

Headquarters U.S. Air Force

Integrity - Service - Excellence

Guidance on Acquisition Alternative Dispute Resolution



**SAF/GCR
AF/JAQ
(2016)**

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Agenda

- **What is Acquisition ADR?**
 - **Defining Acquisition ADR**
 - **Purpose of Acquisition ADR**
- Why should the AF use Acquisition ADR?
- Who participates in Acquisition ADR?
- When should the AF use Acquisition ADR?
- How should the AF use Acquisition ADR?





Defining Acquisition ADR

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- Alternative Dispute Resolution (ADR): “Any procedures in which parties agree to use a neutral to resolve issues in controversy, including but not limited to, facilitation, mediation . . . or any combination thereof.” AFPD 51-12, see FAR 33.201
- Neutral: “An individual who functions specifically to aid the parties in resolving the issue in controversy.” AFI 51-1201
- Issue in controversy:
 - A material issue to a decision concerning an agency administrative matter and with which there is disagreement. AFPD 51-12
 - A material disagreement between the Government and the contractor that may result in a claim or, is all or part of an existing claim. FAR 33.201



Purpose of Acquisition ADR

- Increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. FAR 33.214(a)
- Promote voluntary, informal, and consensual dispute resolution. AFD 51-12, para 2.1.
- Promote creative, efficient, and sensible outcomes in dispute resolution. AFD 51-12, para 2.2.
- Reduce the tangible and intangible costs, in time and resources, associated with dispute resolution. AFD 51-12, para 2.3.



- What is Acquisition ADR?
- **Why should the AF use Acquisition ADR?**
 - **Statutes & Regulations**
 - **Policy**
 - **Pragmatic Considerations**
- Who participates in Acquisition ADR?
- When should the AF use Acquisition ADR?
- How should the AF use Acquisition ADR?



Statutes & Regulations

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- The Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified at 5 U.S.C. §§ 571-584)
- The Contract Disputes Act, 41 U.S.C. § 607(e)
- FAR 33.204
 - “Agencies are encouraged to use ADR procedures to the maximum extent practicable.”
- AFFARS 5333.214
 - “The acquisition team must use ADR to the maximum extent practicable.”



DODD 5145.5

- Each DoD Component shall make use of existing ADR resources to avoid unnecessary expenditure of time and money.

AFPD 51-12

- It is Air Force policy to voluntarily use ADR to the maximum extent practicable and appropriate to resolve disputes
 - at the earliest stage feasible,
 - by the fastest and least expensive method possible, and
 - at the lowest possible organizational level.



Pragmatic Considerations

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- Parties retain control over the resolution
- Relationships between the parties can be maintained
- Parties can design a resolution process that is custom-tailored to resolving their issue





- What is Acquisition ADR?
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The Contracting Officer

- Is authorized to use ADR procedures to resolve contract disputes. FAR 33.210(a)
- As part of the acquisition team, uses ADR to the maximum extent practicable. AFFARS 5333.214
- Responds to requests for ADR. FAR 33.214(b)
- Initiates the referral and review process of ADR for claims and T4Ds/T4Cs, with assistance from their cognizant legal office. AFFARS 5333.290(b)

The Program Manager

- Secures funding
- Serves as a “witness”



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Critical Roles

The Cognizant Legal Office

Advises the CO at the lowest organizational level, and coordinates review by AFLOA/JAQ of all proposed final decisions. AFFARS 5333.290(b)

Uses ADR, in collaboration with AFLOA/JAQ, to the maximum extent practicable

- To resolve affirmative Air Force claims. AFFARS 5333.290(c)
- To resolve bid protests. AFFARS 5333.214(c)
- Prior to and after the commencement of litigation once unassisted negotiations have reached an impasse. AFFARS 5333.214(c)



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Critical Roles

AFLOA/JAQ

- Reviews all proposed final decisions of claims, terminations for default, and terminations for cause. AFFARS 5333.290(b)
- Serves as Air Force Counsel
 - In appeals to the ASBCA. AFFARS 5333.291(a)
 - To the Department of Justice in appeals before COFC. AFFARS 5333.292(a)
 - Before the GAO. AFFARS 5333.104(a)





SAF/GCR

- Analyzes data obtained from COs. The CO must provide SAF/GCR with:
 - Any proposed final decision on a claim involving PEO programs
 - Any proposed final decision on a claim greater than \$500,000
 - Any proposed termination for default with estimated excess procurement costs greater than \$500,000
 - All known information relating to any recommended T4D/T4C
 - See AFFARS 5333.290(b); www.adr.af.mil
- See AFFARS 5333.290(c) for affirmative claim data reporting; see AFFARS 5333.292(b) for Court of Federal Claims data reporting

The screenshot shows the 'Contract Impasse Report' form. It includes sections for Contracting Officer Information, Contractor Information, Contract Information, and Action Details. The form contains several input fields for Name, Email, Company Name, Cage Code, Contract Number, Contract Type, Contract Value, Date of Action, and Dollar Amount of Action. There are also radio button options for Type of Action: T4D, T4C, Complete, and Partial. A large text area is provided for Additional Notes. At the bottom, there is a button that says 'Please click here to send to usaf.pentagon.saf-gc.mbx.saf-gc-workflow@mail.mil'.

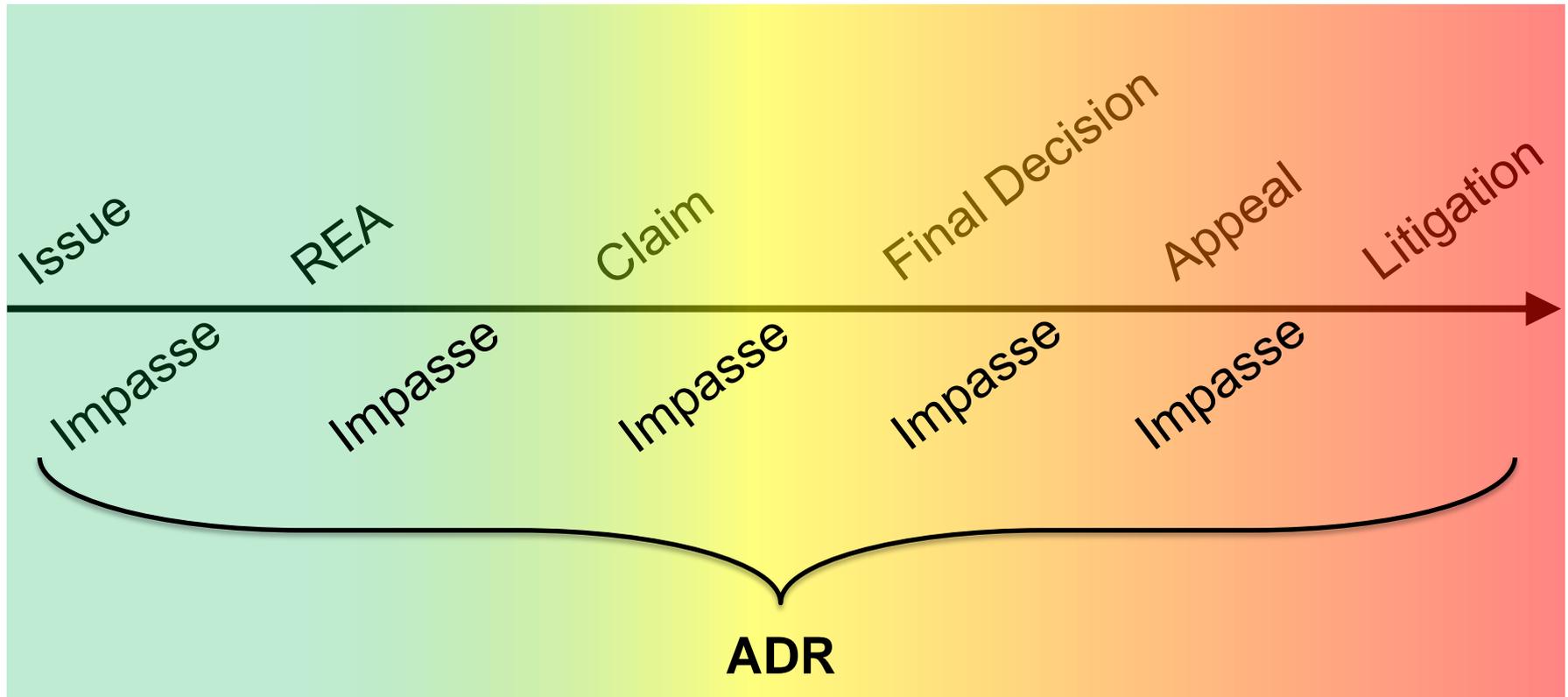


- What is Acquisition ADR?
- Why should the AF use Acquisition ADR?
- Who participates in Acquisition ADR?
- **When should the AF use ADR?**
 - **Spectrum of Controversy**
 - **Suitability Criteria**
- How should the AF use ADR?



Spectrum of Controversy

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Spectrum of Controversy

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Pre-COFD

- Before issuing a contracting officer's final decision (COFD) on a claim, a termination for default, or a termination for cause, the contracting officer must
 - Refer the proposed final decision to the cognizant legal office for advice and to AFLOA/JAQ for review. AFFARS 5333.290(b)
 - Send informational copies to GCR. AFFARS 5333.290(b)

Post-COFD and Pre Appeal

- The use of ADR does not alter the time limitations or procedural requirements for filing an appeal of the COFD and does not constitute a reconsideration of the COFD. FAR 33.214(c)



Spectrum of Controversy

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Before and After the Commencement of Litigation

- The acquisition team must attempt to use ADR prior to the commencement of litigation once unassisted negotiations have reached an impasse. AFFARS 5333.214(c)
- ADR must be offered in litigation unless certain exceptions apply. AFFARS 5333.214(c)

Upon receipt of a Bid Protest

- ADR must also be used to resolve protests to the maximum extent practicable. AFFARS 5333.214(c)



Spectrum of Controversy

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Affirmative Air Force Claims

The contracting officer must

- Use ADR to the maximum extent practicable, with the assistance of the cognizant legal office and AFLOA/JAQ. AFFARS 5333.290(c)
- Provide to AFLOA/JAQ and SAF/GCR any audit or other information indicating the Air Force is entitled to recoveries greater than \$500,000. AFFARS 5333.290(c)



Factors Favoring ADR: Relationship between Parties

- There is a continuing relationship between the parties
- Parties have poor communication, personality conflicts, or are polarized into an “all or none” position
- One party’s view of the controversy is unrealistic
- Either party would benefit from hearing directly from the opposing side or a third-party neutral
- The parties are prepared to discuss settlement



Suitability Criteria

Factors Favoring ADR: Nature of the Issue in Controversy

- Need for flexibility or creativity in shaping relief
- Need for a swift resolution
- The parties need a factual interpretation and the applicable law is well settled
- The issue is factually or technically complex and a third-party neutral could provide expertise or fact-finding



Suitability Criteria

Factors Favoring ADR: Nature of the Issue in Controversy

- Some entitlement exists and the real task is negotiating a reasonable recovery
- Need to minimize disruption to other programs or mission areas by the diversion of resources to support litigation
- Bad facts, bad law, or a hostile forum or decision maker make avoiding an adverse precedent desirable
- Decision-quality information is accessible





Suitability Criteria

Factors Disfavoring ADR: Statutory & Policy Considerations

- A definitive and authoritative decision is needed as a precedent
- The matter involves significant issues of Government policy and ADR will not assist policy development
- Maintaining established policy and avoiding variations in implementation is of special importance
- The matter significantly affects non-parties
- A full public record of the proceeding or resolution is important

ADRA, AAFP 51-12



Factors Disfavoring ADR: Practical Considerations

- The issue is likely to settle without assistance, or in the context of litigation, can be resolved efficiently by motion
- Decision-quality information is not accessible
- The opposing party will not engage in ADR in good faith
- The CO lacks authority. FAR 33.210(a)



- What is Acquisition ADR?
- Why should the AF use Acquisition ADR?
- Who is involved in Acquisition ADR?
- When should the AF use ADR?
- **How should the AF use ADR?**
 - **The Conduct of ADR**
 - **Critical Players**
 - **Fitting the Form to the Fuss**
 - **ADR Agreements**



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The Conduct of ADR

Contract Administration

- For ACAT I and II programs, the contracting officer must establish an agreement between the Government and the contractor, such as a memorandum of understanding, that outlines the intent of the parties with respect to the use of ADR. AFFARS 5333.214(a)
- Contracting officers must consider establishing ADR agreements for other programs and acquisitions. AFFARS 5333.214(a)
- See www.af.adr.mil.



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The Conduct of ADR



- Assemble an ADR Team
- Identify Decision-Quality Information
- Fit the Form to the Fuss
- Select a Third-Party Neutral
- Exchange Information
- Develop and Execute an ADR Agreement
- Prepare for ADR
- Present
- Negotiate
- Develop and Execute a Settlement Agreement



Assemble an ADR team

- CO—settlement authority
- Program—funding & witnesses
- Procurement attorney—assess litigation risk, develop negotiation strategy, prepare clients, present the opening statement, draft the settlement
- DCMA and DCAA personnel, price analysts—expertise

Select a Principal

- Must have the authority to negotiate a settlement

Select a Third Party Neutral

- ASBCA Judge
- Government employee
- Private neutral (cost shared between the parties; AF costs funded by Program or GC)



Fitting the Form to the Fuss

Business Goals:	Mediation	Early Neutral Evaluation	Mini-Trial	Summary Trial with Binding Decision	Litigation
Preserve or Enhance Contractor Relationship	✓	✓	✓	✓	
Maintain Control	✓	✓	✓		
Deal with Strong Emotions	✓	✓	✓		
Want a hearing on the merits without a binding decision		✓			
Maintain a Simple Process	✓	✓	✓		
Need a Quick Decision				✓	
Establish Precedent					✓



ADR Agreements

- Prior to a dispute, AFFARS 5333.214(a)
- For a specific dispute, FAR 33.214(a)(3)

Settlement Agreements

- Ensure the principal has authority to agree to settlement terms
- Attain approval of general settlement terms before mediation begins
- Memorialize the settlement terms and the parties intent

Practice Tips

- Consider Template Settlement Agreements (www.adr.af.mil)
- Coordinate with AFLOA/JAQ