

Welcome

Alternative Disputes Resolution (ADR) is one method that can be used to resolve contracting disputes.

But, what, specifically is ADR? In this lesson, we will explain what ADR is and why it is a better solution than traditional litigation.

Upon completion of this lesson, you should be able to:

- Define Alternative Disputes Resolution.
- Identify the barriers and benefits of using ADR.



Origins of ADR

Alternative Disputes Resolution (ADR) was established to create an environment in which disputes may be resolved collaboratively, as opposed to competitively.

The basis for ADR can be found in the:

- [Federal Acquisition Regulation \(FAR\)](#)
- [Administrative Disputes Resolution Act of 1996 \(ADRA\)](#)

Select each item to learn more.



Popup Text

Federal Acquisition Regulation (FAR)

The Federal Acquisition Regulation (FAR) - codified at Title 48 of the Code of Federal Regulations - contains the uniform policies and procedures for acquisitions by all federal agencies. It implements or addresses nearly every procurement-related statute or executive policy. In doing so, the FAR reaches every stage of the acquisition process. The FAR's promulgation in 1984 reflected the Congress' efforts to create a uniform structure for Executive Branch federal contracting.

Prior to the FAR, the defense services and civilian agencies each had their own set of regulations, dating back to the late 1940s. This goal of uniformity has been undermined, to a degree, by the numerous agency-specific supplements implemented after promulgation of the FAR. These supplements, however, may not conflict with or supersede relevant FAR provisions. (Vacketta, Carl Lee, Federal Government Contract Overview, ©1999, DLA Piper US LLP.)

Administrative Disputes Act (ADRA)

The Administrative Disputes Act of 1996 (ADRA) (P.L. 101-552, 104 Stat. 2736), which was actually created in 1990 and amended in 1996 and 1998, was passed in response to the Government's and contractors' dissatisfaction with the extensive time and costs associated with the dispute process.

Basis of ADR in the FAR

As stated in FAR 33.204:

"The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level.

Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent possible."



Basis of ADR in the ADRA

ADRA 1996, states the following Congressional findings:

- Administrative procedure...is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts.
- Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.
- Alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious.
- Explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law.
- Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques.

Basis of ADR in the ADRA, Cont.

Specifically, the ADRA of 1996 required Federal Agencies to:

- Adopt policies addressing the use of ADR as a means of dispute resolution for all administrative programs.
- Designate a senior agency official to act as a disputes resolution specialist.
- Provide agency training in ADR techniques.



What is ADR?

ADR, as defined in the FAR 33.201 is:

"Any procedure or combination of procedures voluntarily used to resolve issues in controversy without the use of litigation."

The above definition does not refer to dispute. It refers to issues in controversy.

An issue in controversy is defined as:

"A material disagreement between the government and the contractor which:

1. May result in a claim
2. Is all or part of an existing claim"

FAR - Part 33


Protests, Disputes,
and Appeals

(FAC 2005-13)
(28 September 2006)

Elements of ADR

For ADR to be used, the following conditions must be met:

- Existence of an issue in controversy
- Voluntary election by both parties to participate in the ADR process
- An agreement on alternative procedures and terms to be used in lieu of formal litigation
- Participation in the process by officials of both parties who have the authority to resolve the issue in controversy



To Use ADR:

- Issue of controversy
- Voluntary election by both parties
- Agreement
- Participation by officials with the authority

Long Description

Clipboard that reads To Use ADR:

- Issue of controversy
- Voluntary election by both parties
- Agreement
- Participation by officials with the authority

Elements of ADR, Cont.

Notice that one of the essential elements for the use of ADR is that both parties have to agree to participate in the ADR process. But what happens if one party does not want to participate? See the table below for the answer to this question.

What if the...***Contracting Officer rejects the contractor's request for ADR proceedings?***

The Contracting Officer shall provide the Contractor written explanation citing one or more of the conditions in 5 U.S.C. 572 (b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. (FAR 33.214(b))

Contract rejects the request of an agency for ADR proceedings?

The Contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request. (FAR 33.214(b))

Contractor's Past Performance Evaluation

Keep in mind that the contractor's participation in the ADR process is **voluntary**. The contractor's use or non-use of ADR **cannot** be used in past performance evaluations or in source selections.

The OFPP (Office of Federal Procurement Policy) Administrator directed that:

1. Contractors may not be given "downgraded" past performance evaluations for availing themselves of their rights by filing protests and claims or for deciding not to use ADR.
2. Contractors may not be given more "positive" past performance evaluations for refraining from filing protests and claims or for agreeing to use ADR.



Knowledge Review

A Contracting Officer can force a contractor to resolve a dispute using ADR.

☐ True

☒ False

Check Answer



The answer is **False**. Both parties have to elect to participate in the ADR process.

Benefits of Using ADR

ADR is a great solution to resolving contracting disputes. There are many benefits of using ADR. The list below identifies several of these.

Benefits of using ADR:

- Minimizes cost and time
- Preserves relationships
- Allows you to maintain control of the process
- Results in long lasting settlements
- Allows you to retain the decision-making authority
- Gives you greater control and predictability of the outcome



Barriers to ADR

You may encounter barriers when you try to use ADR for a variety of reasons, including:

- Lack of awareness about ADR's existence or how it works
- Resistance to change – people may not want to try something new
- Some people might view an offer of ADR as a sign that the offeror's case is weak
- Some people may prefer position-based negotiation over joint-problem solving
- There may not be organizational support for the ADR process



Roadblocks to ADR

What does a roadblock to ADR sound like? Click on each person's face to learn how some common roadblocks can be put into words.



Popup Text**Person 1**

I'm the PCO. I don't need help settling this issue.

Person 2

I'm a good lawyer. We don't want to give away our advantage. I'm confident that we can win this if it goes to litigation.

Person 4

This is just another government give-away program.

Person 5

This situation is too sticky. All the players are scattered to the winds, We'll just wait it out.

Person 6

As the Program Manager, I say, let the lawyers handle it. Right now I have to focus on the future, not yesterday's issues.

When NOT to use ADR

ADR is not appropriate in all situations. There are some specific situations where ADR should not be used. The table below identifies some of these situations.

<i>When NOT to Use ADR</i>
<ul style="list-style-type: none">• Precedential decision required• Significant Government policy involved• Outcome will affect nonparties• Full public record required• Case involves allegations of fraud• One party is not trustworthy• One party has no motivation to settle

ADR Versus Traditional Litigation

In order for you to have a better understanding of ADR, the table below compares and contrasts ADR with traditional litigation.

Topic	ADR	Traditional Litigation
<i>Focus</i>	The parties' real interests	The parties' litigation position
<i>Information Sharing</i>	Required early as part of the problem-solving process	Only as required by the rules of the court
<i>Perspective</i>	Business perspective of the dispute	Legal theory of each party
<i>Decision-Making</i>	By the parties to the dispute	By a disinterested third party
<i>Procedures & Processes</i>	Designed by the parties	Made by the Board or Court
<i>Concentration</i>	Informal presentation of facts	Compliance with formal rules of evidence
<i>Communication</i>	Parties to talk to each other	Parties talk to the judge

ADR Summary

Remember, ADR is not:

- **Mandatory** - The parties choose to participate in ADR or to use traditional litigation processes.
- **Successful without total commitment** - Top management must accept the start-up costs and think in the long-run.
- **A panacea** - Some issues and some cases should not use ADR. Traditional litigation should be used when seeking to establish or preserve a case precedent or policy.
- **Contrary to government business interests** - The shared government-contractor interests are paramount in considering whether to use ADR and what specific form it should take.
- **A one-way street** - Everyone must buy into the process.



Knowledge Review

All of the following situations could utilize ADR as an appropriate method for resolving a contracting dispute EXCEPT?

- ☐ When you need to preserve the relationships
- ☐ When you need to retain decision-making authority
- ☒ When one party has no motivation to settle
- ☐ When you need greater control and predictability of the outcome

Check Answer



ADR is not appropriate **when one party involved in the dispute has no motivation to settle.**

Summary

This lesson defined ADR and identified the essential elements of ADR.

It also identified benefits of and barriers to using ADR in different situations and contrasted ADR with traditional litigation.

You should now be able to:

- Define Alternative Disputes Resolution (ADR).
- Identify the barriers and benefits of using ADR.



Lesson Completion

You have completed the content for this lesson.

To continue, select another lesson from the Table of Contents on the left.

If you have closed or hidden the Table of Contents, click the Show TOC button at the top in the Atlas navigation bar.