

ALTERNATIVE DISPUTE RESOLUTION (ADR) AT THE CIVILIAN BOARD OF CONTRACT APPEALS

General information. The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, directs that boards of contract appeals provide informal, expeditious, and inexpensive ways to resolve contract issues in controversy. Toward this end, the Civilian Board of Contract Appeals (CBCA) encourages parties to consider the use of Alternative Dispute Resolution (ADR) procedures at all stages of a contract controversy: pre-appeal, post-appeal, and post-hearing – whenever the parties believe that a neutral third person may be helpful to the settlement process. The CBCA makes its judges available to serve as ADR Neutrals.

ADR is always voluntary and all parties as well as the ADR Neutral must agree ADR is appropriate for the matter. The ADR procedures described below are not intended to replace a party's right to fully adjudicate its appeal, but are meant to supplement that right and provide more flexible choices for parties to resolve their differences.

ADR procedures should be tailored to suit the parties' particular needs. Adoption of an ADR procedure as early in the appeal process as feasible can save parties substantial costs and delay and can help them maintain or restore amicable relations. Parties should never regard ADR and a willingness to discuss matters in which they disagree as a weakness. Finally, parties should keep in mind that the success of ADR depends upon both parties coming to an ADR proceeding well prepared and having a firm, good faith commitment to resolve their differences. Without that commitment, the best structured dispute resolution procedure cannot succeed.

The ADR procedures described below have worked very well in the past. The names used for the various procedures are not meant to limit the parties' choices. They are set forth simply to give the parties ideas of the kinds of processes that can be used. Any procedure or a combination of procedures that brings parties together in settlement or partial settlement of their disputes is a good procedure. When the parties structure the ADR procedures to be used in their case, they should focus on the role the ADR Neutral might play. The Neutral can assist in defining that role as part of an ADR Agreement.

Deciding to use ADR. To use ADR procedures, both parties must make a written joint request to the CBCA. Requests should be addressed to the Board's Chairman. If the request pertains to a docketed appeal, a copy should be sent to the presiding judge for that appeal. If the parties wish that a particular CBCA judge or judges serve as their ADR Neutral(s), they should state that desire in their request to the Board's Chairman. Depending on caseload and availability, a determination will be made by the Chairman on whether a requested judge should serve as the ADR Neutral. If the request does not specify a particular judge, one will be assigned. Prior to the start of ADR proceedings, the parties are required to sign a written

ADR Agreement that establishes guidelines for implementing the ADR method selected.

The presiding judge, the Board's Chairman, and the Board's Chief Counsel can answer questions about how ADR can best be used for a case.

If ADR does not result in settlement. For docketed appeals, if ADR fails to resolve the dispute completely, the appeal will generally return to the presiding judge for adjudication. If the presiding judge served as the ADR Neutral, however, special rules apply. If the ADR proceeding involved private communications between the Neutral and individual parties, unless the parties and judge all agree that the judge should continue to serve as the presiding judge, the Neutral will have no further involvement with the case. If no private communications occurred during the ADR proceeding (all communications with the Neutral were made during a joint session with all parties present), the Neutral, after considering the parties' wishes, has the discretion to decide whether or not to retain the case as presiding judge and adjudicate the appeal.

For ADR in cases which have not been docketed as appeals, if a claim has not been submitted under the Contract Disputes Act, one can be submitted to the contracting officer for decision. An appeal may be taken from a contracting officer's decision, provided that the CDA's statutory time limitation for appeal has not expired. It is important to remember that during the time that parties use ADR procedures, statutory time limitations will not be tolled.

Confidentiality. A CBCA judge who serve as an ADR Neutral will maintain the confidentiality established for ADR under the Board's rules.

Types of ADR at the CBCA. The following ADR procedures are voluntary and consensual, and both the parties and the ADR Neutral must agree to their use. The names or titles given to various ADR procedures are not controlling, but rather articulate what role the ADR Neutral is to play.

Facilitative Mediation. Normally, mediations begin with a joint session, with the parties making informal presentations to one another and the ADR Neutral regarding the facts and circumstances giving rise to the issues in controversy as well as an explanation of their respective legal positions. The ADR Neutral, as mediator, aids the parties in settling their case, frequently by meeting with each party separately in confidential sessions, engaging in private discussions with each of the parties, for the purpose of facilitating the formulation and transmission of settlement offers.

Evaluative Mediation. In addition to engaging in facilitative mediation, as described above, if authorized under the terms of the parties' ADR Agreement, the mediator may also discuss informally with the parties, either jointly or in private sessions, the strengths and weaknesses of their respective positions.

Mini-Trial. A mini-trial is a somewhat more formal procedure in which the parties make abbreviated presentations to an ADR Neutral who sits with the parties' designated principal representatives as a mini-trial panel to hear and evaluate evidence relating to an issue in controversy. The neutral may thereafter meet with the principal representatives to attempt to mediate a settlement. The mini-trial process may also be a prelude to the Neutral's provision of a non-binding advisory opinion or to the Neutral's rendering a binding decision.

Non-Binding Advisory Opinion. The parties present to the ADR Neutral information on which the Neutral bases a non-binding, advisory opinion on the merits of the case, which opinion may be delivered to the parties jointly either orally or in writing. The manner in which the information is presented will vary from case to case, depending upon the circumstances and the terms of the parties' ADR Agreement. Presentations may range from an informal proffer of evidence together with limited argument from the parties to a more formal presentation, with oral testimony and documentary evidence and argument from counsel, such as may be done in the context of a mini-trial.

Summary Binding Decision. This is a binding ADR procedure similar to binding arbitration under which, by prior agreement of the parties, the ADR Neutral renders a brief written decision that is to be binding, non-precedential, and non-appealable. As in a procedure under which the Neutral provides a non-binding advisory opinion, the manner in which information is presented for a summary binding decision may vary depending on the circumstances of the particular case and the wishes of the parties as outlined in their ADR Agreement.

Parties considering ADR are encouraged to adapt for their purposes any provisions in the CBCA's rules which they believe will be useful for ADR.

Non-CBCA Neutrals and Procedures. In addition to other ADR procedures, including modifications to those listed above, as agreed to by the CBCA and the parties, the parties may use ADR Neutrals outside the CBCA or techniques that do not require direct CBCA involvement.