

Federal Agency ADR Programs

Objectives and Accomplishments

Overview

- Focus of Agency Programs
 - Procurement
 - Employment
 - Compliance
 - Rule making

The Federal ADR Initiative

- Administrative Dispute Resolution Act of 1990
 - Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management.
 - PL 101-552, Sec.3(a); 5 USC 581 note.
 - Each agency shall review its standard . . . contracts . . . and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

– PL 101-552, Sec. 3(d); 5 USC 581 note.

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The Federal ADR Initiative

- 1996 ADRA Amendments
 - 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.
 - PL 104-320, Sec. 7©
- Interagency ADR Working Group (7/98)
 - 8/98 Procurement Subgroup led by Air Force General Frank Anderson

Program Objectives:

Typical Program Statements *

- Reduce Costs/Less Litigation
- Improve Relations
- Speed Resolution of Disputes
- Resolve Disputes at Lowest Level

* From IADRWG Materials

What Does This Mean?

- Reduce The Number of Disputed Contract Claims.
- Or Eliminate Claims?

The DOJ Guidelines*: Promoting ADR?

- “The Department of Justice views ADR as another tool in its arsenal for achieving success in litigation.”
 - DOJ Guidance on the use of ADR in Federal Courts, 1992
- “ADR is another tool to resolve disputes and can provide unique advantages.”
 - DOJ Civil Division, Case Selection Criteria, 61 FR 36899 (1996)

The DOJ Guidelines: Commercial Litigation Branch

- Factors Favoring ADR
 - Continuing Relationship
 - Neutral would be Influential
 - Complex Case
 - Need Quick Resolution
 - Flexible Relief
- Factors Disfavoring ADR
 - Need for precedent
 - Need for public determination or sanction
 - Case likely to settle soon without assistance

*Federal Register: July 15, 1996 (Volume 61, Number 136)]

The DOJ Guidelines: Commercial Litigation Branch

- Factors Favoring ADR
 - Hostile forum or decisionmaker
 - Need to avoid adverse precedent
- Factors Disfavoring ADR
 - Opposition has unrealistic view
 - Case likely to be resolved efficiently by motion
 - Opposing counsel are not trustworthy

*Federal Register: July 15, 1996 (Volume 61, Number 136)]

The Guidelines in Practice: DOS*

- Consider using ADR when:
 - Facts are clearly not favorable to the Government.
 - Meritorious claim but value overstated.
- Factors Disfavoring ADR
 - Cases involving disputes controlled by clear legal precedent, making compromise difficult.

*48 USC 633.214-70

Characteristics of Agency ADR Programs

Scope of ADR Procurement Programs

- Boards and Other Quasi-Independent Forums
- In-House Programs
- Binding Arbitration

Types of Programs

Formalized

1. Strong Policy Statement
2. ADR Personnel/Office
3. Case Evaluation Procedures
4. ADR Decision at CO Level

Unstructured

1. Contracting Staff Handles ADR
2. Utilize Non-Agency Resources
3. ADR Decision Requires Approval at Level Above CO



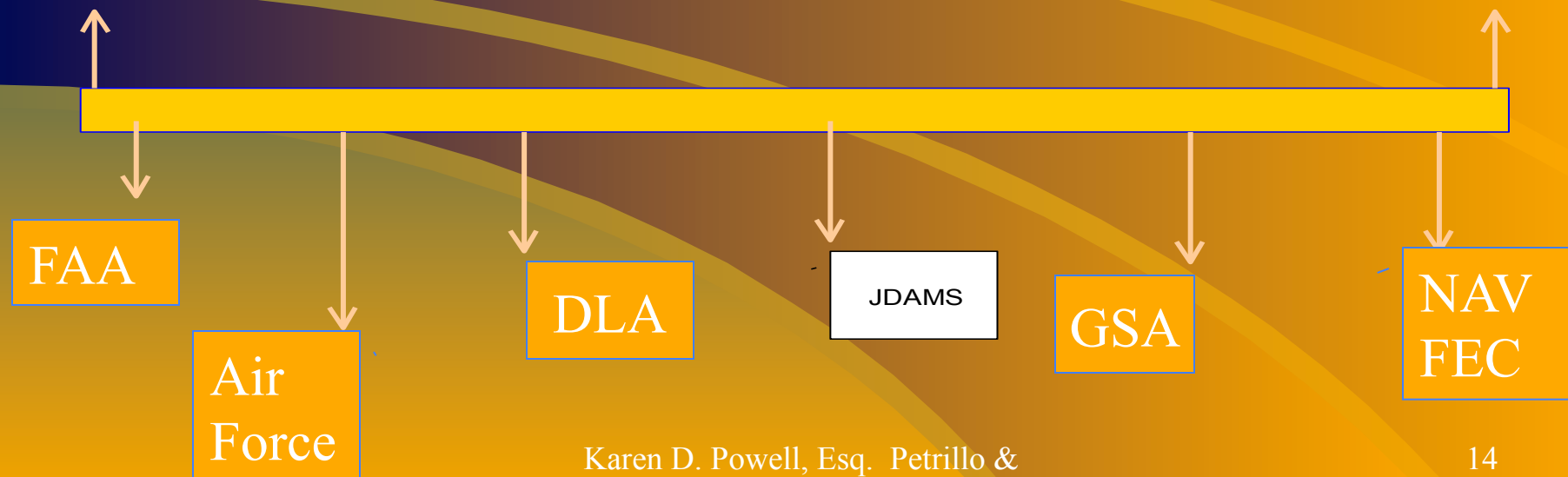
Types of Programs

Command Style

1. Each Case Evaluated for ADR
2. Strong [Dis]Incentives
3. Emphasis on Pre-Dispute ADR
4. Goal of ADR Is Final Resolution

Ad-Hoc

1. Voluntary Participation
2. ADR is One Step in Dispute Resolution Process



Meeting Program Objectives: The Air Force Initiative

- SAF/AQ Five Year Plan
 - “The purpose of this plan is to ensure Air Force program and business teams use alternative dispute resolution (ADR) techniques to the maximum extent practicable and appropriate when normal contract negotiations fail.”
 - “Emphasis is on use of structured processes to achieve principled resolution of contract controversies”

Alternatives To Command Style Programs

- NAVFAC Chiefs Board
 - Pre- CDA Dispute
 - Requires Mutual Agreement To Proceed
 - Outcome Is Non Binding on Contractor

Contractor's ADR Objectives

- Improve Rate of Return on Claims
 - Lower Prosecution Costs
 - Faster Resolution
 - Reduce Risk
- Preserve Customer Relations

The Clash of Objectives

- Agency Programs Are Process Oriented
- Contractors Are Interested In Results

Contractor Perspectives: The Air Force Initiatives

- Pluses

- Emphasis on Being First and Most Successful Has Overcome Bureaucratic Inertia
- Opportunity To Experiment

- Minuses

- Not Voluntary
- Procedural Costs
- Further Erosion of CO Responsibility

Contractor Perspectives: NAVFEC

- Pluses

- Part of the Dispute Resolution process.
- Gives an early read on merits, and basis for compromise.
- Potentially Lower Costs.

- Minuses

- Process costs
- Neutral is Not Truly Independent

Are Unstructured Programs Useful?

- Decision Making Above The CO Level
- Leveraging the Boards Of Contract Appeals

Recommendations

- Participation Should Be Voluntary
- Integrate, Don't Substitute
- Don't Duplicate Other ADR Resources