

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

SEPTEMBER 25, 1996.—Ordered to be printed

Mr. HYDE, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 2977]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2977), to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Administrative Dispute Resolution Act of 1996”.

SEC. 2. AMENDMENT TO DEFINITIONS.

Section 571 of title 5, United States Code, is amended—

(1) in paragraph (3)—

(A) by striking “, in lieu of an adjudication as defined in section 551(7) of this title,”;

(B) by striking “settlement negotiations,”; and

(C) by striking “and arbitration” and inserting “arbitration, and use of ombuds”; and

(2) in paragraph (8)—

(A) in subparagraph (B) by striking “decision,” and inserting “decision.”; and

(B) by striking the matter following subparagraph (B).

SEC. 3. AMENDMENTS TO CONFIDENTIALITY PROVISIONS.

(a) *LIMITATION OF CONFIDENTIALITY APPLICATION TO COMMUNICATION.*—Subsections (a) and (b) of section 574 of title 5, United States Code, are each amended in the matter before paragraph (1) by striking “any information concerning”.

(b) *DISPUTE RESOLUTION COMMUNICATION.*—Section 574(b)(7) of title 5, United States Code, is amended to read as follows:

“(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.”.

(c) *ALTERNATIVE CONFIDENTIALITY PROCEDURES.*—Section 574(d) of title 5, United States Code, is amended—

(1) by inserting “(1)” after “(d)”; and

(2) by adding at the end thereof the following new paragraph:

“(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.”.

(d) *EXEMPTION FROM DISCLOSURE BY STATUTE.*—Section 574 of title 5, United States Code, is amended by amending subsection (j) to read as follows:

“(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).”.

SEC. 4. AMENDMENT TO REFLECT THE CLOSURE OF THE ADMINISTRATIVE CONFERENCE.

(a) *PROMOTION OF ADMINISTRATIVE DISPUTE RESOLUTIONS.*—Section 3(a)(1) of the Administrative Dispute Resolution Act (5 U.S.C. 571 note; Public Law 101-552; 104 Stat. 2736) is amended to read as follows:

“(1) consult with the agency designated by, or the inter-agency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and”.

(b) *COMPILATION OF INFORMATION.*—

(1) *IN GENERAL.*—Section 582 of title 5, United States Code, is repealed.

(2) *TECHNICAL AND CONFORMING AMENDMENT.*—The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 582.

(c) *FEDERAL MEDIATION AND CONCILIATION SERVICE.*—Section 203(f) of the Labor Management Relations Act, 1947 (29 U.S.C. 173(f)) is amended by striking “the Administrative Conference of the United States and other agencies” and inserting “the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code,”.

SEC. 5. AMENDMENTS TO SUPPORT SERVICES PROVISION.

Section 583 of title 5, United States Code, is amended by inserting “State, local, and tribal governments,” after “other Federal agencies,”.

SEC. 6. AMENDMENTS TO THE CONTRACT DISPUTES ACT.

Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) is amended—

(1) in subsection (d) by striking the second sentence and inserting: “The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or as otherwise required by law.”; and

(2) in subsection (e) by striking the first sentence.

SEC. 7. AMENDMENTS ON ACQUIRING NEUTRALS.

(a) EXPEDITED HIRING OF NEUTRALS.—

(1) COMPETITIVE REQUIREMENTS IN DEFENSE AGENCY CONTRACTS.—Section 2304(c)(3)(C) of title 10, United States Code, is amended by striking “agency, or” and inserting “agency, or to procure the services of an expert or neutral for use”.

(2) COMPETITIVE REQUIREMENTS IN FEDERAL CONTRACTS.—Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by striking “agency, or” and inserting “agency, or to procure the services of an expert or neutral for use”.

(b) REFERENCES TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.—Section 573 of title 5, United States Code, is amended—

(1) by striking subsection (c) and inserting the following:

“(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall—

“(1) encourage and facilitate agency use of alternative means of dispute resolution; and

“(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.”; and

(2) in subsection (e) by striking “on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual”.

SEC. 8. ARBITRATION AWARDS AND JUDICIAL REVIEW.

(a) ARBITRATION AWARDS.—Section 580 of title 5, United States Code, is amended—

(1) by striking subsections (c), (f), and (g); and

(2) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively.

(b) JUDICIAL AWARDS.—Section 581(d) of title 5, United States Code, is amended—

(1) by striking “(1)” after “(b)”;

(2) by striking paragraph (2).

(c) AUTHORIZATION OF ARBITRATION.—Section 575 of title 5, United States Code, is amended—

(1) in subsection (a)(2), by striking “Any” and inserting “The”;

(2) in subsection (a)(2), by adding at the end the following: “Each such arbitration agreement shall specify a maximum

award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.”;

(3) in subsection (b)—

(A) by striking “may offer to use arbitration for the resolution of issues in controversy, if” and inserting “shall not offer to use arbitration for the resolution of issues in controversy unless”; and

(B) by striking in paragraph (1) “has authority” and inserting “would otherwise have authority”; and

(4) by adding at the end the following:

“(c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.”.

SEC. 9. PERMANENT AUTHORIZATION OF THE ALTERNATIVE DISPUTE RESOLUTION PROVISIONS OF TITLE 5, UNITED STATES CODE.

The Administrative Dispute Resolution Act (Public Law 101-552; 104 Stat. 2747; 5 U.S.C. 571 note) is amended by striking section 11.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

(a) *IN GENERAL.*—Subchapter IV of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 584. Authorization of appropriations

“There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.”.

(b) *TECHNICAL AND CONFORMING AMENDMENT.*—The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 583 the following:

“584. Authorizations of appropriations.”.

SEC. 11. REAUTHORIZATION OF NEGOTIATED RULEMAKING ACT OF 1990.

(a) *PERMANENT REAUTHORIZATION.*—Section 5 of the Negotiated Rulemaking Act of 1990 (Public Law 101-648; 5 U.S.C. 561 note) is repealed.

(b) *CLOSURE OF ADMINISTRATIVE CONFERENCE.*—

(1) *IN GENERAL.*—Section 569 of title 5, United States Code, is amended—

(A) by amending the section heading to read as follows:

“§ 569. Encouraging negotiated rulemaking”; and

(B) by striking subsections (a) through (g) and inserting the following:

“(a) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of negotiated rulemaking. An agency that is considering, planning, or conducting a negotiated rulemaking may consult with such agency or committee for information and assistance.

“(b) To carry out the purposes of this subchapter, an agency planning or conducting a negotiated rulemaking may accept, hold,

administer, and utilize gifts, devises, and bequests of property, both real and personal if that agency's acceptance and use of such gifts, devises, or bequests do not create a conflict of interest. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the head of such agency. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests."

(2) **TECHNICAL AND CONFORMING AMENDMENT.**—*The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 569 and inserting the following:*

"569. Encouraging negotiated rulemaking."

(c) **EXPEDITED HIRING OF CONVENORS AND FACILITATORS.**—

(1) **DEFENSE AGENCY CONTRACTS.**—*Section 2304(c)(3)(C) of title 10, United States Code, is amended by inserting "or negotiated rulemaking" after "alternative dispute resolution".*

(2) **FEDERAL CONTRACTS.**—*Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by inserting "or negotiated rulemaking" after "alternative dispute resolution".*

(d) **AUTHORIZATION OF APPROPRIATIONS.**—

(1) **IN GENERAL.**—*Subchapter III of title 5, United States Code, is amended by adding at the end thereof the following new section:*

"§ 570a. Authorization of appropriations

"There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter."

(2) **TECHNICAL AND CONFORMING AMENDMENT.**—*The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 570 the following:*

"570a. Authorization of appropriations."

(e) **NEGOTIATED RULEMAKING COMMITTEES.**—*The Director of the Office of Management and Budget shall—*

(1) *within 180 days of the date of the enactment of this Act, take appropriate action to expedite the establishment of negotiated rulemaking committees and committees established to resolve disputes under the Administrative Dispute Resolution Act, including, with respect to negotiated rulemaking committees, eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) and providing public notice of such committee under section 564 of title 5, United States Code; and*

(2) *within one year of the date of the enactment of this Act, submit recommendations to Congress for any necessary legislative changes.*

SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS: PROCUREMENT PROTESTS.

(a) **PROCUREMENT PROTESTS.**—

(1) *TERMINATION OF JURISDICTION OF DISTRICT COURTS.*—Section 1491 of title 28, United States Code, is amended—

(A) by redesignating subsection (b) as subsection (d) and by striking “(d)” and inserting “(d) *EXCLUSIVE JURISDICTION OF OTHER TRIBUNALS.*—”;

(B) in subsection (a)—

(i) by striking “(a)(1)” and inserting “(a) *CLAIMS AGAINST THE UNITED STATES.*—”;

(ii) in paragraph (2), by striking “(2) To” and inserting “(b) *REMEDY AND RELIEF.*—To”;

(iii) by striking paragraph (3); and

(C) by inserting after subsection (b), as designated by paragraph (1)(B)(ii), the following new subsection (c):

“(c) *PROCUREMENT PROTESTS.*—(1) The United States Court of Federal Claims has exclusive jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for procurements or proposals for a proposed contract or to a proposed award or the award of a contract. The court has jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

“(2) To afford relief in such an action, the court may award any relief that the court considers proper, including declaratory and injunctive relief.

“(3) In exercising jurisdiction under this subsection, the court shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

“(4) In any action under this subsection, the court shall review the agency’s decision pursuant to the standards set forth in section 706 of title 5, United States Code.”.

(2) *CLERICAL AMENDMENTS.*—

(A) *SECTION HEADING.*—The heading of such section is amended by inserting “**procurement protests;**” after “**generally;**”.

(B) *TABLE OF SECTIONS.*—The table of sections at the beginning of chapter 91 of title 28, United States Code, is amended by striking the item relating to section 1491 and inserting the following:

“1491. Claims against United States generally; procurement protests; actions involving Tennessee Valley Authority.”.

(b) *NONEXCLUSIVITY OF GAO REMEDIES.*—Section 3556 of title 31, United States Code, is amended by striking “a district court of the United States or” in the first sentence.

(c) *SAVINGS PROVISIONS.*—

(1) *ORDERS.*—The amendments made by this section shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on the day before the effective date of this section. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) *PROCEEDINGS AND APPLICATIONS.*—(A) The amendments made by this section shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is

pending before the court on the day before the effective date of this section.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if this section had not been enacted. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this section had not been enacted.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on December 31, 1996.

And the Senate agree to the same.

That the Senate recede from its amendment to the title of the bill.

HENRY HYDE,
 GEORGE W. GEKAS,
 MICHAEL PATRICK FLANAGAN,
 JOHN CONYERS, Jr.,
 JACK REED,
Managers on the Part of the House.

TED STEVENS,
 BILL COHEN,
 CHUCK GRASSLEY,
 JOHN GLENN,
 CARL LEVIN,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2977) to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

The conferees incorporate by reference in this Statement of Managers the legislative history reflected in both House Report 104-597 and Senate Report 104-245. To the extent not otherwise inconsistent with the conference agreement, those reports give expression to the intent of the conferees.

Section 3—House recedes to Senate amendment with modifications. This section clarifies that, under 5 U.S.C. section 574, a dispute resolution communication between a party and a neutral or a neutral and a party that meets the requirements for confidentiality in section 574 is also exempt from disclosure under FOIA. In addition, a dispute resolution communication originating from a neutral and provided to all of the parties, such as Early Neutral Evaluation, is protected from discovery under 574(b)(7) and from disclosure under FOIA. A dispute resolution communication originating from a party to a party or parties is not protected from disclosure by the ADR Act.

The Managers recognize that the intent of the Conference Agreement not to exempt from disclosure under FOIA a dispute resolution communication given by one party to another party could be easily thwarted if a neutral in receipt of a dispute resolution communication agrees with a party to in turn pass the communication on to another party. It is the intent of the Managers that if the neutral attempts to circumvent the prohibitions of the ADR Act in this manner, the exemption from FOIA would not apply.

As with all other FOIA exemptions, the exemption created by section 574(j) is to be construed narrowly. The Managers would not expect the parties to use the new exemption as a mere sham to exempt information from FOIA. Thus, for example, we would not ex-

pect litigants to resort to ADR principally as a means of taking advantage of the new exemption. In such a case the new exemption would not apply.

Section 7—Senate recedes to House with a modification. This section requires the President to designate an agency or to designate or establish an interagency committee to facilitate and encourage the use of alternative dispute resolution. The Managers encourage the President to designate the same entity under this provision as is designated under section 11 (regarding Negotiated Rulemaking). This would promote the coordination of policies, enhance institutional memory on the relevant issues, and make more efficient the use of ADR and Negotiated Rulemaking.

Section 8—House recedes to Senate amendment with modifications. This section permits the use of binding arbitration under certain conditions, and clarifies that an agency cannot exceed its otherwise applicable settlement authority in alternative dispute resolution proceedings.

The head of an agency that is a party to an arbitration proceeding will no longer have the authority to terminate the proceeding or vacate any award under 5 U.S.C. section 580. However, it is the Managers' intent that an arbitrator shall not grant an award that is inconsistent with law. In addition, prior to the use of binding arbitration, the head of each agency, in consultation with the Attorney General, must issue guidelines on the use and limitations of binding arbitration.

Section 11—House recedes to Senate amendment with modifications. This section permanently reauthorizes the Negotiated Rulemaking Act of 1990. The President is required to designate an agency or interagency committee to facilitate and encourage the use of negotiated rulemaking.

In addition, this section requires the Director of the Office of Management and Budget to take action to expedite the establishment of negotiated rulemaking committees and committees to resolve disputes under the Administrative Dispute Resolution Act. It is the understanding of the Managers that the Federal Advisory Committee Act (FACA) applies to proceedings under the Negotiated Rulemaking Act, but does not apply to proceedings under the Administrative Dispute Resolution Act. The Director also is required to submit recommendations to Congress for any necessary legislative changes within one year after enactment.

The Managers deleted language in paragraph (b)(1)(B) determining that property accepted under this section shall be considered a gift to the United States for federal tax purposes because the Managers determined that the language merely repeated current law.

Section 12—House recedes to Senate amendment with modifications. This section consolidates federal court jurisdiction for procurement protest cases in the Court of Federal Claims. Previously, in addition to the jurisdiction exercised by the Court of Federal Claims, certain procurement protest cases were subject to review in the federal district courts. The grant of exclusive federal court jurisdiction to the Court of Federal Claims does not affect in any way the authority of the Comptroller General to review procurement protests pursuant to Chapter 35 of Title 31, U.S. Code.

This section also applies the Administrative Procedure Act standard of review previously applied by the district courts (5 U.S.C. sec. 706) to all procurement protest cases in the Court of Federal Claims. It is the intention of the Managers to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims. This section is not intended to affect the jurisdiction or standards applied by the Court of Federal Claims in any other area of the law.

HENRY HYDE,
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