**How to Engage in ADR**

## The Importance of Decision-Quality Information

An issue will not be ready for ADR unless decision-quality information is accessible using available resources within the time frame contemplated. This is because the parties must have sufficient knowledge of the facts to determine their business interests and make a credible ADR presentation. Accordingly, each party must be conscious of the other party’s need for reliable information sufficient to support a rational decision to conclude the matter and should cooperate in furnishing this information.

Audit input on financial matters is often critical to establish facts needed to justify a settlement. Many contract controversies stem from audit exceptions. These issues are often complex and require in-depth knowledge of accounting and related regulations. To fully understand the financial consequences of decisions, government procurement professionals should include auditors as part of the ADR team in appropriate cases. Seek audit assistance whenever equitable adjustment proposals or claims are included in the ADR. The ADR agreement should address the type of information and documents to be provided to the auditor and whether there are any restrictions on the use of the information or documents provided.

##  Subcontractor Claims

Except in very limited cases involving the Small Business Administration 8(a) contracts,[[1]](#footnote-1) subcontract claims cannot be considered by the Agency unless the prime contractor sponsors the claim.[[2]](#footnote-2) This rule applies because the Agency has no direct contractual relationship (privity of contract) with the subcontractor. As a result, the only contractual relationship is through the prime contractor. Therefore any negotiations or ADR procedures used to resolve a subcontractor issue in controversy must involve or be processed through the prime contractor.

**Preparation for ADR** Non-binding ADR leads to agreement, not judgment. Always keep in mind that the process will not succeed unless the parties agree to the terms of a resolution. Therefore ensure you have a process that builds bridges necessary for resolution. Preparation for ADR will depend upon the type of ADR to be used. After the parties have agreed to participate in ADR, the next step is to locate a Neutral.

# Neutrals

## Qualifications of Neutrals

A Neutral must have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree to use that Neutral. Subject to the limitations listed above, the market dictates the qualifications of a Neutral. This means that the admonition “buyer beware” applies to those entering the marketplace for Neutrals’ services.

 **Choosing a Neutral**

When seeking assistance of a Neutral, always choose an individual with a reputation for unquestioned integrity, someone that can be trusted to be impartial and unbiased. The Neutral should have ample knowledge and experience in the resolution of federal contract-related controversies, preferably experience with the kinds of issues, contract type and subject matter that your controversy involves.

If the respective board of contract appeals is unable to support a request to use one of its judges as a Neutral, there are procedures in place that permit an agency to request the services of a judge from one of the other Boards of Contract Appeals. Such requests should only be made after the chairman of the Board has had an opportunity to consider and decline a request to make one of his judges available to serve as a Neutral.

There are a large number of private-sector organizations and individuals that provide Neutrals services. Many of these organizations and individuals have excellent qualifications and track records in resolving commercial contract issues, especially commercial construction contract issues. The costs of hiring a private-sector Neutral can range from $1,000 a day to $9,000 a day.

Parties should agree to the use of a particular ADR procedure or combination of procedures before selecting the Neutral. The parties then typically agree to use one of the following processes:

* Exchange a list of names of Neutrals until they reach agreement on a particular Neutral;
* Each party picks another individual. The selected individuals then meet and select a Neutral; or
* Employ the services of an organization to provide a Neutral. See 10 U.S.C. § 2304(c)(3)(c).

 Only BCA judges or COFC judges are authorized to access the Judgment Fund to pay for a settlement.

## Using Senior-level Officials to Resolve the Issue

In some instances, agencies have developed mechanisms for using high-level agency procurement officials as Neutrals to review the merits of controversies and assisting the parties in resolving their differences. High-level agency and contractor officials can also serve jointly in given cases, either as co-mediators or as a mini-trial panel. Although mini-trials typically involve the assistance of a third-party Neutral, the parties, as a first step, will try to resolve their controversy with a structured settlement process that uses the mini-trial forum without the Neutral. Although these individuals are not technically “Neutrals” since they are employed by parties to the controversy, if they have not had direct involvement with the matters at issue, they can maintain a considerable degree of impartiality. Moreover, in some instances, their involvement is all that is required to settle a controversy.

**Paying For a Neutral**

If the CO opts to utilize ADR, then the CO and the Agency attorney providing advice to the CO, need to consider what funding is available to pay for the Neutral's services. BCA judges are at no-cost to the parties. However, if a private sector Neutral is desired, the Agency and the opposing party often share that expense. This ensures that these parties have a stake in the process and a vested interest in its success. It is important that the exact financial terms with all parties be reduced to writing before the initiation of ADR procedures. The services of a Neutral can be obtained “by name” using “Other than Full and Open Competition.”[[3]](#footnote-3) The next step is to assemble the ADR Team.

## Assembling the ADR Team

### Identifying a Principal

Both the Agency and the contractor should each designate a person to act as the principal negotiating representative. This person should have the authority to negotiate a settlement. It is also important that this person be able to approach the ADR proceeding objectively, with an open mind. It is preferable to resolve matters at the contracting officer’s level (*see* FAR 33.204). However, there may be occasions (due to the emotional nature of a particular controversy) when it may be helpful if the person selected has had little or no prior involvement in the day-to-day contract administration or with the matter in controversy. As a result, the person can view the facts with fresh eyes and without having to justify their own previous positions or actions.

On the other hand, if the principals already know each other, their prior experiences may have been cordial and thus have a positive effect. If the prior relations have been “unfriendly,” it may be more productive not to involve them in either the presentation phase of the ADR proceeding or in direct face-to-face negotiations. A more effective approach in the “unfriendly situation” may be to keep the principals in separate rooms, and for the Neutral to mediate between them by means of “shuttle diplomacy.”

### Identifying Team Members Who Should Participate and When

Be prepared to have the people with direct, first-hand knowledge of the facts attend the ADR proceeding. Their participation is key in helping the principal understand the other side’s position. Similarly, these people can also assist the Neutral more accurately assess the strengths and weaknesses of the other side’s position. This is critical where credibility becomes an issue. Another reason to include the people who have been involved in the issue since its inception is that this can bring about some emotional closure.

Keep in mind, a large number of people may hinder negotiations. Therefore, the number of participants should be kept to a necessary minimum. Again, only those people most knowledgeable about the issues to be presented should be involved. In addition, these people should be available to respond to questions throughout the course of any presentation phase of the ADR proceeding, and should remain available throughout the negotiation phase, unless released by their principals or the Neutral. Also, sometimes the people who have the most direct experience and knowledge of the issues are too emotionally involved with the issue to participate effectively (objectively) in the negotiations

## Preparing for an ADR Proceeding

# The ADR Agreement

The ADR agreement provides the framework and procedures for the parties to follow during and after the proceeding. A well-drafted agreement allows the parties to avoid or resolve many of the potential issues that can arise during the proceeding. You should consider some or all of the following sections for inclusion in the ADR agreement.

## Appointment of a Neutral

The ADR agreement should address the appointment, role and payment of the party (including costs of facilities used and other similar expenses, if any).

The agreement should spell out the role the Neutral is anticipated to fulfill (mediator, fact finder, arbitrator, etc.). In the case of a mediator, the parties may specify whether they desire the mediator to be “evaluative” or “facilitative.” The ADR agreement should also state that the Neutral will not retain any notes taken during the ADR proceedings and that the Neutral is also disqualified as a witness in subsequent litigation. The agreement should also specify the nature, subject, and permissibility of *ex parte* communications [communications between the Neutral and one party without the other party present]. If the Neutral has been selected in advance and has a set of preferred “ground rules”, these rules may also be included in the agreement.

## Good faith

The parties should insert language that the parties agree to act in good faith throughout the ADR process with a view toward resolving the dispute.

## Stipulation of Fact

The parties may want to author a Stipulation of Fact and include this as part of the ADR Agreement. This gives the Neutral background as to what facts the parties agree upon and what facts that still remain in dispute.

**Issues in Dispute**

The ADR agreement should clearly set forth the issues that are in dispute. Most often, parties will include a position paper as part of the ADR agreement and this is where the issues will be highlighted. However, if the parties do not elected to submit position papers, there should be a section in the ADR agreement itself that sets forth the disputed issues.

**Position Papers**

The ADR agreement should also state if the parties are expected to submit a position paper. Address length, format, general content, due date, and to whom copies should be provided. Do the parties want confidential position statements given only to the Neutral, or submitted to each other as well? Do parties want to allow written responses to each others’ position papers? May the Neutral engage in ex parte communications about the position papers before the proceedings begin? The position papers should also clearly define the issues in dispute.

**ADR Method and Sequence of Events**

 The type of ADR technique to be used should be stated in the ADR agreement, as well as if the proceeding will be binding or nonbinding. Additionally, the order of events should also be stated. For example, if participating in a binding summary trial, the parties should both set forth the number of witnesses participating, length of time permitted for each witness, etc.

**Expenses**

The parties should set forth the nature of anticipated expenses and the determination of whom is paying for what. (i.e. paying for the Neutral, paying for a facility rental fee). If the parties agree to share the ADR expenses, clearly definite “share” in terms of percentage (i.e. 50/50 versus 60/40).

## Stay or Suspension of Litigation

## If the parties have agreed to suspend or stay the litigation until after ADR, this should be memorialized in the ADR agreement. It should spell out the duration of the stay (i.e., whether indefinite or linked to specific events or dates), the manner in which the Court or Board will be informed of the agreement and how the parties will obtain concurrence of the forum. If there is to be no stay, the agreement should also state that fact.

## Audit

If a Request for Equitable Adjustment (REA) or claim needs to be audited, provide for the audit in the agreement. The agreement should address the types of information and documents are to be provided to the auditor and whether there are any restrictions on the use of the information or documents provided.

## Exchange of Information

The ADR agreement should set out provisions allowing for discovery and document exchange. What is to be allowed? What type of limits (schedule, time, relevance to issues/subjects, types and number of requests) are necessary? May witnesses previously deposed be deposed again? Also address records retention, future use and the effect on future access/discovery. How will discovery issues, if any, be resolved? Can matters disclosed be used in future litigation? What if the parties want to alter the ADR Agreement itself—must they seek the Neutral’s approval? Or can they alter the agreement, provided they both agree to the proposed changes? Also keep in mind that alteration of discovery schedules must be coordinated with and approved by the Court or Board. In a recent ADR proceeding, a Government ADR team was surprised by new evidence submitted by the contractor only hours before the two sides were to present their case in a Summary Trial with binding decision. The Judge allowed the evidence to be heard and its effect was significant. Submission agreements should have a cut-off date for the submission of evidence.

Provisions for control of statements, briefs, opening offers or position papers can also be included in the agreement. Do the parties submit confidential position statements only to the Neutral? What are the length and format requirements for the position statements? May the Neutral respond with *ex parte* communications?

The agreement should also mandate an exchange of information required to justify and support any settlement reached. This could include an audit of costs incurred and certified cost and pricing data.

This discussion is not intended to be exhaustive. It is intended to illustrate the complexity of confidentiality issues related to drafting an ADR agreement. You should engage the services of an Agency lawyer to ensure that any confidentiality concerns are properly addressed.

**Confidentiality**

 Things to consider when addressing confidentiality:

* If, how, and to whom the Neutral may share any information acquired in caucus

(e.g. “The Neutral shall not reveal communications made in a caucus to anyone, unless the party participating in the caucus authorizes the neutral to reveal a particular communication.”)

* If, how, and to whom a party participating in a caucus may share a communication made

by the Neutral (e.g. “A party shall not offer any communication made by the Neutral in a caucus in any future hearing.”)

* What use parties may make of joint session communications (e.g. “Nothing shared in

a joint session is confidential, and a party is not prohibited by this agreement from offering anything presented in a joint session in any follow-on hearing.”)

* What use parties may make of materials prepared for the ADR proceeding (like

position papers) if the ADR proceeding is unsuccessful

* Whether persons not participating in the ADR proceeding have access to any

 information exchanged during the ADR process

* How otherwise privileged or protected information will be addressed (e.g. attorney-

client, attorney work product, proprietary, source-selection)

Confidentiality is addressed in detail in the Administrative Dispute Resolution Act of 1996 (ADRA).[[4]](#footnote-4) However, unless a Neutral is utilized in a proceeding, the proceeding does not qualify as a “dispute resolution proceeding” under the ADRA—and the proceeding would not automatically be covered by the ADRA confidentiality provisions.[[5]](#footnote-5) It is better practice to spell out the specifics of confidentiality agreed to by the parties than to simply state that confidentiality will be governed by the ADRA. The parties are also authorized to agree to and impose confidentiality provisions on the Neutral different from those set out in the ADRA.[[6]](#footnote-6) However, those provisions cannot provide less disclosure than provided for by the ADRA and still qualify for the ADRA’s exemptions to FOIA disclosure.[[7]](#footnote-7)

**Termination**

Address the rights of each party, as well as the Neutral, to terminate the ADR proceeding. Generally, the parties agree that before the binding part of a process begins, and anytime during any non-binding portion of a process, either party may terminate the ADR process—and that if the process is terminated, the confidentiality provisions remain in effect. Also address the parties’ responsibilities if the dispute settles (e.g. jointly move to dismiss the underlying appeal with prejudice).

## Other Considerations

An ADR agreement may provide for the waiver of recovery of fees under Equal Access to Justice Act (EAJA). Also, a provision may be included addressing interest, waiver of attorney fees, and the use or the waiver of transcripts. In the alternative, the parties' agreement may specify that the parties and the Neutral at the close of the ADR proceeding will address any or all of these costs.

1. Although Small Business Administration 8(a) contracts are technically subcontracted through the SBA, contractors under SBA 8 (a) program may file claims directly with the Agency. [↑](#footnote-ref-1)
2. See FAR 44.203 [↑](#footnote-ref-2)
3. See 10 U.S.C.§2304(c)(3) & FAR 6.302**-**3 (a)(2)(iii) [↑](#footnote-ref-3)
4. 5 U.S.C. §574 [↑](#footnote-ref-4)
5. 5 U.S.C. §571(6) [↑](#footnote-ref-5)
6. 5. U.S.C. 574(d)(1) [↑](#footnote-ref-6)
7. 5. U.S.C. 574(d)(2) [↑](#footnote-ref-7)