

## A match made in heaven

*Procurement disputes and alternative dispute resolution*

**P**arties involved in procurement and government contracting disputes in Canada who want to complete the contracts on time and within budget should whole-heartedly embrace the practice of alternative dispute resolution, also known as ADR. Touted as being "faster, cheaper and better" than traditional adversarial litigation, ADR has been hailed as a way to lessen costs, save time, reduce stress, build and strengthen relationships, provide more flexible processes and more party-sensitive and complex solutions than a traditional litigated outcome.

ADR encompasses a wide range of techniques, including negotiation, mediation, arbitration, settlement conferences and mini-trials that may be used to attempt to resolve a legal dispute without having to proceed to trial.

The benefits of such resolutions are obvious: the savings in time, expense, effort and emotional stress for the parties, as well as a reduction in the number of cases proceeding to court with a savings in court resources. There is also the opportunity for the parties to participate more directly in the process and to tailor the resolution to the parties' needs in a way that the parties are more satisfied with the result instead of their being a "winner" and a "loser" at trial. This also increases compliance with the resolution and can result in greater public satisfaction with our justice system.

ADR recognizes the inefficiencies with having one's day in court and that often winners of lawsuits are losers in terms of fees, frustration and wasted time, not to mention other factors not measurable in monetary terms, like ruined relationships. As the French philosopher Voltaire said, "I was ruined but twice—once when I lost a lawsuit—and once when I won one!"

ADR is a valued, integral and complimentary part of the civil justice system, which strives to provide a fair, just and accessible resolution to the legal disputes of all individuals in the manner best-suited to the type of dispute and the needs of the parties.

### Procurement disputes

ADR is ideal for the resolution of procurement disputes whether they are small or large, simple or complex, local, inter-provincial, national or international. In fact, the practice has permeated into procurement systems in Canada and internationally. Public procurement practitioners and government contract administrators around the world have adopted it. They recognize ADR is a tool—offering variety, flexibility, adaptability and practicality—that, if skilfully and appropriately used, promises to help in fundamentally enhancing procurement systems which are comprised of complex case law authorities, statutes, regulations, international and domestic trade agreements/treaties, practices, policies and procedures that are the foundation of the competitive procurement/tendering systems in Canada and elsewhere.

Those involved in procurement disputes that are experimenting with or are using ADR techniques and concepts recognize ADR's im-

measurable value and versatility. These participants, who have chosen to take advantage of these facilitating elements of the ADR process, have maximized the chances of resolving their procurement disputes. They are the ones that have experienced a reduction in costs and risk to their reputations, all the while keeping the process in the hands of public procurement officials, managers and government contract administrators, and out of the hands of lawyers and judges.

They have been able to engage in discussions without prejudice; to facilitate communication; to better identify the problem and work on a solution; to keep the negotiation process alive and emotionalism to a minimum; to better re-assess legal predictions; and to shift the focus to completing the contracts on time and within budget instead of on the dispute or the disputants.

Disputes within the public procurement field and ADR can be a match made in heaven. ADR's full potential—although recognized—has yet to be realized. Inventiveness and imagination will yield further ADR innovations and hybrid techniques and concepts. The process of evolution will continue.

Careful, critical examination by both proponents and critics of ADR, especially in the context of procurement disputes, is required to properly evaluate the ADR phenomenon and its value, effects and different procedures and objectives. In this process of raising questions, effective solutions may be found.

The key is the effective use of ADR and the need to "fit the fuss to the forum." That is, select the correct process and people for the specific dispute and the disputants. In this way, the appropriate dispute resolution process will be selected as the best match for a particular dispute and the specific parties involved. **b2b**

*Marvin J. Huberman, LL.M., is a Toronto lawyer, mediator and arbitrator. Visit Marvin online at: [www.marvinhuberman.com](http://www.marvinhuberman.com).*