SECNAV INSTRUCTION 5800.15A

From: Secretary of the Navy

Subj: USE OF BINDING ARBITRATION FOR CONTRACT CONTROVERSIES

Ref: (a) Federal Acquisition Regulations Subpart 33.2
     (b) DoD Instruction 4105.67 of 1 Dec 2017
     (c) 5 U.S.C. §§ 571-584
     (d) DoD Directive 5145.5 of 27 May 2016
     (e) SECNAVINST 5800.13B
     (f) Navy Marine Corps Acquisition Regulation Supplement, Chapter 5233, Sep 2013
     (g) SECNAVINST 5210.8E
     (h) 41 U.S.C. §§ 7101-7109
     (i) Addendum II, Alternative Means of Dispute Resolution, Rules of Armed Services Board of Contract Appeals
     (j) 18 U.S.C. § 1621
     (k) 32 C.F.R. § 257.5(c)
     (l) SECNAVINST 5820.8A
     (m) 9 U.S.C. §§ 1 et seq
     (n) Federal Acquisition Regulations Subpart 32.6

Encl: (1) Department of the Navy Contract Arbitration Procedural Guidance

1. Purpose. To provide a comprehensive Department of the Navy (DON) policy for the use of binding arbitration for contract issues in controversy under references (a) and (b).

2. Cancellation. SECNAVINST 5800.15.

3. Background

   a. Overview of Binding Arbitration. Contractors and contracting officers can use binding arbitration to resolve disputes quickly, conclusively, and with minimum expense. Binding arbitration is a voluntary dispute resolution process in which the parties select a neutral decision-maker (arbitrator) to hear their dispute and resolve it by rendering a final and binding award. Like
litigation, arbitration is an adversarial process designed to resolve specific issues submitted by the parties. Arbitration differs from litigation by reducing procedural and evidentiary rules, allowing flexibility in timing and choice of decision-makers, and resulting in awards with no precedential value in other disputes. Also, there are very limited rights of appeal from a binding arbitration award. Arbitration may offer an advantage over the usual claims process under references (a) and (b) by allowing the parties to address an issue in controversy once, rather than repeatedly through claims followed by appeals.

b. References (a), (c), (d), and (e) encourage Federal agencies to use Alternative Dispute Resolution (ADR) procedures, including binding arbitration, albeit subject to statutory restrictions. Prior to using binding arbitration authorized by reference (c), agency heads must consult with the Attorney General and issue guidance on the appropriate uses of the technique. This instruction is intended to meet that requirement.

4. Applicability. This instruction applies to all contracting activities of the DON. This instruction does not apply to grievance arbitrations under the Federal Service Labor Management Relations Act, 5 U.S.C. 7121.

5. Policy. Contracting officers are authorized to use the binding arbitration procedures contained in enclosure (1) for issues in controversy as defined by section 33.201 of reference (a), subject to:

   a. The limitations and requirements of references (a), (c), and (d), and enclosure (1);

   b. For matters in litigation, the approval of the Associate General Counsel (Litigation) (AGC (L)) in consultation with the AGC ADR, and;

   c. The approval of officials ordinarily required for approval of settlements, as measured by the maximum award cap identified for the proposed arbitration. See reference (f).
6. **Relationship to Other ADR Methods.** Arbitration under this instruction may be used in conjunction with other methods agreeable to the parties. For example, the parties may consider using combinations of mediation and arbitration (commonly called “Med-Arb”). Another option is to incorporate arbitration as a feature of a Dispute Resolution Board. One intent of this instruction is to provide as many options to the parties as possible for cost-effective, collaborative dispute resolution.

7. **Responsibilities**

   a. The AGC ADR shall assist activities wishing to use binding arbitration.

   b. All contracting activities shall consider the use of ADR methods, including arbitration, for pending and future claims and issues in controversy.

   c. The AGC ADR shall provide training to Office of the General Counsel attorneys and other interested DON personnel in the effective use of arbitration under this instruction.

   d. Parties rejecting offers of binding arbitration under this instruction shall provide written reasons in accordance with section 33.214 of reference (a). Contracting officers issuing or receiving such written statements shall forward them to the DON ADR Program Office electronically at adr@navy.mil for the purpose of trend analysis.

8. **Records Management**

   a. Records created as a result of this instruction, regardless of format or media, shall be managed per reference (g). The records disposition schedules from reference (g) can also be found on the Directives and Records Management Division (DRMD) portal page: https://portal.secnav.navy.mil/orgs/DUSNM/DONAA/DRM/SitePages/Home.aspx.

   b. For questions concerning the management of records related to this instruction or the records disposition
schedules, please contact your local Records Manager or the DRMD program office.

THOMAS B. MODLY  
Under Secretary of the Navy

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CONTRACT ARBITRATION PROCEDURAL GUIDANCE

1. General Guidance. Issues in controversy resolved through binding arbitration under this instruction may differ greatly in complexity and level of risk. Accordingly, parties should tailor arbitration procedures to their particular needs, guided by the principle that binding arbitration should be quicker and less expensive than the standard administrative procedures found in reference (h), the Contract Disputes Act (CDA); the Federal Acquisition Regulation (FAR); and supplements to the FAR. Further, such arbitration procedures must conform to the procedures described herein.

2. Parties

   a. Under this instruction, the term “parties” is limited to the DON and its contractors as defined in section 7101(7) of reference (h). Subcontractors wishing to raise issues for binding arbitration are not parties, and must obtain sponsorship by the prime contractor.

   b. The Office of the General Counsel (OGC) has sole authority to represent the DON in arbitrations under this instruction. DON attorneys who are not part of OGC may represent the DON only with the approval of the AGC (L), after demonstrating sufficient background in government contract law. Similar to CDA claims and appeals processing under the Navy Marine Corps Acquisition Regulation Supplement, the contracting activity involved should ordinarily maintain the continuity of any DON contract team that might have investigated and evaluated the issue in controversy. Such teams should continue to function in an assisting capacity under the leadership of the OGC attorney, or other attorney, assigned to handle the arbitration. However, no final settlement agreement will be made without the written approval and signature of the contracting officer. See reference (f).

3. The Decision to Use Binding Arbitration. Reference (e) encourages all DON personnel to use ADR techniques like arbitration to the maximum extent practicable. The decision to arbitrate must be voluntary on the part of all parties to the arbitration, and the DON shall not require anyone to consent to arbitration as a condition of award of a contract. See section
575(a) of reference (c); section 33.214(f) of reference (a). But
ADR procedures are not right for all cases. Agencies shall
consider not using any form of ADR, including binding
arbitration, in a number of specified circumstances. See 572(b)
of reference (c), which is cited in section 33.214(b) of reference
(a). Accordingly, unless it can be established to the
satisfaction of the AGC (L) that the use of binding arbitration
for the resolution of a contract issue in controversy will be in
the best interests of the Government, binding arbitration will
not be used whenever:

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

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

c. Maintaining established policies is of special
importance, so that variations among individual decisions are not
increased and binding arbitration would not likely reach
consistent results among individual decisions;

d. The matter significantly affects persons or organizations
that are not parties to the proceeding;

e. A full public record of the proceeding is important, and
binding arbitration cannot provide such a record;

f. The agency must maintain continuing jurisdiction over the
matter with authority to alter the disposition of the matter in
the light of changed circumstances, and binding arbitration would
interfere with the agency’s fulfilling that requirement;

g. Any related issues, claims, counterclaim, cross-claim, or
defenses which would require the arbitrator to rule on legal
issues beyond the scope of contract dispute jurisdiction
ordinarily provided by reference (h); or,

h. The claim involves fraud. See reference (a) at sections
33.209 and 33.210(b).
4. The Arbitration Agreement

   a. Prior to commencing binding arbitration, the contractor and the contracting officer must execute an arbitration agreement that defines the scope and procedures for the arbitration.

   b. Subject to paragraph 3 above of this instruction, a DON contracting officer who otherwise has authority to enter into a settlement concerning the matter may execute a binding arbitration agreement. See sections 575(b)(1) and (2) of reference (c).

   c. An arbitration agreement must be in writing, signed, and dated. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or “cap” that may be granted by the arbitrator. See section 575(a)(2) of reference (c). The issue of whether these agreements are contingent liabilities needs to be addressed. As a result, contracting officers should consult with the appropriate comptroller’s office prior to execution. Further:

      (1) All agreements to arbitrate shall explicitly exclude any award of punitive, consequential, special, or exemplary damages by the arbitrator.

      (2) All agreements to arbitrate shall explicitly state that the parties to the arbitration proceedings must each bear their respective arbitration costs, including all attorney fees and expenses. The agreement to arbitrate shall explicitly exclude any award of attorneys’ fees or arbitration costs by the arbitrator.

   d. The parties may limit the issues that they agree to submit to arbitration. See section 575(a)(1)(A) of reference (c).

   e. In addition to the required cap under 4.b. above, the parties may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. See section 575(a)(1)(B) of reference (c).

   f. To maximize the time and cost savings that arbitration offers, arbitration proceedings should not ordinarily exceed the claim processing times found in section 33.211(c) of reference
(a). Accordingly, the following time parameters are recommended for inclusion in arbitration agreements:

(1) Claims of $100,000 or less. The record (as defined by the arbitration agreement) should close, and briefing should be completed, within 60 days of the execution of the agreement to use arbitration. Unless the parties agree in writing, no hearing should begin less than 40 days from the date of execution of the agreement to use arbitration.

(2) Non-monetary Claims and Claims Exceeding $100,000. The record should close, and briefing should be completed, within 180 days of the execution of the agreement to use arbitration. Unless the parties agree in writing, no hearing should begin until at least 60 days from the date of execution of the agreement to use arbitration.

(3) Docketed Appeals at the Armed Services Board of Contract Appeals and matters in court. Ideally, arbitration should be used prior to appeal, but subject to the rules and orders of the Armed Services Board of Contract Appeals (ASBCA), binding arbitration may be used in appeals to the ASBCA in a manner consistent with the principles of this instruction. Counsel should consider whether the use of Summary Proceeding with Binding Decision (see reference (i)) offers appropriate benefits. Recognizing that actions in the United States District Courts and the United States Court of Federal Claims are outside the scope of reference (a), this instruction does not authorize the use of binding arbitration in those fora.

g. The arbitration agreement shall establish “confidentiality” per section 574 of reference (c) as the confidentiality standard for dispute resolution communications. Under that statute, neither the agreement to use binding arbitration nor an arbitral award will be confidential. Notably, except for those dispute resolution communications generated by the arbitrator, dispute resolution communications available to all parties are not deemed confidential under the statute. See section 547(b)(7) of reference (c).

h. The arbitration agreement should define and limit the scope of discovery needed to support the arbitration proceeding.
i. The arbitration agreement should specify whether the arbitration proceeding will involve a hearing or if the award will be made simply on a written record. Regardless of the procedures used, the parties retain the burden of proving the facts supporting their allegations or defenses. Affidavits, declarations, depositions, admissions, answers to interrogatories, stipulations, and hearing testimony under oath may be employed to supplement other documentary evidence in the record.

j. The arbitration agreement should address any requirements or restrictions on briefs, expert reports, or other expected filings.

5. Arbitrators

a. The selection of the arbitrator shall be upon mutual agreement of the parties. See section 577(a) of reference (c). The ASBCA has agreed to make administrative judges available to serve as arbitrators under this instruction. Requests for ASBCA administrative judges must be filed with the Chairman of the ASBCA. The parties also may elect to use a mutually acceptable arbitrator from another source if the parties agree as to how the costs are to be shared. In no event shall the arbitrator have an official, financial, or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that the individual may serve as the arbitrator. See section 573 and 577(b) of reference (c). The AGC (L) serves as the approving official for the DON in such matters.

b. The arbitrator may regulate the course and conduct of the arbitration hearing. See section 578(1) of reference (c).

c. The arbitrator may administer oaths and affirmations. See section 578(2) of reference (c) and reference (j).

d. The arbitrator may order the attendance of witnesses and the production of documents under the control of the parties, for discovery or hearings within the scope of the arbitration agreement. See section 578 of reference (c). Arbitrators may consider a party’s failure to comply when weighing that party’s evidence. An arbitrator may also draw an adverse inference against a party that fails to comply with an order requiring
attendance of witnesses or production of evidence under its control. For arbitration of issues in controversy that have been sponsored by prime contractors on behalf of subcontractors, such subcontractors are considered under the control of the prime contractor.

e. If the issues before the arbitrator are the subject of an appeal under reference (h), and the arbitrator is an administrative judge sitting on the ASBCA, the arbitrator may compel testimony and production of evidence at the hearing using the authority conferred by section 7105 of reference (h) and section 578(3) of reference (c).

f. An arbitrator may make awards. See section 578(4)) of reference (c). An “award” is any decision by an arbitrator resolving the issues in controversy. See section 571(4) of reference (c).

g. The arbitrator shall set the time and place for the arbitration hearing and shall notify the parties at least 10 business days before the hearing is to take place.

h. The arbitrator may hear sworn testimony and consider documentary evidence that is not irrelevant, immaterial, unduly repetitious, or privileged. See section 579(c)(4) of reference (c).

i. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents, and policy directives. See section 579(c)(5) of reference (c).

j. No party shall have any unauthorized ex parte communication with the arbitrator, unless the parties otherwise agree. If a party violates this provision, the arbitrator may require that party to show cause why the issue in controversy should not be resolved against it for the improper conduct. See section 579(d) of reference (c).

6. Arbitration Hearings

a. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall:

(1) Make the arrangements for it;
(2) Notify the arbitrator and other parties that a record is being prepared;

(3) Supply copies to the arbitrator and the other parties; and

(4) Pay all costs, unless the parties have agreed to share the costs or the arbitrator determines that the costs should be apportioned. See sections 579(b)(1)-(4) of reference (c).

b. At any arbitration hearing, parties are entitled to be heard and present evidence. Parties are also entitled to cross-examine witnesses appearing at the hearing, but the parties may voluntarily waive this entitlement in the interest of providing an expeditious and informal proceeding, to conduct a hearing on written submissions, or for other reasons. Parties may agree to use affidavits or declarations for witnesses who do not appear. The arbitration agreement should address methods of cross-examination (or waiver) for such out-of-hearing statements. Parties should recognize that arbitrators have discretion regarding the weight to give statements that are not subject to advance notice and an opportunity for cross-examination. See section 579 of reference (c).

7. Awards

a. Under section 579(e) of reference (c), the arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the parties agree to some other time limit.

b. An arbitration award shall include a brief informal discussion of the factual and legal basis for the award. Formal findings of fact and law are not required. See section 580(a)(1) of reference (c).

c. Arbitrators shall use formal service of process procedures to deliver the award to the General Counsel of the Navy and other parties. Pursuant to references (k) and (l), the Secretary of the Navy’s sole delegate for service of process is the General Counsel of the Navy. All process for such documents shall be served via certified mail or Federal Express to the:
d. The award in an arbitration proceeding shall become final 30 days after it is served on all parties. The DON may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period pursuant to section 580(b) of reference (c).

e. Final awards are binding on the parties, and confirmation is not required. Nevertheless, an award may be enforced using the confirmation procedures found in section 9 of reference (m). Awards also may be vacated, modified, or corrected on the grounds and procedures found in sections 10 to 13 of reference (m). See also section 580(c) of reference (c).

f. Prior awards may be cited in factually related proceedings (arbitral, administrative, or judicial) to raise the defense of res judicata, to serve as precedents, or otherwise. Although bounded by the terms of the contract at issue and the arbitration agreement, subsequent arbitrators have considerable discretion in how they use prior awards. The statute, however, does not permit using the prior award in factually unrelated proceedings, or for issue preclusion under the theory of collateral estoppel. See section 580(d) of reference (c).

g. For the purposes of 7.f., above, proceedings are sufficiently “factually related” when they arise between the same parties (or their legal successors or assignees) under the same contract, basic agreement, basic ordering agreement, or other similar documents. Delivery orders under the same indefinite delivery, indefinite quantity contract are factually related. For other proceedings between the same parties (or their legal successors or assignees) that arise out of different contracts, the arbitrator has discretion in determining whether the proceedings are factually related. Factors to consider include, but are not limited to, whether the subsequent contract is a follow-on contract, the prior award provides evidence of the intent of the parties, or the parties conformed their pre-dispute behavior in the subsequent contract to the terms of the prior award.
h. Contractors may invoice for final awards in accordance with established contractual procedures, provided that the arbitration award has been made part of a formal modification of the contract. The modification should include an acceptable release of all claims that were the subject of the arbitration, as well as a release of all motions or actions to vacate, correct, modify, or confirm the award. Awards in favor of the DON can result in deductive modifications to the contract, and any necessary demands for payment and recoupment action under reference (n) or other methods. Awards regarding non-monetary issues may be incorporated into the contract as appropriate. Prior to modifying the contract, the government shall ensure that the proper funds are available and all of the required approvals have been obtained.

8. Review in the United States District Court

a. The decision to use binding arbitration is subject to judicial review under section 10(b) of reference (l) for awards or uses of arbitration that are inconsistent with section 572 of reference (c). See section 581(b) of reference (c).

b. Any action for review of an arbitration award must be made pursuant to sections 9 through 13 of reference (m). See 581(a) of reference (c). Under section 12 of reference (m), “a notice of a motion to vacate, correct or modify an award must be served on the adverse party or his attorney within three months after the award is filed or delivered.” To ensure compliance with this provision, DON activities seeking review must have AGC (L) approval to initiate affirmative litigation to ensure timely processing.