The Role of Alternative Dispute Resolution in Government Construction Contract Disputes

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NOTE

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN GOVERNMENT CONSTRUCTION CONTRACT DISPUTES

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I. INTRODUCTION

A serious problem in the construction industry is that of unforeseen or unexpected subsurface conditions. In construction contracts, contractors rely heavily on preconstruction documents such as engineering plans and specifications to predict site conditions and formu-
late a scheme for performance of the contract. After construction has begun, it is often discovered that, as a result of inaccurate data, "insufficient data, human error . . . or unforeseen conditions," actual site conditions do not correspond to the plans and specifications on which the contractor has relied. Construction litigation is typically the end product of this discrepancy between actual conditions and preconstruction predictions.

There has been an increasing awareness of the excessive time and complexity involved in the litigation of contracts in which the government is a party. The delays associated with the resolution of government contract disputes can rise to intolerable levels when a construction contract is involved since most construction projects are based on rigid time schedules and take several years to complete even in the absence of disputes. When disputes do arise, they can add several years and millions of dollars to the total cost of a government construction project.

Part II of this Note will address the allocation of additional costs and responsibilities when different site conditions are encountered in the particular instances when a governmental entity is a party to the construction contract. The traditional methods of resolving government contract disputes through contracting officers, agency boards of contract appeals, and litigation will be discussed in part III. Part IV will explore alternatives to traditional litigation, as well as the advantages and disadvantages of these alternative dispute resolution ("ADR") techniques. In part V, two of the more common ADR mechanisms, mediation and arbitration, will be discussed and compared in terms of their effectiveness in resolving disputes over government construction contracts. Part VI will set forth the extent to which governmental agencies have used ADR to date. I believe that mediation emerges as the more suitable alternative for the resolution of construction contract disputes. The reasons for my conclusion will be discussed in part VII.

2. Id.
II. CONFLICTS ARISING AS A RESULT OF DIFFERING SITE CONDITIONS

Various federal and state statutes provide that public construction contracts in which the government is the owner must be awarded to the lowest bidder that is capable of performing the contract according to its terms.\footnote{4} Due to the nature of the bidding process, which requires contractors to adhere to strict time constraints in the submission of bids, contractors often rely on subsurface data and boring information supplied by the owner or engineer. Such reliance by the contractor frequently occurs, even when the contract specifically instructs each contractor bidding on the project to conduct his own site investigation and not to rely on subsurface information provided by the owner since such information may not indicate all conditions that could potentially be encountered at the site.\footnote{5}

The presence or absence of specific contract clauses controls the allocation of costs and responsibilities associated with unforeseen or differing site conditions.\footnote{6} Absent specific differing site conditions or changed conditions clauses in a construction contract, both the owner and the contractor incur additional costs when unexpected site conditions are encountered.\footnote{7} Bids for a construction contract are frequently inflated because bidding contractors will include contingencies in their


5. See George A. Smith, Site Conditions: Contractor Beware, ASS’N OF DRILL SHAFT CONTRACTORS, Dec./Jan. 1991, at 52-54; see also Green Constr. Co. v. Kansas Power and Light Co., 717 F. Supp. 738 (D. Kan. 1989) (denying a contractor’s $2 million claim for unanticipated additional costs associated with excessive soil moisture because the absence of a changed conditions clause, coupled with the inclusion of a clause requiring the contractor to inspect the site, placed the risk of unexpected subsurface conditions on the contractor); Branna Constr. Corp. v. West Allegheny Joint Sch. Auth., 242 A.2d 244, 248 (Pa. 1968) (holding that where a contractor had no right, due to a specific contract provision, to rely on boring logs furnished by the owner and where the contractor failed to conduct an independent investigation of the site’s subsurface conditions as required by the contract, the contractor had no right to recover additional costs incurred as a result of subsurface conditions materially differing from those indicated on the boring logs).

6. Cushman et al., supra note 4, at 87.

prices to account for unexpected conditions which may delay the project and result in claims that are typically settled only after a long, expensive legal battle.\(^8\) If the contract does not specifically allocate responsibility and costs, both the contractor and the owner will suffer from time delays and legal costs associated with the settlement of these issues. Once litigation has begun, legal fees skyrocket because "[c]ontractors have a tendency to inflate the claim[,] knowing that the owner will try his best to negotiate the price down . . . ."\(^9\) One manner of dealing with the problem of increasing litigation in connection with unexpected site conditions is to change the current construction environment so that owners and contractors devote their time and energy to the construction of the project, rather than defending claims in a courtroom.\(^{10}\)

In order to change the current environment, a differing site conditions or changed conditions clause which "provide[s] for an equitable price and time adjustment when differing site conditions are encountered" is necessary to maintain good relations between the parties to the contract and to avoid costly litigation.\(^{11}\) A differing site conditions clause places the risk of unknown subsurface conditions on the owner,\(^{12}\) thereby "generat[ing] lower, more competitive bid prices, and the owner's payment for unforeseen subsurface conditions will be limited only to those projects where such an adjustment is appropriate."\(^{13}\) To the contrary, when construction bids are artificially inflated to specifically account for the risk of differing site conditions, the owner incurs an additional cost for unforeseen conditions regardless of whether such differing site conditions are actually encountered.

A recommended and commonly used differing site conditions clause is that required by the federal government in all federal construction contracts.\(^{14}\) The current version of the federal differing site conditions clause places the risk of unforeseen site conditions on the

\(^{8}\) Id.; Smith, supra note 5, at 54.

\(^{9}\) Himick & Nicholson, supra note 7, at 1.

\(^{10}\) Id. at 2.

\(^{11}\) Id. at 3; see also COMMITTEE ON CONTRACTING PRACTICES OF THE UNDERGROUND TECHNOLOGY RESEARCH COUNCIL, AVOIDING AND RESOLVING DISPUTES IN UNDERGROUND CONSTRUCTION 1 (1989) [hereinafter COMMITTEE ON CONTRACTING PRACTICES] (finding that an attitude of equitable risk-sharing between owner and contractor results in a lower total cost for the construction project).

\(^{12}\) COMMITTEE ON CONTRACTING PRACTICES, supra note 11, § B-1, app. at B-2.

\(^{13}\) Smith, supra note 5, at 54.

\(^{14}\) See COMMITTEE ON CONTRACTING PRACTICES, supra note 11, § B-1, app. at B-2; see also Himick & Nicholson, supra note 7, at 3.
government, provided that the contractor gives the government timely notification in writing regarding conditions that are substantially different from those anticipated.\textsuperscript{15}

Another option which has been recommended as a possible means of curtailing the excessive amount of litigation over construction contracts is the requirement that an owner prepare a Geotechnical Design Summary Report ("GDSR") for all construction projects.\textsuperscript{16} The purpose of mandating a GDSR is to compel the owner to provide a written summary of the engineer's predictions with respect to the underground conditions that the contractor can expect.\textsuperscript{17} The GDSR sets forth a "baseline" for all anticipated conditions.\textsuperscript{18} If conditions are materially different from those depicted in the baseline, and the contractor is unable to perform the contract for the price agreed upon, the contractor is entitled to an increase in the contract price.\textsuperscript{19} Thus, the GDSR effectively places the risk of differing site conditions on the owner; as a result, the owner will receive lower bids from contractors.\textsuperscript{20}

The GDSR has proven to be an effective vehicle in reducing the number of construction contract disputes.\textsuperscript{21} When a GDSR requirement was adopted by the Washington Metropolitan Area Transit Authority, the number of claims based on differing site conditions

\begin{itemize}
\item \textsuperscript{15} 48 C.F.R. § 52.236-2 (1993); see William R. Medsger, Category II Differing Site Conditions in Construction Contracts, \textit{Army Law.}, June 1988, at 10.
\item \textsuperscript{16} The federal differing site conditions clause, as codified in 48 C.F.R. § 52.236-2(a)-(b), provides:
\begin{itemize}
\item \textsuperscript{(a)} The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
\item \textsuperscript{(b)} The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
\end{itemize}
\item \textsuperscript{17} 48 C.F.R. § 52.236-2(a)-(b) (1993).
\item \textsuperscript{18} COMMITTEE ON CONTRACTING PRACTICES, \textit{supra} note 11, at 6.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\end{itemize}
was significantly reduced. Other governmental entities that have incorporated a GDSR requirement into their construction projects include the Colorado Department of Highways, the Hawaii Department of Transportation, the Pennsylvania Turnpike Commission, and the United States Bureau of Reclamation.

Even with the requirement that federal construction contracts include a differing site conditions clause or a clause requiring the preparation of a GDSR, litigation may arise in the interpretation of such clauses. With respect to use of the differing site conditions clause mandated by the federal government, much litigation has resulted from the requirement that the “unknown physical conditions” be of an “unusual nature.”

While there has generally been an increase in the number of lawsuits filed in the United States since the 1960s, the number of lawsuits in which the United States was a party increased by 155% from 1970 to 1980. Even more staggering is the finding that legal costs to the government associated with these lawsuits more than tripled from 1970 to 1980. The federal government cannot afford such tremendous increases in the costs of litigation and must find ways to avoid the waste of excessive litigation.

In addition to the increasing costs of traditional litigation, concern has also been expressed over the excessive time delays associated with resolving disputes through the courts. Also, the nature of the construction industry is such that the parties to a contract will often be involved in future contractual relations with each other. The adversarial atmosphere of court proceedings often serves as an obsta-
cle to the ability of the government and the contractor to resume successful business relationships in the future. Moreover, while judges have legal expertise, they often lack the technical expertise required for appropriate resolution of construction contract disputes.

Despite the disadvantages of traditional courtroom litigation (i.e., excessive costs and time delays, adversarial climate, judges’ lack of technical expertise), the courts provide an indispensable and unparalleled forum for dispute resolution in certain circumstances. Such circumstances exist when the purpose of the litigation is to establish a legal precedent or to establish and preserve a record of events that happened in the past. Also, a party may choose the court system when its purpose is “to delay a [final] decision for as long as possible.” However, with respect to construction contracts, disputes are often centered around questions of fact involving technical matters, and therefore the establishment of legal precedent is not of primary concern. Furthermore, since the contractor and the owner both have a tremendous amount of resources tied up in the project, including capital and personnel, both parties have a vested interest in avoiding delays and completing the project as soon as possible.

III. TRADITIONAL METHODS OF RESOLVING GOVERNMENT CONTRACT DISPUTES

In 1978, the Contract Disputes Act ("CDA") was enacted by Congress to “provide[] a fair, balanced, and comprehensive statutory system of legal . . . remedies in resolving [government contract claims].” The Act was specifically designed to “induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and [government agencies].”

The CDA established a statutory scheme for resolving disputes

30. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 10 (1983) [hereinafter NATIONAL INSTITUTE FOR DISPUTE RESOLUTION], reprinted in SOURCEBOOK, supra note 25, at 18.
31. See id.
32. Id.
33. Id. at 11, reprinted in SOURCEBOOK, supra note 25, at 19.
35. Id.
arising out of government contracts.\textsuperscript{36} This scheme begins with the contracting officer, an agency official with "authority to enter into and administer [government] contracts,"\textsuperscript{37} who has the authority to decide all claims, asserted by either the contractor or the government, relating to the contract.\textsuperscript{38} The decision of a contracting officer may be appealed to an agency board of contract appeals ("BCA") or directly to the United States Claims Court.\textsuperscript{39} A subsequent negative decision by an agency BCA or the United States Claims Court may be appealed to the United States Court of Appeals for the Federal Circuit.\textsuperscript{40} If the decision of a BCA is appealed, the finding of the BCA on a question of law is not "final or conclusive," but the BCA's finding on a question of fact is "final and conclusive and shall not be set aside unless the decision is fraudulent, . . . arbitrary, . . . capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."\textsuperscript{41}

Courts have consistently upheld the finality of findings of fact by BCAs. In \textit{United States v. Carlo Bianchi & Co. Inc.},\textsuperscript{42} the United States Supreme Court held that, in reviewing the decision of the Board of Claims and Appeals of the Corps of Engineers, the United States Court of Claims was confined to reviewing the administrative record on findings of fact and could not receive new evidence if the record was supported by substantial evidence.\textsuperscript{43} This position was reaffirmed in \textit{United States v. Utah Construction & Mining Co.},\textsuperscript{44} in which a government contract disputes clause provided that all disputes concerning questions of fact arising under the contract were to be decided by the contracting officer, subject to written appeal by the

\textsuperscript{36} Crowell & Pou, \textit{supra} note 3, at 189.
\textsuperscript{38} 41 U.S.C. § 605(a) (1988).
\textsuperscript{39} Crowell & Pou, \textit{supra} note 3, at 189-90. An executive agency of the federal government has the authority to establish an agency BCA when the "volume of contract claims justifies the establishment of a full-time agency board of at least three members" whose sole responsibility is to review the decisions of contracting officers. 41 U.S.C. § 607(a)(1) (1988). If the volume of contract claims in a particular agency is not sufficient to justify the establishment of a BCA by the agency, the head of the agency may direct appeals from decisions of contracting officers of his agency to a BCA of another executive agency. 41 U.S.C. § 607(c) (1988).
\textsuperscript{40} Crowell & Pou, \textit{supra} note 3, at 190.
\textsuperscript{41} 41 U.S.C. § 609(b) (1988).
\textsuperscript{42} 373 U.S. 709 (1963).
\textsuperscript{43} \textit{Id.} at 718.
\textsuperscript{44} 384 U.S. 394 (1966).
contractor to a BCA appointed by the head of the department concerned.\textsuperscript{45} Although the Supreme Court held that this clause did not extend to breach of contract claims not covered under other clauses of the contract,\textsuperscript{46} it still held that factual findings of the BCA which related to questions of fact arising under the contract were binding on all parties.\textsuperscript{47}

BCAs were instituted to "provide an alternative to the Claims Court that was 'more informal and expeditious and less expensive than comparable proceedings in court.'\textsuperscript{48} While many BCAs were initially successful in achieving this goal,\textsuperscript{49} excessive litigation, formal rules and procedures, and a rise in the number of appeals have resulted in a tremendous increase in the "time and cost[s] of pursuing a claim before [a] . . . BCA."\textsuperscript{50} The increased time and cost are the direct result of increases in the use of attorneys and discovery mechanisms in BCA proceedings.\textsuperscript{51} As a result, the average BCA proceeding now requires a period of two to four years from the date of filing to the date of decision.\textsuperscript{52}

\section*{IV. ALTERNATIVES TO TRADITIONAL LITIGATION}

Recognizing the problems associated with traditional litigation and resolution of disputes before BCAs, agencies of the federal government have begun to explore ADR techniques.\textsuperscript{53} The Administrative Conference of the United States is an independent agency of the federal government responsible for "promot[ing] the efficiency, adequacy and fairness of federal administrative procedures."\textsuperscript{54} In the

\begin{thebibliography}{9}
\bibitem{45} Id. at 397-98, 399 n.2 (holding that the decision of the board was "final and conclusive" on all parties).
\bibitem{46} Id. at 404.
\bibitem{47} Id. at 420.
\bibitem{49} See id. at 3, \textit{reprinted in SOURCEBOOK, supra} note 25, at 151.
\bibitem{50} Id. at 2, \textit{reprinted in SOURCEBOOK, supra} note 25, at 148.
\bibitem{52} See Korthals-Altes, \textit{supra} note 48, at 3, \textit{reprinted in SOURCEBOOK, supra} note 25, at 151.
\bibitem{53} Philip J. Harter, \textit{Points on a Continuum: Dispute Resolution Procedures and the Administrative Process} (June 5, 1986), \textit{reprinted in SOURCEBOOK, supra} note 25, at 245.
\end{thebibliography}
1980s, the Administrative Conference began to explore particular ADR methods which are premised on the resolution of contract disputes through informal, nonadversarial means.\textsuperscript{55}

The first product of the Administrative Conference's experimentation with ADR in resolving government contract disputes was Recommendation 86-3 on Agencies' Use of Alternative Means of Dispute Resolution.\textsuperscript{56} This recommendation encouraged federal agencies to use ADR techniques and provided guidance on when and how to use various ADR methods.\textsuperscript{57}

**A. Advantages of Alternative Dispute Resolution ("ADR")**

The potential of ADR has been described as follows:

Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.\textsuperscript{58}

In general, ADR techniques "reflect[] a serious new effort to design workable and fair alternatives to our traditional judicial systems."\textsuperscript{59} They typically involve the presence of an impartial third party, or neutral.\textsuperscript{60} When used in appropriate situations, ADR techniques offer numerous advantages including simplified and informal proceedings, reduced legal expenses, and faster decisions.\textsuperscript{61} ADR techniques also give the parties the option of confidentiality because

\begin{enumerate}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Charles Pou, Jr., Federal Agency Use of "ADR": The Experience to Date, Jan. 28, 1987, at 10, reprinted in SOURCEBOOK, supra note 25, at 110; see also 1 C.F.R. § 305.86-3 (1993).
\item \textsuperscript{57} See 1 C.F.R. § 305.86-3 (1993).
\item \textsuperscript{58} NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, supra note 30, at 1, reprinted in SOURCEBOOK, supra note 25, at 9.
\item \textsuperscript{59} Harry T. Edwards, Commentary, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668, 668 (1986), reprinted in SOURCEBOOK, supra note 25, at 77.
\item \textsuperscript{60} NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, supra note 30, at 36, reprinted in SOURCEBOOK, supra note 25, at 44.
\item \textsuperscript{61} Korthals-Altes, supra note 48, at 5, reprinted in SOURCEBOOK, supra note 25, at 153.
\end{enumerate}
no transcript of the proceeding is made and thus there are no disclosure requirements pursuant to the Freedom of Information Act.\textsuperscript{62} Since ADR focuses on the cooperation of the parties and attempts to encourage the parties to settle their disputes outside of the adversarial setting of a courtroom, the parties are often able to engage in future business relationships.\textsuperscript{63} Finally, another important advantage of ADR techniques is their flexibility. The wide range of ADR options allows the parties to choose a resolution method that takes into account the nature of the problem and the interests and objectives of the parties.\textsuperscript{64}

\textbf{B. Potential Disadvantages and Obstacles to Use of ADR Methods}

While the apparent advantages of ADR techniques are numerous, many obstacles stand in the way of widespread use of ADR methods in the area of government construction contracts. Many fear that ADR techniques do not produce significant savings in time or money.\textsuperscript{65} Some ADR techniques are nonbinding, with either party free to reject the settlement. This lack of finality raises a concern that nonbinding ADR may actually increase the time and expense of dispute resolution.\textsuperscript{66} Another criticism is that the parties will be reluctant to use ADR for “fear of appearing inadequate or losing control of the case itself.”\textsuperscript{67} This particularly applies to cases in which resolution of the dispute is left to a neutral.\textsuperscript{68} Others fear that the introduction of a neutral into the case will lead to increased costs and time.\textsuperscript{69} Yet another concern with the ADR process, expressed by Judge Corcoran of the Veterans Administration Board of Contract Appeals, is that “resolving many disputes through ADR will produce no precedent which may, in turn, undermine the predictability that aids the government’s competitive bidding system, heighten contract costs, and increase

\textsuperscript{62.} Id.
\textsuperscript{63.} Id.
\textsuperscript{64.} Marguerite Millhauser, \textit{In Choosing ADR, the People, as Well as the Problem, Count}, NAT’L L.J., Apr. 6, 1987, at 15.
\textsuperscript{65.} NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, \textit{supra} note 30, at 33, \textit{reprinted in SOURCEBOOK, supra note 25, at 41.}
\textsuperscript{66.} Id.
\textsuperscript{67.} Richard H. Robinson, \textit{The Use of Alternative Dispute Resolution in Enforcement Actions in the U.S. Environmental Protection Agency}, Jan. 21, 1987, at 8, \textit{reprinted in SOURCEBOOK, supra note 25, at 521.}
\textsuperscript{68.} See id.
\textsuperscript{69.} Robinson, \textit{supra} note 67, at 10, \textit{reprinted in SOURCEBOOK, supra note 25, at 523.}
One of the strongest obstacles to widespread use of ADR is lack of familiarity with the characteristics of the broad range of alternative procedures available and reluctance to wander away from the security associated with traditional litigation. Currently, the typical law school curriculum fails to take into account the fact that lawyers spend much more time negotiating than litigating. Many predict that in the near future, lawyers will learn about ADR from professors and will be specifically trained in negotiating skills and how the various ADR methods work. The organization of symposiums through which contractors and government officials can speak to parties having first-hand experience with ADR techniques would also serve as an effective way to foster widespread use of ADR.

The education of lawyers with respect to the benefits of ADR is crucial to its widespread use and acceptance. While many attorneys support ADR, others oppose alternatives to litigation because of the lack of rules in such environments. One particular concern is that ADR processes prevent attorneys from properly advising clients since these processes do not establish precedents and therefore result in "loss of uniformity." By agreeing to submit to various forms of ADR, the parties are giving up adherence to a known set of rules which has been developed over hundreds of years. Other factors which may prevent lawyers from recommending ADR methods to their clients include the following: faster settlements translate into lower legal fees; proposals to use ADR methods may suggest a position of weakness; and lawyers are generally unfamiliar with ADR techniques.

Despite the concerns raised in connection with use of ADR
methods, a number of reports and articles have established that ADR techniques have produced competent results while avoiding the formality and expense of traditional methods.\textsuperscript{78} Attorneys who practice and advocate use of ADR note that ADR avoids the opportunity costs associated with traditional litigation in terms of diversion of staff from ongoing activities.\textsuperscript{79} Moreover, “ADR allows both sides to get back to doing business with each other more quickly and with less residual ill will than in litigation.”\textsuperscript{80}

V. SPECIFIC ADR TECHNIQUES

A. Mediation

Mediation is an ADR technique in which the parties attempt to reach a settlement by negotiating directly with each other.\textsuperscript{81} The negotiations are facilitated through the participation of a third party neutral (mediator) chosen by the parties. The role of the mediator is to aid the parties in achieving a settlement; the mediator typically has special training in dispute resolution mechanisms but has no authority to resolve the issues in dispute.\textsuperscript{82}

As an ADR mechanism, mediation offers a number of benefits. It focuses on the concerns and the priorities of the parties, thereby providing an opportunity to directly address the fundamental issues of the dispute.\textsuperscript{83} By stressing settlement as the desirable outcome of the proceedings, mediation mitigates the adversarial propensity of the parties and allows them to “build understanding and trust,” enabling them to continue their business relationship once the dispute has been resolved.\textsuperscript{84} It also allows for privacy since no transcript of the proceedings is maintained.\textsuperscript{85}

One of the potential weaknesses of mediation is that it may require a great deal of time, and the end result is not binding on
either party.\textsuperscript{86} It also requires that both parties are willing to participate in the negotiations and reach a settlement in good faith.\textsuperscript{87} Finally, there are no guarantees that mediation will result in a settlement; therefore, the effort to mediate may simply increase the time and costs associated with resolution of the dispute.\textsuperscript{88}

The role of the neutral in the mediation process is to "listen, review, analyze, reason, explore and suggest possible ways and means of movement with both parties to generate a basis for reaching agreement."\textsuperscript{89} A skillful mediator clarifies the significant issues of the dispute and identifies the interests of each party.\textsuperscript{90} He assists the parties in deciding what to discuss and how to conduct the discussions,\textsuperscript{91} allows the parties to confide in him without revealing such confidential information to the other party,\textsuperscript{92} and suggests possible settlement options that the parties might be interested in but would never propose "for fear of appearing 'soft.'"\textsuperscript{93}

The success of mediation as an ADR mechanism is demonstrated by a study conducted by DPIC Companies, one of America's largest insurers of design professionals.\textsuperscript{94} In this study, DPIC referred 1,042 cases to mediation, and mediation was accepted in 745 or 78% of the cases.\textsuperscript{95} Of these 745 cases in which mediation was accepted, 385 cases were successfully settled through mediation, and 233 cases were in the process of being settled when the study was concluded.\textsuperscript{96} The average cost of mediation was $2,400 per case.\textsuperscript{97} The mediation process saved approximately ten months of continuing litigation for each claim.\textsuperscript{98} Additionally, mediation reduced legal costs for the 385 cases that were resolved by approximately $15 million, or an average of

\begin{itemize}
  \item \textsuperscript{86} Id. at 14, reprinted in \textit{SOURCEBOOK}, supra note 25, at 22.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Kay McMurray, \textit{Information Statement of the Federal Mediation and Conciliation Service} (Apr. 1987), reprinted in \textit{SOURCEBOOK}, supra note 25, at 507.
  \item \textsuperscript{90} Barbara A. Phillips & Anthony C. Piazza, \textit{The Role of Mediation in Public Interest Disputes}, 34 HASTINGS L.J. 1231, 1234 (1983), reprinted in \textit{SOURCEBOOK}, supra note 25, at 218.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Lawrence Susskind & Connie Ozawa, \textit{Mediated Negotiation in the Public Sector}, 27 AM. BEHAV. SCIENTIST 255, 256 (1983), reprinted in \textit{SOURCEBOOK}, supra note 25, at 190.
  \item \textsuperscript{94} \textit{Alternative Dispute Resolution Up Close}, GEOTECHNICAL NEWS, Mar. 1991, at 19.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
\end{itemize}
$40,250 per case. The results of the DPIC Companies' study demonstrates that the time and cost savings associated with resolution of disputes through mediation as opposed to traditional litigation can be quite significant.

B. Arbitration

Arbitration, a second option in the realm of ADR mechanisms, utilizes a neutral “to hear stipulated issues pursuant to procedures specified by the parties.” Arbitration has no set rules; its procedure is determined by agreement of the parties. Depending upon the arrangement between the parties, the decision of the neutral arbitrator may be binding or nonbinding. However, the federal government is required by law to use binding arbitration with respect to issues of fact.

Arbitration offers a number of advantages over traditional litigation. It can be initiated within a short period of time, the process is typically short, and a decision can be reached fairly quickly. In addition, the parties select the arbitrator and the body of law applicable to the proceeding. Thus, the parties can select an arbitrator with expertise in the particular area in which the dispute has arisen. Like mediation, arbitration also allows for confidentiality since no transcript of the proceedings is maintained. Arbitration is particularly useful when the parties have a large number of disputes which must be settled within the course of the contractual relationship.

Despite its advantages, arbitration also has a number of weaknesses. The process does not establish precedents for the resolution of future cases, thus resulting in a lack of uniformity. The time and costs associated with arbitration may rise to excessively high levels, particularly when the parties seek to resolve a large number of dis-

99. Id.
100. U.S. ENVTL. PROTECTION AGENCY, supra note 82, at 4 reprinted in SOURCEBOOK, supra note 25, at 742.
101. See id.
102. Id.
103. Id. at 5, reprinted in SOURCEBOOK, supra note 25, at 743.
104. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, supra note 30, at 12, reprinted in SOURCEBOOK, supra note 25, at 20.
105. Id. at 13, reprinted in SOURCEBOOK, supra note 25, at 21.
106. Id. at 34, reprinted in SOURCEBOOK, supra note 25, at 42.
107. Id. at 13, reprinted in SOURCEBOOK, supra note 25, at 21.
108. Id. at 34, reprinted in SOURCEBOOK, supra note 25, at 42.
Parties may not want to arbitrate due to the limited scope of judicial review and the possibility of having to abide by a negative decision that cannot be appealed. An additional obstacle to use of arbitration has been a series of decisions by the Comptroller General which provide that "the government cannot be bound by arbitration unless the [government] agency specifically is authorized by statute to engage in arbitration or the arbitration is limited to factfinding."

C. Mediation v. Arbitration

Mediation and arbitration are each used in different circumstances. Since the goal of mediation is settlement, mediation is appropriate when there is a possibility that the parties can reach a mutually satisfactory agreement with the help of a neutral. In addition, when the parties plan to continue their relationship after the dispute has been resolved, mediation is the more suitable ADR mechanism since it tends to minimize adversarial tensions between the parties and promote good will. On the contrary, arbitration should be used when the parties have reached an irreconcilable impasse with no likelihood of being able to negotiate a settlement and when the parties have no interest in continuing their relationship after resolution of the dispute. Moreover, due to its finality and limited scope of review, arbitration is the more appropriate option when the parties need to quickly reach a final decision.

VI. USE OF ADR BY GOVERNMENTAL AGENCIES TO DATE

The construction industry has had some experience in the use of arbitration to resolve contract disputes. The appeal of arbitration in this specialized industry is largely due to the parties' ability to select an experienced neutral with the necessary technical expertise to resolve the issues that are at the center of the dispute and the ability

109. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, supra note 30, at 14, reprinted in SOURCEBOOK, supra note 25, at 22.
110. Crowell & Pou, supra note 3, at 234.
111. Id. at 233.
113. Id.
114. Id.
of this respected neutral to render a binding decision to which all parties must adhere. In particular, the Environmental Protection Agency has promulgated rules to encourage the use of arbitration to resolve contract disputes.

Although historically the federal government generally has not engaged in mediation to resolve construction contract disputes, mediation has been widely used by federal agencies in a number of other contexts, especially in the labor arena. For example, the Federal Mediation and Conciliation Service, an agency of the federal government, has received Congressional authority to mediate disputes arising from negotiations between labor organizations and the federal government in the area of labor-management relations. In addition, in 1981 the Department of Health and Human Services issued a rule authorizing the mediation of disputes over grants-in-aid.

Recently, the construction industry has begun to explore the possible role of mediation in the resolution of contract disputes. The Construction Industry Dispute Avoidance and Resolution Task Force, a newly formed organization, is currently working with the state of Kentucky to establish a state-wide construction mediation program. The program seeks to develop procedures and guidelines for the mediation of construction contract disputes and the training of mediators throughout the state. If successful, the program will be the first of its kind in the United States and will serve as a framework for the development of similar programs throughout the country.

In light of the tremendous success of ADR processes, the efforts of the federal government thus far in attempting to implement ADR requirements have been meager at best. The time has come for

116. See Stulberg, supra note 115, at 979.
117. See SOURCEBOOK, supra note 25, at 497.
118. See, e.g., Stipanowich, supra note 115, at 868-69.
120. 45 C.F.R. § 16.18(b) (1993); see Smith, supra note 25, at 17-18, reprinted in SOURCEBOOK, supra note 25, at 171-72.
121. See Stipanowich, supra note 115, at 926.
122. Id. at 927.
123. Id.
124. See id.
125. See Smith, supra note 25, at 11, reprinted in SOURCEBOOK, supra note 25, at 165; see also Marshall J. Breger, Chairman's Foreword to SOURCEBOOK, supra note 25, at v (calling for federal agencies to evaluate the potential of ADR processes as viable alternatives to litigation).
the federal and state governments to seriously consider the various ADR processes and select the alternative that is most suitable in light of the types of disputes addressed by that particular entity.

VII. CONCLUSION

Government construction projects often involve large-scale contracts which require a tremendous expenditure of time, personnel, and capital. Due to the size of such contracts, only a small number of contractors have the expertise and capability to execute these contracts. Thus, the same contractors may be used repeatedly by the federal or state government to perform different contracts. Alternatively, some construction contracts require a period of several years to complete; thus, the government and the contractor are thrust into an ongoing, long-term relationship.

Given the characteristics of the relationship between the government and contractors, mediation will emerge as the most suitable ADR technique for resolving construction contract disputes. Mediation, through its atmosphere of negotiated problem-solving and the ability of either party to reject a highly unfavorable settlement, preserves the ongoing business relationship which is valuable to both the contractor and the government.

The mediator, as a neutral, encourages each party to reevaluate its own position and explore the strengths of the other party's position. Whereas litigation and arbitration stress the adversarial relationship between the parties, mediation encourages the parties to work together to arrive at a settlement that both parties can live with. Since both parties contribute to the negotiation process, the parties are more likely to abide by the terms of the settlement. Furthermore, by allowing the parties to work together toward a solution, mediation downplays the antagonism between the parties and allows the government and the contractor to continue their business relationship without the tensions which result from binding arbitration and traditional litigation. As one professor discussing the role of mediation has noted, "mediation not only allows the parties to set their own standards for an acceptable solution, it also requires them to search for solutions that are within their own capacity to effectuate. In other words, the parties themselves set the standards, and the parties themselves marshall the actual resources to resolve the dispute."\(^{126}\)

\(^{126}\) Robert A.B. Bush, *Efficiency and Protection, or Empowerment and Recognition?*.
Mediation also allows the parties to directly participate in the selection of the neutral and benefit from the technical expertise of a neutral who is knowledgeable in a particular field of construction, without requiring the parties to be bound by the decision of the neutral. The parties can seek advise from and discuss the strengths and weaknesses of their cases with this knowledgeable expert. However, the ultimate settlement is arrived at through the combined efforts of the parties, with the assistance of the mediator, thus eliminating potential hostility. Furthermore, by allowing the parties to select a mediator with technical knowledge and expertise in the subject matter at issue, no time is wasted in educating a judge on the technical issues involved in the dispute.

The construction industry involves the development of constantly innovative methods for building various structures. Since each construction contract dispute will generally involve a different issue and a new set of facts, there is no need to establish precedents for resolving future disputes. Mediation preserves the creative environment of the construction industry by allowing the parties to negotiate inventive settlements based on the particular facts of each case. In addition, construction contract disputes generally involve factual disputes as opposed to disputes over legal issues. Thus, the technical expertise of an appropriately selected mediator is far more valuable than the legal expertise of a judge in the resolution of these disputes.

Since mediation does not pressure the parties to accept unfavorable settlement terms, due process concerns do not arise in the context of mediation. Such concerns may potentially exist in the case of binding arbitration since the parties are forced to abide by the decision rendered by the arbitrator.

As a final thought, given the great potential of mediation (and other ADR mechanisms) to effectively resolve disputes, law schools need to train students in ADR techniques. Many law schools currently train students to focus on the adversarial relationship between opposing parties, ignoring the potential for negotiated dispute resolution. Just as law schools offer courses in trial techniques and pretrial litigation, law students must also be given the opportunity to receive ADR training. In order to give ADR a fighting chance, lawyers must be adequately instructed with respect to the advantages of the numerous ADR processes, and law school is an appropriate forum for the in-

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The Mediator's Role and Ethical Standards in Mediation, 41 FLA. L. REV. 253, 267 (1989).
struction of future lawyers with respect to the availability and advantages of ADR techniques.

Moreover, in order for mediation to be a successful alternative to litigation, standard ethical guidelines for mediators must be developed.127 While the American Arbitration Association has set forth Commercial Mediation Rules to serve as proposed standards of practice,128 mediators do not have the benefit of a generally recognized set of ethical guidelines to follow.129 In order for mediators to serve effectively, they must be able to operate under “clearly defined expectations.”130 The American Bar Association can perhaps play an instrumental role in the development of effective guidelines.

In conclusion, the construction industry can save a tremendous amount of time and money through the industry-wide implementation of mediation to resolve contract disputes. Furthermore, mediation allows owners and contractors to coexist in an ongoing business relationship of confidence and trust. However, the success of mediation in the arena of dispute resolution depends largely on the willingness of lawyers to explore this option as a viable alternative to the traditional forum of the courtroom.

Maria R. Lamari

127. See id. at 276.
129. Stipanowich, supra note 115, at 901.
130. See Bush, supra note 126, at 276.