**The Players involved in Conflict Management**

**ADR personnel**

* Developing and executing strategic plans for acquisition ADR
* Providing the vision, guidance, and leadership to implement the acquisition and business processes for ADR initiatives
* Funding the infrastructure associated with acquisition ADR efforts
* Ensuring contracting staff receive training and guidance on ADR use and best practices
* Helping ensure that each time the Agency engages in ADR, that it benefits from “lessons learned” and helps acquisition professionals match existing government resources with their unique ADR needs
* Identifying resources and overcome obstacles for parties interested in using ADR to resolve issues in controversy
* Developing and maintaining ADR training modules
* Understanding when ADR is appropriate and the importance of designing an ADR process that “fits the form to the fuss”
* Collecting and maintaining metrics on the implementation of ADR

#### The Attorneys

#### Generally speaking, the attorney’s job is to provide legal advice and assistance to both contracting and program personnel. The attorneys involved will provide the following assistance:

* Drafting the ADR Agreement.
* Assisting the business team in the design of the ADR process
* Ensuring participants are bound by confidentiality rules during the ADR or Extended Debriefing Program (EDP) sessions
* Ensuring that privileged, or otherwise protected information, is not disclosed
* Assisting in the selection of an effective and unbiased Neutral
* Assessing legal entitlement and litigation risk
* Assisting in drafting and, if appropriate, presenting the agency’s positions
* Helping to identify the underlying interests of the parties
* Providing a reality check of the goals and approach to ADR
* Ensuring that the settlement agreement reached during ADR is legally enforceable and defensible
* Ensuring that payment is based on the contract at issue or another one that is linked to the issue
* Ensuring the CO has provided sufficient information to support the award decision during an extended debriefing
* Ensuring the CO has provided sufficient justification during a pre-award extended debriefing to an offeor for eliminating that offeror from the competitive range or, for a post-award extended debriefing, providing adequate information to help the losing offeror understand why the awardee received a superior rating and was selected as the awardee
* Providing training and advice on ADR resolution strategies and forum selection
* Data collection reflecting use of ADR and the EDP and resultant outcomes
* Acquiring feedback from agency counsel, program managers, source selection decision authorities, contracting officers and their support stf, and other acquisition professionals, on utilization of ADR, the Ombudsman program, and the EDP to assess program strengths, weaknesses, and areas for improvement
* Assist on day-to-day issues involving contract formation and administration, as well as bankruptcy, and intellectual property law issues

Although legal advice is essential for a successful ADR, the decision of whether to settle, and for how much, is not one for the attorneys to make. Ultimately, settlement is not a legal decision; it is a business decision and it is the contracting officer who has the authority to make that decision for the agency. The only exception to this is for cases in which the agency is represented by a DOJ attorney at COFC. For those cases, DOJ has settlement authority.

**Department of Justice (DOJ)**

Agency attorneys will focus exclusively on what is in their agency’s best interest in that support role, which may differ from the DOJ’s focus, which is what is generally best for the Government, as a whole. For example, agency counsel may wish to pursue litigation for certain reasons, but DOJ counsel may decide settlement is warranted as a good business decisions. As previously mentioned, the DOJ has the responsibility and authority to represent the agency in litigation before COFC. Agency contracting officers do not exercise settlement authority in cases filed in this forum.

The Agency contracting staff will work with their agency attorneys, who in turn, support DOJ in COFC litigation.

Because DOJ represents the Agency in litigation before COFC, use of ADR in COFC cases requires an agreement with DOJ, the Agency and the contractor.

**The Contracting Officer (CO)**

The Contract Disputes Act authorizes a CO and contractor to use any mutually agreeable alternative means of dispute resolution to resolve a contract dispute.[[1]](#footnote-1) FAR 33.204 notes that it is the Government’s policy to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level. Specifically, FAR 33.204 states that Agencies are encouraged to use ADR procedures to the maximum extent practicable, noting, however, that certain factors may make the use of ADR inappropriate.[[2]](#footnote-2) Contracting Officers are required to try and resolve disputes at the lowest level and to utilize ADR. If the CO rejects a Contractor’s request for ADR proceedings, the CO shall provide the contractor a 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.[[3]](#footnote-3) Contracting Officers have authority to settle and dispute in controversy, unless it is an issue that involves fraud. In a case involving fraud, or even suspected fraud, the DOJ has authority to handle that case.[[4]](#footnote-4)

### The Contractor

Successful ADR requires all parties to make a good faith effort to help the process work. As a result the contractor is a key player. Contractors, like the Government, are encouraged to resolve disputes at the lowest level and utilize ADR. In any case where a Contractor rejects a 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.[[5]](#footnote-5) Most major contractors have adopted ADR as a preferred method of resolving issues in controversy. Many of these contractors have committed to use ADR with the Agency by executing Corporate and program specific ADR agreements.

**The Ombudsman**

The purpose of the Agency ombudsman program is to foster communication between government and industry. The primary function of the ombudsman is to hear concerns about specific issues in acquisitions, to communicate these concerns to senior management personnel responsible for oversight and to assist in the resolution of the concerns. Note, however, that before consulting with an ombudsman, interested parties must first address their concerns, issues, disagreements, and/or recommendations to the contracting officer for resolution.

**Other Members of the Business Team**

The Agency should ensure that members of the business team include personnel with first-hand knowledge of the issue(s) in controversy. In addition, in many cases the input of a senior price analyst is absolutely critical. Technical experts may also be required to clarify issues.

1. 41 U.S.C. §7103. [↑](#footnote-ref-1)
2. 5 U.S.C. §572(b). [↑](#footnote-ref-2)
3. FAR §33.214(b) [↑](#footnote-ref-3)
4. FAR 33. §210 [↑](#footnote-ref-4)
5. FAR §33.214(b) [↑](#footnote-ref-5)