

**DEPARTMENT OF ENERGY
BOARD OF CONTRACT APPEALS**

ADR HANDBOOK

JANUARY 1999

Preface

This Handbook is not a legal treatise. The American Bar Association is preparing a monograph on alternative dispute resolution (ADR) for Government contract disputes that we expect will serve that purpose admirably. What we have set about in this Handbook is to provide a readable and practical guide for contractor and Government personnel with responsibilities for the business-end of Department of Energy (DOE) contracts, grants and cooperative agreements and for their attorneys. In this regard, we suggest that readers should not be intimidated by the Handbook's length since the ADR discussion is limited to approximately 20 pages. Appendices consisting of forms and reference materials make up the remainder. Furthermore, we have taken pains to organize the Handbook in a manner that readers can refer to the Table of Contents and locate what they need.

We were surprised by the interest in the first version of the Handbook. We distributed over 700 copies, mostly one-by-one in response to requests. However, the original has become somewhat dated. Experience has been a good teacher for the Board and this update reflects the results of our education. In particular, we have become believers in what we see as an emerging synthesis of consensual (primarily mediation) and adjudicatory (i.e. litigation) resolution processes -- a synthesis that is unique to the Boards of Contract Appeals. We have found that the Board can coordinate litigation and ADR schedules and procedures in ways that increase the likelihood of settlement through ADR and minimize costs and delay should ADR fail. In particular, when the parties so choose, we now schedule Board litigation processes to engage immediately in the event ADR fails. We have found that the overall efficacy and economics of dispute resolution were significantly improved when we dovetailed and, to a degree, integrated what we had previously treated as two essentially separate resolution processes.

Another significant change addressed in this new version is DOE's emphasis on consensual resolution subcontractor disputes arising under the Department's cost-reimbursement contracts. In furtherance of this emphasis and to facilitate the use of ADR in subcontractor disputes, the Department has authorized the Board to provide its judges as ADR neutrals, and to provide suitable facilities for ADR at locations convenient for the parties, all without charge to the parties. (See Appendix IV.) In addition to the substantial benefits that flow directly to the disputants, the Department also expects the public to benefit through a reduction in the overall amount of allowable litigation costs incurred by its contractors. We have attempted to accommodate these and other changes in this update.

Finally, there have been important statutory changes, the most notable of which was the enactment of 5 U.S.C. § 574 which provides a complicated scheme of protections against disclosure of ADR communications.

We received numerous comments on the first version. We hope that this version will be equally well received. We encourage you to give us your comments. We welcome everything from corrections of typographical errors, to organizational ideas, to more substantive suggestions

of items we should have I included but did not. We would also especially welcome copies of ADR agreements and specific provisions that, in your experience, were particularly useful, so that we can meld them into our Handbook where the need exists.

We trust this Handbook will be useful to you. We urge you to call the Board if you have any questions or if we may be of assistance to you. Our telephone number is (202) 287-1900.

January 8, 1999

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INTRODUCTION

The Energy Board of Contract Appeals (EBCA) is an experienced provider of Alternative Dispute Resolution (ADR) neutral services. For over a decade the Board has encouraged, supported, and engaged in the use of ADR procedures in appropriate circumstances. The Board provides neutral services and facilities for disputes related to Department of Energy (DOE) contracts, grants, and cooperative agreements. It does the same for disputes between DOE's prime cost-reimbursement contractors and their subcontractors. The Board also provides neutral services for disputes relating to contracts entered into by the Nuclear Regulatory Commission and the Securities and Exchange Commission. Disputes need not be on appeal before the Board. All of our judges are accomplished and knowledgeable in mediation and other forms of ADR

Until recently, we viewed ADR as offering disputants an attractive alternative to litigation in many instances. Today, we consider litigation (including binding arbitration) and ADR to be complementary components of the larger process of disputes resolution. We have concluded that Congress intended the Board's statutory mission to be disputes resolution in this broader sense. As a result, the Board now offers disputants the additional alternative of a resolution process that integrates both the ADR and litigation components. Through this integrated process most disputes are resolved in less time at much lower cost to the parties and DOE.

This integrated process takes advantage of the incentives and dynamics that so often produce settlements "on the court house steps." Imminent litigation can be a powerful inducement for the parties to settle. Disputant concerns over the costs and risks of litigation, time consumed by it, and the diversion of personnel from other tasks and opportunities all serve as an engine that can drive ADR when all other incentives are absent or inadequate. The flexibility of the Board's procedures enables it to schedule litigation processes to engage immediately should ADR fail. When permitted by agreement of the disputants, a Board neutral can request the Board judge presiding over associated litigation to exercise the powers of the Board and issue a scheduling order designed to accelerate the overall resolution process. For instance, a scheduling order may direct that a trial date will be set no later than a specified time after notice from the mediating judge to the presiding judge that the ADR process has ended without resolution of all matters in litigation. This prearranged "handoff" to litigation under an accelerated schedule can provide an especially significant incentive for the parties to reach a negotiated settlement. When limiting dates for the ADR are also established, the incentive is further enhanced. Thus, when the parties conclude that it is in their respective interests, the

Board may dovetail schedules and procedures for both ADR and litigation in a manner which parties often find advantageous.

The integration of ADR and litigation into a comprehensive dispute resolution process increases the efficacy of ADR without diminution of the many advantages of ADR before the Board. Among these advantages are: (1) procedures may be tailored to the desires of disputants; (2) the participation of a skilled mediator with subject matter expertise and unquestioned impartiality; and (3) the ability of disputants to adopt resolutions not possible through a board or court decision. Furthermore, disputants may agree upon procedures designed to give business representatives a high degree of control over the ADR component of the resolution process.

Agency Boards of Contract Appeals, including the EBCA, are uniquely qualified to efficiently bring about this integration. Typically, at the EBCA, when ADR is initiated in a matter on appeal before the Board, two Board judges are involved. One judge serves as a mediator and the other as the presiding judge for the case. The two judges act separately. Separate files are maintained for the ADR and the appeal. Only the mediator judge is permitted to access the mediation file. There is no discussion between the mediator and any judge who might ultimately be involved in a decision on the merits. Unless doing so would be inconsistent with an agreed ADR process, the mediator may, however, refer to the appeal file.

We strongly encourage disputants to consider ADR. We also urge care when undertaking ADR. ADR is not without risk and should not be treated lightly. However, most factors bearing upon ADR decisions relate more to "human science" than "legal science." In general, business people will find themselves comfortable with the common sense considerations that are critical to assessing and controlling risk and to designing a suitable ADR process. For the most part, ADR processes employ settings and mechanisms with which business people are already generally familiar. Under such circumstances, business people usually have little difficulty in understanding their choices and making sound decisions.

Although business people are well qualified to assess most considerations involved in ADR design, we note that there are some technical, legal issues that deserve the close attention of legal counsel before an ADR agreement is reached. In particular, often there are issues relating to confidentiality and the exchange of information which need counsel's attention. In this regard, our experience indicates that legal counsel is an indispensable member of any ADR team handling a significant dispute. While business people usually lead negotiating teams, we believe legal counsel should be involved in the design of the ADR process. We urge disputants to obtain legal counsel when first considering ADR for any significant dispute. In this regard, it may be important for the parties to agree in advance on the roles to be played by lawyers during the ADR.

The Board suggests that disputants are best served when they view ADR as presenting an important option with the potential to significantly affect the overhead costs, duration and outcome of their dispute and, in some instances, the ongoing relationships between disputants. In pursuing the ADR option, disputants should endeavor to tailor arrangements to their particular situation. They should be mindful that each ADR form has its own distinct characteristics that determine whether that technique is suitable for a particular dispute. They need to recognize that ADR does not have the array of safeguards provided by judicial processes, which result in an appealable or judicially reviewable board decision. Finally, they should be conscious that once a settlement agreement is signed, it is final and binding on the parties.

The bottom line is that all parties should carefully examine their options before agreeing to an ADR procedure. They should consult counsel in any significant dispute. They should engage in ADR only if they conclude that ADR is better than their other options. They should make a firm commitment to work collaboratively with other disputants and the neutral toward a negotiated resolution.

We trust that this Handbook will help disputants make sensible choices. However, readers should not consider this Handbook as definitive -- rather it is just a starting point. We generalize a great deal and for almost every unqualified statement, there are exceptions and opposing views. So before you put your business or organization on the line, gather more information and explore your options thoroughly.

DISCUSSION

Types of Disputes in Which the Board May Provide ADR Services

The Board's authority to provide neutral services is very broad. The Board may provide neutrals for ADR at any stage of a dispute and at any stage of the procurement cycle including protests. It is not a prerequisite that a claim be first asserted or that a contracting officer's decision be first issued so long as the disputants and the Board agree that ADR is appropriate. We may provide neutrals for disputes which relate in any manner to the Department's (including the Federal Energy Regulatory Commission's) contracts, grants, and cooperative agreements even where the Board does not have statutory, regulatory or contractual "jurisdiction" to decide the dispute.

Additionally, the Board may provide neutral services, including arbitration, in disputes between a DOE cost-reimbursement contractor and its subcontractors and in certain second-tier subcontract disputes. Further, pursuant to interagency agreements, the Board provides ADR for contract disputes relating to prime contracts awarded by the Nuclear Regulatory Commission (NRC) and the Securities and Exchange Commission (SEC). The Board's authorities and available services are described in the "Overview" portion of 10 CFR Part 1023, which appears in Appendix IV of this Handbook.

How is ADR Initiated?

Any disputant, including a contractor, qualifying subcontractor or the DOE, may take the first steps toward ADR. Typically, the initial step is a telephone call to the Board from one or more participants (contracting officer, owner, officer, lawyer, etc.) inquiring about Board ADR services. Board personnel are instructed to refer such calls to one of our judges. That judge will respond to questions; describe Board ADR services, personnel, and facilities; and, if desired, propose appropriate steps. The judge keeps this consultation on a general informational level for reasons of fairness and to avoid disqualifying the judge from further participation in the dispute. The Board does not treat these initial inquiries as other than procedural inquiries. It does not inform other disputants about them unless the inquirer requests further action. The Board will make the arrangements for a conference call with other parties to discuss ADR, if desired. Thereafter, if the parties wish to pursue ADR, they negotiate an ADR agreement (protocol). Generally, the Board provides good offices and expertise to the parties as they negotiate their agreement.

In cases already pending before the Board, Board procedures require consideration of ADR whenever appropriate. It is likely that early in an appeal the presiding judge will suggest to the parties that they discuss ADR and may suggest types of ADR for their consideration. If the parties elect to explore ADR, the presiding judge will provide assistance to them in designing an

optimal ADR procedure, if requested. However, the Board has no power to compel parties to engage in ADR. The essence of all forms of ADR is that it is consensual. All ADR procedures are entered into voluntarily by the parties.

If the parties agree to engage in ADR in a pending Board case, and if the ADR is to be Board-annexed (see discussion of Board-annexed ADR later in this Handbook), the Board may issue an order adopting and implementing the agreement. There are sample agreements for many forms of ADR in Appendix II. Parties may find these samples helpful in developing an agreement tailored to their requirements and circumstances.

It should be noted that recent amendments to Section 6 of the CDA extend the certification requirements of the CDA to ADR procedures, if the dispute has been reduced to a claim submitted to the contracting officer.¹

When May ADR Be Initiated?

As indicated above, the Board may provide ADR services at any stage of a dispute. In general, the earlier disputants initiate ADR, the greater the likelihood of successful resolution, the lower the costs, and the greater the chance of maintaining good relationships. Thus, it is important to know that an appeal to the Board from a contracting officer's decision is not a prerequisite to Board ADR. Indeed, a contracting officer's decision is not required. As indicated earlier in this Handbook, it is not even necessary for the dispute to have been reduced to a formal claim. It is, however, significant from a practical standpoint that the dispute be sufficiently crystallized and that the parties know the basis of their dispute and their respective positions.

The advantages of early initiation notwithstanding, there are some countervailing considerations. For instance, in some disputes the availability of subpoenas for third party discovery is of paramount importance. This consideration may suggest that a disputant's interests would be best served by first initiating an appeal to a board or an action in a court and conducting any critical discovery under the auspices of that forum. In appropriate circumstances, where both ADR and litigation are pending before the Board, the judge presiding over the litigation may issue subpoenas and order other involuntary discovery as an aid to ADR if such subpoenas or orders would be otherwise appropriate during the course of the parties' preparation for litigation.

¹ Section 6(d) of the Contract Disputes Act (41 U.S.C. ' 605(d)) states, in part, with reference to the use of alternative means of disputes resolution: "The contractor shall certify the claim when required to do so as provided under subsection (c)(1) [of the Contract Disputes Act] or as otherwise required by law." This provision is implemented in FAR 33.207.

How Much Does the Board Charge for Its Services?

Ordinarily, there is no cost to the parties for neutral services provided by a member of the Board or for facilities provided by the Board in a suitable location. Unless otherwise agreed by the parties, each party bears its own costs of participation, including travel.

The Role of Counsel in ADR Proceedings

ADR presents new opportunities for lawyers to increase their value to their clients, especially in Government contract disputes. ADR proceedings generally start with a presentation by each side of the relevant facts, contract provisions, and principles of law. Inevitably, negotiations are conducted against a backdrop of these facts, provisions, and principles and, inevitably, each negotiator needs legal counsel to be effective. It is difficult for us to envision negotiation of a substantial Federal contract dispute without the active participation of counsel.

However, this does not mean that counsel's role in ADR is the same as in litigation. The role of counsel may differ markedly from that in litigation, since most forms of ADR emphasize common interests and negotiated solutions and de-emphasize adversarial methodologies. Nevertheless, an effective lawyer remains just as critical to the client's success in ADR as in litigation. In litigation the lawyer is center stage, directly responsible for presenting the client's case to an adjudicator. In non-adjudicatory ADR, the lawyer may not be the primary spokesperson for a party. While commonly a member of a negotiating team, the spokesman is more typically the contractor's owner or an appropriate executive or manager. For the Government, the spokesperson is usually a contracting officer or program manager. The lawyer remains responsible to the client for essential support in the presentation of the client's case and for assessing advantages, disadvantages, and legalities of various approaches. Once in a while we encounter counsel who treats non-adjudicative ADR as an adversarial proceeding and seeks to "win the ADR." An attorney who approaches ADR in this manner is likely to be a counterproductive influence and may not serve his client well.

Early counsel involvement is important. As indicated elsewhere in this guide, the decision to engage in ADR is a significant one, laden with legal implications, as is the design of any ADR process adopted. There are risks and issues associated with ADR that only a lawyer can help a client assess. For example, are there any third parties that need to be involved? Are there risks that information disclosed during the ADR proceeding could impair the client's position in litigation if the ADR fails? How can those risks be minimized? Are there risks that a resulting settlement may be difficult to enforce? Can anything be done to make such an agreement more enforceable?

Consequently, we conclude that disputants are better served in most cases by involving their lawyers in dispute resolution and by doing so early. Of course, a party should take the size

and importance of a dispute into account in deciding the extent of its counsel's involvement. Indeed, some disputes are too small for counsel's involvement to make economic sense. However, there is no question, ADR goes better with counsel.

Audits and Auditors

It is generally important that contractor claims be fully audited and an audit report provided to all parties prior to negotiations. Further, where there are questioned items, it is important to have the author of the report present at the negotiations. It is our experience that many exceptions and questions raised by auditors are due to insufficient information. In many instances, once the contractor understands the question or exception, the contractor is able to provide documentation adequate for resolution. Auditors are often helpful in suggesting alternative sources of the information needed to resolve their questions and exceptions.

Factors Conducive to ADR

The Board has found the following factors to be among those that are conducive to resolution through ADR. The Board has found it useful to review these factors with the parties prior to designing an ADR process. ADR processes can be designed to minimize the impact of those factors that are absent.

1. The parties have a strong desire to settle the dispute.
2. The parties have sufficient resources to implement a compromise settlement.
3. There are recognized external pressures for settlement (such as a deadline imposed by the Board or another forum, uncertain outcomes, or a need to free encumbered financial and other resources for other purposes).
4. The parties have an ongoing business relationship or the potential for such a relationship. In general, disputes in contracts which have substantial work yet to be performed are more amenable to mediation than those which have been fully performed.
5. The parties have a history of cooperation and an established problem-solving approach to problems encountered.
6. Each party has some leverage or power to influence the other.
7. Suitable representatives for both parties are available.
8. The parties and their representatives are not unduly hostile toward each other.
9. The stakes are not so high as to jeopardize a party, a component of a party, its representatives, or any person or organization with the capacity to prevent entering a settlement agreement.
10. Public interest is low.

11. The parties have confidence in each other's integrity.
12. The parties are receptive to the assistance of a neutral third party.
13. Persons/organizations with a veto power are known by both parties, are limited in number, and support the ADR process.

Rarely, if ever, are all these favorable factors present. One or more have been absent from nearly all of the Board's **successful** mediations. The old saw, "if there is a will, there is a way," is very apt for ADR. The most important consideration (aside from the where-with-all to effect a settlement) is a recognition by all parties that settlement is a better alternative than any other available choice. If all parties recognize settlement as their best alternative, an arrangement can be structured which will have a high probability of success even if many of the numbered factors are not present.

Early Board Involvement

In all events, the Board strongly suggests that, at the outset, parties fully involve the Board in their choice of ADR processes and in the development of their ADR agreement. The Board has had considerable experience in guiding parties in the selection of optimal ADR processes, in identifying and mitigating potential obstacles to success, and in tailoring appropriate agreements. Early Board involvement also facilitates the Board's formal acceptance of its responsibilities under ADR agreements under which it is to provide ADR services.

CONSIDERATIONS IN SELECTING ADR TYPE AND PREPARING AN ADR AGREEMENT

Issues and Choices for the Parties

- ◆ What should be the scope of the ADR? Should only specified matters be considered? Or do the parties want to pursue a global settlement of all outstanding issues?
- ◆ Should the ADR use non-adjudicative or adjudicative procedures? Or would a combination of both, such as mediation/arbitration be appropriate? Is an adjudicative form of ADR, in which a neutral renders a binding decision, the best choice? Is a non-adjudicative process, such as mediation, which depends upon the ability of the parties to reach agreement, a better choice? (Adjudicative procedures include summary binding trials and arbitration. Non-adjudicative processes include case evaluation by a settlement judge (with or without mediation), mediation, and mini-trial.)
- ◆ Should there be a neutral? What role should the neutral play? Should the neutral be an individual or a panel? How should the neutral be selected? Should the neutral be a subject

matter expert? Should the neutral perform any evaluation function? Should the neutral be authorized to caucus separately with the parties? What, if any, responsibility should the neutral have for promoting settlement?

- ◆ What schedule and time limits should be established?
- ◆ What, if any, information should be exchanged and how should any exchanges be conducted?
- ◆ Should the ADR be conducted under the auspices of the Board or independent of the Board?
- ◆ Are there issues of confidentiality that need to be addressed? For instance, may statements or information produced for the ADR be used in a judicial proceeding if a settlement is not reached? May such statements be used by a disputant to justify a settlement to the Inspector General, the General Accounting Office, or to stockholders or creditors?
- ◆ If a paid neutral is employed, how should the fee or expenses be shared? (Board neutrals do not charge for their services.)
- ◆ When should ADR be initiated? Should it be before or after a claim is submitted? Before or after a contracting officer's decision is issued? Before or after an appeal is filed with the Board?

Importance of Choosing/Designing a Suitable ADR Arrangement

All of the above matters and many others need to be carefully considered and discussed before an agreement can be reached. Disputants cannot overestimate the importance of the design of their ADR arrangements. This becomes obvious when an adjudicative form is being considered. It is, however, every bit as important for non-adjudicative forms. A well-suited and designed arrangement greatly enhances the prospect of success where resolution depends upon mutual agreement. Likewise, without question, a poorly structured arrangement can be an impediment to settlement and may even deepen the gap between the disputants.

Disputants should be aware that most forms of ADR intentionally compress the time available to reach resolution. This compression increases the likelihood of settlement; however, it may also increase the opportunity for miscalculation. Parties need to understand this dynamic and be prepared for it. Moreover, care should be taken in the design of the ADR procedures to assure that the pressures inherent in ADR are balanced and within each disputant's capabilities. In this regard, mutual trust is essential, and trust building begins with the disputants dealing openly and in good faith in designing their ADR process. In choosing and designing their ADR procedures, parties should be mindful that arrangements that give one disputant a decided advantage over the other are likely to prove counterproductive since each disputant retains the power to say "no" in non-adjudicative ADR and to end the ADR. The likelihood of a party using

its "no" increases whenever the party feels that it has been placed at a disadvantage -- even if the offer on the table at the time is a fair one.

The Board is always willing to help the parties work out a suitable arrangement and the Board intends this Handbook to help the parties get a better understanding of their choices.

ADR Variables

When designing an ADR process for a dispute, disputants may find it helpful to mentally categorize Board ADR by four variables:

First, disputants should distinguish between ADR for disputes relating to contracts that are not yet complete (mid-performance disputes) and ADR for disputes relating to contracts that are complete (post-completion disputes). Parties to an on-going contract generally have a greater incentive to work things out. As becomes evident later in this Handbook, this greater incentive can affect prospects for success and should be an important consideration in the choice of the ADR form.

Second, disputants should consider the importance of the dispute to each party. Importance is usually, but not always, a function of amounts of money in dispute relative to the resources available to the disputant. The importance of a dispute may be critical to the type of ADR which is suitable and, indeed, whether ADR is appropriate at all.

Third, disputants may find it helpful to differentiate between adjudicative and non-adjudicative forms of ADR, which are so different that some consider it misleading to classify both together. Adjudicative forms result in a binding decision by a neutral at the end of an agreed process. The adjudicative processes can provide as much or as little of the trappings of full litigation as the parties choose. Non-adjudicative forms include a wide spectrum of processes that usually use a neutral to assist the parties in negotiating a settlement. At its simplest, non-adjudicative ADR may be simply a structured negotiation between principals. At its most complex, it can take the form of a non-binding decision at the end of a trial-like process. Mediation with case evaluation by a settlement judge is an effective non-adjudicative procedure for many contract disputes. In some instances, disputants want classic mediation without the mediator performing any evaluation.

And, **fourth**, disputants should be aware that there are Board-annexed ADR processes conducted under the Board's auspices and there are non-annexed processes where the Board's involvement is limited to adjusting the schedule of the Board case so that the parties can proceed with ADR entirely independent of the Board.

It may be of interest that most Board ADR has been Board-annexed and the recent trend is strongly toward non-adjudicative forms rather than adjudicative. The next several paragraphs discuss why these distinctions are important to the disputants.

ADR for Mid-Performance Disputes

Mid-performance disputes are often excellent candidates for non-adjudicative forms of ADR, which rely more heavily on the parties to work out a settlement. This is because the parties have stronger incentives to maintain good relations with each other while performance is on going. The most suitable non-adjudicative ADR form depends upon the specific circumstances of the dispute. They range from structured or moderated negotiations, to facilitation, to mediation, to case evaluation with or without mediation, to fact-finding, and to non-binding arbitration.

There is little question that it is usually easier to settle a mid-performance dispute than a post-performance dispute. Settlement negotiation of mid-performance disputes is often “interest based” while negotiation of post-performance disputes is usually “position based.” Normally, during performance, all parties have an interest in getting along with one another and in successfully and timely completing the contract work. Once the contract is complete the importance of the relationship wanes. This is especially true of Federal Government contracts because future contracts are usually awarded through a competitive process in which prior relationships play a limited role.

An additional phenomenon inherent in the nature of mid-performance disputes is their tendency to expand during negotiation to broader issues, and for resolution of these broader issues to become collaborative. For example, during negotiation of a mid-performance dispute over the delay and cost of an alleged untimely Government approval, the parties may discover that there are systemic problems with both parties' operations that contributed to the dispute and which, without correction, would probably generate more problems. They may conclude that correction of these problems transcends resolution of the immediate dispute. The parties may find that the contractor's systems fail to take into account Government approval times in its scheduling and, further, have no provision for the contractor to identify to the Government critical path items that need priority. On the other side, the parties may discover that there are too many people involved in Government document processing and that no one person was accountable for assuring timely processing. There may be no procedure for responding to the contractor's priorities. The parties may well conclude that these systemic problems need corrective action, and that both sides had previously failed in communicating and reacting to each other's priorities. Non-adjudicative ADR is flexible enough to permit the parties to expand the scope of the negotiations. Additionally, the possibility of expanding the pie to include additional issues may provide the parties with additional tradeoffs and improve the prospects for agreement.

ADR for Post-Completion Disputes

The decision whether to employ ADR in post-completion disputes and selecting the optimal form may appear more problematic than in mid-performance disputes since the incentives may be less. However, the bottom line is, overwhelmingly, that most post-completion ADR is successful.

Negotiation of post-completion disputes usually involves **position-based negotiation** grounded upon each party's assertion of its "rights." The parties typically view the dispute as a **zero-sum game** with little opportunity to expand the range of outcomes beyond an allocation of a limited pot of money. Under Federal law, Government representatives cannot negotiate favorable consideration in awarding future competitive contracts in exchange for favorable settlement terms. Accordingly, the significance of working relationships tends to be less and, thus, may provide less of an incentive to settle than is common in private contracts. Overall, there may be less bargaining room and fewer incentives to settle. The positions of the parties tend to be fixed and their objective is to get a favorable monetary resolution in the shortest time, at the lowest cost, and with the least operational impact.

Nevertheless, the financial and other costs of litigation, its interference with operations, its demands on potential witnesses, and the time required to present and obtain a judicial decision, combine to provide a powerful incentive for most disputants to engage in ADR and to settle. However, since usually money and money alone is the variable in post-completion disputes, these disputes are inherently more difficult to settle by mutual agreement. For this reason, some disputants favor adjudicative forms of ADR in post-completion disputes. These forms assure resolution and, at the same time, can be structured to address costs, time and operational impacts. More frequently, however, parties choose case evaluation with a Board judge with provision for the judge to mediate. The Board's experience is that this form has a very high success rate. The judge-as-mediator is in a position to help the parties assess their litigation risks through the eyes of a judge. Moreover, the experience of the judge is often critical in helping parties evaluate competing options.

We note that, as disputants and their attorneys gain experience, they are becoming more sophisticated in combining various forms of ADR to enhance the likelihood of success in post-completion disputes, and to increase their control over the dispute resolution process. For instance, they recognize that there is a greater incentive to settle if an adjudicated final decision is imminent than if it remains only a remote threat. For this reason, parties now frequently request that the Board establish a schedule for prompt trial or arbitration of the dispute in the event mediation or other non-adjudicative ADR fails. We think this often makes excellent sense. Additionally, the Board has had success with advanced hybrid processes such as that which Sample 4 of Appendix II provides.

ADR for Large Dollar and Other Significant Disputes

Disputes involving a great deal of money, or which are significant for other reasons, have their own special, challenging character. They are often factually and legally complex and may require the exchange of a great quantity of documents and other information. Different elements of each disputant's organization may have strong interests in the outcome. Obtaining suitable party representatives can be difficult. The personal risks for party representatives may be such as to interfere with decision-making.

Information exchange frequently is a major issue in important disputes. Often, in less significant disputes, disputants may responsibly negotiate with less than perfect information. However, in important disputes, party representatives must have sufficient information to make sound decisions. Not infrequently the parties are insufficiently thorough in identifying and producing information necessary for the other party to make sound judgments. Disputants are sometimes under the impression that because they are involved in ADR they need not be as thorough as in litigation. However, this can be a major mistake. Negotiations in major disputes often founder due to inadequate information exchanges.

Important disputes also tend to involve more, and sometimes conflicting, interests within each disputant's organization. Often these interests reflect separate power centers, each with the ability to veto agreements. It is essential that these interests be identified and become involved in the ADR. In rare instances, it even may be appropriate to have these separate interests represented at the negotiation.

Selection of suitable principal representatives is especially important and is often difficult in major disputes. Suitable representatives are key to successful ADR in significant disputes. A suitable principal representative will have a stature commensurate with the importance of the dispute and possess the authority, ability, knowledge and self-confidence to negotiate an agreement, sell it to all of the organizational interests, and make it stick. Such a person will also have the capability of marshalling the support resources to assure that the information exchange is thorough and that information received is properly analyzed. It is often difficult to pry representatives with the necessary stature and personal qualifications away from other responsibilities. Such people are in great demand within their organizations. Further, preparation for, and participation in, ADR can be time consuming.

We also note that there may be reluctance to enter into a settlement of a major dispute. Such settlements are often perceived as full of peril for decision-makers. Potential internal and external Monday-morning quarterbacks abound. While this is a largely unspoken concern, everyone involved in such ADR needs to be sensitive to it. Care in designing the ADR can mitigate the problem by providing, for instance, for internal review and coordination of

settlements before they become binding, for proper documentation of rationales, and by thoughtful consensual release of otherwise confidential information.

Adjudicative Forms of ADR (Arbitration)

The Board may arbitrate² disputes between cost-reimbursement contractors of the Department of Energy and their subcontractors. (See 10 CFR § 1023.1(d), contained in Appendix IV.) Parties may elect to have the Board apply the Board's Rules of Practice for disputes litigated under the CDA or under agreed rules comparable to private commercial arbitration. Additionally, with the approval of the Board, cost-reimbursement contractors may include provisions in their solicitations and subcontracts providing for arbitration of disputes by the Board. One such provision is included as Sample 6, Appendix II.

The Board also conducts summary trials with binding summary decisions. These trials are sometimes considered a form of adjudicative ADR. Whichever way they are viewed, they can be constructed as proceedings conducted pursuant to the Contract Disputes Act. As such, they may have advantages that are important in some circumstances. Typically, a summary trial that is conducted pursuant to the CDA is based upon an agreement between the parties to (1) limit or forego some of the usual procedural steps (such as discovery); (2) limit the amount of time available to parties within which to present their cases at trial and, sometimes, to permit narrative or written testimony; (3) submit the case to a single judge for a summary, oral (bench) decision immediately following conclusion of the trial; and (4) waive any rights to appeal. Summary trials may be conducted in non-CDA cases pursuant to other legal authority. A sample Board order for a summary trial is included as Sample 1, Appendix II.

Non-Adjudicative Forms of ADR

The most common form of Board non-adjudicative ADR is case evaluation by a settlement judge with mediation. Case evaluation without mediation, mediation or facilitation without evaluation, mini-trials and fact-finding are other forms of non-adjudicative ADR that may be used in either Board-annexed or non-annexed ADR. Board experience suggests that use of a settlement judge for case evaluation coupled with mediation (as provided by Sample 2, Appendix II) can be one of the most effective forms of ADR for contract disputes.

Board-Annexed ADR

Board-annexed ADR is ADR in a case filed before the Board and is conducted pursuant to a Board order that, among other matters, incorporates the agreement of the parties to engage in ADR and requires the parties to participate in good faith. Board-annexed ADR can take any

² Adjudicative ADR is another term for arbitration. However, when the word arbitration is used, most people think of arbitration as practiced by the American Arbitration Association.TM In actuality, arbitration may take virtually any form agreed to by the parties. Arbitration, as usually practiced under Board sponsorship, does not follow the American Arbitration Association model.

form and when a neutral is used, the neutral may be a Board judge, another Federal employee, or a private person as the parties may agree. In Board-annexed ADR, the Board bears the costs of providing a neutral from the Board and of appropriate facilities. If the parties request, the Board may, if appropriate, enter a judgment or decision incorporating a settlement reached by the parties. Such a judgment or decision may render awards against the Government eligible for payment out of the Permanent and Indefinite Judgment Fund (31 U.S.C. ' 1304).

Non-Annexed ADR

If the parties choose to use non-annexed ADR in a case filed before the Board, the Board will satisfy itself that the ADR has a reasonable chance of success and will be diligently pursued by the parties. Once satisfied, upon the joint request of the parties, the Board will issue an order suspending the remaining schedule of the case for a specified period of time. It should be noted that the Board has no authority to enforce compliance with an agreement to engage in non-annexed ADR, although it might reinstate the schedule and proceed with the trial of the case if it is clear that non-annexed ADR is not succeeding. Costs of non-annexed proceedings are borne by the parties in such manner as they may agree. Upon occasion, and after a due diligence inquiry into the settlement, the Board may enter a consent judgment incorporating a settlement reached through non-annexed ADR.

Confidentiality

In this Handbook, we have refrained from discussions of legal intricacies. However, one of the more difficult and perplexing issues that may arise in ADR is that of confidentiality. It is impossible to meaningfully address confidentiality in the context of ADR for prime Government contract disputes without getting into such a discussion. We believe it is necessary to provide just enough about confidentiality issues to encourage disputants to obtain legal counsel, at least for the purposes of optimizing confidentiality arrangements.

From a disputant's standpoint, one of the advantages of ADR is the availability of protections against disclosure. However, there are countervailing considerations in Government contract disputes flowing from the need for Government accountability and openness. The basic tension between the benefits of negotiated settlements, the attractiveness of which is enhanced by protections against disclosure, and the value of sunshine in Government activities has resulted in statutes which provide less than unfettered protection against disclosure of information related to ADR.

In particular, 5 U.S.C. § 574, which was enacted as part of the Administrative Dispute Resolution Act, provides considerable protection against voluntary and involuntary disclosure of "dispute resolution communications" between a party and a neutral. However, this is a complex statute and is difficult to interpret with certainty in many respects. It may be that it would not include the ADR agreement itself or any resulting settlement agreement within the scope of its

protections against disclosure. Further, the statute includes an exception from the protections which seems to take away much of what it gives. The exception provides that "except for dispute resolution communications generated by the neutral, [a] dispute resolution communication, [which] was provided to or was available to all parties to the dispute resolution proceedings" is not protected. Further, while 5 U.S.C. § 574 permits confidentiality arrangements for disclosures by a neutral other than those provided by the statute, it states that confidentiality provisions which provide for less disclosure than that provided in this section will not qualify for any (b)(3) exemption from the Freedom of Information which the section otherwise accords. It is our view, that in any dispute where confidentiality is important, disputants need to carefully weigh their ADR confidentiality options. They need to consider:

1. Relevant rules of evidence such as Federal Rule 408 and/or comparable state statutes;
2. 5 U.S.C. § 574 (discussed above) and/or any relevant state statute;
3. The Federal Freedom of Information Act and/or any comparable relevant state statute;
4. The need for contractual confidentiality terms between the disputants and what those terms should be; and
5. Any relevant Federal or state judicial decisions interpreting any of the above or applying common law.

Thus, in any dispute where the confidentiality of matters relating to the dispute is important, disputants should receive legal counsel before entering into a binding ADR agreement.

BOARD ADR FOR SUBCONTRACTOR DISPUTES

The Department of Energy encourages prudent use of ADR for subcontract disputes at all subcontract tiers, especially if the Department may ultimately be required to reimburse litigation costs. All the advantages of ADR operative at the prime contract level are also operative at the subcontract level. Costs are usually less than litigation, resolution is usually quicker, and the business community serving DOE, whether at the prime or subcontract level, is better off with ADR available. Most forms of ADR may be oriented toward the needs of businesses and business people, affording greater control by them and greater opportunity to tailor settlements to meet their core interests.

The Board is a principal source of neutrals for ADR in subcontract disputes arising in connection with DOE's cost-reimbursement contracts. All the Board judges are trained as mediators. Additionally, the combination of procurement expertise and knowledge of DOE's organization, missions, and procurement policies has repeatedly benefited those who have

elected to use the Board's services. The Board's services and facilities are provided without cost to the parties.

The Board's rules authorize it to provide neutral services and facilities for disputes between the Department's cost-reimbursement contractors and their subcontractors. (See 10 CFR 1023.1(d) which appears in Appendix IV.) Additionally, these rules also authorize the Board to provide such service and facilities for second tier disputes (disputes between subcontractors under DOE prime contracts and their sub-subcontractors) when the costs of litigating the dispute might ultimately be chargeable to the DOE as allowable costs through the prime contract. Note, however, that the consent of both the responsible prime DOE cost-reimbursement contractor and the cognizant DOE contracting officer must be obtained for second-tier ADR. Historically, consent has been readily given since the requirement for consent was not established to place bureaucratic obstacles in the way to ADR. Rather it's purpose is to minimize the likelihood of post-settlement complications by assuring early notice to potentially interested organizations higher up in the cost-reimbursement chain.

In general, the Handbook's discussion of ADR for contract disputes is equally applicable to subcontract disputes and prime contract disputes. If anything, it would appear that there are fewer constraints at the subcontract level.

We note that DOE's cost-reimbursement contractors may include a disputes clause in their subcontracts providing for arbitration by the Board. The University of California, the prime contractor for the Los Alamos National Laboratory, includes such a provision in its solicitations and its subcontracts. (See Appendix II, Sample 5.) This provision provides for arbitration following the same Rules of Practice that are applicable to disputes between DOE and its prime contractors.

In performing its responsibilities under arbitration clauses, the Board encourages parties to engage in mediation or other non-adjudicative ADR, just as it does in prime contract disputes before it. When arbitrating parties agree to non-adjudicative ADR, the Board will make its judges available as neutrals without charge, if desired. Unless the parties agree otherwise, they retain their arbitration rights in the event non-adjudicative ADR fails.

APPENDIX I: DESCRIPTION OF ADR PROCEDURES

Case Evaluation by a Settlement Judge with Mediation

Description-----This process involves a private evaluation of each party's case by a Board judge followed by a mediation of the dispute by the judge. The settlement judge becomes disqualified from further participation in litigation of the matter before the Board.

Procedure-----Typically, the case evaluation procedure involves both parties making both a written (with documents) and an oral presentation. In low value cases the parties might agree to omit either the written submission or the oral presentation. If the dispute is already before the Board, the parties and the settlement judge have access to the documents filed in the case.

Before the first joint session, each party furnishes a copy of any written presentation to the opposing party and the settlement judge. The oral presentations are made at a joint session. Usually, a rebuttal statement follows each oral presentation from the other party. Thereafter, the settlement judge meets with each party in a private session. During the private sessions, parties can freely discuss their case with the settlement judge, including aspects not covered in the open presentation. The settlement judge may not disclose any information provided by a party in a private session unless authorized to do so by the party or required to do so by law. The settlement judge will provide each party with a candid assessment of the strengths and weakness of its case. With this evaluation in hand the parties are in a better position to assess their respective litigation risks. Therefore, they may be more realistic in their negotiations.

When the judge has a mediation role in addition to an evaluation role, the evaluation provides a sound foundation from which the judge can help the parties work out an agreement and the evaluation may be updated as new information emerges. However, it is up to the parties to determine beforehand precisely what role they wish the settlement judge-as-mediator to perform and to communicate their desires to the judge. Generally, the parties want the settlement judge-as-mediator to be an active participant in negotiations and to be an advocate for settlement. Ordinarily, the judge is expected to orchestrate a fair settlement process, but it is the parties' responsibility, not the judge's, to satisfy himself or herself that any settlement reached is a fair one. Typically, case evaluation with mediation in a non-complex case is scheduled for two days and usually the parties are able to complete a summary, initial agreement within this time.

Advantages-----At a minimum the settlement judge-as-mediator's role includes frank assessments of each party's case, facilitating communication between the parties, identifying the issues in conflict, promoting an effective negotiation process, and generating options for settlement. However, the mediator has no authority to dictate a solution and does not render a decision: the parties must reach resolution themselves.

Mediation allows the parties to talk face to face under the guidance of a neutral and can provide a discipline to their interaction that may be lacking in other dispute resolution techniques. Even where parties have previously engaged in unsuccessful attempts to negotiate a settlement on their own, a settlement judge can offer perspectives and insights that may allow the parties to overcome past barriers to agreement.

Format----- See Appendix II, Sample 1

Case Evaluation by a Settlement Judge without Mediation

Description-----Case evaluation is intended to provide the parties with an objective, non-binding evaluation of their cases which in many instances is helpful in creating movement in negotiating positions.

Procedure-----Typically, case evaluation without mediation involves the same procedural steps as case evaluation with mediation. The primary difference is the judge has no obligation to actively promote settlement. The judge's commitment ends with a private evaluation to each party.

The initial procedural steps for case evaluations by a settlement judge with or without mediation are similar; however, a judge with mediation responsibilities is likely to be more assertive during these initial steps. Typically, both forms of case evaluation begin with each party making both a written (with documents) and an oral presentation to the settlement judge. In low value cases the parties might agree to either a written submission or an oral presentation, but not both. In addition to this presentation, the judge will have access to any papers that are in the Board's case file if the dispute involves a case already filed with the Board. Before the first joint session, each party furnishes a copy of its written presentation to the opposing party and the judge. Oral presentations are made at the beginning of the first joint session. Usually, a rebuttal statement follows each oral presentation from the other party.

Thereafter, the settlement judge meets with each party in a private session. During the private sessions, parties can freely discuss their case with the settlement judge, including aspects not covered in the open presentation. The discussion stage may involve several conferences with each party. The judge then provides each party with a private, candid assessment of the strengths and weaknesses of its case and the parties begin their negotiations.

With the judge's evaluation, the parties are in a better position to assess their respective litigation risks. Therefore, they may be more realistic in their negotiations. However, since the judge has no facilitation or mediation function, it is entirely up to the parties to negotiate a settlement. A typical case evaluation can be completed in one day, although additional time is required for negotiations. The settlement judge may not disclose any information provided by a party in a private session unless authorized to do so by the party or required to do so by law.

Advantages-----An evaluation by a settlement judge can provide a valuable reality check. Too often, parties convince themselves of the merits of their arguments and arrive at an excessively optimistic view of their case. Too, parties are sometimes aware of weaknesses in their case, but delude themselves into believing that there is a possibility that no one will notice. A settlement judge can break the spell of the Emperor's New Clothes Syndrome. Additionally, there are times

when one or both parties have simply analyzed its or its opponent's case incorrectly. An evaluation by settlement judge can help each party better assess its litigation risks.

Mediation without Case Evaluation

Description-----Mediation involves a neutral third party that assists the parties in negotiating an agreement.

Procedure-----Possible variations of mediation procedures are virtually without limit. The core elements of mediation are the intervention of an impartial and neutral person, who has no authoritative decision-making power, into negotiations between disputants. Mediation is an entirely voluntary process, which depends upon altering existing personal dynamics in such a way that their interaction turns away from assertion of rights and into a problem solving process. The mediator's intervention can be as unobtrusive or as forceful as the parties desire.

Generally, after discussions between the neutral, the parties enter into a mediation agreement with ground rules that, among other matters, define the neutral's role. Usually, the neutral implements an agenda and schedule established by the parties. The duration of the mediation is set in advance, subject to agreed change. Parties are allowed to caucus, as they deem appropriate. The neutral may, and usually does, meet privately with the disputants at various times during the mediation and often shuttles between the parties during negotiations. Parties may request the neutral to help formulate alternative settlement options and to play an active role in fashioning and facilitating agreement.

It is also possible to employ a form of ADR called Mediation/Arbitration (Med/Arb). If the disputants fail to agree in the mediation phase of Med/Arb, the process is automatically converted into an adjudicative process in which the neutral adjudicates the dispute. (See "Med/Arb and Other Hybrids," later in this Appendix).

Advantages-----Mediation is well grounded in theory and practice and, in disputes where a range of outcomes is possible, is often effective. Its focus is on the parties' perceptions of their own interests and maximizes the parties' control over fashioning a resolution reflecting those interests.

Considerations-----Mediation may not be as effective as some other forms of ADR in post-completion disputes, which tend to be position-based.

Format-----See Appendix II, Sample 2. Note that mediation is very flexible. As with all ADR agreements, it is important that the mediation agreement adopted by the parties accurately reflect their expectations.

Mini-Trials

Description-----A mini-trial is not a trial at all. It is a highly flexible, but structured procedure. Mini-trials typically consist of time limited presentations by each side to a panel consisting of high level representatives (principals) from each party and a neutral. The neutral, selected by the parties, usually serves as an advisor to the principals. Thereafter, the principals negotiate, typically with the assistance of the neutral as mediator. The principals, with the benefit of the presentations, negotiate a settlement to the dispute.

Procedure-----The parties designate principals who have authority to conclude a settlement on behalf of the disputants. The parties enter into an agreement establishing the scope and procedures, and either designating a neutral or establishing a mechanism for selecting a neutral. Typically, the agreement establishes a schedule and a time limit within which each party may present its "case" to the principals. Parties often elect to use attorneys to present their cases; however, judicial procedures and rules of evidence are not applicable. Witnesses, experts, documents, graphs, charts, etc. may be used to inform the principals about the dispute. Objections are not allowed, but representatives are free to present arguments concerning the probative value of items offered by the opposing party. Unless the parties agree otherwise, it is left to each party to decide the most effective way for it to present its case within the allowed time depending upon the mini-trial agreement.

After the presentations, the principals attempt to settle the dispute. The neutral may serve a number of functions as provided in the mini-trial agreement. Typically, the neutral functions as a mediator. If the agreement so provides, or all principals agree, the neutral may meet privately with the parties and evaluate their respective cases.

Advantages-----Mini-trials are best suited to disputes where the matter is of sufficient significance to justify the engagement of senior executives as principals and where issues include complex technical or factual matters. If properly structured, the procedure has a very high success rate.

Disadvantages-----A major drawback of a mini-trial is that it requires direct senior level participation as a principal and a commitment of time. Principals need to be carefully selected for personal qualifications such as stature and decisiveness. Further, the basic concept requires principals that have been remote from the fray and are detached from positions previously taken. Mini-trials tend to be more expensive than some other forms of non-adjudicatory ADR.

Comment-----We note that parties are selecting pure mini-trial methods less frequently than in the past. Nevertheless, mini-trials have their own advantageous dynamics flowing from the

involvement of decisive, high level, party representatives and deserve mention for post-completion disputes.

Format-----See Appendix II, Sample 3.

Arbitration (Binding and Non-Binding)

Description-----Similar to judicial adjudication in that a neutral decides the issue in question after reviewing evidence and hearing arguments from the parties. When a contract or other agreement contains an arbitration clause, arbitration may be initiated upon the demand of one party. When there is no arbitration clause, the parties must agree before an existing dispute can be submitted for arbitration.

Procedures-----Arbitration may be pursuant to a contract clause or it may be conducted ad hoc pursuant to a specific agreement. Arbitration agreements may provide for either binding or non-binding arbitration. In the arbitration process, the arbitrator or arbitrators receive adversarial presentations from all sides and thereafter render a brief decision generally with limited or no rationale. Usually, statutes sharply limit any rights to a judicial review of an arbitration award. Parties agree to the procedures to be followed, the amount of pre-hearing discovery, and the selection and number of arbitrators.

Advantages-----Arbitration is more flexible than judicial adjudication. Disputants can control costs and time through agreements to limit discovery, amounts and methods of presentation of evidence, acceptance of decisions without detailed and documented rationale and other procedures. Moreover, as noted above, arbitration decisions are less likely to be challenged through judicial review or appeal than are judicial decisions by the Board or a court since review is limited by statute.

Another feature of arbitration is the option to employ an expert as an arbitrator in a dispute dominated by difficult technical issues. If the expert has experience with arbitration, the expert may be the sole arbitrator. More commonly, such experts are members of arbitration panels that are chaired by a lawyer with adjudication experience.

Considerations-----Arbitration is most appropriate where a precedent setting decision is of limited value to the parties and where matters may be resolved through reference to ascertainable norms such as statutes, rules, or customs. Arbitration is an excellent choice when the matter in issue is highly complex or technical and the parties would benefit from the direct participation of a subject matter expert in the decision.

Arbitration is generally not appropriate where a full public record is necessary. Binding arbitration may be particularly appropriate for disputes between DOE cost-type contractors and their subcontractors. If the parties desire a judicial type of process, they may agree that the Board will follow the procedures applicable to prime contract appeals under the Contract Disputes Act or, of course, they can choose a commercial arbitration procedure.

Format---Because of the variety of arbitration formats available, no arbitration protocol is contained in the Appendix. However, Appendix II includes an arbitration clause which the University of California, the contractor for DOE's Los Alamos National Laboratory, includes in its subcontracts under DOE cost-type contracts. (See Appendix II, Sample 5.) This particular clause contemplates a judicial type of arbitration proceeding. However, in the Board's implementation of the clause, the Board will provide free neutral ADR services to the parties for non-adjudicatory ADR in the same manner as in prime contract disputes under the Contract Disputes Act.

Med/Arb and Other Hybrids

Description: One of the more notable trends in ADR for contract disputes is the development and use of hybrids. One of the oldest hybrids is the venerable mediation/arbitration (or "med/arb") which calls for the parties to first engage in mediation and, if they are unable to reach agreement, to then submit to arbitration. Further, George Washington University Professor Emeritus Ralph Nash has designed a hybrid which combines elements of a mini-trial, roundtable discussion, mediation and, if agreed, arbitration.

Advantages----Most hybrids combine non-adjudicative and adjudicative forms of ADR. As we noted in the text, post-completion disputes tend to have less incentive to settle than mid-performance disputes because the parties generally do not have the same level of concern over continuing good relations and because the range of tradeoffs is more limited. The principal incentive to negotiate a settlement is often the desire to avoid the costs, risks, and inconvenience of litigation. Thus, there is even less incentive to negotiate a settlement when the trial and decision are not imminent. A follow-on adjudicative phase of a hybrid ADR may be scheduled to provide an urgency, which will encourage settlement during the non-adjudicative phase.

Disadvantages----Hybrids tend to be more costly to everybody involved than non-hybrid forms and are more resource intensive for the Board. As a general rule, the Board is generally reluctant to permit the same judge to serve as a neutral during the non-adjudicative phase and then to serve as the adjudicator, if that becomes necessary.

Format----Typically, parties graft provisions for arbitration onto an agreement for their chosen form of non-adjudicatory ADR. See for example, optional paragraph 11 of Sample 4, Appendix II.

Summary Trial

Description-----The summary trial is a simplified, abbreviated and accelerated trial process. The parties present their evidence and arguments before a single Board member who then promptly issues a binding decision, usually immediately after completion of the trial.

Procedure-----A summary trial proceeds much as a normal trial does, but usually pre-trial, trial, and post-trial procedures, and rules are modified to shorten the time for resolution. Discovery, pre-trial motions, and briefs are either eliminated or sharply curtailed. The trial itself is normally conducted within a set amount of time. Narrative direct testimony is often permitted instead of the usual question and answer form. Sometimes affidavits are substituted for the live testimony of less important witnesses. Beforehand, after discussion with the parties, the Board sets the time within which each party may present its case.

Summary trial procedures usually call for a brief oral (Abench@) decision issued at the conclusion of the trial followed by a simple, summary, written “judgment.” Unless otherwise provided, this decision is binding and conclusive. Thus, it may not be appealed and will not be set aside except for fraud.

Advantages-----The summary trial is a quicker and less expensive method of bringing issues before a judge and obtaining a final decision. Its most frequent use is where a contract has been completed and the dispute revolves around a single set of related events.

Considerations-----The summary trial is not appropriate where complex issues are presented or novel or new developments are being litigated. Rulings issued from a summary trial have no precedential value.

The summary trial has fewer due process protections: (1) there is little or no opportunity to discover evidence and information possessed by the other party, (2) the abbreviated trial limits the amount of evidence a party can offer, (3) the curtailment or elimination of briefs creates a greater possibility that the judge may not fully understand all the ramifications of a case, (4) the possibility of an incorrect judgment is possibly greater because the case will be decided by a single judge, rather than a panel, and (5) the opportunity to correct an erroneous decision is very limited since there is no right of appeal. The lessened protections notwithstanding, parties may conclude that the cost and time containment offered by the summary trial procedure outweigh the value to them of the safeguards provided by normal trial procedures.

Format-----Summary trial procedures are implemented through a Board order. This order is developed in cooperation with the parties and is not issued unless all parties agree upon its contents. A sample Board order appears as Appendix II, Sample 6.

APPENDIX II: SAMPLE AGREEMENTS AND BOARD ORDERS

This appendix contains sample orders and agreements that have been adapted from agreements drafted by parties and disputants before the Board, orders issued by the Board pursuant to understandings reached between parties and the presiding judge, models published by the Army Corps of Engineers, and other sources. The Board includes them to assist parties in understanding through example some of the differences between ADR types, and in drafting their own agreements. Parties should tailor their agreements to their particular circumstances and expectations. The various samples contain provisions, which may be useful in other contexts. For instance, parties may find paragraph 7, "Execution in Counterparts," of Sample 2 useful in any type of agreement. Likewise, the "Confidentiality" provision of Sample 4 may have greater applicability than just hybrid ADR.

Sample 1 -- Sample Protocol for Case Evaluation and Mediation by a Settlement Judge or Other Neutral

Agreement for Case Evaluation and Mediation by Settlement Judge

The parties to this agreement are [*Contractor's name*] [*contractor's short name, if any*] and the Department of Energy ("DOE"). The Energy Board of Contract Appeals ["Board"] agrees to provide the neutral services specified by the agreement.

RECITALS

On the ____ day of _____, 20____, the parties entered into Contract No. _____ for the _____ at _____, _____.

[Describe contract, the work required, and any other relevant information]

[State the procedural status of the dispute, e.g.: "The parties are currently in litigation before the Energy Board of Contract Appeals in EBCA No. ____." *or*: "*(Contractor's name)* has submitted a certified claim (copy attached) to the DOE contracting officer [who has issued a final decision (copy attached)]/[has not yet issued a final decision]." *or*: "The parties have been unable to resolve the following dispute which has not been submitted to the contracting officer for decision: (*describe matter to be resolved*)"

The parties have agreed to seek resolution and to submit their dispute to a settlement judge for case evaluation and mediation ("ADR proceeding"). They agree that the procedural requirements and time limitations of the Contract Disputes Act will be temporarily suspended to enable the parties to engage in this ADR process. In the event they are unable to reach agreement settling all matters in dispute, suspended procedural requirements will be restored and time limitations reinstated adjusted for the period between the effective date of this agreement and the date of termination of mediation as provided in this agreement.

AGREEMENT

NOW THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

1. PARTICIPANTS IN THE PROCESS

1.1 The principal representatives for the purpose of this ADR proceeding will be ____ for the Department of Energy and _____ for _____. The parties state that the principal representatives have authority to settle the dispute except:

(List any reviews, approvals, authorizations which either party must obtain for a settlement agreement to be effective and any limitations on the authority of the principal representatives.)

1.2 The Settlement Judge shall be _____.

1.3 All participants in the process agree to act in good faith in all aspects of the process, including obtaining prompt reviews, approvals and authorizations for agreements reached, if any.

2. PURPOSE OF THE ADR PROCEEDING

2.1 The primary subject of this ADR proceeding shall be the dispute stated in the "Recital" above. The parties agree, however, that in the absence of an objection by a party, the settlement judge may expand the scope of the proceeding if the settlement judge deems it in the parties' common interest.

3. SCHEDULE

3.1 Evaluation and Negotiating Sessions. Evaluation and negotiating sessions will be held on (*Dates -- usually 2 days*) in (*City and State*) beginning at a time and place determined by notice from the settlement judge. The parties shall reserve (*insert inclusive dates*) for negotiation sessions.

3.2 To facilitate meaningful evaluation and to enhance negotiations, it is important that each party and the settlement judge have an accurate impression of the positions of each party and the principal bases of the positions. It is also important for parties to know what resources other parties will have available. Accordingly, each party shall furnish to the other party and the settlement judge so as to be received no later than (*Insert number of days C usually ten*) business days prior to the date of the first evaluation and negotiation session:

- (1) A position paper no longer than (*insert number of pages C usually ten*) pages in length. (For a paper to have maximum value, Parties should include what they believe to be key facts, critical issues, and the main points supporting their position;
- (2) Copies of records and information (including by way of example, written communications, internal memoranda, photographs, invoices, audit

reports, price analyses, etc.) which a party expects to be useful during this proceeding. As a matter of convenience, bulky, long or difficult to reproduce items known to be in the possession of another party need not be furnished to the party, provided the item is adequately identified by a full description given. Likewise, bulky, long or difficult to reproduce items previously filed with the Board need not be furnished to the Board, provided the items and the filing in which they are included are adequately described.

- (3) A listing of individuals who may have relevant knowledge or expertise and who a party expects will participate in the evaluation or negotiation sessions or to be available, if needed. If the reason for an individual's presence is not obvious to other parties, the listing should include an informative explanation.

4. SEQUENCE OF EVENTS

- 4.1 The following is the expected sequence of events. During the course of these proceedings, parties may adjust these events and associated procedures, as they believe will best suit their needs. Likewise, the settlement judge may make adjustments unless a party objects.
- 4.2 At the beginning of the first joint session, the settlement judge will describe ground rules previously agreed upon, make any general observations the judge believes appropriate, and provide any necessary administrative details. Thereafter, each party shall summarize its position. Subsequently, each party will have such time as has been agreed to amplify its position by any method that it may choose. Parties have the option of presenting information through witnesses within the time allotted. Personal attacks and inflammatory statements are counterproductive and unacceptable.
- 4.3 At the conclusion of the parties' presentations, the settlement judge will meet privately with each party. These private sessions give each party an opportunity to discuss their views and interests in more detail and in confidence. During the private sessions the settlement judge will assess and discuss the strengths and weakness of the party's case.
- 4.4 Negotiating sessions will commence after the settlement judge completes the assessments.
- 4.5 Any party may call recesses in negotiating sessions to caucus at any time. The party calling the recess will inform the others of the expected length of the recess and the settlement judge will establish a time for reconvening.

- 4.6 Unless otherwise agreed, only the principal representatives and their attorneys may sit at the negotiating table. The settlement judge may limit participation in any discussion to the principal representatives and may exclude others from the negotiation room. However, each principal may ask its attorney or technical advisors to elaborate on relevant points and is free to caucus with them at any time.
- 4.7 Formal rules of evidence and procedure do not apply. Within the time allotted to them, the parties may provide any information in any form.
- 4.8 Negotiating sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

5. THE SETTLEMENT JUDGE

- 5.1 The settlement judge shall be neutral and impartial.
- 5.2 The settlement judge shall control the procedural aspects of the mediation. The parties will cooperate fully with the settlement judge. The settlement judge will decide the time and place of each session and the agenda, in consultation with the parties.
- 5.3 The settlement judge is free to meet and communicate separately with each party. The settlement judge will decide when to hold separate meetings with the parties and when to hold joint meetings. The settlement judge will not disclose confidential information provided by a party unless authorized to do so.
- 5.4 The settlement judge is expected to actively promote agreement between the parties. The judge may, in private or joint sessions, freely express views to the parties on any matters related to the dispute or the relationship between the parties and may, if requested, make recommendations.
- 5.5 The settlement judge shall not be liable for any acts or omissions related to the mediation.

6. EXCHANGE OF INFORMATION AND WITNESSES

- 6.1 The parties recognize that surprises occurring during the evaluation and negotiation sessions are counterproductive and may interfere with successful negotiation. Each party agrees it will endeavor to identify and communicate to the other parties, issues of potential importance as early as possible, and that it will cooperate with the other parties in the identification and exchange of information and will complete such exchanges in a timely, economical and efficient manner. The parties specifically agree that they will cooperate with one another in identifying, locating and arranging the production of information and persons with pertinent knowledge, all in a timely, economical and efficient manner. Moreover, the parties agree that nothing in this agreement nor anything done pursuant to it shall restrict either party's ability to take additional discovery after completion of this ADR procedure.

- 6.2 Each party agrees not to withhold pertinent information requested by the another party. Nothing in this paragraph requires a party to disclose information that is not subject to disclosure under applicable laws or regulations. If a party believes it cannot or should not release such information, it shall describe the information withheld and the reason for not providing it.
- 6.3 A party may withhold documents if it reasonably believes them privileged; however, the existence of any such withheld document shall be disclosed. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document withheld falls within the same category as the document produced.
- 6.4 DOE agrees to submit to the settlement judge and any other parties, not later than ten days prior to commencement of the first joint evaluation and negotiation session, all audit reports or cost or pricing analysis that are associated with the issues that will arise during the proceeding. The contractor agrees to provide a quantum analysis setting forth the amounts sought and the basis for these amounts within the same time frame.

7. CONFIDENTIALITY

- 7.1 This ADR proceeding is confidential. The parties and the settlement judge agree that they will not disclose information regarding this proceeding to third parties, except as provided in this agreement, authorized by law, or as otherwise agreed in writing by all parties. The parties agree, however, that this agreement and any resulting settlement agreement may be disclosed. Further, information presented during this proceeding may be used, as necessary, to justify and document any subsequent modification of the contract based upon the settlement and for any review, approval or authorization processes specified in this agreement.
- 7.2 The settlement judge and any persons who may have acted as staff to the settlement judge in this negotiation will be disqualified as a judge, witness, consultant, or expert in any pending or future action relating to the subject matter of this ADR proceeding, including those involving persons who are not parties to this ADR proceeding. Each party agrees that it will not summon the settlement judge or any persons who may have acted as staff to the settlement judge in this negotiation as a witness in any court or administrative proceeding and will not seek to compel the production of any records retained by any of them or the Energy Board of Contract Appeals relating to this negotiation.
- 7.3 It is the intention of the parties to accord party conduct and statements and information communicated during this ADR proceeding the maximum protection against disclosure to third parties available under law. Regardless of its outcome, this proceeding shall be treated as a compromise negotiation for purposes of determining the future disclosure and admissibility of such information under the Federal Rules of Evidence (Rule 408), the

Administrative Dispute Resolution Act, other applicable rules and comparable state statutes and rules. Parties may not use specific offers, stipulations, positions, or statements made during this proceeding for any purpose other than this proceeding, including pending or future litigation.

7.4 Evidence that is otherwise admissible shall not be rendered inadmissible merely as a result of its use during this ADR proceeding.

8. EARLY TERMINATION

8.1 Each party has the right to terminate this ADR proceeding at any time. The settlement judge also may terminate this at any time if, in the opinion of the settlement judge, further negotiations are unlikely to be fruitful, or for other good reasons that need not be disclosed.

9. MODIFICATION OF AGREEMENT

9.1 The parties may modify all or portions of this agreement at anytime by mutual agreement.

10. SETTLEMENT AGREEMENT

10.1 The parties do not contemplate that they will necessarily prepare and sign a complete written settlement agreement in final form during negotiation sessions. Rather, they intend to arrive at the substance of a settlement agreement and to complete the full text of the agreement promptly after the negotiations. The parties do, however, intend to reduce the substance of any agreements, including any specifically agreed upon language, to a writing that they will initial before the conclusion of the final negotiation session and that these agreements will bind all parties subject to any reviews, approvals or authorizations specified in this agreement. The parties agree to cooperate with one another and to promptly prepare and execute the full text of their agreement.

Dated: _____ **(Name of Party #1)**

By: _____

Principal

Title: _____

Dated: _____ **(Name of Party #2)**

By: _____

Principal

Title: _____

Dated: _____ **Department of Energy Board of Contract Appeals**

_____ ,

Settlement Judge/Mediator

Accepted by

For the Board: _____

Department of Energy Board of Contract Appeals

Sample 2 -- Sample Mediation Agreement without Evaluation

MEDIATION AGREEMENT

This is an agreement to mediate. The disputing parties are (_____) with _____ acting as its principal and (_____) with _____ acting as its principal. The parties voluntarily enter into mediation with the Energy Board of Contract Appeals with the intention of reaching a consensual settlement of their dispute described below. The Board, by its acceptance of this agreement, commits to make _____ available to the parties to serve as the mediator.

1. The Dispute:

(Here briefly describe the dispute and any necessary background to the dispute.)

2. The Role of the Mediator:

- 2.1. The mediator is a neutral facilitator who will assist the parties to reach their own settlement. The mediator will not decide the dispute. The mediator does not offer legal advice. Each party is advised to retain its own attorney to assure that it receives proper legal counsel concerning its interests, rights, and obligations.
- 2.2. The mediator shall not be liable for any acts or omissions related to this ADR proceeding.

3. Confidentiality:

- 3.1. In order for the mediation process to work, open and honest communications are essential. To facilitate such, a party's conduct and statements made in the course of the mediation shall be privileged and, except as expressly agreed in writing, shall be confidential to the mediator and the parties. Negotiating sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept. Additionally, the mediator shall not disclose the conduct and statements made in the course of private meetings and discussions between a party and the mediator unless the party authorizes otherwise.
- 3.2. This mediation is a form of compromise negotiation and any evidence relating to conduct or statements made by a party during the course of the mediation shall not be admissible in any court or administrative proceeding. The parties agree that they will not call the mediator, or any Board employee who acted as staff to the mediator, as a witness in any such proceeding related to this dispute and that they will not subpoena or demand the production of any record, notes, work product or the like of the mediator or such Board employee in any such proceeding.

3.3. The parties, however, expressly agree that this agreement to mediate and any written agreement made and signed by the parties as a result of this mediation may be used in any relevant proceeding except as the parties may otherwise in writing agree. Moreover, if settlement is reached as a result of this mediation, information presented to other parties during the mediation may be used to justify and document any subsequent modifications of the contract based upon the settlement during review or approval processes specified in this agreement.

4. Termination:

The parties intend to continue with the mediation until a settlement is reached. Nevertheless, a party may withdraw from the mediation at any time. It is agreed that before a party decides to withdraw, it will offer to discuss the matter with the other parties and the mediator. Additionally, should the mediator conclude that further mediation is likely to be futile, the mediator may, after discussion with the parties, terminate the mediation. The confidentiality provisions of this agreement shall be unaffected if mediation is terminated without settlement.

5. Authority:

Each of the individuals signing this agreement on behalf of a party warrants that he or she has the authority to sign the agreement and, further, warrants that he or she has the authority to enter into a binding settlement agreement for the matter in dispute except for such reviews and approvals as are specified below. Any party excepting any such review or approvals from the authority to enter into a binding settlement agrees that it will make good faith efforts to complete the reviews and approvals by the times specified for each. The only reviews or approvals excepted, and the time projected for completion of each are:

(List or state "none")

6. Costs:

Each party shall bear its own costs. The Board shall provide the services of neutral without cost to the parties. The Board shall also provide facilities selected by the Board at Board expense. If the parties desire other facilities, the costs shall be borne by the parties, as they shall agree.

7. Schedule:

The parties and the mediator have reserved the following days for the mediation:

8. Settlement Agreement:

The parties will prepare and execute a written agreement setting forth any settlement agreements reached. Parties are not bound by accords reached during the mediation until execution of the

written agreement. The agreement may provide that it is contingent upon completion of such reviews and the obtaining of such approvals as are specified in this mediation agreement.

9. Execution in Counterparts:

This agreement may be executed in counterparts; each of which shall constitute an original and all of which together shall be deemed a single document. The agreement shall be binding upon execution by all signatories and the effective date of the agreement shall be (Here insert date. In order to extend the confidentiality provisions of the agreement to all communications made after the date of the oral commitment to terms of mediation agreement, the date of the oral commitment is usually inserted).

Dated: _____ (Name of Party #1)
By: _____
Principal
Title: _____

Dated: _____ (Name of Party #2)
By: _____
Principal
Title: _____

Dated: _____ Department of Energy Board of Contract Appeals

Mediator

Accepted by
For the Board: _____

Sample 3 -- Mini-Trial

Agreement for Mini-Trial

This Agreement dated this ____ day of _____, 20____ is executed by _____ on behalf of the Department of Energy, and by _____ on behalf of _____, hereinafter referred to as "_____".

RECITALS

- a. On the ____ day of _____, 20____, the parties entered into Contract No. _____ for the _____ at _____, _____.
- b. _____ filed a claim with the contracting officer alleging _____.
- c. _____ certified its claim in accordance with the requirement of the Contract Disputes Act of 1978.
- d. The contracting officer issued a final decision denying _____ claim on _____, 20____.
- e. On _____, 20____, _____ appealed the contracting officer's final decision to the Department of Energy Board of Contract Appeals where the appeal was docketed as EBCA No. _____.
- f. The parties have decided to institute an alternative dispute resolution procedure known as _____, in an effort to voluntarily resolve the dispute without recourse to litigation but also without prejudicing any ultimate litigation.

AGREEMENT

NOW THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

Participants in the Process

- a. The principal representatives for the purpose of these proceedings will be _____ for the Department of Energy and _____ for _____. The principal representatives have authority to settle the dispute.
- b. The parties explicitly recognize that the representatives of the Department of Energy may not have the final authority to agree to all negotiable matters. In some instances, they must obtain final approval from other officials.

c. All participants in the process agree to act in good faith in all aspects of the process, including obtaining any final approval needed.

d. After the process has begun, additional parties may join the process only with the concurrence of all parties already represented.

Purpose of the Proceeding

The purpose of this Mini-Trial is to negotiate a settlement of (describe dispute).

Scheduling

a. The mini-trial will commence with a conference at a time and place convenient to the parties in _____, _____, on _____, 20____.

b. The principals shall reserve _____ days for the mini-trial conference and negotiations. A schedule shall be agreed upon outlining the order of presentation and the time allotted to each party.

c. Following the conclusion of the mini-trial conference, the principal representatives should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within the period reserved in paragraph (b), the mini-trial shall be terminated and the litigation will continue.

Discovery

a. The parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed _____ days before the proceeding. Discovery taken for this proceeding shall be admissible in any subsequent litigation should this proceeding fail to resolve the claim. Discovery during the period prior to the proceeding shall not restrict either party's ability to take additional discovery at a later date. In particular, the parties may take limited depositions to prepare for the proceeding. If the parties do not resolve this dispute through this procedure, more complete depositions of the same individuals may be necessary. In such case, the depositions taken for the mini-trial proceeding shall not limit a party's right to additional depositions of the same individuals into the same or additional subject matters for use in a subsequent hearing before the Board.

b. Each party agrees not to withhold information properly requested by the other. Nothing in this paragraph requires either party to disclose information that is not subject to disclosure under applicable laws or regulations. If a party believes it cannot or should not release certain information, it will describe the information withheld and state the reason for not providing it.

c. A party may withhold documents that it reasonably believes are privileged. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document withheld falls within the same category as the document produced.

d. The agency agrees to submit to _____, no later than _____ days prior to commencement of the _____, any audit report or cost or pricing analysis associated with the issues of the proceeding. _____ agrees to provide a quantum analysis that sets forth the amounts sought and the basis for these amounts within the same time frame.

e. Each party shall provide to the other party and the Mediator a written position paper by _____, 20____. This paper shall be no longer than _____, 8 x 11 double-spaced pages in length, and shall include the highlights of the claims and defenses, the nature of the damages, and discuss the critical issues in the case.

f. The parties will use stipulations to the maximum extent practicable.

g. No later than _____ days before the proceeding, the parties will exchange a listing of witnesses and experts with a brief description of the expected testimony of each.

Confidentiality

a. This proceeding is confidential. The parties and the neutral agree that they will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree in writing or as authorized by law. Regardless of its outcome, this proceeding shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence (Rule 408) and other laws and rules.

b. The Neutral shall be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the proceeding, including those between non-parties to the proceeding.

c. If the dispute is settled as a result of the proceeding, all information prepared for, and presented at, the proceeding may be used to justify and document any subsequent modifications of the contract based upon the settlement.

d. Specific offers, stipulations, positions, or statements made during the proceeding may not be raised by other parties for any other purpose or as a basis for pending or future litigation.

e. Evidence that is otherwise admissible shall not be rendered inadmissible merely as a result of its use at the proceeding.

Termination and Modification

- a. Each person has the right to terminate the proceeding at any time for any reason.
- b. The parties may modify all or portions of this agreement at any time by mutual agreement.

Procedure

- a. _____ shall be the Mini-Trial Neutral. The role of the neutral is that of an advisor. The neutral will preside at the mini-trial conference. The neutral may ask questions of witnesses only if mutually agreed to by the principals. Upon request by either principal, the neutral will provide comments as to the relative strengths and weaknesses of that party's position. The neutral will attend negotiation sessions with the principals following the conference unless a party otherwise requests.
- b. The agency will provide the neutral with copies of the Rule 4 appeal file of the Board case. Attorneys may provide other materials, statements, exhibits and depositions to the Neutral after providing the same materials to the other party's attorney. Attorneys shall not communicate ex parte with the Neutral.
- c. No transcript or recording shall be made of the mini-trial conference.
- d. Presentations during the mini-trial conference will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principals may ask any question of the witnesses that they deem appropriate.
- e. Attorneys may structure their presentations at the mini-trial conference in any manner they believe will be effective. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions, oral argument or any combination of these. The parties may use any type of written material that will advance the progress of the mini-trial.
- f. The parties may not deviate from the agreed schedule except in extraordinary circumstances and with concurrence of the respective principals and the Neutral.

Sample 4 -- Roundtable Mediation (Hybrid -- Mini-trial, Mediation, and Optional Arbitration)

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT

This is an alternative dispute resolution (ADR) agreement. The disputing parties (Parties) are the United States Department of Energy and _____. The dispute to be resolved is as follows: *(Typically Parties should include a statement of the dispute sufficient to identify it, to specify its scope, and, if applicable, to establish its status under the Contract Disputes Act or other relevant law or rule. This statement should include an identification of relevant contract(s); if applicable, a description of any claim or claims submitted to the contracting officer together with a statement of any actions taken by the contracting officer with respect to such claims such as a final decision; and, if applicable, a statement that the dispute has been filed with the Energy Board of Contract Appeals or other forum).*

The Parties mutually agree as follows:

1. Effective Date: The effective date of this agreement is *(usually the date when the parties first reach an understanding that they will engage in ADR)*.
2. Phases of the ADR Process: The planned process consists of the following five phases: (1) information exchange, (2) written submissions, (3) oral presentations, (4) moderated discussions, and (5) negotiation. [*Optional*: If the Parties are unable to reach a settlement agreement, the Neutral Advisor as provided in this agreement shall resolve the matter.] The Parties expect to engage in a continuing open dialogue between themselves, and with the Neutral Advisor, regarding the process and their plans, needs and expectations.
3. Participants in the Process:
 - a. Principals: The Parties have designated _____ and _____ to serve as Principals. The planned process anticipates that Principals will become generally informed about the dispute and will review the written submissions before the presentations and will listen to presentations, engage in discussions with all Participants, and negotiate and enter into a settlement agreement. (Note: This process works best when both Principals are persons of stature within their organizations and possess a measure of detachment from the dispute and position taken.)
 - b. Presenters: A Party may present its position in any manner that it believes will most effectively meet the needs of the Principals and may use any personnel it chooses for this purpose. Parties will designate their Presenters, including their Lead Presenter, in

their written submissions. Parties will discuss appropriate choices of Presenters before their formal designation in an attempt to agree on a balance in representation.

- c. Sources: Sources are individuals possessing fact or technical knowledge which may be significant to the Principals or who have performed relevant analyses. Presenters may use sources in their presentations. Parties will make sources used in their presentations available to participate in the discussion phase. Additional Sources may also be Participants in the discussion phase.
- d. Neutral Advisor: The Parties have designated _____, an administrative judge of the Energy Board of Contract Appeals, as the Neutral Advisor. Parties may also selectively include as Participants individuals whose program or management responsibilities could be affected by a settlement.
- e. Participants: Participants are the Principals, Presenters, Sources, and Neutral Advisor. Parties may also selectively include as Participants individuals whose program or management responsibilities could be affected by a settlement.

4. Generally Applicable Principles:

- a. The purpose of this proceeding is to provide the Principals with the information, assistance, and environment necessary to negotiate a fair and reasonable settlement agreement. It is understood that this process is intended as a collaborative process and requires mutual confidence in the good faith of all participants. Candid, forthright, balanced presentations serve the process. Distorted, selective presentations undermine it, as do personal attacks. Both parties agree to comport themselves in accordance with these principles.
- b. The Principals may mutually agree to changes to this agreement or to the planned process as best serves their needs.
- c. The Neutral Advisor shall implement this agreement and any changes adopted by the Principals. The Neutral Advisor will moderate the presentations and discussions and will participate as an advisor to the Principals during negotiations as they request. The Neutral Advisor may limit attendance at, or participation in, any meeting during the process subject to either Principal's disapproval.
- d. Either Party may call a caucus at any time; however, all Participants will endeavor to keep the process active until settlement has been reached.
- e. Principals may enter into a settlement agreement conditioned upon required reviews and approvals. The Parties agree, however, that they will endeavor to promptly

secure all necessary approvals of agreements reached and the Principals personally agree that they will use their best efforts to secure such approvals.

- f. A Party may not replace its designated Principal except with the consent of the other Party.
 - g. Each Party has the right to terminate this proceeding after first consulting with the Neutral Advisor and discussing its intent with the other Party.
 - h. Each Party will bear its own expenses [*Optional*: including attorney fees and expenses]. The Energy Board of Contract Appeals will provide the Neutral Advisor and facilities for the presentation, discussions, and negotiation without charge to the Parties.
 - i. The Neutral Advisor shall not be liable for any act or omission related to this ADR proceeding.
 - j. In the event this ADR process terminates without a settlement of all issues, the Neutral Advisor shall not be eligible to further participate as a member of the Energy Board of Contract Appeals with respect to this dispute.
5. Schedule:
- a. Oral Presentations: Oral presentations, discussions and negotiations will be conducted beginning _____ at an hour and location to be determined by the Neutral Advisor after discussion with the Parties.
 - b. Written Submission: Parties will supply two copies of their written submissions to the opposing Party, and one copy to the Neutral Advisor, so as to be received no later than (*usually 10*) days prior to the oral presentations.
 - c. Information Exchange: The Parties shall schedule and arrange their information exchanges so that each Party has that information which it will need to prepare its written submission in sufficient time and that any remaining exchanges will be performed in sufficient time for the oral presentations.
6. Confidentiality:
- a. The Parties agree that this process, beginning with the effective date of this agreement, is confidential and proprietary and for the purposes of alternative dispute resolution and compromise negotiations. The Parties intend all conduct and statements of Participants during the course of this process to be accorded the maximum protections under law against disclosure to third parties or against use as evidence in subsequent litigation.

- b. The Parties and the Neutral Advisor agree that they will not disclose to any non-participant any information acquired during this proceeding except as required by law or permitted by this or other subsequent written agreement between the Parties. The Parties will take prudent and reasonable measures to prevent unauthorized disclosure.
- c. Nothing in this agreement shall preclude a Party from disclosing this agreement or any resulting settlement agreement. Further, nothing in this agreement shall prevent a Party from disclosing otherwise confidential information to others within its organization when such disclosure is necessary for a required review or approval, provided, that the disclosure is made under arrangements precluding further disclosure except as required by law.
- d. In the event a settlement agreement is reached, otherwise confidential information may be used to support and justify resulting contract modifications.
- e. Nothing in this agreement shall render otherwise discoverable evidence inadmissible merely because it was presented or disclosed during this process.
- f. No transcript or recording shall be made of these proceedings.
- g. The Neutral Advisor shall be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the proceeding.

7. Information Exchange: The parties recognize that surprises occurring during the negotiation sessions are counterproductive and may interfere with successful negotiation. Accordingly, each Party agrees that it will:

- a. Promptly identify and exchange, or make available to the other for inspection and copying, all relevant documents and other records and it will complete such in a timely, economical, and efficient manner;
- b. Cooperate with the other in identifying, locating and arranging the production of information and persons with pertinent knowledge, all in a timely, economical, and efficient manner;
- c. Make (*two*) potential Sources requested by the other Party available for interview by the other Party.
- d. Not withhold pertinent information requested by the other Party, which is not privileged. If a Party possesses records which it believes are privileged, it shall for each such record withheld, provide a description and the reason for not providing it.
- e. Audits shall be completed prior to written submissions and copies timely provided to the other party.

8. Written Submissions: To facilitate meaningful evaluation and to enhance negotiations, it is important that each Party and the Neutral Advisor have a sound understanding of the positions of each Party and the principal bases of their respective positions. It is also important for Parties to know what resources the other Party have available. Accordingly, each Party shall furnish to the other party's Principal and the Neutral Advisor the following in compliance with the schedule:

- a. A statement of issues to be addressed: *(If feasible, the statement should be a joint statement agreed to between the parties.)*
- b. A list of Participants who will be present or available during the presentations and discussions. If the reason for an individual's presence would not be apparent to the other Party, the listing should include an informative explanation.
- c. A position paper no longer than *(insert number of pages)* pages in length discussing the issues including any additional issues upon which agreement could not be reached. (For a paper to have maximum value, Parties should include what they believe to be key facts and the main points, including legal authority, supporting their position on each issue).
- d. Copies of records and information, including by way of example, written communications, internal memoranda, photographs, invoices, claims, audit reports, price analyses, etc., which the party expects to be useful during this proceeding. As a matter of convenience, bulky, long or difficult to reproduce items known to be in the possession of another Party need not be furnished provided the item is adequately identified by a full description. Likewise, bulky, long or difficult to reproduce items previously filed with the Board need not be furnished to the Neutral Advisor, provided the items and the filing in which they are included are adequately described. The Parties will attempt to arrive at practical solutions if difficulties are encountered. If such solutions prove elusive, the Parties should consult the Neutral Advisor for assistance.
- e. A list of potential sources within the other Party's organizational control that the other Party had previously agreed would be made available for the presentations and discussions.

9. Oral Presentations:

- a. A Party, in any manner that the Party believes will assist the Principals and with whatever aids it believes will be helpful, may make an oral presentation. For instance, sources may be used to present fact or technical information and knowledge in either question or answer or narrative format or a combination of both maybe

employed in the discretion of the presenters. Charts, graphs, photographs, videotapes and other media may be used.

- b. Each presentation will be limited to (*usually one to two hours*).
- c. Rules of evidence will not apply.
- d. (Name of the party seeking redress) will make the first presentation.

10. Discussions:

- a. At the conclusion of the presentations, each issue will be discussed using a moderated roundtable format. Each Party will have its sources including key employees, consultants, and subcontractor personnel, available as participants. Additionally, individuals listed by a Party as Participants in the written submissions will be available unless the Party provides timely notice of their absence.
- b. The proponent of each issue will introduce it with a review of the Party's position giving due consideration to the presentations made. The Neutral Advisor will then moderate a discussion of the issue calling upon participants as they request to be heard. Principals are encouraged to enter fully into the discussions and to ask questions and follow up on answers. Participants will refrain from side discussions and will speak only when called upon by the Neutral Advisor.
- c. Attorneys may invite Sources to contribute their knowledge to the discussions and, thus, ensure that matters of significance are properly developed. Sources will not be "cross-examined."
- d. Discussions will continue until the Principals agree they are prepared to proceed to negotiations.
- e. Each Party may make a brief summation to the Principals at the conclusion of the discussions. Summations may not exceed (*usually 30 minutes*).

11. Negotiations: After discussions have been completed, the Principals and the Neutral Advisor will meet to negotiate a settlement, which is fair and responsive to the interests of both parties. The Principals may engage in these negotiations with or without the Neutral Advisor. The Principals may request the neutral advisor to present views on any matter or to propose resolutions for one or more issues. Either Principal may request, from time to time, a private confidential conference with the neutral advisor to discuss possible settlement positions and related matters. The Neutral Advisor shall maintain the content of such conferences in confidence except as the principal may authorize.

12. [*Optional:* Resolution by the Neutral Advisor: If the Principals do not reach a settlement, the Neutral Advisor shall resolve the dispute by issuing a written resolution within 14 days after the conclusion of negotiations and simultaneously furnishing each Principal with a copy of the resolution both by facsimile and U.S. Postal Service mail. The Neutral Advisor's resolution shall be fair and take into account the neutral advisor's assessment of the parties' relative litigation risks were the matter to have proceeded to a judicial decision. Ordinarily, the resolution shall be final and binding upon the parties unless either Principal rejects it by written notice to the other Principal postmarked not later than 14 days after the date of the resolution.]

Sample 5 -- Subcontract Arbitration Clause³

Disputes

(a) Definitions. For purposes of this clause:

(1) "Board" means the Energy Board of Contract Appeals that has been established by the Secretary of Energy pursuant to Section 8(a)(1) of the Contract Disputes Act of 1978, 41 U.S.C. ' 607(a)(1).

(2) "Arbitration decision" means a decision of the Board in an arbitration pursuant to this clause.

(3) "Claim" means a written demand or written assertion by either contracting party seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of a contract term, or other relief arising under or relating to this subcontract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant.

A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The Subcontractor may convert such submission into a claim if it is disputed either as to liability or amount, or is not acted upon in a reasonable time, by demanding a decision by the Procurement Manager.

(4) "Counterclaim" means a claim asserted in a pleading filed with the Energy Board of Contract Appeals in an arbitration proceeding pursuant to this clause which claim arises from the same occurrence or transaction relating to this subcontract that is the subject matter of the opposing party's claim. Counterclaims do not need to be submitted to the Procurement Manager for decision.

(5) "Procurement Manager" means a person designated by the University to decide claims of the Subcontractor or of the University against the Subcontractor.

(6) "Rules of the Board" means the Board's rules promulgated at 10 C.F.R. Part 1023, Subpart A.

(b) Nature of This Subcontract. This subcontract is not a Government contract and therefore is not subject to the Contract Disputes Act of 1978 (41 U.S.C. " 601-613). The parties agree that the DOE is not a party to this subcontract and is not directly liable to the Subcontractor for

³ The University of California, the prime DOE contractor, developed this clause for the Los Alamos National Laboratory. It is included in its solicitations for construction and in resulting contracts. It also has variations for

claims and disputes within the purview of this clause. Further, the parties agree that, for the purposes of this subcontract, the University is not an agent of the DOE, and that neither the presence of this clause in the subcontract nor provision for arbitration by the Board shall create or imply the existence of privity of contract between the Subcontractor and the DOE.

(c) Scope of Clause. The parties agree that the rights and procedures set forth in this clause are the exclusive rights and procedures for the resolution of all claims and disputes arising under, or relating to, this subcontract. The parties shall be bound by an arbitration decision, which shall be enforceable as provided in the Federal Arbitration Act (9 U.S.C. 1 *et seq.*) and the terms of this clause.

(d) Submission of Claims by Subcontractor, Procurement Manager's Decision

(1) Unless otherwise provided in this subcontract, the Subcontractor must file any claim against the University within 30 calendar days after the Subcontractor knew or should have known the facts giving rise to the claim.

(2) The Subcontractor must submit any claim in writing first to the University's procurement specialist, who shall attempt to resolve the matter within a reasonable amount of time. If the University's procurement specialist does not resolve the claim in a manner satisfactory to the Subcontractor, and the Subcontractor desires to pursue further action, the Subcontractor must submit the claim in writing to the Procurement Manager.

(3) Within 60 days of receipt of the claim, the Procurement Manager must issue a decision or notify the Subcontractor of the time within which a decision will be issued, which shall be reasonable, taking into account such factors as the size and complexity of the claim and the adequacy of the information provided by the Subcontractor in support of the claim. If the Procurement Manager fails to issue a decision on a subcontract claim within the specified period, the Subcontractor may make a demand for arbitration with the Board as if the claim had been denied.

(4) The University's procurement specialist may also submit a claim against the Subcontractor in writing to the Procurement Manager, who shall issue a written decision.

(5) The decision of the Procurement Manager shall be final and conclusive unless the complaining party demands arbitration by the Board in accordance with the terms of this clause.

(e) Demand for Arbitration. If the decision of the Procurement Manager is not satisfactory to a complaining party, and the complaining party desires to pursue further action, the

complaining party must, within 45 days after receipt of the Procurement Manager's decision, submit to the Board a written demand for arbitration of the claim. The Board shall arbitrate the claim and any counterclaims in accordance with the Rules of the Board.

(f) Right to a Hearing; Costs. In any arbitration pursuant to this clause, both parties shall be afforded an opportunity to be heard and to present evidence in accordance with the Rules of the Board. Unless the Board orders otherwise, each party shall pay its own costs of prosecuting or defending an arbitration before the Board.

(g) Arbitration Decisions; Judicial Review. An arbitration decision shall be final and conclusive unless a party, within 120 days after the date of receipt of a copy of the decision, files an action to vacate, modify, or correct the decision pursuant to the Federal Arbitration Act.

(h) Subcontractor Performance Pending Claim Resolution. The Subcontractor shall proceed diligently with performance of this subcontract and shall comply with any decision of the University's procurement specialist or Procurement Manager, pending final resolution of any claim or dispute arising under, or relating to, this subcontract.

(i) No Other Court Action. No action based upon any claim or dispute arising under, or relating to, this subcontract shall be brought in any court except as provided in this clause.

(j) Choice of Law. This subcontract shall be governed by Federal law as provided in this subparagraph. Irrespective of the place of award, execution or performance, this subcontract shall be construed and interpreted, and its validity determined, according to the Federal common law of Government contracts as enunciated and applied to prime Government contracts by the Board and Federal courts having appellate jurisdiction over the decisions of the Board rendered pursuant to the Contract Disputes Act of 1978. The Federal Arbitration Act and other Federal statutes (including the Contract Disputes Act of 1978), Federal rules (including the Federal Acquisition Regulation, the Department of Energy Acquisition Regulation, and the rules promulgated by the Board) shall apply in accordance with their respective provisions.

(k) Interest. Interest on amounts adjudicated due and unpaid by a party shall be paid from the date the complaining party files a demand for arbitration with the Board. Interest on claims shall be paid at the rate established by the Secretary of the Treasury of the United States pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

Sample 6 -- Sample Provisions for Board Order for Summary Trial with Summary Decision

Pursuant to the joint request of the parties, the Board will proceed under the following summary procedure:

1. A pre-hearing conference will be held by telephone at *(time)* on *(date)*. The evidentiary hearing *(trial)* will begin on *(date)* at a time and place to be determined and may continue for a maximum of *(number, usually 1-2)* days.
2. The parties shall cooperate in the avoidance of surprises through the timely and good faith exchange of information relevant to the case. They shall promptly exchange relevant documents, and each party shall have the continuing duty to promptly provide the other party with additional documents as they are identified. The parties shall also exchange lists of witnesses that they intend to call. In all events, document and witness list exchange shall be completed by delivery not later than 3 working days before the evidentiary hearing. No other discovery shall be conducted without Board approval which shall be granted only when the requesting party has established its need and the discovery proposed is proportionate to the matters in dispute and is the least burdensome form of discovery that will satisfy the needs of the party. No documents not timely exchanged shall be admitted into evidence.
3. Each party shall have *(Insert Number)* hours to present its case. Parties may reserve a portion of their allotted time for rebuttal.
4. In the interests of finality, cost containment and speed, each party agrees that the Board's decision will be a summary, binding bench or written decision rendered by the presiding judge alone promptly following the trial. Post-trial briefs will not be permitted except as directed by the presiding judge. If the presiding judge determines that reference to the transcript of the proceeding is appropriate prior to decision, the judge will render a decision promptly, and, if practicable, within 10 days after receipt of the transcript. The decision, whether from the bench or in writing, will be in summary form without detailed findings of fact or extended rationale. The decision of the presiding judge will be final and binding upon all parties unless obtained through fraud. Each party expressly waives:
 - a. Any rights to appeal or to obtain judicial review;
 - b. Any right to have its case decided by a panel of administrative judges;
 - c. Any other rights inconsistent with the forgoing procedures.

5. Objections to or motions for resettlement of this ORDER shall be filed with the Board within five days of receipt hereof.

APPENDIX III: CHECKLIST FOR NON-ADJUDICATIVE ADR AGREEMENTS

1. Identify parties and representatives.
2. Name neutral or provide for mechanisms to identify neutral.
3. Effective date (Usually date of oral agreement to terms of ADR).
4. Describe dispute; include identification of contract and, if subcontract dispute, include identification of prime DOE contract and any intermediate contracts.
5. Specify scope of ADR. Are parties to address specified issues only, or is global settlement of all issues sought.
6. Describe ADR process and procedures.
7. Specify role of principles and attorneys
8. Establish dates for key events.
9. Specify planned duration of negotiation session.
10. Specify neutral's role:
 - a. Neutral and impartial.
 - b. Controls process?
 - c. May meet privately with parties?
 - d. Provides evaluations?
 - e. Advocate for settlement?
 - f. "Rules" on documents claimed to be privileged?
 - g. May terminate? Under what circumstances?
 - h. Provision stating neutral not personally liable.
11. Specify procedure (and schedule) for document and "evidence" production, if any.
12. Confidentiality Provisions: (consider the following)
 - a. Specify that which is to be confidential, i.e., ADR agreement? Information produced for ADR and statements made during ADR? Settlement agreement or terms?
 - b. Agreement to maintain confidentiality of specified information and not to voluntarily disclose to unauthorized persons.

- c. Specify to whom confidential matters may be disclosed.
 - d. Agreement not to use statements and information produced for ADR in future litigation.
 - e. Invoke statutory protections against third party subpoena -- E.g., State and/or Federal rules of evidence providing protection against discovery of or use as evidence.
 - f. Invoke protections provided by the Administrative Dispute Resolution Act in 5 U.S.C. 574, if applicable and appropriate.
 - g. Recite exemptions (b)(4) and (b)(5) to the Freedom of Information Act (5 U.S.C. 552), if applicable and appropriate, and provide the factual basis for exemption.
 - h. Recite that evidence that is otherwise admissible shall not be made inadmissible as a result of its use at the ADR proceeding.
13. Provide for any necessary internal reviews or approvals; assure that confidentiality provisions do not prevent access to information necessary for reviews and approval.
 14. Include provisions for party initiated withdrawal and termination?
 15. Include provision for drafting and executing settlement agreement.
 16. Execute (may be done in counterparts, if so provided in the agreement).
 17. Acceptance of the agreement by the Board.

APPENDIX IV -- Board Organization and Authorities. 10 C.F.R. Part 1023, Overview.

(Begins on next page)

PART 1023--CONTRACT APPEALS

Overview: Organization, Functions and Authorities

- ' 1023.1 Introductory Material on the Board and Its Functions.
- ' 1023.2 Organization and Location of the Board.
- ' 1023.3 Principles of General Applicability.
- ' 1023.4 Authorities.
- ' 1023.5 Duties and Responsibilities of the Chair.
- ' 1023.6 Duties and Responsibilities of Board Members and Staff.
- ' 1023.7 Board Decisions; Assignment of Judges.
- ' 1023.8 Alternative Dispute Resolution (ADR).
- ' 1023.9 General Guidelines.

' 1023.1 Introductory Material on the Board and Its Functions.

- (a) The Energy Board of Contract Appeals ("EBCA" or "Board") functions as a separate quasi-judicial entity within the Department of Energy (DOE). The Secretary has delegated to the Board's Chair the appropriate authorities necessary for the Board to maintain its separate operations and decisional independence.
- (b) The Board's primary function is to hear and decide appeals from final decisions of DOE contracting officers on claims pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 et seq. The Board's Rules of Practice for these appeals are set forth in subpart A of this part. Rules relating to recovery of attorney fees and other expenses under the Equal Access to Justice Act are set forth in subpart C of this part.
- (c) In addition to its functions under the CDA, the Secretary, in Delegation Order 0204-162, has authorized the Board to:
 - (1) Adjudicate appeals from agency contracting officers' decisions not taken pursuant to the CDA (non-CDA disputes) under the rules of practice set forth in subpart A of this part;
 - (2) Perform other quasi-judicial functions that are consistent with the Board members' duties under the CDA as directed by the Secretary.
 - (3) Serve as the Energy Financial Assistance Appeals Board to hear and decide certain appeals by the Department's financial assistance recipients as provided in 10 CFR 600.22, under rules of procedure set forth in 10 CFR Part 1024;

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- (4) Serve as the Energy Invention Licensing Appeals Board to hear and decide appeals from license terminations, denials of license applications and petitions by third-parties for license terminations, as provided in 10 CFR Part 781, under rules of practice set forth in subpart A of this part, modified by the Board as determined to be necessary and appropriate with advance notice to the parties; and
- (5) Serve as the Energy Patent Compensation Board to hear and decide, as provided in 10 CFR Part 780, certain applications and petitions filed under authority provided by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (1954), and the Invention Secrecy Act, 35 U.S.C. 181-188, including:
 - (i) Whether a patent is affected with the public interest;
 - (ii) Whether a license to a patent affected by the public interest should be granted and equitable terms therefor; and
 - (iii) Whether there should be allotment of royalties, award, or compensation to a party contributing to the making of certain categories of inventions or discoveries, or an owner of a patent within certain categories, under rules of practice set forth in subpart A of this part, modified by the Board as determined to be necessary and appropriate, with advance notice to the parties.
- (d) The Board provides alternative disputes resolution neutral services and facilities, as agreed between the parties and the Board, for:
 - (1) Disputes related to the Department's prime contracts and to financial assistance awards made by the Department.
 - (2) Disputes related to contracts between the Department's cost-reimbursement contractors, including Management and Operating Contractors (M&Os) and Environmental Remediation Contractors (ERMCS), and their subcontractors. Additionally, with the consent of both the responsible prime DOE cost-reimbursement contractor and the cognizant DOE contracting officer, the Board may provide neutral services and facilities for disputes under second-tier subcontracts where the costs of litigating the dispute might be ultimately charged to the DOE as allowable costs through the prime contract.
 - (3) Other matters involving DOE procurement and financial assistance, as appropriate.

' 1023.2 Organization and Location of the Board.

(a) Location of the Board.

- (1) The Board's offices are located at, and hand and commercial parcel deliveries should be made to:

Board of Contract Appeals
U.S. Department of Energy
950 L'Enfant Plaza, SW; Suite 810
Washington, DC 20024

- (2) The Board's mailing address is as follows: (The entire nine digit ZIP code should be used to avoid delay)

Board of Contract Appeals
U.S. Department of Energy
HG-50, Building 950
Washington, DC 20585-0116

- (3) The Board's telephone numbers are: (202) 287-1900 (voice) and (202) 287-1700 (facsimile).

(b) Organization of the Board.

As required by the CDA, the Board consists of a Chair, a Vice Chair, and at least one other member. Members are designated Administrative Judges. The Chair is designated Chief Administrative Judge and the Vice Chair, Deputy Chief Administrative Judge.

' 1023.3 Principles of General Applicability.

- (a) Adjudicatory functions. The following principles shall apply to all adjudicatory activities whether pursuant to the authority of the CDA, authority delegated under this part, or authority of other laws, rules, or directives.

- (1) The Board shall hear and decide each case independently, fairly, and impartially.
- (2) Decisions shall be based exclusively upon the record established in each case. Written or oral communication with the Board by or for one party is not permitted without participation or notice to other parties. Except as provided by law, no person or agency, directly or indirectly involved in a matter before the Board, may submit off the record to the Board or the Board's staff any evidence, explanation, analysis, or advice (whether written or oral) regarding any matter at issue in an appeal, nor shall any member of the Board or of the Board's staff accept or consider ex parte communications from any person. This provision does not apply to consultation among Board members or staff or to other persons acting under authority expressly granted by the Board with notice to parties nor

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- does it apply to communications concerning the Board's administrative functions or procedures, including ADR.
- (3) Decisions of the Board shall be final agency decisions and shall not be subject to administrative appeal or administrative review.
- (b) Alternative Dispute Resolution (ADR) Functions.
- (1) Board judges and personnel shall perform ADR related functions impartially, with procedural fairness, and with integrity and diligence.
 - (2) Ex parte communications with Board staff and judges limited to the nature, procedures, and availability of ADR through the Board are permitted and encouraged. Once parties have agreed to engage in ADR and have entered into an ADR agreement accepted by the Board, ex parte communications by Board neutrals, support staff and parties shall be as specified by any applicable agreements or protocols and as is consistent with law, integrity, and fairness.
 - (3) Board-supplied neutrals and support personnel shall keep ADR matters confidential and comply with any confidentiality requirements of ADR agreements accepted by the Board. Board personnel may not disclose any confidential information unless permitted by the parties or required to do so by law.

' 1023.4 Authorities.

- (a) Contract Disputes Act Authorities. The CDA imposes upon the Board the duty, a grants it the powers necessary, to hear and decide, or to otherwise resolve through agreed procedures, appeals from decisions made by agency contracting officers on contractor claims relating to contracts entered into by the DOE or relating to contracts of another agency, as provided in Section 8(d) of the CDA, 41 U.S.C. 607(d). The Board may issue rules of practice or procedure for proceedings pursuant to the CDA. The CDA also imposes upon the Board the duty, and grants it powers necessary, to act upon petitions for orders directing contracting officers to issue decisions on claims relating to such contracts, 41 U.S.C. 605(c)(4). The Board may apply through the Attorney General to an appropriate United States District Court for an order requiring a person who has failed to obey a subpoena issued by the Board to produce evidence or to give testimony, or both, 41 U.S.C. 610.
- (b) General Powers and Authorities. The Board's general powers include, but are not limited to, the powers to:
- (1) Manage its cases and docket; issue procedural orders; conduct conferences and hearings; administer oaths; authorize and manage discovery, including

depositions and the production of documents or other evidence; take official notice of facts within general knowledge; call witnesses on its own motion; engage experts; dismiss actions with or without prejudice; decide all questions of fact or law raised in an action; and make and publish rules of practice and procedure.

- (2) Exercise, in proceedings to which it applies, all powers granted to arbitrators by the Federal Arbitration Act, 9 U.S.C. 1-14, including the power to issue summonses.
- (c) In addition to its authorities under the CDA, the Board has been delegated, by Delegation Order 0204-162 issued by the Secretary of Energy, the following authorities:
 - (1) Issue rules, including rules of procedure, not inconsistent with this section and departmental regulations;
 - (2) Issue subpoenas under the authority of ' 161.c of the Atomic Energy Act of 1954, 42 U.S.C. 2201(c), as applicable;
 - (3) Such other authorities as the Secretary may delegate.

' 1023.5 Duties and Responsibilities of the Chair.

The Chair shall be responsible for the following:

- (a) The proper administration of the Board;
- (b) Assignment and reassignment of cases, including alternative dispute resolution (ADR) proceedings, to administrative judges, hearing officers, and decision panels;
- (c) Monitoring the progress of individual cases to promote their timely resolution;
- (d) Appointment and supervision of a Recorder;
- (e) Arranging for the services of masters, mediators, and other neutrals;
- (f) Issuing delegations of Board authority to individual administrative judges, panels of judges, commissioners, masters, and hearing officers within such limits, if any, which a majority of the members of the Board shall establish;
- (g) Designating an acting chair during the absence of both the Chair and the Vice Chair;
- (h) Designating a member of another Federal board of contract appeals to serve as the third member of a decision panel if the Board is reduced to less than three members because of vacant positions, protracted absences, disabilities or disqualifications;
- (i) Authorizing and approving ADR arrangements for Board cases; obtaining non-Board personnel to serve as settlement judges, third-party neutrals, masters and similar capacities; authorizing the use of Board-provided personnel and facilities in ADR capacities, for matters before the Board, and for other matters when requested by officials

- of the DOE; and entering into arrangements with other Federal administrative forums for the provision of personnel to serve in ADR capacities on a reciprocal basis;
- (j) Recommending to the Secretary the selection of qualified and eligible members. New members shall, upon selection, be appointed to serve as provided in the CDA;
 - (k) Determining whether member duties are consistent with the CDA; and
 - (l) Reporting Board activities to the Secretary not less often than biennially.

' 1023.6 Duties and Responsibilities of Board Members and Staff.

- (a) As is consistent with the Board's functions, Board members and staff shall perform their duties with the highest integrity and consistent with the principles set forth in ' 1023.3.
- (b) Members of the Board and Board attorneys may serve as commissioners, magistrates, masters, hearing officers, arbitrators, mediators, and neutrals and in other similar capacities.
- (c) Except as may be ordered by a court of competent jurisdiction, members of the Board and its staff are permanently barred from ex parte disclosure of information concerning any Board deliberations.

' 1023.7 Board Decisions; Assignment of Judges.

- (a) In each case, the Chair shall assign an administrative judge as the Presiding Administrative Judge to hear a case and develop the record upon which the decision will be made. A presiding judge has authority to act for the Board in all non-dispositive matters, except as otherwise provided in this part. This subparagraph shall not preclude the Presiding Administrative Judge from taking dispositive actions as provided in this part or by agreement of the parties. Other persons acting as commissioners, magistrates, masters, or hearing officers shall have such powers as the Board shall delegate.
- (b) Except as provided by law, rule, or agreement of the parties, contract appeals and other cases are assigned to a deciding panel established by the Board Chair consisting of two or more administrative judges.
- (c) The concurring votes of a majority of a deciding panel shall be sufficient to decide an appeal. All members assigned to a panel shall vote unless unavailable. The Chair will assign an additional member if necessary to resolve tie votes.

' 1023.8 Alternative Dispute Resolution (ADR).

- (a) Statement of Policy. It is the policy of the DOE and of the Board to facilitate consensual resolution of disputes and to employ ADR in all of the Board's functions when agreed to by the parties. ADR is a core judicial function performed by the Board and its judges.
- (b) ADR for Docketed Cases. Pursuant to the agreement of the parties, the Board, in an exercise of discretion, may approve either the use of Board-annexed ADR (ADR which is conducted under Board auspices and pursuant to Board order) or the suspension of the Board's procedural schedule to permit the parties to engage in ADR outside of the Board's purview. While any form of ADR may be employed, the forms of ADR commonly employed using Board judges as neutrals are: case evaluation by a settlement judge (with or without mediation by the judge); arbitration; mini-trial; summary (time and procedurally limited) trial with one-judge; summary binding (non-appealable) bench decision; and fact-finding.
- (c) ADR for Non-Docketed Disputes. As a general matter the earlier a dispute is identified and resolved, the less the financial and other costs incurred by the parties. When a contract is not yet complete, there may be opportunities to eliminate tensions through ADR and to confine and resolve problems in a way that the remaining performance is eased and improved. For these reasons, the Board is available to provide a full range of ADR services and facilities before, as well as after, a case is filed with the Board. A contracting officer's decision is not a prerequisite for the Board to provide ADR services and such services may be furnished whenever they are warranted by the overall best interests of the parties. The forms of ADR most suitable for mid-performance disputes are often the non-dispositive forms such as mediation, facilitation and fact-finding, mini-trials, or non-binding arbitration, although binding arbitration is also available.
- (d) Availability of Information on ADR. Parties are encouraged to consult with the Board regarding the Board's ADR services at the earliest possible time. A handbook describing Board ADR is available from the Board upon request.

' 1023.9 General Guidelines.

- (a) The principles of this Overview shall apply to all Board functions unless a specific provision of the relevant rules of practice applies. It is, however, impractical to articulate a rule to fit every circumstance. Accordingly, this part, and the other Board rules referenced in it, will be interpreted and applied consistent with the Board's responsibility to provide just, expeditious, and inexpensive resolution of cases before it. When Board rules of procedure do not cover a specific situation, a party may contend that the Board should apply pertinent provisions from the Federal Rules of Civil Procedure. However,

while the Board may refer to the Federal Rules of Civil Procedure for guidance, such rules are not binding on the Board absent a ruling or order to the contrary.

- (b) The Board is responsible to the parties, the public, and the Secretary for the expeditious resolution of cases before it. Accordingly, subject to the objection of a party, the procedures and time limitations set forth in rules of procedure may be modified, consistent with law and fairness. Presiding judges and hearing officers may issue prehearing orders varying procedures and time limitations if they determine that purposes of the CDA or the interests of justice would be advanced thereby and provided both parties consent. Parties should not consume an entire period authorized for an action if the action can be sooner completed. Informal communication between parties is encouraged to reduce time periods whenever possible.
- (c) The Board shall conduct proceedings in compliance with the security regulations and requirements of the Department or other agency involved.

' 1023.101 Scope and Purpose.

The rules of the Board of Contract Appeals are intended to govern all appeal procedures before the Department of Energy Board of Contract Appeals (Board) which are within the scope of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). The rules, with modifications determined by the Board to be appropriate to the nature of the dispute, also apply to all other contract and subcontract related appeals which are properly before the Board.

' 1023.102 Effective date.

The rules of the Board of Contract Appeals shall apply to all proceedings filed on or after June 6, 1997, except that Rule 1(a) and (b) of ' 1023.120 shall apply only to appeals filed on or after October 1, 1995.

' 1023.120 Rules of Practice

The following rules of practice shall govern the procedure as to all contract disputes appealed to this Board in accordance with this subpart:

Preliminary Procedures

Rule

- 1** Appeals, how taken.
- 2** Notice of appeal, contents.
- 3** Docketing of appeals.
- 4** Contracting officer appeal file.

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- 5 Motions.
- 6 Appellants election of procedure.
- 7 Pleadings.
- 8 Amendments of pleadings or record.
- 9 Hearing election.
- 10 Submission of appeal without a hearing.
- 11 Prehearing briefs.
- 12 Prehearing conference.
- 13 Optional Small Claims (Expedited) procedure.
- 14 Optional Accelerated procedure.
- 15 Settling the record.
- 16 Discovery--General.
- 17 Discovery--Depositions, interrogatories, admissions, production and inspection.
- 18 Subpoenas.
- 19 Time and service of papers.

Hearings

- 20 Hearings--Time and place.
- 21 Hearings--Notice.
- 22 Hearings--Unexcused absence of a party.
- 23 Hearings--Rules of evidence and examination of witnesses.

Representation

- 24 Appellant.
- 25 Respondent.

Decisions

- 26 Decisions.
- 27 Motion for reconsideration.
- 28 Remand from court.

Dismissals

- 29 Dismissals without prejudice.
- 30 Dismissal for failure to prosecute.

Sanctions

31 Failure to obey Board order.

Preliminary Procedures

Rule 1 *Appeals, How Taken.*

- (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy of the notice shall be furnished at the same time to the contracting officer from whose decision the appeal is taken.
- (b) Where the contractor has submitted a claim of \$100,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and where the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.
- (c) Where the contractor has submitted a claim in excess of \$100,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.
- (d) Upon docketing of appeals filed pursuant to (b) or (c) of this rule, the Board, at its option, may stay further proceedings pending issuance of a final decision by the contracting officer within the time fixed by the Board, or order the appeal to proceed without the contracting officer's decision.

Rule 2 *Notice of Appeal, Contents.*

A notice of appeal must indicate that an appeal is being taken and must identify the contract (by number), and the department, administration, agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

Rule 3 *Docketing of Appeals.*

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice of docketing shall be mailed promptly to all parties (with a copy of these rules to appellant).

Rule 4 ***Contracting Officer Appeal File.***

- (a) *Composition:* Within 30 days after receipt of notice that an appeal has been docketed, the contracting officer shall assemble and transmit to the Board one copy of the appeal file with an additional copy each to appellant (except that items 1 and 2, below, need not be retransmitted to the appellant) and to attorney for respondent. The appeal file shall consist of all documents pertinent to the appeal, including:
 - (1) The contracting officer's decision and findings of fact from which the appeal is taken;
 - (2) The contract, including pertinent specifications, modifications, plans, and drawings;
 - (3) All correspondence between the parties pertinent to the appeal, including the letters of claim in response to which the decision was issued;
 - (4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
 - (5) Any additional information considered pertinent.
- (b) *Organization:* Documents in the appeal file may be originals, legible facsimiles, or authenticated copies. They shall be arranged in chronological order, where practicable, and indexed to identify readily the contents of the file. The contracting officer's final decision and the contract shall be conveniently placed in the file for ready reference.
- (c) *Supplements:* Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant may supplement the file by transmitting to the Board any additional documents which it considers pertinent to the appeal and shall furnish two copies of such documents to attorney for respondent.
- (d) *Burdensome documents.* The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files with the Board a document as to which such a waiver has been granted, the other party shall be notified that the document or a copy is available for inspection at the offices of the Board or of the party filing the document.
- (e) *Status of Documents:* Documents in the appeal file or supplements thereto shall become part of the historical record but shall not be included in the record upon which the Board's

decision will be rendered unless each individual document has been offered and admitted into evidence.

Rule 5 *Motions.*

- (a) Any timely motion may be considered by the Board. Motions shall be in writing (unless made during a conference or a hearing), shall indicate the relief or order sought, and shall state with particularity the grounds therefor. Those motions which would dispose of a case shall be filed promptly and shall be supported by a brief. The Board may, on its own motion, initiate any motion by notice to the parties.
- (b) Parties may respond to a dispositive motion within 20 days of receipt, or as otherwise ordered by the Board. Answering material to all other motions may be filed within 10 days after receipt. Replies to responses ordinarily will not be allowed.
- (c) Board rules relating to pleadings, service and number of copies shall apply to all motions. In its discretion, the Board may permit a hearing on a motion, and may require presentation of briefs, or it may defer a decision pending hearing on both the motion and the merits.

Rule 6 *Appellants' election of procedures.*

- (a) The election to use Small Claims (Expedited) (Rule 13) or Accelerated (Rule 14) procedures is available only to appellant. The election shall be filed with the Board in writing no later than 30 days after receipt of notice that the appeal has been docketed, unless otherwise allowed by the Board.
- (b) Where the amount in dispute is \$100,000 or less, appellant may elect to use the Accelerated procedures. Where the amount is \$50,000 or less, appellant may elect to use the Small Claims (Expedited) or the Accelerated procedures. Any question regarding the amount in dispute shall be determined by the Board.

Rule 7 *Pleadings.*

(a) Complaint.

Within 30 days after receipt of notice that the appeal has been docketed, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. A copy of the

complaint shall be served upon the attorney for the respondent or, if the identity of the latter is not known, upon the General Counsel, Department of Energy, Forrestal Building, Washington, D.C. 20585. If the complaint is not filed within 30 days and in the opinion of the Board the issues before the Board are sufficiently defined, appellant's claim and Notice of Appeal may be deemed to set forth its complaint and the respondent shall be so notified.

(b) Answer.

Within 30 days after receipt of complaint, or a Rule 7(a) notice from the Board, the respondent shall file with the Board an original and two copies of an answer, setting forth simple, concise and direct statements of respondent's defense to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counterclaims as appropriate. Should the answer not be filed within 30 days, the Board may, in its discretion, enter a general denial on behalf of the respondent and the parties shall be so notified.

Rule 8 Amendments of Pleadings or Record.

- (a) The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The application for such an order suspends the time for responsive pleadings. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions fair to both parties.
- (b) When issues not raised by the pleadings are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised in the pleadings. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. Similarly, if evidence is objected to at a hearing on the ground that it is not relevant to an issue raised by the pleadings, it may be admitted but the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

Rule 9 Hearing Election.

Except as may be required under Rules 13 or 14, each party shall advise the Board, following service upon appellant of respondent's answer or a Rule 7(b) notice from the Board, whether it desires a hearing as prescribed in Rules 20 through 23.

Rule 10 Submission of Appeal without a Hearing.

Either party may elect to waive a hearing and to submit its case upon the record as settled pursuant to Rule 15. Waiver by one party shall not deprive the other party of an opportunity for a hearing. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument and by briefs.

Rule 11 Prehearing Briefs.

The Board may, in its discretion, require the parties to submit prehearing briefs in any case or motion. If the Board does not require briefs, either party may, upon timely notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

Rule 12 Prehearing Conference.

- (a) Whether the case is to be submitted under Rule 10 or heard pursuant to Rules 20 through 23, the Board may, upon its own initiative or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge for a conference to consider:
 - (1) Simplification, clarification, or severing of the issues;
 - (2) The possibility of obtaining stipulations, admissions, agreements and rulings on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
 - (3) Agreements and rulings to facilitate discovery;
 - (4) Limitation of the number of expert witnesses, or avoidance with similar cumulative evidence;
 - (5) The possibility for settlement of any or all of the issues in dispute; and
 - (6) Such other matters as may aid in the disposition of the appeal including the filing of proposed Findings of Fact and Conclusions of Law, briefs, and other such papers.
- (b) Any conference results not reflected in a transcript shall be reduced to writing by the Administrative Judge and the writing shall thereafter constitute part of the evidentiary record.

Rule 13 ***Optional Small Claims (Expedited) Procedure.***

- (a) The Small Claims (Expedited) procedure for disputes involving \$50,000 or less provides for simplified rules of procedure to facilitate the decision of an appeal, whenever possible, within 120 days after the Board receives written notice of the election.
- (b) Promptly upon receipt of an appellant's election of the Small Claims (Expedited) procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:
 - (1) Identify and simplify the issues in dispute;
 - (2) Establish a simplified procedure appropriate to the particular appeal;
 - (3) Determine whether a hearing is desired and, if so, fix a time and place;
 - (4) Establish a schedule for the expedited resolution of the appeal; and
 - (5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.
- (c) Failure to request an oral hearing within 15 days of receipt of notice of the Small Claims election shall be deemed a waiver and an election to submit the case on the record under Rule 10.
- (d) The subpoena power set forth in Rule 18 is available for use under the Small Claims (Expedited) procedure.
- (e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement of conducting the hearing at the scheduled time and place or, if no hearing is scheduled, of closing the record at an early time so as to permit a decision of the appeal within the target limit of 120 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.
- (f) Decisions in appeals considered under the Small Claims (Expedited) procedure will be rendered by a single Administrative Judge. If there is a hearing, the Presiding Administrative Judge may, exercising discretion, hear closing oral arguments of the parties and then render an oral decision on the record. Whenever such an oral decision is rendered, the Board subsequently will furnish the parties with a written transcript of the decision for record and payment purposes and to establish the date for commencement of the time period for filing a motion for reconsideration under Rule 27.
- (g) Decisions of the Board under the Small Claims (Expedited) procedure shall have no value as precedent for future cases and, in the absence of fraud, cannot be appealed.

Rule 14 ***Optional Accelerated Procedure.***

- (a) This option makes available an Accelerated procedure, for disputes involving \$100,000 or less, whereby the appeal is resolved, whenever possible, within 180 days from Board notice of the election.
- (b) Promptly upon receipt of appellant's election of the Accelerated procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:
 - (1) Identify and simplify the issues in dispute;
 - (2) Establish a simplified procedure appropriate to the particular appeal;
 - (3) Determine whether a hearing is desired and, if so, fix a time and place;
 - (4) Establish a schedule for the accelerated resolution of the appeal; and
 - (5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.
- (c) Failure by either party to request an oral hearing within 15 days of receipt of notice of the election under Rule 6 shall be deemed a waiver and an election to submit on the record under Rule 10.
- (d) The subpoena power set forth in Rule 18 is available for use under the Accelerated procedure.
- (e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement for conducting the hearing at the scheduled time and place or, if no hearing is scheduled, the closing of the record at an early time so as to permit decision of the appeal within the target limit of 180 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date, allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.
- (f) Decisions in appeals considered under the Accelerated procedure will be rendered by a single Administrative Judge with the concurrence of another assigned Administrative Judge or an additional member in the event of disagreement.

Rule 15 ***Settling the Record.***

- (a) The record upon which the Board's decision will be rendered consists of the documents, papers and exhibits admitted in evidence, and the pleadings, prehearing conference memoranda or orders, prehearing briefs, admissions, stipulations, transcripts of conferences and hearings, and post-hearing briefs. The record will, at all reasonable

- times, be available for inspection by the parties at the office of the Board. In cases submitted pursuant to Rule 10, the evidentiary records shall be comprised of those documents, papers and exhibits submitted by the parties and admitted by the Board.
- (b) Except as the Board, in its discretion, may otherwise order, no proof shall be received in evidence after completion of the evidentiary hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.
 - (c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

Rule 16 *Discovery--General.*

- (a) *General Policy and Protective Orders--*The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting trade secrets or other confidential information or documents.
- (b) *Expenses--*Each party bears its own expenses associated with discovery, unless in the discretion of the Board, the expenses are apportioned otherwise.
- (c) *Subpoenas--*Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 18.

Rule 17 *Discovery--Depositions, Interrogatories, Admissions, Production and Inspection.*

- (a) *When Depositions Permitted--*If the parties are unable to agree upon the taking of a deposition, the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination.
- (b) *Orders on Depositions--*The time, place, and manner of taking depositions shall be as mutually agreed by the parties or, failing such agreement, as governed by order of the Board.
- (c) *Depositions as Evidence--*No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received as evidence at such hearing. It will not ordinarily be received as evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be

used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

- (d) *Interrogatories, etc.*--After an appeal has been filed with the Board, a party may serve on the other party: (1) written interrogatories to be addressed separately in writing, signed under oath and answered within 30 days unless objections are filed within 10 days of receipt; (2) a request for the admission of specified facts or the authenticity of any documents, to be answered or objected to within 30 days after service (the factual statements and the authenticity of the documents shall be deemed admitted upon failure of a party to timely respond); and (3) a request for the production, inspection and copying of any documents or objects not privileged, which are relevant to the appeal.
- (e) Any discovery engaged in under this rule shall be subject to the provisions of Rule 16.

Rule 18 *Subpoenas.*

- (a) ***Voluntary Cooperation***--Each party is expected to cooperate and make available witnesses and evidence under its control without issuance of a subpoena. Additionally, parties will secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.
- (b) Procedure
 - (1) Upon request of a party and after a showing of relevance, a subpoena may be issued requiring the attendance of a witness for the purpose of taking testimony at a deposition or hearing and, if appropriate, the production by the witness, at the deposition or hearing, of documentary evidence, including inspection and copying, as designated in the subpoena.
 - (2) The request shall identify the name, title, and address of the person to whom the subpoena is addressed, the specific documentary evidence sought, the time and place proposed and a showing of relevancy to the appeal.
 - (3) Every subpoena shall state the name of the Board, the title of the appeal, and shall command each person to whom it is directed to attend and give testimony and, if appropriate, to produce specified documentary evidence at a time and place therein specified. The Presiding Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness or the documentary evidence sought, or may leave it blank. The party requesting the subpoena shall complete the subpoena before service.

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- (4) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.
- (c) Requests to Quash or Modify--Upon motion made promptly but in any event not later than the time specified in the subpoena for compliance, the Board may: (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; (ii) condition denial of the motion upon payment by the person in whose behalf the subpoena was issued of the reasonable cost of producing the subpoenaed documentary evidence; or (iii) apply protective provisions under Rule 16(a).
- (d) ***Service--***
 - (1) The party requesting the subpoena shall arrange for service.
 - (2) A subpoena may be served at any place by a United States Marshal or Deputy Marshal, or by any other person who is not a party to the proceeding and not less than 18 years of age. Service of a subpoena shall be made by personally delivering a copy to the person named therein and tendering the fees for one day's attendance and the mileage that would be allowed in the courts of the United States. When the subpoena is issued on behalf of the United States or an officer or agency of the United States, money payments need not be tendered in advance of attendance.

- (3) The party requesting a subpoena shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and any documentary evidence the witness has produced.
- (e) Contumacy or Refusal to Obey a Subpoena. In case of a contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

Rule 19 Time and Service of Papers.

- (a) All pleadings, briefs or other papers submitted to the Board shall be filed in triplicate and a copy shall be sent to other parties. Such communications shall be sent by delivering in person or by mailing, properly addressed with postage prepaid, to the opposing party or, where the party is represented by counsel, to its counsel. Pleadings, briefs or other papers filed with the Board shall be accompanied by a statement, signed by the originating party, saying when, how, and to whom a copy was sent.
- (b) The Board may extend any time limitation for good cause and in accordance with legal precedent. All requests for time extensions shall be in writing except when raised during a recorded hearing.
- (c) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day. Unless otherwise stated in a rule or Board order, dates will be met and papers considered filed when deposited in the mail system of the U.S. Postal Service, or hand-delivery is acknowledged at the Board offices.

Hearings

Rule 20 Hearings: Time and Place.

Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, the requirements for expedited or accelerated procedures and other pertinent factors. On request by either party and for good cause, the Board may, in its discretion, change the time and place of a hearing.

Rule 21 *Hearings: Notice.*

The parties shall be given at least 15 days notice of time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties. Failure to promptly acknowledge shall be deemed consent to the time and place.

Rule 22 *Hearings: Unexcused Absence of a Party.*

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the Presiding Administrative Judge may order the hearing to proceed and the case will be regarded as submitted by the absent party as under Rule 10.

Rule 23 *Hearings: Rules of Evidence and Examination of Witnesses.*

- (a) Nature of Hearings--Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the respondent may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding judge. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.
- (b) Examination of Witnesses--Witnesses before the Board will be examined orally under oath or affirmation, unless the Presiding Administrative Judge shall otherwise order.

Representation

Rule 24 *Appellant.*

An individual appellant may appear before the Board in person; a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney-at-law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

Rule 25 *Respondent.*

Counsel may, in accordance with their authority, represent the interest of the Government or other client before the Board. They shall file notices of appearance with the Board, and serve notice on appellant or appellant's attorney.

Board Decision

Rule 26 *Decisions.*

Except as allowed under Rule 13, decisions of the Board shall be in writing upon the record as described in Rule 15 and will be forwarded simultaneously to both parties. The rules of the

Board and all final orders and decisions shall be available for public inspection at the offices of the Board.

Rule 27 Motion for Reconsideration.

- (a) Motion for reconsideration shall set forth specifically the grounds relied upon to sustain the motion and shall be filed within 30 days after receipt of a copy of the Board's decision.
- (b) Motions for reconsideration of cases decided under either the Small Claims (Expedited) procedure or the Accelerated procedure need not be decided within the original 120-day or 180-day limit, but shall be processed and decided rapidly.

Rule 28 Remand from Court.

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders.

Dismissals

Rule 29 Dismissal Without Prejudice.

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 30 Dismissal for Failure to Prosecute.

Whenever a record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate. If no cause, the Board may take such action as it deems reasonable and proper.

Sanctions

Rule 31 Failure to Obey Board Order.

If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to the just and expeditious conduct of the appeal, including dismissal with prejudice.