REPORT TO THE

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDING THAT

GOVERNMENT CONTRACTING OFFICERS SHOULD MAKE GREATER USE OF ADR TECHNIQUES IN RESOLVING CONTRACT DISPUTES

BY

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GOVERNMENT CONTRACTING OFFICERS SHOULD MAKE GREATER USE OF ADR TECHNIQUES IN RESOLVING CONTRACT DISPUTES

INTRODUCTION

To the reader whose experience in the federal Government contracts disputes process is extensive, the proposition embodied in the title of this report is hardly a shocker.[1] Those familiar with the disputes process authorized by the Contract Disputes Act of 1978[2] (CDA), know that its essence is not so much to provide direction and control from above, but rather to provide a framework within which the contracting parties themselves have the dominant role of determining their rights and duties within a particular contract. The gist of the CDA is that contract disputes first are presented to the Government contracting officer (CO) for resolution and are litigated only if that initial effort fails. The goal of the CDA is to provide an informal and expeditious[3] process for resolving disputes without disrupting contract performance. Practitioners in this specialty generally agree that more cases should be disposed by agreement between the parties by whatever honorable, fair and legitimate means.[4] For

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1 This report addresses the process of resolving disputes which arise during performance of Government contracts and does not extend specifically to controversies which arise during the contract formation process.

2 41 U.S.C. §§ 601-613; 5 U.S.C. § 5108(c)(3); 28 U.S.C. §§ 1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517; 31 U.S.C. § 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

3 This report does not include an independent study of the fact of or causes of delay in processing contract disputes beyond the contracting officer level. However, the problem of substantial delay in litigating appeals before agency boards of contract appeals is well known by those who observe the process. Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals, 16 Public Contract L.J., 161 (1986).

4 Both caseloads and litigation time have increased sharply in recent years. For example, the number of docketed appeals at the Armed Services Board of Contract Appeals (ASBCA) increased 200% from 1978 to 1987. ASBCA's Report on Board Procedures During Fiscal 1986. 47 Fed. Cont. Rep. 93-95 (1987). The growth in the number, complexity and cost of litigating these cases is further described in Crowell & Pou, Appealing Government Contract Decisions: Reducing the Cost

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the Government, failure to settle may mean litigating small claims whose litigation costs exceed the amount claimed. For the Government contractor, the CDA options that remain when settlement of the issues with the CO fails to materialize -- litigate or forget it -- simply are not satisfactory in many situations. To litigate a contract dispute before an agency board of contract appeals or in the Claims Court is to embark on a resource-costly, time-consuming venture.[5] To give up a claim thought to be valid -- because it has been denied by the CO -- may be a bitter, costly business decision.

If the CDA options for resolution often are unsatisfactory, why then don't the parties caught up in Government contract disputes now make greater use of ADR techniques to settle their differences? The answer to that question is fairly complex. It depends on: (1) a general understanding of the primary Government

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and Delay of Procurement Litigation, 1987 Recommendations & Reports of the Administrative Conference ___ (1988) (hereinafter Crowell & Pou). The authors state that in recent years,

> . . . hearings on the merits became more formalized and extensive. Caseloads and backlogs increased, disputes became more heavily lawyered, and discovery and motions practice were introduced and expanded. More and more decisions took longer to be reached, and read. Many applauded these trends as enhancing contractors' due process rights; other viewers decried them as inducing delay, bureaucratic irresponsibility, and litigation expenses.
>
> Whatever the merits of these various viewpoints, in 1978 the judicialized model of claims resolution prevailed with the enactment of the Contract Disputes Act ("CDA"), due in large part to a few court decisions finding broad due process rights and agitation by some private bar and board members.

5 The procedures of the agency boards of contract appeals in particular allow for shortened processes in specific circumstances. For example, decisions on motion for summary judgment, submissions on the record only, and speedier processing of smaller claims. See Arnavas, Donald P., Five Ways to the Merits: Some Suggestions on Seeking Expeditious Resolution of Contract Dispute Litigation, 19 Nat'l Cont. Mgmt. J. 11 (Winter, 1985).

contracts disputes process; (2) an appreciation of the pivotal role of the Government contracting officer and the other principal participants in contract disputes; (3) a familiarity with the various ADR techniques that have potential application to this process; (4) an understanding of the key obstacles that lie in the way of greater ADR use; (5) a recognition of those conditions that are conducive to expanded use of ADR techniques; and finally, (6) an understanding of what specific actions are required to attain the objective of greater CO use of ADR techniques. This paper strives to support the proposition presented by addressing each of these particular considerations.

The central focus of this report is on the Government CO[6] who holds statutory authority to decide disputes that arise under or relate to a Government contract.[7] Implicit in the CO's authority to decide disputes is the authority to resolve disputes by agreement with the claimant.[8] Pursuant to the CDA, the CO decides which Government claims are meritorious and should be presented to the contractor for payment. The CO also finally decides which contractor claims against the Government are compensable and which are not. The finality of the CO's decision to deny a contractor's claims can be overturned only upon successful contractor appeal to the agency board of contract appeals or by successful direct access suit in the Claims Court.[9] The CO has continuing opportunity and authority to settle the disputed matter, extending from the time a contract controversy first arises until the matter is ultimately decided by a board of contract appeals or the Claims Court.[10] In a real sense, the CO presides over the control valve to the whole disputes resolution process. If more disputes are to be settled the CO must be involved. Thus, this CDA process itself will be facilitated by encouraging COs to learn alternate dispute

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6 A detailed description of the role of the contracting officer in the Government procurement process is presented in Bednar & Jones, "The DOD Contracting Officer: A Study of the Past; An Assessment of the Present; Recommendations for the Future", A Report by the Ad Hoc Committee on the Role of DOD Contracting Officers, American Bar Association, Section of Public Contract Law (1987) (hereinafter The DOD Contracting Officer).

7 41 U.S.C. § 605(a).

8 Gene Peters v. United States, 694 F.2d 687 (Fed. Cir. 1982); Cannon Construction Co. v. United States, 162 Ct. Cl. 94, 319 F.2d 173 (1963).

9 41 U.S.C. § 605(b).

10 See Appendix A, Disputes Process, which shows the multiple opportunities for negotiated settlement in the disputes process.

resolution techniques and to use them in appropriate circumstances.

The principal objective of greater CO use of ADR in this context is to provide increased opportunities for fair, relatively inexpensive and relatively expeditious resolution of Government contract disputes by the contracting parties.[11] By recognizing the usefulness of ADR in this decisionmaking process, by encouraging greater ADR application, and by improving the ADR skills of those agency personnel who participate in the CDA process, Government contracting agencies can create a climate in which more disputes are rationally and justly settled without resort to litigation.

What is proposed in this study is not an alternative system to the CDA process, but rather some modest stimuli and incentives to improve the effectiveness of the CDA process itself.[12] What is specifically suggested is expanded use of consensual forms of ADR -- not ADR by regulatory mandate. Agencies as well as COs should be authorized and encouraged, rather than required, to expand the use of ADR methods at the CO level.

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11 Of course, the agency boards of contract appeals were created for a nearly identical purpose -- to provide informal, expeditious procedures for resolving disputes. See, Statement of Eldon H. Crowell before the U.S. Senate, Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, Hearings on Administrative Dispute Resolution Act of 1988, S.2274, April 29, 1988.

12 The policy of encouraging agencies and COs to explore the use of ADR in resolving matters between the agency and the contractor before the CO issues a final decision and after the resultant appeal is still in dispute has been supported by the Office of Federal Procurement Policy. Letter to ACUS from Robert P. Bedell, Administrator, OFPP, Dec. 10, 1987.

THE GOVERNMENT CONTRACTS DISPUTES PROCESS

The first major event of the CDA disputes procedure is to direct a particular contractor or Government claim[13] to the contracting officer for a decision. The CO literally controls the sole point of entry to the contract disputes process.[14] The CDA requires that all contract claims be presented in writing to the CO. It also requires that the CO issue a decision in writing and state the reasons for the decision. The CO's decision on contract claims is final and conclusive and is not subject to review by any forum or agency, unless a timely appeal or suit is taken as provided in the CDA. The contractor can litigate final CO decisions in either of two forums -- the appropriate agency board of contract appeals[15] or the Claims Court.[16] Because the CDA greatly broadened the types of claims covered by the process, and specifically includes Government claims against the contractor, the vast majority of Government contract dispute resolution is accomplished in accordance with this CDA procedure.[17]

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13 A contract claim in this context is a written demand by one of the contracting parties (certified as required by the CDA) seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract FAR § 33.201.

14 This is not to suggest that the only ADR opportunities in the disputes process are at the CO level. For discussion of ADR opportunities beyond the level of the CO, see Crowell & Pou, Appealing Government Contract Decisions: Reducing The Cost And Delay of Procurement Litigation, 1987 ACUS __ (1987). In addition to the specific ADR techniques discussed in Crowell & Pou, the agency boards of contract appeals under the CDA have procedures intended to truncate the litigation process. The CDA requires these boards to provide for accelerated disposition of claims of $50,000 or less and to establish both expedited disposition and simplified procedures for disputes of $10,000 or less.

15 Currently, there are 12 federal agency boards of contract appeals, of which the Armed Services Board of Contract Appeals is the oldest and by far the largest.

16 The option lies with the contractor. For discussion of factors which should be considered in making this binding election, see discussion in Cibinic and Nash, at 947-952.

17 A discussion of the types of controversies subject to the disputes process established by the CDA is presented in Cibinic and Nash, Administration of Government Contracts, Second Edition, Government Contracts Program, The George

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To appreciate the prominent position of the CO in the disputes process, it is helpful to know the nature and sweep of the CO's decisionmaking authority concerning contracts administration. FAR[18] § 2.101 defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings . . ." The text further explains that a single contracting officer may be responsible for duties in any or all of these areas. However, it is quite common, especially for larger contracting agencies and for major acquisition programs, to divide these basic duties among several contracting officers. For example, one contracting officer may be responsible for awarding contracts and modifications to contracts, another responsible for administering contracts, and a third responsible for settling terminated contracts.[19] Of course, contracting officers have supervisors, such as branch chiefs, office chiefs and heads of contracting activities.

What the quoted definition of a CO suggests but does not make explicit is that this is a powerful Government official, with authority over the contract that is unlike that found in the private sector.[20] For example, contract clauses such as Changes,[21] Inspection,[22] and Termination for Convenience[23] give the CO the unilateral authority to alter significantly the bargain between the parties.

Under the Changes clause, the CO may make unilateral changes, in specified contract features, within the general scope of the contract. The contractor must, in order to avoid breaching this material contract provision, continue performance of the work as changed, even if the contractor disagrees with the change. Then,

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Washington University, 1985 pp. 894-912 (hereinafter Cibinic and Nash).

18 "FAR" stands for Federal Acquisition Regulation. The FAR was developed pursuant to the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 403(4) and 405(a), and is published in 48 C.F.R. _____.

19 The DOD Contracting Officer, at 26-31.

20 In remarks at the 1987 Government Contractor Conference on January 29, 1987, Brig. Gen. Norman R. Thorpe, U.S. Air Force reported that the FAR uses the words "the contracting officer shall" a total of 1,879 times.

21 FAR § 52.243-1.

22 FAR § 52.246-2.

23 FAR § 52.249-2.

unless the parties are able to agree on a contract price adjustment resulting from the change, the CO will unilaterally determine the amount, subject to contractor remedies under the Disputes clause.[24]

The Inspection clause grants broad authority to the CO as the Government representative to assure that the contractor accomplishes all inspection and testing necessary to determine that the supplies or services conform to the contract requirements. The clause requires the contractor to provide an inspection system acceptable to the Government. It also authorizes the Government to make inspections and tests while the work is in process. As the Government's representative, the CO may, as authorized by the Inspection clause, reject nonconforming items and services, require correction of defects, and even terminate the contract in circumstances where the contractor fails or refuses to comply. Disputes between the parties as to this inspection process are decided pursuant to the Disputes clause.

The Termination for Convenience clause empowers the CO to terminate contracts for the "convenience of the Government", if the CO determines that a termination is in the Government's interest. The clause gives the Government the broad right to terminate without cause, and to limit the contractor's recovery to incurred costs, profit only on work accomplished, and costs of preparing the termination settlement proposal. There is no recovery for anticipated contract profits.[25] Administration of this clause is also subject to the Disputes clause.

These three clauses -- Changes, Inspection and Termination for Convenience -- are cited merely as examples of the unique authority held by Government COs. This CO authority is unlike that found in the commercial sector.

Administration of these clauses spawns disputes, but these examples are by no means exhaustive of the class. Other examples of typical contract disputes would include cost or pricing issues, specification ambiguities and other contract interpretation controversies. Other contract clauses and other contract administration issues place the CO squarely in the role of decisionmaker for the Government. These Government contract clauses require decisions in the context of the CO acting as the contracting agent

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24 FAR § 52.233-1. The Supreme Court has recognized that this power to direct changes is an important right in a Government contract. Choteau v. U.S., 95 U.S. 61 (1877). Also see vonBaur, The Origins of the Changes Clause in Naval Procurement, 8 Pub. Cont. L.J. 175 (1976).

25 The courts have recognized this unilateral power, unparalleled in the commercial section, as an important element of public policy. G.L. Christian and Sons v. U.S., 160 Ct. Cl. 1; 312 F.2d 418 (1963).

of the Government and directly chargeable with protecting the best interests of the United States.

In an entirely different context, as mandated by the CDA, the CO is required to make decisions under the Disputes clause of the contract, not as the contracting representative of the United States, per se, but rather in the context of one standing apart from the controversy and acting as an impartial judge.[26] Here lies the opportunity for expanded use of ADR techniques. This vital decisionmaking function should not be constricted by old habits and rote practices. It is in this role of deciding contract disputes that COs should be authorized and encouraged to use whatever disputes resolution technique is best suited for the circumstances. It is in this context that federal contracting agencies[27] are missing opportunities to enjoy the resource savings of litigation avoidance. It is in this context that there exists opportunity for greater use of ADR methods.[28]

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26 Quite unlike the day-to-day duties of the CO to vigorously protect the interests of the United states under the contract, the CO is required to be unbiased and impartial in deciding the merits of a contractor's claim. In Penn Installation Corp. v. United States, 116 Ct. Cl. 550, 89 F. Supp. 545, aff'd, 340 U.S. 898 (1950), the Court of Claims observed at page 563: "In other words, the contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but also as an impartial, unbiased judge."

The law does not permit the contracting officer to blindly follow the advice of technical advisors. For example, in Shirley Contracting Corp., ASBCA No. 29848, 87-2 BCA ¶ 19,759, the Board found the final CO decision was flawed because the CO accepted an audit report which was obviously inadequate and superficial. More discussion of this legal requirement is presented later in this report.

27 Alternate dispute resolution techniques have been widely used in the private sector and by state and local jurisdiction. The federal government has been notably slow in picking up on these techniques. Smith, Alternate Means of Dispute Resolution: Practice and Possibilities in the Federal Government, Mo. J. of Dispute Resolution 9 (1984). Also see Dispute Resolution, 88 Yale L. J., 905, 905-1104 (1979).

28 The U.S. Army Corps of Engineers was the first federal agency to establish an ADR program. ADR Report, June 23, 1988, Vol. 2, p. 219.

THE KEY ROLE OF THE CONTRACTING OFFICER IN RESOLVING DISPUTES

As a body politic, the Government of the United States can act only through its agents. For most functions involving the formation and administration of contracts, that agent is the contracting officer.[29] But, it would be a mistake to conclude that the CO acts alone in the formation and administration of Government contracts. Successful contracts administration in particular depends on daily interaction between Government personnel and contractor employees. Among the key Government participants in this interaction are auditors, inspectors, engineers, production specialists, safety specialists, contracts administrators, and many others whose efforts are essential to efficient contract administration.[30]

With all of this daily dialogue and interaction between representatives of the contracting parties, controversies and disagreements are bound to occur. Most such controversies and disagreements which emerge during this process eventually are settled by agreement between the disputants and do not grow into a formal "claim" by one party against the other.[31] It is common for these contracts administration issues to be amicably resolved without the direct participation of the CO. In fact, the disputes process would collapse of its own burden if all controversies involved the personal attention of the CO. Routine disagreements, often issues of contract interpretation, generally are resolved informally at the level at which they arise. Many of these first-tier controversies involve minor issues of a technical nature and are resolved through discussions between technical personnel on an ad hoc basis. The disputants reach an informal compromise, or one disputant acquiesces in view of the other, or the matter is simply forgotten. It would be rare for disputes resolution techniques more sophisticated than ad hoc negotiation to be helpful in these routine dispositions of controversies.

However, those contract dispute issues that are elevated to the level of the CO present an entirely different opportunity. Disputes rising to this level invoke the CDA process. The CO and team of advisers must address the disputed issues as required by the CDA. It is here that ADR fits naturally into the process, as it is express Government policy to try to resolve these disputes

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29 Shedd, Joel P., Principles on Authority of Contracting Officers in Administration of Government Contracts, 5 Pub. Cont. L.J. 88 (1972). This article provides an excellent discussion of the source and extent of CO authority.

30 The DOD Contracting Officer, at 41-53.

31 Cibinic and Nash, at 926.

by mutual agreement.[32] Realization of this policy objective depends on three principal factors:

- o The authority of the CO to deal with the particular matter.[33]
- o The adequacy of the relevant information brought to the CO's attention.[34]
- o The willingness of the parties to reach settlement agreement.[35]

FAR § 33.210 describes the broad settlement authority of the CO in these terms:

> "Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under or relating to a contract subject to the Act. This authorization does not extend to --
>
> (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another

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32 It has long been Government policy to try to reach a negotiated settlement with the contractor before turning to the formal disputes process. Cibinic and Nash, 927. In fact, it is specific Government policy to try to resolve all contract claims by mutual agreement at the CO level, without litigation. Office of Federal Procurement Policy Regulation, 45 Fed. Reg. 31035 (1980); FAR § 33.204.

33 The authority of the CO is not boundless. For example, the CO has no authority to settle, compromise, pay or adjust any claim involving fraud. FAR § 33.210. For another example, the CO has no authority to settle a tort claim that is not connected with the contract. Cibinic and Nash, at 901-902.

34 A classic complaint of Government COs is that they are unable to settle the contract dispute because the contractor has not furnished adequate facts to substantiate the claim. Faced with inadequate factual justification, the CO has no alternative other than to deny the claim. Interview with Frank Carr, Chief Trial Attorney, U.S. Army Corps of Engineers, May 9, 1988.

35 Willingness turns on several factors, including attitude, pressures or lack thereof from others, and finding the time to become involved.

> Federal agency is specifically authorized to administer, settle, or determine; or
>
> (b) The settlement, compromise, payment, or adjustment of any claim involving fraud."

These limitations on the CO's settlement authority derive from the statutory limitations contained in § 6(a) of the CDA. Requests for relief that have been held to be outside the settlement authority because they are "penalties or forfeitures" include disputes concerning Davis-Bacon Act[36] wage classifications and the Contract Work Hours and Safety Standards Act.[37] Where there is evidence of fraud, the CO refers the matter to the agency official responsible for fraud investigation.[38]

If the parties are unable to dispose of a dispute through settlement, the disputes process contemplates the issuance of a contracting officer's "final" decision. A CO's final decision is not appealable by the Government,[39] and the contractor seeking further consideration of the dispute must appeal or file suit within the timeframe and in the manner provided by law.

The courts and the various boards of contract appeals have construed the standard Disputes clause as requiring a contracting officer to make a "personal and independent" judgment on the merits of a contractor's claim or Government claim. This requirement has been held to preclude a CO from agreeing to submit a claim to binding arbitration. In Dames & Moore, IBCA 1308-10-79, 81-2 BCA ¶ 15,418, the Department of Interior Board of Contract Appeals said that an agreement to arbitrate cannot relieve the CO of the duty to make a personal and independent decision on contract disputes, or relieve the Government and the contractor of their duty to resolve disputes in accordance with the Disputes clause. This decision, as well as the position of the Comptroller General, discussed later in this report, have effectively stopped use of

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36 40 U.S.C. § 276.

37 40 U.S.C. § 327.

38 FAR § 33.209.

39 41 U.S.C. § 605(b). The question may be asked, if the CO is truly impartial and unbiased in rendering a final decision, why shouldn't the Government have the same appeal opportunities as the contractor. As discussed in a later section of this report, the Government final decisionmaking process involves the interested elements of the Agency such that the CO's decision typically represents a consensus position.

binding arbitration as a method for federal contract disputes resolution.

Under most circumstances, a contracting officer should and does seek legal and technical advice in arriving at a final decision under the Disputes article.[40] The requirement for independence in the decisionmaking process is satisfied if the final decision is the contracting officer's own by adoption.[41] In fact, the "personal and independent" requirement may be met even though the decision is based principally upon legal advice given the CO by the Government attorneys.[42]

But, a decision by a contracting officer who follows the command direction of a superior without making a personal and independent judgment on the merits of a contractor's claim has been held to be an invalid final decision under the Disputes clause.[43] Instead, such situation may well be determined to be an abdication of CO responsibility.

The contracting officer is required to make an unbiased and impartial determination of the merits of the contractor's claim. Certain agency regulations require contracting officers to refer proposed final decisions to superiors for review.[44] It has been held that a CO's decision submitted to a superior for "approval" nevertheless may constitute a valid final decision.[45]

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40 FAR § 33.211(a); FAR § 1.602-2(c).

41 Max Jordan Bauunternehmung, ASBCA No. 23055, 82-1 BCA ¶ 15,685 (1982).

42 Pacific Architects & Engineers, Inc. v. United States, 203 Ct. Cl. 499, 491 F.2d 734 (1974). Also see Cibinic and Nash, at 941.

43 See cases discussed in Cibinic and Nash, at 942, 943.

44 The internal review process does not involve the participation of the contractor. However, the bill which eventually became the CDA included up to the end of the legislation process a provision granting the contractor the right to an informal conference above the level of the CO. The purpose of such informal conference was to encourage settlement of the claim. This feature was stricken from the bill because Admiral Rickover and others thought it would undermine the authority of the contracting officer. 124 Cong. Rec. 36267.

45 Jacob Schlesinger, Inc. v. U.S., 94 Ct. Cl. 289 (1941); Penner Installation Corp. v. U.S., 116 Ct. Cl. 550, 89 F. Supp. 545, aff'd, 340 U.S. 898 (1950).

A contracting officer's final decision becomes binding on both parties unless a timely appeal is taken.[46] Under the CDA, a final decision becomes "final and conclusive and not subject to review by any forum, tribunal or Government agency" unless appealed to a board within ninety days after receipt of the decision, or to the Claims Court within 12 months following its receipt.[47]

FAR Subpart 33.2, which implements the CDA, establishes additional policy and procedure for deciding Government contract disputes. The Government policy encouraging resolution all contractual issues by mutual agreement at the CO level, without litigation, is clearly expressed in FAR § 33.204. In an apparent gesture to ADR, this section includes the following suggestion:

> In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation of the dispute from the perspective of those not directly involved in creating or perpetuating the dispute. This simple suggestion is predicated on the fact that sometimes particular individuals can be involved so deeply in the disputed issues that their positions become nonnegotiable and unchangeable.[48] The FAR suggestion also recognizes that settlement possibilities may be improved by having different representatives of the contracting parties weigh the issues. What is not said is how this process is to flow and how the results of this "fresh look" relate to the ultimate CO decision. While the door is open to a variety of ADR possibilities, in actual practice ADR is rarely even considered.

Beyond this modest, oblique reference to one form of ADR, the FAR provides some specific guidance for application in the CO's contract disputes decisionmaking process. FAR § 33.211 requires the CO to:

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46 In U.S. v. Holpuch, 328 U.S. 234 (1946), the court held that a contractor's claim was "outlawed" because the contractor did not appeal to the board within the time prescribed in the Disputes clause.

47 41 U.S.C. § 609(a).

48 One of the reasons that cases may be settled even after getting into the grips of the litigators is that the litigators provide a new and detached assessment of the case.

- o review the facts pertinent to the claim;
- o secure assistance from legal and other advisers;
- o coordinate with the contract administration officer and others as appropriate; and
- o prepare a written decision.

The issuance of a final decision and the filing of an appeal by the contractor does not end the contracting officer's authority to settle the claim.[49] If a contracting officer enters into settlement negotiations after issuing a final decision but before the time for appeal has expired, the decision can lose its "finality."[50]

In fact, the CO retains settlement authority even during litigation at the board of contract appeals.[51] For example, settlement agreements reached after a decision by the Board but prior to the expiration of time for a motion for reconsideration have been held to constitute an accord and satisfaction binding both parties.[52]

However, the CO's authority to settle claims does not extend to cases where litigation has commenced in a court, because federal law grants the Attorney General sole authority to settle cases being litigated in the courts.[53] Nevertheless, the CO can and usually does strongly influence the outcome by assuring the CO's position is known and understood.

The rather "bare bones" FAR guidance to COs results in considerable variety in the specific way agency contracting officers actually decide contract disputes. The following are examples of the variations amongst agencies:

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49 See chart at Appendix A.

50 Cibinic and Nash, at 929.

51 The CO has authority to settle until the rights are vested. American Bosch Arma Corp., ASBCA No. 10305, 67-2 BCA ¶ 6564 (1967).

52 Cibinic and Nash, at 930.

53 28 U.S.C. §§ 516 & 519; Executive Order No. 6166; United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir.), cert. denied, 439 U.S. 875 (1978).

- The CO makes the final decision after drawing in advice and information from others as necessary.[54]

- The CO is required to coordinate or confer with a superior agency official or committee for approval before issuing a final decision.[55]

- The CO is required to obtain the review and comments of the Chief Trial Attorney before issuing a final decision.[56]

- The CO is the nominal and apparent author of the final decision, but in fact the actual decisionmaker is someone else in the agency.[57]

- The CO is a member of the decisionmaking board or committee.[58]

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54 This is the situation within the Environmental Protection Agency. COs are required to have final decisions reviewed by legal counsel and the Chief, Contracting Office, prior to its issuance. 48 C.F.R. § 1533.211. Many other Government agencies follow this same procedure.

55 The procedure in the Naval Facilities Engineering Command is to control authority to issue final decisions at a high level. In contractor claims less than $250,000, the final decision is issued by the Engineering Field Division; over $250,000 by the Naval Facilities Engineering Command. In both situations the policy is to try to settle the dispute before it rises to the level of a final CO decision. Naval Facilities Engineering Command Contracting Manual (NAVFAC p. 68) (Oct. 1987).

56 This is the situation for the U.S. Air Force. AF FAR Supp. 33.211(a)(2). The Chief Trial Attorney leads the office to which are assigned the attorneys who represent the Air Force in disputes before the Armed Services Board of Contract Appeals.

57 This has been observed personally by the author in his experience with the disputes process. For example, where the dispute turns on a technical issue beyond the full understanding of the CO, the CO is likely to adopt the determination of a technical advisor.

58 This formal structure for advice would draw into conference all those advisors having special knowledge or experience related to the issues in dispute. The CO may or may not be

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What actual practice shows is that CO disputes resolution is very much a shared activity, with other Government persons participating in the process. In all situations the CO acts in concert with others and the difference is only in the extent of the structure and the formality of the process. Accordingly, for ADR to flourish, the active support of all who share in the disputes resolution process is important.

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the chairperson, but would come away with a decision developed during the meeting of the board or committee.

CO RELATIONSHIPS WITH OTHER GOVERNMENT PARTICIPANTS

Only in rare instances would the CO act alone in deciding a Government contract dispute.[59] Depending on the nature of the problem, specialists in pricing, auditing, production, packaging, maintenance, quality control, transportation, contract administration, contract law and various fields of engineering are available from within the agency or within the Government.[60] In most contract dispute situations several Government advisers participate directly or indirectly. Perhaps the most common participants are attorneys, auditors, engineers and program managers.[61] The CO interacts with these professional and technical specialists to obtain advice, information and direction. Each of these participants in the disputes process, and others not mentioned as examples, has a strong influence on the disposition of issues.[62] They are positioned to encourage or discourage wider use of ADR techniques.

1. Attorneys.

The CO is required by FAR §§ 1.602-2(c) and 33.211(a)(2) to obtain legal advice in the process of developing a decision on a contract dispute. Government attorneys who provide that advice ordinarily are knowledgeable and experienced in Government contract law and disputes procedure. Most attorneys are assigned to legal offices reporting directly to senior agency management.[63] In this organizational structure, neither the CO nor the attorney

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59 In most dispute situations it would be very poor judgment for the CO to act without first gaining legal and technical advice. Barringer & Botke, IBCA No. 428-3-64, 65-1 BCA ¶ 4797 (1965).

60 See Briefing Paper No. 86-4 (Reidl & Bastianelli) "Contracting Officer Authority", Federal Publications, Inc., March, 1986.

61 For a fuller discussion of these relationships with the CO see The DOD Contracting Officer, at 41-53.

62 An experienced Government attorney wrote, "Often, the dispute is between the contractor and the Government engineer, inspector, auditor, or disbursing officer. I have seen numerous cases in which the CO sided with the contractor against these Government officials." Letter to the author from James F. Nagle, Attorney, Contract Law Division, Department of the Army, March 28, 1988.

63 The DoD Contracting Officer, at 46.

is the superior or subordinate of the other. The Government attorney is not a CO and has no independent authority to bind the Government in contract.[64] Nevertheless, because of the attorney's professional stature and lofty position within the agency organization, the attorney has significant influence over CO decisions. In some situations, the legal adviser to the CO may also be the attorney to represent the agency before a board of contract appeals if the contractor appeals an adverse final decision. In practice, the CO tends to be deferential to the advice of the attorney and acts contrary to that advice only in unusual circumstances.

Thus, Government attorneys could stimulate and influence expanded use of ADR in settling contract disputes.[65] With some exceptions, this has not been the prevailing condition. The reasons why most Government attorneys have not been more forceful in promoting ADR are not objectively demonstrable. There are some likely reasons. All attorneys tend to be conservative in doing their work and stick to conventional approaches to solving problems. Government attorneys are particularly familiar with the CDA process and are comfortable in working within that traditional method of disputes resolution. Many are unfamiliar with ADR and would be uncomfortable recommending ADR use. On the other hand, the job of providing legal advice to the CO could extend to suggesting that a particular case was appropriate for ADR. While it is for Government managers rather than their lawyers to give official concern to conserving agency time and money resources and to seek more efficient ways to do the agency's work, Government lawyers do have a strong interest in efficient legal methods. Many Government attorneys surely have felt the frustrations of the CDA disputes process and could be strong advocates of ADR once convinced of its benefits to the process.[66] Significant acceptance of ADR may come once more Government attorneys

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64 Defoe Shipbuilding Co., ASBCA No. 17095, 74-1 BCA ¶ 10,537 (1974).

65 Interview of Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers, April 8, 1988. The Corps of Engineers has settled several contract disputes pursuant to ADR techniques, and is recognized as the lead federal agency in this regard. As attorneys have strong influence within the organization, it is important to train them in ADR techniques.

66 Marquerite Millhauser, in her essay "The Unspoken Resistance to Alternate Dispute Resolution," Negotiation Journal, January 1987, suggests that, because of self-doubts or skepticism, a lawyer's first reaction to a proposal to use ADR is likely to be aggressive opposition. But with calm persistence by the side first proposing ADR, the lawyer on the other side may be more willing to accept the proposal on its face and embrace it as his or her own.

recognize that these techniques often provide a more efficient method of disposing of claims than does litigation.

2. Auditors.

COs also tend to be deferential to the conclusions of Government auditors. By regulation, if an agency CO disagrees with the auditor's conclusions in an audit of a contractor's pricing proposal, the CO is required to explain the basis for the disagreement in writing.[67] Most COs are strongly impelled by practice as well as by regulation to accede to the conclusions of the auditor. An auditor's advice ordinarily is rejected only after deliberate review of the auditor's advice.[68]

As auditors deal with precise numbers, it is arguable that auditors are by nature opposed to compromise settlement of disputes. On the other hand, few contract disputes turn exclusively on facts and figures which are objectively determinable. For example, while it may be objectively determinable how much expense a contractor has incurred on a given contractual requirement, the real issue in dispute may be how much of that cost incurrence was reasonable. For another example, it may easily be shown the amount of money originally bid on a job, when the disputed issue may be whether the job was underbid. Both of these examples provide room for judgment and compromise. In deciding a dispute, the CO would use the auditor's information but also would use judgment. In short, there is no reason inherent in the nature of their work for auditors to be opposed to wider use of ADR.[69] Auditors may be expected to raise a strong voice favoring a well-reasoned, auditable, written ADR settlement agreement reached through ADR methods.[70] Having gained that assurance, auditors reasonably may be expected to join in support of expanded ADR use.

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67 FAR § 15.803(c).

68 The DOD Contracting Officer, at 47; DOD Directive 7640.2.

69 Interview with Michael J. Thibault and David Capitano, Defense Contract Audit Agency, May 13, 1988.

70 The Corps of Engineers used a minitrial to resolve a dispute on the Tennessee-Tom Bigbee waterway project. The contractor's claim of $60 million was settled for $17.25 million. The DOD Inspector General investigated the settlement. The Inspector General found no fault with the use of a minitrial or with the settlement, but did criticize the adequacy of the supporting documentation for arriving at the amount due. Sourcebook, 581-586.

3. Engineers.

COs are rarely prepared by education or experience to deal comfortably with the technical aspects of a dispute. When technical issues are present the CO looks to Government engineers for technical advice. Government engineers prepare contract specifications, evaluate contractor technical proposals and assist COs directly in evaluating claims. Engineers frequently are appointed as CO technical representatives for contract administration. Sometimes engineers have direct knowledge of the facts giving rise to the dispute. Sometimes the engineers have authored the specification about which the parties are in controversy. Thus, engineers play an important and sometimes decisive role in disputes resolution.[71]

Engineers tend to have strong views as to the technical correctness of a contract claim, but they also tend to be practical minded. Engineers may thus be expected to support wider use of ADR in disputes resolution, if they believe that ADR provides an efficient forum for full consideration of the technical aspects of the disputed matter.

4. Program Managers.[72]

Most Government program managers are found in DOD. A program manager has the responsibility for acquiring and fielding a major system. Thus, the program manager has centralized management authority over all technical and business aspects of major systems acquisition. In this sense, the program manager controls the funds, and speaks for the agency element which generated the

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71 The DOD Contracting Officer, at 44. In disputes involving technical issues, the CO would look to the Government's technical experts to evaluate the facts and circumstances and to develop a position. That position ordinarily is adopted by the CO. Sometimes, during the course of negotiations with the contractor's representatives, the CO will be persuaded to use the contractor's technical position and will, in effect, overrule the Government's technical position.

72 Much has been written about the relationship of the CO and the Program Manager. The Packard Commission report A Quest for Excellence, June 1986, includes the recommendation: "Establishing short, unambiguous lines of authority would streamline the acquisition process and cut through bureaucratic red tape. By this means, the DoD should substantially reduce the number of acquisition personnel."

In the report, The DoD Contracting Officer, it is recommended that program managers and COs train together.

requirement for the contract and is awaiting the completion of contract performance. While having overall authority and responsibility for the acquisition of a system, program managers generally do not have authority to enter contracts. Contractual arrangements are the province of the CO. The organizational relationships between the program manager and the CO tends to fall into one of four categories:

- o The CO works in the contracts department, but provides direct support to the program manager on a full or part-time basis.
- o The CO works in the program office, but reports to and is supervised by the contracts department.
- o The CO both works in and is supervised by the program manager.
- o The program manager is appointed as a CO.[73]

Whatever the organizational relationship, there is a close tie between the CO and the program manager which is reflected also in their approach to disputes resolution. Very broadly speaking, the program manager drives to meet the program needs of the agency, while leaving the contract-related problems in the hands of the CO.[74] As the focus of the program manager is on timely acquisition and fielding of the system, contract disputes become matters of concern to the program manager in direct relationship to their potential program impact. If the dispute disrupts or does not materially impact the program, the typical program manager would tend to defer to others on how best to bring the matter to resolution. On the other hand, if the contract disputes or looms as a threat to the program, the program manager will be a key actor in seeking a prompt and satisfactory resolution.[75]

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[73] One reason why the Corps of Engineers has found success in using ADR methods in resolving contract disputes is that the commander (District Engineer) is appointed as a CO for the ADR process.

[74] A discussion of this relationship is presented in Higginbotham, Richard W., Program Manager and Contracting Officer: What are Their Roles?, Contract Management, April 1987, at 12.

[75] In dealing with disputes arising out of contracts which are not under a program manager, the CO will contend with an agency official representing the ultimate user of the goods or services being required. The "user" also provides the funds for the acquisition and, accordingly, is another team person to deal with in the disputes resolution process.

Accordingly, there are no irreconcilable differences between the roles and interests of those who participate most directly in the disputes process and the expanded use of ADR. Disputes resolution should be viewed as a team effort, with a number of essential participants in direct support of the CO. Strengthening this team work through increased use of ADR techniques is consistent with best management practices and catches the spirit of the much respected Packard Commission Report for greater efficiency in procurement.[76] Wider ADR use in contract disputes resolution is dependent in large part on gaining the enthusiastic support of those Government advisers and officials who hold major roles in the contracting process as well as in the more narrow disputes resolution process. This is a tough challenge, but a challenge that can be met with time, patience and persistence. Some modest suggestions for gaining agency support of greater ADR use in resolving contract disputes at the CO level are presented in a later section.[77]

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76 See Kavanaugh, Jack & Michelle Kalkowski, The Packard Commission: A Blueprint for Change, Contract Management, April, 1986, at 14.

77 Participation of these advisors to the CO in the CDA process provides a sort of multiple check and balance. This term approach tends to protect the public interest that important decision be rationally made. For this additional reason, it is important that these same team members have a role in ADR methods. This has been the experience of the Corps of Engineers and the Navy in their successful use of ADR in resolving Government contract disputes.

KEY FORMS OF ADR SUITABLE FOR CONTRACT DISPUTES

The law is clear that actual authority is required to bind the Government in contract.[78] The CO is the Government official authorized to execute contractual documents which bind the United States.[79] Similarly, only the CO holds authority to decide disputes arising under or relating to such contracts. Thus, there are serious practical and legal implications in pursuing any ADR approach which purports to work outside the CO's authority. Properly structured, however, there are a number of ADR techniques which are consistent with the CO authority, which may even have the effect of strengthening that authority, and which are perfectly suitable for resolving Government contract disputes.

1. Negotiation.

Because ad hoc negotiations between the parties to the contract dispute already is a familiar technique under CDA procedures, one does not readily reflect on it as a form of ADR. However, negotiation is a key ADR method, and one which should be developed for greater use at the CO level. Skilled in negotiation techniques, COs could do much better in their bargaining, whether with contractors or informally with agency personnel. Many COs doubtless already see themselves as experienced and competent negotiators. However, experience has shown that increased training and attention to listening and communication skills, use of "interest" and "principled" rather than "positional" bargaining, and similar negotiation approaches can significantly improve many persons' abilities. Present CO training does not specifically address these skills, and thus presents a gap in their skills and self-image as professionals.[80]

As developed earlier, the CO also holds a key role as "team builder" of those who participate in the disputes resolution process. ADR, including in particular improved negotiation skills, can better enable a CO to facilitate meaningful discussion with a contractor by first working to develop a coherent intra-agency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others.

In this way, even without the assistance of a third-party neutral, the CO can help avert appeals by reducing the number of

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78 Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

79 FAR § 2.101.

80 For discussion of key self perceptions of DoD contracting officers, see, The DoD Contracting Officer, at 82.

situations where it is easier simply to pass the buck to the board of contract appeals because of internal disagreements or incoherent positions.

2. Arbitration.[81]

The essence of arbitration is that a neutral third party selected by the disputing parties decides the issues submitted after receiving evidence and argument from the parties. The neutral commonly is selected because of subject-matter expertise. Arbitration may be binding on the parties by operation of law or through contractual agreement. Non-binding arbitration also is practiced to a more limited extent. Arbitration also may be either voluntary or mandatory, depending on the basis of the structure. Arbitration is widely used in resolving disputes between Government prime contractors and subcontractors.[82] It is also widely used in the commercial sector, especially in labor-management disputes.[83] Arbitration may be structured to permit a compromise solution.

In the Government contracts context, as in many others, the Comptroller General has held that the Government cannot be bound by arbitration unless the agency has specific statutory authorization, or the arbitrator is limited to fact finding.[84].

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81 An excellent discussion of arbitration in the Government contracts context is presented in Crowell & Pou, 54-57. Also see Elkouri, Frank & Edna A. Elkouri, How Arbitration Works, D.C.: BNA, 1960.

82 Subcontractors generally do not have the right to take contract claims directly with the Government because of the lack of privity. FAR § 44.203(b)(3).

83 Hardy, Timothy S. and R. Mason Cargill, Resolving Government Contract Disputes: Why Not Arbitrate?. 34 Fed. B. J., 20 (1975).

84 The Administrative Conference and others have called for Congress to overturn this view. Administrative Conference 86-3, 1 C.F.R. § 305.86-3; Harter, 1986 Recommendations and Reports of the Administrative Conference of the U.S. (hereinafter 1986 ACUS); ADR Sourcebook, p. 309 (1987); Hardy & Cargill, Resolving Government Contracts Disputes: Why Not Arbitrate?, 34 Fed. B. J. 1 (1975), ADR Sourcebook 351; Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Cont. L. J. 66 (1986). A recent report to the Administrative Conference by Richard K. Berg, Legal and Structural Obstacles to the Use of Alternative

[Footnote continued on next page]

Because of the CDA process and the position of the Comptroller General, arbitration is not one of the favored ADR techniques presently used to resolve disputes between the Government and its contracting partners.[85] Should the legal cloud cast by the Comptroller General be removed, such as by legislation, the way would be clear to consider arbitration more fully as a potential ADR technique.

Given the CO's CDA decisionmaking authority, arbitration could be a viable consideration in at least two contexts: one, in a non-binding scenario where the neutral arbitrator's decision would be advisory only to the CO; two, in a scenario designating a particularly recognized and respected Government official as the CO and "arbitrator." By agreeing to making a CO the arbitrator -- that is, a CO who theretofore was not involved in the disputed issues -- the contracting parties would, in effect, facilitate the CO's decisionmaking responsibility under the CDA through a structured arbitration. An immediate concern is whether a contractor would agree to arbitration in circumstances where a Government official was designated as a contracting officer and arbitrator. The answer of course depends on the facts and circumstances. However, holding in mind that the CDA now requires the contracting officer to be unbiased and impartial in making a final decision under the Disputes clause, and that the CO's decision is often made on the basis of facts informally developed, there may very well be situations where the parties would agree to making the CO the arbitrator. Unlike the current process for reaching a final decision, where no procedure is prescribed for presenting facts and argument to the CO, traditional arbitration procedure at least would lend itself to a more disciplined presentation of facts and arguments to the CO in the role of arbitrator. In this context, placing a CO in the role of arbitrator would not be remarkably different from the CO's current CDA role as a neutral, final decisionmaker. In fact, the arbitration process would better equip the CO to render a better informed decision.

[Footnote continued from previous page]
Dispute Resolution in Federal Programs, (September 1987), argues persuasively that GAO's objections are without legal foundation and unpersuasive.

85 There are exceptions to this general rule. In his unpublished paper "Alternative Dispute Resolution Methods for Government Contracting" June, 1988, Frank Carr reports on the successful use of non-binding arbitration in several separate cases involving Corps of Engineers contracts.

3. Factfinding.

The central idea of this ADR method is to locate and designate an individual or panel with special qualifications in the subject matter of the dispute, who then develops the facts and presents them in a report to the contracting parties.[86] The parties then may negotiate a settlement, embark on another ADR path, or place the matter back onto the CDA track. Considering that most Government contract disputes are heavily fact-driven, and that highly technical issues often separate the parties, factfinding has strong potential application to the Government contract's disputes resolution process.

Consider for example a dispute focusing on the issue of whether certain sophisticated electronics work did or did not conform to the technical specification of the contract. Using the technique of factfinding, the CO and the contractor might be able to accelerate dispute resolution by gaining the informed, factual analysis and advice of a recognized, neutral, electronics expert.

4. Minitrial.

To the limited extent that ADR so far has been used in the resolution of Government contract disputes, the minitrial has been the preferred approach.[87] The Corps of Engineers, the Navy, NASA and others have used the minitrial with well-publicized success.[88] In essence, the minitrial is a structured settlement process based on densely concentrated presentations of facts and arguments to senior officials for each side authorized to settle the dispute.[89] The minitrial occurs before a final CO decision. In most Government contracts minitrials to date, a neutral adviser has participated to provide opinions and advice and to otherwise facilitate resolution of the issues. The idea of the minitrial is that the principals for each side will come to agreement after

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86 Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution (Oct. 1983), ADR Sourcebook, at 45.

87 Crowell & Pou, at 19.

88 Edelman, Lester & Frank Carr, The Mini-Trial: An Alternative Dispute Resolution Procedure, 42 Arb. J. 7 (1987) ADR Sourcebook, 231.

89 Nash, A New Technique for Settling Disputes--The Minitrial (1985) (unpublished article); Killian, Paul & David Mancini, Mini-Trails: Basic Principles & Guidelines, Construction Briefings, Fed. Pub. (March 1985).

having heard the presentations of fact and argument within the catalytic presence of the neutral adviser. The CO or the CO Supervisor who also is a CO could very well be the principal for the Government in a minitrial structured to resolve a Government contract dispute. Such direct CO participation is seen as being in harmony with the CDA. If the minitrial produces agreement, the dispute is resolved. If the minitrial fails to produce agreement, the matter would be ripe for final decision and follow-on CDA litigation.

5. Mediation.

This technique simply involves the assistance of a neutral third party in negotiating an agreement between the contracting parties themselves.[90] It is less formal and less structured than the minitrial. The mediator has no authority beyond that bestowed by the parties and is not asked to render a decision. The CO could represent the Government at mediation without prejudice to the CDA responsibilities. Mediation is seen as a step above ad hoc negotiations, as it recognizes the potential for an earlier and better settlement by drawing upon the knowledge and experience of a trusted neutral. The mediator's role can be as active as the parties themselves permit,[91] thus keeping the parties in control of the process. The mediator can be a source of fresh approaches to problem resolution, a sounding board for settlement ideas, and an impartial adviser.[92] The skills of a mediator can produce agreement even in circumstances where the positions of the negotiators seem to be immutably hardened.[93]

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90 Folberg, Jay & Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation. San Francisco: Jossey-Bass (1984).

91 A strong mediator can play a role similar to a settlement judge by proposing settlement terms and urging the parties to accept them. Letter to ACUS from Peter H. Kaskell, Senior Vice President, Center for Public Resources, Nov. 17, 1987.

92 Having an experienced, mediator is key. Having a mediator knowledgeable in the subject matter of the dispute is a distinct advantage. Interview of Judge Edward Houry, Department of Agriculture Board of Contract Appeals, by Mr. Wallace Warfield, ACUS, March 2, 1988.

93 See discussion in Crowell & Pou, at 49-51.

6. Settlement Judges

This ADR technique contemplates the use of a special "settlement" judge to encourage the parties to resolve the dispute without compromising the position of the parties in subsequent litigations should settlement not be attained. The settlement judge ordinarily is not the trial judge later in those situations where settlement does not materialize. Hence, this process is readily distinguishable from the routine practice of many trial judges to encourage the parties during pretrial to narrow the issues or settle the dispute.

The CO's role in this particular ADR process is subject to considerable variation. The use of a settlement judge could prompt the CO to undertake a relook of the disputed issues even after having made a final decision denying the contractor's claim. The perceived advantage of this approach is the opportunity to gain authoritative advice as to how the case might be decided in the settlement judge's court or board of contract appeals. The apparent shortcoming of this ADR method is that the settlement judge's advice necessarily would be based on something less than that information which would emerge during actual litigation. Furthermore, a settlement judge is aware of the forum's caseload and could be influenced by that knowledge. Nevertheless, the way should be cleared for COs to seek assistance from a settlement judge in suitable circumstances.

7. Disputes Resolution Boards[94]

Recently, the Corps of Engineers began using a new ADR method that the Corps refers to as a "dispute resolution panel." Although this method is new to the federal sector, it has been used by several state governments in large construction projects performed in the western states. Under this ADR method, the parties agree that contract disputes arising during construction may be voluntarily submitted to the panel for an opinion as soon as the disputes occur.

Under the Corps of Engineers program, a disputes resolution panel consists of three private technical experts. The government and the contractor each select one member of the panel and the third is selected by agreement of those two members. The procedure provides for disputes to be submitted to the panel as disputes inevitably emerge during actual construction. The panel makes a nonbinding written recommendation to the contracting officer and the contractor.

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94 This description of the Disputes Resolution Board is based on an unpublished paper by Frank Carr, titled "Alternate Dispute Resolution Methods for Government Contracting", June, 1988.

Unlike most ADR methods which address disputes reactively, the dispute resolution board attempts to resolve a dispute at its inception, before the Government and the contractor have begun to expend resources in support of the litigation. Further, easy accessibility to the panel and the prompt resolution of disputes should cause a minimum of disruption of the construction work and maintain an amicable working relationship between the parties.

At this writing, two Corps of Engineers Districts are in the process of implementing this ADR method by including a disputes resolution board provision in several contracts. So far, however, this ADR technique is not known to have been used in Government construction contracting.

8. Summary Trial With Binding Decision

This is a procedure pursuant to which the scheduling of the appeal is expedited and the disputants 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 its conclusion. The parties must agree that decisions, rulings, and orders by the Board under this method, against the Government or Appellant, 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 to which scheduling of the appeal is expedited will be tailored to the needs of each particular case. Pre-trial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

Because of the public interest involved, it is important in all settlement methods that the Government side has before it sufficient factual information on which to base a rational decision. In this regard, it should be understood that dispute resolution through use of an alternate technique would nevertheless require that the contractor provide sufficient facts to the Government and to certify in the submission of those facts for claims over $50,000 that: "the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." This certification, presently required

by the CDA for claims over $50,000[95] should continue to be required in the ADR context.

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95 41 U.S.C. § 605(c)(1). The essential value of such certificate is to place liability on the contractor for misstatements or false claims. The CDA gives the Government additional protection against false claims by entitling it to recover the amount of the unsupported part of the claim, plus the costs of reviewing that part of the claim which states an overcharge. 41 U.S.C. § 604.

KEY OBSTACLES TO GREATER ADR USE

A convincing case can be made for the proposition that agreement between the parties directly involved is the best way to resolve disputes which arise during the performance of Government contracts. The parties to the dispute are best positioned to know the facts. They even may have participated in creation of the issues which remain in dispute. They are best positioned to know the program and other business implications of settlement -- certainly better positioned than would be a board or court. They often are strongly motivated to compose their differences and get on with the work which is the subject of the contract. By prompt settlement of the issues there is a real opportunity to better control the outcome and to save both time and litigation costs.

If those obvious virtues of early settlement of disputes by the contracting parties involved directly are valid, it then follows that the parties to the dispute ought to be encouraged and motivated to settle rather than to litigate, and ought to be facilitated in the disputes resolution process through appropriate use of a variety of techniques and procedures. Particularly at the level of the contracting officer, there should be expanded use of dispute resolution techniques like those previously discussed in this report.

The term "at the level of the contracting officer" is meant at the level of the contracting officer having authority to make final decisions within the meaning of the Contract Disputes Act. Said another way, the CO who is given responsibility for disputes resolution is not necessarily the CO who awarded the contract or is principally responsible for its administration. The term also should be understood to encompass a relatively wide band of time, not precisely delimited, including at the front end of the process settlement of contract administration issues which have not ripened into formal claims, and extending in time to include continuing opportunities to settle cases that have moved to the hands of the litigators after the CO's final decision. In short, ADR has a legitimate place in the decisionmaking process at any time the CO has authority to settle the contract dispute.

Given the proposition that ADR techniques could foster settlement of more disputes, it becomes important to identify and consider those key obstacles standing in the way. The following are seen as the key impediments:

1. Unawareness.

Notwithstanding the recent welling of attention to ADR in the Government contracts context, Government agencies traditionally have relied on negotiations by COs or litigation before agency boards of contract appeals to resolve contract disputes. This has

been the primary path to resolution of contract disputes. There remains widespread lack of enlightenment and misunderstanding of what other ADR techniques are and how they might fit into the contract disputes resolution process. ADR simply is not well known by those responsible for contracts disputes resolution -- by either the contractor or by the Government.

The principal reason for this incognizance seems to be agency inertia. Contract disputes resolution follows a familiar path, the path specifically authorized by statute, pointed to by regulations, described in a contract clause and routinized in practice. Contract disputes resolution was simply not regarded as fertile ground for ADR techniques until the relatively recent use of minitrials by the Corps of Engineers and occasional ADR experiments in a small number of other agencies. As ADR has not been employed extensively in the contracts disputes process, there is no broad exposure to its qualities and applications. Thus, this lack of awareness remains a serious obstacle. Much work needs to be done by proponents of ADR to teach what these techniques are and to warm up the potential participants to the idea of ADR. As more Government contracts cases are successfully settled through an ADR approach, the good news of ADR gradually will spread and the obstacle of unawareness will be abated.

2. Apprehensiveness.

There seems to be no end to the fears associated with first use of ADR.[96] Among the most commonly misgivings mentioned in the literature and by persons interviewed are (a) fear that the contractor will agree to ADR for the real purpose of learning more about the Government's case -- or vice versa; (b) nervousness by the contracting officer that the ADR result will be criticized by the agency's inspector general or by the Congress; (c) skittishness that the "boss" will disagree with the settlement result; (d) concern that the private bar somehow will manipulate ADR practice to its advantage and to the disadvantage of the disputants; (e) misgiving that ADR somehow will carve into the contracting officer's turf or authority; and (f) concern that ADR will expose weaknesses in the case. There are other fears, but these few are most frequently mentioned. The obstacle of apprehensiveness, like that of ignorance, will be overcome as ADR success breeds additional success. There is no rational basis for any of these fears. If the ADR process produces agreement, it is an agreement achieved by persons of authority who are well positioned to know all the facts and implications of the settlement; certainly they

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96 Fear, particularly fear of being criticized by others such as DCAA, may well be the major obstacle to wider use of ADR techniques at the CO level. Letter to the author from Jeffrey B. Trattner, Director of Purchasing, The Perkin-Elmer Corporation, August 4, 1988.

are better positioned than a court or board. If the ADR process results in failure to agree, at least the parties will have learned more about the strengths and weaknesses of their own case as well as that of their contracting partner. Surely, even a "failed" ADR experience will help expedite the preparation for any litigation which follows. In this sense, the "risk" of pursuing ADR is minimum.

3. Concern That ADR May Not Save Time Or Money.

Some suggest a reluctance to try ADR techniques because they are not convinced that time or money actually will be saved.[97] ADR, it is asserted, may turn out to be a sidetrack from the straighter, more familiar path to resolution by litigation. It is true that there are no precise gauges by which it may be objectively demonstrated how much time or money that ADR will save. On the other hand, to the extent that settlement of the dispute by the parties generally is a quicker process than litigation, this is a baseless concern.[98] In the context used in this report, ADR serves to strengthen and extend the techniques already available to the contracting officer for settlement. Given the time-consuming steps involved in litigation, settlement of the issues between the parties through use of ADR techniques at least warrants thoughtful consideration in most cases. Adding the real cost of the litigation risk itself to the comparison of ADR with litigation would further tip the balance toward ADR as the less costly alternative.

4. Short-Term Schedule Problems.

This objection declares that ADR should be dismissed from consideration simply because busy executives cannot spare the time required to participate directly in the ADR process. In a sense,

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97 It is important to hold in mind that the Government rarely decides to settle a case simply because it would be expensive to litigate the case. There are two key reasons for this. First, the Government may not spend funds unless it is authorized to do so. Second, in the public interest, citizens must know that they cannot obtain Government money simply by filing suit. Statement of Stuart E. Schiffer, Department of Justice, before the Senate Administrative Law and Government Relations Subcommittee, Committee on the Judiciary, June 16, 1988.

98 Use of ADR in circumstances other than Government contract disputes has resulted in substantial dollar savings over litigation. "ADR Is For Real", BNA's ADR Report, Vol. 2, No. 19, Sept. 1988, at 318.

some forms of ADR does ask busy executives to take on work that in the traditional manner of contracts disputes resolution could be passed on to litigators. Accordingly, there is a misperception that litigation is less disruptive to managers than ADR.

The answer to this concern is that the busy executives should welcome an opportunity to deal with and dispose of a matter early through ADR. ADR means early addressal of the disputed issues. Litigation on the other hand promises to drain precious, corporate and government resources for weeks, months or even years to come. Bad news does not improve with age. The more important the dispute, the more important it is for the busy executive to become involved early in the process.

The total time and energy required to take on a tough problem is likely to be less when concentrated soon after the events, as opposed to continued but less concentrated addressal over a longer time period. Settlement through ADR suggests prompt and concentrated effort; litigation preparation and execution tends to be largely a start-stop effort over a protracted period, with periodic interruptions of the executive, culminating in many situations with a surge effort at the end. In short, whether settled by ADR or litigated, a significant contract dispute will put time demands upon the executive.

5. ADR May Hide Mistakes From Public Scrutiny.

It is a legitimate concern that important Government decisions be shown under the bright light of public scrutiny. Under the CDA process this is attained through published decisions of boards and courts. Settlement agreements, however, are not published. Some argue that settlement of contract disputes are essentially secret agreements, hidden from public view and thus sheltered from public accountability. Unlike court or board decisions which are published, settlement agreements, so the argument goes, may be used to conceal mistakes and bad judgment. Others suggest that settling a case makes it easier for the Government to give away too much in the interest of expediency. These concerns can present a substantial obstacle to greater use of ADR techniques in support of contract dispute settlement.

The removal of this obstacle lies in the detail which may be required to be included in the written ADR settlement agreement, and in what happens to the agreement after it is reached. The predicate for public accountability may be established by requiring that the basis and justification for the settlement agreement be expressed with reasons in written format. Whatever the ADR technique, it is important to prepare a memorandum reflecting that the settlement result is contractually rational as well as fair and reasonable. The memorandum should take the reader from the initial position of each contesting participant through the negotiating or bargaining process and ultimately to

the final agreement. In doing this, it is important that the memorandum show clearly the reasoning process for arriving at the settlement result. The memorandum could then provide written evidence that the result is rational, fair and reasonable. The evidence must be detailed enough to reflect the most significant considerations which shape the settlement agreement, without burdening the ADR process with detail or minutia.

The fulfillment of public accountability may be met by assuring that the settlement agreement is subject to Government audit. Essentially, there is no ultimate difference between a settlement agreement reached through the ADR process and a settlement agreement reached through traditional CO decision under the CDA or settlement of quantum issues following litigation of the entitlement issues. In all these situations, the ultimate measure of the rightness of the result is the competency and integrity of the participants.

6. The Facts Are Too Complex.

A critical element of the contract disputes process is knowing the facts. The argument which holds up this obstacle to ADR asserts that it takes a board or court to thoroughly sort out the complex tangle of facts which often characterize a Government contract dispute. The thought is that ADR necessarily would provide a more shallow or too hasty addressal of the facts and thus be more likely to lead to a wrong result than that produced by a court or board. Just the opposite should be true.

While a judge unquestionably will know the law, a judge with no technical experience in the disputed matters is far less qualified to deal with the technical issues than are the principals to an ADR procedure who have been specially selected for their particular knowledge or ability. In other circumstances, the ADR principals literally may have lived with the issues as they were emerging. Experience with minitrials has demonstrated that even principals with thin preknowledge of the case can quickly absorb the facts essential for a rational decision. Another important ADR attribute is that no information need be excluded from the decisionmakers on procedural grounds, as is true in formal litigation. ADR methods facilitate the marshalling and presenting of the facts to the decisionmakers. In short, factual complexity of the dispute is an argument favoring ADR rather than favoring litigation.

7. The Law Is Too Complex.

There are at least a couple of aspects to this objection to greater use of ADR. One aspect is that, particularly in view of the recent rush of new Government contract laws and regulations,

the legal guideposts may be too complicated or undefined to support a settlement of the issues. Hence, so goes the argument, only the courts and boards should determine what the law is. The other aspect of this objection is that settlement is inappropriate in those circumstances where legal issues are present as opposed to factual issues only. The first aspect of this concern presents the argument that only courts or boards should establish legal precedent. The second aspect presents the notion that legal questions themselves are inappropriate for resolution through use of ADR.

The approach to removal of this obstacle is to clarify that what is proposed in this report is nothing more than the application of additional, more effective techniques to the settlement process which already exists. Government contract controversies are settled every day. The CDA, which is the key source of procedural law, has been part of the scene for roughly 10 years. Most of the CDA is stable law. ADR merely adds sensible refinement to the settlement process already authorized by the CDA and practiced in a more limited way every day. As to the proposition that legal precedent is to be made exclusively by the boards and the courts, there is no disagreement in this paper.[99] That, of course, means that not all contract disputes are appropriate for settlement. If no legal precedent exists, one or both of the parties may not be comfortable with settlement. Gaining the precedent of a board or court decision may be important and ADR would not be pursued in these circumstances.

On the other hand, as to the argument that ADR techniques are inappropriate for deciding legal issues, the answer is that legal issues routinely are decided by lay persons, with or without legal advice, every day in the ordinary course of Government contracts administration. If this were not true, the very process of contracts administration would come to a standstill while legal issues such as "latent" defect, "acceptance" of the goods or services, "allowable" cost and "final" payment were referred for judicial decision. Lay persons can and do decide these legal issues every day. Moreover, settling a contract dispute by means of ADR does not mean the settlement is accomplished without benefit of legal advice. The principal representatives of the parties to a contract dispute do seek legal advice on legal issues. There is every reason why this practice should continue under ADR. In short, the fact that legal issues are involved in the dispute does not disqualify the case for use of ADR techniques.

In sum, there is a clear, rational path to overcome each of these commonly perceived obstacles to wider use of ADR. ADR is not here proposed as a panacea to all the frustrations which attend the CDA disputes process. What is proposed is a logical

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99 That precedent, of course, can be modified or superceded by legislative action.

extension of existing settlement practice by employment of techniques which are demonstrably effective and which are gaining favor in many other sectors.

CONDITIONS FOSTERING SUCCESSFUL USE OF ADR

Just as certain preexisting conditions tend to promote successful formation of a Government contract, there are certain conditions which tend to promote the chances of ADR success in Government contract disputes resolution. As is true with every consensual undertaking, the disposition of the participants and the climate in which they interact strongly influence the eventual outcome. Parties to a Government contract dispute will be motivated to pursue a particular course of action aimed at dispute resolution if they believe that that particular course of action is legitimately available and has a reasonable chance of success. The parties would not set out deliberately to fail. Other factors, of course, bear on selection of a course of action. Time and cost are two of these. But the critical element is the belief that success is reasonably within reach. These, then, are some of the conditions which tend to foster rather than to smother chances for ADR success.

1. Authority.

The disputes resolution process should be direct and dispositive. The representatives of the Government and of the contractor should have unmistakable authority to reach a binding settlement of the disputed issues. They should not be mere spokespersons for the real decisionmakers. Disputes resolution discussions between persons with authority only to provide advice or recommendations are likely to be seen as an unpromising diversion from the straighter path to actual disposition by a court or agency board of contract appeals.

The problem with designating persons lacking settlement authority to conduct or participate in the ADR proceedings is that the results cannot be dispository. At best, such settlement approach results in an affirmative recommendation for acceptance and approval of a tentative settlement reached by the respective authorized participants. At worst, it is a fruitless exercise with no agreement by anybody. Government contracting officers in particular tend to staunchly guard their personal authority to make "final" decisions in the disputes process. They would tend to see an ADR proceeding conducted exclusively by others as either an unhelpful exercise or as a threat to their own authority.

In some ADR circumstances, of course, there would be an important role for third-party advisers. In a mini-trial, for example, the participation of a qualified neutral adviser can make the difference between settlement and failure. Similarly, the facts attending the dispute may well make it appropriate for each

side to gain personal, technical advice during the ADR proceeding.[100]

In the ADR process, then, an official empowered to bind the Government should represent the Government. This means either the contracting officer responsible for the contract out of which the dispute arose or an official especially appointed to settle the dispute. Similarly, the contractor should be represented by someone with authority to bind the contractor. Authority is seen as an important element fostering success in ADR.

2. Motivation And Commitment.

The chances of success in using ADR techniques are substantially improved if the principal representative for each side believes that ADR holds a real promise of dispute resolution and is worth pursuing.[101] This condition is particularly difficult to develop in circumstances where the participants have not had earlier, positive experience with ADR. Because ADR techniques generally are not well understood within the Government contracts community, there is a natural reluctance to give ADR a try. If the disputants don't know about ADR, or believe ADR is not much more than an interesting experiment, or think it is a side track to the more promising path to dispute resolution, then the ADR approach is doomed to fail. There must be sincere motivation to become involved in the ADR approach and to see it through to conclusion.

The motivation to try an ADR approach can be developed. The strongest proponents of ADR use in contract disputes are those who actually have employed its techniques in contract dispute resolution. This speaks well for the future of ADR in this milieu, for as greater use of ADR catches on the chorus of supportive voices will multiply. Meanwhile, it will remain important for those who have practiced or studied the application of ADR to Government contracts dispute resolution to continue to explain its virtues and to advocate its use.

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100 But in all these situations, it remains essential that the principal representative of each side have actual authority to dispose of the dispute.

101 In this regard, the earlier in the controversy the better. As observed by the Army's Litigation Chief in a letter to ACUS dated November 16, 1987, it is difficult to get the parties to agree to ADR after the contractor has rejected less formal procedures by filing suit in the Claims Court.

3. Approval.

Conditions must be such that the principal representative of each side feels comfortable that their respective superiors approve of the use of ADR techniques. This a separate concern from that of authority. Both the contractor and Government participants must be certain that ADR is more than an authorized path to dispute resolution; it must also be recognized as an acceptable process. The participants seek assurance that they will not be criticized for its use. ADR simply cannot work if the principal representatives are unsure of their authority or are strongly concerned that their pursuit of dispute resolution through ADR is not "okay". In this regard, there is no federal statute or executive order or Government-wide regulation which specifically sanctions and encourages the use of ADR in Government contract dispute resolution.[102]

In the absence of such statutory and regulatory underpinning, the parties to a contract dispute are likely to lack confidence that ADR is "alright", and therefore lack the confidence to try it. As a pure legal matter, enabling legislation is unnecessary for the practice of ADR (other than, perhaps, binding arbitration) in the context discussed in this paper. Nevertheless, as is discussed more fully in another section of this report, a supporting statute is desirable to place ADR at the same level of approval as the primary disputes process prescribed by the CDA. This is not to recommend a check list approach to ADR; rather it is to suggest authorization and encouragement. An executive order implemented by affirmative language in FAR Part 33, "Protests, Disputes, and Appeals" also is important to establish a sufficient condition of approval and encouragement of broader use of ADR techniques to resolve Government contract disputes.

4. ADR Skill.

Another condition that tends to promote successful use of ADR is basic training or experience in the skills of ADR techniques. Principal representatives familiar with the mechanics and art of ADR are better equipped than is the novice to embark on a particular ADR technique and to move steadily and confidently to dispute resolution. Skills such as conflict management and negotiation techniques put the parties in a more favorable position to take on ADR. Of course, every ADR approach to dispute resolution is a unique experience, necessarily shaped and formed by the facts, the law and the total make-up of the participants in the particular dispute. It is important for the parties to be flexible. Rigid protocols are inimical to ADR success. It would be a mistake to

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102 This thought is developed in a letter from Gary L. Hopkins, Associate Counsel, E-Systems, to the author, July 22, 1988.

develop a stylized routine to be followed in all situations. Nevertheless, just as there are certain fundamental advocacy skills which tend to make one a better advocate, there are certain ADR techniques to be learned which tend to make one better in the ADR arena. Training in ADR techniques should teach these fundamentals in case settings drawn from real situations. At the same time, ADR training should emphasize the imperative of flexibility.

5. Maneuver Room.

Contract disputes are unlikely to settle unless there is a reasonable range within which each party is willing to come to terms. If either party is convinced it has a clear winner, ADR is unlikely to work. From an objective viewpoint, plainly meritorious claims should be paid; conversely, claims clearly without merit should not be paid and will not gain in dignity simply because they are addressed pursuant to ADR techniques. Both parties must believe that the correct result is somewhere in the middle of a given range of possibilities. ADR works best in an arena where claimants with reasonable positions and a willingness to make reasonable compromise are present.

6. Economy.

Another important condition which tends to foster use of ADR techniques is that the ADR alternative be less costly than litigation in either an administrative or judicial forum. This is not to suggest that the ultimate compensation paid pursuant to ADR must be either greater or lesser than what might be won or lost in court. The point here is that the actual cost of the ADR dispute resolution process itself is less expensive than the primary forms of litigation before a court or appeals board. This is a very important factor, for as things are now, all a contracting officer need do is make a "final" decision denying the claim, thus leaving the litigation effort for others. To the CO, this can be a cheap if irresponsible disposition. Managers must be made familiar with ADR methods, as managers are required by their positions to care about the costs of contract disputes resolution in terms of resources. For the contracting officer to be willing to find the time and make the effort to employ ADR, the contracting officer must know that the ADR route in fact will be less costly in time and effort than would the full route of litigation. If ADR is merely an added step in the process, or if it is perceived as just as costly and onerous as litigation, the contracting officer will not participate. As those who have had actual ADR experience are convinced of its relative cost advantage, the condition of economy should not be difficult to demonstrate for parties otherwise willing to try ADR.

7. Contractual Basis For Settlement.

Another important condition is that the subject matter in dispute be resolvable under the Contract Disputes Act of 1978 (CDA). Broadly speaking, that means the claims for relief must arise under or relate to a Government contract. Additionally, the dispute must be one within the subject matter settlement authority of the contracting officer under the CDA. This would exclude from the ADR process, for examples, claims not arising under or related to contract, claims involving fraud and claims involving statutory penalties or forfeitures under the jurisdiction of another particular federal agency. The essential theme of this report is to suggest expanded use of ADR techniques in the course of CDA disputes resolution by Government contracting officers; not to suggest a widening of the sorts of disputes appropriate for settlement by contracting officers.

8. Settled Government Policy.

ADR techniques normally would not provide a proper method for establishing Government procurement policy. The task to be accomplished is the resolution of a contract dispute, not the establishment of new public procurement policy. Those policy matters should be left to the traditional agency mechanisms. This is not to suggest that ADR is appropriate only in circumstances where the law of the case is clearly settled. That is not the condition which exists today in many circumstances where a contracting officer settles a contract dispute with the contractor. Many contract disputes are a tangled mixture of fact and law not surgically separable. Contracting officer decisions do not typically differentiate between law and fact.[103] Nevertheless, contracting officers are empowered to settle such cases. Adding ADR techniques to the settlement process should not detract from the existing authority of contracting officers.

9. Rules Of Engagement.

The parties to the contract dispute should agree in advance on the framework within which the ADR procedure will be conducted.

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103 In other circumstances, contracting officers make legal decisions directly, such as determining that a given condition is a "latent" defect.

This agreement is best reduced to writing and signed by the principal representative of each party.[104] While the primary rule should be flexibility, a number of procedural and administrative issues should be settled in advance in order to facilitate the entire process. Among those considerations would be the identification of the participants, written expression of the issues to be resolved, the date, time and place of the ADR sessions, the sequence of events and the manner of payment of the ADR costs. In some cases it also may be necessary to reach agreement on the extent to which information disclosed during the ADR procedures may be used in future related and unrelated proceedings.

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104 An excellent sample agreement concerning procedures for mini-trial appears as an attachment to Turnquist, "ADR initiations at the Department of the Navy", Continuing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government, Edited by: Erika S. Fine, Butterworth Legal Publishers, 1988 at 305.

COs CAN BE MOVED TO RESOLVE MORE DISPUTES WITHOUT RESORT TO LITIGATION

Generally speaking, the typical CO will make strong efforts at resolving the disputed issues before making the final decision turning the parties to litigation.[105] COs have an enviable record of resolving most disputes that come before them. In some situations the attempt at settlement will be through exchange of correspondence; in other less common situations, the CO and other Government representatives will meet with the contractor representatives for face-to-face discussions. These are the traditional approaches. Rarely does a CO consider alternative approaches to dispute resolution. The fundamental reason for this mindset, of course, is that traditionally ADR has not been used. Before the CDA, the primary disputes process was prescribed by regulation and implemented by a contract clause. There was no mention of ADR in the regulations or in the contract clauses which prescribed the administrative disputes process. Now that there is a statutory basis for contract disputes resolution, the CDA, there still is no statutory or regulatory language directly authorizing or approving ADR techniques for the CO. As a practical matter, it simply is too much to expect for most contracting officers regularly to initiate an alternate approach to disputes resolution when no law or regulation covering disputes even directly mentions the subject.[106]

Those agencies which have experimented in any significant way with ADR have done so mainly because of the strong influence of a high-ranking individual within the agency who has formed an interest in the subject.[107]

One way to correct this situation and to encourage expanded consideration is through legislation. The Administrative Conference has recommended that Congress encourage appropriate use of ADR and to make agency disputes resolutions practice simpler and more productive. A broad-based bill introduced in the 100th Congress by Senator Grassley would confirm agencies' authority to employ these methods and encourage them to make use of it. S. 2274, the Administrative Dispute Resolution Act of 1988, would

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105 Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts? (1988), ADR Sourcebook, at 371.

106 For ADR to take hold in the contract disputes resolution process it needs to be "institutionalized." Letter to ACUS from Peter H. Kaskell, Senior Vice President, Center for Public Resources, November 17, 1987.

107 For example, the acknowledged leader of the Government contracts ADR effort in the Corps of Engineers is the Chief Counsel, Lester Edleman.

go far to shape a positive government policy encouraging informed public sector use of ADR -- much as the U.S. Arbitration Act of 1925 did for arbitration in many private sector disputes. Congressman Pease has introduced a companion House ADR bill, H.R. 5101, that is similar. Even though the bulk of agency comments were quite positive, the bills failed to become law during the 100th Congress.

The main procedural thrust of S. 2274 and H.R. 5101 would be to foster the use of flexible alternatives by allowing the contracting parties to shape procedures to fit the circumstances on a case by case basis. Although the Grassley proposal would potentially apply to all kinds of disputes relating to agency administrative programs, it is based wholly on the principle of consent -- every process addressed in the bill would be invoked only with the knowing agreement of the parties, including the Government.

The federal Government is in an ideal position to serve as a model for the rest of our society in this particular regard. Given the CDA policy encouraging settlement, Government contracting agencies should be in the forefront in using consensual dispute resolution. Instead, almost all are lagging far behind the remainder of our country's state, local and private sector dispute processors. More than one knowledgeable observer has noted that while top echelon officials at DOJ sing the praises of ADR, all too many litigators cling tenaciously to the motions and discovery practice with which they are comfortable and disdain the less adversarial approaches.[108] This duality should be ended; ADR should cease being "one of those subjects that receives almost universal endorsement in theory but substantially less in practice."[109] This attitude should be replaced, with government managers, COs, attorneys, program officials and others viewing alternative means of dispute resolution as a major set of tools that can be routinely considered and aptly used.

The impetus for meaningful change will have to come from the top levels of government -- Congress and top executive officials. Otherwise, those who participate in contract disputes resolution may prefer the safety of the status quo to thoughtful consideration of more suitable alternatives. Congress should send a clear signal that "ADR is okay", and that informed, rational use of it will be supported. S. 2274 is an important first step along this path.

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108 E.g., Richard Mays, ADR & Environmental Enforcement: A Noble Experiment or a Lost Cause?, 18 Envtl. L. Rptr. 10087, 10091 (1988); remarks of Eldon Crowell at Administrative Conference Colloquium on Improving Dispute Resolution, transcript (June 1, 1987).

109 Marguerite Millhauser, The Unspoken Resistance to ADR, Negotiation J. 29 (Jan. 1987).

As directly related to the subject of this report, Section 3 of the Bill calls on agencies to consider potential ADR uses and to develop a dispute resolution policy, to appoint a dispute resolution specialist, and to ensure personnel training in negotiation and dispute resolution methods. These provisions are intended as a start to carrying out both the Act's policy favoring ADR and its findings that greater use of ADR will improve the operation of the government.

The proposed legislation also amends the Administrative Procedure Act to authorize the parties specifically to agree to use mediation, simplified or expedited procedures, or other mutually agreeable processes to resolve disputes arising under federal administrative programs. (Section 4). Although the use of most ADR is not necessarily inconsistent with existing requirements, this feature will resolve any doubt about the compatibility of ADR with current requirements. Arbitration is included subject to general guidelines on issues likely to be apt or inapt for ADR (Section 4).

Section 5 of the Bill amends the Contract Disputes Act to encourage agency COs and BCAs to use consensual methods to settle acquisition disputes; it specifically authorizes use of ADR in contract disputes, subject to Section 4's guidelines. These changes will greatly extend the flexibility of COs, boards of contract appeals, and contractors to use minitrials and other appropriate means to better handle contract claims. The Act also takes steps to make it easier for agencies to use ADR. It authorizes them, for instance, to accept volunteer services from mediators or other "neutrals" and to hire them promptly and efficiently. These steps will encourage other agencies to follow the initiatives of the Army Corps of Engineers, the Department of the Navy, and the Claims Court in an area where litigation has increased almost exponentially in recent years.

Of course, there are factors other than the absence of a specific ADR statute which inhibit the CO's use of alternate approaches. These were discussed earlier in this report and include prominently the specter of being second-guessed or criticized. There also will remain even with an ADR statute the comfort of following the CDA process knowing that somebody else has to litigate if the claimant simply is turned down. There also is the press on the CO of other business, which leaves little time for settling contract claims. Most significant, however, is the fact that the primary method of disputes resolution is clearly laid out in the statute, the FAR and the contract Disputes clause, while ADR is not even mentioned as a possibility. Unless ADR has a statutory foundation compatible with the CDA, many COs are unlikely to give ADR techniques serious consideration in the contract disputes process. What this strongly suggests is that ADR can never flower in the patch of contract disputes until it is planted firmly by statute or at least by some other strong expression of federal policy such as an executive order.

This perceived need for an authorizing statute is not to suggest that there presently exists a fundamental legal impediment to using ADR techniques. With the single possible exception of binding arbitration, it does not appear from review of the literature and from interviews of experts that there is a statutory impediment in the CDA to CO use of ADR techniques to resolve Government contract disputes. While legislation may not be needed to provide a technical legal undergirding, it could provide a clear, unambiguous policy signal that ADR techniques plainly are authorized and approved. COs and others need this assurance. Until this uncertainly that ADR is alright is removed by legislation or executive order, and agencies then encourage COs to employ ADR techniques in settling disputes, use of ADR in this context is likely to remain at the experimental level. Additionally, as has been recommended by the Administrative Conference,[110] Congress should specifically authorize the use of arbitration in contract disputes at the agency's discretion.

More than Congressional and Presidential anointment of ADR will be necessary to realize a significant increase in alternate techniques for disputes resolution. The full potential of ADR cannot be attained without a cultural change within most contracting agencies. A clear federal ADR policy and rational implementing regulations may dissolve agency and CO concern over authority for and approval of ADR techniques, but will not have the immediate effect of establishing confidence in alternate methods or of igniting excitement in their use. There are several practical reasons for this. First, it will remain the principal business of COs to award new contracts. This concentration on contract awards, which cannot be put off, makes disputes resolution, which often can be put off, a secondary matter. Traditionally, the job performance of COs is evaluated principally on their success in contract formation -- often rated on the basis of contracts awarded or dollars obligated by contract -- and for less on their achievements in contract dispute resolution. This condition is hardly conducive to the trying of more imaginative approaches to dispute resolution. This suggests that COs must be specifically motivated to use ADR before there can be a dramatic increase in its use.

Effective use of ADR means coming to grips firmly with the dispute and reaching a dispositive solution. This is a different process than "deciding" a dispute by turning down a claimant and forcing litigation. Thus, even with a statute, the COs must be

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110 Administrative Conference Recommendation 87-5, Assuring the Fairness and Acceptability of Federal Agency Arbitration, 1 C.F.R. § 305.87-5.

further encouraged to try ADR, trained[111] in ADR techniques and rewarded for appropriate use of them.

Some COs too will continue to have the problem of finding the time to pursue ADR personally.

What this all means is that with or without a statute providing a firm undergirding, it will take time for the CDA mindset to be tempered with the advantages presented by ADR, and time to train those involved in the dispute resolution process. While ADR training readily can be developed and presented, the cultural wariness of ADR will take longer to abate. To mold genuine, enthusiastic support for ADR techniques will require specific and sustained efforts on many fronts. Both broad categories of participants in the contract disputes process must be stimulated to reflect upon the possibilities of ADR in each particular dispute -- Government personnel and contractor personnel. Within each of these groupings, the key participants tend to mirror each other in job assignment and orientation. These key figures are executive officials responsible for the contracting process, program and project managers, attorneys, accountants, engineers and other technical personnel, and, finally, contracting officials. The flow of encouragement should be from top-down. Some specific incentives would include:

1. Stronger federal policy statements -- arrived at through the FAR process, so as to gain specifically the participation of Government contractors and the public -- which would encourage COs, before final decision, to explore the use of ADR to resolve the dispute.

2. More comprehensive programs of promoting ADR, such as that recently established by the Corps of Engineers, to apply ADR techniques in specific test cases, to conduct training programs and to provide notices and guidance for personnel and contractors.[112]

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111 The Federal Acquisition Institute (FAI) can be a valuable resource in identifying the managerial and operational population for whom ADR training is key, and in structuring the content of the training programs. Interview of Jack Livingston, Director of FAI, Office of Federal Procurement Policy, April 29, 1988.

112 The Corps of Engineers Program is described in 2 ADR Report 365 (1988).

3. Agencies, and perhaps large Government contractors,[113] should designate an official within the acquisition hierarchy as the ADR Specialist, with the specific mission of developing more effective contract disputes resolution practices, to include encouraging wider use of ADR methods in the contract dispute process.[114]

4. Government contracts should include a clause specifically describing the full range of ADR techniques available for consideration by the parties at the time a claim is presented to the CO for resolution under the CDA.[115]

5. COs involved in the disputes process should be specifically evaluated as part of the annual performance evaluation cycle on their effectiveness in managing contract disputes, to include the use of alternate techniques in disposing of such disputes during the rated period.

6. BCA judges should be specifically alert for suggesting return to the CO level of cases which evidently should be pursued more vigorously for settlement.[116]

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113 It was reported in The National Law Journal that most corporations that seriously pursue ADR designate a "point person" who is responsible for conceiving, coordinating and implementing the program throughout the corporation. (Oct. 3, 1988 at 17)

114 The ADR Specialist could be a senior acquisition executive within the agency. The mission of this position would include challenging barriers to wider ADR use and promoting ADR use through outreach programs with industry and Government. The ADR Specialist has potential to achieve substantially improved understanding of and use of ADR procedures at the CO level. The ADR Specialist would operate much as the agency "Competition Advocate" operates to foster greater competition in contracting pursuant to the Office of Federal Procurement Policy Act, 41 U.S.C. § 404.

115 The best time to first open the issue of ADR is in the drafting of the contract. Reichardt, David L., "Auditing Litigation -- The Ultimate Finesse," Contract Management, pp. 8-9, July 1986.

116 A number of agency boards of contract appeals, to include NASA, Navy, Agriculture and Transportation have developed or are developing DR rules which could be amended to encourage remand to COs in appropriate cases.

7. ADR training programs[117] for both industry and Government personnel will be necessary, as well. In this regard, ADR training should not be offered as a "stand alone" subject, as though it had some life of its own. Rather, ADR training should be integrated into existing training programs on techniques to improve the contract formation and contract administration processes itself, so as to abate conditions which later lead to disputes. ADR training also fits naturally into training on broader disputes resolution procedures under CDA.

In the long run, however, ADR will catch on only to the extent that its actual practice produces convincing measurable results. When the parties to a contract dispute come to recognize that ADR holds greater promise than does litigation for a just, relatively expeditious and relatively less costly solution, ADR will become a more popular option in suitable cases.

There also is the obvious requirement for contractor participation in ADR. Will it be difficult to gain the cooperation of Government contractors in expanded use of ADR techniques? The key is whether contractors can be persuaded as to the practical advantages of ADR in given circumstances.[118] Government contractors are accustomed to conforming with federal policy and practices, to include Government procedural requirements. Furthermore, the terms of most Government contracts today are set by the Government. Pursuant to both the Changes clause and the Disputes clause the contractor today does not have the option of walking off the job and challenging the Government's position through litigation. The Government contract requires that the contractor continue performance under the contract, leaving until later the determination of the issue of which party will bear the costs.[119] If contractors can foresee earlier and less costly claims recovery through ADR, then ADR will be supported.

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117 An attachment to the report includes examples of ADR training components for COs, recently developed by Wallace Warfield, Visiting Fellow, ACUS.

118 On the other hand, contractors may be unwilling to agree to ADR in circumstances where they have a strong case or where they fear "losing face" with the customer by being unwilling to compromise. Letter from Robert Eastburn, Jr., Chief Counsel, Forth Worth Division, General Dynamics, to the author, June 30, 1988.

119 Contractors may be expected to be more willing to agree to ADR when it is a contractor claim and the Government holds the money. Department of Defense Inspector General Memorandum for Assistant Inspector General (Analysis and Followup), subject "Review of Contract Audit Reports in Litigation", April 1, 1988.

Contractors tend to be frustrated with the burdens and bureaucracy which attend litigation. To the extent that ADR holds real promise of fairly resolving the issues in dispute short of expensive litigation, the Government contractor should be willing to participate.[120]

Other factors also should motivate contractors to participate in greater use of ADR. Highly important is that many ADR techniques keep the outcome within the control of the contracting parties instead of surrendering the outcome to the board or court. Settlement also speeds the process of determining which party bears the costs of the contested contract issues, tends to preserve a cooperative, business relationship between the parties, avoids the adversarial nature of litigation,[121] and fosters the early return to concentrating on the real purpose of the contract, namely productive contract work. Once ADR is specifically sanctioned and encouraged as a preferred choice over litigation, willing contractor participation will be forthcoming.[122]

CONCLUSION

The promise of a quick and inexpensive contract disputes resolution process that was embodied in the CDA has been frustrated by the longstanding practice of overlooking greater settlement opportunities at the CO level. Disputes which should be settled needlessly pass through the hands of the CO and into litigation, feeding the conditions of increased cost and increased delay. Litigation costs too much. It takes too long. It tends to separate rather than to harmonize the relationships between the contracting partners. Greater use of ADR at the CO level holds real promise of restoring the original purposes of the CDA.

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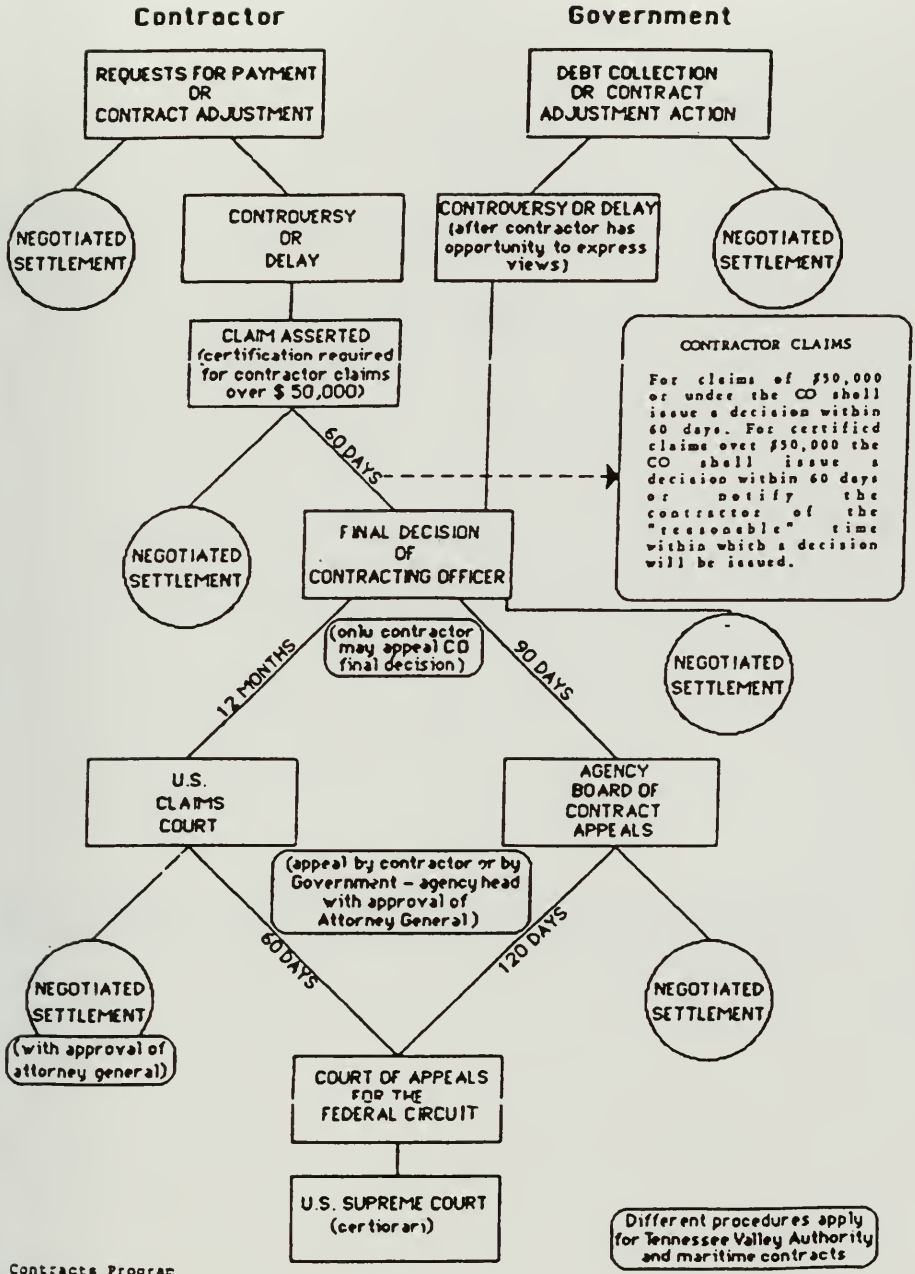
120 Contractor enthusiasm for ADR may be slow-growing. For example, few Government contractors have agreed to participate in the Navy's pilot program of a summary binding procedure for small claims at the ASBCA. BNA: Daily Report for Executives, Oct. 4, 1988, p. 176. This program, of course, is available only after final decision by the CO and thus is distinguishable from the ADR use recommended in this report.

121 Litigation of contract disputes sometimes produces an unnecessarily adversary relationship between opposing counsel. vonBaur, F. Trowbridge, The Breakdown of the Changes and Disputes Process, Pub. Cont. L.J. ___, 143.

122 The disputes clause included in Government contracts is intended to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and to the contractor often times ruinous litigation." S&E Contractors, Inc. v. United States, 406 U.S. 1, 8 (1972)(Blackmun, J., concurring).

Greater use of ADR at the CO level can be promoted by establishing clear policy signals from the pinnacles of the Executive and Legislative Branches Government that ADR is okay. Practice of ADR methods at the CO level will grow as the contracting parties are stimulated and encouraged to employ these proven disputes resolution techniques.



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