARD PHASE**

#### **SOLICIT VERBAL/WRITTEN COMMENTS ON COMPLETED ACQUISITION PROCESS**

##### **Potential Benefits:**

May improve future Departmental procurements by making agencies aware of possible problems that they may not otherwise be aware of. Potential lessons learned may include information on the clarity, or lack thereof, of the Department's requirements; whether or not the Department disseminated sufficient information to potential offerors during the acquisition process; whether the Department provided sufficient opportunity for offerors to express concerns pertaining to the solicitation, etc.

##### **Best Practices:**

There are a number of methods available to the Contracting to solicit verbal or written comments from participants in the procurement process. Comments may be solicited in writing via notices to unsuccessful offerors, and public notices of award. Comments may also be solicited during debriefings.

#### **CONDUCT POST-AWARD ORIENTATION CONFERENCE**

##### **Potential Benefits:**

The prompt conduct of a post award orientation conference with the awardee may avoid or mitigate potential misunderstandings pertaining to the Department's and the contractor's contract administration responsibilities. Such conferences may help both Departmental and contractor personnel achieve a clear, mutual understanding of the contract's requirements. Subsequent status or progress meetings may assist the Department in monitoring the contractor's performance and ensure that all parties understand the impact of any changes to the contract, and assists the contractor in understanding the Department's priorities.

##### **Best Practices:**

- o The extent of post-award orientation conferences and meetings depend on several factors, including the nature and extent of the pre-award survey and prior discussions; the type, value and complexity of the contract; the urgency of the delivery schedule; the contractor's performance history; and the contractor's status as either a small or small disadvantaged business (merit special consideration for post award conference).

- o Often, a letter from the Contracting Officer to the contractor is sufficient to provide post award orientation. The letter identifies contract administration personnel and reiterates any significant or unusual contractual requirements.
- o Post award conferences between Departmental and contractor personnel may be held to introduce key personnel, review the contract requirements and discuss/clarify any issues by both parties. The Contracting Officer normally acts as, or designates a chairperson for the conference.
- o Preliminary orientation for Departmental personnel is conducting, and usually involves the Contracting Officer and technical personnel. Topics discussed may include appropriate and required communications practices between Departmental and contractor personnel; the contract administration process; the responsibilities of the parties; and contractual terms pertaining to deliverables, acceptance and payment.
- o The Department may schedule status meetings with contractor personnel to review performance and the Department's priorities. Attendees typically include key contractor personnel, the Contracting Officer, the Contracting Officer's Technical Representative, and other technical personnel, as required. The Department may anticipate the need for such meetings, and may include a schedule up-front in the solicitation and resultant contract, including standard agenda items.
- o The Conference Chairperson prepares a report of the conference and provides a copy to the contractor. Commitments or directions, if any, given by the Contracting Officer within the scope of the Contracting Officer's authority are documented and signed whether or not they change the contract. Commitments or direction that changes the contract also requires a contract modification.
- o Department may request and attend post award conferences conducted by the prime contractor for subcontractors. Departmental representatives cannot take any action inconsistent with or that changes a subcontract. Again, commitments or directions are appropriately documented, and changes to the prime contract are facilitated through the issuance of a modification to the prime contract.

## DEVELOP/EXECUTE VOLUNTARY PARTNERING AGREEMENT

### **Potential Benefits:**

Voluntary post-award partnering agreements may provide an effective means of delineating the roles and responsibilities of the parties, discussing common objectives and expectations, and establishing a common understanding among contractors and between the Department and the prime contractor. They may help to avoid and resolve post award problems and help both the Department and the contractor achieve their respective goals to complete a quality project, on time, within budget, and with a minimum of contract modifications and litigation.

Typically utilized for integration type requirements. May be particularly beneficial for large complex system development projects and requirements that are satisfied through the award of multiple related contracts.

### **Best Practices:**

- o Voluntary partnering agreements may include the Department, the prime contractor(s), and subcontractor(s).
- o Following award, the Department and its contractors create a partnering agreement that addresses the duties and areas of cooperation required among the parties to the agreement. A special contract provision may be developed and incorporated to describe the commitment to cooperate. The agreement usually defines the individual responsibilities consistent with the contract terms and conditions to focus both the Department's and the contractor's actions on accomplishing the mission while achieving quality and performance objectives.
- o The process of developing a partnering agreement usually begins with the conduct of a training session utilizing a neutral facilitator. Participants include Departmental, prime contractor and subcontractor personnel. The training consists of team building exercises, problem solving, conflict management, communications and barrier identification. A mission statement and specific goals for the partnership are developed and agreed to, with follow-up workshops conducted as deemed necessary by the parties.
- o The following describes potential commitments and actions that may comprise a Voluntary Partnership Agreement. Actual final agreements may include additional terms and conditions explaining implementation and administration of the agreement. A Voluntary Partnership Agreement between the Department and its prime contractor(s) and subcontractor(s) may include commitments by all parties to:

- a. Achieve customer satisfaction through the delivery of information services;
- b. Function as a team;
- c. Communicate clearly and candidly;
- d. Practice effective contract administration;
- e. Establish an organizational structure to support the success of the partnership;
- f. Maintain executive level support;

The Partnership Agreement should also describe the action that each party will take to meet the commitments established.

### **CONDUCT POST AWARD MARKET RESEARCH**

#### **Potential Benefits:**

Most beneficial for fixed priced, supply-type contracts (e.g., automated data processing hardware/software). Following contract award, the Department continues to conduct market research in searching for the most advantageous means to satisfy its needs. Market information helps the Department determine whether to execute contract modifications, exercise existing contract options, or obtain alternative sources of supply. May encourage existing contractors to find ways to remain competitive with the marketplace following award, and may influence voluntary price reductions and product substitutions within the scope of existing contracts to provide the most advantageous alternative.

#### **Best Practices:**

The Contracting Officer and cognizant program office personnel develop a plan for conducting post contract award market research. The plan may include any of the pre-solicitation activities described above, including conducting meetings with prospective offerors and issuance of pre-solicitation documents used to gather market information.

### **CONDUCT PERIODIC STATUS/PROGRESS MEETINGS**

#### **Potential Benefits:**

Periodic status or progress meetings involving both Department and contractor personnel help the Department monitor the contractor's performance and ensures that all parties understand the impact of any changes. Periodic progress meetings also help the

contractor understand the Department's priorities.

**Best Practices:**

- o The Department may schedule status meetings with contractor personnel during the contract to review and assess the contractor's performance and to clarify the Department's priorities. Attendees may include key contractor personnel, the contracting officer, the contracting officer's technical representative, the Department's program manager and other Department technical personnel.
- o The need for status/progress meetings may be anticipated during the formulation of the solicitation and/or the negotiation of the resultant contract. Accordingly, a regular schedule and standardized agenda for such meetings (i.e., weekly, monthly, quarterly) may be incorporated into the solicitation/contract document. Additional meetings may be held as warranted.

**ESTABLISH A QUALITY COUNCIL**

**Potential Benefits:**

The establishment of a Quality Council for significant Departmental acquisitions provides for high level coordination between the parties to a contract to ensure a complete and consistent understanding of contract requirements and performance expectations, to closely monitor contract performance, and to expeditiously resolve unique and highly complex contract administration issues and problems.

**Best Practices:**

- o The use of a Quality Council should be restricted to procurements having a significant impact on the Department's mission and that involves the integration of activities of several contractors performing highly complex efforts.
- o The Quality Council should be comprised of senior contractor and Departmental management within the procurement organization. Membership should be established at the highest decision-making levels deemed necessary to effectively resolve performance issues/problems that directly impact the Department's mission.
- o Depending upon the complexity of the effort, the significance of performance on the Department's mission, the extent of coordination and timely decision-making required to ensure effective contract performance, Departmental membership may range from the Branch Chief level of management to the Procurement Executive. Contractor representation should be commensurate with the level of Departmental representation determined necessary.



- o The frequency with which the Quality Council convenes is dependent upon the nature of the work, the number of issues or problems that require Quality Council attention, etc.
- o Pursuant to the "Best Practices" cited above for the conduct of periodic status/progress meetings between Departmental and contractor personnel, regular sessions and a standardized agenda may be established within the solicitation and contract or may be held only when determined necessary to clarify contractual or performance issues and problems.

### **ESTABLISHMENT OF ALTERNATIVE DISPUTES RESOLUTION (ADR) PROCEDURES**

#### **Potential Benefits:**

The establishment of ADR procedures is intended to resolve disputes in a less costly and more timely manner through the use of informal procedures rather than litigation. ADR techniques are flexible and adaptable to the unique circumstances of individual transactions, and permit consideration of each parties' litigation risk in establishing the ADR techniques to be employed under the contract. Utilizing ADR techniques, officials from both the Department and the contractor directly resolve controversies, or use a neutral third party under pre-established rules to resolve contract disputes.

#### **Best Practices:**

- o The Department and the contractor should establish and set forth voluntary ADR procedures in the contract document. The procedures that are established should be employed when either party has a material disagreement with the other party to the contract.
- o When the Contracting Officer and the contractor cannot reach agreement on a contested contract issue, such ADR techniques as unassisted settlement negotiations, conciliation, facilitation, mediation, fact-finding minitrials and arbitration should be employed in lieu of litigation.
- o Specific Departmental guidance on the utilization and implementation of ADR techniques and procedures is contained in Department of Energy Acquisition Letter 94-22, effective January 22, 1995, incorporated herewith as Appendix A of this Guide.

## **APPENDIX A**

### **Department of Energy Acquisition Letter 94-22**

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.

\* \* \* \* \*

CONTENTSCITATIONTITLE

DEAR Part 933

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.
- 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 Administrative 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 be considered for disputes that are before the Energy Board of Contract Appeals (EBCA) and disputed claims before they have been filed with either the EBCA or the Federal Claims Court. 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 alternate dispute resolution be used:

a. Generally, alternate dispute resolution 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 alternate dispute resolution 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 alternate dispute resolution is in many cases risk-free; if no resolution is reached, the parties retain all their legal rights.

b. The best candidates for alternate dispute resolution 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 alternate dispute resolution. It is strongly suggested, however, that the parties give serious consideration to using alternate dispute resolution in all disputes where the amount in controversy is less than \$100,000. Alternate dispute resolution 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 alternate dispute resolution is the preferred way to resolve the dispute:

- (1) Have settlement discussions reached an impasse?
- (2) Have alternate dispute resolution 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 alternate dispute resolution. Each case will have its own individual characteristics that might influence the official's decision whether or not to use alternate dispute resolution. Each case, therefore, should be evaluated on its own merits, with the caveat that it is the policy of DOE to resolve disputes by alternate dispute resolution whenever feasible.

d. Because of its alternate dispute resolution experience, ability to assist in developing alternate dispute resolution agreements and protocols, and cost-effectiveness, Energy Board of Contract Appeals is often an obvious choice to provide/conduct all forms of alternate dispute resolution 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 Energy Board of Contract Appeals should be consulted by the contracting officer and/or the contractor in the earliest stages of alternate dispute resolution planning whenever the Energy Board of Contract Appeals may become a source of alternate dispute resolution 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 alternate dispute resolution is less likely:

a. Although the use of alternate dispute resolution in any case should not be precluded, the following types of cases have generally proven to be less likely candidates for alternate dispute resolution:

- (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 alternate dispute resolution.

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 alternate dispute resolution, 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 alternate dispute resolution procedure greater (in time and money) than the costs of pursuing litigation?
- (7) Is the nature of the case such that alternate dispute resolution might be used merely for delay?

3. The steps in the process:

The following six steps are associated with using alternate dispute resolution 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 shall consult with the DOE alternate dispute resolution specialist concerning whether the disagreement appears susceptible to resolution by alternate dispute resolution. Section 33.204 of the FAR recognizes the potential usefulness of alternate dispute resolution at this early stage in the process by recommending that "[i]n appropriate circumstances, the [contracting officer], 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 contracting officer may want to propose to the other party, one, or a combination, of the following alternate dispute resolution techniques, and the parties may request the Chair of Energy Board of Contract Appeals, 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 contracting officer must prepare to issue a decision. If the claim involves a factual dispute, the contracting officer shall send the contractor a copy of the proposed findings of fact and advise him that all supporting data may be reviewed at the contracting officer'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 contracting officer shall then review the contractor's comments and make any appropriate corrections in the proposed findings of fact.

4. Step Four: The contracting officer 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.\* The decision is a written document furnished the contractor, which contains the final findings of fact and reasons upon which the conclusion of the contracting officer is based.

5. Step Five: The contractor may appeal the contracting officer's decision to the Energy Board of Contract Appeals or to the United States Federal Claims Court. Energy Board of Contract Appeals 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 alternate dispute resolution 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 alternate dispute resolution in appropriate cases before the Federal Claims Court.

6. Step Six: DOE's decision whether to use alternate dispute resolution at this stage should be made by assigned counsel, in consultation with the contracting officer. If DOE and the contractor agree that the claim is susceptible to resolution by alternate dispute resolution, 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 alternate dispute resolution Techniques:

a. 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.

(1) 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.

(2) The hearing stage. Representatives present their respective positions to the officials. Each representative is given a

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\* Increases to \$100,000 under the Federal Acquisition Streamlining Act of 1994.



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.

- (3) 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 Energy Board of Contract Appeals, 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.

b. Mediation. Mediation is a process in which the disputing parties select a neutral third party to assist them in reaching a settlement of 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.

c. Settlement Judge. An administrative judge (or Energy Board of Contract Appeals hearing officer) who is appointed by the Chair of the Energy Board of Contract Appeals 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 Energy Board of Contract Appeals is not resolved through use of the settlement judge, it will be restored by the Energy Board of Contract Appeals docket. This process is also available at General Services Board of Contract Appeals and many other tribunals, including the Federal Claims Court.