

ALTERNATIVE
DISPUTE
RESOLUTION
(ADR)

A Great Choice for
Resolving Disputes.

OVERVIEW OF ADR

Traditional dispute resolution typically is either negotiation or litigation, both of which have limitations.

Negotiation: This is usually what parties try first, but coming to agreement can be a long, hard process. Parties typically don't communicate openly with each other; they "keep their cards close to their chests," worried about giving away their position. They don't trust the other side, which is usually seen as "posturing," or taking a particular position because of anticipated litigation. Time passes, as each side reviews proposals and takes weeks or months to counter-offer, leading to more reviews and more lapsed time.

Litigation: Going to court is very expensive, and will require lots of time and energy. Courts follow formal procedural and evidentiary rules, some of which may not allow certain information to be heard. Each side opposes the other in an adversarial context. It may take a long time to get a decision, and when you do, the court could dismiss the case for a procedural reason, or rule against you. If you do win, your relief is limited to what that court has authority to give. Plus, the other side can keep you in litigation by appealing. You lose control because someone else makes the decision for you.

Alternative Dispute Resolution:

ADR involves processes that both parties agree to, and often involves using a third party to resolve disputes.

There are lots of different types. Sometimes a third party actually makes a decision (arbitration); sometimes a third party serves as a mediator or facilitator to help the parties resolve the dispute themselves.

The DLA Director has committed DLA to an “ADR first” policy to help achieve quick, inexpensive, and comparative solutions with employees, contractors, and others.

(See the DLA ADR Homepage at <http://www.dscc.dla.mil/offices/legal/adr/adr.html>.)

DLA policy directs that special consideration be given to use of mediation. DLAD 5145.1, One Book.

So what is "mediation"?

With mediation, the parties meet with a third party neutral (the mediator) in a non-adversarial setting to try to resolve the dispute. The mediator helps the parties craft their own solutions to the problem. If successful, the mediation results in a written agreement resolving the dispute.

The mediation process has several stages.

First, the mediator explains the process to both parties. Next, each party provides their perspective of the situation—uninterrupted by the other party. Then the mediator leads a joint discussion between the two parties, helping them communicate with each other, explore issues, and look for areas of common ground. At some point, the mediator will meet separately (“caucus”) with each party, so open discussions can be held without the presence of the “other side.” Sometimes, several caucuses are held throughout the mediation. The parties may convene for joint sessions between caucuses. Ultimately, the parties will either reach resolution, or conclude their differences cannot be resolved.

OK, now you have a better understanding of mediation in general. But what are we really talking about? This is what it can do for you:

- Saves money, time, resources
- Focuses on the parties' *interests*, not their *positions*
- Builds better relationships between the parties
- Arrives at solutions acceptable to all parties
- Provides parties more options than in other forums
- Helps the parties address the real issues in dispute
- Helps parties avoid unfavorable precedent
- Allows parties to work directly with each other

You may think this is fine in theory, but want to hear some "references" from people who have actually used mediation. No problem: here is what some DLA people have had to say about how helpful a process this is.

"I have participated in a number of mediations. Not only were the matters resolved faster, but the issues that originally seemed to be the problem were not real concerns of the parties. Mediation allowed us to arrive at the true problem and achieve a viable solution."

Frederick N. Baillie, SES, J-37.

"The use of mediation for EEO complaints in DDC has been very effective in resolving disputes quickly, improving communications and relationships, and promoting a better understanding between management and employees."

Brigadier General Barbara
Doornink, Previous
Commander of the Defense
Distribution Command.

So, maybe you are wondering, ADR can't work *all* the time can it? What happens if it fails?

ADR success rates are high (around 80%). However, if ADR fails, you simply return to whatever options you would have had before you tried ADR. **You do not lose any rights.** And even a "failed" ADR has benefits--sometimes the issues have been narrowed, or relationships between the parties improved somewhat.

Hopefully by now you have seen that ADR is a great idea.

But it is more than that--it is also DLA policy. If unassisted negotiations do not resolve an issue in controversy, **ADR must** be considered and a management decision not to use **ADR must** be explained **in writing** by an official at least one level above the deciding official." DLAD 5145.1, One Book.

There are numerous legal authorities establishing the preference for use of ADR. (See the DLA ADR Homepage at <http://www.dscc.dla.mil/offices/legal/adr/adr.html>.)

Want to know more?

Your Office of Counsel is the ADR office at your activity; talk to them for more information, and for help in setting up an ADR process.

So you know the ADR basics,
but want to hear more about
how ADR works in equal
employment opportunity and
personnel disputes?

Well, you've come to the right
place!

Using Alternative
Dispute Resolution to
Resolve Personnel and
Equal Employment
Opportunity Disputes.

Mediation is a great way to resolve personnel and employment disputes. The Overview section explained how mediation works, and why it is so helpful. But, as you'll see, it is especially good for resolving personnel and employment conflicts.

Think about it. If you are arguing with your boss, or you are a manager with an employee you feel is causing a problem, you still have to work with each other every day. Who wants to come to work with a sinking feeling in the pit of their stomach? The more you can avoid hostility and adversarial relations, the better. Mediation is less threatening than the traditional processes. The parties can listen better to each other, and try to come up with creative solutions to solve their problems.

Mediation is such a good way to solve personnel disputes that DLA has formalized its use in its EEO Mediation Program, called **RESOLVE (Reach Equitable SOLUTIONs Voluntarily and Easily)**. RESOLVE gives employees and managers a simple and easy EEO dispute resolution process to informally eliminate EEO disputes without litigation.

Who can participate in RESOLVE?

If you have a complaint: Any DLA civilian employee who contacts the EEO Office with an informal complaint of discrimination can ask that the matter be mediated under the RESOLVE program. You don't have to use the RESOLVE mediation process, but it has great success rates and many benefits, as already noted.

If a complaint has been made against you: DLA has made the policy decision that managers should participate in the RESOLVE program. If you don't want to, you have to consult with legal counsel, say why in writing, and get approval of that decision from a higher authority in writing.

When can I participate in a RESOLVE mediation?

Employees: You have to contact the EEO Office within 45 days of the date of the matter you think is discriminatory. **Right then**, consider mediation. The general rule is the earlier, the better, although you can ask for mediation later on too if you want.

Managers: If you are a manager and a complaint has been made against you, ask if it can be mediated under the RESOLVE program. That is the complainant's choice, not yours, but ask anyway. Perhaps they forgot about this option, or are more willing to go for it if they see you are.

How is a RESOLVE mediation conducted?

Although there are several variations, a RESOLVE mediation usually involves a joint session between the mediator and both parties. After each party has told his/her perspective of the situation, the mediator and the parties may ask questions to clarify an issue or get more information. Typically, the mediator will also meet with each party, one or more times separately to discuss the issues confidentially, and develop potential remedies to the dispute.

Separately or together, the mediator works with the parties to fashion a settlement acceptable to the parties. Therefore, it's important for parties to come into a mediation knowing what they want and why. It's also important for them to understand the strengths and weaknesses of their litigation positions, to help direct the focus and attention to their interests. Attending a mediation does not mean you have done something wrong. It simply means you would like to resolve the matters on your own terms.

We've been talking a lot about the RESOLVE program and EEO complaints, but ADR is encouraged for all other types of personnel disputes as well.

Merit System Protection Board (MSPB) rules also encourage use of ADR and mediation. In fact, MSPB gives an automatic extension (from 30 to 60 days) to file an MSPB appeal, when the Agency and the employee agree in writing to use an ADR process to try and settle the issue. MSPB appeals apply to certain agency actions such as removal, reduction in pay or grade, suspension for more than 14 days and other designated actions.

Regardless of the type of personnel dispute being mediated, the goal of a mediation session is to have the parties reach resolution which is documented in a Resolution Agreement. Remember that litigation often does not resolve the real issues underlying a dispute. But mediation can and does – because the parties focus less on blame and more on resolution. However, even without an agreement, mediations usually help management and employees-- at a minimum by opening lines of communication in discussing the dispute and potential solutions.

There is no set time period for how long a mediation session lasts--most last 4-8 hours. The mediator or any party can terminate the mediation at any time.

Lots of different remedies are available through mediation. You can agree to any resolution that the other side will agree to, as long as it is not against law, regulation, merit principles, or any applicable labor agreements. For this reason, most settlements must be reviewed and approved by at least the Human Resources and Legal offices. Usually you get this review before the resolution agreement is signed. Despite this caution, creative solutions are the rule, not the exception, as you'll see.....

One case involved a written notice issued to a worker for allegedly leaving the job site without permission and for failing to safeguard Government documents. The worker explained he was on the job site but had left his forklift to get work gloves, and that the documents in question had fallen from his forklift accidentally. The notice apparently had errors in it, and the supervisor had been heard making racial slurs about this person. Agreement was reached in mediation. Management agreed to rescind the erroneous form, take appropriate action with the supervisor concerning the racial slurs, and instruct supervisors on the need to issue written notices correctly. The worker agreed to safeguard Government documents and to notify his supervisor before leaving the job site. He is now an enthusiastic supporter of mediation, advocating it to his colleagues.

Another case involved many allegations, but ultimately turned on a hidden one--the employee was assigned a mid-week "day off" under alternative work schedule (AWS) instead of the Friday or Monday he wanted and had traditionally had. The AWS day had been changed because of reorganization. The employee was very senior under the old structure, but was less senior under the reorganization, and thus got a lower priority in selecting AWS days, which was done based on seniority. His union representative, present at the mediation, was impressed with the employee, and had a Friday AWS day himself. The union representative agreed to swap days with the employee, which was acceptable to management, and the problem was solved. See, you never know what will turn up in mediation!

As noted above, mediation is not limited to EEO disputes and the RESOLVE program. You can ask for mediation or another type of ADR technique for other kinds of workplace disputes. Check to see if your union agreement references an ADR process. Beyond that, it is DLA policy to consider the use of ADR in every situation where unassisted negotiations have not proven effective.

So, where do you go from here?

If you are an employee with a complaint, propose mediation. If you are a supervisor, suggest mediation, either when complaints are made against you, or when you see a problem start to surface (remember, you don't have to wait till someone else mentions it first). In either case, if one side says "no," ask again or talk to your ADR Specialist.

Mediation is flexible, opens lines of communication, helps salvage ongoing work relationships, and gives you control in the outcome of your complaint. Try it. You might like it!

Want more information? Your Office of Counsel has an ADR Specialist who can answer your questions and provide you with more information.

So you know the
ADR basics, but want
to hear more about
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protests and contracts
disputes? Well,
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right place!

Using Alternative
Disputes Resolution
to Resolve Protests
and Contract
Disputes.

"Contracting types" live and breathe with the FAR, so you probably want to know what the FAR says about ADR. Well, the FAR authorizes ADR and encourages it, both for protests and for contract disputes.

- Protests
 - FAR 33.103(c): states use of ADR is an acceptable method of resolving protests.

- Contract Disputes
 - FAR 33.103(c): defines ADR
 - FAR 33.204: states that agencies are encouraged to use ADR to the “maximum extent practicable”
 - FAR 33.210: authorizes contracting officers to use ADR
 - FAR 33.214 and the Dispute clause at FAR 52.233-1: states that if either side requests ADR and the other refuses, the party refusing ADR must inform the other side in writing of the specific reasons for the rejection.
 - FAR 33.214: also provides more detail about ADR.

The DLA Senior Procurement Executive has reiterated the DLA Director's commitment to ADR and has required the acquisition community to be an active ADR player. (See the DLA ADR Homepage at

<http://www.dscc.dla.mil/offices/legal/adr/adr.html>.)

Further, under DLAD 33.211, 33.214, 52.233-9001 and 52.233-9002, the Government and the contractor agree to use ADR if unassisted negotiations are unsuccessful. Also, under DLAD 42.501, if post award orientations are held, the subject of dispute avoidance, early dispute resolution, and alternative dispute resolution should be on the agenda. (See the DLA ADR Homepage at

<http://www.dscc.dla.mil/offices/legal/adr/adr.html>.)

The Overview training summarized some of the problems with litigation. Everything we said there applies to contract disputes as well. Did you know it can take 3-5 years to get a decision from the Armed Services Board of Contract Appeals? (Some decisions don't take that long, but others take longer). Even if the contractor loses, he can still appeal; the Government usually *can't* appeal because a Government appeal requires approval by the Justice Department, and they typically feel that one shot at your case is all you get. And remember, win or lose, **someone else is making your decision for you.** Feeling nervous? You should be!

Well, don't panic--ADR to the rescue! All the advantages of ADR mentioned in the Overview Training apply here too, and we've got some great examples for you.

Let's start with protest examples.

Sometimes people say, "Why do ADR on a protest? We can't give the contractor what she wants--we can't just give her the award."

Well, it's true we can't give her the award, but how do you know that is what she wants? All you know is what she tells you, and how straight is she going to be when she is posturing herself for litigation? What does she *really* want? If you can find out, you may have more options than you might think.

Here's one good example. In a DSCR protest, the protester dropped his case objecting to a QPL requirement, after DSCR and the relevant military services agreed to extra efforts to help him get his products qualified. The ADR revealed that the company was less concerned about the specific acquisition he was challenging, and was more concerned about how to get a variety of products qualified. See, we really *didn't* know what he wanted!

In another case, ADR resulted in DDC amending its specifications for warehouse moving equipment. The single mast type used before had cracking and structural problems, so DDC specified a dual mast type in the new RFP. The ADR helped reveal that the problem was not dual versus single mast, but how the single mast was constructed. So DLA could relax the specifications and allow both types (also avoiding a potential sole source situation), while still making it clear that, whatever manufacturing process used, the end item must not crack during use. We got more competition, and the protester got another shot at the procurement.

ADR is great for contract disputes as well as protests. It can be used to resolve contract disputes at any stage--pre-claim, post claim, or claims in litigation. **The earlier the better.**

One DSCC contracts case was resolved just a few weeks before trial, in a manner very favorable to DSCC. The contractor had some merit on its side of the argument, but very little ability to prove the amount of money it was claiming. In a private caucus, the contractor specifically asked the mediator what the mediator thought of the case. The mediator outlined what the contractor would need to do to prove its damages case in court. Realizing the problems, the contractor settled at an amount far less than originally claimed.

This story shows you the benefits of using a third party neutral. The contractor basically dropped his case because he believed what the neutral was telling him. Would that have happened in a two-party negotiation?

Do *you* believe what *your* opponent tells you?

Okay, hopefully by now you are sold on ADR. But how do you make it *happen*?

One way to do ADR is to suggest it, or agree when the other side suggests it, on a case-by-case basis. And remember, don't feel like you have to wait till the contractor files a claim under the Contract Disputes Act. Any time a contractor has a problem under the contract, you have a "dispute," in the ADR sense of the word.

Case-by-case ADR is great, but wouldn't it be even better if you had a contract where, right up front, the parties would agree to use ADR if any disputes arose? Well, you do!

A contract clause supporting ADR is required in all acquisitions unless a contractor objects. (DLAD 33.214 and 52.233-9001) Also, as mentioned earlier, post award orientations should address the subject of dispute avoidance, early dispute resolution, and alternative dispute resolutions (DLAD 42.501). You can also establish a "Partnering Agreement," something especially appropriate for larger dollar value contracts.

(See the DLA ADR Homepage at <http://www.dscc.dla.mil/offices/legal/adr/adr.html>.)

So, where do you go from here? Assume every dispute can be resolved with ADR (most can), unless it is *clearly* not appropriate.

ADR is more than a tool; it's a philosophy. Make it yours!

Want more information?

Your Office of Counsel has an ADR Specialist who can answer your questions and provide you with more information.

**FREQUENTLY
ASKED
QUESTIONS
ABOUT
MEDIATION**

1. Why is mediation preferred over other types of ADR?

Mediation provides the benefits of a structured process while still being flexible and still allowing the parties to control the result. The opportunity for private caucuses with the mediator builds trust and helps temper the parties' expectations, thus increasing the likelihood for agreement.

2. How do I choose a qualified mediator?

DLA maintains lists of qualified and trained mediators. Some mediators are Government employees and some are not. DLA has an ADR Specialist who can help the parties choose a qualified mediator. A number of outside ADR organizations exist that can also assist parties in selecting qualified neutrals. In EEO cases, the EEO Manager selects the mediator from an approved list of qualified sources.

3. Is there a cost to use a mediator, and if so, who pays?

No fees are involved when using a Government mediator. The DLA activity pays any per diem or travel costs.

4. Should a mediator be a subject-matter expert?

The answer depends upon the nature of the dispute, the complexity of the facts, the amount in dispute, and the needs of the parties. Although a subject-matter expertise is not always necessary, it can be a plus. The parties may listen more to a mediator with knowledge in the field than to a mediator who is a generalist. However, it is usually just as important to have a mediator who is skilled in mediation techniques.

5. Should the parties have their attorneys or representatives at the mediation?

The answer depends on the nature and complexity of the case. Each party must answer that question for him/her self.

Having a lawyer or representative at the mediation can be beneficial; however, the process is designed so that the parties do not have to have anyone with them during the mediation. If a party would like to consult a lawyer or other representative during the mediation, arrangements can be made to have the person available by phone.

6. Are the mediation proceedings private?

Yes. Only the parties and their representatives may attend the mediation. The parties agree in advance as to who will be present. Others may attend only if the parties and the mediator agree.

7. Where will the mediation be held?

The parties usually agree on the site of the mediation with the help of the mediator. Usually the mediation is held at either party's location, in a neutral setting.

8. Will the mediation proceedings be kept confidential?

Yes. The mediator is bound not to disclose any information concerning the mediation unless the parties agree to the disclosure. (There are some limited exceptions to this rule. For example, threats of violence against either the mediator or one of the parties are not protected by confidentiality, nor are disclosures of fraud). The mediator solicits a promise from the parties that they will not call the mediator as a witness in any further proceeding related to the dispute being mediated. The written mediation settlement agreement itself is usually not confidential, unless the parties agree to make it so or some specific legal protection applies.

9. Who can I talk to for more information?

The ADR Specialist in your
Office of Counsel.