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Dispute Resolution

Sequester May Encourage Settlements In Contract Disputes, ABA Speakers Say



By Joyce Cutler

SAN FRANCISCO -- Sequestration is creating opportunities to use alternative dispute resolution (ADR) and mediation to come up with innovative solutions to settle federal contract disputes, contractor representatives said at the American Bar Association's annual conference in San Francisco.

Speakers at a session on the aftermath of sequester, "A New Dawn for Mediating Government Contract Claims," agreed that ADR and mediation are not commonly relied on in such disputes, but said they are increasingly being used as a less expensive alternative to litigation.

Mediations have been popular "for good reason, to resolve disputes under commercial contracts or non-government contracts," according to Linda Maramba, a senior counsel for litigation with Northrop Grumman Corp. However, "they don't have that same degree of popularity yet in federal procurement world," she said.

"From a litigation perspective, sequestration has significantly multiplied the power and effectiveness of the use of ADR in mediating and successfully resolving government contract disputes," said Neil Whiteman, of counsel in the Washington, D.C., office of Gibson, Dunn & Crutcher LLP. As agencies struggle to minimize the impact of sequestration on operations, "the government is doing less with less and entertaining creative settlement offers," Whiteman said.

Sequester-caused budget cuts reducing litigators' hours and trial resources are making for a unique environment extremely friendly to contract dispute settlement, according to Whiteman.

"If a trial is going on, the agency counsel litigator is only available 32 hours per week over four working days," if their agencies opted for employee furloughs. Working from home or checking messages is prohibited on furlough days, and overtime and compensatory time off cannot be used to supplement the absences, Whiteman said.

Fewer budget resources are available for electronic discovery, experts, and trial services such as graphics and information technology support. Travel cuts mean fewer witness interviews, site visits, and depositions, he said.

"Thus, we can see that sequestration has set the stage for a very favorable environment for negotiated resolution of government contract disputes," Whiteman said.

A good case in point, Whiteman said, is the settlement in the works to resolve a 20-year-old dispute over a \$4.78 billion contract awarded in 1983 for the Navy's A-12 Avenger bomber aircraft program, which was terminated in 1991 due to cost overruns and schedule delays. The possible agreement between the Navy, Boeing Co., and General Dynamics calls for the contractors to give the Navy \$400 million in free equipment to settle the contract dispute (100 FCR 146, 8/6/13).

The Navy initially demanded the return of \$1.35 billion in progress payments for work that was never accepted, while the contractors sought to recover \$1.2 billion in costs related to the termination of the contract. Those amounts have more than doubled when interest on the payments is taken into account.

The message "of this tentative settlement in the A-12 case is clear—lawyers on both sides of government contract disputes can seize this uniquely settlement-friendly environment to reduce their dockets through creative settlement efforts," Whiteman said.

President Obama signed the sequestration order late March 1 that directed the Office of Management and Budget to cut \$85 billion across all agencies by the Sept. 30 end of the fiscal year. "Just like the doomsday device in 'Dr. Strangelove,' sequestration in the current context was never supposed to have occurred," said Whiteman.

Flexibility Needed

Cost sensitivity to a litigator is frequently a very important tool to settlement, Martin H. Dodd, a mediator, arbitrator, and partner in Futterman Dupree Dodd Croley Maier LLP, San Francisco, said.

Sequestration is a real cost and may encourage settlement; "That said, I can imagine just the opposite situation," particularly if the government is a plaintiff. Dodd suggested a scenario in which the government, due to its limited dollars, "wants to try to collect as much as it possibly can," and ends up "pursuing litigation more aggressively rather than resolving it.

The statutory and regulatory framework encouraging ADR is fairly well-articulated and government agencies' negotiations are subject to legal and practical constraints, Dodd said. While it may seem that agencies lack

flexibility in what they can do, it is important for private parties "to try to encourage flexibility in resolving disputes."

When encountering inflexibility, Dodd advised exercising "yeoman's duty to find ways to come up with creative solutions you might not be hearing from the other side."

Reasons to Worry

Historically when federal contract awards decrease, which is happening with the wind down in Iraq and Afghanistan and now sequester, the number of contract claims increase, "and we're already starting to see that," Carol Park-Conroy, a Judicial Arbitration and Mediation Services neutral in Washington, D.C., and recently retired Armed Services Board of Contract Appeals administrative judge, said.

"The sequester has put government attorneys in a severe, severe financial situation," Park-Conroy said; "they're trying to litigate with one hand tied behind their back."

"It's hard to anticipate just how program managers, contracting officers, and agency heads will determine whether to proceed to litigation or whether they will turn to ADR to resolve disputes. I believe that the nature of the contract dispute is still going to be primary consideration in their choice in how to proceed," Park-Conroy, immediate past chair of the ABA's Public Contract Law Section, said.

The lack of funds, however, "most certainly has become a complicating factor and I personally see more use of ADR as a consequence."

At the same time, however, the U.S. Court of Appeals for the Federal Circuit recently announced its formal ADR and three-person office staff will no longer exist beginning the new fiscal year because of the sequester, said Park-Conroy. ADR will be extremely curtailed if not eliminated all together, a "direct and in my view a very negative result of sequestration," Park-Conroy said.

The Armed Services Board of Contract Appeals recorded 1,726 ADR matters since it starting keeping statistics in 1996 while the Civilian Board of Contract Appeals recorded 453 ADR matters since 2001, according to Park-Conroy.

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ISSN 1523-5696

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