



Office of the Procurement
Ombudsman

Bureau de l'ombudsman
de l'approvisionnement

A background image of a city skyline, likely Toronto, with various skyscrapers. The image is overlaid with a horizontal gradient bar that transitions from purple on the left to orange on the right. The title text is centered over this bar.

What to Expect: Alternative Dispute Resolution

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INTRODUCTION

This guide outlines the Office of the Procurement Ombudsman's (OPO) process and timelines for providing alternative dispute resolution services, and provides an overview of the expectations for all parties involved.

1.1 The Procurement Ombudsman's mandate

Paragraph 22.1(3)(d) of the *Department of Public Works and Government Services Act* states:

The Procurement Ombudsman shall, in accordance with the regulations,

(d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.¹

Subsections 23(1) to (3) of the *Procurement Ombudsman Regulations* state:

- (1) If a party to a contract requests an alternative dispute resolution process under paragraph 22.1(3)(d) of the Act with respect to a dispute on the interpretation or application of a contract's terms and conditions, the Procurement Ombudsman shall ask the other parties if they agree to participate in such a process and to bear the costs of that process, within 10 working days after the request, and permit those parties 10 working days to respond to his or her request.
- (2) The Procurement Ombudsman shall receive a request that is in writing and includes
 - a. the names of the parties to the contract;
 - b. a copy of the contract; and
 - c. a brief summary of the facts in issue.
- (3) Within 10 working days after receiving the last of the other parties' responses:
 - a. if all parties agree, the Procurement Ombudsman shall submit to the parties a proposal for an alternative dispute resolution process; and
 - b. if the parties do not agree, the Procurement Ombudsman shall notify the party who made the request that the request cannot be granted.

1.2 What is alternative dispute resolution?

OPO defines alternative dispute resolution (ADR) as a confidential and voluntary process in which a certified OPO mediator assists the parties involved in a contractual dispute to address the issues being contested and resolve the dispute.

1.3 What types of ADR does OPO offer?

OPO offers two types of ADR processes:

¹ One of the parties to the contract must be a federal organization.

- **Facilitation:** An informal process in which a certified OPO mediator assists parties by playing an intermediary role in communicating between the parties to help them understand each other's views and to seek to help them resolve their dispute informally. This process is also referred to as "shuttle diplomacy."
- **Mediation:** A formal process in which a certified OPO mediator guides parties through discussions about the disputed issues in an attempt to help the parties resolve those issues and reach a mutually acceptable solution. The mediator has no decision-making power. So while the mediator is responsible for managing the process, the parties maintain control over the substance and outcome of the mediation. If an acceptable solution is reached, the parties will sign a legally binding settlement agreement.

1.4 Who can the Procurement Ombudsman offer ADR to?

The Procurement Ombudsman can provide an ADR process to Canadian suppliers and federal organizations listed in schedules [I](#), [I.1](#) and [II](#) of the *Financial Administration Act*. This essentially means that most federal organizations – excluding Crown corporations – fall within the mandate of the Procurement Ombudsman. However, Section 3 of the Regulations prohibits the Procurement Ombudsman from providing an ADR process to the Canadian Security Intelligence Service, and the staff of the Senate and the House of Commons.

The Regulations prescribe that the Ombudsman may only provide an ADR process for disputes regarding the interpretation or application of a procurement contract's terms and conditions. The requesting party must be a party to the contract in dispute.

1.5 Why use OPO's ADR process?

OPO's ADR process provides an alternative to litigation that is both less costly and less time consuming. OPO's services are provided on a no-fee basis and, with the exception of any applicable travel costs, usually do not result in costs to the parties to participate in the ADR session. OPO also handles all the logistics of the ADR session, including scheduling and room bookings. By using OPO's no-fee ADR process, the parties to a contract are guaranteed a neutral mediator who has no vested interest in the outcome of the process, while saving time and money when compared to litigation. In addition, OPO's ADR process is confidential and voluntary, and the discussions are undertaken on a "without prejudice" basis. More importantly, OPO's ADR process allows the parties to retain control over the solutions generated and the resolution of the dispute.

INFORMATION NECESSARY FOR THE ADR PROCESS

2.1 Information required

In order to initiate an OPO ADR process, subsection 23(2) of the Regulations requires:

- 2) The Procurement Ombudsman shall receive a request that is in writing and includes:
 - a. the names of the parties to the contract;

- b. a copy of the contract; and
- c. a brief summary of the facts in issue.

The requestor must be a party to the contract. Once the request has been received, the Ombudsman shall ask the other party (or parties²) to the contract if they agree to participate in an ADR process. The written agreement of all parties is required for OPO ADR process to be initiated.

HOW DOES OPO'S ADR PROCESS WORK?

The following section provides an overview of what to expect from the OPO ADR process.

3.1 Initial contact with the parties

A supplier or a federal organization can request OPO's ADR services. Within 10 days of receiving a written request for ADR, the Procurement Ombudsman will ask the other parties to the contract if they agree to participate. The other parties have 10 working days to respond to the request. If the other parties do not agree, the Ombudsman will notify the requesting party that their request for ADR cannot be granted. If, on the other hand, the other parties agree, the Ombudsman will submit a proposal to all parties for a mediation process within 10 working days of receiving written agreement from all parties.

Throughout this time (i.e. from the receipt of the ADR request to the receipt of responses from all parties), a certified OPO mediator will act as a facilitator between the parties to try to resolve the issues prior to proceeding to the mediation session. If the issues can be resolved through facilitation, then the requesting party has the option to withdraw their request for ADR.

3.2 Planning

Once all parties have agreed to participate in the ADR process, the Ombudsman will draft a mediation proposal for review and acceptance by all parties. This proposal, which will be based on consultation and discussion with the parties, will include the duration and location of the process. The proposal will then be sent to all parties for review and comment. On the basis of the feedback, the proposal will be updated as necessary. Once the proposal has been accepted and signed, preparations will begin for the session. As part of the no-fee service, OPO will take care of logistics, from booking rooms to obtaining equipment and liaising with the parties. In general, the parties will need to set aside one working day for the conduct of the mediation session. OPO will seek to obtain the parties agreement to have a face-to-face mediation session.

² The Regulations require the Ombudsman to "ask the other parties [to the contract] if they agree to participate in" an ADR process.

Prior to the session, OPO mediator will contact each party by telephone for a pre-ADR discussion. This discussion allows the mediator to provide an overview of the process and answer any questions the parties may have.

3.3 Mediation session

The following is an overview of how a typical mediation session will unfold.

A certified OPO mediator will begin the day by establishing ground rules that will help guide the session. Key guiding principles are that the parties will treat each other with respect and common courtesy throughout the session.

The parties will then have an opportunity to present their version of the events that led to their participation in the mediation session; what OPO refers to as “storytelling.” While parties should arrive ready to present their story, there is no obligation to provide a written position paper prior to or during the ADR session.

Once each party has had an opportunity to present their version of events, the mediator will ask each party to discuss their issues and interests. This allows the parties to outline the problems (issues) they want to resolve and explain the importance of resolving those problems (interests).

Next, the parties will be asked to brainstorm potential solutions. It is key to keep an open mind during the brainstorming and to identify all potential solutions. Some solutions may be presented by the mediator. If a party is considering a solution, but is not yet willing to discuss it with the other party, they can raise it in caucus with the mediator.

It is important to note that any solutions proposed during brainstorming are considered non-committal or non-binding. Moreover, OPO’s mediation sessions are without prejudice, meaning anything discussed in the session cannot be used in legal proceedings. Throughout the mediation, individuals involved in the session are free to consult with individuals not present (including legal counsel) and can request private consultations (caucuses) with the mediator.

Once solutions have been brainstormed, the mediator will begin to work with parties to identify which solutions may be durable options. Durable options are those that will address the issues and interests of all parties. Through discussion of these options, the mediator will work with the parties to determine which solutions could be included in a settlement agreement.

3.4 A settlement is reached

If a settlement agreement is reached during the mediation session, a document will be completed and signed by the parties. A copy of the signed agreement will be provided to each party at, or immediately following, the end of the mediation session. This settlement agreement is a legally binding document. After the conclusion of the session, OPO will write to all parties to acknowledge the results of the ADR process and conclude the ADR.

3.5 A settlement cannot be reached

If a settlement cannot be reached by the end of the session, OPO's mediator will acknowledge any progress made, identify potential options for the parties to move forward and confirm if and how the parties plan to move forward.

Should parties wish to continue to try to resolve the dispute, it is possible to schedule another mediation session. If the parties do not agree to another mediation session, the mediator will offer to continue to attempt to resolve the issues using facilitation (i.e. "shuttle diplomacy"). This involves the mediator going back and forth between the parties by email and telephone until an agreement can be reached by the parties.

At any time during the mediation, the parties may choose to withdraw. In the event that a party does so, the mediator will inform the other parties of this decision, discuss any progress made with all parties, and provide potential options for moving forward.

3.6 What the parties can expect from OPO

During the process, the parties can expect that OPO will:

- show respect, fairness, professionalism and courtesy to all parties;
- manage the mediation process in an unbiased, independent and efficient manner;
- perform duties in a manner that instills confidence in the impartial nature of OPO;
- ensure that OPO's actions are transparent to all parties, without compromising confidentiality where it is required.

3.7 What OPO expects from the parties

During the process, OPO expects the parties will:

- ensure the representative(s) for each party have sufficient authority to speak on behalf of, and agree to a legally binding settlement agreement for, their organization;
- disclose information that is relevant to resolving the dispute, both prior to and during the mediation session;
- simplify any documentation to ensure that it can be understood by all;
- refrain from personal attacks against the other parties;
- treat all parties with respect; and
- come to the mediation with an open mind and prepared to discuss potential options and solutions.

A ROADMAP TO THE ADR PROCESS

