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**APPEALING GOVERNMENT CONTRACT  
DECISIONS: REDUCING THE COST AND  
DELAY OF PROCUREMENT LITIGATION**

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*APPEALING GOVERNMENT CONTRACT DECISIONS:  
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## I

## INTRODUCTION

Within the government contracts community, a small but promising movement has begun away from a perilous trend toward red tape, proceduralism, and intolerable delay. Most contractors, agency officials, government attorneys, auditors, inspector generals and administrative judges agree that government contract appeals have become too complicated, too expensive, and too time-consuming.

As with most federal programs, problems stem from more than a single source. The factors range from contracting officers' lack of authority to overloaded boards of contract appeals and political and organizational failures. Despite Congress' declared goals in the Contract Disputes Act of 1978 ("CDA")<sup>1</sup> to provide an expeditious alternative to court litigation by encouraging negotiated settlement,<sup>2</sup> appeals are now rarely resolved expeditiously or inexpensively in any forum.

Today's appeals system is cumbersome for a number of reasons. Many contracting officers' fears of being second-guessed by superiors, auditors, congressmen or the press significantly reduce incentive to take sensible steps to settle a complex or controversial problem. Not surprisingly, this uncertainty can cause some contractors to prefer simply to appeal a decision rather than waste their time negotiating a tenuous settlement. Increasingly, management problems are handed over to lawyers and accountants to be resolved by criteria that are often only marginally relevant in forums hardly designed for efficiency. One result is an ever-increasing caseload at many appeals boards. Most notably, the active docket of the Armed Services Board of Contract Appeals, has virtually doubled since 1979<sup>3</sup> without a concomitant increase in manpower. A common complaint is that the boards, themselves originally created as a sort of "ADR," have become too "judicialized."<sup>4</sup> With depositions, discovery and opinion writing, it is virtually impossible to avoid the burdens of traditional litigation<sup>5</sup> - - the very situation the Boards were created to avoid.

Interest in improving resolution of contract disputes has risen steadily since 1972, when the congressionally-created Commission on Government Procurement recommended that an informal conference be instituted before any appeal by the contractor to review contracting

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<sup>1</sup> Indeed, some would say, *because* of the Act.

<sup>2</sup> S. Rep. No. 1118, 95th Cong., 2d Sess. 1, *reprinted* in 1978 U.S. Code Cong. & Ad. News 5235 ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation....").

<sup>3</sup> Williams, *A Brief Look at the Armed Services Board of Contract Appeals*, 22 Public Contract Newsletter 3, 17 (1986) (1,221 cases in 1979 grew to 2,074 by the end of 1985).

<sup>4</sup> Spector, *The Contract Disputes Act of 1978 - Some Observations and Predictions*, 39 Fed. B.J. 1 (1980).

<sup>5</sup> See e.g., Eldon Crowell, remarks at Admin. Conf. Colloquium, *Improving Dispute Resolution: Options for the Federal Government*, Panel on Government Contract Disputes, June 1, 1987, 1 Admin. L.J., 339, 553 (1987) (hereinafter *ACUS Colloquium*).

officer decisions adverse to the contractor<sup>6</sup>. A subsequent policy directive of the Office of Federal Procurement Policy encouraged informal discussions "before issuance of a contracting officer's decision on a claim, ...to the extent feasible, by individuals who have not participated substantially in the matter in dispute, [to] aid in the resolution of differences by mutual agreement."<sup>7</sup>

It is in this spirit that in the mid-1980s a few agencies began experimenting with several alternative means of dispute resolution ("ADR"), including minitrials, mediation and settlement conferences. These methods are consistent with the goals of the CDA and have proven to be efficient and fair ways to resolve a variety of contractual and other private disputes. One way agencies accomplish this is to involve decisionmakers, rather than their representatives, in the conflict resolution process.

This study focuses on the actual and potential application to contract appeals of the ADR methods most commonly used, particularly the minitrial. It is not the purpose of this study to reverse the recent trend toward judicialization, but to explore the uses of one possible set of options to help reduce the formality of some proceedings. Even given an impressive success rate in the relatively few cases where ADR has been used to date, it would be naive to suggest that ADR methods are panaceas, or that they will work in most contract appeals. Their use presents serious, unresolved issues in some cases. Nevertheless, we can benefit from examining agencies' experiences, seeking to describe what happened and why, exploring some of the practical and legal questions raised, and recommending procedures to make life easier and more productive for those who do choose to engage in ADR.

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<sup>6</sup> This review would have been conducted at the request of the contractor by a high-level agency official who had not previously been involved in the claim. Although the draft versions of both the House and the Senate contained this provision, it was dropped from the Act at the last minute. Senator Byrd explained that "It is still the policy of Congress that contractor claims should be resolved by mutual agreement, in lieu of litigation, to the maximum extent possible. [But the provision was dropped because of concerns that] contractors will use this statutory authority for a meeting with supervisors of the contracting officer to undermine the negotiating position of the contracting officer." Cong. Rec., Oct. 12, 1978, at S18641.

<sup>7</sup> 45 Fed. Reg. 31035 (May 9, 1980). See also Federal Acquisition Regulation (FAR) § 33.204.

## II

## CONTRACT APPEALS: A BRIEF LOOK AT THE LANDSCAPE

## A. Background: The Growth of Contract Appeals

Today's system for handling contract disputes has origins in much earlier times with simpler problems and processes. In 1855, the first general legislation was enacted permitting monetary claims against the federal government in a newly created Court of Claims.<sup>8</sup> During the Civil War, Secretary of War Simon Cameron appointed a board--probably the first such--to hear and decide certain claims under ship construction contracts awarded by a chief quartermaster who was found to have committed fraud against the government.<sup>9</sup> Subsequently, many government contracts explicitly allowed contractors to appeal a government contract official's decision to the agency head.

The first formal appeal procedures were established in the aftermath of World Wars I and II. A Board of Contract Adjustment was established in the War Department in 1918 to resolve contract disputes which had not been disposed of by mutual agreement. Comprised of seven army officers and fifteen eminent civilian attorneys,<sup>10</sup> the Board conducted trial-type hearings in some cases, complete with verbatim transcripts. Before dissolution early in 1922, this Board and its successor disposed of over 3,000 cases.<sup>11</sup> Secretary of the Navy Josephus Daniels was not a lawyer, unlike the Secretary of War Newton D. Baker, and took a considerably different approach at about the same time when he established a Compensation Board to avoid "conducting interviews and hearings which were taking considerable of his time and patience."<sup>12</sup> The Navy Board emphasized use of naval officers experienced in engineering, management and accounting "with sufficient rank and experience to command the respect of senior officials of contractors."<sup>13</sup> This Board of technical experts operated continuously, until replaced by the Navy Department Board of Contract Appeals in 1944 and ultimately subsumed into the Armed Services Board of Contract Appeals in 1949.<sup>14</sup>

<sup>8</sup> The Court (now the U.S. Claims Court) has continuously had jurisdiction over contract, and other, claims ever since, first as a place of appeal from agency decisions and now more or less on a par with the agency boards of contract appeals. Much of the early history described herein is set forth in considerable detail by Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Boards of Contract Appeals*, 29 L. and Contemp. Prob. 39 (1966) (hereinafter *Disputes and Appeals*).

<sup>9</sup> The three-commissioner board went to the Western Military District, examined proofs of claims, and made recommendations to the Secretary on all claims where payment had been suspended. The Secretary's authority was upheld in 1868, when the Court of Claims refused to entertain a claim for the unpaid balance on the contractor's initial claim following payment of a part at the commissioners' recommendation. See *Adams v. U.S.*, 2 Ct. Cl. 70 (1866), *affd.* 74 U.S. 463 (1868), which upheld the Secretary's authority to appoint a board, with the proviso that claimants had the option whether or not to consent to use a board.

<sup>10</sup> Civilian members' salaries were \$7,500 per year, then equal to those of Senators and Congressman and more than judges of the Court of Claims received.

<sup>11</sup> According to Professor Wigmore, the Board's opinions were "models of clarity." J. Wigmore, *Evidence* § 4(c), at 74 (3d ed. 1940).

<sup>12</sup> Report for Under Secretary of War dated May 28, 1942, see *Disputes and Appeals* 46.

<sup>13</sup> *Id.*

<sup>14</sup> For a detailed look at the creation of the ASBCA, see *Disputes and Appeals* 50-60.

The number and size of government contracts continued to grow in the post-WWII period, as did their importance to the nation's economy; additional agencies began establishing boards both to lighten the burden on top officials and to give contractors an option of avoiding the cost and delay of the courts. Without any authorizing legislation, nearly a dozen agencies had created boards by the early 1960's.<sup>15</sup>

Until the early 1960's, proceedings before the boards of contract appeals were informal and relatively expeditious. In most cases, there was little or no discovery, and the hearings were conducted more on the model of arbitrations than court trials. Members of the government contracts bar usually presented a scaled-down version of their case before the boards, assuming that if the contractor lost at the board level, they would be able to obtain a full-scale de novo trial on the merits before the U.S. Court of Claims.

The Supreme Court put a halt to this practice with its 1963 decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, in which the Court held that findings of fact by the boards of contract appeals on disputes arising under the contract were final and binding, subject only to judicial review on the administrative record in the Court of Claims. The Court ruled that a de novo hearing on the merits would no longer be available in the Court of Claims, and that the boards were thus the sole forum for trying disputes arising under the remedy-granting clauses of the contract.<sup>16</sup> Under a later decision in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the Court held that the Court of Claims would continue to be the exclusive forum for contractor claims based upon breach of contract.

In the wake of *Bianchi* and *Utah Construction*, the boards took on a far more significant role in the resolution of government contracts disputes. This led to pressure by the government contractors' bar to "judicialize" procedures before the boards in an effort to obtain procedural due process. As a result, the boards changed their procedures to permit written and deposition discovery, and the 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.<sup>17</sup>

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.<sup>18</sup> Among other things, the Act gave the boards a statutory basis, enhanced the independence and authority of board judges (as well as the finality of their decisions), and prescribed exclusive dispute resolution procedures.<sup>19</sup>

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<sup>15</sup> Administrative Conference of the United States, *Statistical Data Relating to Administrative Proceedings Conducted by Federal Agencies*, Classified Index 78-79 (1962).

<sup>16</sup> Spector, *Is It "Bianchi's Ghost" or "Much Ado About Nothing"?*, 29 *Law & Contemp. Probs.* 87 (1964).

<sup>17</sup> Spector, *Public Contract Claims Procedures - A Perspective*, 30 *Fed. B.J.* 1 (1971).

<sup>18</sup> Crowell, remarks at *ACUS Colloquium*, Panel on Government Contract Disputes.

<sup>19</sup> These are discussed briefly in Section II.C.2, *infra*.

### B. The Current Rules: The Contract Disputes Act

*Background.* The Contract Disputes Act of 1978<sup>20</sup> was intended to bring greater consistency, fairness, and efficiency to the resolution of disputes arising out of government contracts.<sup>21</sup> The legislation reflected in large part the recommendations of the Commission on Governmental Procurement, created by Congress in 1969 to recommend improvements in the procurement process.<sup>22</sup>

*Agency Procedures.* The statutory system established by the Contract Disputes Act, and applicable to all agencies, begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the contracting officer. The contracting officer has a dual role; not only to represent the government as a party to the contract, but also (subject to certain decisional safeguards) to make the decisions on claims.<sup>23</sup> If the dispute is not amicably resolved, the CDA requires the CO to issue a written decision on the claim, stating the reasons for the decision and informing the contractor of available appeal rights.

A contractor dissatisfied with a contracting officer's decision on the claim may appeal the decision either to an agency board of contract appeals or to the U.S. Claims Court. The

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<sup>20</sup> 41 U.S. Code §§ 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; significantly amended April 2, 1982 by Pub. L. No. 97-164, title 1, §§ 156-157, 160, 161, 96 Stat. 25, 47-49.

<sup>21</sup> Much of the following discussion is drawn from the Administrative Conference's *Federal Administrative Procedure Sourcebook* (hereinafter *Procedure Sourcebook*), Chapter 5 (1985). Other useful sources include Crowell, Johnson & Boyd, *The Contract Disputes Act of 1978* (Federal Publications, 1979); and Cibinic and Nash, *Government Contract Claims* (1981).

<sup>22</sup> Efforts to pass contract disputes legislation began after the Commission on Governmental Procurement issued its final report and recommendations and succeeded in October of 1978. H.R. 11002 was introduced by Representatives Harris (D. Va.) and Kindness (R. Ohio) on February 20, 1978 and reported favorably by the House Judiciary Committee without hearings. (The Commission had held hearings on similar legislation the previous year.) The House passed the bill on September 26, 1978. A similar Senate bill, S. 3178, was introduced by Senators Chiles (D. Fla.), Packwood (R. Ore.), Heinz (R. Pa.) and DeConcini (D. Ariz.) on June 7, 1978 and favorably reported, with amendments, by the Committees on Governmental Affairs and the Judiciary. The Senate took up floor consideration of the bill on October 12, agreeing to amendments that exempted the Tennessee Valley Authority from certain of the Act's requirements, added the requirement that claims of \$50,000 or more be certified, deleted a requirement that an informal settlement convergence be afforded contractors, and changed the standard of judicial review of contract appeals board decisions from "clearly erroneous" to "substantial evidence," among other things. The Senate then passed H.R. 11002, amended to contain the amended provisions of S. 3178, and the House agreed to the Senate-passed version the next day.

Perhaps because it was passed quickly, at the end of the legislative session, the Contract Disputes Act (including the Senate amendments to it) was not the subject of extensive debate. However, the Congressional Record for October 12 does include a brief explanation of the amendments agreed to on the floor (95 Cong. Rec. 36261-68).

<sup>23</sup> The term "claim" is not defined, but includes disputes arising during contract performance (involving, for example, the interpretation of contract terms or requests for equitable adjustments to the contract price) and claims for breach of contract. It does not include bid protests or proceedings for the debarment or suspension of government contractors.

proceedings become more formal at this stage of the dispute. The contractor may then appeal the decision of either body to the U.S. Court of Appeals for the Federal Circuit.<sup>24</sup>

*Other Provisions.* In addition to establishing a single comprehensive law covering the contract disputes process for almost all government contracts (some remain outside the scope of the law), the Contract Disputes Act made several other important changes in existing law. The Act, for the first time, gave a statutory basis to the boards of contract appeals ("BCAs")<sup>25</sup>, expanded their jurisdiction, gave them subpoena power, and authorized them to grant any relief within the authority of the Claims Court. The CDA added new requirements for the selection of contract appeals board members, intended to enhance the quality and independence of the boards.<sup>26</sup> It also directed the Office of Federal Procurement Policy to issue guidelines for the establishment and procedures of agency contract appeals boards.<sup>27</sup>

### C. Surveying the Disputes Landscape: Why, What, and How?

*1. Why So Many Disputes?* A variety of factors have served to increase the incidence of controversies that remain unresolved between the parties. These included:

- ⊗ Historical reasons, such as growing impact of government contracting;<sup>28</sup> increased complexity of contracts; new auditing and other regulatory requirements; and an expanded notion--perhaps overexpanded--of necessary due process rights.
- ⊗ More and more contractors have come to be dependent on government for their existence.
- ⊗ An increased willingness to resort to litigation is found in many contractors and an expanding government contracts bar.
- ⊗ Increased public division or controversy over the wisdom of some kinds of expenditures (e.g., some defense spending), often are vented peripherally in controversy over contract or administrative decisions.
- ⊗ Increased oversight by many congressional sources may discourage contracting officers or their supervisors from risking close calls, taking on politically sensitive cases, or handling "hot potatoes."

<sup>24</sup> This court was established and given jurisdiction over contract appeals as well as certain other appeals involving the United States by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164. Before passage of this law, the U.S. Court of Claims heard appeals from contract appeals board cases as well as original appeals from contracting officers' decisions.

<sup>25</sup> 41 U.S.C. § 607.

<sup>26</sup> The CDA requires contract appeals boards to provide for accelerated disposition of cases involving claims of \$50,000 or less and to establish both expedited disposition and simplified procedures for disputes of \$10,000 or less. (Jurisdiction of U.S. district courts over small claim contract disputes was eliminated.) These procedures are intended to encourage the use of the agency boards, rather than the Claims Court, for minor disputes.

<sup>27</sup> The model rules developed pursuant to this mandate appear in the *Procedure Sourcebook*, as do cites to individual boards' procedural rules. In addition, the OFPP has issued a policy directive setting forth procedures for the handling of claims by agency contracting officers and the text of a disputes clause to be included in government contracts. OFPP Policy Letter 80-3; see *Procedure Sourcebook*, 331.

<sup>28</sup> According to the Census Bureau, the dollar value of federal contracting rose by \$65 billion (to \$206.5 billion) during the five years preceding the current one.

⊙ The establishment (or expansion) of intra-agency audit offices and inspectors general, and statutes or rules enhancing their authority, inhibit settlement of disputes and limit decisional flexibility.

The result has been a reduced willingness or ability to exercise responsibility by contracting officials, and increased doubt in some quarters that they truly act to serve the government's best interest.<sup>29</sup> One knowledgeable observer sees an environment "where management seems willing to throw their difficult problems into the litigation mill rather than work them out at a management level."<sup>30</sup>

Dissatisfaction with many agencies' contracting processes and methods of dispute resolution is increasing.<sup>31</sup> Much of this dissatisfaction is focused on various boards of contract appeals to which agencies and contractors turn after failure to resolve disputes. Many of the broad criticisms are unreflective, and one should bear in mind that judges, boards, caseloads, and work habits vary enormously. Nevertheless, the unhappiness among many contractors, lawyers, and agency officials is based upon accurate perceptions that these disputes often are unnecessarily contentious and their resolution needlessly complex and drawn out and, therefore, very costly to both sides.

2. *What Kinds of Cases?* Acquisition disputes under agency programs are far more homogeneous than are cases before the federal district courts in that they all involve contracts. While, each agency and its program assortment, board, and caseload have their own characteristics, generalizations as to typical contract disputes may be helpful. For example, the Veterans Administration Board of Contract Appeals handles primarily claims and disputes arising under construction contracts for VA hospitals. The Army Corps of Engineers Board processes domestic and international construction disputes arising under Corps contracts. The Corps BCA also has an agreement with the Washington Metropolitan Area Transit Authority (WMATA) to decide appeals under WMATA construction contracts. The largest board, the Armed Services Board of Contract Appeals (ASBCA), decides a wide range of disputes under DOD procurements. These disputes often include technical issues regarding specifications for state-of-the-art equipment, engineering issues arising under construction contracts, and complex accounting questions associated with claims by the government under the Truth In Negotiations Act, 10 U.S.C. 2304(f). The ASBCA also hears appeals on behalf of other agencies. The General Services Board of Contract Appeals (GSBCA) has jurisdiction not only over disputes arising out of GSA supply schedule contracts, but also appeals under contracts for automatic data processing equipment (ADPE) pursuant to the Brooks Act.<sup>32</sup> Under the Competition in Contracting Act of 1984,<sup>33</sup> the GSBCA has jurisdiction to resolve bid protests brought by disappointed bidders under federal ADP contracts.

<sup>29</sup> R.J. Bednar & J.T. Jones, *The DOD Contracting Officer*, Report of an ABA Public Contracts Section Subcommittee (1987); *Conduct and Accountability*, Report by the President's Blue Ribbon Commission on Defense Management (Packard Commission) (June 1986).

<sup>30</sup> Nash, *A New Technique for Settling Disputes--The Mini Trial* (1985) (unpublished article).

<sup>31</sup> Where one knowledgeable observer could comment in 1966, "In recent years contractor complaints of delay in receiving ASBCA decisions were rare indeed." *Disputes and Appeals* 60, an understated view two decades later held, ". . . in the past few years the process seems to have been gradually slowing down." Nash, *A New Technique for Settling Disputes--The Mini Trial* (1985) (unpublished article). See also, letter from Multinational Legal Services to Robert P. Bedell, OFPP, March 31, 1987 ("Litigated contract disputes have, to put it bluntly, all but swamped the overburdened boards of contract appeals and the U.S. Claims Court.")

<sup>32</sup> 40 U.S.C. 759.

<sup>33</sup> Pub. L. No. 98-369, 98 Stat. 1175.

3. *How? -- BCAs and their Procedures.* The boards, their rules, and the matters that they decide are hardly uniform, but they have enough in common that the following description is broadly illustrative.

Pursuant to Section 8(h) of the CDA,<sup>34</sup> the Office of Federal Procurement Policy at OMB has promulgated proposed uniform rules of procedure for the boards of contract appeals. These uniform rules have generally been adopted by the boards, although each board has made minor modifications to suit its type of cases and caseload. The procedures followed by the ASBCA are as follows:

*Appeals.* If a contractor wishes to appeal the final decision of the contracting officer, he must file his written notice of appeal within 90 days of receipt of the decision.<sup>35</sup>

*Appeal File.* Within 30 days of receipt of the appeal, the contracting officer must file with the Board pertinent documents relating to the dispute, including his final decision, the contract and specifications, pertinent correspondence, and other relevant documents. This is commonly referred to as the "Rule 4 File."

*Complaint.* Within 30 days of docketing of the appeal by the Board, the contractor must file his complaint setting forth the basis for and amount of his claim. The government's answer is due within 30 days of receipt of the complaint.

*Written Discovery.* The ASBCA encourages cooperation between the parties in exchanging written and documentary discovery. The Board rules provide that responses to interrogatories, requests for admission, and requests for production of documents are due within 30 days of service.

*Depositions.* The Board's rules provide for depositions, and the deposition practice before the Board has become nearly as extensive as in court litigation.

*Subpoenas.* Pursuant to Section 11 of the CDA,<sup>36</sup> the ASBCA has the power to issue subpoenas compelling testimony in deposition or at trial, as well as subpoenas for the production of documents.

*Hearings.* Hearings are conducted before one Board member and result in a written transcript. Rule 20 of the Board provides that hearings "shall be as informal as may be reasonable and appropriate under the circumstances." The Board's rules refer to the Federal Rules of Evidence, but leave admissibility of evidence to "the sound discretion of the presiding administrative judge."

*Decisions.* After the hearing, the parties customarily submit simultaneous post-hearing briefs. The Board then issues a decision in writing signed by the Board member who conducted the hearing and the other members of his or her panel.

*Small Claims.* The Board's rules provide for an accelerated procedure for claims under \$50,000, with the decision rendered within 180 days of the notice of appeal. Pursuant to Section 9 of the CDA,<sup>37</sup> the Board also offers an even more streamlined "expedited" procedure for claims under \$10,000, with the decision rendered within 120 days.

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<sup>34</sup> 41 U.S.C. 607(h).

<sup>35</sup> CDA § 7, 41 U.S.C. 606.

<sup>36</sup> 41 U.S.C. 610.

<sup>37</sup> 41 U.S.C. 608.

## III

## ALTERNATIVES FOR RESOLVING CONTRACT APPEALS

## A. Will ADR Work?

While the widespread dissatisfaction over the growth and consequences of contract disputes is obvious, solutions are less so. Several remedies have been prescribed for dealing with the problems encountered. They range from marginal revisions of the boards<sup>38</sup> (e.g., more judges, added support staff) to increased professionalization of COs to structural changes in the ways agencies do business. Some believe that it makes much more sense to have one board, or at most two (one military - ASBCA, and the other civilian), than to have many small ones. However meritorious these proposals may be, a discussion of them falls outside the scope of this study.

Many regard the cluster of methods that have come to be known as "alternative means of dispute resolution" ("ADR") as particularly appropriate to resolving many questions that arise in government contract claims.<sup>39</sup> While some see ADR as merely a "fad," and question its specific utility in government disputes,<sup>40</sup> it is indisputable that these methods successfully help resolve private conflicts raising questions similar to those heard by BCAs. The main conclusion of this report is that it is time for all major contracting agencies, and those who deal with them, to explore seriously the potential uses for ADR and to begin creating an atmosphere in which these methods can be more readily employed. Before addressing specific issues involved in agency integration of ADR methods into the contracting process, we must of necessity decide whether they are worth the effort. The answer is not obvious to everyone. Skeptics have raised concern over agencies' use of some ADR processes. They worry that ADR will reduce the accountability of government officials for their decisions. Some of them fear that widespread use of ADR will merely add another layer of "time-consuming and wasteful techniques in return for minimal (if any) reductions in the alleged delay and cost of resolving a relatively small number of contract disputes."<sup>41</sup> Others express concern that resolving many disputes through means that produce no precedent may undermine predictability that aids the government's competitive bidding system, heighten

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<sup>38</sup> *Expediting Contract Appeals* 169-180.

<sup>39</sup> E.g., letter from Multinational Legal Services, P.C. to Robert P. Bedell, OFPP, March 31, 1987. ("Among all the disputes to which the Government is a party, contract disputes are perhaps the most appropriate for resolution by ADR. . . . [C]ontract disputes are primarily disputes about money, more or less involving disputed facts . . . with few questions of credibility of witnesses . . . ADR is the future of government contract litigation."); Korthals-Altes, *The Applicability of Alternative Dispute Resolution Techniques to Government Defense Contract Disputes* (1986), *ADR Sourcebook* 147.

<sup>40</sup> See the various arguments in Edwards, *Alternative Dispute Resolution: Anathema or Panacea?*, 99 Harv. L. Rev. 668 (1986), *Administrative Conference Sourcebook: Agency Use of Alternative Means of Dispute Resolution* (hereinafter *ADR Sourcebook*) 77; and in Pou, *Federal Agency Use of "ADR": The Experience to Date* (1987), *ADR Sourcebook*, 101.

<sup>41</sup> Letter from Stuart Schiffer, Civil Division, Department of Justice, to Marshall J. Breger, Chairman, Administrative Conference, dated Nov. 13, 1987. One need not be a skeptic to recognize that ADR is "one of those subjects that receives almost universal endorsement in theory but substantially less in practice." Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, *Negotiation* J. 29 (Jan. 1987).

contract costs, and increase uncertainty and disputes.<sup>42</sup> A few even maintain that many officials do, and should, prefer a system that shifts most potentially controversial or difficult decisions to judges, accountants, technicians, or others who are less directly involved in managing government contracts.

Two crucial questions are presented. First, do these concerns loom so large as to render ADR ineffective or positively harmful and thus unsupportable in contract claims? Second, how can they be mitigated in practice without sacrificing the unique aspects that can make ADR valuable?

Certainly, many knowledgeable observers have remarked on ADR's potential for the government.<sup>43</sup> The Administrative Conference, for instance, has repeatedly studied issues in governmental dispute resolution and has recommended that agencies make greater use of mediation, negotiation, minitrials & similar means to reduce the delay and contentiousness accompanying many agency decisions.<sup>44</sup> The Conference has even gone on record twice calling for legislation to authorize agencies to agree to use voluntary, binding arbitration in limited classes of contract and other disputes.<sup>45</sup> Numerous articles and reports, including several prepared for the Conference, have demonstrated that mediation, negotiated rulemaking, and similar methods have produced sound agency decisions while avoiding much of the formality and cost of standard processes.<sup>46</sup> Among the agency officials who have taken part<sup>47</sup> and others who have been involved,<sup>48</sup> considerable enthusiasm has been shown.

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<sup>42</sup> Letter from Judge John Corcoran, VA BCA, to Marshall J. Breger, dated Nov. 16, 1987.

<sup>43</sup> E.g., statements at *ACUS Colloquium* by Senator Orrin Hatch and Arnold I. Burns, Deputy Attorney General, Department of Justice ("In the long term, nothing less than a retooling of the roles of lawyers can be accepted, particularly government lawyers. This retooling should deemphasize adversarial behavior and give greater weight to the lawyer as problem solver and negotiator who can resolve controversies before they escalate into major disputes or proceed to a full hearing. This is the central challenge of the legal profession."); *Dispute Resolution in Massachusetts*, Final Report of Governor's ADR Working Group (Nov. 1986)(hereinafter *Dispute Resolution in Massachusetts*); and Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, Mo. J. of Dispute Resolution 9 (1984), *ADR Sourcebook* 163.

<sup>44</sup> See, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3; *Procedures for Negotiating Proposed Regulations*, 1 CFR §305.82-4 & .85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR §305.84-4; and *Resolving Disputes under Federal Grant Programs*, 1 CFR §305.82-2.

<sup>45</sup> Conference Recommendations 86-3, *id.*, and 87-5, *Assuring the Fairness and Acceptability of Arbitration in Federal Programs*, 1 CFR §305.87-5, also address procedural safeguards and appropriate subjects for agency arbitrators. The ABA is considering resolutions drawn from Recommendation 86-3; these have already been approved by the ABA's Section of Administrative Law.

<sup>46</sup> E.g., Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L. J. 261; Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1986 ACUS 165; Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 1986 ACUS 637; Adams & Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB's Appeals Arbitration Procedure*, report to the Administrative Conference, 1985; Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, report to the Administrative Conference (1987); Bingham, *Resolving Environmental Disputes: A Decade of Experience* (1986); Barrett, *Mediation and Adjudication: The Double Track Approach*, 30 Fed. B. News & J. 436 (1983), *ADR Sourcebook*, 527.

<sup>47</sup> E.g., Edelman & Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7 (1987); Office of the Inspector General, DOD, *Tennessee-Tom Bigbee Claim Settlement* (report of investigation, July 29, 1987), *ADR Sourcebook*, 583.

<sup>48</sup> E.g., Nash, *A New Technique for Settling Disputes: The Mini Trial*(1985)(unpublished paper); remarks of Jack Lemley, Ralph Nash, and Derek Vander Schaaf at *ACUS ADR*

Outside the governmental context, testimonials to ADR's applications have become so commonplace that some worry about overselling it<sup>49</sup> and many government contract cases resemble those others where ADR has been applied successfully.<sup>50</sup> Even recognizing that most of this evidence is "anecdotal," observation and common sense suggest that a closer look at the possibilities of these methods in government contract disputes should be taken.

Moreover, some empirical evidence of ADR's effectiveness in contract cases does exist. As the next segment of this report indicates, experience to date shows that these methods have "worked" when used in contract disputes. While it is true that proof of the benefits of these methods may be somewhat less than scientific at this point, these case studies show ADR to be effective for cutting cost and delay in some instances. Each agency minitrial save one has avoided years of litigation and a full-fledged hearing, while producing outcomes that appear to have satisfied nearly every party who took part. Even the one Navy case where ADR failed to produce a settlement significantly narrowed the issues and reduced the hearing burden. While these data fall short of absolute, scientific certitude, they do suffice to demonstrate the worth of these methods in at least some contract disputes. Moreover, the adoption of limited policies or rules, combined with efforts to enhance awareness, receptivity and training, have hardly amounted to a major shift in the way contract claims are handled.

We believe that the concerns that have been raised can be met by careful attention when integrating ADR into the contract system at the point where conflicts tend to arise and be dealt with, as well as by enlightened administration and oversight. Accountability issues deserve close attention, since ADR clearly should not be seen as susceptible to producing outcomes that are unreviewable, unfair, or not in the public interest. Methods of ensuring defensible ADR decisions are examined in greater detail in section IV.B, below; for now, let us begin consideration by expressing confidence that guidelines can be developed on ADR use that emphasize the need for flexibility without undermining accountability. After all, agency contracting officials already negotiate routinely over the award and adjustment of tens of thousands of contracts, pursuant to guidance on documentation that is generally viewed as adequate. Settlement negotiations in the context of a dispute generally deal with issues that are the same as, or analogous to, those that typically arise in negotiating or amending contracts. The mere existence of a formal dispute should not render suspect a settlement worked out by the parties, particularly as a sizeable percentage of contractor claims at the CO and BCA levels are already disposed of consensually. As with other kinds

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*Colloquium: Harter, Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship*, 29 Vill. L. Rev. 1393 (1983-84).

<sup>49</sup> Rich, *Alternative Dispute Resolution: Opening Doors to Settlement*, Chemical Week 28 (Aug. 14, 1985); Millhauser, *Rush to Mediation: Where Is the Bandwagon Going?*, Legal Times 16 (Aug. 10, 1987, as clarified, Aug. 17, 1987); *The Effectiveness of the Minitrial in Resolving Complex Commercial Disputes: A Survey*, Report of Subcommittee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, American Bar Association Section of Litigation, July 1, 1986.

<sup>50</sup> Speaking generically of litigation, an experienced observer pointed out, "An attorney or his client tend to advance an argument or an offer as an absolute fixed quantity that cannot change. The position is important to a party, representing the merger of all prior principles and emotions in a case. When the adversary advances a contrary position, the first party sometimes feels threatened and besieged and defensively advances the same position with more argument to overcome the opponent by will, strength, and coercion. One becomes afraid to make a concession which he thinks will be viewed as a sign of weakness and generate demands for more concessions. Further aggression ensues. The other party also reacts in the same manner. Emotions take over and each side may lose sight of a realistic objective evaluation of a case. Consequently effective communication stops and each side points its position at the other sometimes with great hostility. The legal combat continues and escalates." Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, Mo. B.J. 251, 254 (June 1984).

of negotiations, adequate guidance can, and should, be provided on the degree of documentation appropriate to justify settlements reached via ADR.

Critics have also worried that ADR will merely add more procedures, tie up busy executives, and bog down BCA judges who should be concentrating on decisions that will reduce often considerable backlogs and set precedents to avert future disputes. However, hardly every case, or even most cases, will be apt for ADR. In most, it will not be a factor. Second, many agency officials at various levels can serve as principal negotiators, and it would be inaccurate to suggest that only the agency head or other busy high-ranking officials would possess the necessary qualifications. Third, while some disputes will need judicial attention -- especially those that present a new or important question in construing a basic statute or regulation -- such cases clearly do not predominate and by most accounts are not numerous.<sup>51</sup> To the extent that precedent-setting cases do occur, ADR will ultimately allow a BCA to focus more attention on them by taking a little judicial time early in efforts to avoid lengthy discovery or hearings in other, less important cases. In federal courts and agencies, the benefits of active judges using ADR and related case management techniques have been shown.<sup>52</sup> Though some doubts as to the notion of the "managerial judge" have been expressed,<sup>53</sup> the recent, near-continuous rise in the ratio of filings to BCA judges indicates that in the long run BCAs will inevitably have to take added steps to encourage expeditious processes for reaching acceptable decisions.

Parties, including agencies, can be expected to act in their enlightened self-interest to avoid uncertainty that would interfere with planning or to refrain from resorting to ADR where it is likely to be meaningless. Moreover, BCA judges and other agency officials can be expected to oversee use of ADR methods in ways that allow problems to be brought to light and dealt with as they occur. For all of these reasons, many of the concerns expressed seem overdrawn. The ultimate questions on ADR use do not primarily involve accountability, resources, or efficiency.

Even most skeptics would agree that there are procurement cases where ADR can help and should be used. Most agree that some training in ADR skills would help BCA judges and other participants recognize apt cases and settle them. Such modest steps are worthwhile if only for the prospect of marginal improvements. Whether ADR methods can do more, as they have in certain areas, will depend on whether agency officials, those who deal with them, and congressional and other overseers come to perceive consensual decisions that are reached by a person directly responsible as both possible and often preferable to those delegated elsewhere. If so, no reason exists why ADR cannot work as well with government contract disputes as it has in other contexts.

Having said this, let us turn to a closer look at the innovative methods that have been, or might be, employed.

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<sup>51</sup> E.g., letter from David Schwartz, Multinational Legal Services, to Marshall J. Breger, Chairman, Administrative Conference, Nov. 16, 1987.

<sup>52</sup> E.g., Adams & Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB's Appeals Arbitration Procedure* (1985); Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication* (1987); Cappalli, *Model for Case Management: The Grants Appeals Board (HHS)*, 1986 ACUS 663.

<sup>53</sup> E.g., Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984); Resnik, *Managerial Judges* (Rand Institute for Civil Justice 1982).

## B. Minitrial<sup>54</sup>

### 1. General.

Of all the ADR methods discussed, the minitrial has been the one most often used in major contract claims and most written about. The "minitrial" is not really a trial at all, but is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. Following the presentations, the officers seek to negotiate a settlement. The minitrial combines aspects of several alternative means of dispute resolution to create an informal settlement procedure that retains many of the features of adversary litigation. Several agencies have adopted minitrial policies; the approaches are slightly different, but there are certain common elements. Perhaps most important, the parties must reach a pre-minitrial agreement in which the ground rules for the minitrial are set forth, and in which specific time limits for each stage are established. Generally the parties agree to curtail discovery. They also impose a limit of one or two days for the minitrial hearing, followed by a more flexible limit for the negotiations.

The parties each designate one (or occasionally two) principals to represent them at the minitrial. These principals are typically high level officials who have full authority to settle the dispute, and who usually have not previously been involved in preparing the case for litigation. The parties at their option may also choose a neutral advisor to help run the minitrial and advise them on technical or legal issues. The neutral should have a legal, and ideally a technical, background in the area of dispute.

At the minitrial, counsel for each party presents his party's case to the principals and perhaps a neutral advisor, in any way he chooses. This may include oral argument, examination of witnesses, documentary evidence, films, photos or other exhibits. The rules of evidence do not apply. The principals may ask questions of both attorneys and witnesses. Depending on the pre-minitrial agreement, each party's presentation can take anywhere from a few hours to a full day or even more than a day.

Once the hearing stage of the minitrial is over, the principals and, with consent, the neutral meet privately to negotiate without the attorneys. Depending on the wishes of the principals, the neutral may mediate the discussions, give legal or technical advice when asked, or even propose settlement terms. The principals generally have auditors or legal and technical advisors available for consultation, but conduct the negotiations themselves. No transcript is made of the proceedings, and if the minitrial does not lead to settlement, litigation will be resumed without reference to the settlement attempts or to evidence presented at the minitrial.

The advantages of the minitrial proceeding for government contract disputes are many, and are discussed in detail below.<sup>55</sup> Some are worth mentioning briefly here. Preparing and completing a minitrial can take as little as a month or two instead of two to four years required for litigation. The saving of personnel time, attorneys' fees, hearings and discovery burdens, and opportunity costs is obvious. Since the majority of contract disputes involve questions of fact (or mixed questions) it makes much more sense for high level management officials to hear summary presentations and negotiate a settlement using good business judgment, rather than for lawyers to litigate the facts for weeks or months in a hearing. For those who feel that justice is more readily served in an adversarial system than in a

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<sup>54</sup> The length of this section reflects not only the greater attention that observers have focused on use of minitrials in contract cases, but also the fact that some portions (e.g., principals, other participants, neutrals, rosters) will be pertinent to other devices discussed.

<sup>55</sup> See Section III.B.4.

conciliatory one, the minitrial retains the best of the adversarial presentations without the time-consuming rules of evidence and procedure. Hence, presentations can take just a few hours instead of a few months as might be required to present similar quantities of information at hearing.<sup>56</sup> Finally, the minitrial, like arbitration and mediation, removes the case from the BCA's docket, and permits the judges to focus on those unseizable cases.

Like any ADR procedure, the minitrial does have its drawbacks and uncertainties. If the pre-minitrial agreement and time limits are not strictly enforced, especially for discovery, the process may still take too long. Also, if only one party participates in good faith, or if the government is not willing to give its principal full authority to settle, or if an inspector general or other investigation follows the minitrial, the process may be doomed to failure. Other issues involve the stage of the litigation at which the minitrial should occur, who should be government's principal, what role the BCA should play in overseeing or participating in the minitrial, and what procedures to use in the minitrial itself.

## 2. *Minitrial Initiatives to Date.*

Four agencies--the National Aeronautics and Space Administration (NASA), the U.S. Army Corps of Engineers, the Department of the Navy, and the Department of Energy--have experimented successfully with it to resolve contract disputes. Of a total of eleven cases submitted to minitrial by these four agencies, nine have settled and one is ongoing.<sup>57</sup> In addition, the Corps of Engineers, the Department of Justice Commercial Branch, and the Navy have formal minitrial policies; the EPA and the Claims Court have promulgated ADR guidance. These are the experiences upon which most of this study is based.

NASA. The first minitrial ever engaged in by the government was conducted by NASA in 1982. The claim, filed by Spacecom and TRW in 1979, was prompted by a complex technical dispute about whether certain requests by NASA were included in the contract or were changes to it. Shortly after discovery began the parties suspended the litigation for three months to conduct settlement discussions. These failed, however, and by 1981, when the parties had engaged in lengthy discovery, trial was still estimated to be at least a year away. At that point Spacecom proposed that they engage in a minitrial to resolve the dispute. The minitrial hearing lasted only one day, and the parties settled for over \$100 million on the second day of negotiations.<sup>58</sup> Although NASA is a proponent of minitrials, that agency has not used the minitrial device since 1982, and does not have a formal ADR policy.

Army Corps of Engineers. By 1984 the U.S. Army Corps of Engineers became interested in experimenting with minitrials. It conducted its first minitrial in December, 1984, and settled a \$630,000 claim for \$380,000. Six months later, in June of 1985, the Corps used another minitrial to settle a \$43 million claim involving a 1979 contract to excavate 11 miles of the Tennessee-Tombigbee waterway. This was a differing site condition action alleging that the soil excavated turned out to be different from the Corps' samples; the contractor, a joint venture named Tenn-Tom, submitted a claim for equitable adjustment. Corps officials did not really expect to settle the dispute, but reasoned that they had nothing to lose by trying. As it turned out, the parties settled for \$17.2 million after a total of four days of hearings and two days of negotiations<sup>59</sup> spread out over two weeks.

<sup>56</sup> Nash, *A New Technique for Settling Disputes--The Minitrial* (1985) (unpublished article).

<sup>57</sup> See *ACUS ADR Sourcebook*, 229-252, 573-593, 701-852.

<sup>58</sup> Appendix B contains a detailed description of each minitrial.

<sup>59</sup> See Parker & Radoff, *The Mini Hearing: An Alternative to Complex Litigation*, Bus. Lawyer 38 (Nov. 82), for a discussion of this case and issues raised.

Unfortunately, Tenn-Tom's claim was vehemently opposed by district level personnel within the Corps, and the settlement was criticized for being too generous. A disgruntled Corps employee accused the Corps of incompetence, claiming that the case was too complex to settle in just a few days. This prompted a Department of Defense Inspector General's investigation into the minitrial. A year after the minitrial, the IG released his report, which endorsed the minitrial process in the Tenn-Tom case and concluded that the claim was "reasonably settled in the best interest of the Government."<sup>60</sup> It also recommended, however, that the Corps document its procedures better in the future.

Just after the Tenn-Tom minitrial the Corps issued its first formal circular providing guidance on the use of minitrials.<sup>61</sup> The Corps gave Division Engineers<sup>62</sup> the responsibility for selecting cases for minitrial, and required that the Chief Trial Attorney be notified only when a minitrial had been offered to the contractor. The government principal was to be the Division Engineer, the contractor's principal a senior management official with settlement authority, and the neutral an impartial third party with experience in government contracting and litigation. The circular further outlined the procedure to be followed in drafting a minitrial agreement and conducting the hearing and negotiations.

The Corps' South Atlantic Division has employed ADR once in 1987. The North Atlantic Division also conducted a minitrial although a neutral was not employed in this particular case,<sup>63</sup> and once conducting a variation on its Review Board procedure discussed in Section III.E, below. This most recent minitrial, involving a \$1,768,000 claim by Granite Construction Company, was actually a combination of a minitrial and non-binding technical arbitration. The government's and contractor's cases were presented by technical experts, rather than by lawyers, to a neutral technical expert chosen by the two parties. This neutral expert then prepared a non-binding written recommendation and three weeks later made an oral presentation to the principals. After reading the neutral's report and negotiating for four hours principals agreed to settle for \$725,630, the amount recommended by the neutral.

The Corps has engaged in two other minitrials. In one minitrial the Middle East/Africa Projects Office settled a \$105 million claim for \$7 million. In the other, the Ohio River Division resolved a complicated \$515,123 claim (consisting of nine appeals concerning such issues as differing site conditions, weather related delays, impact costs and improper bookkeeping) for \$155,000 after a two and a half day minitrial.

Almost all participants in the Corps of Engineers experiment express pleasure with its successes so far, and the Corps is actively looking for new cases for using minitrials. The Ohio River Division, for example, now has a new policy requiring that all contracting officer decisions within its jurisdiction be considered for ADR, including minitrials.

Department of the Navy. Interested in NASA's and the Corps' minitrial successes and concerned with the enormous backlog of cases at the ASBCA, the Navy held two experimental minitrials during the summer of 1986. The first of these involved two disputes with McDonnell-Douglas Corporation concerning mixed audit and legal issues. Both disputes

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<sup>60</sup> Tennessee-Tombigbee Claim Settlement Report, July 29, 1986, *reprinted in ADR Sourcebook*, at 583.

<sup>61</sup> See Appendix C for a summary of agency policies.

<sup>62</sup> The Army Corps of Engineers is a decentralized organization. The Headquarters are in Washington, which is also where the Chief Counsel is, but the Division Engineers, who are Generals, have almost complete authority to do as they wish within their divisions. Each division is divided into districts, and it is the District Engineer, usually a colonel, who is the contracting officer on most contracts.

<sup>63</sup> W.G. Construction Corp. case, which settled a \$765,000 claim for \$288,000 in February, 1987.

were settled through a confidential minitrial process. The second minitrial, involving an overhead cost allocation suit, did not settle, but did significantly narrow the issues.

As a result of the relative success of its first two minitrials, the Navy circulated a one year test policy in December 1986, stating that it is the Navy's policy to utilize ADR, including minitrials and summary binding and non-binding ASBCA procedures, in every appropriate case.<sup>64</sup> The main differences between the Corps' and the Navy's minitrial policy is that the Navy's General Counsel must approve all uses of ADR before they are conducted, and that the Navy strongly prefers that neutrals be current ASBCA judges.<sup>65</sup> This test policy was followed in July 1987 by a directive requiring contracting officers to offer contractors, where appropriate, a summary binding ASBCA procedure in cases involving \$25,000 or less, and in disputes greater than \$25,000, to review each case for minitrial suitability. Detailed guidelines on minitrials will be forthcoming from the Navy, but "[i]n the interim, prior to the issuance of a Contracting Officer's Final Decision, the Head of the Contracting Activity ... shall ensure that all appropriate steps have been taken to resolve the claim, including the use of ADR techniques."<sup>66</sup> Currently, the Navy is engaged in a \$75,000 minitrial in Seattle and is considering three other cases for possible minitrial.

Department of Energy. At about the same time that the Corps and the Navy were implementing ADR, the Department of Energy held its first minitrial in the summer of 1986, involving a case where a six-week hearing had just been completed. Boecon, a subsidiary of Boeing and the subcontractor in this case, had filed a claim against the Department of Energy for damages from government changes and delay in the construction of the substructure of a nuclear waste processing plant. After a year of discovery, pronounced hostility between the attorneys, and numerous unsuccessful attempts by the Energy BCA to convince them to settle, the case finally went to trial.

Following the hearing before the BCA, and after the Administrative Judge began to write his opinion, the parties, with much judicial prodding, agreed to a minitrial to try to resolve the dispute. The parties' settlement of over \$5 million, which was very close to the original claim, was formally approved by the Energy BCA three months after the minitrial. The Department of Energy has not conducted any more minitrials, and does not have a formal policy on ADR.

Other Agencies. Other offices have become increasingly interested in ADR. The Commercial Litigation Branch of the Department of Justice circulated a minitrial policy in June, 1986, but has not yet conducted any minitrials. The Environmental Protection Agency has issued guidance on the use of ADR (including minitrials) in enforcement cases. The Claims Court this spring implemented voluntary ADR procedures suggesting or favoring the use of settlement judges and minitrials.<sup>67</sup>

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<sup>64</sup> Department of the Navy Alternative Disputes Resolution Test Program, *outlined in Memorandum from the Secretary of the Navy, 23 Dec. 1986 (hereinafter Navy ADR Program), reprinted in ADR Sourcebook, 847.*

<sup>65</sup> See Section III.B.6. *infra* for a detailed discussion of minitrial neutrals.

<sup>66</sup> Memorandum from Everett Pyatt, Assistant Sec. of the Navy, July 13, 1987.

<sup>67</sup> For texts of these and other relevant agency policy statements, see *ADR Sourcebook*, 703 - 860.

### 3. *Minitrial Results.*

Of the 11 cases that have been minitried by the government, all but one have settled.<sup>68</sup> Generally, the settlements have been somewhere between the two parties' positions. For example, in the Tenn-Tom case, "[t]he settlement represented a substantial compromise by both sides from their initial positions in the litigation."<sup>69</sup> It is difficult to tell in all cases how close the settlements have been to what a board would decide, but at least in the Boecon case the settlement figure was very close to what the judge would have awarded.<sup>70</sup> Given the high settlement rate and acceptability of results (with the exception of the controversy over the Tenn Tom case), it is surprising that so few minitrials have been undertaken.

### 4. *Benefits and Burdens.*

The key consideration for most parties in choosing to participate in a minitrial is the desire to save time and money. The amounts saved will depend on what stage in the litigation process the minitrial is used. Minitrials generally take between one and three months for preparation, hearing and negotiations, as compared to a board of contract appeals process that can take two to four years. The neutral in one minitrial, for instance, estimated that the process saved the parties "several months of additional discovery and a minimum of four weeks of trial before a board of contract appeals."<sup>71</sup>

More specifically, a reason for preferring a minitrial to litigation has been that such an expedited procedure ties up key personnel for a much shorter period of time.<sup>72</sup> This is especially true for smaller contractors and agencies who have only a few top managers. When these managers are occupied with litigation for a year or more, a company inevitably spends less energy on servicing current contracts or developing new business. Although the opportunity cost of litigation is often less immediately apparent to government officers, the administrative and legal manpower costs in both the private and the public sectors should be a significant incentive to shortening the time spent on resolving contract disputes. Minitrials often produce better decisions than formal processes because the decisionmakers are the experts and managers in the field. Finally, minitrials are particularly advantageous when the parties expect to have a continuing business relationship, allowing them to resolve disputes quickly and in an informal way that avoids much of the adversarial posturing inherent in litigation.

While a minitrial has usually resolved disputes sooner, evidence that the process dramatically cuts down the total hours spent on the dispute is more commonsensical and anecdotal than scientific. Parties' attorney must master the details of dispute in a short time in order to present cogent, complete arguments at a minitrial. While minitrials are believed

<sup>68</sup> The one unsettled case was a Navy minitrial conducted in the summer of 1986. According to John Turnquist, Associate General Counsel (Litigation) for the Navy, however, the minitrial did serve to significantly focus the issues. Interview, June 19, 1987.

<sup>69</sup> Ruttinger, *Army Corps of Engineers Settles \$45 Million Claim at Mini-Trial, Alternatives to the High Cost of Litigation*, Center for Public Resources, Vol. 3 No. 8 (August 1985). See also Nash, *supra* note 30 (the minitrial arrived at "a settlement which pleased neither party but which represented a fair middle ground").

<sup>70</sup> Interview with Judge Carlos Garza, June 24, 1987. Judge Garza had already held a six week hearing in the case and was almost halfway through writing his opinion when the minitrial was held, and was thus in a good position to judge the fairness of the settlement.

<sup>71</sup> Nash, *A New Technique for Settling Disputes - The Mini Trial* (1985) (unpublished article). See also Sample Minitrial Agreement Between the United States Army Corps of Engineers and Appellant, in *ADR Sourcebook*, 710 (minitrial is a procedure which "provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board").

<sup>72</sup> See, e.g., Jack Lemley, remarks at *ACUS Colloquium*.

to reduce discovery and trial time, "[t]he preparation by the trial attorney must be even more intense and consuming than for a board hearing. The trial attorney must know his case *totally*."<sup>73</sup> One Corps attorney said that in preparation for the minitrial she did about two-thirds the amount of work she would have for a regular hearing. She also said, however, that the process was well worth the time because it resolved the dispute quickly and with less disruption of work.<sup>74</sup>

Further considerations in estimating the time the process will take include the expected length of the hearing and negotiations, and the possible travel to and from the minitrial. The amount of time required of the neutral similarly varies with the complexity of the case and the role the principals expect him to play in the minitrial. Clearly, an intensive preparatory effort is required for effective presentation and negotiation. Equally apparent, however, is that these efforts have almost always succeeded in finally resolving the case.

##### 5. Minitrial Decisionmakers.

**Principals.** Crucial participants in any minitrial or other ADR process are the principals, representatives of each party to the dispute who hear competing presentations and then seek to negotiate a settlement. The principals most often have been fairly high ranking government officials and business executives. Opinion and practice have varied as the appropriate rank, experience, and preparation of the principals, but a number of helpful observations can be made.

**HOW MANY PRINCIPALS?** While the number of principals representing each side has varied up to three (one business representative and two attorneys, for instance),<sup>75</sup> a clear trend exists toward using a "panel" of only one principal from each side (possibly assisted by a neutral advisor). This has the advantage of being less burdensome, as well as simplifying the "hearing" and negotiation parts of the minitrial; unless a case is so sprawling and complex that a lone representative cannot properly prepare and negotiate, one should suffice. The exception proving the rule is the one government minitrial to date where a larger panel was employed--the NASA-TRW dispute, a very complicated multi-party case in which, coincidentally, no neutral advisor was used since none could be found who was adequately informed.

**WHO SHOULD SERVE?** In selecting its principal, a party must balance several competing factors. Principals should be located high enough in their organizations to negotiate, and successfully defend, a binding settlement. They must have inherent or delegated authority to bind the organizations they represent in the dispute at hand. Generally, principals should come from a higher level in the organization than that where the controversy arose.<sup>76</sup> According to several participants surveyed, principals should have little

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<sup>73</sup> Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.

<sup>74</sup> Interview with Reba Page, Ohio River Division trial attorney in the Corps' Walter T. Dickerson minitrial, July 31, 1987.

<sup>75</sup> *The Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey*, Report of Subcommittee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, American Bar Association Section of Litigation, July 1, 1986, p. 24 (hereinafter "*ABA Subcommittee Report*"), *ADR Sourcebook*, 253.

<sup>76</sup> Edelman and Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 *Arb. J.* 7, 9-10 (1987), *ADR Sourcebook*, 231.

prior involvement with the case so as to be able to take an objective look at the issues.<sup>77</sup> On the other hand, they will need enough technical expertise to grasp the main issues quickly.

Another competing consideration, especially for government agencies, is that the principal obviously cannot routinely hail from such a high level that his or her involvement will detract in a major way from the agency's operations. Recognition that top management's time is at a premium will be especially important if minitrials become more common.<sup>78</sup> Agencies can meet this concern by tailoring the rank of the manager-principal to suit the magnitude of the case, by encouraging ADR use earlier in the case (e.g., the CO level), or by bringing in auditors or others occasionally as principals.

Contractors have often used vice presidents with responsibility for government contract activities or other senior executives. In the Corps of Engineers, the principals have tended to be division engineers, generals who oversee the work of several districts where contracts are administered day-to-day. In smaller minitrials, contracting officers have occasionally acted as principals.

Agencies may wish to designate several respected officials (e.g., generals or admirals in the armed forces) as a pool of potential principals for major minitrials, take related steps to make participation as a principal an attractive career step, and encourage (or even provide) training in negotiation, mediation and ADR skills among groups of potential principals.

Virtually all knowledgeable observers disfavor using attorneys as principals, preferring high or mid level bureaucrats, business representatives or technical experts. As two active government proponents put it,

The involvement of top management in the mini-trial is essential for the success of the process. Having top management decide the dispute, rather than attorneys and judges, enables the parties to use management skills and policies to resolve a dispute that is heavily fact-oriented.<sup>79</sup>

Lawyers are trained, and often tend to act, more as advocates than as negotiators, and may be less likely to reach decisions based on sound business reasons than on litigation tactics or formal legal or other principles less relevant to the case at hand. Opponents often are reluctant to risk a minitrial under such circumstances. The minitrial policies where litigators are expected to act as principals--those of the Claims Court and the Department of Justice--have been criticized by some experts for this reason, and DOJ's policy in fact has produced a disappointing number of minitrials.

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<sup>77</sup> Where an agency or contractor is not large, or on major agency projects, there may be some difficulty finding an "unbiased" principal. This has not precluded successful resort to minitrial, which in any event will likely be a principal's first chance to hear all the weaknesses of his side's case and should thus be of considerable value. (Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.)

<sup>78</sup> Interviews indicate that several contractors have preferred for the government principal to be as high ranking as possible. Perhaps this stems from a desire to increase finality by reducing second-guessing within the agency; other possible explanations are that a high level officer will be less influenced by operational level biases, less well-informed on technical details, more comfortable dealing with large sums, or simply inclined to split the difference and get back to other duties.

<sup>79</sup> Edelman and Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 *Arb. J.* 7, 9 (1987), *ADR Sourcebook*, 231.

**PREPARATION.** While a few observers prescribe unfamiliarity as the best approach, most principals to date have been well served by being informed thoroughly in advance of relevant facts and the parties' positions. This permits trial counsel to concentrate on educating the *other* principal and the neutral advisor as to the strengths of his case and the weaknesses of his opponent's; counsel should not also feel a need simultaneously to educate his own principal. Principals' minitrial preparation should include both liability and quantum issues, since any settlement will necessarily address these issues and, given the brief time frame, there will not be time to prepare a quantum case once the hearing has begun.

A good example of thorough preparation might be the government principal in the Department of Energy-Boecon proceeding, William Voigt--a nuclear physicist serving as the Director of the Department's Office of Remedial Action and Waste Technology with only limited previous experience in contract disputes. He estimated<sup>80</sup> having spent 60 to 70 hours reviewing briefs and documents, talking to the Department's project manager, and being briefed by the agency's trial attorneys and General Counsel on the law. His burden was especially great because the case had already gone through a year of discovery and a six-week hearing. Most principals to date have spent considerably less preparation time, and some view this degree of preparation by a high-level manager as excessive; Mr. Voigt says he could have negotiated comfortably with less information. Still, in that case and others<sup>81</sup> it has helped produce prompt settlements of bitterly contested, highly complex disputes without subsequent recriminations.

**PRINCIPALS' ROLES.** During the minitrial process, the principals typically have acted to preside over the "hearing," to enforce (and decide whether to vary) the ground rules, and to negotiate together immediately afterwards. During the initial stage, they are free to pose questions, either while both sides are presenting their cases or in designated question-and-answer sessions; they typically seek to elicit basic facts, have presenters elaborate on an issue, or clarify misunderstandings. Principals also determine the role to be played by the neutral advisor. Several have maintained that it is important that the principals not only approach the process with an open minded willingness to assess both sides, but also conduct themselves so as to avoid giving the appearance of being biased as to the merits; to do otherwise inhibits effective negotiation. One way to do this is to encourage the neutral advisor to ask many of the tough questions at the hearing, even at the risk of making the neutral appear biased.

Once the principals have had a chance to assess the strengths and weaknesses of both sides' positions, their negotiations should take place promptly and should be final and binding. This does not mean that expert advice should not be sought as needed during their talks or that other representatives of the parties ought never be involved in the negotiations, but that the responsible principals should have, and feel comfortable exercising, authority to resolve all issues before them without seeking third-party approval following the close of negotiations. (One exception here may be occasional consultation with in-house counsel in preparation of a settlement or legal memorandum supporting the result.)<sup>82</sup>

Successful service as a principal will in many cases call for more than sound preparation, questioning and negotiating. Some degree of courage and bureaucratic skill will also be needed, given that principals sometimes will have need to find merit in an opponent's contentions long after subordinates, auditors or counsel have taken fixed (and possibly narrow or contentious) positions to the contrary. As with some agencies or administrators who prefer safe, "regular" decisions, there will inevitably be some potential principals who lack the fortitude or skill to deal creatively to resolve difficulties that arise over a contract.

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<sup>80</sup> Interview with William R. Voigt, Jr., DOE, June 26, 1987.

<sup>81</sup> In at least one case, principal was drilled in a preparatory mock-minitrial.

<sup>82</sup> See *Navy ADR Program*, IV C. 1(d)(IV).

Just as many cases will not be appropriate for ADR, inevitably some mistakes will be made in those that are minitried.

Contracting officers, project officers and their superiors (at headquarters, regional or division level) must see the truth in two fundamental notions: *first*, that there are worse things than making a mistake and, *second*, that safe procedures and exhaustive documentation will often produce, not better decisions, but still more procedures and, ultimately, stultification. It remains to be seen whether bureaucratic behavior, agency evaluations and congressional oversight of minitrial uses can reflect sensitivity to these factors. If they do, there is a possibility of the leadership necessary for developing (1) an atmosphere that will make line officers comfortable with exercising discretion, (2) minitrial or other ADR procedures designed to yield defensible compromise efficiently, and (3) officers who have the skills and training to use them energetically.

Much remains to be done. So far, for whatever reason, apparently no principal has served twice in minitrials. In some agencies, congressional objections or other controversy over particular settlements have had inhibiting effects. It may be, for instance, that, notwithstanding the exceptional leadership displayed in the Corps' ADR effort, the relatively small number of minitrials so far may stem from a reluctance of some division officers to risk district-level recriminations or inspector general investigations. It is certain though, that, without bureaucrats and officers who are willing and able to exercise the negotiation and management skills necessary for a principal, the value inherent in minitrials and other kinds of ADR will never be realized in the government.

#### 6. Other Participants.

Principals must be well-advised. They have generally had access to advisors, including (in appropriate cases) legal counsel, technical experts, and auditors. Frequently, these persons have taken part themselves as witnesses or observers in minitrials; in other cases, the principal has consulted with them only in preparation and acted alone at the minitrial itself. These persons certainly should be available generally to desirous principals during the hearing and negotiations.<sup>83</sup> This serves to produce a more well-informed, defensible resolution, enhance accountability, and build intra-organizational support for the settlement. These goals are important, since by the time a dispute reaches the BCA stage, major segments of the agency will have fought a contractor's claims and likely will be displeased at the prospect of a settlement that is negotiated in a day or so.

At times during the negotiation phase, the principals have benefited from caucuses with others from their organizations to discuss the progress of the negotiations and staff's concerns. Government principals have also brought auditors or other staff members into the negotiations on occasion when they thought it important for the contractor to provide a more detailed explanation of claimed costs.

On occasion, access to the hearing has been restricted tightly, and witnesses sequestered --as in the Navy-McDonnell Douglas minitrial, where, in addition, auditors were not allowed to be present at minitrial of a case raising cost allocation issues.<sup>84</sup> Unless secrecy is especially important, it will ordinarily be unwise to sequester most minitrial witnesses, particularly experts, since a looser format may encourage dialogs or exchanges that can help focus issues and sometimes promote agreement.

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<sup>83</sup> The Corps apparently makes a practice of including auditors at minitrials.

<sup>84</sup> This decision, and the subsequent settlement, have been criticized by some agency officials as intended simply to "allow the parties to continue their business relationship" without confronting all issues; however, even these critics have not questioned the substantive settlement, only the closed process by which it was reached.

Legal Advisors. Many interviewed for this study suggested that if the principal is to have a legal advisor during the course of the proceedings, this person should ordinarily not be the trial counsel who prepares and presents the case at the minitrial. It was felt that such a dual role poses the danger that the trial counsel might be too adversarial to provide dispassionate advice during the settlement talks. Also, the principal may have difficulty distinguishing the trial counsel's advocacy from his best advice as to appropriate future action. Other countered that qualified lawyers would know best how to serve their clients, be that in an adversarial or an advisory role, or both.

Auditors. Volumes could be written on the benefits and drawbacks of the growing influence of auditors and inspectors.<sup>85</sup> These personnel will presumably have a role in many cases featuring major issues of accounting principles or their application. They are valuable resources and should not be ignored. Auditors can address cost issues (incurred and allowable) and help principals decide these issues and understand what a good settlement figure is. Auditors who participate in minitrials as part of a management problem solving team--and with recognition that accounting, like management, is often as much art as science--can be quite effective in furthering defensible settlements in the government interest. As with lawyers, principals, and oversight personnel, what is to be avoided is auditor participation that is inflexible, refuses to balance competing views, or fails to give heed to the fact that management realities sometimes must influence decisions as much as "neat" categories.

#### 7. Neutral Advisors.

Is a Neutral Necessary? The "neutral advisor" who helps the parties assess the merits of a case is, unlike the principals, not always indispensable. While a majority of attorneys surveyed in one study thought the advisor helpful in resolving their disputes,<sup>86</sup> several government minitrials have yielded settlements without any third-party intervention.<sup>87</sup> In fact, the Department of the Navy's policy is that in smaller cases the use of an advisor will be an exception.<sup>88</sup> Cases where a neutral is less likely to be helpful, while hard to categorize, will likely be those where the principals already have a good working relationship, where issues are simple or amounts small, or, conversely, where complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral. Neutrals probably will also be needed less where the minitrial occurs early on--say, at the contracting officer level--when positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency implicated. In those cases, the contracting officer might well serve as a sort of presider--principal.

Roles of the Neutral. In the cases where a neutral has been used, his role has varied greatly, depending on the dispute and the parties' wishes; the neutral's background, skills and predilections; and developments during the minitrial process. Indeed, one of the strengths of the minitrial has been the flexibility available to the parties for shaping the neutral's role to the case at hand. In most cases, this role has been very different from -- though not

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<sup>85</sup> In the Department of Defense, COs who depart substantially from auditors' recommendations must justify their actions in writing. The Department of Defense Office of the Inspector General now supervises over 20,000 persons, including DCAA auditors and more criminal investigators than the entire FBI.

<sup>86</sup> *ABA Subcommittee Report*, at 20.

<sup>87</sup> Most notably, NASA's and two Corps of Engineers proceedings.

<sup>88</sup> Department of the Navy, Alternative Disputes Resolution Programs Memorandum from the Secretary and Procedures (Dec. 1986), § IV.C.1.(b). (Hereinafter "*Navy ADR Program*").

incompatible with -- that of a judge.<sup>89</sup> The neutral makes no binding decisions on the merits, and usually does not become involved in the management of the case or attempt to control or regulate the manner or substance of presentations. Rather he serves as a facilitator and an advisor, posing questions and, when asked by the principal representatives, providing insight and observations on various points and issues.<sup>90</sup>

The neutral's role should be defined (at least tentatively) prior to the hearing with input from the principals, who should know what to expect from the neutral. Any shift during the proceeding should be only with the concurrence of the principals.

In the Corps' Tennessee-Tombigbee case, as in some others, the role of the neutral advisor turned out to be larger than anticipated. The principals (both high-ranking managers) and the advisor met for dinner the night before the minitrial and decided that, notwithstanding a fairly restrictive minitrial agreement,<sup>91</sup> they should approach the entire proceeding with a degree of flexibility.<sup>92</sup> During the "hearing," the advisor and the principals asked questions to assure that the facts were ascertained. At one point, the neutral advisor suggested that key expert witnesses of each side be called and questioned simultaneously, and then guided them "through a conversation where they were able to directly confront each other in discussing the most significant areas of factual disagreement."<sup>93</sup>

The neutral also helped the parties prepare for, and identify relevant issues in, a supplemental hearing on quantum. During the negotiation the neutral advisor worked actively to aid settlement, advising each side on the strengths and weaknesses of its case, relevant legal principals, and how the law applied to the facts established, as well as serving "as a type of mediator suggesting middle grounds that might lead to settlement and proposing various methods of computing the amount of the price adjustment to which the contractor might be entitled."<sup>94</sup>

This model, obviously a relatively activist one, includes inquisitorial, advice-giving, and mediating components. Attorneys in many minitrials have expressed the view that the advisor is most useful when thus actively involved.<sup>95</sup> While the parties' preferences should be the ultimate arbiter of the neutral's role, it may be said that, without controlling the proceedings or making judicial-style rulings, the advisor can be helpful by acting to help question witnesses in a probing yet nonadversarial fashion, to respond freely to principals' requests for advice,<sup>96</sup> and to point out gently the proper weight to be given certain

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<sup>89</sup> "Appeals Board Judges' Conference Explores ADR Applicability," 1 Alt. Dis. Res. Reporter 32, 33 (BNA, May 14, 1987) (remarks of Ralph Nash).

<sup>90</sup> Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.

<sup>91</sup> The minitrial agreement provided that the advisor "will be responsible for enforcing the time limitations set forth in paragraph 13 hereof, but otherwise will not be actively involved in the conduct of the mini-trial proceedings."

<sup>92</sup> Nash, *A New Technique for Settling Disputes--The Mini Trial*, (1985) (unpublished article).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* In one case the neutral, when requested, told the principals that the contractor had a slightly better case than the government, but that its costs were inflated and there was substantial room for negotiation. Lingenfelter letter, Dec. 13, 1984. In the Boecon--Department of Energy minitrial, the neutral similarly advised the parties, though never advising a party to accept a particular offer. 1 Alt. Dis. Res. Reporter 45 (BNA, May 14, 1987).

<sup>95</sup> *ABA Subcommittee Report*, at 21-23.

<sup>96</sup> One neutral saw a need for the adviser to "reassure [the principals] as to the impact of federal contract law in the case." 1 Alt. Dis. Res. Reporter 33 (BNA, May 14, 1987).

testimony.<sup>97</sup> In at least one case, the advisor has provided a written, non-binding opinion to aid the principals, while in others he has done little more in furthering settlement than respond to technical or legal questions from the principals. If the principals are concerned about persuading members of their staffs, the neutral can help by suggesting that certain ones be brought into the negotiations or briefed, or work with the principals and attorneys to prepare a settlement memorandum or other justification for the compromise reached. Unless principals specifically direct otherwise, a neutral who feels comfortable acting in a mediative role should not hesitate to do so provided he or she will not be involved in subsequent proceedings in the case.

**Requisite Skills.** Many participants in minitrials so far maintain that neutral advisors need no legal training, and that any person acceptable to the parties can be used.<sup>98</sup> They point out that many cases turn on engineering, accounting, or other technical or scientific questions. Some suggest that mediation training, is useful, allowing the neutral to respond perceptively to the principals' wishes and help further negotiations if asked. So far, though, no neutral in a government minitrial has been a professional mediator.<sup>99</sup> Others maintain legal expertise to be a *sine qua non*.<sup>100</sup> They note that the principals and their staffs will likely have the background to weigh technical issues, but would frequently benefit from independent legal advice, on often-arcane matters, that will let them better assess risks, reach a decision, and "sell" or defend a settlement within their organizations.<sup>101</sup> Both the Corps and the Navy require government contracting and litigation experience.

**Sources.** Theoretically, major sources of ADR neutrals include (1) ex-judges, (2) BCA members and other active judges, (3) academics, (4) current government employees, (5) retired government employees, (6) private practitioners, and (7) mediators or other ADR experts. In practice, as mentioned, virtually all neutrals in the relatively few cases to date have been ex-judges or law professors expert in government contracting. Dipping into any of these potential pools has ramifications, many obvious and others fairly subtle.

**PRIVATE PRACTITIONERS AND RETIRED JUDGES.** George Ruttinger, in his 1986 study for the Conference, thoughtfully explored several major issues involved in using some of these groups,<sup>102</sup> including neutrality standards, relevant expertise, and finding and hiring private neutrals.

There are a number of potential problems in finding, hiring, and contracting with private neutrals. The lengthy nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated rulemaking, where speed and efficiency often are critical. The competition required in all but small procurements may be inconsistent with an agency's particular needs when hiring the services of a neutral when distinct criteria are needed. Emphasizing price as a consideration in evaluating proposals may not be the most effective means of selecting the best neutral for the job. While most

<sup>97</sup> This might happen if evidence is clearly hearsay or another reason for concern exists. In one minitrial, for example, the neutral pointed out that, while the views of a consulting C.P.A. who testified on planned and total costs would be of interest, he would also want to hear from an engineer who could address the reasonableness of the planned cost and reasons for increases. The neutral pointed out that an auditor generally provides an analysis of information given to him without questioning why or how costs were incurred.

<sup>98</sup> *ABA Subcommittee Report*, at 21.

<sup>99</sup> 1 Alt. Dis. Res. Reporter 33 (BNA, May 14, 1987).

<sup>100</sup> Edelman and Carr, *The Mini Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7 (1987).

<sup>101</sup> Nash, BOCAJA seminar remarks, April 11, 1987.

<sup>102</sup> *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*, 1986 ACUS 863 (1987), *ADR Sourcebook*, 885. His conclusions, are embodied in Administrative Conference Recommendation 86-8, 1 CFR § 305.86-8.

agency payments to neutrals (save perhaps in some large arbitrations) will fall below the thresholds for full competition and even CBD notice, this fact does not render negligible the importance of competition and an open process. Also, the picture is complicated by the suggestion made by a few persons that neutrals' services will be considered "personnel services" which must be secured through employment and not contract.

Other problems of dealing with private neutrals, and some publicly employed ones, relate to qualifications and neutrality. Hard-and-fast rules are not easy to come by, but the Administrative Conference has suggested a few guidelines in Recommendation 86-8:

"While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"--e.g., no prior affiliation with either the agency or the private industry involved--may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it."<sup>103</sup>

A few agencies have taken positions against using as a neutral, any private lawyer who represents contractors against the government or who has any past or present affiliation with any party. These policies seem somewhat too restrictive, though they may have been justified as necessary to insulate the first few tentative minitrials from one possible source of criticism. The persons most knowledgeable about contracting disputes will almost certainly have been affiliated with the government, private contractors, or both. In the long run, unless retired and sitting judges are used exclusively, restrictive agency policies will probably mellow. So long as private neutrals have no personal or financial stake, they should be eligible to serve.

ACADEMICS. A surprisingly high number of advisors have been law professors expert in government contracts. Some programs regard them as preferred minitrial neutrals,<sup>104</sup> because of their expertise and perceived neutrality. In addition, unlike BCA judges they can be employed without concern that other cases will suffer neglect. On the other hand, such neutrals, unless *pro bono*, will have to be contracted with and paid. Occasional observers have also complained that academics may have strong views on some legal, accounting or technical questions and thus unduly influence the outcome.<sup>105</sup> In any case, professors with this background are minuscule in number,<sup>106</sup> barring a rapid rise in academic interest in the area, this pool will remain shallow quantitatively if not qualitatively.

<sup>103</sup> Conference Recommendation 86-8, 1 CFR 305.86-8.

<sup>104</sup> Corps ADR Policy, *ADR Sourcebook*, p. 705-706.

<sup>105</sup> One informed observer expressed concern over this problem in a Navy minitrial of a case where complex accounting standards were applied to an involved fact situation.

<sup>106</sup> All such government minitrial neutrals to date have taught at George Washington University School of Law, which has a unique government contracts program.

BCA MEMBERS AND OTHER ACTIVE JUDGES. Many, probably most, observers in the contract field view these officers as potentially excellent neutrals. Active BCA members and judges comprise the preferred sources for minitrials under the recent Navy and Claims Court ADR policies. Obvious advantages include their expertise in government contracting matters,<sup>107</sup> the authoritative nature of their advice, the fact that they are already on the government payroll, and their relative neutrality.<sup>108</sup> The BCAs, currently the tribunals of last resort for the great bulk of government contract disputes that reach litigation, have generally gained credibility and authority that may quite readily be employed in helping parties resolve many disputes earlier in the process and with less formality than a full hearing.

Other advantages will sometimes accrue. Administrative judges are familiar with issues or cases (or classes of cases) commonly before their boards, and presumably should take less time than outsiders to get up-to-speed for a minitrial. Also, a presiding BCA judge may more readily enter as a board order a settlement negotiated with the involvement of another judge than one facilitated by a private neutral; some contend that this may influence the government's willingness to settle, since in some cases a formal order, unlike an agreement between the parties, may be paid from the general judgment fund rather than scarce agency program funds.<sup>109</sup> Similarly, Congress may prove more receptive to appropriating additional funds to cover large settlements approved by a BCA member, and congressional committees or inspector generals somewhat less likely to scrutinize closely such agreements.<sup>110</sup>

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<sup>107</sup> BCA judges are required to have five years experience in public contract law.

<sup>108</sup> Administrative Judges at BCAs, according to the CDA, are to be selected in same manner as ALJs, 41 U.S.C. § 607(b)(1), and are insulated by *ex parte* restrictions and other guarantees of independence. Daniel Joseph's Draft Report to the Administrative Conference of the U.S. regarding agency use of settlement judges, (October 1987), indicates that the settlement judge can command substantial deference and speaks with authority that derives both from his general familiarity with an agency's case load and his position as a judge; "If that official decisionmaking system meets (the parties) halfway with an official, authoritative, but still non-binding and non-prejudging review of the questions of whether settlement is appropriate, they may feel that their perceived need to invoke adjudication has been responded to".

<sup>109</sup> Technically, the CDA requires agencies to reimburse the judgment fund, 41 U.S.C. § 612(a), either out of current funds or through deficiency appropriations from Congress. Sometimes, however, agencies cannot reimburse the fund because they do not have enough money themselves and are unable to get additional appropriations, either because OMB prevents them from asking Congress or Congress refuses the request. While GAO seeks to ensure subsequent reimbursement, and maintains that it usually does so, contracting officials' perceptions that payments will not affect current appropriations are real and have an effect.

<sup>110</sup> An example of the danger settlements can run into is *Blackhawk Heating and Plumbing Co. v. United States*, 622 F.2d 539 (1980). The Veterans Administration ("VA") reached a \$10.3 million settlement with Blackhawk for a dispute arising out of the construction of additions to a VA hospital. Before the money could be paid, however, a number of senators and congressmen questioned the settlement and urged the Administrator of the VA not to pay it. The Administrator nevertheless decided to go ahead and honor the settlement. As a result, an amendment was added to the Supplemental Appropriations Act of 1974 which required the VA to obtain specific appropriation from Congress to settle any construction contract dispute for over \$1,000,000. The conferees also provided that the VA could pay only up to \$6,000,000 of any pending settlement agreement. The conference report further stated that it is the sense of the conferees that all claims against the Veterans Administration should be processed through the agency Board of Contract Appeals unless there is adequate legal analysis, audit information, and claim documentation to show that settlement outside the board of contract appeals is in the best interests of the government.

The VA paid \$6 million of the settlement before the Appropriations Act was enacted into law, but thereafter could not legally pay the remaining amount. The court held that the contract was subject to acts of Congress, and that Blackhawk was not entitled to the rest of the settlement, though it could still pursue further relief in an appropriate forum in connection with the contract claims underlying the settlement.

Consultations with representatives of the General Accounting Office ("GAO") and with other experts in federal personnel and contracting, reveal no legal obstacles to BCA members acting as neutrals in cases pending before their own or other Boards. The CDA says only that BCA members shall have no other inconsistent duties.<sup>111</sup> It seems that as long as the agency knows that its BCA members are serving as neutrals and has determined that there is no conflict with their regular duties, there are no legal impediments to using BCA judges as neutrals.

On the other hand, the Army Corps of Engineers has so far preferred not to use BCA judges, and has employed private neutrals. Several knowledgeable observers have put forth vigorous arguments that using BCA judges as neutrals may not be the best choice. They pointed out:

⊙ Government personnel's time and services are hardly "free," and the effective costs may equal or exceed those of private neutrals.

⊙ BCA judges, at least at several boards, have large backlogs and can better spend their time writing decisions than working to resolve cases that may ultimately settle without judicial intervention.<sup>112</sup>

⊙ Many BCA judges are experts, not at mediation or minitrial or even settlement promotion, but rather at holding formal hearings and applying contracting or accounting rules to factual situations in written decisions.

⊙ Even if the BCA member acting as a neutral advisor is recused after an inconclusive minitrial, the close quarters and small size of most boards can render confidentiality difficult to maintain. A judge may be hard-pressed to avoid hearing discussions of a case.

⊙ Many boards have only three members, and--since panels are comprised of three judges--will have trouble finding a minitrial or settlement judge who could then be recused if settlement efforts fail.

These interviewees maintained that active judges, who are used to presiding over formal proceedings and issuing rulings to control the parties, are less likely to tailor their actions to the case at hand than others with relations to the parties that are more flexible and less hierarchical. They feared losing control to the judges of a process intended to be shaped and guided by the parties.

It is a fact of life that some judges are more successful promoting settlements than others who are less activist; minitrial "styles" will vary similarly. Even so, it is worth considering whether BCA judges as a class, presiding regularly as they do over a relatively compact group of agency personnel and public contracts lawyers, will be less inclined to intervene actively to offer frank opinions and explore alternatives, and will be received less comfortably, than someone who is unlikely ever to preside again over the parties. One judge stated that, if called on to serve as a neutral in a case already before him, he would feel these constraints:

⊙ He would be uncomfortable getting involved in quantum discussions.

⊙ He would be less likely to get involved in furthering a rapport with the principals, as have some neutrals.

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<sup>111</sup> 41 U.S.C. § 604(a).

<sup>112</sup> The majority of cases at the ASBCA, for example, have been resolved without hearings in recent years. Comments of Judge Ruth Burg at meeting of Administrative Conference Committee on Administration, May 2, 1986, minutes.

⊙ He would be leery of *ex parte* contacts and of talking to the principals without counsel present, as many mediators and other neutrals do regularly.<sup>113</sup>

The same judge suggested that he would feel only somewhat less constrained if he were not going to be on the panel ultimately hearing the case, and would feel most free to take an active role if he were doing it for another agency's board. While these averments hardly prove that judges should not be used, they suggest that it may be unwise to limit the parties to judges from a particular board or even to BCA judges as a group.

The weight of the objections recited, when compared to the advantages of using board members, is certain to vary depending on the judge, the board, the case in question, and available alternatives neutrals. Several can be overcome, and it is clear that agencies have the authority to use BCA judges as neutral advisors. This is true both for cases before the boards and at the CO level.

For now, it is enough to state that these expert officials should by no means be routinely excluded, if for no other reason than that dispute resolution experience gained in mediation or minitrials may be carried over to the remainder of a judge's cases.<sup>114</sup> The enthusiastic responses by several board chairmen to experimenting with ADR, and specifically to having interested board members trained to act as minitrial neutrals, indicate that careful thought should be given to how best to employ them more actively to resolve cases without hearing.

Selection and Payment. The parties sometimes identify the expert in the minitrial agreement; more commonly, the minitrial agreement includes a provision setting forth the selection procedure. The most common process so far has probably been for the parties to submit ranked lists of acceptable neutrals.<sup>115</sup> In one case, this was a prolonged process, with over a dozen suggestions being rejected before an acceptable person was found.<sup>116</sup> The new Navy process calls for the parties to seek to agree on a list of mutually acceptable ASBCA judges to be submitted to the Board's Chairman. At the Claims Court, an ADR judge is assigned by the Clerk of the Court on application by the parties with the presiding judge's concurrence.

Occasionally an effort is made to ascertain, and maintain, an advisor's neutrality at this stage. This may be done by forbidding either party to approach unilaterally the advisor concerning the merits, or by even requiring the parties' to ascertain and disclose all prior

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<sup>113</sup> Interview with NASA BCA Judge Carroll C. Dicus, Jr., July 15, 1987.

<sup>114</sup> This has proven true, for instance, at the MSPB, where some presiding officers participating in an expedited appeal experiment upped their overall settlement rate dramatically. Letter from Paul Mahoney, MSPB, to Charles Pou, dated March 11, 1987.

<sup>115</sup> E.g., *ADR Sourcebook*, 753-4; a particularly comprehensive provision for selecting a neutral in a private minitrial provided,

The parties will select a neutral advisor acceptable to both parties. The parties will exchange lists of five choices for the neutral advisor, listed in order of preference. Neither party shall nominate any person as a neutral advisor who has any conflict of interest, bias or partiality for or against either party. If one name appears on both lists, that person is automatically selected. If two or more names match, the name with the highest average position on the two lists is selected. If no name is common to both lists, the parties will attempt to agree to select a person nominated by one party who is acceptable to the other.

<sup>116</sup> Some minitrial agreements in private contract disputes provide that if no neutral is agreed on by a specified deadline, an ADR organization will make the selection from a list. *ABA Subcommittee Report*, at 13.

contacts with a person nominated to serve as advisor.<sup>117</sup> Such formality often will be unnecessary, or even counterproductive, but may at times help guarantee acceptability and fairness.

A few private neutrals have served *pro bono*, while others have contracted to serve for fixed fees,<sup>118</sup> with the costs split by the parties. An alternative used occasionally provides that if the advisor gives an opinion on how the case should be resolved, a party that does not follow the recommended disposition shall bear the advisor's fees and expenses.<sup>119</sup>

**Roster of Neutrals.** There are a number of challenges facing the expansion of ADR and the use of neutrals. Agencies should attempt to develop and refine procurement procedures that will simplify the process of hiring outside neutrals. The government should also strive to expand the base from which to select the services of either private or public neutrals. Information on neutrals should be pooled into a centralized place from which to formulate rosters. Agencies should be flexible in defining the qualifications required of outside neutrals, by avoiding rigid technical and expertise requirements. Agencies, Congress, and others employing ADR should further the following goals:

- \*increasing the supply of ADR services available to the federal government,
- \*insuring qualifications of neutrals,
- \*improving acquisition methods for hiring neutrals, and
- \*clarifying neutrals' roles and authority.

A large number of interviewees saw great potential benefit in developing a central roster of ADR experts and, in particular, minitrial neutrals for contract cases.<sup>120</sup> In their view, rosters can save time and energy for parties seeking an advisor, help small boards find settlement or minitrial judges, and serve to encourage creation of a cadre of reliable, expert neutrals to help resolve contract disputes consensually. One or two agencies have made use of short lists of private neutrals, but so far these efforts have been very informal.

It seems clear that a government-wide roster is worth a try. Having said that, a number of questions arise: Who should be eligible for listing? Should standards of experience, education, or third-party recommendations be set and non-conforming applicants rejected? If so, what criteria should apply? Should the roster be limited to a small, elite group,<sup>121</sup> on the theory that this will enhance the credibility of the nascent minitrial process and tend to cause those on the list to view their role as a public service? Alternately, should the roster be based on a disclosure principle, with most or all applicants who provide certain data being listed, leaving the parties to decide on a particular neutral and possibly stimulating a "cottage industry" of advisors? Should any particular groups, such as government personnel or private attorneys, be wholly excluded on grounds that one side or the other likely will strike them for possible bias or conflict of interest? How should complaints against allegedly incompetent or unfair advisors be handled? Should there be separate rosters for different kinds of cases or skills?

<sup>117</sup> See, Minitrial Agreement between Trunkline LNG Co. and FMC Corp., Oct. 4, 1985.

<sup>118</sup> Contracting issues in government agency acquisition of neutrals' services are discussed in Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking*, 1986 ACUS 863 (1987), *ADR Sourcebook*, 891.

<sup>119</sup> E.g., EPA model agreement to institute minitrial proceedings, p. 2.

<sup>120</sup> In its Recommendation 87-8, 1 CFR § 305.87-8, the Administrative Conference called for such rosters, which it would work with the Federal Mediation and Conciliation Service ("FMCS") and affected agencies to compile.

<sup>121</sup> Much like the D.C. Circuit Court of Appeals' new mediation program or the Center for Public Resources' list of "distinguished persons" available to help resolve certain disputes, which is comprised of persons such as former judges, government officials, and executives.

These questions need not all be addressed exhaustively in this report, but several points are worth making. *First*, the list probably should include all who have experience as ministerial advisors. *Second*, it should include all administrative judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both.<sup>122</sup> (Some safeguards to ensure interagency reciprocity may be necessary.) *Third*, the list should include all retired Claims Court, BCA, and federal judges who are interested. *Fourth*, in any case before a contracting officer or a BCA, the parties should have the option of selecting any mutually agreeable neutral who is available and has no clear conflict of interest, regardless of where the neutral comes from. *Fifth*, no standard fee scale should be established, and, indeed, neutrals should be encouraged to serve in some cases *pro bono* or at reduced rates; agencies expecting to have their judges loaned out should consider developing standards for reimbursement by user agencies.<sup>123</sup>

Several groups might be in a position to compile such a roster and keep it up-to-date, including the Administrative Conference, the Office of Federal Procurement Policy ("OFPP"), or the Board of Contract Appeals Judges Association ("BOCAJA"). It is our view that, resources permitting, the best-placed of these groups to administer such a roster is, quite simply, the Administrative Conference, working with the consultation of the groups mentioned and others knowledgeable about contract claims. The Conference's membership has recently approved a recommendation calling on its Chairman to work with other agencies to establish rosters of neutrals on which agencies can draw.<sup>124</sup> Similarly, the recommendation suggests that the Chairman work to encourage imaginative efforts to encourage the sharing of federal neutrals and remove obstacles.<sup>125</sup> The Conference's stated willingness to serve, combined with its relative objectivity and familiarity with the administrative process, make it a natural candidate for this job.

### C. Mediation

#### 1. *Where has it been used?*

A second category of ADR that may be useful in government contract cases is mediation. Several courts and agencies have instituted mediation programs, some with dramatic results. Mediation is a process in which the parties may reach settlement by negotiating directly with each other with the help of a neutral mediator who often is specially trained in dispute resolution. In addition to many district courts, several federal courts of appeal have introduced mandatory mediation for some cases. The Second, Sixth and Eighth Circuit Courts of Appeal have operated programs for some time.<sup>126</sup> The Court of Appeals for the District of Columbia Circuit commenced, effective May 8, 1987, an experimental civil mediation program that requires attendance at an initial mediation session.

<sup>122</sup> An informal arrangement now in place between the NASA, Energy, and HUD Boards provides for exchanges of administrative judges where recusal of a settlement judge or retirement reduces the available panel to fewer than three. No legal obstacles appear to inhibit inter-agency sharing; indeed, agencies have for years shared administrative law judges from time to time, with or without reimbursing the lender agency.

<sup>123</sup> *Id.*

<sup>124</sup> Administrative Conference Recommendation 86-8, para. A.5, 1 CFR § 305.86-8.

<sup>125</sup> *Id.* at para. A.2.

<sup>126</sup> John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, Missouri Bar Journal 253 (June 1984); Robert W. Rack, Jr., *Pre-Agreement Conferences in the Sixth Circuit Court of Appeals*, 15 Toledo L. Rev. 921 (1984). A variety of Federal Judicial Center reports have also dealt with the issue of settlement conferences including: D. Marie Provine, *Settlement Strategies for Federal District Judges* (1986); *The Role of the Judge in the Settlement Process* (1977); and Frederick B. Lacey, *The Judge's Role in the Settlement of Civil Suits* (1977).

Distinguished senior members of the bar serve as mediators, and parties must be represented by someone with authority to enter into a settlement agreement during the session. *Pro se* cases are excluded, as are those involving multiple parties or intervenors. Counsel are required to provide some case documents to the mediator, and to prepare short position papers.<sup>127</sup>

## 2. *What is it?*

Mediation is typically initiated either by the parties voluntarily submitting the matter to a public or private dispute resolution organization, or by the court suggesting or ordering the parties to submit to mediation. The mediator is generally process-oriented, arranging meetings between the parties, assisting in the exchange of information, and relaying parties' interests and positions. In fulfilling this role, the mediator may have private meetings with the parties to facilitate the negotiations, and may even actively participate by proposing settlements. In many cases the mediator need not have any special expertise in the area of dispute, but in contract cases it is often helpful if he does.

## 3. *Advantages and Disadvantages in the Government Contract Setting.*

Mediation has the advantage of often being a fairly quick and inexpensive procedure. Since the negotiations are private they can be made confidential, or at least treated as settlement talks, an attractive feature in many cases. Furthermore, the negotiations can be informal and relatively non-adversarial, helping preserve future business relations and cooperation. Finally, mediation, like arbitration, clears the courts' overloaded dockets.

There are, however, some disadvantages. Parties may feel uncomfortable using mediation in lieu of the formal process created by the CDA. Some fear opening up their case in talks with an adversary who "lays behind the log" in bad faith. Another drawback of mediation is that it can be used to simply draw out the litigation with an added step, though this is not likely to be a major concern in government contract disputes that already take two to four years.

Informality, one of the biggest advantages of mediation, may perversely prove a hindrance in some government contract cases. Agreements between parties reached without the formality of a hearing or a written opinion, may not stand up as well to rigorous review, or may be criticized for having less of a documentary pedigree or for not conforming foursquare with certain precedent. Government negotiators are justifiably reluctant to settle a case knowing that the informal procedure, and their performance, may not survive a legalistic review by the agency or a court. Contractors also would not want to participate in a procedure that may end up simply wasting time and money if the settlement turns out not to be acceptable to other parts of the government. Though many of these problems can be corrected, many parties to contract litigation may simply be more comfortable with a more formalistic proceeding than with mediation.

Even given the foregoing, mediation definitely deserves greater use in contract disputes. Probably the best place to begin is with the boards, where a scarcity of supergrade judge slots may make staff mediators attractive and where many current judges can benefit from mediation training. At the least, boards should encourage training and take a page from the D.C. Circuit's mediation book by creating distinguished panels of available mediators. Larger boards, or a combine, should examine seriously the approaches taken by the courts. All

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<sup>127</sup> See, D.C. Circuit and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement, *Third Branch* 19 (1987).

boards should adopt policies and rules, described below, encouraging and making possible mediation use.

#### D. Settlement Judges

##### 1. *Current Usage.*

"Settlement judges" can be used to encourage parties to settle their cases without compromising the parties' ability to engage in subsequent litigation should they not be able to reach settlement. While some BCA judges have begun taking a more active posture in encouraging settlement, apparently only the Federal Energy Regulatory Commission (FERC) and Occupational Safety and Health Review Commission have adopted rules for using settlement judges.<sup>128</sup> The U.S. Claims Court has recently implemented a policy to inform parties at the outset that they may request a settlement judge to help them assess their positions, resolve their dispute or narrow the issues in controversy. The settlement judge is another member of the Claims Court who works in confidence to guide the parties toward settlement. If the procedure does not produce agreement, the case is typically returned to the presiding judge's docket and litigation can proceed without prejudice toward either party.<sup>129</sup>

##### 2. *Judge's Role.*

The settlement judge's role is subject, of course, to immense variation,<sup>130</sup> but one illustration may be enlightening. A U.S. Magistrate, resolved a 1985 Corps of Engineers lawsuit, filed in U.S. District Court, against Allis-Chambers for loss sustained as a result of recently discovered latent defects in generator coils installed in 1970.<sup>131</sup> The parties were asked to submit five-page summaries a week before the settlement conference, and were expected to have someone in attendance with either authority to settle or enough influence that his recommendation would carry substantial weight. At the conference, the Magistrate had the parties discuss the issues and estimate the litigation expense they would incur in attorney fees, out-of-pocket costs and employee time. He then stated his belief that, while the trial judge would be conservative in any damages awarded, defendants did have an exposure to liability. The parties were then led through a process of exploring settlement rationales and constructing the "building blocks of settlement."

The magistrate then met separately with each party, discussing frankly the problems each side had with its case, and each party's bottom-line settlement figures. He did not

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<sup>128</sup> These agencies' uses of this process are explored in Daniel Joseph's draft report to the Administrative Conference of the U.S. regarding agencies' uses of settlement judges, (October 1987). In fact, during the early 1970's the NASA Board's rules provided for appointment of an administrative judge to help the parties explore settlement. This procedure was discontinued several years ago. Interview with NASA BCA Judge Carroll Dicus, Jr., July 15, 1987.

<sup>129</sup> U.S. Claims Court General Order No. 13 and Notice to Counsel on ADR Techniques (April 15, 1987; see Appendix C), *ADR Sourcebook* 731; D.C. Cir. and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement, 19 *Third Branch* (1987).

<sup>130</sup> This area has been explored in detail in several studies sponsored by the Federal Judicial Center. They include D. Marie Provine, *Settlement Strategies for Federal District Judges* (1986); *The Role of the Judge in the Settlement Process* (1977); and Frederick B. Lacey, *The Judge's Role in the Settlement of Civil Suits* (1977).

<sup>131</sup> *U.S. v. Allis-Chalmers*, Case No. 85-C-567-B (N. D. Okla.). This description is drawn from a memorandum by Rowe C. Wynn, Jr., Assistant Chief, Office of Counsel, Aug. 21, 1986.

reveal to the parties what their opponent was willing to settle for, and promised not to develop his recommended settlement amount by splitting the difference between each side's bottom-line amount. At a final joint session, he announced his recommended settlement, and gave the parties less than a day to advise whether the amount was acceptable. There were to be no counter offers. Unless both sides accepted, they would not know whether the other agreed to the amount. The next day, both parties advised the settlement judge that, subject to Department of Justice approval, his recommended settlement figure was acceptable.

### 3. *Benefits.*

Such an approach obviously can save time and money, though the benefits are difficult to quantify.<sup>132</sup> It can also be particularly helpful to parties seeking a sensible "business" solution, who can benefit from advice on how the case might be decided in court. The disadvantage is that, once again, a judge's time is being used for something other than hearing cases. If the case does not settle, the extra step has engaged the time of *two* judges, and may, therefore, prove more inefficient than simply litigating the case the first time around. Some argue also that it may be dangerous for a judicial figure to undertake to produce settlements on the basis of very limited information; they fear an influence disproportionate to his or her actual knowledge.

### 4. *Mandatory Use of Settlement Judges?*

Though agencies should provide by rule for use of settlement judges, only certain types of cases and parties will be susceptible to settlement. Mandatory settlement conferences in all cases may be too drastic. If settlement judges were ubiquitous, parties might start routinely gaming the settlement conferences as well as the trial. Nonetheless, presiding and chief judges should regularly examine their dockets and not hesitate to suggest use of a settlement judge whenever appropriate; since parties often are hesitant to raise settlement themselves for fear of appearing "weak," a judge can be quite effective in focusing parties' attentions on their mutual interests. And, if they do nothing else, boards should always inform all parties that a settlement judge will be made available in any cases where a party requests it.<sup>133</sup>

## E. **Arbitration**

### 1. *Defined.*

Arbitration is a flexible procedure where the disputants present their cases to a neutral third party, usually selected by mutual agreement, who hears the evidence and decides the award. Arbitration may be binding or non-binding. If binding, the parties must abide by the arbitrator's award unless a party appeals, which can be done only under a highly circumscribed standard of review. If non-binding, parties are free to accept or refuse the arbitrator's recommended decision. Arbitration is typically initiated in one of three ways: (1) the parties agree before a conflict arises to submit all disputes to arbitration; (2) the parties agree to submit to arbitration after the dispute arises; or (3) a court, agency, or statute mandates that the dispute be arbitrated.

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<sup>132</sup> See G. Bingham, *Resolving Environmental Disputes* (1986), for an excellent discussion of problems in measuring the costs and benefits of ADR.

<sup>133</sup> See Administrative Conference Recommendations 86-3 and 86-7, 1 CFR § 305.86-3 and 86-7.

## 2. Procedure and Experience.

The exact procedure for presenting the case depends upon the arbitration agreement between the parties, but it always involves an arbitrator who hears evidence and renders an award. Procedure is informal, with limited discovery and relaxed evidentiary rules. An arbitrator's award is usually a one or two sentence conclusion. At most it will be accompanied by an abbreviated review of facts and the legal basis for the opinion, rather than by a lengthy opinion. The arbitrator usually has technical knowledge of the area, and often has a legal background. He renders his decision pursuant to a standard chosen by the parties, which may simply be the law of a certain jurisdiction, the provisions of the contract, or even the arbitrator's own sense of justice.

## 3. Advantages and Disadvantages.

Ideally, arbitration can be an expedited process that can save the parties significant time and money, although occasionally extensive proceedings can be involved. It is particularly useful when the parties have an ongoing business relation, as is the case with the government and most contractors. Since discovery is often curtailed and the hearing itself can be simpler than a judicial hearing employing all the rules of evidence, an arbitration often takes less time and money than a traditional trial. Moreover, the use of an expert cuts down on the time needed to educate the decision-maker on the technical issues, and may lead to a more well-informed decision. A further advantage of arbitration is that it need not always be a public procedure, thus allowing the parties to protect trade secrets. Lastly, the quite limited scope of review gives arbitration awards greater finality than most judicial or agency decisions. The main disadvantage of this technique is that in many cases it can be almost, or just, as slow and costly as a formal adjudication.

While many government contract disputes would seem well suited to arbitration, and indeed, this alternative has been seriously considered, it has not yet been adopted. An Interdepartmental Board created in 1921 by the Director of the Bureau of the Budget to standardize government contract forms considered, but rejected, both establishment of a central appeals board and use of arbitration in contractors' appeals from the decisions of contracting officers. Objections included the apparent need for authorizing legislation and that these processes would deprive the department head of the control necessary to discharge his statutory responsibilities.<sup>134</sup>

During World War II, arbitration was again considered, but agency boards were developed instead. Several obstacles have prevented the use of arbitration to resolve government contract disputes. The Interior Board in 1981 ruled that agencies cannot submit contract disputes to arbitration, at least where the contract's dispute clause requires otherwise--as all now do.<sup>135</sup> A more long-standing roadblock has been a series of opinions the Comptroller General, who has been determined that the government cannot be bound by arbitration unless the agency is specifically authorized by statute to engage in arbitration or the arbitration is limited to factfinding. This view is based largely on a fear of improper decisions by arbitrators who may not be well informed on government appropriations and expenditure laws. The Administrative Conference of the United States and many others have criticized this view and has called for Congress to overturn it.<sup>136</sup> Finally, while Articles II

<sup>134</sup> See *Disputes and Appeals* 48-49.

<sup>135</sup> *Dames and Moore, Inc.*, IBCA No. 1308-10-79, 81-2 BCA 76, 393 (Oct. 27, 1981).

<sup>136</sup> Administrative Conference 86-3, 1 CFR § 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*

and III of the Constitution may restrict some government uses of arbitration, in most cases agencies and Congress should be able to safeguard the process to avoid these problems.<sup>137</sup>

In addition to these legal obstacles, there are some practical problems with arbitration. Arbitrations are not always speedy, lack some of the "quality control" of trials because they are not documented as well and less subject to public scrutiny. Some fear that arbitral awards may not always accurately reflect the merits of the case, as when the arbitrator simply decides to split the difference between the parties. Arbitration does not generally establish precedent, and although some agencies may choose to employ arbitral awards to create precedents, extensive use of arbitration may lead to some loss of uniformity. Finally, parties may be reluctant to engage in arbitration since the scope of judicial review of awards is limited and they may be stuck with an unsatisfactory and unappealable decision.

Nevertheless, many federal contract cases are, on their face, good candidates for arbitration. These include cases where the standard to be applied has already been established by statute, precedent or rule; where the resolution of the dispute will not have precedential effect or establish major new policies or precedents; where the parties want the arbitrator to base his decision on some general standard without regard to a prevailing norm; where it would be valuable to have a decisionmaker with technical, in addition to legal, knowledge; or where the parties desire privacy.<sup>138</sup> Passing many of these decisions on to arbitrators would presumably free up BCA judges and the Claims Court to focus their managerial and decisional skills on significant cases with precedential or policy implications.

## F. Disputes Review Boards

### 1. Army Corps of Engineers Model.

The South Atlantic Division of the Army Corps of Engineers has developed an ADR procedure to attempt to resolve factual, as opposed to legal, contract disputes at the contracting officer level. At the time the contract is signed, the government and the contractor may agree to create a Disputes Review Board that can review factual disputes arising under the contract. This Board consists of three members, one each representing the government and the contractor, and a third chosen by agreement of the parties. The procedure then allows the contractor who is dissatisfied with a contracting officer's preliminary opinion either to request a final opinion which can then be appealed, or to submit the dispute to the Disputes Review Board with the consent of the government.

If the parties agree to submit the dispute to the Disputes Review Board, they must do so within 30 days of the receipt of the contracting officer's preliminary opinion. At the hearing, both parties present evidence on the dispute to the Board, which then has 30 days to make a factual recommendation. If the parties accept the Board's recommendation, the dispute is considered settled and the government will expeditiously make any required contract modifications. If the parties do not accept the recommendation, the usual dispute resolution procedures are followed.

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*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 Public 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 Dispute Resolution in Federal Programs*, (September 1987), argues persuasively that GAO's objections are without legal foundation and unpersuasive.

<sup>137</sup> See H. Bruff, *The Constitutionality of Arbitration in Federal Programs*, Report to the Administrative Conference (May 1987); ACUS Recommendations 86-3 and 87-5.

<sup>138</sup> See Administrative Conference Recommendation 86-3, 1 CFR § 305.86-3, *ADR Sourcebook*, 113.

## 2. *Procedures.*

This procedure effectively takes care of disputes early on in the process, and, therefore, saves the parties both time and money and helps keep the BCA's docket clear. It further saves time by creating the Board even before any disputes arise and keeping the Board members up to date on the construction so that they are already acquainted with the project and do not have to be educated on the issues when a dispute does arise. Finally, the Disputes Review Board system addresses the statutory and constitutional problems of ADR by making the Board merely advisory and limiting it to factual disputes. It recognizes that this ADR is not suitable for legal disputes that may have precedential value, and therefore emphasizes that the Board is to make "recommendations towards factual (as opposed to legal) resolution of a dispute. . . ."

## 3. *Drawbacks.*

One drawback of the procedure is that it allows the parties to second-guess the contracting officer and to essentially disregard his opinion, perhaps without legal authority to do so. Another potential problem with regards to neutrals is that it may not be economically feasible to keep one or more "on tap". Neutrals would be more helpful in large contracts where keeping that individual "up to speed" is a relatively minor expensive compared to the potential claim size.

## G. Summary Procedure

### 1. *Definition and Description.*

Summary procedures for small claims are another alternative to litigation before BCAs. Of course, the "accelerated" and "expedited" processes authorized by the Contract Disputes Act permit abbreviated resolution of small claims.<sup>139</sup> The processes have had some utility, but their monetary limits are too low for them to make a big difference.

### 2. *Examples.*

A new Navy policy authorizes resolution of small cases singly or in groups via a summary ASBCA process that can be binding. It requires contracting officers, ". . . where appropriate, [to] afford contractors pursuing disputes of \$25,000 or less the opportunity to utilize the Summary Binding ASBCA Procedure."<sup>140</sup> "Precedential" cases are excluded. According to the Navy policy, participation is voluntary, but if the parties do agree to participate, they must also waive their right to appeal under the Contract Disputes Act. According to the binding procedure, each party has a limited amount of time, usually one to two hours, in which to present its case to a single BCA judge, who renders a decision from the bench immediately following the presentations.

<sup>139</sup> The Act requires BCAs to provide for accelerated disposition of cases for claims of \$50,000 or less, and to establish expedited simplified procedures for disputes of \$10,000 or less. 41 U.S.C. §§ 606(f), 608.

<sup>140</sup> Memo from Everett Pyatt re Navy ADR Program, July 13, 1987. It also provides that a CO decision that a full trial must be pursued shall be reviewed.

Ideally a judge would be able to hear a number such cases in one or a few days, and so help clear the BCA's docket. John Turnquist, Chief Litigation Counsel for the Navy, has proposed organizing a settlement week in which seven or eight judges dispose of 70 - 100 cases in summary proceedings.

Another summary process has been attempted experimentally by the ASBCA. In it, the judge orally issues a brief, final, binding bench decision without preparing the customary written decision. This process, also consensual with the parties, has been used once so far.

### 3. *Advantages.*

While the advantages of a summary process are readily apparent, the chief drawback is that it uses already overloaded BCA judges to resolve the cases. While some argue that it is better to use a week of a judge's time to resolve ten small cases than to let those cases wallow in litigation, others feel that BCA judges can better spend their time working through the Board's docket rather than resolving small cases. Another criticism is that summary procedure is merely a thinly veiled attempt to engage in arbitration that may be statutorily prohibited; this attack, however, is without foundation since the deciders remain BCA judges. The principal problem of this proposal is simply that a "settlement week" is very hard to schedule, and anything less may be inefficient.

## H. Case Management

### 1. *Benefits.*

"ADR, techniques in the hands of judges, no matter how well-trained and well-intended, will not significantly reduce cost or delay nor enhance litigant satisfaction unless they are premised upon a system that encourages and effectuates judicial management."<sup>141</sup> Keeping track of caseloads and focusing parties' efforts help to create a "culture" where timeliness, rather than extensions, becomes the norm. Both the Administrative Conference and the A.B.A.'s Public Contracts Section have called for greater use of case management as a tool.<sup>142</sup> The Federal Trade Commission, for instance, has adopted a mandatory "fast-track" rule for all cases pending before its administrative law judges. Before a party files a petition or motion it must have made a good faith effort to settle the case or at least to narrow the issues. Prior to the required scheduling conference, the parties must exchange non-binding statements of claims and defenses. The ALJ is then required to set a trial date for no more than six months from the time of the scheduling conference.

### 2. *Experience.*

The Grant Appeals Board (GAB) of the Department of Health and Human Services makes use of a number of interrelated procedures to create an even more interventionist case management model.<sup>143</sup> For example, the Board tries to consolidate appeals involving common questions of law or fact so that a single hearing suffices for all. The Board periodically gives parties specific procedural directions to help them speed up the process. They also may ask a party to clarify an argument or position if it is not clear to the judge, or to submit further

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<sup>141</sup> *Dispute Resolution in Massachusetts* 32.

<sup>142</sup> Administrative Conference Recommendation 86-7, 1 CFR § 305.86-7; *Expediting Contract Appeals*.

<sup>143</sup> See R. Cappalli, *Model for Case Management: The Grant Appeals Board*, 1986 ACUS 663 (1987).

factual or legal evidence to help develop the record. Following up on such issues, the judge frequently uses written questions as the framework for the hearing. "Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the Member will ordinarily structure the conference or hearing as a forum for addressing these ambiguities."<sup>144</sup>

### 3. Approaches.

Another method of case management is to have the judge early in the litigation formulate the issues to be decided rather than to let them emerge slowly during the pretrial phase. GAB members also employ warnings and sanctions to encourage compliance with time limits, and issue orders to show cause why a sanction should not be imposed or a preliminary finding not finalized. Another tactic is to encourage as many stipulations of fact as possible, which often forces parties to recognize the merits of their cases, and occasionally to pressure parties to concede certain points, or even entire claims. On occasion the Board specifically invites the parties to brief particularly complicated or important issues of law, which helps the Board make an informed decision. Sometimes a party knows that it will lose its appeal because of a governing precedent, and simply wants to exhaust its administrative remedy as quickly as possible so that he may bring suit in federal court. In such cases the GAB is perfectly willing to issue a one or two paragraph summary decision.

Many of these case management techniques are already used at a few boards to speed up the resolution of government contract disputes. In the view of many judges and lawyers, however, these approaches require significant time and energy that BCA judges do not have. Case management also posits an active judicial role in framing cases for litigation that some may feel inappropriate and may even hinder justice. As these perspectives make clear, case management should not become a fetish. Nevertheless the trend, in federal district courts for instance, clearly is in favor of these methods. Given the likelihood of continued growth in caseloads and stable board sizes, case management may become a necessary a tool for all boards, and certainly merits a close look.<sup>145</sup>

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<sup>144</sup> *Id.* at 88.

<sup>145</sup> Besides the Cappalli report, a 1983 study for the Administrative Conference by Charles Pou and Charlotte Jones examines the varying ways in which several agencies have made use of some of these devices. *Agency Time Limits as a Tool for Reducing Regulatory Delay*, 1986 ACUS 835 (1987). This report, and the cases and articles it discusses, suggest that agencies possess the authority to develop and enforce criteria for ensuring expeditious disposition of cases by ALJs and BCA judges.

## IV

## IMPLEMENTING ADR IN GOVERNMENT CONTRACT APPEALS

## A. When Does ADR Work Best?

1. *Appropriate Issues.*

ADR has resolved a broad range of technical, monetary, and responsibility questions between contractors and procurement agencies.<sup>146</sup> For example a variety of contracts and issues have been involved in cases using the minitrial format so far. The first case involved a dispute regarding a highly technical satellite communications system at NASA. The Army Corps of Engineers minitrials have involved disputes over a variety of construction problems. The Navy's first two involved both auditing and legal issues with the same contractor (the specifics of which have remained confidential among the parties), while the third involved an overhead cost allocation suit. The Department of Energy minitrial dealt with a subcontractor's claim based on delayed access and inadequate drawings.

Many interviewees felt that all dispute cases are potentially appropriate for ADR use, except those clearly turning on legal issues.<sup>147</sup> The Corps "Tenn-Tom" minitrial showed that ADR techniques can be used effectively even when the issues in dispute are highly complex.<sup>148</sup> Many observers saw ADR, if implemented properly, as a useful alternative to litigation in the resolution of contract claims disputes in these situations: (1) where there is a close factual question as to entitlement, and experts support both the government's and contractor's position, (2) where agreement has been reached as to entitlement, but the parties cannot agree on quantum, and (3) where legal or technical staff presents an overzealous assessment of the government's position. The minitrial can demonstrate to the CO or other principal the weaknesses, as well as strengths of the government's position which would enable the CO better to assess the merits of the claim.<sup>149</sup>

Substantively, the cases most often cited as appropriate for minitrial consideration are differing site disputes where the parties disagree on the conditions of the site; disputes arising from the agency changing the required work of the contract; defects in contract specifications with which the contractor finds impossible to comply;<sup>150</sup> defective pricing audits;<sup>151</sup> and disputes over construction and ship repair contracts. The minitrial process is unlikely to be useful where contractor fraud is alleged.

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<sup>146</sup> See Appendix B.

<sup>147</sup> Interview with Paul Killian, Esq., July 10, 1987

<sup>148</sup> "DOD Deputy IG Endorses ADR", *Federal Acquisition Report*, vol. IV, no. 8, Aug. 1987 (Derek J. Vander Schaaf's comments at ACUS ADR Colloquium).

<sup>149</sup> After-action report, ASBCA Minitrial No. 28767, Dec. 20, 1984 prepared by trial attorney, Major Northrop, Mobile District, Army Corps of Engineers.

<sup>150</sup> "Federal Reclamation Bureau Soon to Adopt an ADR Policy", *Alternatives to the High Cost of Litigation*, vol.5, no.2 (Feb. 1987, CPR).

<sup>151</sup> "DOD Depute IG Endorses ADR", *Federal Acquisition Report*, Vol. IV, No. 8, Aug. 1987.

### 2. Case Size.

It has been suggested that there be some minimum amount in controversy below which the value of the minitrial is exceeded by costs. Because ADR options are at such an experimental stage, quantitative evaluations of this nature would have a weak empirical foundation. It would be very difficult to compare the costs of ADR as compared to the costs of going directly to the board or court, because these three dispute resolution arenas cannot easily be compared. It is difficult to assess whether and how a dispute settled by ADR, might have been settled otherwise. Therefore, the size at which the case is deemed appropriate for ADR settlement would be hard to pinpoint and will best be determined by the parties in a particular dispute. While agencies might want to set up some standards, these would have to be quite flexible given the variations possible.

### 3. Timing.

The general feeling is that it is better to agree to ADR sooner rather than later, in order to curtail discovery--the chief cause of expense and delay.<sup>152</sup> In addition, the sooner in the process the parties get together to negotiate, the less rigid they are likely to be in discussing their cases, and the greater the possibility of a mutually acceptable settlement. Another related consideration, especially for the government, is the reaction of the staff. The longer a team has been preparing and conducting discovery on a case, the less willing its members may be to accept a quick settlement decision, in part because they will feel more knowledgeable about the dispute than the principal.<sup>153</sup>

For instance, minitrials have been conducted at all stages of the appeals process. Some have taken place before the parties responded to initial interrogatories, a number occurred after significant discovery, and one, the above-mentioned Boecon case, took place after a six-week Board hearing. It may also be possible to have minitrials even before a final decision by the contracting officer, or after the decision but before an appeal is filed. Since cases typically present several settlement "windows" as they progress, regular review can help find apt subjects for ADR.

Thought certainly should be given to using ADR, including minitrials, at the contracting officer level.<sup>154</sup> While the present report focuses on the appeals level, there is no contradiction between employing these methods at both the CO and BCA stages.<sup>155</sup> Obviously, backlogs at the BCAs would be alleviated by having COs settle more cases.<sup>156</sup> The earlier that disputed contractual issues are brought to the CO's attention, the earlier and more readily they can be resolved.<sup>157</sup> Parties, often less entrenched and more cognizant of what the dispute was about in the first place, would have a chance to deal with their problems

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<sup>152</sup> See e.g., Killian & Mancini, *Mini-Trials - Basic Principles and Guidelines*, Construction Briefings, March 1985, at 4.

<sup>153</sup> This happened in the Corps' Tenn-Tom case, where an unhappy staff member used the "hotline" to request an Inspector General's investigation into the process and settlement. See Appendix B.

<sup>154</sup> Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987

<sup>155</sup> The only drawback to simultaneous minitrials at these two levels would be the appearance of a duplication of effort. Some agencies might not be able to fiscally justify such a dual effort.

<sup>156</sup> Interview with Chairman (ret.), Armed Services Board of Contract Appeals, and Senior Judge (ret.), U.S. Claims Court, Louis Spector, June 17, 1987.

<sup>157</sup> Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987.

directly, and promptly. For these reasons, many have suggested implementing these devices before cases get to the boards.<sup>158</sup>

Some observers, seeing an erosion in recent years of many COs' managerial authority, wonder whether this may inhibit their willingness to go out on a limb by negotiating a compromise. COs need their agencies behind them on these decisions.<sup>159</sup> A recent A.B.A. report states:

"The CO should have the authority to fulfill the mission of contracting in the most efficient and economical way, while assuring that the spirit and intent of the law is faithfully implemented.' By contrast to this ideal of discretionary authority, . . . the current DOD acquisition system 'blankets the CO with oversight, laws and regulations. The magnitude of new laws has thrown a shadow on the contracting officer's authority and the pace of change is too swift to be effectively absorbed and implemented'. . . 'In this atmosphere of intense oversight and close regulation, correct procedure becomes more important than substantive success in acquisition . . . CO's can be so confined by compliance with regulations . . . that they are afraid to express ideas and afraid to act beyond their familiar routines'. To make matters worse, the rapid rate of statutory and regulatory change makes past training increasingly obsolete."<sup>160</sup>

Even so, and even if less objective than someone higher up, often a CO will be potentially the best principal. One way to get the CO involved in the minitrial is to make the CO the government's principal; if the minitrial takes place before the CO's decision, the CO could present the settlement as his decision; if the minitrial occurs after the CO's decision, the CO can always change his mind and reconsider his decision<sup>161</sup>; if both parties are satisfied with the settlement and the CO's subsequent decision, there should be no complaints about improper influence. Minitrials seem to present far fewer concerns over improper influence on COs, though sticklers may wonder if informal advice from a BCA judge acting as a neutral can be disregarded.<sup>162</sup>

<sup>158</sup> After-action report, ASBCA Minitrial No. 28767, Dec. 20, 1984 prepared by trial attorney, Major Northrop, Mobile District, Army Corps of Engineers. It is worth noting that the report of the Commission on Government Procurement recommended a new level of claim consideration where an informal review would occur in any case that a CO's decision was adverse to the contractor. The review would have allowed the agency to correct or amend some CO decisions before the contractor commenced litigation, and would have focused on the CO's justification for the adverse decision and settlement possibilities. CO decisions were to be submitted to a higher level agency official, who was not involved in the contract's administration, for purposes of injecting an element of neutrality into the attempted settlement. It was also suggested that the conference be held prior to the CO's decision, before the parties became settled in their positions. Notwithstanding contractor support, Congress deleted the notion of a settlement conference because it was thought to undermine the negotiating position of the CO.

<sup>159</sup> Interview with Chairman (ret.), Armed Services Board of Contract Appeals, and Senior Judge (ret.), U.S. Claims Court, Louis Spector, June 17, 1987

<sup>160</sup> R.J. Bednar & J.T. Jones, *The DOD Contracting Officer*, Report of an ABA Public Contracts Section Subcommittee, (1987), Federal Acquisition Report, Vol. IV, no. 8 (Aug. 1987).

<sup>161</sup> According to Robert T. Peacock, *A Complete Guide to the Contract Disputes Act* (1986), at 40, "the CO may reconsider or amend a decision even after a timely appeal has been taken." *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA Sec. 15,766; *Watson, Rice and Co.*, AGBCA No. 82-126-3, 82-2 BCA Sec. 16,009."

<sup>162</sup> In one case, *Pacific Architects and Engineers Inc. v. U.S.*, 491 F.2d 734 (1974), concerns a CO's decision which the plaintiffs alleged was unduly influenced by the legal advice of a government lawyer. The FAR 33.211(a)(2), promulgated in 1983, states that the CO "shall secure assistance from legal and other advisors." Thus, a CO should be allowed to

## B. Negotiating and Living with ADR Settlements

### 1. *The Negotiation Process.*

During settlement negotiations, the principals have typically met alone to weigh the merits of the case and discuss areas of compromise. Many have been advised by their technical advisors and counsel on the legal issues; advised by experts on technical issues; advised by auditors on the quantum aspects of the case; and advised by the neutral advisor on the merits of the case, as well as the probable outcome at trial. No transcripts are kept of these proceedings. At most, intra-agency documents are prepared after the fact, explaining and justifying the outcome and perhaps describing the process for evaluative purposes.<sup>163</sup>

### 2. *Review or Approval of Settlements.*

Generally there is no follow-up review of the ADR settlement, as the principals must have prior authority from the agencies to settle the case. These principals must have the confidence that their agencies are behind them to settle the case with the best interest of the government in mind. One dispute settlement was brought to the attention of the agency Inspector General by an agency subordinate who felt that agency's principal had given in too easily in the minitrial negotiations. The IG's report generally endorsed the process, determining that the parties in this case acted in the best interest of the government but that greater justification should be provided for settlement decisions.<sup>164</sup>

An IG generally should not become involved while an ADR settlement is in progress; the IG's role in preserving accountability can best be performed less intrusively. IG reviews of these activities should be approached with caution, as excessive post-review of settlement outcomes could undermine the potential for further use. Conceivably, some liaison by the principal with the auditors for the agency (e.g. Defense Contract Audit Agency) prior to the actual initiation of the procedures may occasionally be useful. The auditors might, on request, review a case agencies have deemed appropriate for settlement, and provide quantum data for the principals in order to assist with the settlement process. The auditors may also offer guidance on appropriate levels of documentation for settlements, hopefully taking into account considerations of both accountability and flexibility.

In some cases, Congress might also feel the need to second-guess settlement decisions. An extreme example is *Blackhawk Heating and Plumbing Co. v. U.S.*,<sup>165</sup> discussed above in connection with use of BCA judges as minitrial neutrals. In that situation, Congress questioned the settlement, urged the VA Administrator not to pay it, and ultimately forbade payment of the full settlement amount. While agencies must act carefully with ADR to avoid

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get advice from the BCA member acting as a neutral. Another case, *Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (1983), addressed the issue of congressional pressure on such a decisionmaker, finding it, without proof of effect on the outcome, enough to vacate a decision.

<sup>163</sup> Interview with Frank Carr, Army Corps of Engineers (June 18, 1987).

<sup>164</sup> The only other post-settlement agency reviews have been evaluations of their ADR programs and policies. This general assessment is useful to policy makers seeking to improve the process, and should help assure that the governments interest is served.

<sup>165</sup> 622 F.2d 539 (1980).

indefensible settlements and to provide oversight entities with an accurate view of the costs and benefits of their ADR uses, members of Congress must also assume responsibility for a level of review that recognizes the need for compromise in many disputes and the transaction costs of formal adjudication.

### 3. Documentation.

The agency ADR procedure should almost always provide for some brief documentation to justify the settlement reached. This would improve accountability, especially for cases involving large dollar amounts, and would ultimately lessen the probability of any investigation. This need for rational settlement must be balanced by the fact that the primary appeal of ADR is its informality. Also, the assurance of privacy in the negotiation process is essential. If the details of the negotiation process became common knowledge, criticism from both sides might increase and inhibit future negotiations. In short, if the process were too open, the incentive for using ADR would be gone.

The level of documentation will depend on for whom it is being created. If it is created for oversight on the part of individuals outside of the agency, not much detail would be apt. If it is created for in-house use, as is more likely, the principal or his advisor should set down cost and other factors taken into consideration, any pre-negotiation positions developed, and a statement justifying acceptance of the compromise; in short, a reflection of the thought process or rationale of government officials who agreed to the settlement. Interviews with IG personnel suggest that this documentation will not significantly exceed what would ordinarily be used to justify negotiated settlements of government contract disputes. A price negotiation memoranda would typically be adequate. Justification should be written after the fact so that ongoing negotiations are not jeopardized or delayed. The neutral could help the parties draw up the justification memo, or offer an advisory decision in a potentially sensitive case.<sup>166</sup>

### C. Agency Policies

Despite the initial apparent success of ADR procedures, widespread use has not resulted. To those in the bureaucracy, this is understandable; most public officials are adverse to change. Lessening the backlog of cases is often not incentive enough for officials to risk a new procedure by using ADR tools. Innovative policies must therefore balance a variety of interests and concerns. These include parties' needs to resolve disputes, so that they can re-focus personnel and resources on more pressing matters; maintenance of positive ongoing relationships; finality in decisions; needs for accountability; and procedural fairness.

Probably the simplest way for an agency or board to implement ADR in the contracts litigation process is to write and distribute a policy encouraging contracting officers and BCA judges to explore ADR. It should state clearly that high-level agency officers, or the board, support such initiatives and place the responsibility for these implementing policies or rules with contracting officers, government counsel, and judges. OFPP should encourage development of such advice via its guidance; a presidential executive order and changes in the FAR encouraging ADR are also warranted.

An ADR policy can give both government officials and private contractors the encouragement they need to experiment with these techniques. One consideration holding parties back from any kind of ADR, for instance, is the possibility that one's opponent might take willingness to settle as a sign of weakness. An agency can avoid this problem by

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<sup>166</sup> Interview with Derek J. Vander Schaaf (DOD OIG), May 27, 1987.

making it a policy to review systematically *all* cases for settlement potential, thereby avoiding the impression, however unfounded, that it will only consider ADR in a weak case. This statement should thus make it clear that not all cases need be litigated, that choosing to settle rather than litigate is often a sign of reasonableness, and that the responsible agency officials will support settlement's reached via duly selected ADR methods.

An ADR susceptibility review should be done by persons experienced or familiar with its potential success. However, many agencies do not have such individuals. The BCA might be an appropriate starting place for such an endeavor because these judges are most familiar with different types of disputes and with managing the docket caseload.

The policy statements of the Corps of Engineers, the Navy, the Justice Department and the Claims Court essentially outline their recommended ADR procedures. The policies emphasize the voluntary nature of the procedures, as they eschew strict guidelines, and do not require that anything in particular be done. They do establish who has authority to approve the selection of a case for ADR consideration. These policies offer guidelines on many of the issues discussed in the previous sections of this study, such as case selection, representatives, neutrals, and the nature of the agreement, process and negotiation. The guidelines are usually fairly loose, as they should be, and allow the parties to design a procedure most appropriate for the particular case. For example, the South Atlantic Division of the Corps of Engineers has its own minitrial policy in addition to that of the Corps. Yet in the Granite Construction case, the parties combined elements of the two policies into yet a third kind of ADR procedure.<sup>167</sup>

An important question to be addressed in formulating a specific policy is what roles the agency's BCA and COs should play in the minitrial or other ADR process. The whole point of ADR is to avoid litigation, and it seems logical to try to implement minitrials before the BCA is even involved in the case.<sup>168</sup> This saves the parties time, clears the board's docket for cases that should be litigated, and avoids some possible formalism and institutionalization that the board might impose. The policy should not transfer control over the structure of the ADR process from the parties to the judge.<sup>169</sup> However, a policy implemented by the board may imbue the process with added legitimacy in the eyes of Inspectors General and Congress. Furthermore, the board's formal approval of a settlement finalizes the issue, and can protect it from second-guessing by the agency or Congress. Finally, judges may well prefer to issue their own policy rather than have one imposed upon them in the interest of preserving their independence.<sup>170</sup>

#### D. Rule Changes

In addition to implementing dispute resolution policies, contracting agencies and their BCAs should consider in their rules of practice changes to encourage the use of ADR. While agencies should be careful not to over institutionalize ADR--lest it become part of the problem rather than part of the solution--a rule requiring CO decisions to alert appellants to ADR possibilities and parties to explore the possibility of ADR would ensure that they realize the alternative is available. In many disputes, this may be all the parties need to commence a process leading to settlement. If done early in a case, savings would be dramatic. Such a rule could be especially helpful to larger BCAs in getting the word out to

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<sup>167</sup> See Appendix B (Agency Initiatives to Date).

<sup>168</sup> Indeed, arbitration would substitute a private decider in less important, nonprecedential disputes.

<sup>169</sup> Interview with Paul Killian, Esq., July 10, 1987.

<sup>170</sup> 41 U.S.C. 607(b)(1) (BCA judges are appointed in the same manner as ALJs).

judges to think about ADR and to help implement the agency's ADR policy. In the long run, rule changes to encourage ADR could help to make these techniques a more common and accepted procedure.

There are, of course, some drawbacks to innovating through rule changes. Adoption of a new rule can be extremely laborious, with some boards--notably the ASBCA-- requiring a burdensome high-level sign-off procedure. Furthermore, rules often lead to unwanted formalism as parties adhere only to the letter of the law, and demand explicit authority to adopt any procedure not specifically enumerated. Rule changes may not be needed for smaller BCAs, where communication among the judges and litigants may be more immediate and the agency's ADR policy may be better known than at the larger boards. Nonetheless a rule is worth considering, since it would also indicate an agency commitment to procedural innovation, give BCA judges clear authority to encourage ADR, and send a message to contract officials and contractors.

A rule on ADR should (1) authorize and encourage agency officers to make use of alternative means of dispute resolution; (2) make provisions for automatically alerting the parties, both at the CO level and as soon as an appeal is filed, that one or more ADR methods is available;<sup>171</sup> (3) authorize a judge to encourage its use and to require the attendance at any conference held for the purposes of proposing or implementing ADR, of at least one representative of each party who has authority to settle all matters; (4) briefly describe the alternatives; and (5) authorize the parties to agree to vary any procedural rule in their case. While it is likely that administrative judges and officials already have these powers,<sup>172</sup> explicit authorization would certainly allay any doubts and encourage greater use.

Changes can be made to the procedural rules of each individual agency or board, or to the government-wide central regulations and guidelines.<sup>173</sup> A section of the A.B.A., for example, is considering a recommendation to change the ASBCA rules to authorize the Board to call a conference to consider the possibility of agreement or *alternative dispute resolution procedures which might dispose* of any or all of the issues in dispute.<sup>174</sup> Such an addition to the rules of the ASBCA or other boards could make a substantial difference in the resolution of contract disputes, as would a policy encouraging presiding or settlement judges to raise ADR possibilities.

A more sweeping rule change would allow a BCA judge to impose sanctions on a party for unjustifiably refusing to participate in settlement efforts. This would mirror some draft legislation and proposed FRCP changes that would provide that any party who fails to participate in good faith in any settlement conference might be sanctioned. Again, in all likelihood BCA members now have the authority to impose sanctions for failure to participate in good faith once a party has agreed to do so, but a rule should be considered to make that authority clear. Doing any more than this might lessen the voluntariness of ADR use and scare off some.

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<sup>171</sup> Many interviewees recommend including a statement on the ADR alternative in the docketing notice. *E.g.*, Interview with Emanuel P. Snyder, Chief Judge of Transportation BCA, May 4, 1987; interview with Judges David Doane and Russell C. Lynch, Interior BCA, July 17, 1987. The Claims Court has done precisely this in its notice to counsel explaining the operation of its ministerial and settlement judge policies. *See* Appendix C.

<sup>172</sup> Some federal district courts have mandated exploration of ADR use by rule, and have even made mediation or arbitration mandatory in certain kinds of cases.

<sup>173</sup> Strong arguments can be made for issuance at the agency level, as opposed to the sub-agency (e.g., Corps or Navy) or board level. As a practical matter, though, agency rules at any level are likely to suffice.

<sup>174</sup> A.B.A. Alternate Disputes Resolution Committee of the Section of Public Contract Law draft recommendations covering the use of ADR procedures by the ASBCA, April 8, 1987. The italicized section is the proposed change to ASBCA Rule 10(a)(5), 48 CFR Ch. 2, App. A.

Multinational Legal Services, P.C. ("MLS"), a Washington consulting firm, has taken a different approach, recommending to the Office of Federal Procurement Policy ("OFPP") that the Federal Acquisition Regulation ("FAR") be changed to encourage settlement through ADR. MLS proposes adding the following paragraph to FAR 33.204, which states the government's policy to try to resolve all contractual disputes by mutual agreement:

Specifically, the contracting officer, before issuing a decision likely to be unacceptable to the claimant, shall recommend to the non-Government parties and the representatives of the Government involved in the dispute that they seek to resolve their differences by methods other than litigation and that they agree on an alternative method of dispute resolution (ADR), such as a minitrial, mediation, arbitration, a settlement judge or administrative judge or some other neutral person, a two-team settlement process, or some other method of ADR as promises an agreed resolution of the dispute without the litigation following upon a decision of the contracting officer on the claim of the non-Government party.<sup>175</sup>

MLS argues that this regulation change will do three things: (1) "[I]t will unambiguously affirm that ADR is as much or more the policy of the United States as is litigation...." (2) "[I]t introduces ADR at the contracting officer's level -- *before* the parties have been caught up in a formal 'dispute', with pleadings, briefs, subpoenas and depositions...." And (3) "[T]he benefits of resolution by ADR of many disputes will, in turn, speed up the progress of those other cases requiring formal litigation."<sup>176</sup> The notion of greater OFPP and FAR guidance strongly supporting use of ADR at both the CO and BCA stages has great merit.

In conclusion, it must be emphasized that any rule changes should be broad and permissive; they must neither add more layers to the resolution process, nor detract seriously from the voluntary nature of ADR.

#### E. Contract Clauses

Still another means of ADR implementation in the contract process is to write a broad ADR clause into government contracts. Such a clause alerts the parties to the alternative even before a dispute arises and may make it easier to raise and implement the procedure later. Standard and optional dispute resolution clauses authorizing ADR should be prepared for agency use.<sup>177</sup>

#### F. Statutory Changes

It does not appear from interviews with a variety of experts that there are major statutory obstacles in the Administrative Procedure Act or the CDA to using any form of

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<sup>175</sup> Multinational Legal Services, P.C. letter to Robert P. Bedell, Administrator, OFFPP, March 31, 1987.

<sup>176</sup> *Id.*

<sup>177</sup> Recently the Army Corps of Engineers South Atlantic Division inadvertently conducted an experiment of sorts when it accidentally inserted a voluntary alternative disputes review process clause in four solicitations. The Corps had decided not to include the clause for fear that even though the language specifically provided that the process was voluntary, it might have resulted in higher bids. (Memorandum from Stephen Lingenfelter, South Atlantic Division Counsel, to Lester Edelman, May 8 1987. For a sample minitrial clause in a contract between private parties, see Killian & Mancini, *supra* note 152, at 20.) We do not have any information on whether the clause did in fact have an impact, but agencies should consider the possibility.

ADR (except perhaps binding arbitration)<sup>178</sup> to resolve government contract disputes.<sup>179</sup> Legislation, however, would give agencies and boards a strong policy signal, clear authority, and an incentive to use these well-tested techniques, as well as eliminate any existing ambiguity as to agency power to engage in these common sense procedures in fitting cases. Several other policy changes may be beneficial. First, COs should be encouraged to settle cases. Second, as repeatedly recommended by the Administrative Conference and others,<sup>180</sup> Congress should authorize use of arbitration in contract disputes at the agency's sound discretion.<sup>181</sup> At a bare minimum, some consideration should be given in appropriations decisions to funding for training and outreach programs to increase agency use of ADR and for payment to neutrals who help resolve contract claims promptly.

### G. Training and Outreach

Training of, and outreach to, the contracting community is vital to promoting ADR in the government contracts field. Judges and neutrals should receive training in mediation and other ADR skills to help facilitate the procedures. Agency personnel must be educated about both the existence of ADR and how properly to use it. Private contractors must be made aware of alternatives, and must be assured these are fair and efficient and not just another onerous system of adjudication.

#### 1. Training.

A number of interviewees felt that many BCA judges do not have adequate training in case management and mediation to either help them act as a neutral in a minitrial, or even to comprehend fully what ADR is all about. This is also true for the vast majority of contracting officers. The Navy, for example, does not provide any formal training to its personnel, but discusses the procedure case by case as the situation arises.<sup>182</sup> Providing training to its personnel should, therefore, be one of each agency's priorities.

Judges have a variety of concerns regarding ADR in general and minitrials specifically; these include resolving disputes as efficiently and accurately as possible, lessening their caseload, and preserving their independence and neutrality. Some ALJs view various ADR experiments with apparent resistance. It has been reported that many BCA judges are unwilling to "manage" hearings or to resolve cases in the most expeditious way, viewing

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<sup>178</sup> See issues raised in the articles by Harold Bruff and Richard Berg, discussed in Section III.E., above.

<sup>179</sup> See e.g. Multinational Legal Services letter to Robert P. Bedell, Mar. 31, 1987, at 3. (We believe that there is no legal obstacle to an ADR solution to a dispute before or after the contracting officer makes his decision. If it occurs before the contracting officer's decision, the alternative resolution simply becomes the contracting officer's decision; if after his decision, it becomes the settlement agreement with the agency.)

<sup>180</sup> The Conference called on Congress to allow agency arbitration in Administrative Conference Recommendations 86-3 and 87-5, 1 CFR §§ 305.86-3 and .87-5. The Administrative Law Section of the A.B.A. this year approved a resolution virtually identical to Recommendation 86-3.

<sup>181</sup> At the least, parties should be authorized to agree to arbitrate non-precedential disputes that have arisen. Arbitration clauses in acquisition contracts pose more substantial concerns, and are less clearly desirable.

<sup>182</sup> Interview with C. John Turnquist, June 19, 1987.

themselves as onlookers who ultimately make the decision.<sup>183</sup> This view could be changed by their participation in developing and overseeing any new rules, regulations or policies on ADR within their agencies. In this way they will be an active part of the dispute resolution solution. Efforts must be made to demonstrate that the short term burden of case ADR review is worth the long term goals of increased settlements, at an expedited pace, with the result of better overall case management.

Training for government personnel can be accomplished in a number of ways. The Federal Mediation and Conciliation Service ("FMCS") or others could conduct courses at the agencies, focusing on whichever ADR method the agency deems appropriate. Private organizations like the American Arbitration Association ("AAA") and the Center for Public Resources ("CPR") could also provide valuable training. The Board of Contract Appeals Judges Association and other professional organizations could also sponsor seminars on ADR for judges. Still another possibility is to include ADR in the curriculum at the Defense Weapons System Management College, and other bodies which train contract projects managers. DOD has apparently been more successful training its COs than many other agencies, but GSA is now starting a CO training program.<sup>184</sup> The teaching of ADR skills could be incorporated into these programs.

The designation of a particular agency representative as the ADR specialist would help to expedite its ADR development and better coordinate implementation. Who this specialist might be, what part of the agency he or she might be from, what type of training or experience might be required, what the job description might look like, and how that individual might be compensated, are all issues to be dealt with in considering ADR training and development in federal agencies. For example, currently DOD has no central data base for tracking contract disputes, and thus is unable to identify types of cases that could be uniformly settled using ADR procedures.<sup>185</sup> An agency ADR specialist could administer such a system to expedite the consideration of ADR.

## 2. Outreach.

Many of the participants in the ADR field to whom we have spoken consider that the lack of utilization of these techniques is due, in part, to agency personnel and contractors requiring a greater knowledge of the alternatives. To combat this ignorance, outreach and public relations of the benefits of ADR is strongly encouraged. Education is a slow process, and even the most flexible bureaucrats are slow to change. Others interviewed say there is awareness in the procurement community of ADR but that the problems are institutional impediments to implementation of these alternatives. Therefore, education and outreach efforts would only have a limited effect. There is also debate as to the source of an ADR outreach program. Opinions vary as to whether it should come from within the agency as a directive or from some outside source.

An agency will have a difficult time implementing an ADR policy until it has educated both its own personnel and private contractors. Many are still skeptical about ADR, and must be shown that these techniques have actually worked. Within the government, the education should be focused on BCA judges, contracting officers, counsel, and auditors. Beyond spreading the news by word of mouth, agencies could cooperate with other interested groups to sponsor seminars to educate their personnel on the uses of ADR. The Department

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<sup>183</sup> Korthals-Altes, *The Applicability of ADR Techniques to Government Defense Contract Disputes*, Harvard University, May 1986, *ADR Sourcebook*, 147.

<sup>184</sup> Interview with Judge David Doane (Interior BCA), July 17, 1987.

<sup>185</sup> "DOD Deputy IG Endorses ADR", Federal Acquisition Report, Vol. IV, No. 8, Aug. 1987.

of Defense, for instance, is planning to have the Navy give a presentation on its minitrial experiences to personnel from each of the four services.<sup>186</sup>

Professional associations of the aforementioned parties (including BOCAJA, the Armed Services Trial Lawyers Association, and the National Contract Management Association) would be useful for promoting ADR.<sup>187</sup> Private sector participants in the government contract procurement area should be active in ADR development. Other outside actors might want to do follow-up studies and reports of these activities, their success and limitations. Groups like the National Institute for Dispute Resolution ("NIDR"), the Center for Public Resources, Endispute, the American Arbitration Association, the Federal Mediation and Conciliation Service, would be useful organizations for purposes of ADR education and training, as these groups have experience in this area.

Conferences or seminars featuring presentations, working groups, and position papers could be employed to educate people about ADR processes. Participating groups and agencies should include the Administrative Conference, the Board of Contract Appeals Judges Association, the Armed Services Trial Lawyers Association, The Center for Public Resources, The Federal Mediation and Conciliation Service, the Public Contract Law Section of the A.B.A., the Association of General Contractors, and the National Contract Management Association. Such a conference could be directed at both government personnel and private contractors.

There are also other ways to reach the private sector. Something as simple as including an ADR policy statement in the docketing notice could make a big difference. An endorsement of the process by the A.B.A. could also help legitimize and publicize ADR among contractors. The ADR Committee of the A.B.A.'s Section of Public Contract Law has recommended that the Program Committee of the Section and the Section's various divisions conduct educational programs on the Navy's and Corps' ADR procedures, and that particular emphasis be placed on informing and educating small and medium-sized contractors on the existence of these alternatives.<sup>188</sup> The various contractor associations could also help disseminate information on ADR. A number of minitrials conducted by the government have occurred because the contractors had heard of the possibility and suggested it to the agencies. The better the alternatives are publicized, the more successful any program will be.

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<sup>186</sup> Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987.

<sup>187</sup> Interview with C. Stanley Dees (Chairman, ABA Section on Public Contract Law), July 24, 1987.

<sup>188</sup> Memorandum to former Section Chairman Paul Dembling, April 8, 1987.

## V. CONCLUSION

ADR has adapted well to traditional agency decisionmaking formats. Where these methods have been used, they have worked. Apparently, these techniques are flexible enough for a variety of organizational settings, and regulations and policies did not need to be dramatically altered. As a result, some agencies do not see the need for an ADR policy. We disagree. Policies would create greater awareness of ADR proceedings and enhance the probability of their utilization.

To sum up, agencies should adopt policies promoting and encouraging ADR techniques on a voluntary basis. An agency policy should encourage regular review of cases for susceptibility, with caution not to undermine the process with excessive regulations and standardization. The policy should offer advice on how to document the process and justify settlements, to protect decisionmakers and further an effective evaluation of these alternatives. Policies should be supplemented with training and outreach efforts on ADR applications. Whether these efforts will suffice remains to be seen. It is clear, though, that, without these kinds of initiatives, government contract disputes will continue to be handled in a manner that leaves most parties dissatisfied.

## APPENDIX A

## LESSONS IN CHOOSING AND USING MINITRIALS

*1. Deciding to Use a Minitrial*

The initiative to use minitrials has come from both contractors and the government, particularly when an agency policy is established. In some cases contractors, having read about a particular agency's interest in minitrials, have approached the agency after an adverse contracting officer's decision and proposed trying a minitrial.<sup>189</sup> In other cases the impetus has come from the agency itself.

The Navy's ADR program places responsibility for identifying cases for ADR with both the Navy trial counsel in charge of reviewing on-going litigation, and with the Navy officials involved with the contract. All decisions to engage in a minitrial must be approved by the General Counsel or his designee.<sup>190</sup> The Navy's recent ADR directive requires that contracting officers review for possible minitrial all disputes involving over \$25,000.<sup>191</sup>

The Army Corps of Engineers' has a more decentralized policy that authorizes the Division Counsel to select appeals for minitrial. Once the Division Engineer accepts the minitrial recommendation, he proposes the option to the contractor, and also notifies the government trial attorney and the Chief Trial Attorney in Washington.<sup>192</sup> The Ohio River Division has just implemented a new policy as of August 1, 1987, requiring that all contracting officer decisions within its jurisdiction be reviewed for possible minitrial.

The Department of Justice does not have a formal review process for ADR, but its policy encourages Department attorneys to consider the possibility of a minitrial. Whether proposed by a government attorney or the contractor, "[t]he decision to participate in a minitrial requires the approval of the Deputy Assistant Attorney General in charge of the

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<sup>189</sup> For example, in the Corps' Tenn Tom and Walter T. Dickerson, Inc., cases, the contractor had read about the Corps' minitrial policy, and contacted the Corps with its proposal. Similarly, the Granite Construction Company originally requested that the Corps consider a minitrial. After the Corps' Office of Counsel recommended to the contracting officer that the alternative be explored, and the government and the contractor worked out an agreement. In a few cases, the Corps (and Navy) have rejected cases proposed as unsuitable for minitrial.

<sup>190</sup> *Navy ADR Program, ADR Sourcebook*, 848.

<sup>191</sup> Memorandum from Everett Pyatt, Assistant Secretary of the Navy, July 13, 1987.

<sup>192</sup> U.S. Army Corps of Engineers Minitrial Policy, issued in EC 27-1-3, 23 Sept. 1985, expired 30 Sept. 1986, in *ADR Sourcebook*, 703.

Branch and is solely within the discretion of the Department."<sup>193</sup> So far the Department of Justice has not conducted a minitrial.

One minitrial was conducted at the instigation of the presiding BCA judge, after the Department of Energy and Boecon, a subsidiary of Boeing, had completed a year of discovery and a six-week hearing. Reasoning that the inevitable appeal would cost both parties significant time and money, the judge proposed a minitrial; the proposal was approved by the Undersecretary of Energy.<sup>194</sup>

Deciding when to utilize the minitrial screening process is largely a function of each agency's organization. The Corps of Engineers is a decentralized organization and has therefore decided to place the review at the Division level. The Navy, on the other hand, has chosen to keep the final decision in the Office of General Counsel with its Chief Trial Counsel, though contracting officers are now being asked to identify candidate cases. Regardless of when and where the final decision in a case is made, the consensus is that the single most important factor in choosing cases for minitrial is the assurance that the agency stands strongly behind its minitrial policy and supports efforts to implement ADR. Therefore, a number of thoughtful participants and observers have said that the impetus for ADR should come from the top down.<sup>195</sup>

## 2. The Minitrial Agreement

The main distinction of the minitrial procedure is the ability of the parties to make up their own rules so as to tailor them to particular disputes. A "minitrial agreement" between the parties is essential to success, and every minitrial surveyed for this study employed one. Such an agreement not only serves to get the parties talking on matters of procedure, where agreement is more likely and possibly contagious but also to avoid any potentially harmful misunderstandings about scope, procedure or substance.<sup>196</sup> There is no strictly mandated agreement, although the Corps of Engineers, EPA, Department of Justice and the Navy have distributed model minitrial agreements along with their policy statements.<sup>197</sup> General categories for an agreement should include: rules on discovery; roles of the participants, including any neutral participants; exchange of position papers, documents and exhibits; procedure and format of the hearing; possible time limit on the negotiations; fees and expenses; and confidentiality of the proceedings.<sup>198</sup> The agreement should also give each party the right to terminate the minitrial at any time for any reason.<sup>199</sup>

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<sup>193</sup> Commercial Litigation Branch Policy Concerning the Use of Mini-Trials, in Memorandum from Stuart E. Schiffer, Dep. Asst. Attorney General, Civil Division, June 19, 1986, in *ADR Sourcebook*, 827.

<sup>194</sup> See Appendix B for details.

<sup>195</sup> See e.g., interview with William Voigt, Jr., Director of the Office of Remedial Action and Waste Technology, June 26, 1987; Office of the Chairman, Administrative Conference of the U.S., An Overview of Federal Agency Use of ADR, *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 Admin. L.J., 405 (1987); remarks of Lee Thomas and Arnold Burns, *id.* at 510, 441.

<sup>196</sup> See e.g., *Report of Subcommittee on Alternate Means of Dispute Resolution, Committee on Corporate Counsel*, A.B.A. Section of Litigation, in *ADR Sourcebook*, 253, 260.

<sup>197</sup> *ADR Sourcebook*, 710, 792, 833, 850. See also Killian & Mancini, *supra* note 152, at 16-20 (model minitrial agreement between private parties).

<sup>198</sup> For a comprehensive discussion of the pre-minitrial agreement and the confidentiality issue, see Killian & Mancini, *id.*, at 4 - 9.

<sup>199</sup> E.g., minitrial agreement between Corps and Tenn-Tom Constructors, paragraph 18.

### 3. Conducting the Minitrial

(a) Initial Exchanges A major element of a successful minitrial is the initial exchange of position papers, witness lists, exhibits and stipulations of fact. This saves time because each party knows basically what to expect during the minitrial and therefore, need not spend time on establishing superfluous facts and countering unexpected arguments.

(b) Discovery In order to help the parties to define the issues and to present them to the principals in a coherent and convincing manner, discovery is sometimes, but certainly not always necessary. None of the minitrial participants interviewed, however, felt that discovery, to the extent that it would have been conducted in normal litigation, was necessary. Indeed, all of the pre-minitrial agreements limited discovery in some way by imposing a time limit, limiting additional depositions or by regulating the means of discovery. Limiting discovery to project file and audit reports, exchanges may be a convenient measure worth emulating in minitrials where discovery is permitted.

(c) Basic Process Most minitrials take a day or so--at most three days--to complete, depending on the number and complexity of the issues involved.<sup>200</sup> The usual sequence of events has been as follows: The contractor's attorney first presents his case through oral argument, witnesses and exhibits. The government then has time for cross-examination and rebuttal, after which the contractor may conduct a brief re-examination. This may be followed by a question and answer session for the principals and neutral.<sup>201</sup> The process is then repeated with the parties reversed, after which the principals and neutral retire to negotiate. Depending on the minitrial agreement, a party may have as little as one hour or as much as five hours in which to present its case in chief.<sup>202</sup>

(d) Presenting Evidence The minitrial agreement usually states that the trial attorney can present his case by whatever means he wishes, including oral argument, audio visual and documentary exhibits, and expert and lay witnesses. The minitrial is meant to be an informal proceeding, and the rules of evidence are not enforced. The attorney, therefore, has both the luxury and the burden of essentially briefing the principals and neutral on his position.

The most common method of presentation is to make an opening statement, present the most important testimony through witnesses and exhibits and finish with a closing argument. In several minitrials, such as the Energy-Boecon case, the lawyers did all of the presentation

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<sup>200</sup> Several observers believe the process should be compressed even further--perhaps two hours per side in some cases, followed by a brief "conference table" question and answer session. "Alternative Disputes Resolution Process Can Be Expanded in Department of Defense, Deputy Inspector General Says," 47 Fed. Contracts Reporter 1128, 1129 (BNA June 22, 1987) (remarks of Ralph C. Nash at ACUS Colloquium).

<sup>201</sup> This may not be necessary in many cases, however, since the principals should be free to ask questions throughout the hearing.

<sup>202</sup> Most sample agency minitrial agreements include a schedule for the hearing, *see* note 15. A typical format is as follows: Day One: 8:30 a.m.- 12:30 p.m.: appellant's case presentation; 12:30 p.m. - 1:30 p.m.: lunch; 1:30 p.m. - 3:00 p.m.: government's cross-examination; 3:00 p.m. - 3:30 p.m.: appellant's re-examination; 3:30 p.m. - 5:30 p.m.: government's presentation. Day Two: 8:30 a.m. - 10:30 a.m.: government's presentation; 10:30 a.m. - 12:00: appellant's cross-examination; 12:00 - 12:30 p.m.: government's re-examination; 12:30 p.m. - 1:30 p.m.: lunch; 1:30 p.m. - 2:00 p.m.: appellant's closing argument; 2:00 p.m. - 2:30 p.m.: government's closing argument; 2:30 p.m. - 5:30 p.m.: settlement negotiations. *See* Minitrial Agreement Between the United States Army Corps of Engineers and W.G. Construction Corporation.

via extended oral argument.<sup>203</sup> Argument can be much more important and effective at a minitrial than at a standard board hearing, because the point of a minitrial is to convince the principals rather than to create a record.<sup>204</sup> Moreover, since the principals are expected to absorb a considerable amount of information in a short time, a good oral argument should effectively emphasize key points. The time constraints of the minitrial also make demonstrative exhibits important. Slides, models, charts and video tapes have been used effectively in a number of minitrials.<sup>205</sup> Without the rules of evidence almost any exhibits are admissible.

(e) Examining Witnesses The examination of witnesses is usually very different from direct examination in a trial or hearing before a BCA. Since the rules of evidence are waived, the attorney need not worry about establishing a foundation or asking leading questions, but can simply have the witness testify in the narrative. The attorney can even present evidence himself. Thus, basic evidence can be developed far more quickly and concisely than with a formal question and answer format. As one attorney for the Corps of Engineers points out, Corps personnel are accustomed to giving briefings, and he simply lets them give their testimony in essentially briefing style.<sup>206</sup> The principals and neutral should be able to ask questions of the witnesses at any time. In the Tenn-Tom minitrial the principals and neutral "recalled the key witnesses of each party and questioned them simultaneously. In effect, they were able to directly confront each other in discussing the most significant areas of factual disagreement."<sup>207</sup>

Although many minitrial agreements provide some time in the schedule for cross-examination, there is some disagreement about its usefulness. A few argue that some limited cross-examination is typically a good idea since it allows the parties to establish the veracity of the witness.<sup>208</sup> On the other hand, there are a number of arguments against conducting cross examination in a minitrial. Some participants have found that cross examination simply takes too long and is not worth it. Others argue that since much of the information is presented by the attorney, cross-examination is very difficult and adds little to the process.

At the conclusion of the hearing, the principals and neutral begin the negotiation segment of the minitrial. This generally takes between a few hours and a few days.

(f) Administrative Details A number of minitrial participants have made recommendations about running minitrials. If the neutral is to participate actively in the minitrial, the parties should designate another person to coordinate all of the arrangements, ranging from reserving the rooms, to supplying exhibit stands and coffee. One attorney advises that the minitrial take place away from the office so that it will not be interrupted. He further warns that the parties should realize that they may need as many as four rooms - a large room for the hearing, one room for each side for case preparation and discussion, and

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<sup>203</sup> In one private minitrial, counsel had witnesses present, but used them almost exclusively to confirm crucial points. (E.g., question: "Isn't that so?" answer: "Yes.") Interview with Chairman (ret.), Armed Services Board of Contract Appeals, adn Senior Judge (ret.), U.S. Claims Court Louis Spector, June 17, 1987.

<sup>204</sup> Transcripts are almost never made.

<sup>205</sup> *Id. at 4*: "Exhibits are extremely important. Spend whatever time necessary to make your visual aids as clear and dramatic as possible. You have one shot of probably three hours to convince someone of the validity of your position. Visual presentations have great impact under these time constraints. The principals and neutral advisor will focus on the exhibits presented." See also Killian & Mancini, *supra* note 152, at 10.

<sup>206</sup> Interview with Wesley Jockisch, July 16, 1987.

<sup>207</sup> Nash, *A New Technique for Settling Disputes - The Mini-Trial* (1985) (unpublished article).

<sup>208</sup> Interview with Frank Carr, June 18, 1987.

a smaller room for the negotiations between the principals.<sup>209</sup> The minitrial coordinator must make sure that all necessary equipment and supplies, such as slide projectors, screens and exhibit stands are readily available. Sometimes, the advisor takes on some of these tasks.

The informality of the process can be enhanced by attention to administrative detail. In one case, for instance, the neutral met with the two principals for dinner the night before the minitrial so they could get to know each other. A final but very important detail is the seating arrangement. Administrative expenses may be divided, though in a number of cases the government provides the facilities at no cost.

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<sup>209</sup> Memorandum from Wesley Jockisch to Lester Edelman, Aug. 13, 1985, at 2.

## APPENDIX B

## AGENCY MINITRIALS TO DATE - CASE STUDIES

## NASA

*Spacecom/TRW (1982)*

Background This was the first time a government agency used a minitrial to settle a contract dispute. In 1976, NASA contracted with Western Union to build a tracking and data relay satellite system (TDRSS) for \$786 million, to be deployed by the space shuttle, and Western Union hired TRW, Inc. as its subcontractor. In 1982, Western Union sold its interest in the program to Spacecom. The dispute involved NASA's requests for expertise which it considered to be within the scope of the contract, but which TRW and Spacecom believed to be changes in the contract. TRW and Spacecom filed a complaint in 1979. The parties suspended discovery for three months in 1980 to attempt a settlement, but when that failed the parties renewed litigation and engaged in massive document discovery involving the reproduction of approximately 33,000 pages of government files and 72,000 pages of the contractors' files. In September 1981, with trial estimated as at least one year away, Spacecom suggested to NASA that they try settlement again, and the parties agreed to a minitrial.

Pre-Minitrial Agreement The parties agreed that discovery would be suspended during the minitrial. Spacecom and TRW would submit a formal claim covering cost of performance and proposed allocation of cost of each legal issue, and the parties would simultaneously exchange briefs containing copies of all cited documents. There were no reply briefs. After the briefs were exchanged, each party would submit a list of questions to be answered during the minitrial.

The parties further agreed that the minitrial would last only one day, with three hours allotted to each side to present its position through any combination of lawyers and engineers that it chose. These presentations would cover only matters previously discussed in the briefs or written questions, and could not address new issues. The presentations would be made only to senior officials of each party: an associate administrator of NASA and the director of Goddard Space Flight Center for NASA, and a Vice President of TRW and the President of Spacecom, for the contractors. Only these officials could ask questions, though advisors were present for consultation.

The parties decided not to employ a neutral because they felt that the issues were so technologically complex that educating the neutral could slow down the minitrial process significantly, while a brief explanation of the technical issues could be misleading.

Finally, the settlement negotiations were limited to one day following the minitrial. If settlement was not reached, the parties would abandon the process and proceed to trial.

The Minitrial The minitrial took place in 1982. TRW and Spacecom had two and a half hours for their presentation. NASA had three hours to present its position and to respond to the presentation of the contractors. The contractors then had half an hour to respond to NASA's position. Although the minitrial agreement provided that the presentations could be made by both lawyers and engineers, only the lawyers made oral presentations. Viewgraphs were used by both sides during the presentation.

Settlement negotiations attended only by the four principal negotiators began the day after the minitrial. Lawyers and advisors were available for consultation, but did not attend the negotiating sessions. Although the parties had agreed to limit the negotiations to one day, they decided to extend the session another day since substantial progress had been made. In fact, "[a]s the negotiations actually developed, the negotiators were able to go beyond the specific issues framed by the appeals and settle other outstanding questions between the parties as a part of the overall settlement." (Legal Times 17) The final settlement was for over \$100 million.

#### U.S. ARMY CORPS OF ENGINEERS

The Army Corps of Engineers has used minitrials more often than any other government agency. They have engaged in six to date, the first of which involved Industrial Contractors, Inc., in 1984.

##### *Industrial Contractors, Inc. (1984)*

Background In 1980, the Army Corps of Engineers entered into a contract with Industrial Contractors, Inc. for modifications to a missile silo test facility at Arnold Air Force Base in Tennessee. In November 1981, Industrial Contractors filed a claim with the contracting officer contending that the government had improperly accelerated the contract and requesting \$630,000 in damages. The claim was denied by the contracting officer in July 1983 and Industrial Contractors appealed the decision to the Armed Services Board of Contract Appeals (ASBCA). In 1984, after much of the discovery had been completed, the parties agreed to suspend litigation and engage in a minitrial in an attempt to settle the case.

Pre-minitrial agreement The minitrial was to be held on December 3 and 4, 1984 at the Atlanta Office of the Corps of Engineers. The principal negotiators were South Atlantic Division Commander Brigadier General Forrest T. Gay for the Corps of Engineers, and H.W. Beasley, the president of Industrial Contractors. Major John K. Northrop was the attorney for the government, while John R. Tacke served as counsel to Industrial Contractors. The neutral was now retired Claims Court Judge Louis Spector, who served *pro bono*. While the neutral advisor was not intended to be actively involved in the minitrial, only asking questions if agreed to by both parties, in fact he turned out to be an active participant in planning the minitrial and facilitating settlement. All costs were to be borne by the party incurring them and were not to be treated as legal costs in the event that the negotiations failed and the case was litigated before the ASBCA.

Although the parties were already concluding discovery, they agreed to a schedule for any remaining discovery three weeks before the minitrial and stipulated that this limited discovery would not affect later discovery in the event that the parties failed to reach a settlement. In particular, the parties recognized that they might only take partial depositions in preparation for the minitrial and provided that this would not prevent them from later deposing the same witnesses on the same or additional subject matter. At least two weeks before the minitrial, Industrial Contractors was to provide the government with an analysis of the costs associated with each issue.

The presentations were to be informal and could be structured in any manner that the parties desired. Expert witnesses, audio-visual aids, demonstrative evidence, depositions and oral argument were all allowed. Witnesses would be allowed to testify in the narrative and could be questioned by the principals. Any type of written material that would further the progress of the minitrial could be used, and the parties agreed to stipulate to as much as possible. At least two weeks before the minitrial, the parties were to exchange copies of all documentary evidence to be used and a list of all witnesses expected to appear. If they wished, the parties could also submit a position paper of no more than 25 double-spaced pages at least one week before the minitrial.

The minitrial itself was to take two days. On the first day the plaintiff would begin with a three and a half hour presentation of its position. This would be followed by one and a half hours of cross-examination by the government, then one and a half hours of plaintiff's re-examination. Finally, one hour was reserved for a question and answer period. The second day would follow a similar schedule with the parties reversed.

Negotiations were to begin within three days following the minitrial and would continue as often during the next 30 days as the parties thought useful. If no settlement had been reached by the end of the 30 day period, the negotiations would be broken off and the litigation resumed.

The pre-minitrial agreement stipulated that no transcript be made of the proceedings, and that

"[e]xcept for discovery and several depositions undertaken in connection with this appeal, all aspects of the minitrial including, without limitation, all written material prepared specifically for utilization at the minitrial, or oral presentations made, between or among the parties and/or the advisor at the minitrial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in an pending or future Board of Contract action which directly or indirectly involves the parties and this matter in dispute. . . . However, . . . evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the minitrial."

Each party reserved the right to withdraw from the minitrial at any time for any reason.

The Minitrial As mentioned above, the principal for the Corps was Brigadier General Gay, Commander of the South Atlantic Division. Major Northrop, an attorney from the Corp's Mobile, Alabama District, presented the government's case. The Corps' South Atlantic Division attorney was present and available to General Gay for consultation, but did not present the case. According to Frank Carr, the Corps' Chief Trial Attorney, this was to avoid any conflict or confusion regarding the roles of presentors of the Corps' position and counsel to the principal. The participants sat around a large rectangular table with the two principals flanking the neutral on one side of the table. The attorneys sat at the ends of the table, and the witnesses sat on the remaining side.

On the first day, John Tacke, the contractor's attorney, gave a 45 minute presentation on his theory of the case. Thereafter he called the contractor's project manager, its vice-president who had prepared the bid, and a consulting CPA as witnesses who provided testimony in narrative form guided by general questions from the attorney. The rules of evidence did not apply. Mr. Tacke finished his presentation 30 minutes ahead of schedule, and later said that "he had been able in less than 3 1/2 hours of testimony to present as much information to the principal representatives and neutral advisor as would have taken him at least a week to a week and a half before a Board or Court."<sup>210</sup>

In the afternoon, Major John Northrop, the government's counsel, conducted cross-examination, after which the contractor's counsel, having asked a few questions on re-direct, rested his case an hour and a half earlier than scheduled in the pretrial agreement. The second day of the hearing followed the same schedule with the parties reversed. At the end of the day the principals and the neutral decided that brief summations by each side would be helpful, and the pre-minitrial schedule was altered to allow each side ten to fifteen minutes for closing argument. The presentations focused mostly on entitlement issues, though the contractor presented more evidence than the government on quantum

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<sup>210</sup> Letter from Stephen Lingenfelter to Lester Edelman, Dec. 13, 1984.

In addition to counsel, other advisors sat in on the minitrial, but did not take part in it or the subsequent negotiations. Technical advisors were available to the principals for consultation. In addition, a Corps auditor was present to validate any agreed upon monetary amounts. According to Carr, it has since become the Corps' practice to always involve an auditor in the proceedings.

Judge Spector, the neutral, asked questions during the presentations, but did not control the proceedings. He commented on weighing the evidence and other issues and occasionally pointed out problems with testimony. After the presentations he met with the principals. In response to a question from General Gay, Judge Spector said that he thought the contractor had a slightly stronger case, but also advised that there was substantial room for negotiation. The contractor's principal then made an offer of \$456,000, which General Gay took to his staff. Since the government's presentation had dealt almost exclusively with entitlement, while the contractor's attorney had also presented quantum, General Gay suggested that the Division technical staff meet with the contractor to go over the claimed costs in detail.

The next day the contractor's project manager, the DCAA auditor, the South Atlantic Division auditor and a technical advisor from the Construction Division met for almost six hours to substantiate the contractor's claims. That afternoon General Gay and Mr. Beasley reconvened and agreed to a \$380,000 settlement.

#### *Tenn-Tom Constructors, Inc. (1985)*

The Army Corps of Engineers' second minitrial involved a contract for the excavation of 11 miles of the Tennessee-Tombigbee waterway. The contract was awarded in 1979 to Tenn-Tom Constructors, a joint venture involving Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. The award was based on soil conditions found by the Corps in testing prior to solicitation of the contract. When Tenn-Tom discovered different soil conditions, they submitted a \$42.8 million claim for equitable adjustment. The claim was denied by the contracting officer in August 1984, and Tenn-Tom appealed to the Army Corps of Engineers Board of Contract Appeals in October 1984.

In April 1985, the parties agreed to a minitrial which was held on June 12 - 14, and 27 - 28, 1985. The Corps had been publicizing its new ADR approach, and Tenn-Tom's counsel approached the Corps with the suggestion that they try a minitrial. The claim, by then amounting to \$55.6 million including interest, was settled for \$17.2 million.

The principals at the minitrial were Ohio River Division Engineer Brigadier General Peter Offringa for the Corps and J.K. Lemley, Senior Vice President for Morrison-Knudsen for the contractors. General Offringa had never had a contracting assignment before, but is trained as a civil engineer. The government's case was presented by Wes Jockisch, Division counsel for the Ohio River Division, while the contractor was represented by George Ruttinger and Stanfield Johnson of Crowell & Moring. The parties exchanged lists of eight or nine possible neutrals, but had trouble agreeing on one because each felt that the other's proposed neutral was biased in some way. They finally agreed on Professor Ralph Nash, a law professor at George Washington University, as the neutral.

At the time the parties agreed to the minitrial, the parties had filed, but not responded to initial discovery requests. Judge Solibakke granted a three month delay for the minitrial, but also put together a fall-back calendar for full discovery, hearings and monthly conferences. Trial was expected in the Spring of 1986, almost a year away. The parties agreed to grant access to project files in preparation, but otherwise agreed that there would be no pre-minitrial formal discovery.

Two weeks before the minitrial, the parties exchanged copies of all documentary evidence to be presented at the hearing, a list of all witnesses and position papers which were limited to 50 double spaced pages. The Corps used the contracting officer's final

decision as its position paper. Four weeks before the hearing, the Corps submitted an audit report, and two weeks later the contractor gave the Corps a quantum analysis identifying the costs associated with the issues involved at the hearing.

The parties presented their cases on June 12 and 13, while June 14 was reserved for evidence on quantum and for remaining questions. On the first day Tenn-Tom was allotted five hours for its presentation, after which the Corps had 30 minutes for cross-examination followed by 30 minutes of redirect. Thereafter two hours were set aside for questions from the principals. The next day the Corps had four and a half hours for its presentation, followed by 30 minutes each for cross and redirect examinations. The principals then had an hour and a half for questions, after which each side had 30 minutes for closing argument. On the third day each side had an hour and a half for their quantum presentations, followed once again by an hour of questions from the principals.

Both sides used slides, video tapes and witnesses to present their cases. These methods appeared to be very effective. Mr. Johnson, counsel for Tenn-Tom, noted afterward that they probably would not have been able to get the slides and videos entered as evidence in a formal BCA hearing, though Mr. Jockisch disagreed. The witnesses gave some testimony in narrative form. The parties agreed that the rules of evidence would not apply. Both parties felt that this allowed more information to be presented in a much shorter time than would be the case in a formal BCA hearing. Each side also had an expert witness whom the principals and neutral asked to stand side by side and respond to each other in an informal colloquy. Cross-examination was allowed only after the other side had completed its presentation. No transcript was made of the proceeding, and the minitrial was completely confidential. If the parties settled, however, all information prepared for and presented at the proceeding could be used to justify and document the settlement modification.

The principals asked many questions during the minitrial, mostly on factual issues. Originally, Mr. Nash's role was simply to enforce the time limitations imposed by the pre-minitrial agreement, but not to actively participate in the proceedings unless permitted by the principals. As it turned out, the parties did ask him to participate fully in both the hearing, including questioning of witnesses, and the subsequent settlement negotiations. He also served as a mediator during the negotiations, suggesting middle grounds that might lead to settlement and proposing various methods of computing the amount of the price adjustment to which the contractor might be entitled. The principals had advisors, including legal counsel, technical people, consultants and auditors, available at all times during both the minitrial and the negotiations. Mr. Jockisch served as both trial attorney and counsel to General Offringa.

The pre-minitrial agreement provided that the principals would meet immediately after the hearing to negotiate a settlement; if they could not reach agreement within 15 days, litigation would resume. After meeting for several hours after the hearing, however, the principals decided that they needed more evidence on certain additional subjects and agreed to reconvene the hearing on June 27. They settled on June 28, 1985 for \$17.2 million. According to George Ruttinger, counsel for Tenn-Tom, the settlement represented a substantial compromise by both sides from their initial positions in the litigation.

Soon after the settlement, a disgruntled regional staffer accused the Corps of incompetence, claiming that the case was too complex to settle in just a few days. This prompted a Department of Defense Inspector General's investigation into the minitrial. The Inspector General's report concluded that the Tenn-Tom claim was reasonably settled in the best interest of the Government but advised the Corps to better document its procedures.

*Saudi Building Technic General Contracting Co, Ltd./Erectors, Inc. (December 1986)*<sup>211</sup>

In a procedure similar to the minitrial, the Middle East/Africa Projects Office successfully used ADR to settle \$105 million in claims arising out of the construction at the King Khalid Military City, Saudi Arabia. After a week long negotiating session that included presentations by the attorneys and claims consultants to each party and representatives for the Saudi Arabian and Philippine Governments, the parties settled the claims for \$7 million.

*W.G. Construction Corp. (January 26 and 27, 1987)*

This minitrial involved a claim for equitable adjustment of a contract for the construction of the Administration Building, Visitors Center, and Maintenance Complex at the Morris Hill Recreation Area at Gathright Lake, Virginia. W.G. Construction Corporation, the contractor, asserted a \$764,783 delay and impact claim, alleging that deficiencies in certain drawings and plans and rock unexpectedly encountered during excavation caused delay and additional costs. The claim was denied by the contracting officer on October 11, 1983, and W.G. Construction appealed the decision to the Engineers Board. On December 24, 1986, the parties agreed to a minitrial to be held on January 26 and 27, 1987, the scheduled trial date.

The minitrial was proposed by the Division counsel, who had been looking for appeals that would be good candidates for minitrials. They identified the W.G. Construction case as a good possibility and suggested it to the District counsel who readily agreed. The District counsel made the proposal to the contractor who also agreed. The Corps first asked the Division Engineer to be the government's principal. When he declined, they turned to Col. Claude D. Boyd, the then current contracting officer. The contracting officer who had actually denied the claim was no longer serving in the District at the time of the minitrial. The contractor was represented by Mr. R.C. Doyle, who had been overseeing some of the administrative aspects of the contract. Both had full authority to settle the dispute. Counsel for the contractor declined to employ a neutral, saying that they did not want to take the time to find a neutral and work out the details.

Discovery was to be finished two weeks before the beginning of the minitrial, which meant that the parties only had about two weeks to conduct their abbreviated discovery. The pre-minitrial agreement stipulated that ten days before the minitrial the contractor would submit a quantum analysis to the Corps, and a week before the hearing the parties would exchange copies of all documentary evidence and witness lists. If they wished, the parties could exchange position papers of no more than 25 pages at least a week before the hearing.

The parties were to present their cases to the two principals in two days. During the first day, the contractor was to present its case in four hours after which each side had an hour and a half for cross and redirect examination. This was to be followed by a two hour presentation by the Corps. The next day the Corps was to continue its presentation for another two hours, followed once again by cross and redirect. Each side then had a half hour for closing argument, after which the two principals were to meet for negotiations for three hours. Evidence could be presented through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. No transcript was to be made of the proceedings, and either party could withdraw at any time for any reason.

As it turned out, the parties adhered closely to the total allotted time for their presentations, but did not follow the order outlined in the agreement. For instance, the government did not conduct a cross-examination, but instead annexed that hour and a half to

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<sup>211</sup> Six Corps minitrials are summarized in a memorandum dated March 30, 1987; *ADR Sourcebook*, 587.

its presentation time. The parties used both documentary evidence and lay witnesses, but neither side used experts. Bob Oswald, the Corps' attorney, used approximately 20% of his allotted time for his own oral presentation of his case, while the remainder of his time was used for witness testimony. He generally directed his witnesses, but they essentially testified in narrative form. The contractor's attorney, on the other hand, used most of his time for oral argument, relying largely on documentary evidence without much testimony from witnesses. Those witnesses he called testified in question-and-answer, rather than narrative, form.

The principals did ask some questions, but not as many as one of the attorneys expected. Mr. Doyle was advised during the minitrial hearing and negotiations by his trial attorney. Mr. Oswald played the dual role of trial attorney and counsel, and Colonel Boyd consulted with his District counsel as well. An auditor was available to Colonel Boyd throughout the procedure, but neither testified nor was consulted. During the negotiations, which lasted about a week, the principals frequently consulted with their attorneys on possible settlement amounts.

After the claim was settled on February 10, 1987, for \$288,000, the Corps attorney wrote a justification memo for the settlement. At the time the Corps did not have the money to pay the settlement and had to go to Congress for additional appropriations. The justification memo was included in the package requesting the appropriations. The Corps received the settlement money from Congress the week of July 13, 1987.

*Walter T. Dickerson* (February 18, 19 and 20, 1987)

This, the Corps' fifth minitrial, concerned a contract for the modification and repair of Tainter Gates at Greenup Locks and Dam on the Ohio River. The claim for \$515,123, consisting of nine appeals to the Engineer Board, involved such issues as differing site conditions, weather related delays, impact costs and inadequate bookkeeping. The parties settled after a two and a half day minitrial for \$155,000, including interest.

The Corps' principal was Colonel<sup>212</sup> Ernest J. Harrell, the Ohio River Division Engineer, who was given contracting officer authority for this case. The contractor was represented by Mr. Terry Isenman, its vice president and co-owner. The parties interviewed a number of people before they settled on Frederick Lees, former Chairman of the NASA Board and currently a professor at George Washington Law School as the neutral. The Corps and the contractor discussed whether they wanted someone with a technical or legal background and decided that it did not matter as long as the neutral had a background in government contracts. They chose Professor Lees because he is an expert in government contracts and a retired BCA judge.

The idea of using a minitrial in this case came from the contractor who contacted the Corps after having read an article about minitrials. The parties agreed to a minitrial in October of 1986 when the case was docketed and preparation of interrogatories had begun. They scheduled the minitrial for April, which left approximately 60 days for discovery including depositions, informal discussions, and document examination. Before the hearing, the parties submitted informational position papers rather than formal legal briefs. They also exchanged witness and exhibit lists informally by letter.

The minitrial took about two and a half days. Each side's presentation took four and one half hours and employed exhibits and narrative witnesses. The trial attorneys also conducted limited cross-examinations. The hearing was informal to the extent that contrary to the parties' intentions, one witness felt free to jump in at any time with comments and remarks.

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<sup>212</sup> Colonel Harrell has since been promoted to General.

The neutral's role was determined by the principals, who at first wanted him to hold back. Once they got to know him, however, they allowed him to ask questions, and in fact let him talk often. The principals also asked frequent questions and were constantly talking and negotiating with each other throughout the hearing. The formal post-hearing negotiations took about half a day.

The parties drew up a very brief settlement document stating the amount settled for and the time when the check would be handed over. They had documented the whole proceeding very carefully as they went along, however, and therefore were not concerned about a possible Inspector General's investigation of the Tenn-Tom sort.

*Granite Construction Co. (March 19 and 20, 1987)*

The ADR procedure used in this case was a combination of a minitrial and non-binding technical arbitration. After the Corps' experience with the Tenn-Tom minitrial and the subsequent discontent among some staffers, the South Atlantic Division was reluctant to engage in another minitrial and chose this hybrid instead.

Granite Construction Company, the prime contractor, had subcontracted with R & S Haulers, Inc. to provide sand for a mass concrete placement for the Aberdeen Lock and Dam on the Tennessee-Tombigbee Waterway. During construction, the government condemned the site upon which R & S's plant was located, forcing the subcontractor to move and causing delays in the production of sand. The government had already recognized entitlement, but the parties were at odds over the amount. The claim presented to the neutral advisor was for over \$1.9 million.

The pre-minitrial agreement stipulated that the parties select a neutral advisor, specifically not a lawyer, with a strong background in mass concrete construction. They were to submit all proposed exhibits to him and each other at least seven days before the hearing. After considering one other possible neutral, they chose Mr. Chris Woods, a semi-retired executive with the Al Johnson Construction Company who had extensive experience with concrete work and had participated in work done by his company on the Tennessee-Tombigbee Waterway. The principals were Colonel C. Hilton Dunn, the contracting officer for the Corps, and Richard H. Roberts, the Executive Vice President of Granite. Both had authority to settle the claim.

On March 19 and 20, 1987, technical advisors from each party presented their case to Mr. Woods. The principals were not present. Granite's chief spokesman was Mr. Dick Lewis, an engineer, who was supported by four other technical people. The Corps' case was presented by a team of four engineers and technical advisors. The Corps' team had been extensively briefed on the case by counsel before the hearing, and they frequently consulted with counsel during breaks in the proceedings. By agreement no attorneys were present at the hearing, but they were available by telephone for consultation. The neutral advisor could ask questions at any time during the hearing, and the parties could submit written questions of the other side to the neutral, though he was not obligated to ask the questions. There was no cross-examination of witnesses. Each presentation took approximately half a day, and the second day was used for rebuttal. The proceeding was not transcribed.

In accordance with the pre-minitrial agreement, Mr. Woods prepared his findings within ten days, recommending that the parties settle for \$725,630. According to the pre-minitrial agreement, this decision "[setting] forth the amounts which he ... [had] allowed for the various portions of the claim and the general methods used to determine said amounts," (Agreement, 2) was non-binding and was "only intended as a guide to the parties for the final resolution." He presented his findings to the two principals, Colonel Dunn and Mr. Roberts, in a meeting on April 9, 1987. After the oral presentation, the principals read Mr. Woods' report and negotiated for approximately four hours. While both parties agreed that

the advisor had a logical and reasonable basis for his findings, they disagreed with certain parts of the report. They wanted to avoid an item-by-item negotiation however, fearing that such an approach would lead to adversarial positioning. After consulting with their respective staffs, the principals settled for the recommended amount. The only question remaining was how to calculate interest on the settled sum.

The fees and expenses of the neutral advisor were split evenly between the parties, while each side bore its own cost.

## DEPARTMENT OF THE NAVY

### *McDonnell-Douglas Corporation (1986)*

The Navy held two experimental minitrials involving three disputes during the summer of 1986. While the parties have released no details of the minitrials, some information is available.

The first minitrial involved two disputes with McDonnell-Douglas Corporation and concerned mixed audit and legal issues. The principal for the Navy was a Rear Admiral who was advised by non-litigation in-house counsel, and the neutral in both cases was Professor Ralph Nash of George Washington University. The parties combined two disputes into one minitrial, stipulating that they could and would not settle one without settling the other. The first case was two years old, and discovery had already been conducted for six months (54 depositions had been taken). The second dispute was new, and no discovery had yet been conducted at the time of the minitrial agreement.

While preparation for the minitrial took about three months, the hearing took two and a half days (each side had four and one half hours per case), plus half a day for negotiations. The parties agreed before the proceeding that either side could designate any evidence they wished as confidential without objection by the other side. As a result, the only people present throughout the hearing were the two principals, the neutral, and the two attorneys. Three expert witnesses were called to testify, but were sequestered and did not know the facts of the case. DCAA auditors were not allowed in the room, but had to be consulted during breaks in the hearing.

The settlement negotiations took only a few hours. The parties agreed to the Navy's position in one case, and the other was evenly split. Together the cases settled for a total of \$6.5 million.

### *Other Navy Minitrials*

The second minitrial did not reach settlement, but did significantly narrow the issues. This minitrial involved an overhead cost allocation suit. The parties decided not to engage a neutral, and the process from the time the parties agreed to a minitrial to the time they broke off negotiations took thirty-one days.

The Navy is currently engaged in a minitrial in Seattle, Washington, involving a \$75,000 claim. This minitrial seeks to resolve a dispute before the contracting officer makes a final determination. The principal for the Navy is the contracting officer, while the neutral is a local attorney.

The Navy is currently considering three other cases for minitrial.

## DEPARTMENT OF ENERGY

*Boecon Corporation (1986)*

The Department of Energy (DOE) held its first minitrial in the summer of 1986. The DOE had contracted with Catalytic, Inc. to build additions to a chemical storage facility in Idaho Falls. Catalytic in turn subcontracted with Boecon, a subsidiary of Boeing, which in 1984 claimed damages for "loss of productivity from numerous disruptions and delays due to government changes in the project."<sup>213</sup> The government and the prime contractor counterclaimed for negligent performance.

After a year of discovery, during which the DOE's Board of Contract Appeals repeatedly and unsuccessfully tried to convince the parties to settle, the case finally went to trial. The six-week hearing produced a record consisting of eight or nine volumes and eleven boxes of exhibits. (1 ADR report 45) As Judge Carlos Garza began to write his opinion, he convinced the Board to authorize a minitrial to help the parties settle. Judge Garza held several telephone conferences with the parties and the Board. A minitrial agreement was finally reached and its terms were set out in Judge Garza's order of April 30, 1986.

Pre-Minitrial Agreement Each party was to appoint a very high-level representative not previously involved with the appeal, who had full authority to settle the dispute. Each representative was to be accompanied by an attorney. The parties and the Board would together decide upon a neutral who would serve both as the presiding officer at the minitrial and as advisor to the two high-level principals. The costs of the neutral would be borne sixty percent by the government and Catalytic, and forty percent by Boecon. Either party could withdraw from the procedure at any time without reason, but if a party were to withdraw before the neutral had formally decided that the minitrial could not be successful, that party would bear all costs of the minitrial.

At the minitrial each side would have a strictly enforced time limit in which to present its arguments. In addition, if the parties wished, the Board would present on the record or through counsel agreements a short summary of the case, undisputed facts and fact stipulations, as well as admissions of fact. The transcript of the earlier Board hearing and documents admitted into evidence would be available for reference during the negotiations.

The Board's only participation in the minitrial would be to present its summary if requested and then immediately leave the hearing. The attorneys were to leave at the conclusion of the hearing. The negotiations were to involve only the two principals and the neutral. The Board and attorneys would, however, be available for questions.

Finally, the parties agreed that, "[s]hould they be successful, this [would] end all litigation, of every type and nature whatsoever, involved in this case." If the minitrial did not succeed, Judge Garza would issue the Board opinion he was in the process of writing.

The Minitrial William R. Voigt, Jr., a nuclear physicist and Director of the Office of Remedial Action and Waste Technology, was chosen as the principal for the government and Catalytic Inc. He had previous experience in contract disputes, but his experience was limited so that he had to spend approximately 60 to 70 hours over a two week period preparing for the minitrial. In a memo signed by the Director of Procurement, the manager of the Idaho Operations Office, and the Undersecretary of Energy, Mr Voigt received full authority to exercise his independent judgment in settling the dispute without further need for approval from the government. Boecon, a subsidiary of Boeing, chose William N. Allbrecht, Boeing's Vice President for Governmental Contracts as its representative. The

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<sup>213</sup> 1 BNA ADR Rep. 45, May 13, 1987.

parties agreed upon Donald P. Arnavas, a former ASBCA judge now in private practice, as the neutral.

Each party was given two hours to present its case, which was sufficient, according to Mr. Voigt. The only real issue was how much the government owed Boecon in damages. An interesting aspect of the process was the contractor's use of a comparison of government witnesses' deposition and hearing testimony to point out basic inconsistencies weakening the government's litigating positions.

During the subsequent negotiations, Mr. Arnavas acted as a referee, explaining legalities and steering the principals in the right direction. He also advised the principals on factual and legal issues and gave his opinion of the reasonableness of particular offers. He did not, however, tell them how he would decide the case, nor did he advise any party to accept a particular offer. Mr. Arnavas was present during the negotiations, though at one point the parties did ask him to leave for a while. Voigt says that he did not rely too much on the neutral or the attorneys for legal advice, having already been briefed by both the Energy Department's trial attorneys and the General Counsel and having sought out advice from a variety of people, including the government project manager, before the minitrial.

After one and a half days of negotiation, the parties agreed on a \$5,061,871 settlement which "essentially equalled [Boecon's] original claim without interest."<sup>214</sup> The "complete settlement" was signed on July 24, 1986 and was approved by the Board three months later. There was no further documentation of the minitrial. According to Judge Garza, the Board would have rejected any settlement found not to be fair and equitable. Since he had already written approximately half of his decision in the case, Judge Garza was in a good position to determine the fairness of the settlement. The Department of Energy accepted the settlement without review or investigation.

One problem did arise over a second unsettled contract which the government thought to be included in the pre-minitrial agreement clause providing that all litigation involved in the case would be ended by a final agreement. Boecon disagrees that this unsettled contract is covered by the pre-trial agreement, and as a result, the parties are now negotiating a settlement without a neutral.

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<sup>214</sup> 1 ADR Rep. 46.

## APPENDIX C

## SUMMARY OF AGENCY MINITRIAL POLICIES

*A. Summary of Army Corps of Engineers Minitrial Policy, issued in EC 27-1-3, 23 Sept. 1985*

Case Selection When the Division Engineer receives the contract appeal file, the Division Counsel reviews the case for suitability for minitrial. The Division Engineer has the authority to select cases for minitrial. The policy states that though "most contract appeals are suitable for minitrials, appeals involving clear legal precedent or having significant precedential value are not appropriate." Once the Division Engineer determines that the case is appropriate for minitrial, Division Counsel notifies the appellant and gives him the chance to participate.

Representatives The government's principal who has the authority to resolve the claim must be the Division Engineer or in particular circumstances the Deputy Division Engineer. The contractor's principal should be a senior management official who has not previously been involved with the dispute and who has settlement authority. Each party must also have a representative to present the case. For the government, this representative is the trial attorney.

Neutrals If the parties choose, they may engage a neutral advisor with experience in government contracting and litigation. This neutral is to be chosen from a list maintained by the Chief Trial Attorney, and his costs are to be shared equally by the parties. The role of the neutral advisor is to be determined by the parties in the minitrial agreement. His duties may include, but are not limited to, enforcing the agreement and giving his opinion on the merits of the claim. The neutral may not be called as a witness in any later litigation.

Minitrial Agreement A minitrial agreement is mandatory and is to be negotiated by the Division Council in conjunction with the government trial attorney. The agreement must contain a specific time limit for the minitrial, but beyond that requirement there are no rules for the agreement. Each agreement should reflect the needs of the particular case. Once an agreement is reached the BCA proceedings are suspended for the duration of the minitrial.

Minitrial Process The policy states that "(t)he minitrial process is flexible and as such the procedure should reflect the needs of the parties considering the time and costs involved." The time for the minitrial, however, should be limited and strictly adhered to. In addition, the scope of discovery should be limited, and discovery itself should be finished two weeks before the start of the minitrial. All minitrial discovery is on the record.

After discovery and before the minitrial, the parties should exchange "written submittals" such as position papers and exhibit and witness lists. Appellant should also submit a quantum analysis.

The minitrial hearing should not take more than two days. The parties can choose how best to present their cases and may use "expert witnesses, audio visuals, demonstrative evidence and oral argument." All testimony will be unsworn, and no transcript will be made. Closing arguments should be made since there are no post-hearing briefs. Either principal may terminate the minitrial at any time.

Negotiations The principals should meet for negotiations immediately following the minitrial. The meeting should be private, though the agreement may allow the neutral to be consulted. Staff members may also be consulted. All discussions in the negotiation are confidential and may not be used as evidence in later litigation.

*B. Summary of Department of the Navy Alternative Disputes Resolution Test Program, outlined in Memorandum from the Secretary of the Navy, 23 December 1986*

According to the Navy's policy, "[w]hile the minitrial will be the basic technique most commonly used in resolving contract disputes outside the traditional litigation context, [it] does not necessarily limit other approaches. Further, while it is the linchpin of a structured settlement process, imaginative adjustments to the litigation process at the ASBCA could also be a valuable tool for the parties to resolve disputes at a substantial savings of time and dollars." Among these other methods are summary binding and non-binding ASBCA procedures.

Case Selection The program applies to all Navy contract appeals before the ASBCA. According to the program outline, "(t)he decision to proceed with ADR is a business decision, which must take into account relevant legal considerations." The best kinds of cases for ADR are those involving only factual disputes, while the worst are those involving disputed law applied to undisputed facts. The amount in dispute and the fact that a case involves legal issues are not determinative of whether a case is suitable to minitrial. The only kinds of cases where ADR should not be used are 1) those involving clear legal precedent where compromise is difficult and 2) those that may create important precedent themselves. The responsibility for identifying cases for ADR lies with both the Navy trial counsel in charge of reviewing on-going litigation and with the Navy officials involved with the contract.

Representatives The Navy's principal should have contracting officer authority sufficient for the amount in dispute, and neither principal should have been involved in preparing or denying the claim. Where necessary, the minitrial agreement should allow the presence and participation of in-house non-litigation counsel for each party. Since a legal memorandum must be written to support any settlement, the Navy principal must be allowed to consult with his in-house non-litigation counsel before a final agreement.

Neutrals A minitrial agreement may, but is not required to, call for the use of a neutral advisor who is experienced in government contract law and preferably in litigation. In smaller, less complex cases, a neutral will not normally be necessary. The role of the neutral is not set out in the Navy policy, but should rather be laid out in the minitrial agreement. The Navy's sample agreement however, states that "[t]he neutral advisor shall preside or serve as moderator at the minitrial hearing. The neutral advisor may ask questions to seek clarification, but may not direct, limit or otherwise interfere with either representative's presentation or rebuttal, surrebuttal, or closing argument." The sample agreement further states that the parties may jointly and by agreement seek the advice of the neutral on procedural and administrative matters.

In choosing a neutral, the parties should agree on a list of ASBCA judges acceptable to both. The General Counsel then submits the minitrial schedule and a request that one of the judges on that list be assigned to the minitrial to the Chairman of the ASBCA. If this fails, the neutral advisor may be chosen from the private sector, providing that he is not currently representing the contractor in a dispute against the Navy. The policy states that sources of private sector neutral advisors include retired Trial Commissioners of the U.S. Claims Court, retired Judges of the Claims Court and present or retired members of law school faculties.

Minitrial Process Each minitrial has three stages -- pre-hearing, hearing, and post-hearing. The pre-hearing stage covers the time from when the parties draw up a minitrial agreement to the hearing itself. This period is used for whatever activities the agreement permits, including for instance, discovery and exchange of position papers.

The hearing stage should usually take between one and three days. The representatives of the parties, usually the trial attorneys, are allotted a specific amount of time in which to present their cases to the principals in whatever way they choose. The post-hearing negotiations should be limited by the minitrial agreement, and the parties should agree to resume litigation if they are unable to settle in that time. All proceedings are confidential and are not to be used in later litigation.

*C. Summary of Policy Statement on Minitrials, Dept. of Justice, Commercial Litigation Branch, circulated June 19, 1986*

Case Selection A minitrial should not be used for cases which are likely to be governed by clear precedent, are expected to establish important legal precedent or are clearly without merit. Cases involving factual disputes which do not depend upon the credibility of witnesses are preferred.

If the contractor proposes a minitrial, the Department's trial attorney should submit the request and a recommendation to his supervisor. If the Department's attorney thinks that a case is suitable for minitrial, he must get the recommendations of the interested agency, obtain approval from his supervisor and then propose the procedure to the contractor. "The decision to participate in a minitrial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department."

Representatives The government's principal will be the DOJ official with settlement authority or, if necessary, the official with authority to recommend settlement. The contractor's principal must be a high level official with settlement authority who preferably has not previously been involved in the case. Each party will have a representative to present the case; for the government this will be the attorney of record.

Neutrals The parties may designate a neutral third party to advise the principals on any issue upon which the parties agree in advance. "The neutral ... should be a person with either legal or substantive knowledge in a relevant field," and cannot be involved in any further litigation after the minitrial. The amount and manner of compensation for the neutral must also be agreed upon by the parties in advance.

Minitrial Agreement The minitrial agreement is to be negotiated by the representatives of the parties with the approval of the principals. The agreement should be tailored to each particular case, but must contain time limitations for each aspect of the procedure, a statement on the non-binding nature of the minitrial and an agreement to suspend litigation during the minitrial.

Minitrial Process The policy does not require any specific procedures, but lists those that are generally appropriate. Time limitations are to be specifically stated and strictly enforced. The scope and amount of discovery should be limited and completed at least two weeks before the minitrial. A nongovernment party may not conduct discovery under the minitrial agreement if it has a FOIA request pending. Before the minitrial, the parties should exchange written submittals and lists of exhibits and witnesses. The contractor must also include a quantum analysis. If the minitrial does not take place at a government facility, the government will not pay any part of the fee charged for the facility.

The presentation of the case to the principals should normally take only one day. Each representative may, within his allotted time, present his case in any manner he wishes,

including through witnesses, demonstrative evidence and oral argument. The principals will be able to examine any witness. No transcript of the proceedings will be made.

**Negotiations** The settlement negotiations will take place immediately after the minitrial and will be private, although the minitrial agreement may allow each principal to have a technical advisor present. This technical advisor may not be the party's representative. Though the principal's attorneys may not be present at the negotiations, he may consult with them whenever he wishes. "The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation."

Finally, any party may withdraw from the minitrial at any time.<sup>215</sup>

*D. Summary of U.S. Claims Court General Order No. 13, April 15, 1987*

**Case Selection** Claims Court General Order No. 13 encourages parties to employ either settlement judges or minitrials to help resolve disputes and states that these methods are particularly appropriate where the parties anticipate a lengthy discovery period followed by a protracted trial and where the amount in controversy is greater than \$100,000. Minitrials should only be employed in cases involving factual disputes and well-established principles of law.

When both parties agree to employ one of the two ADR methods, they should notify the presiding judge who will then decide whether to refer the case to ADR. If the judge agrees that the dispute is suitable for ADR, the case is assigned to another Claims Court judge who will preside over the ADR procedure chosen. The ADR judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court.

**Representatives** Each party should be represented by an individual with settlement authority and may be represented by counsel. The participation of senior management/agency officials with first-hand knowledge of the underlying dispute is highly recommended.

**Minitrial Process** Discovery should be expedited, limited in scope, and should conclude at least two weeks prior to the hearing. At the close of discovery the parties should exchange brief written submittals, witness lists and exhibits. The parties should also establish final procedures for the hearing at a pre-hearing conference with the minitrial judge.

The hearing itself should take no more than one day. The parties may present their case through examination of witnesses, demonstrative evidence and oral argument. The rules of evidence and procedure do not apply, so objections will not be permitted and no transcript will be made. The role of the minitrial judge is flexible and may provide for active questioning of witnesses.

**Negotiations** At the conclusion of the hearing the principals and/or counsel will meet to discuss resolution of the dispute. The minitrial judge may play an active role in the discussions or merely be available to render an advisory opinion concerning the merits of the claim.

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<sup>215</sup> The DOJ policy applies to all cases in the Commercial Litigation Branch, not just to contract cases. However, since this is a study of contract disputes, the language in this summary focuses on contracts.

## APPENDIX D

## PERSONS INTERVIEWED FOR THE STUDY

We would like to acknowledge gratefully the invaluable assistance of the following interviewees:

Donald P. Arnavas, Pierson, Ball, & Dowd

Daniel M. Arons, Vice Chairman, Armed Services Board of Contract Appeals

Robert P. Bedell, Administrator, Office of Federal Procurement Policy

Richard K. Berg, Multinational Legal Services, P.C.

Gene Perry Bond, Perkins Coie

Frank Carr, Chief Trial Attorney, U. S. Army Corps of Engineers

John J. Corcoran, Chairman, Veterans Administration Board of Contract Appeals

C. Stanley Dees, McKenna, Conner & Cuneo

Carroll C. Dicus, Jr., Chairman, NASA Board of Contract Appeals

David Doane, Administrative Judge, Interior Board of Contract Appeals

Rollee H. Efros, Associate General Counsel, General Accounting Office

Carlos R. Garza, Administrative Judge (ret.), Department of Energy Board of Contract Appeals

Forrest Gay, Brig. General (ret.), U.S. Army Corps of Engineers

David Glendinning, Office of the Inspector General, Department of Defense

Wesley C. Jockisch, Division Counsel, U. S. Army Corps of Engineers

Paul Killian, Watt, Tieder, Killian, Toole, & Hoffar

Vincent A. LaBella, Administrative Judge, General Services Administration Board of Contract Appeals

Stephen I. Lingenfelter, Division Counsel, U.S. Army Corps of Engineers

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Louis Spector, Chairman (ret.), Armed Services Board of Contract Appeals, and  
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