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An Evaluation of the Merits of Mandatory Mediation in Federal Government Contracting

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An Evaluation of the Merits of Mandatory Mediation
in
Federal Government Contracting

by

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Report

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Dedication

This report is dedicated to the late Professor Gary Chapman. Professor Chapman has been incredibly influential in my life over the past few years. First, he was instrumental in my joining the Lyndon B. Johnson School of Public Affairs program. Second, I directly benefited from his insight and guidance during an excellent Policy Research Project that opened so many new opportunities. Finally, and most importantly, I relied on his experience and wisdom in making several very important personal decisions over the past few years. Professor Chapman was a special mentor who helped facilitate my transition from military service to the academic environment. He inspired me in every aspect. He was a touchstone for me given our military experience, and I enjoyed his stories the few occasions he would talk about his time in the military. He was a true quiet warrior who people would be even more impressed with if they had heard more of his adventures. He proudly, but ever so modestly, served our nation as a Green Beret. Professor Gary Chapman was a former warrior who preferred applying his considerable intellect to the exploration and development of peace for humanity embodying the Special Forces motto *de oppresso liber*. He lived up to that motto everyday as he enlightened his students with new insight and opportunities for growth. He was a visionary who saw the needs of others as a call to action. He was committed to helping all. Our world is better because of Professor Chapman. His absence is keenly felt.

Acknowledgements

I am very grateful to the assistance, guidance and support of my readers: Professor Bacon, Professor Evans and Professor Nelson, and my Writing Instructor, Ms. Talitha May. I am very honored to have had the opportunity to work with my readers on this report. I selected my readers for their conscientiousness, meticulousness, excellent organizational skills, working experience and dedication to students. The sponsorship I have received has well surpassed their reputations, and I will add patience to the long list of highly prized talents as they all accommodated my eleventh-hour revival. My readers made time out of their busy schedule to advise my research and review my work, and without their encouragement and counsel, this Professional Report would be the worse off. I am very thankful to Ms. Talitha May, who, over the three years I have known her as the Writing Instructor at the Lyndon B. Johnson School of Public Affairs, has been an outstanding resource and supporter for all aspiring public policy writers. I admit to using more than my fair share of her valuable time. Ms. Talitha May's passion for the craft inspires me to broaden my abilities as I "join the conversation" of public policy professionals

Any omissions or errors are solely my responsibility despite the excellent advice and counsel I have received from my readers.

23 August 2011

Abstract

An Evaluation of the Merits of Mandatory Mediation in Federal Government Contracting

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The University of Texas at Austin, 2011

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Traditionally, parties to a government contract have sought administrative or judicial review to resolve disputes; however, appeals to these courts are costly and may take years to reach a conclusion. Congress has encouraged the use of Alternative Dispute Resolution methods to resolve disputes arising in federal government contracting. Alternative Dispute Resolution includes a broad range of techniques, including mediation; however, use of Alternative Dispute Resolution to resolve disputes in contracting has focused on arbitration. Arbitration is the Alternative Dispute Resolution method most similar to a trial. Attorneys largely lead the resolution of these contractual disputes given their expertise in contract law. This expertise in contract law as well as comfort and familiarity with the litigation process may encourage attorneys to select arbitration over other means of Alternative Dispute Resolution that may be more

beneficial to all parties. "Lawyers bred in litigation may not realize when one or more of the techniques in the ADR procedural array may be far preferable to court litigation, and they may take an unnecessarily narrow view of their clients' interests" (Section of Administrative Law and Regulatory Practice, 2001). "Arbitration has become expensive and time consuming because of increasing demands for discovery (a process through which both parties exchange information prior to an administrative or judicial hearing), which results in an unintended consequence of participants not fully engaging in Alternative Dispute Resolution processes. The increased costs of arbitration associated with the discovery process encourages disputants to forgo investing in Alternative Dispute Resolution methods and proceed directly to administrative or judicial hearings where the parties can get a final ruling on the merits of the case with limited appeals options. If Alternative Dispute Resolution is to fulfill its original mandate or promise, parties must find resolution before the parties even get to arbitration. To encourage a fuller exploration of other Alternative Dispute Resolution methods, federal contracts should include mandatory dispute avoidance measures and mediation. Mediation should be required before parties can proceed with a grievance or a lawsuit.

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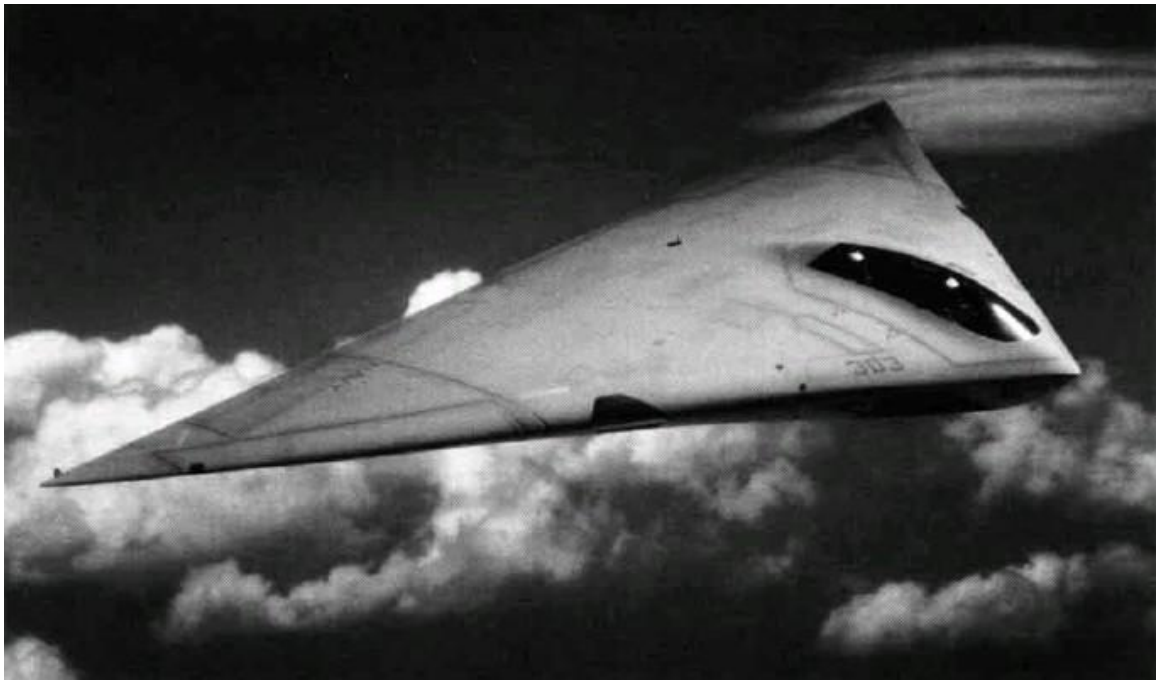

Figure 1: Contractor's rendition of the A-12 Avenger II in flight

One story should suffice to posit the need for effective dispute resolution in government contracting. The extreme case of the A-12 Avenger II can serve as a cautionary tale on the potential shortcomings of relying exclusively on the judicial system to provide dispute resolution. The A-12 demands all stakeholders in federal contracting learn a vital lesson on the merits of using alternative dispute resolution methods. The A-12 Avenger II had its beginnings as the Advanced Tactical Aircraft (ATA). "The U.S. Navy Advanced Tactical Aircraft (ATA) program began in 1983 as a proposed long range, very low observable, high payload medium-attack aircraft to replace the [Vietnam-era] Grumman A-6, [which had served] in the carrier-based, medium-attack role for close

to thirty years" (F-35 Lightning II Program, 2011). On January 13, 1988, the McDonnell Douglas and General Dynamics team was awarded the contract to develop the ATA. Designated the A-12 Avenger II (Figure 1), "the unique flying wing design was to be a long-range, subsonic aircraft with a large internal weapons load including air-to-surface and air-to-air weapons" (F-35 Lightning II Program, 2011). The Navy wanted to buy 858 airframes with the first flight scheduled for March 1992. (Richeson, 1990)

On 7 January 1991, Secretary of Defense Cheney canceled the A-12 program "following the disclosure of severe cost and schedule overruns and technical problems in late 1990" (F-35 Lightning II Program, 2011). Subsequently, a dispute emerged where the federal government sought to recoup the billions of dollars spent in the development program. The contracting team refused to return the money awarded under the initial contract and claimed the government canceled the contract improperly.

The government began the process of recouping the funds and the contracting team filed suit. The contracting team disputed the government's assessment and questioned the motives for the contract cancellation. The federal government prevailed at the first hearing, but the manufacturer subsequently appealed. The lawsuit slowly worked its way through the judicial system with the U.S. Court of Appeals for the Federal Circuit ruling on 1 June 2009 that the U.S. Navy had been justified in canceling the contract. (Borak, 2009) The ruling from the Appeals Court essentially made the contractors not only liable for repayment of US$1.35 billion to the U.S. government but also interest charges of US$1.45 billion (Borak, 2009). As a prime example of the long

delays involved in judicial proceedings, since the contract was cancelled Boeing had merged with McDonnell Douglas. As the successor and now responsible party moving forward, Boeing vowed to appeal the decision along with General Dynamics. On 18 January 2011, the U.S. Supreme Court heard arguments from the two companies and the government. On 23 May 2011, the Supreme Court remanded the case back to the Appeals Court for further proceedings (Vicini & Shalal-Esa, 2011).

Twenty years have passed since the contract was cancelled, yet the federal government and contracting team still have no clear resolution or even a timeline when to expect resolution. The only implied promise from the Supreme Court upon remanding the case back to the Appellate level is that "neither the defense contractors nor the government will be entirely happy with the court's resolution of the case" (Vicini & Shalal-Esa, 2011).

The primary question that arises from this legal morass is whether there is a better way to handle disputes between the federal government and companies. It is too trite to answer "yes" given the complexities of the dispute, however, before this saga wended its way through the legal system perhaps fully exploring and using Alternative Dispute Resolution methods would have improved the outcome for all concerned.

This Professional Report highlights weaknesses in the current dispute resolution process in government contracting and identifies potential improvements to the current contract dispute process, specifically the inclusion of mandatory dispute avoidance mechanisms and mediation provisions in federal government contracts and regulations.

This Professional Report focuses on United States federal government contracting and starts with an overview of government contracting including a discussion of the stakeholders and a review of the contacting process. As part of this overview, the report then examines Federal Acquisition Regulations with a focus on the dispute process. The Report then shifts to define Alternative Dispute Resolution with a focus on arbitration and mediation. The Professional Report explores Dispute Avoidance as a compliment to Alternative Dispute Resolution processes. The Report examines the merits of incorporating additional mandatory measures into federal government contracting, concluding with specific recommendations on what should be included to enhance the dispute resolution process. Finally, the Professional Report recommends areas for additional research.

Government Contracting

Although the authority to make acquisitions, much less enter into contracts, is not specifically enumerated in the U.S. Constitution, the federal government must procure products and services to carry out its mandate on behalf of the people. The federal government must enter into contracts to acquire required products and services to establish obligations, responsibilities, and terms between the parties. "Procurement contracts are used when the agency's principal purpose is to acquire construction, products, or services for the direct benefit or use of the Federal government" (Keyes, Government Contracts in a Nutshell, 2000). From this implicit authority grounded in law and organic statutes, the federal government has established, over time, an extensive

acquisition process.

A contract with the United States federal government presents several unique aspects that differ significantly when compared to a commercial contract between two parties. Parties who contract with the government manage issues of risk, power differential, public policy, and covenants and restrictions, to highlight but a few. In terms of risk, contractors are presumed to benefit from lower risk of payment default as the payment is backed by the full faith and credit of the government. However, almost all contracts include cancellation provisions should the government not appropriate the required funds as well as options for the government to terminate the contract at its convenience when in the best interests of the government.[1] Furthermore,

> [a] government agency cannot contract for the furnishing of supplies and services needed for a period beyond the current fiscal year, unless specifically so authorized by statute, or regulation, even though the government's liability is specifically made contingent upon the availability of appropriations for future fiscal years. The Comptroller General has held that a contract for the delivery of materials in future fiscal years, containing a cancellation clause obligating the government to pay, in one fiscal year, a charge in excess of its needs for that year, was improper because the contract did not fulfill the requirements of a bona fide need in the current year. (Keyes, Government Contracts in a Nutshell, 2000)

[1] "A 'Termination for Convenience' clause is [a unilateral right uniquely reserved by the Government and is] required in all Government contracts." "A termination for convenience is 'the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest.'…The 'Termination for Convenience' clause limits the contractor's recovery of profit to "profit on work done." (Seidman & Seidman, 2008) Contracts may be canceled at the convenience of the government for a variety of reasons, and may include but are not limited to, changed priorities, changed funding allocations, obsolete product; and that the product or service is no longer required. The Contracting Officer must identify how the canceled contract is in the government's best interests.

In practice, the contractor is effectively assured payment as long as the funds are appropriated and the contract is completed, however there are exogenous risks that are difficult to assess or predict. In a recent survey, a Grant Thorton study identifies:

> "Government contracting can be a high-risk business, considering the complex noncommercial regulations that govern the industry and the tendency of many government officials involved in the procurement process not to function reasonably or efficiently. The risks are compounded when the government's business approach changes with the political winds and when practices that were formerly acceptable parts of routine contract administration and negotiation suddenly become the basis for procrastination, investigation and accusation." (Grant Thorton, 2010)

Parties that contract with the government contend with a significant power differential when compared to commercial contracts between private parties. Governments have the authority and power of the state, and supposedly vast resources to develop evidence to justify their position.[2] Furthermore, governments have broad powers to recoup from businesses and individuals funds they feel entitled to in a way that no private party can in a civil dispute. Government contracts incorporate additional concerns and mandates reflective of the citizenry's values; therefore, government contracts go beyond the narrow limitations of good business practices typically found in commercial contracts. Contracts with governments may include public policy initiatives such as affirmative action plans, outreach to underutilized populations, and environmental protections.

[2] In some respects these concerns are idealistic in nature. The reality is the responsible government office is often undermanned and overworked, and if the Corporation is large, the Corporation will benefit from extensive resources, including world-class legal counsel or former government officials with tremendous insight into the contracting process, that far outpace the resources the government office can draw together.

> Social contracting includes both socioeconomic programs, wherein equal opportunity or affirmative action programs are employed to expand contracting opportunities with targeted companies, and green contracting to avoid an adverse impact on the environment. In both cases, governments pursue social or economic goals with the award of contracts is toward achievement of these objectives. *Targeted company* is the generic term used for companies that are agency targets for increased contracting opportunities through that agency socioeconomic contract program. (Curry, 2010)

These public policy initiatives are rarely incorporated in commercial contracts between two private parties.[3] Therefore, parties that do business with governments may face additional overhead to ensure compliance with these public policy initiatives. Covenants and restrictions may include drug testing, prescribing and limiting where a contractor may source materials, and maintaining audit records for a prescribed periods, all of which may increase overhead costs for the party.

> In 1989, the office of Federal procurement policy estimated that the government procurement related information requirements cost government contractors more than 289 million hours a year. Only tax reporting and recordkeeping pose a greater burden on the public. (Keyes, Government Contracts in a Nutshell, 2000)

Aside from the additional potential overhead costs, parties that engage in business with the government face legal liability beyond those found in a commercial contract between two private parties.

> Government procurement regulations bear little or no resemblance to the standard business practices followed in commercial transactions between companies and individuals. The government regulations control every aspect of the business relationship, including unique rules for source selection, how the procurement is priced, how employees must be recruited and hired, subcontracting, the costs that

[3] "Social contracting programs are normally enacted by law or administrative procedures to institute the furtherance of goals for expanding contracting opportunities to targeted companies or to meet other social objectives" (Curry, 2010).

> are chargeable and not chargeable to the contract, inspection and acceptance of the contract deliverables, and payment. (Grant Thorton, 2010)

There are additional wrinkles when specifically addressing contracts with the US federal government. For example, the Uniform Contract Code (UCC) covers most commercial contracts, but does not cover contracts with the U.S. government.[4] The UCC derives its authority from state law, which does not have precedence over federal law. Furthermore, government contracts are covered by federal common law, which is derived from case law as opposed to statutory law. Most commercial contracts are between private parties under the same state jurisdiction and would be subject to that state's UCC. In several ways, the FAR addresses in part the lack of statutory commercial contract law found in the UCC.

Despite these additional considerations and complications to business with the government, government contracts remain an attractive option for businesses. In most respects, this process is effective and provides businesses with meaningful work while providing our citizenry with valuable products or services. The existing arrangement must be effective as the government has increasingly relied on contractors to provide

[4] "On October 13, 1994, President Clinton signed into law the Federal Acquisition Streamlining Act (FASA), the most significant acquisition legislation since the creation of the FAR. The law included some 225 changes. A principal segment of this legislation dealt with the acquisition of commercial items. The legislation did not adopt the Uniform Commercial Code (UCC) for procurement of commercial items. The UCC is state law and neither covers pre-order matters nor includes contract clauses. However, numerous changes would be made to increase use of commercial items at commercial prices. The emphasis is on having the 'the authority to make decisions…accountability for the decision made, [and] delegation to the lowest level with the system consistent with law,' as well as on the 'absence of direction' so as to permit the use of 'sound business judgment that is otherwise consistent with law' when 'acting on behalf of the American taxpayer.' They are standards that are almost totally dependent upon both the technical and business quality of the employee and on his integrity (not the same), which are essentially beyond the bounds of the regulation. It is been said that 'far too many high-ranking officers and civilians evidently still see themselves as salesman – rather than managers – for the programs they are running.'" (Keyes, Government Contracts in a Nutshell, 2000)

products and services to our citizenry. Professor Ralph C. Nash, Jr., Professor Emeritus of Law of The George Washington University and founder of the Government Contracts Program stated, "Some estimates figure that more than half of the federal government's work is performed by contractors and about half of contracting work is buying services."[5] Furthermore,

> [p]rivate-sector companies represent a valuable resource for government. These companies design, manufacture, and market products that either fully meet the needs of government or can meet government requirements through value-added effort. With respect to the majority of products sold to government, the private-sector market is vastly larger than the government market, thus permitting government the advantage of large-scale manufacturing. Private-sector companies also designed and built capital projects requiring similar skills and resources needed for government action or experts available for the private-sector provide needed expert services to government. (Curry, 2010)

"The alternative to contracting from the private-sector is to provide government resources to produce, or otherwise provide, all systems, services, and commodities required by government" (Curry, 2010). The government production of all required product and services would not only be inefficient economically, but contrary to the political-economic principles of the United States.

Most attorneys would consider a good contract a contract that is enforceable in the courts; however, a good contract for the purpose of this report includes additional elements. In its most basic form, a contract is fundamentally an exchange of value, where Party A provides product or service X to Party B. Party B, in turn, provides Party

[5] The Obama Administration is making modest efforts to reverse this trend due to evidence that there is a false economy of maintaining long-term contractors rather than hire personnel to perform those same services.

A with compensation for the product or service. Parties to a contract agree on terms and conditions, e.g., schedule and acceptance criteria, etc. The contract should be clear and define roles and responsibilities. A good contract specifies the deliverables and schedule. A good contract also ensures the incentives are aligned with the contract's goals to maximize contractor performance. A very good contract also includes mechanisms to deal with disputes, especially mechanisms that are proactive and that reinforce the working relationships of the stakeholders. As many factors there are that establish a good contract, one could argue there are even more that would define a bad contract. Foremost, a bad contract enshrines a bad agreement or deal, perhaps leading to a non-performance finding by the Contracting Officer. A bad contract is not aligned with the organization's goals and wastes taxpayer resources. A bad contract does not adequately define the final service or product to be provided. Alternative Dispute Resolution clauses and processes reinforce the positive elements of a good contract and may even mitigate the weaker elements of a contract.

GOVERNMENT CONTRACT STAKEHOLDERS

In commercial contracting, any two parties may agree on terms and conditions and the roles will be specified by the contract. However, in federal contracting there are specific roles delineated by law and understanding the importance and context of those relationships reviewing the stakeholders to a government contract may prove beneficial. In a federal contract, the primary participants are the Contracting Officer and the service provider. This analysis incorporates the citizenry and the government agency requesting

products or services as stakeholders. The citizens are the ultimate recipients and benefactors of the contract and are an interested party as a stakeholder. The government agency requesting the product or service acts as a proxy for the citizens and shares an interest in contract performance. Interests are not always aligned between all the stakeholders. The Contracting Officer is the government representative legally responsible for contract management. From the perspective of the Contracting Officer, the government agency requesting the product or service is actually a client. The Contracting Officer is responsible for managing the three-pronged nature of these relationships, where the Contracting Officer is responsible to: the citizen for effective program oversight in accordance with laws and regulations; the government agency to ensure the delivered products and services meet the agency's needs; and to the contractor to ensure contract management complies with the terms and conditions of agreement. The stakeholders who are not a direct party to the contract is an unusual arrangement as typically the primary participants in a contract are the direct benefactors of the agreement, however, in a government contract it is presumed all products and services are acquired on behalf of citizens and residents of the United States. As citizens are the rightful customer of any government contract, all contracts should incorporate every measure available to render better services. Contracts that include Alternative Dispute Resolution clauses and processes saves citizens and residents national treasure while enhancing the efficiency of the contractor.

Contracting Officers

The Contracting Officer is a person that executes or terminates the contract on behalf of the government (Keyes, Government Contracts in a Nutshell, 2000). Contracting Officers are authorized by law to request bids for products and services on behalf of the government, oversee the contract awarding process, obligate the government, oversee contract performance, and authorize payment on behalf of the government. Furthermore, "Contracting Officers have unique authority to bind the government to purchase above the micro-purchase threshold. After ensuring that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met" (Keyes, Government Contracts in a Nutshell, 2000).

There are three types of Contracting officers: "The Procurement Contracting Officer (referred to as the "PCO") places contracts and handles contract terminations when the contractor defaults. The Administrative Contracting Officer (referred to as the "ACO") administers the contracts. The Termination Contracting Officer (referred to as the "TCO") handles contract terminations when the government terminates for its convenience" (FedVest, 2011). Depending on the contract, the same person may hold all three responsibilities

Given the extent to which the federal government contracts for products and services, one of the consistent critiques is there are insufficient Contracting Officers to

adequately oversee the expenditure of government funds (Curry, 2010). One reason limiting the success of the recent stimulus program was not a lack of projects, but rather a lack of Contracting Officers to oversee projects given the imperative to commence projects as soon as possible to have the desired impact on the economy (Korte, 2010). The insufficient number of Contracting Officers is only getting worse. In 1999"

> one contracting officer existed for every three hundred thousand dollars ($300,000) in federal contracts. Federal spending has increased each year, but the federal work force directly responsible for properly administering all the spending has not. With current contract spending growing to one trillion dollars, and no growth in the number of contracting officers, [the] government now has one contracting officer for every fifty million ($50,000,000) in government spending. (Doan, 2009)

"Government spending on contractors rose 144% from 2001 to 2008, while contracting staff increased 12%" (Korte, 2010). This lack of Contracting Officers results in less effective oversight.

After receiving a protest from a contractor, the FAR details a Contracting Officer's duties when the protest "cannot be satisfied or settled by mutual agreement" (Integrated Acquisition Environment, 2011). Specifically, the Contracting Officer shall review pertinent facts, consult with legal representatives and other advisors, coordinate with the contracting office, and prepare a written decision (Integrated Acquisition Environment, 2011). The written decision will include a description of the claim or dispute, reference the pertinent terms of the contract, state the factual areas of agreement and disagreement, and state the Contracting Officer's decision and rationale used to reach

the decision (Integrated Acquisition Environment, 2011). As the government's representative, the Contracting Officer's decision establishes the government's official position on the circumstances surrounding the contract.

Government Contractors

Government Contractors act as service providers and are corporations and individuals who have an appropriate capability not resident within the federal government that is necessary for the government to carry out its obligations to its citizens.

Citizens

Although citizens may not have direct involvement in the contract management process, citizens are most definitely interested in the delivery of products and services. Citizens exercise their oversight of the process through their representatives, as well as through media reports. As a further distinction from traditional commercial contracting, citizens also bring social initiatives and values into the contracting process, for example, initiatives promoting the use of small businesses, veteran-owned businesses and woman-owned businesses.

CONTRACTING PROCESS

The contracting process is an involved, multi-phase project. Table 1 highlights the phases and summary of events in the contracting process (Curry, 2010).

Table 1: Phases of the Contracting Cycle

Phase	Events during each phase
Pre-solicitation	• Advanced contract planning • Initiate list of prospective contractors • Develop guidelines for RFP proposal evaluation • Establish strategy for management of pre-proposal communications
Solicitation	• Contractors prepare their proposals • Respond to inquiries from contractors • Manage pre-proposal communication
Proposal evaluation	• Receive proposals and treat them confidentially • Evaluating proposals, according to criteria in the RFP • Conduct negotiations as appropriate
Contract award	• Guard against unlikely event of collusion • Respond in a timely and complete manner to contractor protests • Award contract
Contract administration	• Monitor contractor's performance • Evaluate contractors invoices prior to payment approval • Ensure that deliverables meet contract specifications • Guard against collusion
Contract closeout	• Relieve financial encumbrances • Prepare contractor performance report • Audit contract, if applicable • Maintain records for specified period • Destroy records at completion of retention period

Source: (Curry, 2010)

Federal Acquisition Regulations

Acquisition by the federal government holds an intriguing position in public policy. Federal acquisition policy is one of the least obvious, but most pervasive public policy arenas due to the significant amount of expenditures made on behalf of the residents of the United States, but given its bureaucratic nature the policy receives little

direct attention from the public. The Federal Acquisition Regulatory Counsel sets federal acquisition policy. Created in 1988,

> [t]he Council comprised four members, the administrator of the [Office of Federal Procurement Policy] OFPP, and the official assigned by statute with the responsibility for acquisition policy in the GSA, DOD, and NASA. The new layer of management of the FAR, members of the Council became responsible for (1) approving or disapproving procurement regulations in each of their own agencies; (2) carrying out procurement related paperwork reduction responsibilities for their agencies; and (3) reducing levels of regulatory review and their agencies procurement systems. It was not always effective in curbing the seemingly endless proliferation of agency implementations and supplements to the FAR. (Keyes, Government Contracts in a Nutshell, 2000)

Effective April 1, 1984, the Federal Acquisition Regulations (FAR) codifies[6] uniform policies for acquisition of supplies and services by executive agencies and is issued and maintained jointly by the Secretary of Defense, Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration (NASA). The Secretary of Defense is responsible for all regulations for military related acquisition, while the Administrator of General Services is responsible for all civilian related acquisition with the exception of NASA, and the Administrator of NASA is responsible for acquisition regulations related to its own program. Some agencies are completely exempt from using the FAR, in particular the Federal Aviation Administration (FAA), Tennessee Valley Authority, and U.S. Postal Service.[7]

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[6] "[The FAR] is now codified as Chapter 1 of Title 48 of the Code of Federal Regulations and contains 52 parts (with some parts being reserved) categorized in eight Subchapters: (A) General; (B) Competition and Acquisition Planning; (C) Contracting Methods and Contract Types; (D) Socioeconomic Programs; (E) General Contracting Requirements; (F) Special Categories of Contracting; (G) Contract Management; and (H) Clauses and Forms" (Keyes, Government Contracts in a Nutshell, 2000).

[7] "Congress gave the Federal Aviation Agency (FAA) the authority to develop its own acquisition regulations; therefore it is not bound by the FAR. Although the FAA has chosen to adopt or adapt many parts of the FAR, don't assume that its provisions are all just like those in the FAR. Some quasi-

> The Federal Acquisition Regulation (FAR) was the first in US history to establish, codify, and publish uniform policies and procedures for acquisition by all executive agencies. (Keyes, Government Contracts in a Nutshell, 2000)

The purpose of the FAR is to provide "uniform policies and procedures for acquisition" (Integrated Acquisition Environment, 2011, p. FAR 1.101).

> The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. (Integrated Acquisition Environment, 2011, p. FAR 1.102)

The Federal Acquisition System stated goal is to "[s]atisfy the customer in terms of cost, quality, and timeliness of the delivered product or service; [m]inimize administrative operating costs; [c]onduct business with integrity, fairness, and openness; and [f]ulfill public policy objectives. (Integrated Acquisition Environment, 2011, p. FAR 1.102(b)). Public policy objectives include: safety programs; employment initiatives; Small Disadvantaged Business Participation Program; Historically Underutilized Business Zone (HUBZone) Program; Service-Disabled Veteran-Owned Small Business Procurement Program; Women-Owned Small Business (WOSB) Program; as well as other public policy measures such as trafficking in persons, child labor laws and anti-discriminatory practices. The FAR is not a single set of rules, but rather a system. "The [FAR] system consists of the FAR (which is called the "the primary document") and agency acquisition regulations that implement their supplement to the FAR. (Keyes, Government Contracts in a Nutshell, 2000) Agency supplements include the Defense Federal Acquisition Regulation Supplement (DFARS), the General Services Acquisition

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government agencies, like the Tennessee Valley Authority or United States Postal Service, are not bound by the FAR, but many of their acquisition regulations are adaptations of FAR provisions" (FedVest, 2011).

Regulation Supplement (GSARS), and the National Aeronautics Space Administration FAR Supplement (NASFARS). (FedVest, 2011) The FAR is constantly under review to ensure the regulations keep pace with industry developments and changing needs of the public.

> Revisions to the FAR are prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulations Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council). The chairperson of the CAA Council is the representative of the Administrator of General Services. The other members of this council are "one each representative from the (1) Departments of Agriculture, Commerce, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation, and (2) Environmental Protection Agency, Small Business Administration, and Department of Veterans Affairs and the Social Security Administration." (Keyes, Government Contracts in a Nutshell, 2000)

As with any regulation published in the Federal Register[8], the FAR has "the force and effect of law, i.e., they are binding on Federal agencies and the general public" (Keyes, Government Contracts in a Nutshell, 2000).

Disputes in Federal Contracting

Despite considerable effort through the FAR oversight process to ensure there is in place a framework for an equitable and fair federal procurement process, inevitably, there will be conflicts, especially given the many contracts and the total value of those contracts. These conflicts are generically referred to as disputes. Disputes are officially recognized with a written objection.

[8] "Publication in the Federal Register gives legal notice of their contents to all who may be affected thereby" (Keyes, Government Contracts in a Nutshell, 2000).

> The written objection by one who would be economically affected by an agency's solicitation or award of a contract is called a "protest," The protestor is called an "interested party" who is the actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. (Keyes, Government Contracts in a Nutshell, 2000)

Disputes are classified whether they are a pre-award or post-award dispute. In terms of pre-award disputes,

> [t]ypically, protesters claim that the solicitation or award decision violates an applicable statute or regulation; that the agency improperly excluded the protester from the competitive range; that the agency engaged in improper discussions with other offers or failed to conduct meaningful discussions; that the source selection evaluation was an irrational, arbitrary, were not conducted in accordance with the solicitation; or that the awardee is not responsible or qualified to perform the work, or its offer was not responsive to the solicitation. (Keyes, Government Contracts in a Nutshell, 2000)

Post-award disputes typically include issues with failure to perform. "[M]any disputes or controversies arise during contract performance because of personality clashes or difficulties between the contracting parties" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

There are three principal means to resolve contractual disputes with the federal government: unassisted negotiation, Alternative Dispute Resolution (ADR), and appeal. Appeals are made under the Contract Disputes Act of 1978 ("CDA"). "The Contract Disputes Act of 1978 established a statutory basis for boards of contract appeals within an agency" (Keyes, Government Contracts in a Nutshell, 2000). "As of January 1, 2001, protesters have three fora in which to bring a pre- or post-award protest: (1) the

contracting agency, (2) the General Accounting Office (GAO), and (3) the U.S. Court of Federal Claims (COFC)" (Keyes, Government Contracts in a Nutshell, 2000).[9] Appeals are made to either the United States Court of Federal Claims, or the appropriate agency board of appeals, e.g., the Armed Services Board of Contract Appeals if the contract is for military related procurement.

The Contracting Officer is the first person responsible for reviewing a protest. The government contractor should meet with the Contracting Officer at an informal Contracting Officer Conference (Keyes, Government Contracts in a Nutshell, 2000).

> The purpose of such a conference is to consider the possibility of disposing of the claim by mutual agreement, or by use of Alternative Dispute Resolution (ADR). This conference (which often precedes ADR) may be held within a period of about thirty days of the request for such conference, or later by mutual agreement between the contractor and the agency. Such a conference will also enable the agency to detect differences at an early point and to correct decisions that may not be in accord with procurement regulations. (Keyes, Government Contracts in a Nutshell, 2000)

Contracting Officers review the protest and write a reply either sustaining or denying the protest. If a government contractor disagrees with the Contracting Officer's decision, the government contractor can appeal the decision to higher authority, including to the appeals courts and boards. Judges nominated by the president and confirmed by

[9] "The Administrative Dispute Resolution Act of 1996 (ADRA), which took effect on December 31, 1996, significantly expanded the scope of the COFC's protest jurisdiction and extended it to include post-award protests. The ADRA also terminated the U.S. District Court's protest jurisdiction, effective January 1, 2001. As a result, the COFC is the sole judicial forum in which protests may be brought, and the U.S. Court of Appeals for the Federal Circuit is the sole forum for appellate review" (Keyes, Government Contracts in a Nutshell, 2000).

the Senate hear cases at the Court of Federal Claims while Administrative Judges hear the cases at the appeals boards.

> A significant difference between the court and the boards is that the decisions of the boards are collegial. Unlike CFC decisions, board decisions (with the exception of expedited or small claims appeals) are generally the work of a panel of at least two, and usually three, judges, even though hearings before the boards are usually before a single judge. A majority of judges on the panel must agree for the decision to be issued. (Schaengold & Brams, 2008)

If a party disagrees with the decision reached at either of these courts, the party can appeal to higher authority in the federal circuit court system, including up to the Supreme Court.

In the mid-80s, new initiatives were introduced in an attempt to more efficiently process contractual disputes. One notable example was with the Corps of Engineers. Once a Contracting Officer had denied a government contractor's claim, rather than proceed to an official appeal process, the Corps of Engineers would organize a mini-trial, which consisted of information exchange as well as opportunity to make a case-in-chief[10] and cross-examine witnesses in front of an impartial attorney. Following the presentations, the impartial attorney[11] would review and synopsize the merits of the case for each party. Following this mini-trial, the parties would begin negotiations. This

[10] The case-in-chief is the portion of a hearing or trial where the party that bears the burden of proof in the case presents its argument and evidence, not to be confused with a case, which is the sum total of argument and evidence presented by all parties at a hearing or trial. (Lehman & Phelps, 2005)

[11] Ensuring adequate impartial third parties are available for ADR processes is a consideration for all stakeholders. Given the scope and breath of the federal government the demands could be considerable. One solution was incorporated into the U.S. Postal Service's "Resolving Employment Disputes, Reach Equitable Solutions Swiftly" program (REDRESS). The estimated demand for services led to the establishment of a nationwide pool of trained, third-party neutrals to facilitate the mediation program. Another source for impartial, third-parties is the Federal Mediation and Conciliation Service (FMCS).

process over "two days, […] accomplished what might have taken weeks of hearings before a board of contract appeals and months of waiting for a decision" (Keyes, Government Contracts in a Nutshell, 2000). Similar reforms have been made at several other agencies; however, few processes have been formalized across the entire federal government, leaving the extent to which these processes are integrated into an organization and the measures of success of dispute resolution programs up to the initiative of agency or local leadership.

Alternative Dispute Resolution

Disputes with the federal government may be inevitable, but litigation is not.
— *Jeffery Senger* (Senger, 2004)

Alternative Dispute Resolution (ADR) is broadly defined as a procedure or process to resolve conflict, typically outside of the traditional judicial process. "Alternative Dispute Resolution has been increasingly prominent in the US government's approaches to the narrowing or resolution of ordinary, non-policy administrative disputes in which the government as a direct or interested party" (Section of Administrative Law and Regulatory Practice, 2001). Some may argue that administrative boards may constitute a form of Alternative Dispute Resolution, however, in the case of the boards that are empowered to review disputes related to government contracting, given the processes, evidentiary rules, time frame and appealability to the judicial system, administrative boards should not be considered an Alternative Dispute Resolution process. The more common examples of Alternative Dispute Resolution processes

include any of the methods covering a spectrum from "conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen"[12] (Integrated Acquisition Environment, 2011, p. Subpart 33.2). Figure 2 plots the main Alternative Dispute Resolution methods on a spectrum from least litigious to the most litigious.

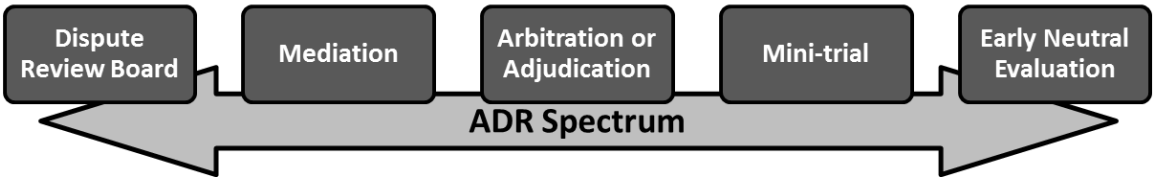

Figure 2: Major Alternative Dispute Resolution (ADR) categories

"The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include — (1) [e]xistence of an issue in controversy; (2) [a] voluntary election by both parties to participate in the ADR process; (3) [a]n agreement on alternative procedures and terms to be used in lieu of formal litigation; and (4) [p]articipation in the process by officials of both parties who have the authority to resolve the issue in controversy" (Integrated Acquisition Environment, 2011, p. Subpart 33.2). Many advocates of ADR processes highlight "several advantages of using ADR over more traditional judicial review, including time savings, money savings, greater predictability and self-determination, greater creativity, improved relationships, and increased satisfaction" (Senger, 2004). "ADR can be cheaper and faster than litigation

[12] Appendix A offers an introduction for those unfamiliar with Alternative Dispute Resolution methods, specifically Table 3 and Table 4 respectively, introduce the spectrum of the major formats, as well as advantages.

and particularly appropriate where the parties may retain at least a potential interest in a relationship that continues—although perhaps on new terms" (Keyes, Government Contracts in a Nutshell, 2000). As attractive as the advantages listed above may be to disputants, perhaps the limitations of the judicial system should be more noteworthy.

> Traditional government methods of dispute resolution, including adversarial processes such as trials, have inherent limitations. They are expensive, sapping resources from both citizens and their government. These methods are time-consuming, demanding participants' attention and energy for months and even years. They often force people who need to work together to engage in combat instead, driving them further apart rather than bringing them together. Even when parties prevail in these processes, they can find the victory has come too late or at too high a price. Moreover, controversy may not end just because one side has won and the other has lost. ***Court rulings often fail to resolve the underlying problems that caused the complaints to be filed in the first place.*** [emphasis added] It is no wonder that citizens and government officials alike are increasingly searching for other ways to resolve conflict. (Senger, 2004)

Supreme Court Justice Sandra Day O'Connor identified the preferred role for the judiciary stating, "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried" (McFeatters, 2005). Although the advantages are numerous and ADR has the potential to be transformative, ADR is not a universal tool and parties to contracts should tailor the use to their circumstances, as ADR may prove beneficial in certain areas and sectors, and not as helpful in other circumstances, areas or sectors.[13] "Whether and what sort of ADR may be appropriate depends on the nature of the dispute, the interests of the parties, who is in

[13] Appendix A identifies circumstances where ADR may prove beneficial, and other circumstances where ADR may not be as helpful, specifically Table 5 and Table 6 respectively.

a position to make what kind of promise, the external interest that may be at stake, and the programmer agency" (Section of Administrative Law and Regulatory Practice, 2001).

Notwithstanding limitations of ADR, the value of ADR is so widely recognized that legislators have encouraged the use of ADR methods to settle disputes, often enshrining those precepts in law. Most states have adopted some form of required or recommended ADR procedure for specific areas of dispute, e.g., domestic disputes, labor disputes. The U.S. Congress has passed a series of laws intended to encourage the use of ADR methods in a wider spectrum of conflict management, specifically, The Newlands Act of 1913; Federal Arbitration Act of 1925; Administrative Procedure Act of 1946; Contract Disputes Act of 1978; Dispute Resolution Act of 1980; Civil Justice Reform Act of 1990; Administrative Dispute Resolutions Act of 1990; Negotiated Rulemaking Act of 1990; Administrative Dispute Resolutions Act of 1996; and culminating in the Alternative Dispute Resolution Act of 1998 (Smith, 2010).[14]

Although Congress has a well-established pattern of passing legislation that has encouraged the development of ADR, all three branches of the United States Federal government have also independently enacted measures to support the use of Alternative Dispute Resolution in resolving disagreements between parties. The Executive branch has used its authority and purview to establish guidance, interpretations or regulations that have enhanced the use of ADR in federal disputes. The Courts have also used their discretion to establish rules and procedures that have encouraged parties to explore ADR

[14] Appendix C provides a summary of each piece of legislation.

as a mechanism to resolve disputes before embarking on legal proceedings. That said, the basis of any action by the Executive and Judicial branches has its roots in Congressional law; therefore, a focus on important legislation that has carved out the space for the Executive and Judicial branches to support ADR is vital to understand the Federal government's support for ADR. Congress has showed a continuing interest in promoting ADR demonstrated by the over 17 Titles of the U.S. Code that include an ADR provision with Title 5 and Title 28 being the main focus of legislation.[15] Congress's intent appears to make ADR pervasive throughout the law of the land, with considerable direction provided to the Federal government itself in terms of organization and employee management, as well as clear direction to the Courts and legal system. Although the focus on Congressional law is essential, the interrelatedness and communication between the three federal branches requires readers to understand that one cannot easily isolate developments of Congressional ADR law from the influence and precedence that the Executive and Judicial branches have had in the crafting of the law (Smith, 2010). For example, once:

> [t]he Administrative Dispute Resolution Act (ADRA) was signed into law by the President [Bush] on November 15, 1990. Thereafter, each agency was required to adopt a policy on the use of Alternative Dispute Resolution (ADR) in connection with formal and informal adjudications, rulemakings, enforcement actions, licensing proceedings, contract administration, litigation, and must designate a

[15] Title 5: Government Organization and Employees; Title 10: Armed Forces; Title 11: Bankruptcy; Title 12: Banks and Banking; Title 15: Commerce and Trade; Title 16: Conservation; Title 18: Crimes and Criminal Procedure; Title 20: Education; Title 25: Indians; Title 28: Judiciary and Judicial Procedure; Title 29: Labor; Title 30: Mineral Lands and Mining; Title 38: Veterans' Benefits; Title 40: Public Buildings: Property: and Works; Title 41: Public Contracts; Title 42: The Public Health and Welfare; Title 45: Railroads; Title 48: Territories and Insular Possessions; Title 49: Transportation

> senior official as “dispute resolutions specialist.” (Keyes, Government Contracts in a Nutshell, 2000)

The use of ADR processes has been included in the FAR, specifically a Contracting Officer "may agree to use ADR processes prior to issuing a final decision where: (1) there is a material disagreement between the government and the contractor which is related to a claim; and (2) the parties voluntarily agreed to participate in the process, and the contractor provides certification with respect to the validity of its claims" (Section of Administrative Law and Regulatory Practice, 2001). Even after a Contracting Officer has reached a final decision on a protest “the parties may continue to use ADR processes” (Section of Administrative Law and Regulatory Practice, 2001).[16] . Interestingly, most ADR efforts related to government contract disputes occur after the contractor files an appeal to a Contracting Officer's adverse final decision. (Committee on Alternative Dispute Resolution Section of Public Contract Law American Bar Association, 2005)

Without effective Executive management the intent of Congress cannot reach its full potential and the judicial system could potentially be beset with disputes that could be handled in other venues. In the area of effective public oversight, ADR presents its own complication, specifically that most settlements are confidential. The increased use of ADR processes and the attendant confidential nature of most agreements make the government’s work less transparent or readily accessible to those charged with oversight

[16] Note that after the Contracting Officer's final decision, should the parties continue using an ADR process, the party’s participation does not change any of the procedures or time constraints for filing an appeal and also “does not constitute a reconsideration of the final decision” (Integrated Acquisition Environment, 2011).

responsibilities, including the citizenry. To the point, Noel Keyes found in his research "the public's diminished access to and scrutiny of settlements" troubled people experienced with the increasing shift toward ADR processes. One person was "particularly trouble[ed] given the number of experienced agency counsel who expressed their belief that their agencies today willingly pay out larger settlements to comply with the 'spirit' of their agency's ADR initiatives and mandates" (Keyes, Government Contracts in a Nutshell, 2000). These public policy questions deserve further attention and research to determine how best to balance the advantages conferred by using ADR processes over the equally compelling need to exercise oversight and management over those same processes. There is no denying "ADR is part of the procedural picture in federal administrative advocacy and in doing business with or for the government" and any "party or advocate who ignores ADR issues now does so at his or her peril" (Keyes, Government Contracts in a Nutshell, 2000).

ARBITRATION

Arbitration (also known as adjudication) represents one extreme of the ADR process and is the ADR process most similar to a trial. Parties make formal presentations to an arbitrator, including opening statements, witness testimony, physical evidence, and closing arguments. Prior to arbitration, parties may engage in lengthy discovery. At the conclusion of the presentations an arbitrator makes a decision. "Binding arbitration is the only ADR process where the parties surrender final control to an outside party" (Senger, 2004). The arbitrator's decision may be binding or non-binding depending on the

contractual arrangements between the parties. As of 2004, "the only [federal] agencies to issue arbitration guidance are the FDIC, the FAA, and the Federal Motor Carrier Safety Administration" (Senger, 2004).

There is some bias in favor of arbitration. Most contracts now include mandatory arbitration clauses; however, very few contracts incorporate mediation. Edward Packard, Jr, author and attorney, suggests a reason for this relationship when he states, “Law students are trained in the case method, and to the lawyer everything in life looks like a case” (Nash & Zullo, 2001). It is not a stretch of the imagination to argue that since attorneys draft federal contract law and the very contracts that govern the use of ADR processes that of all the forms of ADR available arbitration is consistently specifically enumerated. Attorneys are trained as litigators and given that arbitration is most similar to a trial, attorneys may feel more comfortable with arbitration. Additionally, there are different skills required for the other forms of ADR, especially mediation where the attorney takes on a completely different role of facilitating communication, which may at times create a challenge of maintaining client privileged and confidential information while in pursuit of bridging differences and fostering communication. Furthermore, if an attorney is responsible for reviewing and revising a contract intended to protect the interests of their client, an attorney would naturally consider what circumstances they would prefer to work in if called upon to act on behalf of the client. If an attorney is given the opportunity to choose the rules and environment to represent their client it is not much of a stretch to expect that an attorney would likely incorporate terms in a

contract that would be most beneficial. For example, an attorney would seek terms that would be narrowly defined and therefore less sensitive to establishing a legal precedence. Additionally, an attorney would recommend a dispute resolution process that would be structured to minimize litigation. These choices by the attorney may limit Contracting Officers and managers considerably, thereby affording little room to explore other Alternative Dispute Resolution options. Only a fraction of attorneys has any considerable training or experience in other formats of ADR, including mediation. The few attorneys with advanced mediation skills represent a boutique, specialty service, while most attorneys understand their roles in litigation.

MEDIATION

An ounce of mediation is worth a pound of arbitration and a ton of litigation!
— Joseph Grynbaum, P.E., Principal, Mediation Resolution Int'l, LLC

Mediation is a voluntary, negotiation-based, nonbinding, flexible dispute resolution method that incorporates a third-party neutral to assist disputants reach mutual agreement. The third-party neutral is referred to as a mediator.

> Mediation is a consensual process in which the disputing parties decide the resolution of their dispute themselves with the help of a mediator, rather than having a ruling imposed upon them. The parties' participation in mediation allows them to reach results that are tailored to their interests and needs. (National Conference of Commissioners on Uniform State Laws, 2011)

As much flexibility as disputants have in determining the outcome of the mediation, there is also considerable diversity in the role that the third-party neutral can take. Mediators may explore numerous styles in an effort to guide disputants to a

mutually agreeable settlement. For example, mediators can take on facilitative, evaluative or transformative roles.

> A mediator with a facilitative approach would be most inclined toward exploring opportunities for improving the parties' communication and finding problem-solving opportunities, to that end, a facilitative mediator would probably want to explore each party's perception of the events that led to the dispute underlying the mediation—for purposes of understanding what might motivate the disputants in their search for a settlement. (Moffitt & Schneider, 2008)

> A mediator with an evaluative approach would be most inclined toward exploring each party's perceptions of what a court might do in this case. To that end, like a facilitative mediator, an evaluative mediator would probably want to explore each party's perception of the events that led.to the dispute underlying the mediation. But unlike the facilitative mediator, the evaluative mediator would likely explore these perceptions for the purpose of assessing the extent to which the facts establish a right to relief or a defense under the relevant law. (Moffitt & Schneider, 2008)

> A mediator with a transformative approach would be most inclined to invite the parties to suggest an agenda or sequence of topics for discussion in the mediation. The mediator might invite—but not force—conversation about each party's perception of the events that led to the dispute underlying the mediation. The aim of doing so, however, would not necessarily be the resolution of the narrow dispute in question. Instead, quite conceivably, the mediator's focus would be largely or entirely on the parties themselves or on their relationship. (Moffitt & Schneider, 2008)

Table 2 highlights the mediation approaches and the different role a mediator may take and the process used to assist parties reach agreement. (Moffitt & Schneider, 2008)

An important concept to understand is that a mediator has no decision-making authority. "Unlike a judge or an arbitrator, a mediator cannot decide what is right or 'make' anyone do anything" (Section of Administrative Law and Regulatory Practice, 2001). The parties to the mediation develop the actual agreement or settlement guided through the process by the mediator.

Table 2: Mediation Styles

	Facilitative	Evaluative	Transformative
Primary Goal	Settlement	Settlement	Improve the quality of parties interactions
Likely Processes	Joint sessions and private caucuses	Primarily private caucuses	Primarily joint sessions
Negotiation Challenges Targeted	• Misunderstood or unexplored interests • Too few creative options • Bad communication	• Parties have unrealistic expectations about litigation alternatives • Parties need a "nudge" toward reasonable options	• Parties unable to resolve problems on their own • Bad working relationship • Neither understands the other well
Mediator Role	• Ask open questions • Keep parties' conversations on track • Set agendas	• Assess the merits of each side's case • Explore possible alternatives to settlement • Urge particular outcomes	• Highlight opportunities for "empowerment" (parties taking charge" and "recognition" (party seeking each other's perspectives)
Primary mediation principle	• Impartiality or neutrality	• Informed consent	• Self-determination

Source: (Moffitt & Schneider, 2008)

Featuring the diversity in the mediator's role serves to highlight one point, that those who lack a deeper appreciation for the flexibility of ADR methods, in particular mediation, will not be able to access the benefits derived from investing in these processes. It appears that many principals and senior managers are not entirely certain

what mediation is or what mediation can do as "enthusiasm for ADR is uneven both within and among the agencies" (Section of Administrative Law and Regulatory Practice, 2001). Furthermore, there appears little interest in “moving the goal post” in terms of incorporating mandatory mediation in the federal government contracting dispute process.

Dispute Avoidance

ADR processes offer disputants a significant advantage over traditional judicial and administrative review of disputes; however, even these processes can be costly and time-consuming, especially if the parties embarking in arbitration engage in substantial discovery. Most ADR measures only come into effect once an official protest has been made and the Contracting Officer has reviewed the protest. Even before the Contracting Officer has written an official response to the government contractor's protest there is an opportunity to address disputes.

Dispute avoidance (and similar conflict management techniques) are voluntary measures "usually established during the contract formation process, and rely on the strength of the contracting parties commitment to avoid issues and controversy or to resolve them at the earliest possible point in time" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002). Dispute avoidance techniques include issue escalation clauses, partnering, and Dispute Review Boards (Task Force on Dispute Resolution and Early Dispute Resolution

Section of Public Contract Law American Bar Association, 2002). All dispute avoidance techniques share two objectives: an enhancement of opportunities for negotiated settlements, and a process aimed at "resolving issues and controversy before the Contracting Officer issues a final decision to the CDA" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

Escalation clauses are provisions incorporated into the contract that commit parties to resolving problems at the "lowest possible level, before they ripen into full-blown disputes" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002). Escalation clauses may include a gradual escalation as well as require "face-to-face negotiation" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

> Many issue escalation clauses impose a three-step process on the contracting parties: face-to-face negotiation between the individuals who are directly involved in the issue; escalation to a level above the individuals who are directly involved in the issue; and escalation to mediation, arbitration or litigation. (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002)

Partnering is not as much a contractual arrangement in the context of government contracts, rather it is a commitment to relationship building among the stakeholders with a focus on identifying and working towards mutually beneficial objectives. The key concept with partnering is that the shared goals and improved communication will

mitigate disputes that might arise during contract performance. Partnering provides additional benefits as the commitment to the relationship permits stakeholders to delve into matter not normally covered by contracts, e.g., interpersonal behavior (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

A Dispute Review Board is a contractual provision intended to address disputes as they occur and very early in any dispute process. One of the major advantages of using a Dispute Review Board is that it "enables the parties to continue contract performance while a particular dispute is being presented to and evaluated by the DRB." Dispute review boards consist of "one or more neutral members" who evaluates the dispute with an interest in furthering the business relationship between the parties. The neutral members provide "non-binding recommendations" as an option to resolve the dispute (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

Unfortunately, "familiarity with these techniques, and the degree to which they are used within the acquisition community as a whole, vary significantly" (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002).

> Most government agencies and contractors with active ADR programs are willing to explore a wide range of dispute avoidance and conflict management techniques that are based on the effective use of bilateral negotiations. The challenge, in most cases, is to find negotiators who are objective and dispassionate enough to

> resolve issues in controversy, but who can also effectively represent the interests of the government agency or the contractor. (Task Force on Dispute Resolution and Early Dispute Resolution Section of Public Contract Law American Bar Association, 2002)

Mandatory Measures

Despite the robust dispute resolution framework found within the FAR system, "74% of contractors consider the government to be slow and inefficient in addressing issues with contract disputes" (Grant Thorton, 2010). In order to address concerns about inefficiency, it is imperative to keep the dispute resolution process as close as possible to the interested party who has filed a protest. Mandatory arbitration measures are intended to relieve court loads as well as provide disputants timely closure and relief with a minimum expenditure of resources (Cornell University ILR School, 2009). Although increased use of arbitration appears to have relieved the courts' docket from these types of cases, many disputants are not realizing expected efficiencies, perhaps due to increasing and extensive use of discovery processes. As the law allows for mandatory arbitration, consideration should be given to allowing for mandatory mediation and requiring mandatory dispute avoidance measures. One concern with mandatory mediation or dispute avoidance measures is that it undermines the precepts of the Alternative Dispute Resolution framework, specifically, that making any Alternative Dispute Resolution measure mandatory diminishes the unique contribution that Alternative Dispute Resolution can provide participants, especially in terms of building relationships and emphasizing the mutual benefits that can be met through cooperative processes.

Recommendations

Three improvements can be made to the existing dispute resolution system. First and foremost, dispute avoidance clauses should be required in the boilerplate language of federal government contracts. Including dispute avoidance clauses will establish an environment of addressing conflict proactively, as well as create an environment where the parties identify areas of mutual interest. Second, as part of a dispute avoidance clause, parties should be required to participate in mediation prior to the Contracting Officer formally replies to the protest. Third, better define factors that would require certain ADR processes that would encourage parties to engage in conflict resolution processes before parties could file suit in the courts or boards. For example, establish monetary thresholds to determine whether mandatory mediation is required. The larger the funds at stake the more Alternative Dispute Resolution processes parties would be required to attempt. Additionally those thresholds could be used to limit the time frame and extent to which discovery can be collected as part of an arbitration process. Limiting the discovery process may accelerate and enhance the arbitration process, but perhaps more importantly the limits on arbitration may encourage parties to examine other Alternative Dispute Resolution processes more fully. These limitations also keep arbitration closer to its founding goals. These limitations may also encourage participants to develop new value-added processes that would inspire parties to seek out ADR when faced with conflict or disputes.

Not only does there appear to be a lack of Contracting Officers to meet the needs

of our government, but also there is a question of how much training Contracting Officers receive in ADR. Without adequate training in the full spectrum of ADR processes, Contracting Officers may be limited in their ability to find solutions prior to the dispute progressing to the courts or boards. Enhanced training on the merits of ADR may encourage Contracting Officers to embrace the potential that ADR processes may have in augmenting their ability to exercise adequate oversight over the contracts.

Although the focus of this report is not on the abilities and competencies of the professionals who guide or otherwise participate in ADR processes given the interest in performance reporting, research should be considered to identify a feedback process for arbitrators and mediators. These feedback mechanisms may assist ADR professionals to improve their craft, which may draw more parties to use their services as they display more competencies.

Conclusion

Notwithstanding Congress's intent, the degree to which ADR has been successfully implemented is still very much a question. Agencies that commit to an ADR process must carefully evaluate the business case for engaging in ADR to ensure that the disputes selected for ADR show the best chances for promoting Congress's intent. Effective use of ADR measures enhance the processes credibility as well as encourage others to engage in ADR processes. Ineffective use of ADR not only undermines Congress's intent, but may burden the government and its citizens with additional costs and delays.

Incorporating a few modest enhancements to the FAR's current dispute resolution

process may provide improvement in efficiency that government contractors are seeking as well as reduce the burden that unnecessary litigation costs taxpayers.

To develop a definitive plan, additional research and discussion is required on the concerns raised in this report. For instance, does mandatory mediation invalidate the precept of ADR? Given that many courts require mandatory mediation before petitioners can request judicial review in civil matters, primarily family matters, there is a precedent to incorporate a mandatory dispute avoidance and mediation measure in federal contractual disputes. Another question in the same vein, can a mandatory measure help more than harm? Much Alternative Dispute Resolution thought presumes that voluntary participation in the process is a bedrock principle. There are those that feel that any mandate associated with Alternative Dispute Resolution methods changes the process to such a degree that no longer conforms to the framework, nor can it confer the presumed benefits to participants. In order to assess the extent that ADR has been integrated into the dispute resolution process, research should be undertaken to determine to what extent principals (and other heads of agency) make use of and understand ADR methods, specifically mediation. Until senior leaders and principals in the contracting process value ADR in its fullest spectrum, ADR methods will continue to be perceived to be a sideshow to the dispute resolution process. Ultimately, whether any of these changes are incorporated depends considerably on congressional leadership. Research into congressional attitudes expressing an interest in enhancing current Alternative Dispute Resolution processes may prove helpful.

Figure 3: Contractor's rendition of the A-12 Avenger II over a battlegroup

Appendixes

APPENDIX A[17]
ALTERNATIVE DISPUTE RESOLUTION METHODS AND CONSIDERATIONS

Alternative Dispute Resolution (ADR) resides on a continuum of conflict management. Depending on the nature of the conflict or dispute, disputants must factor in estimated costs and future implications when selecting a dispute resolution alternative.

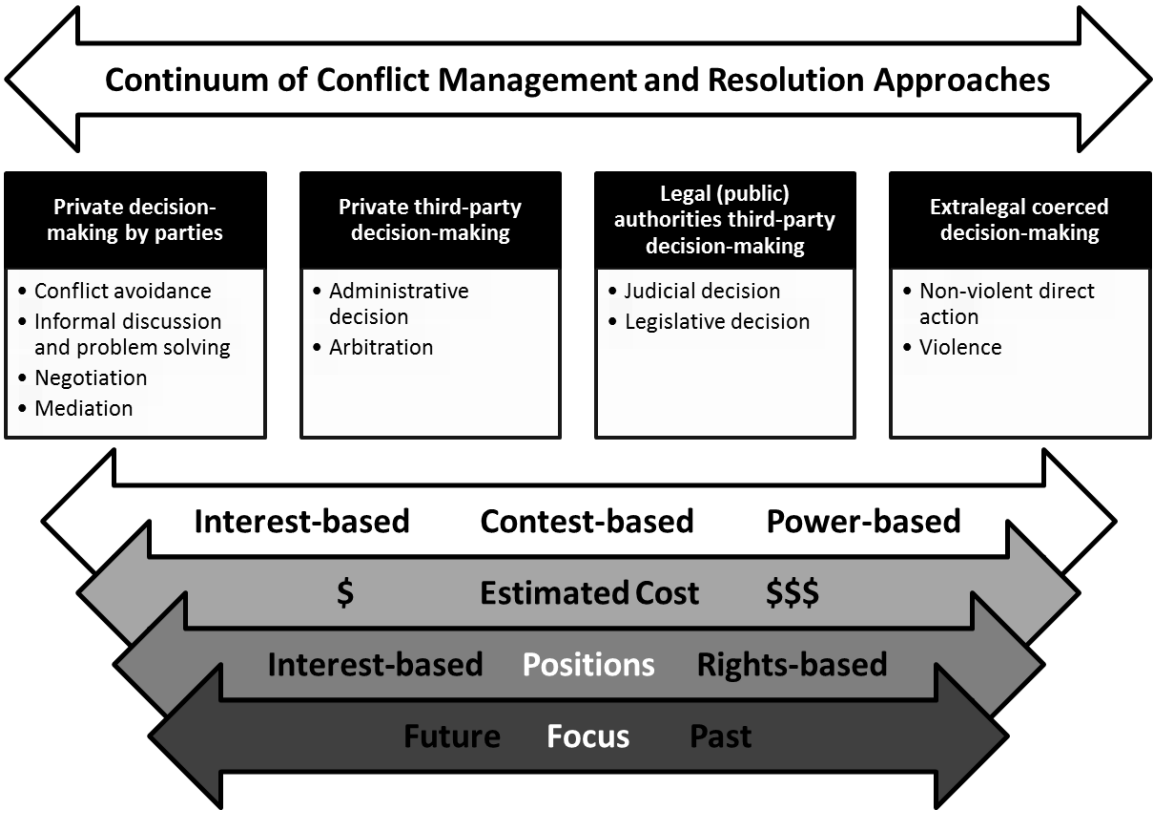

Figure 4: Continuum of Conflict Management and Resolution Approaches

[17] Appendix A is from an unpublished document by the author used with permission from supervising committee.

Figure 4 shows the entire conflict management continuum and resolution approaches ranging from conflict avoidance to violence (The Mediators' Institute of Ireland, 2011). The full spectrum of ADR methods trend toward interest-based, future focused conflict resolution techniques that are relatively less expensive.

ADR refers to a wide spectrum of methods and processes used to resolve disagreements between parties short of litigation. ADR can be described by categories ranging from preventive to judicial depending on the degree of external involvement and independence with considerable variation in terms of the resources committed to each ADR process (Smith, 2010). Figure 5 places various conflict resolution methods on the ADR spectrum by category.

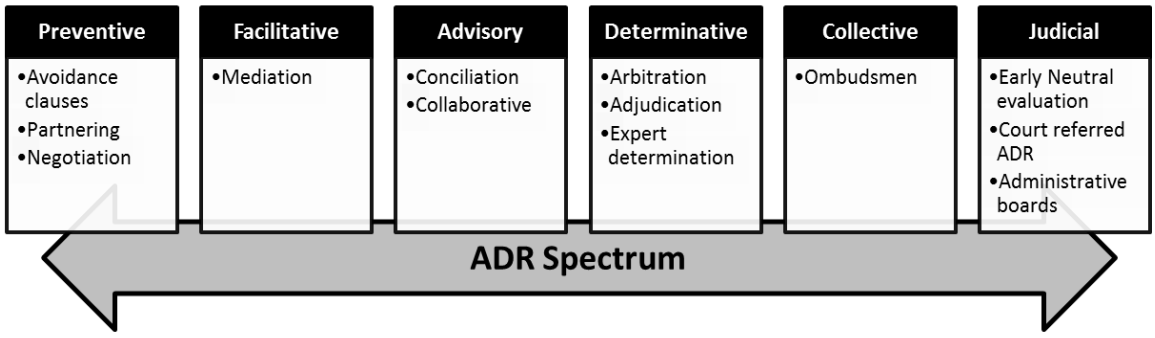

Figure 5: Spectrum of ADR methods by category

Table 3 outlines the primary forms ADR may take. (Senger, 2004) ADR provides several advantages over litigation. Table 4 outlines several of the advantages available to those who opt for an ADR process. (Senger, 2004) The degree to which parties benefit from the advantages of using an ADR process in contrast to traditional judicial or administrative review varies with the particular form of ADR selected by the parties with

mediation conferring the most advantages and arbitration offering the least difference from traditional processes. Given the wide spectrum of choices available for ADR there are general circumstances that can be evaluated to determine if a dispute is well suited for ADR processes. (Smith, 2010) Table 5 highlights a few circumstances where ADR may be optimal. (Senger, 2004) Notwithstanding the many benefits ADR may confer to parties who embark on a given process, ADR is not considered ideal for every dispute. (Smith, 2010) Table 6 highlights a few circumstances where ADR may not be optimal. (Senger, 2004)

Table 3: Major ADR categories

Method	Description
Dispute Review Board	The Dispute Review Board is a contractual mechanism establishing a neutral board that permits parties to obtain non-binding evaluations of any disputes that result over contract controversies.
Mediation	Mediation is a flexible, non-binding, negotiation-based process, where a third-party neutral assists disputants resolve any issues.
Arbitration or Adjudication	Arbitration or adjudication is the ADR process most akin to a trial with parties making formal presentations to an arbitrator, including opening statements, witness testimony, physical evidence, and closing arguments. At the conclusion of the presentations an arbitrator makes a decision.
Mini-trial	A mini-trial is a shortened version of trial where the jury consists of high-level decision-makers from each side who listen to the merits of the case with the assistance of a neutral party who oversees the process. Formal rules of evidence do not apply and parties agree to limit their presentations. After the mini-trial is complete the high-level decision-makers negotiate a final settlement.
Early Neutral Evaluation	Early Neutral Evaluation consists of parties providing summaries of their case and position to a neutral party, and the neutral then provides parties with a non-binding evaluation of the case. This process is useful for parties who may not have a good assessment of the value of their case and to receive an impartial analysis of the merits and potential recoveries.

Source: (Senger, 2004)

Table 4: Advantages of ADR

Circumstances	Factors
Time Savings	ADR is intended to reduce delays by sidestepping the litigation process as well as the many hours spent preparing for litigation.
Money Savings	Litigation is expensive and the money saved is in direct relation to the aforementioned timesavings.
Better Predictability	Disputants relinquish control over outcomes whenever a dispute is tried before a judge or jury. As a result, once litigation begins the results are unpredictable. ADR processes allow disputants an opportunity to manage risks and therefore improve predictability.
Improved Self-Determination	ADR allows disputants to decide how to resolve their dispute allowing for outcomes more aligned to their own self-interests.
More Creativity	Courts are limited in the relief that can be awarded with most relief consisting of monetary restitution. Additionally, Courts have to keep in mind a greater good, which may not necessarily be aligned with either disputants' primary interests. ADR allows disputants more creativity in identifying and including other aspects in the settlement agreement beyond what a Court could provide.
Improved Relationships	Litigation pits disputants against each other with parties attacking each other's positions with the attendant expectation that the Court will decide which side will prevail. The litigation process may destroy relationships. ADR allows disputants an opportunity to preserve their long-term relationship as they focus on the value added portions of subsequent negotiations.
Increased Satisfaction	The litigation process tends to minimize the interests of parties because of the rigid litigious process that requires parties' attorneys to take lead. ADR requires disputants have a voice in resolving their own disputes. This sense of control enables parties to ADR to feel more invested in the process and more satisfied with the outcomes.

Source: (Senger, 2004)

Table 5: Circumstances where the use of ADR is optimal.

Circumstances	Factors
Unassisted negotiation is not working	This is particularly helpful when parties have not been able to come to an agreement by themselves and a neutral party can facilitate an agreement.
Litigation would be expensive	Expected costs to litigate the case would be much higher than any benefits the parties may receive.
Litigation would be time-consuming	Parties require a timely resolution to the conflict.
Preserving the relationships of the parties would be worthwhile	The loss of the relationship for the sake of a singular victory would be to the long-term detriment of the parties.
Creativity would be valuable	The parties are interested in exploring other options beyond what the Court can provide.
One or more parties have an unrealistic valuation of the case	A party may not have a very good assessment of what the courts can realistically provide in terms of relief.
Emotional obstacles are hindering settlement	A party may be imbuing a dispute with emotions that clouds their judgment.
Communication has broken down	The communication barrier is actually preventing parties from being able to identify solutions to the dispute.
The case is complex, with multiple issues or parties	Multiple interests and parties are difficult to address given the constraints of the litigation process.
One or more parties would like a confidential resolution	Litigation becomes a part of the public record and parties may wish to keep the dispute and resolution out of the public record.

Source: (Senger, 2004)

Table 6: Circumstances where the use of ADR may not be advisable

Circumstances	Factors
Disputants want a precedent	A disputant may want to establish a precedent, especially if there appears to be multiple similar cases.
An inflexible disputant requires a certain result	A disputant may be adamant about a particular outcome that may significantly limit the ability for parties to find creative solutions.
A disputant requires public proceedings for deterrence purposes	A disputant may seek a public record of a decision with the intention of advertising and promulgating the outcome as an example for other potential disputants.
A dispute may result in a criminal investigation involving the same matter	Parties engaged in ADR may realize that the dispute will involve negotiation over facts that constitute a criminal offense; therefore, any agreements achieved through ADR cannot take precedence over potential criminal investigations or litigation.
The case is likely to settle easily without ADR	The circumstances and facts in dispute maybe such that a one-party settlement offer or a brief hearing is all that is required to resolve the dispute.
Litigation will be quick and inexpensive	The precedent may be so well established or the resolution so clear-cut that the Court can quickly assess and address the dispute.
A party does not have enough information to assess the case's value	In circumstances where a party cannot actually ascertain what the dispute is worth litigation maybe required to establish the appropriate compensation and value of the dispute.
A party is proposing ADR in bad faith	A party that does not intend to identify suitable solutions through ADR may be using the ADR process as a stalling technique.

Source: (Senger, 2004)

APPENDIX B
HISTORICAL HIGHLIGHTS OF FEDERAL PROCUREMENT

Federal procurement necessarily goes back to the origins of the nation. The ratification of the Constitution provided the federal government implicit approval to contract. The Purveyor of Public Affairs Act of 1795 was the first law that explicitly granted the government the approval to purchase supplies and materials in support of government functions. Little changed in the federal procurement environment until the Civil War. The Civil Sundry Appropriations Act of 1861 began a connection between large military related purchases and legal advances in government procurement. The Civil Sundry Appropriations Act of 1861 established the first formally advertised, competitive, open-bid contract process. This innovation established contract management provisions still in use today and "continued the principle of advertised procurements for the next 86 years" (FedVest, 2011). Once again, another long pause between major federal procurement legislation until The Armed Services Procurement Act of 1947, which created the first comprehensive set of procurement regulations, the Armed Services Procurement Regulation, which was the foundation for the FAR. (FedVest, 2011). The Armed Services Procurement Act of 1947 reaffirmed the sealed bid as the preferred method of procurement.

> The Federal procurement system as of the early 1940's was largely formulated from the Civil War era. After World War II, the Armed Services Procurement Act of 1947 and the Federal Property and Administration Services Act of 1949, were enacted. These acts, as amended, together with voluminous regulations issued under them comprise most of the procedures governing the federal procurement system for many years. They remained applicable for a number of

> years following the initial publication of the Federal Acquisition Regulation [FAR] in 1984. (Keyes, Government Contracts in a Nutshell, 2000)

Using the Armed Services Procurement Regulation as a foundation, the FAR was "originally drafted by personnel of both the Department of Defense and the General Services Administration under the direction of the Office of Federal Procurement Policy" and was published in September 1983 (Keyes, Government Contracts in a Nutshell, 2000). The FAR system is the definitive collection of regulations that govern federal procurement.

APPENDIX C[18]
ADR RELATED FEDERAL LEGISLATION

The following is a list of federal legislation that highlights the development and promotion of Alternative Dispute Resolution methods.

The Newlands Act of 1913

Prior to the Newlands Act of 1913 (Ch. 6, 38 Stat. 103), the Arbitration Act of 1888 and Erdman Act of 1898 established voluntary ad hoc arbitration between labor and management of railway companies to limit the impact of disputes that could pose interruptions to interstate commerce. However, few parties actually availed themselves of the voluntary mechanism and as a result, both acts were considered largely ineffective. The Newlands Act of 1913 established the Board of Mediation and Conciliation[19] to specifically handle railroad labor disputes. The Board was empowered to render opinions on disputed portions of any agreement upon request by either party. The establishment of the full-time Board emphasized Congress's intent that disputes should be settled through mediation rather than litigation.

Federal Arbitration Act of 1925

Federal Arbitration Act of 1925 (43 Stat. 883 §§ 1-14, and in 1947 codified as Title 9 §§ 1-16) was the first legislation that allowed for contractually-based compulsory and binding arbitration. Parties that agree to arbitrate must do so rather than go to court. The Act also provided limited means for challenging arbitration awards and once an arbitration award was confirmed by court the judgment was enforceable. The limited

[18] Appendix B is from an unpublished document by the author used with permission from supervising committee. (Smith, 2010).
[19] The Board of Mediation and Conciliation is the predecessor agency to the National Mediation Board.

challenge to arbitration awards follows the same grounds applicable to challenges to contractual provisions, e.g., capacity, duress, or unconscionability.

Administrative Procedure Act of 1946

The Administrative Procedure Act of 1946 (Public Law 79-404, 5 U.S.C. §§ 571 – 584) was intended to provide uniformity to the rulemaking and adjudicative processes of the federal government as a result of the huge expansion of federal agencies following the New Deal legislation. These new agencies held both rulemaking and enforcement responsibilities and legislators addressed concerns about *separation of powers* issues with the Administrative Procedure Act. The agencies adjudication responsibilities are also further broken down into two distinct phases: formal and informal adjudication. As a result of the revised definition for the adjudicative process, developments in ADR were incorporated into the Administrative Procedure Act.[20]

Contract Disputes Act of 1978

The Contract Disputes Act of 1978 (Public Law 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613) was crafted to govern claims brought by parties engaged in business with the United States government. This law explicitly encourages the use of ADR methods and authorizes agencies to establish Board of Contract Appeals to review certain cases. The agency's Board of Contract Appeals can reasonably be considered a form of ADR as the boards are to be utilized prior to litigation. The Contract Disputes Act, in conjunction with the Federal Acquisition Regulation, encourages agencies to use ADR procedures to the maximum extent practicable to conform to the law which requires agencies to provide inexpensive, informal, simple, and expeditious resolution of disputes. The preference for

[20] Adjudicative processes in the Administrative Procedure Act have been further enhanced by the Administrative Dispute Resolution Act.

ADR provisions is such that if a Contracting Officer declines a contractor's request for ADR, the Contracting Officer must stipulate that certain conditions or specific reasons have been met precluding the use of ADR procedures. The Contracting Officer's decision denying ADR is reviewable by higher authority.

Dispute Resolution Act of 1980

Dispute Resolution Act of 1980 (Public Law 96-190, 94 Stat. 17) was an unfunded initiative encouraging state and local government to consider and evaluate where ADR methods could assist those governments with disputes in their localities. In principle, the Dispute Resolution Act was to, according to the House report, "assist states, localities, and nonprofit organizations by providing seed money to develop inexpensive, fair, and easy–to–use mechanisms for resolving minor disputes . . . to encourage the development of effective mechanisms at a local, community or state level, and to provide access to justice for individuals with disputes not readily resolvable in the existing judicial system." The authorization was unfunded, which essentially neutered any prospects for the act to have real impact; however the seed was set for future legislation.

Civil Justice Reform Act of 1990

The Civil Justice Reform Act of 1990 (Public Law 101-650, Title I, 104 Stat. 5089, 28 U.S.C. §§ 471-482) was developed "to promote for all citizens, rich or poor, individual or corporation, plaintiff or defendant, the just, speedy and inexpensive resolution of civil disputes in our Nation's federal courts"[21] Among the several provisions included in the act, each U.S. District Court was to develop and implement a Delay Reduction Plan. As part of these plans Courts were required to consider ADR

[21] Senate Report No. 101-416, 101 Cong., 2nd Sess., at 1, 03AUG1990

methods and to implement ADR methods to the maximum extent possible, to include a pilot program where Courts are authorized to refer cases to ADR programs.

Administrative Dispute Resolutions Act of 1990

The Administrative Dispute Resolution Act of 1990 (Public Law 101-552, 104 Stat. 2736, 5 U.S.C. §§ 571-584) was an amendment to the Administrative Procedures Act of 1946 and represented Congress's attempt to address the increasing use of formal adjudicatory administrative processes within the federal government. The law included a "sunset provision" – where the law would lapse at a certain point without action by the Congress, in this case five years after being passed – and an evaluation requirement. The ADR Act authorized all federal government agencies to use alternative dispute resolution in practically any dispute, e.g., government and private parties, interagency and intraagency, labor-management, etc. The Act was intended to provide federal agencies with an "inexpensive means of resolving disputes as an alternative to litigation in the Federal courts" (ADR Act, Sec. 2). (Bingham & Wise, 1996)

Negotiated Rulemaking Act of 1990

The Negotiated Rulemaking Act of 1990 (Public Law 101-648, 104 Stat. 4969, 5 U.S.C. §§ 561-570), known as the Reg Neg Act, "establish[ed] a framework for the conduct of negotiated rulemaking"[22] and "to encourage agencies to use negotiated rulemaking when it enhances the informal rulemaking process."[23] The Reg Neg Act has been incorporated into the Administrative Procedure Act at 5 U.S.C. §§ 561-570. Under the Negotiated Rulemaking Act, an agency would convene a board of experts who would evaluate the impact of the potential rule and make recommendations to the agency that

[22] 5 U.S.C. § 561
[23] 5 U.S.C. § 561

convened the board. A public policy mediator facilitates the process for the board, focusing on keeping the negotiations moving forward while providing skills to manage any conflict that may arise within the Board. The informal Reg Neg development process has been considered a success as very complex and controversial rules have been drafted using this method. Although there are complaints with the process, this law has encouraged the U.S. Congress to perceive ADR methods as a viable alternative to formal conflict resolution methods.

Administrative Dispute Resolutions Act of 1996

The Administrative Dispute Resolution Act of 1996 (Public Law 104-320, 110 Stat. 3870) was an amendment to provisions of the Contract Disputes Act of 1978 and the Administrative Dispute Resolutions Act of 1990. The Act also reauthorized the Negotiated Rulemaking Act of 1990 and made the Administrative Dispute Resolutions Act of 1990 permanent while eliminating the data collection and reporting requirement and authorizing appropriations to support the Act.[24] The Administrative Dispute Resolution Act of 1996 authorized – for the first time – Federal agencies to enter into binding arbitration. (Committee on Alternative Dispute Resolution Section of Public Contract Law American Bar Association, 2005)

Alternative Dispute Resolution Act of 1998

The Alternative Dispute Resolution Act of 1998 (Public Law 105-315, 112 Stat. 2993) amended Title 28 of the United States Code to authorize ADR processes in all US District Courts in all civil actions, require all US courts to encourage and promote use of ADR in its district, as well as, establish an ADR program evaluation system. The Act

[24] Public Law 104-320

formalizes and further defines certain concepts, to include amount limits, participants in the process (such as neutrals and arbitrators), compensation and immunity.

Glossary

ATA: Advanced Tactical Aircraft

CDA: Contract Disputes Act of 1978

DOD: Department of Defense

FAA: Federal Aviation Administration

FAR: Federal Acquisition Regulation

FMCS: Federal Mediation and Conciliation Service

GSA: General Services Administration

NASA: National Aeronautics and Space Administration

OFPP: Office of Federal Procurement Policy

RFP: Request for Proposal

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