

Defense Logistics Agency
Nomination for the
Office of Federal Procurement Policy's
2004 Alternative Dispute Resolution
Awards in Acquisition



Defense Logistics Agency
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NOMINATION FORM
OFPP AWARDS FOR OUTSTANDING ACQUISITION-RELATED
ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

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**Defense Logistics Agency Acquisition ADR Program
Office of Federal Procurement Policy Awards Program, 2004**

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DEFENSE LOGISTICS AGENCY ACQUISITION ADR PROGRAM

ADR has been a part of DLA for 15 years. ADR efforts in acquisition have produced impressive results, with \$10.4 million in estimated cost savings and a 77% success rate (85% partial success rate). DLA's acquisition ADR program is perhaps most notable for its broad scope (rare in small agencies like DLA), and a combination of centralized program management with a core of grass roots advocates. The acquisition ADR program helps DLA focus forward on customer support (providing goods and related services to the Military Services), rather than dwelling adversarially on yesterday's disputes and problems. DLA's ADR philosophy is that constructive, cooperative problem-solving is the best way to avoid and resolve disputes.

I. PROGRAM DESIGN

A. Program Goals and Objectives*

DLA's goal is to solve acquisition disputes as early, effectively, inexpensively, and amicably as possible, with the ultimate objective of saving the agency money, time, resources, and reputation.

DLA's Acquisition ADR program focuses on people and processes. People can commit to using ADR once they are exposed to the concept and understand its benefits. Process changes can capture ADR as part of the agency structure, keeping it from being dependent solely on individuals for growth. Both approaches combine to advance the agency goal.

* Documents available electronically are linked in this narrative. Documents without an electronic link are not available electronically but are available upon request.

B. Program Origin and Evolution

DLA's ADR program began in 1990, after passage of the ADR Act, with initial training for DLA lawyers. By 1992, DLA had formalized its recognition of ADR in DLA Regulation 5145.1, "Alternative Dispute Resolution Program." DLA's ADR regulation reflected DLA policy to encourage the use of ADR techniques whenever unassisted negotiations proved ineffective.

During 1994, DLA joined other federal agencies in signing an Office of Federal Procurement Policy pledge to expand use of ADR. At about the same time, DLA joined other Defense components under the leadership of the DoD General Counsel to form the DoD ADR Coordinating Committee.

In 1995, the DLA General Counsel developed the new position of an ADR Counsel whose role was to continue to develop the ADR program within DLA. In turn, the ADR Counsel established an ADR Practice Group made up of representatives from each field activity legal office.

ADR efforts in DLA increased again after passage of the ADR Act of 1996. The General Counsel required ADR training for all DLA lawyers, and the DLA ADR Regulation was revised to a Directive and updated to reflect the changes in the law and an increased emphasis on ADR in agency policy. (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). This Directive established a preference for ADR, requiring justifications to proceed with litigation rather than ADR.

Today, the DLA Acquisition ADR program builds on the foundation of the past decade, and adjusts emphasis areas as needed.

C. Program Staffing and Design

The DLA General Counsel serves as the agency Dispute Resolution Specialist and issues general ADR guidance. Legal offices of field activities also have ADR Specialists; the ADR Specialist is responsible for advancing the ADR program locally and serving as a resource on ADR. The Chief Counsel at each

field activity is also ultimately accountable overall for the ADR program at that location. A DLA Headquarters Associate General Counsel serves as the ADR advocate for acquisition ADR matters. The ADR Program Manager administers the program and serves as the chair of an ADR Practice Group composed of DLA lawyers from all field activities.

Although flexibility is allowed at the local level, DLA does have a DLA Office of Counsel Procurement/Contract ADR Program Design Implementation Plan that contains the basic elements for each field activity Acquisition ADR program. These elements include: policy, procedures, training, publicity, and data collection. All field activity ADR programs are expected to contain these elements.

Top management commitment, especially by the General Counsel, has helped ensure the program is adopted and advanced. ADR specialists at each activity can help advance the program with continued training, sharing of successes and lessons learned, and adaptation of ADR into local processes.

D. Program Scope (Disputes and Techniques)

The DLA Acquisition ADR program covers all types of acquisition and sales transactions, at any stage. Examples, discussed below in more detail, include: protests (contracting officer, Agency-level, and Government Accountability Office); dispute avoidance and prevention; complaints filed with the Task and Delivery Order Ombudsman; matters raised in Congressional inquiries; pre-claim contract disputes that arise between DLA and contractors; contractor claims; and DLA claims against contractors, including fraud related matters.

DLA offers mediation on protests, both in person and through telephone conferences. Mediations have been held at the GAO with GAO personnel as the neutral, and at field activities in response to contracting officer and agency level protests with DLA personnel as the neutral. Telephone conferences have been

held in response to local, agency and GAO protests, with a trained DLA attorney-mediator facilitating. DLA protest attorneys are also encouraged to request outcome prediction ADR from GAO in all cases that proceed on the merits. The agency level protest process adopts ADR elements; agency level protests are answered by the Chief of the Contracting Office who acts as a third party neutral, reviewing input from both sides in order to make an independent decision. One DLA field activity uses mediation for all its agency level protests, unless the protester opts otherwise.

For contract administration, DLA has initiatives to both avoid disputes entirely, and to resolve those that arise with ADR. Dispute avoidance initiatives include partnering agreements and ADR provisions in DLA strategic supplier alliances. A contract clause supporting ADR is required in all acquisitions unless the contractor objects. (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-09). DLA policy guidance states that post-award orientations should address the subject of dispute avoidance, early dispute resolution, and alternative dispute resolution. (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-07). All of these efforts illustrate DLA's efforts to broaden the concept of ADR to dispute avoidance.

When disputes do arise, DLA offers contractors the opportunity to resolve disputes before formal claims are presented. In-person and telephone conference mediations and facilitations have been used to address both contractor and Government concerns arising during the contract administration phase. DLA has also used the approach offered by the ASBCA to mediate cases before an appeal has been filed.

DLA uses a variety of ADR techniques to address a wide range of issues, including:

- issue escalation clauses;

- partnering to promote dispute avoidance and the use of informal dispute resolution processes between the parties;
- settlement judges when parties are in litigation or at an administrative proceeding;
- mediation by court judges, administrative judges, magistrates, private individuals, GAO personnel, and DLA personnel, before or after a matter has been formally filed;
- facilitation to enhance communication and options for dispute resolution;
- ombudsmen who serve as facilitators, information gatherers, or decision-makers;
- telephone mediation/facilitation whereby a neutral facilitates one or more phone conversations between parties in dispute in order to exchange information and or reach settlement;
- a summary trial with a binding decision; and
- early neutral evaluation.

Of course, a blend of techniques may be best, especially if the case is so complex that a “one-step” ADR is not likely to resolve the dispute.

II. PROGRAM ADMINISTRATION

A. Program Staffing and Funding

The staffing structure for DLA’s Acquisition ADR program is discussed above (Section I C, Program Design). This section will address program funding.

The ADR Program Manager position is a full-time ADR position, funded by the agency. At DLA Headquarters, the DLA Acquisition ADR advocate performs her ADR functions as part of her assigned responsibilities as senior acquisition counsel; this enables her to address ADR not just as a separate program, but also as part of her overall responsibilities in acquisition law. She is

rated on ADR as part of the annual appraisal process. Chief Counsel have “Dispute Resolution” as part of their critical elements on which they are evaluated. Their ADR specialists perform their ADR responsibilities as part of their assigned jobs, as do DLA lawyers who serve as neutrals.

The only direct cost associated with DLA in-house neutrals is travel costs. These are either shared by the parties, shouldered by the activity providing the neutral, or, more commonly, paid by the field activity asking for the neutral.

Costs for private sector neutrals are funded by the activity requesting the neutral, from that activity’s budget (fully, or shared with the opposing party).

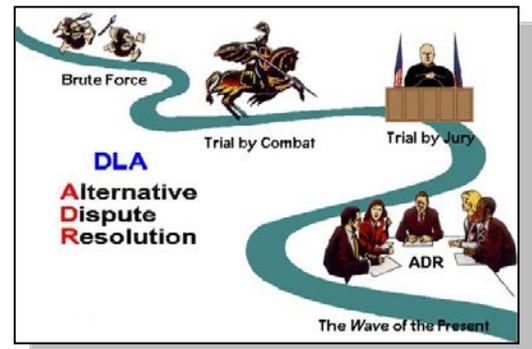
B. Program Publicity

Publicity is a required element of DLA’s Acquisition ADR Program. (DLA Office of General Counsel Procurement/Contract ADR Program Design Implementation Plan). Publicity for the Acquisition ADR program falls in 3 areas: a) publicity to clients, b) publicity to other lawyers, and c) publicity to the contracting community.

The ADR *Law Notes* publication, issued by the ADR Program Manager, includes articles about acquisition ADR cases, issues, and recent events. (See DLA’s ADR Home Page, <http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Training). The *Law Notes* is distributed by email throughout DLA to DLA lawyers and clients. ADR is addressed at acquisition staff meetings, during regular ADR Practice Group and Senior Contracts Group teleconferences, and through ADR success stories, and articles (for example, in the *DLA Dimensions* (September/October 2000)). Publicity also flows from awards. The DLA Office of General Counsel has recognized attorneys active in ADR; one field activity has instituted its own awards program.

In addition to direct publicity, resources are available through many channels, particularly the DLA ADR Home Page, (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>)

(See graphic at right.) The Home Page provides extensive ADR information to Government and contractor personnel such as laws, directives, ADR definitions, model documents, training modules, visual aids, and links to related sites. Field activity websites also provide ADR information. A variety of videos, brochures, and business cards that explain ADR and its benefits are available. Field activities have issued various policy statements to contractors announcing the preference for ADR, such as one posted on an electronic bulletin board for automated acquisitions. Similarly, internal policy statements, local messages of the day, and newspaper articles reinforce the idea of using ADR.



Publicity to the contracting community has included efforts on Government-private sector committees and task forces, speaking at conferences (such as the National Contract Management Association), and participating at vendor fairs and industry associations.

C. Processes for Implementing ADR

This section addresses the mechanics by which DLA ADR policies are implemented in the acquisition arena. (The scope of DLA's Acquisition ADR program and the techniques used are addressed above in Section I D).

For any type of acquisition issue, when unassisted negotiation does not resolve a matter, the deciding official must consider the use of ADR, and a decision not to use ADR must be documented in writing by an official higher than the deciding official. DLA Directive 5145.1.

(<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). Field activities are responsible for ensuring compliance with this requirement. If ADR

is appropriate, the deciding official will consult with legal personnel to work out process specifics.

For agency protests, the DLA Supplement to the FAR sets forth the requirement that an independent official - the Chief of the Contracting Office at each field activity - be the deciding official, with input from both sides. DLAD 4105.1, Sec. 33.103 (c) and (d) (<http://www.dla.mil/j-3/j-336>). Counsel advising the Chief of the Contracting Office are responsible for ensuring a neutral decision, with ADR incorporated if warranted.

For GAO protests, the DLA Bid Protest Manual requires that every protest be reviewed to see if it can be resolved by ADR. This policy is also contained in fax cover sheets from DLA Headquarters that transmit incoming GAO protests to field offices, and in attached sample ADR worksheets to document consideration of ADR and justification for rejection if ADR is not used. Although the protest process at DLA is decentralized, DLA retains oversight at headquarters. The DLA Acquisition ADR advocate also runs the Bid Protest Program. She reviews incoming protests with an eye to ADR, and for those where agency reports are filed, discusses ADR options with the field attorney handling the case.

For contract disputes, all DLA contracting officer final decisions must contain language offering the contractor ADR as one of the options to contest the decision (unless the field activity has determined in writing that ADR is inappropriate). (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-05). Of course, ADR should be considered before a final decision is issued, but this requirement ensures that ADR is raised as part of the dispute process itself, rather than having to rely on someone to suggest ADR.

Most recently, DLA has begun a process to better institutionalize ADR into the agency ASBCA litigation process. For ASBCA cases, contractors are notified after filing their appeal of the possibility for ADR, and later (after fuller review of

the case) are offered ADR unless an official at a level above the contracting officer determines ADR to be inappropriate. Sample letters have been provided to the field lawyers for their use.

D. Neutrals

DLA primarily uses judges and DLA attorneys as neutrals. The judges primarily serve as mediators or settlement judges, whereas DLA attorneys typically serve as mediators or facilitators. Private individuals can also serve as neutrals, in a variety of capacities.

When a case is already at the ASBCA or a Federal Court, the judges typically serve as the neutral, following the forum's procedures for assignment. DLA also uses Board judges to serve as a neutral before a final decision and before an appeal. Parties to a dispute also have the option of using DLA legal personnel as mediators or facilitators, in person or by phone. The ADR Program Manager, Headquarters ADR advocate, or local ADR Specialist helps identify the potential neutrals and arrange for their use.

Criteria for determining the qualifications for neutrals vary. When a case is at the ASBCA, the Board assigns the ADR judge. DLA lawyers serving as neutrals in acquisition disputes are required to have at least 24 hours of mediation training, co-mediate three cases before serving as a mediator or facilitator on their own, and have extensive acquisition expertise. DLA mediators are evaluated by their co-mediators, and at the option of the participants, are also evaluated by the participants. They are required to follow the DLA Standards of Conduct for Mediators, and have use of model documents and other reference material provided to them. (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). Periodic advanced training is provided in-house, either through group in-person training sessions or group conference calls. Non-DLA neutrals are not trained by DLA, except to provide them facts about DLA that are necessary for the ADR process.

III. AWARENESS AND SKILLS TRAINING

A. Training Objectives, Participants, and Providers

DLA training objectives are: 1) to train all DLA lawyers in ADR, and 2) to ensure acquisition personnel receive at least ADR awareness training and preferably ADR user training as well.

All DLA lawyers are required to have a minimum of 24 hours ADR training, plus refresher training. Specific ADR training programs are provided within the Office of General Counsel, both as separate workshops and as part of established acquisition law conferences. The Acquisition ADR advocate also shares information about available ADR training with contracting personnel and ADR lawyers.

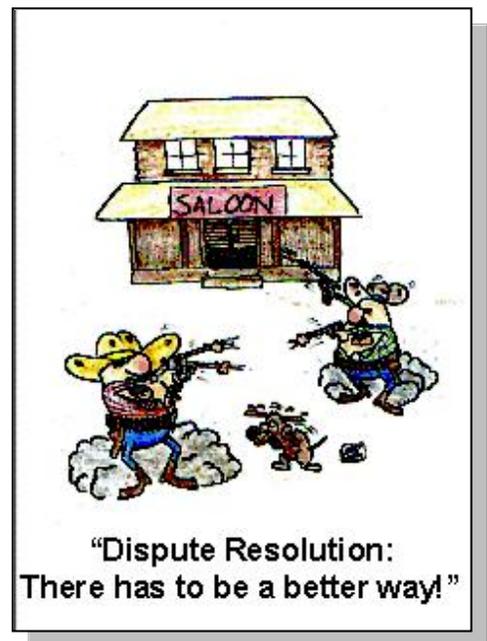
DLA contracting personnel receive ADR awareness training from the ADR specialists, or occasionally from outside sources, and will pursue more extensive user training if warranted. Training is provided through in-person presentations, video teleconferences, satellite broadcasts, videos, and paper products. DLA also prepared an on-line internet ADR training module (the first of its kind, to our knowledge) to supplement more interactive training and reach a wider group of employees.

(<http://www.dsc.dla.mil/Offices/legal/adr/adr.html>,

DLA Publications, Training). A combination of approaches has been used: for example, one training session involved showing a video about a business that

was followed by an audience question and answer period concerning the application of ADR to the disputes that arose in the business. Another in-person training session involved a mock mediation followed by questions and answers.

Aside from training specifically targeted for lawyers and contracting



personnel, ADR is also included as an integral component of routine training provided to agency personnel in general. ADR is included as a topic at Commander's Conferences, senior level seminars, Acquisition Reform Days, Small Business seminars, and other internal and outreach programs.

Awareness and skills training is provided to DLA acquisition personnel by ADR Specialists, by the Headquarters ADR Advocate, by the ADR Program Manager, by personnel from other government agencies, and by private sources.

ADR training costs are usually borne by DLA, typically through the local field activity. The General Counsel supports funding for DLA lawyers to stay current in ADR.

B. Training Success and Benefits

The success of the ADR training program is judged by several factors.

- 1) How many employees are trained? Of course, training a large number of people does not mean that the training is effective, but it does show the extent to which the message is propounded in the agency.
- 2) How well do DLA employees understand ADR and recognize when to use it? Often, clients approach their ADR specialist shortly after receiving training, for help on issues that have recently arisen that may merit ADR.
- 3) Do existing litigation dockets reflect that a case is in ADR (or settlement negotiations) unless a reason exists why ADR is not appropriate in that case?
- 4) How many cases are resolved via ADR? These should be increasing unless, again, there is an explanation for why fewer disputes are being raised to begin with.
- 5) What percent of disputes are successfully resolved through ADR? Although success in ADR is never guaranteed, the more the parties have understood the process through effective training and preparation, the greater the likelihood of resolution.
- 6) What feedback has been received on the quality of the ADR training sessions?

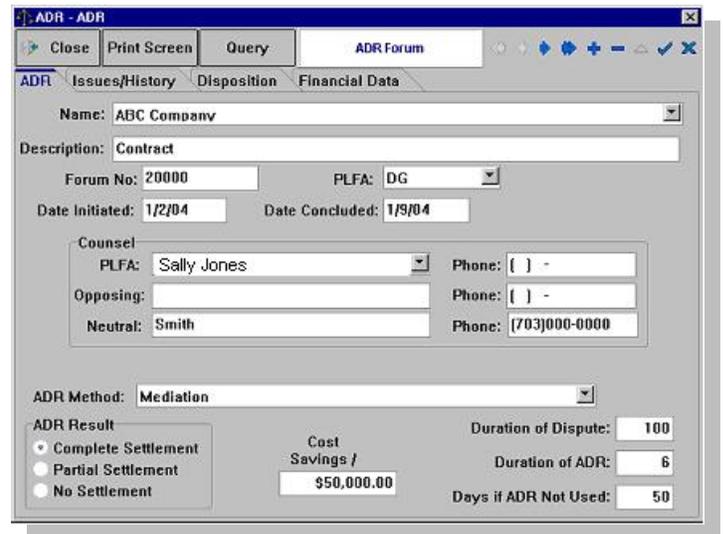
Aside from advancing DLA ADR goals, DLA’s ADR training is available to others outside the agency, or indeed outside the Government. DLA personnel who train regularly for DLA also serve as trainers for other organizations, such as the National Reconnaissance Office, and the Defense Finance Accounting Service. Similarly, DLA lawyers give numerous ADR presentations such as at DoD ADR Conferences, National Contract Management Association meetings, and at other venues.

IV. PROGRAM EVALUATION AND RESULTS

A. Program Measurement

DLA uses an in-house database to help measure the effectiveness of the Acquisition ADR program. The primary data collected includes:

- the type of ADR used;
- whether the process ended in a complete, partial, or no settlement;
- the duration of the dispute before use of ADR;
- the duration of the ADR;
- the projected number of days needed to resolve the dispute without ADR;
- estimated days saved using ADR; and
- the costs saved or avoided with ADR.



The database also provides a link to other fields if the case was in another forum, such as GAO or the ASBCA, before ADR was used. The database is part of a larger, internal database called the “Case Management System” (CMS) that is maintained by the Office of General Counsel.

The Acquisition ADR advocate reviews the ADR statistics twice a year for accuracy and program management. The DLA General Counsel reports ADR

statistics quarterly to the DLA Corporate Board and annually to DoD. Field activity legal offices use this data to report their ADR activity to their commands. The Acquisition ADR advocate also reviews litigation statistics (GAO, ASBCA and Court) to ensure that cases are either in ADR or settlement negotiations unless an exception is warranted.

The Acquisition ADR advocate also gets input each year from field activities on ADR initiatives, apart from individual cases or statistics. By experimenting with new ideas or pilot programs, the overall ADR program can evolve and better support agency goals and objectives. This input also helps in assessing the strength of each ADR program at the local level.

Program measurement is also done on a case-by-case basis. Feedback is obtained from individual ADRs through participant evaluation forms, which can be used to improve future efforts.

B. Program Results

As reflected in CMS, DLA's Acquisition ADR program has, since data was first captured in 1997, resulted in cost savings of approximately \$10.4 million. For the 188 cases involved during this time, this equates to an average savings of approximately \$55,000 per case. This figure is primarily comprised of avoiding the costs associated with traditional formal litigation, avoiding the risks of judgments against DLA, and savings from settlements reached by the parties.

Use of ADR has saved time, both in terms of the duration of the dispute and in terms of staff time saved. For example, for GAO protests for FY 04, a total of 17 protests went to decision on the merits (11) or were resolved through ADR (6). The protests handled via ADR (35%) were resolved in **half the time** than those that went to decision (40 days instead of 80 days). In addition, approximately 12 days of staff time were saved during this period using ADR; this figure is based on

an assumption of 2 days of staff time saved per GAO protest resolved through ADR.

For ASBCA cases as well, ADR has saved time, both in resolving the dispute and in staff time involved. For example, for ASBCA cases closed in FY 04, approximately 10% were resolved through ADR. The ADR cases were resolved in an average of 131 days, versus 281 days for non-ADR cases. (This difference is even larger when statistics are adjusted to deduct 9 companion cases that were promptly dismissed; then the non-ADR cases averaged 536 days to resolution.) Staff time savings attributable to the ADR cases equate to an estimated 70 days, based on the assumption that 35 days of staff time are saved on an ASBCA case when it is resolved through ADR.

Resolution rates in the DLA Acquisition ADR program are excellent. For FY 04, 77% of acquisition matters for which ADR was used reached complete or partial resolution.

Other specific, positive effects, while not quantifiable, have surfaced as a result of DLA's ADR program. One example is improved relationships with contractors and an improved agency image. Contractors have written to agency officials involved in facilitated meetings, expressing appreciation for the idea of using facilitation and for the way the facilitations were handled. This contributes to a positive reputation for the agency in constructive problem-solving, and increases the likelihood that ADR will be used in the future.

Another example of positive effects has been in the reduction of exposure to adverse decisions in litigation. Through the GAO Outcome Prediction process, for example, several protests were resolved that would have been sustained had the protest continued to decision. This helps ensure appropriate agency action, and avoid becoming a "case study" for the contractor and the Government community alike on how *not* to conduct an acquisition.

CONCLUSION

The DLA Acquisition ADR program has been an effective, cost-efficient way to resolve disputes. As a result, DLA has increased its emphasis on resolving disputes using techniques such as mediation and facilitation, and relies less on traditional adversarial models. Further, using ADR for contract disputes has contributed to the view that contractors are partners, not adversaries; this in turn leads to continued cooperation and to the ultimate objective of better mission support.