

# THE CLAUSE

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## PRESIDENT'S MESSAGE

I am pleased to report on two important BCABA programs. The Association held its annual Trial Practice Seminar on September 21, 2005 at The George Washington University Law School. J. Michael Littejohn of Wickwire Gavin, Chair of the Trial Practice Committee and Secretary of the BCABA, moderated this event. The program panel consisted of Judges Stephen Daniels (GSBCA), Eileen Fennessy (DOTBCA), Reba Page (ASBCA), and Cheryl Rome (ASBCA). The panel discussed a number of issues, including the value of opening and closing statements, the use of pre-trial conferences, the timing of assignments to Board Judges, the frequency, timing and appropriate use of alternative dispute resolution, expert witnesses, telephonic testimony, the degree of informality in Board practice, resolution of discovery disputes, and Judges' "pet peeves." Judging by the comments of the participants ("very worthwhile," "great program," and "glad I came"), it was very well-received. We commend Mike for an outstanding job in putting together and moderating this program.

*Continued on page 2*

## INSIDE THIS ISSUE

<b>President's Message</b> <i>Michele Mintz Brown</i>	1
<b>Editor's Column</b> <i>Clarence D. Long, III</i>	3
<b>Treasurer's Report</b>	4
<b>Quarterly Board of Governor's Meeting Minutes</b>	5
<b>Alternative Dispute Resolution for Air Force Contracts: Precision Guided Solutions that are Right on Target</b> <i>Major Karen Douglas</i>	8
<b>USPS's New Purchasing Regulations and Policies</b> <i>David P. Hendel</i>	14
<b>Consolidation of the Boards of Contract Appeals</b>	19

## BOARD OF GOVERNORS

**Col Anthony P. Dattilo**  
AFMCLO/JAB  
2240 B Street, Bldg. 11, Rm. C1  
Wright-Patterson AFB, OH 45433  
(w): 937-255-6111  
(f): 937-255-9570  
[anthony.dattilo@wpafb.mil](mailto:anthony.dattilo@wpafb.mil)

**John A. Dietrich**  
Department of the Navy  
Office of the General Counsel  
720 Kennon St., SE, Rm. 214  
Washington Navy Yard, DC 20374  
202-685-7000

**Susan Warshaw Ebner**  
Buchanan Ingersoll, P.C. 1776 K Street, NW,  
Ste. 800  
Washington, DC 20006-2365  
202-452-7995

**Elizabeth W. Fleming**  
The Boeing Company  
Box 516, MC S1000-3340  
St. Louis, MO 63166  
(w): 314-232-8201  
(f): 314-234-6857  
[elizabeth.w.fleming@boeing.com](mailto:elizabeth.w.fleming@boeing.com)

*The Clause*

**Stephen D. Knight**  
Smith, Pachter, McWhorter & Allen  
8000 Towers Crescent Drive, Ste. 900  
Vienna, VA 22182-2700  
(w): 703-847-6300  
(f): 703-847-6312  
[sknight@smithpachter.com](mailto:sknight@smithpachter.com)

**Michael Littlejohn**  
Wickwire Gavin  
8100 Boone Boulevard  
Vienna, VA 22182-7732  
(w): 703-790-8750  
(f): 703-448-1767  
[mlittlejohn@wickwire.com](mailto:mlittlejohn@wickwire.com)

**Kevin P. Mullen**  
Piper Rudnick Gray Cary  
1200 19th Street, NW  
Washington, DC 20036  
(w): 202-861-6414  
(f): 202-223-2085  
[kevin.mullen@piperrudnick.com](mailto:kevin.mullen@piperrudnick.com)

**Lynda Troutman O'Sullivan**  
United States Air Force  
Office of General Counsel I  
777 Kent Street, Ste. 11500  
Rosslyn, VA 22209  
703-588-2210  
[lynda.osullivan@pentagon.af.mil](mailto:lynda.osullivan@pentagon.af.mil)

**Richard J. Vacura**  
Morrison & Foerster  
1650 Tysons Boulevard  
McLean, VA 22102  
(w): 703-760-7764  
(f): 703-760-7777  
[rvacura@mofa.com](mailto:rvacura@mofa.com)

**Jennifer S. Zucker**  
Patton Boggs LLP  
2550 M Street, NW  
Washington, DC 20037-1350  
202-457-6000

1

Volume XVI, Issue 3

## PRESIDENT'S MESSAGE (CONT.)

Most recently, the BCABA held its Annual Program on October 28, 2005 at the City Center Hotel in Washington, D.C. The program, comprised of experts in the government contracts community, was truly outstanding. The BCABA was privileged to have as its keynote speaker Domenico Cipicchio, Acting Director, Defense Procurement and Acquisition Policy.

The first panel, "The Boards of Contract Appeals: Consolidation, Trends and Other Issues," consisted of Judges Stephen Daniels (GSBCA), Carroll Dicus, Jr. (ASBCA), Gary Krump (VABCA) and Howard Pollack (AGBCA). James McCullough, a partner at Fried, Frank, Harris, Shriver & Jacobson LLP, moderated the panel.

The second panel, "Industry Perspectives: Services, Funding Constraints and Increased Demands on Contracts," consisted of Michael Mutek, Vice President and General Counsel, Raytheon Intelligence and Information Systems, Stan Soloway, President, Professional Services Council, and Sheila Cheston, Senior Vice President, General Counsel and Secretary, BAE Systems. David Metzger, a partner with Holland & Knight LLP, moderated this panel.

The third panel addressed "Ethics in Government Contracting" and was moderated by Christopher Yukins, an Associate Professor of Government Contracts Law at The George Washington University Law School. This panel consisted of Richard Bednar, Senior Counsel, Crowell & Moring LLP, Stephen Epstein, Director of the Standards of Conduct, Office of the General Counsel, Department of Defense, and Maryanne Lavan, Vice President, Ethics & Business Conduct, Lockheed Martin Corporation.

The final panel discussed "The Use and Abuse of the GSA Schedules." This panel, moderated by Carl Vacketta, a Partner with DLA Piper Rudnick Gray Cary US LLP, was comprised of the following: Carolyn Alston, General Counsel, Washington Management Group, Joseph Neurauter, Chief Procurement Officer, U.S. Department of Urban Housing and Development, and Jonathan Spear, Vice President, Law and Public Policy, MCI, Inc.

These panels were all extremely informative and thought-provoking. We thank all of the participants for their hard work and commitment in making these panels a successful part of our Program.

At the Program, the Honorable Stephen Daniels (GSBCA) presented the Life Service Award to Hugh Long for his long-time service and commitment to the BCABA. Hugh Long gave this year's Writing Award to Brent Curtis for the best article in *The Clause*. David Metzger presented a plaque to outgoing President, Joe McDade, for his outstanding service and dedication to the BCABA this past year. Joe McDade presented me with the President's Award, for which I was truly humbled and grateful.

As this past year's Annual Program Chair, I would like to extend my personal thanks to our immediate past President, Joe McDade, our Vice President, the Honorable Richard Walters, our Treasurer, Thomas Gourlay, Jr., and past Presidents, David Metzger and Peter McDonald, for their unparalleled energy and support throughout the year to ensure the Program's success. Special thanks go to Hugh Long, our editor of *The Clause*, for his continued commitment to the growth of the BCABA.

At the Annual Members Meeting following the Annual Program, the Members elected the following slate of officers: President: Michele Mintz Brown; Vice President: Honorable Richard Walters; Secretary: J.

Michael Littlejohn; and Treasurer: Thomas Gourlay, Jr. The following individuals were also elected to the Board of Governors: John Dietrich, Lynda Troutman O'Sullivan and Jennifer Zucker.

I am also pleased to announce a number of initiatives. The BCABA Directory will soon be available on our website at <http://www.bcabar.org>. Members of the BCABA will have password-protected access to the Directory. We thank Peter McDonald for his assistance in finalizing the Directory, and to James (Ty) Hughes, our website coordinator.

The BCABA Executive Policy Forum will take place in May 2006 in Washington, D.C. David Metzger will again chair this event. The BCABA will also hold its annual Trial Practice Seminar in September 2006. J. Michael Littlejohn has once again agreed to chair this program. In addition, the BCABA will hold its Annual Program in October 2006. The Honorable Richard Walters has agreed to chair this event.

I invite you to join us at our quarterly meetings that will take place at the Washington, D.C. offices of Holland & Knight LLP on the following dates: (1) December 15, 2005; (2) March 21, 2006; (3) June 27, 2006; and (4) September 19, 2006. The meetings will start at noon and generally last about one hour. While all of you are invited, please RSVP so that we can make the appropriate arrangements. I may be reached at (703) 720-8017 or at [michclb.brown@hklaw.com](mailto:michclb.brown@hklaw.com). I encourage you to contact me or any of our officers with your comments and suggestions.

We look forward to your participation and support in the coming year.

Michele Mintz Brown  
President

## EDITOR'S COLUMN

### IT CAN HAPPEN HERE

As I write this, the scenes from New Orleans can fairly be described as Biblical. Temporarily at least, law and order appears to have broken down. I am fortunate that my son got out of there in time. Not everyone can say that. At least one BCABA member has a dead relative in New Orleans. Now is the time to show compassion, and to contribute as much as you can to those in need. Three of the major charities are the Red Cross, the B'nai B'rith, and the Catholic Charities of America. There are others as well

Addresses are:

American Red Cross  
P.O. Box 37243  
Washington DC 20013  
[www.redcross.org](http://www.redcross.org)

B'nai B'rith Disaster Relief Fund  
2020 K Street, 7<sup>th</sup> Floor  
Washington, DC 2006  
[www.bnaibrith.org](http://www.bnaibrith.org)

Catholic Charities USA  
1731 King Street  
Alexandria, Va. 22314  
[www.catholiccharitiesusa.org](http://www.catholiccharitiesusa.org)

Please send as much as you can reasonably afford. Many Americans have already been generous, and our military, at least, has once again proven its competence and courage. LTG Honore makes every soldier feel proud.

## FRANCO-PHOBIA AND LAWYERS

Everybody hates the French. But almost no one can tell you why. The ones who can cite the usual reasons—too many different kinds of cheese, rude concierges, lack of gratitude, etc. But it took me a long while to figure it out personally. Then I found out about their work habits. Thirty five hours a week, 7 week vacations, and retirement at 55. I've been steamed at the country of Lafayette ever since.

Recently I was reminded of this when I read an article in the Washington Lawyer—the periodical I get because I joined the DC Bar a long time ago. The DC Bar is a so-called “integrated bar,” meaning you have to pay your dues in order to practice law around here.

In the July/August issue of their glossy magazine, there is a prominently featured article on sabbaticals for lawyers. A sabbatical, in case you didn't know, is a sort of extended vacation in which hard working lawyers take time off to deal with stress, smell the flowers, spend time with their families, and so forth.

I have been practicing law in DC for 25 years and in all this time I have never heard of lawyers taking a sabbatical. But such persons apparently do exist. The author, a young lady who took two years off to bicycle around the world with her husband, found five or six of them, mostly partners at heavy duty firms. Sabbaticals of up to two years are not unknown. They all think it's wonderful. I do not doubt it.

But if I were to ask my boss for such a time out, he would suggest that I take a Sabbatical for the rest of my life. So would the superiors of most of the members of the BCABA, private sector or public.

This was followed the following month by an approving article on lawyers who tired of the law and quit to do bee-keeping or

something. Why this is a problem was not fully clear to me, possibly because I still have to make a living. After reading this egregious nonsense, I began to feel about lawyers the way some Americans feel about the French—fed up.

### TREASURER'S REPORT (as of October 14, 2005)

As of today, our balance is \$27,736. (Also – I have about \$4k in checks for which there is no information right now as to what/whom they are for (i.e., dues and annual meeting).

Regards,  
Tom Gourlay  
Treasurer

**BOARDS OF CONTRACT  
APPEALS BAR ASSOCIATION  
QUARTERLY BOARD OF  
GOVERNORS MEETING  
HOLLAND & KNIGHT LLP  
September 27, 2005**

**MINUTES**

The meeting was called to order at 12:17 p.m. by BCABA President, Joe McDade. In attendance were the following:

Name	Organization
Joe McDade	Air Force Deputy General Counsel
Michele Brown	Holland & Knight LLP
Rich Walters	VABCA
Gary Krump	VABCA
Jeri Somers	DOTBCA
Candy Steel	IBCA
Pete McDonald	McGladrey & Pullen LLP
Clarence Long	USAF
Steve Daniels	GSBICA
David Anderson	HUDBCA
Susan Warshaw Ebner	Buchanan Ingersoll PC
Beryl Gilmore	EBCA
Howard Pollack	AGBCA
Tony McCann	EBCA

**Old Business**

**Minutes.** Rich Walters, BCABA Secretary, had previously distributed copies of the minutes for the June 28, 2005 Quarterly Board Meeting. Motion made and seconded to accept the minutes. Passed. Joe McDade raised one "open item" in the minutes, namely, the posting of the BCABA Directory on the Association website and the creation of password protection to allow access. Joe obtained an estimate from Susan Donohue (the contractor for the website) of \$350 for this work. A motion was made to allow Joe to have Ms. Donohue proceed with posting the Directory and creating

password protection. The motion was seconded and passed.

**Treasurer's Report.** BCABA Treasurer, Tom Gourlay, was not present. He provided an e-mail message to Michele Brown, BCABA Vice-President/President Elect. According to the message, even after payment of a \$6,000.00 deposit to the Wyndham Hotel (for the Annual Program – see below), the treasury has a current balance of \$23,980.23. This is not including checks received by Joe McDade for membership dues and registration for the Annual Program.

**Annual Trial Practice Symposium.** Rich Walters reported that the BCABA Trial Practice Seminar was held on September 21, 2005 from noon to 2 P.M. at the George Washington University Law School Moot Court Room. Mike Littlejohn of Wickwire Gavin, Chair of the BCABA Trial Practice Committee, served as Moderator. The program panel consisted of Judges Steve Daniels (GSBICA), Reba Page (ASBICA), Cheryl Rome (ASBICA) and Eileen Fennessey (DOTBCA). A number of issues were discussed, including the value of opening and closing statements, the use of pre-trial conferences, the timing of assignments of appeals to Board Judges, the frequency, timing and appropriate use of alternative dispute resolution (ADR), expert witnesses, telephonic testimony, the degree of informality in Board practice, resolution of discovery disputes, and Judges' "pet peeves." Rich advised that the Seminar was excellent and well received. Mike is to be commended for a first-rate job.

**Annual Program.** The BCABA Annual Program is to be held on October 28, 2005 at the Wyndham Hotel on New Hampshire Avenue in Washington, D.C. Michele Brown, BCABA Vice-President/President Elect and Program Chair, reported that four outstanding panels have been lined up for the program, and CLE credit from Virginia has been requested – a total of 5 CLE credit

hours, including 1 hour for ethics. The luncheon speaker will be Domenico C. Cipicchio, Acting Director, Defense Procurement & Acquisition Policy (DoD). Attendees were urged to spread the word about the program and reminded that registration closes on October 20, 2005. In terms of publicity, at Rich Walters' request, Jerry Walz has mounted the program brochure and registration form on the ABA Public Contract webpage and has sent Rich Walters' reminder notice for the program out via his Public Contract Listserv. In addition, Rich will be sending reminder notices to a variety of other listservs, including the BCABA Listserv, his own ABA ADR Committee Listserv, a listserv he has created from the ABA Public Contract Law Section Leadership Directory, the NCMA Listserv, and possibly others. Gary Krump volunteered to contact David Drabkin to see if the reminder notice, program brochure and registration form might be distributed to the FACE Mailing List for agency Chief Acquisition Officers that David maintains. Joe mentioned that, at the program, a Lifetime Achievement Award will be presented as well as a new President's Award, previously authorized by the Board.

One further item was raised regarding the Annual Program. Michele stated that, in the past, a token gift has been provided to attendees. Last year, the gift was a BCABA key chain. She distributed samples of suggested gifts – all at the same price of just under \$5. The Board voted for a BCABA leather pad and pen set, notwithstanding that the minimum quantity to be ordered of those sets was a gross (144) (whereas the other possible gifts – pens – only required a minimum order quantity of 44).

#### **New Business**

**The Clause.** Joe raised the issue of printing and mailing costs. Annually, the costs of printing and mailing hard copies of The Clause have amounted to approximately

\$2,000.00. The Board discussed whether to dispense with hard copies and to disseminate The Clause solely via e-mail and by posting it on the Association website. Pete McDonald indicated that there is a “core group” of members historically who have insisted on hard copies. Hugh Long, Editor of The Clause, stated that the number is approximately 130 at this time. He said that printing currently is done on a per page/per number of copies basis, with no minimums. The concept of asking for additional fees for printing was considered and rejected. The consensus of the Board was that, since the dues notice recently sent out by the Association gave members the option of receiving The Clause in hard copy by mail, and since the cost was not excessive in light of the BCABA's “healthy” financial status, hard copies would be continued for the coming year. The Board's intent next year will be to require members to indicate affirmatively whether they need hard copies, rather than having them “opt out.”

**Gold Medal Firm Discounts.** Joe reported that one of the Gold Medal Firms, Crowell & Moring, had inquired as to whether there was any discount for Gold Medal Firms in terms of Annual Program tuition. Michele Brown moved that a 10% discount be extended as an additional incentive for Gold Medal Firm status (regardless of numbers of members or Annual Program attendees) and that a similar discount be furnished to any firm or organization sending 10 or more individuals to the Annual Program. This motion was seconded, by Jeri Somers, and later by Pete McDonald. After considerable discussion, the motion was passed. Gary Krump further suggested that something like Gold Medal membership be explored with federal agencies and that agencies be encouraged to build the BCABA programs into their own procurement training programs.

**Transition of Leadership.** Joe stated that he wanted to designate a Nominating Committee for development of a slate of

officers and Board members for the coming year. The Nominating Committee would consist of Pete McDonald along with Michele Brown and Rich Walters. A motion was made to accept the Nominating Committee. The motion was seconded and passed.

**Board Consolidation – Update.** The Joint Conference Committee has yet to consider the board consolidation issue as part of the Defense Authorization Bill. Westlaw’s The Government Contractor published an article entitled “BCA Consolidation Proposal Draws Fire” (written by Rick Southern, formerly Joe McDade’s Assistant Deputy General Counsel) analyzing the proposed legislation and the responses thus far – from the Senior Executives Association (SEA) and the non-Government members of the BCABA. She distributed a copy of the article to the attendees. Dave Anderson thanked the BCABA (Dave Metzger and Michele) for their excellent work in providing comments on the legislation.

**Other Matters of Interest.** Joe stated that, in conjunction with the DoD’s Quadrennial Defense Review (QDR), it was expected that a number of Congressional bills will emerge this Fall for targeted reductions within the Defense Department, including possibly some major weapons systems. In addition to the Air Force planning to cut 25% of its fighter force, Joe said, he expects some “historic changes” reflecting significantly less investment in a variety of Cold War weapons systems. This will likely mean termination claims and appeals at the Armed Services Board.

Gary Krump reported that, in his discussions with people at FEMA and DHS, FEMA indicated that it is seeking to hire hundreds and possibly thousands of mediators, not only for procurement disputes, including leases, but for other matters as well. He noted that waivers of offsets against federal annuities may be available, should anyone about to retire wish to contract with FEMA for mediation services.

Finally, Michele Brown, on behalf of the Board and BCABA membership, noted that this was the final Board meeting presided over by Joe McDade and expressed our deep appreciation for his wonderful leadership and contributions during the past several years. Joe, in response, advised that he had been offered and had accepted a non-legal management position with the Air Force – that, as of November 1, 2005 (just after our Annual Program), he would be in charge of Force Development (both civilian and military) for the entire Air Force. We all wished Joe congratulations and best of luck in this wonderful career opportunity.

No further business was raised or discussed. Joe adjourned the meeting at 1:00 P.M.

Respectfully submitted,

Richard C. Walters  
Secretary

**ALTERNATIVE DISPUTE RESOLUTION FOR AIR FORCE CONTRACTS: PRECISION  
GUIDED SOLUTIONS THAT ARE RIGHT ON TARGET**

By Karen L. Douglas, Major, USAF

About the Author: Major Karen Douglas is an Air Force JAG practicing alternate dispute resolution and contracts litigation at the Air Force Material Command Law Office's Directorate of Contract Dispute Resolution at Wright-Patterson Air Force Base in Dayton, Ohio.

Abstract: This article is an overview of the ADR techniques and procedures used by the Air Force to resolve contract disputes, and can be used as a quick reference to Air Force ADR policy and regulations. Six years have passed since the advent of the Air Force's "ADR First" policy, and the results show that Air Force contractors have much to benefit and nothing to lose by electing to use ADR.

**ALTERNATIVE DISPUTE RESOLUTION FOR AIR FORCE CONTRACTS: PRECISION  
GUIDED SOLUTIONS THAT ARE RIGHT ON TARGET**

"A successful lawsuit is the one worn by the policeman."  
-Robert Frost

"I was never ruined but twice: once when I lost a lawsuit,  
and once when I won."  
-Voltaire

With the advent of the "ADR First" policy in 1999, United States Air Force contract dispute strategy evolved into a creative quest for mutually agreeable solutions without litigation.<sup>i</sup> The desired effect of this strategic revolution was to foster better business relationships with contractors, increase remedy options beyond those available at trial, and substantially reduce the time necessary to resolve disputes.<sup>ii</sup> Six years later, the Air Force's "ADR First" policy has achieved all of those goals and more, making ADR the smart choice for contractors who are unhappy with a contracting officer's final decision. Never before have contractors enjoyed such an abundant variety of contract dispute resolution options that are geared towards achieving fair, expeditious and inexpensive business solutions.

In the "Pre-ADR First" days, once contract dispute negotiations failed, an Air Force contractor had but three choices: appeal the contracting officer's final decision to the Armed Services Board of Contracting Appeals, appeal the contracting officer's final decision to the Court of Federal Claims, or accept the contracting officer's final decision. Given the expense and time involved in litigation, a contractor could expend a small fortune during the many years necessary to reach a final decision at trial. Thus, it may have been a wiser business decision for a contractor to abandon a meritorious claim, rather than undergo litigation.

"ADR First" policy requires that the Air Force use ADR to the maximum extent practicable and appropriate to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level.<sup>iii</sup> Once an appeal has been docketed, the Air Force will send the contractor two letters, one upon receipt of the appeal and

8



another sixty days later, informing the contractor of ADR options. Historically speaking, the Air Force offers ADR in over 75% of its contract appeal cases, and of those, more than 40% elect to use ADR.<sup>iv</sup>

The Air Force offers ADR for pre-litigation cases that meet published screening criteria,<sup>v</sup> and offers ADR to all litigating contractors unless one of the exceptions found in 5 U.S.C. 572(b) applies.<sup>vi</sup> An offer of ADR does not imply that the Air Force expects to win (or lose) the case, but instead indicates that the facts and issues surrounding the case by and large meet the ADR selection criteria and the case is of the type most likely to be resolved by ADR.

In circumstances where ADR is declined by either party, the Federal Acquisition Regulation ensures there will be no mystery about why ADR was rejected. If the contractor requests ADR and the Air Force declines, the contracting officer will explain in writing why ADR was declined, and will cite to one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons why ADR procedures were inappropriate to resolve the dispute.<sup>vii</sup> Likewise, where a contractor rejects an Air Force offer of ADR, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.<sup>viii</sup>

### **What Types of ADR Does the Air Force Use?**

The types of ADR offered by the Air Force are limited only by creativity and agreement of the parties. Department of Defense<sup>ix</sup> and Air Force policy<sup>x</sup> encourage flexible use of ADR procedures, and specifically state that there are no limitations on what sort of ADR the parties can use.

Amongst the ADR modes that the Air Force employs are assisted negotiations at mediation and mini-trials, outcome prediction by early neutral evaluation and dispute review boards, non-binding arbitration, and binding arbitration by summary trial.<sup>xi</sup> The Armed Services Board of Contract Appeals offers settlement judges for mini-trials, summary trials with binding decisions, and other structured ADR modes that the Board and parties agree on.<sup>xii</sup>

### **Mediation**

An assisted negotiation by mediation is an ADR forum aided by a neutral third party who has no stake in the result. This type of ADR is effective when the parties have "room to settle," but have been unsuccessful with traditional negotiations. The neutral third party is called a mediator. The mediator is not authorized to impose a settlement upon the parties, but rather assists the parties in fashioning a mutually satisfactory solution to the controversy.

"Facilitative mediation" is the ADR technique in which the mediator simply facilitates discussions between or among the parties, without providing any form of evaluation of the merits of their respective positions.

"Outcome prediction" and "evaluative mediation" are ADR modes in which the mediator provides the parties with his/her views as to the strengths and weaknesses of their respective positions, opines as to potential outcome if the case were litigated, and endeavors to help the parties fashion a mutually acceptable resolution to the controversy.

Mediation is one of the most widely used ADR techniques in the private sector because the flexibility and informality make it useful for a wide variety of matters.<sup>xiii</sup> In addition, mediation

parties never surrender control of the ultimate resolution of their conflict. Contractors who are reluctant to lose control over the outcome of the disputed matter should be especially attracted to ADR by mediation.

The mediation process is completely flexible, and can be designed in a manner that meets the needs of the parties. Typically it begins with all parties meeting in a joint session to share their respective interests and positions. The process often includes a private session between each of the parties and 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 and conduct "shuttle diplomacy." The mediator will work with the parties to identify common interests and to narrow the gap between the parties' respective positions.

The mediator serves to structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and assesses the positions taken by the parties during the course of the negotiations. In some cases, the mediator may propose specific suggestions for settlement. In other cases the mediator may guide the parties to generate more creative settlement proposals amongst themselves. During mediation, the parties retain the power to resolve the issues through an informal, voluntary process. If a mutually agreeable settlement is possible, the mediator's role is to bring the parties to closure.

#### Early Neutral Evaluation

Early neutral evaluation (also referred to as "outcome prediction" or the "settlement judge" approach) has many of the same features as mediation. But outcome prediction adds the neutral's review of the parties' positions and the information they provide. Furthermore, the neutral discloses his/her evaluation of the relative strengths and weaknesses of each party's position. These evaluations can be given to the parties individually or jointly. The early neutral evaluation/outcome prediction mode of ADR is a non-binding process. The parties generally select a neutral with subject matter expertise whose opinion they respect, and frequently turn to the ASBCA judges to perform this function.

#### Mini-Trial

Despite the name, a mini-trial is not a small trial, but is instead a more structured process that includes the use of each of the party's senior principals. Mini-trials permit the parties to present their case (or an agreed upon portion of the case) to their principals, who have authority to settle the issue in controversy. Often these presentations are made with the assistance of a third-party neutral advisor, who might meet with the principals after the mini-trial to attempt to mediate a settlement. The neutral may also issue a formal written non-binding advisory opinion. The parties' ADR agreement can also provide for limits on discovery for the proceeding.

The mini-trial presentation itself may be a summary or abbreviated hearing with or without oral testimony. After the presentation, the principals often begin negotiations with the aid of the neutral as mediator or facilitator. The neutral's role is pre-defined by the written ADR Agreement. The neutral generally presides at the presentation of the case, sets the ground rules, and as in other ADR actions, sees that the proceeding is conducted according to the ADR Agreement. The neutral often has expertise in the federal rules of evidence and substantive law and may be called upon for advisory rulings on questions likely to arise if the matter proceeds to litigation. If the neutral has subject matter expertise then the ADR agreement may also permit the

