

**U.S. Army
Materiel
Command**

Alternative Dispute Resolution Program



**Progressive approaches &
creative initiatives to meet
the litigation challenge**

The AMC Alternative Dispute Resolution Program

The objectives of the AMC ADR Program are to adopt an interdisciplinary approach to address disputes and dispute resolution, to design processes, to enable the parties to foster creative, acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation.

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"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often a real loser—in fees, expenses and waste of time."

—Abraham Lincoln

Alternative Dispute Resolution

Basic Definition

Alternative Dispute Resolution (ADR) is an inclusive term used to describe a variety of joint problem-solving processes that present options in lieu of adjudicative or adversarial methods of resolving conflict. ADR encourages the consideration of creative solutions to disputes that are unavailable in traditional dispute resolution forums. It encourages communication between the parties, and focuses on the parties' real interests, rather than on their positions or demands, enabling them to address the real concerns underlying the conflict.

Characteristics of ADR

Regardless of the specific ADR process chosen, there are characteristics common to all.

- ♦ **Voluntary**—the parties choose to use ADR.
- ♦ **Expeditious**—avoids components of traditional litigation that prolong and delay dispute resolution.
- ♦ **Controlled By the Parties**—the dispute is handled and resolved through an ADR agreement in which the parties choose the ADR method, outline the specific steps of the process, and establish time periods for each step.
- ♦ **Nonjudicial**—rather than turning the case over to a third-party decision-maker who has no stake in the outcome of the dispute, ADR decision-making is in the hands of the parties to the dispute—the stakeholders.
- ♦ **Flexible**—ADR is not a single method of dispute resolution. There are many methods: the parties decide what is best for them.

Benefits of ADR

- ♦ Reduces the costs of litigation.
- ♦ Avoids program delays occasioned by protracted litigation.
- ♦ Recognizes the need to maintain a harmonious business relationship.
- ♦ Shifts the focus of decisionmaking from a legal to a business perspective.

Examples of ADR Processes

Negotiation

- ◆ Communication between parties to a suit. The parties seek resolution by listening to each other's view point.
- ◆ The basic building block of all forms of ADR.

Mediation

- ◆ Negotiation facilitated by a neutral third party who does not have power to issue a decision—the parties decide the outcome themselves.
- ◆ Assists in clarifying issues, identifying objectives, and managing the process.

Fact-Finding

- ◆ An impartial third party collects information on the dispute and makes a report about relevant data or issues recommendations.
- ◆ Provides an impartial assessment of the dispute for the parties.

Arbitration

- ◆ The parties choose a neutral person to hear their dispute and to resolve it by issuing a decision, which can be advisory or binding.
- ◆ Although adjudicative, differs from litigation in that rules of evidence are not applicable, there is flexibility in timing and the process is expedited.

Mini-Trial

- ◆ Summary presentation of the case to key principals who are chosen by the parties to preside and render a decision.
- ◆ A pretrial agreement identifies the process to include strict time limits on presentation, submission of position papers, restrictions on discovery and witnesses.

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least ... innumerable young people have married into it; innumerable old people have died out of it."

Charles Dickens,
Bleak House

AMC-Level Protest Program

Background

During the 1990s the General Accounting Office (GAO) protest system became more formal, with the adoption of administrative hearings and trial-like processes. Further, the General Services Administration Board of Contract Appeals (GSBCA) has very strict time limits applicable to the handling of protests of Automated Data Processing Equipment (ADPE) procurements.

AMC developed a program which was approved for testing by the Assistant Secretary of the Army for Research, Development and Acquisition (SARDA) in April 1991. The test proved so successful that SARDA granted permanent authority in 1992. In 1995, Dr. Steve Kelman, Director of the Office of Federal Procurement Policy, designated the AMC-Level Protest Program as one of the “Ten Best Government Procurement Practices.”

On October 25, 1995, President Clinton signed Executive Order 12979 directing Federal agencies to allow protests to be filed at the agency level above the contracting officer—a process modeled after the AMC-Level Protest Program.

Procedures

- ◆ Election of AMC Forum—Protest to AMC
- ◆ Contracting officer report within 10 working days
- ◆ Final decision issued NLT 20th working day
- ◆ Decision binding on AMC
- ◆ Contractor can appeal to GAO/GSBCA
- ◆ Award withheld/work stopped unless “override” issued

Remedies

- ◆ Terminate contract
- ◆ Recompete requirement
- ◆ Revise solicitation
- ◆ Not exercise options
- ◆ Award contract
- ◆ Combination of remedies

Experience & Results

(Apr 1991- Dec 1995)

- ◆ 338 protests filed, 337 decided, 1 pending
- ◆ Average decision time: 15 days (GAO 75 days)
- ◆ Corrective action rate: 15%
- ◆ Only 38 AMC decisions appealed, 36 decided for AMC
1 sustained by GAO, 1 sustained by GSBCA

AMC Debriefing Handbook

Background

The law requires that whenever the Government awards a contract based on competitive proposals, an unsuccessful offeror is entitled to a debriefing if it requests one during the allowed timeframe.

AMC believes that comprehensive and open debriefings enhance the relationship between Government and industry, provide necessary information to unsuccessful offerors, instill confidence in the acquisition process, lead to increased acceptance of Government decisions, and serve as a deterrent to misunderstanding and litigation.

Conducting meaningful debriefings is part of the AMC program to reduce protests—an ADR initiative.

Purposes of a Debriefing

- ◆ To explain the rationale for the contract award decision.
- ◆ To instill confidence in the offeror that he was treated fairly.
- ◆ To assure the offeror that proposals were evaluated in accordance with the solicitation and applicable laws and regulations.
- ◆ To identify weaknesses in the offeror's proposal so the offeror can prepare better proposals in the future.
- ◆ To reduce misunderstandings and protests.

AMC Debriefing Handbook

In 1995, AMC published a Debriefing Handbook: A Practical Guide for Conducting Post-Award Debriefings, accompanied by a Debriefing Videotape used as a training resource.

The Pamphlet includes sections on preparing for a briefing, suggests types of personnel who should be present, identifies ground rules and other procedures, describes the contents of a written post-debriefing memorandum, and provides sample charts to be used by Government debriefers.

"Good debriefings do not encourage protests. On the contrary, a comprehensive debriefing is the most effective deterrent to the misunderstandings and distrust that generate litigation."

*Command Counsel
U.S. Army Materiel Command*

Partnering for Success: The AMC Partnering Program

The objective of the AMC Partnering Program is to promote Government-industry communication and teamwork throughout the acquisition process by developing and implementing a “Model” Partnering Program for AMC.

What is Partnering?

Partnering is a “Team Concept for Program Management.” Partnering is a long term commitment by two organizations to achieve business objectives by early and continuing communication, anticipating potential problems, and designing a dispute resolution process to solve problems, with the goal of maximizing the effectiveness of resources.

In a Memorandum to the Acquisition Community, the Army Acquisition Executive and the AMC Commanding General stated that *“Team management is the single most effective approach for accomplishing our streamlining goals.”*

Components of Partnering

“Partnering Charter” drafted by the parties:

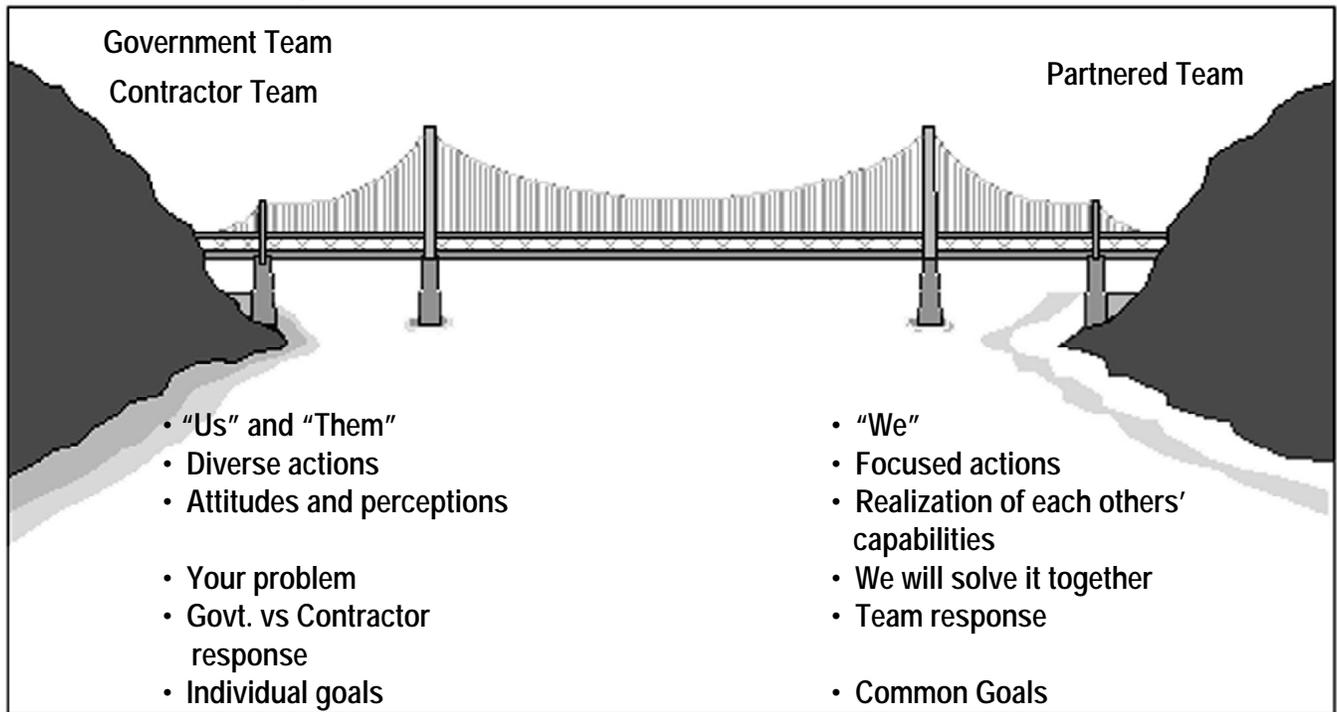
- ◆ Developed in a Joint Partnering Workshop
- ◆ Defines mutual goals and objectives
- ◆ Establishes procedures for conflict resolution
- ◆ Provides measurable milestones
- ◆ Documents the parties’ commitment

ADR: By early communication and recognition of potential problem issues, the parties design a resolution process that seeks to avoid traditional litigation.



Benefits of Partnering

Partnering Builds Bridges



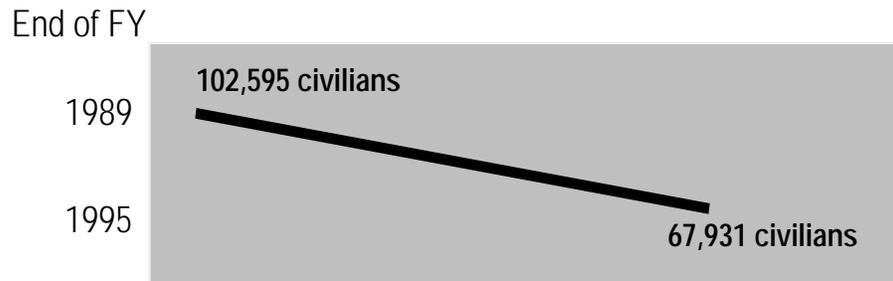
AMC Partnering Initiatives

AMC has approximately 12 Partnering initiatives being conducted.

In 1996, we will publish a Partnering Pamphlet and Videotape to enhance use of Partnering and to institutionalize the program.

ADR in Employment Law

The AMC Reshape Challenge



As AMC reshapes, we recognize that personnel turmoil will increase and, not surprisingly, the number of grievances, appeals of reduction-in force actions, EEO complaints and labor-management relations disputes are likely to increase.

Traditional employment law litigation is time-consuming, resource intensive, and, most importantly, has a negative impact on the employer-employee relationship.

ADR Employment Law Initiatives

Labor-Management Partnership: AMC has 147 collective bargaining units representing over 80% of the AMC workforce

- ♦ Executive Order 12871 (1993) directs training in “consensual methods of dispute resolution techniques.”
- ♦ AMC Chief of Staff is member of DOD Partnership Council.
- ♦ Partnership Councils, charters and agreements define the relationship between management and labor.
- ♦ AMC Labor-Management Partnership at Red River Army Depot, Letterkenny Army Depot, and Tobyhanna Army Depot have been recognized by the National Performance Review project.



Partnership is *“an attitude adjustment”*

**Elected Voluntary
Alternative
DESCOM Disci-
pline (EVADED)
or Alternative to
Traditional
Discipline (ATD)**

Created by the former AMC Depot Systems Command (DESCOM), these programs have gained wide-acceptance within AMC. Managers and employees work together for a resolution that recognizes the future employment relationship.

- ◆ Negotiated with AMC labor unions
- ◆ Coverage of specified conduct/performance issues
- ◆ Admission of wrongdoing
- ◆ Remedy negotiated between the parties—they design the solution
- ◆ Discipline officially recorded
- ◆ Waiver of grievance, appeal, complaint rights
- ◆ Commitment to future course of behavior, performance and assistance from management

**Performance
Grievance
Procedure.**

Created by AMC's Communications and Electronics Command (CECOM) to meet a specific local concern: the rise of grievances over performance appraisals.

- ◆ Agreed to by CECOM unions
- ◆ Expedited hearing before a panel
- ◆ Strict time lines agreed to in advance
- ◆ Facilitator clarifies issues
- ◆ No costly arbitration
- ◆ Resolution by "stakeholders" in the organization



ADR for Contract Disputes

Background

The Contract Disputes Act of 1978 (CDA) is considered the first statutory attempt to utilize alternative dispute resolution. The Act states that boards of contract appeals “shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.”

Despite this objective, in practice, the contract disputes system under the Act could not be characterized as using ADR.

- ♦ The average contract claim before the Armed Services Board of Contract Appeals (ASBCA) exceeds \$1,000,000, and takes over 2 years from docket to decision.
- ♦ Successive rounds of discovery require the time of agency officials.
- ♦ Disputes interfere with the ongoing business relationship.
- ♦ The decision is made by a judge who has no stake in the outcome of the dispute.

The ASBCA provides parties with a “*Notice Regarding Alternative Methods of Dispute Resolution*” which suggests certain expedited procedures, including mini-trials, settlement judge, summary trial with binding bench decision. It also encourages activities to adopt their own mechanisms for dispute resolution.

AMC Program Objective

To establish a fast, fair, affordable dispute resolution procedure that:

- ♦ Reduces dispute resolution time from over 2 years to 3 months.
- ♦ Is acceptable to industry, Government program managers, contracting officers, attorneys, the field, HQ AMC, HQDA, and the ASBCA.

AMC Field Test

In 1996, AMC will identify 2 cases for field testing of expedited ADR contract dispute resolution as a test for evaluating the program approach.

The results will be analyzed by a Working Group and high-level Steering Committee to make adjustments, determine whether to expand the program, or decide to go in another direction.

1996 AMC ADR Expansion

In 1996 AMC is **planning** on introducing new ADR programs to our arsenal of tools available to meet the challenge of litigation:

Equal Employment Opportunity

The Equal Employment Opportunity Commission encourages the use of ADR. To this end, they have sponsored training in ADR—in a pilot Mediation Training Program cosponsored by the Federal Mediation and Conciliation Service.

The AMC Director of Equal Opportunity has taken a team of AMC EEO, CPO and legal representatives to observe the Mediation Center used at Kirkland Air Force Base.

Also being considered is the adoption of a One-Stop-Shop to handle potential and actual EEO complaints.

Environmental Programs

The AMC environmental and legal community has met with the Environmental Protection Agency (EPA) ADR Coordinator to discuss the adoption of ADR programs to meet the burgeoning area of disputes in the environmental area.

The potential is there to adopt ADR procedures for use in negotiating with regulators at the local, state and Federal levels on interagency agreements, fines and penalties, consent orders and permits.

Basic ADR Principles

- *Be Creative*
- *Start Small*
- *Welcome Change*
- *Be Patient*

ADR Summary

ADR Is Not

Mandatory: *the parties choose to participate in ADR or use traditional litigation processes.*

Successful without total commitment: *top management must accept the start-up costs and think in the long-run.*

A panacea: *some issues, some cases should not use ADR. Traditional litigation should be used when seeking to establish or preserve a case precedent or policy.*

Contrary to Government business interests: *the shared employer-employee and Government-industry interests are paramount in considering whether to use ADR and what specific form it should take.*

A one-way street: *all must buy into the process.*

ADR	VS	Traditional Litigation
Focuses on the parties' real interests		Focuses on their litigation position.
Requires the sharing of information early as part of the problem-solving process		Sharing of information only as a required component of pretrial or pre-hearing procedures.
Focuses on the business perspective of the dispute		Focuses on the legal theory of each party.
Decisionmaking is by the parties to the dispute		Decisionmaking by a disinterested third party.
Procedures and processes are designed by the parties		Procedures and processes by a rule-making tribunal.
Concentrates on the informal presentation of facts		Concentrates on compliance with formal rules of evidence.
Requires the parties to talk to each other		Parties talk to a judge or hearing examiner.

AMC ADR Program Chronology

Year	Issue
1989	<p>ADR introduced to the AMC Chief Counsels at the AMC Command Counsel Continuing Legal Education Program</p> <ul style="list-style-type: none"> ◆ Announce AMC ADR Project Committee ◆ ADR background materials distributed <p>AMC Labor and Employment Law Workshop</p> <ul style="list-style-type: none"> ◆ Pending ADR Legislation presentation ◆ Discussion of Elected Voluntary Alternative DESCOM Discipline (EVADED)
1990	<p>Passage of the Administrative Dispute Resolution Statute</p> <p>Designation of Principal Deputy General Counsel as DA ADR Specialist</p> <p>AMC Develops ADR point of contact program</p>
1991	<p>AMC-Level Protest Test Program approved by Assistant Secretary of the Army for Research, Development and Acquisition (SARDA)</p>
1992	<p>DA ADR Workshop sponsored by AMC</p> <ul style="list-style-type: none"> ◆ 200+ attendees in a 2 1/2 day workshop <p>SARDA grants permanent status to AMC-Level Protest Program</p>
1993	<p>AMC Commanding General designates the AMC Command Counsel as AMC ADR Senior Advisor</p> <p>Designation of AMC Major Subordinate Command ADR advisors</p>
1994	<p>AMC Debriefing Program</p> <ul style="list-style-type: none"> ◆ Pamphlet published and videotape released ◆ Part of AMC Protest Reduction Program <p>Performance Appraisal Expedited Grievance Procedure negotiated at CECOM</p>
1995	<p>Office of Federal Procurement Policy identifies the AMC-Level Protest Program as one of the Ten Best Government Procurement Practices</p> <p>AMC Partnering Program Plan of Action approved by AMC DCG</p> <p>AMC Contract Disputes and Claims Initiative approved</p>

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