

**PRESIDIO TRUST
GUIDANCE FOR THE USE OF BINDING ARBITRATION UNDER THE
ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996**

October 2007

Introduction.

The following guidance for the appropriate use of binding arbitration was prepared by the Presidio Trust (“Trust”) in consultation with the United States Department of Justice, Office of Dispute Resolution (hereinafter the “Justice Department”), pursuant to the requirement of 5 U.S.C. §575(c). The guidance herein pertains to the resolution of disputes arising primarily in the context of the Trust’s real estate leasing activities (most significantly, disputes related to possession) and the Trust’s contracts for the procurement of goods and services (hereinafter collectively referred to as “disputes relating to leasing or procurement activities”). The Trust anticipates that while the foregoing areas will generate most of the activity under this guidance, issues in other areas may occasionally be deemed appropriate for resolution hereunder. The Presidio Trust is committed to the early and expeditious resolution of disputes and intends to employ, as appropriate under the circumstances, mediation, fact-finding, arbitration (binding and non-binding) and other techniques collectively known as “alternative dispute resolution” (ADR). To further the use of ADR, this Guidance for the Use of Binding Arbitration has been issued. This Guidance specifically provides that the use of binding arbitration is entirely voluntary and is to be used only when it is in the best interest of the Government.

In 1996, Congress established The Presidio Trust (Title I of the Omnibus Parks and Public Lands Management Act of 1996, P.L. 104-333, set out at 16 U.S.C. §460 bb appendix) as a wholly owned corporation of the United States of America, with the specific purpose of preserving, enhancing, and maintaining the Presidio of San Francisco as a park using the revenues from its leasable assets to fund that effort. Congress gave the Trust jurisdiction over the inland 1,168 acres of the Presidio, and required that the Trust become independent of annual federal appropriations by FY 2013. The Trust was given significant financial authorities: the ability to earn and retain revenue, borrow from the U.S. Treasury, and enter into real estate transactions that bring private capital to the enormous effort of rehabilitating historic buildings. The Trust Act also freed the Trust from many strictures traditionally constraining federal agencies in the areas of procurement and labor. Consistent with this creation of an untraditional, fiscally nimble entity, in an amendment to the Trust Act of March 2000, Congress specifically authorized the Trust to use ADR under the Alternative Disputes Resolution Act (see Trust Act, section 104 (b)).

Organizationally, the Trust has a compact and efficient structure. Overall authority resides in the seven person Board of Directors, one of whom is the Secretary of Interior or the Secretary’s designee and the rest of whom are appointed directly by the President without the need for confirmation. An Executive Director reports to the Board, and he in turn oversees a Chief Operating Officer, the General Counsel,

a Chief Financial Officer and four department directors or their equivalents. All of these senior managers are located in one building along with the Executive Director. Altogether, the professional staff of the Trust is comprised of well under 100 individuals. This highly concentrated administration of the agency results in a rapid flow of management information and implementation of decisions that is not possible to achieve in larger more dispersed (geographically and organizationally) agencies. Thus, while sensitive to the importance of records creation, consistency in operations, and documentation, the Trust can operate (and indeed is expected by Congress to operate) effectively with more efficient processes and a much more highly concentrated decision making structure than those of many garden variety Federal executive agencies.

The following guidance has been crafted to satisfy the requirements regarding binding arbitration specified within the Alternative Dispute Resolution Act (ADRA) of 1996 and to identify and address critical issues relating to binding arbitration.

I. Statutory Requirements

A. Considerations for Not Using Arbitration

The ADRA of 1996 calls for agencies to consider not using any form of ADR, including binding arbitration, in a number of specified circumstances. Accordingly, the Presidio Trust will consider not using a dispute resolution proceeding if -

- (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;**
- (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;**
- (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;**
- (4) the matter significantly affects persons or organizations who are not parties to the proceeding;**
- (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or**

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

See 5 U.S.C. §572(b).¹

B. Other Statutory Requirements

In accordance with the ADRA of 1996, the following shall apply to all binding arbitrations for the resolution of disputes to which the Presidio Trust is a party:

1. Arbitration will be used only when all parties to the dispute have consented to the arbitration. Consent to undertake arbitration may be obtained before or after the dispute arises (*See* 5 U.S.C. §575(a)(1)).
2. A party may limit the issues it agrees to submit to arbitration. (*See* 5 U.S.C. §575(a)(1)(A)).
3. A party may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. (*See* 5 U.S.C. §575(a)(1)(B)).
4. An agreement to arbitrate must be in writing. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or "cap" that may be granted by the arbitrator. (*See* 5 U.S.C. §575(a)(2)).
5. The Presidio Trust shall not require anyone to consent to arbitration as a condition of entering into a contract or obtaining a benefit. (*See* 5 U.S.C. §575(a)(3)).
6. An officer or employee of the Presidio Trust who offers to use arbitration must otherwise have the authority to enter into a settlement concerning the matter or must be specifically authorized to consent to the use of arbitration. (*See* 5 U.S.C. §§575(b)(1) and (2)).
7. The parties to an arbitration shall be entitled to participate in the selection of the arbitrator (*See* 5 U.S.C. §577(a)). The arbitrator shall be a neutral who meets the criteria of 5 U.S.C. §573, and in no event shall the arbitrator have an official, financial, or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he/she may serve as the arbitrator. (*See* 5 U.S.C. §§573, 577(b)).
8. An arbitrator may regulate the course and conduct of the arbitration hearing. (*See* 5 U.S.C. §578(1)).

¹ Additionally, although not required by statute, the Presidio Trust will consider not using binding arbitration in matters involving complex interpretation and application of regulations and policy.

9. An arbitrator may administer oaths and affirmations. (See 5 U.S.C. §578(2)).
10. An arbitrator may order the attendance of witnesses and the production of documents. (See 5 U.S.C. §578(3)).
11. An arbitrator may make awards. (See 5 U.S.C. §578(4)).
12. The arbitrator shall set the time and place for the arbitration hearing and shall notify the parties of same at least five days before the hearing is to take place. (See 5 U.S.C. 579(a))
13. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall: (1) make the arrangements for it; (2) notify the arbitrator and other parties that a record is being prepared; (3) supply copies to the arbitrator and the other parties; and (4) pay all costs, unless the parties have agreed to share the costs or the arbitrator decides that such costs should be apportioned. (See 5 U.S.C. §§579(b)(1)-(4)).
14. At any arbitration hearing, parties are entitled to be heard, to present evidence material to the controversy, and to cross examine witnesses appearing at the hearing. With the consent of the parties, the arbitrator may conduct all or part of a hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate. (See 5 U.S.C. §§579(c)(1) and (2)).
15. The arbitrator may receive any oral or documentary evidence except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator (See 5 U.S.C. §579(c)(4)).
16. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents, and policy directives. (See 5 U.S.C. §579(c)(5)).
17. No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying ADRA, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct. (See 5 U.S.C. §579(d)).
18. The arbitration award shall be made within thirty days from the closing of the arbitration hearing (or the date a hearing would have been held in the event that a party does not appear at a scheduled hearing) unless the parties mutually agree upon an extension of time. (See 5 U.S.C. §579(e)). The award in an arbitration

proceeding shall become final thirty days after it is served on all parties. (See 5 U.S.C. §580(b)).

19. An arbitration award shall include a brief informal discussion of the factual and legal basis for the award. While formal findings of fact and law are not required, the award should clearly articulate the factual and legal bases upon which it stands. (See 5 U.S.C. §580(a)(1)).

20. A final award is binding on the parties and may be enforced pursuant to sections 9 through 13 of Title 9, U.S. Code. (See 5 U.S.C. §580(c)).

21. An arbitration award may not serve as an estoppel in any other proceeding and may not be used as precedent or otherwise considered in any factually unrelated proceeding. (See 5 U.S.C. §580(d)).

22. Any action for review of an arbitration award must be made pursuant to sections 9 through 13 of Title 9, U.S. Code by a party adversely affected or aggrieved. (See 5 U.S.C. §581(a)).

23. Arbitral decisions shall be subject to judicial review under section 10(b) of Title 9, U.S. Code. (See 5 U.S.C. §581(b)).

24. If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. (See 9 U.S.C. §10(b)).

II. Binding Arbitration Guidance

A. The ADR Spectrum

ADR processes, as defined in 5 U.S.C. §571(3) include, but are not limited to, conciliation, facilitation, mediation, fact-finding, use of ombuds, mini-trials, and arbitration. ADR processes are generally designed to reduce costs, avoid the delays of judicial proceedings, protect the privacy of the parties and increase the level of compliance by involving decision makers in the process. Consensual forms of ADR are clearly preferred by the Presidio Trust as a general matter. However, the Presidio Trust contemplates the availability of binding arbitration in the event parties desire to utilize that form of ADR to resolve a particular dispute.

B. Binding Arbitration: Description and Forms

Like litigation, binding arbitration is an adversarial, adjudicative process designed to resolve the specific issues submitted by the parties. Binding arbitration differs significantly from litigation in that it does not require conformity with the legal rules of evidence, and the proceeding is conducted in a private rather than a public forum. Binding arbitration awards typically are enforceable by courts, absent

defects in the arbitration procedure. Appeal from such awards, pursuant to the Federal Arbitration Act, 9 U.S.C. §10, is generally limited to fraud or misconduct in the proceedings.

Binding arbitration may also be used in conjunction with mediation in several ways:

- It may be part of a mediation/arbitration (so-called "med/arb") proceeding, where the parties attempt to mediate the dispute first. Failing resolution, the same neutral arbitrates and issues a binding award. Using the same person as both mediator and arbitrator may have a chilling effect on full participation in mediation, as a party may not believe that the arbitrator will be able to discount unfavorable information learned during the mediation.
- In co-mediation/arbitration, two neutrals preside over the initial joint session. After that, the neutral designated as the mediator works with the parties. Failing settlement, the case, or any unresolved issues, may be submitted to the neutral designated as the "arbitrator," for a binding decision.
- Arbitration/mediation is another way to avoid the problem of one neutral serving as both mediator and arbitrator. The arbitrator hears the case and renders a written determination that is not disclosed to the parties. He or she then attempts to mediate, with the understanding that if the parties reach no settlement, his/her earlier determination will become the award.

C. Setting the Award "Cap"

In terms of the ADRA's mandatory requirement for establishing an award "cap," in addition to negotiating a maximum award, the parties might consider agreeing to a minimum award prior to arbitration, using the "High-Low" method as described in *A Handbook for Federal Agencies* (hereinafter, the Handbook)²:

High-Low. The parties agree privately without informing the arbitrator that the final award will be within certain parameters. At the conclusion of the hearing, if the arbitrator's award is within the agreed upon range, the parties are bound by that figure. If, however, the award is outside the parameters, it is adjusted accordingly. For example, if the high-low figures were \$50,000 and \$100,000 and the award was \$25,000, it would be adjusted to \$50,000. Similarly, if the award were \$250,000, it would be adjusted to \$100,000.

² See "Developing Guidance for Binding Arbitration: *A Handbook for Federal Agencies*," prepared by Phyllis Hanfling, Esq., Department of Energy, and Martha McClellan, Federal Deposit Insurance Corporation, written as a "blueprint" for the development of agency guidance for use of binding arbitration, as contemplated by the ADRA of 1996.

D. The Checklist of Arbitration Issues

The following responds to the substantive issues relevant to the Presidio Trust identified in the Handbook as "substantive issues to consider."

Issue 1: For what types of cases will the agency be willing to use binding arbitration?

Response: The Presidio Trust is willing to consider the use of binding arbitration for the resolution of issues in controversy involving leasing or procurement activities, as well as considering using binding arbitration in those other matters where the Trust deems such use in the best interests of the government. Where the circumstances specified above in section I.A. are involved, the Trust shall consider non-use of ADR. (See I.A. above).

Issue 2: Will the Presidio Trust agree to arbitrate issues other than money, e.g., specific performance, punitive damages, injunctive relief, apportionment of fees?

Response: Because established case law provides that an award of punitive damages against the government would be a violation of sovereign immunity, the Presidio Trust will not agree to have such damages as part of any arbitration award under the Presidio Trust dispute resolution process. On the other hand, non-monetary relief may be and frequently is necessary for the proper resolution of leasing or procurement related disputes. In such cases, should the arbitrator conclude that non-monetary relief is appropriate, the arbitrator's authority would allow the award to contain a grant of such relief. The resolution of some disputes (including without limitation leasing or procurement disputes) also may entail the need for declaratory or equitable relief. Where declaratory relief is needed, the arbitrator may be authorized to grant such relief. The arbitrator may be authorized to recommend other forms of equitable relief, such as specific performance.

Issue 3: How and by whom will the decision to arbitrate be made?

Response: As between the parties, the decision to arbitrate is strictly that of the parties. As with any other form of ADR, arbitration must be a process undertaken with the consent of all parties to the dispute. Within the Presidio Trust organization, a decision to arbitrate will be made by the Executive Director after briefing by the General Counsel.

a. Who will have authority to recommend arbitration?

Response: Within the Trust, arbitration may be recommended by the General Counsel.

b. Who has the authority to enter into settlement? Can this authority be delegated?

Response: Generally, it will be the Executive Director who will have authority to execute a settlement agreement on behalf of the Presidio Trust. The Executive Director may delegate this authority to the General Counsel or an appropriate senior management official.

c. Who will negotiate the cap on the award?

Response: The General Counsel or an appropriate senior management official acting with the concurrence of the General Counsel.

d. Who will negotiate the rules and selection of the arbitrator?

Response: For the Presidio Trust, the decision regarding selection of the arbitrator will be that of the General Counsel or appropriate senior management official. The procedural rules that will govern any binding arbitration are to be established by the parties.

e. Who will draft the Agreement to Arbitrate?

Response: The Agreement will be drafted by the parties. In some cases an Agreement to Arbitrate may be drafted as part of a lease or contract before a dispute arises as allowed by 5 U.S.C. §575 (a)(1).

Issue 4: What will the process be for entering into arbitration?

Response: The process for entering into arbitration in a Presidio Trust proceeding is an informal process. The Executive Director (who may delegate this authority to the General Counsel) is authorized to execute Arbitration Agreements, provided he/she ascertains first that sufficient funds will be available to cover the maximum possible award against the Presidio Trust and second that circumstances are such that binding arbitration would not be precluded under ADRA of 1996 or this guidance. No justification of binding arbitration for approval by a higher level within the agency is required.

Issue 5: How can the Presidio Trust encourage the efficiency of the arbitration process?

Response: As a general matter, (see Issue 10, below), only single arbitrators (rather than panels of arbitrators) will handle Presidio Trust disputes. Arbitrators shall employ the following measures, with the parties' consent and cooperation, in order to assure maximum efficiency of the arbitration process:

- A. Limit the scope of discovery.
- B. Establish reasonable deadlines for discovery, the hearing, and rendering of an award, consistent with the need for expedited review. These timeframes shall be incorporated into the Arbitration Agreement. Specify therein also that the arbitration award shall be made within 30 days of the close of the arbitration hearing (or the date the hearing would have been held in the event that a party does not appear at a scheduled hearing) unless the parties mutually agree on an extension of time, that the award shall be final 30 days after it is served on all parties and that service must be effected by means of certified mail, return receipt requested. In accordance with the ADRA of 1996, the award will be enforceable 30 days after service on all parties. See 5 U.S.C. §580(b).
- C. Limit the number of witnesses.
- D. Resolve the controversy or individual issues by means of document review or by arbitration via telephone conference in appropriate cases.

Issue 6: How and by whom will outside requests for binding arbitration be accepted?

Response: The General Counsel will review any request to assure compliance with the ADRA of 1996 and the guidance herein and then make a recommendation to the Executive Director whose decision shall be final.

Issue 7: Will the Presidio Trust allow arbitration clauses to be written into leases and contracts?

Response: Arbitration may be written into leases and contracts but will not be mandated as a condition of obtaining a government benefit.

Issue 8: If the agency allows arbitration clauses in leases and contracts, what should be included in the clause?

Response: An unambiguous statement that the agreement to arbitrate is consensual, an award cap or a methodology for determining a cap, a methodology for selection of an arbitrator, and an incorporation by reference of the mandatory terms of ADRA of 1996.

Issue 9: What is the arbitrator's role under the ADRA of 1996?

Response: Under the ADRA of 1996, the arbitrator will have, *inter alia*, the authority to:

- Regulate the course and conduct of arbitration hearings;
- Administer oaths;
- Order attendance of witnesses and production of evidence, to the extent that the agency is authorized to do so by law;
- Issue awards.

Issue 10: Will the Presidio Trust permit the use of a panel of arbitrators in some circumstances?

Response: Only under appropriate circumstances would the Presidio Trust permit more than a single arbitrator to be utilized. Because of the cost attendant to compensating an arbitration panel, the issue(s) in controversy would have to involve significant dollar amounts. Further, there would have to be a compelling reason for not proceeding with a single arbitrator such as the matter being of such technical complexity that no single arbitrator would have sufficient expertise or experience to be able to resolve the matter.

Issue 11: What selection criteria will be considered in choosing an arbitrator?

Response: The ADRA allows an agency to use, with or without reimbursement, the services and facilities of other Federal agencies, State, local and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals, and without regard to the provisions of 31 U.S.C. §1342 (regarding the acceptance of voluntary services). The ADRA permits selection of all ADR neutrals, including arbitrators, to be done non-competitively. In terms of any arbitrator, the individual must be

acceptable to both the Presidio Trust and other parties involved in the dispute. Among the primary criteria for selection of an arbitrator would be: (1) overall reputation of the arbitrator in terms of competence, integrity, and impartiality; (2) degree of expertise and experience in relevant areas of the law and with relevant unique aspects of the Presidio Trust; (3) degree of expertise and experience with the subject matter/ technical issues involved in the controversy; (4) availability of the arbitrator during the periods most convenient for the parties; (5) geographic proximity of the proposed arbitrator to the parties and to witnesses; (6) relative cost; and (7) the absence of any actual or potential conflict of interest. To the extent rosters of qualified arbitrators are developed, these should be consulted.

Issue 12: Will the agency agree to allow non-attorneys to represent a party, or for a party to appear *pro se* at the arbitration?

Response: Yes. The Presidio Trust Dispute Resolution Process has been designed so that it is readily accessible to small business enterprises and other entities or individuals that wish to appear without representation of counsel.

Issue 13: What should an Arbitration Agreement include?

Response: The Agreement must be in writing and should include the following:

1. The names of the parties.
2. The issues being submitted to binding arbitration. The parties can submit all or only certain issues in controversy to binding arbitration.
3. The maximum award ("cap") that the arbitrator may direct. (Note: The parties must negotiate such a maximum prior to signing the Agreement. The "cap" amount and any negotiated "low" value (should the parties adopt the aforementioned "High-Low" method or similar approaches) should be redacted from the document prior to presenting it to the arbitrator, if the parties wish not to disclose it.)
4. Any other conditions limiting the range of possible outcomes.
5. The scope of the arbitration. This will limit time and cost and give the arbitrator power to be a "case manager." A sample case management provision might read:

"The Arbitrator is expected to assume control of the process and to schedule all events as expeditiously as possible, to insure

that an award is issued no later than 10 days from the date of closing the hearing under this Agreement.”

6. References to all procedural rules regarding discovery and the conduct of hearings that the parties may wish to apply to the arbitration process.
7. The name of the arbitrator, the amount of compensation and how it will be paid.
8. The date when the arbitration will commence.
9. The types of remedies available.
10. A provision invoking the ADRA of 1996.

Issue 14: How will the agency pay the arbitrator(s)?

Response: Generally, the parties will agree in advance to share any arbitrator fees and costs, the costs of any transcripts, etc., all of which will be paid after the award is issued.

Issue 15: Is the Presidio Trust willing to use “administered arbitration”?

Response: Yes, so long as the administering entity agrees to be bound by ADRA. As used herein, “administered arbitration” refers to a situation where a private ADR provider organization manages the arbitration process.

Issue 16: What must the arbitration award include?

Response: The arbitration award must include findings of fact and conclusions of law sufficient to allow the parties to understand the basis of the decision, and a clear statement of the relief granted. The award will be subject to the “cap” and any other limitations agreed upon by the parties.

Issue 17: Will the agency allow arbitration on the documents only, without a hearing, or a telephonic hearing? If so, in what circumstances?

Response: In simple, low dollar amount cases, or with respect to individual issues of lesser consequence, the parties may agree to have the arbitrator render an award based solely on his/her review of the documents or based on telephonic testimony.

Issue 18: What selection criteria will be considered in choosing or amending arbitration rules and what must those rules include?

Response: There are no specific rules governing arbitration, *per se*. Accordingly, the establishment of criteria for selection of rules to conduct any given arbitration will be left to the parties and the arbitrator and should be set forth with adequate particularity within the Arbitration Agreement. Where the Trust is engaged in administered arbitration, the rules of the administering entity shall be used to the extent those rules are consistent with ADRA and are acceptable to both parties. Whatever rules are set forth in the Agreement should be aimed at obtaining an expeditious and impartial resolution of the matters at issue. Simpler cases usually will require less in terms of process (*i.e.*, more tailored discovery and more abbreviated hearings) than cases that are more complex.

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