



Alternative Dispute Resolution Deskbook for Acquisition Professionals

U.S. Department of the Air Force
Office of the General Counsel
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Introduction

This deskbook provides guidance as to when a matter is suitable for alternative dispute resolution (ADR) and on how to conduct ADR when it is pursued. It also provides a template Memorandum of Understanding regarding the use of ADR which can be entered into at the commencement of an acquisition program or contract, and sample ADR template agreements which outline the conduct of ADR between parties to a contract dispute or issue in controversy.

ADR is a process agreed to by the parties in which a third-party neutral assists in the resolution of an issue or issues in controversy. ADR must be considered in the larger context of conflict management. Air Force personnel shall take appropriate steps to identify and to address, at the earliest stage possible, conflicts and controversies that can lead to one or more disputes. The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the Contracting Officer level. The skillful application of negotiation skills is the first step in managing conflicts and controversies. Air Force Policy Directive (AFPD) 51-12 and the Air Force Federal Acquisition Regulation Supplement (AFFARS) require Air Force personnel to use ADR to the maximum extent practicable. Similarly, Contracting Officers must be prepared to use ADR to resolve protests to the maximum extent practicable.

AFFARS 5333.2 provides a framework for the pursuit of ADR strategies, and is an essential part of Air Force Acquisition ADR governance. For example, Contracting Officers must refer proposed decisions on claims and terminations for default to legal counsel for advice on ADR suitability and appropriate dispute resolution strategies. Contracting officers must also report specified information to SAF/GCR when negotiations reach an impasse, e.g., when preparing decisions for claims on PEO programs and for claims greater than \$500,000 on non-PEO programs.

SAF/GCR is committed to the ongoing enhancement of ADR resources and guidance. This deskbook is just one step in SAF/GCR's continuing efforts to strengthen the Acquisition ADR Program. It is designed to be a living, breathing document which will be updated on an iterative basis as best practices and lessons learned are identified over time. SAF/GCR, as the leader of the Air Force ADR Program in accordance with AFPD 51-12, welcomes all ideas and suggestions regarding improvements to this deskbook or any other aspect of the program. Input can be sent to SAF/GCR at usaf.pentagon.saf-gc.mbx.saf-gcr-workflow@mail.mil.

Additional information is available at www.af.adr.mil.



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1.0 The Air Force ADR Program

The Air Force has an “ADR first” policy, requiring the use of ADR in all contract controversies and disputes, where the normal negotiation process has reached impasse—except in those limited circumstances when an applicable exception exists (covered below in Section 2.1). This policy derives from AFPD 51-12, which calls for the use of ADR:

- To the maximum extent practicable and appropriate,
- At the earliest stage feasible,
- By the most efficient and least expensive method possible, and
- At the lowest possible organizational level.

While litigation has its place as the dispute resolution process of last resort, ADR is the Air Force’s primary and preferred method for resolving contract controversies and disputes once negotiations have reached an impasse.

1.1 What is ADR?

ADR refers to a variety of cost-saving, streamlined techniques designed to resolve issues in controversy when negotiations reach an impasse. ADR is any procedure, or combination of procedures, where the parties agree to use a third-party neutral who functions primarily to aid the parties in resolving issues in controversy. For the purposes of ADR, an issue in controversy is a material disagreement between the Government and the contractor, which may result in a claim, or is all or part of an existing claim.

ADR procedures include, but are not limited to, structured fact-finding, facilitative and evaluative mediation, mini-trials, and binding summary trials. These procedures, explained further in this guidance, are not the first step in litigation; they are business tools available to the acquisition team in order to resolve issues before the parties contemplate litigation.

1.2 Why Use ADR?

Using ADR to the maximum extent practicable is Air Force policy under AFPD 51-12 and AFFARS Part 5333. This policy implements the Administrative Dispute Resolution Act of 1996 (ADRA), the Contract Disputes Act (CDA), and the Federal Acquisition Regulation (FAR). These sources of authority recognize that effective use of ADR makes good business sense. ADR processes significantly reduce the time and transaction costs associated with protracted litigation. Additional factors include:

- **Control.** Parties retain control over the resolution of the issue rather than relinquish control to a judge. For example, parties can fashion agreements that address the time and effort necessary to resolve their issue.
- **Flexibility.** Parties can design a resolution process that is custom-tailored to resolving their issue, *i.e.*, fitting the form to the fuss. This process can adapt, as necessary, to changing business circumstances in order to remain effective.

- **Open Communication and Information Exchange.** ADR processes can significantly reduce the adversarial nature of resolving an issue, improve the productivity of face-to-face discussions between stakeholders, and typically permit expedited exchange of information.
- **Relationship Building.** Many ADR processes directly involve stakeholders, which can increase buy-in for the results and enhance the long-term relationships of the parties. In contrast, protracted litigation can lead to inefficiencies and distractions that can materially impact the quality of performance on existing and future contracts.
- **ADR Works.** In fiscal year (FY) 15, the Armed Services Board of Contract Appeals (ASBCA) successfully resolved 93 percent of issues in controversy with nonbinding ADR techniques. Between FY 87 and FY 15, the ASBCA has used nonbinding ADR techniques to resolve 1,474 contractor controversies, with, on average, a 96 percent success rate. Additional data can be found at www.asbca.mil.

1.3 When to Use ADR

The Air Force's ADR first policy requires the use of ADR to the maximum extent practicable in all contract controversies and disputes when the normal negotiation process has reached impasse. Establishing memoranda of understanding (MOU) regarding the use of ADR with contractors before issues in controversy arise supports this policy. MOUs create an overarching commitment to ADR and an ADR process that requires the parties to use a cooperative philosophy throughout the acquisition life cycle, resolve all contract issues at the lowest possible level, and use ADR to resolve any issues that cannot be resolved through negotiation.

Under AFFARS Part 5333, Contracting Officers must establish such an agreement, such as a MOU, between the Government and the contractor that outlines the intent of the parties with respect to the use of ADR for Acquisition Category (ACAT) I and ACAT II programs. Contracting Officers must consider establishing agreements for other programs and acquisitions. A template MOU is included in Appendix B.

Once an issue in controversy arises, parties should use ADR as early in the lifecycle of that issue as possible, pursuant to AFPD 51-12. For many Air Force programs, issues in controversy arise at the Request for Equitable Adjustment (REA) stage. Contracting officers and their servicing legal office should use ADR to the maximum extent practicable to resolve these REAs. AFFARS Part 5333 provides a framework for the pursuit of ADR strategies at additional stages of contract administration, identified below.

- **Prior to a Contracting Officer's Final Decision (COFD).** Prior to making a final decision on a claim, termination for default, or termination for cause, the Contracting Officer must refer his or her proposed final decision to their servicing legal office and the Commercial Law and Litigation Directorate of the Air Force Legal Operations Agency (AFLOA/JAQ) for advice, ADR suitability, and appropriate dispute resolution strategies, pursuant to AFFARS 5333.290.

- **When Resolving an Affirmative Air Force Claim.** Under AFFARS 5333.290, the Contracting Officer must also use ADR to the maximum extent practicable to resolve an Air Force affirmative contract claim such as defective pricing or liquidated damages when negotiations have reached an impasse. In order to develop a dispute resolution strategy, the Contracting Officer must provide AFLOA/JAQ, with copy to SAF/GCR, information indicating the Air Force is entitled to recover amounts greater than \$500,000. See AFFARS Part 5333 for additional Contracting Officer reporting requirements.
- **Prior to Litigation.** Under AFFARS 5333.214, acquisition teams must attempt to use ADR prior to the commencement of litigation once unassisted negotiations have reached an impasse. This provision applies both to litigation under the Tucker Act and Contract Disputes Act (CDA). Under the CDA, litigation commences when a contractor appeals a COFD. Accordingly, the acquisition team must attempt to use ADR prior to the appeal of a COFD. The use of ADR does not alter the time limitations or procedural requirements for filing an appeal of the COFD and does not constitute a reconsideration of the COFD under FAR 33.214(c).
- **In litigation.** Under AFFARS 5333.214, ADR must be offered by AFLOA/JAQ in litigation, unless one of the exceptions in part 2.2 of this deskbook apply. AFLOA/JAQ represents the Air Force in appeals before the ASBCA and with the Department of Justice in appeals before the Court of Federal Claims (COFC).
- **Upon receipt of a bid protest.** Under AFFARS 5333.214, ADR must also be used by AFLOA/JAQ to resolve protests to the maximum extent practicable. AFLOA/JAQ represents the Air Force in bid protests before the Government Accountability Office (GAO) and with the Department of Justice (DOJ) in protests before COFC.

Using ADR to the maximum extent practicable involves determining whether the issue or issues in controversy are suitable for ADR. Suitability criteria are explained in section 2 of this deskbook.

2.0 ADR Suitability Factors

Determining whether an issue in controversy is suitable for ADR is a case-specific analysis. Although not an exhaustive list, the below guidance includes factors that favor and disfavor the use of ADR. Contracting Officers and their servicing legal office can refer to these factors to assess the suitability of ADR in a contract controversy, or a portion of a contract controversy.

2.1 Factors Favoring ADR

Relationship between Parties

- There is a continuing relationship between the parties on a program or otherwise.
- Parties have poor communication, personality conflicts, or are polarized into an all or none position.
- One party's view of the controversy is unrealistic and third-party evaluation may resolve the matter.
- Either party would benefit from hearing directly from the opposing side or a third-party neutral.
- The parties are prepared to discuss settlement.

Nature of the Issue in Controversy

- The parties need a factual interpretation and the applicable law is well settled.
- The issue is factually or technically complex and a third-party neutral could provide expertise or fact-finding.
- The parties need flexibility or creativity in shaping relief, such as the inclusion of issues that are not part of the instant controversy.
- The parties need a swifter resolution than possible through litigation. ADR could speed anticipated settlement by streamlining or limiting the exchange of information and time needed to resolve the matter.
- Some entitlement exists and the real task is negotiating a reasonable recovery.
- The Air Force needs to minimize disruption to other programs or mission areas by the diversion of resources to support litigation.
- Bad facts, bad law, or a hostile forum or decision maker make avoiding an adverse precedent desirable.
- Decision-quality information is accessible. Decision-quality information is sufficient knowledge of the facts to determine the ADR team's business interests, make a credible ADR presentation, and support a rational decision to settle the matter. If not accessible in

Government files, decision-quality information can be obtained via fact-finding or information exchange.

2.2 Factors Disfavoring ADR

- A definitive and authoritative decision is needed as a precedent.
- The issue is likely to settle without assistance, or in the context of litigation, can be resolved efficiently by motion.
- The opposing party will not engage in ADR in good faith.
- Allegations of fraud may prohibit the CO from proceeding with ADR. A CO lacks authority to settle issues related to fraud. The DOJ has the authority to resolve such matters. If a contract dispute involves elements or allegations of fraud, it must be referred to DOJ.
- Decision-quality information is not accessible.
- The Administrative Dispute Resolution Act of 1996 lists additional factors that, when present, may make engaging ADR inappropriate. However, these factors are not typically relevant to contract issues in controversy.

3.0 ADR Techniques

A key decision for the parties, and a dividing line between ADR techniques, is whether the ADR will produce a binding or nonbinding outcome. Although certain ADR techniques are associated with binding or nonbinding outcomes, the parties must spell out in their ADR agreement whether they are agreeing to a binding or nonbinding process.

The table below shows the most common ADR techniques in relation to their general use. The techniques are explained in this section and are defined in Appendix A. Appendix B contains template agreements for the most common techniques used by the Air Force.

ALTERNATIVE DISPUTE RESOLUTION				
<i>Negotiation</i>	<i>Nonbinding</i>		<i>Binding</i>	<i>Litigation</i>
<i>Unassisted negotiations with no third-party neutral</i>	Assisted Negotiations	Outcome Prediction	Binding summary trial	<i>GAO</i>
	Fact-finding	Evaluative mediation	Mediation followed by binding summary trial/decision	<i>ASBCA</i>
	Facilitative mediation	Settlement judge		<i>COFC</i>
	Mini-Trial			

Although the above table has lines between the different ADR techniques, these techniques are not mutually exclusive, but rather, may be used in combination in order to best meet the parties' business goals. For example, an ADR process using mediation could involve elements of both facilitation—helping the parties understand what each is saying—and evaluation—opining how issues would likely be decided if they were addressed at trial.

3.1 Nonbinding ADR Techniques

Nonbinding ADR techniques use a third-party neutral to facilitate communication between the parties. Frequently, parties that can no longer effectively communicate reach impasse on an issue in controversy, and need a neutral, third person to act as a conduit. In such instances, fact-finding, mediation, and mini-trials are viable means of resolving an issue in controversy. In nonbinding ADR, neither party is bound by the neutral's opinions. If the parties cannot reach agreement, they do not authorize the neutral to decide the outcome of the issue in controversy.

3.1.1 Fact-finding

Fact-finding involves a neutral, usually with subject matter expertise, who examines the disputed issues. The neutral helps the parties identify areas of agreement and disagreement, with a focus on defining and narrowing the issues in dispute. The neutral does not opine on the merits of the parties' positions.

3.1.2 Mediation

Mediation uses the assistance of a neutral to assist with negotiations between parties. This technique is used when the parties have room to settle, but have been unsuccessful with traditional negotiations. Mediation is one of the most widely used ADR techniques in the private sector and is favored for the following reasons:

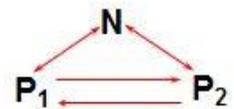
- The flexibility and informality of the process makes it useful in a wide variety of matters.
- The process can be tailored in a manner that meets the needs of the parties.
- The parties are voluntary participants who do not surrender control of the ultimate resolution of an issue in controversy.

In mediation, a third-party neutral can structure negotiations, focus discussions, and facilitate exchange between the parties. In some cases, the neutral may propose specific suggestions for settlement; in other cases the mediator helps the parties generate more creative settlement proposals.

- **Facilitative Mediation.** Parties may seek facilitative mediation, in which the neutral facilitates discussions between the parties and does not evaluate or opine on the merits of the parties' respective positions.
- **Evaluative Mediation.** In evaluative mediation, also called mediation with outcome prediction, the neutral provides the parties with his or her views as to the strengths and weaknesses of parties' respective positions, in conjunction with efforts to help the parties fashion a mutually acceptable resolution to the issue in controversy. Although the neutral offers an evaluation, the neutral's evaluation is not binding on the parties. Where the neutral is an ASBCA judge, the neutral may be called a settlement judge.

Mediation typically begins with all parties meeting in a joint session where the respective interests and positions are shared. The process often includes a private caucus session with the mediator to allow further discussion of the case. At times, particularly when emotions run high, the mediator may choose to keep the parties separated, caucus with them individually, and act as a conduit between the two, engaging in shuttle diplomacy. The mediator will work with the parties to identify common interests and to narrow the gap between the parties' positions.

Process Dynamics:
Third-party assisted negotiations



Unique Features:
Confidential caucuses
Neutral can be a *facilitator* or *evaluator*



Decision Makers:
The parties



The parties retain the power to resolve the issues and reach a mutually acceptable agreement. If settlement is possible, the mediator is not authorized to impose a settlement upon the parties. Rather, the mediator's role is to assist the parties in fashioning a mutually satisfactory solution to resolve the issue in controversy.

3.1.3 Mini-Trial

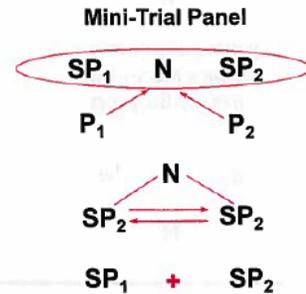
A mini-trial is not a short trial; it is more structured than facilitative mediation and is unique in its use of senior principals and a third-party neutral. A mini-trial typically involves each party presenting its point of view in an agreed manner to a panel composed of the neutral and a principal from each party who has the authority to settle the dispute.

The presentation may be a summary or abbreviated hearing with or without oral testimony as the parties agree. Limited discovery, as outlined in the ADR agreement, ordinarily precedes this presentation. At the conclusion of the presentation the decision-makers may adjourn to negotiate the matter. The neutral may be called upon to act as advisor, mediator or fact-finder in this subsequent session depending upon the terms of the ADR agreement and the desires of the parties. The neutral's recommendations are not binding on the parties.

Process Dynamics:
Hybrid settlement negotiation process combining senior-decisionmakers with mediation

Unique Feature:
Involvement of senior-decisionmakers

Decisionmakers:
The parties



3.2 Binding ADR Techniques

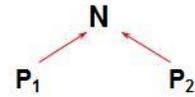
In binding ADR, the parties agree to let the neutral determine the outcome of the issue in controversy, and to be bound by that determination. However, even a binding ADR process usually incorporates elements of nonbinding processes. Depending on the parties' ADR agreement, a binding ADR process might start off with evaluative mediation. If the parties still cannot reach agreement, then the neutral would issue a binding decision.

Currently, the Air Force does not authorize its personnel to use binding ADR techniques unless an ASBCA judge serves as the third-party neutral. Although arbitration—a process by which a neutral third party is empowered by agreement of the parties to issue a binding decision—is commonly used in the private sector, it is not used in the Air Force. Instead, the only binding ADR techniques available to the Air Force are a binding summary trial or binding summary decision before the ASBCA, explained below.

3.2.1 Binding Summary Trial

A binding summary trial is an ADR technique that resembles a shortened trial. The parties agree to modify traditional hearing procedures and rules to expedite and simplify the process. They also agree to let the neutral, an ASBCA judge, issue a binding decision at, or close to, the conclusion of the hearing. The parties usually agree that the neutral's decision will not contain any findings of fact or conclusions of law, and that the neutral's decision cannot be appealed.

Process Dynamics:
Case presented to a third party in an expedited manner and the Third party makes a decision



Unique Feature:
Binding Decision

Binding Decision

Decision Maker:
ASBCA Judge

N

The expedited schedule of this ADR technique is one of its primary advantages. In a traditional ASBCA trial, a judgment is rendered only after the parties submit post trial briefs and two other judges review the trial record and briefs. This process can easily exceed a year, and then the judges' decision can still be appealed. The decision by the ASBCA judge in a binding summary trial cannot be appealed.

Binding summary trials are generally used to resolve claims, *i.e.*, COFDs that contractors appeal, rather than pre-appeal issues in controversy. However, where the parties agree and the ASBCA consents, this ADR process can be used to resolve pre-appeal issues in controversy as part of an existing summary trial on other claims.

3.2.2 Mediation followed by Binding Summary Trial

This binding ADR technique is a modification on a binding summary trial and starts with evaluative mediation. If the parties are unable to reach a settlement through mediation, the parties agree to move to a summary trial phase, presenting the dispute in front of the same ASBCA judge who handled the mediation. The judge then issues a binding, non-appealable decision based on the information presented during the mediation and the summary trial.

3.2.3 Mediation followed by Binding Summary Decision

This binding ADR technique also starts with evaluative mediation. If the parties are unable to reach a settlement through mediation, the parties agree that the neutral, an ASBCA judge, may issue a binding, non-appealable decision based on the information presented during the mediation alone.

4.0 The Conduct of ADR

Once the acquisition team and contractor agree to use ADR, the parties pursue the below steps. Under the CDA, if a contractor declines an Air Force request to use ADR, the contractor must provide the Contracting Officer a written explanation of the specific reason or reasons that ADR is inappropriate for resolving the issue in controversy. Conversely, if the Contracting Officer declines a contractor’s request to use ADR, 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 issue in controversy. FAR 33.214(b) implements these requirements.

4.1 Assemble an ADR Team

Members of an ADR team should have first-hand knowledge of the facts and issue or issues in controversy. At minimum, the team should be composed of the Contracting Officer, program manager, and procurement attorney. Teams should be augmented with DCMA and DCAA personnel, price analysts, and technical experts where necessary. However, a large number of people on an ADR team may hinder negotiations. The team should designate a person to act as the principal negotiating representative. The principal should have the authority to negotiate a settlement, as well as possess leadership and conflict management skills.

4.2 Identify Decision-Quality Information

An issue will not be appropriate for ADR unless decision-quality information is accessible. Decision-quality information is sufficient knowledge of the facts to determine the ADR team’s business interests, make a credible ADR presentation, and support a rational decision to conclude the matter. The ADR Team should identify what information is necessary and accessible in Government files and what information is necessary and should be requested via fact finding and information exchange.

4.3 Fit the Form to the Fuss: Select an ADR Technique

The dispute resolution continuum, reproduced below, ranges from unassisted negotiations to litigation. In between these two postures, lie ADR techniques. These techniques vary in resources required and control retained by the parties over the dispute resolution process and outcome. From left to right, the below chart depicts increasingly adversarial, costly, and time-consuming modes of issue resolution. Moving from left to right, the parties lose some, or all, control of the process and its outcome.

ALTERNATIVE DISPUTE RESOLUTION					
<i>Negotiation</i>		NONBINDING		BINDING	<i>Litigation</i>
<i>Unassisted negotiations</i>		Assisted Negotiations	Outcome Prediction	Binding summary trial	<i>GAO</i>
	<i>No third-party neutral</i>	Fact-finding	Evaluative mediation	Mediation followed by binding summary trial/decision	<i>ASBCA</i>
		Facilitative mediation	Settlement judge	Arbitration	<i>COFC</i>
		Mini-Trial			

ADR techniques are not mutually exclusive, but rather, may be used in combination in order to best meet the parties’ business goals. The below chart identifies ADR techniques that best meet common business goals.

Business Goals:	Assisted Negotiations	Outcome Predication	Mini-Trial	Binding Summary Trial	Litigation
Preserve or Enhance Contractor Relationship	✓	✓	✓	✓	
Maintain Control	✓	✓	✓		
Deal with Strong Emotions	✓	✓	✓		
Want a hearing on the merits without a binding decision		✓			
Maintain a Simple Process	✓	✓	✓		
Need a Decision Quickly				✓	
Establish Precedent					✓

4.4 Select a Third-Party Neutral

By definition, ADR requires the use of a neutral. A neutral is an impartial third party who serves as a mediator, fact finder, or otherwise assists the parties in resolving the issues in controversy. Typically, a neutral is selected after parties agree to use a particular ADR technique. Parties typically select a neutral by one of three processes: (1) exchange a list of neutrals and reach agreement on a particular neutral; (2) each party picks an individual, and the selected individuals reach an agreement on a particular neutral; or (3) agree to employ the services of an organization to provide a neutral. Where the ADR team seeks an ASBCA judge to serve as a neutral, the selection process should begin early in the conduct of ADR.

A neutral must have no 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 to use that neutral. The neutral should have ample knowledge and experience in the resolution of federal contract-related controversies, preferably experience with the kinds of issues, contract type and subject matter that your controversy involves. The parties must have confidence in the neutral and the neutral’s abilities and impartiality.

For these reasons, it is Air Force preference to use sitting ASBCA judges to serve as third-party neutrals for contract controversies. To date, the Air Force has used sitting ASBCA judges as neutrals for both appeals docketed before the ASBCA and contract controversies that have not yet been appealed. ASBCA judges serve as neutrals at no cost to the parties. When appearing before the board, the Air Force can pursue payment for a settlement through the Judgment Fund. (Fiscal issues in settlements are covered in Section 5.0 below.) If the ASBCA is unable to support a request to use one of its judges as a neutral, there are procedures in place that permit the Air Force to request the services of a judge from the Civilian Board of Contract Appeals. Such requests will only be made after the chairman of the ASBCA has had an opportunity to consider and decline a request to make one of his or her judges available to serve as a neutral.

Although not preferred by the Air Force, government and private third-party neutrals are available. The costs of hiring a private-sector neutral are generally shared by the parties. AFLOA/JAQ and SAF/GCR can assist in the selection of a third-party neutral.

4.5 Develop and Execute an ADR Agreement

The ADR agreement provides the framework and procedures for the parties to follow during and after the proceeding. The agreement may be as simple or detailed as the controversy and parties require. Template ADR agreements for the following processes are at Attachment C.

- Fact-finding
- Mediation (facilitative)
- Mediation (evaluative or with outcome prediction)
- Mini-Trial
- Binding summary trial
- Mediation followed by binding summary decision
- Mediation followed by binding summary trial

All of the templates provide examples of basic agreements that can be modified to accommodate additional or customized elements.

4.6 Fact-finding and Information Exchange

For the parties to achieve the comfort level needed to engage in ADR and reach a negotiated settlement, they must do an appropriate amount of fact-finding. Parties should identify issues in controversy and documents needed to discuss and value each issue, and establish a timeline for the exchange of information. The ADR neutral can aid the parties in structuring a schedule of document exchanges, informal meetings, witness interviews, or depositions of critical personnel. The parties may consider building joint binders with information relevant for each issue, and developing common statements of fact and legal theories to support the position of each side, the elements needed to establish theory, and the information needed to support each element.

4.7 Prepare for ADR

Preparation for ADR includes preparing and providing position papers to the neutral and opposing party. Position papers should summarize the facts surrounding each issue in dispute and the legal basis for the positions being taken on each issue. The parties should also exchange check lists of key nonmonetary settlement terms, such as mutual release provisions, and confidentiality concerns. Additionally, parties should prepare to present to the neutral their opening settlement positions as well as one or more fallback negotiating positions. Finally, attorneys should prepare their clients prior to the presentation phase of ADR.

4.8 Presentation Phase

The neutral will initiate the ADR proceeding with a discussion of the selected ADR process and the procedures that will be followed, the authority of the principals, confidentiality, disclosures of any known conflicts of interest, and the parties' willingness to participate voluntarily and in

good faith. Each party then makes a presentation of its position. The presentations may be done in whatever manner the parties deem desirable and appropriate, as determined by the ADR agreement, and will vary depending on the ADR process selected. When using a nonbinding ADR process, the principals should meet with the neutral jointly or separately at the beginning and end of each day of the joint-presentation phase to make adjustments to the ADR Process as necessary to keep it on track.

4.9 Negotiation Phase

Negotiations between parties can be conducted via shuttle diplomacy or face-to-face. When the parties caucus in separate locations, the neutral communicates information concerning positions and settlement possibilities between them. Face-to-face negotiations should involve the neutral, the parties' representative with authority to settle, and a limited number of additional representatives from each party.

4.10 Develop and Execute a Settlement Agreement

Settlement agreements and the rationale underlying the decision to settle should be memorialized in writing during the ADR proceeding. If it is impracticable to draft a final settlement agreement during the course of an ADR proceeding, the neutral should ensure that a date for completion and execution is specified in a written memorandum of understanding. The procurement attorneys typically draft the settlement agreement. Air Force attorneys can obtain sample agreements and guidance from AFLOA/JAQ and SAF/GCR.

5.0 Fiscal & Monetary Considerations

In advance of any ADR proceeding, agency representatives should identify the sources of funding that will be available should the parties be able to settle their issues in controversy through ADR. Whether the parties desire or require access to the Judgement Fund affects what type of third-party neutral the parties agree to use.

5.1 Who Pays for the Cost of an ADR Procedure?

Each party to an issue in controversy bears the cost of their own internal ADR preparation, *i.e.*, fact-finding, document control, and expert witnesses. The program office, on a systems contract, or the requiring activity, on an operational contract, would fund these preparation costs. The parties usually share the cost of the private sector neutral, if selected. The Air Force prefers using judges from the ASBCA to serve as neutrals in ADR proceedings, as there is no cost to either party when an ASBCA judge serves in this capacity. Some central funding to support ADR may be available on a case-by-case basis from SAF/GCR.

5.2 Funding a Settlement

Settlements are funded differently than judgments. Settlements are mutually agreed-upon resolutions that do not involve a court or board sustained appeal. Understanding the basic principles of fiscal law will help all parties understand courses of action that may be taken when engaging in settlement. The acquisition team should always consult Financial Management as well as a fiscal law attorney when discussing settlement funding issues.

5.2.1 Fiscal Law Basics

There are specific rules regarding which type of funds can be used for funding settlement agreements. A Contracting Officer entering into settlement negotiations should consult with Financial Management and a fiscal law attorney to determine the source of the settlement funds and estimate how long it will take to make the payment after the parties agree to settle. Funds fall into one of three categories: (1) current, (2) expired, or (3) canceled.

Current year funds are funds available for new obligations. This availability differs based upon how the funds are classified. For example, military construction (MILCON) funds are current for five years, procurement funds are current for three years, research and development (R&D) funds for two years and operations and maintenance (O&M) funds for one year. Current funds *expire* at the end of their period of availability, and stay in expired status for five years. Fund can be used for ADR settlements when they are current or expired.

Canceled funds are funds that are no longer available for any purpose. The Anti-Deficiency Act prohibits their use for ADR settlements. Funds become canceled after the five-year period in an expired account.

5.2.2 Source of Settlement Funds

Most Air Force cases that result in monetary relief to the contractor occur when settlement discussion among the parties results in an agreed-to compromise of an ASBCA appeal and underlying claim or claims. In this instance, the settlement is effected by a bilateral agreement between the parties and modification to the contract. The settlement amount is paid by the Contracting Officer from the appropriation available to fund the contract. In certain cases, this settlement payment may come from expired money on a relation back theory. Under this theory, the settlement can be paid from expired funds if the claim relates back to work that could have been funded with current funds.

5.2.3 Stipulated and Consent Judgements

In some settlements, the parties may agree to a stipulated judgment (the parties agree to the facts and the amount of the judgment) or a consent judgment (one party consents to the facts and amount of judgment to which the other party raises no objection). These judgments are then adopted by the ASBCA in an order of award that is satisfied from the Judgment Fund.

Use of stipulated or consent judgments to be paid from the Judgment Fund may be advantageous to the Government when: (1) the appropriation which funded the contract is exhausted or canceled; (2) the Contracting Officer must obtain funds from higher headquarters which may involve substantial delay and the unnecessary incurrence of interest charges on the CDA claim; or (3) reimbursement of the award from subsequent annual appropriations would have a cash flow advantage to the contracting agency.

There are disadvantages in the use of stipulated or consent judgments. Reimbursement of the Judgment Fund, which is necessary when stipulated or consent judgments are used, must be from current year funds, whereas payment of settlements by the Contracting Officer may occur on a relation back theory from expired funds. Any decision to use a stipulated or consent judgments should be coordinated with the Air Force financial community prior to execution.

In summary:

- If contract funds are still available, they are the preferred source to fund settlements.
- If contract funds are exhausted, the availability of funds in expired accounts should be determined.
- If expired accounts are not available (insufficient amount of the correct FY or type); current year funds must be used.
- If both current and expired year funds are not available, but settlement is determined to be most advantageous to the Government, consult with AFLOA/JAQ to prepare a motion to the ASBCA. This motion should seek to have the board adopt the settlement as its decision in the case, and have the settlement, now a “judgment,” paid by the Judgment Fund. As discussed below, the Judgment Fund will have to be repaid by the Air Force. In most instances the Air Force will look to the appropriate requiring activity to reimburse the fund.

5.2.4 The Judgement Fund

Congress created the Judgment Fund as a source of funds to pay judgments against the United States Government pursuant to 31 U.S.C. § 1304. The Contract Disputes Act, 41 U.S.C. § 7108, provides, “[a]ny monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in [the Judgment Fund statute]....” When the Air Force uses the Judgment Fund, it must identify what appropriation originally funded the work that led to the controversy and subsequent judgment, and then reimburse the Judgment Fund with funds available for the same originally funded purpose that were current at the time of the judgment.

The U.S. Treasury requires that when the ASBCA renders a monetary award to a contractor, a certificate of finality be executed by the parties (certifying neither party contemplates an appeal or further action on the appeal), and three Treasury Department forms be completed by the Contracting Officer: Judgment Fund Transmittal FMS Form 194; Judgment Fund Award Data Sheet FMS Form 196; and Judgment Fund Voucher for Payment FMS Form 197. These forms are available at www.fms.treas.gov/judgefund/forms.html.

The ASBCA will include copies of the FMS forms and certificates of finality for completion by the parties when it forwards a decision reflecting the monetary award to a contractor. The Air Force Trial Team docket clerk will forward these forms to the Contracting Officer upon receipt of the authenticated copy of the Board’s decision. The contracting office will then submit the completed forms, along with the Board’s decision, to the Treasury Department in accordance with the directions on the FMS forms.

The Treasury Department will send payment to the contracting office, which will be responsible for delivering the payment to the contractor or the contractor’s representative. The Treasury Department also requires that all check or wire transfers have the payee’s Taxpayer Identification or Social Security Number on the payment. If the payee is the contractor’s attorney, include the attorney’s tax identification number.

The Contract Disputes Act requires the contracting activity listed on the certificate of finality reimburses the Judgment Fund out of current appropriations or obtain additional appropriations from Congress for the judgment. Such reimbursement must be out of current year funds unless a specific appropriation is obtained. Reimbursements come from funds available for obligation *when the judgment is entered*. For example, if funds were current at the time of the judgment but expired by the time the Air Force seeks to reimburse the Judgment Fund, those funds can still be used. However, if at the time of the judgment, the funds that relate to the judgment are already expired, the Air Force cannot use them to reimburse the Judgment Fund.

The Air Force will normally seek funds from the local base or MAJCOM involved to reimburse the Judgment Fund after the Air Force has reimbursed the Treasury.

5.3 Other Issues Associated with the Cost of ADR

Air Force personnel should be familiar with a number of cost allowability issues that may arise under certain types of contracts and in certain types of ADR proceedings. None of these matters alone are likely to tip the scales on when to pursue ADR if it is appropriate. They are matters that should be considered when entering into ADR, writing the ADR agreement, and preparing settlement documents.

5.3.1 Interest

The CDA entitles contractors to receive interest on their claims. Accrual of CDA interest begins on the date the Contracting Officer receives a proper claim under the CDA, pursuant to 41 U.S.C. § 7109; FAR 33.208; FAR 33.208. Interest prior to the submission of a contractor's claim is generally unallowable under FAR 31.205-20. Generally, ADR settlements should address the issue of interest and the settlement agreement should reflect the specific terms to which the parties have agreed.

5.3.2 Payment of Attorney's Fees

Although parties to litigation are generally not entitled to attorney's fees and costs, government contractors may be entitled to attorney's fees and costs under certain circumstances. The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, provides that government contractors who meet specified eligibility requirements relating to business size may be permitted to recover attorney fees and associated litigation costs. EAJA can apply to ADR processes as well. As a result, the issue of attorney's fees and costs must be considered in any ADR and addressed within any ADR settlement agreement. The effects of the EAJA also play a role in the timing of ADR. EAJA fees are imposed upon the granting of a final judgment. An order of settlement is considered a final judgment for the purposes of the Act. As a result, ADR should be timed to avoid or minimize EAJA attorney fees when possible and any settlement should contain language waiving or satisfying any EAJA fee obligation. Resolution prior to a COFD is normally desirable if EAJA fees are a primary concern.

Appendix A—Definitions

Alternative Dispute Resolution (ADR)—Any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trials, and arbitration, or any combination thereof (5 U.S.C. § 571(3)). Specific ADR procedures are defined as follows:

1. **Facilitation:** An unstructured and flexible process in which a trained third-party neutral (not necessarily a mediator) assists the parties resolves issues in controversy by utilizing interest-based negotiation techniques.
2. **Fact-finding:** A relatively informal process in which a neutral third party examines the evidence to determine the facts giving rise to the dispute, in order to assist the parties negotiate a resolution.
3. **Early Neutral Evaluation:** A structured process in which the parties seek the assistance of a subject matter expert to review the dispute and to provide an assessment of the likely outcome of the dispute based on the facts as found or as agreed to by the parties.
4. **Mediation:** A structured process in which the parties seek the assistance of a qualified mediator to help them in resolving their issue in controversy. The primary attributes of mediation are a structured process, the use of interest-based negotiation techniques, and the use of separate and confidential caucuses between each party and the mediator.
5. **Arbitration:** Arbitration involves the parties' mutual selection of a neutral third party, *i.e.*, an arbitrator, to decide the issue in controversy after hearing witnesses, considering other items of evidence, and listening to the arguments of each side. The arbitrator's decision, called an award, can be binding or nonbinding, depending on the parties' agreement, but Air Force policy generally precludes binding arbitration outside of the collective bargaining context.

Issue in controversy—An issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement (A) between an agency and persons who would be substantially affected by the decision; or (B) between persons who would be substantially affected by the decision (5 U.S.C. § 571(8)).

Neutral—An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy (5 U.S.C. § 571(9)). This individual may be a Federal government employee or someone outside the Government. For purposes of determining whether communications are confidential, the term “neutral” also includes ADR intake or other administrative personnel designated and identified by the ADR manager as a neutral for the purpose of taking information from the party or parties to a dispute to assist them in deciding whether to use a dispute resolution proceeding to resolve the dispute.

Appendix B—Sample Memorandum of Understanding

Statement of Principles Regarding the Use of Alternative Dispute Resolution Processes Between The Department of the Air Force and

The Department of the Air Force (Air Force) and _____ share the objective of supplying America's war fighters with technologically advanced and reliable equipment in a timely manner to promote swift, safe and successful accomplishment of the national defense mission. Litigation unnecessarily consumes scarce and expensive resources and detracts from this mission. For most disputes, Alternative Dispute Resolution (ADR) is a less expensive and more effective method of resolution than the traditional legal remedies. ADR procedures involve collaborative techniques, which can forestall—and even avoid—expensive and disruptive legal proceedings.

In recognition of the foregoing, we affirm our commitment to use ADR processes in accordance with the following principles:

1. Conduct our business in a manner that will avoid or minimize disputes.
2. Utilize a cooperative philosophy throughout the acquisition life cycle. In furtherance of this principle, all Air Force/ _____ teams are encouraged to jointly review each contract's goals and objectives, identify potential obstacles to the contract's timely and effective completion, and periodically assess progress toward overcoming these obstacles.
3. Resolve all contract issues at the lowest possible level. This principle recognizes that the detailed knowledge of the issues is generally at the program level and vested in the Contracting Officer and designated program counsel. Resolution of contractual problems at that level fosters teamwork in pursuing mutually satisfactory solutions.
4. In the event an issue cannot be resolved through negotiation at the program and Contracting Officer level, the parties shall, in lieu of litigation, endeavor to use ADR to facilitate resolution. Air Force and _____ management will be kept advised of progress in resolving these issues, whether through negotiation or through ADR techniques.

5. Consistent with FAR 33.214, the Air Force and _____ will, before initiation of the use of ADR for a particular matter, agree in writing to specific ADR collaborative techniques, timelines and identification of neutrals appropriate to the issues in controversy.

6. If it is necessary for the parties to protect information during the ADR process, the parties will enter into a confidentiality agreement sufficient to maintain such information in confidence to the extent permitted by law, including the Trade Secrets Act, 18 U.S.C. § 1905, and the Procurement Integrity Act, 41 U.S.C. § 423. Should the matter not resolve in ADR, documents shall be marked “protected” by its responsible party, and if required for the adjudication, documents shall be submitted to the adjudicating forum in accordance with that forum’s protected material process.

7. It is not the intention of the parties for this agreement to alter, supplement or deviate from the terms and conditions of contract(s) between the parties and the legal rights and obligations of the parties set forth therein. Any changes to the contract(s) must be executed in writing by authorized contracting officials.

8. In the event either party believes a particular issue is not well-suited to ADR, or is dissatisfied with progress being made in a particular ADR proceeding, that party may, after good faith efforts to resolve the issue, elect to opt out of the ADR processes and proceed as otherwise provided under contract, regulation or statute. Nothing in this Statement of Principles shall prevent either party from preserving its legal rights and remedies during the ADR process.

CONTRACTOR

AIR FORCE

By: _____

By: _____

U.S. Air Force Contracting Officer*

Dated: _____

Dated: _____

* Program-level MOUs are signed by U.S. Air Force program directors or managers. See www.adr.af.mil for existing MOUs.

Appendix C—Template ADR Agreements

SAMPLE ADR AGREEMENT – FACT-FINDING

THIS AGREEMENT is entered into by _____(Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. _____; and involves claims by the Contractor for [**OR** Air Force for] ____ in the amount of \$ _____; and

OR for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (if applicable)] claim [**OR** certified (if applicable) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve the claim [**OR** REA] by nonbinding alternative dispute resolution (ADR), specifically an unassisted fact-finding proceeding.

[Consider whether to set forth a resolution plan if fact-finding does not result in settlement. For example:

WHEREAS, if the parties are unable to resolve the claim [**OR** REA] by unassisted fact-finding, the parties wish to attempt resolution via nonbinding alternative dispute resolution (ADR), specifically, mediation with the assistance of a Neutral [**OR** mediation with outcome prediction]

OR

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically summary trial with binding decision, [**OR** mediation followed by (if necessary) by binding decision] under the Contract Disputes Act].

Note that for pre-appeal situations, the parties must secure ASBCA jurisdiction before using any binding ADR procedure. If a binding procedure is contemplated in the resolution plan, make sure that the ADR agreement sets forth the dates by which the Contracting Officer final decision will be issued and the appeal will be filed with the ASBCA.]

Accordingly, the parties agree as follows:

1. Schedule. The fact-finding proceeding is scheduled for _____ days(s), namely _____, at _____.

2. Neutral. The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.

2.1. Role of Neutral. The Neutral's role will be to facilitate the parties' settlement efforts. The Neutral will preside during the ADR proceeding and will participate in the negotiations between the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral's recommendations are not binding upon the parties.

2.2. Recusal of Neutral. In the event this nonbinding ADR procedure fails to resolve the issue(s), at the request of either party or at the Neutral's election, the Neutral will recuse himself/herself from further participation in the ASBCA Appeal [**OR** a potential appeal of the issue(s) to the ASBCA].

OR

3. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

3. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place in advance of the fact-finding session. The parties are also free to make informal and formal discovery requests. The production of a document protected from disclosure will not waive any otherwise applicable privilege.

OR

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place in advance of the fact-finding session. [*Optional*: provide a provision for bates stamping opposing parties documents]. Inadvertently producing information that is protected from disclosure will not waive any otherwise

applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts, and will be limited to the following issues: _____. The number of depositions will be limited to ____ and the following people will be deposed: _____. Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*]

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Air Force. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

6. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

7. Fact-finding. The goal of the fact-finding proceeding is to resolve the matters in dispute between the parties through negotiation by the parties' principal representatives. At a minimum, the parties wish to identify areas of agreement and identify, define, and narrow the remaining issues in dispute. To this end, the fact-finding proceeding will be aimed at informing the principal representatives of the underlying bases of the parties' positions in a setting that encourages full and open disclosure. The parties will act in accordance with the following fact-finding procedures:

I. Submissions. The parties will exchange written position papers on _____. The parties also may exchange a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed ____ and ____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits. [*Consider whether to include a provision allowing either party to request certain witnesses in the other party's control be made available at the fact-finding.*]

OR

I. Submissions.

a. Position Papers: No later than ___ calendar days before the fact-finding, the parties will exchange one copy of the party's "position paper." The position paper shall be no more than ___ double-spaced pages, including footnotes, with margins no smaller than one inch and typeface not smaller than 12-point type. The position paper will explain the party's factual and legal position regarding the ___ issues. The parties will not submit replies to the other party's "position paper." [OR Replies to each party's position paper will be due ___ calendar days before the fact-finding, shall be no more than ___ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ___ calendar days before the fact-finding, the parties will exchange:

i. All exhibits the parties anticipate using at the fact-finding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [OR will not] be provided at the time as the document binder(s).

c. No later than ___ calendar days before the fact-finding, the parties will exchange:

i. A list of expected participants in the party's fact-finding presentation. The list will contain a brief description of specific subject matter the participant will be addressing along with the estimated length of time. [*Consider whether to include a provision allowing either party to request certain witnesses in the other party's control be made available at the fact-finding.*]

ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

II. Fact-finding proceedings. Each party will have a total of ___ hours to present its case and may use any of the following: witness narrative, statements and argument of counsel, documents, summaries, charts or other demonstrative evidence. Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours. [*Consider: After the Air Force's*

presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. The order of presentation will reverse where a government claim is at issue.] *[Note, when setting the schedule, if rebuttal is included, figure in a reasonable time period for rebuttal preparation.]* Once the parties have made their initial presentations, each party will have an opportunity to ask questions of the other side regarding their presentation. *[Consider tailoring this paragraph to allow an optional negotiation period conditioned upon principal's receipt of decision-quality information.]*

[Consider including a provision calling for the parties to reduce mutually agreed upon facts to written stipulations for use in later proceedings, if necessary, including other ADR techniques and trial proceedings.]

[Consider including separate additional sections here on further ADR proceedings if fact-finding does not result in settlement.]

8. Participants. The principal representatives for the purpose of this proceeding will be:

For the Contractor: _____

For the Air Force: _____

Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approval in advance of the proceeding. *[Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214).]*

9. Confidentiality. This entire process, including the parties' conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted by the parties' written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Air Force from disclosing information within the Government, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the propriety of the actions of a party or their attorney.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

[Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in connection with later litigation. (Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail.) If you decide not to use a confidentiality clause, consider using at a minimum, the following:

10. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.]

11. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: “Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor.” In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim has been filed, CDA interest is running during time period of ADR proceeding. If no claim has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Government are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. There is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]*

12. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

13. Termination and Settlement. Each party has the right to terminate the ADR at any time for any reason. *[Consider, if further nonbinding ADR proceedings are identified in this agreement: The Neutral may also terminate the ADR at any time if, after discussions with the parties, the Neutral believes that further negotiations are unlikely to be fruitful. The Neutral may also terminate the ADR for other good reasons that need not be disclosed.]*

[Consider, if a confidentiality provision is included in this agreement: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.] If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated. If the parties do not reach a settlement agreement on any issues, the parties will jointly move the ASBCA to lift the stay on Contractor's appeal.

14. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____

SAMPLE ADR AGREEMENT – MEDIATION

THIS AGREEMENT is entered into by _____ (Contractor) and the Air Force, referred to collectively herein as “the parties.”

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. ____; and involves claims by the Contractor for [**OR** Air Force for]___ in the amount of \$ _____; and

OR for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve the claim [**OR** REA] by nonbinding alternative dispute resolution (ADR), specifically an unassisted fact-finding proceeding.

Accordingly, the parties agree as follows:

1. **Schedule.** The ADR proceeding is scheduled for _____ days(s), namely _____, at the (ASBCA or other agreed location).

2. **Neutral.** The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.
 - 2.1. **Role of Neutral.** The Neutral’s role will be to facilitate the parties’ settlement efforts. The Neutral will preside during the ADR proceeding and will participate in the negotiations between the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral’s recommendations are not binding upon the parties.

 - 2.2. **Recusal of Neutral.** In the event this nonbinding ADR procedure fails to resolve the issue(s), at the request of either party or at the Neutral’s election, the Neutral will recuse himself/herself from further participation in the ASBCA Appeal [**OR** a potential appeal of the issue(s) to the ASBCA].

3. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

3. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Neutral for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. The parties are also free to make informal and formal discovery requests. The production of a document protected from disclosure will not waive any otherwise applicable privilege. If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary and as the Board may allow. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, privilege, confidentiality provision, or law. The Neutral will resolve any discovery disputes that arise during the ADR process.

OR

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts and will be limited to the following issues:_____.* The number of depositions will be limited to ____ and the following people will be deposed: _____]. [*Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] The Neutral will resolve any discovery disputes. If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary pursuant to the ASBCA Rules. [*If pre-appeal or pre-claim, this sentence is inapplicable.*]

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Government. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

6. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

7. Submissions. The parties will exchange and present to the Neutral written position papers, with exhibits and lists of witnesses, if any, together with a brief description of the subject matter of their testimony on _____. The parties also may exchange and submit to the Neutral a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed _____ and _____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

7. Submissions.

a. Position Papers: No later than ____ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of the party's "position paper." The position paper shall be no more than _____ double-spaced pages, including footnotes, with margins no smaller than one inch and typeface not smaller than 12-point type. The position paper will explain the party's factual and legal position regarding the _____ issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ____ calendar days before the ADR proceeding, shall be no more than _____ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ____ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

i. All exhibits which the party will be using at the ADR proceeding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to*

include instructions to assemble the documents either by issue or chronologically.]

- ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).
- c. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:
- i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.
 - ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[If applicable, consider adding provision addressing expert testimony and or reports.]

8. **Proceedings.** Each party will have a total of ___ hours to present its case and may use any of the following: statements and argument of counsel, documents, summaries, charts or other demonstrative evidence, narrative testimony, traditional direct examination, or declarations under penalty of perjury. *[Consider whether to provide for cross-examination/questioning of the other side's witnesses, and, whether cross-examination/questioning will be during the other side's presentation, during your case-in-chief, or during rebuttal. Also, consider whether the cross-examination time period counts toward the examiner's total allotted time.]* Witnesses will be [**OR** will not be] sworn. The rules of evidence are waived, but the Neutral may limit evidence where necessary for the reasonable conduct of the hearing.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. *[Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.]*

OR [include specific daily schedule]

The issues in dispute shall be presented in the following order:

- a. _____;

b. _____; and

c. _____.

[*Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks.*]

9. The record. The parties' submissions will be the record. Parties will not be permitted to introduce any exhibits, documents or other materials in the proceedings that were not included in its submissions and exchanged, except as ordered by the Neutral based upon good cause shown.

10. Record of the proceeding. No transcript or other recording of the proceedings will be prepared. [*Note: If the ADR process is in resolution of Contractor's ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue "substantial justification" if necessary in a subsequent EAJA dispute.*]

11. Participants. The principal representatives for the purpose of this proceeding will be:

For the Contractor: _____

For the Air Force: _____

Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approval in advance of the proceeding. [*Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214).*] Except for compelling circumstances determined on a case-by-case basis including where contractors are *pro se*, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

12. Confidentiality. This entire process, including the parties' conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted by the parties' written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Air Force from disclosing information within the Air Force, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the

propriety of the actions of a party or their attorney. The parties further agree that nothing in this subparagraph prohibits any party from using its own work product in any subsequent settlement meetings or ASBCA proceedings regarding the issues in controversy.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

The parties agree not to subpoena or call upon the Neutral in any legal or administrative proceeding to testify or produce documents that were prepared or exchanged in this proceeding. The parties recognize that ADRA § 574(e) gives the parties 15 calendar days from the date of notice that the Neutral has received a discovery request or other legal process regarding a dispute-resolution communication, in which to offer to defend the Neutral's refusal to disclose the information. ADRA further provides that failure to make this offer within the 15-day period waives any objection to the disclosure.

[Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in connection with later litigation. Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail. If you decide not to use a confidentiality clause, consider using at a minimum, one of the below clauses.]

12. Subsequent use of statements and documents. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, confidentiality provision, privilege or law.

OR

12. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.

13. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: "Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor." In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim*

has been filed, CDA interests is running during time period of ADR proceeding. If no claim has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Government are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. The problem is that there is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]

14. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

15. Termination and Settlement. Each party has the right to terminate the ADR at any time for any reason. The Neutral may also terminate the ADR at any time if, after discussions with the parties, the Neutral believes that further negotiations are unlikely to be fruitful. The Neutral may also terminate the ADR for other good reasons that need not be disclosed. [*Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.*]

If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated. If the parties do not reach a settlement agreement on any issues, the parties will jointly move the ASBCA to lift the stay on Contractor's appeal.

The Parties agree, on behalf of themselves and their counsel, that they will not call or subpoena the Neutral in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or his/her thoughts or impressions.

16. Other Agreements Regarding the Neutral. The Neutral shall have the same common law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, statement, or communication in or concerning the ADR proceeding. The parties understand that there is no attorney-client relationship between the Neutral and any party to this Agreement, and each party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Neutral.

The Parties agree, on behalf of themselves and their counsel, that they will not call or subpoena the Neutral in any legal action or administrative proceeding of any kind to

produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or his/her thoughts or impressions.

17. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____

SAMPLE ADR AGREEMENT – MEDIATION
WITH OUTCOME PREDICTION

THIS AGREEMENT is entered into by _____(Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. _____; and involves claims by the Contractor for [**OR** Air Force for]___ in the amount of \$ _____; and

OR for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve the claim [**OR** REA] by nonbinding alternative dispute resolution (ADR), specifically a mediation with the assistance of a Neutral.

Accordingly, the parties agree as follows:

1. **Schedule**. The ADR proceeding is scheduled for _____days(s), namely _____, at the (ASBCA or other agreed location).
2. **Neutral**. The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.
 - 2.1. **Role of Neutral**. The Neutral’s role will be to facilitate the parties’ settlement efforts. The Neutral will preside during the ADR proceeding and will participate in the negotiations between the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral’s recommendations are not binding upon the parties.
 - 2.2. **Recusal of Neutral**. In the event this nonbinding ADR procedure fails to resolve the issue(s), at the request of either party or at the Neutral’s election, the Neutral will recuse himself/herself from further participation in the ASBCA Appeal [**OR** a potential appeal of the issue(s) to the ASBCA].

3. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

3. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Neutral for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying relevant [**OR** requested (eliminates confusion as to what is "relevant")] documents at a mutually agreeable time and place. The parties are also free to make informal and formal discovery requests. The production of a document protected from disclosure will not waive any otherwise applicable privilege. If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary and as the Board may allow. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, privilege, confidentiality provision, or law. The Neutral will resolve any discovery disputes that arise during the ADR process.

OR

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts and will be limited to the following issues: _____.* The number of depositions will be limited to ____ and the following people will be deposed: _____]. [*Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary pursuant to the ASBCA Rules. [*If pre-appeal or pre-claim, this sentence is inapplicable.*] If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective

order, privilege, confidentiality provision, or law. The Neutral will resolve any discovery disputes that arise during the ADR process.

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Government. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

6. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

7. Submissions. The parties will exchange and present to the Neutral written position papers, with exhibits and lists of witnesses, if any, together with a brief description of the subject matter of their testimony on _____. The parties also may exchange and submit to the Neutral a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed _____ and _____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

7. Submissions.

a. Position Papers: No later than ____ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of the party's "position paper," which shall be no more than _____ double-spaced pages, including footnotes, with no less than one inch margins top, sides and bottom and type font no smaller than 12 point. The position paper will explain the party's factual and legal position regarding the _____ issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ____ calendar days before the ADR proceeding, shall be no more than _____ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ____ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

i. All exhibits which the party will be using at the ADR proceeding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item

contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.

ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[*If applicable, consider adding provision addressing expert testimony and or reports.*]

8. **Proceedings.** Each party will have a total of ___ hours to present its case and may use any of the following: statements and argument of counsel, documents, summaries, charts or other demonstrative evidence, narrative testimony, traditional direct examination, or declarations under penalty of perjury. [*Consider whether to provide for cross-examination of the other side's witnesses, and, whether cross-examination will be during the other side's presentation, during your case-in-chief, or during rebuttal. Also, consider whether the cross-examination time period counts toward the examiner's total allotted time.*] Witnesses will be [**OR** will not be] sworn. The rules of evidence are waived, but the Neutral may limit evidence where necessary for the reasonable conduct of the hearing.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. [*Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.*]

OR [include specific daily schedule]

The issues in dispute shall be presented in the following order:

a. _____;

b. _____; and

c. _____.

[*Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks.*]

When the parties' rebuttal presentations are concluded [**OR** When the parties' rebuttal presentations are concluded and after an appropriate time for deliberation], the Neutral will advise the parties in private [**OR** jointly, **OR** both in private and jointly] of the strengths and weaknesses of their respective cases and will provide his/her prediction on the outcome of the dispute. The parties will then have no more than ____ hours to negotiate a settlement. The Neutral will participate as mediator during the negotiations to the extent requested by either party.

9. The record. The parties' submissions will be the record. Parties will not be permitted to introduce any exhibits, documents or other materials in the proceedings that were not included in, and exchanged with, its submissions except as ordered by the Neutral based upon good cause shown.

10. Record of the proceeding. No transcript or other recording of the proceedings will be prepared. [*Note: If the ADR process is in resolution of Contractor's ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue "substantial justification" if necessary in a subsequent EAJA dispute.*]

11. Participants. The principal representatives for the purpose of this proceeding will be:

For the Contractor: _____

For the Air Force: _____

Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approval in advance of the proceeding. [*Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214).*] Except for compelling circumstances determined on a case-by-case basis including where contractors are *pro se*, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

12. Confidentiality. This entire process, including the parties' conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted

by the parties' written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Government from disclosing information within the Government, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the propriety of the actions of a party or their attorney. The parties further agree that nothing in this subparagraph prohibits any party from using its own work product in any subsequent settlement meetings or ASBCA proceedings regarding the issues in controversy.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

The parties agree not to subpoena or call upon the Neutral in any legal or administrative proceeding to testify or produce documents that were prepared or exchanged in this proceeding. The parties recognize that ADRA § 574(e) gives the parties 15 calendar days from the date of notice that the Neutral has received a discovery request or other legal process regarding a dispute-resolution communication, in which to offer to defend the Neutral's refusal to disclose the information. ADRA further provides that failure to make this offer within the 15-day period waives any objection to the disclosure.

[[Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in connection with later litigation. Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail. If you decide not to use a confidentiality clause, consider using at a minimum, one of the below clauses.]]

12. Subsequent use of statements and documents. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, confidentiality provision, privilege or law.

OR

12. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under

the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.

13. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: “Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor.” In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim has been filed, CDA interests is running during time period of ADR proceeding. If no claim has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Government are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. The problem is that there is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]*

14. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

15. Termination and Settlement. Each party has the right to terminate the ADR at any time for any reason. The Neutral may also terminate the ADR at any time if, after discussions with the parties, the Neutral believes that further negotiations are unlikely to be fruitful. The Neutral may also terminate the ADR for other good reasons that need not be disclosed. *[Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.]* If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated. If the parties do not reach a settlement agreement on any issues, the parties will jointly move the ASBCA to lift the stay on Contractor’s appeal.

16. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____

SAMPLE ADR AGREEMENT – MINI-TRIAL

THIS AGREEMENT is entered into by _____ (Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. ____; and involves claims by the Contractor for [**OR** Air Force for] ____ in the amount of \$ _____; and

***OR** for pre-claim or pre-appeal situations, use the following:*

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*)] request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and

WHEREAS, the Contractor and the Air Force wish to resolve their dispute through the use of the nonbinding, mini-trial method of alternative dispute resolution (ADR); and

Accordingly, the Contractor and the Air Force agree as follows:

1. Good Faith Efforts to Resolve the Dispute. The nonbinding mini-trial procedure seeks to inform the principal representatives and the Neutral of the underlying bases of the parties' positions and to resolve the parties' dispute through questioning and negotiation by the parties' principal representatives, guided as necessary by a Neutral. The presentations will be made primarily through the parties' counsel. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the goal of resolving the dispute.
2. Schedule. The mini-trial will be held on _____, at [a mutually agreed location or the offices of the Board]. The ADR proceeding will take _____ day(s).
3. The Principal Representatives. The principal representatives for the purpose of this proceeding will be:

For the Contractor: _____

For the Air Force: _____

Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approvals in advance of the proceeding. [*Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214).*] Except for compelling circumstances determined on a case-by-case basis including where contractors

are *pro se*, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

4. Neutral. The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.

4.1. Role of Neutral. The Neutral's role will be to facilitate the parties' settlement efforts. The Neutral will preside during the ADR proceeding and will participate in the negotiations between the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral's recommendations are not binding upon the parties.

4.2. Recusal of Neutral. In the event this nonbinding ADR procedure fails to resolve the issue(s), at the request of either party or at the Neutral's election, the Neutral will recuse himself/herself from further participation in the ASBCA Appeal [**OR** a potential appeal of the issue(s) to the ASBCA].

5. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

5. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Neutral for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

6. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. The production of a document protected from disclosure will not waive any otherwise applicable privilege. If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary and as the Board may allow. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, confidentiality provision, privilege or law. The Neutral will resolve any discovery disputes that arise during ADR process.

OR

6. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts and will be limited to the following issues:_____.* The number of depositions will be limited to ____ and the following people will be deposed: _____]. *Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] The Neutral will resolve any discovery disputes. If the matter does not settle, the parties will remain entitled to pursue additional discovery as they believe is necessary pursuant to the ASBCA Rules. [*If pre-appeal or pre-claim, this sentence is inapplicable.*]

7. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Government. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

8. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

9. Submissions. The parties will exchange and present to the Neutral written position papers, with exhibits and lists of witnesses, if any, together with a brief description of the subject matter of their testimony on _____. The parties also may exchange and submit to the Neutral a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed ____ and ____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

9. Submissions.

a. Position Papers: No later than ____ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of the party's "position paper," which shall be no more than ____ double-spaced pages, including footnotes, with no less than one inch margins top, sides and bottom and type font no

smaller than 12 point. The position paper will explain the party's factual and legal position regarding the ___ issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ___ calendar days before the ADR proceeding, shall be no more than ___ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

- i. All exhibits which the party will be using at the ADR proceeding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]
- ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

- i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.
- ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[If applicable, consider adding provision addressing expert testimony and or reports.]

10. **Proceedings.** Each party will have a total of ___ hours to present its case and may use any of the following: statements and argument of counsel, documents, summaries, charts or other demonstrative evidence, narrative testimony, traditional direct examination, or declarations under penalty of perjury. [*Consider whether to provide for cross-examination of the other side's witnesses, and, whether cross-examination will be during the other side's presentation, during your case-in-chief, or during rebuttal. Also, consider whether the cross-examination time period counts toward the examiner's total allotted time.*] Witnesses will be [**OR** will not be] sworn. The rules of evidence are waived, but the

Neutral may limit evidence where necessary for the reasonable conduct of the hearing. The principal representatives and the Neutral may ask any relevant question of the witnesses or parties that they deem appropriate.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. *[Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.]*

OR *[include specific daily schedule]*

The issues in dispute shall be presented in the following order:

- a. _____;
- b. _____; and
- c. _____.

If the parties are unable to resolve the dispute, the mini-trial shall be terminated.

[Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks. An example is below.]

The Mini-trial shall proceed in the following manner:

SUGGESTED OPTION 1

- a. Opening statements. The party with the burden of proof may make an opening statement [consider limiting to 10 or 30 minutes]. At the conclusion of this opening statement, the other party [will make its opening statement **OR** will defer its opening statement until the beginning of its presentation (consider limiting time)].
- b. The party with the burden of proof will make its presentation on Issue 1. [Consider limiting each party's time either by issue or in aggregate. Remember to include breaks where needed, for example, a brief rebuttal preparation period.] Presentation may be made by any combination of the following:

Witness testimony, attorney presentations, witness presentations, or panel presentations.

- c. At the conclusion of this presentation on Issue 1, the other party will have an opportunity to probe the positions of the witnesses and/or presenters with questions or cross examination. [*Clarify whether this questioning period will occur at the end of each subsection (for example, each witness) or at the conclusion of the party's presentation on Issue 1. Consider limiting the questioning/cross examination time and identifying who may ask questions or conduct cross-examination.*]
- d. At the conclusion of the other party's questioning or cross examination on all matters in Issue 1, the party with the burden of proof will make its presentation on Issue 2. The parties shall repeat the above procedures for each of the remaining successive issues.
- e. At the conclusion of the above process, the other party will begin its presentation on Issue 1 under the same guidelines and restrictions as the party who presented its position first until all remaining issues have been covered. The parties will follow the same procedures regarding questioning/cross examination period as previously followed.
- f. [*At the conclusion of the other party's presentation, consider whether to include a rebuttal period. The party with the burden of proof will go first beginning with Issue 1, presenting rebuttal for each consecutive issue in turn. The other party will then present its rebuttal position, beginning with Issue 1, and following through with rebuttal for each consecutive issue. The parties will follow the same procedures regarding questioning/cross examination period as previously followed. Consider limiting rebuttal to the specific subject matter of the issue presented, or only to the specific items raised (documents or testimony topics).*]
- g. Closing statements. When the parties have completed the above process for all issues, the party with the burden of proof may choose to make a closing statement [*consider limiting to 10 or 30 minutes*], followed by a closing statement (optional) by the other party [*consider limiting in time*].
- h. The parties shall then break for deliberation and consultation with the neutral regarding the strengths and weaknesses of each party's positions. [*Consider whether the participants in the consultation should be principal and attorney only, or whether important witnesses (such as a DCAA auditor or a key engineer) should also be present. Also, consider whether the neutral will be meeting with the parties together or separately.*] After a suitable break, the parties will attempt to negotiate the issues alone or with the assistance of the neutral, as the parties deem necessary.

- i. After ___ hours [*set a time that is appropriate based on the number and complexity of issues, number of important documents, and dollar amounts at issue*], either party or the mediator may declare an impasse and the mini-trial will be terminated.

SUGGESTED OPTION 2

Rather than allowing the party with the burden of proof to present its position on all issues consecutively, consider trying to resolve (using the same procedures set forth above) each issue before moving on to the next issue. In such a case, the party without the burden of proof gives its opening statement and complete presentation on Issue 1, with parallel options for a questioning period and/or rebuttal period by the other party, followed by a closing statements, then consultation with the neutral on the strengths and weaknesses of each party's position regarding Issue 1, and concluding with a negotiation (with the goal of resolution) on Issue 1. Once Issue 1 is finalized, this process shall be repeated for each successive issue. If this option is used, a period at the conclusion of the mini-trial should be included for deliberation, consultation with the neutral, and global settlement negotiations for all remaining unresolved issues.

11. The record. The parties' submissions and the materials presented at the proceedings will be the record. Parties will not be permitted to introduce any exhibits, documents or other materials, in the proceedings that were not included and exchanged in its submissions, except as ordered by the Neutral based upon good cause shown.

12. Record of the Proceeding. No transcript or recording shall be made of the ADR proceeding. [*Note: If the ADR process is in resolution of Contractor's ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue "substantial justification" if necessary in a subsequent EAJA dispute.*]

13. Confidentiality. This entire process, including the parties' conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted by the parties' written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Air Force from disclosing information within the Air Force, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the propriety of the actions of a party or their attorney. The parties further agree that nothing in

this subparagraph prohibits any party from using its own work product in any subsequent settlement meetings or ASBCA proceedings regarding the issues in controversy.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

The parties agree not to subpoena or call upon the Neutral in any legal or administrative proceeding to testify or produce documents that were prepared or exchanged in this proceeding. The parties recognize that ADRA § 574(e) gives the parties 15 calendar days from the date of notice that the Neutral has received a discovery request or other legal process regarding a dispute-resolution communication, in which to offer to defend the Neutral's refusal to disclose the information. ADRA further provides that failure to make this offer within the 15-day period waives any objection to the disclosure.

[Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in connection with later litigation. Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail. If you decide not to use a confidentiality clause, consider using at a minimum, one of the below clauses.]

13. Subsequent use of statements and documents. If this ADR is terminated and the matter proceeds to formal litigation, information exchanged in the ADR may be used in the formal litigation of this matter, except as prohibited by protective order, confidentiality provision, privilege or law.

OR

13. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.

14. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: "Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor." In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim has been filed, CDA interests is running during time period of ADR proceeding. If no claim*

has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Government are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. The problem is that there is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]

15. Termination and Settlement. Each party has the right to terminate the ADR at any time for any reason. The Neutral may also terminate the ADR at any time if, after discussions with the parties, the Neutral believes that further negotiations are unlikely to be fruitful, or for other good reasons that need not be disclosed. [*Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.*] If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated. If the parties do not reach a settlement agreement on any issues, the parties will jointly move the ASBCA to lift the stay on Contractor’s appeal. [*This provision applies only for pre-appeal situations*].

16. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Principal Representative

Principal Representative

Dated: _____

Dated: _____

By: _____

Contracting Officer (if not already
acting as principal representative)

Dated: _____

SAMPLE ADR AGREEMENT – BINDING SUMMARY TRIAL

THIS AGREEMENT is entered into by _____ (Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. _____; and

WHEREAS ASBCA No. _____ involves claim(s) by Contractor for [**OR** Air Force for]_____ in the amount of \$ _____; and

OR for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve their dispute by alternative dispute resolution, specifically summary trial with binding decision.

Accordingly, the parties agree as follows:

1. **Schedule**. The ADR proceeding is scheduled for _____ days(s), namely: _____, at the (ASBCA or other agreed location).

[Note that for pre-appeal situations, the parties must secure ASBCA jurisdiction before using any binding ADR procedure. DOJ approval may be required. In any ADR agreement with a binding component, the parties should identify the date by which a final decision will be issued and the date by which the Contractor will file its appeal with the ASBCA. For example: 1. Schedule. The Air Force Contracting Officer will issue a final decision on or before _____. The Contractor will appeal the final decision to the ASBCA within ____ business days after receipt. The ADR proceeding is scheduled for _____ days(s), namely _____, at (the ASBCA or other agreed location).]

2. **Judge**. The parties will request that the ASBCA Chairman designate a Judge for this ADR proceeding. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.

3. Issues. The parties agree to resolve all matters at issue in ASBCA No. ____ through this summary trial and binding decision. The parties agree that the following issues are in dispute:

- a.
- b.
- c.

OR

3. Issues. The parties agree to resolve all matters at issue in ASBCA No. ____ through this summary trial and binding decision. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Judge for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts, and will be limited to the following issues: _____.* The number of depositions will be limited to ____ and the following people will be deposed: _____]. [*Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] The Neutral will resolve any discovery disputes.

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Government. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

6. Motions. Except for discovery motions, motion practice is waived.

7. Submissions. The parties will exchange and present to the Judge written position papers, with exhibits and lists of witnesses, together with a brief description of the subject matter of their testimony, on _____. The parties also may exchange and submit to the Judge a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed _____ and _____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

7. Submissions.

a. Position Papers: No later than ____ calendar days before the ADR proceeding, each party will provide to the Judge, and to the other party, one copy of the party's "position paper," which shall be no more than _____ double-spaced pages, including footnotes, with no less than one inch margins top, sides and bottom and type font no smaller than 12 point. The position paper will explain the party's factual and legal position regarding the issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ____ calendar days before the ADR proceeding, shall be no more than _____ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than _____ calendar days before the ADR proceeding, each party will provide to the Judge, and to the other party, one copy of:

i. All exhibits which the party will be using at the ADR proceeding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than _____ calendar days before the ADR proceeding, each party will provide to the Judge, and to the other party, one copy of:

i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject

matter that each participant will be addressing along with the estimated length of time.

- ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[If applicable, consider adding provision addressing expert testimony and or reports.]

8. Proceedings. Each party will have a total of __ hours to present its case including opening statements, direct and cross-examination, rebuttal, and closing argument. *[Consider whether to specify that cross-examination time will count towards the examiner's total allotted time period.]* Witnesses will be sworn. The rules of evidence are waived, but the Judge may limit evidence where necessary for the reasonable conduct of the hearing. Post-trial briefs are waived.

Except for compelling circumstances determined on a case-by-case basis, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

Beginning at ____ a.m. on ____, the Contractor will make its presentation, which will not exceed __ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed __ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed __ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed __ hours. *[Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.]*

OR [include specific daily schedule]

The issues in dispute shall be presented in the following order:

- a. _____;
- b. _____; and
- c. _____.

Suggested example: The Binding Summary Trial shall proceed in the following manner:

- a. Opening statements. The party with the burden of proof may make an opening statement *[consider limiting to 10 or 30 minutes]*. At the conclusion of this opening statement, the other party *[will make its opening statement **OR** will defer its opening statement until the beginning of its case-in-chief (*consider limiting in time*)].*

- b. The party with the burden of proof will present its case-in-chief on Issue 1. [*Consider limiting each party's time. Remember to include breaks where needed, for example, a brief rebuttal preparation period.*] Presentation will be made through direct examination of witnesses and the documents exchanged in accordance with Paragraph 7 "Submissions" above.
 - c. At the conclusion of this presentation on Issue 1, the other party will have an opportunity to cross examine the witnesses who testified on direct examination. [*Clarify whether this questioning period will occur at the end of each subsection (for example, each witness) or at the conclusion of the party's presentation on Issue 1. Consider limiting the questioning/cross examination time.*]
 - d. At the conclusion of the other party's cross examination on all matters in Issue 1, the party with the burden of proof will make its presentation on Issue 2. The parties shall repeat the above procedures for each of the remaining successive issues.
 - e. At the conclusion of the above process, the other party will present its case-in-chief on Issue 1 under the same guidelines and restrictions as the party who presented its position first until all remaining issues have been covered. The parties will follow the same procedures regarding the questioning/cross examination period as previously followed.
 - f. [*At the conclusion of the other party's presentation, consider whether to include a rebuttal period. The party with the burden of proof will go first beginning with Issue 1, presenting rebuttal for each consecutive issue in turn. The other party will then present its rebuttal position, beginning with Issue 1, and following through with rebuttal for each consecutive issue. The parties will follow the same procedures regarding cross examination as previously followed. Consider limiting rebuttal to the specific subject matter of the issue presented, or only to the specific items raised (documents or testimony topics).*]
 - g. Closing statements. When the parties have completed the above process for all issues, the party with the burden of proof may choose to make a closing statement [*consider limiting to 10 or 30 minutes*], followed by a closing statement (optional) by the other party [*consider limiting to 10 or 30 minutes*].
9. The record. The documentary record will be limited to the Rule 4 file and the parties' submissions discussed above. A party may not introduce any exhibits or other materials that were not included in, and exchanged with, its submissions, except as ordered by the Judge on good cause shown.
10. Record of the proceeding. A transcript of the proceedings will [**OR** will not] be prepared. [*Note: If the ADR process is in resolution of Contractor's ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue "substantial justification" if necessary in a subsequent EAJA dispute.*]

11. Summary decision. The Judge shall issue a bench decision at the end of the hearing, or, at the option of the Judge, no later than _____ business days after receipt of the transcript. The decision will contain no findings of fact or conclusions of law. The Board's decision shall be final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value.

12. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[If Contractor will not agree to waive EAJA, consider including issue of EAJA in the proceeding.]*

13. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

14. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

15. Termination and Settlement. Each party has the right to terminate the ADR at any time prior to the start of the binding summary trial for any reason. *[Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.]* If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated.

OR

15. Settlement. If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____

SAMPLE ADR AGREEMENT –

MEDIATION FOLLOWED BY BINDING SUMMARY TRIAL

THIS AGREEMENT is entered into by _____ (Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. ____; and involves claims by the Contractor for [**OR** Air Force for] ___ in the amount of \$ _____; and

OR [for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve the appeal [**OR** claim, **OR** REA] by nonbinding alternative dispute resolution (ADR), specifically a mediation with the assistance of a Neutral; and

WHEREAS, if the parties are unable to resolve the appeal [**OR** claim, **OR** REA] by nonbinding mediation, the parties wish to resolve the appeal by binding ADR, specifically summary trial with binding decision.

Accordingly, the parties agree as follows:

1. **Schedule.** The mediation proceeding is scheduled for ____ days(s), namely _____, at the (ASBCA or other agreed location). If necessary, the binding summary trial proceeding is scheduled for _____ day(s), namely _____, at the (ASBCA or other agreed location).

OR

[Note that for pre-appeal situations, the parties must secure ASBCA jurisdiction before using any binding ADR procedure. DOJ approval may be required. The parties should identify the date by which a final decision will be issued and the date by which the Contractor will file its appeal with the ASBCA. Consider whether the final decision should be issued before the mediation or after the mediation but before the binding summary trial. For example: 1. Schedule. The Air Force Contracting Officer will issue a final decision on or before _____. The Contractor will appeal the final decision to the ASBCA within ____ business days after receipt. The mediation proceeding is scheduled for ____ days(s), namely _____, at the ASBCA or other agreed location). If necessary, the

binding summary trial proceeding is scheduled for _____ day(s), namely _____, at the (ASBCA or other agreed location).]

2. Neutral. The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this mediation proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral's role will be to facilitate the parties' settlement efforts. The Neutral may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The Neutral's recommendations will not be binding on the parties. If the parties are unable to settle the issues during the mediation, the parties will proceed to a binding summary trial as discussed below. If the parties are unable to settle during the mediation, the Neutral will also serve as the binding summary trial Judge. [**OR** the Neutral will be recused from further participation and the ASBCA Chairman will select an ASBCA Judge to serve as binding summary trial Judge.] The Neutral will serve at no expense to either party.

OR

2.1. Selection of Neutral. The parties agree that a Judge from the Armed Services Board of Contract Appeals (ASBCA) shall serve as the Neutral. Further, the parties agree that the ASBCA Chairman shall make the selection of the ASBCA Judge. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.

2.2. Role of Neutral. The role of the Neutral is both that of advisor and facilitator in settlement negotiations. The Neutral will preside during the mediation and will participate in the negotiations between the parties. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral's recommendations are not binding upon the parties.

2.3. Recusal of Neutral. In the event this nonbinding ADR procedure fails to resolve the issue(s), at the request of either party or at the Neutral's election, the Neutral will recuse himself/herself from participation in the binding summary trial discussed below. Should one or both party request that the Neutral be recused, the parties agree that a Judge from the Armed Services Board of Contract Appeals (ASBCA) shall serve as the summary trial judge. Further, the parties agree that the ASBCA Chairman shall make the selection of the ASBCA Judge. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge for the summary trial proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Judge will serve at no expense to either party.

3. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

3. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Neutral for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. The parties are also free to make informal and formal discovery requests. The production of a document protected from disclosure will not waive any otherwise applicable privilege. The Neutral will resolve any discovery disputes.

OR

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts and will be limited to the following issues: _____. The number of depositions will be limited to ____ and the following people will be deposed: _____.* Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of deposition)] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] The Neutral will resolve any discovery disputes.

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Air Force. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the*

auditor and whether there will be any restrictions on the use of the information and documents provided.]

6. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

7. Mediation. The parties will follow the following mediation procedures:

I. Mediation submissions. The parties will exchange and present to the Neutral written position papers, with exhibits and lists of witnesses, if any, together with a brief description of the subject matter of their testimony on _____. The parties also may exchange and submit to the Neutral a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed _____ and _____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

I. Mediation submissions.

a. Position Papers: No later than ____ calendar days before the mediation, each party will provide to the Neutral, and to the other party, one copy of the party's "position paper," which shall be no more than _____ double-spaced pages, including footnotes, with no less than one inch margins top, sides and bottom and type font no smaller than 12 point. The position paper will explain the party's factual and legal position regarding the _____ issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ____ calendar days before the mediation, shall be no more than _____ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than _____ calendar days before the mediation, each party will provide to the Neutral, and to the other party, one copy of:

i. All exhibits which the party will be using at the mediation. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation,

or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than ___ calendar days before the mediation, each party will provide to the Neutral, and to the other party, one copy of:

i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.

ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[Consider: Parties will not be permitted to introduce any exhibits, documents or other materials in the proceedings that were not included in, and exchanged with, its submissions, except as ordered by the Neutral based upon good cause shown.]

[If applicable, consider adding provision addressing expert testimony and or reports.]

II. Mediation proceedings. Each party will have a total of ___ hours to present its case and may use any of the following: statements and argument of counsel, documents, summaries, charts or other demonstrative evidence, narrative testimony, traditional direct examination, or declarations under penalty of perjury. *[Consider whether to provide for cross-examination of the other side's witnesses, and, whether cross-examination will be during the other side's presentation, during your case-in-chief, or during rebuttal. Also, consider whether the cross-examination time period counts toward the examiner's total allotted time.]* The rules of evidence are waived, but the Neutral may limit evidence where necessary for the reasonable conduct of the hearing.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. *[Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.]*

OR *[include a specific daily schedule]*

The issues in dispute shall be presented in the following order:

- a. _____;
- b. _____; and
- c. _____.

[Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks.]

*[Consider stating the plan for debrief from the Neutral, negotiations, and the conclusion of mediation. For example: When the parties' rebuttal presentations are concluded **[OR** When the parties' rebuttal presentations are concluded and after an appropriate time for deliberation], the Neutral will advise the parties in private **[OR** jointly, **OR** both in private and jointly] of the strengths and weaknesses of their respective cases and will provide his/her prediction on the outcome of the dispute. The parties will then have no more than ___ hours to negotiate a settlement. The Neutral will participate as mediator during the negotiations to the extent requested by either party.]*

8. Binding summary trial. If the parties have not reached complete settlement of the issues by ___, they will resolve all remaining issues by binding summary trial under the following procedures:

I. Additional discovery. *[Consider setting forth additional opportunity for written discovery and depositions or interviews, with related deadlines and limitations.]*

II. Binding summary trial submissions. The parties will exchange and present to the Judge written position papers, with exhibits and lists of witnesses, together with a brief description of the subject matter of their testimony, on ___. The parties also may exchange and submit to the Judge a rebuttal statement, with exhibits on ___. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed ___ and ___ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

II. Binding summary trial submissions.

- a. Position Papers: No later than ___ calendar days before the binding summary trial, each party will provide to the Judge, and to the other party, one copy of the party's "position paper," which shall be no more than ___ double-spaced pages, including footnotes, with no less than one inch

margins top, sides and bottom and type font no smaller than 12 point. The position paper will explain the party's factual and legal position regarding the issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ___ calendar days before the binding summary trial, shall be no more than ___ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ___ calendar days before the binding summary trial, each party will provide to the Judge, and to the other party, one copy of:

i. All exhibits which the party will be using at the binding summary trial. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder.

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than ___ calendar days before the binding summary trial, each party will provide to the Judge, and to the other party, one copy of:

i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.

ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[If applicable, consider adding provision addressing expert testimony and or reports.]

III. Binding summary trial proceedings. Each party will have a total of ___ hours to present its case including opening statements, direct and cross-examination, rebuttal, and closing argument. [*Consider whether the cross-examination time period counts toward the examiner's total allotted time.*] Witnesses will be sworn. The rules of evidence are waived, but the Judge may limit evidence where necessary for the reasonable conduct of the hearing. Post-trial briefs are waived.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor’s presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force’s presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor’s rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. *[Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.]*

OR [include a specific daily schedule]

The issues in dispute shall be presented in the following order:

- a. _____;
- b. _____; and
- c. _____.

[Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks.]

IV. **Binding summary trial record.** The documentary record will be limited to the parties’ submissions discussed above. A party may not introduce any exhibits or other materials that were not included in, and exchanged with, its submissions, except as ordered by the Judge on good cause shown.

V. **Transcript.** A transcript of the binding summary trial proceedings will be prepared. **OR** No transcript or other recording of the binding summary trial proceedings will be prepared.] *[Note: If the ADR process is in resolution of Contractor’s ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue “substantial justification” if necessary in a subsequent EAJA dispute.]*

VI. **Summary decision.** The Judge shall issue a bench decision at the end of the summary trial, or, at the option of the Judge, issue a written summary decision no later than _____ business days after the conclusion of the binding summary trial **OR** after receipt of the transcript]. The decision will address entitlement and quantum **OR** entitlement only], and will **OR** will not] contain summary findings of fact and conclusions of law on each of the unresolved issues. **OR** At the neutral’s discretion, the written summary decision can be limited to a sentence denying or affirming each of the claimed items, with a quantum amount specified

for any claims affirmed.] The Judge's decision shall be final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value.

9. Participants. Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approval in advance of the proceeding. [*Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214)*] Except for compelling circumstances determined on a case-by-case basis including where contractors are *pro se*, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

10. Confidentiality. This entire process, including the parties' conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted by the parties' written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Government from disclosing information within the Government, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the propriety of the actions of a party or their attorney.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

The parties agree not to subpoena or call upon the Neutral in any legal or administrative proceeding to testify or produce documents that were prepared or exchanged in this proceeding. The parties recognize that ADRA § 574(e) gives the parties 15 calendar days from the date of notice that the Neutral has received a discovery request or other legal process regarding a dispute-resolution communication, in which to offer to defend the Neutral's refusal to disclose the information. ADRA further provides that failure to make this offer within the 15-day period waives any objection to the disclosure.

[Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in connection with later litigation. (Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail.) If

you decide not to use a confidentiality clause, consider using at a minimum, one of the below clauses]

10. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.

11. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: “Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor.” In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim has been filed, CDA interests is running during time period of ADR proceeding. If no claim has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Government are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. The problem is that there is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]*

12. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

13. Termination and Settlement. Each party has the right to terminate the ADR at any time prior to the start of mediation for any reason. The Neutral may also terminate the ADR at any time prior to the completion of the mediation for good reasons that need not be disclosed. *[Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.]* If the ADR is terminated before or during the mediation, the parties will jointly move the ASBCA to lift the stay on Contractor’s appeal. If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated.

14. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____

SAMPLE ADR AGREEMENT –

MEDIATION FOLLOWED BY BINDING DECISION

THIS AGREEMENT is entered into by _____(Contractor) and the Air Force.

WHEREAS, the parties entered into Contract No. _____; and

WHEREAS, the Contractor filed an appeal with the Armed Services Board of Contract Appeals (ASBCA) under or relating to that contract; and

WHEREAS, the appeal is designated ASBCA No. ____; and involves claims by the Contractor for [**OR** Air Force for] ___ in the amount of \$ _____; and

OR [for pre-claim or pre-appeal situation, use the following:

WHEREAS, the Contractor has submitted a [certified (*if applicable*)] claim [**OR** certified (*if applicable*) request for equitable adjustment (REA)], dated ____, in the amount of \$ _____; and]

WHEREAS, the parties wish to resolve the appeal [**OR** claim, **OR** REA] by nonbinding alternative dispute resolution (ADR), specifically a mediation with the assistance of a Neutral; and

WHEREAS, if the parties are unable to resolve the appeal [**OR** claim, **OR** REA] by nonbinding ADR, the parties wish to submit the unresolved issues to the Neutral for a binding decision.

Accordingly, the parties agree as follows:

1. Schedule. The ADR proceeding is scheduled for _____days(s), namely _____, at the (ASBCA or other agreed location).

[Note that for pre-appeal situations, the parties must secure ASBCA jurisdiction before using any binding ADR procedure. DOJ approval may be required. In any ADR agreement with a binding component, the parties should identify the date by which a final decision will be issued and the date by which the Contractor will file its appeal with the ASBCA. Consider whether the final decision should be issued before the mediation or after the mediation but before the binding summary trial. For example: 1. Schedule. The Air Force Contracting Officer will issue a final decision on or before _____. The Contractor will appeal the final decision to the ASBCA within ___ business days after receipt. The mediation proceeding is scheduled for _____ days(s), namely, _____ at (the ASBCA or other agreed location).]

2. Neutral. The parties will request that the ASBCA Chairman designate a Judge as the Neutral. [**OR** The parties can make a joint, by-name request for a particular ASBCA

Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral's initial role will be to facilitate the parties' settlement efforts. The Neutral may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The Neutral's recommendations will not be binding on the parties. If the parties are unable to settle the issues during the mediation, the Neutral will make a binding summary decision as discussed below.

OR

2.1. Selection of Neutral. The parties agree that a Judge from the Armed Services Board of Contract Appeals (ASBCA) shall serve as the Neutral. Further, the parties agree that the ASBCA Chairman shall make the selection of the ASBCA Judge. [**OR** The parties can make a joint, by-name request for a particular ASBCA Judge as the Neutral for this ADR proceeding. If the parties fail to agree upon a specific ASBCA Judge, the ASBCA Chairman will be asked to designate a Judge.] The Neutral will serve at no expense to either party.

2.2. Role of Neutral During Mediation. The role of the Neutral is both that of advisor and facilitator in settlement negotiations. The Neutral will preside during the ADR proceeding and will participate in the negotiations between the parties. The Neutral may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The Neutral may meet with the parties and/or their counsel, jointly or individually, to the extent the Neutral deems desirable to foster a negotiated settlement of the dispute. The Neutral's recommendations are not binding upon the parties during the mediation.

2.3. Role of Neutral If Mediation Fails. If the parties have not reached a complete settlement of the issues at the conclusion of the mediation, the Neutral will make a binding summary decision on the issues.

3. Issue Identification. The parties agree that the following issues are in dispute:

- 1.
- 2.
- 3.

OR

3. Issue Identification. The parties will exchange a list of proposed issues on _____. After any necessary discussions, the parties shall prepare a list of agreed issues on or before _____. If the parties cannot agree upon the wording of the issues, then both parties' issues will be presented to the Neutral for resolution during the ADR process. The submissions discussed below will set forth the parties' respective positions on each issue.

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. The parties are also free to make informal and formal discovery requests. The production of a document protected from disclosure will not waive any otherwise applicable privilege. The Neutral will resolve any discovery disputes that arise during the ADR process.

OR

4. Discovery. The parties will exchange for inspection and copying requested documents at a mutually agreeable time and place. [*Optional: provide a provision for bates stamping opposing parties documents*]. Inadvertently producing information that is protected from disclosure will not waive any otherwise applicable privilege. Informal witness interviews [**OR** depositions] will be conducted for the following individuals _____ at a mutually agreed time and place. [*Consider including limitations: Discovery will be limited in the following manner: The number of interrogatories will not exceed ____, including subparts and will be limited to the following issues:_____.* The number of depositions will be limited to ____ and the following people will be deposed: _____]. *Consider whether beneficial to further limit depositions as to issue subject matter, and time limit on length of depositions.*] Discovery will be concluded on _____, and will not be extended. [*For expedited discovery, list specific deadlines for sending and answering interrogatories, noticing and conducting depositions, and exchanging or producing, and copying documents.*] The Neutral will resolve any discovery disputes that arise during the ADR process.

5. Audit. The Contractor will timely cooperate with DCAA to audit the Contractor's incurred cost of performance and the additional costs that the Contractor seeks from the Government. The Contractor will provide all documents and other information necessary for the audit. The Contractor will also authorize all individuals and activities to provide DCAA with documents, other information, and an explanation of the Contractor's work papers and documents. The Government and the DCAA will follow their normal audit practices. [*Consider addressing what types of information and documents are to be provided to the auditor and whether there will be any restrictions on the use of the information and documents provided.*]

6. Stay of litigation. Except as provided in this agreement, formal litigation is stayed pending termination of the ADR.

7. Submissions. The parties will exchange and present to the Neutral written position papers, with exhibits and lists of witnesses, if any, together with a brief description of the subject matter of their testimony on _____. The parties also may exchange and submit to the Neutral a rebuttal statement, with exhibits on _____. The submissions will use margins no smaller than one inch and typeface not smaller than 12-point type. The position papers and rebuttal will not exceed ____ and ____ pages respectively, including footnotes and excluding cover pages, tables of contents and authorities, indices, and exhibits.

OR

7. Submissions.

a. Position Papers: No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of the party's "position paper," which shall be no more than ___ double-spaced pages, including footnotes, with no less than one inch margins top, sides and bottom and type font no smaller than 12 point. The position paper will explain the party's factual and legal position regarding the ___ issues. The parties will not be permitted to submit replies to the other party's "position paper." [**OR** Replies to each party's position paper will be due ___ calendar days before the ADR proceeding, shall be no more than ___ pages, in the same format and under the same restrictions as the "position paper."]

b. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

i. All exhibits which the party will be using at the ADR proceeding. Exhibits will be provided in a three-ring binder(s). For ease of reference, each document in a binder will be separately tabbed and indexed. The tab index will contain the tab number, the date of the document, and a brief description of the document. A complete tab index will be the first item contained within each binder. [*Consider whether it would be of benefit to include instructions to assemble the documents either by issue or chronologically.*]

ii. In the event that a party's presentation contains any form of demonstrative electronic media, such as a power point presentation, or other form of electronic media, it will [**OR** will not] be provided with and at the time of the exchange of document binder(s).

c. No later than ___ calendar days before the ADR proceeding, each party will provide to the Neutral, and to the other party, one copy of:

i. The party's list of expected participants/witnesses in the party's ADR presentation. The list will contain a brief description of the specific subject matter that each participant will be addressing along with the estimated length of time.

ii. Any documents in rebuttal to the other party's position paper, to be provided in the form specified above.

[*If applicable, consider adding provision addressing expert testimony and or reports.*]

8. Mediation Proceedings. Each party will have a total of ___ hours to present its case and may use any of the following: statements and argument of counsel, documents, summaries, charts or other demonstrative evidence, narrative testimony, traditional direct examination, or declarations under penalty of perjury. [*Consider whether to provide for cross-*

examination of the other side's witnesses, and, whether cross-examination will be during the other side's presentation, during your case-in-chief, or during rebuttal. Also, consider whether the cross-examination time period counts toward the examiner's total allotted time.] Witnesses will be [**OR** will not be] sworn. The rules of evidence are waived, but the Neutral may limit evidence where necessary for the reasonable conduct of the hearing.

Beginning at ___ a.m. on ___, the Contractor will make its presentation, which will not exceed ___ hours. After the Contractor's presentation, the Air Force will make its presentation, which will not exceed ___ hours.

After the Air Force's presentation, the Contractor will make its rebuttal presentation, which will not exceed ___ hours. And after the Contractor's rebuttal, the Air Force will make its rebuttal presentation, which will not exceed ___ hours. [*Note: When setting the schedule, figure in a reasonable time period for rebuttal preparation. The order of presentation will reverse where a government claim is at issue.*]

OR [include a specific daily schedule]

[Note: The ADR process is a flexible process, however, the parties should spell out how they wish to make their informal presentations and agree on the time to be allotted to various phases of the process. Consider incorporating into the agreement a specific daily schedule, including time for breaks.]

The issues in dispute shall be presented in the following order:

- a. _____;
- b. _____; and
- c. _____.

9. **Binding Decision**. If the parties have not reached complete settlement of the issues by ___, they will refer all unresolved issues to the Neutral for his or her decision in writing [**OR bench decision**]. The summary decision will address entitlement and quantum [**OR entitlement only**], and will [**OR will not**] contain summary findings of fact and conclusions of law on each of the unresolved issues. [**OR** At the neutral's discretion, the written summary decision can be limited to a sentence denying or affirming each of the claimed items, with a quantum amount specified for any claims affirmed.] The written decision shall be issued on _____. The Neutral's decision shall be final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value.

10. **The record**. The parties' submissions will be the record. Parties will not be permitted to introduce any exhibits, documents or other materials in the proceedings that were not included and exchanged in its submissions, except as ordered by the Neutral based upon good cause shown.

11. Record of the proceeding. A transcript of the proceedings will be prepared. [**OR** No transcript or other recording of the proceedings will be prepared.] [*Note: If the ADR process is in resolution of Contractor’s ASBCA appeal, and the Contractor does not agree to waive EAJA or agree to resolve EAJA within the ADR process, then consider having transcript of proceedings prepared in order to have a basis upon which to argue “substantial justification” if necessary in a subsequent EAJA dispute.*]

12. Participants. Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approval in advance of the proceeding. [*Remember, only the Contracting Officer has the authority to sign settlement modification (see FAR 33.210, and FAR 33.214).*] Except for compelling circumstances determined on a case-by-case basis including where contractors are *pro se*, the principals will be represented by counsel in all sessions attended by the presiding judge or neutral.

13. Confidentiality. This entire process, including the parties’ conduct and statements, shall be considered settlement discussions for the purpose of Fed. R. Evid. 408. The information used in this proceeding may also be protected from disclosure by the Administrative Dispute Resolution Act of 1996. Except as authorized by law or permitted by the parties’ written agreement, the information prepared for this proceeding shall not be used for any other purpose and shall not be disclosed to any non-participant.

This agreement does not preclude disclosure of this agreement or any settlement agreement. Nothing in this agreement prevents a Contractor from disclosing information within its organization, or prevents the Government from disclosing information within the Government, when the disclosure is necessary for a review, approval, or justification of the settlement. The parties and their attorneys may also use confidential information if it is necessary for proceedings under the Equal Access to Justice Act or to respond to challenges to the propriety of the actions of a party or their attorney.

Disclosure of privileged information shall not waive any otherwise applicable privilege. Information that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable merely because of its use in this proceeding.

The parties agree not to subpoena or call upon the Neutral in any legal or administrative proceeding to testify or produce documents that were prepared or exchanged in this proceeding. The parties recognize that ADRA § 574(e) gives the parties 15 calendar days from the date of notice that the Neutral has received a discovery request or other legal process regarding a dispute-resolution communication, in which to offer to defend the Neutral’s refusal to disclose the information. ADRA further provides that failure to make this offer within the 15-day period waives any objection to the disclosure.

[*Note: Confidentiality is also addressed in the ADRA of 1996 (5 U.S.C. §574) and FAR 33.214(e). Thus, the Confidentiality clause is not mandatory. However, it should be considered, and if appropriate, a tailored provision can be included. The ADR agreement should define the extent, if any, to which information exchanged is to be treated as confidential settlement communications and the extent to which it can be used in*

connection with later litigation. (Remember that documents normally included in the Rule 4 file will need to be used in litigation in the event ADR and/or settlement efforts fail.) If you decide not to use a confidentiality clause, consider using at a minimum, one of the below clauses.]

13. Subsequent use of statements and documents. Future admissibility of any statements or admissions made or documents used in connection with this ADR proceeding will be governed by Federal Rule of Evidence 408. However, evidence otherwise admissible under the Federal Rules of Evidence and/or ASBCA Rule 4, is not rendered inadmissible because of its use in this ADR proceeding.

14. Costs, fees, and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding. The Contractor waives any right under the Equal Access to Justice Act or other authority to recover attorney fees or other costs associated with this ADR proceeding. *[In ADR procedures involving REAs, consider including limiting language such as: “Costs in preparation for or otherwise associated with this ADR procedure will be borne by Contractor.” In addition, if the Contractor will not agree to waive EAJA, consider including issue of EAJA in the ADR proceeding.] [Note, if a claim has been filed, CDA interests is running during time period of ADR proceeding. If no claim has been filed and ADR process addresses issues in REA, be aware that the Contractor may subsequently try to argue and recoup those costs associated with ADR procedure as REA preparation costs, even when the parties agree to bear their own expenses. The cost of preparation and presentation of claims against the Air Force are not allowable, thus not reimbursable as part of an equitable adjustment. FAR 31.205-47(f)(1); FAR 31.205-47(a). However, costs associated with contract administration, such as preparation for a request for equitable adjustment, might be reimbursable. The problem is that there is rarely a bright line between claims preparation and contract administration costs in practice. Every case is unique and requires research into legal precedent, which in this area can be very technical and complex in application since all holdings are fact sensitive. Therefore, have available sufficient legal justification prior to agreeing to a settlement involving such costs. This is particularly important in ADR procedures involving early intervention REA scenarios. Generally, the Board will look at the nature of the costs, how they were incurred and when they were incurred.]*

15. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

16. Termination and Settlement. Each party has the right to terminate the ADR at any time prior to the start of mediation for any reason. The Neutral may also terminate the ADR at any time prior to the completion of the mediation for good reasons that need not be disclosed. *[Consider: If the ADR is terminated, the confidentiality provisions of this agreement remain in effect.]* If the ADR is terminated before or during the mediation, the parties will jointly move the ASBCA to lift the stay on Contractor’s appeal. If the parties reach a complete settlement, the parties will jointly move the ASBCA to dismiss the appeal with prejudice, subject to reinstatement only if the settlement is not consummated.

17. Amendments to this Agreement. The parties may change any provisions of this agreement by mutual written agreement at any time.

CONTRACTOR

AIR FORCE

By: _____

By: _____

Contracting Officer

Dated: _____

Dated: _____