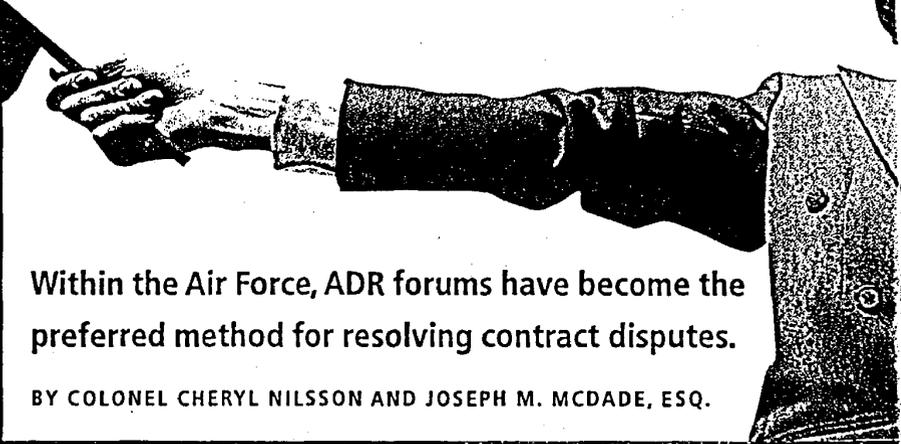


"I believe the Air Force can and will be judged not on what we say about ADR, but rather, we will be judged by what we do in successfully implementing an ADR culture and our use of ADR."

—Darleen A. Druyun
Principal Deputy Assistant
Secretary, U.S. Air Force
(Acquisition and
Management)

The Air Force Takes the **A** out of ADR



Within the Air Force, ADR forums have become the preferred method for resolving contract disputes.

BY COLONEL CHERYL NILSSON AND JOSEPH M. MCDADE, ESQ.

Under the leadership of Darleen A. Druyun, the Air Force has taken the A out of alternative dispute resolution (ADR) by making ADR forums the preferred method for resolving contract disputes. This initiative has achieved the following objectives:

- The Air Force resolved contract disputes valued at approximately \$1 billion.
- The Air Force placed 52 percent of all eligible appeals before the Armed Services Board of Contract Appeals (ASBCA) on an ADR track.
- The Air Force Materiel Command (AFMC) created an ADR division of 10 attorneys within its trial team and changed the mission of the trial team to ensure that it mirrors the new ADR First policy.
- The Air Force engaged with industry and signed 17 corporate-level ADR

agreements that commit the parties to using ADR First, before resorting to litigation.

- The Air Force has executed 88 program-level agreements that cover all acquisition category I and II programs committing the senior leadership of those programs to using ADR.

This initiative constitutes a major policy shift by the Air Force as it steps up its efforts to carry out its ADR program, which will have a significant effect on contractors of all sizes that are doing business with the Air Force. The Air Force ADR program also serves as an example for other agencies interested in achieving similar results.

Air Force ADR Policy and Plan

Last year, the Air Force published an important policy document to institutionalize the use of ADR to resolve contract disputes. Air Force Instruction 51-12, Alternative Dispute Resolution,

established the policy to use ADR to the maximum extent practicable and appropriate.¹ The policy directive mandated the development of five-year ADR plans for the acquisition, work-place, and environmental areas. The assistant secretary of the Air Force for acquisition approved the acquisition five-year ADR plan in July of 1999 (the AQ ADR plan).²

The AQ ADR plan envisions using ADR "to resolve disputes, at the earliest stage feasible, as efficiently and at the lowest organizational level possible." Table 1 summarizes the major elements of the AQ ADR plan and their status, and should give a good idea of the size and scope of this effort. The extraordinary fact about the AQ ADR plan is that all of the foregoing accomplishments were achieved in less than two years.

Support from the Air Force Legal Community

To support the Air Force's ADR policy, the Air Force trial team (formerly the



Directorate of Contract Appeals, now the Directorate of Contract Dispute Resolution) at Wright-Patterson Air Force Base was reorganized. Its mission was expanded and the AFMC staff judge advocate, Brigadier General Jerald Stubbs, directed that ADR be offered in cases that are presently on the litigation track. The trial team's three geographic divisions were replaced with two geographic divisions (East and West, divided by the Mississippi river) and an ADR division (responsible for Program Executive Office/ Designated Acquisition Commander programs and other high-dollar or high-interest cases).

To resolve disputes as early as possible without litigation, the directorate's mission was expanded to include providing evaluative, investigative, settlement, and ADR assistance for pre-final decisions. In the first quarter of the calendar year, ADR was offered in 52 percent of the active Air Force cases. Forty-three percent of the contractors to whom the ADR offer

was made agreed to convert their appeals to ADR forums, 14 percent rejected the offer, and 43 percent either did not respond or elected to hold off on the decision.

The Air Force ADR experience has been overwhelmingly positive, regardless of the stage of litigation, type of dispute, or dollar value involved in the case. In the last six months, the Air Force resolved 20 cases (both systems and operational claims, valued from tens of thousands to millions of dollars) using the full range of ADR techniques and forums, from unassisted negotiations to binding arbitration (summary trial).

Air Force ADR Process Experiences and Observations

ADR as defined and practiced in the Air Force pivots around a problem-solving mindset and a plan (the ADR agreement). It starts with an offer (from either party) to consider ADR and a willingness to engage in a discussion of suitable forums for resolution. Unlike traditional litigation methods where the steps and timelines are well defined, Air Force ADR looks first at the goal or endgame, and then the parties work together to figure out how to get there and by when. The process takes an extra dose of teamwork, creativity, and communication.

The ADR Agreement

The ADR agreement is a key component of an ADR effort. Crafting an ADR agreement requires the parties to address up front (1) the issues (legal, interpersonal, political, business), (2) the available resolution tools and forums (which often requires advance consultation with the ASBCA or other neutral to determine the parameters of their assistance), and (3) the minimum process necessary to get the job done. The ADR agreement forms the resolution plan, sets the schedule, and defines the parameters of discovery and the role of the neutral, if one is used. The process requires continuous exploration and constant coordination.

The agreement is critical and optimally addresses all of the chal-

lenges that the case presents. The earlier in the process the agreement can be negotiated, the better. Working together on the terms of the ADR agreement opens up lines of communication and gets both parties focused on resolution. The Air Force encourages including a discovery plan in the agreement and views this plan as a necessary step in choosing the appropriate ADR forum. In a number of cases, interrogatories and depositions have been significantly limited, replaced with interviews (in person or by telephone), or eliminated altogether. With resolution as the goal, the agreements often include multiple steps that escalate the amount of process that is applied to achieve resolution. In one case that required significant travel commitments and expense, the parties agreed to a three-step process that began with two days of unassisted negotiations followed by mediation with a neutral and, ultimately, a binding decision if necessary. (A binding decision was needed to resolve this case.)

The Neutral

With one exception, ASBCA judges have been the neutrals of preference, primarily because they know the government contract business, have been extraordinarily accommodating to the needs and demands of the parties, serve at no additional cost, and have been extremely successful in bringing cases to resolution. Chairman Paul Williams has made judges available for both pre- and post-appeal

About the Authors

COLONEL CHERYL NILSSON is the chief of the ADR Division, Air Force Materiel Command Law Office, Directorate of Contract Dispute Resolution.

JOSEPH M. MCDADE is the deputy dispute resolution specialist, Office of the General Counsel, Department of the Air Force.

Send comments on this article to cm@ncmahq.org.

Table 1. AQ ADR Plan Elements and Their Status

Plan Element	Status	Summary
Engagement with industry	Major effort complete	16 corporate and 88 program-level agreements executed; AFMC/judge advocate (JA) hosting corporate counsels (June 2000)
ADR infrastructure	Major changes	ADR advisory team, ADR division and ADR champions appointed; Team energized
Air Force/JA ADR support services	Major changes	AFMC/JA policy change: 20 ADRs completed (January–April 2000) with 42 pending and 63 candidates
Integrating fiscal	Underway	Coordinating ADR efforts with the appropriate Air Force financial management offices
ADR case screening	Complete	Pre-appeal (criteria established); Post-appeal (ADR First)
Data collection and	Large-scale effort	Assistant secretary of the Air Force, acquisition, data call with the Air Force Audit Agency, ADR funding approved
Air Force training	Large-scale effort	Extensive Air Force ADR training effort underway; Established ADR Web site (www.adr.af.mil —150,000 hits)

disputes, to work details of the agreement, and to resolve discovery disputes. Without exception, the board has been able to accommodate specific requests for judges and locations, even on short notice (in one case, assistance was forthcoming with only three week's notice). They have served as mediators, settlement judges, and arbitrators—often in combination when the situation demanded. When the agreement called for a decision within a stated period of time, the ASBCA judges met those deadlines each time.

ADR Forums and Techniques

ADR forums are adaptable to the full range of contract disputes if the parties are open-minded, imaginative, and willing to explore. To date, no two ADRs have been the same, and with one exception, all have resulted in successful resolution. The forums and techniques used have been as diverse as the cases served. A fact-finding forum has worked early in the litigation and pre-appeal stages either to

resolve the case or to isolate issues and set a plan for resolution. Typically, they have not required a neutral (though in one case, a mediator was indispensable). The key to success using this forum is to have the fact witnesses and the individuals (of both parties) with the authority to settle meet with a specific agenda, the requisite documentary evidence, and the goals of narrowing the issues and resolving the case.

Mediations and ADRs that use a settlement judge (usually involving outcome prediction) often have similar formats (presentations, caucuses, and so forth), but differ in the parties' expectations on the role of the judge. In mediation, the parties expect a diplomat and some effective "shuttle diplomacy," without much evaluation or case critique. With a settlement judge, the parties are looking for a "reality check"—an assessment of the strengths and weaknesses of each party's case.

Summary trials (binding arbitration) offer the parties a decision by a

board judge with a minimum amount of process. The parties, with the assistance (or at least the concurrence) of the judge, design the hearing format that best suits the case. It may look identical to a traditional hearing, but it does not have to (and most of the Air Force's have not). Typically, the hearings have been one to two days in length with a combination of testimony and expository presentations. All witnesses are sworn in. The parties agree in advance on the amount of time allotted to each side, the extent of cross-examination and rebuttal testimony, the length of any position papers, the timing of the decision, and so forth. In one case, each side was given six hours to speak—which was carried out exactly. Every time someone spoke (direct, cross, or in narrative) the judge started the clock and time was assessed. In another case, each side had three uninterrupted hours to present its case and a half hour to be questioned by the other side (in the form of cross-examination or general questioning).

Conclusion

The Air Force ADR initiatives are reinventing the way in which the Air Force resolves contract controversies. The ASBCA has proved to be remarkably flexible and effective in supporting the party's use of ADR. With the continued support of senior Air Force leadership, the Air Force remains committed to building on its successes to date. If industry continues to support this effort and all concerned remain committed to keeping the ADR process flexible, disciplined, and responsive, the vast majority of contract disputes can be resolved cooperatively, in minimum time, and at minimum cost. *CM*

Endnotes

1. This document can be accessed on the Web at <http://afpubs.hq.af.mil/pubfiles/af/51/afpd51-12/afpd51-12.pdf>.
2. The Acquisition ADR plan can be found on the Web at www.safaq.hq.af.mil/contracting/toolkit/adr/AQ5yr_plan_Final.htm.