

CHAPTER 10. USE OF ALTERNATIVE DISPUTE RESOLUTION

- 10-1 PURPOSE. This chapter implements the Department’s policy on the use of Alternative Dispute Resolution (ADR) in connection with disputes that arise under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. sections 601-613 as implemented in FAR Part 33.
- 10-2 AUTHORITY.
- A. Public Law 101-552, the “Administrative Dispute Resolution Act,” promotes the use of ADR techniques and encourages Contracting Officers to voluntarily initiate ADR procedures.
 - B. Executive Order 12988, “Civil Justice Reform,” dated February 5, 1996, encourages agencies to resolve claims and disputes through the use of ADR.
- 10-3 GENERAL. ADR is any process or combination of processes voluntarily agreed to and used by the parties to a dispute to resolve issues in controversy without litigation. These processes may include, but are not limited to, negotiation, facilitation, fact-finding, mediation, mini-trial, arbitration, or any combination thereof, and a form of dispute avoidance or prevention known as “partnering.” ADR does not include binding arbitration. Either party may initiate ADR. An ADR process can provide the parties an opportunity to reach a faster, less expensive, more appropriate, and more satisfying resolution of the dispute at the lowest organizational level, preferably prior to the Contracting Officer’s having to render a final decision. The underlying premise is that the participants, sometimes aided by an impartial third party, or “neutral person,” are capable of resolving their own disputes.
- 10-4 POLICY. The Contracting Officer shall make maximum use of ADR as an alternative to litigation where it appears such an approach will facilitate dispute resolution.
- 10-5 OBJECTIVES. The Government’s goal in using ADR is to increase the opportunity for relatively inexpensive and expeditious resolutions of issues in controversy. Objectives in support of this goal are to:
- A. Identify issues of controversy that can be resolved at the earliest feasible point and at the lowest appropriate level of responsibility by agreement of the parties;
 - B. Provide mechanisms that may be used to break negotiating impasses by focusing on legal and practical strengths and weaknesses of the parties’ positions; and,

- C. Provide an environment for a participative, cooperative (“win-win”), problem-solving process that reconciles the competing interests and positions of the parties.

10-6 ADR TECHNIQUES AND GUIDELINES.

- A. The following are techniques generally appropriate for resolving disputes under HUD contracts.
 1. Negotiation is a process that allows the disputants to try to settle the dispute themselves and is the most common ADR procedure. This is the most traditional approach to resolving differences. It is often referred to as “positional negotiation,” because each party has and tries to maintain some part of its initial position. The goal is to reach a mutually agreed upon “middle ground.”
 2. Facilitation is a process that involves a neutral person who works with the parties together and provides procedural assistance regarding how to develop a mutually acceptable solution. Facilitation differs from mediation in that there is normally not any requirement that there be resolution.
 3. Fact-finding is a process that requires the services of a neutral person who is authorized by the parties to investigate the issues in dispute and provides either an assessment of the situation outlining all of the relevant issues and options, or a specific, non-binding, procedural or substantive recommendation regarding how the dispute might be settled. This report then becomes the basis for further negotiations or other means of resolution.
 4. Mediation is a process that also requires the services of a neutral person who is authorized either by the disputants or the courts to help the disputants reach a mutually acceptable resolution. The disputants normally execute a written agreement to mediate in good faith. Normally, the terms of the resolution are put into writing and constitute a legally enforceable document. Mediation seeks to arrive at resolutions that satisfy the issues and the emotional interests of the disputants. Its goal is collaborative resolution versus traditional positional negotiation.
 5. Partnering is a bilateral relationship between parties which draws on the strengths of each party in an effort to work cooperatively to achieve a jointly defined set of goals and objectives for a contract. The objective is to establish a cooperative relationship, and thereby prevent disputes from arising. The parties seek to avoid adversarial mind-sets and form a relationship focused on quality performance, customer satisfaction, and the prevention of disputes. Unlike the other procedures, the primary focus

of partnering is the prevention and avoidance of disputes. Ideally, potential contractors are introduced to the process in the solicitation phase.

- B. ADR procedures may be used at any time during the life of a contract. The parties should consider ADR whenever a dispute arises as to the parties' rights or obligations under a contract and remains unresolved after exploration of issues. The best candidates for the use of ADR are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontested facts.
- C. ADR may also be used when:
1. There is a negotiation impasse and it is in the best interests of the parties to break the impasse or it is necessary to determine if such a break is indeed in their best interest;
 2. There is a significant disagreement over technical data which could be resolved by independent, expert analysis; or,
 3. A claim has merit, but is overstated or there are multiple parties, issues, and/or claims involved that can be resolved together.
- D. ADR may not be appropriate when:
1. Resolution of the matter is required to establish an authoritative precedent; or,
 2. Resolution involves a question of policy and will have a significant impact on pending cases or on the future conduct of business.

10-7 RESPONSIBILITIES.

- A. Contracting Officer. The Contracting Officer serves as the focal point and coordinator for ADR.
1. The Contracting Officer may recommend that ADR procedures be used whenever he or she believes that they would be appropriate. The Contracting Officer should seek advice from the OGC before suggesting the use of ADR procedures to a contractor. If the OGC concurs in the use of ADR, the Contracting Officer shall advise the contractor that the use of ADR should be considered.
 2. The Contracting Officer shall ensure that an appropriate ADR agreement, which is mutually agreeable to the contractor and HUD, is prepared. This agreement will provide the guidelines, procedures, and requirement to implement the ADR procedure that will be followed throughout the

proceedings including, as appropriate, potential neutral persons, allocation of costs, limited discovery, confidentiality, and a tentative schedule. The agreement shall not be presented to the contractor until it is reviewed by the OGC. The Contracting Officer should seek the assistance of OGC in preparing the agreement.

3. As appropriate, the Contracting Officer shall be responsible for preparing, or having prepared, contract-related background information for use by a neutral person. This information will enable the neutral person to understand the disputing parties' respective positions and the related contractual provisions on the issue in controversy. The Contracting Officer shall be responsible for assembling and forwarding copies of the pertinent documents to the neutral person and, as appropriate, the contractor, and for protecting their confidentiality. These documents shall be reviewed by the OGC prior to forwarding them to the neutral person and the contractor.
4. If the Contracting Officer rejects a contractor's proposed use of ADR, the Contracting Officer shall prepare a written determination containing his/her basis for the rejection. The Contracting Officer shall not reject any proposed use of ADR methods presented by a contractor without prior OGC concurrence.
5. The Contracting Officer shall notify the HCA and the OGC of any intent to use ADR and shall comply with any guidance provided by the OGC. The Contracting Officer shall also report on the status and results of the ADR as requested by contracting management.

B. Office of General Counsel (OGC).

1. The OGC shall provide guidance to the Contracting Officer as to the appropriate use of ADR and the method(s) best suited to the specific case.
2. The OGC shall assist the parties in preparing a written ADR agreement.
3. When a contractor proposes to use ADR, and the Contracting Officer wishes to reject it, the OGC shall consult with the Contracting Officer and, if a rejection is agreed upon, shall concur in the Contracting Officer's written determination documenting the basis for not participating in ADR.
4. Once the ADR method has been decided, OGC participation will vary depending upon the objectives of the parties and the method of ADR (e.g., provide advice, represent the Government or participate in the appointment of a neutral person).

C. Neutral Person.

1. The neutral person shall assist the parties in the initiation of the process by identifying and evaluating ADR options, facilitating negotiations of procedural details, and assisting the Contracting Officer and the contractor in preparing the ADR agreement.
2. Depending upon the method of ADR selected, the neutral person may participate in the process itself (e.g., leading the parties toward substantive resolution by suggesting appropriate compromises, guiding the process, and providing impartial non-binding opinions of the merits of the respective positions).
3. Neutral persons should normally be selected mutually by both parties or by an acceptable independent third party (e.g., an alternative dispute resolution center).

D. Program Office.

1. ADR is most effective when all parties, including program offices, commit to the process. The decision to use ADR to resolve a contract dispute is made jointly by the Contracting Officer and the contractor. Nevertheless, the Contracting Officer should notify the cognizant program office staff (e.g., GTR) of his/her intention to use ADR as soon as he or she has decided to consider such means to resolution.
2. When the Contracting Officer and the contractor have agreed to use ADR, the program office shall be available to participate as the technical expert and/or provide technical expertise in efforts to resolve the dispute.

10-8 CONFIDENTIALITY.

- A. The ADR Act fosters the use of ADR by ensuring adequate protection of communications in ADR proceedings. It provides a balance between the openness required and the confidentiality that is critical to yield successful agreements under ADR and generally prohibits the disclosure of settlement communications.
- B. Written material, oral presentations, and all discussions prepared for or connected with ADR proceedings are confidential and, unless otherwise specifically agreed upon by all parties involved, are inadmissible as evidence in any future HUD Board of Contract Appeals (HUDBCA) proceeding. Evidence that would otherwise be admissible before the HUDBCA is not rendered inadmissible because of its use in ADR proceedings.
- C. The ADR Act is not a statute specifically exempting disclosure under the Freedom of Information Act (FOIA). Although precautions can be taken by the

parties in dispute to protect confidentiality, parties who are not parties to the dispute would not be prevented from seeking disclosure. Neutral persons who are requested to disclose protected documents under FOIA shall notify the Contracting Officer and the contractor of demands for disclosure.

- D. A contractor that does not offer to defend the neutral person's refusal to disclose is considered to have waived any objection. The ADR Act does give the disputing parties the authority to vary the confidentiality provisions if all parties and the neutral person agree to alternate provisions in the ADR agreement.
- E. The Contracting Officer shall refer all requests for information concerning the terms of ADR proceedings and communications to the OGC for advice prior to making any disclosure.

10-9 EXPENSES.

- A. Each party to a dispute resolved through ADR shall be responsible for its own costs. The Contracting Officer shall inform contractors of this requirement before initiating any ADR process. It is not contemplated that the parties conducting ADR procedures will incur significant costs.
- B. If ADR proceedings are conducted after a final decision is issued, the Contracting Officer shall consult with the OGC on the payment of attorney fees and costs.