REPORT

House Bill 2054 (2005)

Authorizes VITA to pilot the use ADR in procurement protests
HB 2054 (2005) authorizes the Virginia Information Technologies Agency (VITA) "to promulgate administrative rules allowing the use of alternative dispute resolution in procurement protests involving its procurement of information technology and telecommunications goods and services pursuant to § 2.2-2012." The bill further provides that VITA's administrative rules "shall provide that deadlines specified in the Virginia Public Procurement Act for filing procurement protests are tolled during the use of alternative dispute resolution" and that the rules "shall not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review."

Requires Interagency Dispute Resolution Advisory Council to report on agency ADR pilots
HB 2054 (2005) also requires that "[o]n or before July 1, 2006, and every July 1 thereafter until the expiration of this act [July 1, 2008], the Chief Information Officer of the Commonwealth shall submit a report to the Interagency Dispute Resolution Advisory Council (the Council) on the implementation of the provisions of this act." Further, "[p]ursuant to the Virginia Administrative Dispute Resolution Act (§2.2-4115 et seq.), the Council shall report on this pilot project and other council alternative dispute resolution programs to the chairs of the House and Senate Committees on General Laws, the House Committee on Science and Technology, and the Joint Commission on Technology and Science."

Interagency Dispute Resolution Advisory Council

Virginia Administrative Dispute Resolution Act
In 2002, the Virginia General Assembly passed the Virginia Administrative Dispute Resolution Act ("VADRA"), expressly authorizing all public bodies in state and local government to use alternative dispute resolution (ADR) processes -- such as mediation, facilitation, partnering, and any other process that encourages collaborative problem-solving -- to address and resolve controversial issues across a broad range of governmental functions. VADRA requires state agencies to adopt policies addressing the use of ADR in their programs and operations, and to designate an employee to serve as the agency's Dispute Resolution Coordinator.

Council Members
VADRA also created the Interagency Dispute Resolution Advisory Council to serve as a resource to public bodies in the effective use of ADR and collaborative practices. The

Council includes the Secretary of Administration as chairperson; the Director of the Department of Employment Dispute Resolution; two state employee representatives appointed by each Cabinet Secretary from among the Dispute Resolution Coordinators within their Secretariats; and three private sector appointees by the Governor, at least two of whom must have experience in mediation. At the invitation of the Secretary of Administration, the Attorney General has also designated assistant attorneys general to serve as his liaisons with the Council.

Council Achievements
Since its inception four years ago, the Council, in partnership with private sector professional organizations such as the Virginia Mediation Network and the Virginia State Bar/Virginia Bar Association's Joint Committee on ADR, has trained well over 100 agency Dispute Resolution Coordinators in ADR program basics, created a pool of shared state employee ADR practitioners, surveyed and reported on executive branch agency usage of ADR, and launched an informative web site at www.vadra.virginia.gov.

The Council has also provided ADR expertise and support to state agencies in the development and implementation of pilot projects in which ADR and collaborative practices were put in place to address and resolve an array of issues facing state government today. Seven agencies -- VITA, the Board of Accountancy, and the Departments of Environmental Quality, Forestry, General Services, Charitable Gaming, and Mental Health, Mental Retardation and Substance Abuse Services -- have taken the lead in piloting alternative dispute processes as a means to improve the way they do business, in areas as diverse as procurement, contracting, consumer complaints, the workplace, environmental problem-solving, and regulatory enforcement. In general, these agencies have found that the appropriate use of ADR and collaborative problem-solving results in significant efficiencies and economies, and produces more satisfying results for their stakeholders, as compared with more traditional forms of dispute resolution, such as litigation.

This Report by the Interagency Dispute Resolution Advisory Council addresses seven agency pilots, starting with the VITA pilot, which was expressly authorized by HB 2054 (2005) and expressly included within its reporting requirements. Each of the seven agencies provided the information contained in this Report regarding its pilot.

Executive Branch ADR Pilots

I. Virginia Information Technologies Agency (VITA)

VITA has taken a very active role in implementing ADR into its procurement policies. As the Commonwealth's central procurement agency for information technology, VITA is responsible for the procurement of millions of dollars of technology each year. As part of its procurement responsibility and authority, VITA has utilized alternative dispute resolution options to resolve protests of contract awards and contractual disputes. Most of VITA's key strategic suppliers such as Microsoft, DELL, Oracle and HP have

extensive experience with the use of alternative dispute resolution as a means of resolving disputes collaboratively within the private sector and have been very supportive of VITA's ADR efforts.

As one of the seven pilot agencies assisted by the Interagency Dispute Resolution Advisory Council, VITA undertook a comprehensive review of its statutory authority, agency regulations, policies, standards and guidelines to identify potential areas for collaborative problem solving and dispute resolution processes. VITA quickly ascertained that a proactive use of alternative dispute resolution processes, utilizing a variety of collaborative approaches, could assist in resolving appeals from procurement (contract award) protests and in resolving any contractual dispute that may arise between the Commonwealth and a supplier. Utilizing ADR in these contexts creates many positive benefits for VITA, its suppliers and the Commonwealth through litigation avoidance, consensus building, relationship building, improved implementation and service delivery while reducing costs and increasing efficiency.

VITA established specific goals and objectives for the incorporation of ADR as a pilot program to resolve protest appeals and contractual disputes. VITA's goals and objectives specifically included:

VITA ADR GOALS	HOW THOSE GOALS WERE ACHIEVED
• Develop and publish VITA's Alternative Dispute Resolution Procedures including the establishment of Alternative Dispute Resolution webpage for easy supplier access and education.	• VITA developed its Alternative Dispute Resolution Procedures for Contractual Disputes and Protests • http://www.vita.virginia.gov/procurement/documents/adrProceduresForDisputes.cfm. • ADR Procedures have been communicated to suppliers and VITA staff through website, training sessions, forums, eVA and solicitation instructions.
• Incorporate use of Alternative Dispute Resolution into VITA's information technology solicitations as a required "first step" for the protesting supplier and VITA to avoid litigation in resolving protests of contract awards.	• VITA included language in its template solicitations for hardware, software, services and maintenance that requested that any proposing supplier (offeror) agree to submit a contract award protest to VITA's ADR process before (but not in lieu of) instituting legal action as allowed by Va. Code §2.2-4360 et seq. of the Virginia Public Procurement Act. • VITA adopted a Protest Appeal Policy which established ADR as its Administrative appeals procedure for hearing appeals of protest denials pursuant to Va. Code §2.2-4365. This administrative appeal procedure provides for a mediated session between the supplier and VITA which allows the protesting supplier an opportunity to present pertinent information regarding the solicitation. As the Code requires the issuance of a written decision upon the conclusion of an administrative appeal procedure, the

VITA ADR GOALS	HOW THOSE GOALS WERE ACHIEVED
	mediator will be tasked with memorializing the mediation session and the issuance of a written decision.
• Incorporate the use of Alternative Dispute Resolution into VITA's IT contracts as the required method for resolution of contractual disputes before either party could institute litigation.	• VITA included language in its template contracts for hardware, software, services and maintenance which required its contractors to agree to submit any contractual dispute to VITA's ADR procedures before instituting legal action.

Statutory Background

While implementing ADR into its protest and contractual dispute procedures, VITA has also utilized a broad range of ADR methods such as facilitation, mediation and partnering to resolve protests and disputes during FY2005. Through the use of volunteer state employee mediators, VITA resolved two contract award protests successfully during FY 2005. In incorporating ADR into its administrative appeals procedure for protests, VITA realized that the wording of §2.2-4360 (Protest of Award or Decision to Award) could potentially require a supplier to file suit against VITA to protect their appellate rights, even while participating in mediation.

§2.2-4360 provides as follows:

> *§2.2-4360. Protest of award or decision to award.*
>
> *A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the public body in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in § 2.2-4303. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under § 2.2-4342, then the time within which the protest shall be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 2.2-4342, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in*

writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of receipt of the written decision by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

Until such time as VITA had established that ADR would serve as its administrative appeal procedure for appeal of contract awards, protesting suppliers were forced to file suit against VITA within ten days of having received a protest denial to preserve their appeal rights. This was true even though VITA and the supplier may have agreed to submit the appeal of the protest denial to ADR. VITA realized that a supplier who was forced to file suit would be hampered in their commitment and ability to resolve the protest collaboratively through ADR. Both parties would be operating under a cloud of ongoing litigation, thus impacting the free exchange of information, the ability to explore perceived risks or search for shared interests while facilitating solutions using a collaborative, interest-based approach. VITA was desirous of "tolling" the requirement for instituting litigation within ten days of receipt of the protest denial to allow ADR to be utilized proactively to resolve the protest appeal without the umbrella of litigation overshadowing the ADR process.

By passing HB 2054 in 2005, the General Assembly authorized VITA to promulgate administrative rules that would (i) toll, during the use of ADR, the deadlines specified in the Virginia Public Procurement Act for filing procurement protests, and (ii) would not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review.

Results

VITA has experienced tremendous success in avoiding costly litigation and resource drains through the insertion of ADR into its protest of contract award appeal procedure and into the resolution of contractual disputes with its suppliers. In the past three years, VITA has successfully resolved three (3) protests through the use of facilitation. VITA and the protesting supplier were able to discuss complex, often controversial issues in a collaborative, fair and constructive manner with the assistance of a trained volunteer neutral, and to craft resolutions acceptable to both parties. VITA has surveyed the three protesting suppliers which participated in the facilitative process and all three suppliers were supportive of the process, felt that information was shared fairly and openly and stated that even when the resolution was not as they had hoped, they were pleased with the result. In addition, VITA was able to establish on-going constructive relationships and open communication with these suppliers which will provide dividends in the future in dealing with these and other suppliers.

Since HB2054 became effective on July 1, 2005, VITA has experienced one appeal of a contract award protest denial. The contract involved was a statewide contract, which, although optional use, had the potential to be a large dollar contract if utilized by most of

the Commonwealth's public bodies. The protest denial was mediated through a volunteer state employee mediator, who was able to assist both VITA and the supplier in shaping a resolution in which the supplier would be educated extensively as to why they were not the contract winner and how they could more effectively compete for future Commonwealth contracts. Due to the large dollar amount of the contract, the parties agreed to utilize mediation where they were able to successfully discuss and resolve differences in a confidential setting with the assistance of a trained neutral. This successful resolution saved VITA countless personnel hours and required no out of pocket costs for the Commonwealth.

VITA's utilization of ADR to resolve protests of contract awards and contractual disputes has produced significant results such as:

- Better Relationship Building, Open Collaboration
    - Promoted on-going relationships and communications between VITA and suppliers.
    - Both parties were vested in achieving a successful resolution through facilitation or mediation and had no expectation of court action.
    - Solutions and open communication built consensus and buy-in among agency staff and supplier community.
    - Improves implementation and service delivery by both parties with realization that collaboration can be successful.
    - Increased stakeholder satisfaction with more creative options for resolution and more staying power. Solutions with "buy-in" from both parties are more likely to last and are better for on-going relationships.
    - Both parties retain control and shape outcome.
    - Less controversial and adversarial for all involved.

- Faster with Less Resources Required for Successful Resolutions
    - Protest appeals of contract awards and contractual disputes settled informally, quickly through use of volunteer facilitators and mediators.
    - Avoids costly litigation, reduces costs, prevents wasteful impasses while awaiting resolution.
    - Expectation among both parties is for quick resolution with less drain on resources.
    - Less formality promotes quicker, creative and practical resolutions.

- Cheaper for all parties involved:
    - ADR is much less resource and personnel intensive for VITA than litigation.
    - Trained state employee volunteer mediators have kept VITA and supplier costs to a minimum.
    - Staff resource drain in limited.
    - Conflict is a big waste of time and money – ADR allows VITA to avoid utilizing resources on unnecessary conflict.
    - Increases efficiency while driving down agency administrative costs.

ADR – Changing the Way VITA Does Business
VITA, like most state agencies, has no extra resources to throw away or devote to unnecessary conflict. In the fast paced, ever-changing world of information technology, VITA must continually strive to increase its efficiency efforts while cutting costs and meeting growing demands. ADR has allowed VITA to devote staff and resources to improving the quality and reducing the cost of procuring information technology goods and services that VITA procures on behalf of the Commonwealth without the drain of threatened litigation. ADR is a proven, successful, collaborative process for resolving disputes between parties, which increases efficiency and drives down the cost of government. VITA will continue to utilize HB 2054 and other resources to further implement ADR into its processes and procedures to drive successful, low cost results for procurement protests and contractual disputes.

II. Department of Environmental Quality (DEQ)

Pilot Overview
Community Involvement is no longer considered a "pilot program" at DEQ but rather an integral part of Agency operations. DEQ has adopted the recommendations of the Community Involvement Task Force, a collaboration which includes the environmental and conservation community with the regulatory agency staff. Top recommendations now being implemented include face to face meetings with citizens when controversial and emotional environmental issues arise.

The Agency has pledged to provide opportunities for involvement early and often in the process. Citizens are involved throughout permitting and regulation writing.

Regional efforts are underway to consult and collaborate with stakeholders, particularly directly affected communities. This year the agency held many community informational meetings and public information sessions prior to the more structured public hearings. Staff determined that this new approach saved time and resources by addressing community concerns right up front, before they become major contentious issues.

Goals
One of the Agency's priority strategic goals is the development of an "informed and engaged community" who can then collaborate and effectively deal with environmental issues of mutual interest.

Internally, DEQ has provided training and experiential learning opportunities for staff to improve their community involvement capabilities. Externally, the agency has actively promoted public involvement in significant environmental actions. DEQ has also collaborated with civic and conservation groups, including members of the Task Force, addressing common environmental protection goals.

As more citizens become involved with the agency, they develop an enhanced understanding of what their regulatory agency does to protect Virginia's natural resources. It is vital that the public have realistic expectations of the Agency and for the Agency's staff to improve their ability to meet these public expectations.

Participants in Dispute Resolution through Community Involvement
Participants in the process have included leaders from community, civic and conservation organizations, such as Lake Anna Civic Association and the Sierra Club; local government representatives such as Patrick County Administrator and Board of Supervisors; and homeowners groups such as Bedford County concerned citizens. Within the agency, the staff members have been involved from the Agency Director to the field scientists in air, water and waste programs. Regional directors and office managers, permit writers and regulation developers, environmental educators and policy staff have all been a part of community involvement and the pre-emptive, proactive approach to ADR.

Steps Taken
The Community Involvement Task Force, chaired by the Director and consisting of conservation community leaders and agency staff, was re-convened for a progress check-up. The group addressed areas of concern and opportunities for improvement for both agency and stakeholders. Results of this meeting were incorporated into the Task Force Action Plan with an emphasis on more website and e-mail communication about issues and opportunities for involvement.

Throughout the year, the agency implemented the new DEQ Community Involvement policy developed collaboratively with the Task Force. Staff, together with the conservation community, implemented many of the recommendations. Each of the seven DEQ Regional Offices held a second annual community event, such as an open house, in the fall. Staff and community members discussed and prioritized local environmental issues. Over 20 additional community meetings were held prior to formal hearings and early in the process to listen to community concerns about potentially controversial topics. Regional community involvement plans were developed to address locally identified issues in a timely and effective manner. Some of the plans included training for local officials, outreach exhibits at major community events, and relationship building with conservation organizations.

Training was offered for agency staff in communicating technical information to non-technical audiences, collaboration and participation, facilitation and leadership. Staff members were asked to help identify what they needed to implement the new Community Involvement Policy. Continuous training, active support from the agency Director and coaching for frontline staff have all increased the agency capacity to address community concerns, thus implementing the dispute resolution phase immediately.

Supporting Conditions & Impacts
In order for this process to succeed within the DEQ through the Community Involvement Program, it was necessary to recognize the shared commitment to environmental

protection, to recognize the common ground with environmental and conservation organizations and to develop a shared commitment/responsibility to community involvement in environmental protection.

Recognition of mutual benefits increased as community involvement efforts were successful. By proactively calling stakeholders to the table as concerns were identified, the agency saved both human and financial resources and avoided several major confrontations which could have resulted in the need for mediation and or conflict resolution at a later stage.

Challenges & Solutions
Mistrust and lack of understanding were major challenges again this year. More environmental and conservation organizations were involved and learned to be more effective in participating and being heard throughout the regulatory process. However, there is still a residual mistrust and lack of understanding on the part of those who have not been directly involved.

DEQ proactively invited stakeholders to local listening sessions and held community meetings in local venues which were closer and more familiar, making it easier for participants to attend.

In order to be viewed as impartial, DEQ chose to use neutral facilitators for highly visible and controversial meetings. Some of them were agency employees from other program areas with strong facilitation skills and some were from outside the agency. The use of facilitators has helped both staff and community to work through some difficult environmental issues such as lake water quality, landfill maintenance, air quality and local water supply planning.

Implementing the New ADR Process:
How It Worked
DEQ implemented state wide and regional action plan strategies with internal and external stakeholders. Collaborative work demonstrated mutual commitment to goals of the new DEQ Community Involvement Policy. The agency continued to train and support staff in areas related to the implementation of outreach plans such as communication, facilitation, participation, leadership and dealing with controversy. As staff developed more expertise and confidence, they had more success with collaborative, issues-focused community involvement. Relationships were developed and improved at the local, regional and state levels as staff, collaborators and stakeholders shared their successes with others, creating momentum and excitement.

Stakeholder Involvement
Key leaders were involved from primary stakeholder groups and agency air, water and waste programs. A continuous effort was made to communicate with external and internal stakeholders using multiple methods such as email, post, phone and websites. Community open houses, pre-hearing open discussions, specific topic meetings and targeted audience meetings all brought stakeholders together to address common

concerns in a collaborative way. Some of this year's issues have included: lake sedimentation and debris dumping, water quality and impaired waters clean up, water supply and re-use, landfill sites and performance in low income and minority communities, and air quality along interstate and urban corridors.

Results Produced

Better?

Improved involvement opportunities led to better public comments, more community awareness and concern about the environment and better environmental protection. Over eight hundred participants attended regional open houses and targeted environmental issue meetings at the local level. With more people wanting more information more often, DEQ made a concerted effort to update and improve the public website, including interactive permit tracking and new GPS applications.

Working together much earlier and more often in the regulatory process has improved the agency's ability to work with stakeholders towards common goals and reach decisions or take actions that are better understood and supported by the public.

Faster?

As a result of pre-hearing community informational meetings and discussions, the agency experienced a reduced number of regulatory permit hearings. More community members demonstrated an increased trust in agency actions. They were more often willing to collaborate with conservation groups and key leaders in an effort to reach consensus actions. This resulted in less time required for resolution of many issues.

Cheaper?

Relatively small investment was required to increase participation opportunities and to improve public access to information. Contentious issues have taken much agency time and talent in the past but staff time was reduced with early efforts to identify and address community concerns. The ADR component of the Community Involvement program provides opportunities to meet and discuss issues before they become major conflicts. In the end, the collaborative approach to problem solving is cheaper than litigation.

Lessons Learned

Addressing issues collaboratively before they become major problems requires a change in agency culture. Continuous training and support are needed at all levels, especially for front line staff, to provide the tools and techniques required by this participatory pro-active dispute resolution approach. Agency leadership commitment is essential, the effort must be highly visible and successful efforts must be rewarded. Staff must be encouraged and rewarded for listening and responding to the community. Successful collaboration increases when successes are shared and results are discussed from many stakeholder perspectives.

To obtain support and involvement from stakeholders, they must be asked to participate. And meeting times and locations must be convenient to promote involvement. People often decline, but are pleased to be asked.

At the end of the day, it is vital to "Trust the Process" even though it can be difficult at times. The potential benefits of Community Involvement as a guiding policy at DEQ are immense.

III. Department of Forestry (DOF)

Pilot Overview: Incorporating Mediation as a Component of Silvicultural Water Quality Law Enforcement

The goal of the DOF ADR Pilot Program is to change the behavior of individuals who have been involved in an enforcement action to the point of civil penalty assessment under the Commonwealth's Silvicultural Water Quality Law. A major goal of the agency is to protect water quality from impacts from timber harvesting. The program was designed through a cooperative effort by John Carroll, Deputy State Forester; Matt Poirot, Water Resources Program Manager; Merri Hanson, Peninsula Mediation and ADR; and Tanya Denkla-Cobb, Institute for Environmental Negotiation at the University of Virginia.

Developmental Steps

During the Summer and Fall of 2004, the Department of Forestry with assistance from Merri Hanson with Peninsula Mediation & ADR and Tanya Denkla-Cobb with UVA's Institute for Environmental Negotiation embarked on the development of a Pilot Program for the agency's Water Quality Law Enforcement Program. The process involves the use of a mediator employing a facilitative, non-evaluative style of mediation. Development involved the determination of when to consider the use of mediation in the agency's law enforcement process. Procedures were developed, and forms and letters created to support program implementation. The agency met with the Attorney General's Office to insure that legal requirements of the law were being addressed through this process.

A recruitment process for mediators took place during the winter of 2004 and a training session for interested mediators occurred during February of 2005. The pilot program began in March of 2005.

Supporting Conditions & Challenges

The agency currently has the "Silvicultural Water Quality Law" and procedures in place to support the role of the ADR process to allow mediation as an opportunity to those individuals impacted by the agency's enforcement of the law. The opportunity for mediation provides an option for water quality issues to be resolved on a specific site as well as the possibility to gain some behavioral changes of the owners and operators in a more constructive manner.

While mediation could lengthen the law enforcement process, which is already quite lengthy, it is offered in a way and time period that adds it as another step in the agency's law enforcement procedure and really does not add but a very few days to the process. The settlement agreements (if reached) always have a component to correct the original Water Quality violation for every case. Additionally, the agency usually requests that training be taken to avoid future problems, a reduction of what the agency will be seeking in terms of civil penalty, and a component that additional violations of law do not occur for a designated period of time (probation). These things are usually pretty agreeable to all parties.

There is also the potential for savings to the agency, in terms of staff time and other enforcement costs, of an estimated $3,150 for each enforcement case that is successfully mediated as opposed to going the usual enforcement route through appeal. Given that the agency has approximately 12 cases per year which go beyond the normal resolution and result in civil penalties being assessed, the total potential annual savings could amount to $37,800.

Implementation of the ADR Process

The agency began implementation of this pilot program in February of 2005. It was decided that the process would be incorporated into the law enforcement procedure after violation of a standing Special Order and prior to a Formal Hearing to prove that the Special Order was not complied with. The Formal Hearing is really the civil penalty assessment hearing. The mediation fits quite nicely into the agency's enforcement within the guidelines of the Administrative Process Act. The agency notifies all parties involved that they did not successfully comply with the Special order to fix the Water Quality problem. The agency notifies all parties that they will be seeking civil penalties of a fixed amount per day of violation. Then the agency offers the opportunity to come to some resolution through the ADR process.

The pilot program was rolled out after gaining approval of the State Forester's Water Quality Task Force, the main Stakeholders group, and selecting and training of the mediators.

Results

The agency had two (2) opportunities to mediate Water Quality Law violations during fiscal year 2005 and four (4) opportunities during fiscal year 2006. All six of those mediated cases resulted in settlement agreements among all parties involved. The basic components of all of the settlement agreements were as follows:

- Reduced civil penalty (usually reduced from a 30 day period to one day of civil penalty)
- Request for written harvest plans on the operator's next 3 jobs.
- Proof that the logger and timber owner have been through BMP educational program or that they will agree to go to educational program on BMPs.
- No more Water Quality Law Special Orders for the next 6 months.

Of the two mediated cases in fiscal year 2005, the settlement agreements were complied with by the parties. However, of the four mediated cases in fiscal year 2006, three of the settlement agreements were not complied with by the parties involved, resulting in default of those agreements. In one of the defaulted cases, none of the agreed upon terms were complied with. At Formal Hearing in the case, a Civil Penalty of approximately $36,000 was assessed, where the amount of civil penalty agreed to was $2,500.

In one of the other cases, a settlement amount of $2,320 was agreed to, it was provided two weeks late after default on the agreement, and that check bounced, and none of the other terms were met. A Formal Hearing was then held with a Civil Penalty amount of approximately $116,000 assessed against the operator. In the third of the defaulted cases, a settlement amount of $872.00 was agreed to by all parties and paid two weeks after the individual received word that the settlement agreement was defaulted upon due to not having met any of the requirements of the settlement agreement. A formal hearing in this matter was also held and a Civil Penalty of $105,000 was assessed against the individual.

While the ADR process did not prove in all cases to be any better, faster or cheaper to implement, it did provide a reasonable approach to settling the issues involving the enforcement of the Water Quality Law in a proactive manner. It allowed the agency to be somewhat gracious in its enforcement action. Unfortunately, three of the six opposing parties chose to not follow the agreement that the mediation had satisfactorily created. The results speak for themselves.

Lessons Learned
The agency has been re-evaluating the use of mediation in this enforcement program. It has been determined that to achieve the desired results of behavioral changes that the agency is seeking, a screening process will have to be created to allow suitable candidates the option for mediation. For example, habitual offenders may be screened out of the program. The Attorney General's Office has been consulted and has indicated that we can enact criteria for the program for this purpose as long as the agency is consistent in the use of the screening criteria.

In those cases that we have had a successful settlement of the issues, the agency has been quite satisfied with the results. We feel that this option of mediation still provides an opportunity with the right parties to be successful in addressing the behavioral changes that the agency is seeking and needs to remain an option for those individuals.

IV. Department of Mental Health, Mental Retardation, and Substance Abuse Services

Goals
Assist a mental health facility in achieving its mission through:

- Enhanced leadership skills of management team

- Enhanced capacity for achieving important, long-term policy goals and highest quality service delivery
- Enhanced internal staff communication
- Enhanced cohesiveness of management team

Participants
- Facility Executive and Senior Management Team
- DMRMRSAS Central Office Support
- Interagency Dispute Resolution Advisory Council facilitators (John Settle and Jim Pope)

Steps Taken
- Buy-in from facility management
- Develop strategy for informing participants
- On-site one-on-one confidential interviews with facility management staff
- Analyze results of interviews to identify common themes and needs
- Report back to management team (depersonalized)
- Develop strategy for future action
- Response by management team
- Follow-up items

Supporting Conditions
- No blame
- Forward focus
- Management team receptive to process

Challenges
- Recent restructuring
- Silo operations
- Changing client base

How the ADR Process Worked
- Positive team building
- Coach reinforcement
- Enable open discussion of issues
- Gain commitment to support identified outcomes

Roll Out to Stakeholders
- Initial communication to participants from facility director
- One-on-one confidential opportunity to provide input
- Reporting back (feedback and updates)

Lessons Learned
- More focus on data driven outcomes
- Management must ensure on-going horizontal communication

- Management must be open to options to traditional training delivery
- Management must demonstrate commitment

Results

- Positive steps taken
    - Staff realignment
    - Enhanced communications
    - Staff recognition in the form of compensation for contributions to facility programs
    - Enhanced project management skills
    - Planned action steps for further improvements
- ADR pilot and the positive steps that resulted are viewed by agency as key factors in:
    - Reducing turnover from 57.1% in FY04 to 28.0% in FY05
    - Decreasing terminations of non-probationary employees from four in FY04 to 1 in FY05
    - Reducing injuries by 40% in CY2004 and decreasing the severity of those injuries
    - Reducing by 57% in FY05 the use of seclusion and restraint of patients
    - Enhancing staff leadership and significant partnerships with community, national and global resources
    - Positive patient feedback
        - Statement taken from a plaque sent by a previous patient and her family that was presented to the treatment team:

"To all Doctors and Staff,
Thanks for all the help and support you gave me during my stay there. You always knew just what to say and do to make my day better. Each and every one of you went from being doctors and staff to friends and family. I will never forget how you guided me through my 7-week long "journey" at CCCA. With love and much appreciation. [Patient name]"

V. Board of Accountancy

Goals

To offer complainants and regulants an alternate way to resolve disputes.
To save time and money for the Agency.

Participants

Dispute Resolution Coordinator- Jean Grant
Executive Director/Agency Head- Nancy Taylor Feldman
BOA Enforcement Committee

Steps Taken
Design the pilot and establish criteria with the involvement of the Executive Director, the Board's Dispute Resolution Coordinator, Enforcement Committee, and Assistant Attorney General, and with full Board approval. Decision made to utilize the mediation process in carrying out the Board's mission of public protection by continuously improving the enforcement process to ensure prompt investigation and appropriate resolution of these matters.

Ongoing Challenges and Solutions
To provide the Complainant and the Regulant with a tool to obtain a resolution to the dispute that is fast and fair. The Board has embraced and employed mediation as the first means of resolving its enforcement cases when appropriate. The Board has determined that mediation is an additional effective tool in the enforcement process.

How It Works
The Board's Dispute Resolution Coordinator reviews and submits qualifying cases for consideration to the Enforcement Committee. The complainant and disputant are offered the process. A neutral mediator is assigned, and the mediation is scheduled.

Cases during FY2006 and FY2005
Case 2006# 1- Complainant felt that the Regulant, a previous employee, was soliciting clients prior to leaving the company to begin a new practice. Mediation provided an equitable resolution for both parties.

Case 2006# 2-Complainant felt that the Regulant's level of professionalism was not acceptable due to work not being completed on time, causing penalties and late fees. Both parties came to an agreement prior to their mediation date and the resolution was settled.

Case 2006# 3-Complainant felt that the Regulant did not look out for their best interest. Regulant refused mediation, the case was referred back to the Enforcement Committee, an investigation was completed and the Board found "No Violations".

Case 2006# 4-Complainant felt that the Regulant overcharged them for services he did not perform. This case is currently in mediation and the outcome is not known at this time.

Case 2005#1-Complaint alleged the CPA and CPA firm failed to collect necessary facts to accurately prepare returns and failed to consider & evaluate impact on corporation and shareholders of complexities & tax filing alternatives. Offered mediation however, resolved issues prior to mediation.

Case 2005-#2- Complaint alleged the CPA ignored his request for status of tax returns and did not complete in a timely manner all of the fiduciary duties agreed upon. CPA and Complainant agreed to mediation, however, all work was completed without charge in a timely manner and the complainant withdrew the complaint

Overall Estimated Benefits
The Board has embraced and employed mediation as the first means of resolving its enforcement cases when appropriate. The Board has determined that mediation is an additional effective tool in the enforcement process. The Board strongly endorses the fast, fair, and equitable use of mediation in the enforcement process and therefore recommends mediation as the first step in resolving conflicts with the assistance of a neutral facilitator. With mediation, the Board can avoid the cost of a court reporter, hearing officer, as well as Board travel and staff time to resolve a complaint against a regulant. In addition, the resolution time using mediation is generally about 2 weeks, much shorter than the average time of 3.45 months for formal Board hearings.

VI. Department of Charitable Gaming

Goals
To develop a specialized informal process as an alternative to the Administrative Process Act (APA), to resolve controversies involving licensing decisions, as well as statutory and/or regulatory violations, in an expeditious manner to the mutual satisfaction of all parties, and in a regulatory environment that is also customer service oriented for the Department's constituents. To increase the efficiency of the process, and to reduce the Department's costs associated with more formal processes.

Participants
Applicable Department staff and constituents that include charitable organizations that conduct charitable gaming, licensed charitable gaming suppliers, and licensed game managers/callers.

Steps Taken
- Realization of the need to more efficiently address statutory and/or regulatory issues.
- Designated ADR Coordinator and ADR Contact person.
- Provided instruction to meet the educational needs of all Department stakeholders.
- Adopted written policies and procedures.
- Established criteria to determine whether a controversy would be appropriate for ADR after a review and analysis of policy and law.

Supporting Conditions and Impact
- Stakeholders are empowered to control their fate by taking an active role in the resolution of controversies at hand.
- Stakeholders are asked to actively participate in and provide information in an informal environment that expedites resolution.
- Creates a non-adversarial atmosphere.
- Less staff time involved in the resolution using ADR than in utilizing the APA.
- ADR avoids the time involved in the preparation of notices, reports, transcripts, and closing documents.

- Neither party waives any rights under the APA, and there is no risk to stakeholders.
- Allows the Department and the stakeholder to identify and remove together obstacles for the effective use of ADR.

Challenges

- Finding suitable candidates for ADR.
- Making a distinction between an organization that makes a statutory or regulatory mistake versus an organization that purposefully contradicts the statute and regulations.
- Being mindful that not all disputes are appropriate for ADR.
- Timely exercising the Department's rights under the APA as soon as possible when an ADR attempt is not successful.
- The Department must weigh the potential benefit of ADR for each particular stakeholder by conducting a review and analysis of the Department's records, and the organization's history and prior performance.
- The Department must be careful to make certain that stakeholders are sincere participants in ADR versus stalling the inevitable formal process.
- Overcoming the theory that ADR is a soft approach to conflict resolution.

How the ADR Process Works

- At the discretion of the Director, a constituent organization may be afforded an opportunity to participate in a face to face meeting to discuss the issues at hand.
- All stakeholders will establish an agreed upon meeting date that will include the various Department disciplines, the organization's leadership, and if applicable, a third-party mediator.
- A letter is generated to the constituent outlining the controversies at hand and the Department's process in utilizing ADR and confirming the agreed upon date and location.
- The staff member designated by the Director will conduct the meeting, and each party will be afforded an opportunity to present their case and introduce any documents in support of their position. The controversies will be addressed in detail with the goal of reaching an amicable agreement.
- Follow up and monitoring by the Department to ensure that the stakeholder complies with the agreed upon resolution is crucial.

Decision to Utilize the Process

The decision to utilize the process is made on a case by case basis after:

- Thorough discussions with and recommendations from the applicable Department disciplines.
- Thorough review of the statutory and regulatory controversies, and the organization's compliance with its statutory and regulatory obligations to date.
- An analysis of the benefit of (1) the ADR process pertaining to the individual constituent, (2) the cost benefit to the Department, and (3) the potential for settlement.

- The potential customer service benefit to both the Department and the organization after careful review and analysis.

Results

- **Better?** Yes, effectively promotes the resolution of disputes outside of the APA, and stakeholders still have their "day in court." ADR focuses on solving the problem in lieu of who is at fault.
- **Faster?** Yes, as controversies can be resolved as early and as quickly as possible, most often within 30 days.
- **Cheaper?** Yes, the Department has abridged both its actual and intangible costs, measured in staff time and Department resources. A single enforcement case can take over two years to resolve using the traditional hearings process, and cost over $10,000 in legal expenses.

Lessons Learned

- ADR has clearly helped the Department meet its goal of being more customer service oriented, while still fulfilling its statutory and regulatory responsibilities.
- The Department has learned that its stakeholders would much rather utilize this informal process for the resolution of controversies.
- In most cases, there is a clear distinction between organizations that are better suited for ADR versus those that are more inclined to be litigious.
- ADR is in essence a mutual problem-solving process.

VII. Department of General Services

Goals

- Promotes agency/contractor partnership
- Less formal process resulting in faster and less costly resolution
- Less confrontational
- Parties retain control over outcome

Participants

- All state agencies that follow DGS's Division of Purchases and Supply (DPS) *Agency Procurement and Surplus Property Manual (APSPM)*
- Vendor community that follows the DPS *Vendors Manual*

Steps Taken

- DPS Research – Local governments, Virginia Association of Governmental Purchasing, National Institute of Governmental Purchasing, Federal Acquisition Regulation
- Discussions with the Virginia Information Technologies Agency (VITA)
- Consultation with the Office of the Attorney General
- Policy developed and approved by DPS Policy Committee and Director

- Policy incorporated into the *APSPM* – July 2004 – applicable to non-technology goods/services and non-professional services contracts
- Agencies notified and provided instruction on use of DPS ADR Policy:
    - DPS website
    - DPS statewide procurement forum – December 2004 and December 2005
    - Added to Virginia Contracting Office curriculum – 2005
        - Since July 2005 – approximately 150 individuals have received training on the ADR process described in the *APSPM* – Chapter 11.4

Supporting Conditions and Impact

- Prior to DPS Policy, vendors' only option to challenge agency contractual dispute decision was legal action – costly for all involved
- Developed partnerships between agencies and their vendors
- Vendors reluctant to challenge agencies in court – concerned about ramifications

Challenges and Solutions

- Awareness of policy
- Change the business practices of vendors and agency buyers
- Education/Training
    - 150 individuals received training on DPS *APSPM* ADR process

How It Works

- Agency denies a contractor's claim
- Contractor decides to challenge the denial of its claim
- Parties encouraged to use ADR
    - Contractor gives written notice to agency purchasing office requesting ADR process to resolve issue
    - Each party appoints senior management official not previously involved in the transaction to negotiate on their behalf
    - Each party shall furnish to the other party all non-privileged documents and information with respect to the dispute that either party believes to be appropriate and germane
    - Informal – attorneys excluded
    - Use of facilitator recommended
    - Resolution agreement must be in writing and signed by authorized representatives of both parties
    - Any compensation paid to facilitator shall be shared equally by the two parties

Roll Out to Stakeholders

- DPS Procurement Forum – December 2004
    - Buyer and Vendor workshops
- *APSPM* and Vendor Manual
- DPS Procurement Forum – November 2005
- 2005 – Added to curriculum of DPS Virginia Contracting Officer training

Results Expected to Produce

- **Better**
  - Communications between contractors and agencies
  - Less confrontational
  - Parties retain control over outcome
- **Faster**
  - Reduces time to resolve contractual dispute
- **Cheaper**
  - ADR less expensive than legal/court alternative

Lessons Learned

- Different way of thinking – agency buyers and contractors need "Interest-Based Negotiation" training
- Improved agency/contractor relations
- It's still early in the implementation process – but each ADR endeavor is a potential "Win/Win" solution
- Examples of state agency use of ADR for contractual disputes (see also Virginia Information Technologies, Section I above):
  - Department of Transportation: ADR used on three occasions in FY05 to resolve procurement claims or contractual disputes. ADR participants indicated that they were satisfied with the results, the issues were resolved quicker and the costs were cheaper.
  - Department of Labor and Industry: Interest-based negotiation used in 2005, continued from 2004. Ultimately the desired result was achieved; however, in this instance, the more formal, traditional approach may have brought about the desired result more quickly. While this approach seemed to engender genuine cooperation from the contractor, the stimulus of a penalty or potential loss of contract inherent in the formal procurement process for redress could have caused a quicker resolution by contractor.
  - State Board of Elections: The agency and a contractor agreed to use ADR to resolve contractual issues. They successfully resolved the issues and found ADR to be an effective alternative to the formal contract compliance process.

APPENDIX

CHAPTER 577

An Act to authorize the Virginia Information Technologies Agency to conduct an alternative dispute resolution pilot project.

[H 2054]

Approved March 22, 2005

Be it enacted by the General Assembly of Virginia:

1. *§ 1. Notwithstanding the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Virginia Information Technologies Agency is authorized to promulgate administrative rules allowing the use of alternative dispute resolution in procurement protests involving its procurement of information technology and telecommunications goods and services pursuant to § 2.2-2012. Such rules shall provide that deadlines specified in the Virginia Public Procurement Act for filing procurement protests are tolled during the use of alternative dispute resolution.*

§ 2. Such rules shall not require the protesting party to exhaust all available administrative remedies prior to seeking judicial review.

§ 3. On or before July 1, 2006, and every July 1 thereafter until the expiration of this act, the Chief Information Officer of the Commonwealth shall submit a report to the Interagency Dispute Resolution Advisory Council (the Council) on the implementation of the provisions of this act. Pursuant to the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.), the Council shall report on this pilot project and other council alternative dispute resolution programs to the chairs of the House and Senate Committees on General Laws, the House Committee on Science and Technology, and the Joint Commission on Technology and Science.

2. That the provisions of this act shall expire on July 1, 2008.

VIRGINIA ADMINISTRATIVE DISPUTE RESOLUTION ACT

§ 2.2-4116. Authority to use dispute resolution proceedings.

A. Except as specifically prohibited by law, if the parties to the dispute agree, any public body may use dispute resolution proceedings to narrow or resolve any issue in controversy. Nothing in this chapter shall be construed to prohibit or limit other public body dispute resolution authority. Nothing in this chapter shall create or alter any right, action, cause of action, or be interpreted or applied in a manner inconsistent with the Administrative Process Act (§ 2.2-4000 et seq.), applicable federal or state law or any provision that requires the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program. Nothing in this chapter shall prevent the use of the Virginia Freedom of Information Act to obtain the disclosure of information concerning expenses incurred in connection with a dispute resolution proceeding or the amount of money paid by a public body or agency to settle a dispute.

B. A decision by a public body to participate in or not to participate in a specific dispute resolution proceeding shall be within the discretion of the public body and is not subject to judicial review. This subsection does not affect or supersede any law mandating the use of a dispute resolution proceeding.

C. An agreement arising out of any dispute resolution proceeding shall not be binding upon a public body unless the agreement is affirmed by the public body.

(2002, c. 633.)

§ 2.2-4117. State agency promotion of dispute resolution proceedings.

A. Each state agency shall adopt a written policy that addresses the use of dispute resolution proceedings within the agency and for the agency's program and operations. The policy shall include, among other things, training for employees involved in implementing the agency's policy and the qualifications of a neutral to be used by the agency.

B. The head of each state agency shall designate an existing or new employee to be the dispute resolution coordinator of the agency. The duties of a dispute resolution coordinator may be collateral to those of an existing official.

C. Each state agency shall review its policies, procedures and regulations and shall determine whether and how to amend such policies, procedures and regulations to authorize and encourage the use of dispute resolution proceedings.

D. Any state agency may use the services of other agencies' employees as neutrals and an agency may allow its employees to serve as neutrals for other agencies as part of a neutral-sharing program.

E. This chapter does not supersede the provisions of subdivision 2 of § 2.2-1001 and subdivision B 4 of § 2.2-3000, which require certain agencies to participate in the mediation program administered by the Department of Employment Dispute Resolution.

(2002, c. 633.)

§ 2.2-4118. Interagency Dispute Resolution Advisory Council.

A. The Interagency Dispute Resolution Advisory Council is hereby created as an advisory council to the Secretary of Administration.

B. The Council shall consist of two dispute resolution coordinators from each Secretariat appointed by each Secretary, the Director of the Department of Employment Dispute Resolution, and three persons who are not employees of the Commonwealth, at least two of whom have experience in mediation, appointed by the Governor. The appointees who are not employees of the Commonwealth may be selected from nominations submitted by the Virginia Mediation Network and the Virginia State Bar and the Virginia Bar Association Joint Committee on Alternative Dispute Resolution, who shall each nominate two persons for each such vacancy. In no case shall the Governor be bound to make any appointment from such nominations. The Secretary of Administration or his designee shall serve as chairman of the Council.

C. The Council shall have the power and duty to:

1. Conduct training seminars and educational programs for the members and staff of agencies and public bodies and other interested persons on the use of dispute resolution proceedings.

2. Publish educational materials as it deems appropriate on the use of dispute resolution proceedings.

3. Report on its activities as may be appropriate and on the use of dispute resolution proceedings, including recommendations for changes in the law to the Governor and General Assembly.

D. Every state agency shall cooperate with and provide such assistance to the Council as the Council may request.

(2002, c. 633.)

§ 2.2-4119. Confidentiality between parties; exemption to Freedom of Information Act.

A. Except for the materials described in subsection B, all dispute resolution proceedings conducted pursuant to this chapter are subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. All memoranda, work products, or other materials contained in the case file of a mediator are confidential and all materials in the case file of a mediation program pertaining to a specific mediation are confidential. Any communication made in or in connection with a mediation that relates to the dispute, including communications to schedule a mediation, whether made to a mediator, a mediation program, a party or any other person is confidential. A written settlement agreement is not confidential unless the parties agree in writing. Confidential materials and communications are not subject to disclosure or discovery in any judicial or administrative proceeding except (i) when all parties to the mediation agree, in writing, to waive the confidentiality; (ii) to the extent necessary in a subsequent action between the mediator and a party for damages arising out of the mediation; (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation; (iv) where communications are sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against the mediator; (v) where a threat to inflict bodily injury is made; (vi) where communications are intentionally used to plan, attempt to commit or commit a crime or conceal an ongoing crime; (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party, nonparty, participant or representative of a party based on conduct occurring during a mediation; (viii) where communications are sought or offered to prove or disprove any of the reasons listed in § 8.01-576.12 that would enable a court to vacate a mediated agreement; or (ix) as provided by law or rule other than the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege. Unless otherwise specified by the parties, no mediation proceeding shall be electronically or stenographically recorded.

(2002, c. 633.)