### ATTACHMENT B

### Legal and Policy Mandates to Use ADR

After recognizing private sector successes with alternative means of dispute resolution, in 1996, Congress enacted the Administrative Dispute Resolution Act.[[1]](#footnote-1) To foster ADR use, the ADRA required government agencies to begin laying groundwork for ADR utilization by mandating each government agency adopt a policy that addresses the use of alternative means of dispute resolution and case management.[[2]](#footnote-2) The Act also required that within one year of this legislation, that the Federal Acquisition Regulation (FAR), be amended, as necessary, to carry out ADRA and its amendments.[[3]](#footnote-3)

FAR Part 33.204 states it is Government policy to:

[R]esolve 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 practicable.[[4]](#footnote-4)

The Contracts Disputes Act (CDA) also authorizes contracting officers to use any “alternative means of dispute resolution….”[[5]](#footnote-5) Additionally, the CDA requires contracting officers to explain in writing why they have declined a contractor’s request to use ADR.[[6]](#footnote-6)

**How to Determine When ADR is Right (or not) for Your Case**

It’s clear that there is a strong preference to resolve disputes using ADR, but that begs the question--how does one determine if a case is appropriate for ADR? It is actually easier to answer the inverse of that question—when is ADR inappropriate? That is because 5 U.S.C. §572(b)(1-6) sets forth specific guidance on when ADR is not recommended. Specifically, ADR should not be used in the following circumstances:

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.

In addition to the factors disfavoring ADR set out in ADRA, there are other factors to consider, such as:

* Issues relating to fraud. A Contracting Officer lacks authority to settle issues related to fraud.[[7]](#footnote-7) The Department of Justice (DOJ) has the authority to resolve fraud matters. If a contract dispute involves elements or allegations of fraud, it must be referred to DOJ.
* Case can be resolved efficiently by motion (i.e. Motion to Dismiss; Motion for Summary Judgment)
* Opposing counsel is not trustworthy
* Opposing party is disgruntled, unwilling to compromise, and will not engage in ADR in good faith.
* The opposing party is unrepresented by counsel. Although this isn’t an absolute prohibition to engage in ADR, it could create significant procedural problems, as well as ethical problems, particularly for a third-party neutral.
* Injunctive relief is appropriate. If the case involves any issues that involve an emergency or where irreparable harm could occur, then injunctive relief should be pursued before considering the use of ADR.

# When is ADR Appropriate?

Now that the types of cases that are inappropriate for ADR have been identified, we can focus on what factors may favor using ADR. ADR must be thought of as a tool to resolve issues, but it is not an all-or-nothing approach (i.e. either we settle this case in its entirety via ADR or we litigate). ADR can be used to resolve some issues in a case, even if the case continues on to litigation for its remaining issues. The goal is to minimize litigated issues as much as possible. The parties must focus on the common interests and goals, rather than trying to “defeat” the other side. That being said, there’s no bright-line test for assessing if your case is a good candidate for ADR, but there are factors to consider that indicate ADR may be a good choice. Here are some examples:

* Parties want to maintain a positive working relationship
* Desire for early problem solving by use of creative alternatives
* Flexibility desired in shaping relief (For example, the parties may want to achieve a more comprehensive resolution involving other issues, which are not part of the contract controversy).
* Need for a quicker resolution than could be achieved by litigation
* Need to minimize disruption to other programs or mission areas by diversion of resources to support litigation
* Need a factual interpretation or the parties are polarized into an “all or none” position and believe that an evaluation by a third party Neutral could help resolve the matter and provide some perspective
* Reasonably clear that some entitlement exists and the real task is negotiating or agreeing to a reasonable amount (If lack of funds, or cancelled funds, preclude meaningful negotiations, the ADR Advisory Team may help identify potential sources of funds)
* One party’s view of the case is unrealistic, and a realistic appraisal of the situation by a Neutral third party may help
* ADR could speed anticipated settlement by streamlining or limiting the exchange of information and time needed to resolve the matter
* Bad facts, bad law, or other factors make avoiding an adverse precedent desirable

### Pragmatic Considerations Favoring the Use of ADR

Even if a party believes it could successfully litigate a case, it may still be a smart business decision to utilize ADR. Here are some of the reasons highlighting why ADR may be beneficial:

*Control Remains with the Parties*: ADR permits the parties to fashion agreements that address the time and effort they need to resolve their issue. It also ensures the parties mutually resolve the issue rather than relinquish control to a disinterested (and probably less knowledgeable) third party. Litigation is always a risk for either party.

*Preserving a Positive Business Relationship*: ADR processes can significantly reduce the adversarial nature of resolving an issue, improve the productivity of face-to-face discussions between stakeholders, and typically permit expedited information exchanges. It can lead to a more trusting, collaborative relationship between the parties.

*Tangible Benefits*: ADR significantly reduces the time it takes to resolve an issue. For example, if a contractor submits a protest before the Government Accountability Office (GAO), it will typically take 100 days before a decision is issued. If a contractor submits a claim to the Armed Services Board of Contract Appeals (ASBCA) or the Court of Federal Claims (COFC), the issue may even take years to be resolved. ADR performed early on at the lowest level can save time and avoid the uncertainty of litigation.

*Intangible Benefits*: The impact of protracted litigation is a financial and emotional drain on all parties. Time each party spends in preparation for litigation is time that is not spent on performing the contract or performing on other requirements. It leads to inefficiencies and distractions that can materially impact an agency’s mission. In addition, many ADR processes directly involve stakeholders. This direct involvement provides incentive for the parties to resolve their issues.

The attorneys and contracting staff who are most intimately involved with a case should be the ones to assess whether ADR is appropriate for their case. They are the ones who are most familiar with the facts of the case, as well as the opposing party’s issues and ability to cooperate in an effort to resolve those issues. If, after considering the factors above, ADR appears to be a viable option, the next step would be for the parties to agree upon the ADR technique to be used.

1. The Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320 (ADRA 1996)(codified at 5 U.S.C. §571 et. seq. and various sections of 41 U.S.C. §605); at Sec. 2(3). [↑](#footnote-ref-1)
2. *Id*. at Sec. 3(a). [↑](#footnote-ref-2)
3. *Id*. at Sec. 3(d)(2)(A). [↑](#footnote-ref-3)
4. FAR Part 33.204. [↑](#footnote-ref-4)
5. 5 41 U.S.C. §7103 (h)(1) [↑](#footnote-ref-5)
6. 41 U.S.C. §7103 (h)(3)(A) [↑](#footnote-ref-6)
7. FAR 33.210(b). [↑](#footnote-ref-7)