



**DEPARTMENT OF DEFENSE**  
**Defense Contract Management Agency**

# **INSTRUCTION**

## **Alternative Dispute Resolution (ADR)**

**Office of General Counsel**  
**OPR: DCMA-GC**

**DCMA-INST 902**  
**December 17, 2013**  
*Validated Current, 1 June 2015*

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**1. REISSUANCE AND PURPOSE.** This Instruction:

a. Revises and replaces DCMA Instruction (DCMA-INST) 902, “Alternative Dispute Resolution (ADR)” (Reference (a)).

b. Establishes policy which facilitates the use of alternative methods for resolving disputes or issues in controversy other than through administrative and court adjudicatory processes.

c. Is established in compliance with DoD Directive 5105.64, “Defense Contract Management Agency (DCMA)” (Reference (b)) and Executive Order 12988, Civil Justice Reform (Reference (c)).

d. Encourages DCMA activities to use the ADR process whenever feasible, and when such use will materially contribute to the prompt, fair, and efficient resolution of disputes involving the agency without unnecessary expenditure of time and money.

e. Contains DCMA mandatory requirements that are not appropriate for Contract Management Office Commander/Center Director deviation approval authority.

**2. APPLICABILITY.** This Instruction applies to all DCMA activities except when other policy or agreement takes precedence (e.g., collective bargaining agreement(s)). This Instruction does not create any rights or reservations and may not be relied on by any person, organization, or other entity to allege a denial of any rights or reservations.

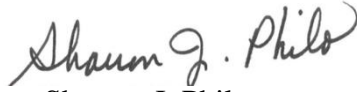
**3. MANAGERS’ INTERNAL CONTROL SYSTEM.** In accordance with DCMA-INST 710, “Managers’ Internal Control Program” (Reference (d)), this Instruction is subject to evaluation and testing. Process flowcharts are located at Appendix A.

**4. RELEASABILITY – UNLIMITED.** This Instruction is approved for public release and is located on DCMA’s Intranet Web site.

**5. PLAS CODE.** PLAS Process code 156.

**6. POLICY RESOURCE PAGE.** <https://home.dcma.mil/POLICY/902r/>

**7. EFFECTIVE DATE.** By order of the Director, DCMA, this Instruction is effective December 17, 2013, and all applicable activities shall be fully compliant within 60 days from this date.



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## **REFERENCES**

- (a) DCMA-INST 902, “Alternate Dispute Resolution (ADR),” September 2004 (hereby canceled)
- (b) DoD Directive 5105.64, “Defense Contract Management Agency (DCMA),” January 10, 2013
- (c) Executive Order 12988, “Civil Justice Reform,” February 5, 1996
- (d) DCMA-INST 710, “Managers’ Internal Control Program,” September 12, 2011
- (e) Sections 571 to 584 of title 5, United States Code, Administrative Dispute Resolution Act of 1996 (ADRA of 1996), as amended
- (f) DCMA Director’s Policy Statement 005, “Policy Statement on Alternative Dispute Resolution,” October 1, 2012
- (g) DCMA-INST 905, “Contract Claims and Disputes,” November 2007
- (h) DoD Directive 5145.5, “Alternative Dispute Resolution (ADR),” April 22, 1996

## CHAPTER 1

### POLICY

**1.1. POLICY.** This Instruction, as reissued, provides guidance and direction regarding the Agency Alternative Dispute Resolution Program and sets forth guidelines for the use of Alternative Dispute Resolution (ADR) within DCMA to fairly and efficiently resolve disputes or issues in controversy other than through administrative and court adjudicatory processes when feasible.

#### **1.2. BACKGROUND ON ALTERNATIVE DISPUTE RESOLUTION (ADR).**

1.2.1. Understanding the ADR Process. This process provides an alternative to litigation or formal administrative procedures to resolve disputes or issues in controversy arising in the business of the agency. The use of ADR may result in faster, less expensive, and less contentious resolution of issues in controversy at the lowest possible level. Therefore, the ADR process is strongly encouraged, when feasible and not prohibited by another policy or agreement and shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable and appropriate.

1.2.2. Types of ADR. ADR consists of various methods or a combination of methods utilizing a third party neutral to assist the parties in resolving disputes. Some of these methods include mediation, conciliation, facilitation, fact-finding, use of early neutral evaluation, mini-trials, settlement judge, summary trial with binding decision at the Armed Services Board of Contract Appeals (ASBCA) and arbitration. The term ADR does not include unassisted negotiation.

1.2.2.1. Mediation. While all forms of ADR are available for use, if appropriate, special consideration should be given to use of mediation. Mediation, in which the parties to a dispute meet in a non-adversarial setting and arrive at their own resolution with the help of a skilled intermediary, is especially effective for workplace disputes.

1.2.2.2. Arbitration. In arbitration, the issue in controversy is decided in part or in whole by a third party neutral. Arbitrations will be conducted in accordance with the Administrative Dispute Resolution Act of 1996 (ADRA) (Reference (e)).

#### 1.2.3. When to Use ADR.

1.2.3.1. ADR may be used to resolve the entire issue in controversy or a portion of the issue in controversy. While ADR may generally be undertaken at any time in a dispute, initially, it should be considered for resolution of the dispute at the earliest appropriate opportunity.

1.2.3.2. The use of ADR may not be appropriate in matters involving current fraud or other investigations or in cases where:

1.2.3.2.1. A definitive and authoritative decision is needed as a precedent.

1.2.3.2.2. The matter involves significant issues of government policy that require procedural development and ADR will not assist policy development.

1.2.3.2.3. Maintaining and establishing policy or avoiding variations in decisions are especially important.

1.2.3.2.4. The matter significantly affects non-parties.

1.2.3.2.5. A full public record of the proceeding or resolution is important.

1.2.3.2.6. The agency must maintain continuing jurisdiction over the matter with the right to alter the resolution, as circumstances demand.

### **1.3. DETERMINE ADR APPLICATION METHODOLOGY.**

1.3.1. Workplace Disputes. The use of ADR in Equal Employment Opportunity (EEO) related disputes will be undertaken in accordance with DCMA Director's Policy Statement 005, "Policy Statement on Alternative Dispute Resolution" (Reference (f)) and pursuant to the governing Equal Employment Opportunity Commission (EEOC) rules, regulations, and procedures. Use of ADR in other workplace disputes will be undertaken in accordance with Merit Systems Protection Board (MSPB); Office of Special Counsel (OSC); Federal Mediation and Conciliation Service (FMCS); Federal Labor Relations Authority (FLRA) rules, regulations, and procedures; Collective Bargaining Agreement(s); and/or other relevant guidance, as appropriate.

1.3.2. Contract Disputes. The use of ADR in contract disputes will be undertaken in accordance with the guidance provided in DCMA-INST 905, "Contract Claims and Disputes" (Reference (g)); pursuant to governing law and regulation, including sections 571 to 584 of Title 5, United States Code (Reference (e)); and DoD Directive 5145.5, "Alternative Dispute Resolution (ADR)" (Reference (h)).

## CHAPTER 2

### ROLES AND RESPONSIBILITIES

**2.1. DISPUTE RESOLUTION SPECIALIST (DRS).** The DRS is the senior agency official responsible for development of DCMA's ADR program and its implementation. The DCMA General Counsel will serve as the DRS. The DRS (or designee) will:

2.1.1. Develop and maintain ADR policies, utilization procedures and initiatives, coordinating and promoting them within DCMA.

2.1.2. Monitor implementation, evaluate program execution and results, and maintain data describing DCMA's use of ADR.

2.1.3. Determine the appropriate and necessary ADR training for agency personnel.

2.1.4. Represent DCMA on the Department of Defense Alternative Dispute Resolution Coordinating Committee.

**2.2. ALTERNATIVE DISPUTE RESOLUTION SPECIALISTS (ADRS).** An ADRS is an individual designated by the DCMA General Counsel with subject area ADRS authority who is responsible for implementation and administration of the ADR program for either contract disputes or employment related disputes. The ADRS for contract disputes is the Director of the Contract Dispute Resolution Center, and the ADRS for employment related disputes is the Senior Associate General Counsel for Ethics and Personnel, unless otherwise designated by the General Counsel. The ADRS for each subject area will:

2.2.1. Advise and assist DCMA personnel in the use of ADR, including, recognizing situations appropriate for use of ADR, locating third party neutrals and scheduling ADR sessions.

2.2.2. Annually review the ADR program within their subject area and, if warranted, take steps to promote greater use of ADR.

2.2.3. Provide ADR training to appropriate agency personnel.

2.2.4. Provide the DRS information as requested, on the status of the ADR program within their subject area.

## CHAPTER 3

### PROCEDURES

**3.1. IMPLEMENTING ADR.** DCMA employees will consider using ADR in every situation where unassisted negotiation has not been effective and the other party has filed or has a right to file an action before a Court or formal administrative body. This includes ADR as provided for in this instruction, as well as ADR processes provided for by other agencies and in the rules, general orders, and procedures of judicial and quasi-judicial bodies such as the United States Court of Federal Claims, the ASBCA, EEOC, MSPB, OSC, FMCS, and FLRA. Advice, assistance, and training in the use of ADR are available through the DRS, ADRS, and assigned legal counsel.

**3.2. WHO PARTICIPATES IN ADR.** Each ADR proceeding will involve a third party neutral and deciding officials and may or may not involve counsel, depending on the procedure selected and agreement of the parties.

3.2.1. The neutral is an individual who, with respect to the issue in controversy, functions specifically to aid the parties in resolving the controversy. This person may be a Government employee or someone outside the Government. The ADRS can assist in the identification and selection of a neutral.

3.2.2. The Deciding Official is the individual designated by each of the parties who is responsible for and has authority to take action on the issue in controversy. For the agency this may be the contracting officer, supervisor, or other management official who may grant relief or decide the issue.

3.2.3. Counsel, where representing the agency in ADR proceedings, may serve as advocate for or advisor to the agency's Deciding Official who is acting on behalf of the agency.

3.2.4. The parties will execute a written agreement with respect to each ADR procedure to be undertaken. The form and content of the agreement will depend upon the type and subject matter of the ADR proceeding. Generally, the agreement will include the method of ADR to be used, the time and location where the ADR will take place, designation of the parties in attendance and how selection and payment, if any, for a third party neutral will be effected. Assigned agency counsel must approve the agreement prior to the commencement of any ADR sessions, except agreements for mediation of EEO complaints.

3.2.5. Each agreement to engage in arbitration shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes. Each agreement to engage in arbitration must be approved in advance by the DRS or appropriate ADRS.



**3.3. WHEN ADR IS NOT UTILIZED.** A management decision not to use ADR, when unassisted negotiations have not been effective, will only be made after its possible use has been fully evaluated and discussed between the Deciding Official and the appropriate ADRS or assigned legal counsel.

3.3.1. The decision not to use ADR shall be approved by an official at least one level above the Deciding Official, after consultation with assigned legal counsel. The decision not to offer ADR in a contract dispute must also be coordinated with the DCMA General Counsel (or designee). A management decision not to use ADR will be explained in writing, citing the specific reasons why using ADR is inappropriate or impracticable in the situation.

3.3.2. This process does not cover arbitration of grievances covered under a negotiated collective bargaining agreement.

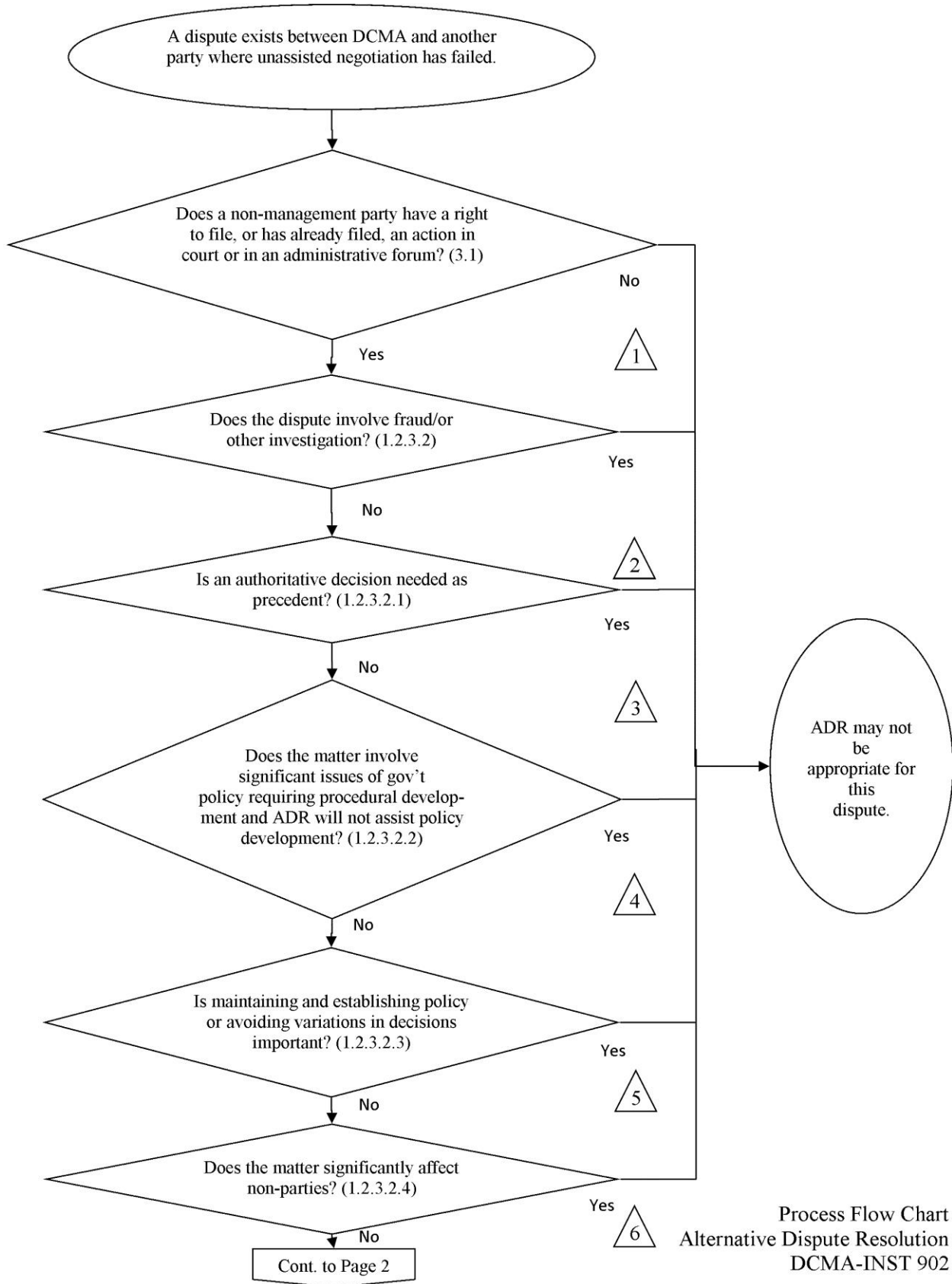
**3.4. EXPENSES.** Expenses for the use of ADR are generally borne by the parties to the dispute the same as if the matter were being resolved through litigation or formal dispute resolution procedures, although, ADR is typically less expensive.

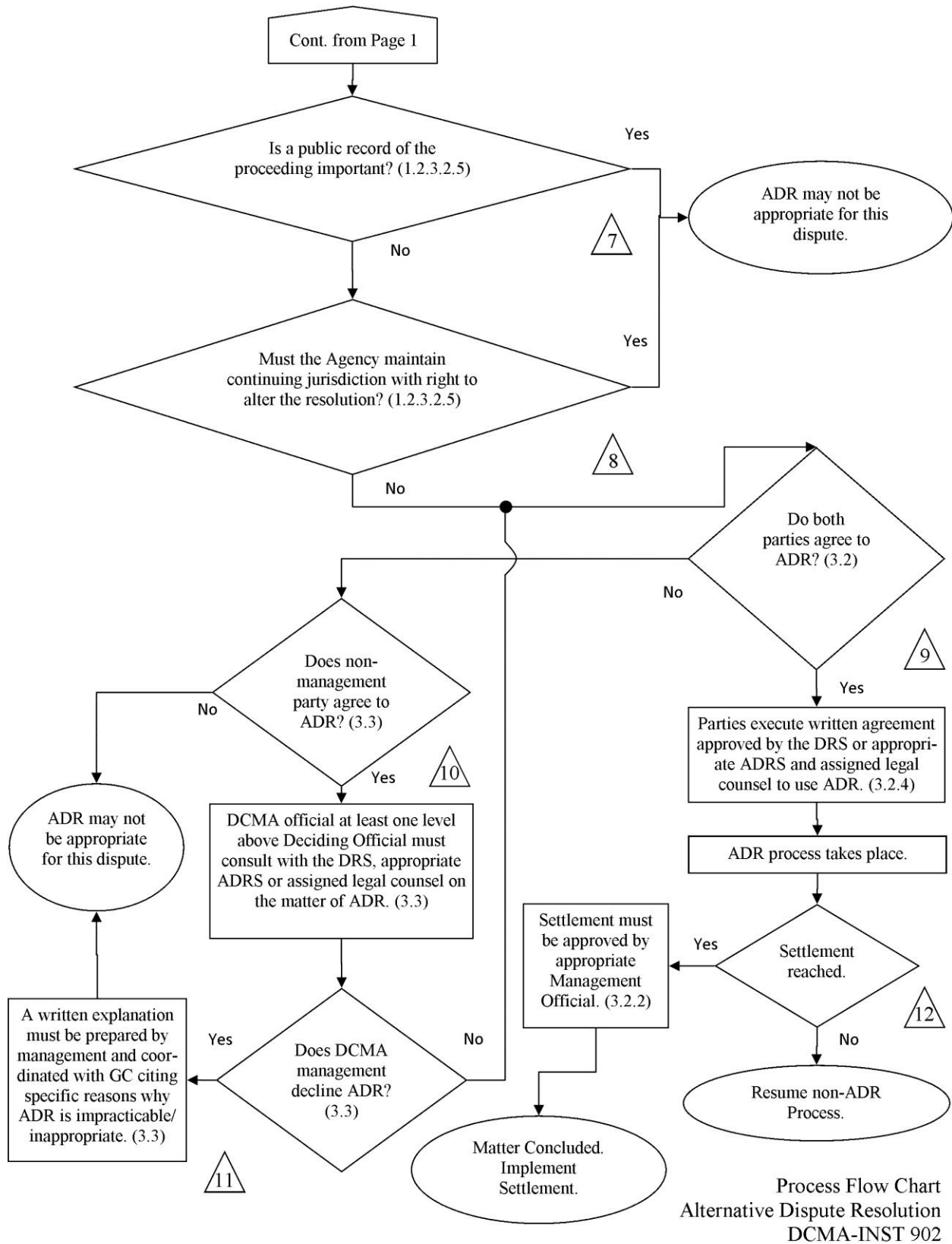
3.4.1. The written agreement for each ADR procedure to be undertaken will include appropriate provisions for payment of expenses.

3.4.2. Depending upon the type and subject matter of the dispute, third party neutrals may be available at little or no cost; e.g., ASBCA Settlement Judges in contract disputes or MSPB and EEOC Settlement Judges in workplace disputes. Assistance in identifying appropriate third party neutrals is available through the DRS, ADRS and assigned legal counsel.

**3.5. TOOLS AND ADDITIONAL GUIDANCE.** Additional considerations for disputes involving contracts or contractual actions can be found in the DCMA-INST 905 (Reference (g)).

**APPENDIX A**





**Risk Control Table**

| <b>Control Key No.</b> | <b>Functional Area (Paragraph)</b>   | <b>Risk/Vulnerability</b>   | <b>Possible Key Controls</b>             |
|------------------------|--|---|--|
| 1                      | Compliance, Open Communication, and Validation (3.1)   | Failure to determine if a non-management party has the right to file an action, may lead to establishment of needless agreements where no dispute exists.   | General Counsel review and determination |
| 2-8                    | Open Communications, Approval, Fact Finding Decision Making, Consistency in Precedents (1.2.3.2) | Failure to identify possible precedence/s, jurisdiction, whether or not public record of the proceeding is important, may cause dispute to be handled inappropriately and the Agency may enter into agreements where larger issues exist, but go unaddressed. | General Counsel review and determination |
| 9                      | Compliance, Communication, Consistency in Precedents, Jurisdiction (3.2)                         | Failure of appropriate DCMA Official to consult with DRS, ADRS or assigned Legal Counsel and document that ADR was offered; may not allow engagement in ADR process when appropriate and unnecessarily put Agency at litigation risk.                         | General Counsel review and determination |
| 10-11                  | Compliance, Communication, Documentation and Management Approval (3.3)                           | Failure to engage in ADR process when appropriate exposes Agency to unneeded litigation risk.   | General Counsel review and determination |
|                        |  | Failure to consult with the DRS, appropriate ADRS or assigned legal counsel may create additional legal issues for the Agency.  |  |

|    |       |   |  |
|----|-------|---|--|
|    |       | Failure to coordinate written explanation with GC citing specific reasons why ADR is inappropriate may needlessly expose the Agency to liability. |  |
| 12 | 3.2.2 | Failure to document and secure appropriate management official approval may create enforceability issues.   | General Counsel review and determination |

## **GLOSSARY**

### **ACRONYMS**

|           |  |
|-----------|--|
| ADR       | Alternative Dispute Resolution             |
| ADRA      | Alternative Dispute Resolution Act         |
| ADRS      | Alternative Dispute Resolution Specialist  |
| ASBCA     | Armed Service Board of Contract Appeals    |
| DCMA-INST | DCMA Instruction                           |
| DRS       | Dispute Resolution Specialist              |
| EEO       | Equal Employment Opportunity               |
| EEOC      | Equal Employment Opportunity Commission    |
| FLRA      | Federal Labor Relations Authority          |
| FMCS      | Federal Mediation and Conciliation Service |
| GC        | General Counsel                            |
| MSPB      | Merit Systems Protection Board             |
| OPR       | Office of Primary Responsibility           |
| OSC       | Office of Special Counsel                  |
| PLAS      | Performance Labor Accounting System        |