

**OFFICE OF THE CHIEF TRIAL ATTORNEY  
US ARMY LITIGATION CENTER  
ARLINGTON, VIRGINIA**



**ALTERNATIVE DISPUTES RESOLUTION**

Policies and Procedures Guide  
for  
Trial Attorneys

## **INTRODUCTION**

**The use of Alternative Disputes Resolution (ADR) techniques to resolve contract disputes continues to grow. Throughout the Army ADR has successfully been used both in large, complex cases as well as in smaller disputes that many would consider routine in nature. In all instances the use of ADR resulted in significant savings in time and resources. As more and more professionals learn when and how to use ADR effectively they find new and different ways to efficiently apply ADR techniques to solve business disputes.**

**This ADR Policy and Procedure Guide is designed primarily for use by members of the Army Contract Appeals Division (CAD). It provides suggestions on how to analyze a particular dispute for its ADR potential and provides a ready ADR reference guide. Others outside of CAD are welcome, and encouraged, to use it as a guide whenever they are considering ADR as a tool for disputes resolution.**

**Nicholas P. Retson**

**COL, JA  
Army Chief Trial Attorney**

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**Many of the materials in this guide would not have been possible without support from the other legal members of the Acquisition Working Group of the DoD ADR Coordinating Committee: Joe McDade (Air Force); Mark Wilkoff (Navy); George Sisson (Defense Logistics Agency); and Frank Carr (Corps of Engineers). I thank them for their assistance, contributions, and suggestions. Thanks also to Judge Martin Harty of the Armed Services Board of Contract Appeals for sharing his sample agreements and judges survey. A special thanks to LTC Ralph Littlefield, LTC Steve Dooley, and MAJ Sam Stevenson of Contract Appeals Division for their writing and researching contributions and to Sondra Wood for her administrative support.**

## TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
Introduction	i
Table of Contents	ii
<b><u>ALTERNATE DISPUTE RESOLUTION POLICIES AND PROCEDURES</u></b>	1
1. Application	1
2. Purpose	1
3. Policy	1
4. Procedures	1
a. ADR Team Chief	1
b. ADR Timing	1
c. Determining Whether ADR is Appropriate	2
d. Determining an Appropriate ADR Method	2
e. ADR Forum	3
f. Required Approvals to Conduct ADR	4
g. Requirements in Utilizing ADR	4
h. Settlement ADR	5
i. After-Action Report	6

5. References and Resources		6
Enclosure 1:	<u><a href="#">ADR APPROPRIATENESS CHECKLIST</a></u>	1-1
Enclosure 2:	<u><a href="#">Results of Survey of Boards of Contract Appeals (BCA) Attitudes Towards Alternative Dispute Resolution (ADR)</a></u>	<u><a href="#">Judges'</a></u> 2-1
Enclosure 3:	<u><a href="#">ADR METHODS CHECKLIST</a></u>	3-1
Enclosure 4:	<u><a href="#">ASBCA NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION</a></u>	4-1
Enclosure 5:	<u><a href="#">BOARDS OF CONTRACT APPEALS - ALTERNATIVE DISPUTE RESOLUTION (BCA-ADR) SHARING ARRANGEMENT</a></u>	5-1
Enclosure 6:	A. <u><a href="#">ADR SAMPLE AGREEMENT</a></u>	6-A-1
	B. <u><a href="#">NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS</a></u>	6-B-1
	C. <u><a href="#">ASBCA AGREEMENT TO USE SETTLEMENT JUDGE</a></u>	6-C-1
	D. <u><a href="#">ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE</a></u>	6-D-1
	E. <u><a href="#">ASBCA AGREEMENT TO UTILIZE THE SUMMARY TRIAL</a></u>	6-E-1
Enclosure 7:	<u><a href="#">CAD ADR SETTLEMENT GOALS MEMORANDUM</a></u>	7-1
Enclosure 8:	<u><a href="#">CAD EVALUATION OF ALTERNATIVE DISPUTE RESOLUTION PROCESS REPORT FORM</a></u>	8-1
Enclosure 9:	<u><a href="#">DoD &amp; HQDA POLICY STATEMENTS ON ADR</a></u> (excerpts)	9-1

Enclosure 10: **THE ADMINISTRATIVE DISPUTE RESOLUTION ACT** **OF**  
**1996** - *What You Need To Know To Make it Work For You.*  
Attachment: Full Text of ADR Act of 1996 10-1

## **ADR SERIES - POLICIES AND PROCEDURES**

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### **ALTERNATE DISPUTE RESOLUTION POLICIES AND PROCEDURES**

#### **1. APPLICATION.**

a. Attorneys in the Army Contract Appeals Division (CAD) are to use the following policies and procedures when considering the use of alternative dispute resolution (ADR) techniques facilitated by a third-party neutral. Although CAD considers negotiated settlements not using third-party ADR procedures to be a form of ADR resolution (basic settlements), they are outside the scope of this memorandum.

b. Non-CAD personnel are welcome to use these policies and procedures as guides when making their own decisions about the applicability of ADR to a particular dispute.

2. **PURPOSE.** This memorandum is designed to:

a. Provide a framework for decisions concerning whether to utilize ADR procedures.

b. Provide guidance in utilizing ADR procedures.

#### **3. POLICY.**

a. Federal Government policy favors the use of ADR in resolving Government business disputes (see, *e.g.*, FAR 33.204). Although ADR is not appropriate in every dispute, it can greatly facilitate the resolution of disputes when it is properly used.

b. It is the policy of the Army Chief Trial Attorney (CTA) to assist the Army to efficiently and expeditiously resolve its business disputes. Proper use of ADR techniques by CAD Trial Attorneys helps carry out this policy and supports CAD's "Partners In Litigation" initiatives.

#### **4. PROCEDURES.**

a. ADR Team Chief. The CTA will appoint an "ADR Team Chief" to coordinate CAD's ADR efforts, to collect data and lessons learned, and to assist non-CAD personnel on ADR matters.

b. ADR Timing.

(1) *Prior to Notice of Appeal.* Contracting Officers or field attorneys may request CAD's assistance in resolving a dispute prior to the filing of an appeal. After consultation with their Team Chief, and to the extent practicable, Trial Attorneys are encouraged to assist field personnel in resolving disputes through informal procedures. These procedures can include, but are not limited to, MACOM or other command dispute resolution procedures, and ADR conducted IAW this policy memorandum. Such assistance supports CAD's efforts to have disputes resolved at the lowest possible level and, if not resolved, to have the Army's evidence as organized as possible when the appeal arrives at CAD. At this stage in a dispute CAD has only limited knowledge of

"PRACTICE TIPS" and "ADR SERIES" are prepared by members of the US Army Contract Appeals Division as an element of our "Partners in Litigation" program. They are intended to share practical experiences of those involved at all stages of the contract disputes process. Your ideas, comments, experiences, and improvements are welcome at any time (703) 696-1500; FAX (703) 696-1535; DSN 426 + ext.

## ADR SERIES - POLICIES AND PROCEDURES

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the key facts. Advice should be focused on informing field personnel about available options.

(2) *After Appeal is Initiated.* Trial Attorneys will more commonly encounter the opportunity to utilize ADR after an appeal is filed with the Armed Services Board of Contract Appeals (ASBCA). In this situation the three main considerations are:

(a) Is ADR appropriate?

(b) If ADR is appropriate, what ADR method will be used?

(c) Will the ADR be conducted by the ASBCA pursuant to its procedures, or will it be conducted using a non-affiliated third party with procedures agreed to between the parties?

c. Determining Whether ADR is Appropriate.

(1) *General.* Trial Attorneys will analyze each assigned appeal IAW the enclosed ADR Appropriateness Checklist to determine whether using ADR is appropriate (Encl. 1). This analysis will be done not later than the time of filing the Government's answer (or equivalent stage of the appeal if for some reason a Government answer will not be filed). It will be analyzed again at appropriate stages throughout the appeal such as after completion of written discovery, after completion of depositions, or when either side expresses an interest in settlement. Trial Attorneys should also consider requesting a Rule 11 submission, if appropriate, at each of these stages. A copy of the CAD

ADR Appropriateness Checklist will be included in each new case file.

(2) *Survey of Board Judges.* The results of a survey of Boards of Contract Appeals judges appears as Enclosure 2. It provides useful insight into their perspective on the usefulness of ADR.

d. Determining an Appropriate ADR Method.

(1) *General.* Every ADR technique or method has its own strengths and weaknesses. If the Trial Attorney determines that ADR is appropriate, the next step is to determine the appropriate method for conducting the ADR. Trial Attorneys shall use the enclosed ADR Methods Checklist to determine the ADR method most appropriate for the particular case (Encl. 3).

(2) *Legal Authority.* The primary sources of authority for utilizing ADR are 41 USC § 605(d) (the Contract Disputes Act), FAR 33.214 (Alternative Dispute Resolution), and 5 USC Subchapter IV (Alternative Means of Dispute Resolution in the Administrative Process), as amended by PL 104-320 (the Administrative Dispute Resolution Act of 1996 [ADRA]). The statutory authority in Title 5 of the USC includes a number of provisions that may not be applicable when proceeding under the authority of the Contract Disputes Act and FAR. Therefore, in determining an appropriate ADR method, the Trial Attorney must concurrently examine the sources of authority to determine which source is most appropriate for use in the particular appeal. The full text of the

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## ARMY CONTRACT APPEALS DIVISION

## ADR SERIES - POLICIES AND PROCEDURES

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ADRA and a helpful commentary about its contents appear at Enclosure 10.

(3) *ASBCA Methods*. The ASBCA's Notice Regarding Alternative Methods of Dispute Resolution ("ADR Notice"), refers to three methods for conducting ADR: settlement judge, minitrial, and summary trial with binding decision (Encl. 4). It also provides for "other informal methods which are structured and tailored to suit the requirements of the individual appeal."

(4) *Restriction on ADR Methods*. CAD attorneys are not limited to ADR methods specified in the ADR Notice. They may employ any appropriate ADR method, except that binding arbitration will not be proposed or utilized without the Chief Trial Attorney's (CTA) or Deputy CTA (DCTA) approval. This restriction is imposed because of special statutory requirements and the fact that arbitration is one of the least preferred ADR methods. Generally, ASBCA-sponsored Summary Trial with Binding Decision will be used instead. Attorneys proposing binding arbitration will submit a written request to utilize binding arbitration through their Team Chief to the CTA. The request will include:

(a) A short summary of the case and its present status.

(b) A summary of factors relevant to the decision whether to use binding arbitration, including a notation of the Contracting Officer's concurrence in the proposal (may be telephonic).

(c) Justification for the use of binding arbitration satisfying the requirements of applicable guidance established pursuant to 5 USC § 575(c) (Added by PL 104-320). [Note: As of the date of this memorandum, the Department of Defense has not yet issued guidance implementing the statutory authorization to conduct binding arbitration. Until such DoD guidance is issued, the Army has no legal authority to participate in any binding arbitration ADRs other than those approved by the Board.]

(d) The proposed source(s) for an arbitrator, the probable expense to employ an arbitrator, and the party or parties who will pay this expense.

e. *ADR Forum*. Trial Attorneys should also consider whether the ADR will be conducted by the ASBCA IAW its ADR Notice, by a judge from another Board, or by a third-party neutral not affiliated with the Board. Requests for ASBCA judges or judges from other Boards of Contract Appeals will be made by letter to the appropriate Board Chairman, unless the Board specifies another procedure. The following priorities apply in selecting the ADR forum. Unless authorized by the CTA a lower-priority option will not be used unless all higher-priority options are unavailable. Funds for cost associated with a neutral are the responsibility of the contracting command.

(1) An ASBCA judge appointed by the Chairman [generally no added costs involved].

(2) A judge from another Board of Contract Appeals, appointed by its Chairman

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## ARMY CONTRACT APPEALS DIVISION

## ADR SERIES - POLICIES AND PROCEDURES

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[may have to pay costs and salaries; but see, BCA-ADR Sharing Arrangement (Encl. 5)].

(3) A third-party neutral not affiliated with a Board of Contract Appeals [generally must pay for cost and or fees].

f. Required Approvals to Conduct ADR.

(1) *Consultation with Team Chief.* Trial Attorneys will consult with their Team Chief prior to concurring in a proposal to conduct ADR or completing an ADR agreement. Team Chiefs will consult with the DCTA or CTA if the amount in controversy, the nature of the issues, and the potential for higher-level (MACOM or above) interest in the outcome so warrant.

(2) *Contracting Officer's Approval Required.* The appropriate Contracting Officer must approve use of ADR and the particular ADR method proposed for use. It is the Trial Attorney's responsibility to ensure that the Contracting Officer and the field attorney fully understand the potential limitations and benefits of a selected ADR procedure.

(3) *Board Approval.* When utilizing an ADR method involving a third-party neutral from a Board of Contract Appeals other than the ASBCA or a non-affiliated third-party neutral, the parties will notify the ASBCA of the intended action and seek a stay in the appeal so that the ADR proceeding can take place.

g. Requirements in Utilizing ADR. When the Trial Attorney, Contracting Officer, and the Appellant are all in agreement that ADR is

appropriate, certain steps must be taken. The following guidelines apply:

(1) *ADR Agreement - General.* Agreements to conduct ADR will be reduced to writing and signed by the Contracting Officer and Appellant's counsel (or Appellant, if *pro se*). Trial Attorneys will review relevant provisions of the agreement with the Contracting Officer and field counsel before it is signed. This review will include the Government's waiver of appeal rights (if necessary) and discussion of other differences between formal litigation and the proposed ADR method. Sources and availability of funds for paying amounts agreed to in the ADR proceeding will also be addressed. The Trial Attorney will also ensure that the Contracting Officer secures any local or MACOM approvals required for participation in ADR.

(2) *ADR Agreement - Content.* The content of ADR agreements will accurately reflect the parties' agreement based on the specifics of each case. The agreement should always describe the method of ADR being used and the role of the third-party neutral. Some sample ADR agreements are attached at Enclosure 6. These can be modified for your particular ADR case. The following issues should also be considered for inclusion in the agreement.

(a) Cost-sharing arrangements for ADR expenses.

(b) Timing, method, and scope of discovery.

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## ARMY CONTRACT APPEALS DIVISION

## ADR SERIES - POLICIES AND PROCEDURES

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(c) Timely, method and scope of pre-ADR submissions such as position papers and exhibits.

(d) Restrictions on use of materials generated for or presented in the ADR proceeding.

(e) The identity of the principals who will represent each party in the ADR. Consider the benefits and weaknesses of designating someone other than the original Contracting Officer as the Government's primary representative in the ADR. In some cases it is preferable to use a representative that has no "emotional" attachment to the original Government position.

h. Settlement ADR. Settlement ADR includes, but is not limited to, the ASBCA's Settlement Judge and Minitrial methods of ADR. In settlement ADR, the parties, not the ASBCA, determine the outcome of the appeal. The Government's representative must have settlement authority. CAD Trial Attorneys do not have settlement authority. Only a contracting officer can speak for the Government in settling an ASBCA appeal. However, AFARS 33.212-90-7(a)(2) provides that Contracting Officers "shall consult with the Chief Trial Attorney before accepting a contractor's offer of settlement and before making a settlement offer to the contractor." *Post facto* consultation with the CTA is contrary to the expectation that a full and binding settlement will be reached during the ADR proceeding. The following procedures will therefore be used to maximize the probability of success at settlement ADR proceedings.

(1) When a settlement ADR agreement is approved by the parties the Trial Attorney will prepare a short memorandum to the CTA or appropriate delegee. A sample memorandum is enclosed (Encl. 7). The memorandum will include a copy of the settlement ADR agreement, will discuss the case background and factors relevant to the ADR, and will discuss the Government's goals in the settlement, including a target settlement amount (if appropriate). The Government's goals and target settlement amount should be based on the Trial Attorney's assessment of litigation risk and other factors relevant to the proposed settlement. Upon the CTA's (or delegee's) concurrence, the Trial Attorney is authorized to represent the CTA in consultation with the Contracting Officer during the course of the settlement ADR process in satisfaction of the AFARS 33.212-90-7(a)(2) requirement.

(2) Occasionally, successful settlement may require agreement to a provision that would be significantly more onerous to the Government than was contemplated in the Trial Attorney's settlement ADR memorandum to the CTA or delegee. If this is the case, the Trial Attorney should, if possible, contact the CTA or appropriate delegee to discuss the issue.

(3) Trial Attorneys will not request or participate in joint requests that specify a specific ASBCA judge to be assigned to the settlement ADR.

i. After-Action Report. Trial Attorneys and Contracting Officers will prepare a short after-action report following completion of ADR

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## ARMY CONTRACT APPEALS DIVISION

## **ADR SERIES - POLICIES AND PROCEDURES**

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proceedings, to be submitted through the Team Chief to the CTA. A copy will be filed in the appeal file. A sample after-action report is enclosed (Encl. 8).

### **5. REFERENCES AND RESOURCES.**

#### a. References.

(1) 5 USC, Subchapter IV, § 571 *et seq.*, as amended by PL 104-320.

(2) 41 USC § 605, as amended by PL 104-320.

(3) Executive Order No. 12778, 23 October 1991.

(4) FAR 33.201, 33.204, 33.207, 33.212, 33.214.

(5) DoD Directive 5145.5 (22 APR 96)

(6) Sec Army Policy Letter (25 Jul 95)

(7) Asst Sec Army (RD & A) Policy Letter (1 May 96)

#### b. Resources.

(1) CAD ADR Appropriateness Checklist (Encl. 1).

(2) Survey Results of BCA Judges' Attitudes Towards ADR (Encl. 2).

(3) CAD ADR Methods Checklist (Encl. 3).

(4) ASBCA Notice Regarding Alternative Methods of Dispute Resolution (Encl. 4).

(5) BCAs ADR Sharing Agreement (Encl. 5).

(6) Sample ADR Agreements (Encl. 6).

(7) Sample CAD ADR Settlement Goals Memorandum (Encl. 7).

(8) CAD ADR After-Action Report Form (Encl. 8).

(9) DoD & HQDA Policy Statements on ADR (excerpts) (Encl. 9).

(10) Air Force Paper entitled "The ADR Act of 1996 - What You Need To Know To Make It Work For You" (Encl. 10).

#### (c) Point of Contact

The Contract Appeals Division "ADR Team Chief" may be contacted if you have questions concerning use of ADR procedures and a Trial Team Chief has not yet been assigned. Call (703) 696-1500 or DSN 426-1500, and ask for the ADR Team Chief.

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(updated 11 June 1997)

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## **ARMY CONTRACT APPEALS DIVISION**

## **ADR SERIES - APPROPRIATENESS CHECKLIST**

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### **ADR APPROPRIATENESS CHECKLIST**

Use the following factors, to the extent relevant in the particular appeal, in determining whether ADR procedures are appropriate:

#### **a. General Considerations .**

(1) Will using ADR be more cost efficient, faster, or enhance the opportunities for a better result than litigation or traditional settlement negotiations?

(2) Will using ADR otherwise benefit the case, such as by narrowing the issues or expediting critical discovery?

#### **b. Factors Favoring ADR.**

(1) There is a continuing relationship between the parties.

(2) There may be benefits from either party hearing directly from the opposing party.

(3) Either party would be influenced by the opinion of a neutral third party.

(4) The opposing party does not have a realistic view of the case, but may be influenced by a strong presentation.

(5) The parties have expressed a desire to settle or give indications that they do not want to litigate the case.

(6) Either party needs a swift resolution.

(7) The case is factually and/or technically complex.

(8) The forum or decision maker is unfavorable.

(9) Flexibility is desired in the remedies that may be given.

(10) Trial preparation will be substantially more difficult, costly, or lengthy than preparation for ADR.

(11) There is need to avoid an adverse precedent.

(12) The dispute is primarily factual, and the applicable law is well-settled.

(13) Each party's position has some merit, but its value may be overstated.

(14) No further discovery is required, or limited expedited discovery will suffice, for each side to adequately assess its case.

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## **ADR SERIES - APPROPRIATENESS CHECKLIST**

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(15) Use of a third-party neutral may overcome hostility or personality conflicts that are hindering settlement.

### **c. Factors Disfavoring ADR.**

(1) A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent (5 USC § 572(b)(1)).

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency (5 USC § 572(b)(2)).

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions (5 USC § 572(b)(3)).

(4) The outcome would significantly affect nonparties (5 USC § 572(b)(4)).

(5) A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record (5 USC § 572(b)(5)).

(6) The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution

proceeding would interfere with the agency's fulfilling that requirement (5 USC § 572(b)(6)).

(7) The dispute is primarily over issues of law.

(8) The case is likely to settle soon without outside assistance.

(9) The case is likely to be resolved efficiently by motion.

(10) The Appellant/opposing counsel are not trustworthy, or there is need for continuing Board supervision of one of the parties.

(11) The case involves fraud (this bars settlement, whether through formal ADR or otherwise).

(12) The cost of using ADR would probably be greater (in time and money) than the costs of pursuing litigation.

(13) The other side's case is without merit, so that there is no basis for compromising the Government's position.

(14) The other side has no real motivation to settle.

(15) More time is needed to evaluate each side's position and settlement possibilities.

revised 11 Jun 97

**The following is a retyped copy of a survey on ADR  
compiled by ASBCA Judge Martin J. Harty**

**Results of Survey of  
Boards of Contract Appeals (BCA) Judges' Attitudes  
Towards Alternative Dispute Resolution (ADR)  
October 1996**

I. Introduction

A. The survey was conducted during October 1996 and updates a similar survey conducted in late September and early October, 1994. The numbers presented should be considered estimates and are aimed at providing a rough order of magnitude.

B. Over 80 percent of the BCA judges responded. This compares to a roughly 85 percent response to the 1994 survey. Of the judges responding, almost all had participated in at least one ADR proceeding, although not necessarily within the last two years. (In the previous study, over 80 percent of the judges reported participating in at least one ADR proceeding.)

C. For purposes of defining ADR techniques, the ASBCA's "Notice Regarding Alternative Methods of Dispute Resolution" was used. The notice describes three basic techniques. One is binding: the summary trial with binding decision. The other two methods are non-binding: the settlement judge and minitrial.

II. Scope of ADR Activity at the BCA's

A. Some measurements of ADR activity:

1. From 1987 through fiscal year 1994, there were roughly 216 ADR requests, covering 330 appeals. In the case of the ASBCA, for example, there were 93 requests for ADR, covering 164 appeals, with most ADR activity beginning in fiscal year 1990.

2. For fiscal year 1994, the ASBCA received 19 requests, covering 29 appeals. Five of the requests were for binding ADR and the remaining 14 requests were for

## **ADR SERIES - ASBCA SURVEY**

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non-binding ADR, with 10 requests for a settlement judge and 4 requests for minitrials. The other boards identified 12 requests.

3. For fiscal year 1995, the boards received ADR requests covering 107 appeals. The ASBCA received 31 requests for ADR, covering 61 appeals. Of the requests, 12 were for binding ADR and the remaining 19 requests were for non-binding ADR, with 17 requests for a settlement judge and 2 requests for a minitrial. The other boards reported receiving requests covering 46 appeals.

4. For fiscal year 1996, the boards received ADR requests covering 169 appeals. The ASBCA received 42 requests covering 53 appeals. Of the 42 requests, 21 were for binding ADR and the other 21 requests were for non-binding ADR, with 16 requests for a settlement judge and 5 requests for minitrials. The other boards reported receiving requests covering 116 appeals.

B. Many judges felt that the increased focus on ADR by the Government and the private sector has had an impact at their board, although no one would say it was dramatic. Many observed that ADR has been available at the boards for sometime. Some pointed to an increase in ADR activity itself as evidence of the effect. Others expressed the feeling that the parties were more willing to consider settlement. As a result, they believed more cases were settling, and settling earlier. A few speculated that a change in attitudes has resulted in more settlements at the contracting officer level and, consequently, fewer appeals.

### III. Support for ADR

A. Over 85 percent believe that encouraging the parties to engage in ADR should be an integral part of board proceedings. This compares to 70 percent in the 1994 survey. The remaining judges felt that it was enough to simply make the parties aware of the availability of the procedure. A number of judges who would encourage use of ADR pointed out that the potential for a faster, less expensive disposition of the appeal served the Contract Disputes Act's goal of informal, expeditious resolution of disputes. Though more judges are willing to "encourage" the use of ADR, all would draw the line at being seen as coercing the parties. As in the 1994 study, they share a concern with those who would maintain a more neutral stance about "pressing" the parties to adopt an ADR procedure for the resolution of their dispute. More than one judge pointed out that compelling the parties to participate in a non-binding ADR could undermine the chances for success. In summary, ADR is viewed as an important "tool" for dispute resolution, but not one that should be forced on the parties.

B. The 1994 survey confirmed the willingness of over 80 percent of the judges to act as a neutral in an ADR proceeding even before an appeal was docketed. (Resource constraints and the

## **ADR SERIES - ASBCA SURVEY**

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demands of dealing with docketed appeals were of particular concern to some of those who responded negatively.) In addition, almost 85 percent were willing to stay a proceeding while the parties engaged in ADR independent of their board and then enter the settlement as a board judgment. Board Chairs responding to the October 1996 survey again confirmed their willingness to have board judges serve as neutrals before an appeal was docketed and to stay a proceeding to allow an ADR effort independent of the board in an appropriate case.

C. During fiscal years 1995 and 1996, very few ADR requests were turned down. The only reported rejections occurred at the ASBCA where two judges reported turning down requests. Of those judges responding to the 1994 survey, only six judges reported turning down a request for ADR.

1. The low rejection rate is attributable in large measure to the requirement, formal or informal, of a number of boards that the request for ADR be joint.
2. The reasons given in the 1994 survey for refusing a request was that it was either not joint or the presiding judge believed one of the parties was not committed to the process. The latter reason was cited by the two judges turning down requests in fiscal years 1995 and 1996.

### **IV. Cases Appropriate for ADR**

A. Judges continue to consider all ADR techniques effective in resolving disputes. Almost all are unwilling to rule out any case for ADR, particularly if the parties believe the process could work for their case.

B. The following types of cases were identified as particularly suitable for ADR:

1. Small dollar cases, particularly where litigation costs would seriously erode any award.
2. Non-complex cases with relatively clear-cut factual or legal issues.
3. Cases where only quantum is in dispute.
4. Large, factually complex claims where both parties recognize some liability.

Judgment must be exercised in the selection of the ADR technique to be used. Binding ADR techniques were suggested for cases in categories 1 and 2, while non-binding ADR was suggested for cases in category 4.

## **ADR SERIES - ASBCA SURVEY**

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### V. Binding ADR (Summary Trial with Binding Decision)

A. Binding ADR accounted for roughly 40 percent of the ADR proceedings from 1987 through fiscal year 1994. In fiscal years 1995 and 1996, binding ADR accounted for roughly 45 percent of the total ADR requests at the ASBCA, and roughly 15 percent of the overall activity at the other boards.

B. From the judges' perspective, binding ADR is working satisfactorily. It offers an inexpensive, expeditious resolution of disputes through the use of a non-precedential bottom line decision which may not be appealed. However, there is also a recognition by the judges that care must be taken because the truncated proceeding may increase the risk of error.

### VI. Non-binding ADR (Settlement Judge and Minitrial)

A. Non-binding ADR accounted for roughly 60 percent of the ADR proceedings from 1987 through fiscal year 1994. The settlement judge approach was used in roughly 50 percent of the procedures, with minitrials or modifications thereof accounting for the remaining 10 percent. For fiscal years 1995 and 1996, non-binding ADR accounted for roughly 55 percent of the ADR requests received by the ASBCA and roughly 85 percent of the ADR activity at the other boards.

B. The overall success rate for non-binding ADRs continues at the 90 to 95 percent level reported in the 1994 survey.

C. Three key elements contributing to the likelihood of success of a non-binding ADR were identified:

1. The parties and the neutral advisor must be thoroughly prepared before the ADR begins. This means the parties must be satisfied that they know enough about their respective cases through discovery or otherwise to proceed.

2. The principals who participate in the ADR must have the authority to settle and must want the process to work. Several judges emphasized the importance of making certain that all of the parties with a stake in the outcome were behind the process. Subcontractors, banks and insurers were mentioned as potential stakeholders.

## **ADR SERIES - ASBCA SURVEY**

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3. The parties must have confidence in the neutral advisor and the neutral advisor's ability to provide an unbiased and realistic assessment of the strength and weaknesses of a party's case. A number of judges stressed the value of ex parte communications in facilitating discussions and the importance of recusal of the neutral if the ADR fails.

D. In describing their role in the process, the judges emphasized the importance of keeping in mind that the role is one of a neutral facilitator, not a decision maker.

1. All stressed the importance of providing the parties with a candid assessment of their positions, while maintaining neutrality. Some cautioned against becoming so intent on helping the parties achieve a settlement that the neutral forgets his or her role.

2. The ability to facilitate communication between the parties was identified as an important skill. Patience, good listening skills and a sense of humor were among the traits often mentioned as important for any facilitator.

E. The major concern with the non-binding ADR process remains the non-productive use of board resources when the ADR fails since the matter must then be assigned to another judge because of the recusal policy. A few judges suggested that consolidation of the areas of agreement and highlighting the areas that remain in dispute by the parties, with the neutral's assistance, might eliminate some duplication of effort.

### **VII. The Settlement Process in General**

A. In the 1994 survey, over 90 percent of the judges reported discussing settlement during prehearing conferences. Over 80 percent of the judges indicated that they offered to aid in settlement at anytime during the case.

B. Over 95 percent of the judges responding to the October 1996 survey indicated that they discuss settlement during prehearing conferences and over 90 percent indicated that they offer to aid in settlement at anytime during the case.

C. As was true during the 1994 survey, most felt that more cases should settle. However, there was a suggestion by some that the pool of cases that should settle was shrinking. The October 1996 survey reaffirmed the reasons most frequently cited in the 1994 survey for why cases that should settle do not. The most frequently cited reasons are:

## **ADR SERIES - ASBCA SURVEY**

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1. Emotional involvement preventing realistic assessment of case.
2. Lack of preparation by one or both of the parties.
3. Breakdown in communication due to personality conflicts.

D. A majority of the contract appeals cases that are filed are settled. This fact was emphasized by many of the judges responding to the 1994 survey. Some of them observed that the role judges play during the appeal process fosters settlement apart from one of the “formal” ADR procedures. On the other hand, many cases were settled without any active role being played by the judge. When asked in the October 1996 survey to assess the percentage of cases that settled as a result of the judge's exploration of settlement possibilities, estimates varied widely and many were unwilling to speculate. A rough estimate would be that one-third of the cases settle because of the judge's involvement.

E. In summary, ADR is viewed as an important tool for dispute resolution and support for its use is strong among the judges.

prepared by:

MARTIN J. HARTY  
Administrative Judge  
Armed Services Board  
of Contract Appeals  
31 October 1996

## ADR SERIES - METHODS CHECKLIST

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### ADR METHODS CHECKLIST

Use the following definitions and factors, to the extent relevant in the particular appeal, in determining which ADR technique is appropriate. This list is not exhaustive and any technique can be agreed to by the parties, subject to applicable legal, regulatory, and policy restrictions.

#### **a. Fact-Finding (Early Neutral Case Evaluator/Expert).**

(1) *Definition.* Involves a third-party neutral, selected by the parties, who investigates the relevant issues. The neutral usually has specific subject-matter expertise relevant to the issues, and can help narrow the disputed factual/technical issues.

#### (2) *Factors Favoring Use.*

(a) There is a good probability that the case can be settled, but the parties disagree on the amount of damages.

(b) The dispute is complex, and the parties desire to narrow the issues in controversy, but have been unable to do so on their own.

(c) The dispute is fact-intensive and is likely to be resolved once the parties agree on facts or their interpretation, and assessment by an expert will assist this.

(d) The opposition needs a realistic view of the case.

#### **b. Mediation.**

(1) *Definition.* The parties retain a third-party neutral to assist in negotiating a settlement. The process is confidential and non-binding, and essentially represents an extension of settlement negotiations with the participation of a mutually acceptable neutral. The parties maintain control of the process, which is extremely flexible. The ASBCA ADR format most closely akin to mediation is the Settlement Judge procedure.

#### (2) *Factors Favoring Use.*

(a) A negotiated settlement is more likely if the participants can be emotionally distanced from the controversy.

(b) Negotiations have reached an impasse, and creative problem solving may resolve the dispute.

“PRACTICE TIPS” and “ADR SERIES” are prepared by members of the US Army Contract Appeals Division as an element of our “Partners in Litigation” program. They are intended to share practical experiences of those involved at all stages of the contract disputes process. Your ideas, comments, experiences, and improvements are welcome at any time (703) 696-1500; FAX (703) 696-1535; DSN 426 + ext.

## ADR SERIES - METHODS CHECKLIST

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(c) The advice/assistance of a knowledgeable neutral respected by both parties will assist in reaching a solution.

(d) There is a continuing relationship among the parties.

(e) The disputed facts are not technical, and don't require subject-matter expertise.

(f) There is risk of unfavorable precedent.

(g) Either side can benefit from hearing directly from the opposing party (*i.e.*, not filtered through counsel).

(h) The opposition needs a realistic view of the case.

(i) There is need for flexibility in the desired relief.

(j) The parties have at least partially developed the facts through discovery, and there is recognition by each party of at least some merit to the other side's case.

### **c. Mini-Trial.**

(1) *Definition.* The mini-trial is a highly-flexible, expedited, but structured procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and, under ASBCA procedures, to a Board-appointed neutral advisor. The neutral

advisor may provide non-binding findings or recommendations to the parties.

Following the parties' presentations they engage in settlement negotiations, which may be assisted by the neutral advisor.

#### *(2) Factors Favoring Use.*

(a) The case is complex, senior-level decision makers are willing to devote a significant amount of time to resolve the dispute, and the cost or delay resulting from litigation would greatly diminish the benefit of resolving the disputes.

(b) The factual issues are simple, but would take an excessive amount of time to present in a traditional forum.

(c) The factual issues are complex and would normally require expert testimony for resolution.

(d) The attorneys can equitably summarize the facts to the fact-finder, without the necessity of lengthy cross-examination.

### **d. Summary Trial with Binding Decision**

(1) *Definition.* This is an ASBCA procedure in which the appeal schedule is expedited and the parties try the appeal informally before a judge or panel of judges. A summary, "bench" decision generally will be issued at the conclusion of the hearing or within 10 days thereafter. This procedure is similar to

## ADR SERIES - METHODS CHECKLIST

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binding arbitration in that the decision is final and all appeal rights are waived.

(2) *Factors Favoring Use.*

(a) The issues are amenable to immediate resolution by the presiding judge.

(b) The parties prefer an immediate ruling on the issues.

(c) There is risk of unfavorable precedent.

(d) The parties have at least partially developed the facts through discovery, so that further trial preparation can be completed swiftly and economically.

(c) The parties seek a relatively quick decision.

(d) The amount in controversy is small enough that an adverse decision would not be overly onerous to the parties.

Revised 11 Jun 97

e. **Arbitration.**

(1) *Definition.* Involves a neutral third party arbitrator who reviews evidence and hears arguments on issues agreed to by the parties, and then issues a decision. That decision can either be advisory (non-binding) or binding depending upon how the parties set up the ADR. In binding arbitration the decision is final and binding.

(2) *Factors Favoring Use.*

(a) The parties disagree on the amount of damages.

(b) There are no complex factual issues involving several areas of expertise, but the parties disagree on the facts.

**ADR SERIES - METHODS CHECKLIST**

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## **ADR SERIES - ASBCA Notice Regarding ADR**

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**The following is a retyped copy of ADR information  
provided by the ASBCA to each Appellant  
upon docketing of an appeal**

ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE SIX  
5109 LEESURG PIKE  
FALLS CHURCH, VA 22041-3208

### **NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION**

The Contract Disputes Act of 1978, 41 U.S.C. § 607, states that boards of contract appeals "shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." Resolution of a dispute at the earliest stage feasible by the fastest and least expensive method possible, benefits both parties. To that end, the Board suggests that the parties consider Alternative Disputes Resolution (ADR) procedures.

The ADR methods described in this Notice are intended to suggest techniques which have worked in the past. Any method which brings the parties together in settlement, or partial settlement, of their disputes is a good method. The ADR methods listed are not intended to preclude the parties use of other ADR techniques which do not require the Board's participation, such as settlement negotiations, fact finding conferences or procedures, mediation, or minitrials not involving use of the Board's personnel. The ADR methods described below are designed to supplement existing "extrajudicial" settlement techniques, not to replace them. Any method, or combination of methods, including one which will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.

Requests to the Board to utilize ADR procedures must be made jointly by the parties. If an ADR method involving the Board's participation is requested by the parties, the presiding administrative judge or member of the Board's Legal staff will forward the request to the Board's Chairman for consideration. Unilateral request or motions seeking ADR will not be considered. The presiding administrative judge or member of the Board's legal staff may also schedule a conference to explore the desirability and selection of an ADR method. If a non-binding ADR method involving the Board's participation is requested and approved by the Chairman, a settlement judge or a neutral advisor will be appointed. Usually the person appointed will be an administrative judge or hearing examiner employed by the Board.

If a non-binding ADR method fails to resolve the dispute, the appeal will be restored to the active docket for processing under the Board's Rules. To facilitate full, frank and open discussion and presentations, any settlement judge or neutral advisor who has participated in a non-binding ADR procedure which has failed to resolve the underlying dispute will ordinarily not participate in the restored appeal. Further, the judge or advisor will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other Board personnel. Unless the parties explicitly request to the contrary, and such request is approved by the

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**ARMY CONTRACT APPEALS DIVISION**

## **ADR SERIES - ASBCA Notice Regarding ADR**

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Chairman, the assigned ADR settlement judge or neutral advisor will be recused from consideration of the restored appeal.

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 between representatives of the parties and a settlement judge or a neutral advisor are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in a ADR proceeding.

Guidelines, procedures, and requirements implementing the ADR method selected will be prescribed by agreement of the parties and the settlement judge or neutral advisor. ADR methods can be used successfully at any stage of the Litigation. Adoption of an ADR method as early in the appeal process as feasible will eliminate substantial cost and delay. Generally, ADR proceedings will be concluded within 120 days following approval of their use by the Chairman.

The following ADR methods are consensual and voluntary. Both parties and the Board must agree to use of any of these methods.

1. Settlement Judge: A “settlement judge” is an administrative judge or hearing examiner who will not hear or have any formal or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the settlement judge. The agenda for meetings with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. A settlement judge's recommendations are not binding on the parties.

2. Minitrial: The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each minitrial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

3. Summary Trial With Binding Decision: A summary trial with binding decision is a procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. A summary, “bench” decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of conclusion of the trial or receipt of a trial transcript. The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. The length of trial and the extent

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## **ARMY CONTRACT APPEALS DIVISION**

## **ADR SERIES - ASBCA Notice Regarding ADR**

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to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

4. Other Agreed Methods: The parties and the Board may agree upon other informal methods which are structured and tailored to suit the requirements of the individual appeal.

The above-listed ADR procedures are intended to shorten and simplify the Board's more formalized procedures. Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations. The Board will not view the parties' participation in ADR proceedings as a sign of weakness. Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is unlikely to be successful.

**ADR SERIES - ASBCA Notice Regarding ADR**

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**BOARDS OF CONTRACT APPEALS-  
ALTERNATIVE DISPUTE RESOLUTION  
(BCA-ADR)  
SHARING ARRANGEMENT**

A number of Boards of Contract Appeals (BCAs) are participating in an interagency sharing arrangement, the purpose of which is to make neutral BCA personnel available to the Government and Federal contractors for use in Alternative Dispute Resolution (ADR). The BCAs are an excellent source of impartial and cost effective neutrals with specific expertise appropriate for assisting in the resolution of Government contracting disputes, whose use might be optimized through the BCA-ADR Sharing Arrangement. Under this Arrangement participating Boards provide their services free of charge.

**OBTAINING A NEUTRAL THROUGH THE BCA-ADR SHARING ARRANGEMENT:**

Parties are encouraged to look first to obtaining ADR services from the Board that would normally handle the matter. Agency contracting officials or Federal contractors who are interested in using the BCA-ADR Sharing Arrangement, and obtaining BCA personnel from other agencies to serve as neutrals, should contact the Chair of the Board that would normally handle the matter. Upon receiving a request from a neutral from another Board, the Chair will promptly take the necessary steps to obtain a neutral through the BCA-ADR Sharing Arrangement. Board Chairs, recognizing the need for a quick response, will act upon ADR requests expeditiously.

**MEDIATOR SKILLS TRAINING:**

Mediator skills training has been provided to a number of BCA personnel serving as mediators. Based on need, additional mediator skills training courses are planned for the future.

**MONITORING ADR USAGE:**

The Chairs will monitor ADR usage at their respective Boards.

“PRACTICE TIPS” and “ADR SERIES” are prepared by members of the US Army Contract Appeals Division as an element of our “Partners in Litigation” program. They are intended to share practical experiences of those involved at all stages of the contract disputes process. Your ideas, comments, experiences, and improvements are welcome at any time (703) 696-1500; FAX (703) 696-1535; DSN 426 + ext.

## **ADR SERIES - BOARDS OF CONTRACT APPEALS ADR SHARING AGREEMENT**

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### **BCAs PARTICIPATING IN THE BCA-ADR SHARING ARRANGEMENT:**

Armed Services BCA, Department of Agriculture BCA, Department of Energy BCA, Corps of Engineers BCA, Department of the Interior BCA, Department of Housing and Urban Development BCA, Department of Labor BCA, Postal Service BCA, Department of Transportation BCA, Department of Veterans Affairs BCA.

### **STATEMENT FROM THE CHAIRS SETTING FORTH THE GENERAL PRINCIPLES AND GUIDANCE FOR USING THE BCA-ADR SHARING ARRANGEMENT:**

Alternative Dispute Resolution (ADR) techniques offer the potential for a faster, less expensive disposition of contract disputes. The Boards of Contract Appeals (BCAs) are committed to fostering the use of ADR in appropriate Government contract-related matters and will continue to make Board personnel available to participate in ADR proceedings in protest, pre-appeal matters and post-appeal disputes.

The BCAs offer a wide choice of ADR techniques as an option to traditional dispute resolution procedures. Assistance is also available in designing ADR arrangements that will best serve the parties' interests in resolving a particular dispute. Parties who are interested in pursuing ADR should consult the procedures and or rules or practice of the BCA that would typically handle the matter.

Most of the BCAs also participate in an arrangement in which BCA personnel can be made available to conduct ADR processes for other agencies. Under the BCA-ADR Sharing Arrangement, the Boards may provide their services free of charge.

Agency contracting officials or Federal contractors who are interested in using BCA personnel from another agency should contact the Chair of the Board that would normally handle the matter. Chairs can suggest the names of personnel from other Boards who can be made available to conduct ADR processes.

## **ADR SERIES - ADR SAMPLE AGREEMENT**

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### AGREEMENT TO UTILIZE A SETTLEMENT JUDGE UNDER THE ASBCA'S "NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS Alternative Dispute Resolution Agreement (“ADR Agreement”) is entered into by and between \_\_\_\_\_ (“Appellant”) and the Department of the Army (“the Government”).

#### **RECITALS**

WHEREAS, Appellant and the Government entered into Contract No. \_\_\_\_\_ (“the Contract”);

WHEREAS, Appellant submitted certified monetary claims relating to the Contract to the Government, which claims were denied by the Contracting Officer;

WHEREAS, Appellant filed with the Armed Services Board of Contract Appeals (“ASBCA”) appeals of the Contracting Officer’s final decisions relating to the Contracts, which are designated as ASBCA Nos. \_\_\_\_\_ (“the appeals”); and

WHEREAS, the parties wish to resolve the appeals by alternative dispute resolution under the Contract Disputes Act, specifically by the use of a settlement judge appointed by the ASBCA.

#### **ADR AGREEMENT AND PROCEDURES**

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. All discovery relevant to this alternative dispute resolution (“ADR”) proceeding shall be concluded not later than 30 days prior to the scheduled date of the proceeding, and both parties shall fully disclose all relevant information and provide all documents requested by the other (except privileged documents and documents that have been previously provided to the other party during discovery) not later than 30 days prior to the scheduled date of the proceeding.

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## **ADR SERIES - ADR SAMPLE AGREEMENT**

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2. It is agreed that both entitlement and quantum are appropriate for consideration during this ADR proceeding. Each party shall submit to the settlement judge, with a copy to the other party, a detailed position on the issues with all supporting documentation, to be received by the settlement judge and the other party not later than 25 days prior to the scheduled date of the proceeding. The parties shall also exchange with each other and submit to the designated settlement judge a pre-hearing brief not to exceed twenty-five (25) pages, and any proposed stipulations of fact, to be received by the settlement judge and the other party not later than 10 days prior to the scheduled date of the ADR proceeding. Each party shall also submit a confidential document to the settlement judge, not to exceed ten (10) pages, which sets out the strengths and weaknesses of the party's position on each issue in dispute, as well as each party's best legitimate offer of settlement. This document will not be disclosed to the other party and will be destroyed upon conclusion of the ADR proceeding.

3. The settlement judge shall be recused from any further participation involving the appeals upon completion or termination of the ADR proceedings.

4. The ADR proceeding will be conducted at \_\_\_\_\_ for \_\_\_\_ days. The ADR proceeding will not be transcribed. The attorney representing each party shall make an oral presentation of the respective party's position to the settlement judge, not to exceed \_\_\_\_\_ hours, including rebuttal. The attorney may be accompanied by such other individuals as the attorney believes are appropriate to adequately represent his or her client's interest, and must be accompanied by a person with full decision-making and settlement authority over the claim. The attorney shall be the principal speaker during the ADR proceeding, but other person(s) may be called upon to discuss specific facts or issues. The settlement judge may ask questions of either attorney, or of any party's representative(s), during any portion of the ADR proceeding. Appellant's attorney shall make the initial presentation.

5. After completion of the oral presentations by both parties, and an appropriate recess at the discretion of the settlement judge, the judge shall provide an oral analysis of the respective strengths and weaknesses of each party's position. After re-evaluation of the positions by the parties based on the observations and recommendations of the settlement judge, the parties will discuss settlement proposals. The settlement judge shall actively participate in the negotiation and mediation of settlement.

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**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - ADR SAMPLE AGREEMENT**

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6. The proceedings shall commence promptly at 9:00 a.m. and continue on the second day (and succeeding days, as applicable) until such time as the parties either conclude the settlement process or determine that an impasse in negotiations has been reached, or either party determines that the appeal will not be resolved through the use of ADR procedures. The parties agree that they are entering into this ADR Agreement in good faith, shall act in accordance with the terms and conditions stated herein, and shall use all measures reasonably available to effect the resolution by settlement as provided for herein.

7. No offer of settlement, pre-hearing statement, or other statements made by a party or party's representative during the ADR proceeding may be used by the opposing party in any other proceeding before the ASBCA, including the litigation of ASBCA Nos. \_\_\_\_\_. Under the ASBCA's Notice Regarding Alternative Methods of Dispute Resolution, written material prepared specifically for use in the ADR proceeding is confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceedings involving the parties or matter in dispute. Other documents and tangible items utilized during the ADR proceeding are not rendered inadmissible because of their use in the ADR proceeding, and may be used in other Board proceedings, including ASBCA Nos. \_\_\_\_\_ in accordance with the Rules of the Armed Services Board of Contract Appeals.

8. Should the parties consummate a final agreement resolving all matters in dispute under ASBCA Nos. \_\_\_\_\_, the parties hereby agree that they shall record the specifics of the agreement, and reduce it to writing for execution as soon as practicable thereafter.

\_\_\_\_\_  
(name)  
Contracting Officer  
(identify contracting command)

\_\_\_\_\_  
(name)  
President  
(identify Appellant)

DATED: \_\_\_\_\_

DATED: \_\_\_\_\_

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**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - ADR SAMPLE AGREEMENT**

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**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - ADR SAMPLE AGREEMENT**

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**ARMY CONTRACT APPEALS DIVISION**

**THIS DOCUMENT WAS PREPARED TO FACILITATE POTENTIAL SETTLEMENT DISCUSSIONS. IT SHALL BE CONSIDERED PRIVILEGED AND CONFIDENTIAL IN ALL SUBSEQUENT PROCEEDINGS AND AS TO ALL THIRD PARTIES.**

*NAVY PROVIDED SAMPLE*

**PLAN FOR PROCEEDING WITH NEGOTIATIONS AND  
RESOLVING LITIGATION AND CLAIMS**

**PURPOSE:** To facilitate the development of decision-quality information on the basis of which the parties' representatives might agree on a comprehensive resolution of the \_\_\_\_\_.

**STEP 1:** Agreement on Plan  
The parties agree on the Plan of action as set forth herein, including the attached schedule.

**STEP 2:** Procedural Matters

**NOTE:** A. Proceedings  
**ALTERNATIVELY,**  
**A SPECIFIC**  
**STAY OF**  
**PROCEEDING**

1. All proceedings and activities under this Plan are in lieu of proceedings before the \_\_\_\_\_ on \_\_\_\_\_.
2. Neither party shall raise in any proceeding the other party's inaction or delay in taking actions during the proceedings and activities under this Plan.
3. For purposes of this Plan, and particularly paragraph 1, the Plan proceedings shall begin on the date of execution

**ADR SERIES - NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS**

and shall continue until resolution of all \_\_\_\_\_  
or \_\_\_\_ days after either party provides the other

with written notice that the proceedings are to end,  
whichever shall first occur. Notwithstanding cessation of  
these proceedings, all promises in Step 2 shall remain in  
full force and effect.

**NOTE: PROVISIONS  
NEED TO BE  
TAILORED TO  
ASSURE NO  
RESTRICTIONS ON  
DCAA ACCESS TO OR  
USE OF DATA AND TO  
AT LEAST  
THE MINIMUM  
NECESSARY  
CONTRACTOR  
COOPERATION.  
TENSION IS BETWEEN  
GOVERNMENT NEED  
FOR MAXIMUM  
INFORMATION WITH  
NO OR MINIMAL  
DISCOVERY AND  
CONTRACTOR'S DESIRE  
TO PROVIDE AS LITTLE  
DISCOVERY AS POSSIBLE  
audit  
VIA THE AUDIT PROCESS.**

B. Audit

1. The Navy will request, and \_\_\_\_\_ will  
timely cooperate with, DCAA to audit \_\_\_\_\_  
incurred cost of contract performance and the costs  
sought by \_\_\_\_\_ in connection with \_\_\_\_\_.
2. \_\_\_\_\_ and DCAA will **ASSURE**  
follow their normal audit processes and practices.  
\_\_\_\_\_ will make available the work papers regarding  
\_\_\_\_\_.
3. \_\_\_\_\_ will authorize all  
individuals and activities to provide DCAA with copies  
and an explanation of its work papers and documents.
4. Subject to \_\_\_\_\_ providing authorization  
from each of its subcontractors to release each  
subcontractor's data, the Navy will authorize DCAA to  
provide \_\_\_\_\_ a copy of all DCAA's  
reports and other supporting U.S. Government reports  
related to \_\_\_\_\_.

**NOTE: 1  
SHOULD BE  
LIMITED TO THE  
ESSENTIAL INFORMATION**

C. Discovery

1. The parties will file with the ASBCA and exchange those  
documents which are described by ASBCA Rules 4 (a)

**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS**

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**NOT ALREADY IN EACH PARTY'S POSSESSION AND NOT OBTAINABLE BY OTHER MEANS.**

and (b).

2. The parties will cooperate in limited, discovery of relevant non-privileged facts, regarding disputed issues, consistent

with ASBCA Rules 14 and 15 as supplemented by Rules 26-37 of the Federal Rules of Civil Procedure. The parties shall meet and agree on discovery consistent with the attached expedited schedule. The parties may extend the schedule to permit additional discovery if such discovery is deemed necessary by either party. Either party may elect not to produce any privileged document or information. With respect to any discovery request, if a party does not have any documents or withholds any documents on the basis of privilege it will so inform the other party.

**NOTE: 2  
THESE SUGGESTIONS ARE FOR SITUATIONS WHERE THE ESSENTIAL INFORMATION IS UNKNOWN AND/OR CAN NOT BE AGREED TO SIMPLY EXCHANGE AT THE OUTSET OR BY A DATE CERTAIN.**

3. Both parties shall immediately notify the other if they withhold a classified document pertinent to \_\_\_\_\_. With respect to any classified documents each party must follow applicable security laws and regulations for obtaining any such documents and in submitting any such documents as part of its position paper.

**NOTE:  
SHOULD BE IN AGREEMENT EVEN IF FIRST THREE PARAGRAPHS OR EQUIVALENT ARE NOT USED**

4. Any information, data or document (including but not limited to Rule 4 documents and attachments to position papers) presented or discovered by either party during or pursuant to these procedures to which there is otherwise any right to access or which otherwise may be discovered pursuant to the Federal Rules of Civil Procedure and admitted in evidence pursuant to the Federal Rules of Evidence may be retained and used, or, if returned, accessed, discovered, or admitted in evidence in any proceeding. Discovery obtained under this Plan shall not affect in any manner either party's right to any additional discovery in the event the parties do not resolve all

**NOTE:  
THESE  
PARAGRAPHS  
SHOULD BE  
TAILORED TO  
THE SPECIFIC  
SITUATION**

D. Confidentiality

1. Settlement Discussions

Subject to Step 2C4, Communications pertaining to the proceedings set forth herein, including (without limitation) this Plan, Plan correspondence, and the position papers, and privileged documents described in Step 3 shall be considered conduct, statements, and/or offers to compromise as set forth in FRE 408 in conjunction with possible settlement of the disputes between the parties on the \_\_\_\_\_, and may not be used for any purpose other than activities under this Plan. The originating party shall in good faith mark with the legend “Submitted for Possible Settlement” all papers and documents which are either privileged or prepared for carrying out this Plan. Within (10) days after this Plan terminates as provided in Step 2A3, all copies of all papers and documents so marked and provided in Step 3 shall be destroyed or returned to the originating party.

2. Discovery

Nothing contained herein shall constitute a waiver of any objection to provide nor preclude either party from seeking documents or the content of a person’s knowledge of relevant matters through regular means of discovery in administrative or judicial proceedings, should settlement discussions not resolve all claims.

3. Work Product

This position papers contemplated by step 3 of this Plan are

## **ADR SERIES - NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS**

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the work product of counsel and are exchanged for the mutual and limited purpose of exploring possible settlement. Similarly, any litigation assessments prepared (whether or not submitted to the other party), while work product of counsel, are also subject to the attorney-client privilege. Further, both types of documents described in the preceding sentences also are subject to protection as matters prepared in contemplation of settlement.

Accordingly, the parties agree that all such documents are privileged and are not to be used for any purpose other than as permitted by this Plan or required by court order.

#### 4. Non-Disclosure

The parties agree not to make any third party or public disclosures of the contents of this Plan, the content of any discussions pursuant to this Plan or of any submissions contemplated by this Plan including (without limitation) Plan correspondence, any offers, promises, statements, conduct, or other communication without the prior written approval of the other party. Such approval shall not be unreasonably delayed or withheld for required disclosures. Provided, however:

(a) \_\_\_\_\_ shall be entitled to disclose the status and content of the discussions contemplated by this Plan to the extent required by securities or other laws. \_\_\_\_\_ agrees to give the Navy advance notice of the content of any such required disclosure and to give the Navy a copy at the same time the disclosure is filed.

(b) Nothing herein shall obligate any agency of the Executive Branch to coordinate with \_\_\_\_\_ before communicating with

**ADR SERIES - NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS**

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**SECOND SENTENCE  
OPTIONAL**

Congress or any Government agency. To the extent permitted and not prohibited by law, the Navy agrees to furnish a copy of any such disclosures to \_\_\_\_\_.

- (c) As appropriate, the parties may disclose to the ASBCA or court the Plan, the existence of these proceedings, or the status of these proceedings.

**OPTIONAL FOR  
WHEN SUBCONTRACTORS  
ARE INVOLVED**

- (d) As appropriate, \_\_\_\_\_ may disclose the contents of this Plan and all information related to or obtained pursuant to the procedures set forth herein to its subcontractors involved in its \_\_\_\_\_.

E. Senior Officials

**NOTE:  
ASSUMES NEITHER  
BINDING  
ARBITRATION NOR  
SUMMARY DISPOSITION  
IS BEING EMPLOYED**

For the procedures set forth herein, \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of the Navy shall serve as high level Representatives of the parties. As set forth in Step 4, each party's representative shall, after reviewing the positions and facts, enter into good faith resolution discussions.

**STEP 3:** Submissions of Position Papers

**NOTE:  
PAGE  
LIMITATIONS  
(10-50)  
ARE  
NORMALLY  
BENEFICIAL  
AND**

Each party shall have complete discretion to structure their respective position papers. The parties shall prepare and exchange papers, which shall provide a comprehensive statement of the specific facts regarding the parties' positions on the issues in this case with the goal of developing decision-quality information on the basis of which the parties can determine whether this case can be resolved without further litigation. Papers will be exchanged in accordance with the attached schedule. Documents relied upon by the parties on each position shall be listed and

**ADR SERIES - NAVY ADR PLAN FOR POTENTIAL SETTLEMENT DISCUSSIONS**

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**DESIRABLE** documents not in the Rule 4 file or previously provided shall be attached.  
For areas of the position papers unsupported by other documents or which  
**TAILOR TO** require further explanation, any portion(s) of deposition testimony relied  
**SITUATION** upon shall be attached.

**STEP 4:** After the exchange of position papers described in Step 3 is completed, the senior officials will meet and decide on and conduct any process(es) to be used to attempt to resolve \_\_\_\_\_. The representatives shall have authority to settle all \_\_\_\_\_. The representatives may consult with others as appropriate during their discussions and before making any final commitment to any mutual agreed resolution. Subject to Step 2A3, the representatives may extend their discussions beyond the dates set forth in the attached schedule.

Executed: \_\_\_\_\_

Executed \_\_\_\_\_

UNITED STATES NAVY

\_\_\_\_\_

\_\_\_\_\_

**FURTHER TAILORING MAY  
BE NECESSARY WHEN  
RESORTING TO MEDIATORS  
OR SPECIFIC METHODS OF  
PRESENTING DATA SUCH  
AS "MINITRIAL"**

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**ARMY CONTRACT APPEALS DIVISION**

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**ADR SERIES - ASBCA AGREEMENT TO USE SETTLEMENT JUDGE**

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**The following is a retyped copy of a sample from the ASBCA**

NOTE: The following sample agreement is provided in response to requests the Board receives for examples of ADR agreements that may be suitable for use in ADR proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution." This sample is offered solely as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 2, 6 and 9, however, are key features of the settlement judge method of ADR. In all cases consultation with the presiding judge is encouraged.

*ASBCA PROVIDED SAMPLE*

AGREEMENT TO UTILIZE THE  
PROCEDURE OF SETTLEMENT JUDGE  
UNDER THE ASBCA'S "NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter "Appellant") and the Department of \_\_\_\_\_ (hereinafter the "Government").

WHEREAS, Appellant and the Government entered into Contract No. \_\_\_\_\_;  
and

WHEREAS, Appellant filed with the Armed Services Board of Contract Appeals (hereinafter the "ASBCA") an appeal under said contract; and

WHEREAS, said appeal is designated ASBCA No. \_\_\_\_\_; and

WHEREAS, ASBCA No. \_\_\_\_\_ involves claims by [Appellant for][Government for] in the amount of \$ \_\_\_\_\_; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically with the assistance of a settlement judge, under the Contract Disputes Act; and

## **ADR SERIES - ASBCA AGREEMENT TO USE SETTLEMENT JUDGE**

---

WHEREAS, the ASBCA is authorized to resolve disputes by alternative disputes resolution under its Charter and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. Schedule. The ADR proceeding on the appeal is scheduled for \_\_\_\_\_ days(s), namely: \_\_\_\_\_, at the Board (or other agreed location).
2. Settlement judge. The judge's role will be to facilitate the parties' settlement efforts. The judge may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The judge's recommendations are not binding on the parties. [Note: The settlement judge will normally not participate further in the appeal if the parties' efforts are unsuccessful, unless the parties seek the continued involvement of the judge.]
3. Record. [The parties should agree on what documents will be included in the record for consideration by the settlement judge in assessing the merits of the parties' positions]
4. Transcript. A transcript of the proceedings will not be prepared.
5. Agenda. The presentations of the parties will be informal and the rules of evidence are waived. The settlement judge may, nonetheless, guide the presentation of evidence. [The parties should spell out how they wish to make their informal presentations and agree on time to be allotted to various phases of the process. It is often helpful for each party to submit a brief position paper (3 to 5 pages) sufficiently in advance of the proceeding for the judge to consider it in connection with the record agreed to by the parties.]
6. Participants. Each party will include among its representatives a principal with authority to settle the appeal.
7. Use of statements and documents. The admissibility of statements made or documents used in connection with the ADR proceeding will be governed by Federal Rule of Evidence 408.
8. Fees and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding.
9. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

**ADR SERIES - ASBCA AGREEMENT TO USE SETTLEMENT JUDGE**

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APPELLANT

GOVERNMENT AGENCY

By: \_\_\_\_\_

By: \_\_\_\_\_

Dated \_\_\_\_\_

Dated \_\_\_\_\_

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**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

---

**The following is a retyped copy of  
a sample from the ASBCA**

NOTE: The following sample agreement is provided in response to requests the Board receives for examples of agreements that may be suitable for use in Alternative Dispute Resolution (ADR) proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution. "This sample is offered solely as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 2, 3 and 4, however, are key features of the minitrial method of ADR. In all cases consultation with the presiding judge is encouraged.]

*ASBCA PROVIDED SAMPLE*

AGREEMENT TO UTILIZE THE  
MINITRIAL PROCEDURE  
UNDER THE ASBCA'S "NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter the Appellant) and \_\_\_\_\_ (hereinafter the Government).

WHEREAS, the Appellant and the Government entered into contract No. \_\_\_\_\_; and

WHEREAS, the Appellant and the Government are currently engaged in litigation before the Armed Services Board of Contract Appeals (ASBCA or Board), which is docketed as ASBCA No(s). \_\_\_\_\_; and

**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

---

WHEREAS, the Appellant and the Government wish to resolve their dispute through the use of the minitrial method of alternative dispute resolution (ADR) under the Contract Disputes Act; and

WHEREAS, the ASBCA is authorized to resolve disputes by ADR under its Charter and the Contract Disputes Act;

NOW THEREFORE, the Appellant and the Government mutually stipulate and agree as follows:

1. Scope of the ADR. The Appellant and the Government will voluntarily engage in a non-binding minitrial on the claim(s) of \_\_\_\_\_. [Spell out the parties' claims (including the amounts) that are to be resolved during the proceeding to a level of detail that satisfies the parties.]

2. Good Faith Efforts to Resolve the Dispute. The goal of the ADR proceeding is to resolve the matters in dispute between the parties through negotiation by the parties' principal representatives, guided as necessary by a neutral advisor. To this end the minitrial proceeding will be aimed at informing the principal representatives and the neutral advisor of the underlying bases of the parties' positions. Each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum. The presentations will be made primarily through the parties' counsel. Other persons may attend in the discretion of each party. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the goal of resolving the dispute.

**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

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3. The Principal Representatives. The principal representatives for the purpose of this proceeding will be:

For the Appellant: \_\_\_\_\_

For the Government: \_\_\_\_\_

Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approvals in advance of the proceeding. Each party will bear its own expenses associated with the ADR proceeding.

4. The Neutral Advisor. The ASBCA will designate the neutral advisor. The neutral advisor will preside during the ADR proceeding and will participate in the negotiations between the parties. The neutral advisor may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The neutral advisor may meet with the parties or their counsel, jointly or individually, to the extent the neutral advisor deems desirable to foster a negotiated settlement of the dispute. The neutral advisor's recommendations are not binding on the parties. In the event the ADR proceeding does not result in settlement of the issues in dispute, the neutral advisor will not participate further in the appeal. [Recusal is the normal practice if the ADR is unsuccessful; however, the parties may seek the continued involvement of the neutral advisor.] The neutral advisor will serve at no expense to either party.

5. Discovery. [Parties should take into account the discovery necessary for the minitrial. Board practice is to stay discovery during the ADR proceeding if it is reasonable to

**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

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do so.] Discovery will be stayed from the date of this Agreement. If this matter is not resolved as a result of the ADR proceeding, the Board will lift the stay. The Appellant and the Government will remain entitled to pursue such additional discovery as they believe necessary and as the Board may allow.

6. The Record for Purposes of the ADR Proceeding. The Appellant and the Government in consultation with the neutral advisor will agree on the composition of the record upon which the ADR proceeding will be based. [Generally, the parties will designate key portions of the R4 file and often prepare special exhibits. The extent of the record and the time of its submission to the parties' representatives and the neutral advisor is left to the parties, keeping in mind that the record must be manageable and the time to assimilate it sufficient.] No later than \_\_\_\_\_ weeks prior to commencement of the minitrial proceeding, the parties will provide to the neutral advisor and exchange copies of all documentary evidence proposed for utilization at the conference, inclusive of a listing of all witnesses with a brief statement of the subject matter of their testimony.

7. The Position Paper. No later than \_\_\_\_\_ weeks prior to commencement of the proceeding, the parties will exchange and submit to the principal representatives and the neutral advisor a position paper of no more than 30 double-spaced pages. The position paper will spell out a party's factual and legal position on each claim to be resolved. Each party may submit a reply of no more than 10 pages not later than \_\_\_\_\_ weeks prior to the commencement of the proceeding.

8. The Schedule. The minitrial will be held on \_\_\_\_\_, at [a mutually agreed location or the offices of the Board]. The ADR proceeding will take

**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

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\_\_\_\_\_ day(s). The parties have agreed to the following schedule [sample one day schedule]:

MINITRIAL CONFERENCE SCHEDULE

Day 1

9:00 a.m. - 10:30 a.m.	Appellant's statement of case & presentation of position
10:45 a.m. - 12:15 p.m.	Government's Rebuttal
12:15 p.m. - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	Appellant's Reply
2:15 p.m. - 3:15 p.m.	Open question & answer period
3:15 p.m. - 5:00 p.m.	Negotiations/Discussions between parties and neutral advisor

If the parties are unable to resolve the dispute, the minitrial shall be deemed terminated and the appeal will continue.

9. Manner of Proceeding. At the ADR proceeding counsel for the parties have the discretion to structure the content of their presentations as they desire. The presentations may include, for example, remarks by fact or expert witnesses, audio-visual aids, demonstrative evidence, affidavits, and oral argument. The rules of evidence will not apply and witnesses may provide testimony in narrative form. The principal representatives and the neutral advisor may ask any relevant question of the witnesses that they deem appropriate.

**ADR SERIES - ASBCA AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE**

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10. Record of the Proceeding. No transcript or recording shall be made of the ADR proceeding.

11. Use of Statements and Documents. The admissibility of statements made and documents used in connection with the ADR proceeding will be governed by Federal Rule of Evidence 408.

12. Termination of the ADR Proceeding. Each party has the right to terminate the minitrial at any time for any reason. The neutral advisor may terminate the proceeding if he/she believes that one or both of the parties are not committed to the process.

DATED:

DATED:

BY:

BY:

\_\_\_\_\_  
Principal Representative for  
Government

\_\_\_\_\_  
Principal Representative for  
Appellant

\_\_\_\_\_  
Attorney for the Government

\_\_\_\_\_  
Attorney for the Appellant

**ADR - ASBCA AGREEMENT TO UTILIZE THE SUMMARY TRIAL**

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**The following is a retyped copy of  
a sample from the ASBCA**

[NOTE: The following sample agreement is provided in response to requests the Board receives for examples of ADR agreements that may be suitable for use in ADR proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution." This sample is offered solely as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 13 and 14, however, are key features of the Summary Trial with Binding Decision Method of ADR. In all cases consultation with the presiding judge is encouraged.]

*ASBCA PROVIDED SAMPLE*

AGREEMENT TO UTILIZE THE  
PROCEDURE OF SUMMARY TRIAL WITH BINDING DECISION  
UNDER THE ASBCA'S "NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter "Appellant") and the Department of \_\_\_\_\_ (hereinafter the "Government").

WHEREAS, Appellant and the Government entered into Contract No. \_\_\_\_\_;  
and

WHEREAS, Appellant filed with the Armed Services Board of Contract Appeals (hereinafter the "ASBCA") an appeal under said contract; and

WHEREAS, said appeal is designated ASBCA No. \_\_\_\_\_; and

WHEREAS, ASBCA No. \_\_\_\_\_ involves claims by [Appellant for][Government for] in the amount of \$ \_\_\_\_\_; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically summary trial with binding decision, under the Contract Disputes Act; and

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**ARMY CONTRACT APPEALS DIVISION**

## **ADR - ASBCA AGREEMENT TO UTILIZE THE SUMMARY TRIAL**

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WHEREAS, the ASBCA is authorized to resolve disputes by alternative disputes resolution under its Charter and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. Motion practice in this appeal is waived.
2. Discovery will be concluded by \_\_\_\_\_.
3. The documentary record will be limited to those documents which have been submitted, identified and indexed pursuant to Rule 4 or as exhibits no later than \_\_\_\_\_;

[NOTE: The parties may agree to have the appeal decided on the documentary record in accordance with ASBCA Rule 11. If so, such procedure may be provided in additional paragraph(s) and should include the concepts in ¶¶ 12-14 below modified as may be necessary. If the parties seek an oral hearing on the appeal, the following ADR paragraphs should be considered:]

4. Each party's hearing presentation will be limited to \_\_\_\_\_ hours [day], including time for examination of witnesses, presentation of rebuttal evidence and oral argument, if any.
5. The appeal shall be tried informally, and the rules of evidence are waived. The parties agree, nonetheless, that the presiding judge shall retain discretion to limit evidence where necessary for the reasonable conduct of the hearing.
6. Witnesses shall be examined orally under oath or affirmation. A party shall be allowed to cross-examine the adverse party's witnesses.
7. Pre- and post-hearing briefs are waived. [A very brief (three to five page) prehearing submission is often useful to the presiding judge.]
8. A transcript of the proceedings will be prepared. [Preparation of a transcript is waived.]

**ADR - ASBCA AGREEMENT TO UTILIZE THE SUMMARY TRIAL**

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9. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding;

10. The hearing on this appeal is scheduled for \_\_\_\_\_ day(s), namely: \_\_\_\_\_;

11. The issues in dispute shall be presented in the following order:

a. \_\_\_\_\_;

b. \_\_\_\_\_;

c. \_\_\_\_\_;

d. \_\_\_\_\_; and

e. [Other issues, if any]

12. The Board shall issue a bench decision at the conclusion of the hearing, or, at the option of the presiding judge, no later than \_\_\_\_\_ business days after receipt of the transcript [or conclusion of the hearing if no transcript].

13. The decision will contain no findings of fact or conclusions of law.

14. The Board's decision shall be final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value.

APPELLANT

GOVERNMENT AGENCY

By: \_\_\_\_\_

By: \_\_\_\_\_

Dated \_\_\_\_\_

Dated \_\_\_\_\_

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**ARMY CONTRACT APPEALS DIVISION**

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## ADR SERIES - CAD ADR SETTLEMENT GOALS MEMORANDUM

### SAMPLE MEMO

DAJA-CA

MEMORANDUM FOR (CTA or Appropriate Delegee; route through Team Chief and DCTA if going to CTA)

SUBJECT: Proposed Settlement ADR Goals

Appeal of XXXX

ASBCA No. XXXXX

Under Contract No. XXXX

1. [*Discuss the case background and factors relevant to the ADR:*] The subject appeal is based on the denial of Appellant's claim for \$XXXX, based on its assertion that (*discuss main factual and legal theories advanced by Appellant*). Appellant and the Contracting Officer have informally discussed settlement, but have been unable to resolve their differences. The chief issues are (*discuss main points in contention*).
2. The parties have agreed to attempt to resolve the dispute through settlement ADR, and have signed the enclosed ADR agreement, under which they will use (*state selected ADR method*) to attempt to settle the appeal.
3. [*Discuss the Government's goals in the settlement, including a target settlement amount (if appropriate):*] The Contracting Officer's goal is to settle for no more than \$XXXX. The (Contracting Officer) (Appellant) would also like to (*discuss other, non-monetary goals, such as no-cost conversion of T4D to T4C*). The Appellant has previously offered to settle for \$XXXX, a difference of \$XXXX. In my view, a settlement goal of \$XXXX (and XXXX (*non-monetary goal, if any*)) is appropriate, for the following reasons (*discuss reasons proposed settlement goal(s) is/are appropriate, such as litigation risk, etc.*):

a.

"PRACTICE TIPS" and "ADR SERIES" are prepared by members of the US Army Contract Appeals Division as an element of our "Partners in Litigation" program. They are intended to share practical experiences of those involved at all stages of the contract disputes process. Your ideas, comments, experiences, and improvements are welcome at any time (703) 696-1500; FAX (703) 696-1535; DSN 426 + ext.

**ADR SERIES - CAD SAMPLE ADR SETTLEMENT GOALS MEMORANDUM**

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DAJA-CA

SUBJECT: Proposed Settlement ADR Goals  
Appeal of XXXX  
ASBCA No. XXXXX  
Under Contract No. XXXX

b.

c.

d.

Encl

*[Trial Attorney's Signature as  
Block]*

(Concur) (Nonconcur) Date: \_\_\_\_\_

Initials: \_\_\_\_ *[CTA or appropriate delegee's initials]*

Comments:

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**ARMY CONTRACT APPEALS DIVISION**

## **Evaluation of Alternative Dispute Resolution Process**

1. Name:
2. Address:
3. MACOM:
4. Telephone Numbers:
  - a. Commercial:
  - b. DSN:
  - c. FAX:
5. Name of Contractor:
6. Contract Number:
7. A. What Category of contract was this? (Circle one)  

Service	Construction	Supply	Other	_____
---------	--------------	--------	-------	-------
- B. Contract Type (Circle one)  

FFP	FPW/EPA	CPAF	Cost	Other_____
-----	---------	------	------	------------
- C. Type of Dispute (Note: Question 15 has space for details about the dispute)  

Equitable Adjustment.	T4D	T4C	Other
-----------------------	-----	-----	-------

\_\_\_\_\_
8. What type of alternative dispute resolution (ADR) procedure was used?
  - A. ASBCA Sponsored ADR Methods
    1. Settlement Judge
    2. Minitrial
    3. Summary Trial with Binding Decision
    4. Other agreed methods \_\_\_\_\_

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## **ADR SERIES - EVALUATION FORM**

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### B. Other ADR Procedures

1. Mediation
2. Arbitration
3. Fact-Finding
4. Early Neutral Evaluation
5. Unassisted Negotiations Pursuant to an ADR Agreement
6. Other (Please specify)

*(IF POSSIBLE, PROVIDE COPY OF ADR AGREEMENT THAT WAS USED)*

9. Once you reached impasse, how long did the ADR process last? (Provide your answer in terms of the approximate number of days, e.g., 30 days. Begin counting from the time the parties first agreed to use an ADR technique.)
10. Had the case not been submitted to ADR, what do you think would have happened? Would it have gone to trial? If you think it would have settled, how much more (or less) time would it have taken?
11. After you reached impasse, how long do you believe it would have taken to resolve this dispute if you had gone to trial? (Provide your answer in terms of the approximate number of days, e.g., 30 days. The purpose of this question is to see how much faster you reached resolution using ADR rather than litigation.)
12. Which of the following describes the outcome of the ADR process:
- a. \_\_\_\_\_ Complete Settlement
  - b. \_\_\_\_\_ Partial Settlement
  - c. \_\_\_\_\_ No Settlement
13. If the ADR process resulted in full or partial settlement, what (if any) liability did the Army avoid by agreeing to settle this case? (For example, a contractor claims \$100,000 and, through the use of ADR, the parties settle the matter for \$40,000. The liability avoided by the Army would be \$60,000 plus interest).
- a. Amount claimed:
  - b. Settlement amount:
  - c. Liability avoided:
  - d. Does c., above, include interest? Yes No N/A

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**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - EVALUATION FORM**

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e. Does c., above, include potential or actual EAJA fees? Yes No N/A

14. Would you use this process again? (Please explain) Yes No

15. Briefly describe the nature of the dispute and (if appropriate) the terms of the settlement reached.

16. What lessons were learned? What would you do differently if you had it to do over again?

17. If the ADR process resulted in full or partial settlement, indicate your level of satisfaction or dissatisfaction with the items listed below according to the following scale:

(1) Very Unsatisfied (2) Unsatisfied (3) Neutral (4) Satisfied (5) Very Satisfied

a. Time Savings	1	2	3	4	5
b. Money Savings	1	2	3	4	5
c. Expertise of Third Party	1	2	3	4	5
d. Key Management Involvement	1	2	3	4	5
e. Preservation of Relationship Between Parties	1	2	3	4	5
f. Outcome of the Case	1	2	3	4	5

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**ARMY CONTRACT APPEALS DIVISION**

**ADR SERIES - EVALUATION FORM**

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18. ADR may be helpful or detrimental in a number of different ways. Indicate the extent to which the ADR process was helpful or detrimental in the ways listed below and according to the following scale:

- (1) I can't say      (2) Very Detrimental      (3) Somewhat Detrimental  
(4) Little Impact      (5) Somewhat Helpful      (6) Very Helpful

a. Moving the parties in this case toward settlement.

1      2      3      4      5      6

b. Helping the parties in this case define the issues earlier than they otherwise would have.

1      2      3      4      5      6

c. Helping the parties define the scope of discovery earlier than they otherwise would have.

1      2      3      4      5      6

d. Prompting the parties to exchange essential documents earlier than they otherwise would have.

1      2      3      4      5      6

e. Helping you identify the strengths and weaknesses of your case.

1      2      3      4      5      6

f. Expediting the resolution of this case.

1      2      3      4      5      6

g. Reducing the cost to litigate this case.

1      2      3      4      5      6

h. Improving relationships between the parties in this case.

1      2      3      4      5      6

**ADR SERIES - EVALUATION FORM**

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19. In what other ways was ADR helpful or detrimental in this case?

20. What was the name and affiliation of the neutral? From what source did you obtain the neutral?

21. Additional Comments:

Signature \_\_\_\_\_

Date \_\_\_\_\_

Concurrence: \_\_\_\_\_  
Field Counsel

Date \_\_\_\_\_

Please fax or mail this voluntary report to: U.S. Army Legal Services Agency, Attn: JALS-CA (ADR Program), 901 N. Stuart, Arlington, VA 22203-1837. Fax (703) 696-1535 or DSN 426-1535. If you have any questions about how to complete this form, please contact Contract Appeals Divisions' ADR Team Chief at (703) 696-1500 or DSN 426-1500.

(saved 12 Jun 97)

**ADR SERIES - EVALUATION FORM**

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**ARMY CONTRACT APPEALS DIVISION**

*DoD Directive 5145.5*  
*Alternative Dispute Resolution (ADR)*  
*April 22, 1996*  
*(EXCERPT)*

“The DoD ADR Policy is that:

1. Each DoD Component shall establish and implement ADR policies and programs. Each Component shall make use of existing government ADR resources to avoid unnecessary expenditure of time and money.
2. All DoD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings, whenever appropriate. Every dispute, regardless of subject matter, is a potential candidate for ADR.
3. Each DoD component shall review its existing approaches to dispute resolution, and, where feasible, foster increased use of ADR techniques. Components shall identify and eliminate unnecessary barriers to the use of ADR.”

*Secretary of the Army*  
*Policy Memorandum dated July 25, 1995*  
*(EXCERPT)*

SUBJECT: Implementation of the Administrative Dispute Resolution Act of 1990

“Army personnel are urged to use ADR procedures in appropriate cases. The goal is to resolve disputes at the earliest stage feasible, by the fastest and least expensive method, and at the lowest organizational level.”

*Assistant Secretary of the Army*  
*(Research, Development & Acquisition),*  
*Memorandum for Heads of Contracting Activities*  
*dated May 1, 1996*  
*(EXCERPT)*

SUBJECT: Use of Alternative Disputes Resolution (ADR) Techniques

“I heartily endorse the appropriate use of ADR techniques as a way for you to resolve Army contract disputes. Your use of these techniques will allow for resolution of many disputes in a business-like fashion without the necessity for protracted litigation.”



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EDITOR'S COMMENT: This exceptional set of materials about the ADRA of 1996 was prepared by Mr. Joseph M. McDade, Office of the General Counsel, Department of the Air Force. In my personal opinion, Mr. McDade is among the foremost leading experts on ADR in the Department of Defense, or for that matter, in the US Government. These materials, as with everything he prepares, he willingly shared with the Army in the interest of fostering wider understanding and use of ADR in the Government.

COL RETSON

# **THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996**

*What You Need to Know to Make it  
Work for You*

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*By Joseph M. McDade, Esq.  
Spring, 1997*

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[INTRODUCTION](#)

[TABLE OF CONTENTS](#)

[KEY PROVISIONS OF THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996](#)

[ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996](#)

## *INTRODUCTION*

This document focuses on those aspects of the Administrative Dispute Resolution Act of 1996 (ADRA or the Act) that establish a framework for ADR use by federal agencies. It is intended to provide guidance to agency personnel, regardless of their area of expertise. Accordingly, it provides, where necessary, background information to ensure the reader understands the context in which certain provisions operate.

Here is what you will find in the pages that follow.<sup>1</sup> Section I discusses the ADRA's general grant of authority to use ADR procedures as well as its guidelines for determining if ADR use is appropriate. Section II outlines the Act's provisions authorizing agencies to submit to binding arbitration. This section integrates relevant sections of the ADRA with the Federal Arbitration Act to provide a better understanding of how binding arbitration will work under the ADRA. Section III discusses the Act's provisions regarding statutory guidelines about which disputes may not be appropriate for ADR.

Section IV discusses the powers provided to an arbitrator pursuant to the ADRA. Section V. discusses enforcement of arbitration agreements as well as the enforcement and vacation of arbitration awards.

Section VI discusses the limited guidance provided by the Act regarding the qualifications of neutrals. Sections VII and VIII discuss the authority and procedures for procuring the services of a neutral. Section VIII integrates portions of the Competition in Contracting Act as well as relevant portions of the Federal Acquisition Regulations in order to place the ADRA's provisions in the proper context.

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<sup>1</sup> Some may say that we have ignored the most important provisions of the ADRA of 1996 -- specifically, Section 3 of the ADRA of 1996 which requires federal agencies to take certain concrete steps to implement its terms. We recognize the importance of this section, but choose to address it in detail on our soon to be released ADR Program Web Site. Our Web Site will also provide information on how to match your agency's ADR needs with policies, guidance, regulations, and other ADR products already created by other federal agencies. Many of the documents, web site links and other information will be available for you to print at your personal or network printer.

Section IX provides a step-by-step analysis that you can use to ensure certain information provided in, and for the purposes of, a dispute resolution proceeding remains confidential.

Section X addresses the amendments made to the Contract Disputes Act (CDA) by the ADRA. And last, but not least, Section XI discusses certain CDA provisions that are designed to promote the use of ADR.

The paper's conclusions are found in Section XII.

***TABLE OF CONTENTS***

<u>TOPIC</u>	<u>PAGE</u>
<b>I. AUTHORITY TO USE THIRD-PARTY NEUTRALS IN NON-BINDING ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEEDINGS.</b>	
1	
A. The Administrative Dispute Resolution Act of 1996 (ADRA of 1996) authorizes the <i>voluntary</i> use of non-binding "Dispute Resolution Proceeding[s]."	1
B. Elements of a Dispute Resolution Proceeding.	1
C. The ADRA of 1996 authorizes the voluntary use of ADR and "supplement[s] rather than limit[s] other available agency dispute resolution techniques."	2
D. An agency's decision to use or not use a non-binding Dispute Resolution Proceeding is <i>not subject to judicial review</i> .	2
<b>II. AUTHORITY TO USE ADR PROCEEDINGS.</b>	
3	
A. The ADRA specifically authorizes the use of binding arbitration, but requires that specified procedures be	

## SUMMARY OF THE ADR ACT OF 1996

---

followed.	3
B. An agency’s decision to use or not use a binding Dispute Resolution Proceeding is <i>not subject to judicial review</i> .	4
<b>III. THE ADRA OF 1996 PROVIDES GUIDANCE ON WHAT CASES MAY NOT BE APPROPRIATE FOR AN ADR RESOLUTION.</b>	4
A. The ADRA of 1996 provides guidelines for determining if ADR use <i>may not</i> be appropriate.	4
B. Other considerations may render ADR use inappropriate.	5
<b>IV. POWERS PROVIDED TO AN ARBITRATOR UNDER THE ADRA OF 1996.</b>	6
A. Arbitrators are authorized to regulate the course and conduct of arbitral hearings.	6
B. Arbitrators are authorized to administer oaths and affirmations.	6
C. Arbitrators are authorized to compel attendance of witnesses and production of evidence at the hearing, but only to the extent that the agency is otherwise authorized to do so by law.	6
D. Arbitrators are authorized to make awards.	6

## **SUMMARY OF THE ADR ACT OF 1996**

---

<b>V. ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS.</b>	7
A. Enforcement of agreements to submit a dispute to arbitration.	7
B. Finality and enforcement of arbitration awards.	8
C. Vacation of arbitration awards.	9
<b>VI. QUALIFICATIONS OF NEUTRALS.</b>	10
A. The ADRA of 1996 provides little guidance regarding the qualifications of neutrals.	10
B. The ADRA of 1996 deleted the ADRA of 1990's requirement for a "lead agency" to establish standards for neutrals (including experience, training, affiliations, and other qualifications).	11
<b>VII. AUTHORITY TO PROCURE THE SERVICES OF NEUTRALS.</b>	12
A. The ADRA of 1996 authorizes agencies to procure the services of neutrals.	12
B. Agencies are, however, required to ensure that parties be "entitled to participate in the selection of an arbitrator."	12

## **SUMMARY OF THE ADR ACT OF 1996**

---

<b>VIII. STREAMLINED PROCEDURES FOR HIRING NEUTRALS.</b>	12
A. The ADRA of 1996 amended the Competition in Contracting Act to permit the acquisition of neutral services for ADR proceedings to occur without “full and open competition.”	12
B. Justifications, procedures and approvals required to procure the services of a neutral using “other than full and open” competition vary with the anticipated contract amount.	13
<b>IX. ADRA OF 1996’S CONFIDENTIALITY PROVISIONS.</b>	15
A. The ADRA of 1996 establishes a narrow confidentiality provision aimed at protecting certain communications to and generated by a neutral.	15
B. To qualify for the confidentiality protections of the ADRA, certain threshold requirements must be met.	15
C. Qualifying Confidential Dispute Resolution communications between a Neutral and a <u>Party</u> or generated by the Neutral and provided to all <u>Parties</u> are also exempt from disclosure under the Freedom of Information Act (FOIA).	16
D. The application of the ADRA’s confidentiality protections to communications between: (1) a Party and a Neutral; (2) a Party and a Party; and (3) the Neutral and the Parties, require separate analysis and may yield different results.	18

## **SUMMARY OF THE ADR ACT OF 1996**

---

### **X. THE ADRA OF 1996 AMENDS THE CONTRACT DISPUTES ACT (CDA) OF 1978, TO INCORPORATE MOST OF THE ADRA OF 1996'S PROVISIONS.**

23

A. "Notwithstanding any other provision of the ADRA of 1996, contracting officers are authorized to use any "alternative means of dispute resolution under the ADRA of 1996." 23

B. Contractors are held to the same claim certification requirements that normally apply to the submission of a claim. Generally, this means that contractors must certify all contractor claims exceeding \$100,000. 23

### **XI. THE CDA HAS BEEN AMENDED BY OTHER STATUTES TO PROMOTE THE USE OF ADR BY CONTRACTING OFFICERS.**

24

A. Contracting officers are required by law to provide a written explanation, citing one or more of the conditions contained in § 572(b) of the ADRA, as to why he or she declined a contractor's request to use ADR. 24

B. Contractors are required by law to provide a written explanation, citing one or more of the conditions contained in § 572(b) of the ADRA, as to why they declined a contracting officer's request to use ADR. 24

## **SUMMARY OF THE ADR ACT OF 1996**

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### **XII. CONCLUSION**

24

#### **ATTACHMENT:**

1. The Administrative Dispute Resolution Act of 1996.

## SUMMARY OF THE ADR ACT OF 1996

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# KEY PROVISIONS OF THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996<sup>1</sup>

## I. AUTHORITY TO USE THIRD-PARTY NEUTRALS IN NON-BINDING ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEEDINGS.

A. The Administrative Dispute Resolution Act of 1996 (ADRA of 1996) authorizes the ***voluntary*** use of non-binding "Dispute Resolution Proceeding[s]." See 5 U.S.C. § 572(a).<sup>2</sup>

B. Elements of Dispute Resolution Proceeding.

1. Use of an ***alternative means of dispute resolution***<sup>3</sup> process;
2. ***Resolution of an issue in controversy***;<sup>4</sup>

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<sup>1</sup> The views and opinions expressed by the author are his own and do not represent the opinion or position of the Department of the Air Force. I wish to acknowledge the invaluable assistance received from the reviews and comments made by: Hon. Martin Harty, Armed Services Board of Contract Appeals; Chris Edwards, ADR Program Manager, Department of the Air Force; Chris Tang, ADR Program Student Intern, Department of the Air Force; and Jennifer May Bergstrom.

<sup>2</sup> The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) ("ADRA of 1996") makes permanent the ADRA of 1990, Pub. L. No. 101-552, 104 Stat. 2736 as amended by the Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354.

<sup>3</sup> This term is defined to mean "any procedure that is used to resolve an issue in controversy, including but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration and use of ombuds, or any combination thereof." 5 U.S.C. § 571(3).

<sup>4</sup> This term is defined as "an issue which is material to a decision concerning an administrative program of an agency, and when there is a disagreement (A) between an agency and persons who would be substantially affected by the decision; (B) between persons who would be substantially affected by the

## SUMMARY OF THE ADR ACT OF 1996

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3. Appointment of a *neutral*; and
4. *Specification of the parties who will participate.*

See 5 U.S.C. § 571(6) (emphasis added).

- C. The ADRA of 1996 authorizes the voluntary use of ADR and "supplement[s] rather than limit[s] other available agency dispute resolution techniques." 5 U.S.C. § 572(c).
- D. An agency's decision to use or not use a non-binding Dispute Resolution Proceeding is *not subject to judicial review*. 5 U.S.C. § 581(b).

**NOTE**: The foregoing provisions provide objective standards for determining when the confidentiality provisions of this Act apply. Once the parties agree to use an ADR technique, select a neutral, and the neutral agrees to provide the service, then the neutral has been "appointed" and "specified parties" are participating. To avoid disputes regarding when the ADR process began, a memorandum to the record or a formal written ADR agreement is recommended.

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decision. See 5 U.S.C. § 571(8). Under the Federal Acquisition Regulations (FAR), this term is defined, for purpose of contract controversies, to mean "a material disagreement between the Government and the contractor which (1) may result in a claim or (2) is all or part of an existing claim." See FAR 33.201.

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## SUMMARY OF THE ADR ACT OF 1996

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### II. AUTHORITY TO USE BINDING ADR PROCEEDINGS.<sup>5</sup>

A. The ADRA specifically authorizes the use of binding arbitration, but requires that specified procedures be followed.

1. The authority to engage in binding arbitration becomes effective *only after* the agency, “in consultation with the Attorney General,” promulgates arbitration guidelines. See 5 U.S.C. § 575(c).
2. Procedural and substantive restrictions on the use of binding arbitration require that:
  - a. The decision to arbitrate *must be voluntary* on the part of all parties to the arbitration. See 5 U.S.C. § 575(a)(1)(agencies authorized to use binding arbitration “whenever all parties consent”); § 575(a)(3)(“An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit”); and
  - b. An officer or employee of the agency must either:
    - i. Have the authority to enter into a settlement concerning the matter; or

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<sup>5</sup> For a discussion of the legal and policy arguments raised against providing the federal government with such authority during passage of the ADRA of 1990, see generally Dauber, The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies, 9 Admin. L. J. Am. U. 165 (1995).

## SUMMARY OF THE ADR ACT OF 1996

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- ii. Be specifically authorized by the agency to consent to the use of arbitration.

See 5 § U.S.C. 575(b).

3. The agreement to arbitrate *must be in writing* and must set forth the subject matter submitted to the arbitrator. See 5 U.S.C. § 575(a)(2).<sup>6</sup> (See Section IV, for a discussion of some of the provisions that should be considered in drafting an arbitration agreement.)
4. Each written agreement to arbitrate *must specify the maximum award* that may be granted by the arbitrator and may specify other conditions limiting the range of possible outcomes. See 5 U.S.C. § 575(a)(2).

- B. An agency's decision to use or not use a binding Dispute Resolution Proceeding is *not subject to judicial review*. See 5 U.S.C. § 581(b).

### III. THE ADRA OF 1996 PROVIDES GUIDANCE ON WHAT CASES MAY NOT BE APPROPRIATE FOR AN ADR RESOLUTION.

- A. The ADRA of 1996 provides guidelines for determining if ADR use *may not* be appropriate.
  1. A definitive and authoritative decision is needed as a precedent;

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<sup>6</sup> The ADRA expressly permits parties to agree to submit only certain issues in controversy to arbitration. See § 575(a)(1)(A).

## **SUMMARY OF THE ADR ACT OF 1996**

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2. The matter involves significant issues of government policy that require procedural development and ADR will not assist policy development;
3. Maintaining and established policy and/or avoiding variations in decision is of special importance;
4. The matter significantly affects non-parties;
5. A full public record of the proceeding or resolution is important;  
or
6. The agency must maintain continuing jurisdiction over the matter with the right to alter the resolution as circumstances demand.

See 5 U.S.C. § 571(b).

### **B. Other considerations may render ADR use inappropriate.**

1. Fraud: If a party to a proposed ADR attempt is under criminal investigation for conduct related to the dispute to be submitted to ADR, then ADR use is inappropriate.
2. Injunctive relief required: Matters in which injunctive relief is required are not appropriate for ADR.
3. Inspector general investigations: Agency personnel should be careful to coordinate with all appropriate offices when using ADR to resolve matters that they believe are the subject of an agency inspector general investigation.

## **IV. POWERS PROVIDED TO AN ARBITRATOR UNDER THE ADRA OF 1996.**

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## **SUMMARY OF THE ADR ACT OF 1996**

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- A. Arbitrators are authorized to regulate the course and conduct of arbitral hearings. 5 U.S.C. § 578.
- B. Arbitrators are authorized to administer oaths and affirmations. 5 U.S.C. § 578.
- C. Arbitrators are authorized to compel attendance of witnesses and production of evidence at the hearing as authorized by Section 9 of the Arbitration Act, but only to the extent that the agency is otherwise authorized to do so by law.
- D. Arbitrators are authorized to make awards.

### **NOTES:**

1. Because the ADRA requires each written agreement to specify the maximum award an arbitrator may grant, agencies may not want to agree to use binding arbitration to resolve future disputes, but may want to restrict its use to post-dispute arbitrations. This will permit agencies to enter into arbitration on a case-by-case basis with a better understanding of facts and circumstances that make its use desirable. In addition, post-dispute arbitrations will prevent agencies from agreeing to this process in disputes that may not be appropriate for ADR pursuant to 5 U.S.C. § 572(b).
2. Any written agreement to use binding arbitration should state that the arbitrator's authority is restricted to specifying who wins and how much must be paid. Arbitrators should be denied the authority to order either party to engage in specific performance, *i.e.*, ordering the government to restructure a contract or program.

## SUMMARY OF THE ADR ACT OF 1996

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3. Agency counsel should be careful about using standard arbitration agreements and procedures. Some of these procedures contain provisions or procedures that may be not be legal and would therefore be unenforceable, *i.e.*, agreements for the payment in advance of the receipt of the arbitrator's services. This is, in part, why the ADRA requires agencies to develop guidance regarding arbitration. It is anticipated that unique arbitration rules and procedures will be developed for government disputes submitted to arbitration.
4. The ADRA permits the parties to an arbitration proceeding to agree to arbitration on the condition that the award be within a range of possible outcomes, *i.e.*, to agree to a "high-low" arbitration process or perhaps even a "final offer" arbitration. See § 575(a)(1)(B).

### V. ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS.

- A. Enforcement of agreements to submit a dispute to arbitration.
  1. The ADRA of 1996 provides that an agreement to arbitrate is enforceable pursuant to the Federal Arbitration Act (Arbitration Act), § 4. See 5 U.S.C. § 576. Accordingly, once the parties draft and sign an agreement to arbitrate, they will be compelled, by a court if necessary, to submit the dispute to arbitration.
  2. Procedures for enforcing an agreement to arbitrate.
    - a. A party seeking to enforce a written agreement to arbitrate may petition a district court of competent

## SUMMARY OF THE ADR ACT OF 1996

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jurisdiction for an order to enforce the terms of the agreement to arbitrate. See 9 U.S.C. § 4.

- b. Procedures for initiating such an arbitration agreement enforcement proceeding and the right of the parties to a hearing are outlined in the Arbitration Act. See 9 U.S.C. § 4.

### B. Finality and enforcement of arbitration awards.

1. Arbitration awards do not automatically become final.
  - a. Before an arbitrator's award can be enforced, it must become final. Such awards only become *final 30 days after it is served on all parties*. See 5 U.S.C. § 580(b).
  - b. An agency may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30 day period. Id.
2. Once an arbitration award becomes final, it is binding on all parties pursuant to the Arbitration Act, Sections 9 through 13. See 5 U.S.C. § 580(c). If the parties seek to enforce an arbitrator's award, they may have options regarding how the award will be enforced.

## SUMMARY OF THE ADR ACT OF 1996

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- a. If the parties in their agreement to arbitrate agree that a judgment of the court will be entered once an arbitration award is rendered, ***and specify the court to enter the judgment***, then within one year after the award is rendered, any party can apply to the specified court for an order to enforce the award. See 9 U.S.C. § 9.
- b. If the parties in their agreement to arbitrate agree that a judgment of the court be entered once an arbitration award is rendered, ***but do not specify the court to enter the judgment***, then application may be made to the United States court “in and for the district within which the award was made” pursuant to the statutorily mandated notification procedures. Id.

### C. Vacation of arbitration awards.

1. An arbitral award may be vacated by application of a party to the arbitration agreement to a “court in and for the district wherein the award was made” if one of the following apply where:
  - a. The award was procured by ***corruption, fraud, or undue means***;
  - b. There was ***evident partiality or corruption*** in the arbitrator;

## SUMMARY OF THE ADR ACT OF 1996

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- c. The arbitrator was *guilty of misconduct* in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party may have been prejudiced; or
  - d. The arbitrator *exceeded his/her power*, or so imperfectly executed it that a mutual, final, and definite award upon the subject matter submitted was not made. See 9 U.S.C. § 10.
2. The award is vacated and the time within which the agreement required the award to be made has not expired the court may, at its discretion, direct a rehearing by the arbitrator. Id.
  3. An arbitrator award may be vacated by application of a person “*other than a party to the arbitration*,” who is adversely affected or aggrieved by the award, if any of the factors listed in V.C.1.a-d, above, are present. Id.

## VI. QUALIFICATIONS OF NEUTRALS.

- A. The ADRA of 1996 provides little guidance regarding the qualifications of neutrals. The Act merely requires a neutral to:
  1. Be a permanent or temporary officer or employee of the federal government; or

## SUMMARY OF THE ADR ACT OF 1996

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2. Be any other individual who is acceptable to the parties to a dispute resolution proceeding; and
3. Have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.<sup>7</sup>

See 5 U.S.C. § 573

- B. The ADRA of 1996 deleted the ADRA of 1990's requirement for a "lead agency" to establish standards for neutrals (including experience, training, affiliations, and other qualifications).<sup>8</sup>

**NOTE:** The ADRA of 1996 adopts "a free market" approach with regard to the qualifications of neutrals. In other words, those qualifications necessary to convince an agency and party to select and employ a third party neutral, subject to the limitations of 5 U.S.C. § 573, are sufficient to qualify the neutral to provide the requested ADR services.

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<sup>7</sup> The foregoing elements appear as the definition of a "neutral" in the Federal Acquisition Regulations (FAR) 33.201.

<sup>8</sup> The ADRA of 1996 replaced § 573(c) of the ADRA of 1990 with new text that merely requires "an agency" or "an interagency committee" to encourage and facilitate agency use of ADR and to develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

## **SUMMARY OF THE ADR ACT OF 1996**

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### **VII. AUTHORITY TO PROCURE THE SERVICES OF NEUTRALS.**

A. The ADRA of 1996 authorizes agencies to:

1. Enter into contracts for the services of neutrals.<sup>9</sup>  
See 5 U.S.C. § 573(e).
2. Use the services of one or more employees of other agencies to serve as neutrals in Dispute Resolution Proceedings.  
See 5 U.S.C. § 573(d).
3. Use, *with or without reimbursement*, the services and facilities of other federal agencies, state, local and tribal governments, and private organizations.  
See 5 U.S.C. § 583.<sup>10</sup>

B. Agencies are, however, required to ensure that parties be “entitled to participate in the selection of an arbitrator.” See 5 U.S.C. § 577(a).

### **VIII. STREAMLINED PROCEDURES FOR HIRING NEUTRALS**

A. The ADRA of 1996 amended the Competition in Contracting Act to permit the acquisition of neutral services for ADR proceedings to occur without “full and open competition.”<sup>11</sup>

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9 Agency officials are generally prohibited by law from entering into personal service contracts.

10 The General Accounting Office has traditionally taken the view that employees being paid by one agency should not be detailed to perform the work of another agency without reimbursement, unless there is expressed statutory authority to do so. In a 31 Dec. 93 memorandum, however, James Hinchman, General Counsel of the GAO, stated that the ADRA “clearly provides that authority.”

11 Full and open competition in which all responsible sources are permitted to compete for a contract is the norm in Government Contracting. See 41 U.S.C. § 253(a) and 10 U.S.C. § 3204(c). Exceptions to the

## SUMMARY OF THE ADR ACT OF 1996

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- B. Justifications, procedures and approvals required to procure the services of a neutral using “other than full and open” competition vary with the anticipated contract amount.
1. Acquisition of neutral services with an anticipated dollar value not exceeding \$2,500: These contracts<sup>12</sup> may be awarded without soliciting competitive quotations if the contracting officer or individual appointed in accordance with FAR 1.603-3(b)<sup>13</sup> considers the price reasonable.<sup>14</sup>
  2. Acquisition of neutral services with an anticipated dollar value exceeding \$2,500 and not exceeding \$100,000 (which should be the dollar range that applies to the vast majority of contracts for the services of private-sector neutrals):
    - a. These contracts are *reserved exclusively for small business concerns* and must be set aside in accordance with FAR 19.5.

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requirement for full and open competition are also provided by law. See 10 U.S.C. § 2304(c) and 41 U.S.C. § 253(c). The ADRA of 1996 amends 10 U.S.C § 2304(c) and 41 U.S.C. § 253(c) to permit the use of “other than full and open competition” when acquiring the “services of an expert or neutral in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.”

12 Contracts for this amount are known as micro-purchases, which are defined to mean the acquisition of supplies or services, the aggregate amount of which does not exceed \$2,500, except that in the case of construction, the limit is \$2,000. FAR 2.101.

13 Agency heads are encouraged to delegate micro-purchase authority to individuals who are employees of an executive agency or members of the Armed Forces of the United States who will be using the supplies or services being purchased. Individuals delegated this authority are not required to be appointed on an SF 1402, but shall be appointed in writing in accordance with agency procedures. FAR 106-3(b).

14 These contracts are not subject to the “other than full an open” justification documentation requirements of FAR Part 6. See FAR 6.001(a)(FAR Part 6 does not apply to “contracts awarded using the simplified acquisition procedures of part 13.”).

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## SUMMARY OF THE ADR ACT OF 1996

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- b. Contracting officers may solicit from only one source if the contracting officer determines that under the circumstances of the contract action only *one source is reasonably available*. FAR 13.106-2(a)(5).<sup>15</sup>
  - c. If only one source is solicited, the contracting officer must provide a written “notation” to explain the absence of competition. FAR 13.106-2(d)(3).
3. Acquisition of neutral services with an anticipated dollar value exceeding \$100,000: These procurements are governed by the procedures, documentation and approvals required by FAR 6.302.

**NOTE:** The procedures and justifications for hiring an ADR neutral are now essentially the same for agency counsel to hire an expert to assist them in preparing for litigation or appearing as a government witness during a trial or hearing. Agency personnel should contact their trial attorney office to obtain the forms and procedures used to hire such experts without “full and open” competition.

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<sup>15</sup> These contracts are not subject to the “other than full and open” justification documentation, procedures and approvals found in FAR Part 6. See FAR 6.001(a)(FAR Part 6 does not apply to “contracts awarded using the simplified acquisition procedures of part 13.”).

## SUMMARY OF THE ADR ACT OF 1996

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### IX. ADRA OF 1996'S CONFIDENTIALITY PROVISIONS.

- A. The ADRA of 1996 establishes *narrow* confidentiality protections for certain communications made to or generated by a neutral. These provisions *do not* provide any new confidentiality protections for communications made between the parties themselves. *Written agreements to enter into an ADR proceeding*, or a *final written agreement or arbitral award* reached as a result of an ADR proceeding *are not*, under the terms of the ADRA of 1996, confidential.<sup>16</sup>
- B. To qualify for the confidentiality protections of the ADRA of 1996, certain threshold requirements must be met:
1. The oral or written communication occurred between the time a neutral was appointed and specified parties began participating until the termination of the ADR process;<sup>17</sup>
  2. The communication was made for the purposes of the ADR process<sup>18</sup> and was not discoverable before the ADR process began;<sup>19</sup> and

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<sup>16</sup> The definition of “dispute resolution communication” specifically excludes such documents. See 5 U.S.C. § 571(5).

<sup>17</sup> 5 U.S.C. § 574(a) provides that a “neutral in a dispute resolution proceeding shall not voluntarily disclose . . . any dispute resolution communication or any communication provided in confidence to the neutral.” A “dispute resolution proceeding” is defined as any “alternative means of dispute resolution . . . in which a neutral is appointed and specified parties participate.” 5 U.S.C. § 571(6).

<sup>18</sup> This key restriction on the scope of the ADRA’s confidentiality protections is found in the definition of “dispute resolution communication” which states it covers “any oral or written communication prepared for the purposes of a dispute resolution proceeding . . .” See 5 U.S.C. § 571(5).

<sup>19</sup> 5 U.S.C. § 574(f) states that “Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.”

## SUMMARY OF THE ADR ACT OF 1996

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3. The information was provided by a party to the neutral in confidence<sup>20</sup> or was generated by the neutral and provided to the parties in confidence.

C. Qualifying Confidential Dispute Resolution communications *between a Neutral and a Party or generated by the Neutral and provided to all Parties* can benefit from the following:

1. Nondisclosure: Parties and Neutrals may not voluntarily disclose qualifying communications, see Section IX. D 1.-3., unless certain specified conditions are met. See Section IX. D. 1. c., below.
2. Inadmissibility: Any qualifying communication disclosed in violation of the rules specified in the ADRA *shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made*. See 5 U.S.C. § 574(c).
3. An Exemption from disclosure under Freedom of Information Act (FOIA). See 5 U.S.C. § 574(j).<sup>21</sup>

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<sup>20</sup> The term “in confidence” is defined to mean that the information is provided with the express intent by the source that it not be disclosed; or under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed. See 5 U.S.C. § 571(7).

<sup>21</sup> See 5 U.S.C. § 574(j) and compare § 574(b)(7)(communications “provided to or available to all the parties to a dispute resolution proceeding” do not qualify for confidentiality protection under the ADRA of 1996. Note also that the text of 5 U.S.C. § 574(j) merely states that qualifying communications “between a neutral and a party” are exempt from disclosure under FOIA. The legislative history of the ADRA of 1996, however, makes it clear that Congress intended qualifying communications between a neutral and the parties to be covered as well. See Cong. Rec. H11449 (Sept. 27, 1996) (Representative Reed’s Floor statement during the House’s consideration of H.R. 4194 in which he states: “The bill provides that *a document generated by a neutral and provided to all the parties is exempt from discovery under § 574(b)(7), as well as from disclosure pursuant to FOIA*. This change will facilitate the use of early neutral

## SUMMARY OF THE ADR ACT OF 1996

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- a. Only “agency records” are subject to the disclosure requirements of FOIA. See 5 U.S.C. § 552(f). Accordingly, dispute resolution communications that are not, or do not become, agency records, are not obtainable under FOIA, i.e., oral statements.<sup>22</sup>
- b. The following general categories of dispute resolution communications may become “agency records:”<sup>23</sup>
  - i. Agency personnel generate a written or electronic dispute resolution communication.
  - ii. A party or nonparty participant in an ADR proceeding provides a written or electronic dispute resolution communication to the agency, and it becomes part of the agency’s files.
  - iii. A party or participant submits a written dispute or electronic resolution communication to a neutral who is a government employee (or possibly a non-employee who works under the control of an

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evaluation and similar ADR processes that provide an outcome prediction for both sides. Parties are understandably reluctant to subject themselves to the risk of the neutral’s opinion, which is not based on full discovery, being used against them at trial later.”). Id. (emphasis added).

<sup>22</sup> See generally, Grunewald, Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act, 9 Admin. L. J. Am. U. 985 (1996).

<sup>23</sup> Id.; See also, Fordham v. Harris, 445 U.S. 169, 182-84 (1980) (stating “an agency must first either create or obtain a record as a prerequisite to its becoming an “agency record” within the meaning of FOIA.”).

## SUMMARY OF THE ADR ACT OF 1996

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agency)<sup>24</sup>, and is retained and made part of the agency's files by the neutral.

- iv. A neutral who is a government employee (and in some instances a non-employee) prepares and retains a written or electronic dispute resolution communication as part of the agency's files.

D. The application of the ADRA's confidentiality protections to communications between: (1) a Party and a Neutral; (2) a Party and a Party; and (3) the Neutral and the Parties, require separate analysis and may yield different results.

1. Communications between a party and a neutral:

- a. If the communications satisfy the threshold requirements for and fall within the scope of the confidentiality protection outlined in IX. B., above.<sup>25</sup>
- b. Then they are potentially afforded the full protection of the ADRA of 1996's: (1) nondisclosure rules; (2) inadmissibility rules; and (3) FOIA exemption.  
See § 574(a) & (b) & (j).

c. ***Unless:***

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<sup>24</sup> See, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (Army ammunition plant telephone directory prepared at the Government's expense and for use by the government contractor that operated the plant was an agency record under the "indicia of ownership" standard applied in Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980).

<sup>25</sup> In addition to the threshold confidentiality requirements outlined in IX. A., the ADRA requires neutrals, subject to certain limitations, not to voluntarily disclose "any communication provided in confidence." See § 574(a). This means that a communications made prior to the commencement of a dispute resolution proceeding could be covered. In addition, communications made in confidence to the neutral, but not "for the purpose of a dispute resolution proceeding may also be covered.

## SUMMARY OF THE ADR ACT OF 1996

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- i. *All parties* to the dispute resolution proceeding and the neutral *consent in writing*, and, if the dispute resolution communication was provided by a nonparty participant, that participant consents in writing. See § 574(a)(1) & (b)(2);
- ii. The dispute resolution communication has *already been made public*. See § 574(a)(2) & (b)(3);
- iii. The dispute resolution communication *is required by statute to be made public*, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; See § 574(a)(3) & (b)(4);
- iv. *A Court determines* such testimony or disclosure is necessary to: (1) prevent a manifest injustice; (2) help establish a violation of law; or (3) prevent harm to the public health or safety of sufficient magnitude in the particular case so as to outweigh the loss of confidentiality in the dispute resolution proceedings. See § 574(a)(4) & (b)(5);
- v. The dispute resolution communication is relevant to determining the *existence or meaning of an agreement or award* that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award. See § 574(b)(6) & (g); or

If a discovery request is made upon the neutral regarding a dispute resolution communication and the neutral notifies the parties/affected nonparty

## SUMMARY OF THE ADR ACT OF 1996

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participant of the demand; then any party/nonparty participant who *within 15 calendar days does not offer to defend a refusal by the neutral to disclose* the requested information shall have *waived* any objection to such disclosure. See § 574(e)(emphasis added).

2. Communications between the parties fall outside the scope of the confidentiality protections of the ADRA of 1996.
  - a. Unless a dispute resolution communication is generated by a neutral, *information that is provided to or is available to all parties to the dispute resolution proceeding falls outside the confidentiality protections of the ADRA of 1996*. See § 574(b)(7).
  - b. Nothing in the ADRA, however, prevents a party from using other methods of protecting settlement discussions between parties such as: (1) seeking a protective order from a Court or Board; (2) entering into an agreement pursuant to Federal Rule of Evidence 408; or (3) simply entering into a contractual agreement that contains confidentiality terms that will bind only those parties to the contract.
3. Communications generated by the neutral and provided to the parties, i.e., a written or oral opinion generated by the neutral as part of an Early Neutral Evaluation (ENE) process or a fact-finding effort.
  - a. The potential ambiguity of the text of the ADRA.

## SUMMARY OF THE ADR ACT OF 1996

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- i. The text of 5 U.S.C. § 547(j) merely states that a qualifying communication between a neutral and “*a party*,” that becomes an agency record, is exempt from disclosure under FOIA. Accordingly, it appears that communications generated by the neutral and provided to *all the parties* lose their confidentiality protection.
  - ii. The text of 5 U.S.C. § 574(b)(7), however, states that a communications generated by a neutral and given to *all the parties* does not lose its confidentiality protection.”
  - iii. Some are unclear whether information generated by the neutral retains its confidentiality protections if provided *only to one* of the parties or if it can remain confidential if provided to *all the parties*. If the former is true, then a neutral could not, if effect, provide an early neutral evaluation to all the parties.
- b. The legislative history of the ADRA, however, is clear that the confidentiality protections apply to communications *generated by the neutral and provided to all the parties* as the following quote illustrates:

H.R. 4194 also enhances the confidentiality provisions of the ADR statute. The bill provides that a *document generated by a neutral and provided to all parties is exempt from discovery under § 574(b)(7), as well as from disclosure pursuant to FOIA*. This change will facilitate the use of early neutral evaluation and similar ADR

## SUMMARY OF THE ADR ACT OF 1996

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processes that provide an outcome prediction to both sides. Parties are understandably reluctant to subject themselves to the risk of the neutral's opinion, which is not based on full discovery, being used against them at trial later. This is a change from the House passed version of H.R. 2977 [the predecessor bill to H.R. 4194].”

See Cong. Rec. H11449 (Sept. 27, 1996) (Statement of Representative Reed made on the floor of the House during consideration of H.R. 4194 and changes made to ADR legislation recently passed by the House.)(emphasis added).<sup>26</sup>

- c. The exceptions that apply to these communications are the same as those that apply between a neutral and a party communication. See IX. D. 1. c., above.

**NOTE:** In addition to relying on the ADRA's confidentiality provisions, counsel should consider the following: Rule 408 of the Federal Rules of Civil Procedure; a confidentiality contract between the parties; a protective order by a board of contract appeals or the Court of Federal Claims.

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<sup>26</sup> See also H. Rep. 104-841, 104th Cong. (2d Sess.) (Sept. 1996)(Joint Explanatory Statement of the Committee of Conference regarding H.R. 2977, the predecessor bill to H.R. 4194 that eventually became the ADRA of 1996, in which the committee stated: “In addition, a dispute resolution communication originating from a neutral and provided to all of the parties, such as Early Neutral Evaluation, is protected from discovery under § 574(b)(7) and from disclosure under FOIA.”).

## **SUMMARY OF THE ADR ACT OF 1996**

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### **X. THE ADRA OF 1996 AMENDS THE CONTRACT DISPUTES ACT (CDA) OF 1978 TO INCORPORATE MOST OF THE ADRA OF 1996'S PROVISIONS.<sup>27</sup>**

- A. “Notwithstanding any other provision of the ADRA of 1996” contracting officers are authorized to use any “alternative means of dispute resolution under the ADRA of 1996.”<sup>28</sup>
  
- B. Contractors are held to the same claim certification requirements that normally apply to the submission of a claim.<sup>29</sup> Generally, this means that contractors must certify all contractor claims exceeding \$100,000. See 41 U.S.C. § 605(c)(1); FAR 33.207(Note: the FAR has not yet been amended to implement the changes required by the ADRA of 1996).

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<sup>27</sup> Section 6 of the ADRA of 1996 amends 41 U.S.C. § 605(d) to incorporate by reference the general provisions of the ADRA.

<sup>28</sup> The ADRA of 1996's general grant of authority is for agencies to use alternative dispute resolution proceedings, see 5 U.S.C. § 572(a), which among other things requires the participation of a third party neutral. The term used above, “alternative means of dispute resolution” is much broader in that it does not require the participation of a third party neutral. Accordingly, contracting officers may agree to participate in ADR processes in which no third-party is present. It is, however, unclear if the confidentiality provisions of the ADRA of 1996 apply in an “unassisted ADR” proceeding.

<sup>29</sup> Under the ADRA of 1990, it appeared that contractors had to certify anything that was submitted to an ADR proceeding. Some viewed this requirement, which normally only applied to claims in excess of \$50,000, as creating an unnecessary obstacle to using ADR in small dollar contract disputes. Congress agreed, and the foregoing provision makes this clear.

## **SUMMARY OF THE ADR ACT OF 1996**

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### **XI. THE CDA HAS BEEN AMENDED BY OTHER STATUTES TO PROMOTE THE USE OF ADR BY CONTRACTING OFFICERS.**

- A. Contracting officers are required by law to provide a written explanation, citing one or more of the conditions contained in § 572(b) of the ADRA, as to why he or she declined a contractor's request to use ADR. See 41 U.S.C. § 605(e).<sup>30</sup>
  
- B. Contractors are required by law to provide a written explanation, citing one or more of the conditions contained in § 572(b) of the ADRA, as to why they declined a contracting officer's request to use ADR. See 41 U.S.C. § 605(e).

### **XII. CONCLUSION:**

The ADRA of 1996 provides much needed improvements to the legal framework for using nonbinding ADR techniques to resolve issues in controversy. Only time will tell, however, if the Act's provisions authorizes the use of binding arbitration will be viewed as a positive development.

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<sup>30</sup> The FAR implementation of this provision, however, creates a double standard, depending on whether a large or small company request the use of ADR. Specifically, FAR 33.214(b) states that the foregoing provision only applies "If the contracting officer rejects a request for ADR from a small business contractor."

# **Administrative Dispute Resolution Act of 1996**

## ***Public Law 104-320***

*(Compiled by Jennifer May Bergstrom)*

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### **OVERVIEW**

The following document provides the text of Administrative Dispute Resolution Act of 1990 as amended by the the ADRA of 1996 (Pub. Law 104-320). Sections 1 through 7 were prepared using the “redlined” format as follows: the text of these sections appear as normal printed text for those provisions that have not changed; lined-through text has been deleted from the original Act by the ADRA of 1996; and text that is boldened and underlined have been added by the ADRA of 1996. Sections 8 through 12 are not redlined, and instead include only the final version of the provision’s text.

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#### **Sec. 1. Short Title**

This Act may be cited as the “Administrative Dispute Resolution Act **of 1996.**”

#### **Sec. 2. Findings**

The Congress finds that--

(1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means can lead to more creative, efficient, and sensible outcomes;

(5) such alternative means may be used advantageously in a wide variety of administrative programs;

(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;

(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

### **Sec. 3. Promotion of Alternative Means of Dispute Resolution**

(a) Promulgation of Agency Policy.--Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall--

(1) ~~consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service; and~~ **consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and**

(2) examine alternative means of resolving disputes in connection with--

- (A) formal and informal adjudications;
- (B) rulemakings;
- (C) enforcement actions;
- (D) issuing and revoking licenses or permits;
- (E) contract administration;
- (F) litigation brought by or against the agency; and
- (G) other agency actions.

(b) Dispute Resolution Specialists.--The head of each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall be responsible for the implementation of--

- (1) the provisions of this Act and the amendments made by this Act; and
- (2) the agency policy developed under subsection (a).

(c) Training.--Each agency shall provide for training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency developed under subsection (a). Such training should encompass the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

(d) Procedures for Grants and Contracts.

(1) Each agency shall review each of its standard agreements for contracts, grants, and other assistance and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

(2) (A) Within 1 year after the date of the enactment of this Act [Nov. 15, 1990], the Federal Acquisition Regulation shall be amended, as necessary, to carry out this Act and the amendments made by this Act.

(B) For purposes of this section, the term 'Federal Acquisition Regulation' means the single system of Government-wide procurement regulation referred to in section 6(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(a)).

**Sec. 4. Administrative Procedures.**

(a) Administrative Hearings.--Section 556(c) of title 5, United States Code, is amended--

(1) in paragraph (6) by inserting before the semicolon at the end thereof the following: "or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) as paragraphs (9) through (11), respectively, and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;"

(b) Alternative Means of Dispute Resolution.--Chapter 5 of title 5, United States Code, is amended by adding at the end the following new subchapter:

“Subchapter IV Alternative Means of Dispute Resolution in the Administrative Process

§571. Definitions.

§572. General authority.

§573. Neutrals.

§574. Confidentiality.

§575. Authorization of arbitration.

§576. Enforcement of arbitration agreements.

§577. Arbitrators.

§578. Authority of the arbitrator.

§579. Arbitration proceedings.

§580. Arbitration awards.

§581. Judicial review.

§582. ~~Compilation of information.~~ **(Repealed)**

§583. Support services.

**§584. Authorization of appropriations.**

## §571. Definitions

For the purposes of this subchapter, the term--

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;
- (3) "alternative means of dispute resolution" means any procedure that is used, ~~in lieu of an adjudication as defined in section 551(7) of this title,~~ to resolve issues in controversy, including, but not limited to, ~~settlement negotiations,~~ conciliation, facilitation, mediation, factfinding, minitrials, ~~and arbitration~~ **arbitration, and use of ombuds**, or any combination thereof;
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided--
  - (A) with the expressed intent of the source that it not be disclosed; or
  - (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
  - (A) between an agency and persons who would be substantially affected by the decision; or
  - (B) between persons who would be substantially affected by the ~~decision,~~ **decision;**

~~except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;~~
- (9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
- (10) "party" means--
  - (A) for a proceeding with named parties, the same as in section 551(3) of this title; and
  - (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
- (11) "person" has the same meaning as in section 551(2) of this title; and
- (12) "roster" means a list of persons qualified to provide services as neutrals.

## §572. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if--

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

### **§573. Neutrals**

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

~~(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall—~~

~~(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;~~

~~(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;~~

~~(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and~~

~~(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.~~

**(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal**

**agencies and professional organizations experienced in matters concerning dispute resolution, shall--**

**(1) encourage and facilitate agency use of alternative means of dispute resolution; and**  
**(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.**

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person ~~on a roster established under subsection (e)(2) or a roster maintained by other public or private organizations, or individual~~ for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

#### **§574. Confidentiality**

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose ~~any information concerning~~ any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose ~~any information concerning~~ any dispute resolution communication, unless--

- (1) the communication was prepared by the party seeking disclosure;
- (2) all parties to the dispute resolution proceeding consent in writing;
- (3) the dispute resolution communication has already been made public;
- (4) the dispute resolution communication is required by statute to be made public;
- (5) a court determines that such testimony or disclosure is necessary to--
  - (A) prevent a manifest injustice;
  - (B) help establish a violation of law; or
  - (C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) **except for dispute resolution communications generated by the neutral**, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) **(1)** The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

**(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.**

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) ~~This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.~~ **A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).**

### **§575. Authorization of arbitration**

(a) (1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to--

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) ~~Any~~ **The** arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. **Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.**

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency ~~may offer to use arbitration for the resolution of issues in controversy, if~~ **shall not offer to use arbitration for the resolution of issues in controversy unless** such officer or employee--

(1) ~~has authority~~ **would otherwise have authority** to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

**(c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.**

### **§576. Enforcement of arbitration agreements**

An agreement to arbitrate a matter to which this subchapter applies is enforceable pursuant to section 4 of title 9, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

### **§577. Arbitrators**

(a) The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.

(b) The arbitrator shall be a neutral who meets the criteria of section 573 of this title.

### **§578. Authority of the arbitrator**

An arbitrator to whom a dispute is referred under this subchapter may--

- (1) regulate the course of and conduct arbitral hearings;
- (2) administer oaths and affirmations;
- (3) compel the attendance of witnesses and production of evidence at the hearing under the provisions of section 7 of title 9 only to the extent the agency involved is otherwise authorized by law to do so; and
- (4) make awards.

### **§579. Arbitration proceedings**

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than 5 days before the hearing.

(b) Any party wishing a record of the hearing shall--

- (1) be responsible for the preparation of such record;
- (2) notify the other parties and the arbitrator of the preparation of such record;
- (3) furnish copies to all identified parties and the arbitrator; and
- (4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c) (1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless--

- (1) the parties agree to some other time limit; or
- (2) the agency provides by rule for some other time limit.

#### **§580. Arbitration awards**

(a) (1) Unless the agency provides otherwise by rule, the award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) The prevailing parties shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

~~(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of any request by a party, nonparty participant or other person that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, advise in a decision under this subsection to terminate an arbitration proceeding or to vacate an arbitral award, except as witness or counsel in public proceedings.~~

~~(d)~~ **(c)** A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be

dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

~~(e)~~ **(d)** An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

~~(f) An arbitral award that is vacated under subsection (e) shall not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.~~

~~(g) If an agency head vacates an award under subsection (e), a party to the arbitration (other than the United States) may within 30 days of such action petition the agency head for an award of fees and other expenses (as defined in section 504(b)(1)(A) of this title) incurred in connection with the arbitration proceeding. The agency head shall award the petitioning party those fees and expenses that would not have been incurred in the absence of such arbitration proceeding, unless the agency head or his or her designee finds that special circumstances make such an award unjust. The procedures for reviewing applications for awards shall, where appropriate, be consistent with those set forth in subsection (a)(2) and (3) of section 504 of this title. Such fees and expenses shall be paid from the funds of the agency that vacated the award.~~

### **§581. Judicial Review**

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

~~(b) (1)~~ A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

~~(2) A decision by the head of an agency under section 580 to terminate an arbitration proceeding or vacate an arbitral award shall be committed to the discretion of the agency and shall not be subject to judicial review.~~

### **§582. ~~Compilation of information~~ (Repealed)**

~~The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.~~

### **§583. Support services**

For the purposes of this subchapter, an agency may use (with or without reimbursement) the services and facilities of other Federal agencies, **State, local, and tribal governments,** public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.”

### **§584. Authorization of appropriations**

**There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.**

### **Sec. 5. Judicial Review of Arbitration Awards.**

Section 10 of title 9, United States Code, is amended--

- (1) by designating subsections (a) through (e) as paragraphs (1) through (5), respectively;
- (2) by striking out "In either" and inserting in lieu thereof "(a) in any"; and
- (3) by adding at the end thereof the following:

"(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5".

### **Sec. 6. Government Contract Claims.**

(a) Alternative Means of Dispute Resolution.--Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by adding at the end the following new subsections:

"(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other mutually agreeable procedures, for resolving claims. ~~In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.~~ **The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or as otherwise required by law.** All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.

~~"(e) The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate."~~

(b) Judicial Review of Arbitral Awards.--Section 8(g) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)) is amended by adding at the end the following new paragraph:

"(3) An award by an arbitrator under this Act shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute."

### **Sec. 7. Federal Mediation and Conciliation Service.**

Section 203 of the Labor Management Relations Act, 1947 (29 U.S.C. 173) is amended by adding at the end the following new subsection:

"(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 573 of title 5, United States Code, may be assigned to act as neutrals. The Service shall consult with ~~the Administrative Conference of the United States and other agencies~~ **the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code,** in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection."

### **Sec. 8. Government Tort and Other Claims.**

(a) Federal Tort Claims.--Section 2672 of title 28, United States Code, is amended by adding at the end of the first paragraph the following: "Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee."

(b) Claims of the Government.--Section 3711(a)(2) of title 31, United States Code, is amended by striking out "\$20,000 (excluding interest)" and inserting in lieu thereof "\$100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe."

### **Sec. 9. Use of Nonattorneys.**

(a) Representation of Parties.--Each agency, in developing a policy on the use of alternative means of dispute resolution under this Act, shall develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings and shall identify any of its administrative programs with numerous claims or disputes before the agency and determine--

(1) the extent to which individuals are represented or assisted by attorneys or by persons who are not attorneys; and

(2) whether the subject areas of the applicable proceedings or the procedures are so complex or specialized that only attorneys may adequately provide such representation or assistance.

(b) Representation and Assistance by Nonattorneys.--A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if--

(1) such claim or dispute concerns an administrative program identified under subsection (a);

(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a)(2); and

(3) such person meets any requirement of the agency to provide representation or assistance in such a claim or dispute.

(c) Disqualification of Representation or Assistance.--Any agency that adopts regulations under subchapter IV of chapter 5 of title 5, United States Code, to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to--

(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also apply, as appropriate, to other persons who provide representation or assistance; and

(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.

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### **Sec. 10. Definitions.**

As used in this Act, the terms 'agency', 'administrative program', and 'alternative means of dispute resolution' have the meanings given such terms in section 571 of title 5, United States Code (enacted as section 581 of title 5, United States Code, by section 4(b) of this Act, and redesignated as section 571 of such title by section 3(b) of the Administrative Procedure Technical Amendments Act of 1991).

### **Sec. 11. Sunset Provision.**

~~The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect~~

with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate.

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*The following sections, 7, 11 and 12, are strictly the text of the corrections as presented in the ADRA of 1996. For the ease of reading, there has been no attempt to integrate the changes to the text of the amended U.S. Code provisions.*

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## **SEC. 7. Amendments on Acquiring Neutrals**

Section 7 of the Administrative Dispute Resolution Act of 1996 contained amendments regarding the expedited hiring of neutrals. These amendments changed the language found at 10 U.S.C. § 2304(c)(3)(C) as they apply to Defense Agency contracts and at 41 U.S.C. § 253(c)(3)(C) as they apply to Civilian Agency contracts.<sup>1 2</sup>

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### <sup>1</sup>**Sec. 7 Amendments on Acquiring Neutrals.**

- (a) Expedited Hiring of Neutrals.--
- (1) Competitive Requirements in Defense Agency Requirements.
  - (2) Competitive Requirements in Federal Contracts.

The expedited hiring procedures codified at 10 U.S.C. § 2304(c)(3)(C) as enacted by the Administrative Dispute Resolution Act of 1996 as they apply to the Defense Agency Contracts reads as follows:

- (c) The head of an agency may use procedures other than competitive procedures only when

\* \* \*

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing or proceeding before any court, administrative tribunal, or ~~agency, or~~ **agency, or to procure the services of an expert or neutral for use** in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

\* \* \*

<sup>2</sup> The expedited hiring procedures codified at 41 U.S.C. § 253(c)(3)(C) as enacted by the Administrative Dispute Resolution Act of 1996 as they apply to the Civilian Agency Contracts reads corrected as follows:

- (c) The head of an agency may use procedures other than competitive procedures only when

\* \* \*

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development

**SEC. 11. Reauthorization of Negotiated Rulemaking Act of 1990.**

(a) Permanent Reauthorization.- Section 5 of the Negotiated Rulemaking Act of 1990 (Public Law 101-648; 5 U.S.C. 561 note) is repealed.

(b) Closure of Administrative Conference-

(1) In General- Section 569 of title 5, United States Code, is amended--

(A) by amending the section heading to read as follows:

`Sec. 569. Encouraging negotiated rulemaking'; and

(B) by striking subsections (a) through (g) and inserting the following:

`(a) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of negotiated rulemaking. An agency that is considering, planning, or conducting a negotiated rulemaking may consult with such agency or committee for information and assistance.

`(b) To carry out the purposes of this subchapter, an agency planning or conducting a negotiated rulemaking may accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal if that agency's acceptance and use of such gifts, devises, or bequests do not create a conflict of interest. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the head of such agency. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests.'.

(2) Technical and Conforming Amendment- The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 569 and inserting the following: `569. Encouraging negotiated rulemaking.'.

(c) Expedited Hiring of Convenors and Facilitators-

(1) Defense Agency Contracts- Section 2304(c)(3)(C) of title 10, United States Code, is amended by inserting `or negotiated rulemaking' after `alternative dispute resolution'.

(2) Federal Contracts- Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by inserting `or negotiated rulemaking' after `alternative dispute resolution'.

(d) Authorization of Appropriations-

(1) In General- Subchapter III of title 5, United States Code, is amended by adding at the end thereof the following new section:

`Sec. 570a. Authorization of appropriations

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capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing or proceeding before any court, administrative tribunal, or ~~agency, or~~ **agency, or to procure the services of an expert or neutral for use** in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

\* \* \*

`There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.'

(2) Technical and Conforming Amendment- The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 570 the following:  
`570a. Authorization of appropriations.'

(e) Negotiated Rulemaking Committees- The Director of the Office of Management and Budget shall--

(1) within 180 days of the date of the enactment of this Act, take appropriate action to expedite the establishment of negotiated rulemaking committees and committees established to resolve disputes under the Administrative Dispute Resolution Act, including, with respect to negotiated rulemaking committees, eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) and providing public notice of such committee under section 564 of title 5, United States Code; and

(2) within one year of the date of the enactment of this Act, submit recommendations to Congress for any necessary legislative changes.

## **SEC. 12. Jurisdiction of the United States Court of Federal Claims and the District Courts of the United States: Bid Protests.**

(a) Bid Protests- Section 1491 of title 28, United States Code, is amended--

(1) by redesignating subsection (b) as subsection (c);

(2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

`(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

`(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

`(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

`(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.'

(b) Effective Date- This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date.

(c) Study- No earlier than 2 years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of

the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

(d) Sunset- The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.

(e) Savings Provisions-

(1) Orders- A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(2) Proceedings and Applications- (A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

(f) Nonexclusivity of GAO Remedies- In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking 'a court of the United States or' in the first sentence. Speaker of the House of Representatives. Vice President of the United States and President of the Senate.