

6101.54 Alternative dispute resolution [Rule 54].

(a) *Availability of alternative dispute resolution (ADR) procedures at the Board.* The Board will make its services available for ADR proceedings to help resolve issues in controversy and claims involving procurements, contracts (including interagency agreements), and grants. The use of ADR will not toll any relevant statutory time limitations.

(1) *Matters not on Board's Contract Disputes Act (CDA) docket.* Upon request, the Board will make an ADR Neutral available for an ADR proceeding, even if a contracting officer's decision has not been issued or is not contemplated. To initiate an ADR proceeding for all matters other than docketed CDA appeals, the parties shall jointly request ADR in writing and direct such a request to the Board Chairman. For agencies whose issues in controversy do not fall within the Board's jurisdiction, the Board may provide ADR services on a reimbursable basis.

(2) *Docketed CDA appeals.* Parties are encouraged to consider the advantages of using ADR techniques at any stage of an appeal. Joint requests for ADR services for docketed appeals should be addressed to the Board Chairman, with a copy to the presiding judge. ADR may be used concurrently with standard litigation proceedings such as the filing of pleadings and discovery, or the presiding judge may suspend such proceedings for a reasonable period of time while the parties attempt to resolve the appeal using ADR.

(b) *Conduct of ADR—(1) Selection of ADR Neutral.* The parties may ask the Board Chairman to appoint a judge(s) to serve as the ADR Neutral(s). If desired, the parties may request the appointment of a particular judge(s). In a docketed appeal, the parties may also request that the presiding judge serve as the ADR Neutral for the ADR proceeding. If the parties elect a non-binding ADR procedure and the implementation of the procedure does not result in a settlement, where the procedure has involved *ex parte* contact, the ADR Neutral may retain the case for adjudication as the presiding judge, but only if the parties and the presiding

judge all agree to such retention. If the procedure has not involved *ex parte* contact, the ADR Neutral, after considering the parties' views, may retain the case as the presiding judge at his/her discretion.

(2) *The ADR agreement.* Before an ADR proceeding can occur, the parties must execute a written ADR agreement. This agreement should set forth, among other things, the identity of the ADR Neutral to be used, the role and authority of the Neutral, the ADR techniques to be employed, the scope and extent of any discovery relating to ADR, the location and schedule for the ADR proceeding, and the extent to which dispute resolution communications in conjunction with the ADR proceeding are to be kept confidential (6101.54(b)(3) (Rule 54(b)(3))).

(3) *Confidentiality of ADR communications and materials.* Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered "dispute resolution communications" as defined in 5 U.S.C. 571(5) and are subject to the confidentiality requirements of 5 U.S.C. 574. Unless otherwise specifically agreed by the parties, confidential dispute resolution communications shall be inadmissible as evidence in any pending or future Board proceeding involving the parties or the issue in controversy which is the subject of the ADR proceeding. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding. The Board will not retain written materials used in an ADR proceeding after the proceeding is concluded or otherwise terminated. Parties may request a protective order in an ADR proceeding in the manner provided in 6101.9(c) (Rule 9(c)).

(c) *Types of ADR.* ADR is not defined by any single procedure or set of procedures. Board judges, when engaged as ADR Neutrals, most commonly use a combination of facilitative and evaluative mediation approaches, as explained in paragraphs (c)(1) through (c)(7) of this section. However, the Board will consider the use of any ADR technique or combination of techniques proposed by the parties in their

ADR agreement which is deemed to be fair, reasonable, and in the best interest of the parties, the Board, and the resolution of the issue(s) in controversy. The following are descriptions of some available techniques:

(1) *Facilitative mediation.* Facilitative mediations usually begin with a joint session, where the parties each make 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 a mediator, aids the parties in settling their dispute, frequently by meeting with each party separately in confidential sessions and engaging in ex parte discussions with each of the parties, for the purpose of facilitating the formulation and transmission of settlement offers.

(2) *Evaluative mediation.* In addition to engaging in facilitative mediation, if authorized under the terms of the parties' ADR agreement, the ADR Neutral may also discuss informally the strengths and weaknesses of the parties' respective positions in either joint sessions or confidential sessions.

(3) *Mini-trial.* 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 ADR 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 (6101.54(c)(4) (Rule 54(c)(4))) or to the Neutral's rendering of a binding decision (6101.54(c)(5) (Rule 54(c)(5))).

(4) *Non-binding advisory opinion.* The parties present to the ADR Neutral information upon which the Neutral bases a non-binding, advisory opinion regarding the merits of the dispute. The opinion may be delivered to the parties jointly, either orally or in writing. The manner in which the information is presented will vary, depending upon the circumstances of the dispute 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, exchange of documentary evidence, and argument from counsel.

(5) *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 which is 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 dispute and the wishes of the parties as set out in their ADR agreement.

(6) *Other procedures.* In addition to other ADR techniques, including modifications to those listed in paragraphs (c)(1) through (c)(5) of this section, the parties may use ADR neutrals outside the Board and techniques which do not require direct Board involvement.

(7) *Selective use of standard procedures.* Parties considering ADR proceedings are encouraged to adapt for their purposes any provisions in 6101.1 through 6101.34 (Rules 1 through 34) of the Board's rules which they believe will be useful.

APPENDIX TO PART 6101—FORM NOS. 1–5

FORM 1, GSA FORM 2465, NOTICE OF APPEAL.