

How to Sell ADR to the U.S. Government

BY DAVE ALEXANDER

In an uncertain economy, the federal government can be a reliable business partner and source of revenue for ADR service organizations. Federal agencies contract for dispute resolution and facilitation services for many purposes, such as to develop regulations, settle complaints filed with the Equal Employment Opportunity Commission and other federal workplace grievances, resolve conflicts over federal water rights or other issues, help other nations develop a civil infrastructure, and train staff in ADR processes and facilitation techniques. There is strong demand for firms with expertise in ADR, conflict avoidance and consensus building. In some cases the demand is spurred by executive action and federal law. For example, in the 1990s, two executive orders were signed by the president encouraging the use of ADR. Then, in 1996, the

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Alternative Dispute Resolution Act (ADRA) was enacted, reauthorizing ADR for the federal sector. It required federal agencies to use ADR techniques whenever it would help them avoid more contentious and costly traditional dispute resolution approaches. The ADRA also required agencies to develop ADR policies, training programs and other measures to promote the use of ADR. In 1998, the president created the Interagency Alternative Dispute Resolution Working Group by executive order, to encourage and coordinate the use of ADR.

There are a number of ways to become a government contractor of ADR services. One way to break into the federal market is to win a spot on the U.S. General Services Administration's roster of approved contractors. Another is by submitting a proposal in response to an agency-specific request for proposal (RFP).

The General Services Administration

The GSA offers a variety of products and services to federal agencies, including ADR services. The GSA maintains a stable of ADR and facilitation service providers, ranging from small niche shops to some of the nation's largest, full-service firms. The way one joins this stable is to negotiate a five-year contract with the GSA along with a set of approved hourly rates, which can escalate over time and be extended for up to 15 years.

The benefit of having an approved contract with the GSA is that any federal agency can order services from the firm with no dollar limit on any individual project or group of projects. Moreover, firms on the GSA list can market their services to all federal agencies and departments as "approved" contractors.

While federal agencies are free to acquire services on their own by issuing RFPs, they are increasingly issuing "task orders" to GSA contractors, principally because the GSA approach offers:

- **Choice.** Federal departments and agencies can choose from many different ADR firms. The GSA does not insert itself into this selection process.

- **Speed.** Federal agencies can select an ADR firm from the GSA list, then issue a task order and have the firm begin work within a few weeks. This dramatically reduces the lead time required to start a project, since it is not uncommon for a federal agency to take a year or more to put a traditional contract in place.

- **Simplicity.** Federal agencies can skip many of the tedious steps often involved in federal procurements, because the GSA already has satisfied key legal requirements—such as certifying each firm's "price reasonableness."

ADR firms that have won GSA contracts now command almost \$100 million per year in federal billings. Many of these firms are small and do not have offices in the Washington, D.C., area.

How to Join the GSA Roster

To obtain a spot on the GSA's roster, a firm has to respond to a GSA RFP. These RFPs are "standing" solicitations and are virtually always open to new applicants. They also have no time limit, so an ADR firm that wishes to send in a proposal can do so at any time. The GSA typically awards a contract within about four months if it finds that the proposal is complete, the firm is "acceptable" with respect to the RFP's technical evaluation criteria, and the proposed prices are "fair and reasonable."

Some sections of a GSA RFP are relatively easy to fill out—for example, the firm's qualifications and its basic approaches to various types of ADR and facilitation services. But others can be tricky. For example, the GSA allows for commercial-style billing rates, so responding to the pricing instructions should be done only with expert advice. Strategic errors can have negative repercussions if the contract is awarded. An experienced consultant can help most firms prepare a proposal within about four weeks.

When it comes to marketing services, approved firms that qualify as "small" have an advantage because all federal agencies try to meet ambitious goals for awarding a certain amount of their contracting dollars to firms that are either under a certain size or disadvantaged.

Costs of Being on the GSA List

ADR firms have to shoulder certain administrative requirements associated with their GSA contracts. For example, they must report changes to their commercial hourly rates if relevant to the prices quoted to the GSA in their original pro-

SOUP TO NUTS. Under GSA contracts, firms can provide a wide range of ADR and facilitation services. When submitting a proposal, a firm can offer to provide all services or only a subset of services sought by GSA, some of which include:

- Early neutral evaluation
- Facilitated, preventative fact-finding, or advisory or imposed ADR
- Ombudsperson services
- Negotiated rulemaking (i.e., development of regulations)
- Special Master services
- Non-binding or binding arbitration
- Mediation
- Private judging
- Mini-trials
- Consensus building
- Conciliation
- Meeting facilitation support
- Joint problem solving
- Problem-solving techniques
- Resolving disputes, disagreements and divergent views

posals. In addition, they are required to periodically remit an “industrial funding fee” to the GSA equal to 0.75% of the firm’s gross sales under the contract. However, ADR firms can pass this cost along to the federal agency buyer since the GSA allows approved contractors a markup on top of their approved rates. Thus, a federal agency or department that purchases ADR services from an approved GSA contractor will bear the cost of the 0.75% tariff. ADR firms that are not small businesses themselves are required to make good faith attempts to make subcontracting opportunities available to small and disadvantaged vendors.

Other Means of Federal Procurement

ADR firms that would like to provide services to federal entities should learn about other ways in which federal agencies procure services. One way that agencies find contractors is by issuing a stand-alone RFP. For example, the EEOC recently announced a series of RFPs to procure ADR services in various geographic areas. You can find a list of RFPs, updated continuously, on www.FedBizOpps.gov, a Web site updated continuously by the federal government.

Federal agencies also use “combined synopses/solicitations.” These tend to be less complex than RFPs and, in general, are easier for potential contractors to respond to. The U.S. Department of Agriculture and the U.S. Agency for International Development (U.S. AID) are planning to procure subcontractor services to support an initiative in Nepal, titled the “Strengthened Rule of Law and Respect for Human Rights, and More Transparent and Accountable Governance.”

Among other things, the procurement will require the contractor team to “assess, design and develop initiatives leading to formation of a national Alternative Dispute Resolution (ADR) system.” (Pre-solicitation notice for 367-03-021 rev. Jan. 2004.)

In some circumstances, a federal agency will issue a sole-source contract to a unique service provider. These are issued without obtaining competitive bids. The Department of the Interior, for example, recently issued a sole-source contract to an expert in mediating federal water rights issues.

Another way to enter the federal market is to participate as a subcontractor in government contracts that include ADR or facilitation as ancillary tasks. One example is the Nepal contract noted above. Another example is a U.S. Environmental Protection Agency “Regional Oversight Contract” (ROC) for cleaning up hazardous waste sites. This is a mammoth contract usually awarded to a large engineering firm, which enters into agreements with specialty subcontractors, including experts in mediation and building consensus.

Whether the federal market makes sense for a firm depends on many factors, including the willingness to learn federal business customs, which, in the case of GSA contracts, are considerably less complex than they were only a short while ago. Success in the federal market also demands structured and continuous research to find and assess specific procurement opportunities and, for many firms, the willingness to team with other companies. ■