

**ALTERNATIVE MEANS OF DISPUTE RESOLUTION (ADR) PROGRAM
FOR ACQUISITION**

1. REASON FOR ISSUE: To update policy for the Department of Veterans Affairs (VA) Alternative Means of Dispute Resolution (ADR) Program for Acquisition. This program provides the VA Board of Contract Appeals' (VABCA) administrative judges and the hearing examiner as a core of impartial or neutral third parties (Neutrals). These Neutrals are available to VA contracting activities to assist in resolving bid protests, contract claims, and issues in controversy, as authorized in the Federal Acquisition Regulation (FAR) Subparts 33.103, Protests to the agency, 33.210, Contracting officer's authority, and 33.214, Alternative Dispute Resolution (ADR).

2. SUMMARY OF CONTENTS/MAJOR CHANGES: This directive updates and sets forth policies and responsibilities for implementing ADR procedures utilizing VABCA Neutrals. It outlines the responsibilities and roles of the contracting officer, the contractor, and the VABCA under ADR procedures. VABCA Neutrals can be used in ADR procedures to assist in resolving bid protests, issues in controversy, and claims which have not yet been appealed to the VABCA or the Court of Federal Claims. The VA Handbook 7433.3, Alternative Means of Dispute Resolution (ADR) Program for Acquisition, provides the procedures to implement the policies contained in this directive. This reissue of the directive removes the "pilot program" designation and expands the ADR program to apply to bid protests.

3. RESPONSIBLE OFFICE: The Office of Acquisition and Materiel Management (90) and the VA Board of Contract Appeals (09).

4. RELATED HANDBOOK: VA Handbook 7433.3, Alternative Means of Dispute Resolution (ADR) Program for Acquisition.

5. RECISSION: VA Directive 7433, Alternative Means of Dispute Resolution (ADR) Pilot Program, dated October 12, 1994.

CERTIFIED BY:

/S/

Principal Deputy Assistant Secretary
for Information and Technology

**BY DIRECTION OF THE SECRETARY
OF VETERANS AFFAIRS:**

/S/

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ALTERNATIVE MEANS OF DISPUTE RESOLUTION (ADR) PROGRAM FOR ACQUISITION

1. PURPOSE. This directive implements policy for a program that provides a core of neutral third parties (Neutrals) for use in Alternative Means of Dispute Resolution (ADR). This will further assist Department of Veterans Affairs (VA) contracting officers in using ADR procedures to resolve bid protest issues, issues in controversy, and contract claims before the matter has been protested or appealed to the VA Board of Contract Appeals (VABCA) or the Court of Federal Claims. The Federal Acquisition Regulation (FAR) Subparts 33.1, Protests, and 33.2, Disputes and Appeals, and VA Acquisition Regulation (VAAR) Sections 833.103, Protests to the Department, and 833.214, Alternative dispute resolution (ADR), encourage agencies to use ADR procedures to the maximum extent practicable. The VABCA considers disputes between contracting officers and Federal contractors in connection with VA construction, supply, and service contracts and leases; and as part of that process, offers various ADR options to parties appearing before it. Under the program, the VABCA Chair, who is the Department's Dispute Resolution Specialist, appoints an administrative judge or hearing examiner to be used as a Neutral to aid in resolving matters prior to their being appealable disputes or protests filed with the General Accounting Office. The administrative judges and hearing examiner are trained Neutrals and are available to assist in ADR proceedings at the request of the contracting activity.

2. POLICY.

a. The Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (Public Law No. 104-320) (hereinafter referred to as the ADRA of 1996), encourages parties to resolve issues in controversy by using less formal procedures. FAR Subpart 33.2, Disputes and Appeals, defines an issue in controversy as 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 also defines ADR as "any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation." These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact finding, settlement judge, minitrials, and arbitration that require an impartial advisor or neutral third party. (See VA Handbook 7433.3, Appendix D, ADR Procedures for Acquisition.)

b. ADR can be applied in cases with some or all of the following characteristics: (1) parties are looking for a quick resolution; (2) parties would like more control over the decision-making process than is allowed by formal litigation; (3) there is an ongoing relationship between the parties that might be

damaged if they used formal litigation; and/or (4) parties wish to narrow or define the issues in controversy. ADR is not appropriate when the parties are not willing to negotiate or when there is a desire to create case law or other policy. The essential elements of ADR are provided at FAR Subpart 33.214, Alternative dispute resolution (ADR). The confidentiality of ADR proceedings shall be protected, consistent with Section 4 of the ADRA of 1996, 5 U.S.C. § 574, that generally prohibits disclosure of most settlement communications.

3. RESPONSIBILITIES.

a. Contracting Officer.

(1) ADR procedures may be used at any time during the solicitation or contract period. When the contracting officer considers the use of ADR procedures appropriate and has consulted with the Office of the General Counsel, the contracting officer may approach the contractor and discuss the use of ADR. After receiving a conditional agreement between the contracting officer and the contractor, the contracting officer shall submit a request to the VABCA Chair for a Neutral. (See VA Handbook 7433.3, Alternative Means of Dispute Resolution (ADR) Program for Acquisition, for instructions on requesting a Neutral from the VABCA Chair.)

(2) The contracting officer shall prepare an ADR agreement that is mutually agreed upon by the contractor. This agreement will provide the guidelines, procedures, and requirements to implement the ADR procedure that will be followed throughout the proceedings. The ADR agreement shall not be presented to the contractor until it is reviewed by the Office of the General Counsel.

(3) After discussions with the designated Neutral, the contracting officer and the contractor shall prepare pertinent documents for use during the ADR proceedings. This will enable the Neutral to understand the disputing parties' respective positions and the related contractual provisions on the issue in controversy.

(4) Within 30 days after the conclusion of the ADR procedure, the contracting officer shall submit to the VABCA a report on the outcome of the ADR procedure, including assessments of the ADR process.

b. **VABCA.**

(1) The VABCA Chair shall notify the contracting officer on the approval or disapproval of the ADR request. If approved, the VABCA Chair will appoint an administrative judge or hearing examiner as a Neutral for the ADR.

(2) The Neutral shall conduct conferences, via phone, to assist the disputing parties in selecting and executing the appropriate ADR procedure. The Neutral will provide assistance to the contracting officer and the contractor in preparing the ADR agreement.

(3) The Neutral may schedule and conduct telephone conferences, as considered appropriate by either disputing party or the Neutral, to discuss outstanding issues pertinent to the ADR procedure and the issue in controversy. Depending on the complexity of the issue, ADR proceedings may be conducted by telephone to hear and resolve the case or to narrow the issues prior to face-to-face negotiations, thereby reducing travel costs.

(4) The VABCA Neutral will be provided at no cost to either party. It is not contemplated that the parties conducting ADR procedures will incur significant costs. Each party will normally be responsible for their own costs, i.e., witnesses and experts.

(5) If the matter is not resolved by the ADR process and is appealed to the VABCA, the participating Neutral, who is bound by confidentiality requirements, will not be further involved in the matter. If, at any time during the process, the Neutral finds that ADR is inappropriate, the matter shall be addressed to the disputing parties and the process shall be terminated.

4. REFERENCES.

a. Federal Acquisition Regulation; Part 33, Protests, Disputes, and Appeals.

b. VA Acquisition Regulation, Part 833, Protests, Disputes, and Appeals.

c. The Administrative Dispute Resolution Act of 1996, codified at 5 U.S.C. §§ 571-584 (1996 Supp).