104TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 104–597

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

MAY 29, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2977]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2977) to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other proposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

SUMMARY AND PURPOSE

H.R. 2977, the "Administrative Dispute Resolution Act of 1996", permanently reauthorizes the Administrative Dispute Resolution Act (5 U.S.C. § 571–583). The Act was designed to encourage and provide a framework to facilitate the use of alternative means of dispute resolution by agencies in the discharge of their administrative responsibilities. Despite an agency's inherent authority to utilize such alternative means, the Committee feels that a statute providing explicit authority for ADR has been, and would continue to be, more effective in promoting its use.

BACKGROUND AND NEED FOR THE LEGISLATION

The Administrative Dispute Resolution Act was signed into law by President George W. Bush on November 15, 1990 and expired on October 1, 1995.[1] The Act grew out of efforts by the Administrative Conference of the United States and the Federal Mediation and Conciliation Service that dated from the early 1980's to encour-

[1] Administrative Dispute Resolution Act, Pub. L. 101–552.

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age flexible alternatives for the resolution of disputes regarding agency programs.

Administrative Dispute Resolution (ADR) means a procedure such as mediation, arbitration, facilitation, minitrials, or various combinations of these, used voluntarily to resolve issues in controversy.[2] The purpose of ADR is to lower the cost to all parties of agency decisions, while at the same time encouraging the kind of compromise and settlement that recognize and address the valid concerns of all parties to a dispute. It developed in response to the growth in formal hearings and litigation challenging agency actions that threatened to overburden the regulatory and judicial process. While before the passage of the Act only a few agencies engaged in ADR, its enactment has helped promote the use of ADR throughout the government. Among those agencies which have dedicated the most effort to ADR and the Air Force, the Army Corps of Engineers, the Environmental Protection Agency and the Federal Deposit Insurance Corporation. While agencies have utilized ADR techniques in a wide array of situations, the most active areas have been governmental contracting, workplace disputes, and enforcement and program-related disputes.[3]

The Administrative Conference of the United States (ACUS), which was given responsibility under the Act to survey and facilitate its use,[4] has reported that several ADR techniques have been promising. It indicated that partnering, for example, was responsible for a dramatic decline in the volume of contract claims and appeals experienced by the Army Corps of Engineers (from 1,079 claims in 1988 to 314 in 1994, and from 742 appeals in 1991 to 365 in 1994). The Air Force successfully resolved over 100 Equal Employment Opportunity disputes through mediation in 1992 and 1993, saving more than $4 million in complaint processing costs. The Federal Deposit Insurance Corporation and Resolution Trust Corporation have reported that mediation of claims and disputes among failed financial institutions they control has resulted in savings of $13 million in legal costs over three years for the FDIC and more than $115 million over four years for the RTC.[5]

While the Act was designed to encourage the use of alternative means of dispute resolution, it does recognize that some situations are not appropriate for such a method or proceeding and it establishes several criteria for identifying these instances. These are where

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[2] Mediation utilizes a trained, neutral third-party to assist in negotiating a settlement; arbitration is a proceeding wherein a neutral third-party has authority to decide disputed issues following an informal evidentiary hearing; facilitation, or "partnering", is a process used to avoid contract disputes where parties establish a team approach to fulfilling project goals and use a neutral facilitator to maintain lines of communication during the project; minitrials are a structured settlement process whereby each party presents abbreviated versions of the case to a judge or jury with the results being used as the basis for settlement negotiations.

[3] "Toward Improved Agency Dispute Resolution: Implementing the ADR Act", *Report of the Administrative Conference of the United States on Agency Implementation of the Administrative Dispute Resolution Act* 16–31 (February 1995).

[4] The Administrative Conference of the United States (ACUS) was not funded in fiscal year 96 and has passed out of existence. Section 4 of H.R. 2977 amends current law to reflect that fact by deleting references to ACUS. Subsection (a) eliminates the requirement that agencies must consult with ACUS in developing policies to promote the use of ADR. Subsection (b) repeals the provisions requiring ACUS to compile information concerning agency use of ADR. Subsection (c) deletes the reference to ACUS in the Labor Management Relations Act.

[5] *Id* at 37. Savings attributable to the use of ADR is discussed more extensively infra.

A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent;

The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency;

Maintaining established policies is of special importance so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions;

The matter significantly affects persons or organizations who are not parties to the proceeding;

A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

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.[6]

The Act has been a positive force in encouraging agencies to actively seek alternative means of settling disputes that might otherwise require costly and time-consuming litigation. Consequently, the Committee believes that the Act should be reauthorized.

One means of resolving a dispute short of adjudication is arbitration. Arbitration resembles adjudication in that a neutral third party is empowered to decide disputed issues after hearing evidence and arguments from the parties. In the world of dispute negotiation, an arbitrator's decision may be binding on the parties through agreement or operation of law, or it may be nonbinding or advisory. It can be voluntary (when parties agree to it), or it may be mandatory and the exclusive means available for settling a particular dispute. Arbitration has been a tool for resolving disputes throughout American history, gaining more widespread use recently for labor relations and commercial practices.[7]

However, the involvement of the federal government as a party to binding arbitration has introduced unsettled constitutional and policy questions that continue to arise. During hearings on proposed ADR legislation in 1990 before the Subcommittee on Administrative Law and Governmental Relations, William P. Barr, then Assistant Attorney General, Office of Legal Counsel, testified that binding arbitration raised potential constitutional concerns if it involved the executive branch. Mr. Barr felt that binding arbitration might violate the Appointments Clause of the United States Constitution[8] by delegating to private individuals the "performance of a significant governmental duty exercised pursuant to a public

[6] 5 U.S.C. § 572(b) (1994).

[7] Professor Harold H. Bruff, "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs", 67 Texas L.Rev. 441 (1989). (*See also, A Report to the Administrative Conference of the United States, Studies in Administrative Law and Procedure, Agency Arbitration: Constitutional and Statutory Issues* 9 (ACUS) (July 1988).

[8] U.S. Const. art. II, § 2, cl. 2.

law"[9] that must be performed by "officers of the United States" appointed in accordance with the aforementioned clause.[10]

The constitutional problem raised by Mr. Barr was solved by a compromise embodied in 5 U.S.C. § 580 and § 581(b) providing that an arbitration award would be reviewable and reversible by the agency head before becoming final, thus ensuring that an officer of the United States would be responsible for each such decision.[11]

During testimony before the subcommittee in 1995, some witnesses indicated that this provision discouraged private parties from entering into arbitration with agencies because of the tentative nature of any award granted under it. A memorandum from the current Assistant Attorney General, Office of Legal Counsel, Walter Dellinger, was cited for its criticism of Mr. Barr's constitutional analysis and its conclusion that no constitutional barrier existed to binding arbitration involving the federal government.[12]

The committee was reluctant, however, to reverse a decision that the Congress made little more than five years earlier which had been motivated by constitutional concerns significant and persuasive enough to convince legislators to fashion a mechanism to allay them. To reject, at this point, the analysis of the previous Department of Justice was viewed as too abrupt a departure.[13]

Another issue raised during the hearings related to the expansion of the confidentiality protections of the Act. Currently, the Administrative Dispute Resolution Act prohibits third-party neutrals and parties from disclosing communications made during an ADR proceeding, with limited exceptions.[14] However, the communications are not necessarily exempt from disclosure under the Freedom of Information Act (FOIA).[15] Several witnesses testified that because a full and candid exchange between the parties and the neutral is necessary if mediation or another consensus process is to yield agreements, the uncertainty over whether ADR commu-

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[9] *Buckley* v. *Valeo,* 424 U.S. 1, 140–141 (1976).

[10] Administrative Dispute Resolution: Hearing on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong., 2nd Sess. 35–64 (1990)(statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice). Mr. Barr also raised policy questions concerning binding arbitration. *See also,* Richard K. Berg, "Legal and Structural Obstacles the Use of Alternative Dispute Resolution for Claims For and Against the Federal Government", *A Report to the Administrative Conference of the United States, Studies in Administrative Law and Procedure, Agency Arbitration; Constitutional and Statutory Issues* 43 (ACUS)(July 1988):

"In fairness one cannot ascribe the Comptroller General's reluctance to embrace arbitration solely to stubborn adherence to outdated doctrine or a desire to protect his turf. Private parties may spend their money as they please. Even publicly-owned private corporations are governed in their transactions by the remarkably flexible business judgement rule. But agencies of the Federal Government may spend or obligate public funds only up to the limits and with the conditions imposed by their appropriations laws and other relevant statutes. *Id.* at 57."

[11] This procedure resembles somewhat that established under specific statutes providing for the use of arbitration, viz. 7 U.S.C. § 671 (1994) and 20 U.S.C. § 107(d)(1–2)(1994).

[12] Memorandum from Walter Dellinger to John Schmidt, Associate Attorney General, Department of Justice regarding Constitutional Limitations on Federal Government Participation in Binding Arbitration. 16 (September 7, 1995). Mr. Dellinger discusses at considerable length his differences with Mr. Barr's interpretation of the Appointments Clause which, he indicates, extends beyond the issue of arbitration to several other areas, leading him to "disavow" the holdings with respect to that issue of four recent prior opinions of the Office of Legal Counsel.

[13] Emphasizing the abruptness of this departure was the fact that barely two weeks before testifying at the subcommittee's hearing in favor of amending current law with respect to arbitration, the same witness representing the Department of Justice testified before the Senate Governmental Affairs Committee in favor of retaining current law despite the new memorandum of the Office of Legal Counsel.

[14] 5 U.S.C. § 574 (1994).

[15] 5 U.S.C. § 552 (1994).

nications would be exempt from FOIA may have a chilling effect on the use of ADR.[16] In particular, the lack of a FOIA exemption serves as an incentive to hire private neutrals who are not subject to FOIA, rather than government neutrals.[17] The Committee is also aware of opposition to the creation of any new exemption from FOIA.[18]

A careful balance must be struck between the desire on the part of ADR advocates for greater confidentiality protections and the basic purpose underlying FOIA, that openness in government is essential to accountability. H.R. 2977 provides that the memoranda, notes, or work product of the neutral are exempt from disclosure under FOIA. Exempting these communications from FOIA does not diminish the amount of information that would otherwise be available to the public if a neutral were not employed.

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held an oversight hearing on the Administrative Dispute Resolution Act on December 13, 1995. Testimony was received from Peter R. Steenland, Jr., senior counsel for Administrative Dispute Resolution, Office of the Associate Attorney General, U.S. Department of Justice; Joseph M. McDade, assistant general counsel, Office of the General Counsel, Department of the U.S. Air Force; Diane Liff, ADR counsel, on behalf of John C. Wells, director, Federal Mediation & Conciliation Services; Philip J. Harter, chair of the section of Administrative Law & Regulatory Practice of the American Bar Association; Gail Bingham, president, RESOLVE; and James C. Diggs, vice president & assistant general counsel, TRW, Inc.

COMMITTEE CONSIDERATION

On February 29, 1996, the Subcommittee on Commercial and Administrative Law met in open session and ordered reported the bill (H.R. 2977), without amendment, by voice vote, a quorum being present. On March 12, 1996, the full Committee met in open session and ordered reported the bill (H.R. 2977), without amendment, by voice vote, a quorum being present.

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[16] Oversight Hearing on the Reauthorization of the Administrative Dispute Resolution Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 4 (1995) (statement by Peter R. Steenland, Jr., senior counsel, Office of Administrative Dispute Resolution, Department of Justice).

[17] Oversight Hearing on the Reauthorization of the Administrative Dispute Resolution Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 14 (1995) (prepared statement of John Calhoun Wells, director, Federal Mediation and Conciliation Service).

[18] *1994–1995 Annual Report of The Administrative Conference of the United States, Recommendation 95–6, ADR Confidentiality and the Freedom of Information Act,* Adopted June 15, 1995. 108–109 (statement of Jane Kirtley).

"The ADR Act was designed to address the interests of parties in resolving disputes. Its confidentiality provisions do not adequately represent the public interest in monitoring government activity. That is a job better left to the FOI Act, which strikes the appropriate balance between confidentiality and disclosure when the government plays a role as party, participant, neutral or record holder in ADR Act proceedings. *Id.* at 109."

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) or rule X of the Rules of the House of Representatives are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) or rule XI of Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 2977, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 18, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 2977, the Administrative Dispute Resolution Act of 1996, as ordered reported by the House Committee on the Judiciary on March 12, 1996. Enacting H.R. 2977 could result in some net savings to the federal government from increased use of alternative means of dispute resolution (ADR), but we cannot estimate the amount of any savings. Any improvement in the dispute resolution process would allow agencies to make more efficient use of their appropriated funds, but would affect total spending only if appropriations were reduced correspondingly. Enacting H.R. 2977 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

H.R. 2977 would make many changes and additions to the current laws relating to the application of ADR to conflicts involving the federal government. The bill would change the definition of ADR to include the use of ombudsmen. It would also exclude the use of settlement negotiations—that is, negotiations of a complaint by an employee and his or her agency without involving a neutral party—as a form of ADR. In addition, H.R. 2977 would permit parties to use ADR to resolve employment-related disputes and would

increase the responsibilities of the Federal Mediation and Conciliation Service (FMCS).

Federal Budgetary Impact. Currently, many executive branch agencies utilize various methods of ADR. Data compiled by the General Accounting Office (GAO) indicates that the use of ADR tends to result in more efficient resolutions of disputes, although such conclusions are based mainly on anecdotal evidence. Implementation of this bill likely would result in increased use of ADR by federal agencies. If greater use of ADR leads to more efficient dispute resolution, then agencies could realize some savings, and such savings could more than offset any increased spending by the FMCS in support of ADR. However, CBO does not have sufficient information to estimate the likelihood or magnitude of such potential savings.

The bill would require the FMCS to take on some of the responsibilities formerly performed by the Administrative Conference of the United States (ACUS), which received $1.8 million in appropriations for fiscal year 1995. Any increase in federal spending by the FMCS, however, would be subject to annual appropriations actions. Furthermore, as noted above, any additional costs from this provision could be offset by savings from enhanced use of alternative means of dispute resolution by federal agencies.

Impact on State, Local and Tribal Governments. H.R. 2977 contains no intergovernmental mandates as defined in Public Law 104–4 and would impose no direct costs on state, local, or tribal governments. Such governments currently may resolve disputes with the federal government through the use of certain forms of ADR. H.R. 2977 would broaden the forms of ADR that are available.

State, local, and tribal governments could decide to resolve disputes with the federal government through the use of these additional forms of ADR. However, instances where ADR is used are rare and usually involve highly complex legal and regulatory issues. In those cases, savings may accrue; however, the magnitude of any savings resulting from the changes in H.R. 2977, in all likelihood, would be relatively small.

Private Sector Mandates. This bill would impose no new private sector mandates, as defined in Public Law 104–4.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz and John Righter, Christi Hawley, and, for state and local impacts, Leo Lex.

Sincerely,

JUNE E. O'NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 2977 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 2. Amended definitions

Section 2 amends section 571 of title 5, United States Code, containing definitions relevant to the Administrative Disputes Resolution Act. H.R. 2977 changes the definition of "alternative means of dispute resolution" to include "the use of ombudsmen" while striking "settlement negotiations". It also strikes language in subsection (3) to the effect that an "alternative means of dispute resolution" must be a procedure that is "in lieu of an adjudication as defined in section 551(7)" in order to broaden the options for use of ADR.

The definition of "issue in controversy" is amended to delete the exemption for employee grievance proceedings specified under section 2302 or 7121(c) of title 5. This change would permit parties to use ADR to resolve employment related disputes.

Section 3. Confidentiality

Section 3 amends the confidentiality provisions contained in section 574 of title 5, United States Code.

Subsection (a) narrows the class of matters that are protected by the confidentiality provisions of the ADR Act with respect to neutrals by deleting "any information concerning" before "any dispute resolution communication" where it appears in section 574 (a) of title 5. This is in recognition of the fact that the bill extends greater protection from disclosure under FOIA to communications to a neutral under this section. While the Committee is thus strengthening the confidentiality to promote the participation of neutrals from the government by adding protection from disclosure under FOIA, it intends that protection to be applied as specifically as possible to the ADR process.

Subsection (b) provides that alternative confidentiality procedures agreed to by the parties do not qualify for the Act's new exemption from FOIA unless they provide for more disclosure than the ADR Act itself.

Subsection (c) changes section 574 of title 5, United States Code to provide that 5 U.S.C. § 574 (a) is a statute specifically exempting disclosure under FOIA, thus protecting dispute resolution communications to neutrals from disclosure under FOIA.

Section 4. Amendment to reflect the closure of the administrative conference

Section 4 contains amendments necessary to reflect the fact that the Administrative Conference of the United States (ACUS) is no longer in existence. Subsection (a) eliminates the requirement that agencies must consult with ACUS in developing policies to promote the use of ADR. Subsection (b) repeals the provision requiring ACUS to compile information concerning agency use of ADR. Subsection (c) deletes the reference to ACUS in the Labor Management Relations Act (29 U.S.C. § 173(f)).

Section 5. Amendments to support service provision

Section 5 amends section 583 of title 5, United States Code to authorize agencies to use the services and facilities of State, local and tribal governments for the purposes of implementing the ADR Act.

Section 6. Amendments to the Contract Disputes Act

Subsection 1 amends the Contract Disputes Act to require that only contract claims in excess of $100,000 must be certified.

Subsection 2 amends the Contract Disputes Act to reflect the permanent reauthorization of the ADR Act.

Section 7. Amendments on acquiring neutrals

Section 7 amends the sections of the ADR Act concerning the acquisition of neutrals. Subsection (a) amends the Federal Property and Administrative Services Act (41 U.S.C. § 253(c)(3)(C) and § 2304(c)(3)(C) of title 10, United States Code) to clarify that agencies may use expedited procurement procedures when hiring neutral third parties for ADR proceedings. Subsection (b) amends section 573 of title 5 United State Code, which authorizes the government to use neutrals in ADR proceedings. This section, as amended by the bill, requires the Federal Mediation and Conciliation Service to assume the responsibilities formerly performed by the Administrative Conference of the United States (ACUS) to encourage and promote the use of ADR in federal agencies and develop procedures for agencies to hire neutrals on an expedited basis. The statutory requirements for the government to establish professional standards for neutrals and maintain a roster of eligible neutrals are repealed.

Section 8. Permanent Authorization of the Alternative Dispute Resolution Provisions of title 5, United States Code

Section 8 deletes the ADR Act's sunset provision, thereby providing permanent reauthorization of the Act.

Section 9. Authorization of appropriations

Section 9 creates a new section 584 of title 5, United States Code which authorizes such funds as may be necessary to carry out the purposes of the ADR Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.

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SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

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[Sec. 582. Compilation of information.]
Sec. 583. Support services.
584. Authorization of appropriations.

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SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

§ 571. Definitions

For the purposes of this subchapter, the term—

(1) * * *

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(3) "alternative means of dispute resolution" means any procedure that is used[, in lieu of an adjudication as defined in section 551(7) of this title,] to resolve issues in controversy, including, but not limited to, [settlement negotiations,] conciliation, facilitation, mediation, factfinding, minitrials, [and arbitration] *arbitration, and use of ombudsmen*, or any combination thereof;

* * * * * * *

(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement—

(A) between an agency and persons who would be substantially affected by the decision; or

(B) between persons who would be substantially affected by the [decision,] *decision;*

[except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;]

* * * * * * *

§ 573. Neutrals

(a) * * *

* * * * * * *

[(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall—

[(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;

[(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

[(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and

[(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.]

(c) In consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, the Federal Mediation and Conciliation Service shall—

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

* * * * * * *

(e) Any agency may enter into a contract with any person [on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual] for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

§ 574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose [any information concerning] any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

* * * * * * *

(d)*(1)* The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

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(j) [This section] *This section (other than subsection (a))* shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.

* * * * * * *

[§ 582. Compilation of information

[The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.]

§ 583. Support services

For the purposes of this subchapter, an agency may 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. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.

§ 584. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.

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ADMINISTRATIVE DISPUTE RESOLUTION ACT

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SEC. 3. PROMOTION OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

(a) PROMULGATION OF AGENCY POLICY.—Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall—

(1) consult with [the Administrative Conference of the United States and] the Federal Mediation and Conciliation Service; and

* * * * * * *

[SEC. 11. SUNSET PROVISION.

[The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate.]

SECTION 203 OF THE LABOR MANAGEMENT RELATIONS ACT, 1947

FUNCTIONS OF THE SERVICE

SEC. 203. (a) * * *

* * * * * * *

(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 573 of title 5, United States Code, may be assigned to act as neutrals. The Service shall consult with [the Administrative Conference of the United States and] other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection.

SECTION 6 OF THE CONTRACT DISPUTES ACT OF 1978

DECISION BY THE CONTRACTING OFFICER

SEC. 6. (a) * * *

* * * * * * *

(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code (as in effect on September 30, 1995), or other mutually agreeable procedures, for resolving claims. [In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.] *The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or as otherwise required by law.* All provisions of subchapter IV of chapter 5 of title 5, United States Code (as in effect on September 30, 1995), shall apply to such alternative means of dispute resolution.

(e) [The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) shall cease to be effective on October 1, 1999, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate.] 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 (as in effect on September 30, 1995), 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.

SECTION 2304 OF TITLE 10, UNITED STATES CODE

§ 2304. Contracts: competition requirements

(a) * * *

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(c) The head of an agency may use procedures other than competitive procedures only when—

(1) * * *

* * * * * * *

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or [agency, or] *agency, or to procure the services of an expert or neutral for use* in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

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SECTION 303 OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

SEC. 303. COMPETITION REQUIREMENTS.

(a) * * *

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(c) An executive agency may use procedures other than competitive procedures only when—

(1) * * *

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(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be pro-

vided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or [agency, or] *agency, or to procure the services of an expert or neutral for use* in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

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