BACKGROUND REPORT FOR RECOMMENDATION 86-8

ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

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ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

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I.

INTRODUCTION

Efficient resolution of disputes involving federal agencies is often impeded by the formalities of the adjudication or the litigation process. In recent years, private parties and the federal government have been searching for ways to streamline the litigation process by developing alternative means for dispute resolution.[1] To this end, the Administrative Conference of the United States ("ACUS") has recommended that administrative agencies, where not inconsistent with statutory authority, adopt alternatives to litigation such as arbitration, mediation, and minitrials.[2] The various techniques for resolving disputes without resort to full litigation or adjudication are referred to as Alternatives Means of Disputes Resolution, or ADR.

In the sphere of administrative rulemaking, similar trends have developed. In recent years, several agencies have experimented with a technique referred to as negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule before it is published for notice and comment in accordance with the Administrative Procedure Act.[3] ACUS has been instrumental in promoting such experimentation through its Recommendations 82-4 and 85-5, both of which are entitled "Procedures for Negotiating Proposed Regulations."[4]

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1/ See, e.g., Harter, Points On A Continuum: Dispute Resolution Procedures and the Administrative Process, Report to the Administrative Conference of the United States (June 5, 1986).

2/ ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution", 1 C.F.R. § 305.86-3.

3/ See, Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

4/ 1 C.F.R. §§ 305.82-4 and 85-5. See also, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 C.F.R. § 305.84-4.

A key figure in the effective working of ADR and negotiated rulemaking is the "neutral" who generally presides at the proceedings and attempts to assist the parties in reaching a negotiated resolution or, in the case of arbitration, issues a decision on the matter in dispute. The various types of ADR neutrals may be summarized as follows:

Minitrial Neutral Advisors. "A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case."[5/] In some (but not all) minitrials, a "neutral advisor" participates in the minitrial and subsequent efforts to settle the dispute. Typically, the neutral advisor is a private individual who is selected by the parties in dispute, namely the government agency and the private party or parties engaged in litigation or adjudication with the government. The role of the neutral advisor varies, but his duties may include presiding at the hearing, questioning witnesses, acting as a mediator during negotiations between the representatives of the litigants, and rendering an advisory opinion to the parties. In no event does the neutral advisor render a decision that is binding on either party to the minitrial.

Mediators. A mediator is simply a neutral third party who attempts to assist parties in negotiating an agreement. A mediator has no authority to make any decisions that are binding on either party.

Arbitrators. Arbitration is another form of litigation or adjudication, without some of the formal trappings. An arbitrator is a neutral third party who issues a decision on the arbitration issues after receiving evidence and hearing arguments from the parties. The arbitrator's decision may or may not be binding. Arbitration may be voluntary, in which the parties agree to resolve the issues in dispute through arbitration, or it may be mandatory, in which a statute or contract specifies arbitration as the exclusive means for resolving disputes.

Convenors-Facilitators for Negotiated Rulemakings. Negotiated rulemakings generally proceed in two phases. In the first phase, a "convenor" studies the issues presented by the proposed regulation, attempts to identify the interested parties, and then advises the agency regarding the feasibility of convening the interested parties in an attempt to negotiate a proposed regulation. If the agency decides to go forward with negotiated rulemaking, the facilitator then meets with the interested parties and attempts to mediate their differences and develop a proposed rule. Under the concept put forward by the ACUS recommendations, the

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5/ ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3.

proposed rule developed through this process is then published for notice and comment pursuant to Section 553 of the Administrative Procedure Act. The convenor and facilitator may be, and often is, the same person or persons. The convenor/facilitator has no authority to make any decisions that are binding on the interested parties to the negotiated rulemaking or the agency promulgating the rule.

One of the by-products of the movement toward ADR and negotiated rulemaking is the need for agencies to develop methods for identifying qualified neutrals and acquiring their services. This process involves a number of issues that will be explored in this report. Among those issues are the following:

1. Qualifications. An agency dispute or rulemaking may involve technical issues arising under a complex regulatory scheme. How can agencies insure that neutrals that are hired to promote negotiation of settlements are qualified to assist the parties in sorting through such issues? Are technical expertise and substantive knowledge required, or do generic mediation skills suffice?

2. Procurement procedures. Statutes and regulations governing procurement of services by federal agencies require competition and specify a series of procedural steps for ensuring that competition is maximized. In some cases, these procedures may be inconsistent with the agency's need for expedition in acquiring the services of an outside neutral. Are there other ways in which agencies can acquire neutrals' services expeditiously within the competitive system mandated by statute and regulation?

3. Delegation. Most neutrals lack authority to render a decision that is binding upon either the agency or private parties. However, in the case of binding arbitration, questions continue to be raised about whether decisions delegated to executive agencies by Congress can be re-delegated to private parties for binding resolution. What are the potential "delegation" issues with respect to binding forms of ADR, particularly arbitration?

4. Long-term structural issues. The universe of neutrals who have specific experience in the experimental forms of ADR and negotiated rulemaking is presently very small. If the use of such techniques by agencies expands, how can agencies broaden the base of individuals or organizations who are available and are experienced in the arbitration/mediation/facilitation process? Should federal agencies develop a centralized roster of neutrals from which all agencies could draw? To what extent should the federal government utilize and

expand the capabilities of government employees in dispute resolution?

This report will explore these and other issues, drawing heavily upon the experience of agencies to date.

II.

ESTABLISHING QUALIFICATIONS

A. Potential Criteria

The qualifications required to serve as a neutral vary depending upon the nature and complexity of the issues, the type of dispute resolution technique employed, and the size and importance of the dispute or regulation to be negotiated. In many cases, seeking an ideal combination of qualifications and experience would unduly limit the pool of individuals available to serve as neutrals. For example, only a handful of private parties have actual experience in convening or facilitating the negotiation of environmental regulations. Thus, in determining the criteria applicable to selection of a neutral, agencies will need to balance their desire for competence and experience against the need to avoid exclusivity.

There are various levels of training and experience that could be considered adequate to perform the function of a neutral in a given case:

1. General dispute resolution experience. Some of those contacted in connection with this report expressed the view that "mediation is mediation" -- that is, a person who has skill and experience in mediating disputes can perform the role of a neutral, regardless of the substantive issues involved. The Federal Mediation and Conciliation Service ("FMCS") has responsibility for mediating labor disputes under the Labor-Management Relations Act of 1947.[6/] But FMCS labor mediators have performed a variety of other dispute resolution functions. Recently, an FMCS mediator successfully acted as convenor of a negotiated rulemaking for the Federal Aviation Administration ("FAA") in

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6/ 29 U.S.C. § 173.

developing proposed regulations concerning flight and duty time for aircraft crews.[7/]

2. Experience in specific ADR techniques. As noted, agency experience with ADR and negotiated rulemaking has been relatively limited to date. If the selection of neutrals is confined to persons with direct experience in these techniques, the fear of exclusivity will become a reality.

3. Technical expertise. There is no denying that it would be useful in arbitrating a dispute regarding licensing of a pesticide under the Federal Insecticide Fungicide and Rodenticide Act to have a degree or some formal experience in chemical engineering. Similarly, knowledge or experience in the construction industry would aid a neutral in mediating the settlement of a construction dispute. Depending upon the nature of the issues involved, it may or may not be necessary to have such technical expertise in order to understand and communicate the conflicting positions of the disputants in a way that will promote settlement.

4. Knowledge of the statutory/regulatory scheme. Particularly in regulatory negotiation, familiarity with the legal framework in which the regulation is being developed may be an important criterion in selecting a neutral. In the arbitration setting, the Supreme Court upheld mandatory arbitration of Medicare claims by employees of private insurance carriers in part on the basis that agency regulations required such arbitrators to possess "a thorough knowledge of the Medicare program and the statutory authority and regulations upon which it is based . . . ."[8/]

5. "Absolute Neutrality". Screening out potential neutrals who have a personal or financial interest in the proceeding will always be an important step

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[7/] See Harter, Regulatory Negotiation: The Experience So Far, Resolve, Conservation Foundation 6-7 (Winter 1984); Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 712-26.

[8/] Schwieker v. McClure, 456 U.S. 188, 199 (1982) (emphasis in original).

in the selection process. But some agencies have gone beyond such basic conflict-of-interest considerations by insisting upon neutrals who have no past or present affiliation with any side of the controversy. Such insistence upon "absolute neutrality" could be an extremely limiting qualification, particularly since many of the persons who are most knowledgeable in a given regulatory scheme have been affiliated with either government or private industry, and sometimes both.

B. Agency Experience

1. Minitrials

a. Corps of Engineers

The agency that has had the most experience with minitrials is the U.S. Army Corps of Engineers.[9/] In its Engineer Circular No. 27-1-3, dated September 23, 1985, the Corps has set forth detailed guidelines for the use of minitrials, together with a model "Minitrial Agreement".[10/] The Engineer Circular specifies that the minitrial neutral advisor "must be an impartial third party with experience in government contracting and litigation."[11/] In the two minitrials that the Corps has successfully completed to date, it has used a retired judge from the United States Court of Claims and a university professor of government contracts law as neutral advisors. Corps attorneys who are responsible for the minitrial program have stated their desire, at least at the initial stages of the minitrial program, to utilize neutral advisors who have no present or past affiliation with either the government or private construction contractors. This means that in the short term, the pool of persons who have the requisite neutrality and government contracts expertise to serve as neutral advisors for Corps of Engineers minitrails will be limited.

b. Department of Justice

On June 19, 1986, the Commercial Litigation Branch of the Department of Justice issued a "Policy Concerning the Use of

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9/ See Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 (August 1985).

10/ A copy of the Corps Circular, together with the model agreement, is reproduced as Appendix A to this Report.

11/ Engineer Circular No. 27-1-3 at 3.

Mini-trials,"[12] which encouraged Branch attorneys "to assess cases assigned to them for the potential for resolution by mini-trial . . . ."[13] The Policy provides that, where appropriate, the parties may agree upon a neutral advisor to assist the management officials in resolution of the dispute. With respect to the qualifications of the neutral advisor, the Policy states as follows:

> The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial.[14]

c. Department of the Navy

The Department of the Navy has embarked upon the experimental use of minitrials to resolve disputes arising under Navy contracts. The Navy has expressed a preference for utilizing administrative judges from the Armed Services Board of Contract Appeals ("ASBCA") to serve as neutral advisors. The ASBCA is one of the forums designated by the Contract Disputes Act of 1978[15] to conduct hearings and render decisions on disputes arising under government contracts. However, in its first minitrial of a contract dispute, the Navy utilized the services of the same university professor of government contracting who had earlier been employed by the Corps of Engineers as a neutral advisor.

d. Department of Energy

The Energy Department has conducted a minitrial on a contract claim in which the neutral advisor was a former ASBCA judge who was practicing government contracts law with a private firm.[16]

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[12] Copy of this Policy is reproduced as Appendix B to this Report.

[13] Commercial Litigation Branch Policy Concerning the Use of Mini-trials (June 19, 1986) at 1.

[14] Id. at 3.

[15] 41 U.S.C. § 601 et seq.

[16] It is also possible to conduct a minitrial without utilizing a neutral advisor at all. This was done to resolve a contract dispute between the National Aeronautics and Space Administration and TRW Inc. See "Minitrial Successfully Resolves NASA-TRW Dispute," The Legal Times (September 6, 1982), p. 19.

2. Negotiated Rulemakings

Neutrals for "reg neg" procedures have come from several sources. In some cases, agencies have tapped the private sector for convenors and facilitators. In other cases, government personnel, including an FMCS mediator and a staff attorney for the rulemaking agency, have performed these functions.

a. Department of Interior

In January 1986, the Department of Interior issued a Request for Proposals for convening and facilitation services for negotiated rulemaking on air quality regulations for the California Outer Continental Shelf ("OCS"). The evaluation factors for this award are detailed, and include specific ability and achievement as a facilitator, knowledge of the Outer Continental Shelf Oil and Gas Program and the Outer Continental Shelf Lands Act, understanding of the needs of the Department of Interior and other parties to the rulemaking, general dispute resolution skills, and "practical knowledge of the convening/facilitating process."[17/]

b. Council on Environmental Quality

In April 1986, the Executive Office of the President, on behalf of the Council on Environmental Quality ("CEQ"), issued a Request for Proposals ("RFP") for an indefinite quantity contract to supply various types of services in connection with negotiated rulemaking, including convening, facilitating, documenting, resource support, analytic support, and training. The RFP specified that the overall purpose of the contract is "to assist EPA, CEQ, and other participating agencies with joint projects in the area of regulatory negotiations."[18/] In setting forth evaluation criteria for award, the solicitation states that technical proposals will be evaluated in part according to "the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work."[19/]

One of the successful offerors in the CEQ procurement, the Conservation Foundation, proposed a team approach in which each regulatory negotiation would be staffed by a "senior dispute resolution professional" and appropriate technical personnel

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17/ Solicitation No. 3292, January 4, 1986, § M-2. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix C to this Report.

18/ Solicitation No. EOPOA-86-05, April 10, 1986, § C.2, p. 13.

19/ Id. § M.1. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix D to this Report.

selected in consultation with the agency.[20] The Foundation's proposal provided the following rationale for combining mediation and technical expertise:

> It is hard to imagine an environmental mediator being effective unless he or she has some expertise in the substance and the history of the issues at hand and, therefore, some understanding of the implications that various "process" choices have on the parties, e.g. in helping the affected interests decide how best to represent themselves, how to define the scope of issues to be negotiated, or what protocols to adopt. The stability both of the process and of a consensus agreement, if reached, is increased when the parties make these decisions in a well informed way.[21]

During negotiations leading up to contract award, the agencies (CEQ and EPA) took the position that inclusion of technical personnel on the regulatory negotiation team would not be acceptable. The rationale for the agencies' position was that while dispute resolution process skills are critical to the success of a negotiated rulemaking, technical expertise is not only unnecessary but, in some cases, counterproductive. Officials in charge of EPA's negotiated rulemaking project believe that if the negotiating group feels that it needs the assistance of a technical expert, the group itself should select that expert.

3. Summary

From the foregoing, it appears that during the experimental stages of ADR and negotiated rulemaking, agencies have sometimes opted for rather restrictive definitions of the qualifications required for neutrals. In some of the early regulatory negotiations, agencies have sought neutrals with a combination of skills that only very few individuals possess, including specific experience in facilitation of negotiated rulemakings and technical expertise in the subject matter of the rulemaking proceeding. In some cases, organizations have been able to respond to these demanding requirements through a "team approach," in which the skills of dispute resolution personnel and technical experts are combined. The agency that has the most experience in regulatory negotiation, the EPA, has consciously eschewed technical expertise as a criterion for selection of neutrals and has emphasized generic dispute resolution skills as the controlling factor.

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[20] Conservation Foundation, Technical Proposal EOPOA-86-05 -- Regulatory Negotiation Support Services, May 28, 1986, p. 7.

[21] Id.

In the case of the Corps of Engineers minitrial program, the Corps has consciously selected neutral advisors who are both "truly neutral" and expert in government contracts law applicable to the disputes. One goal of this approach is to isolate the minitrial process from political criticism at the early stages of its development. As the program progresses and the use of minitrials becomes more routine, the qualifications may be loosened, thus broadening the pool of available neutrals.

C. Qualifications Required by Government Dispute Resolution Agencies

1. Federal Mediation and Conciliation Service

The basic statutory charter of FMCS is set forth in Section 203 of the Labor-Management Relations Act of 1947:

> It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.[22/]

FMCS employs approximately 240 mediators, stationed at 75 separate locations. The basic qualification for employment as an FMCS mediator is seven years experience in collective bargaining and/or labor-management relations. FMCS operates an intensive in-house training program for its mediators.

2. Community Relations Service

The function of the Community Relations Service ("CRS") is:

> To provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.[23/]

22/ 29 U.S.C. § 173. Under the Health Care Amendments of 1974, FMCS is authorized to provide conciliation services to avert or minimize work stoppages in the health care industry. 29 U.S.C. § 183.

23/ 42 U.S.C. § 2000g-1.

CRS employs a total of 60 to 70 "conciliators" in its ten regional offices. There are no specified qualifications for entry-level conciliators, and most of the training is on-the-job.

D. Rosters Maintained By Private Organizations

1. American Arbitration Association ("AAA")

The AAA maintains panels from which arbitrators may be chosen by parties who have agreed to arbitrate a dispute or disputes. The AAA has established separate panels of arbitrators for use in various types of commercial disputes. For example, for disputes arising under construction contracts, the AAA maintains a Construction Industry Panel. Members of the Construction Industry Panel are persons recommended by the National Construction Industry Arbitration Committee as "qualified to serve by virtue of their experience in the construction field."[24/]

Federal agencies have from time to time used the AAA as a resource in establishing arbitration programs. For example, under the terms of the Superfund Statute, disputes arising out of claims against the fund are resolved by a Board of Arbitrators appointed by the President.[25/] The Act provides that each member of the Board "shall be selected through utilization of the procedures of the American Arbitration Association."[26/]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") authorizes the Environmental Protection Agency to use research data submitted by one manufacturer to register pesticides submitted by another manufacturer. The Act further provides that a manufacturer who depends upon data submitted by another firm to obtain registration must compensate that other firm, and that any disputes over the amount of compensation will be resolved through binding arbitration under the auspices of FMCS.[27/] The statute requires that FMCS appoint an arbitrator from a roster of arbitrators maintained by the Service, and that the procedures and rules of the Service shall be applicable. In turn, FMCS regulations have adopted the roster of arbitrators maintained by the AAA to resolve FIFRA compensation disputes and have designated that the AAA rules and procedures shall be used.[28/] The Supreme

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24/ American Arbitration Association, Construction Industry Arbitration Rules (January 1, 1986) at 3.

25/ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9612(4)(A).

26/ Id.

27/ FIFRA, § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(C)(1)(D)(ii).

28/ 29 C.F.R. § 1440.1.

Court upheld the FIFRA arbitration provision against constitutional challenge in Thomas v. Union Carbide Agricultural Products Co.[29/]

2. Center for Public Resources ("CPR")

CPR is a private non-profit organization that is devoted to promoting the use of ADR to resolve commercial disputes, as well as disputes between private parties and the government. In furtherance of this purpose, CPR maintains a list of distinguished persons who are available to serve as mediators, arbitrators, or neutral advisors in resolving disputes through ADR. The CPR roster is a blue ribbon group consisting largely of retired federal judges, former cabinet officers, and other dignitaries.

E. Conclusion

Because the substantive and procedural aspects of ADR vary significantly from case to case, it would be virtually impossible to develop a generalized set of qualifications applicable to all dispute resolution proceedings. Rather, agencies will need to take a practical approach to the selection of neutrals, balancing the demands of the specific ADR proceeding against the long-range need to develop a broader base of experienced neutrals from which to draw. While the diversity of proceedings makes specific advice hazardous, certain general guidelines can be gleaned from agency experience to date:

(1) Generic dispute resolution skills are an important prerequisite in most cases; insistence upon specific experience in the ADR process being pursued, however, many unnecessarily exclude persons whose general mediation skills are transferable to other contexts.

(2) Familiarity with the applicable statutory and regulatory scheme is generally desirable, particularly in negotiated rulemaking.

(3) Technical expertise should be required only when the substantive issues are so complex that the neutral could not effectively understand and communicate the parties' positions without in-depth technical knowledge.

(4) Avoiding conflicts of interest is important, but requiring "absolute neutrality" may unduly restrict the field of potential neutrals to retired judges or university professors.

29/ ___ U.S. ___, 105 S.Ct. 3325 (1985).

III.

PROCUREMENT ISSUES

A. The Federal Acquisition System

In some circumstances, it may be possible for agencies to retain neutrals as experts, consultants, or special employees.[30] In most cases, however, neutrals' services must be acquired through contracting with the private individual or organization.

Federal procurement of goods and services is a highly regulated form of contracting. The principal statutes are the Armed Services Procurement Act,[31] which governs military procurements, and the Federal Property and Administrative Services Act of 1949,[32] which governs procurements by civilian agencies. These statutes have undergone substantial revision in recent years, principally by the Competition in Contracting Act of 1984 ("CICA").[33] CICA mandates that as a general rule, federal agencies conducting a procurement for property or services "shall obtain full and open competition through the use of competitive procedures . . . ."[34] Prior to CICA, the Armed Services Procurement Act and Federal Property and Administrative Services Act expressed a preference for formally advertised procurements, in which competitors submit sealed bids and the lowest "responsive and responsible" bidder wins the contract. The prior statutes provided that agencies could negotiate a contract rather than engage in formal advertising if one of 17 exceptions were present; one of those exceptions was contracts for "personal or professional services."[35]

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[30] See discussion in Section III.D.4., infra.

[31] 10 U.S.C. § 2201 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[32] 41 U.S.C. § 251 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[33] Pub. L. No. 98-369, Title VII, 98 Stat. 1175. Other major procurement reform statutes of recent vintage include the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, and the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525.

[34] Id., § 303(a)(1).

[35] Armed Services Procurement Act, 10 U.S.C. § 2304(a)(4) (1982).

CICA mandates full and open competition in any form, whether it be by formal advertising or negotiation.[36] The Act further provides that agencies may use procedures other than competition only when one of seven specific exceptions exists. These exceptions include situations when "the property or services needed by the executive agencies are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." or "the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals . . . ."[37] Procurements under one of the seven exceptions to competition are referred to as "sole source." CICA eliminated the former exception for procurements of personal and professional services.

Under the Office of Federal Procurement Policy Act,[38] both military and civilian agency procurements are governed by a unified regulatory system, the Federal Acquisition Regulation (FAR").[39] The FAR sets forth detailed procedures for conducting federal agency procurements. For procurements over $10,000, agencies generally must publish a synopsis of the proposed procurement in the Commerce Business Daily ("CBD") at least 15

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[36] CICA now refers to formal advertising as "sealed bids." Under the statute, sealed bids are appropriate in the following circumstances:

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid.

41 U.S.C. § 253(a)(2)(A); 10 U.S.C. § 2304(a)(2)(A). See also, 48 C.F.R. § 6.401(a)(1)-(4).

[37] Id., § 303(c)(1) & (2).

[38] 41 U.S.C. § 405(a).

[39] 48 C.F.R., Chapter 1, Parts 1-53. Each agency has promulgated supplements to the FAR to deal with that agency's unique acquisition problems. See, e.g., DOD FAR Supplement, 48 C.F.R. Chapter 2.

days in advance of issuing the solicitation.[40] After the CBD synopsis, agencies must allow at least 30 days response time for receipt of bids or proposals.[41] The agency's evaluations of bids or proposals usually takes a minimum of 30 days, although no minimum time is specified in the regulation. Thus, a competitive procurement under the procedures specified by FAR can be expected to take a minimum of two to three months.

The FAR also specifies procedures for sole source procurements -- that is, non-competitive procurements conducted under one of the seven exceptions established by CICA. In order to conduct a sole source procurement, the agency's contracting officer must provide a written justification for negotiating with only one source and must obtain the approval of his superiors in the procurement chain, at an increasingly higher level depending upon the size of the procurement.[42] The justification must contain, among other things, an identification of the statutory authority for proceeding on a basis other than full and open competition; a demonstration that "the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited;" a description of efforts made to ensure solicitation of offers "from as many potential sources as practicable;" and a determination that the anticipated cost of the government will be "fair and reasonable."[43] In addition, the contracting officer must conduct a "market survey" to determine whether other qualified sources capable of satisfying the government's requirement exists.[44] The written justification for a sole source procurement is public information that is available for inspection by disappointed bidders, among others.[45]

The competitive requirements of CICA are enforceable through a number of different actions available to disappointed bidders or

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[40] 48 C.F.R. § 5.201(a) and § 5.203(a). The requirement for a CBD synopsis is imposed by the Small Business Act, 15 U.S.C. § 637(c) and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416. The Continuing Resolution for Appropriations FY1987 contains an exemption for solicitations between $10,000 and $25,000 when the agency reasonably expects to receive at least two offers from responsive and responsible offerors. Pub. L. No. 99-500, October 18, 1986, Title IX, Section 922.

[41] 48 C.F.R. § 5.204(b).

[42] 48 C.F.R. §§ 6.303-2, 6.304.

[43] 48 C.F.R. § 6.303-2(a).

[44] 48 C.F.R. §§ 6.303-2(a)(8), 7.101.

[45] 48 C.F.R. § 6.305(1).

offerors. An interested party who alleges a violation of a procurement statute or regulation may file a protest with the Comptroller General.[46] When such a protest is filed, the agency must suspend award or performance of the contract until the protest has been decided, unless the head of the agency finds that award or performance is warranted because of "urgent and compelling circumstances."[47] For procurements of automatic data processing equipment, such protests, with similar suspension provisions, may be filed with the General Services Board of Contract Appeals.[48] In addition, under the Federal Court Improvements Act of 1982, disappointed bidders or offerors may seek to enjoin award of a contract allegedly tainted by illegal action by filing suit in the U.S. Claims Court.[49] Traditionally, federal district courts have also entertained suits to enjoin the award or performance of federal contracts when the agency allegedly violated its mandate to promote full and open competition.[50]

B. Issues in Contracting for Neutrals' Services

The overriding requirement of free and open competition, together with the detailed acquisition procedures prescribed by the FAR, raise a number of issues when agencies seek to acquire the services of neutrals. The first and most obvious issue is time. For any procurement over $10,000, a notice of the solicitation must be placed in the CBD, the agency must wait 15 days before issuing the solicitation, and 30 days must pass before bids or offers can be received. When the time for evaluating proposals is added, the process consumes a minimum of two to three months. Practically speaking, most fully competitive negotiated procurements take several months. In the case of the competitive procurement for convening and facilitating services conducted by the Department of Interior in connection with the California Outer Continental Shelf rulemaking, the entire procurement process, from development of the terms of the solicitation through the award of the contract, took over a year.

The protracted nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated

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[46] 31 U.S.C. § 3552.

[47] 31 U.S.C. § 3553.

[48] 40 U.S.C. § 759(h).

[49] 28 U.S.C. § 1491(a)(3).

[50] See, Control Data Corporation v. Baldrige, 655 F.2d 283 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981); Merriam v. Kunzig, 476 F.2d 1233 (3rd Cir.), cert. denied, 414 U.S. 911 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

rulemaking. The very purpose of ADR is to avoid the delays inherent in the normal litigation process. Introducing several months of delay while the services of a neutral are procured could be viewed as self-defeating. Similarly, a lengthy acquisition process for the convenor or facilitator may be unacceptable when an agency is seeking to expedite the development of rules affecting the environment or health and safety.

A second problem is that, as discussed above, the requirement of "full and open competition" may be inconsistent with the agency's need to acquire the services of a neutral who meets a number of specific criteria. Particularly at the formative stages of ADR and negotiated rulemaking, there are only a handful of individuals and organizations that have the combination of specific experience in the procedure plus technical expertise in the substantive issues. To the extent such qualities are important to successful resolution of the issue, the field of available neutrals may be very limited, until further experience results a development of a broader base. In the case of neutral advisors for minitrials, the fact that the neutral is generally selected by agreement between the private party and the government may mean that there is only one "qualified source." Yet the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.[51/]

A third issue arises with respect to the consideration of price in the evaluation of proposals. CICA mandates that the contract will be awarded to the "responsible source whose proposal was most advantageous to the United States, considering only price and the other factors included in the solicitation."[52/] One of the principal purposes of full and open competition is to obtain the lowest available price for the federal government.[53/] The requirement of some form of price competition may be inconsistent with the need to obtain the services of neutrals who have the requisite experience and reputation, as well as the neutrality, to gain the confidence of the parties and bring delicate negotiations

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51/ In addition, the Comptroller General has stated that sole source procurements under CICA will be closely scrutinized. Daniel H. Wagner Associates, Inc., B-220633, 86-1 CPD ¶ 166 (Feb. 18, 1986); WSI Corp., B-220025, 85-2 CPD ¶ 626 (Dec. 4, 1985).

52/ Pub. L. No. 98-369, § 2711(d)(4), 41 U.S.C. § 253(b)(d)(4).

53/ See Control Data Corporation v. Baldrige, supra note 50, 655 F.2d at 295.

to a satisfactory conclusion.[54] The FAR is at least of some help in this regard because it recognizes that price competition may not be appropriate in certain circumstances, including acquisitions of "professional services":

> While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.[55]

Finally, some of those contacted in connection with this study expressed concern that the services of neutrals could be considered "personal services." As a general rule, the government must secure personal services through employment rather than contract. Agencies are not permitted to award personal services contracts in the absence of specific statutory authorization.[56] These restrictions do not appear to be a significant concern under the regulatory definition of "non-personal services contract":

> [A] contract in which the personnel rendering services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.[57]

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[54] Acquisition of the services of neutrals is at least roughly parallel to procurement of architect/engineer services, which is governed by the Brooks Act. 40 U.S.C. §§ 541-44. The Brooks Act provides that "the agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government." 40 U.S.C. § 544(a) (emphasis added).

[55] 48 C.F.R. § 15.605(c).

[56] 48 C.F.R. § 37.104(a), (b).

[57] 48 C.F.R. § 37.101.

Since neutrals by definition act independently and are subject to no one's supervision, their services can generally be regarded as "non-personal."[58/]

C. Case Studies

1. Corps of Engineers Minitrials

The minitrial has several distinctive features that dictate the procurement procedures to be followed. First, a minitrial is by definition an extremely abbreviated hearing before senior executives of the two parties and the neutral advisor, if one is employed. Under the Corps' model minitrial agreement, the proceeding is scheduled to last two days, with a limited period for negotiating a settlement thereafter.[59/] Second, the government and the private party to the dispute generally share the cost of the neutral advisor's services.[60/] Third, the agency and the private party must agree on the selection of the neutral.

Given the first two factors (the abbreviated nature of the minitrial and equal sharing of costs by the private parties), acquisition of the services of the neutral advisor should seldom if ever cost the government more than $10,000, at least at current prices. This means that some of the formalities of the procurement process can be dispensed with. Procurements under $10,000 need not be advertised in the CBD.[61/] In addition, the low-dollar amount of neutral advisor acquisitions means that agencies can avail themselves of the small purchase procedures (under $25,000) of FAR Part 13.1. These procedures allow the agencies to procure on a more informal basis, such as soliciting quotations orally rather than through a formal request for proposals. The Corps used the small purchase procedures, without a CBD announcement, in

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58/ See 61 Comp. Gen. 69, 72-74 (1981) (agency authorized to contract for legal services because law firm acted as an independent contractor and was not subject to agency supervision).

59/ Engineer Circular No. 27-1-3 at A-8. The first Corps minitrial required two days of hearings while the second lasted approximately three days. See Army Engineers Succeed in First Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 3 at 1 (March 1985); Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 at 1 (August 1985).

60/ Engineer Circular No. 27-1-3 at A-4, ¶ 6.

61/ 48 C.F.R. § 5.201(a).

acquiring the services of neutral advisors for both of its prior minitrials. The Department of the Navy used the same procedure in retaining a neutral advisor for its minitrial of a cost allowability dispute.

2. Department of Interior OCS Negotiated Rulemaking

As noted above, the Department of Interior used full competitive procedures to acquire convening/facilitating services for regulatory negotiation of environmental rules applicable to the California OCS development. This involved the development and issuance of a 62-page request for proposals, which detailed the nature and scope of the services to be provided as well as the evaluation factors for award. An announcement of the solicitation was published in advance in the CBD. Seven firms submitted offers on the solicitation, followed by detailed evaluation and negotiations. Ultimately, a cost-reimbursement type contract was awarded to the Mediation Institute of Seattle, Washington.

The evaluation factors for award in the solicitation focused upon the experience and technical expertise of the offerors. Points were assigned to each of the five separate categories, comprising experience (30 points), understanding of the problem (25 points), dispute resolution skills (25 points), technical approach (10 points), and personnel staffing (10 points). No numerical weight was assigned to the cost proposal. The solicitation stated as follows:

> In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee.[62/]

The solicitation went on to state that the cost proposal was required to reflect a "realistic and reasonable approach" to the contract.

[62/] Solicitation No. 3292, § M-3, pp. 66-62. See 48 C.F.R. § 15.605(d).

3. CEQ Procurement of Regulatory Negotiating Services

a. Historical Background

EPA has been one of the most active agencies in promoting regulatory negotiation. EPA has several "reg negs" in process and has used the procedure to complete two sets of regulations: nonconformance penalties under Section 206(g) of the Clean Air Act and pesticide exemptions under Section 18 of the FIFRA.[63] In the case of the nonconformance penalties rulemaking, EPA employed the services of ERM-McGlennon Associates as the convenor/facilitator.[64] In the second rulemaking, regarding pesticide exemptions, ERM-McGlennon Associates was used as the convenor, but the facilitator was an employee of EPA's Office of General Counsel. In acquiring the services of the outside convenor/facilitator, EPA utilized a basic ordering agreement, which is a form of contracting described in FAR Subpart 16.7.

b. The CEQ Procurement

In April 1986, CEQ undertook to acquire convening, facilitating and related services for use by EPA in its ongoing regulatory negotiation project, and by other agencies interested in launching similar projects. CEQ did so pursuant to its statutory role as a clearinghouse for hiring experts and consultants in furtherance of environment policy.[65] The procurement was conducted by a contracting officer for the Executive Office of the President ("EOP"). The EOP synopsized the solicitation in the CBD, and received some 200 requests for the RFP. Ultimately, however, only four organizations submitted offers.

The RFP solicited proposals on seven different categories of convening, facilitating, and related services.[66] The RFP contemplated the award of one or more indefinite quantity contracts for a one-year period, plus two option years. Under the terms of the RFP, the agency could have awarded separate contracts for each of the seven different types of services. In fact, one contract was awarded for six categories of services to the Conservation Foundation, a nonprofit environmental research organization, and a separate contract for the seventh category was awarded to the

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[63] See Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 726-745.

[64] Mr. McGlennon was an experienced environmental mediator and former administrator of EPA Region 1.

[65] 42 U.S.C. § 4343.

[66] These services included convening, facilitating, documenting, resource support, analytic support, and training.

National Institute for Dispute Resolution ("NIDR"). While the RFP described the regulatory negotiation project as arising out of the program initiated by EPA, the terms of the RFP made clear that the services being procured were for the purpose of assisting EPA, the Office of Environmental Quality ("OEQ") and "other participating agencies" with joint projects in regulatory negotiations.

c. The Request for Proposals

Under the terms of the RFP, offerors were to propose a roster of professionals who would be available to perform the various services called for under the contract. These categories included "professional," defined as convenors, facilitators, analysts, and trainers, and "administrative personnel," defined as documentors, direct support staff, resource support staff, and management/ clerical positions. For each category and subcategory of personnel, the offeror was to propose a base period hourly rate, and rates for the first and second options under the contract. The offerors were also required to propose percentage ceiling rates for such items as fringe benefits, overhead, general and administrative expense, and profit/fee. As required by the regulations governing indefinite quantity contracts,[67] the RFP specified a minimum order quantity of $5,000 and maximum of $175,000.

The evaluation section of the RFP made it clear that each of the seven discrete categories of services (i.e., convening, facilitating, document support, etc.) would be evaluated separately. The EOP reserved the right to award separate contracts for each category or more than one contract for a given category. The evaluation factors were stated as follows:

> The Technical proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work . . . . The Technical Proposal will also be rated as to the approach, methodology, and accuracy of Work Plan for the Benchmark Task Order.
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> The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.[68]

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[67] 48 C.F.R. §16.504(a)(1).

[68] Solicitation No. EOPOA-86-05, § M.1, p. 85.

The RFP contained a "benchmark task order" describing a hypothetical EPA negotiated rulemaking[69] Each offeror was required to submit a work plan outlining the offeror's proposed approach, staffing, management plan, and schedule for this hypothetical task order.

Under the terms of the indefinite quantity contract, work is commissioned on particular regulatory negotiations through the issuance of task orders. The task order defines the scope of the work required, the estimated period of performance, and the estimated level of effort.[70] Within the time period specified in each task order (expected to be a week or two), the contractor is required to submit a proposed work plan outlining the contractor's objectives, approach, statement of work, deliverables, staffing arrangements, management plan, schedule, and cost/price assumptions.[71] The contractor is also required to submit a separate cost analysis providing a breakdown of costs and specifying the type of contract desired, i.e., firm fixed-price, cost plus fixed-fee, or labor hour. It is contemplated that the agency can negotiate with the contractor regarding each aspect of the work plan, including the personnel who are proposed. The RFP specifically states that the government reserves the right "to award the task orders in any order, or not to award."[72]

In the eyes of the EOP, CEQ, and EPA, the principal advantage to this indefinite quantity contract is its flexibility. Rather than having to go through a fully competitive process for each and every regulatory negotiation, the EOP conducted a competitive procurement for the initial indefinite quantity contract. Under the terms of the contract, task orders can be issued and negotiated with the contractor for each separate rulemaking within a matter of weeks, thus shortening the period required to engage the services of a convenor or facilitator. By engaging groups like the Conservation Federation and National Institute for Dispute Resolution, CEQ, EPA, and other agencies have ready access to the rosters of experienced professionals that those groups have retained as employees or subcontractors.

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[69] The Benchmark Task Order is reproduced as Appendix E to this Report.

[70] Solicitation No. EOPOA-86-05, § H.9, p. 27.

[71] The Benchmark Task Order in the RFP states that a firm fixed-price order is anticipated.

[72] Solicitation No. EOPOA-86-05, § H.9, p. 28.

4. Use of Government "Neutrals"

Another possibility for obtaining services of neutrals is to utilize government personnel. This has been done in at least two cases: the FAA negotiated rulemaking regarding flight and duty time for aircraft crews and the EPA's regulatory negotiation regarding pesticide exemptions. In the former case, a mediator from FMCS was employed as the convenor/facilitator; in the latter case, an employee from the EPA's Office of General Counsel was used. In addition, OSHA is now undertaking its second negotiated rulemaking with the intent of using an FMCS mediator.[13/]

D. Evaluation of Techniques

1. Full Competitive Procurement

The most straightforward approach to acquiring the services of a neutral is that utilized by the Department of Interior for the California OCS rulemaking. The agency conducted an open competition for the contract in which seven offerors submitted proposals. The agency also ensured that a qualified source would be selected by specifying detailed technical evaluation factors, and making these technical factors the exclusive basis for evaluation of the proposals. By obtaining cost proposals but not making cost an evaluated factor, the agency avoided potential problems inherent in selecting a provider of professional services on the basis of cost rather than professional experience or expertise.

However, the principal disadvantage of a fully competitive procurement is the time and effort required, which in most cases make full competition impractical for an individual dispute resolution or regulatory negotiation. From start to finish, the Interior Department procurement of convening and facilitating services took over a year. The successful offeror submitted a detailed, two-volume proposal that took months to prepare and was estimated to cost several thousand dollars. Thus, while fully competitive procurements are the most desirable and compliant with statutory requirements, they may be impractical when time is of the essence.

2. Small Purchases

Use of the small purchase procedures provided for in FAR Subpart 13.1 should work for most procurements of neutral advisor services, and possibly in the case of small arbitrations and regulatory negotiations. As noted, in virtually all cases, contracts with minitrial neutral advisors should involve expenditure of

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[13/] In the past, agencies that have used FMCS mediators have paid a pro rata share of the mediator's salary through an inter-agency transfer of funds pursuant to the Economy Act, 31 U.S.C. § 1535.

under $10,000 by the government. Thus, no announcement in the CBD is required, and the streamlined procedures for small purchases can be utilized. In its two successful minitrials, the Corps of Engineers has contracted with the neutral advisor through a purchase order issued based upon an oral quotation. In each case, the purchase order was accompanied by a tripartite agreement among the neutral advisor, the government, and the private party to the dispute.[74/]

Even for small purchases, however, agencies are required to obtain competition "to the maximum extent practicable."[75/] Solicitations may be limited to one source only "if the contracting officer determines that only one source is reasonably available."[76/] However, unlike the procedures specified in Parts 6 and 7 of the FAR for larger procurements, sole source purchases under the small purchase procedures do not require a written determination by the contracting officer or approvals by senior procurement officials. In the case of minitrial neutral advisors, sole source procurements should be justified on the basis of the need for prompt action to effect a settlement, the limitations on the number of qualified sources, and the fact that the selection of the neutral advisor must be approved in advance by the private party to the dispute.

Similar factors may control the hiring of arbitrators and mediators -- i.e., joint selection and sharing of fees by the agency and private party to the dispute. In arbitrations or mediations of smaller disputes that take a few days to resolve, the small purchase procedures should be available for acquisition of the neutral's services.

3. Indefinite Quantity Contracts

As noted above, the indefinite quantity contract used by the CEQ to procure convening and facilitating services for the EPA and other agencies is a flexible procedure. Under the regulations, this type of contracting may be used when "the Government cannot predetermine . . . the precise quantities of supplies and services that will be required during the contract period . . . ."[77/] --

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74/ A redacted copy of the Agreement for Services of Neutral Advisor utilized in one of the minitrials is reproduced in Appendix F hereto.

75/ 48 C.F.R. § 13.106(b)(1).

76/ Id.

77/ 48 C.F.R. § 16.504(b)(1). See generally Virden, Indefinite Delivery Contracts, Government Contractor Briefing Papers No. 78-2, Federal Publications (April 1978).

precisely the situation that may exist when an agency embarks upon a regulatory negotiation project. Full and open competition, as required by CICA and the procurement regulations, takes place in response to the RFP for the indefinite quantity contract. Once the contract has been awarded, acquisition of services for each separate regulatory negotiation is done through the task order/ work plan procedure described above. The contractor can respond to each task order much more quickly than if full competitive procedures were required for each separate rulemaking.

Use of the indefinite quantity contract for this purpose raises several issues. First, the regulations specify that such contracts should be used only for "commercial or commercial-type products."[78/] "Commercial product" is defined as something that is "sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices . . . ."[79/] A "commercial-type product" is a commercial product that has been modified to meet some peculiar requirement of the government. A case could presumably be made that the mediation-type services provided by convenors and facilitators are also sold or traded in the commerical market. It is less clear whether such services are sold "to the general public" at "established catalog or market prices". Since the "commercial product" restriction is not mandatory, however, it should not pose an insuperable barrier to the use of indefinite quantity contracts for ADR-related services.

Second, the regulations require that an indefinite quantity contract specify a "minimum quantity" of the item to be procured, and further that such minimum quantity must be more than a "nominal" amount.[80/] This is necessary to avoid an illusory contract under which the government has no obligation to do anything in return for the contractor's agreement to fill orders.[81/] In the regulatory negotiation and ADR context, it is obviously difficult to specify a minimum quantity of services to be procured. In a somewhat parallel context, the Court of Claims upheld an indefinite quantity contract for various categories of

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78/ 48 C.F.R. § 16.504(b).

79/ 48 C.F.R. § 11.001.

80/ 48 C.F.R. § 16.504(a)(2).

81/ See Mason v. United States, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980), citing, Willard Sutherland & Co. v. United States, 262 U.S. 489, 493 (1923).

construction work where the "minimum quantity" specified in the contract was a payment of $5,000.[82/]

Third, the task order procedure specified in the RFP allows the agency and the contractor to negotiate the terms of each individual task order, including the personnel who will be assigned to a particular project and, presumably, the cost of those services. In the typical indefinite quantity contract for a commercial product sold at a catalog price, the agency issues an order for a given quantity and the contractor fills the order at the price specified in the contract. That price was, of course, established through competition for the initial contract. In the case of the EOP/CEQ procurement of convening and facilitating services, the mix of services, the personnel supplied to provide the services, and even the cost of the services (within the ceilings specified in the contract) are subject to negotiation for each individual task order. Both the government and the contractor have the right not to go forward with the particular task order if the detailed terms of the order and work plan cannot be agreed upon. This leaves the arrangement open to the criticism that each task order is in fact a separate procurement that should be conducted on a competitive basis, rather than through a de facto "sole source" process under the indefinite quantity contract.

A further problem in this regard may be that the service providers in each case are subcontractors to the organization that is performing the indefinite quantity contract. By allowing the agency and the contractor to negotiate the identity of the "subcontractor" for each separate task order, the indefinite quantity contract may in effect allow the agency to select a sole source for each separate regulatory negotiation without complying with the sole source justification procedures of the regulations.

These potential problems may be ameliorated by the fact that the material terms of each work plan -- including ceilings on cost and rates, identity of the service providers, and general approach and methodology -- were defined in the proposals submitted in response to the competitive RFP. So long as the parties adhere to those terms in negotiating individual task orders, sole source issues should be avoided.

In summary, the EOP/CEQ's use of indefinite quantity contracts is an imaginative application of an existing procurement

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82/ Mason v. United States, supra note 81. See also, Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512 (1985) (indefinite quantity contracts for flying services upheld, although contract required no minimum purchase of services, because contractor was paid a dollar amount to maintain the availability of his aircraft for government use).

techique to the peculiar needs of the regulatory negotiation setting.

4. Other Potential Acquisition Techniques

a. Basic Ordering Agreements

Prior to the CEQ indefinite quantity contract, the EPA procured convening and facilitating services for its regulatory negotiation project through basic ordering agreements under FAR Subpart 16.7. A basic ordering agreement is not itself a contract, but rather an agreement specifying a product or service to be procured, the contract clauses that will apply to future contracts, and other terms and conditions as negotiated between the government and the contractor. The agreement contemplates that orders can be issued during the term of the agreement and that each such order will become a separate contract upon acceptance by the contractor. The basic ordering agreement is also required to specify a method for pricing future orders.

The basic ordering agreement theoretically eliminates some of the formal steps required in competitively procuring services of a convenor/facilitator for each negotiated rulemaking. By entering into such an agreement with a mediation/facilitation firm, EPA was able to issue orders for services as each new regulatory negotiation arose. However, use of basic ordering agreements became less attractive when recent revisions to the FAR required that, before issuing an order under a basic ordering agreement, a federal agency must obtain competition in accordance with Part 6 of the FAR.[83] This means that each order under a basic ordering agreement is, in effect, a separate competitive procurement subject to the same procedures and requirements as would apply to a new contract. Thus, some of the gains in efficiency previously achieved by using basic ordering agreements have been diminished.

b. Blanket Purchasing Agreements

Blanket purchasing agreements, which are not contracts, are the equivalent of government charge accounts with qualified sources of supply.[84] These are used for simplifying purchasing when a wide variety of items in a broad class of goods is generally purchased, but the exact items, quantities and delivery requirements are not known in advance and can be expected to vary widely, or where an agreement may avoid the necessity of writing a large number of purchase orders.[85] Blanket purchasing agreements

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[83] 48 C.F.R. § 16.703(d)(1).

[84] 48 C.F.R. § 13.201(a).

[85] 48 C.F.R. § 13.203-1.

are small purchase procedures and cannot cumulatively exceed the dollar limitations for small purchases ($25,000). Use of a blanket purchase agreement does not justify sole source purchases.[86]

Such agreements do not appear to be especially useful as procedures for contracting with ADR neutrals. The dollar limitations are too low for regulatory negotiation (but could pay for individual arbitrators or minitrial neutrals), the services would not be the sort of standard, frequently purchased item contemplated by the regulations, and such an agreement is not a contract and could not be used to bind anyone to performance. Nor does the existence of a blanket purchase order remove the requirements for obtaining competition.[87]

c. Supply Schedules

The federal supply schedule program[88] provides agencies with a simplified process for acquiring commonly used supplies and services. Under a supply schedule, contractors agree to fill relatively small individual orders from agencies at price discounts normally available only with commercial volume purchases, in return for a promise by the government that certain agencies will obtain all of their requirements for the contract items by purchasing from the schedule. While one of the main purposes of the supply schedule program is to obtain this price advantage for the government, a second purpose is to provide a mechanism by which agencies can obtain goods and services for which there is a recurrent need without struggling through the rigors of the normal procurement process. The supply schedule mechanism, or the variant thereof, presents obvious possibilities for the acquisition of the services of mediators, facilitators, arbitrators, and perhaps other ADR professionals.

A supply schedule is maintained by an administering agency. Most existing schedules are managed by the General Services Administration, but other agencies can be authorized to administer

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[86] 48 C.F.R. § 13.204.

[87] See 48 C.F.R. § 16.703(d).

[88] FAR Subpart 38.1 specifies the salient legal characteristics of the contract device, and FAR Subpart 8.4 contains instructions for use by federal agencies in making purchases from a supply schedule. 48 C.F.R. Parts 8.4, 38.1.

schedules.[89] A supply schedule is often a multiple award[90] contract in which all offerors who meet the criteria for inclusion are placed on the schedule. Full competition is used to select qualified suppliers through an ordinary contracting process that may be by sealed bids or by proposals and negotiation,[91] as appropriate.

One or more "mandatory" agencies are designated by the schedule administrator as being required to purchase all of their requirements for the included goods or services from schedule suppliers.[92] The designated agencies need not engage in competitive considerations,[93] but may obtain their needs by direct order from any schedule supplier. Exceptions to the mandatory purchase requirements are available, but do not provide much latitude to purchase non-schedule items. Urgent needs that cannot be filled by allowing a schedule contractor to accelerate the agreed-upon delivery terms can be obtained off-schedule.[94] If a mandatory agency finds a schedule item available from a non-schedule supplier at a lower price, then the agency can purchase off-schedule -- but only after obtaining full competition.[95]

Non-mandatory agencies, while not required to purchase from the schedule, have the option to do so at the specified schedule prices.[96] A schedule contractor is not required to fill orders from the non-mandatory agencies, but he is encouraged to do so.[97]

89/ 48 C.F.R. § 38.101(e). The GSA must authorize another agency to award a schedule contract.

90/ A single award schedule is also possible (48 C.F.R. § 38.102-1), and, in fact, is the preferred mechanism (48 C.F.R. § 8.403-1).

91/ Multiple award schedules are always negotiated. 48 C.F.R. § 38.102-2(a).

92/ 48 C.F.R. § 38.101(b).

93/ In fact, competitive procedures, such as soliciting bids from schedule suppliers, is prohibited. 48 C.F.R. § 8.404(b).

94/ 48 C.F.R. § 8.404-1(a).

95/ 48 C.F.R. § 8.404-1(e).

96/ 48 C.F.R. § 38.101(c).

97/ 48 C.F.R. § 8.404-2(b).

If the contractor accepts an order from an optional agency, he must comply with the pricing and delivery terms of the schedule.[98]

Where more than one supplier qualifies under a multiple award, then no supplier is entitled to make any sales under the schedule, although the mandatory agencies are still bound to obtain their requirements from schedule suppliers. This entitles a schedule supplier to some relief in the event a mandatory agency illegally purchases "off-schedule" (which may include acquiring the schedule items from another government agency[99]).

In the context of ADR services, one salient feature of ordinary supply schedules may require modification. Under current rules, a qualifying offeror must agree to deliver services on the same terms (in particular, volume pricing discount schedules) as the offeror makes available to its best commercial customers. This appears to have little meaning in the ADR services situation, although a requirement that offerors quote rates equivalent to their commercial rates, if any, may be appropriate. This particular feature reportedly has caused many desirable firms to avoid supply schedule contracts, because of the possibility that they would be required to sell at high-volume prices, whereas they might have the opportunity to fill only low-volume orders.[100]

d. Hiring Neutrals as Consultants, Experts, or "Special" Government Employees

Several statutes authorize federal agencies to obtain the services of consultants or experts, either by hiring them as federal employees on a short-term or interim basis, or by contracting for their services.[101] The most important

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[98] Id.

[99] For example, the Department of Defense was held to have breached a requirements contract by ordering items covered by the contract from GSA. Inland Container v. United States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975).

[100] See W. Goodrich & C. Mann, Avoid Disaster in Federal Supply Schedule Contracts, 15 Pub. Cont. L.J. 1 (1984) for a review of pitfalls facing supply schedule contractors.

[101] Examples: 5 U.S.C. § 575 (Administrative Conference); 7 U.S.C. § 1642 (Department of Agriculture, rate not to exceed $50 per day); 21 U.S.C. § 1116 (Food and Drug Administration, six persons may be so employed with no time limitations); 22 U.S.C. § 290(F) (Inter-American Foundation); 29 U.S.C. § 656 (Department of Labor, contracts may be renewed annually); 33 U.S.C. § 569A (Corps of Engineers); 40 U.S.C. § 758 (General Services Administration); 49 U.S.C. § 1657(B) (Department of Transportation, pay not to exceed $100 per day).

of these laws is 5 U.S.C. § 3109, which provides, in pertinent part:

> When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of one year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to:
>
> (1) the provisions of this title governing appointment in the competitive service;
>
> (2) chapter 51 [civil service classifications] and subchapter iii of chapter 53 [pay] of this title; and
>
> (3) section 5 of title 41 [requirements for advertising of contracts] . . . .

Section 3109 confers on those agencies that have the appropriate authorization in an organic or appropriation statute[102] the ability to employ consultants or experts without regard to civil service competitive hiring restrictions. In the context of ADR neutrals, experts are of most interest here as a consultant serves primarily "as an advisor to an officer" but "neither performs nor supervises performance of operating functions."[103]

Agencies can retain experts and consultants on a full-time basis for only one year, although many of the authorizing statutes allow for annual renewals. Experts and consultants can be hired on an intermittent basis -- that is, from time to time, working up to 130 days in a year -- for an indefinite period.[104] The pay is set by the employing agency, and may be up to the rate of pay for level V of the Executive Service.[105] No retirement benefits are accorded, and, unless required by other statutes, no holidays or overtime are provided for. Employees in this category are "per diem" employees, even if their tour of duty is for one year.

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[102] The Department of Defense Authorization, for example, have been contained in the yearly DOD appropriations acts.

[103] 23 Comp. Gen. 497 (1944); Federal Personnel Manual ("FPM") 304-1-2(1).

[104] FPM 304-1-2(5), (6).

[105] 5 U.S.C. § 3109. Other limitations may apply under statutes that provide specific authorization. See note 101, supra.

The employment of experts and consultants could be used by an agency with an irregular need for ADR services. Professionals could be brought on board in a short time, without the need for either a full-blown procurement or a competitive civil service placement. If a requirement for many services can be foreseen, but their timing is liable to be sporadic, then the employees could be hired on an intermittent basis, providing services from time to time as necessary.[106]

There are several potential impediments to hiring ADR neutrals as special government employees. These impediments may be summarized as follows:

Conflicts of Interest. Employees hired under 5 U.S.C. § 3109 are subject to all statutory prohibitions on conflicts of interest, including ethical standards, financial disclosure, and post-employment restrictions on employment.[107] To the extent that an expert or consultant becomes subject to conflict-of-interest restrictions, his professional options after serving as a neutral could be constrained. For example, a consultant employed by EPA on an intermittent basis was excluded from bidding on an EPA contract relating to her area of expertise because, at the time of the contract bidding, she was still technically an employee of EPA. This result was reached even though the consultant had not actually accepted any work for the agency for a period of time prior to bidding.[108] In a recent case, the government was enjoined from proceeding with a contract awarded to a bidder who had been an employee of the government when he bid, but who resigned prior to the award.[109]

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[106] It is possible for a professional to maintain two or more intermittent positions with different agencies. See 5 U.S.C. § 5703. The Federal Personnel Manual states that, under an exception to the general restriction against being paid for more than one position for more than 40 hours per week, "an individual is entitled to pay for services on an intermittent basis from more than one consultant or expert position, provided the pay is not received for the same hours of the same day." FPM 304-6-1.

[107] FPM 304-1-9. Temporary or interim employees who serve less than 130 days per year may qualify for treatment as a "special government employee", and thereby will not be subject to all of the prohibitions that apply to regular employees. See FPM Chapter 735.

[108] Matter of Enarco, Inc., B-218106, 85-1 CPD ¶ 592 (May 23, 1985).

[109] Speakman Co. v. Weinberger, (unpublished, D.D.C.), CCH Government Contracts Reports ¶ 74,539 (October 2, 1986).

Pay Limitations. Compensation for experts and consultants who are hired under Section 3109 is limited to the rate of pay for level V of the Executive Service. The daily rate may therefore be considerably less than a highly qualified neutral could command in the commercial market. Moreover, specific authorizing statutes for some agencies limit the compensation for temporary experts and consultants to very low levels; for example, the rate of compensation for Department of Agriculture experts is limited to $50 per day.[110/] Thus, some qualified potential ADR neutrals may be unwilling to offer their services to government agencies if their compensation is limited to an arbitrarily low level.

Requirement to Follow Procurement Procedures. As noted above, hiring a neutral through Section 3109 obviates competitive civil service requirements. Section 3109 also exempts such hirings from the requirements of 41 U.S.C. § 5, which requires that all procurements of contracts for supplies or services in excess of $10,000 be publically advertised. However, the Comptroller General has held that this exemption

> does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949 . . . and the Federal Procurement Regulations . . . on Government contracts for goods or nonpersonal services.[111/]

Thus, it is not at all clear that hiring ADR neutrals as special government employees is any more efficient than utilizing procurement techniques discussed above.

e. Innovations in Procedures

Contracting for services for multiple proceedings (especially in the case of indefinite quantity contracts) can encounter procedural requirements in the Federal Acquisition Regulation that simply do not conform to the needs of the agencies. Subpart 1.4

110/ 7 U.S.C. § 1642.

111/ 61 Comp. Gen. 69, 78 (1981) (citations omitted).

of FAR contains the kernel that may provide the solution to this situation:[112]

> Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specified needs and requirements of each agency. The development and testing of new techiques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods . . . .[113]

While statutory requirements cannot be waived, the FAR itself points the way toward its own adjustment. Many specifications for contract devices, such as supply schedules and indefinite quantity contracts, were not established by statute, but rather developed

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[112] 48 C.F.R. § 1.402.

[113] Revisions to the Federal Acquisition Regulations are prepared and issued through the coordinated action of the Civilian Agency Acquisition Council (composed of representatives of the civilian executive departments and EPA, the Small Business Administration, and the Veterans Administration) and the Defense Acquisition Regulatory Council (representatives of military departments, the Defense Logistics Agency, and NASA). 48 C.F.R. § 1.201-1. Notice and comment rulemaking is used when the revision is "significant". 48 C.F.R. § 1.501.2.

Deviations from the FAR are permitted "when necessary to meet the specific needs and requirements" of an agency, and require authorization by specified agency officials. 48 C.F.R. § 1.402. Deviations for a single contracting action require the agency head or a delegee to authorize the deviation and to furnish the FAR Secretariat with a copy of the authorization. 48 C.F.R. § 1.403. Deviations for a class of civilian contracting actions require that the appropriate agency official first consult with the Civilian Agency Acquisition Council. 48 C.F.R. § 1.404(a)(1). When an agency perceives the need for a class deviation on a permanent basis, the agency must submit a proposed FAR revision to the FAR Secretariat for consideration by the pertinent FAR Council(s). 48 C.F.R. § 1.404(a)(2). Deviations for defense agencies and NASA are subject to slightly different requirements.

over the years largely through experience and adjudication; it is these structural devices that are susceptible of modification.

5. Use of Government Neutrals

Using employees of the federal government as neutrals has several advantages. First, assuming the immediate availability of a qualified government neutral, the delays inherent in the procurement process described above may be avoided. Second, using government employees presumably spares the government the additional expense of paying outside neutrals.[114/] Third, to the extent that the use of private parties as "neutrals" creates constitutional issues under the "delegation doctrine" (See § IV infra), those issues are presumably avoided, or at least substantially reduced, when government employees perform the neutral function. Finally, there may be a long-term advantage to the extent that as government employees become expert in acting as neutral advisors, arbitrators, or convenors/facilitators, the process of institutionalizing ADR and regulatory negotiation within the government will be enhanced.

Potential limitations on the use of government employees as neutrals are: first, private parties to disputes may not view government employees as truly neutral; and second, the most logical providers of neutral services, such as FMCS and CRS, may be inhibited by their statutory charter[115/] and/or manpower limitations from providing such services on a regular basis.

E. Long-Term Structural Issues

As discussed above, use of state-of-the-art ADR techniques and regulatory negotiation by federal agencies is still in an

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114/ However, an agency may be required to compensate the FMCS, for example, for the services of one of its mediators through an inter-agency transfer of funds. See 31 U.S.C. § 1535. Some have argued that if one considers the fully allocated cost of a government employee's time, including salary and overhead, use of a government neutral may be more costly than contracting with an outsider.

115/ FMCS is authorized to conciliate labor disputes (29 U.S.C. § 173), while the CRS is charged with mediating community disputes relating to discrimination on the basis of race, color, or national origin. As in the past, FMCS or CRS could in effect loan an employee to another agency for a limited period to assist in an ADR or reg neg proceeding. See discussion in Section III.C.4 above. But the agencies' statutory charters would probably prevent them from establishing an ongoing ADR neutrals services for other federal agencies without specific congressional authorization.

experimental or formative stage. The experience of agencies is limited, and many agencies are sensitive to potential political criticism of their use of newly developed negotiation techniques.

The dilemma created by these factors is that the growth of these ADR techniques and regulatory negotiation may be limited by the shortage of experienced neutrals in the private sector; if agencies do not expand their use of such techniques, however, the pool of experienced neutrals cannot expand.

Thus, agencies must respond to the long-term need to develop a broader base of expertise upon which to draw for neutral services. Expansion of the talent pool could occur through several processes:

Less stringent criteria for selection. The Corps of Engineers has conceded that it is more sensitive about the selection of neutral advisors for its minitrials during the developmental stage, when the process is potentially subject to greater scrutiny by higher officials in the agency and/or Congress. As the program gains acceptance over time and becomes more part of the Corps' routine procedures, its visibility will be reduced. At that point, the Corps believes it may loosen its criteria for selection to broaden the base of available neutrals.

Training mechanisms. The proposal submitted by NIDR on the EOP/CEQ regulatory negotiation procurement provided that each negotiation would be staffed by at least two convening/facilitating professionals. One purpose of this staffing was to allow the senior professional to train his colleague in the process, thus giving the junior professional the experience needed to perform convening or facilitating services for future regulatory negotiations. While such a "team" approach may involve some short-term costs, it may be beneficial in the long run in developing a broader cadre of trained professionals available to the agencies.

Government neutrals. Both the FMCS and CRS were created in response to a specific need for mediation services within the government. By expanding the authority of FMCS, CRS, or other agencies, or creating a new "neutrals" service organization within the government, agencies' ability to expand their use of ADR and regulatory negotiation techniques would be enhanced.[116/]

Government Roster of Neutrals. Another device for expanding the availability of qualified neutrals would be to assign a single

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[116/] The National Institute for Dispute Resolution has a program for providing moderate grants to educational institutions and state governments to establish dispute resolution programs. Such "seed money" may be available to federal agencies that are interested in establishing pilot programs or policy guidelines for the use of ADR or regulatory negotiation.

agency, such as ACUS, to maintain a roster of qualified neutrals from which other agencies could draw. Private individuals and organizations who wished to be listed on the roster would submit applications specifying educational background, experience, and techical expertise, if any. The central agency could also collect feedback on those neutrals who were actually employeed by agencies for ADR or regulatory negotiation. The establishment and maintenance of such a roster could be patterned after the Roster of Arbitrators maintained by FMCS for use in voluntary arbitrations of disputes arising under labor collective bargaining agreements.[117/]

IV.

DELEGATION ISSUES

A recurring issue with respect to federal government use of ADR techniques is whether the functions performed by private neutrals are unconstitutional under the "delegation" doctrine.[118/] "Delegation" actually encompasses a number of different constitutional concepts, including violations of due process, delegation of legislative power, and violation of the Appointments Clause.[119/]

[117/] 29 C.F.R. Part 1404.

[118/] See Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, "Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques" (May 24, 1986).

[119/] In addition, OMB Circular A-76, Performance of Commercial Activities, August 16, 1983, prohibits award of any contract "for the performance of an inherently governmental function." The Circular defines "governmental function" as follows:

> (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-

(Footnote continued)

Due Process. In a line of cases dating back to the Depression era, the Supreme Court struck down legislative delegations of public decisionmaking authority to private entities on the ground that such delegations violated due process.[120] In each of these cases, the principal due process objection was that the power to regulate a group of private parties was delegated to a subgroup of such parties who had an interest in the result of the regulation. For example, in Carter v. Carter Coal Company[121] the Court was reviewing the Bituminous Coal Conservation Act of 1935. The Act established a national bituminous coal commission and divided the country into districts. Within each district, the majority of producers and miners were authorized to fix maximum hours of labor and minimum wages that were binding upon all producers and miners within the district. The Supreme Court held that this was an unconstitutional violation of due process, stating as follows:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[122]

Other infirmities in the private delegations found unconstitutional by the due process line of cases are the lack of any specified standards for decision by the private parties, and the lack of any review by a government agency or court.

Delegation of legislative power. The principal case in this line of authority is A.L.A. Schecter Poultry Corp. v. United States.[123] Schecter struck down portions of the National Recovery Act as unconstitutional delegations of legislative power. In particular, Section 3 of the Act delegated to private parties and the President the power to enact codes of fair competition

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[119] (continued)
intelligence operations; and regulation of industry and commerce, including food and drugs.

[120] Carter v. Carter Coal Company, 298 U.S. 238 (1938); Seattle Title Trust Co. v. Roberge, 226 U.S. 1 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

[121] 298 U.S. 238 (1935).

[122] Id., 298 U.S. at 311.

[123] 295 U.S. 495, 537 (1935).

that were enforceable by injunction and punishable as crimes. The Court held that this "unfettered" delegation of legislative power was an unconstitutional violation of the separation of powers doctrine.

Appointments Clause. In this line of cases, the Court has nullified delegations of decisionmaking authority to private parties on the basis that official government functions cannot be performed by persons who were not appointed by the President with the advice and consent of the Senate pursuant to Article II, section 2, clause 2 of the Constitution. In Buckley v. Valeo[124/] the Court held certain provisions of the Federal Election Campaign Act of 1971 to be unconstitutional on the basis that the majority of the voting members of the Federal Election Commission were appointed by the President pro tempore of the Senate and the Speaker of the House. The Commission had authority to make rules for carrying out the Act, to enforce the Act by bringing civil actions against violators, and to temporarily disqualify federal candidates for failing to file required reports. The Court held that the delegation of such regulatory and enforcement functions to persons not appointed by the President with the advice and consent of the Senate violated the Appointments Clause.

Under these various lines of delegation cases,[125/] constitutional issues should not arise with respect to the various forms of ADR that are totally nonbinding, such as minitrials and mediation. In a minitrial, for example, the neutral advisor at most presides at the hearing and acts as a mediator between the principal negotiators. In no event does he render any kind of decision that is binding on either the private party or the government. The lack of any binding decisionmaking authority thus insolates nonbinding ADR from constitutional criticism.

Similarly, there should be no constitutional issues with respect to regulatory negotiation, as structured under the ACUS recommendations. First, the convenor/facilitator is not a decisionmaker, but rather a person who identifies the issues and the interested parties, and attempts to mediate a negotiated resolution among the parties. Second, under the ACUS recommendations, the product of the regulatory negotiation is a proposed rule that is not in any way binding upon the agency.[126/] At the completion of the regulatory negotiation, the proposed regulation must be

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[124/] 424 U.S. 1 (1976).

[125/] See generally Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650 (1975).

[126/] See R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855 (1952); United Black Fund, Inc. v. Hampton, 352 F.Supp. 898 (D.D.C. 1972).

published in the Federal Register and subjected to the notice-and-comment rulemaking procedures of the Administrative Procedure Act.[127]

The constitutional delegation issues arise principally with respect to neutrals who have authority to issue decisions that are binding upon the parties to a dispute. This is most likely to be an issue in the case of arbitration. Again, however, if agencies follow the details of the ACUS recommendation regarding ADR, constitutional issues should be avoided.[128] Under the ACUS recommendation, resort to arbitration is a voluntary decision of the parties, unless mandated by a statute. Thus all parties consent to the arbitration proceeding. In addition, the parties have a role in the selection of the arbitrators, thus insuring that they will be neutral and disinterested. The decision of the arbitrator is subject to judicial review under the standards of the U.S. Arbitration Act.[129] Finally, the ACUS recommendation provides that arbitration is appropriate only when the norms for decision have been established by statute, precedent, or rule.[130]

Thus, the potential due process objections to delegations of decisionmaking authority to private parties should not apply to voluntary arbitration, as structured by the ACUS recommendation. The fact that the interested parties consent to the procedure as a practical matter eliminates the potential for due process challenge. Moreover, the traditional due process objections (self-interest of the decisionmaker, lack of decisional norms, and lack of judicial review) are specifically addressed and resolved by the ACUS recommendation.

Finally, any doubts regarding whether binding arbitration complies with the due process clause are probably eliminated by the Supreme Court's decision in Schweiker v. McClure.[131] That case involved review of provisions of the Social Security Act establishing the Medicare program. The Act provided that any disputes regarding Medicare claims would be subject to mandatory arbitration by employees of private insurance carriers who had been retained to administer the program. Implementing regulations promulgated by the Department of Health and Human Services required that these private "hearing officers" be attorneys or other qualified individuals who (1) had the ability to conduct formal hearings; (2) generally understood of medical matters and

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[127] ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4, ¶¶ 13-14.

[128] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 4.

[129] 9 U.S.C. § 10.

[130] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

[131] 456 U.S. 188 (1982).

terminology; and (3) possessed a thorough knowledge of the Medicare program, including the statute and regulations on which it is based.[132]

The Supreme Court held that this scheme complies with due process. The Court stated that there was a presumption that the hearing officers who decided Medicare claims were unbiased. Since claims were ultimately paid by the federal government, and not their private employers, the hearing officers had no personal or financial interest in the outcome of the proceedings. In addition, the requirement that hearing officers have pertinent experience and familiarity with the Medicare program minimized the risk of an erroneous decision and the probable value of additional procedural safeguards.[133] Under Schweiker, therefore, mandatory arbitration schemes are constitutional under the Due Process Clause, so long as the arbitrator are disinterested and possess adequate qualifications.[134]

Nor should binding arbitration, as defined in the ACUS recommendation, involve unconstitutional delegation of legislative power or violation of the Appointments Clause. Recommendation 86-3 makes it clear that binding arbitration is inappropriate where the norms for decision are not established by statute, regulation, or precedent.[135] Thus, arbitrators will in no event be making policy decisions, but rather will be applying existing decisional standards to the facts of a particular dispute. Certainly, an arbitrator's award cannot be fairly analogized to the codes of fair competition that were struck down in the Schecter Poultry case; in that case, the codes established norms for behavior by private parties that were enforceable through injunctions or criminal actions. An arbitrator's award simply resolves a fact-specific dispute between a private party and the government, or among private parties.

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[132] Id., 456 U.S. at 199.

[133] Id., 456 U.S. at 198-99. See also Thomas v. Union Carbide Agricultural Products Co., ____ U.S. ____, 105 S. Ct. 3325 (1985) (Upholding binding arbitration provisions of the FIFRA).

[134] A specific statutory mandate does not appear necessary for the delegation of decisionmaking authority by an agency. See Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977).

[135] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

Finally, arbitrators do not have the authority to promulgate or enforce regulations, as did the Federal Electoral Commission in Buckley v. Valeo.[136/] Thus, the Appointments Clause should not stand in the way of agencies' employing arbitration under the ACUS recommendation.

V.

CONCLUSIONS

The challenges facing federal agencies in expanding the use of ADR and regulatory negotiations include developing and refining procurement procedures that will streamline the process of hiring outside neutrals, and developing a broader base from which to draw in acquiring the services of private or government neutrals. Meeting this challenge will require that agencies be flexible in defining the qualifications required of outside neutrals, avoiding rigid requirements of technical expertise or specific ADR experience unless such qualities are essential to the success of the proceedings. Agencies would also benefit from efforts to pool information about their experience with ADR neutrals, ideally with the advice and assistance of agencies like ACUS and FMCS. Advantage should be taken of opportunities to train government personnel in ADR skills, and to utilize the expertise of existing dispute resolution services within the government. Finally, agencies should use existing procurement techniques in imaginative ways, and seek to develop new techniques, so that the services of qualified ADR neutrals can be acquired without the delays and procedural hurdles inherent in the normal competitive procurement process.

136/ In the specific context of government contracts disputes, an issue has been raised as to whether binding arbitration would violate the requirements of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1982). That Act expressly authorizes agency boards of contract appeals or the U.S. Claims Court to hear and decide appeals arising out of disputes between government contractors and federal agencies. Arguably, the Contracts Disputes Act would pose a barrier to the use of arbitration in government contracts disputes unless the Act were specifically amended to permit arbitration.

Appendix A

DEPARTMENT OF THE ARMY EC 27-1-3
US Army Corps of Engineers
DAEN-CCZ Washington, D.C. 20314-1000

Engineer Circular
No. 27-1-3 23 September 1985

EXPIRES 30 SEPTEMBER 1986
Legal Services
ALTERNATE DISPUTE RESOLUTION: MINI-TRIALS

1. Purpose. This circular sets forth guidance for the use of a mini-trial as an alternate dispute resolution procedure in contract appeals. The mini-trial is an alternative to litigation before the Engineer Board of Contract Appeals (ENG BCA) and the Armed Services Board of Contract Appeals (ASBCA). Guidance pertains to case selection and procedures.

2. Applicability. This circular applies to all HQUSACE/OCE elements and all FOA processing contract appeals pending before the ENG BCA or ASBCA.

3. Reference. EFARS Appendix N, "Contract Requests, Contract Dispute Claims and Appeals."

4. General.

a. Definition. A mini-trial is a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes.

b. Background. The mini-trial was developed as an alternative to litigation because of the costs, delays and disruptions associated with litigation. Although the term mini-trial has been coined, it is not really a trial. It is a technique used to bring top management officials together voluntarily to resolve disputes in a short period of time rather than relying upon a third party such as a judge to decide the matter. The mini-trial consists of a blend of selected characteristics from the adjudicative process with arbitration, mediation and negotiation. This blend can be structured to meet the particular needs of the parties.

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c. Characteristics.

(1) Top Management Involvement. Top management officials for both parties are directly involved as principals in making the decision to resolve the dispute.

(2) Time Period Limited. The time period for the process is short. In most cases it should be completed within two to three months.

(3) Informal Hearing Format. The hearing is informal and in most instances should last only one to two days. Each party has a representative make a presentation to the principals.

(4) Discussions Non-binding. At the conclusion of the hearing, the principals meet by themselves to discuss the dispute. These discussions are non-binding and are kept strictly confidential.

(5) Neutral Advisor Input. A neutral advisor may be retained by the parties to assist in the mini-trial.

5. Case Selection.

a. Initial Determination. The Division Engineer has the authority to select a pending contract appeal for the mini-trial process. This decision may be based upon the request of the appellant.

b. Procedures. Upon receipt of the contract appeal file by the Division Engineer, it will be reviewed by appropriate staff members, including the Division Counsel. When a mini-trial is recommended, the Division Counsel will prepare a report to the Division Engineer setting forth the reasons for the recommendation.

c. Time of Case Selection. The selection of a pending appeal should be made after Division review has been completed so that the facts and issues have been sufficiently developed.

d. Types of Disputes. While most contract appeals are suitable for mini-trials, appeals involving clear legal precedent or having significant precedential value are not appropriate.

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6. Initiation of Process.

a. Offer to Appellant. Once the decision has been made that an appeal is appropriate for a mini-trial, the Division Engineer will offer appellant the opportunity to participate in the process. At that time, the Division Counsel should notify the government trial attorney and the Chief Trial Attorney, (DAEN-CCF) that a mini-trial is being offered to appellant. Appellant will be advised that the procedure is voluntary and will not prejudice its appeal before the Board. The Division Engineer will explain the nature of the mini-trial and set forth its basic characteristics and participants. Appellant will also be advised that the parties will have to enter into a written agreement governing the mini-trial procedures.

b. Participants.

(1) Principals.

(a) The Government's principal participant will be the Division Engineer. However, in appropriate circumstances in the discretion of the Division Engineer, the principal participant may be the Deputy Division Engineer. The authority of the Division Engineer to resolve the contract claim shall be set forth in a warrant as the contracting officer for purpose of the mini-trial. The request for a warrant shall be submitted to HQUSACE (DAEN-PR) WASH DC 20314-1000.

(b) The contractor's principal should be a senior management official who has authority to settle the appeal. Further, if possible, the contractor's principal should not have been previously involved with the preparation of the claim or presentation of the appeal.

(2) Representatives. Each party will designate a representative who will act as point of contact and make the mini-trial presentation. The government trial attorney should be the Government representative.

(3) Neutral Advisor. At the option of the parties, a neutral advisor may be used to assist in the mini-trial. The neutral advisor must be an impartial third party with experience in government contracting and litigation.

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The Chief Trial Attorney (DAEN-CCF) will maintain a list of neutral advisors. The name of anyone not on the list may be submitted by the Division Counsel for addition to the list.

(c). Mini-Trial Agreement. The Division Counsel, in coordination with the Government trial attorney should negotiate the mini-trial agreement with appellant. The agreement will contain the procedures to be followed during the course of the mini-trial. The agreement must contain specific time limitations to assure that the mini-trial is handled in an expeditious manner. The agreement should be executed by the principals and representatives for both parties. A sample agreement is at Appendix A. However, each mini-trial agreement should be structured to meet the needs of each situation.

(d) Contracting With the Neutral Advisor. The services provided by the neutral advisor are non-personal in nature and therefore the engagement of a neutral advisor may be handled by entering into a non-personal services tripartite contract in compliance with FAR, Part 37, Subpart 37.1. The parties to this tripartite contract will be the Government, the contractor, and the neutral advisor. The contract should, at a minimum, cover the services to be furnished by the neutral advisor; the time for performance of such services (which shall include a "not to exceed" time for the performance of such services); the total price for the services of the neutral advisor with a breakdown of the price to indicate the amount to be paid by the Government and the amount to be paid by the contractor.

(e) Suspension of Board Proceedings. Upon the execution of the mini-trial agreement, the government trial attorney should file a motion to suspend proceedings before the Board of Contract Appeals. Appellant shall be requested to make this a joint motion. The motion should advise the Board that the suspension is for the purpose of conducting a mini-trial and should state the time limitation for completing the mini-trial.

7. Procedures.

a. General. The mini-trial process is flexible and as such the procedures should reflect the needs of the parties considering the time and costs involved.

b. Time Considerations. Since the mini-trial must be conducted in an expeditious manner the schedule set forth in the mini-trial agreement must be strictly adhered to. The agreement must expressly state the time limitations for discovery, the mini-trial presentation and the post-presentation discussions.

c. Discovery. All mini-trial discovery should be on the record. The scope of discovery should be limited by the parties in the agreement. This may include limiting the number and length of both depositions and interrogatories. Discovery should conclude at least two weeks prior to the mini-trial.

d. Pre Mini-Trial Conference.

(1) Timing. At the conclusion of discovery the representatives should confer with the neutral advisor, if any, and arrange for the timely exchange of written submittals.

(2) Written Submittals. The parties may use any type of written submittal which will further the progress of the mini-trial. A position paper, the format and length of which should be specified in the mini-trial agreement, is recommended. The parties should also agree to exchange exhibits and witness lists. Appellant should submit a quantum analysis which identifies the costs associated with issues that will arise during the mini-trial.

e. Mini-Trial.

(1) Location. The site for conducting a mini-trial should be specified in the mini-trial agreement. The cost of the site, if any, should be shared equally by both parties.

(2) Manner of Presentation. The allocation of time during the mini-trial is at the discretion of the parties. The hearing should not exceed two days. The mini-trial agreement should specify the exact time for each presentation and the type of presentation, whether direct or rebuttal. The time limitations should be strictly adhered to. Each representative shall have the discretion to structure its presentation as desired. This may include the examination of witnesses including expert witnesses, audio

visuals, demonstrative evidence and oral argument. Any testimony given shall be unsworn. Furthermore, the recording or verbatim transcription of testimony will not be acceptable. The mini-trial agreement should indicate whether the neutral advisor and opposing representatives or principals will be permitted to examine witnesses. If agreed, a time for such examination should be specified in the agreement. Also, closing statements should be made since post-hearing briefs are not submitted.

(3) Role of the Neutral Advisor. The neutral advisor shall be present at the hearing and provide such services as are specified in the mini-trial agreement, such as the application of the agreement and providing an oral or written opinion on the merits of the claim. The agreement shall provide that the neutral advisor may not be called as a witness in any subsequent litigation concerning the claim. The cost of the neutral advisor shall be shared equally by both parties.

f. Settlement Discussions. The principals should meet immediately following the mini-trial to discuss resolution of the claim. The meeting should be conducted privately, but the mini-trial agreement may provide for the principals to consult with the neutral advisor. Also a principal may consult with staff members. Any additional examination of witnesses or argument by representatives shall be conducted in the presence of both principals and, if applicable, the neutral advisor.

g. Confidentiality. The advice of the neutral advisor, if any, and the discussions between the principals shall not be used in any subsequent litigation as an indication or admission of liability or to indicate what either party was willing to agree to as a part of the settlement discussions.

h. Termination. Since the mini-trial is a voluntary process, either principal may terminate the mini-trial agreement at any time.

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8. Notification. When a mini-trial is initiated the Chief Trial Attorney (DAEN-CCF) must be notified in writing. Such notification should include a copy of the Division Counsel's report to the Division Engineer and a copy of the mini-trial agreement.

FOR THE COMMANDER:

Lester Edelman

LESTER EDELMAN
Chief Counsel

1 Appendix:
App A - Sample
Mini-Trial Agreement

App. A

EC 27-1-3
23 September 1985

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES ARMY CORPS OF ENGINEERS
AND
APPELLANT

This mini-trial agreement dated this _____ day of _____, 19____ is executed by _____, Division Engineer, United States Army Corps of Engineers on behalf of the Corps, and by _____, on behalf of _____ hereinafter referred to as _____.

WHEREAS: On the ____ day of _____, 19____, the parties hereto entered into Contract No. _____ for the _____ _____;

WHEREAS, under the Disputes Clause (General Provision No. 4) of that contract, Appellant on _____ ____, 19____ filed a claim with the contracting officer alleging _____ _____ _____ _____;

WHEREAS, Appellant certified its claim in accordance with the requirements of the Contract Disputes Act of 1978;

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WHEREAS, in a letter dated _____ ____, 19_____ the contracting officer issued a final decision denying appellant's claim;

WHEREAS, on _____ _____, 19____ Appellant appealed the contracting officer's final decision to the _____ Board of Contract Appeals where the appeal has been docketed as (ASBCA) (ENG BCA) No. _____;

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals nor prejudicing such proceeding; and

WHEREAS, the Corps and Appellant have agreed to submit (ASBCA) (ENG BCA) No._____ to a "Mini-Trial".

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

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1. The Corps and Appellant will voluntarily engage in a non-binding mini-trial on the issue of _____ _____ _____. The mini-trial will be held on _____ ____, 19 ____ at _____ _____.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of such. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be _____ for the Corps, and _____ for appellant. The principal participants have the authority to settle the dispute. Each party will present its position to the

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principal participants through a trial attorney(s). In addition, _____ will attend as a mutually selected "neutral advisor".

4. The role of the neutral advisor is that of an advisor. The neutral advisor will not be actively involved in the conduct of the mini-trial proceedings. The neutral advisor may ask questions of witnesses only if mutually agreed to by the principal participants. Upon request by either principal the neutral advisor will provide comments as to the relative strengths and weaknesses of that party's position.

5. The Government trial attorney will provide the neutral advisor with copies of this agreement and the Rule 4 appeal assembly. Other source materials, statements, exhibits and depositions may be provided to the neutral advisor by the trial attorneys, but only after providing the same materials to the other trial attorney. Neither trial attorney shall conduct ex parte communications with the neutral advisor.

6. The fees and expenses of the neutral advisor shall be borne equally by both parties. Except for the costs of the neutral advisor, all costs incurred by either party in connection with the mini-trial proceedings shall be borne by that party, and shall not be treated as legal costs for apportionment in the event that the dispute is not resolved, and proceeds to a Court or Board determination.

7. Unless completed prior to the execution of this agreement, the parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed _____ weeks prior to the mini-trial. Discovery taken during the period prior to the mini-trial shall be admissible for all purposed in this litigation, including any subsequent hearing before any Board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In such case the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing date before a Court or Board.

8. No later than _____ weeks prior to commencement of the mini-trial, _____ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial.

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9. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principal participants may ask any question of the witnesses that they deem appropriate. However, any such questioning by the principals shall be within the time period allowed for that parties' presentation of its case as hereinafter delineated in paragraph 10.

10. At the mini-trial proceeding, the trial attorneys have the discretion to structure its presentation as desired. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants understanding of the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side, as well as the neutral advisor, a position paper of

no more than 25 - 8-1/2 X 11 double spaced pages. No later than _____ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for utilization at the mini-trial, inclusive of a listing of all witnesses.

11. The mini-trial proceedings shall take _____ day(s). The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until ____ p.m. (A sample two day schedule follows:)

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SCHEDULE

Day 1

8:30 a.m. - 12:00 Noon	Appellant's position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Corps' cross-examination.
2:30 p.m. - 4:00 p.m.	Appellant's re-examination.
4:00 p.m. - 5:00 p.m.	Open question & answer period.

Day 2

8:30 a.m. - 12:00 Noon	Corps' position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Appellant's cross-examination.
2:30 p.m. - 3:00 p.m.	Corps' re-examination.
3:00 p.m. - 4:30 p.m.	Open question and answer period.
4:30 p.m. - 4:45 p.m.	Appellant's closing argument.
4:45 p.m. - 5:00 p.m.	Corps' closing argument.

*Flexible time period for lunch of a stated duration.

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11. Within _____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ___ days following completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

12. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this appeal, all aspects of the mini-trial including, without limitation, all written material prepared specifically for utilization at the mini-trial, or oral presentations made, between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future Court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement modification. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

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13. The neutral advisor will be instructed to treat the subject matter of this proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties. The neutral advisor is disqualified as a witness, consultant or expert for either party in this and any other dispute between the parties arising out of performance of Contract No._____.

14. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

15. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the Corps and Appellant shall file a joint motion to suspend proceedings of this appeal before the _____ Board of Contract Appeals. The motion shall advise the Board that the suspension is for the purpose of conducting a mini-trial. The Board will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED _____ DATED _____

BY: _____ BY: _____

Principal participant for Corps Principal participant for

_____ _____

Attorney for the Corps Attorney for Appellant

NOTE: This agreement reflects a mini-trial which involves a neutral advisor. In the event a neutral advisor is not used, you should eliminate all references to the neutral advisor.

U.S. Department of Justice

Appendix B

Washington, D.C. 20530

MEMORANDUM JUN 19 1986

TO: Commercial Litigation Branch
Attorneys

FROM: Stuart E. Schiffer
Deputy Assistant Attorney General
Civil Division

SUBJECT: Alternative Dispute Resolution --
Mini-Trials

Mini-trials, a form of alternative dispute resolution, can be a less expensive, less time-consuming means of resolving disputes between the Government and private parties. It is our policy to encourage alternative means of resolving disputes when these goals can be achieved.

Attached is a statement of policy regarding the use of mini-trials. If you are responsible for a case that you believe is amenable to resolution by mini-trial, please consult with your reviewer.

Attachment

App. B

JUN 19 1986

COMMERCIAL LITIGATION BRANCH POLICY CONCERNING
THE USE OF MINI-TRIALS

I.

STATEMENT OF POLICY

It is the policy of the Commercial Litigation Branch of the Department of Justice to consider carefully and, where appropriate, implement methods for resolving disputes that are alternatives to judicial proceedings. In furtherance of that policy, the Branch will participate in mini-trials as a form of alternate dispute resolution. Branch attorneys are encouraged to assess cases assigned to them for the potential for resolution by mini-trial and are requested to forward requests for mini-trials from opposing counsel to obtain a decision by an appropriate Department of Justice official. Branch attorneys should make it clear to opposing counsel, however, that the Branch will not participate in a mini-trial unless appropriate Departmental officials, in the exercise of their discretion, determine that participation is appropriate and in the best interests of the Government.

II.

GENERAL

1. Definition. A mini-trial is a voluntary, expedited, nonjudicial procedure through which management officials for each party meet to resolve disputes.

2. Purpose. A mini-trial is intended to reduce the cost, disruption and delay associated with litigation.

3. Description. A mini-trial is not actually a trial; rather, it is a process designed to facilitate settlement by educating the parties' principals regarding the strengths and weaknesses of the positions of both parties. The process combines the salutary aspects of negotiation and litigation, using flexible procedures designed to meet the needs of each individual case.

4. Attributes. The following are characteristic of all mini-trials in which the Department will participate:

a. Involvement of Principals: Management officials with settlement authority (or with the authority to make a final

recommendation as to settlement) for both parties participate directly.

b. Expedited Time Period: The time period allowed for a mini-trial is brief and deadlines are expedited.

c. Non-binding Discussions By Principals: At the close of the presentation, the principals meet by themselves to attempt to resolve the dispute. These discussions are not binding and may not be used by either party in any subsequent proceedings.

d. Informality: All proceedings are informal.

In addition, where appropriate, the parties may select a neutral advisor to provide advice to the management officials involved in the mini-trial.

III.

CRITERIA FOR SELECTING CASES

Cases likely to be governed by clear legal precedent are not good candidates for resolution by mini-trial. Cases which involve factual disputes, which do not depend upon the credibility of the witnesses, are preferred. Cases which are expected to establish important legal precedent and those which are clearly without merit do not lend themselves to resolution by mini-trial.

IV.

INITIATION OF PROCESS

The suggestion that a mini-trial be conducted may emanate from either party. If the non-governmental party requests a mini-trial, the Department's trial attorney is requested to submit that request, along with his or her recommendations and those of the interested agency, to his or her supervisor. If the Department's attorney, in the absence of a request by the non-governmental party, concludes that a mini-trial would be advantageous, he or she shall obtain the recommendations of the interested agency, obtain approval from appropriate supervisors and then propose this procedure to the opposing party. The opposing party will be supplied with a copy of this memorandum and will be advised that a written agreement between the parties is a prerequisite to initiating the procedure. The decision to participate in a mini-trial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department.

V.

PARTICIPANTS

The Government's principal participant will be the Department of Justice official with settlement authority or, where that is not feasible, the official with the authority finally to recommend acceptance of a settlement. Usually, the official or officials within the interested agency or agencies with authority to make recommendations which are binding upon the agency or agencies will participate as a secondary principal for the Government.

The non-governmental party's principal participant must be a senior level management official who possesses authority to settle the dispute in the absence of litigation. Where possible, the official should be an individual who has not participated in preparing the case for litigation.

Each party will designate one representative who will be responsible for conducting the mini-trial and ensuring that procedures are followed. The Department's attorney of record will be the Government's representative.

Where appropriate, the parties may agree upon a neutral advisor to advise the management officials who participate in the mini-trial. The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial. The neutral advisor and the parties must agree in advance that the neutral advisor will have no further involvement in the litigation should the mini-trial fail to result in a settlement.

VI.

THE MINI-TRIAL AGREEMENT

The mini-trial agreement is a written document, signed by the principals and the representatives, in which the parties agree to the procedures to be used. While each mini-trial agreement should be structured so as to meet the needs of each individual case, every agreement must contain specific expedited time limitations for each aspect of the procedure, a statement regarding the non-binding nature of the procedure, and an agreement that the parties will seek a suspension of proceedings in the pending litigation while the mini-trial process is continuing. The mini-trial agreement will be negotiated by the representatives, with the approval of the principals. A sample mini-trial agreement is Appendix A to this memorandum.

VII.

PROCEDURES

While the procedures to be used are subject to negotiation and should be designed to meet the needs of each individual case, the following procedures are generally considered to be appropriate:

a. Time Limits: Time limitations are to be explicit, brief and strictly observed.

b. Discovery: Discovery procedures should be expedited and should be the subject of a specific provision contained in the mini-trial agreement. The parties should consider including in the agreement a limitation upon the scope of discovery as well as the number and length of depositions and interrogatories. Discovery conducted prior to the initiation of mini-trial procedures shall not be duplicated during the mini-trial process. A nongovernmental party may not conduct discovery under the mini-trial agreement if it has pending a request or requests for disclosure of information under the Freedom of Information Act. The mini-trial agreement should normally provide that discovery shall be completed at least two weeks prior to the mini-trial.

c. Written Submittals: The parties should normally provide for an exchange of written submittals prior to the mini-trial. The mini-trial agreement should set forth the timing, format and length of the submittals. The written submittal of the nongovernmental party must include an analysis of its quantum claim which includes information regarding the source of the figures. At the time the written submittals are exchanged, the parties should also exchange exhibit lists and, if applicable, witness lists.

d. Location of the Mini-Trial: The location of the mini-trial shall be specified in the mini-trial agreement. Government facilities may be used; the Government will not agree to pay any part of a fee charged for the use of nongovernmental facilities.

e. Manner of Presentation at the Mini-Trial: The allocation of the time agreed upon for presentation of the case to the principals shall be set forth in the mini-trial agreement. The presentation should exceed one day only in exceptional circumstances. The time allotted to each representative may be used as that representative desires, including examination of or presentations by witnesses, demonstrative evidence and oral argument. Recording or verbatim transcription of the testimony shall not be allowed. The mini-trial agreement may provide for an opportunity for the principals to examine any witnesses.

f. Neutral Advisor: The parties may agree that a neutral advisor shall be present during the mini-trial in order to provide an opinion, upon request, to the principals on any issue upon which the parties agree in advance. The neutral advisor should be selected by agreement of the parties. The advisor should be a person with legal and/or relevant substantive knowledge and should be a person who has had no prior involvement in the dispute or the litigation. The parties shall agree in advance upon the amount of compensation to be paid to the neutral advisor and the manner in which this compensation shall be paid. The neutral advisor shall agree in advance that he or she will have no further involvement in the case should the mini-trial fail to dispose of the litigation.

g. Settlement Discussions: The principals shall meet immediately following presentation of the mini-trial to discuss the possibility of settling the claim. This meeting shall be private, although the mini-trial agreement may provide that each principal may designate an individual to act as his or her technical advisor. This individual may not be the party's representative. A principal may consult with his or her attorneys, although they may not take part in the discussions regarding settlement.

h. Confidentiality: The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation.

i. Termination: Any party may terminate mini-trial proceedings at any time.

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES
AND
_____

This mini-trial agreement dated this _____ day of _____, 19__, is executed by ____[name]_____, ____[title]____, on behalf of the United States and by _____[name]_____, on behalf of ____[name of plaintiff]____, hereinafter referred to as plaintiff.

WHEREAS: On the _____ day of _____, 19__, plaintiff and the United States entered into Contract No. _____ ____for the _____ _____;

WHEREAS, under the Contract Disputes Act of 1978, plaintiff on _____, 19__, filed a suit in the United States Claims Court alleging _____ _____ _____ _____;

WHEREAS, the United States and plaintiff have agreed to submit [name of case] No. [docket no.] to a "Mini-Trial";

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The United States and plaintiff will voluntarily engage in a non-binding mini-trial on the issue of _____

_____

_____.

The mini-trial will be held on _____, 19__, at [time of day] at _____[location]_____.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be _____ for the United States and _____ for plaintiff. The principal participants have the authority to settle the dispute or to make a final recommendation concerning settlement. Each

party will present its position to the principal participants through that party's designated representative, _____, for the United States, and _____, for plaintiff.

4. The parties have agreed that _____ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in a separate agreement with the advisor. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the mini-trial fail to resolve the dispute.

The neutral advisor shall participate in the mini-trial proceedings and shall render an opinion, upon request, on the following issues: _____

_____

_____. NOTE: This clause is to be used only if the parties have agreed that the participation of a neutral advisor would be useful.

5. All discovery will be completed in the twenty working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation,

including any subsequent hearing before any board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6. No later than _____ weeks prior to commencement of the mini-trial, the plaintiff shall submit to the United States a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial and which identifies the source of all data.

7. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set

aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in paragraph 9.

8. At the mini-trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the mini-trial and a list of all witnesses.

9. The mini-trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ___ p.m. (A sample schedule follows.)

SCHEDULE

9:00 a.m. - 10:00 a.m.	Plaintiff's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	Plaintiff's rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	Plaintiff's cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	Plaintiff's closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

10. Within ____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following

completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

11. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this mini-trial, all written material prepared specifically for utilization at the mini-trial, all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

12. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

13. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the United States and the plaintiff shall file a joint motion to suspend proceedings in the Claims Court in this case. The motion shall advise the

court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED _____

BY: _____

Principal participant for the United States

_____

Attorney for the United States

DATED _____

BY: _____

Principal participant for _____

_____

Attorney for _____

Appendix C

Solicitation No. 3292
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SECTION M

EVALUATION FACTORS FOR AWARD

M-1. COMPETITIVE PROPOSAL EVALUATION

Every timely proposal received in response to this solicitation will be evaluated according to all of the criteria stated below. Numerical scores will be assigned each proposal according to the criteria stated in Article M-2 only.

M-2. NUMERICALLY RATED CRITERIA: Maximum Possible Score: One-hundred points (100 Points)

Subfactors in each category are generally listed in descending order of importance.

A. Experience 30 points

1. Ability and achievement as a facilitator in analysis of existing or incipient disputes and ability to assess conflicts and make cogent recommendations and professional judgements on the prospects for conflict resolution through a facilitated negotiation or similar process. Ability to gain acceptance and bring disputing parties into negotiations, and ability to communicate essential information without violating confidentiality.

2. Work experience and demonstrated achievement as a facilitator to work as a neutral third party with disputing parties in group problem solving and formal negotiations.

3. Skill, as demonstrated by experience, in effectively resolving scientifically and technically complex natural resource and environmental protection issues in dispute among many polarized parties.

4. Experience in advising disputing parties on techniques of coalition building, in-team bargaining, and negotiation while maintaining neutrality and credibility.

5. Experience in effectively managing negotiations related to regulations or other rulemakings, and knowledge of the Federal regulatory process as evidenced by research, publication, or experience.

6. Demonstrated ability and willingness to develop and use innovative dispute resolution techniques as evidenced by experience, research, and publication.

7. Ability to provide interactive graphic recording of meetings.

SECTION M-continued

8. Knowledge or general familiarity with the outer continental shelf oil and gas program and the Outer Continental Shelf Lands Act.

B. Understanding of the Problem 25 points

1. How well the proposal discusses a clear rationale for the approaches, strategies, and procedures to be employed, and shows insight and understanding in developing a process likely to promote resolution of differences.

2. Clear understanding of the needs of the Department of the Interior and other parties to the California air quality rulemaking negotiation, and how well the proposal satisfies those needs.

3. How well the proposal discusses the use of innovative dispute resolution techniques and their applicability to this rulemaking.

C. Dispute Resolution Skills 25 points

Perceived ability to devise and effectively manage dispute resolution process, including the perceived ability to deal successfully with groups and individuals possessing different viewpoints on the issues which are the subject of the proposed rulemaking.

D. Technical Approach 10 points

1. How well the proposed methods, techniques, and procedures are likely to fulfill the stated project requirements and demonstrate a practical knowledge of the convening/facilitation process.

2. How well the proposal provides for full coordination of logistical and communications needs associated with scheduled meetings during the course of convening and negotiations.

3. How well the proposal provides for interactive graphic recording of meetings and timely delivery of all required reports and meeting summaries.

E. Personnel Staffing 10 points

1. Ability/flexibility to provide a staff/team having the proper mix of professional expertise and support skills necessary to manage not more than two simultaneous, multiple group problem solving sessions.

2. Availability of key personnel to fulfill requirements of the contract.

-3. COST PROPOSAL CRITERIA (No Numerical Weight Assigned)

A. In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as

SECTION M-continued

controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. Cost estimates will be evaluated to determine the prospective Contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed. It is the Department of the Interior's policy to use a structured approach for determining the fee objective in contracts such as this that require cost analysis (see DIAR Subpart 1415.9 and FAR Subpart 15.9).

B. The cost and business proposal must be clear, accurate, complete, and reflect a realistic and reasonable approach to the contract.

M-4. OTHER CRITERIA

The Contracting Officer shall consider several factors in the selection process which are important, but have not been assigned specific point values, such as:

(1) Proposals must respond to all the requirements of the RFP, and must include all information specifically required in all sections of the RFP.

(2) Award of a contract may not be made unless an agreement can be secured for all general and special contract provisions.

(3) Award of a contract shall not be made to any Offeror whose proposed period of performance is not within a period of time acceptable to the MMS.

(4) Award of a contract shall only be made to an Offeror determined to be a responsible Contractor by the Contracting Officer in accordance with the provisions of the Federal Acquisition Regulation 9.1.

M-5. CONTRACT AWARD

Contract award shall be made to the responsible Offeror whose offer, conforming to this RFP, is most advantageous to the Government, technical evaluation factors, cost, and other factors considered. The Government's objective is to obtain the highest technical quality considered necessary to achieve the project objectives with a realistic and reasonable cost. Technical evaluation factors as a whole are more important than cost; however, between proposals that are evaluated as substantially equal in technical quality, the estimated probable cost to the Government will be a major selection factor.

SECTION M - EVALUATION FACTORS FOR AWARD

Appendix D

M.1 EVALUATION CRITERIA/INSTRUCTIONS

a. An evaluation of all offers will be made in accordance with the criteria of this Section M.

b. This is a Solicitation for contract work in seven separate and distinct categories as identified in C.3 (i. e. items i through vii).

c. Offerors may submit one proposal identifying separate categories of interest as indicated in section L.10. Offerors may compete for only one category, several categories, or all seven categories.

d. The government will rate all proposals received for each of the categories against each other, and select the most responsive proposal(s). The government may award more than one contract in each of the above categories. When an offeror submits multiple proposals, the government may award a contract for one (or more), and reject the proposal(s) for other categories in favor of one from another offeror that is more responsive.

e. The Council on Environmental Quality shall assemble a technical evaluation panel composed of professional regulatory staff from the Council and other federal environmental agencies.

f. The Technical Proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work (Section C). The Technical Proposal will also be rated as to the approach, methodology, and accuracy of the Work Plan for the Benchmark Task Order (Appendix J.2).

g. The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.

h. Proposals will also be compared by cost categories set forth in the cost Analysis for the Benchmark Task Order. (Refer to Sections B.7.b., H.9.c., L.11 and Appendices J.1. and J.2.)

M.2. RESPONSIBILITY

An offeror must be determined responsible according to the standards in FAR, Part 9, to be eligible for contract award.

M.3. CONTRACT AWARD

(a) The Government will award a contract from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most

App. D-

advantageous to the Government, cost or price and other factors, specified elsewhere in this Solicitation, considered.

(b) The Government may (1) reject all offers, (2) accept other than the lowest offer, and (3) waive informalities and minor irregularities in offers received.

(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offerors best terms from a cost or price and technical standpoint.

(d) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer, whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award. Negotiations conducted after receipt of an offer do not constitute a rejection or counter offer by the Government.

(e) Neither financial data submitted with an offer, nor representations concerning facilities or financing, will form a part of the resulting contract. However, if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished is incomplete, inaccurate, or not current.

M.4. TOTAL EVALUATED TECHNICAL SCORE

In weighted evaluations, the following formula will be used to arrive at the total evaluated technical score:

Each Vendor's Total Number of Technical Points X 75% = TOTAL EVALUATED TECHNICAL SCORE

M.5. TOTAL EVALUATED PRICE SCORE

For weighted evaluations, each proposal will be given a total evaluated price score based on the following formula:

Lowest Offered Price / Each Vendor's Offered Price X 25% = TOTAL EVALUATED PRICE SCORE

M.6. TOTAL EVALUATED SCORE

The total score in this weighted evaluation section is determined by combining the total evaluated technical score and the total evaluated price score.

Appendix E

BENCHMARK TASK ORDER

INTRODUCTION

This is a sample Task Order in abbreviated format modeled after an actual negotiation conducted under the EPA project. It is indicative of the type of work to be expected under the Indefinite Quantity Contract.

As part of the response requirements for this Solicitation, each offeror must prepare a Work Plan (see Section L.10) and a Cost Analysis (see Section L.11) to illustrate its typical approach and methodology, assignment of personnel by labor category, and costs of the work broken down by accounting category and project subtask.

This Task Order consists of seven individual tasks, which are described in detail in sections C.2 and C.3 of this Request for Proposal. Although the tasks are interrelated, each represents a function of the negotiation process that is severable and could be performed by one contractor alone. In preparing your proposal, you may select any one (or more) of these tasks to compete for. However, both the Work Plan and Cost Analysis must clearly segregate the material for each task into clearly labeled Sections so that it can be evaluated separate and apart from other tasks. The Section in the Work Plan for any given task may not exceed 10 pages in length.

Your Work Plan should concentrate on the procedural, logistical, and administrative considerations of the task. Emphasize your approach, methodology, and assumptions. You may include a brief description of your qualifications to understand the technical environmental factors. (Such qualifications are helpful, but secondary to the procedural aspects.) Indicate staff requirements by labor category. Prepare your sample Work Plan and Cost Analysis according to the format set forth in Appendix J.1.

To perform its mission, the Council engages in joint projects with other federal environmental agencies concerned with the particular topic involved. This sample Task Order is written as if the project will be cosponsored by the Environmental Protection Agency (EPA).

I. BACKGROUND

On April 2, 1986, the Assistant Administrator for the Office of Pesticides and Toxic Substances has recommended that the Environmental Protection Agency use a negotiated rulemaking to develop the substance of a proposed rule for regulating the application of pesticides in areas where migrant farmworkers would be subject to exposure. A negotiated rulemaking is a relatively new procedure under which representatives of an agency and interested parties are convened to reach a consensus that forms the basis of the proposed rule published by the agency. By involving the interested parties in the formulation of the proposed rule with the assistance of a trained facilitator, the resulting rule should be more acceptable to the competing interests and less likely tobe the subject of litigation.

EPA has prepared and submitted a charter for a federal advisory committee. In the event negotiations proceed, the representatives of various parties will conduct bargaining sessions through this vehicle. The Charter for this Committee is attached hereto.

EPA has adopted the "Procedures for Negotiating Proposed Regulations" promulgated by the Administrative Conference of the United States for use in its bargaining sessions. (Copy attached.) In addition, the parties themselves will adopt their own protocols for the process under the guidance of a facilitator as the first part of the negotiation.

Additional descriptive material is attached to this Task Order and should be reviewed as background information relevant to this negotiation. The material includes the following items: EPA Regulatory Negotiation Overview, Regulatory Negotiation Overview - FORUM, Interview with Lee Thomas, and Breaking Down the Walls: Negotiated Rulemaking at EPA.

The project is expected to take a total of 9 months to complete and will be divided into two distinct phasis: convening phase and facilitation phase.

PHASE I CONVENING THE NEGOTIATIONS

Objective: To determine whether a regulatory negotiation concerning the Rule on Farmworker Protection Standards is likely to be successful, and if so, to determine the interests that must be represented in the negotiation, the members of the actual negotiating group, and the issues that must be addressed.

Schedule: Complete all work within three months of award.

Tasks for the first phase include Convening Support, Documenting Support, Analytic Support, Resource Support, and Training Support. Refer to the applicable provisions in sections C.2 and C.3 for the substantive requirements of the above tasks. Use this information to prepare your proposal. Anticipate difficulties that may be encountered and list available options.

At the conclusion of the convening phase, the convener submits a report containing his/her professional opinion on the prospect of resolving the issues through negotiation given the mix of parties and the desire of the parties to negotiate in good faith. Assume that the convenor recommends proceeding with the negotiation.

PHASE II THE BARGAINING SESSIONS

Objective: To develop, through negotiations, a consensus proposal for the Rule on Farmworker Protection Standards.

Schedule: Complete all work within six months of end of Phase I.

Tasks for Phase II include: Facilitating Support, Documenting Support, Analytic Support, Resource Support, and Direct Support. Refer to the applicable provisions in Sections C.2 and C.3 for the substantive requirements of the above tasks. Use this information to prepare your proposal. Anticipate difficulties that may be encountered and list available options.

RESOURCE AND TIME REQUIREMENTS

Estimated Labor Intensity* by Task for Phases I and II:

Convening Support: 2.5 work months

Facilitating Support: 2.5 work months

Documenting Support: 2.0 work months

Analytic Support: 2.0 work months

Resource Support: 2.0 work month

Training Support: 1.0 work months

Direct Support: 0.5 work months

*The term "Labor Intensity" refers to cumulative staff time for the entire Task Order.

TRAVEL

There will be 5 monthly bargaining sessions of the federal Advisory Committee in Washington, D. C. Each session will last 2 days.

DELIVERABLES

Monthly progress reports

Final Report for each task indicating progress of negotiation, problems solved, and recommendations for future negotiations.

TYPE OF CONTRACT ANTICIPATED

It is anticipated that this Task Order will result in a firm fixed-price contract.

Appendix F

AGREEMENT FOR SERVICES
OF NEUTRAL ADVISOR

This agreement, dated this _____ day of executed by the U. S. Army Engineer District, , on behalf of the Corps of Engineers (hereinafter referred to as "Corps"),

and

WHEREAS, on the day of the Corps, on behalf of the United States of America, and entered into Contract No. (hereinafter referred to as "Contract") for the construction of

and

WHEREAS, has filed a claim with the Corps in accordance with the Contract Disputes Act of 1978 alleging that

and

WHEREAS, in a letter dated the Corps' contracting officer issued a final decision denying claim; and

WHEREAS, on appealed the Corps' final decision to the Corps of Engineers Board of Contract Appeals, where the appeal has been docketed as Eng BCA No. and

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals but without prejudicing such proceeding; and

WHEREAS, and the Corps have agree to submit Eng BCA No. 5128 to a "Mini-Trial" and have requested to serve as neutral advisor for the "Mini-Trial":

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. agrees to serve as neutral advisor for the "Mini-Trial" to be held in on and to undertake those services set forth in the "Mini-Trial Agreement Between the United States Army Corps of Engineers and dated which agreement is attached hereto and incorporated herein by reference. shall be compensated for services rendered in the lump sum amount of , which sum shall include all fees and expenses incurred by by virtue of this agreement, including all travel and lodging expenses as well as time spent in preparation for the "Mini-Trial."

2. and the Corps agree to share equally the fees and expenses incurred by in connection with his services as neutral advisor, as set forth in paragraph 1, above. Payment to for services rendered will be made separately by and the Corps upon submission of an invoice to each of them in the amount of

3. further agrees to treat any information conveyed to him in connection with the "Mini-Trial" as confidential and agrees to refrain from disclosing to third parties any of the information exchanged at the Mini-Trial" or in preparation therefor.

4. The parties agree that will be disqualified as a trial witness, consultant, or expert for any party and that his advisory response will be inadmissible for any purpose in this or any other dispute under the contract.

CORPS OF ENGINEERS

By:_____ By:_____ _____