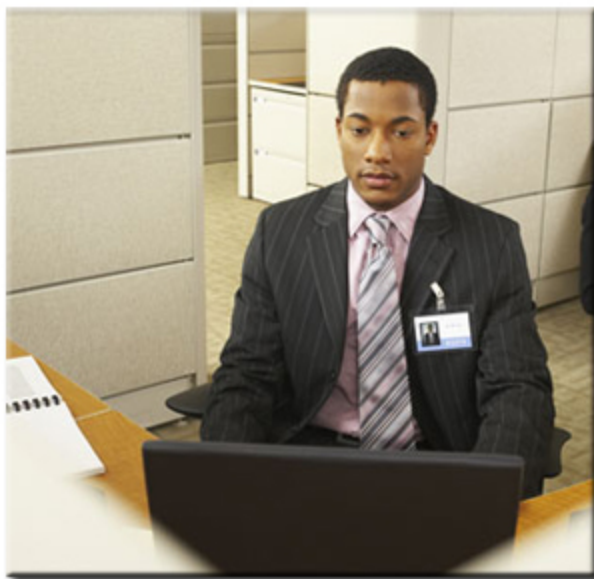


## Welcome

This lesson provides you with an opportunity to use your knowledge of ADR by evaluating several case studies and determining if ADR is appropriate and, if it is, which ADR procedure is appropriate for use.

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

- Identify, accurately, which ADR procedure is being used in contracting-provided scenarios.



### About this Exercise

It is important that you be able to identify the situations in which it is appropriate for ADR to be used.

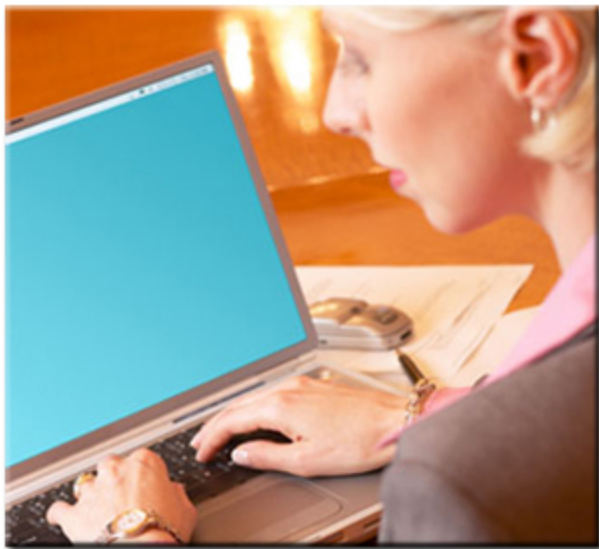
Then, you need to be able to sift through the details of the situation and determine which ADR procedure would most likely work the best to resolve the dispute.

In this exercise, you will examine various scenarios describing contracting disputes. You will need to decide:

1. If ADR is appropriate
2. If so, which ADR procedure you would recommend

There are six scenarios.

**Good Luck!**



### Scenario 1: Alleged Disclosure of Proprietary Information

This first scenario involves a protest in which a contractor alleges improper disclosure of its proprietary information.

The contractor submits a proposal to the Navy in response to an RFP for CPIF R&D and production contract for torpedo homing and navigational array, including software. The contractor thereafter files a pre-award agency protest alleging that the Government improperly disclosed its properly marked proprietary technical data to a competitor during discussions. The Contracting Officer's personal investigation revealed no evidence that anyone in the Navy disclosed the data.

Is ADR appropriate?



Yes



No

Check Answer

The answer is **Yes**. ADR is appropriate because the parties appear to be at an impasse. There are also factual issues in dispute, which might impact the award of the solicitation. Select Next to answer the next question about this dispute.

### Scenario 1: Alleged Disclosure of Proprietary Information, Cont.

[Click here to view the dispute scenario again if needed.](#) Then answer the question.

Which ADR procedure best resolves this dispute?

- ☐ Conciliation
- ☐ Facilitation
- ☐ Mediation - Evaluative
- ☐ Mediation - Facilitative
- ☒ Fact finding

Check Answer



**Fact-finding** is the most appropriate ADR procedure to use, because it is necessary for a third party technical expert to independently determine the facts. The third party technical expert would then render an advisory decision.

**Popup Text**

**[Click here to view the dispute scenario again if needed.](#)**

**Dispute Scenario**

The contractor submits a proposal to the Navy in response to an RFP for CPIF R&D and production contract for torpedo homing and navigational array, including software.

The contractor thereafter files a pre-award agency protest alleging that the Government improperly disclosed its properly marked proprietary technical data to a competitor during discussions. The Contracting Officer's personal investigation revealed no evidence that anyone in the Navy disclosed the data.

### Scenario 2: Dispute over Excavation

This next scenario involves a dispute over extra costs incurred during an excavation project.

[Click here to see the details of the dispute.](#) Then answer the question.

Is ADR appropriate?

☒ Yes

☐ No

Check Answer



**Yes**, ADR is appropriate because the parties are heading toward litigation, the parties hold differing interpretations of the facts, both parties have reasonable arguments and there is a need for the parties to maintain control.

## **Popup Text**

**[Click here to see the details of the dispute](#)**

### **Dispute**

The government contracted with Dirt Movers, Inc. to excavate an eleven-mile stretch of waterway. The \$270 million contract was fixed-price and required the removal and disposal of 95 million cubic yards of earth. Prior to soliciting bids for the contract, the government performed extensive studies to determine subsurface soil conditions, including a test excavation of a 1,500-foot-wide section of the project area. The government provided potential contractors with the geological test results to help them calculate cost projections. Based on the government's data, Dirt Movers, Inc. projected it would take 160 minutes for each truck to load and leave the site, dump, and return. During the excavation process, Dirt Movers, Inc. encountered less drainage and more moisture levels in the soil than the pre-bid data supplied by the government suggested.

Dirt Movers, Inc. claimed that because of this, its trucks had to travel slower, adding five to ten minutes per trip, and its equipment required more repairs than expected. Dirt Movers, Inc. alleged that because of the number of truck trips involved in the project, each additional minute on the total number of trips cost \$2 million. Dirt Movers, Inc. therefore filed a differing site conditions claim and requested an equitable adjustment of \$42.8 million. The government contended that geological tests performed prior to awarding the contract clearly identified soil conditions that were not significantly different from those experienced by Dirt Movers, Inc.

Moreover, the models used by Dirt Movers, Inc. to generate the times and speeds of trucks were only valid if one assumed ideal soil conditions because they were unable to consider inefficiencies other than moisture levels in the soil. Finally, the government contended that Dirt Movers, Inc. did not correctly excavate water drainage ditches. Experts from both sides are assembled and, while they agree on the facts, hold differing interpretations of their meaning. Negotiations break down and litigation appears imminent. Neither party appears willing to compromise. Assume that both the contractor and government have reasonable arguments, but neither party is more persuasive than the other.

### Scenario 2: Dispute over Excavation, Cont.

[Click here to review the dispute scenario again if needed.](#) Then answer the question.

Which ADR procedure would you recommend to resolve this dispute?

- ☐ Conciliation
- ☐ Facilitation
- ☒ Mini-trial
- ☐ Settlement judges
- ☐ Arbitration

Check Answer



**Mini-trial** is the most appropriate ADR procedure to use, because of the large amount of money involved and the need for high-level decision-making. Fact finding and Evaluative Mediation could also be used.



## **Popup Text**

**Click here to review the dispute scenario again if needed.**

### **Dispute**

The government contracted with Dirt Movers, Inc. to excavate an eleven-mile stretch of waterway. The \$270 million contract was fixed-price and required the removal and disposal of 95 million cubic yards of earth. Prior to soliciting bids for the contract, the government performed extensive studies to determine subsurface soil conditions, including a test excavation of a 1,500-foot-wide section of the project area. The government provided potential contractors with the geological test results to help them calculate cost projections. Based on the government's data, Dirt Movers, Inc. projected it would take 160 minutes for each truck to load and leave the site, dump, and return. During the excavation process, Dirt Movers, Inc. encountered less drainage and more moisture levels in the soil than the pre-bid data supplied by the government suggested.

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### Scenario 3: Differing Site Conditions

This next scenario involves a dispute over alleged differences in site conditions encountered and contract specifications that are alleged to be defective.

[Click here to view the details of the dispute.](#) Then answer the question.

Is ADR appropriate?



Yes



No

Check Answer



**Yes**, ADR is appropriate because it appears that the contractor will prevail at the ASBCA. Therefore, litigation would be a waste of money. In addition, there is a need for the parties to maintain control because of the size of the claim and potential for Congressional and media attention. This case should not become public knowledge.

## **Popup Text**

**Click here to view the details of the dispute.**

### **Scenario**

The government awarded a \$44 million firm-fixed-price contract to ACME to build a large structure. Shortly after work began on the contract, Acme alleged it encountered differing site conditions and that the contract's specifications were defective. Ten months later, Acme alleged that these conditions caused changes and additional work and increased Acme's costs of performing the work. In addition, Acme alleged the government was responsible for causing more than a year's delay in contract performance. Over the course of contract performance, the government paid Acme \$7 million for additional work performed. Acme filed claims totaling \$56 million at the Armed Services Board of Contract Appeals. This dollar figure did not include attorney's fees, costs, and amounts relating to two separate subcontractor claims.

Relations between the parties deteriorated badly. The company is on the verge of bankruptcy and its officers have their backs against the wall. Because of the dollar amounts involved, this case is likely to get a lot of media and/or congressional attention.

Moreover, if Acme wins your agency will likely have to seek a supplemental appropriation to pay Acme. For purposes of this scenario assume Acme has asserted facts sufficient to satisfy all legal elements of the claims it has submitted. In addition, assume that the contractor is almost certain to prevail because the government has little or no credible defense to liability.

### Scenario 3: Differing Site Conditions, Cont.

Based on the [previous scenario](#), which ADR procedure(s) would you recommend to resolve this dispute? (Select all that apply.)

- ☒ Mini-trial
- ☒ Mediation - Evaluative
- ☒ Mediation - Facilitative
- ☒ Settlement Judges

Check Answer



All of the choices would be effective in resolving this dispute.

## **Popup Text**

### **Pervious scenario**

#### **Scenario**

The government awarded a \$44 million firm-fixed-price contract to ACME to build a large structure. Shortly after work began on the contract, Acme alleged it encountered differing site conditions and that the contract's specifications were defective. Ten months later, Acme alleged that these conditions caused changes and additional work and increased Acme's costs of performing the work. In addition, Acme alleged the government was responsible for causing more than a year's delay in contract performance. Over the course of contract performance, the government paid Acme \$7 million for additional work performed. Acme filed claims totaling \$56 million at the Armed Services Board of Contract Appeals. This dollar figure did not include attorney's fees, costs, and amounts relating to two separate subcontractor claims.

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Moreover, if Acme wins your agency will likely have to seek a supplemental appropriation to pay Acme. For purposes of this scenario assume Acme has asserted facts sufficient to satisfy all legal elements of the claims it has submitted. In addition, assume that the contractor is almost certain to prevail because the government has little or no credible defense to liability.

#### Scenario 4: Alleged Design Errors on Renovation

This next scenario involves a dispute over alleged design errors in a renovation contract.

[Click here to view the details of the dispute.](#) Then answer the question.

Is ADR appropriate?



Yes



No

Check Answer



**Yes**, ADR is appropriate because the parties are not communicating with each other and appear to be preparing for a legal battle.

## **Popup Text**

**[Click here to view the details of the dispute](#)**

### **Scenario**

The government awarded a \$4 million contract for the renovation of an enlisted personnel barracks to Titan Constructors. At the beginning of the contract, the relationship between the government and the contractor had been excellent. However, ever since the contractor had discovered numerous design errors in the contract documents, the relationship has gone downhill. As a result, the contractor and the government rarely speak to each other. The only real communication between the parties is now written. In fact, both parties are participating in a letter writing contest.

The elapsed contract time is 70%. However, the contractor has completed only 50% of the contract work. The contractor has indicated that they will be submitting a large delay and impact claim. To date, nothing has been submitted.

**Scenario 4: Alleged Design Errors on Renovation, Cont.**

[Click here to review the dispute scenario again if needed.](#) Then answer the question.

Which ADR procedure would you recommend to resolve this dispute?

- ☒ Conciliation
- ☐ Facilitation
- ☐ Mediation - Evaluative
- ☐ Mediation - Facilitative
- ☐ Settlement judges

Check Answer



**Conciliation** is the most appropriate ADR procedure to use, because it is necessary to re-open the lines of communication and rebuild the relationship between the contractor and the Government.



### **Popup Text**

**Click here to review the dispute scenario again if needed.**

### **Scenario**

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The elapsed contract time is 70%. However, the contractor has completed only 50% of the contract work. The contractor has indicated that they will be submitting a large delay and impact claim. To date, nothing has been submitted.

### Scenario 5: Firm-Fixed-Price Contract for Roof Replacement

This next scenario involves a dispute over problems that occurred in a roof replacement contract.

[Click here to view the details of the dispute.](#) Then answer the question.

Is ADR appropriate?

☒ Yes

☐ No

Check Answer



**Yes**, ADR is appropriate because success at the boards or courts is not assured, the facts in the case are not clear, there is a need for the parties to maintain control, and there is a potential liability for defective specifications.

## **Popup Text**

**Click here to view the details of the dispute.**

### **Scenario**

The government awarded a \$5.4 million firm-fixed-price contract to Roofs-R-Us (aka RUFUS) to replace one of the largest roofs in the world (covering some 25 acres). The design of the roof was developed by the government and called for the use of a new single-ply membrane technology.

At the outset RUFUS encountered difficulty getting the roofing system it had selected to pass the Underwriter Laboratories wind uplift and fire tests as required by the contract. RUFUS requested, and the government agreed, to relax some contract specifications. RUFUS then used the relaxation to claim the contract's specifications were defective and caused substantial increases in costs and delays in contract performance. The government disagreed with RUFUS on several points.

First, it alleged RUFUS was entirely responsible for the delay in completing the roof. RUFUS, in contrast, believed that the delay was caused by the hidden ambiguities in the government design. Second, the government argued that the roof's failure to pass the stipulated wind and burn tests was due to RUFUS' imprudent selection of materials, whereas RUFUS believed that it had been misled by the government as to the availability of suitable roofing materials. The government conceded, however, that only when the contract's required testing standards were waived was it clearly possible for RUFUS to meet the remaining standards. Once the standards were waived, however, the government believed that RUFUS and its supplier were not diligent in obtaining laboratory approval for their materials (regarding fire testing) as was reasonably required in the contract.

As a result, RUFUS submitted a claim citing a defective specification in the amount of \$997,000 and 121 calendar-days time extension to contract schedule. For purposes of this scenario assume RUFUS has asserted facts sufficient to satisfy all legal elements of the claim. Assume the government is more likely than not to prevail on entitlement.

**Scenario 5: Firm-Fixed-Price Contract for Roof Replacement, Cont.**

Based on the [previous scenario](#), which ADR procedure(s) would you recommend to resolve this dispute? (Select all that apply.)

- ☒ Fact finding
- ☐ Mediation - Facilitative
- ☐ Mini-trial
- ☒ Mediation - Evaluative
- ☐ Arbitration

Check Answer



Both **fact-finding** and **evaluative mediation** are the best procedures for resolving this dispute.

## **Popup Text**

### **Previous scenario**

#### **Scenario**

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### Scenario 6: Development of Remote Piloted Vehicle

This next scenario involves a dispute over discrepancies found in the design criteria for a remote piloted vehicle (RPV).

[Click here to view the details of the dispute.](#) Then answer the question.

Is ADR appropriate?

☒ Yes

☐ No

Check Answer



**Yes**, ADR is appropriate because the parties do not know the procedures for cooperative problem-solving necessary to resolve the issues.

## **Popup Text**

**Click here to view the details of the dispute.**

### **Scenario**

The government awarded a \$20 million contract to Spy Incorporated for the development of a new remotely piloted vehicle (RPV) to be used by the Army in the battlefield area. The contract is approximately 50% complete. So far, the relationship between the government and the contractor is good. It is only six months until First Article Testing, and the contractor has recently discovered some discrepancies in the Army's design criteria, which might impact the contract schedule.

However, the First Article Testing date can not be slipped. Unfortunately, the contractor and the government are not experienced in the methods of joint problem solving and do not have the time to learn. Thus, they do not know how to begin to resolve the issues.

### Scenario 6: Development of Remote Piloted Vehicle, Cont.

Based on the [previous scenario](#), which ADR procedure(s) would you recommend to resolve this dispute? (Select all that apply.)

- ☐ Conciliation
- ☒ Facilitation
- ☐ Mediation - Evaluative
- ☐ Mediation - Facilitative
- ☒ Fact-finding

Check Answer



Both **facilitation** and **fact-finding** are the best procedures for resolving this dispute.



## **Popup Text**

### **Previous scenario**

### **Scenario**

The government awarded a \$20 million contract to Spy Incorporated for the development of a new remotely piloted vehicle (RPV) to be used by the Army in the battlefield area. The contract is approximately 50% complete. So far, the relationship between the government and the contractor is good. It is only six months until First Article Testing, and the contractor has recently discovered some discrepancies in the Army's design criteria, which might impact the contract schedule.

However, the First Article Testing date can not be slipped. Unfortunately, the contractor and the government are not experienced in the methods of joint problem solving and do not have the time to learn. Thus, they do not know how to begin to resolve the issues.

## Summary

Great job! As you can see, ADR procedures can be applied to all sorts of different disputes in an effort to resolve them without litigation.

You should now be able to:

- Identify, accurately, which ADR procedure is being used in contracting-provided scenarios.



## 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.