GENERAL SERVICES ADMINISTRATION
Washington, DC 20405

CSL P 5050.1A, Extended

March 23, 2005

GSA ORDER

SUBJECT: Using Alternative Dispute Resolution Techniques

1. Purpose. This order transmits the Using Alternative Dispute Resolution Techniques Handbook.

2. Background.

a. On November 15, 1990, Congress enacted Public Law 101-552, the Administrative Dispute Resolution Act (the "Act"), to promote the use of alternative dispute resolution (ADR) techniques by Federal agencies. The Act provides agencies with the explicit authorization to consider and use means other than litigation to resolve disputes that arise in connection with administrative proceedings. The goal is to enhance the operation of the Government by improving service to the public. The Act has since been amended by Public Law 104-320 October 19, 1996 (5 USC § 571).

b. The Act requires, among other things, that each agency adopts a policy on the use of ADR techniques, designates a senior official as the Dispute Resolution Specialist for the agency, and provides training for all personnel involved in implementing the agency's policy. The Dispute Resolution Specialist is the agency official responsible for implementing the provisions of the Act and the agency's policy on the use of ADR. On December 5, 1990, the Administrator appointed the General Counsel to serve as the Dispute Resolution Specialist for GSA.

c. GSA is committed to using dispute prevention methods and ADR techniques to effect prompt, efficient, and just resolution of disputes.

d. This handbook sends a clear message to GSA employees that using ADR to resolve disputes involving the Federal Government is an accepted and, indeed, the preferred practice. It also provides support for GSA's effort to develop and implement an effective ADR program.

3. Scope. This handbook is not meant to supersede collective bargaining agreements or other statutory, regulatory, or contractual dispute resolution procedures. The techniques described in

this handbook are intended to supplement rather than replace existing procedures.

/S/
GEORGE N. BARCLAY
Acting General Counsel

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USING ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES



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CHAPTER 1. INTRODUCTION

## CHAPTER 1. INTRODUCTION

1. Applicability. This handbook applies to all GSA personnel involved in the resolution of disputes. Alternative Dispute Resolution (ADR) is any procedure or combination of procedures voluntarily used to resolve issues in controversy as an alternative to litigation. Attorneys, contracting officers, and other GSA employees involved in resolving disputes concerning labor/management issues, personnel, contracts, construction, or other disagreements will find this handbook helpful.

2. Contents of the handbook. This handbook provides information on the ADR process including a general policy directive on the use of ADR, an explanation of the various techniques available for use, and guidelines on when ADR techniques should and should not be used.

3. How to use the handbook. This handbook is divided into nine chapters. A table of contents is provided at the beginning of each chapter for easy reference to all material.

4. Reference materials. The following is a partial listing of sources of additional information on ADR:

a. Alternative Means of Dispute Resolution in the Administrative Process, subchapter IV, chapter 5 of Title 5 of the United States Code (U.S.C.);

b. The Federal Acquisition Regulation (FAR), chapter 1 (part 33- Protests, Disputes and Appeals) of 48 CFR;

c. The General Services Administration Acquisition Regulation (GSAR), chapter 5 of 48 CFR; and

d. Government agencies, such as the Administrative Conference of the United States and the Federal Mediation and Conciliation Service, and other agency Dispute Resolution Specialists.

5. Additional information. Assistance and additional information on ADR may be obtained from assigned legal counsel.

6. Revisions. Comments on the handbook or GSA's ADR program should be directed to the Agency's General Counsel, who has been designated by the Administrator as the Agency's Dispute Resolution Specialist.

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CHAPTER 2. POLICY ON USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES



## CHAPTER 2. POLICY ON USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

1. General.

a. Historically, Federal agencies have relied heavily on the court system for resolving disputes. However, the formality and complexity of the court system, as well as a staggering backlog of cases, have made it an ill-suited forum for an increasing number of these disputes. The administrative costs to file actions or defend suits are soaring, and the delay in receiving decisions is also significant. Perhaps most important, the court system's adversarial process is not conducive to long-term working relationships between or among the disputants. Disputes that culminate in litigation can do irreparable harm to ongoing or future relationships. In response to these disturbing developments, boards of appeals were established as an alternative to the courts to resolve contract disputes. Over time, these boards have become institutionalized and formalized in their procedures, to the point that they are now perceived as little different from the courts.

b. Recognizing the need for efficient and inexpensive ways of resolving disputes in which Federal agencies are a party, Congress enacted Public Law 101-552, the Administrative Dispute Resolution Act (the "Act"), on November 15, 1990. The Act promotes the use of ADR techniques by Federal agencies and provides them with the statutory authority to use means other than law suits to resolve disputes to improve the operation of the Government and better serve the public.

c. ADR is an informal process that allows disputing parties an opportunity to resolve their differences through mutually agreeable methods without litigation. The process used and decisions reached through ADR (except for decisions resulting from arbitration subject to judicial review) should not be made public, unless authorized in writing by the parties to the agreement. The parties should be aware, however, that the courts have not recognized a general

exemption to the Freedom of Information Act (FOIA) to protect the confidentiality of information exchanged during the settlement negotiation process. Whether or not this information is subject to disclosure under FOIA will depend on the circumstances of each case.

d. In many cases, an ADR process can provide the parties an opportunity to reach a faster, less expensive, and more appropriate resolution of the dispute. The underlying premise is that the participants, sometimes aided by an impartial third party, or "neutral", are capable of resolving their own disputes.

2. Definitions.

a. "Alternative Dispute Resolution" is any procedure or combination of procedures voluntarily agreed to and used by the parties to the dispute to resolve issues in controversy to avoid resorting to litigation. The procedures include, but are not limited to, negotiation, facilitation, mediation, factfinding, mini-trial, arbitration, or any combination thereof, and a form of dispute avoidance or prevention known as partnering.

b. "Negotiation" is a process that allows the parties involved in a dispute to try to settle the dispute themselves. It may be either collaborative or adversarial and is the major ADR procedure. Almost all of the other ADR techniques in which the parties maintain control over the process are variations on this theme.

c. "Facilitation" is a process that involves a neutral who works with all of the parties at the same time, providing only procedural assistance regarding how to develop a mutually acceptable solution. This technique works best when the parties or issues are not polarized and there is enough trust for the parties to work together.

d. "Mediation" is an informal process in which a neutral helps others resolve their own dispute but does not, and ordinarily has no authority to, impose a solution. The mediator, like the facilitator, is a catalyst who makes primarily procedural suggestions, but may, unlike the facilitator, also suggest substantive ways for the parties to reach an agreement. Mediation is needed in situations where parties are unable to initiate discussions, have reached an impasse, or are otherwise unable to negotiate an agreement on their own.

e. "Factfinding" is a process that calls for the services of a neutral who is authorized by the parties to investigate the issues in dispute and asked to come up with either an assessment of the situation outlining all of the relevant issues and options, or a specific, non-binding, procedural or substantive recommendation regarding how the dispute might be settled. This report then becomes the basis for further negotiations between the parties.

f. "Mini-trial" is a nonbinding, structured form of negotiated settlement, where decision makers from opposing sides, who have authority to settle the issues in dispute, hear a detailed presentation of the facts and legal merits of each party's case. The assumption underlying this technique is that if the decision makers are fully informed as to the strengths and weaknesses of their respective cases, they will be better prepared to resolve their differences. The procedure is voluntary, expedited, nonjudicial, informal, and confidential.

g. "Arbitration" involves submitting the dispute to a neutral who decides the matter after reviewing the evidence and hearing arguments from the parties. The arbitrator's decision may be nonbinding, in that it is only a recommendation that the parties can take into account when negotiating a settlement or it may be binding. The Act authorizes agencies to arbitrate only if all parties give their consent and they follow the procedural safeguards outlined in 5 U.S.C. sections 575 - 580.

h. "Partnering" is a bilateral relationship between parties which draws on the strengths of each party in an effort to work cooperatively to achieve a jointly defined set of goals and objectives for a project. The objective is for the parties to transform their relationship from one that is adversarial to one that is cooperative, and thereby prevent disputes from arising in the first place. Unlike the other procedures described above, which do not come into play until a dispute has already arisen, partnering may represent the ultimate ADR technique since its aim is the prevention and avoidance of disputes.

3. Statutory requirements.

a. The Act requires each agency to:

(1) Adopt a policy on the use of ADR and case management (section 3(a));

(2) Appoint a senior official to be the agency's dispute resolution specialist (section 3(b));

(3) Provide ADR training on a regular basis (section 3(c)); and

(4) Review standard agreements for contracts, grants and other forms of assistance to determine whether to amend the agreements to authorize and encourage the use of ADR (section 3(d)(1)).

b. The Act requires the Federal Acquisition Regulation (FAR)to be amended to put the new legislation into effect (section 3 (d)(2)).

c. The Act also amends the United States Code as follows:

(1) Title 5 in the chapter on administrative procedures includes a new subchapter on the use of ADR techniques (section 4(b)). The new subchapter is entitled "Alternative Means of Dispute Resolution in the Administrative Process." It provides: definitions (section 571 of Title 5, chapter 5); statutory authorization allowing Federal agencies to use ADR (section 572); guidelines for the selection and use of neutrals (section 573); rules to protect the confidentiality of ADR proceedings (section 574); authorization and basic rules for the use of arbitration (sections 575 to 580); and authority for agencies to use support services for ADR proceedings (section 583);

(2) Section 556(c) of Title 5, encourages the use of ADR in administrative hearings (section 4(a));

(3) Section 10 of Title 9, authorizes judicial review of arbitration awards (section 5);

(4) Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605), authorizes a contractor and a contracting officer to use ADR or other mutually agreeable procedures for resolving claims (section 6);

(5) Section 203 of the Labor Management Relations Act, 1947 (29 U.S.C. 173), authorizes the Federal Mediation and Conciliation Service to make its services available to Federal agencies to aid in the resolution of disputes using ADR (section 7);

(6) Section 2672 of Title 28, authorizes each Federal agency to use ADR to settle any tort claim against the United States, to the extent the Attorney General delegates to the agency head the authority to award, compromise, or settle such claim without the prior written approval of the Attorney General (section 8(a)); and

(7) Section 3711(a)(2) of Title 31, raises an agency head's claim compromise authority from $20,000 (excluding interest) to $100,000 (excluding interest), or such higher amount as the Attorney General may prescribe (section 8(b)).

4. Objectives of ADR. The goal of ADR is to increase the opportunity for relatively inexpensive and expeditious resolutions of issues in controversy. Objectives in support of this goal are to:

a. Identify issues of controversy that can be resolved at the earliest feasible point and the lowest appropriate level of responsibility through mutual agreement of the parties themselves;

b. Provide mechanisms that may be used to break negotiating impasse (typically, due to communication failure, strong emotions, or lack of technical expertise on disputed issues) by focusing on legal and practical strengths and weaknesses of the parties' positions; and

c. Supplement the win-lose adversarial process with a more participative, cooperative, problem-solving, win-win process that reconciles the competing interests of the parties.

5. Presidential policy on use of ADR techniques.

a. Executive Order 12988 of February 5, 1996, (which revoked and superceded EO 12778 of October 23, 1991) encourages agencies to settle civil disputes involving the Government before trial and, toward that end, to utilize ADR techniques where appropriate (section 1(c)).

b. The Order directs the parties to first attempt to resolve disputes through informal discussion, whenever possible, rather than through any formal or structured court proceeding (section 1(c)(1)).

c. The ADR provisions do not apply to certain asset forfeiture or debt collection cases (section 8(b)).

d. The Executive Order requires that, when possible, agencies that adjudicate administrative claims employ efficient case management procedures in administrative law proceedings (section 4).

6. GSA policy on use of ADR techniques. On July 30, 1992, the Administrator issued the Agency's ADR Policy Statement (GSA Notice ADM 732). This Policy Statement announced the Agency's support for the use of ADR in GSA's administrative programs.

7. Role of attorneys and nonattorneys in the process.

a. Attorneys. The most important role of attorneys in the ADR process is as creative problem-solvers. First, they must analyze the available information, identify relevant interests and issues, and assist their clients in formulating a strategy to achieve their needs and objectives. Attorneys must understand the advantages and disadvantages of each of the different alternatives and in what context they should be applied. Once an effective technique is agreed upon, they must be able to participate in the process. Their role varies depending upon the needs and objectives of the parties and the nature of the proceeding selected. They may either advise or represent parties or they may act as a neutral.

b. Nonattorneys. The goal of ADR is to provide a voluntary, informal, and expedited process for preventing or resolving disputes. Many ADR proceedings are sufficiently non-complex and informal that one need only be well-versed in the subject matter and procedures of the agency to represent or assist a party. In determining whether persons other than attorneys may provide representation or assistance during the ADR proceeding, the parties should focus on the particular functions to be performed and the particular skills, training, and experience needed to perform those functions effectively.

8. Deciding when to use ADR techniques.

a. Decisions to consider the use of ADR should be made by the appropriate GSA official authorized to settle the issue in controversy (e.g., contracting officers, managers, labor advisors, litigation attorneys, equal employment opportunity officers, etc.) after consulting with assigned legal counsel.

b. The parties may make the decision to use ADR before or after a dispute arises. If the parties decide that ADR is preferable to litigation, they should agree upon the procedure for resolution.

c. In determining when to use ADR, agency personnel should evaluate the following elements:

(1) Existence of an issue in controversy;

(2) A voluntary choice by both parties to participate in the ADR process;

(3) An agreement by the parties on the ADR technique(s) to be used instead of litigation; and

(4) Participation in the process by officials who represent the parties and have the authority to resolve the issue in controversy.

d. Additional considerations in assessing the use of ADR in a dispute include:

(1) Whether there is a negotiation impasse;

(2) Whether it is in the best interests of each party to break the impasse; and

(3) The uncertainty (and unpredictability) of the outcome in litigation, litigation costs, and the time required for a decision to be rendered.

e. The Government should consider not using ADR techniques for dispute resolution if:

(1) Resolution of the matter is required to establish an authoritative precedent;

(2) The matter involves or bears upon important questions of Government policy, since a resolution reached through ADR procedures normally will bypass normal levels of agency review and consultation;

(3) Maintaining an established policy or precedent and minimizing variations among individual decisions in a particular subject area is of special importance;

(4) The matter significantly affects persons or organizations that are not parties to the proceeding;

(5) A full public record is required, and the ADR proceeding cannot provide such a record;

(6) GSA must maintain continuing jurisdiction over the matter with authority to alter the disposition of the dispute if circumstances change, and an ADR proceeding would interfere with GSA's ability to fulfill that requirement; or

(7) The case involves a willful or criminal violation of law.

f. Subpart 33.2 (48 CFR 33.214) of the Federal Acquisition Regulation (FAR) prescribes policies and procedures for the use of ADR by contracting officers to resolve issues in controversy subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613), as amended by the Administrative Disputes Resolution Act (Pub. L. 104-320). The procedures apply to the settlement of claims or portions of claims any time the contracting officer has authority to settle the issue in controversy. The ADR techniques may be utilized before or after the issuance of a contracting officer's final decision. When ADR procedures are used after a contracting officer's final decision, their use does not alter any of the requirements for filing appeals of the decision. If the ADR procedure is successful, the appeal will be settled and removed from the docket.

9. Selecting the appropriate ADR technique.

a. A key consideration in selecting an ADR technique is whether it should be binding or nonbinding. Another important decision is whether to involve the services of a neutral third party. Both parties must agree on the technique to be used to resolve a dispute.

(1) Binding techniques (e.g., arbitration) may be appropriate where:

(a) The parties recognize that they are not likely to negotiate settlement of a dispute,

even when assisted by a neutral;

(b) In-court litigation will likely take longer and be more expensive than arbitration; or

(c) Advantages exist to a binding proceeding that is private and presided over by a neutral decision maker, chosen by the parties, with expertise in the subject matter of the dispute.

(2) Nonbinding techniques (e.g., facilitation, fact-finding, mediation, mini-trial, negotiation or combinations thereof) may be appropriate where:

(a) The parties have attempted to negotiate a settlement themselves, but are at an impasse; or

(b) The assistance of a neutral to filter communications and encourage joint problem-solving is likely to break the impasse.

b. The parties may agree to select a neutral to facilitate resolving the controversial issue(s) using procedures chosen by the parties. A "neutral" is an impartial third party, who is acceptable for the parties to a dispute resolution proceeding. A neutral serves as a facilitator, mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the controversy. A neutral person must have no official, financial, or personal conflict of interest with respect to the issue(s) in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve pursuant to 5 U.S.C. § 573. Possible sources of neutrals and guidance on how their services may be obtained is contained in the following chapters of this handbook.

c. The role of the neutral in the ADR process may include:

(1) Assisting the parties in starting the process, identifying and evaluating ADR options, facilitating negotiation of procedural details, and keeping the process going;

(2) Facilitating negotiation of a settlement by serving as an intermediary to communicate the parties' positions and helping to clarify the parties' objectives for resolution of a dispute;

(3) Leading the parties toward substantive resolution of the dispute by suggesting appropriate compromises and providing impartial, nonbinding opinions on the merits of the parties' positions; or

(4) Rendering a decision, if the ADR technique agreed to by the parties is arbitration.

d. The costs for obtaining the services of a neutral will generally be borne equally by the parties.

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CHAPTER 3. NEGOTIATION



## CHAPTER 3. NEGOTIATION

1. General.

a. Negotiation is a voluntary process using communication between/among disputing parties to reach mutual agreement. Negotiation is the most fundamental ADR technique available to resolve issues in controversy. It is used so routinely that it is often overlooked as an alternative means of resolving disputes.

b. Negotiators often view negotiation as a competition, with each party seeking to maximize its own gain at the expense of the other party. As an ADR technique, negotiation is a means to resolve disputes informally at the level that they arise, using a cooperative process.

2. Description of process.

a. Although rather informal and unstructured, a typical negotiation can be broken into a series of stages. During the initial stage, each party presents its credentials and verifies its authority to settle or recommend settlement. The negotiators may have limited authority to enter into agreement (e.g., personnel actions, contractual matters, or policy). It is recommended that persons having the necessary authority to approve agreements should participate in the discussions.

b. Generally, each party has different interests. The next stage involves identifying and understanding each party's priorities and interests. If necessary, supporting data may be elicited to clearly define issues in dispute.

c. Once the issues in controversy are identified and narrowed, the parties develop a strategy for resolving them. Each party reviews the relevant facts, assesses its positions, establishes objectives/goals, and identifies concessions/options that can offer opportunities to reach agreement. By fully understanding the issues in controversy and each party's position and priorities, it may be possible to develop trade-offs for high priority and lesser priority interests. Proposals are exchanged to find common ground and opportunities for settlement.

d. The final stage of negotiations, closing the gap, may involve private discussions between

the principal negotiators. Minor issues are often resolved at the negotiating table, while major issues may require ratification and approval at a management level.

3. Criteria for use.

a. Negotiation is the most fundamental ADR technique. Many of the other procedures developed to resolve disputes are actually ways to further negotiated settlements. Negotiations should be used at the earliest opportunity after the dispute arises and at the lowest appropriate management level. Key elements in the process include:

(1) Voluntary election by the parties;

(2) Use of a nonbinding process;

(3) A preference for informal and unstructured processes that are private;

(4) The presentation of evidence that is usually indirect or limited;

(5) A mutually acceptable agreement is sought; and

(6) An emphasis on the parties' relationship.

b. Negotiation may be used to resolve personnel, contractual, or policy issues/disputes.

c. After a dispute arises, parties typically attempt to negotiate a settlement of the dispute. Sometimes, parties reach an impasse due to anger or hostility, disagreement as to the facts, or lost credibility/trust. At that point, parties may negotiate and agree to another ADR technique in an attempt to break the impasse, and thus resolve the dispute without litigation.

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CHAPTER 4. FACILITATION



## CHAPTER 4. FACILITATION

1. General.

a. Facilitation involves providing procedural assistance to disputing parties to resolve issues in controversy. It involves using an intermediary to enable the parties to work together to resolve disputes. The actions of the facilitator are designed to improve communication, encourage informal discussion, improve relationships, and build trust. The objective is to create a climate in which the parties may more easily reach a mutually agreeable settlement.

b. The facilitator is a neutral third party who assists the parties in resolving their differences themselves. Generally, the facilitator conducts meetings and coordinates discussions. Although a facilitator may perform some of the same functions as a mediator, the facilitator generally does not become as involved in the substantive issues as does a mediator. Instead, the facilitator works to create a problem-solving atmosphere for the parties.

2. Description of process.

a. Facilitation can take any number of forms as the facilitator works to bring the disputing parties together and enables them to move toward agreement. The neutral's primary role is to facilitate communication. A facilitator can help the parties achieve a substantive resolution by:

(1) Ensuring that all parties are given an opportunity to express their positions and opinions and that each party understands the position and objectives of the other parties;

(2) Ensuring that the discussions remain relevant and confidential, if necessary;

(3) Guiding the parties to full participation within a constructive, cooperative, problem-solving environment; and

(4) Offering suggestions on alternatives or proposed solutions which might assist in resolution of the dispute.

b. As previously noted, there are some similarities between mediation and facilitation, and a facilitator may actually engage in a degree of mediation. However, facilitators generally remain on the periphery of the substantive issues and encourage the parties themselves to resolve their differences in the least contentious manner. The mediator is more likely to explore the substantive issues in detail and takes a more participatory role.

3. Criteria for use.

a. Facilitation is likely to prove most effective when:

(1) The parties or issues are not polarized;

(2) Communication is the problem, possibly due to personality conflicts;

(3) The parties trust each other enough to develop a mutually acceptable solution;

(4) Confidentiality is desired; and

(5) The parties contemplate an on-going relationship after settlement of the dispute.

b. Employing a facilitator before disputes arise may prove beneficial in the case of complex contracts. Facilitators may become involved before the contract work begins. In such instances, the facilitator might lead a meeting to cover common interests, communication channels, potential areas of dispute, and procedures for the settlement of such disputes as they arise. The meetings, like the usual facilitation process, are designed to create an atmosphere conducive to problem-solving. When used in this manner, facilitation is similar to partnering, but not as formalized and, therefore, more readily adaptable to lesser-value projects and/or contracts.

4. Sources for facilitators.

a. It may be appropriate for the facilitator to have special knowledge of the subject matter of the dispute, but that is not always required. Sources might include personnel from the Federal Government, professional associations, and/or private sector consultants.

b. Assistance in locating a facilitator may be obtained by contacting the GSA General Counsel, a designee, or an assigned legal counsel.

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CHAPTER 5. MEDIATION



## CHAPTER 5. MEDIATION

1. General. Mediation is a technique which involves assistance from a neutral third party to aid the parties in negotiating an agreement. The mediator must be acceptable to both parties but has no authority beyond that bestowed by the parties and no power to render a decision. Mediators help the parties initiate new discussions or reopen stalled negotiations once they have reached an impasse. They are catalysts, with no vested interest in the outcome, whose objective is to improve communications between the parties by asking open-ended questions, translating or clarifying issues or positions, and evaluating the parties' priorities to move them toward agreement.

2. Description of process.

a. Mediation involves the procedural assistance of a neutral third party (mediator) jointly selected by the disputants. The mediator meets with the parties, together or separately, as needed, in order to move them toward agreement. The mediator may be able to help the negotiations progress toward settlement in a number of ways. The mediator may act as a discussion leader to ensure that all parties have ample opportunity to be heard, or if negotiators are locked into a position and are unable to hear the other side's arguments, the mediator may act as a "translator" to improve communication and break the impasse. The role is similar to that of a facilitator. The mediator may focus on each party's underlying interests and can work with the parties to devise creative solutions to satisfy their needs. Mediation offers the parties a cooperative environment in which to fashion their own settlement agreement.

b. Experience has shown that the most efficient trade-offs are likely to follow the free and open exchange of information. In some disputes, the parties may not trust one another. Their lack of trust or fear of appearing weak or excessively eager to settle may prevent them from revealing their true interests or "bottom line" to one another. In these situations, the mediator attempts to gain the trust of the parties so that they can discuss confidentially with the mediator their priorities, their options, and their alternatives to agreement. This is all critical information that they may be unwilling to share with the other party directly. The mediator may use the information to identify potential areas of agreement and then help the parties to settle the remaining issues.

c. Mediation usually contains the following stages:

(1) The parties agree to mediate the dispute;

(2) The parties choose a mediator;

(3) The parties, with or without the participation of the mediator, establish the role and authority of the mediator;

(4) The mediator gathers information on the dispute, including facts, circumstances, and disputed issues. The parties' positions and priorities are solicited, and an agenda is established;

(5) Throughout the following stages, the mediator manages the interaction between the parties. The mediator meets separately with the parties to discuss their positions and to explore settlement possibilities confidentially. In these meetings, the mediator gathers information and elicits sensitive points that might not surface in a joint session;

(6) Joint sessions, led by the mediator, are usually the next stage. Joint sessions allow the parties to hear directly the other side's version of the dispute, and help identify the areas of agreement and disagreement. Joint sessions also foster open communication between the parties, enhance possibilities for settling the dispute, and engender a positive future relationship;

(7) The mediator formulates possible options for settlement and compares them with the parties' positions and goals, seeking areas of agreement; and

(8) The mediator presents the alternatives to the parties, leads discussions, and works

toward a compromise. If full or partial agreement is reached, the mediator helps the parties develop a plan for its implementation. If it becomes apparent that the parties are at a total impasse, with no hope of further movement toward agreement, the mediator recommends that the parties terminate the mediation and may suggest another, more formal, process for resolving the dispute.

3. Criteria for use.

a. In mediation, the parties voluntarily agree to use a neutral party to help formulate a resolution to the dispute. The mediator is not a decision maker, but instead tries to bring about a negotiated settlement by encouraging open communication between the parties, by serving as a communication link if necessary, by working to provide a balanced process, and by moving both parties toward a mutually agreeable resolution of the dispute.

b. The most important criteria for determining the appropriateness of mediation is the parties' willingness to participate in the process. Mediation should be considered when:

(1) The parties are unable to initiate negotiations or have engaged in negotiations and have reached an impasse;

(2) The parties can voluntarily agree to select a third-party neutral mediator to assist in seeking agreement through this nonbinding, informal, private process;

(3) There are psychological barriers to negotiating a resolution;

(4) Maintaining a working relationship is important to the parties;

(5) A matter of legal principle is not involved and the parties do not want to create a legal precedent; and

(6) The parties believe that they have some flexibility in their positions and a negotiated settlement with the assistance of a mediator is preferable to a judicially imposed decision.

c. Mediation is inappropriate when:

(1) One or more of the parties is acting in bad faith;

(2) Information necessary for a fair and informed settlement is being withheld or distorted;

(3) One or more of the parties want their "day in court"; or

(4) A legal precedent is needed.

4. Sources for mediators. The Federal Mediation and Conciliation Service (FMCS) is an independent agency of the Federal Government. The FMCS has trained mediators in field offices located across the country. In addition, the Administrative Conference of the United States, the Society for Professionals in Dispute Resolution, the American Arbitration Association, the American Bar Association, state bar associations, and professional trade associations all maintain

rosters of professional mediators. These organizations can be contacted through the GSA General Counsel or a designee.

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CHAPTER 6. FACTFINDING



## CHAPTER 6. FACTFINDING

1. General.

a. Fact-finding is a process designed to reduce or eliminate conflict over the "facts" at issue in a case. Disputes sometimes arise when insufficient or inaccurate information causes parties to take positions that they might not otherwise take. Fact-finding may help parties who disagree on the facts to accelerate dispute resolution by utilizing the informed analysis and advice of a neutral expert(s) on the subject matter in dispute.

b. The rationale behind this procedure is the expectation that the opinion of a trusted and impartial neutral will carry great weight with the disputing parties.

2. Description of process.

a. The process begins with the selection of an impartial and acceptable third party, the fact finder, who has specialized technical expertise in the subject matter at issue. The fact finder is authorized to investigate the issue(s) in dispute, review pertinent data and information, and develop an independent factual analysis of the situation. The findings are then reported to the parties. This report may contain either an objective assessment of the situation or a specific, non-binding procedural or substantive recommendation as to how the dispute might be settled, or both. The report can then be used by the parties as the basis for further negotiations.

b. Fact-finding may be either binding or advisory, as agreed by the parties at the outset of the process. The process is designed by the parties and is often utilized as a preliminary/preparatory step for other methods of ADR (such as mediation or arbitration). If the

fact-finding is binding, which is to say that the agency would be bound to implement the factual determinations arising from the fact-finding without the exercise of the agency's discretion, then the procedure would be deemed to be an equivalent technique to binding arbitration and the procedural safeguards set forth in sections 575-580 of the Act would apply. These procedural safeguards are discussed in greater detail in chs. 8-1(c) and 8-2(h).

3. Criteria for use.

a. Fact-finding may be appropriate for resolving disputes involving technical issues or interpretation of facts when the parties:

(1) Voluntarily agree to its use;

(2) Mutually select a third party neutral(s) with technical expertise in the disputed area;

(3) Choose an informal and private process that may influence the result or settlement; and

(4) Desire a reliable factual determination in the form of a report or expert testimony.

b. Even if the recommendations of the fact finder are not accepted, there are still benefits to be gained from this process since the data will be collected and organized in a way as to be readily usable in other dispute resolution procedures.

c. Fact-finding is not an appropriate ADR technique for resolving policy issues.

4. Sources for fact finders.

a. The fact finder may be an individual or group with technical expertise in the subject matter of the dispute. The fact finder must have no personal interest in the outcome of the dispute. Sources might include personnel from the Federal Government, professional associations, and/or private sector consultants.

b. Assistance in locating a fact finder may be obtained by contacting the GSA General Counsel or a designee or assigned legal counsel.

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CHAPTER 7. MINI-TRIAL

## CHAPTER 7. MINI-TRIAL

1. General.

a. Mini-trial is a structured settlement process in which attorneys for each side make summary presentations of their case before senior officials of each party who are authorized to negotiate a settlement. A neutral advisor sometimes presides over the proceeding and, if asked to do so, renders an advisory opinion. Following these presentations, the officials seek to negotiate a settlement, with or without the assistance of the neutral.

b. The assumption underlying this process is that if the decision-makers themselves are fully informed as to the merits of their respective cases, they will be prepared to engage in meaningful settlement discussions. The mini-trial serves to abbreviate the usual dispute process by putting the decision-making responsibility back in the hands of senior managers.

2. Description of process.

a. Each party selects a representative, usually a senior manager or other person with authority to settle the dispute, who has had little or no prior involvement in the dispute.

b. The parties select a mutually acceptable neutral to preside over the proceeding.

c. The parties then negotiate the procedural rules. Since this process is typically invoked after discovery has commenced, the parties must agree on guidelines for conducting any additional discovery, the introduction of evidence and the examination of witnesses. The formal rules of evidence and procedure generally do not apply and the parties have great latitude in structuring the presentation of their case.

d. Each party selects a spokesperson, usually an attorney, who presents their best assessment of their case to the designated management representatives. The representatives and the neutral may ask questions throughout the presentation of the case.

e. After these presentations, the representatives of each party attempt to negotiate a settlement based upon the information presented. These negotiations are generally conducted one-on-one, without the assistance of advisors or attorneys. The neutral may play an active role in the discussions, and if requested to do so, may render an advisory opinion concerning the merits of the claim. This opinion is usually in terms of a settlement range, rather than a specific solution, since representatives are the only persons vested with the authority to settle the dispute.

f. If the parties are able to negotiate a settlement, their agreements are documented. If the parties are still at an impasse, or otherwise unable to resolve all of the outstanding issues, they can pursue an adjudicated resolution in court or use another ADR process.

3. Criteria for use.

a. Mini-trials are likely to be appropriate when:

(1) The parties can voluntarily agree to its use;

(2) The dispute is at a stage where substantial additional litigation expenses, such as discovery expenses or expenses for retaining expert witnesses, are anticipated;

(3) The issue in controversy is significant enough to justify the senior executive's time required to participate in the process;

(4) The issues involved include mixed questions of law and fact. If the dispute relates solely to the law, a mini-trial would not be appropriate; and

(5) The matter involves materials that the Government or other party believes should be kept confidential.

b. Mini-trials are not appropriate when:

(1) A legal precedent needs to be established;

(2) Major questions of public policy are involved;

(3) Witness credibility is of critical importance;

(4) The amount in controversy is not significant enough to justify the senior executive's participation; or

(5) The only alternative is to declare one side or the other completely correct. Since mini-trials are essentially a negotiation process, it is unreasonable to think that you can negotiate an agreement in which either side completely abandons its position.

c. The determination to use the mini-trial format must be coordinated with the GSA General Counsel or a designee and the assigned legal counsel.

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CHAPTER 8. ARBITRATION

## CHAPTER 8. ARBITRATION

1. General.

a. Arbitration is the form of ADR that most closely resembles litigation. It is the process whereby a neutral third party decides the submitted issue after reviewing all the evidence and hearing argument from the parties.

b. Section 4 of the Act, which amends chapter 5 of Title 5 of the United States Code, authorizes government agencies to use arbitration whenever all the parties consent. Sections 575-580 outline the procedures to be followed when the Government is one of the parties to the dispute. These procedures may range from those that are highly formal, virtually indistinguishable from court proceedings, to those that are fairly informal and individually tailored.

c. The Act authorizes agencies to arbitrate issues so long as they meet certain criteria to ensure that the arbitration award withstands constitutional scrutiny. The Act authorizes agencies to agree to arbitration, but provides that the award does not become final until 30 days after it is served on all parties. After 30 days, the award becomes final and enforceable on all parties to the proceeding. If an agency is a party to an arbitration proceeding, it may extend the 30 day period for an additional 30 days by serving a notice of the extension on all parties.

d. Arbitrations in the labor relations area are excluded from the coverage of this chapter. Existing agreements between GSA and the labor unions govern the circumstances when arbitration may be used and how the arbitrators will be selected in this context.

2. Description of process.

a. Arbitration is an inherently flexible procedure where the parties to the dispute voluntarily agree to draft rules, establish schedules, and select the arbitrator to conduct the proceedings. The parties determine the standard(s) of proof and design a mutually acceptable informal process.

b. The first step in the process is to determine, by mutual agreement, that arbitration is the most suitable ADR technique.

c. The parties then negotiate an agreement governing the procedures to be followed during the proceedings.

d. The parties then select an arbitrator or an arbitration panel.

e. The next step is an exchange of relevant information between the parties, in preparation for the hearing.

f. An arbitration hearing is then held, at which time all parties present their facts and positions to the arbitrator. Normally, the format is rather informal. The formal rules of evidence do not apply and objections to testimony or materials are generally not permitted. Witnesses are permitted to testify in the narrative and may be cross-examined. The arbitrator is also free to ask

questions of the witnesses. Transcripts of the proceedings are generally not made. The key point is that the parties have considerable latitude and flexibility in structuring their presentations to the arbitrator.

g. Section 579 requires the arbitrator to make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the parties agree to some other time limit, or the agency provides by rule for some other time limit.

h. Section 580 provides standards for the issuance and finalization of arbitration awards. The arbitration award becomes final 30 days after it is served on the parties, unless the agency, which is a party to the proceeding, extends this 30-day period for an additional 30 days.

3. Criteria for use.

a. Arbitration is likely to be appropriate where:

(1) The benefits from the procedure outweigh the probable delay and costs expected to be incurred in a court proceeding;

(2) Settlement turns on the specific facts of the case and the dispute can be resolved by reference to a clearly articulated statute, precedent or rule, or the parties wish the arbitrator to resolve the dispute using principles of equity and fairness;

(3) The matter to be resolved is not intended to have any precedential effect other than for the specific controversy at hand;

(4) Having an arbitrator with technical expertise will facilitate resolution of the matter; and

(5) The parties desire privacy, and a public record of the proceedings is not required.

b. The same conditions previously discussed in ch. 2-8(e), that make ADR inappropriate also apply to the use of arbitration. In general, arbitration is not likely to be appropriate where:

(1) A precedent needs to be established;

(2) Maintaining established norms or policies is important, since in an arbitration the parties can decide what standard the arbitrator will apply as a basis for the decision;

(3) The case significantly affects persons who are not parties to the proceeding;

(4) A full public record of the proceedings is either important or required; or

(5) The case involves interpreting or implementing significant Government policies.

4. Sources for arbitrators.

a. A listing of arbitrators, possessing the technical expertise desired by the parties, may be

obtained from, among other sources, the Administrative Conference of the United States, the American Arbitration Association, the American Bar Association, state or local bar associations, professional trade associations, or the Society for Professionals in Dispute Resolution.

b. Assistance in identifying arbitrators can be obtained from the GSA General Counsel or a designee or the assigned legal counsel.

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CHAPTER 9. PARTNERING



## CHAPTER 9. PARTNERING

1. General.

a. Partnering is the process by which contracting parties are encouraged to change from their traditional adversarial relationships to a more cooperative, team-based approach to prevent disputes from arising in the first place. By taking steps at the outset of a project to change the adversarial posturing, to recognize common interests, and to establish an atmosphere of trust and frankness in communications, partnering helps develop a cooperative management team.

b. While the partnering principle can apply to any working relationship, it is most commonly used in large construction projects. This is because these projects typically present management with formidable challenges. Each party, the owner/agency and the contractor, generally has its own management team and its own set of project goals and priorities. This fosters an adversarial relationship and inhibits the free flow of information. With communication strained, project delays, cost overruns, disputes, and litigation are possible.

c. Partnering creates an owner/contractor relationship based on cooperation and achieving mutually beneficial, jointly defined goals and objectives. It is the product of a change in attitude among the parties rather than a formal contract. By drawing on the strengths of each organization, the parties seek to avoid disputes, improve communication, promote quality and efficiency, and improve long-term relationships.

2. Description of process.

a. Although the partnering process must be tailored to each specific project, it is flexible and may include the following steps:

(1) A commitment early in the acquisition process to use partnering. Contractors should be advised from the outset that the Government proposes to use partnering;

(2) A personal commitment from top management that is reinforced as needed;

(3) Selection of a "sponsor" or "project manager" to initiate, nurture, and maintain coordination of the process;

(4) Establishment of a "partnering team" comprised of management, engineering, procurement, and technical personnel from each organization. The size of the team will depend on the complexity of the project; however, the team should be as small as possible to aid team building and teamwork;

(5) Selection of a facilitator (not a technical or management member of the team) who is skilled in team building and group dynamics, with no vested interest in the decisions reached by the parties, to focus on building a cooperative relationship among the team members;

(6) Scheduling and conducting an initial workshop (3-5 days) away from the workplace to foster group dynamics and establish the tone for the working relationship;

(7) Drafting of a joint mission statement, or charter, that contains detailed common goals and objectives;

(8) Identification of specific processes designed to forestall conflict, evaluate progress and performance and promote cooperation; and

(9) Scheduling and conducting follow-up workshops (1-2 days) periodically to reinforce team building skills and assess progress of the partnership towards established goals and objectives.

b. The facilitator selected by the parties may be an individual or a group hired by the partnering team on a cost-sharing basis with no change in the contract price.

c. Less complex projects may be facilitated by the project manager or partnering team to reduce the partnership costs.

3. Criteria for use.

a. Generally, partnering requires up-front commitments and costs associated with formation of a partnership. Partnering is probably best suited for projects which are large, complex, sensitive, or have substantial risk associated with timely completion. The parties' willing acceptance of the partnership concept and their commitment to open communications are critical to success. Personal commitment by the management and staff of each partner will ensure the greatest chance of success.

b. Determining which projects are appropriate for partnering requires reasoned and informed judgment. Consideration must be given to risk and costs associated with alternatives. Participation in the partnering process is voluntary. However, the agency's intention to encourage partnering at the outset of a project can be mentioned in the project's contract documents. The provision would emphasize the voluntary nature of partnering, but would also state the Government's intention to invite the successful contractor to participate in a partnering workshop after award of the contract. In other cases, for instance those where communication between the contractor and the Government has broken down and the project is suffering, the decision to pursue partnering could be made during the course of contract administration. In either event, selection of a project for partnering is a management decision, but one which should be coordinated with the GSA General Counsel or a designee or assigned legal counsel.

c. To effectuate partnering, the Government will encourage the formation of a cohesive partnership with the contractor and its subcontractors. This partnership will, through the joint efforts of the parties, identify project goals, and will be structured to best utilize the strengths of each organization to achieve those goals. The objectives are effective and efficient contract performance, allowing project completion within budget, on schedule, and in accordance with plans and specifications. The partnership will be bilateral in makeup, and participation will be voluntary. Costs associated with effectuating this partnership will be agreed upon by both parties, and will be shared equally with no change in contract price.

d. To implement this partnership initiative, it is anticipated that within 60 days of the issuance of the Notice to Proceed, the contractor's on-site project manager and GSA's project engineer and contracting officer's representative would attend a 1-week partnership development seminar. Typically, a 3 to 4-day off-site team building workshop would follow for a manageable group of each organization's participants who are integral to the success of the project. Generally, anyone who has input or decision making authority would be invited to attend. The size and complexity of the project will determine the actual number and specialties of the participants at the workshop. At a minimum, the senior on-site representative from the CQM, the construction contractor, major construction subcontractors (i.e., mechanical and electrical), and the GSA site engineer, plus the contracting officer's representative and an appropriate management official from each organization should attend the workshop. The team-building workshop would culminate in the development and establishment of mutually acceptable goals and objectives for the project, beneficial to both the contractor and the Government.

e. Follow-up workshops of 1 to 2 days' duration would be held periodically throughout the period of the contract, as agreed to by the contractor and the GSA representatives. The follow-up

sessions would be utilized to assess performance, measure goal achievement, and reinforce partnering principles. (The workshops described above could be organized by a facilitation consultant.)

f. If deemed necessary, the consultant could be hired under the terms of existing Construction Manager contracts, with the contractor's share of costs going directly to the consultant. The cost of the partnership development seminar and team building workshops would be equally shared by GSA and the contractor, and would be proportionate to the size and complexity of the project.

g. Partnering can be universally applied to all construction contracts in varying degrees of concentrated efforts, but it is probably most appropriate for those large-scale construction projects where the owner and contractor represent two distinct management groups with separate sets of objectives and operating procedures. Rather than competing as adversaries throughout the life of the project, partnering offers the opportunity to foster teamwork within a cooperative relationship that creates mutual trust and respect for one another's roles in the construction process, and recognizes the risks inherent with those roles.