

CHAPTER 9

CLAIMS AND DISPUTE RESOLUTION IN FEDERAL DESIGN-BUILD PROJECTS

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FEDERAL DESIGN-BUILD**§ 9.01****§ 9.01 INTRODUCTION**

Under a traditional design-bid-build contract, the project owner and the architect and the engineer (A&E) are aligned as a team. This alignment can lead to frequent disputes between the owner/A&E team and the project contractor (including any affected subcontractors).

Under a design-build contract, the party alignment is altered. The A&E are united with the contractor in a design-build team. Owners, including the federal government, find this arrangement beneficial for a number of reasons (many of which are explained in other chapters of this book), one of which is that owners are often excluded from most project-related disputes. Typically, under a design-build contract the contractor is forced into a dispute against another member of the design-build team, rather than against the owner.

The use of alternative dispute resolution (ADR) procedures to avoid and/or settle federal contract disputes, particularly those involving design-build projects, is growing. Fueling this growth is the desire of all parties involved in construction projects to avoid the time, expense, and strained relations that have accompanied the traditional resolution of construction disputes. This chapter details the disputes process in federal design-build contracts when a claim, or potential claim, has arisen. For a detailed discussion of techniques for avoiding the disputes process altogether, *see* **Chapter 10**.

ADR procedures may be used at all stages of a dispute: both before and after a certified claim is submitted to the Contracting Officer (CO), and before and after an appeal from a CO's final decision is filed with a board of contract appeals or the United States Court of Federal Claims. Implemented properly, ADR is expeditious and cost-effective and allows the parties to remain in control of the dispute resolution process and the outcome. ADR most often involves the use of a third-party neutral to assist in the resolution of disputes. Techniques include mediation, mini-trial, arbitration, early neutral evaluation, fact finding, and settlement judges. Partnering—more a means of dispute avoidance—is also sometimes considered a form of ADR.

The formal method for resolving disputes in all federal contracts, including design-build projects, is governed by the Contracts Disputes Act of 1978 (CDA).¹ The CDA, which is explained in detail later in this chapter, remains in full effect even though there has been a proliferation of ADR in federal design-build contracts. The ADR options highlighted in this chapter can be implemented to augment the disputes resolution processes in the CDA and may be employed both before and during formal CDA proceedings.

The legal authority for the federal government to use ADR is set forth in this chapter. This information is important to those who participate in federal design-build contracts for at least two reasons. First, anyone who hopes to engage in ADR with the federal government should know the legal basis for the government's ability to use ADR—including the extent to which the government can

¹ 41 U.S.C. §§ 601–613.

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engage in any type of binding ADR process. Second, and perhaps more important, it is sometimes necessary to convince certain government elements, or particular contracting offices, that the federal government can, and should, engage in ADR. The materials provide all the information anyone should need in this regard.

Information on how selected federal government departments and agencies most involved in design-build projects are currently handling ADR is set forth in § 9.17. The information provided is, of course, limited by the extent to which a particular agency has promulgated guidelines on ADR or taken public positions with respect to it. Where available, agency Web sites have been identified where information may be found on that agency's ADR programs.

In addition, the specific ADR procedures adopted by the United States Court of Federal Claims for actions filed in that forum are set forth.

Given that ADR is a dynamic, vibrant area, it is expected that certain aspects of this chapter will be overtaken by events. Anyone who intends to rely on these materials, for example, should ensure that more recent legislation or regulatory action has not altered them. Similarly, the agencies may change their procedures in response to judicial decisions. Notwithstanding any such changes, these materials will provide a detailed road map to anyone wishing to engage in ADR on federal government contracts.

§ 9.02 DESIGN-BID-BUILD: SUBSTANTIVE CLAIMS AND PROCEDURAL POSTURES

In the event of a dispute under a design-bid-build contract, contractors typically bring one (or more) of four types of substantive claims against the project owner and/or the A&E. The first of these claims is for a cost overrun, caused by defective design by the project owner and/or A&E. Second, contractors may bring a claim alleging other constructive changes made by the owner or A&E to the construction plans. A third type of claim is brought by contractors when site conditions differ from those specified in the original project design. Finally, contractors may attempt to bring claims against the owner for action or inaction during the course of the project. For instance, the contractor may allege that the owner's failure to review or approve construction documents in a timely fashion caused delays and cost overruns.

Under design-bid-build contracts, owners typically bring two types of substantive claims against project contractors. First, project owners often sue for defective work done by the contractor. Second, owners may sue for late delivery of the project. Liquidated damages for delayed delivery are generally included in the original agreement.

Under design-bid-build contracts, there is a common procedural posture for claims. The general contractor typically bring claims directly against the government and indirectly against the A&E by making allegations of defective design in a claim against the owner. These claims attempt to recoup losses incurred by the contractors during construction. Increased costs cut into (and can eliminate altogether) potential contractor profit. Because of this, the procedural

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posture for the government's claims are usually as counterclaims to the contractor's suit.

[A] Dispute Resolution: Design-Bid-Build vs. Design-Build

There are a number of similarities between dispute resolution under federal design-bid-build contracts and dispute resolution under federal design-build contracts. For one, the same dispute resolution forums are available for both types of contracts. Formal litigation is always an option for any of the affected parties. Arbitration is a common option selected by parties to both federal design-bid-build and federal design-build contracts. Another similarity is that design-build parties may bring the same substantive legal claims as the parties to a design-bid-build contract. Finally, a range of alternate dispute resolution techniques may be utilized. These include mediation, mini-trials, dispute review board, and third-party neutral evaluation, which are briefly discussed in this chapter.

Differences also exist between the resolution of claims arising under federal design-bid-build and the resolution of those arising under federal design-build contracts. Because of party realignment, claims brought by the contractor are often brought against the A&E, rather than against the owner. Another difference is in the controlling precedent. For example, in a design-build contract, the government may not extend an "adequacy of specifications" warranty in the same way it does in design-bid-build. This implied warranty assures the contractor that the government, as the project owner, has inspected and warrants the design put forth by the owner's A&E. Because the government does not warrant the A&E's design, the contractor will be unable to pursue remedies from the government for most defective design claims. Instead, the contractor's ability to recover for defective design will hinge on the agreement between the contractor and A&E. The exception may be for deficiencies in the design criteria, but even this may be superseded by the design-builder's design responsibilities.

[B] Identity of Parties in Design-Build Disputes

Because the contractual relationship of the parties in a design-build team affects threshold issues such as standing to pursue claims, the distinction between a prime contractor utilizing a subcontractor and a joint venture is worth discussion. Courts have formulated distinct definitions for both a subcontractor and a joint venture. The United States Supreme Court defined the term "subcontractor" in *Cliford F. Mac Evoy Co. v. United States ex. rel. Calvin Tomkins Co.*² "[A] subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."³ In contrast, a joint venture has been defined as "an association of persons jointly undertaking some commercial

² 322 U.S. 102 (1944).

³ *Id.* at 108.

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enterprise . . . requir[ing] a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in the profit and losses.”⁴ Much confusion can be avoided by labeling the contractual arrangement a joint venture in the contract documents.

It should also be noted that a court could find a joint venture even in the absence of a formal writing documenting the existence of such an agreement. Courts have held that simply combining property, money, assets, and skill or knowledge does not create a joint venture in the absence of intent, as manifested from the facts and circumstances surrounding each case.⁵ Accordingly, an agreement defining the parameters of the relationship and the intent of the parties should be included.

In the absence of an agreement, courts examine various factors to determine what type of contractual arrangements exists between members of a design-build team. In *United States ex rel. Walker v. United States Fidelity & Guaranty Co.*,⁶ a federal court discussed numerous factors in sustaining a surety’s defense that a payment bond claimant was indeed a joint venture with the bonded principal. Most of the factors revolved around the fact that the claimant and the principal had established a joint bank account less than a month after the principal was awarded the contract. First, the joint bank account’s statement read: “This is a joint partnership account for the purpose of transacting business together in connection with . . . contracts which we have taken jointly.” Second, proceeds from the project were deposited in the joint bank account. Third, the premiums for the bond at issue and for bid bonds on other contracts were paid from the joint account. Finally, correspondence between both parties indicated that they were “mutually interested” in the success of the various projects.

Ultimately, the court in *United States ex rel. Walker* awarded the surety judgment. The court stated that, whether or not a written agreement exists, “the rule of law should be that a joint adventurer under these circumstances should not be permitted to recover upon a bond given to guarantee the fulfillment of the contract of this co-adventurer.”⁷

To be sure, some of the characteristics of a contractor/subcontractor relationship are similar to the characteristics of the relationship between design-build team members. However, two fundamental elements denote the existence of a design-build joint venture relationship, rather than a contractor/subcontractor relationship. First, the venturers must each have some right to control performance of the work. Second, the design-build team members must expressly or impliedly agree to share some portion of the losses.⁸ Within the agreement itself,

⁴ Black’s Law Dictionary 839 (6th ed. 1990), citing *Russell v. Klein*, 339 N.E.2d 510, 512 (Ill. App. 1975).

⁵ *Everston v. Cannon*, 411 N.W.2d 612 (Neb. 1987).

⁶ 4 F. Supp. 854 (D. Wyo. 1933).

⁷ *Id.* at 855.

⁸ *United States ex rel. Woodington Elec. Co. v. United Pac. Ins. Co.*, 545 F.2d 1381, 1383 (4th Cir. 1976).

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these two factors can be adjusted to the parties' specifications. The degree of control allotted to each party over the construction and the proportion of losses shared does not have to be equal, but the two factors must be present in some fashion.

In sum, design-build team members may avoid much confusion and quickly resolve potential disputes by drafting an agreement with explicit provisions regarding potential risks and party responsibility. This agreement should discuss what type of agreement has been reached, who furnishes the resources, who manages the joint venture, which parties will bear potential risks, and how the profits or losses are to be divided. The agreement should also discuss the extent to which design-build team members are permitted to engage in other contractual arrangements contemporaneously with the business of the joint venture.

§ 9.03 NATURE OF CLAIMS ARISING UNDER DESIGN-BUILD CONTRACTS

As discussed earlier, the most common dispute scenario under a federal design-build contract is for one member to sue another member of the design-build team. However, disputes arising between the design-build team and the government as the project owner do occur. The following sections discuss the claims that may arise under both of these possible scenarios.

§ 9.04 CLAIMS ARISING BETWEEN THE DESIGN-BUILD TEAM AND THE GOVERNMENT

Under a design-build contract, claims may arise between the design-build team and the owner. These claims are less common than those between members of the design-build team but, nonetheless, may be extremely disruptive to a construction project.

[A] Claims Against the Government

There are three claims that design-build teams generally level against the government. First, the government may be liable to the team for active interference in its effort to complete the project. The likelihood that the design-build team can successfully sue the project owner on these grounds depends on the facts of each case.

The case of *Pitt-Des Moines, Inc.*⁹ exemplifies a case in which the government was held accountable for interfering with a design-build team's construction work. In this case, the federal government entered into a fixed-price contract with the design-build contractor "to design, develop, fabricate, and install a large tank . . . in an existing building identified as Building 5 at the Naval Research Laboratory, Washington, D.C. The work included major structural modifications . . . as needed for the installation and housing of the tank. . . ."

⁹ ASBCA No. 42838, 96-1 BCA ¶ 27,941 (1995).

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The request for proposal included four drawings, which purportedly depicted the existing building. The contractor claimed that the drawings “were not clearly legible and lacked sufficient detail to permit [the contractor] to accurately calculate the actual approximate weight” of the building. The contractor requested additional drawings, but the government stated that no additional drawings were available. The contractor attempted to investigate the condition of the building. However, access was denied because of asbestos removal work.

After its review of the drawings, the contractor developed a best estimate of the wall thickness and the building weight. After the contract was awarded, the government “stumbled across” additional drawings and provided them to the contractor. The building’s dimensions and estimated weight in the newly discovered drawings varied greatly from those in the drawings originally provided.

The government argued that the design-builder had failed to conduct an independent field investigation of the building. The Armed Services Board of Contract Appeals (ASBCA) held that the contractor’s “pre-proposal attempts to obtain better drawings and its pre-proposal site investigation were reasonable.” The ASBCA noted that, although the government had warned the design-builder that the drawings might not have been accurate, the contractor was improperly denied access to the building altogether during its attempted on-site inspection. Accordingly, the ASBCA held that the actual wall thickness of the building was a differing site condition and that the contractor was entitled to the increased costs resulting therefrom.

A second type of claim for which the government may be liable to the project team is for delayed, withheld, or restrictive approvals. The factual situation typically occurs when the project owner is forced to make decisions regarding the course of construction and is unable to, refuses to, or makes decisions that hinder the design-build team’s ability to complete the project. As a result of the delay and the ensuing disruption, the project is not completed on schedule and cost overruns result. The likelihood that the design team can successfully sue the government on these grounds varies on a case-by-case basis.

Finally, the government may be liable to the design-build team for damages resulting from any warranties the government makes regarding the project. Under the *Spearin* doctrine, the government is deemed to warrant the design information that it provides as accurate and suitable for use.¹⁰ It is true that the government makes fewer warranties under design-build contracts than it does under design-bid-build contracts. But it is still liable for any warranties that it does make.

[B] Claims Against the Design-Build Team

There are two types of claims that the government typically brings against the design-build team. First, the government may claim damages under the theory of delayed project delivery. The factual situation surrounding such claims is

¹⁰United States v. Spearin, 248 U.S. 132 (1918).

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simple: the design-build team fails to deliver the project on schedule. The likelihood that the owner can successfully sue the design-build team on these grounds is typically high because the owner's case is straightforward. The design-build team either did or did not meet the predetermined date for project delivery. Damages for such claims include direct and indirect damages incurred by the owner and generally are addressed in the project contract in the form of liquidated damages.

A second claim that the government brings against the design-build team is for defective work. These claims are less common than those arising from delayed delivery, as defective work is generally discovered and addressed during project construction. Obviously, these claims are brought when a project has been delivered and subsequently fails to satisfy an express or implied warranty of fitness for use.

§ 9.05 CLAIMS ARISING BETWEEN MEMBERS OF THE DESIGN-BUILD TEAM

Under a design-build contract, claims may arise either between the design-build team and the owner or between members of the design-build team itself. The second of these possibilities occurs more frequently. The following sections discuss common claims that arise between members of the design-build team.

[A] Practical Lesson in Design-Build Dispute Resolution

The case *CRS Sirrinc, Inc. v. Dravo Corp. et al.*¹¹ exemplifies a federal design-build construction project dispute within the design-build team. Analyzing this case is helpful in understanding the risk spreading that design-build team members achieve under a design-build contract. This section highlights the basic facts of *CRS* and discusses the various breaches of contractual and fiduciary duty found by the court.

In *CRS* a dispute developed between two members of a design-build team. The construction contractor, Dravo Corporation (Dravo),¹² brought action against the A&E, CRS Sirrinc, Inc. (CRS), alleging breach of contractual and fiduciary duties owed under a joint venture agreement. The agreement was entered in connection with the construction of a large, technically complex power plant for the United States Navy at the Norfolk Naval Shipyard in Portsmouth, Virginia. The agreement combined the parties' capabilities to design and construct a complex facility. Dravo possessed the experience and the ability to construct a large project, while CRS had expertise and experience in the design and engineering aspects of the power plant project.

As a summary of the intended project, the Navy prepared conceptual diagrams, drawings, initial performance specifications, and a narrative about the

¹¹ 445 S.E.2d 782 (Ga. Ct. App. 1994).

¹² Technically, Dravo was the parent corporation of the actual contractor, Weyher/Livsey Constructors, Inc. Dravo was included in the contractual arrangement to ensure bonding capacity on the project. However, for simplicity the contractor will be referred to simply as "Dravo."

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power plant. The Navy required potential bidders to submit technical proposals explaining their qualifications and how they would design and construct the project.

In a letter of agreement, Dravo and CRS agreed that CRS would take the lead in preparing and submitting the technical proposal. If the proposal was accepted, Dravo would assume primary responsibility for preparing and submitting the bid on the basis of the technical proposal. CRS was responsible for supplying the technical information needed to prepare the bid but did not guaranty the accuracy of Dravo's estimates used in preparing the bid. CRS's work encompassed design and engineering responsibilities in both the prebid pursuit of the project and the postbid construction of the project.

Pursuant to their agreement, a technical proposal was accepted, and a bid of more than \$100 million was submitted to the Navy in the name of the Dravo-CRS Joint Venture. The joint venture was the low bidder and was awarded the contract. Subsequent to this, CRS and Dravo entered into a formal agreement setting forth their respective responsibilities in pursuing and performing the construction contract.^{12.1} Finally, a formal contract was executed between the joint venture and the United States Navy.

The power plant cost substantially more to construct than the winning bid. Dravo incurred construction cost overruns in excess of \$30 million. Dravo sued CRS, alleging that breaches by CRS caused more than \$12.5 million of the loss in added construction costs. The trial court ultimately concluded that CRS caused aggregate damages in the amount of \$7,910,232 (this amount was reduced to \$5,518,812 on account of risks that Dravo "assumed during . . . the construction process").¹³ The appellate court agreed with the trial court's substantive reasoning but remanded the case to the trial court to achieve a more detailed damages breakdown.

CRS provides an example of A&E breaches of contractual and fiduciary duties that result in construction damages. In *CRS*, the A&E was found liable for six types of construction damages: (1) 60 percent of the quantity gross costs, (2) 100 percent of the disruption costs, (3) 80 percent of the delay costs, (4) 50 percent of the back charges, (5) 100 percent of the punchlist items, and (6) other damages for project redesign, software corrections, and additional drawings.

A substantial portion of Dravo's claimed damages resulted from the fact that the joint venture's fixed-price bid greatly underestimated the quantities of construction materials needed to complete the project. On appeal, CRS argued that the joint venture agreement unambiguously released CRS from liability for damages caused by increased construction costs. The specific clause relied on by CRS stated that "[CRS] shall have no risk, liability, or accumulation will occur of error and omission charges for construction material quantity variations if the actual quantities are different from those in the bid to the Navy."¹⁴ Dravo argued

^{12.1} See *Joint Venture Agreement* (Attachment 1 to this chapter).

¹³ *Id.* at 790; see *Findings by the Court, Order, and Judgment* (June 25, 1993) (Attachment 2 to this chapter).

¹⁴ *Id.* at 788.

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that the contract provision cited by CRS was ambiguous. Furthermore, Dravo argued that the contract provision relied on by CRS was intended to shield CRS from liability for prebid and postbid work performed by Dravo, not CRS.

Both the trial and the appellate courts agreed with Dravo's argument. In support of its position, Dravo cited the following contract provision: "[CRS's] detail design will make every reasonable effort to stay within [Dravo's budget] quantities within the requirements of the prime contract. [Dravo] will be notified promptly if [CRS] believes quantities will be exceeded."¹⁵ The courts found this language particularly significant in light of the fact that CRS's work encompassed design and engineering responsibilities in both the prebid pursuit of the project and the postbid construction of the project. The courts found it unreasonable to expect that the parties intended to relieve CRS of liability under these circumstances.

Public policy implications appeared to weigh heavily on both the trial and the appellate courts' decisions. Both courts were disinclined to enforce the exculpation clause in a joint venture agreement. Had the exculpatory language cited by CRS been truly unambiguous, the courts might have enforced it. However, both courts found that CRS's engagement in a design-build joint venture agreement carried with it certain inherent responsibilities. CRS had an affirmative duty to work together with Dravo under the joint venture agreement and to locate any design or construction errors as early as possible. Without an unambiguous exculpation clause in the contract, the courts found CRS liable. In sum, it appears that courts will assume that design-build parties have agreed to spread risk equitably between themselves unless the parties unambiguously indicate otherwise in their agreement.

There are two clear lessons to be learned from the *CRS* case. First, parties should attempt to incorporate dispute resolution clauses in their design-build agreements. If this can be accomplished, costly litigation may be avoided, and time can be saved. Second, a court might readily find that design-build contract team members have a fiduciary duty to each. Under this duty, team members will be required to bear the burden of losses equitably unless this topic is explicitly addressed by the contract documents. If the intent of design-build team members is to allot more risk to one party than to the other, this intent must be made unambiguously in the design-build agreement.

[B] Claims Against the Construction Contractor

The contractor of a design-build team typically may be found liable to other team members under the following three legal theories. First, the contractor may be found liable for mismanagement of the construction project. Under a mismanagement claim, design-build team members claim that the prime construction contractor caused cost overrun damages for the other team members.

A second cause of action that team members bring against prime construction contractors is for negligent construction estimates. Under this claim, the

¹⁵ *Id.* at 788.

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design-build team members again bring suit against the prime contractor for cost overruns caused by the prime's negligence in bidding the job, which committed the team to do the work for a fixed price lower than it should have been.

Finally, a contractor may be found liable to another member of the design-build team for faulty construction. This is essentially an indemnity claim, which arises when another member of the team has been found liable to the owner for damages for which the contractor is partially liable.

[C] Claims Against the Designer

There are three claims that are typically brought by design-build team members against the team A&E. The most common claim brought by contractors against A&E team members is for defective or negligent design of the project. Under these circumstances, the A&E has made design miscalculations or errors. Team members claim that the A&E's errors caused damages in the form of cost overruns.

Another cause of action that team members may bring against the A&E is for failure to have designs completed to meet construction schedules. Again, damages from this claim come primarily from cost overruns.

Finally, a third type of claim brought against A&Es is for failure to produce a design to meet the budget. This claim does not allege that the project design is defective. Instead, it alleges that the A&E's design is too expensive and fails to comport with the project budget. This affects primarily the construction contractor member of the team because it costs more to build the project, and it introduces delay and disruption to the project schedule while the parties are iterating the design.

§ 9.06 THE DISPUTE RESOLUTION PROCESS

The type of construction contract that is utilized, design-bid-build or design-build, has a significant impact on the degree to which project parties are likely to become involved in construction disputes. Regardless of which parties are involved, the identical dispute resolution options are available to the parties under a federal design-bid-build contract and a federal design-build contract. The following section discusses the dispute resolution options available to the parties participating in a federal government construction project.

§ 9.07 THE CONTRACT DISPUTES ACT OF 1978

Prior to 1978, resolving disputes with the federal government was a fragmented process at best. It was unclear which tribunal was competent to adjudicate disputes and there was no single established process. In 1978, Congress passed the Contract Disputes Act (CDA),¹⁶ which provided for a uniform procedure for resolving all disputes with the federal government. The CDA introduced

¹⁶41 U.S.C. § 601 *et seq.*

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two major changes in the way disputes with the federal government are resolved. First, the CDA broadened the scope of disputes by removing the need for a remedy granting clause; second, it provided the right to appeal a contracting officer's (CO) decision to either an agency board of contract appeals or the Court of Federal Claims.¹⁷

The general CDA process is that when a controversy develops between the government and a contractor and the parties are unable to resolve it, then the controversy rises to the level of a dispute. Once a claim has been asserted for the dispute, the CO has 60 days to issue a final decision. If the claim is over a certain dollar threshold (currently \$100,000), then the contracting officer must notify the contractor of the reasonable time within which a decision will be issued. Once there is a final decision from the contracting officer, the contractor may choose to appeal the CO's decision either to the agency board of contract appeals, within 90 days, or to the Court of Federal Claims, within 12 months. From either of these two tribunals, the contractor is entitled to an appeal to the U.S. Court of Appeals for the Federal Circuit. The Supreme Court may grant certiorari to decide an appeal from the Federal Circuit. Throughout this entire process the contractor is free to enter into a negotiated settlement with the government.¹⁸

Each step of the CDA procedure has special requirements that are established through statute or case law. There are numerous terms of art of which a contractor must be aware before engaging in the formal disputes process. The major issues presented by the CDA are set forth in the following sections.

[A] Claim

Determining when a claim has been submitted is important because there are time limits within which the CO must issue a final decision and, more important, to allow for the calculation of interest if it is awarded, since interest is calculated as of the date the claim is filed. A claim is a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract."¹⁹ In order for a claim to exist, there must be a matter that is in dispute. Therefore, an invoice or other routine request for payment that is not in dispute when submitted is not a claim for purposes of the CDA.²⁰

¹⁷ See R. Nash & J. Cibinic, *Administration of Government Contracts* 1239 (3d ed. 1995).

¹⁸ It should be noted that if the contractor chooses to pursue its claim in the Court of Federal Claims, the authority to settle the claim shifts from the agency to the Department of Justice. See 28 U.S.C. §§ 516 and 519 & EO 6166, which provide the attorney general sole authority to settle matters being litigated in the courts. See also *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283 (4th Cir.), *cert. denied*, 439 U.S. 875 (1978), where the court held the government was not bound by a settlement entered into by the CO.

¹⁹ FAR 52.233-1.

²⁰ *Id.*

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It is not enough to merely reach an impasse to establish that a dispute exists. The CO must be on notice of the matter and either indicate disagreement or unreasonably delay in responding to the contractor. Negotiations with the government have been held to be sufficient evidence to establish that a dispute does not exist.²¹

[B] Asserting Claims

To properly assert a claim, the contract must provide a written demand or written assertion with sufficient detail to permit the contracting officer to give meaningful, reasoned consideration to the claim. In order to meet this sufficiency test, the contractor must identify the issues. In addition, the sum certain, or a reasonable estimate if it is not known, must be included, and the contractor must seek a final decision from the CO.²²

Depending on the amount of the claim, certain certifications may be required. The CDA requires that claims in excess of \$100,000 be certified by a senior responsible official who can verify that the claim is made in good faith and that the supporting data are accurate and complete.²³ The claim must be certified by a person duly authorized to bind the corporation. In addition, the person certifying the claim must have knowledge of the basis for the claim, the claim itself, and the accuracy and completeness of the supporting data.²⁴ The contractor certification does not require exact language, but must in essence state:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.²⁵

A CO does not need to consider a claim that is not certified but must notify the contractor within 60 days of the reasons that the certification may be defective. A defect in the certification does deprive the courts or agency boards of jurisdiction over the claim.²⁶

[C] Contracting Officer's Decision

A CO's final decision is binding on both parties and may be appealed to either the boards of contract appeals or the Court of Federal Claims. The CO must issue the final decision in writing within 60 days of receiving the claim, or within a reasonable time if the certified claim exceeds \$100,000.²⁷ If the CO fails to

²¹ *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991).

²² *Reflectone, Inc.*, 93-3 BCA ¶ 25,966, *aff'd* 34 F.3d 1031 (Fed Cir. 1994).

²³ See 41 U.S.C. § 605(c) and FAR 33.207.

²⁴ *Id.*

²⁵ FAR 33.201.

²⁶ 41 U.S.C. § 605(c)(6).

²⁷ 41 U.S.C. § 605(c)(2).

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make a final decision in this time, the contractor may appeal the failure to make a decision to the appropriate tribunals.

§ 9.08 LITIGATION

Litigation is always an option for the disputants. It is usually the forum of last resort for construction project disputes. Once parties have failed to reach an agreement, either informally or through ADR channels, they may resort to litigation. Because of the time and costs associated with civil litigation today, binding arbitration has become an attractive alternative to litigation. Even if the parties select litigation as the chosen method of dispute resolution in the contract documents, they should seek to establish certain parameters in an effort to streamline the process. For instance, some design-build contracts require a “cooling-off” period during which time suit may not be filed. Another area that can be addressed is what types of damages members of the design-build team may be permitted to recover. Many construction contracts preclude recovery of consequential damages. Finally, forum selection and choice of law clauses can be included in the contract documents to avoid arguments over these issues at a later time.

§ 9.09 ARBITRATION

Under arbitration, the parties voluntarily agree to submit to a neutral arbitrator who will render a binding decision on the dispute. United States courts find arbitration agreements binding, contingent on certain jurisprudential requirements. The parties can agree to arbitrate either at the beginning of the parties’ relationship (i.e., in the contract) or subsequent to the development of a dispute. The arbitrator may be an individual or a panel. The panel may be chosen in advance or by a predetermined method of panel selection. For instance, two disputants might agree that their arbitration panel will be composed of three members. Under the agreement, each party can select one panel member with the third panel member to be chosen by the selected panel members. United States courts have supported the increased use of arbitration under the rubric of conservation of judicial resources.

§ 9.10 MEDIATION

Mediation is a “voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a negotiated settlement.”²⁸ It is “one of the ADR processes best known to result in the mutually acceptable resolution of one or more problems.”²⁹

²⁸ *ABCs of ADR: A Dispute Resolution Glossary*, CPR Alternatives 10, no. 8, 116 (CPR Institute for Dispute Resolution, 1992) (hereinafter *ABCs of ADR*).

²⁹ F. Carr, J. Delanoy, & J. McDade, Jr., *Alternative Dispute Resolution: A Streamlined Approach to Resolving Differences* T.I.P.S. 6, no. 2, at 5 (NCMA, 1995).

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Unlike a judge or arbitrator, a mediator has no authority to decide issues or impose a solution on the parties. The parties control the substance of the process, the discussions, and any agreement that is reached. A mediator helps the disputing parties communicate and negotiate to resolve their differences.³⁰ As discussed later, the mediation process and the mediator's role can take various forms, depending on the nature of the dispute and the mediator's approach.³¹ The mediator can "assist parties to communicate effectively; can identify and narrow issues; crystallize each side's underlying interests and concerns; carry messages between the parties; explore bases for agreement and the consequences of not settling; and develop a cooperative, problem solving approach."³² A mediator may "caucus" with each party. By learning in confidence each party's true concerns, interest, and positions, the mediator often can identify options not previously perceived.³³

Mediation has been found to be appropriate where communications or negotiations between the parties have broken down, where problems provoke emotions, or where any of the parties have inflexible positions or personality conflicts.³⁴ It is typically used when further fact finding is unnecessary for settlement, although the parties can agree to further information or document exchange prior to or during mediation.³⁵

There are a number of benefits to mediation compared to other forms of ADR. They relate mainly to the nature of the process and the nature of the dispute.³⁶ While these benefits have been mentioned briefly, they are worth discussing in more detail.

One of the major benefits to mediation is its procedural flexibility, which permits the parties to create a process that meets their needs. The parties (1) decide whether to have an evaluative (rights-based) or facilitative (interest-based) process, (2) dictate the experience of the mediator, (3) identify the issues they want help deciding, (4) limit the duration of the mediation process, and (5) prescribe logistics, such as schedule, document exchange, and discovery. Either party may withdraw at any time.³⁷

Many industry commentators prefer mediation because the parties have some control over the substantive outcome. Since the mediator has no power to impose a solution, the parties retain the right to define the final result. The parties settle their disputes only if the outcome is mutually acceptable.³⁸ A dispute

³⁰ *Id.*

³¹ *ABCs of ADR* at 116.

³² *Id.*

³³ T. Colosi & C. Colosi, *Mediation: A Primer for Federal Agencies*, ACUS Resource Papers in Administrative Law at 6-7.

³⁴ Carr et al., *supra* note 29, at 6.

³⁵ *Id.*

³⁶ J. M. Keating, Jr., *Getting Reluctant Parties to Mediate: A Guide for Advocates*, 13 CPR Alternatives 13, No. 1, at 9-10 (CPR Institute for Dispute Resolution, 1995); Carr, *supra* note 29, at 38.

³⁷ Keating at 9.

³⁸ *Id.*

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is well suited for mediation when the issues are primarily factual and raise no significant questions of government policy and when each side recognizes that the other's position has some merit.³⁹ Disputes that involve continuing damage to reputation and business interests in the absence of quick resolution are appropriate for mediation, as it can be commenced quickly.

Where a business relationship is expected to survive the dispute, mediation is often the dispute resolution process of choice, as it avoids the placing of blame and focuses on finding solutions that meet the parties' interests, preserving the relationship and cutting further losses. It has been said that "[w]henever there is an important stake in future cooperation, only fools will leap to litigation without an attempt at mediation."⁴⁰ The need to continue together to complete the project is one of the factors that makes mediation of a dispute between the parties attractive.

There are other reasons that some parties prefer mediation. Mediation aims to preserve the privacy of disputants' concerns. The cost of the procedure is likely to be relatively modest (particularly as compared to continued litigation) because mediation is an informal process. Therefore, rules of evidence do not apply, testimony is not taken, witnesses are not sworn or used to support or defend positions, and interrogatories, depositions, and transcripts are not required. Parties cannot be forced to reach agreement.⁴¹ Even if the mediation does not result in an agreement, the parties often come away from it with a better understanding of the problems.

In mediation, the parties' representatives may not always have final decision-making authority.⁴² To smooth the ratification process and to maintain good faith, it is important to apprise the other party of any limits on decision-making authority and to keep ratifiers informed of the status of the mediation. Adequate time for consultation with ratifiers should be factored into any mediation schedule.⁴³

The mediation process can be divided into three phases—introduction, problem solving, and closure.⁴⁴ During the introductory phase, the mediator begins to develop an atmosphere of trust and reasonableness. The mediator may suggest and the parties must agree on the ground rules for the mediation. This may range from simple matters of etiquette to more significant matters such as scope, agenda, the issues and kinds of available documentation to be submitted, order of negotiation, and the use and timing of caucuses. This phase often begins with the drafting and execution of the mediation agreement.

³⁹ Carr, *supra* note 29, at 38.

⁴⁰ *Id.* at 10.

⁴¹ Colosi et al., *supra* note 33, at 2; see also R. Gomez & R. Robertory, *Alternative Means of Resolving Disputes* 19 (GWU Law School Government Contracts Program, Nov. 1995).

⁴² This is particularly true with respect to a case pending in federal court. Since settlement authority for cases in litigation rest with senior DOJ officials, it is DOJ policy that these officials "cannot and will not be made available to attend ADR hearings as decision-makers." See DOJ Civil Division, Guidelines on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts 9–10 n.10 (August 1992).

⁴³ Colosi et al., *supra* note 33, at 11.

⁴⁴ *Id.*, *supra* note 33, at 8–9.

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The primary goal of the problem-solving phase is to continue building trust, to identify the issues, to educate each participant about the dispute from the other party's perspective, and to generate and evaluate possible solutions.

Finally, the objective of the closure phase is to conclude the mediation process. If the parties have reached agreement, the mediator may help draft a memorandum setting forth its terms. The parties may then seek to have it formalized by their attorneys.

Mediation styles range from strictly interest based to very evaluative.⁴⁵ It is, therefore, important to match the mediator to the case. First along the continuum are interest-based mediators who perceive their role to be facilitators of resolution and hesitate to propose resolution options.⁴⁶ Next are interest-based mediators who generate settlement ideas by proposing potential solutions on the basis of party interests but who do not issue evaluations.⁴⁷ Some interest-based mediators will reluctantly issue evaluations on how a court might rule on legal or factual claims, but only when the parties are at an impasse and agree that such an evaluation should be given.⁴⁸ Sometimes, the mediator, at a party's request, will offer an assessment of the probable judicial outcome of the case in court in an effort to provide a benchmark against which the validity of specified claims and defenses, liability, or damages can be gauged to guide negotiations ("reality testing").⁴⁹ Under this option, the mediator must have adequate substantive law expertise to make such an assessment.

Toward the other end of the spectrum are mediators who explore interests and place a heavier emphasis on exploring the strengths and weaknesses of legal claims.⁵⁰ They may recommend a final solution to both parties. Finally, in rare cases, a mediator may focus only on legal interests and the settlement dollars. He or she will probe the strengths and weaknesses of the legal claim in depth and perform reality testing aimed at making the party's claims more realistic. This approach is usually accompanied by evaluation of issues and overall likely court outcome.⁵¹

In light of the range of mediator orientations, it is important to identify the obstacles to resolution of the dispute and to select a mediator whose style will address these barriers in the case at hand. Mediators should be interviewed by both parties using open-ended questions about style with targeted questions such as "What do you perceive your primary task to be?," "Do you caucus?," "Do you issue evaluations of likely court outcomes? When?," "Do you explore interests? When?," and "Do you consider it your task to actively propose possible solutions?"⁵²

⁴⁵ *Commentary: Mediation Preparation and Advocacy*, 12 CPR Alternatives No. 8, at 99, 100 (CPR Institute for Dispute Resolution, 1994).

⁴⁶ *Id.*

⁴⁷ *Id.* at 101–102.

⁴⁸ *Id.*

⁴⁹ *ABCs of ADR*, *supra* note 28, at 116.

⁵⁰ *Commentary: Mediation Preparation and Advocacy*, *supra* note 45, at 101.

⁵¹ *Id.*

⁵² *Id.* at 101–102.

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There is a variety of sources for neutrals/mediators. They include former judges, BCA members, other active judges,⁵³ academics, current government employees, retired government officials, and private mediator practitioners.⁵⁴ The Federal Mediation and Conciliation Service has in-house mediators. There are also numerous private sources, such as the American Arbitration Associations, and the CPR Institute for Dispute Resolution, that can furnish lists of mediators.

Once a mediator has been selected, the parties must enter into an agreement with him or her on the mediator's duties and obligations. There must be full disclosure of any prior relationships, future relationships, and compensation.

§ 9.11 MINI-TRIAL

Among ADR processes, the mini-trial is perhaps the best known. It is not a trial at all. Rather, it has been described as a structured settlement process in which each side presents a highly abbreviated summary of its case to senior officials of each party who are authorized to settle the case. Following the presentations, the officials seek to negotiate a settlement. The mini-trial combines aspects of several alternative means of dispute resolution to create an informal settlement procedure that retains many of the features of adversary litigation.⁵⁵

In a mini-trial proceeding, the principals and their attorneys first develop an agreement containing the ground rules for the mini-trial. The agreement sets forth roles, time limits, scope of discovery, schedules, and the procedures to be followed. The parties generally agree to curtail discovery and impose a limit (typically one or two days) for the mini-trial "hearing" or "conference," followed by a more flexible time limit for negotiations. While the agreement establishes a clear structure, it is also flexible in that the management representatives can agree on whatever procedures work for them.

At the mini-trial "conference," counsel for each party generally presents the party's case to both principals (and often a neutral advisor). This presentation may include oral argument, examination of witnesses, documentary evidence, films, photos, or other exhibits. The rules of evidence do not apply, and no transcript is made of the proceeding. Principals may ask questions of both attorneys and witnesses and time is limited—as set forth in the mini-trial agreement—often to a few hours. The mini-trial agreement may provide for the submission of short position papers to the principals outlining the party's case prior to the conference.

⁵³ Under the Navy's 1986 test program and COFC ADR policy, active BCA and COFC judges are the preferred sources for mini-trial neutrals. See COFC General Order No. 13; Navy ADR Procedures (Dec. 23, 1986). See also R. Page & W. Jockisch, *The Corps of Engineers Board of Contract Appeals Use of Alternative Dispute Resolution*, 24 Pub. Cont. L. J. 453 (1995).

⁵⁴ E. Crowell and C. Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 Md. L. Rev. 183, at 218–224 (1990).

⁵⁵ *Id.* at 200; see also L. Edelman, F. Carr, & J. Creighton, *The Mini-trial*, U.S. Army Corps of Engineers ADR Series Pamphlet 1, 1 (April 1989) (hereinafter *The Mini-trial*).

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In many mini-trials, the principals are assisted by an impartial neutral advisor who can play different roles (e.g., facilitate, evaluative) depending on the preferences of the principals. The purpose of having a neutral advisor is to introduce both an impartial opinion and an element of mediation into the proceedings.⁵⁶ The neutral advisor, if selected early, can also assist in the preparation of the mini-trial agreement. He or she can (1) point out the strengths and weaknesses of each organization's position, (2) advise how a judge might apply the law, (3) devise new compromises or redefine the issues in ways that lend themselves to resolution, (4) chair the conference and help set the proper procedural ambiance for negotiation, (5) help the parties clarify the worth of various claims, (6) deflate unreasonable claims and break down entrenched positions, and (7) articulate the rationale for a solution, making it easier for both sides to buy in than if the solution had been proposed by one of them.⁵⁷ As in mediation, selection of a particular neutral depends in large part upon the role he or she is to play. Any opinions given by the neutral are, however, only advisory, with decisions made by the principals themselves.

Although there is generally flexibility in the conference presentation, it must be remembered that for there to be payment from the government, there must be a legal basis for any costs, expenses, or injuries claimed. This could require the testimony of auditors or other evidence of cost.⁵⁸

Following the conference, the principals meet privately, sometimes with the neutral, to negotiate. As noted, the role of the neutral depends on the wishes of the principals. The neutral may mediate the discussions, give legal or technical advice, and/or propose settlement terms. The principals generally have auditors or other legal and technical advisors available for consultation but conduct the negotiations themselves. There is no transcript of the discussions.

If an agreement is reached, it is memorialized. Often the management representatives will develop an agreement in principle and request that their attorneys finalize it. This agreement in principle should be put in writing and furnished to both parties. Even though the mini-trial results in mutual agreement, the government must still document it as it would any other settlement, and it remains bound by federal procurement regulations.⁵⁹

There are a number of benefits to a mini-trial. It is voluntary, and any participant can drop out at any time, even during or after the conference. It is expeditious, because the parties make decisions themselves. It is as informal and as flexible as the parties want it to be. Like mediation, the process also aims to protect the working relationship of the parties. It has been said that "[f]or those who feel that justice is served more readily in an adversarial system than in a conciliatory one, the mini-trial retains the best of the adversarial presentations

⁵⁶ *The Mini-trial*, *supra* note 55, at 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at 3, 17. Indeed, as the Fourth Circuit has made clear, any settlement must comply with applicable statutes and regulations. *Executive Business Media, Inc. v. Department of Defense*, 3 F.3d 759, 762 (4th Cir. 1993).

⁵⁹ *Id.*

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without the time-consuming rules of evidence and procedure.”⁶⁰

Some concerns have been raised about mini-trials.⁶¹ They are most appropriately used to deal with factual disputes where the law is well established and said to be inappropriately used where interpretation of a new law or regulation is involved.⁶² Mini-trials also require a concentrated commitment of time from a senior manager. Use of a mini-trial can also subject the principal to second guessing and criticism by others who have not heard all the evidence. Moreover, because mini-trials are an informal process, without a judge, there is no oath administered, and most do not include cross-examination. Other issues that complicate the use of mini-trials include the stage of the litigation at which it should be introduced and who should be the government’s principal.⁶³ Furthermore, “if only one party participates in good faith, if the government is not willing to give its principal full authority to settle, or if another investigation follows the mini-trial, the process may be doomed to failure.”⁶⁴

§ 9.12 OTHER ADR PROCEDURES

While mediation, the mini-trial, and arbitration are the most popular forms of ADR, there are a number of other procedures that can be used alone or in combination with the foregoing to resolve disputes.

[A] Partnering

Partnering is more a dispute avoidance technique than a method of dispute resolution. It is a “process” that attempts to “establish working relationships among the parties (stakeholders) through a mutually-developed formal strategy of commitment and communication.”⁶⁵ It aims to “create an environment where trust and teamwork prevent disputes, foster a cooperative bond, and facilitate the completion of a successful project.”⁶⁶

A government agency’s intent to use partnering is ordinarily stated in the invitation or solicitation.⁶⁷ Once a contract is awarded, a partnering workshop is generally held with key personnel from each stakeholder. Personnel include those with decision-making authority who will be involved in contract performance and may include representatives of the agency, contractor, architect/engineer, and

⁶⁰ Crowell & Pou, *supra* note 54, at 202.

⁶¹ *Id.*

⁶² It is the policy of the Corps of Engineers not to use mini-trials to resolve disputes unless there is clear legal precedent. *See The Mini-trial*, *supra* note 55, at 10.

⁶³ *Id.*

⁶⁴ Crowell & Pou, *supra* note 54, at 202.

⁶⁵ Associated General Contractors of America, *Partnering: A Concept for Success* (Sept. 1991) (hereinafter *Partnering*) at 2.

⁶⁶ *Id.*

⁶⁷ *See* GSA Order, *Partnering Within the Public Buildings Service* (June 30, 1994); DOT, Federal Lands Highway contract provisions.

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subcontractors.⁶⁸ A partnering charter for the project that identifies communication objectives, a conflict resolution system using ADR techniques,⁶⁹ and performance objectives is developed and signed by the stakeholders.⁷⁰ Thereafter, regular meetings of the stakeholders and periodic evaluations may be held to ensure adherence to and to adjust the process.⁷¹

[B] Disputes Review Board

The “disputes review board” (DRB) is an ADR technique developed by the private construction industry to resolve contract disputes. The Corps of Engineers has used it in connection with public construction projects.⁷² The unique feature of this ADR technique is that it is established by written agreement before construction begins and remains in place during construction to assist in the resolution of disputes as they occur.⁷³

A three-member board is ordinarily selected by the parties, with each party selecting one member and the third member being selected by the first two members. The members are selected for their technical expertise and must be neutral and have no employment or financial connection with the parties. The board members make periodic visits to the site and meet informally with project managers to discuss schedule and potential areas of dispute and to maintain open communications. When a dispute arises that cannot be resolved by the parties, it can be referred to the board for consideration under established procedures. The board hears the views of both parties and provides a written opinion consisting of analysis and recommendations. The parties can adopt the recommended discussion or use it as a basis for settlement negotiations.⁷⁴

[C] Early Neutral Evaluation

Early neutral evaluation developed as a court-sponsored ADR process.⁷⁵ Under this method, an early neutral evaluator (ENE), usually a private attorney expert in the substance of the case, conducts a brief, confidential, nonbinding session *early* in the litigation to hear both sides of the case.⁷⁶ Subsequently, the

⁶⁸ *Partnering*, *supra* note 65, at 6; *see also ACUS Report*, *infra* note 94 at 21.

⁶⁹ *See* U.S. Army Corps of Engineers, Commander’s Policy Memorandum 5 “Alternative Dispute Resolution” (March 1993) (“Alternative Dispute Resolution methods are an integral aspect of partnering. All successful partnering arrangement include provisions which refer disputes to ADR.”).

⁷⁰ *Partnering*, *supra* note 65, at 6–7, 12–13.

⁷¹ *Id.* at 6–7.

⁷² F. Carr & L. Edelman, *The U.S. Army Corps of Engineers Perspective on ADR and Partnering in the Construction Industry*, 1994 Wiley Construction Update 8. *See also* Attachment 11 (DRB contract provision used in connection with Federal Lands Highway Cumberland Gap National Park Project 25E4).

⁷³ Carr and Edelman, *supra* note 72, at 8.

⁷⁴ *Id.*

⁷⁵ *See ABCs of ADR*, *supra* note 28, at 118; *see also* Colosi et al., *supra* note 33, at 4.

⁷⁶ *ABCs of ADR*, *supra* note 28, at 118.

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ENE identifies the main issues in dispute, explores the possibility of settlement, and offers a nonbinding assessment of the merits of the claims.⁷⁷ If settlement discussions are appropriate, the ENE can act as a mediator holding separate or joint sessions with the parties. When settlement is unlikely, the evaluator can recommend a litigation plan.⁷⁸

[D] Fact Finding

This process is generally a component of other ADR procedures and may take a number of forms.⁷⁹ In *neutral fact finding*, the parties select a neutral third party to perform the function and typically decide in advance if the fact-finding results will be conclusive or only advisory.⁸⁰ With *expert fact finding*, the parties privately employ neutrals to render expert opinions that can be conclusive or nonbinding on technical, scientific, or legal questions.⁸¹ In *joint fact finding*, the parties each select a representative who then works with the others to develop responses to factual questions.⁸²

[E] Confidential Listener

This process involves the submission by the parties of confidential settlement positions to a third-party neutral who, without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable range.⁸³ The parties may agree that, if the proposed figures overlap, with the plaintiff citing the lower figure, they will settle at a level that splits the difference.⁸⁴ Alternatively, if the figures are within a specified range of each other, the parties may direct the neutral to so inform them and help negotiate to narrow the gap.⁸⁵

[F] Med-Arb

This is shorthand for mediation/arbitration. Here the parties agree to mediate with the understanding that any issues not settled through mediation will be resolved by arbitration, with the same individual acting as both mediator and arbitrator.⁸⁶ Since having one individual serve in both capacities has been found to have a chilling effect on full participation in the mediation, a process known as Co-Med-Arb has been developed.⁸⁷ Under this process, there are two neutrals

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 116.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 115–116.

⁸⁴ *Id.* at 116.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

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involved. Both preside over the information exchange, after which one works with the parties as a mediator in the absence of the other.⁸⁸ If mediation fails, the remaining issues can be submitted to the arbitrator for a binding decision.⁸⁹

[G] Two-Track Approach

This approach involves the use of an ADR process in conjunction with litigation. Representatives of the disputing parties who are not involved in the litigation conduct settlement negotiations or engage in ADR. These efforts may proceed concurrently with litigation or during an agreed-upon hiatus.⁹⁰ This approach has been found to be useful where it may not be feasible to abandon litigation while settlement is explored or where the specter of litigation is needed for one party to consider an alternative mechanism.⁹¹ It has also been found to be useful “where the litigation has become acrimonious or where there is a concern that a suggestion of settlement will be construed as a sign of weakness.”⁹²

[H] Settlement Judge

A settlement judge is a form of ADR used by a number of agency boards of contract appeals and by the Court of Federal Claims. A board administrative judge or hearing examiner, who will not hear or have any formal or informal decision-making authority in the appeal, is appointed for the purpose of facilitating settlement through a detailed discussion of the strengths and weaknesses of each party’s position.

[I] Summary Trial with Binding Decision

Another form of ADR used by agency boards of contract appeals, summary trial with binding decision is a procedure under which the scheduling of the appeal is expedited and the appeal is tried informally before an administrative judge or hearing examiner.⁹³ A summary “bench decision” or written decision is generally issued. The decisions and rulings are binding but are not precedential. They are final, conclusive, and nonappealable and may not be set aside except for fraud. The length of the trial is generally expedited and tailored to the needs of the case.

⁸⁸ *Id.*

⁸⁹ In the case of the federal government, “binding” currently with an opt-out.

⁹⁰ *ABCs of ADR, supra* note 28, at 117.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See J. McDade, *Guidelines for Using Alternative Dispute Resolution Techniques to Resolve Contract Disputes* 17–18 (U.S. Air Force Office of the General Counsel, June 1994).

FEDERAL DESIGN-BUILD**§ 9.13[A]****§ 9.13 FEDERAL GOVERNMENT AUTHORITY TO USE ADR**

Federal agencies have always had the inherent authority to use nonbinding ADR to resolve disputes.⁹⁴ Recently, federal agencies have been granted the authority to enter into binding ADR agreements. This evolution is the result of statute and executive order, regulations, agency directives, and judicial orders. Set forth in the next sections is a summary of the authority now conferred on the federal agencies.

[A] Administrative Dispute Resolution Act of 1996⁹⁵

The Administrative Dispute Resolution Act of 1996 (ADRA or Act)⁹⁶ provides explicit congressional endorsement of ADR to resolve disputes in which the government is involved.⁹⁷ The ADRA permanently codifies the authority of federal agencies to use ADR procedures to resolve “issues in controversy” and encourages contracting officers⁹⁸ to initiate ADR procedures.⁹⁹ The ADRA rests on three key congressional findings. First, although administrative proceedings are “intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative” to federal court litigation, these proceedings “have become increasingly formal, costly and lengthy, resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.”¹⁰⁰ Second, alternative means of dispute resolutions used in the private sector in “appropriate circumstances” yield “faster, less expensive, and less

⁹⁴ Administrative Conference of the United States, *Toward Improving Agency Dispute Resolution: Implementing the ADR Act 5* (Feb. 1995) (hereinafter *ACUS Report*).

⁹⁵ Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended at 5 U.S.C. §§ 571–583 (1996)).

⁹⁶ Enacted on October 19, 1996, the ADRA amended and permanently reauthorized its predecessor, the Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990), as amended by Pub. L. No. 102-354, 106 Stat. 946 (the Administrative Procedure Technical Amendments Act of 1991). What the ADRA offers that was not previously available is “explicit congressional endorsement of ADR, . . . protection of the confidentiality of ADR processes, statutory authority to use ‘binding’ arbitration, and practical aids to simplify and encourage ADR use.” *ACUS Report*, *supra* note 94, at 5.

The ADRA formally authorizes the use of ADR only at the *agency level* prior to the initiation of judicial action involving the Department of Justice (DOJ). Executive Order (EO) 12778 and its successor, EO 12988, authorize the use of ADR once judicial action has been initiated and authority to resolve the matter has been transferred to DOJ. DOJ’s Dispute Resolution Office has advised that DOJ look to the ADRA for guidance in using ADR in connection with cases in litigation.

⁹⁷ See 5 U.S.C. § 572(a) (“An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.”).

⁹⁸ A “contracting officer” is “any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto.” 41 U.S.C. § 601(3). This definition also includes “the authorized representative of the contracting officer, acting within the limits of his authority.” *Id.*

⁹⁹ ADRA § 3(d)(1); 5 U.S.C. 572(a).

¹⁰⁰ ADRA §§ 2(1), (2).

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contentious” decisions, potentially “lead[ing] to more creative, efficient, and sensible outcomes.”¹⁰¹ Finally, explicit congressional endorsement of agencies’ use of “well-tested” ADR methods “will eliminate the ambiguity of agency authority under existing law.”¹⁰²

Under the ADRA, federal agencies have flexibility in determining whether and how to use ADR, but they must fulfill four requirements. First, each agency must adopt a policy that addresses the use of ADR.¹⁰³ Second, the head of each agency must designate a senior official to be the “dispute resolution specialist” (DRS) of the agency, with responsibility for implementing the Act and for developing, with appropriate consultation, an ADR policy.¹⁰⁴ Third, each agency must provide training on a regular basis for the DRS and for other employees involved in implementing the Act, including training on the theory and practice of negotiation, mediation, arbitration, and related techniques.¹⁰⁵ Finally, each agency must review its standard contracts, grants, and other assistance agreements and determine whether to amend them to authorize and encourage the use of ADR.¹⁰⁶

The ADRA amended the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 601 *et seq.*, to add a new subsection: 41 U.S.C. § 605(d).¹⁰⁷ Section 605(d) of the CDA permits a contractor and a CO to use any of the ADR procedures authorized by the new subchapter IV¹⁰⁸ of the Administrative Procedure Act (APA)¹⁰⁹ “or other mutually agreeable procedures” to resolve claims. It added a certification requirement that, in cases where ADR procedures or other mutually agreeable procedures are used and where the claim exceeds \$100,000, “the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.”¹¹⁰

In addition to these provisions, the ADRA addresses the following key areas: (1) scope of coverage; (2) appropriateness of ADR; (3) role of neutrals; (4) confidentiality; and (5) arbitration procedure. These areas are discussed in more detail in the following sections.

¹⁰¹ *Id.* §§ 2(3), (4).

¹⁰² *Id.* § 2(6).

¹⁰³ *Id.* § 3(a). For descriptions of various ADR programs and policies at federal agencies, *see* discussion in Part II.

¹⁰⁴ *Id.* § 3(b).

¹⁰⁵ *Id.* § 3(c).

¹⁰⁶ *Id.* § 3(d)(1).

¹⁰⁷ *Id.* § 6(a). This provision was originally found at 41 U.S.C. § 606(d).

¹⁰⁸ 5 U.S.C. § 571 *et seq.* Subchapter IV is entitled “Alternative Means of Dispute Resolution in the Administrative Process.”

¹⁰⁹ 5 U.S.C. § 551 *et seq.*

¹¹⁰ ADRA § 6; 41 U.S.C. §§ 605(c)(1), (d).

FEDERAL DESIGN-BUILD**§ 9.13[C]****[B] Scope of Coverage**

The ADRA covers a wide range of ADR methods, defining “alternative means of dispute resolution” broadly as “any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombuds, or any combination thereof.”¹¹¹ The ADRA further defines “issue in controversy” as “an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement . . . between an agency and persons who would be substantially affected by the decision . . . [or] between persons who would be substantially affected by the decision.”¹¹² As such, the ADRA can be construed to extend coverage to certain federal workplace conflicts set out in 5 U.S.C. § 2302¹¹³ and 5 U.S.C. § 7121.¹¹⁴

[C] Appropriateness of ADR

The ADRA sets forth guidelines for the appropriate agency use of ADR.¹¹⁵ Although an agency may use ADR proceedings to resolve disputes in which the agency is involved, the use of ADR must be “voluntary” and should “supplement rather than limit” other available means for resolving disputes.¹¹⁶ Also, while the use of ADR is not prohibited, the ADRA identifies circumstances in which an agency “shall consider not using” an ADR proceeding.¹¹⁷ Potentially inappropriate situations include those where:

- A definitive authoritative decision is needed as precedent
- The matter involves significant issues of government policy and ADR will not assist policy development
- Maintaining established policy and avoiding variations in implementation are of special importance
- The matter significantly affects nonparties
- A full public record of the proceeding or resolution is important

¹¹¹ 5 U.S.C. § 571(3).

¹¹² 5 U.S.C. § 571(8).

¹¹³ This statute addresses various prohibited personnel practices, including appointing relatives to government positions, coercing political activity, and preventing a person from competing for employment. *See* 5 U.S.C. § 2302(a)(1).

¹¹⁴ This statute deals with matters not subject to negotiated grievance procedures in collective bargaining agreements involving federal employees, including prohibited political activities, retirement, insurance, suspension, removal, examination, certification, and appointment. *See* 5 U.S.C. §§ 7121(c), (d).

¹¹⁵ ADRA § 4(b); 5 U.S.C. § 572.

¹¹⁶ ADRA § 4(b); 5 U.S.C. § 572(c).

¹¹⁷ ADRA § 4(b); 5 U.S.C. § 572(b).

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- The agency involved must maintain continuing jurisdiction over the matter and has the right to alter the resolution as circumstances warrant.¹¹⁸

An agency decision to use or not to use ADR is committed to the discretion of the agency and (except for decisions to arbitrate) is exempt from judicial review.¹¹⁹ However, pursuant to the Federal Acquisition Streamlining Act (FASA) of 1994,¹²⁰ a CO who rejects a contractor's request to use ADR is required to furnish the contractor with a written explanation.¹²¹ A similar obligation applies to contractors who reject a government offer to use ADR.¹²²

[D] Use of Neutrals under the ADRA

The ADRA defines a "neutral" as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy."¹²³ A neutral serves "as a conciliator, facilitator, or mediator" and "at the will of the parties."¹²⁴ The ADRA does not specify any qualifications that a neutral must have, stating simply that the neutral may be a "permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding."¹²⁵ The ADRA prohibits a neutral from having any "official, financial or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve."¹²⁶ The parties to an ADR proceeding are required to agree on compensation for the neutral that is "fair and reasonable to the Government."¹²⁷

Given the important role of neutrals in ADR processes, the ADRA emphasizes the expeditious acquisition of neutral services in two respects. First, the

¹¹⁸ ADRA § 4(b); 5 U.S.C. §§ 572(b)(1)–(6). Section 575 of the ADRA, entitled "Authorization of Arbitration," also references the situations listed in section 572(b), requiring agency heads to consider these "factors" in issuing required guidance on the use of binding arbitration.

¹¹⁹ ADRA § 4(b); 5 U.S.C. § 581(b).

¹²⁰ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

¹²¹ *Id.* § 2352(b). This provision is implemented by Federal Acquisition Regulation 33.214(b) to apply only to *small business* contractors. *See* 48 C.F.R. 33.214(b) ("If the contracting officer rejects a request for ADR from a small business contractor, the contracting officer shall provide the contractor written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute."); *but see infra* notes 180, 183–184 and accompanying text (discussing the proposed changes to this provision).

¹²² FASA § 2352(b). This provision is also implemented by Federal Acquisition Regulation 33.214(b) and appears to apply to *all* contractors. *See* 48 C.F.R. 33.214(b) ("In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request."); *see also infra* notes 180, 183–184 and accompanying text.

¹²³ ADRA § 4(b); 5 U.S.C. § 571(9).

¹²⁴ ADRA § 4(b); 5 U.S.C. § 573(b).

¹²⁵ ADRA § 4(b); 5 U.S.C. § 573(a).

¹²⁶ *Id.*

¹²⁷ ADRA § 4(b); 5 U.S.C. § 573(e).

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ADRA amended the requirements of competitive bidding and award for federal agency contracts (41 U.S.C. § 253(c)(3)(C)) and defense agency contracts (10 U.S.C. § 2304(c)(3)(C)) to authorize agencies to use other than fully competitive procedures to procure the services of an expert or neutral.¹²⁸ Second, section 573 of the ADRA provides that the agency or interagency committee to be designated by the President is responsible for “develop[ing] procedures that permit agencies to obtain the services of neutrals on an expedited basis.”¹²⁹

[E] Confidentiality

The ADRA provides explicit protection for confidential communications in “dispute resolution proceedings,”¹³⁰ thereby recognizing that confidentiality is crucial to the success of ADR programs. Specifically, the ADRA encourages and protects the confidentiality of communications in ADR proceedings by providing that neither the neutral nor the parties should voluntarily disclose or be compelled to disclose a “dispute resolution communication” or “communication provided in confidence” in any type of case or proceeding.¹³¹ The ADRA defines “dispute resolution communication” as “any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant.”¹³² However, this definition excludes from protection “a written agreement to enter into a dispute resolution proceeding, or a final written agreement or arbitral award reached as a result of the proceeding.”¹³³ Moreover, communication is “in confidence” if “that information is provided . . . with the expressed intent of the source that it not be disclosed; or . . . under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.”¹³⁴

Section 574(a) of the ADRA specifically addresses confidentiality as it relates to the neutral. Although this section prohibits a *neutral* in a dispute resolution proceeding from disclosing confidential information, it specifies four situations where disclosure may be appropriate:

- (1) all parties to the proceeding and the neutral consent in writing and, if . . . provided by a nonparty participant, that party also consents in writing;

¹²⁸ As amended, 41 U.S.C. § 253(c)(3)(C) and 10 U.S.C. § 2304(c)(3)(C) provide, in relevant part: “The head of the agency may use procedures other than competitive ones only when . . . it is necessary to award the contract to a particular source or sources in order . . . to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify.”

¹²⁹ ADRA § 4(b); 5 U.S.C. § 573(c)(2).

¹³⁰ The ADRA defines “dispute resolution proceeding” as “any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate.” ADRA § 4(b); 5 U.S.C. § 571(6).

¹³¹ ADRA § 4(b); 5 U.S.C. §§ 574(a), (b).

¹³² ADRA § 4(b); 5 U.S.C. § 571(5).

¹³³ *Id.*

¹³⁴ ADRA § 4(b); 5 U.S.C. § 571(7).

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- (2) the dispute resolution communication has already been made public;
- (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
- (4) a court determines that such testimony or disclosure is necessary to—
 - (A) prevent a manifest injustice;
 - (B) help establish a violation of law; or
 - (C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the interest of the dispute resolution proceeding in general by reducing the confidence of parties in future cases that their communications will remain confidential.¹³⁵

Similarly, section 574(b) of the ADRA prohibits a *party* from disclosing confidential communication but enumerates circumstances where the party's disclosure of information is permitted. The circumstances justifying a *neutral's* disclosure, just described, also provide the basis for a *party's* disclosure. In addition to these circumstances, a *party* may disclose a dispute resolution communication where:

- (1) the communication was prepared by the party seeking disclosure;
- (2) all parties to the dispute resolution proceeding consent in writing; . . .
- (6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or
- (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the proceeding.¹³⁶

The ADRA enforces the nondisclosure by providing that “[a]ny dispute resolution communication that is disclosed in violation of [sections 574(a) and (b)] shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.”¹³⁷ In cases where a party, by way of a discovery request or other legal process, demands that a neutral disclose a dispute resolution communication, section 574(e) of the ADRA requires the neutral to “make reasonable efforts to notify the parties and any affected nonparty participants of the demand.”¹³⁸ However, any objection to such disclosure is “waived” if the “party or affected nonparty participant who receives such

¹³⁵ ADRA § 4(b); 5 U.S.C. § 574(a).

¹³⁶ ADRA § 4(b); 5 U.S.C. § 574(b).

¹³⁷ ADRA § 4(b); 5 U.S.C. § 574(c).

¹³⁸ ADRA § 4(b); 5 U.S.C. § 574(e).

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notice . . . within 15 calendar days does not offer to defend” the neutral’s intention to disclose the requested information.¹³⁹

Finally, communications treated as confidential under the ADRA are also exempt from disclosure under the Freedom of Information Act (FOIA).¹⁴⁰ Specifically, the ADRA exempts the neutral’s notes and communications between neutrals and parties from disclosure under the FOIA, except under certain circumstances listed in sections 574(a)(1)–(4) and 574(b)(1)–(7). Furthermore, the ADRA exempts from FOIA disclosure any communications that the neutral generates for the parties’ use in a proceeding, such as early neutral evaluations or settlement proposals.¹⁴¹

The exemptions from FOIA disclosure may have two major consequences. First, in dispute resolution proceedings involving federal parties, federal employees or officials may serve as neutrals without being compelled to disclose their confidential communications under FOIA. Second, private parties may be more willing to use ADR to resolve disputes with the federal government because the ADRA’s exemptions alleviate any concerns that business competitors might, pursuant to FOIA, force disclosure of proprietary information divulged in the ADR proceeding.¹⁴²

It should be noted, however, that the confidentiality provisions under the ADRA are triggered only if the ADR proceeding “is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate.”¹⁴³ Thus, unless these requirements are met, “dispute resolution communications” may not be treated as confidential under the ADRA.

§ 9.14 ARBITRATION PROCEDURE

The ADRA, by its amendments to the APA, deals specifically with arbitration as a form of ADR.¹⁴⁴ Historically, the General Accounting Office has held that agencies could not enter into binding arbitration without specific statutory authority.¹⁴⁵ The ADRA provides such authority, with certain limitations, when all parties consent.

¹³⁹ *Id.*

¹⁴⁰ *See* ADRA § 4(b); 5 U.S.C. § 574(j) (“[A] dispute resolution communication which is between a neutral and a party and which may not be disclosed under . . . section [4 of the ADRA] shall also be exempt from disclosure under [FOIA].”).

¹⁴¹ ADRA § 4(b); 5 U.S.C. §§ 574(b)(7), (j).

¹⁴² Previously, private parties (whose communications were protected under Federal Rule of Evidence 408) might have been inhibited from engaging in ADR with federal agencies, because such engagement would make the information revealed in ADR proceedings “agency” records.

¹⁴³ ADRA § 4(b); 5 U.S.C. § 571(6).

¹⁴⁴ *See* ADRA § 4(b); 5 U.S.C. §§ 575–581.

¹⁴⁵ *ACUS Report, supra* note 94, at 7.

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The Act explicitly authorizes agencies¹⁴⁶ to engage in binding arbitration.¹⁴⁷ Agencies may use binding arbitration “as an alternative means of dispute resolution whenever all parties consent,” which consent “may be obtained either before or after an issue in controversy has arisen.”¹⁴⁸ However, the Act imposes three limitations on agencies’ binding arbitration authority. First, each agreement to arbitrate must specify a maximum award, namely, a ceiling on the amount the arbitrator can award.¹⁴⁹ This limitation seems to have been designed to ensure that an arbitration award would not unduly burden an agency’s budget. Second, the agency employee or official offering to use arbitration must “have authority to enter into a settlement concerning the matters or is otherwise specifically authorized by the agency to consent to the use of arbitration.”¹⁵⁰ Finally, an agency head must, in consultation with the Attorney General and in conformity with the criteria delineated in section 572, issue guidance on the use of arbitration and on the settlement authority of agency officers and employees before entering into binding arbitration.¹⁵¹

The ADRA also contains other important provisions relating to arbitration. One such provision requires that arbitration agreements be in writing. Another permits the parties to submit only some of the issues in controversy to arbitration and to agree to arbitration on the condition that the award be within a range of outcomes. Finally, an agency may not require a person to consent to arbitration as a condition of contracting.

[B] Selection of Arbitrators

The parties to arbitration are entitled to select the arbitrator,¹⁵² but the arbitrator must be a neutral who meets the criteria set forth in 5 U.S.C. § 573. As discussed earlier, a major criterion is that a neutral may not have any interest in the outcome of the controversy; if such interest does exist, the neutral may still serve if he or she fully discloses the conflict in writing and all parties consent to his or her service.

¹⁴⁶ ADRA § 4(b); 5 U.S.C. § 575.

¹⁴⁷ See ADRA § 4(b); 5 U.S.C. § 580(c) (“A final award is *binding* on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States. . . .”) (emphasis added).

¹⁴⁸ ADRA § 4(b); 5 U.S.C. § 575(a)(1).

¹⁴⁹ ADRA § 4(b); 5 U.S.C. § 575(a)(2).

¹⁵⁰ ADRA § 4(b); 5 U.S.C. § 575(b)(1).

¹⁵¹ ADRA § 4(b); 5 U.S.C. § 575(c).

¹⁵² ADRA § 4(b); 5 U.S.C. § 577.

FEDERAL DESIGN-BUILD**§ 9.14[F]****[C] Authority of the Arbitrator**

The authority of the arbitrator¹⁵³ distinguishes arbitration from other forms of ADR, such as mediation or mini-trial. An arbitrator is authorized to (1) regulate the course and conduct of the arbitral hearings, (2) administer oaths and affirmations, (3) compel the attendance of witnesses and the production of evidence to the extent the agency involved could do so, and (4) make awards.

[D] Arbitration Proceedings

The arbitrator sets the time and place for the hearing and notifies the parties at least five days before the hearing.¹⁵⁴ Any party desiring a record is responsible for its preparation. The parties are entitled to be heard, present material evidence, and cross-examine witnesses. The arbitrator interprets and applies relevant statutory and regulatory requirements, legal precedents, and policy directives. An interested party is prohibited from making or knowingly causing to be made to the arbitrator any unauthorized ex parte communication relevant to the merits of the proceeding unless the parties otherwise agree, and the arbitrator must follow certain steps if such a communication is made. Finally, the arbitrator is required to make award within 30 days after the close of the hearing or the date of filing posthearing briefs, whichever date is later, unless otherwise agreed or agency rules provide otherwise.

[E] Arbitration Awards

An arbitration award¹⁵⁵ is required to include a “brief, informal discussion of the factual and legal bases” for it but does not require formal findings of fact or conclusions of law. An award becomes final 30 days after it is served on all parties. However, an agency that is a party to the proceeding may extend this 30-day period an additional 30 days by serving notice on all other parties before the end of the initial 30-day period.

A final award is binding on the parties to the arbitration proceeding and may be enforced. The award may not serve, however, “as an estoppel in any other proceeding for any issue that was resolved in the proceeding” and “may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.”¹⁵⁶

[F] Judicial Review

A person adversely affected or aggrieved by an arbitration award conducted under this subchapter may seek review of the award pursuant only to 9 U.S.C.

¹⁵³ ADRA § 4(b); 5 U.S.C. § 578.

¹⁵⁴ ADRA § 4(b); 5 U.S.C. § 579.

¹⁵⁵ ADRA § 4(b); 5 U.S.C. § 580.

¹⁵⁶ ADRA § 4(b); 5 U.S.C. § 580(d).

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§§ 9–13.¹⁵⁷ An agency’s decision as to whether to use ADR is a matter of the agency’s discretion and is not subject to judicial review, except that arbitration is subject to judicial review under 9 U.S.C. § 10(b). This means that the United States District Court for the district in which an award was made under 5 U.S.C. § 580 may vacate the award upon the application of a person not a party to the arbitration who is adversely affected or aggrieved “if the use of arbitration or the award is clearly inconsistent with the factors set forth in [5 U.S.C. § 572].”¹⁵⁸

§ 9.15 EXECUTIVE ORDERS 12778 AND 12988—CIVIL JUSTICE REFORM

Two Executive Orders have addressed the use of ADR. The first, Executive Order (EO) No. 12778,¹⁵⁹ was revoked by EO 12988 in 1996.¹⁶⁰ From a historical perspective, however, EO 12778 remains noteworthy.

On October 23, 1991, President Bush signed EO 12778 in an effort, inter alia, to promote the just and efficient resolution of civil claims involving the government. It set forth a preference for the resolution of claims through discussions, negotiations, and settlements, rather than through formal or structured ADR process or court proceedings. However, it stated that litigation counsel¹⁶¹ should be trained in ADR techniques and that, where benefits may be derived, “after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the private parties.”¹⁶² Indeed, the EO expressly stated that

[i]t is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.¹⁶³

However, the EO prohibited the use of binding arbitration as a form of ADR.¹⁶⁴ Section (1)(c)(3) stated that

[I]tigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency’s

¹⁵⁷ ADRA § 4(b); 5 U.S.C. § 581.

¹⁵⁸ 9 U.S.C. § 10.

¹⁵⁹ 56 Fed. Reg. 55, 195 (1991), *reprinted in* 28 U.S.C. § 519 (1994).

¹⁶⁰ 61 Fed. Reg. 4729 (1996).

¹⁶¹ “Litigation counsel” is defined under EO 12778 § 5(b) as “the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney’s Office . . . or a litigating division of the Department of Justice. . . .” It is similarly defined under EO 12988 § 6(b).

¹⁶² EO 12778 § 1(c)(1).

¹⁶³ *Id.* § 1(c)(2).

¹⁶⁴ *Id.* § 1(c)(3).

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discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph should be interpreted in a manner consistent with section 4(b) of the [ADRA].¹⁶⁵

On September 7, 1995, the Department of Justice (DOJ) Office of Legal Counsel issued a memorandum reversing the DOJ's prior position that binding arbitration was constitutionally prohibited and concluding that there was no constitutional bar prohibiting federal agencies from entering into binding arbitration. The memorandum noted, however, that EO 12778, which forbade litigation counsel from seeking or agreeing to enter into binding arbitration, remained in effect.¹⁶⁶

Following the DOJ memorandum, the U.S. Court of Federal Claims in *Tenaska Washington Partners II, L.P. v. United States*¹⁶⁷ enforced, at the government's request, a clause¹⁶⁸ in a Bonneville Power Administration (BPA) contract and required the parties to submit to *binding* arbitration. The decision was based, in large part, upon DOJ's September 7, 1995, memorandum and was "conditioned expressly" on the commitment of DOJ and the BPA to uphold binding arbitration in the case, such that the BPA administrator retained no power to approve or disapprove the arbitration decision other than to seek limited judicial review.¹⁶⁹

On February 5, 1996, President Clinton signed EO 12988 on civil justice reform. The order revoked EO 12778 but incorporated large portions of it. Significantly *omitted* from EO 12988 is the prohibition against binding arbitration contained in § 1(c)(3) of EO 12778.

Section 1(c) of EO 12988, entitled "Alternative Means of Resolving the Dispute in Litigation," states that, where benefits may be derived from the use of ADR, litigation counsel, after consultation with the referring agency, should suggest the use of an appropriate ADR technique to the parties. Section 1(c)(2) states that

¹⁶⁵ Section 4(b) of the ADRA added Subchapter 4 to the APA (5 U.S.C. §§ 571–583, discussed above).

¹⁶⁶ *Justice Department Says Agency Use of Binding Arbitration is Constitutional*, ADR Network 3, no. 2, at 25 (ACUS/Interagency ADR Working Groups, Oct. 1985).

¹⁶⁷ 34 Fed. Cl. 434 (1995).

¹⁶⁸ The clause provided:

Pending resolution of a disputed matter, the Parties shall continue performance of their respective obligations pursuant to this Agreement. Disputes regarding any matter relating to this Agreement shall be discussed by the Authorized Representatives who shall use their best efforts to amicably and promptly resolve the dispute. Should the Authorized Representatives be unable to resolve any controversy or claim arising out of or relating to this Agreement, or the breach thereof, the Parties agree that the controversy or claim shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

Tenaska, 34 Fed. Cl. at 437.

¹⁶⁹ *Id.* at 446.

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[i]t is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

Toward this end, § (1)(c)(3) further directs that litigation counsel be trained in ADR techniques.

§ 9.16 FEDERAL ACQUISITION REGULATION

The Federal Acquisition Regulation (FAR) provisions governing ADR¹⁷⁰ were most recently amended by final rule effective October 1, 1995.¹⁷¹ FAR 33.204 provides that “[a]gencies are encouraged to use ADR procedures to the maximum extent practicable.” It points out, however, that “[c]ertain factors *may* make the use of ADR inappropriate.”¹⁷² FAR 33.204 further states that, except for arbitration conducted pursuant to the ADRA, “agencies have authority which is separate from that provided by the ADRA to use ADR procedures¹⁷³ to resolve issues in controversy . . . [but] may also elect to proceed under the authority and requirements of the ADRA.”

FAR 33.201 defines “alternative dispute resolution” as “any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation.” It says these procedures “may include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration.”¹⁷⁴ An “issue in controversy” is defined as “a material disagreement between the Government and the contractor which (1) may result in a claim or (2) is all or part of an existing claim.”

FAR 33.214(b) implements the FASA provision regarding notice in the event either party rejects ADR. It provides that

[i]f the contracting officer rejects a request for ADR from a small business contractor, the contracting officer shall provide the contractor written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such

¹⁷⁰ See 48 C.F.R. 52.233-1.

¹⁷¹ The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the FAR to implement the ADRA. As of July 14, 1998, the FAR Case 97-015 (the “proposed rule”) is not yet published as a final rule.

¹⁷² 48 C.F.R. § 33.204 (emphasis added); see also 5 U.S.C. 572(b) (listing the situations in which the use of ADR is not appropriate).

¹⁷³ As noted earlier, agencies have always had inherent authority to use nonbinding ADR to resolve disputes. The ADRA merely clarifies this. See *ACUS Report*, *supra* note 94, at 5.

¹⁷⁴ It is expected that this section will be amended to reflect the changes in the ADRA. Specifically, the proposed rule will amend the provision to state as follows: “[The ADR procedures] may include, but are not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombudsmen.” As such, the proposed rule would delete the terms “assisted settlement negotiations” from, and add the terms “use of ombudsmen” to, the current definition of ADR procedures.

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other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.¹⁷⁵

Thus, the government and contractor appear to be subject to different standards of explanation, with a greater onus placed on the contractor who rejects ADR.¹⁷⁶

ADR procedures may be used "at any time that the contracting officer has authority to resolve the issue in controversy."¹⁷⁷ Also, "if a claim has been submitted, ADR procedures may be applied to all or a portion of the claim."¹⁷⁸ However, "[w]hen ADR procedures are used subsequent to issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's decision and does not constitute a reconsideration of the final decision."¹⁷⁹ Finally, the regulations provide for the use of a neutral¹⁸⁰ and require that confidentiality be protected in accordance with 5 U.S.C. § 574.¹⁸¹

These FAR ADR provisions are contractually implemented through the contract clause at FAR 52.233-1.¹⁸² This clause provides that a contract is subject to the CDA and that, except as provided in the CDA, "all disputes arising under or relating to the contract should be resolved under the clause."¹⁸³ The clause defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to [the] contract."¹⁸⁴ The clause differentiates a claim "arising under" a contract from a claim "relating to" a contract; unlike a claim relating to a contract, a claim arising under a contract "is a claim that can be resolved under a contract clause that provides for relief sought by the claimant."¹⁸⁵ The clause further provides that a contractor's written demand for a payment exceeding

¹⁷⁵ 48 C.F.R. § 33.214(b) (emphasis added). The proposed rule would amend this provision to require the contracting officer to provide explanation for rejecting a request for ADR from *any* contractor, not just small business contractors. The relevant revised portion of the rule would read as follows: "If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. § 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute."

¹⁷⁶ It is noteworthy that the implementing clause, FAR 52.233-1(g), sets forth the obligation of the contractor only if it rejects a request for ADR and does not include the obligations of the CO in the event it rejects a request for ADR from a small business contractor.

¹⁷⁷ FAR 33.214(c).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ FAR 33.214(d); FAR 33.201.

¹⁸¹ FAR 33.214(e).

¹⁸² *See* 48 C.F.R. § 52.233-1.

¹⁸³ *Id.* §§ 52.233-1(a), (b).

¹⁸⁴ *Id.* § 52.233-1(c).

¹⁸⁵ *Id.*

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\$100,000 is not a “claim” under the CDA until the demand is “certified.”¹⁸⁶ For contractor-certified claims exceeding \$100,000, the CO “must, within 60 days, decide the claim or notify the contractor of the date by which the decision will be made.”¹⁸⁷ Similarly, for claims of \$100,000 or less, the CO “must, if requested in writing by the Contractor, render a decision within 60 days of the request.”¹⁸⁸

§ 9.17 SPECIFIC AGENCY IMPLEMENTATION OF ADR

Federal agencies have implemented ADR in different ways and with different degrees of enthusiasm. Most have appointed a “dispute resolution specialist” (DRS) and developed ADR policies and training programs.

Government contract disputes provided the focus for some of the earliest agency efforts to use ADR.¹⁸⁹ On May 16, 1994—following the 1993 Report of the National Performance Review, which recommended that ADR be used more extensively—twenty-four federal agencies signed an Office of Federal Procurement Policy pledge to review existing disputes to identify candidates for settlements using ADR techniques and to use ADR on at least one current dispute. The following sets forth the initiatives taken as of July 1998 (both before and after enactment of the ADRA) by the federal agencies that are most involved in design-build programs.

[A] Department of Defense

On January 10, 1992, following enactment of the ADRA, then Deputy Secretary of Defense Donald Atwood issued a memorandum urging the Military Departments and Defense Agencies “to support effective implementation of the [ADRA] throughout all levels and activities in the DOD.”¹⁹⁰ The authority and duties of the secretary of defense under the ADRA were delegated to the DOD general counsel, who was authorized to issue instructions to implement the ADRA and the memorandum.

On April 22, 1996, the Department of Defense issued Directive 5145.3 establishing policy to implement Executive Order 12988, “Civil Justice Reform”

¹⁸⁶ The certification requirement applies to three situations: (1) where a demand for payment exceeds \$100,000; (2) where, regardless of the amount of the claim, arbitration is conducted pursuant to 5 U.S.C. §§ 575–580; and (3) where the agency elects to use any other ADR technique in accordance with the ADRA. *Id.* § 52.233–1(d)(2). In certifying a claim, a contractor must state the following: “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount request accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.” *Id.* §§ 52.233–1(d)(2), (d)(2)(iii). However, the certification requirement does not apply to “issues in controversy that have not been submitted as all or part of a claim.” *Id.* § 52.233–1(d)(3).

¹⁸⁷ *Id.* § 52.233–1(e).

¹⁸⁸ *Id.*

¹⁸⁹ *ACUS Report*, *supra* note 94, at 17–19.

¹⁹⁰ Deputy Secretary of Defense Memorandum, *Administrative Means of Dispute Resolution* (Jan. 10, 1992).

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(February 5, 1996), and the Report of the National Performance Review. The directive “assigns responsibilities; creates the ADR Coordinating Committee; and establishes a framework for encouraging the expanded use of ADR within the Department of Defense.”¹⁹¹ It defines ADR as

[a]ny procedure that parties agree to use, instead of a formal adjudication, to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration or any combination thereof.¹⁹²

According to the directive, DOD’s stated policy toward the use of ADR is that

[e]ach DOD Component shall establish and implement ADR policies and programs . . . [and] make use of existing government ADR resources to avoid unnecessary expenditure of time and money.

- All DOD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings whenever appropriate. Every dispute, regardless of subject matter, is a potential candidate for ADR.
- Each DOD Component shall review its existing approaches to dispute resolution, and, where feasible, foster increased use of ADR techniques. Components shall identify and eliminate unnecessary barriers to the use of ADR.¹⁹³

The directive was effective immediately. Implementing documents were to be forwarded to the general counsel of DOD within 120 days.

The Armed Services Board of Contract Appeals (ASBCA) offers parties the option of using ADR procedures. The board hears appeals primarily of the Army, Navy, Air Force, Defense Logistics Agency, and National Aeronautics and Space Administration. Each party involved in an appeal before the board receives a “Notice Regarding Alternative Methods of Dispute Resolution.” The notice requires that requests to utilize ADR must be made jointly as early as possible. It indicates that generally ADR proceedings will be concluded within 120 days of the board chairman’s approval of its use.

The notice lists three types of ADR procedures that the board says have worked in the past. These three methods—settlement judge, minitrial, and summary trial with binding decision—are not exclusive and are “designed to supplement existing ‘extrajudicial’ settlement techniques, not to replace them.” According to the notice, “[a]ny method or combination of methods, including one which will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.”

The notice describes the confidential nature of the ADR proceedings. It further requires that “[g]uidelines, procedures and requirements implementing the

¹⁹¹ *Id.* at 1.

¹⁹² *Id.*

¹⁹³ *Id.* at 2 (emphasis added).

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ADR method selected” be prescribed by agreement of the parties and the settlement judge or neutral advisor. A sample agreement for the use of summary trial with binding decision is attached to the board’s notice.

The ASBCA chairman’s “Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1997” (ASBCA Report) includes statistics on the use of ADR at the board. According to the report, during FY 97, parties requested the board’s ADR services 35 times covering 57 appeals and three pre-appeal disputes. These appeals varied in amount from \$10,000 dollars to millions of dollars. Thirteen of the 35 requests were for binding ADR, and 22 were for nonbinding ADR. Of the requests for nonbinding ADR, 21 were for a settlement judge and one was for a minitrial.¹⁹⁴

According to Chairman Williams, the decrease in new appeals at the board “may reflect the increased use of ADR by the parties to resolve smaller claims before they become appeals.” This, he said, could be seen “by the 47 percent decrease in the number of Rule 12 dispositions” between FY 1991 and FY 1995.¹⁹⁵

[B] United States Army Corps of Engineers

The United States Army Corps of Engineers (Corps) has been in the forefront in its use of ADR. Since 1990, the Corps’s stated policy has been “to resolve disputes at the first appropriate management level through negotiation, and, where appropriate, Alternative Dispute Resolution (ADR) techniques.”¹⁹⁶ A 1993 policy memorandum pointed out that the Corps had successfully used ADR procedures, including mini-trials, nonbinding arbitration, dispute review boards, mediation, and facilitation, to resolve disputes involving contract claims, environmental restoration and regulation, operations, interagency policy development, and real estate transactions.¹⁹⁷ According to the memorandum, the goal of the Corps was to continue to lead in the ADR arena. To this end, it established a comprehensive program involving training, publishing, and research.¹⁹⁸ The Corps has published a number of pamphlets describing various ADR techniques, including the mini-trial,¹⁹⁹ nonbinding arbitration,²⁰⁰ mediation,²⁰¹ and partnering.²⁰²

The Corps reported using ADR in 144 contract disputes between March 1989 and March 1997, with successful results in 107 of them. The Corps has made particularly heavy use of minitrials in its large construction disputes, engaging

¹⁹⁴ 1997 ASBCA Report at 3.

¹⁹⁵ 1995 ASBCA Report at 3.

¹⁹⁶ Commander’s Policy Memorandum #11, *Alternative Dispute Resolution* (Aug. 7, 1990).

¹⁹⁷ Commander’s Policy Memorandum #5, *Alternative Dispute Resolution* (March 31, 1993).

¹⁹⁸ *Id.*

¹⁹⁹ See *The Mini-trial*, *supra* note 55.

²⁰⁰ See L. Edelman, F. Carr, C. Lancaster & J. Creighton, *Non-Binding Arbitration*, ADR Series Pamphlet 2 (U.S. Army Corps of Engineers, Sept. 1990).

²⁰¹ See C. Moore, *Mediation*, ADR Series Pamphlet 3 (U.S. Army Corps of Engineers Sept. 1991).

²⁰² See L. Edelman, F. Carr, & C. Lancaster, *Partnering*, ADR Series Pamphlet 4 (U.S. Army Corps of Engineers, Dec. 1991) (hereinafter *Corps Partnering*).

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in 33 mini-trials during this period. As an example, the ACUS Report cites a \$55.6 million claim resolved for \$17.3 million in four days.²⁰³ While the Corps could not quantify in its report to ACUS specific cost savings from ADR, it stated unequivocally that “ADR has been extremely effective in resolving contract claims and appeals.”²⁰⁴

Partnering is a key component of the Corps’s ADR program. The Corps has used this technique in construction contracts since the late 1980s.²⁰⁵ Memoranda issued in 1992 and 1993²⁰⁶ state that

it is the clear policy of the Corps of Engineers to develop, promote and practice partnering on all construction contracts, and to universally apply the concept to all other relationships. (Emphasis added)

According to the 1992 memorandum, partnering creates a climate characterized by trust and cooperation because it develops “positive and mutually beneficial relationships.” It

creates a relationship between two or more parties and promotes teamwork. Partnering seeks to eliminate the “us” versus “them” mentality, and to form a “we” approach for the mutual benefit of the project user, the taxpayers, and the contractor.

The Corps indicates its interest in partnering when it requests bids and proposals, but its use is not mandatory.²⁰⁷ The volume of contract claims and appeals involving the Corps dropped from 1,079 contract claims in 1988 to 276 in 1998 and from 742 contract appeals in 1991 to 283 in 1998. The Corps has attributed these reductions to the use of partnering.

The Corps of Engineers Board of Contract Appeals (ENGBCA) gives parties the option of using ADR procedures. Presently, each party involved in an appeal before the ENGBCA is furnished with a “Notice Regarding Alternative Methods of Dispute Resolution” very similar to that furnished by the ASBCA. The notice requires that requests to utilize ADR be made jointly by the parties. It suggests that ADR be selected as early as possible to avoid expense and delay and indicates that proceedings are generally concluded within 120 days following the ENGBCA chairman’s approval of its use.²⁰⁸ The notice lists three types of ADR procedures involving board participation—settlement judge, minitrial, and summary trial with binding decision. The first two methods are nonbinding, and the third is binding.²⁰⁹ These methods are not intended to be exclusive. Rather,

²⁰³ *Id.*

²⁰⁴ *Id.* (citing DOD Report to ACUS, Appendix IID to ACUS Report).

²⁰⁵ *Id.* at 21.

²⁰⁶ Commander’s Policy Memorandum #16, *Partnering* (Feb. 18, 1992) (Attachment 17); Commander’s Policy Memorandum #4, *Partnering* (March 31, 1993).

²⁰⁷ *ACUS Report, supra* note 1, at 21; *see also Corps Partnering, supra* note 210, at 17.

²⁰⁸ *Id.* at 1–2.

²⁰⁹ *Id.* at 2–3.

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the notice says “[a]ny method which brings the parties together in settlement or partial settlement of their disputes is a good method.”²¹⁰ Other procedures that do not require board participation, such as settlement negotiations, fact-finding conferences or procedures, mediation, and mini-trials not involving board personnel, may also be used.

The notice provides that guidelines, procedures, and requirements to implement the selected ADR procedure be prescribed by agreement of the parties and the neutral advisor if one is used.

With respect to confidentiality, the Notice states that

[w]ritten material prepared specifically for use in, and oral presentations made at, an ADR proceeding, and all discussions in connection with such proceeding among representatives of the parties, a Settlement Judge or neutral advisor are confidential, and unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute.²¹¹

If a nonbinding method fails to resolve the dispute, it is then reported to the active docket for processing under the board rules. The settlement judge or neutral advisor does not play a role in the future proceedings unless specifically requested and approved by the board chairman.²¹²

[C] General Services Administration

On July 30, 1992, then GSA Administrator Richard Austin issued a notice setting forth GSA’s ADR policy in which he expressed the agency’s firm commitment to using ADR in its administrative programs.²¹³ GSA’s goal was to use ADR to both prevent and resolve disputes. ADR techniques such as facilitation, mediation, fact finding, mini-trial, and arbitration were identified as the agency’s “preferred way to resolve disputes.” According to the notice, the objective was to “resolve disputes at the earliest opportunity and at the lowest appropriate management level.”²¹⁴

The policy statement pointed out that ADR was voluntary and required informed judgment. “The parties’ relationship, their interest in retaining control over the process, the need to move quickly, and the need for independent, expert analysis are factors to be weighed in that judgment.” ADR was said to be inappropriate where a “precedent-setting decision is needed, if an important policy question is involved, if the decision would have a significant effect on nonparties, or if a full public record of the proceeding is important.”²¹⁵ The statement

²¹⁰ *Id.* at 1.

²¹¹ *Id.* at 2.

²¹² *Id.* at 1.

²¹³ See GSA, Alternative Dispute Resolution, Policy Statement (July 30, 1992).

²¹⁴ *Id.* at 1.

²¹⁵ *Id.* at 1.

FEDERAL DESIGN-BUILD**§ 9.17[C]**

designated GSA's general counsel as GSA's dispute resolution specialist and indicated that ADR training would be provided. It concluded that

[i]nstitutionalizing ADR . . . requires a major commitment from all of us. We must reassess the way we have traditionally handled disputes, and we must apply innovative procedures to facilitate prompt, efficient, and just dispute resolution.²¹⁶

On February 17, 1995, then GSA Administrator Roger Johnson issued a memorandum strongly encouraging the increased use of ADR in contract disputes. The memorandum, entitled "Increasing the Use of Alternative Dispute Resolution (ADR)," stated, *inter alia*:

We are now at the point where we must seriously consider the use of ADR when informal settlement negotiations fail and before resorting to litigation. While ADR will not be appropriate in every case, its non-use will be the exception, not the rule. The rule is that we will seek, whenever possible, settlements through informal negotiations. But even when negotiations fail, our goal is to use, in appropriate circumstances, other ADR methods as alternatives to litigation. . . .

In order to realize the savings available, our contracting officers must use settlement negotiations and ADR whenever possible in the dispute process.

To support this initiative, I have asked the General Counsel to require each attorney to consider, with his or her contracting officer clients, the feasibility of settlement negotiations as well as various other ADR techniques prior to concurring in any final decision on a claim. Accordingly, the General Counsel has directed that, before an attorney may concur in any final decision on a claim, the attorney must determine with the contracting officer that further negotiations and ADR are not appropriate for that claim. Likewise, litigation attorneys have been directed to and will thoroughly consider all negotiations and ADR options prior to litigating any claim.

Pursuant to the administrator's instructions and to encourage attention to the subject, the general counsel adopted performance measurements for the Office of General Counsel, including benchmarks requiring increased use of negotiation and ADR and a challenge to reduce the number of appeals in each region by 10 percent through the use of settlement negotiations and ADR.²¹⁷

The GSA General Counsel's Office has issued draft guidelines on the use of ADR by contracting officers in connection with contract claims.²¹⁸ Taken together with the FAR, the guidelines offer a step-by-step road map for applying ADR to contract claims both before and after a contracting officer's final decision.

Of particular importance at GSA is partnering. On June 30, 1994, a GSA order was issued establishing partnering as a "preferred management process to

²¹⁶ *Id.* at 1–2.

²¹⁷ *Id.* at 2.

²¹⁸ R. Fowler & J. Domber, *Alternative Dispute Resolution & Contract Claims* (GSA Office of General Counsel, October 1994).

§ 9.17[C]**DESIGN-BUILD CONTRACTING CLAIMS**

be used on projects developed by the Public Building Service (PBS)” beginning in fiscal year 1995.²¹⁹ The order applies to new construction and repair and alteration projects within PBS with an estimated construction cost in excess of \$10 million. Its use is also encouraged on projects of less than \$10 million where appropriate. Pursuant to the order, all covered contract solicitations must contain a provision explaining and encouraging partnering, and all solicitations for covered negotiated procurements must include the offeror’s prior experience with partnering as an evaluation factor or subfactor. To date, partnering has been used in connection with the building of the U.S. Courthouse in Shreveport, Louisiana, where the project was completed with no formal claims.²²⁰ GSA also has used partnering in connection with the construction of the Douglas, Arizona, border station and the Trenton, New Jersey, courthouse. Contracts for the Minneapolis courthouse and the Atlanta Federal Center also include partnering clauses.²²¹

On March 4, 1996, GSA entered into two “Partnering Charters”—one with the Associated General Contractors of America (AGC) and the other jointly with the AGC and the American Institute of Architects (AIA). Pursuant to the two charters—which were signed on behalf of GSA by the commissioner of the Public Building Service—the parties adopted a number of shared goals and objectives, including to “[s]hare industry and government best practices and new approaches to construction, including quality management, value engineering, *partnering and alternative dispute resolution (ADR).*”

The General Services Administration Board of Contract Appeals (GSBCA) also has adopted procedures for the use of ADR and informs disputants regularly of the availability of ADR. Rule 10 of the GSBCA rules²²² provides that the feasibility of ADR techniques such as mediation, mini-trials, and summary hearings be discussed at the initial board conference. It further provides that where the parties and the board jointly agree to use ADR, a board neutral (either a judge or board attorney) will be appointed by the board chairman to conduct the proceedings. The parties may alternatively request that the panel chairman serve as the neutral. Board proceedings may be suspended while the parties and the board attempt to resolve the dispute; however, the use of ADR will not toll the statutory time limit for deciding the case. This Rule 10 ADR procedure is not intended to preclude the use of other ADR techniques not requiring board involvement.

Board statistics reveal that, between September 1992 and June 1996, there were seventeen cases in which board-based ADR was used (seven protests and ten appeals). Mediation was used in fourteen cases (five protests, nine appeals), and mini-trials were used in three cases (two protests and one appeal).²²³

Further information about ADR at GSA can be found on the World Wide Web at <<http://www.gsa.gov/eo/adr1.htm>> and about ADR at the GSBCA at <<http://www.erols.com/arbmed/article.htm>>.

²¹⁹ GSA Order (PBS 3400.16), *Partnering Within the Public Buildings Service* (June 30, 1994).

²²⁰ *ACUS Report*, *supra* note 94, at 21.

²²¹ *Id.*

²²² 48 C.F.R. 6101.10.

²²³ *Fowler et al.*, *supra* note 229, at 15.

FEDERAL DESIGN-BUILD**§ 9.18****[D] United States Postal Service**

The United States Postal Service (USPS) has had an ADR program in place to address personnel issues for some time. According to an agency source, the USPS also has implemented a comprehensive ADR program for its purchasing and facilities contracts. The AGC and the USPS have agreed to develop a partnering charter similar to that entered into between the AGC and GSA and are presently working toward that end.

§ 9.18 JUDICIAL IMPLEMENTATION OF ADR

The United States Court of Federal Claims, through its predecessor, the United States Claims Court, has also authorized the use of ADR. By General Order No.13, dated April 15, 1987, the court implemented two methods of ADR: settlement judges and mini-trials.²²⁴ The court directed that a prescribed "Notice to Counsel"²²⁵ be distributed to counsel for all cases then pending, and those filed after April 15, 1987. The notice explains that use by the court of the two prescribed ADR methods is not exclusive and does not preclude the use by the parties of other ADR techniques that do not require court involvement. It further states that use of the two prescribed ADR techniques is "voluntary and flexible" and that they should be employed "early in the litigation process in order to minimize discovery."²²⁶ The notice says the court views their use as most appropriate where the parties anticipate "a lengthy discovery period followed by a protracted trial." According to the notice, these requirements typically will be met when the amount in controversy is greater than \$100,000 and the trial is expected to last more than one week.²²⁷

The procedure outlined in the notice for use of ADR is as follows: when both counsel agree to use one of the two ADR methods offered, they are to notify the presiding judge of their intent "as early as possible in the proceedings, or concurrently with submission of the Joint Preliminary Status Report required by Appendix G." The presiding judge is to consider counsel's request and "make the final decision whether to refer the case to ADR."²²⁸ If considered appropriate, the presiding judge will refer the case to the Office of the Clerk for assignment to a different COFC judge, who will preside over the ADR procedure adopted. "The ADR Judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court." If ADR does not result in a satisfactory settlement, the case will be returned to the presiding judge's docket. "Except as allowed by Federal Rule of Evidence 408, all representations made in the course of the selected ADR proceeding are confidential and may not be used for any reason in subsequent litigation."²²⁹

²²⁴ See Fed. Cl. General Order 13 (1987).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 1.

²²⁹ *Id.*

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As described in the notice, where the “settlement judge” process is selected, another judge is appointed as a neutral advisor to conduct a “frank, in-depth discussion of the strengths and weaknesses of each party’s case.” While the notice says this alternative can be used successfully at any stage of the litigation, early use is preferred. Through this method, “the parties will gain the benefit of a judicial assessment of their settlement positions without jeopardizing their ability to obtain an ‘impartial’ resolution of their case by the presiding judge should settlement not be reached.”²³⁰

As set forth in the notice, the “minitrial” process is a “highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties to negotiate a settlement.” According to the notice, the procedure should be adopted before extensive discovery commences and only where there are factual disputes governed by “well-established principles of law.” The notice further states that “[c]ases which present novel issues of law or where witness credibility is a major factor are handled more effectively by traditional judicial methods.” The notice explains that the mini-trial process calls for strict time limitations, with the entire process concluding in one to three months; expedited and limited discovery; a hearing of not more than one day; and posthearing settlement discussions at which the judge may play an active role and render an advisory opinion on the merits.²³¹

It should be noted that the Department of Justice retains broad discretion and plenary authority to control litigation in the federal courts.²³² DOJ has construed this authority to embrace “all aspects of litigation including . . . settlement authority.”²³³ Since settlement authority for cases in litigation rests with senior DOJ officials, DOJ has determined that these officials “cannot and will not be available to attend ADR hearings as decision-makers.”²³⁴

Principals representing the United States in ADR proceedings (for example, mini-trials) may be agency representatives, but settlement authority still remains with DOJ.²³⁵ While DOJ has recognized that “a mini-trial under these circumstances would not be before true decision-makers,” it has said that the procedure “nonetheless would serve to inform the parties of the strengths and weaknesses of their case.”²³⁶ For ADR to be effective after federal court litigation has commenced, it is, therefore, essential that some mechanism be put in place (for example, detailed briefings) to ensure that senior DOJ officials be kept fully informed of the proceedings.

²³⁰ *Id.* at 2.

²³¹ *Id.* at 2–3.

²³² 28 U.S.C. §§ 516, 519; EO 6166 (1933), reprinted in 5 U.S.C. § 901.

²³³ 6 Op. O.L.C. 47 (1982) (ellipses omitted).

²³⁴ DOJ Civil Division, *Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts*, 9–10 n.10 (Aug. 1992).

²³⁵ *Id.* at 9.

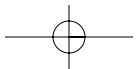
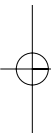
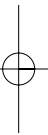
²³⁶ *Id.* at 9–10.

FEDERAL DESIGN-BUILD**§ 9.19****§ 9.19 CONCLUSION**

Under federal design-build contracts, the identical dispute resolution techniques are available as would be available under federal design-bid-build contracts, or for that matter (with the notable exception of the CDA-created rights and remedies), under nonconstruction federal contracts. But it is evident that ADR procedures are likely to play an integral, and growing, role in resolving disputes arising under federal government construction contracts for years to come. This is so because ADR may be used at all stages of a dispute arising under a government design-build contract. It may be used both before and after a certified CDA claim has been submitted to the CO and/or once an appeal has been filed with a board of contract appeals or the COFC. As discussed, the FAR permits ADR to be used “at any time that the contracting officer has authority to resolve the issue in controversy,”²³⁷ which includes a material disagreement between the government and a contractor which “*may result in a claim*” or is “*all or part of an existing claim.*”²³⁸ Similarly, the ADRA permits ADR to be used to resolve an “issue in controversy.” Further, the ADRA provides for the use of ADR to resolve CDA claims. Finally, the boards of contract appeals and the COFC have procedures providing for the use of ADR to resolve appeals pending before them.

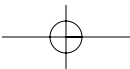
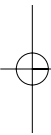
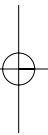
²³⁷ FAR 33.214(c).

²³⁸ FAR 33.201 (emphasis added).



ATTACHMENT 1
JOINT VENTURE AGREEMENT

*Attachment 1 contains the original text of the Joint Venture Agreement, unless specifically noted otherwise; only the format has been changed to fit the page size.



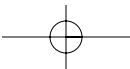
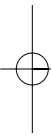
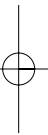
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JOINT VENTURE AGREEMENT

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JOINT VENTURE AGREEMENT

THIS AGREEMENT, made this 26th day of August, 1983, by and between WEYHER/LIVSEY CONSTRUCTORS, INC. (hereinafter "W/L"), DRAVO CORPORATION (hereinafter "Dravo"), and J. E. SIRRINE COMPANY (hereinafter "Sirrine").

WITNESSETH:

WHEREAS, W/L, Dravo, and Sirrine (hereinafter sometimes referred to as "Parties" or "Party" as the context indicates) have been working together for the preparation of a joint proposal to be submitted to the United States Department of the Navy (hereinafter the "Navy") in response to Solicitation No. N62470-81-B-1399 for the supply of engineering, procurement, construction, operation, and maintenance of a steam plant to be located at the Norfolk Naval Shipyard at Portsmouth, Virginia (hereinafter the "Project"); and

WHEREAS, the Parties desire to reduce to writing their agreements with respect to their pursuit of the award of the Project and the execution of the contract let by the Navy for the Project (hereinafter "Prime Contract"), if chosen as the successful bidder thereon.

NOW, THEREFORE, in consideration of the premises and covenants set forth herein and intending to be legally bound hereby, the Parties agree as follows:

ARTICLE 1JOINT VENTURE, EXCLUSIVITY

1.1 The Parties hereby constitute themselves as a joint venture (hereinafter the "Joint Venture") for the purpose of pursuing the award of the Project

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and the execution of the Prime Contract, if chosen as the successful bidder thereon, and the fulfillment and satisfaction of all duties, obligations, responsibilities, and liabilities in connection therewith, but for no other purpose whatsoever. The Joint Venture shall operate under the name "Weyher/Livsey-Dravo-Sirriner, a Joint Venture".

- 1.2 The Parties agree to pursue the Project and to execute (or give power of attorney to sponsor to do so) the Prime Contract, if chosen as the successful bidder thereon, on a mutually exclusive basis upon the terms and conditions and agreements set forth herein. No Party shall pursue the Project or execute the Prime Contract, directly or indirectly, either alone or in conjunction with third parties.
- 1.3 Notwithstanding the foregoing, except as expressly provided otherwise herein, no Party shall act as general agent or partner for any other Party. Nothing herein shall inhibit or restrict any Party from carrying on its own business for its sole benefit relating to matters other than the Project.

ARTICLE 2**COSTS OF PURSUIT OF PROJECT**

- 2.1 In the event the Joint Venture is awarded the Prime Contract, Sirriner will be compensated for its costs and expenses [Three Hundred Thirty Thousand and No/100 Dollars (\$330,000.00)] pursuant to Article 11 incurred in making any proposal and the pursuit of the Project up through and including the execution of the Prime Contract, all of which shall be deemed part of Sirriner's original scope of work specified in Article 6 and therefore shall be deemed a cost in determining Sirriner's costs of performing its scope of work for the purposes of Appendix E, Paragraph (2) regarding W/L's and Sirriner's incentive compensation.

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- 2.2 In the event the Joint Venture is awarded the Prime Contract, all work performed by W/L and all costs and expenses (One Hundred Twenty Five Thousand and No/100 Dollars (\$125,000.00)) incurred by W/L in making any proposal and the pursuit of the Project up through and including the execution of the Prime Contract shall be deemed part of W/L's original scope of work specified in Article 6 and therefore shall be deemed a cost in determining W/L's costs of performing its scope of work for the purposes of (1) Article 11.2 regarding late Navy payments for Sirriner's work and (2) Appendix E, Paragraph (1) regarding the calculation of Sirriner's incentive compensation.

ARTICLE 3EXECUTION OF CONTRACT WITH NAVY, JOINT AND SEVERAL LIABILITY

- 3.1 The Parties shall all execute the Prime Contract such that each Party shall be jointly and severally liable thereunder to the Navy for the full and faithful performance of the Joint Venture and each other. Notwithstanding the foregoing, as between the Parties, all work on the Project shall be performed in accordance with the Parties' respective scopes of work as specified in Article 6 and each Party shall accept responsibility for its scope of work as provided in Articles 8 and 9.

ARTICLE 4INTEREST OF THE PARTIES

- 4.1 Each Party's respective interest in the Joint Venture shall be as set forth in Appendix A.

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ARTICLE 5JOINT VENTURE SPONSOR, PROJECT DIRECTOR, MANAGEMENT
COMMITTEE

- 5.1 W/L, within its scope of work, shall act as the Joint Venture sponsor and shall be the single contact between the Joint Venture and the Navy for all interface and communication, transmission of work product, resolution of disputes, and shall have general charge and supervision of all other matters. Notwithstanding the foregoing, Sitrine shall provide all support as requested by the Navy for W/L to assist W/L in all such matters including, but not limited to Sitrine's attendance at any meetings as requested by the Navy or W/L, verification of invoices, and technical support and explanation regarding Sitrine's work product.
- 5.2 The Management Committee shall appoint a Project Director who shall have full authority in the direction, management, and coordination of the Joint Venture work on a day-to-day basis and may do all acts and things necessary to achieve such end including, but not limited to:
- 5.2.1 The letting of purchase orders and subcontracts on the name of the Joint Venture or W/L;
- 5.2.2 The acquisition of materials and equipment required for the Joint Venture work and the disposition of the same when no longer required;
- 5.2.3 The direction of the Parties and of third parties regarding the requirements of the Navy; and
- 5.2.4 All other acts relating to the direction, management, and coordination of the Joint Venture work.

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- 5.3 A Joint Venture Management Committee (hereinafter the “Management Committee”) comprised of one representative of each Party shall have ultimate authority over the Project including, but not limited to:
- 5.3.1 Establishing Joint Venture policies with respect to the Project;
 - 5.3.2 Appoint Project Director and approve of site manager;
 - 5.3.3 Resolving any disputes that may arise between any of the Parties;
and
 - 5.3.4 Purchase of Construction Equipment by the Joint Venture deemed to have useful life upon completion of the Project.

The Management Committee shall act upon a majority vote of its members in all matters; except that it shall act upon the unanimous vote of its members for the purpose of making a call for capital contributions, making any amendments to the Joint Venture Agreement, and the appointment or removal of the Project Director.

The Management Committee shall meet at least quarterly to review the Joint Venture progress on the Project and act upon any issues or items raised by any Party. The Management Committee shall also meet upon the request of any Party as soon as is practical under the circumstances after written notice of such request has been given the other Parties. Each Party’s Management Committee representative and address shall be as follows:

W/L: [Name Deleted]

Sirrinc: [Name Deleted]

Dravo: [Name Deleted]

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Any Party may temporarily substitute an alternate for its Management Committee representative or permanently replace its Management Committee representative upon written notice to the other Parties by an officer of the Party making such substitution or replacement.

ARTICLE 6SCOPE OF WORK

- 6.1 Each Party's scope of work for the Project shall be as indicated on Appendix B, attached hereto.
- 6.2 It is the intent of the Parties to carry out the Project and Prime Contract through a scope Joint Venture wherein all work under the Prime Contract is divided among the Parties, each Party having sole and exclusive responsibility and liability for its scope of work. However, should any item in the scope of work as set forth in the Prime Contract fail to be included on one of the individual scopes of work of the Parties as defined in Appendix B, such item shall be performed by that Party whose scope of work most closely resembles the omitted item without claim for additional compensation by such Party. Should the omitted item fail to closely resemble any Party's scope of work, then the omitted item shall be performed as agreed upon between the Parties and the cost thereof paid for by the Parties in proportion to their respective interest in the Joint venture established in Article 4.1.
- 6.3 In the event of changes, additions, or modifications to the Prime Contract, all Parties shall be promptly transmitted such changes by the sponsor and are obligated to promptly respond in accordance with the terms outlined in the Prime Contract.
- 6.4 No Party shall initiate any change in its scope of work which will impair the performance or materially increase the cost of equipment, systems, structures, or services within the scope of work of another Party without arranging the following:

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- 6.4.1 Appropriate adjustment and allocation of cost responsibility;
- 6.4.2 Written consent of the other Party; and
- 6.4.3 Written consent of the Navy, if required by contract.

ARTICLE 7

JOINT VENTURE PROPERTY

- 7.1 Any materials, equipment, or other property acquired by the Joint Venture and remaining in the ownership and possession of the Joint Venture upon completion of the Project shall be sold by the Project Director at the best available price and the proceeds of such sale shall be used to reduce the Joint Venture cost.

ARTICLE 8

PERFORMANCE OF WORK, RESPONSIBILITY

- 8.1 Each Party shall perform its individual scope of work as set forth in Article 6 in accordance with the requirements and terms and conditions of the Prime Contract.
- 8.2 Except as expressly provided otherwise in Article 9, each Party will accept full commercial and technical responsibility for its scope of work and will save harmless, indemnify, and defend the other Parties from any and all loss, costs, expenses, and damages (including but not limited to liquidated, special, indirect, and consequential damages) resulting from such Party's performance of its scope of work in an untimely, defective, or manner that is non-conforming with the Prime Contract.

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- 8.3 Sirrine's liability under the Joint Venture shall be limited to those liabilities arising out of its scope of work as specified in Article 6. W/L and Dravo shall indemnify Sirrine for those Joint Venture liabilities arising out of work outside of Sirrine's scope of work as specified in Article 6. Engineering services performed by Sirrine to bring the Project into compliance with the Prime Contract will be reimbursed up to the limit of Sirrine's guaranteed maximum cost.
- 8.4 The indemnities provided for in Paragraphs 8.2 and 8.3 hereinabove shall survive termination of the Prime Contract and this Joint Venture Agreement.

ARTICLE 9SIRRINE ENGINEERING ERRORS

- 9.1 Notwithstanding Article 8.2, Sirrine shall not be liable to W/L or Dravo for any increase in the direct cost to W/L and Dravo to perform their respective scopes of work resulting from Sirrine's engineering errors and omissions detected by Sirrine and noticed to W/L and Dravo or detected by W/L or Dravo prior to W/L's or Dravo's expenditure of any costs in the performance of their work in reliance thereon.
- 9.2 Notwithstanding Article 8.2, Sirrine shall not be liable to W/L or Dravo for any increase in the direct cost to W/L and Dravo to perform their respective scopes of work resulting from Sirrine's engineering errors and omissions detected by Sirrine and noticed to W/L and Dravo subsequent to W/L's or Dravo's expenditure of any costs in the performance of their work in reliance thereon up to a cumulative maximum cost to W/L and Dravo of Seven Hundred Fifty Thousand and No/100 Dollars (\$750,000.00); over and above which Sirrine shall be liable to W/L and Dravo for any such increase in the direct cost to W/L and Dravo to perform their respective scopes of work resulting from Sirrine engineering

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errors that become apparent subsequent to W/L's or Dravo's expenditure of any costs in the performance of their work in reliance thereon.

- 9.3 Notwithstanding any of the foregoing, Sirrinc shall have no risk, liability, or accumulation will occur of error and omission charges for construction material quantity variations if the actual quantities are different from those in the bid to the Navy. W/L will provide Sirrinc with budget quantities for all functional areas of Project and Sirrinc's detail design will make every reasonable effort to stay within these quantities within the requirements of the Prime Contract. W/L will be notified promptly if Sirrinc believes quantities will be exceeded.

ARTICLE 10CONSTRUCTABILITY REVIEWS

- 10.1 Sirrinc's scope of work includes constructability reviews by W/L up to thirty percent (30%) completion of the design on the project for each functional area. Sirrinc, within its scope of work, will make such changes to the design as suggested by W/L up to thirty percent (30%) design completion for each functional area. Subsequent to the constructability review by W/L, Sirrinc shall make no material modifications to the design without the concurrence of W/L. Should W/L require additional design changes to enhance constructability subsequent to Sirrinc's completion of thirty percent (30%) of the design for any functional area, then such changes shall be an addition to Sirrinc's scope of work and Sirrinc shall provide to W/L by means of a design change notice an amount to be added to Sirrinc's guaranteed maximum price as specified in Article 11 for such design changes. Such amount shall be considered an allowable cost to W/L under Appendix D. Sirrinc shall provide such design change notice to W/L and procure from W/L written notice to proceed thereon prior to performing any work or incurring any costs for W/L's account. Sirrinc will make no changes that do not comply with the Prime Contract.

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ARTICLE 11COMPENSATION, PAYMENT, BONUS PAYMENT

- 11.1 Sirrine will be compensated in full for all costs, overhead, and profits relating to its scope of work on a reimbursable cost basis according to the Definition of Charges set forth in Appendix C, subject to a guaranteed maximum cost of Seven Million, Six Hundred Thirty Thousand, and No/100 Dollars (\$7,630,000.00), which shall be subject to adjustment for changes in Sirrine's scope of work by the Navy or W/L, and for no other reason. Adjustments to the guaranteed maximum cost for changes in Sirrine's scope of work shall be limited to the compensation actually received from the Navy or W/L for such change. W/L shall be compensated in full for all costs, overheads, and profits relating to its scope of work on a lump sum basis in the amount of Ninety Four Million Eight Hundred Sixty Thousand and No/100 Dollars (\$94,860,000.00) [or Ninety Nine Million Two Hundred Sixty Thousand and No/100 Dollars (\$99,260,000) if the Joint Venture option for operation and maintenance of the Project is accepted by the Navy] which shall be subject to adjustment for changes in the scope of work. Each Party will make profit or loss on its individual scope of work independent of the other Parties' profit or loss.
- 11.2 Each Party will submit invoices to W/L in accordance with the requirements of the Prime Contract. W/L will consolidate all invoices for submission to the Navy. W/L will accept payment from the Navy on all such consolidated invoices and will remit, within three (3) working days of its receipt thereof, that portion of any such payment to the other Parties according to their individual invoices as has been paid by the Navy. W/L shall have no responsibility or liability to the other Parties whatsoever regarding any invoice of the other Parties for which W/L does not receive payment from the Navy. However, if the Navy does not pay promptly, W/L will take reasonable action to expedite payment to

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the Joint Venture. In the event the Navy delays payment beyond forty five (45) days for no fault or alleged fault of SIRRINE, then W/L will pay any properly due unpaid invoices of SIRRINE, but only to the extent that the individual receipts of W/L at that point in time exceed the costs incurred by W/L in performing its scope of work as specified in the Reimbursable Cost Schedule set forth in Appendix D to that point in time.

- 11.3 In addition to compensation as specified in Article 11.1, SIRRINE and W/L may receive incentive compensation in accordance with the terms of Appendix E, attached hereto.
- 11.4 None of the Parties will be compensated for officers' time in negotiating and administering this Agreement nor will they be compensated for the time spent by their Management Committee representative in fulfilling their duties as a representative. Each of the Parties may charge the Project with out-of-pocket travel and living expenses for officers and Management Committee representatives in fulfilling such duties.
- 11.5 Any compensation resulting from changes shall be allocated on the same basis as set forth in this Article and Appendix E. W/L's profit on any change shall be the greater of percent to labor (36.5%) or percent to total cost (4.3%).

ARTICLE 12**ACCOUNTING**

- 12.1 Separate books of account in connection with the Prime Contract shall be kept by W/L. At intervals to be agreed upon, a set of summary financial statements shall be prepared and distributed to each of the Parties. The books of account shall be open to the examination of personnel authorized by an officer of any Party thereto upon written notice of such Party.

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ARTICLE 13

NOTICES

13.1 All notices required to be given under this Agreement shall be in writing and sent postage prepaid by registered or certified mail with the United States Postal Service with return receipt requested, to the receiving Parties as follows:

13.1.1 Notices to W/L shall be sent to:

[Name Deleted]

13.1.2 Notices to Serrine shall be sent to:

[Name Deleted]

13.1.3 Notices to Dravo shall be sent to:

[Name Deleted]

13.2 All notices shall be deemed to be given on the fourth business day following the date of posting as specified in Article 13.1.

13.3 Routine correspondence between the Parties shall be addressed and transmitted according to procedures mutually agreed upon by the Parties.

ARTICLE 14

BINDING EFFECT, PROHIBITION OF ASSIGNMENT

14.1 W/L, Dravo, and Serrine respectively bind themselves and their successors, assigns, and legal representatives to the other Parties to this Agreement and to their successors, assigns, and legal representatives.

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14.2 No Party shall assign, subcontract, or otherwise transfer its rights, duties, obligations, responsibilities, or liabilities hereunder without the prior written consent of the other Parties, which consent shall not be unreasonably withheld.

ARTICLE 15

GOVERNING LAW

15.1 This Agreement shall be interpreted in accordance with and its administration and performance governed by the laws and regulations of the Commonwealth of Virginia, exclusive of its renvoi laws, and by all applicable federal laws and regulations pertaining to the Project.

ARTICLE 16

TERM

16.1 This Agreement shall remain in full force and effect until it expires upon the first to happen of the following events:

16.1.1 The Prime Contract is awarded to a Party other than a Joint Venture;

16.1-2 The Prime Contract is awarded to the Joint Venture and the Joint Venture fulfills all of its duties, obligations, responsibilities, and liabilities thereunder, and the Project is accepted by the Navy;

16.1.3 It is established that the Prime Contract will not be awarded within one year from the date of this Agreement;

16.1.4 The Prime Contract has been legally terminated, provided there are no liabilities to be adjusted in which case, upon completion

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of such adjustments between the parties and the Navy and after full payment has been made pursuant thereto;

16.1.5 As to any Party and at the option of the other Parties, if such Party becomes legally insolvent, or files a petition of bankruptcy or reorganization under the bankruptcy laws, or such a petition with respect to its business is filed by one of its creditors and is not dismissed within fifteen (15) days, or is adjudicated as bankrupt or makes an assignment for the benefit of its creditors; or

16.1.6 The Parties agree in writing to terminate this Agreement.

16.2 Any termination of this Agreement shall not effect provisions relating to the rights and obligations of the Parties hereto which by their nature shall survive termination.

ARTICLE 17

SEVERABILITY

17.1 If any provisions, in whole or in part, of this Agreement should be found legally invalid, void or unenforceable, the remaining provisions of this Agreement shall not be affected thereby, and the Parties hereto shall, by amendment to this Agreement, properly replace such provision by a reasonable new provision which, as far as legally possible, shall approximate what the Parties intended by such original provision, to carry out their purpose hereunder.

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ARTICLE 18HEADINGS

- 18.1 Any heading preceding the text of any Articles of this Agreement are inserted solely for convenience of reference and are not to be considered a part of this Agreement nor shall they effect in any manner the meaning, interpretation, or effect of this Agreement.

ARTICLE 19EFFECT OF AGREEMENT, PRIORITY OF DOCUMENTS

- 19.1 Upon the date of execution of this Agreement by the Parties, all former written and oral understandings, proposals, writings, representations, and in particular the letter agreement between the Parties dated January 7, 1983, are hereby terminated and cancelled and are merged into this Agreement.

This Agreement expresses the complete and final understanding of the Parties with respect to the subject matter hereof and shall not be altered, modified, or changed in any way except by an instrument in writing signed by the duly authorized officers of all of the Parties.

- 19.2 This Agreement, its Appendices, and the Prime Contract (including its attachments) are intended to be complimentary and what is called for by any one shall be as binding as if called for by all. In case of conflict between the terms and conditions of this Agreement, its Appendices, and the Prime Contract (including its attachments), the terms and conditions of the Prime Contract (including its attachments) shall govern in all cases, and this Agreement shall govern over its Appendices unless all Parties agree in writing otherwise.

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ARTICLE 20

INSURANCE AND BONDS

20.1 INSURANCE

20.1.1 W/L shall procure the following insurances (with limits as may be required by the Prime Contract or if not specifically required by the Prime Contract as deemed appropriate by Dravo subject to the approval of W/L and Sirrinc) for the benefit of the Joint Venture:

20.1.1.1 Builder's Risk (Broad Form),

20.1.1.2 Comprehensive General Liability,

20.1.2 All the above policies shall have all Parties named as co-insureds and waiver rights of subrogation against all Parties.

20.1.3 Each Party shall procure Workmen's Compensation insurance with defense base endorsement covering all its employees engaged in the work in accordance with the laws of the state such work is performed within.

20.1.4 Sirrinc shall procure professional liability insurance to cover design work done by or on behalf of the Joint Venture.

20.2 BONDS

20.2.1 W/L and Dravo shall procure the following bonds as required by the Prime Contract for the benefit of the Joint Venture:

20.2.1.1 Bid bond,

20.2.1.2 Performance Bond, and

20.2.1.3 Payment Bond.

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20.2.2 Surrine will not be a party to any indemnity agreements with the bonding companies, except to the extent at \$1,000.00.

20.3 The procurement and cost of the above insurance and bonds shall be within the above specified Party's scope of work as set forth in Article 6. The above insurance and bonds shall not limit any Party's duties, obligations, responsibility, or liability in any case in which insurance proceeds are insufficient or unavailable.

ARTICLE 21

GENERAL PROVISIONS

21.1 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

21.2 None of the Parties hereto shall sell, assign, pledge, transfer, hypothecate or in any way encumber its interest or any portion of its interest in this Agreement or in any money belonging to or which may accrue to the Joint Venture in connection with the Prime Contract or in the Joint Venture accounts or in any Joint Venture property of any kind employed or used in connection with the Prime Contract, except with the prior written consent of the other Parties hereto.

21.3 Dravo, by signing this Agreement, guarantees and agrees to perform the obligations herein undertaken by its wholly owned subsidiary, W/L, if for any reason W/L cannot perform its obligations for the Project.

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ARTICLE 22

JOINT VENTURE AUTHORIZED SIGNATORY

22.1 The Parties authorize [*Name Deleted*] of W/L, to sign any and all documents on behalf of the Joint Venture relative to the Joint Venture's bid to and execution of the contract with the Navy for the Project specifically including, but not limited to, the Joint Venture's bid bond and proposal.

IN WITNESS WHEREOF, intending to be legally bound hereby, the Parties hereto have executed this Agreement effective the day and year first written above.

WITNESS:

WEYHER/LIVSEY CONSTRUCTORS, INC.

BY: [Signature Deleted]

WITNESS:

DRAVO CORPORATION

BY: [Signature Deleted]

ATTEST:

J. E. SIRRINE COMPANY

BY: [Signature Deleted]

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APPENDIX A

INTEREST OF THE PARTIES

Each Party's respective interest in the Joint Venture shall be as follows:

| | |
|----------------------------------|-----|
| Weyher/Livsey Constructors, Inc. | 85% |
| Dravo Corporation | 7% |
| J. E. Sirrinc Company | 8% |

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APPENDIX B

SCOPE OF WORKA. J. E. SIRRINE COMPANY

The work includes, but is not limited to:

1. Engineering to satisfy requirements of the Navy's RFTP Number N62470-81-B-1399 and the Prime Contract.
2. Purchasing – preparation of technical requisitions and review of technical data from pre-selected vendors. Expediting of vendor drawings.
3. Prepare record drawings from clearly marked drawings provided from the site by W/L.
4. The necessary management and control for the project design effort.
5. Geotechnical investigation and recommendations.
6. Scheduling – effort necessary for support of W/L for scheduling per Navy requirements including construction activities and control and monitoring of these activities. The effort required to control and monitor construction activities is limited to one full time field scheduler and a technician as required for up to one week per month for 24 months, a field terminal and computer time for this duration.
7. Field assistance limited to 9,000 manhours. (Approximately two people for 24 months.)

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8. Construction of the project models per the Navy's requirements.
9. As otherwise specifically set forth in the Joint Venture Agreement.

B. WEYHER/LIVSEY CONSTRUCTORS, INC.

The work includes construction of the total Project, but is not limited to:

1. Purchase and expedite equipment and construction material.
2. Construction labor.
3. Construction equipment.
4. Temporary construction facilities, services, and utilities.
5. Precommissioning and startup.
6. Plant operations, maintenance and operations manuals.
7. Construction management and quality control except as specifically provided by Sirrine in Item 7A of this Appendix.
8. Site surveys.
9. Piping isometrics and detailed hanger design.
10. Site safety.
11. As otherwise specifically set forth in the Joint Venture Agreement.

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APPENDIX C

DEFINITION OF CHARGESA. J. E. SIRRINE COMPANY

The following defines those items that will be chargeable to the Joint Venture during prosecution of the work by Sirrine up to the guaranteed maximum cost of Seven Million Six Hundred Thirty Thousand and No/100 Dollars (\$7,630,000.00) as adjusted by compensable changes in Sirrine's scope of work.

1. Personnel Costs

- a. An hourly rate for home office and field office employees while engaged in the prosecution of the work. The regular time hourly rate shall be calculated by dividing the employee's annual salary by 2088. Premium for overtime shall be chargeable as per established for each employee.
- b. One Hundred and twenty percent (120%) of the regular time hourly rate for home office employees and seventy five percent (75%) of the regular time hourly rate for field office employees incurred under Item 1a which charge shall cover federal and state payroll taxes, worker's compensation insurance, and all other insurance measured by payroll, vacation, paid holidays, sick leave, excused absences, jury duty, health insurance, group life and disability insurance, retirement program benefits, and home office overhead and administrative costs and profit.

2. Travel, Subsistence and Relocation Costs

- a. Relocation and temporary living expenses of supervisory and administrative employees to the site as the construction begins

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and return expenses from the site at the end of the job in accordance with established policy or as may be required to maintain an adequate staff.

- b. Reasonable transportation, traveling, hotel and living expenses of employees incurred in the discharge of duties connected with the work.

3. Plant, Material, Equipment and Supplies

- a. The cost and expense of establishing, maintaining, and operating a field office, or any other engineering or construction facilities required at the jobsite.
- b. Cost, including transportation and storage, of all materials, machinery, equipment and supplies, including all temporary structures and utilities purchased for use or consumption in the prosecution of the work.

4. Subcontracts and Equipment

- a. Cost of soil investigation, tests, laboratory fees, security services and any special consultants.
- b. Equipment cost defined as actual invoiced cost from vendors plus freight FOB the jobsite including any cost passed through by vendor retainage financing associated with equipment such as retainage.

5. Taxes

All taxes, levies, import duties, etc., on or in connection with the performance of the work, including licenses and permits, excepting only the following: taxes levied directly on or measured by net income

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and the cost of licenses or permits required in order for the Parties to carry on business in the jurisdiction wherein the work is performed.

6. Insurance and Bonding Costs and Uninsured Losses

Premiums and other costs in connection with policies of insurance obtained or carried by either Party. All costs, including the cost of repairing or replacing damaged work or materials, or other property not covered by the proceeds of insurance, also the deductible amount of insurance policies.

7. Legal Costs

The cost to the Parties of providing legal services in connection with the execution of the Project, other than those required in the preparation, negotiation and administration of the Venture Agreement.

8. Computer and CAD

- a. Cost of CAD equipment used in the preparation of drawings and engineering reports. CAD will be billed to the venture at Fifty Five and No/100 Dollars (\$55.00) an hour of active graphics terminal time and Fifteen and No/100 Dollars (\$15.00) an hour for A/N terminal time exclusive of operator.
- b. Cost of computer service charges will be charged to the Venture according to the standard Serrine Computer Price Schedule in effect at the time of service. CAD cost is described in Paragraph 8a above.

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9. Miscellaneousa. Reproduction and Office Supplies

The cost of all materials and supplies used or consumed directly in the performance of the work, such as, but not limited to, blueprints, photostats and other reproduction costs, drafting paper, special report binders and the like at standard rates as currently adjusted.

b. Mailing Costs

The cost of postage, parcel post and express charges and the like.

c. Communication Expenses

The cost of long distance and local communications such as telephone, telegraph and cable.

d. Miscellaneous

Any and all other costs and expenses incidental to and reasonably necessary for the performance of the work hereunder.

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APPENDIX D

REIMBURSABLE COST SCHEDULEWEYHER/LIVSEY CONSTRUCTORS, INC.

The following defines those items chargeable to the Joint Venture by W/L for the determination of incentive compensation as set forth in Appendix E.

1. Wages paid for labor in the direct employ of W/L.
2. Salaries of W/L's personnel up through and including Project Director, in whatever capacity employed. Personnel engaged, at shops or on the road, in expediting the production or transportation of materials or equipment, shall be considered as stationed at the field office and their salaries paid for that portion of their time spent on this work.
3. Cost of contributions, insurance, assessments or taxes incurred during the performance of the work for such items as unemployment compensation and social security, insofar as such cost is based on wages, salaries, or other remuneration paid to employees of W/L.
4. The portion of reasonable travel and subsistence expenses of W/L or of its officers or employees incurred while traveling in discharge of duties connected with the work.
5. Cost of all materials, supplies and equipment incorporated in the work, including costs of transportation thereof.
6. Payments made by W/L to subcontractors.
7. Cost, including transportation and maintenance of all materials, supplies, equipment, temporary facilities and hand tools.

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8. Rental charges of all necessary machinery and equipment used at the site of the work, whether rented from W/L or others, including installation, repairs and replacements, dismantling, removal, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area.
9. Cost of premiums for all bonds and insurance.
10. Sales, use or similar taxes related to the work and for which W/L is liable imposed by any governmental authority.
11. Permit fees, royalties, damages for infringement of patents, and costs of defending suits therefor, and deposits lost.
12. Losses and expenses, not compensated by insurance or otherwise, sustained by W/L in connection with the work.
13. Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage, and similar petty cash items in connection with the work.
14. Cost of removal of all debris.
15. Costs incurred due to an emergency.
16. Cost of blueprints and reproduction of drawings and documents.
17. Cost of onsite computer services and expenses relating thereto.
18. Cost of lab fees, security services and any special consultants.
19. Legal costs and salaries.
20. Any and all other costs incurred as a result of the performance of the work.

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APPENDIX E

INCENTIVE COMPENSATION

1. Sirrinc shall receive incentive compensation from W/L equal to one half of the following:

The amount by which W/L's actual cost (including overhead), as calculated in accordance with Appendix D, of performing its scope of work as specified in Article 6 (including operating and maintenance of the Project) and fulfilling all duties, obligations, responsibilities, and liabilities under the Prime Contract (including those duties, obligations, responsibilities, and liabilities relating to warranties) plus W/L's estimated profit for the Project may be less than Ninety Four Million Eight Hundred Sixty Thousand and No/100 Dollars (\$94,860,000.00) base bid scope [Ninety Nine Million Two Hundred Sixty Thousand and No/100 Dollars (\$99,260,000.00) including option 1] as adjusted by compensable changes issued by the Navy in W/L's scope of work. (The cost for establishing this amount is exclusive of engineering costs paid to Sirrinc and compensated by the Navy.)

2. W/L and Sirrinc will each receive incentive compensation equal to one half of the following:

The amount by which Sirrinc's actual cost of performing its scope of work as specified in Article 6, plus overhead, plus profit, all as

specified in Appendix C, may be less than its guaranteed maximum cost of Seven Million Six Hundred Thirty Thousand and No/100 Dollars (\$7,630,000.00) as adjusted by compensable changes in Sirrinc's scope of work issued by the Navy or W/L.

Any incentive compensation payable hereunder shall be determined by a Project audit conducted by W/L in accordance with W/L's customary

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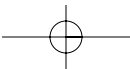
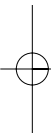
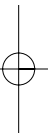
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accounting practices upon the completion of all Joint Venture work on the Project; the satisfaction of all Joint Venture duties, obligations, responsibilities, and liabilities under the Prime Contract (including those duties, obligations, responsibilities, and liabilities relating to warranties); and the acceptance of the Project by the Navy. Sirrinc shall have the right to conduct its own audit and the Management Committee shall discuss any differences between W/L's and Sirrinc's audit.

W/L shall pay any such incentive compensation to Sirrinc within thirty (30) days after the completion of the Project audit by W/L.

3. Sirrinc's guaranteed maximum shall be increased and W/L's lump sum shall be decreased by a like amount should W/L shift to Sirrinc the responsibilities for performance of any line item shown in Schedule One to Exhibit E. The opposite treatment shall occur if Sirrinc shifts to W/L any matters within its scope of work.

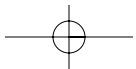
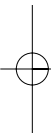
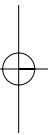
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ATTACHMENT 2

**FINDINGS BY THE COURT,
ORDER, AND JUDGMENT
(JUNE 25, 1993)**

* Attachment 2 contains the original text of Findings by the Court, Order, and Judgment (June 25, 1993); only the format has been changed to fit the page size.



FEDERAL DESIGN-BUILD

Attachment 2

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|-----------------------------|---|-------------------|
| DRAVO CORPORATION |) | |
| and |) | |
| WEYHER/LIVSEY CONSTRUCTORS, |) | |
| INC., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | CIVIL ACTION FILE |
| |) | NO. D57502 |
| CRS SIRRINE, INC. |) | |
| Defendant. |) | |

FINDINGS BY THE COURT, ORDER, AND JUDGMENT

Pursuant to O.C.G.A. § 9-11-52(a) (Michie Supp. 1992), and following consideration of all evidence presented during the 27 trial days of this action and the arguments of counsel, the Court hereby enters the following findings of fact and conclusions of law in the above-captioned action:

I. FINDINGS OF FACT

1. The parties to this action are:

Plaintiffs: Dravo Corporation ("Dravo")
Weyher/Livsey Constructors, Inc.
("Weyher/Livsey")

Defendant: CRS Sirriner, Inc. ("Sirriner")

2. In 1982 the United States Navy ("Navy") announced its decision to solicit bids for the design and construction of a steam plant to be built at the Norfolk Navy Shipyard in Portsmouth, Virginia (the "Steam Plant").

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3. The Navy retained Kaiser Engineers, Inc. (“Kaiser”), to prepare conceptual drawings and diagrams for the Steam Plant, together with an initial set of Performance Specifications, which summarized the intended workings of the Steam Plant, its layout, the inter-relationships among the various pieces of equipment and the demands that would be placed upon the equipment.

4. In 1982 the Navy began a general solicitation for a design/build contract through a two-step formal advertising process. The Navy issued a Request For Technical Proposal (“RFTP”) that incorporated much of Kaiser’s work product (drawings, diagrams, and specifications) and a narrative about the Steam Plant.

5. In October, 1982, the Navy conducted a pre-bid meeting in Norfolk, Virginia for potential contractors. At the meeting, the Navy explained the Project in greater detail and announced that it was available to answer any questions concerning the RFTP. The procurement process would proceed in two phases. First, each potential contractor was eligible to prepare and to submit to the Navy for approval its own technical proposal. The Technical Proposals submitted by potential bidders were to explain each bidders’ qualifications and how they would design and build the Project in accordance with the RFTP. The Technical Proposals would also identify the equipment to be used.

6. Submitting a fixed-price, competitive bid was step two of the procurement process. Once a potential contractor’s technical proposal was accepted by the Navy, the potential contractor became eligible to submit a fixed-price bid to the Navy to build the Project.

7. Representatives from many companies, including Weyher/Livsey and Serrine, attended the October 1982 pre-bid meeting.

8. Prior to this meeting, there was no contractual or other relationship between Weyher/Livsey and Serrine concerning the Project.

9. Although Weyher/Livsey had bid and built large power plant projects before, Weyher/Livsey knew that on its own it was incapable of both preparing a qualifying Technical Proposal and performing the engineering work if it became

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the successful bidder. Weyher/Livsey was in the business of construction, not design engineering. Although Weyher/Livsey did have some employees who were construction engineers, those employees did not have the necessary design expertise or experience to design a plant like the Steam Plant.

10. SIRRINE knew that on its own it could not submit a qualifying Technical Proposal and, if low bidder, construct the Project. While SIRRINE believed it had, and held itself out as having, the necessary design engineering expertise to design the Steam Plant in accordance with the Navy's requirements, SIRRINE knew that it could not construct the Steam Plant.

11. Following the October 1982 pre-bid meeting, representatives from Weyher/Livsey and SIRRINE discussed the possibility of jointly pursuing the Project. These discussions led to several meetings in late December 1982 between representatives of Weyher/Livsey and SIRRINE at SIRRINE's office in Research Triangle Park near Raleigh, North Carolina.

12. Weyher/Livsey was a wholly-owned subsidiary of Dravo. It was eventually agreed that Dravo would participate along with Weyher/Livsey and SIRRINE in the submission of a Technical Proposal to the Navy in order to assure bonding capacity.

13. By letter dated January 7, 1983, and executed on February 17, 1983, Dravo, Weyher/Livsey, and SIRRINE entered into a written "Letter Agreement" designed to (i) describe the responsibilities of the various parties and the efforts they would undertake in preparing the Technical Proposal and submitting a bid, and (ii) assure that any bid that was submitted included sufficient money to reimburse SIRRINE for its cost in providing design engineering work necessary during the pre-bid stages of the Navy's two-step process.

14. The Letter Agreement was drafted by SIRRINE. SIRRINE officers Jim Machen and Gordon Clayton provided input that was ultimately used by SIRRINE's in-house counsel Lawrence Platter in drafting the Letter Agreement. Under the terms of the Letter Agreement, SIRRINE was to take the lead role in preparing the Technical Proposal, while Weyher/Livsey was to take the lead role in preparing the bid "based upon bidder's technical proposal."

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Sirrinc was to “supply the technical information needed to prepare bid(s).” The Letter Agreement further provided that Sirrinc would not be responsible for Weyher/Livsey’s estimating errors: “Sirrinc, as design engineer, will not quaranty [sic] the accuracy of any estimate used in the preparation of the bid(s) . . .”

15. On or about March 15, 1983, Weyher/Livsey-Dravo-Sirrinc, a Joint Venture, submitted the Technical Proposal to the Navy. Between April and July, the Navy made multiple requests for clarification of the Joint Venture’s Technical Proposal, to which the Joint Venture submitted written responses prepared primarily by Sirrinc with additional clarifying information provided by vendors.

16. Other companies prepared and submitted Technical Proposals to the Navy as well. Representatives from the Navy and Kaiser reviewed the Technical Proposals and selected as qualified only the Technical Proposals of potential bidders which satisfied the RFTP requirements. Once the Navy and Kaiser approved the Technical Proposals, the companies that had prepared the qualifying Technical Proposals were eligible to participate in the second step of the two-step procurement process—the submission of fixed-price, competitive bids.

17. On or about July 19, 1983, Weyher/Livsey and Sirrinc learned that the Navy had accepted their Technical Proposal and that they would be eligible to submit a bid.

18. Well before receiving formal notification that the Technical Proposal was qualified, Weyher/Livsey began the process of estimating the construction quantities to be included in the eventual bid to the Navy.

19. In preparing the construction portion of the bid, Weyher/Livsey assigned responsible, experienced estimators to determine quantities and dollars necessary to be included in the bid for all major areas, including structural steel, electrical, piping, and instrumentation and control work.

20. In preparing estimates within the structural steel, electrical, piping, and instrumentation and control disciplines, Weyher/Livsey employees involved with the bid examined the RFTP, Kaiser drawings, drawings prepared by Sirrinc

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included in the Technical Proposal and additional drawings and information provided by Sirrinc, and the Technical Proposal itself. Based upon the available information, Weyher/Livsey's estimators then estimated the quantities of, inter alia, the construction materials such as pipe, wire, steel and instruments that would be required for the project. To do so, Weyher/Livsey's estimators also made conservative assumptions about the routing of pipe, wire, and similar items to connect processes and equipment.

21. The Navy Project as described in the RFTP contained requirements for an extremely complex instrumentation and control system. It was the most complex instrumentation and control system Sirrinc's engineers responsible for instrumentation and controls during both the bid and design phases of the job had ever seen. At no time prior to the bid being submitted did Sirrinc inform Weyher/Livsey that (i) the instrumentation and control system was unique or unusually complex, (ii) the specifications concerning instrumentation and control were interspersed throughout the RFTP and were subject to significant engineering interpretation, or (iii) Sirrinc had not clarified with the Navy either Sirrinc's or Fisher Controls' (the Joint Venture's base instrumentation and control supplier) interpretation of important specifications and how they would be enforced by the Navy for the Project.

22. For structural steel, Sirrinc provided, at Weyher/Livsey's request, structural steel "stick drawings" showing the weight and dimensions of structural steel members to be used on the Project. This information, together with reasonable and customary assumptions about connection weights between structural steel members, formed the basis for estimating the structural steel.

23. After examining the Sirrinc stick drawings and the estimate prepared from them, Weyher/Livsey contacted Sirrinc and informed Sirrinc that the stick drawings appeared to contain less steel than Weyher/Livsey had previously experienced with buildings and equipment of similar size and type. After a review by Sirrinc's Greenville office, Sirrinc told Weyher/Livsey that it stood by its design.

24. On or shortly before bid day, Weyher/Livsey was informed by AESCO, one of the steel suppliers from whom it was soliciting a bid for structural

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steel, that Weyher/Livsey's requested quantities were less than those being solicited by other potential contractors. Following this discussion, Weyher/Livsey added \$100,000 to the bid as a contingency to cover additional steel that might be required.

25. By letter dated August 18, 1983, Weyher/Livsey questioned Serrine about structural steel (including wind bracing issues), additional instruments not reflected in the instrumentation or vendor packages, various pipe and valve specifications, as well as electrical issues. [Plaintiffs' Exhibit 46] The Weyher/Livsey estimators went to Serrine's offices in Raleigh where Serrine, in meetings held on August 21 and 22, responded to Weyher/Livsey's questions. For example, Serrine's electrical engineers were specifically questioned about the number of motors in the job. Weyher/Livsey had estimated 500 motors, but Serrine's electrical engineers had calculated that a total of 550 motors were required for the Project. [Plaintiffs' Exhibit 54]. Therefore, Weyher/Livsey increased its estimate to include 554 motors. [Plaintiffs' Exhibit 60B]

26. On August 26, 1983, before the Joint Venture's bid was submitted, Weyher/Livsey and Serrine representatives met and examined the cover sheet summarizing the bid. The Court finds that Serrine did not express any reservations about the total contingency in the bid or the general approach taken by Weyher/Livsey of using available drawings to perform takeoffs and outline possible routings of material in arriving at bid quantities. The Court finds that the trial testimony of George J. Freeman, the only witness to the effect that Gordon Clayton of Serrine expressed reservations about the contingency in Weyher/Livsey's bid, was contrary to the testimony of Weyher/Livsey's witnesses as well as Mr. Freeman's own deposition testimony. Nor was Mr. Freeman's testimony supported by other Serrine witnesses. Therefore, Mr. Freeman's testimony is not credible.

27. Weyher/Livsey's bid as submitted included \$330,000 as payment for the services Serrine had rendered during the procurement process and included a guaranteed maximum price \$7,630,000 to be paid to Serrine for engineering during the design phase. In the event the Project was ultimately constructed for less than the total design and construction budget, Dravo, Weyher/Livsey, and Serrine would share in the savings through additional compensation.

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28. On August 29, 1983, Weyher/Livsey and Sirrinc submitted their bid to the Navy in the name of the Weyher/Livsey-Dravo-Sirrinc Joint Venture, and on or about August 30, 1983, they received the Navy's letter indicating that the Joint Venture was the low bidder. The next lowest bid was higher than the Joint Venture's by only \$716,000, or less than one percent of the successful bid.

29. On or about September 26, 1983, Weyher/Livsey, Sirrinc, and Dravo executed the written Joint Venture Agreement, effective as of August 26, 1983. The Joint Venture Agreement created a legal entity capable of executing the Navy contract; confirmed in Paragraph 2.1 that Sirrinc's work on the Technical Proposal and to support the bid was part of its scope of work for which it would be paid and which would be used in calculating additional compensation among the parties; and set forth the further, respective responsibilities of Weyher/Livsey and Sirrinc in pursuing and performing the Navy contract.

30. The Joint Venture Agreement confirmed the joint venture relationship. Accordingly, Sirrinc owed Weyher/Livsey and Dravo duties imposed by the contract as well as fiduciary duties owed by one joint venture partner to another.

31. Paragraph 9.3 of the Joint Venture Agreement states:

Notwithstanding any of the foregoing, Sirrinc shall have no risk, liability, or accumulation will occur of error and omission charges for construction material quantity variations if the actual quantities are different from those in the bid to the Navy. W/L will provide Sirrinc with budget quantities for all functional areas of Project and Sirrinc's detail design will make every reasonable effort to stay within these quantities within the requirements of the Prime Contract [with the Navy]. W/L will be notified promptly if Sirrinc believes quantities will be exceeded.

32. Sirrinc contends that this provision means that Weyher/Livsey alone bore the risk of all increased costs occasioned if the quantities of material used on the job exceeded those in the bid, irrespective of the reasons for quantity growth or the failure of Sirrinc's pre-bid work or post-bid work to

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conform to engineering standards of care. Weyher/Livsey contends that Paragraph 9.3 must be read as a whole and that prompt notice when Sirriner believed quantities would be exceeded and reasonable efforts by Sirriner to design within budgeted quantities were both conditions precedent to Sirriner receiving any protection from Paragraph 9.3. Dick Stine, Weyher/Livsey's former Executive Vice President, testified that Paragraph 9.3 was further conditioned upon the receipt by Weyher/Livsey of reasonable engineering information to form the basis of the estimate.

33. Paragraph 9.3 of the Joint Venture Agreement is ambiguous.

34. Sirriner produced one witness in an attempt to explain the origin and meaning of Paragraph 9.31—Sirriner's former general counsel Lawrence Platter. Mr. Platter claimed that even in the case of gross engineering malpractice Sirriner was shielded from any responsibility for quantity growth. However, Sirriner's present senior officer, Mr. Machen, freely admitted that it was not Sirriner's intent to shield itself from any or all liability for quantity growth irrespective of the quality of work performed by Sirriner. This testimony further confirms that the quantity growth provision is ambiguous.

35. Paragraph 9.3 of the Joint Venture Agreement was not included in early drafts of the Joint Venture Agreement [Plaintiffs' Exhibit 1270] and was added to the Agreement late in the drafting process.

36. Paragraph 9.3 of the Joint Venture Agreement limits Sirriner's liability to Dravo and Weyher/Livsey in case quantities of materials used to construct the job exceed quantities contained in the Joint Venture's bid submitted to the Navy. The intent of the parties was that Weyher/Livsey, and not Sirriner, should bear the risk for Weyher/Livsey's bid errors.

37. Paragraph 9.3 of the Joint Venture Agreement also imposed affirmative obligations upon Sirriner to (i) make every reasonable effort with its detailed design to stay within budgeted quantities for all functional areas of the Project within the requirements of the Contract with the Navy and (ii) notify Weyher/Livsey promptly if Sirriner believes quantities will be exceeded.

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38. According to Mr. Platter, the scrivener for the Joint Venture Agreement was Weyher/Livsey and Dravo in-house counsel Jerry Fedele; however, various provisions of the Joint Venture Agreement, including Paragraph 9.3, were drafted primarily by Sirrine.

39. In closing argument Sirrine's trial counsel conceded that Paragraph 9.3 imposed affirmative obligations upon Sirrine. The Court agrees and finds that Sirrine breached its affirmative obligations to make reasonable efforts to design the Project within budgeted quantities and to notify Weyher/Livsey promptly if Sirrine believed budgeted quantities would be exceeded. The Court finds that Sirrine ignored its obligations to design within budgeted quantities, failed to track the quantities in its design, and failed to notify Weyher/Livsey when significant increases over estimated quantities occurred.

40. As a result of Sirrine's breaches of its affirmative obligations, the ambiguity of Paragraph 9.3, and public policy concerning exculpatory clauses, the Court finds that Paragraph 9.3 does not exculpate Sirrine from liability for quantity growth.

41. On September 29, 1983, the members of the Joint Venture executed the Construction Contract with the Navy. The Navy contract price was \$102,490,000. The stated start date for the Project was October 14, 1983, and the completion date was no later than July 25, 1987.

42. The Joint Venture's bid proved too low. The Court finds that Sirrine breached its contractual and fiduciary duties by failing to provide sufficient, accurate information to Weyher/Livsey upon which to base the bid. The Court also finds that Weyher/Livsey was overconfident in its ability to bid the Project and therefore Sirrine is not completely responsible for the quantity growth over a reasonable, should have been bid, estimate. Weyher/Livsey or others are responsible for approximately 40% of these losses.

43. Following execution of the Contract with the Navy, Weyher/Livsey forwarded to Sirrine the budgeted quantities included in the Joint Venture's bid for all functional areas of the Project. While this information was made

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available to SIRRINE's discipline project engineers doing the detailed design for each functional area of the Project, SIRRINE made no effort to design within these budgeted quantities, did not track quantities being designed, and failed to notify Weyher/Livsey when quantity growth over the estimate occurred. SIRRINE's lack of reasonable efforts breached SIRRINE's contractual and fiduciary duties to Weyher/Livsey.

44. The Joint Venture Agreement provided for a constructability review when 30% of the detailed design for each functional area of the Project was completed. In SIRRINE's Procedure Manual for the Navy Project [Plaintiffs' Exhibit 873, p. 37], which SIRRINE supplied to Weyher/Livsey, SIRRINE undertook to inform Weyher/Livsey at the 30% constructability review if quantity increases were likely to occur. Again, SIRRINE made no effort to fulfill this undertaking and breached its contractual and fiduciary duties to Weyher/Livsey.

45. At trial, SIRRINE representatives stated that it would be impossible for SIRRINE to know the quantities that would be necessary to build the job as designed at the 30% design stage. At no time during the course of the Project did SIRRINE inform Weyher/Livsey of the impossibility or difficulty of tracking quantities and providing the information it had undertaken to provide.

46. The quantities of materials designed in the electrical, steel, piping, and instrumentation and control areas of the job increased dramatically over the bid quantities. A part of this increase is attributable to bid errors made by Weyher/Livsey's estimators. The majority of the increase, however, is attributable to SIRRINE's breaches of contractual and fiduciary duties, including its failure to provide sufficient, accurate information to Weyher/Livsey upon which Weyher/Livsey could base its bid.

47. To avoid claiming damages caused by Weyher/Livsey's own bid errors, Plaintiffs' experts from Barrington Consulting had engineers from Dravo Engineering re-estimate the electrical and instrumentation and control portions of the Project. Additionally, Dravo engineers did a spot-check of the original piping estimate. This spot-check revealed that the Dravo engineers would have estimated lower quantities of piping and valves than contained in the original bid, so for comparison purposes Weyher/Livsey used the original piping bid.

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Finally, expert Dr. John Stevenson performed a re-estimate of the amount of structural and miscellaneous steel needed in the Project.

48. All of the re-estimators had substantial estimating and engineering backgrounds. Dr. Stevenson and Harry Shallenberger (the individual performing the instrumentation and control re-estimate) are both licensed professional engineers.

49. The re-estimates (and in the case of piping, original bid estimate) were then compared to literal takeoffs of quantities shown on released for construction drawings. This comparison excludes additional quantities resulting from field changes or purchasing errors, if any.

50. Plaintiff's damages expert Edward H. Ripper, from Barrington Consulting, eliminated any additional quantities included in the released for construction drawings resulting from Navy change orders subsequent to the estimate. Thus, the damages sought do not include payment for quantity increases for which the Navy paid the Joint Venture due to post-bid design changes requested or required by the Navy.

51. Comparing the re-estimates to the released for construction drawings reveals that the Project grew from what reasonably could have been estimated by experienced estimators with engineering experience (as represented by the re-estimate), and what Serrine designed into the job (as revealed by the released for construction drawings). In the electrical area, cable tray should have been bid at 11,832 feet, but Serrine designed 20,017 feet in the released for construction design. Growth caused by Serrine equaled 8,185 feet, representing a 69% increase over the cable tray that could have been anticipated based upon the original drawings. For conduit 199,504 feet could reasonably have been anticipated, but this number more than doubled to 400,817 feet. This is an increase of approximately 38 miles. [Plaintiffs' Exhibit 996]. Wire and cable could reasonably have been anticipated to total 2,509,060 feet, yet the released for construction design included 5,509,702 feet, an increase of 3,000,642 feet, or over 568 miles. The electrical load in substations increased from 4,500 KVA to 7,000 KVA, a 56% increase in total connected load. The cost of electrical increases totalled \$2,486,327. [Plaintiffs' Exhibit 1033]

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52. Piping quantities also grew. The bid included 44,759 feet of pipe and 2,841 valves. The released for construction design required 89,587 linear feet of pipe for a growth of 8 miles or 44,828 feet; 5,494 valves were required in the released for construction design, an increase of 2,653 or 93% over the original bid. [Plaintiffs' Exhibit 997]

53. After accounting for change orders and sales tax, \$2,678,272 worth of steel would have been anticipated based upon Sirriner's drawings, but \$3,518,200 worth of structural and miscellaneous steel is shown on the released for construction designs, an increase of \$839,928 in material costs and \$276,133 in labor. [Plaintiffs' Exhibit 1035]

54. Instrumentation growth between what could have been anticipated based upon the drawings available before the bid and what was shown on the released for construction drawings grew \$546,472 for labor and \$229,471 for materials, for a total cost of growth of \$775,943. [Plaintiffs' Exhibit 1253]

55. The Court finds that Sirriner's failure to meet its contractual and fiduciary obligations caused significant quantity growth in structural steel, piping, electrical and instrumentation.

56. Throughout the comparisons, the same material quantity prices used by Weyher/Livsey in its bid were used by Plaintiffs' damages expert so that the dollar comparisons would be apples to apples.

57. The damages claimed by Plaintiffs for quantity growth are \$6,417,086. [Plaintiffs' Exhibit 1249]

58. Sirriner seeks to attribute much of the electrical and steel growth in the precipitator area to the Joint Venture's selection of a vendor to provide the four precipitators on the Project other than the vendor listed as the base proposal in the original Technical Proposal submitted to the Navy. The Court finds that Sirriner breached its contractual and fiduciary duties to examine competing vendor proposals and adequately inform Weyher/Livsey of any quantity impact of differences among proposals.

FEDERAL DESIGN-BUILD**Attachment 2**

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59. The electrical and piping quantity growth also caused disruption and loss of labor productivity in the piping areas. The loss of productivity resulted from the quantity growth, late notice by SIRRINE of such growth, crowded piping design, and the impact of these factors on the piping and electrical labor forces attempting to install piping and electrical materials simultaneously in the same area. The piping disruption claim totals \$671,202. The Court finds that SIRRINE, because of its breach of its contractual and fiduciary duties, is responsible for this disruption.

60. Barrington Consulting expert Dale Kern presented evidence to the Court of a delay attributable to SIRRINE of 91 working days, ending in March of 1987. Mr. Kern's testimony was credible. The Court finds that the end date of the Project was delayed 91 working days as a result of SIRRINE's failure to give timely notice of quantity growth, SIRRINE's late issue of electrical and instrumentation released for construction drawings, and the increased quantities of material SIRRINE designed to be installed in the Project.

61. An additional 102-day delay was testified to by Dravo Project Manager Larry Lobdell. This delay arose from SIRRINE's underdesign of the cooling water pumps for the coal feeder system necessary to allow the Steam Plant to be tested and accepted by the Navy. This delay runs from March 18, 1987, the date of the performance testing, and concludes 102 working days later when grate burnouts, not attributable to SIRRINE, caused a further delay in acceptance. The Court finds that Mr. Lobdell's testimony concerning this delay and its causes is credible.

62. Costs attributable to the 91-day delay total \$1,256,710 and to the 102-day delay total \$687,990, for total delay costs of \$1,944,700. The Court finds that 80% of the costs of these delays were occasioned by SIRRINE's breaches.

63. Dravo and Weyher/Livsey have also claimed \$1,442,535 against SIRRINE as a result of design errors and omissions or "backcharges." Mr. Lobdell testified that he (i) reviewed each of the backcharges, (ii) eliminated certain backcharges, and (iii) concurred that the amounts claimed are reasonable and

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that the work performed was the result of Sirrine errors. Sirrine elected not to cross-examine Mr. Lobdell regarding the individual backcharges, but instead called its own witnesses to testify that they either did not believe that certain of the backcharges were appropriately charged against Sirrine or could not tell whether individual backcharges were Sirrine's responsibility based upon the documentation included with the backcharges. The Court finds that 50% of the amount claimed for backcharges is properly attributable to Sirrine's breaches.

64. The Navy provided a punchlist consisting of over 1,000 items that needed to be completed before final acceptance. Mr. Lobdell testified that Navy inspectors identified for him many of the items that they believed were actually the result of Sirrine design errors. Mr. Lobdell independently examined the punchlist items he had been informed were the result of Sirrine's design errors, concurred that some were the result of design errors, and disagreed as to others. Mr. Lobdell then examined the costs attributable to the punchlist items he concurred were the result of design errors, and this amount totals \$1,111,751. Sirrine did not cross-examine Mr. Lobdell regarding the validity of individual punchlist items. Sirrine did not question their witnesses about individual punchlist items. The Court finds Mr. Lobdell's testimony on these topics to be both credible and unrebutted.

65. Weyher/Livsey also claims amounts for Dravo redesign efforts due to inadequacies in the Sirrine design, software correction, and payments made to obtain as-built drawings. These amounts total \$489,845; \$430,000; and \$73,500, respectively. The Court finds that Sirrine is partially liable for these costs.

66. Paragraph 9.2 of the Joint Venture Agreement provides that Sirrine shall not be liable as a result of design or engineering errors up to a cumulative maximum amount of \$750,000.

This provision applies only to "Sirrine's engineering errors and omissions detected by Sirrine and noticed to W/L and Dravo. . . ." Because the Court finds that Sirrine did not provide Weyher/Livsey or Dravo notice of the errors and omissions discussed above, the \$750,000 deductible does not apply to the amounts attributable to Sirrine.

FEDERAL DESIGN-BUILD**Attachment 2**

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67. After considering all of the evidence and arguments of counsel, including weighing the credibility of the various witnesses testifying live as well as according due weight to deposition testimony and the documents in the record, the Court finds that Sirriner's breaches of its contractual and fiduciary obligations damaged Weyher/Livsey and Dravo in the cumulative amount of \$5,518,812.

68. The Court has reached its conclusion regarding the final amount by examining the proof with respect to each of the areas of direct damages claimed against Sirriner and summarized on Plaintiffs' Exhibit 1249, determining what portion of each damage area was caused by actions of Sirriner, totaling these, and then discounting the final number to account for risks that Weyher/Livsey assumed during or through the bid and construction process.

69. Paragraph 8.2 of the Joint Venture Agreement entitles Weyher/Livsey to recover "any and all loss, costs, expenses and damages (including but not limited to liquidated, special, indirect, and consequential) damages" attributable to Sirriner's performance of its scope of work in an untimely or defective manner. The Court finds and concludes that these direct and indirect costs do not include prejudgment interest.

70. The Court finds that Sirriner's counterclaim for litigation expenses is without merit.

II. CONCLUSIONS OF LAW

1. Defendant owed contractual duties to Plaintiffs pursuant to the Joint Venture Agreement.
2. Defendant owed fiduciary duties to Plaintiffs as a joint venture partner.
3. As set forth above, Defendant breached its contractual duties to Plaintiffs.

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DESIGN-BUILD CONTRACTING CLAIMS

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4. As set forth above, Defendant breached its fiduciary duties to Plaintiffs.

5. As a result of Defendant's breaches of its fiduciary and contractual duties, Plaintiffs have been damaged by Defendant and are entitled to relief from the Court.

6. Plaintiffs are entitled to recover \$5,518,812 from Defendant as compensation for the damages caused by Defendant's breaches of its fiduciary and contractual duties.

7. Defendant's counterclaim in this action is without merit.

III. JUDGMENT

Based upon the above-stated findings of fact and conclusions of law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment shall enter in favor of Plaintiffs and against Defendant in the amount of \$5,518,812, plus post-judgment interest following the date of entry of this Order and judgment as provided by O.C.G.A. § 7-4-12.

SO ENTERED AND ORDERED, this 23 day of June, 1993.

Philip F. Etheridge, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

FEDERAL DESIGN-BUILD

Attachment 2

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|----------------------------|---|-----------------|
| DRAVO CORPORATION and |) | |
| WEYHER/LIVSEY CONSTRUCTORS |) | |
| INC., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | CIVIL ACTION |
| |) | FILE NO. D57502 |
| v. |) | |
| |) | |
| CRS SIRRINE, INC. |) | |
| Defendant. |) | |

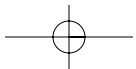
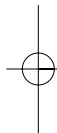
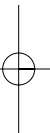
JUDGMENT

The Court having previously vacated and set aside its Findings By the Court, Order, and Judgment in this case, signed by the Court on June 23, 1993, and filed in the Clerk's Office on June 25, 1993 (hereinafter the "Order");

IT IS HEREBY ORDERED that the findings and conclusions of the previous Order are this day adopted as the Court's final Findings of Fact, Conclusions of Law, Order, and Judgment in the above-styled case. The Clerk is directed to enter this Judgment effective this 25th day of August, 1993, with post-judgment interest accruing nunc pro tunc from June 25, 1993, the date the original Order was entered.

This 25th day of August, 1993.

Philip F. Etheridge
Judge, Fulton Superior Court



FEDERAL DESIGN-BUILD

Attachment 2

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|----------------------------|---|-----------------|
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| INC., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | CIVIL ACTION |
| |) | FILE NO. D57502 |
| v. |) | |
| |) | |
| CRS SIRRINE, INC. |) | |
| Defendant. |) | |

ORDER

CRS Sirrinc, Inc., Defendant in the above-styled case, has moved the Court to set aside the Findings By the Court, Order, and Judgment (hereinafter the "Order"), signed by the Court on June 23, 1993, and filed in the Clerk's Office on June 25, 1993. The Court finds that counsel for the Defendant did not receive notice of the Order until after thirty (30) days from its final entry;

Accordingly, IT IS HEREBY ORDERED that the Order, including the judgment contained therein, is set aside and vacated.

SO ORDERED this 25 day of August, 1993.

Philip F. Etheridge
Judge, Fulton Superior Court

