

## **Drafting the Ultimate Alternative Dispute Resolution Clause for Government Subcontracts**

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### **ADR in Government Subcontracts**

- How should government/commercial subcontract disputes be resolved?
- Should the prime or higher tier contractor/subcontractor have to resort to the court for performance and post-performance disputes?
- What is the **attitude/culture** on resolving subcontract disputes—
  - Primes?
  - Subcontractors?
  - Government?

### **ADR in Government Subcontracts**

- What is a simple, cost-effective methodology for resolving subcontract disputes?
  - Teaming Arrangements?
  - Performance-Based Acquisitions?
  - Vendors?
  - Domestic/International transactions and outsourcing?
- New York Convention a factor due to “enforcement” of international awards?
  - Other?

### **ADR in Government Subcontracts**

- Aerospace/Defense Industry Dispute Resolution Commitment
- Air Force/Industry ADR Commitment
- What does the FAR provide relative to ADR at the Subcontract/Small Business level?
- Company Pledges to “Corporate Policy Statement on Alternatives to Litigation”
  - www.CPRADR.org
- American Arbitration Association
  - www.ADR.org

### **ADR in Government Subcontracts**

- Multi-step dispute resolution clause, e.g. escalation to executives of company, mediation and then arbitration.
  - Teaming Environment?
  - Construction—Partnering?
  - Other Industries?
- But having a “default mode” for dispute resolution is important.

### **ADR in Government Subcontracts**

- Scope of disputes subject to arbitration clause.
  - AAA recommendation...
    - “Any controversy or claim **arising out of or relating to this contract**, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”
      - “All claims/controversies between the parties”
      - “Any transaction involving the parties prior to or subsequent to \_\_\_\_ and arising in connection with \_\_\_\_.”
      - Non-binding arbitrations?
- Expert Opinions
- What should be excluded from the clause?

### **ADR in Government Subcontracts**

- Is the ADR clause “self-enforcing/self-executing”?
  - Merely an “agreement to agree?”
  - Waiver by participation in ADR proceedings
- Any issue with enforceability/arbitrability of the ADR clause?
  - Who decides the validity of ADR clause or overriding agreement?
- Unconscionability Issues
- See *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (Feb. 21, 2006)
  - What should the ADR clause state on arbitrability?
  - What do the applicable Arbitral Rules provide?

### **ADR in Government Subcontracts**

- Should Arbitral Association Rules be applicable to Arbitrations?
  - Which “version” of Arbitral Association Rules should apply—time of negotiation or “demand”?
- Use “specialized” rules?
  - Appropriate or tailored for your dispute?
  - Do they “trump” local law?
  - Influence of the Federal Arbitration Act (FAA)
- Self-Administered Arbitrations—Pro/Con

### **ADR in Government Subcontracts**

- Number/composition of the arbitration panel...
  - Expertise
  - Cost considerations
  - Public or private ADR “neutral”?
- Is the person “really” neutral?
  - Due Diligence on selection
- Disclosure obligations
- Unauthorized Practice of Law Issues
  - Must attorney/advocates be a member of the local Bar?
- Other Concerns?

### **ADR in Government Subcontracts**

- “Significant” procedural issues...
  - Class Actions or Non-Signatory participants
  - Pre-hearing Motions
- Motion for Summary Judgments
  - Discovery
  - Issuance of Subpoenas
- Discovery verses Evidence
  - Injunctive/Equitable Relief

### **ADR in Government Subcontracts**

- Importance of arbitration location or venue
  - Who decides?
  - Must attorney/advocates be a licensed member of the Bar?
- Unauthorized Practice of Law Issues Applicable (here too?)
- Can issues of having an arbitration in a “remote” location be mitigated by affidavits, telephone testimony, videos, etc.?

### **ADR in Government Subcontracts**

- Fees, Costs, Attorney Fees Recovered?
  - Compliance with pre-arbitration ADR processes required to “ensure” recovery of same?

### **ADR in Government Subcontracts**

- Choice of law issues
  - Particular State and/or FAA?
  - Generic verses Specific Law
  - Arbitrator required to apply the law?
- Must the arbitrator be an attorney?

### **ADR in Government Subcontracts**

- Grounds to Appeal an Award
- Whose Award is it?**
- Draft Awards
- Reasoned Awards
- Should the Arbitrator be “required” to follow  
(or “correctly” apply) the law?
- “Manifest Disregard of the Law” standard in “some” jurisdictions
- Limitation of Remedies
- Punitive Damages
- Other Concerns?

### **ADR in Government Subcontracts**

- Any clause enforcement issues?
  - Severability
  - Unconscionability
  - Arbitrator Disclosures
  - Contract Defense
  - Other Concerns?

### **ADR in Government Subcontracts**

- Any Contract Formation issues that could be resolved by use of ADR?
  - Letter Subcontracts verses Letter Contracts
  - Moving “ADR to the Left”
- Contract Formation verses Performance verses Post-Performance (Claims) Issues
- Impasse issues
  - Letters of Credit
  - Joint Ventures/Governance Concerns
  - Use of “Baseball Arbitration”--BATNA
  - See NCMA Contract Management Magazine articles on Negotiation—  
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