ALTERNATIVE DISPUTE RESOLUTION (ADR): A PUBLIC PROCUREMENT BEST PRACTICE THAT HAS GLOBAL APPLICATION

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ABSTRACT. Public procurement managers throughout the United States and their legal counterparts are implementing alternative dispute resolution as the preferred method of resolving contractual disputes. ADR seeks to resolve contractual disputes equitably and expeditiously by keeping the process in the hands of public procurement managers and out of the grasp of attorneys and the courts. ADR is a global concept. In 2004 a conference was held in Brussels to discuss self-regulatory initiatives for mediation and to launch the European Code of Conduct for Mediators. ADR is being adopted by public procurement practitioners globally. This paper provides an empirical assessment of its adoption, effectiveness and global application among public sector procurement managers in the United States, Canada and the European community.

INTRODUCTION

Alternative Dispute Resolution (ADR) is an "umbrella" term that refers to various methods used to resolve disputes without resorting to litigation (Nolan-Haley,1992). The basic premise of ADR is that litigation can and should be avoided whenever possible. ADR, when applied to public procurement, seeks to resolve disputes equitably and expeditiously by keeping the process in the hands of procurement officials and their legal advisers and away from litigating attorneys, judges and courts.

The American Bar Association (ABA, 1999) defines ADR as, "an array of non-binding and binding dispute resolution methods that involve

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the use of third-party neutrals to aid the parties in contract controversies via a structured settlement process." The United States Code (5 USC Section 571) defines ADR as consisting of:

- conciliation;
- facilitation;
- mediation;
- fact-finding;
- mini-trials;
- arbitration;
- the use of ombudsmen, and
- any combination of the above.

ADR is used in a variety of civil law policy arenas, not just in public procurement and government contract administration. For example, ADR is used to resolve disputes in such area as consumer affairs, interstate commerce, international trade, environmental regulation, workplace issues and divorce. For public procurement purposes, ADR can be broadly construed to mean the use of any of the previously identified methods to resolve a dispute with (a) a bidder or proposer as a result of a public procurement (b) a contractor during the contract administration phase or (c) any procurement related issue in controversy.

The concept of ADR as an alternative to litigation is globally accepted and has become institutionalized as part of many court systems and systems for justice as a whole throughout the world (Shamir, 2004). Several countries are institutionalizing ADR as the primary source for conflict resolution especially in the area of commercial contract disputes between buyers and sellers particularly in the public sector.

Although ADR is a widely accepted international concept that is used to resolve conflicts, very little quantitative research exists to measure its acceptance and use by public procurement officials and their legal advisors at the state and local level in the United States, Canada and the European Union. Statistical measurement of ADR's adoption among public sector contracting agencies is spotty at best both in the United States and among those countries where it has wide acceptance. Few studies have looked at the diffusion of ADR in the international public

sector procurement community and there has been little research conducted on the adoption of ADR in public sector procurement.

While ADR seems to be well received in the federal sector, it appears that states, counties, cities and other public institutions within the United States, tend to be late adopters of the concept or have decided not to use the concept. The following is illustrative of public sector push back in terms of ADR adoption by some municipal governments within the U.S. Recently the chief legal counsel of a county government in the State of Maryland, U.S. was asked why her county has not embraced ADR to resolve contract disputes. She responded, "We are paid to litigate and not to mediate or arbitrate. If a business has a contract dispute with my county, we will see them in court." This statement may provide telling testimony as to why the use of ADR is not receiving broader public sector acceptance within the U.S. at the state and local level. Although this is a micro example, the larger issue is the need for contracting officials and their legal advisors to approach rifts in contractual relationships from an ADR perspective that emphasizes mutuality over self-interest and reconciliation over termination.

This paper will examine ADR's impact on public contracting in the United States, Canada and the European Union while gauging its acceptance and adoption.

AN OVERVIEW OF ADR

The concept of ADR has been around for millennia and can be traced back as far as the ancient Egyptians. The Greeks and Romans used ADR as did the popes and European kings during the Middle Ages. ADR has been a part of the national experience of the United States since colonial times. Both William Penn and George Washington were proponents of ADR. The modern ADR era is dated from the U.S. Supreme Court Chief Justice Warren Burger's 1982 commentary on overcrowding in the Federal Court System. (Martin-Miller, 2005)

In the United States, ADR was codified in 1990, when the U.S. Congress enacted the *Administrative Dispute Resolution Act* (Public Law 101-552). The passage of this Act, perhaps more than any other event, signaled the Federal Government's general acceptance of, and preference for, the use of ADR methods to settle contract disputes. The Administrative Disputes Resolution Act of 1990 briefly lapsed in 1995

but was permanently reauthorized as the *Alternative Dispute Resolution Act of 1996* (Public Law 104-320). This Act firmly established ADR within the Federal Government as the preferred method for dispute resolution.

There is general agreement among legal and public procurement officials that ADR has many advantages over traditional litigation (Martin-Miller, 2005):

- The parties to the dispute define the issues.
- The process is consensual.
- The process is controlled.
- The process is private.
- The dispute can be resolved expeditiously.
- The business relationship can be preserved.
- The government's rights are protected.
- The results of litigation cannot be predicted.
- The costs of litigation are avoided.
- The government's management and technical resources are conserved.

While it has many advantages, there are important disadvantages which should be noted:

- Case law and legal precedent are avoided.
- The process may create a two tier system of justice.
- The process requires commitment.
- The process may not work with multiple complex issues.

There are six general techniques that are the most frequently used in the dispute resolution process: Negotiation, Mediation, Arbitration, Mini-Trial, Fact-Finding and Mediated Arbitration.

According to Yona Shamir (Israel Center for Negotiation and Mediation), the first ADR method to gain international acceptance was arbitration, which shared many of its practices and procedures with the

judicial system. As ADR has matured and developed, mediation is being received as a preferred alternative and has become widely accepted as a process providing more flexibility and less procedural complexity. Following an act of Congress (1990), federal agencies are obligated to use mediation in certain civil cases before going to court. Many states within the U.S. passed laws requiring mandatory mediation.

Again, according to Shamir, the positive aspects of mediation are:

- It helps to identify the true issues of the dispute.
- It resolves some or all of the issues.
- Agreement can be reached on all or part of the issue at dispute.
- The needs and interests of the parties are met (in part or in full).
- The parties reach an understanding of the true cause of the dispute.
- The parties reach an understanding of each other's needs and interests.
- It provides the possibility of preserving the relationship.

Global businesses have taken a serious look at ADR as an effective means of resolving cross border contract disputes. The International Institute for Conflict Prevention & Resolution (CPR) has developed "THE PLEDGE", and more than 4000 companies around the world have committed to the Corporate Policy Statement on Alternatives to Litigation©, including 400 of the 500 largest firms in the U.S. The corporate pledge states that:

"We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare business the high cost of litigation. In recognition of the foregoing, we subscribe to the following statements of principle on behalf of (company name) and its domestic subsidiaries:

In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR

techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation."

It is interesting to note that this adoption and pledge to use ADR by the private sector has not greatly impacted the public sector within the U.S. For example, the State of Maryland has created the Mediation and Conflict Resolution Office and they have promoted the adoption of the ADR pledge. As of November, 2005, 135 business and law firms have subscribed to the pledge, but not one public sector entity has signed on.

In the UK, the Lord Chancellor announced in March, 2001 that Government Departments and agencies would adopt "The Pledge-Settling Government Disputes through Alternative Dispute Resolution". This endorsement of ADR also requires Government Departments to establish performance measures to monitor the effectiveness of this undertaking. While this is a federal requirement, a similar adoption by local governments within the UK could not be measured.

Economic globalization is also a major force in the adoption of ADR. As large international businesses begin to sell to governments, ADR will have an ever increasing role in the settlement of contract disputes outside of international law. Shihata in his work, *Complimentary Reform:Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank*, states the following:

The settlement of disputes through adequate institutions acquires a unique importance in the context of transition from a command economy to a market economy. In the former, the function of dispute settlement institutions is perhaps akin to an administrative one, mostly concerned with the timely fulfillment of an economic plan. In a market economy, by contrast, economic actors will be left, within certain limits defined by law, to pursue their own economic strategies. Long-term success of those strategies will depend on a climate of stability and predictability, where business risks may be rationally assessed, transaction costs lowered, market failures addressed and governmental arbitrariness reduced. In such a context, fair and efficient dispute settlement institutions will be required as an integral part of the legal framework.

ADR IN THE UNITED STATES

The ADR "movement" started in the United States in response to the need to find more efficient and effective alternatives to litigation. ADR has its roots in the early 20th century. In 1920, the State of New York enacted the first modern arbitration statute in the United States. In 1996 the U.S. Congress passed the *Administrative Dispute Resolution Act of 1996* and in 1998 Congress passed the *Administrative Dispute Resolution Act of 1998* requiring all federal district courts to provide at least one form of ADR. (Martin-Miller, 2005)

ADR is well established in the United States and its use has increased significantly. For example:

- 56% of federal judges support the use of ADR.
- 97 % of corporate executives favor ADR.
- 55% of American Bar Association trial attorneys routinely advise their clients about ADR.
- 90% of federal contract disputes submitted to ADR have been satisfactorily resolved.

(Source: ABA, 1999,2; CPR Institute for Dispute Resolution,n.d., p.1)

The Federal Government in the U.S. has taken the lead on ADR adoption in the area of contract controversies. The Executive Order of Civil Justice Reform, Exec. Order No. 1,988, 61 Fed. Reg. 729, Sec.1 (c) (Feb. 7, 1996), sets out a federal government policy favoring settlements of disputes and the use of ADR:

Whenever feasible, claims should be resolved through informal discussion, negotiations, and settlements rather that through utilization of any formal court proceeding. Where the benefits of alternative dispute resolution (ADR) may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of appropriate ADR techniques to the parties.

The U.S. Federal Government created the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG). This group has compiled what may be the most comprehensive assessment of the results of ADR within the U.S. federal sector. The IADRWG (2000) surveyed federal departments and agencies on their use of ADR in resolving disputes arising from public procurements and during contract

administration. Federal departments and agencies reported significant use of ADR and successful resolution rates in excess of 90% (Martin, Miller, 2005) as illustrated below:

Department of the Air Force
The Air Force has used ADR in over 100 contract disputes with a 93% success rate. One particular dispute with the Boeing Company involved a contract claim of $785 million and represents the largest federal contract claim ever resolved through the use of ADR.
Department of the Army/Army Corps of Engineers
During 1999, the Army Corps of Engineers submitted 17 contract disputes to ADR. By the end of the year, 15 had been resolved and 2 were pending. As a result of ADR, contractor claims of $25 million were reduced to $9 million.
Armed Services Board of Contract Appeals (ASBCA)
Between 1998 and 1999, the ASBCA submitted a total of 131 disputes to ADR and achieved a resolution rate of 97%.
Department of Transportation/Federal Aviation Administration (FAA)
During 1999, the FAA submitted a combined total of 42 contract disputes and bid protests to ADR and achieved a resolution rate of 95% for the contract disputes and 53% for the bid protests.
General Accounting Office (GAO)
During 1999, the GAO submitted 88 bid protests to ADR, with a resolution rate of 95%.

Source: Senger, K. (2000), Journal of Dispute Resolution, 1,87

While ADR is being broadly adopted at the Federal level, its adoption by state and local authorities is difficult to measure. A random sampling of 50 formal bid documents by public agencies in Maryland and Virginia failed to identify a single example of an ADR clause that proposes ADR as the preferred method of resolving contract disputes.

At the State level, both California and Oregon have initiated pilot ADR projects specific to procurement. For example, the California Code of Regulations enacted the “Procedures for Conducting Protests under

the Alternative Protest Pilot Project." This pilot project is directed toward the resolution of bid protests (Martin, Miller, 2005). The Oregon Consensus Program (OCP) is the State of Oregon's program to provide mediation and other alternative dispute resolution services to public bodies and persons who have disputes with pubic bodies. As part of this initiative, the State of Oregon's procurement department has implemented ADR procedures to resolve contract disputes between the State and contractors resulting through State bidding practice (www.odrc.state.or.us).

ADR IN CANADA AND EUROPE

Dr. Naemi Gal-Or (Gal-Or, 2001) states that "the main arguments in favour of international ADR begin by listing the numerous disadvantages associated with litigation in the international context. The vast majority of international disputes are resolved on a case-by-case basis, which causes unpredictability and uncertainty. By its nature, the international scenario entails disadvantages such as time, cost (capital and personal), limitations regarding personal jurisdiction and subjection to the judicial process in foreign courts with differing legal systems. Even if an award results from the international litigation, its practical enforceability is in question, which eliminates the benefit in getting it in the first place." The international business community recognizes the fact that ADR is the best method to quickly resolve disputes both domestically and internationally and organizations such as the International Chamber of Commerce (ICC) headquartered in Paris, France help global business organizations resolve contract disputes with resources such as the ICC ADR Rules which have been in force since July, 2001.

As centralized governmental procurement takes hold throughout the European Union, there has been an increasing awareness of ADR as a means of providing an avenue for the resolution of disputes between governments and the private sector. Businesses throughout the EU are hampered by a perception that cross-border commercial disputes, especially in the public sector, may have to be litigated in regional court systems the are not reliable and resolution will not be impartial. (Source: International Institute for Conflict Prevention & Resolution) The European Union is endeavoring to facilitate access to justice through a series of measures and ADR is a critical component aimed at improving access to justice in commercial disputes. This view is expressed in the

Green Paper on Alternative Dispute Resolution in Civil and Commercial Law presented by the Commission of European Communities in Brussels in 2002. Commission Green Papers are documents intended to stimulate debate and launch a process of consultation at European level on a particular topic (such a social policy, the single currency, telecommunications). These consultations may then lead to the publication of a White Paper, translating the conclusions of the debate into practical proposals for Community action.

This Green Paper states that "Growing interest is being shown in alternative dispute resolution (ADR) in the European Union for three main reasons. First, there has been the increasing awareness of ADR as a means of improving general access to justice in everyday life. Second, ADR has received close attention from the Member States, many of which have passed legislation encouraging it. Third, ADR is a political priority, repeatedly declared by the European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality." The European Parliament passed a Resolution on the Green Paper on March 12, 2002. In this Resolution the European Parliament advocates a European-wide model code on ADR containing certain procedural guarantees. (www.ombuds.org/center/adr2003-7-hornle.html)

The European Commission called for responses to the Green Paper and posed this question,

"What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiative?" The CPR Institute for Dispute Resolution (www.cpradr.org) a nonprofit educational and research organization submitted the following response to that question, "The greatest challenge facing proponents of commercial mediation is lack of awareness of its economic benefits, among the community of those who would most directly derive those benefits: the business community. Numerous studies, well known in Europe, have quantified the many parameters in which diligent, systematic and skillful application of various ADR processes improve business relationships. Among these are lower transaction costs, faster cycle of dispute resolution, avoidance of belligerence, added value in relationships going forward, and maintenance of confidentiality with respect to non-public and strategic

aspects of companies' operations. Yet many businesses continue to believe-and are encouraged to believe-that adjudication is the sole and best way to resolve disputes, whether involving vital supply chain partners or involving critical intellectual property."

As ADR gains a foothold throughout the EU, there has been a call to create a *European Mediation Centre.* Its role would be promotional, educational and facilitative, advising businesses and governments of the various mediation options available to them other than adjudication by the courts. While mediation bodies are emerging throughout Europe- the first was established in the UK in 1991-a central body would help spread the use of mediation and other best practices effectively.

In July, 2004 a conference was held in Brussels to discuss self-regulatory initiatives for mediation in general and to launch the European Code of Conduct. The concept of a European Code of Conduct as a voluntary instrument to improve quality and trust in ADR mediation has broad support. As this concept gains momentum, additional sub-committees will be held to maintain dialogue and encourage exchange of experiences.

As European interest in ADR grows, public sector institutions throughout Europe will be drawn to it, and will begin using it in contract language, to settle tender disputes, and to improve business relationships. For example, Baroness Scotland, Parliamentary Secretary at the Lord Chancellor's Department, has made clear that although local authorities are not bound by the UK's government pledge to use ADR they are still expected to consider using mediation where appropriate. She cited Lord Woolf's *Cowl vs. Plymouth City Council* judgment, which emphasized that the courts now expect a local authority to have at least considered using ADR to resolve a dispute and that litigation should be seen as a last resort. She quoted part of Lord Woolf's judgment: *"today sufficient should be known about ADR to make failure to adopt it, in particular when public money is involved, indefensible."* (Source: Center for Effective Dispute Resolution, www.cedr.co.uk)

Just as the federal government in the U.S. has taken the lead in the implementation of ADR in federal procurement, the UK has taken the lead in Europe. The ADR Pledge, which requires government agencies to consider ADR in "all suitable cases wherever the other party accepts it" was initiated in March 2001. The Pledge states that the "Central Government will produce procurement guidance on the different options

available for ADR in Government disputes and how they might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government." Also the Department for Constitutional Affairs (DCA) in the UK, quantifies the use of ADR by Government Departments and publishes the results in its Monitoring Report. For example, in the financial year 2002-2003 there was an increase of over 1200%, in the use of ADR by Government Departments. (www.dca.gov.uk/civil/adr) There is a marked effort in Government Departments throughout the UK to commit to a culture of settlement rather than a culture of litigation.

The EU is committed to ADR and one of the key aims of the Public Procurement Remedies Directives in 2004 was to make progress on ensuring effective dispute resolution. The EU accepts that providing clear and effective procedures of seeking redress in contract issues builds confidence among suppliers and awarding authorities (www.bipsolutions.com/events/ecdmr). The EU has also taken the initiative that requires public bodies to identify in all of their contract notices the process for appeals by unsuccessful tenderers that includes mediation procedures, where appropriate.

In Canada, a notable move toward the use of ADR has been adopted by the Canadian Revenue Authority (CRA). They have published on their Web-site (www.cra-arc.gc.ca/agency/procurement/dispute) "Alternative Dispute Resolution for Contracts" which states that, "The CRA will make every effort to prevent disputes from arising with the supplier community by being as clear as possible when communicating its needs and requirements and by using procurement processes which are open and fair. The CRA is committed to alternative forms of dispute resolution in its contracting and procurement activities in order that its employees and the supplier community are able to resolve disputes as early and quickly as possible. Therefore, the CRA has introduced an "*Alternative Dispute Resolution System (ADR)* for procurement and contracting." This adoption of ADR is laudable and reflects global best practice in the move toward taking contract disputes out of the court room.

CONCLUSION

As Dr. Gal-Or points out, "At the international level, ADR has since long figured as the system of choice." (Gal-Or, 2001) for resolving commercial disputes. It is the preferred method for settling contract disputes between businesses and the central governments in Canada, the U.S. and the UK.

At the local level, the adoption and use of ADR to resolve procurement dispute issues is wrapped in a question mark. The enthusiasm for ADR among procurement officials and their legal advisors in cities and other municipal jurisdictions in Europe, Canada and the U.S. is difficult to measure. Currently, little literature, research information or statistical quantification of the use of ADR by governmental agencies outside of the Central Government of the UK and the Federal Government in the U.S. exists.

Confidentiality may be a reason why the collection of information on the use of ADR is lacking. Most dispute settlements resulting from the use of ADR, due to confidentiality, prohibit the release of information and if information is released both parties must agree to its release and must know the identity of the subject to whom the information is being released to. This confidentiality requirement creates a barrier to data collection (Gal-Or, 2001). While the confidential nature of ADR may hamper data collection efforts, there is much information on various aspects of the subject that can be easily measured and shared such as in the area of tender/bid protests and settlement.

There is a general absence of documented data on ADR cases and the use of ADR techniques by municipal public agencies in the U.S., the UK and in Canada. Sources that should have information on the use of ADR by local entities, such as the U.S. Department of Commerce, the Commercial Arbitration and Mediation Centre for the Americas (CAMCA), and the Canadian Government have not collected data on the subject that is easily transferable for meaningful data analysis.

A mechanism for data mining and collection needs to be established through a recognized body, which would collect data specific to the use of ADR by various public sector entities at the State and local level, similar to the data collection efforts of the DCA in the UK and the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG), in the U.S.

While it is difficult to track the use of ADR by public procurement beyond the federal level, ADR is being used and is gaining traction. For example, the National Institute of Governmental Purchasing, Inc. offers a two day seminar titled "Alternative Dispute Resolution" which is offered throughout the United States. It is gaining in popularity and its intended audience is senior level procurement professionals. ADR adoption at the local level does require an understanding of the topic and the education of public procurement professionals in its basic tenants is a cornerstone for continued implementation.

Public procurement professionals must advocate for its acceptance and encourage their legal advisors to consider its adoption. Contractual boilerplate language can be easily drafted in concert with legal counsel. One approach would be to adopt common language akin to the UK's ADR Pledge, whereby public entities simply state in their bid/tender document that "Alternative Dispute Resolution will be considered and used in all suitable cases when accepted by both parties and is the preferred method to resolve contract disputes."

ADR adoption by public procurement agencies is a global best practice, easily transferable across international borders. Many international resources exist such as the International Arbitration Rules of the American Arbitration Association, the International Chamber of Commerce, the Center for Public Resources Institute for Dispute Resolution, and the International Arbitration Institute in Paris (Vicuna, 2004).

When public procurement decisions are challenged in a court, be it in New York or Paris, the procurement process is paralyzed until the case is heard by a judge and perhaps a jury and this can take months and cost precious public dollars. Litigation in the courtroom over public procurement policy decisions may become a dinosaur in the international society of the twenty-first century as public procurement professionals embrace and institutionalize the use of Alternative Dispute Resolution.

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