

25 October 1996

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

SAMPLE

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

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

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

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

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

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

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

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

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

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

For the Appellant:

For the Government:

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

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

5. Discovery. [Parties should take into account the discovery necessary for the minitrial. Board practice is to stay discovery during the ADR proceeding if it is reasonable to do so.] Discovery will be stayed from the date of this Agreement. If this matter is not resolved as a result of the ADR proceeding, the Board will lift the stay. The Appellant and the Government will remain entitled to pursue such additional discovery as they believe necessary and as the Board may allow.

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

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

8. The Schedule. The minitrial will be held on _____, at [a mutually agreed location or the offices of the Board]. The ADR proceeding will take _____ day(s). The parties have agreed to the following schedule [sample one day schedule]:

MINITRIAL CONFERENCE SCHEDULE

Day 1

9:00 a.m. - 10:30 a.m. Appellant's statement of case & presentation of position

10:45 a.m. - 12:15 p.m. Government's Rebuttal

12:15 p.m. - 1:00 p.m. Lunch

1:00 p.m. - 2:00 p.m. Appellant's Reply

2:15 p.m. - 3:15 p.m. Open question & answer period

3:15 p.m. - 5:00 p.m. Negotiations/Discussions between parties and neutral advisor

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

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

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

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

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

DATED:

DATED:

BY:

BY:

Principal Representative for
Government

Principal Representative for
Appellant

Attorney for the Government

Attorney for the Appellant