Chapter 26
Alternative Dispute Resolution

2014 Contract Attorneys Deskbook

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CHAPTER 26

ALTERNATIVE DISPUTE RESOLUTION

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ALTERNATIVE DISPUTE RESOLUTION (ADR)

I. INTRODUCTION.

A. Objectives.

This deskbook exploresurpose and application of alternative methods of resolving disputes in the contract law arena (e.g., protests and CDA claims) as required by the Administrative Dispute Resolution Act (ADRA), the Contract Disputes Act (CDA), and the Federal Acquisition Regulation (FAR).

B. References:

1. The Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 7101-7109. Pertinent to ADR, See §7103(h).

2. The Administrative Dispute Resolution Act (ADRA), Pub. L. No. 104-320, 110 Stat 3870, 5 U.S.C. §§ 571-584.

3. Federal Acquisition Regulation (FAR) 33.214, Alternative Dispute Resolution (ADR).

4. DOD Directive 5145.5, Alternative Dispute Resolution (ADR), April 22, 1996http://www.adr.af.mil/shared/media/document/AFD-070924-110.pdf

5. Defense Procurement and Acquisition Policy (DPAP), Alternative Dispute Resolution (ADR). The following link will take you to handbooks, guidance, laws, and service specific ADR programs: http://www.acq.osd.mil/dpap/ccap/cc/jcchb/HTML/Topical/adr.html.

6. Interagency Alternative Dispute Resolution Working Group provides guidance and requirements. http://www.adr.gov/index.html.

C. Statutory Background of the Contract Disputes Act.

The Contract Disputes Act of 1978 (CDA) is the earliest statutory authority for the use of informal, expedited dispute resolution methods in contract disputes. The CDA requires the Boards of Contract Appeals (BCA) to provide "to the fullest extent practicable" "informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. §7105(g).

1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118.

2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. At this stage the agency is typically represented by the contracting officer, who makes the initial decision on a contractor's claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 7105; FAR 33.304, 33.206 and 33.211.

D. Statutory Background of the Administrative Dispute Resolution Act. (ADRA).

Congress passed the first ADRA in 1990, in response to increasingly crowded dockets and escalating litigation costs. In the 1990 statute, Congress found that "administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes." ADRA of 1990, Pub.L. No. 101-552, §2(2), 104 Stat. 2738 (1990).

1. Congress decided that ADR, used successfully in the private sector, would work in the public sector and would "lead to more creative, efficient and sensible outcomes." ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).

2. The 1990 ADRA explicitly authorized federal agencies to use ADR to resolve administrative disputes, including contract disputes. ADRA, Pub. L. No. 101-552, § 4(a), 104 Stat. 2738 (1990).

3. Under the 1990 ADRA, ADR was defined as any procedure used, in lieu of adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, or any combination of these techniques. ADRA, Pub. L. No. 101-552, § 4(b), 104 Stat. 2738 (1990). The ADRA of 1990 expired by its own terms on 1 October 1995.

4. In the 1990s, Congress passed three statutes (the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998) which, collectively, required each agency to adopt a policy encouraging use of ADR in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants. These initiatives also include

the *Civil Rights Act of 1991*; the *National Performance Review*; Executive Order 12871, *Labor Management Partnerships*; and the Equal Employment Opportunity Commission's regulations. http://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf.

E. Amending ADRA. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA)). The 1996 Act:

1. Permanently authorized the ADRA;

2. Redefines ADR as any procedure used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsman, or any combination of these techniques;

3. Requires each agency to adopt an ADR policy, to designate a senior official as the agency "dispute resolution specialist" to implement the ADR policy, and to train agency personnel in negotiation and ADR techniques, including mediation and facilitation;

4. Authorizes federal agencies to promulgate policies permitting the use of binding arbitration in dispute resolution on a case-by-case basis, if authorized by the agency head after consultation with the Attorney General;

5. Extends confidentiality protection to certain "dispute resolution communications" made during the course and for the purpose of dispute resolution proceedings, and exempts such communications disclosure under the Freedom of Information Act;

6. Authorizes an exception to full and open competition for the purpose of contracting with a "neutral person" for the resolution of any existing or anticipated litigation or dispute; and

7. Requires the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR. By Presidential Memorandum dated 1 May 1998, the Interagency Alternative Dispute Resolution Working Group was established. See http://www.adr.gov.

F. Federal Acquisition Regulation. It is now the government's express policy to attempt to resolve all contract disputes at the contracting officer level.

Agencies are encouraged to use ADR procedures to the "maximum extent practicable." FAR 33.204.

1. FAR 33.214(a) identifies four essential elements for the use of ADR techniques:

    a. Existence of an issue in controversy;

    b. Voluntary election by both parties to participate in the ADR process;

    c. Agreement to ADR and terms to be used in lieu of formal litigation; and

    d. Participation in the process by officials of both parties who have authority to resolve the issue in controversy.

2. If the contracting officer rejects a contractor's request for ADR, the contracting officer must provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b)1 or other specific reasons that ADR is inappropriate. FAR 33.214. Additionally, when a contractor rejects an agency ADR request, the contractor must inform the agency in writing of the contractor's specific reasons for rejecting the request. FAR 33.214.

G. DOD Policy and Implementation. Each DOD component shall use ADR techniques "whenever appropriate" and shall establish ADR policies and programs. DOD Dir. 5145.5.

1. Army. The Army established a centralized ADR Program Office in the Office of the General Counsel in 2008, pursuant to the Secretary of the Army's 22 Jun 07 ADR policy memorandum. This policy urges Army personnel to use ADR in appropriate cases to resolve disputes as early as feasible, by the fastest and least expensive method possible,

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1 **(b)**An agency shall consider not using a dispute resolution proceeding if—
(1)a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
(2)the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
(3)maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
(4)the matter significantly affects persons or organizations who are not parties to the proceeding;
(5)a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
(6)the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

and at the lowest possible organizational level. Personnel involved in dispute resolution must receive adequate ADR training, and must consider ADR in every case. The policy designates the Principal Deputy General Counsel as the Army Dispute Resolution Specialist and directs the hiring of personnel to assist in implementing the Army ADR policy. Previously, ADR in the Army was implemented primarily through subordinate commands and components, for example, the Contract and Fiscal Law Division of the U.S. Army Legal Services Agency (for contract claims and bid protests), Army Materiel Command (workplace and bid protests), the Army Corps of Engineers (contract claims, environmental and workplace disputes), and the Army EEO Complaints Program (discrimination claims). These subordinate commands and components continue to have primary operational control over ADR with respect to disputes within their areas of responsibility, but certain aspects of the ADR program, such as policy and guidance, standards, training programs, and ADR support, are within OGC's area of responsibility. In Army contract disputes, the available guidance is referenced in the 1999 "Electronic Guide to Federal Procurement ADR," a product of the Interagency ADR Working Group Steering Committee, and can be found at http://www.adr.gov/adrguide/.

2. Air Force. The Air Force institutionalized its use of ADR in contract disputes by issuance of a comprehensive policy on dispute resolution entitled "ADR First." The policy states that ADR will be the first-choice method of resolving contract disputes if traditional negotiations fail, unless ADR would be inappropriate as judged by the statutory (ADRA) criteria. The ADR First policy represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999); see also Air Force Policy Directive 51-12 (Jan. 9, 2003) and AFFARS 5333.090 (2004). See Air Force ADR website *available at* http://www.adr.af.mil.

3. Navy and Marine Corps. The first Department of Navy ADR policy was issued in 1987, stating "every reasonable step must be taken to resolve disputes prior to litigation." Memorandum, Assistant Secretary of the Navy (Shipbuilding and Logistics), subject: Alternative Dispute Resolution (1987). The current Navy policy states ADR shall be used to the "maximum extent practicable" with the goal of resolving disputes at the earliest stage feasible, by the fastest and quickest means possible, and at the lowest possible organizational level. SECNAVINST 5800.13A (Dec. 22, 2005). See Navy ADR website *available at* http://adr.navy.mil; See USMC *available at* *http://www.hqmc.marines.mil/hrom/EEO/AlternativeDisputeResolution.aspx*

II. DISPUTE RESOLUTION CONTINUUM.

Regarding procurement, guidance, history, and internet links to Acts, Boards, and Service specific matters can be found at http://www.adr.gov/adrguide/.

A. Range.

Alternative dispute resolution techniques exist within a dispute resolution continuum, ranging from dispute avoidance to litigation. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards.

B. Dispute Avoidance.

1. Mechanisms or processes to promote early identification and resolution of potential issues in controversy, before they become disputes. Examples of dispute avoidance processes are partnering, and issue escalation (also known as an "issue ladder") procedures.

2. Partnering.

a. A process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It is a long-term commitment between two or more parties for the purpose of achieving mutually beneficial goals.

b. Partnering fosters communication and agreement on common goals and methods of performance. Examples of common goals are:

(1) The use of ADR and elimination of litigation;

(2) Timely project completion;

(3) High quality work;

(4) Safe workplace;

(5) Cost control;

(6) Value engineering;

(7) Reasonable profit.

c. Partnering is NOT:

(1) Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must voluntarily agree to the process, because it is a commitment to an on-going relationship.

(2) A "Cure-All." Reasonable differences will still occur, but one of the benefits of partnering is that it ensures the differences are honest and in good faith.

d. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods that the parties agree upon. Partnering is labor-intensive, and is therefore best used on more complex projects.

(1) Requires commitment of top management officials of all parties.

(2) Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.

(3) In the Army, both the Army Corps of Engineers and Army Materiel Command have used partnering as a dispute avoidance technique in contracts; for the Corps of Engineers, partnering is also used as a tool to foster collaboration in water projects under Corps supervision. Several very informative publications discussing the Corps' use of partnering are available for download at the Corps Institute for Water Resources' online ADR library at http://www.iwr.usace.army.mil/Home.aspx

3. Issue Escalation.

a. A process of whereby issues that could produce disputes are first referred to a team made up of all parties to the contract or project for resolution.

b. If the issue is not resolved at the first level of review, it is automatically elevated to a higher level of review, usually consisting of the superiors of those in the lower level, for decision.

c. There can be several levels of review up the chain, but the incentive is to avoid higher level review by resolving the issue at the lowest possible level.

C. Unassisted Negotiations.

1. In traditional unassisted negotiation, the parties attempt to reach a settlement without involvement of outside parties.

2. Elements of Successful Negotiation:

   a. Parties identify issues upon which they differ.

   b. Parties disclose their respective needs and interests.

   c. Parties identify possible settlement options.

   d. Parties negotiate terms and conditions of agreement.

3. Goal: Each party should be in a better position than if they had not negotiated.

D. ADR Procedures.

Defined broadly to include any procedure or combination of procedures that "may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen," ADR techniques rely upon participation by a third-party neutral. See ADRA of 1996, 5 U.S.C. §§ 571-584 and FAR 33.201. Typically ADR types fall within one of three general categories:

1. Process Assistance/Assisted Negotiations:

   a. **Mediation**. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate but has no decision-making authority. See "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 1 (April 2003). See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 7 (2004).

      (1) The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision-making power.

      (2) A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation, such as ex parte caucuses, and a variety of mediation tools for breaking impasses and bringing about a resolution.

(3) Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, third-party neutral functions (like mediating and arbitrating) in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).

(4) Most mediations in contract disputes are "evaluative," i.e., the mediator is a subject matter expert who is expected to offer an opinion on the litigation risk for each party if the matter goes to trial. However, the mediator has no power to decide the issue nor to impose a settlement.

(5) At the ASBCA, the process known as the "settlement judge technique" is most similar to evaluative mediation. This is a flexible procedure that allows the parties to make case presentations to each other in the presence of an ASBCA judge, who then facilitates settlement negotiations. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 7 (June 2000). See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution, available at http://www.asbca.mil/ADR/ADR%202011.pdf.

b. **Mini-Trials**. The term "mini-trial" is a misnomer, as it is NOT a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a panel consisting of the neutral and the principals of each party in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early. See ASBCA Notice Regarding Alternative Methods of Dispute Resolution, available at http://www.asbca.mil/ADR/ADR%202011.pdf. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 7 and 127 (2004).

(1) Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. case in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a $17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).

(2) In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially-constituted panel. The panel consists of party principals and the neutral advisor if desired.

(a) Each party selects a principal to represent it on the panel. The principal should have sufficient authority permitting unilateral decisions regarding the dispute and should not have been personally or closely involved in the dispute.

(b) The parties should jointly select the neutral advisor, and share expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.

(c) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.

(3) After hearing the case, the principals try to negotiate a settlement, with the neutral's assistance if the principals desire it. If the neutral is an ASBCA judge, they may discuss the likely outcome if the case were to go to court or the board (outcome prediction - see below).

2. Outcome Prediction.

a. **Non-Binding Arbitration**. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts, 23 and 127 (2004).

(1) Normally an informal presentation of the case, done by counsel with client input.

(2) Evidence is presented by document, deposition, and affidavit.

(3) Few live witnesses.

(4) The arbitrator's decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.

(5) The arbitrator may also evolve into the role of a mediator after a decision is issued.

b. **Outcome Prediction Conference (GAO).** For bid protests at GAO, parties frequently utilize an "outcome prediction" conference, in which a GAO staff attorney advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002. See also Bid Protests at GAO: A Descriptive Guide available at http://www.gao.gov/products/GAO-09-471SP. See also Donald Arnavas, Alternative Dispute Resolution for Government Contracts, 127 (2004).

3. Adjudication.

a. **Binding Arbitration**. Binding arbitration is the ADR technique that most closely resembles traditional, formal litigation. "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 2 (April 2003). This form of arbitration results in an award, enforceable in courts.

(1) Binding Arbitration in DOD.[2] Pursuant to the ADRA of 1996,[3] federal agencies may use binding arbitration, but only after the head of the agency issues appropriate guidance, in consultation with the Attorney General. The Navy is the first (and, so far, only) DOD agency that has issued guidance authorizing the use of binding arbitration in FAR contracts.[4] To date, only 8 federal agencies have issued guidelines for use of binding arbitration.

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[2] Binding arbitration is a voluntary dispute resolution process where the parties select a neutral decision-maker to hear the dispute and resolve it by rendering a final and binding award, with only limited rights to appeal. Unlike traditional litigation, arbitration provides for simplified procedural rules, and flexibility in the choice of the decision-maker. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS, 23-24 (2004).

[3] See ADRA, 5 U.S.C. § 575(c).

[4] See SECNAV Instruction 5800.15 (5 Mar. 2007) Use of Binding Arbitration for Contract Controversies. This instruction may be accessed at http://www.adr.navy.mil and http://doni.daps.dla.mil/allinstructions.aspx.

(2) There is normally a formal presentation of the case, much like a trial, though strict rules of evidence may not be followed.

(3) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.

(4) Arbitration panels consist of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.

(5) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.

(6) The arbitrator has full responsibility for rendering justice under the facts and law.

(7) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.

b. **Summary Trial with Binding Decision (ASBCA).** In practice before the ASBCA, a summary trial results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. There is no right to appeal a decision resulting from this process. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 5 (June 2000). See ASBCA Notice Regarding Alternative Methods of Dispute Resolution available at http://www.asbca.mil/ADR/ADR%202011.pdf. See Donald Arnavas, Alternative Dispute Resolution for Government Contracts 127 (2004).

III. TIME PERIODS FOR USING ADR.

A. Before Protest or Appeal.

1. Protests. The FAR has long provided authority for agencies to hear protests. FAR 33.103 implements Executive Order 12979 and requires agencies to:

a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest (FAR 33.103(b));

b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate (FAR 33.103(c));

c. Allow for review of the protest at "a level above the contracting officer" either initially or as an internal appeal (FAR 33.103(d)(4)) and,

d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).

2. Appeals. The ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c).

B. After Protest or Appeal.

1. The GAO Bid Protest Regulations now provide that GAO, on its own or upon request, may use flexible alternative procedures to resolve a protest, including ADR procedures. 5 C.F.R. 21.10. See Bid Protests at GAO: A Descriptive Guide *available at* http://www.gao.gov/products/GAO-09-471SP. As noted earlier, parties frequently utilize an "outcome prediction" conference. See also Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002.

2. With respect to contractor claims, once an appeal is filed, jurisdiction passes to the BCA. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. The ASBCA has made aggressive use of ADR services in contract appeals disputes. See ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* http://www.asbca.mil/ADR/ADR%202011.pdf. See also "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7 (June 2000).

3. Parties who file appeals with the Court of Federal Claims (COFC) will also be informed of voluntary ADR methods available through the court. In 2007 the Chief Judge of COFC issued General Order No. 44, establishing the ADR Automatic Referral Program, in which all cases (except for bid protests) assigned to a presiding judge are automatically and simultaneously referred to an ADR judge for ADR consideration and participation by the parties.

General Order No. 44, together with the implementing procedures and a sample confidentiality agreement, are available for download at the COFC web site. See http://www.uscfc.uscourts.gov/

IV. APPROPRIATENESS OF ADR.

A. When is it appropriate to use ADR?

Agencies "may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. §572(a). Also, government attorneys are to "make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial." Exec. Order No. 12988, § 1(c). Generally, ADR is appropriate for a case when:

1. Unassisted negotiations have failed to resolve the dispute and have reached an impasse;

2. Neither party is looking for binding precedent;

3. The parties wish to preserve a continuing relationship;

4. Confidentiality is important to either or both sides.

B. When is it inappropriate to use ADR? An agency must consider not using ADR when:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);

2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);

4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);

5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,

6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

[Note: The ADRA, 5 U.S.C. § 572(b), only requires that an agency consider not using ADR if any of the six statutory factors are present; if sufficient countervailing factors exist, an agency may use ADR even if any of the six factors applies.]

In addition to the statutory factors militating against ADR, there may be other reasons why ADR would be inappropriate for a particular dispute (e.g., a claim with a significant counterclaim of fraud). Any reason for considering ADR to be inappropriate should be articulable; in some cases, the reason(s) for refusing ADR must be put in writing. See, e.g., FAR 33.214(b) (rejection of an offer or request for ADR must state the reason(s) for rejection in writing).

V. STATUTORY REQUIREMENTS AND LIMITATIONS.

A. Voluntariness.

ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).

B. Limitations Applicable to Using Arbitration.

1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:

   a. in writing,

   b. submitted to the arbitrator,

   c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(a)(1)(B)(2).

2. The Government representative agreeing to arbitration must have express authority to "enter into a settlement concerning the matter". 5 U.S.C. § 575(b)(2).

3. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 575(c)1. Recall that the Navy

issued an instruction on the appropriate use of binding arbitration in March 2007.[5] Army guidance can be found at http://ogc.hqda.pentagon.mil/ADR/Documents/ADR_Spectrum.pdf. Air Force guidance can be found at http://www.adr.af.mil/factsheets/factsheet.asp?id=7346. See http://www.justice.gov/olp/adr/arbitration_kant.htm.

4. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. §575(a)(3).

5. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. FAR 33.214(b).

6. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. §576; 9U.S.C. § 4.

7. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30-day period for another 30 days by serving notice on all other parties. 5 U.S.C. §580(b).

8. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).

    a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long-standing dispute as to whether an agency can submit to binding arbitration.

    b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.

    c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government participating in binding arbitration if (http://www.justice.gov/olp/adr/arbitration_kant.htm):

[5] See SECNAV Instruction 5800.15, *supra* note 3.

(1) the arbitration agreement preserves Article III review of constitutional issues; and

(2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.

d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995). *Available at* http://www.justice.gov/olp/adr/resources.htm.

C. Judicial Review Prohibited.

Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b).

1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).

2. Section 10 authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.

VI. CONCLUSION.