

## RESOLVING CONFLICT

Newsletter of the Interagency Alternative Dispute Resolution Working Group  
of the U.S. Government  
Issue 2 - February, 2015

*The following two articles are from two federal government agencies which provide ADR – OGIS within the National Archives; and the Civilian Board of Contract Appeals. These ADR programs may not be widely known and so may be of particular interest to the reader.*

### **Office of Governmental Services (OGIS) - The First Five Years**

by Carrie McGuire, NARA

Congress created the Freedom of Information Act (FOIA) in 1966 to allow the public to better understand what the Federal government is doing and why. The law is intended to carefully balance the public's right to know with an agency's need to keep some information private in order to carry out its mission and protect other interests. The history of the FOIA process has been traditionally adversarial and litigious.

In 2007, Congress had a bold idea— to help avoid costly court cases and improve the FOIA process by introducing alternative dispute resolution into FOIA. By adding 104 words to the statute, Congress created the Office of Government Information Services (OGIS) within the National Archives and Records Administration. Since we opened in 2009, we've transformed from the few words that Congress added to the FOIA to a place for anyone—requester or Federal agency—to come for assistance with the FOIA process.

In addition to directing OGIS to provide mediation services to resolve—and prevent—disputes between FOIA requesters and Federal agencies, the law requires OGIS to review agency FOIA policies, procedures and compliance. In fulfilling both missions, our staff of 10 advocates not for the requester or the agency but for the FOIA process to work as intended.

### **OGIS's Mediation Services**

We've spent much of our first five years figuring out how to do our work as we do our work. Our staff attended mediation training from Northern Virginia Mediation Service, Harvard University, Pepperdine University and other sources, creating a foundation to develop a FOIA dispute resolution process that improves communication and increases understanding between FOIA requesters and agencies. While the range of services we offer includes traditional mediation, we have found that most FOIA disputes can be resolved through more informal facilitated communications. That said, OGIS's cases vary widely; sometimes we assist people through a 15-minute phone call, while in other cases, we spend months assisting disputing parties in attempting to reach a mutually agreeable resolution.

OGIS has assisted nearly 4,000 requesters and dozens of agencies. While each dispute is unique, the substance of our cases tends to fall into a few broad categories. We often hear from requesters whose requests have

been pending longer than the 20-day (in some cases 30-day) deadline in the law. Often, these requesters are having a difficult time connecting with someone within the agency who will provide them with any information about their request. In those cases, we contact the agency to learn more about the status of the request and to obtain an estimated date of completion as required by FOIA. We also assist requesters who dispute the fees an agency is levying to process the request, a frequent point of confusion. In these cases, OGIS is able to help requesters and agencies communicate more clearly about why certain fees apply. We also hear from requesters who believe an agency should release more information related to his or her request. The FOIA includes nine statutory exemptions from disclosure, only a few of which allow the agency the discretion to release information that technically falls under the exemption. OGIS is often able to help the requester better understand why a record (or portion of record) is being withheld under a particular exemption.

While the majority of requests for OGIS assistance come from FOIA requesters, we also assist agencies. We have mediated cases from agencies in which communications have badly broken down between requesters and agencies, and helped both parties achieve understanding and develop a path forward. We have also helped agencies improve their internal communications so that their FOIA programs work better.

OGIS also assists agencies by helping their FOIA personnel develop the skills to help prevent and resolve disputes with requesters. Several times a year OGIS provides free daylong Dispute Resolution Skills training. This training does not aim to transform FOIA professionals into mediators; rather, it

provides practical instruction in communications skills (such as separating positions from interests through open questions and active listening). The training also helps agencies meet a requirement added to FOIA in the same 2007 amendments that created OGIS that agency FOIA personnel must work to resolve FOIA disputes.

### **OGIS's Review Program**

Congress also created OGIS to review agency FOIA policies, procedures and compliance. While there is a natural tension between our mediation and review functions, these complimentary processes benefit one another, as well. Congress reasoned that by virtue of the cases brought to OGIS for mediation, the office would be in a good position to catch emerging problems or ongoing issues with FOIA compliance.

In our first five years, our review program has included reviewing agency FOIA regulations (so far, we have reviewed about a quarter of all department and agency regulations) and working with agencies when we observe, through our mediation work, policies or procedures that are not consistent with FOIA law or policy, or that may be different from the practices occurring at other agencies. We are expanding our review program to include assessments of agency FOIA programs, the first of which we completed in November. As with our mediation services, we conduct our assessments of agency FOIA programs as an advocate for the FOIA process with a focus on impartiality and fairness.

Armed with what we call the elements of an effective FOIA program, we created an assessment methodology that includes an online survey for FOIA professionals. We assess the survey results along with the

agency's FOIA regulation, website, training materials and other written materials. We also review the agency's FOIA litigation and look at resources such as Annual FOIA and Chief FOIA Officer reports and reports from open government groups. Finally, we visit the FOIA program to interview agency FOIA professionals and review FOIA request files before writing a final report. The report is not designed to be a "gotcha" document or to provide a grade, but rather to provide a thoughtful analysis of what works and what doesn't along with recommendations for improvement.

### **Other Activities**

FOIA also instructs OGIS to recommend policy changes to Congress and the President to improve the administration of FOIA. In our first five years, we issued 11 such recommendations (link to <https://ogis.archives.gov/about-ogis/ogis-reports.htm>).

What do the next five years hold? We look forward to assisting even more requesters and agencies through our mediation services and review programs. We are also focused on our role in the White House's Open Government National Action Plan, particularly our support of the FOIA Advisory Committee (read more about this on our blog, the FOIA Ombudsman, at <http://blogs.archives.gov/foiablog/2014/06/25/foia-advisory-committee-begins-setting-priorities/>).

### **Alternative Dispute Resolution at the United States Civilian Board of Contract Appeals**

by Judge Allan H. Goodman

The United States Civilian Board of Contract Appeals (CBCA) is an independent tribunal within the General Services Administration. The CBCA presides over

various disputes involving Federal executive branch agencies. Its primary responsibility is to resolve contract disputes between government contractors and agencies under the Contract Disputes Act (CDA).

The CBCA encourages the use of alternative dispute resolution (ADR) in all appropriate cases. In addition to providing ADR in cases docketed before the CBCA, the CBCA makes its ADR services available to any agency that requests ADR services to help resolve issues in controversy and claims involving procurements, contracts (including interagency agreements), and grants. This includes bid protests as well as disputes arising from contract performance. The CBCA has provided ADR services in matters at other Boards of Contract Appeals, the Court of Federal Claims, and the Court of Appeals for the Federal Circuit. In such circumstances, the Board or Court is requested to issue an order staying proceedings pending the completion of ADR proceedings at the CBCA.

### **Initiation of ADR and Selection of the Board Neutral**

The parties must agree to use ADR, as there is no mandatory ADR at the CBCA. The CBCA judge who is to conduct the ADR is referred to as the "Board Neutral." The parties have the option to jointly request a particular judge by name. Otherwise, the Chairman of the CBCA appoints a judge in rotation to serve as Board Neutral.

### **Advantages of ADR at the CBCA**

A major advantage of successful ADR at the CBCA is a swifter resolution of the dispute. An ADR session commences as soon as the parties are prepared to go forward. The parties will usually request some limited discovery to prepare for the ADR session. Parties who engage in ADR before extensive discovery or pre-hearing motions come to the ADR with a greater commitment to

resolve the matter and more flexibility in their negotiating positions.

ADR also tends to be less adversarial than litigation. Parties who have participated in ADR at the CBCA have felt that they have had their “day in court” even though they did not participate in formal proceedings. During mediation and neutral case evaluation, parties tell their story directly to the Board Neutral in a less stressful, informal setting. The cathartic effect of having the opportunity to speak directly to the Board Neutral is conducive to a settlement of the dispute.

Another advantage of ADR is that the resolution may be fashioned by the parties in a way that a judge may not have considered, or possibly in a manner that could not be achieved if the case proceeded in litigation. The parties retain control of the process and the resolution, rather than relinquishing all control to a third party. Ultimately, the parties determine the success or failure of the ADR process.

Also, the ADR proceeding may encompass other issues arising out of the same contract or fact situation not included in the case that was filed. There is often an impetus to reach a global settlement of outstanding disputes once the parties begin to negotiate. For example, the parties may voluntarily submit various performance disputes to ADR which arise after the case is filed. The ADR may also involve parties who are not subject to the CBCA’s jurisdiction, but who participate voluntarily.

### **Mediation – the Most Popular ADR Method**

Most parties choose mediation as the ADR method at the CBCA. The distinguishing feature of mediation is that the Board Neutral is allowed to have *ex parte* contact with the parties. During these *ex parte*

meetings, the parties may reveal confidential information to the Board Neutral which they believe might be helpful. The Board Neutral is not authorized to render a decision in the dispute

Usually the Board Neutral requests position papers from the parties before the mediation session begins. The mediation session convenes in a conference room, rather than a hearing room. The general procedure for mediation consists of an opening statement by the parties with all counsel and clients present. The parties may also bring individuals who have personal knowledge of the facts, who can present a summary of their knowledge to the Board Neutral. The Board Neutral then meets *ex parte* with counsel and their clients, and discusses the strengths and weaknesses of their case. These *ex parte* meetings are called “caucuses.”

After several caucuses during which the facts of the case are analyzed, and the parties have had an opportunity to discuss with the Board Neutral any confidential information they wish, the parties begin to exchange settlement offers. Usually the parties will prefer that the Board Neutral transmit the settlement offers and relay to them whatever reaction, and counteroffer, the opposing party has to the offer. Once the parties reach a settlement, they reconvene in the conference room to confirm that a settlement has occurred.

### **What ADR is Not**

ADR is not a process in which a party receives something for nothing. It is possible that a party receives no recovery in the ADR process. This may occur if the case lacks merit, or if the party fails to convince the Board Neutral or the opposing party that it has any chance of meeting its burden of proof. A party should not expect a reward for merely participating in the ADR process.

The value of submitting claims to ADR which lack merit or are unsupported is that the resolution comes quickly and at less cost. Meritless and unsupported claims do not fare better in ADR.

### **Conclusion**

The CBCA does not compel ADR proceedings. All parties must agree to participate before such proceedings can be held. ADR proceedings are successful in most cases. ADR saves time and resources, and resolves cases to the satisfaction of the parties without extended litigation.

*There are a number of ADR processes now, in addition to mediation. The next article is about one of these: the ombuds process.*

### **The Coalition of Federal Ombudsman.**

By Scott Deyo  
Ombudsman, National Geospatial-  
Intelligence Agency and Chair, Coalition of  
Federal Ombudsman (COFO)

In January 2015, the Coalition of Federal Ombudsman (COFO) had over 80 full members from 43 departments and agencies. This is a substantial increase from the 11 original COFO members when the group began in 1996. We continue to see steady growth in the number of new federal ombudsman programs. There are both statutory ombudsman programs and those established administratively. There are programs with an internal, organizational focus to ombuds that serve the public.

One will find considerable diversity in the types of ombudsman programs that exist in the Federal government. According to Howard Gadlin and Samantha Levine-Finley<sup>1</sup>, federal ombudsmen embrace their differences and “come together in efforts to find common ground and to establish

common protections for their role in the federal government.” Moreover, federal ombuds have a strong sense of community and responsibility for providing world-class ombudsman programs.

To that end, COFO provides two important benefits. First, the group helps to promote collaboration among our members. We share experiences, ideas, policies, standards, and innovative solutions to difficult problems. COFO also plays an important advisory role for executives, administrators, and other groups exploring the possibility of implementing an ombudsman program within their agency. In this capacity, COFO provides advice and guidance on professional ombudsman standards, program development and evaluation.

In 2015, we plan to continue working on an “Ombuds Value Project.” This initiative intends to capture as many examples as possible that epitomize the value of the ombudsman. We are also developing a framework for a voluntary ombudsman peer review program, creating helpful resources for those standing up new ombudsman offices, increasing our outreach, and most importantly, maximizing our monthly and annual meetings to learn and collaborate.

For more information, visit the COFO website at <http://federalombuds.ed.gov/>. You may also sign up to the COFO listserv by emailing [listserv@listserv.ed.gov](mailto:listserv@listserv.ed.gov) with “SUBSCRIBE COFEDOMBUDS” in the body.

<sup>1</sup> Gadlin, H. and Levine-Finley, S. 2008. *Stranger in a Strange World - The Ombudsman in the Federal Government*. Published by the Association for Conflict Resolution in Spring 2008 edition of “ACResolution.” Retrieved: [https://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/OmbudsInFederalGovt-ACResolution.pdf](https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/OmbudsInFederalGovt-ACResolution.pdf)

*The last three articles are from three of the four IADRWG Sections. We will provide information about the fourth IADRWG Section in a subsequent issue.*

## **Contracts and Procurement Section**

By John A. Dietrich, FAA

The Contracts and Procurement Section has been busy for over a year drafting a revision to its venerable **Electronic Guide to Federal Procurement ADR (1999)**. A new edition is required because of the significant changes at administrative tribunals and in the processes used to address protests and contract disputes. The second edition uses some of the text of from the first edition, but the style, organization, and focus have changed.

### **Style**

Writers of a website must recognize that 79% of visitors merely scan webpages, reading only 18% of the text as they evaluate a page's usefulness in an average of five seconds. See [www.plainlanguage.gov](http://www.plainlanguage.gov). This means that key concepts need to jump from the computer screen to catch a reader's eye. The new edition, therefore, features:

- Short, meaningful chapter titles
- Key information near the top webpages
- Frequent paragraph headings enabling readers to skim the content
- Detailed information moved to sub-pages
- Frequent hyperlinks in the text to related information, and
- Additional links under "LEARN MORE," a feature often at the end of high-level webpages.

### **Organization**

The organization has changed significantly. The new edition 34 chapters spread over five parts:

- Part I provides introductory information about ADR and the statutory framework for acquisition.
- Parts II through IV march chronologically through the acquisition process, from acquisition planning, to protests, and ending with disputes. Chapters within these parts address specific areas of interest, such as the use of ADR clauses, protest ADR at the Federal Aviation Administration, or disputes ADR at the boards of contract appeals.
- Part V focuses on specific ADR topics that could be broadly applicable, regardless of forum or issues presented. Such topics include negotiation, settlement authority, preparation, and more.
- Finally, supplements at the end include a page of useful links and a library with thirty-five downloadable ADR agreements, settlement agreements, guidance documents, and more.

### **Focus**

A lot of time has passed between the editions of this guide. In 1999, the authors offered significant insight into how ADR *should be* practiced. In 2015, we fill the chapters with how ADR *is* practiced. Gone is the guidance regarding building acquisition ADR programs at the level of an individual agency. In its place are examples of existing agency ADR efforts such as the Army's agency-level protest system, the NASA ombudsman clause, and the Department of Energy's Open Book technique for debriefings. The new guide also omits lengthy discussion of awareness training. Instead, the guide expressly recognizes that "ADR is firmly embedded as a normal part of protest and dispute resolution processes for federal procurement

matters.” Agency personnel are invited to use this guide as the basis training procurement personnel in ADR.

The chair of the section, Administrative Judge John Dietrich from the FAA’s Office of Dispute Resolution for Acquisition, expresses sincere appreciation to his colleagues who also contributed to the new edition:

- Christy J. Barry, Acquisition Litigation/ADR Attorney, Department of the Air Force
- Judge Diana S. Dickinson, Armed Services Board of Contract Appeals
- Sarah Stanton Huxta, Senior Attorney, Department of the Air Force
- Sharon L. Larkin, former Administrative Judge, Government Accountability Office Contract Appeals Board
- Richard J. McCarthy, Senior Attorney, National Aeronautics and Space Administration
- Judge Patricia J. Sheridan, Civilian Board of Contracts Appeals
- Marc Van Nuys, Army ADR Program Director

The section also appreciates the comments and feedback it has received thus far from agency reviewers through their representatives on the IADRWG Steering Committee. Publication of the final version of the second edition will likely occur early in 2015.

### **The Workplace Conflict Management Section: Addressing Age-old Concerns with Fresh Approaches**

By Cindy Mazur, Chair of the Section and Director of FEMA’s ADR Division, and Vik Kapoor, Attorney Advisor in FEMA’s ADR Division

The Workplace Conflict Management Section helps ADR offices and individuals across the nation address all manner of employee issues, including: bullying, difficult conversations, performance evaluations, enhanced communication skills, strong teams, and problem-solving techniques.

One of its contributions has been its regular brown bag series. Over the years, the Section has presented world famous speakers and topics. For instance, Ken Feinberg spoke of his experiences mediating complex disputes with the government, Suzette Elgin taught the participants the art of verbal self-defense, and Marilee Adams championed the power of asking the best questions.

This past year, the Section published a desk reference designed for anyone who wants to know more about conflict management processes and tools in the federal workplace (available at: <http://www.adr.gov/pdf/desk-reference-handbook-2013.pdf>).

The Section has grown into a rich community for conflict management professionals in the federal government, and has even led to “spin-offs” in the form of the Conflict Management Consortium and the Conflict Coaching Group. Kim Brown chaired this Section at its inception in 1998, and Andrew Colsky nurtured and developed it for several years thereafter, until Cindy became the Chair in 2003.

The Workplace Conflict Management Section has two important missions: (1) to provide educational sessions to representatives from all the different agencies about relevant ADR programs and processes in the public and private sector, and (2) to assist in the development and growth of ADR programs in government.

In the early years, the Section's big push was to introduce the ideas of ADR to the federal agencies in broad strokes, because it was such a foreign concept. Now, many years later, the Section has made a great deal of headway in developing and strengthening the role of ADR in government. In the 2014 IADRWG Report to the President, the Section highlighted several key trends:

- ADR Offices are utilizing upstream tools to prevent and reduce workplace conflict before it becomes problematic.
- ADR offices are experiencing an increase in individual coaching requests and a decrease in mediation requests. Agency departments (e.g., Organizational Development, Human Resources, and Training) are reaching out to their ADR offices to provide leadership and performance coaching, as well as conflict coaching. The Office of Personnel and Management has developed a Federal Coaching Network which will support this trend.
- There has been great expansion in ombuds programs.
- There is a growing emphasis on virtual ADR programs, and harnessing technology for online dispute resolution.
- Finally, many ADR offices are conducting climate assessments to get a better view of organizational and group dynamics.

The Workplace Conflict Management Section strives to provide resources, dialogue, consultation, and networking for interested ADR professionals and administrators.

Please contact the Section at [ADR.gov](http://ADR.gov) if you are developing a federal ADR program, if you have questions about novel issues in your ongoing programs, if you would like to

suggest speakers for our brown bag series, or if you have ideas that might allow us to better serve the federal ADR community.

### **Report from the Litigation Section**

By Joanna Jacobs

Office of Dispute Resolution

U.S. Department of Justice

The mission of the Litigation Section is to facilitate and promote ADR use in litigation involving the United States in the federal courts across the country. We provide legal advice and training to Department of Justice (DOJ) attorneys as well as agency attorneys who are developing new ADR programs. The Section is open to anyone in the Interagency group. Anyone interested in serving on the Section should contact me.

The Department of Justice was an early advocate for ADR. The Office of Dispute Resolution (ODR) was established in 1995 by Attorney General Janet Reno in order to "promote...ADR in appropriate cases to improve access to justice for all citizens and to lead to more effective resolution of disputes involving the government." *See* Attorney General Order at <http://www.adr.gov/pdf/reno.pdf> Courts later embraced ADR practices in response to legislation in 1990 mandating that each of the 93 federal district courts across the country adopt and implement local rules to "encourage and promote ADR use" in each courthouse. *See* 28 U.S.C. § 651 *et seq.*

With that background, DOJ attorneys continue to settle the vast majority of civil litigation cases brought against or on behalf of the U.S. The Federal Judicial Center statistics for FY2013 reflect that only .6 percent of the tens of thousands of civil cases filed each year involving the U.S. reached the trial stage. A large majority of the rest of the cases are adjudicated through



dispositive motions decided by the court. For the balance of the ongoing litigation which DOJ resolves, about 2/3 settle through direct negotiations between the attorneys and parties. The last third—often the most difficult or intractable cases—employ some form of ADR, generally mediation, for case settlement.

In mediated cases, DOJ trial attorneys have a number of options in choosing a neutral including: magistrate judges; court staff mediators or panels of volunteer mediators; and private mediators. In some districts, the magistrate judges perform the majority of mediation or case settlement work, although parties may always decide to hire a private mediator if a case requires something out of the ordinary, such as a case which requires substantive expertise in a narrow area or a complex, multi-party case which requires more time than a magistrate judge could devote to a single case. Some courts have established ADR programs in which they train and maintain a panel of attorneys who volunteer to mediate at no-cost or minimal cost to the parties. A few districts have staff mediators who are also available to mediate for no cost to the parties.

Another option is to hire a private mediator chosen specifically for particular qualities (e.g. substantive expertise in a particular area). *See* Compendium of Federal District Court' Local ADR Rules at

<http://www.justice.gov/olp/compendium-federal-district-courts-local-adr-rules>

Approximately \$5 million is devoted each year to hire private mediators in cases involving the federal government. ODR oversees the government funds used for private mediation and has maintained statistics since 2006 documenting ADR expenditures, cost and time saving and case outcomes.

<http://www.justice.gov/olp/alternative-dispute-resolution-department-justice>

Training litigators in effective settlement strategies is also a priority for the Department. ODR has designed a 2 ½ day course in case settlement options which covers direct negotiations, mediation and other ADR techniques, and judicial settlement conferences. The course, offered twice a year, includes 40-50 DOJ attorneys and faculty from the federal bench, academia and private ADR practice.

It is now clear, as we approach the 20<sup>th</sup> anniversary of the Attorney General's 1995 ADR Order, that the courts and litigants have enthusiastically embraced case resolution without trial; indeed, the number of cases—if all of them actually went to trial—would quickly overwhelm the resources of both the courts and the Department. ADR has proven to be essential to our effective delivery of justice to those litigants reaching out to the courts for assistance in resolving their disputes.

*Send any articles, ideas or items for future issues to Ramona Buck, Chair of Outreach*  
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