

**TIME IS MONEY—A PROPOSAL FOR MANDATORY  
ALTERNATIVE DISPUTE RESOLUTION FOR THE BOARD OF  
CONTRACT APPEALS**

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*“When will mankind be convinced and agree to settle their difficulties by  
arbitration?”* - BENJAMIN FRANKLIN<sup>1</sup>

I. Introduction

In 1993, testimony before the U.S. Senate Subcommittee on Courts and Administrative Practice revealed that contract disputes resolved through arbitration cost seventy percent less than disputes resolved through litigation.<sup>2</sup> In 1995, Army contract attorneys saved approximately 2,190 days of work by resolving just nine cases using Alternative Dispute Resolution (ADR).<sup>3</sup> Case complexity and prolonged discovery only add to contract litigation costs.<sup>4</sup> The Armed Services Board of Contract Appeals (ASBCA) is seeing the effect of this with time-consuming cases creating a significant backlog.

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<sup>1</sup> Conrad C. Daly, *Accreditation: Mediation's Path to Professionalism*, 4 AM. J. MED'N 39, 39 n.5 (2010) (citing Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), reprinted in 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 132 (3d ed., 1818)).

<sup>2</sup> *The Cost Savings Associated with the Air Force Alternative Dispute Resolution Program*, MEDIATE, <http://www.mediate.com/articles/airforceadr.cfm#> (last visited Jan. 15, 2019).

<sup>3</sup> *Id.*

<sup>4</sup> Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 4 (1992).

Therefore, to minimize litigation and reduce the backlog, the ASBCA should mandate use of ADR procedures prior to litigation.

In 1978, Congress promulgated the Contracts Disputes Act (CDA) which authorized the Department of Defense (DoD) to establish an independent, informal board of contract appeals, distinct from the DoD, and outside its management authority.<sup>5</sup> The ASBCA was established to resolve post-award contractual disputes between government contractors and the DoD.<sup>6</sup> The Board has approximately twenty to thirty administrative law judges who adjudicate between 500 and 900 appeals per year.<sup>7</sup> However, there is a significant backlog in appeals cases according to the ASBCA's annual report of transactions

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<sup>5</sup> Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 FED. CIR. B.J. 279, 283 (2008) (internal citations omitted). *See also* 41 U.S.C. § 7105. The Contracts Disputes Act (CDA) centralized the adjudication of government contract claims allowing contractors to choose to file an action in the Court of Federal Claims or to appeal at a board of contract appeals (BCA). Schaengold & Brams, *supra*, at 279. Additionally, the CDA allowed the General Services Administration, Tennessee Valley Authority, and Postal Service to establish individual BCAs. 41 U.S.C. § 7105. Although BCAs already existed prior to the CDA, the adjudicators were not only chosen by the agency involved in the dispute, they also reported to and were paid by that same agency. S. Rep. No. 95-1118, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5237. The CDA sought to change this and specifically authorized federal agencies to establish BCAs to serve as "'independent, quasi-judicial' forums that do not act as representatives of and, in fact, are 'quite distinct from' their respective procuring agencies." Schaengold & Brams, *supra*, at 283. Additionally, the CDA drafters wanted the BCAs to be full-time positions to ensure that the judges remained impartial. S. Rep. No. 95-1118, at 12.

<sup>6</sup> Schaengold & Brams, *supra* note 5, at 283. The ASBCA was formed in 1949 when the Army and Navy's independent boards were merged. *Id.* (citing Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 L. & CONTEMP. PROBS. 39, 56 (1964)). At that time, the ASBCA was divided into three panels that represented the Army, Navy, and Air Force. Shedd, *supra*, at 56. Each panel serviced contract disputes solely for its department. *Id.* When the CDA was promulgated in 1978, the ASBCA's jurisdiction expanded to include contract disputes between government contractors and the National Aeronautics and Space Administration, the Central Intelligence Agency, and other organizations that the Board enters into agreements with to assist in resolving disputes. *See also* ARMED SERVICES BOARD OF CONTRACT APPEALS, <http://www.asbca.mil> (last visited Jan. 15, 2019).

<sup>7</sup> ARMED SERVS. BD. OF CONTRACT APPEALS, REPORT OF TRANSACTIONS AND PROCEEDINGS OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL YEAR ENDING 30 SEPTEMBER 2016 (2016), [http://www.asbca.mil/Reports/FY2016%20Reports/FY2016\\_annual.pdf](http://www.asbca.mil/Reports/FY2016%20Reports/FY2016_annual.pdf) [hereinafter ASBCA ROT FY 16].

and proceedings for fiscal year (FY) 2016.<sup>8</sup> Though the number of appeals filed annually has remained relatively steady since 2011, the number of appeals pending before the Board on 1 October 2016, increased by more than ninety percent compared to 1 October 2011.<sup>9</sup> Specifically, there were 566 pending appeals in 2011 compared to 1,077 in 2016.<sup>10</sup> Thus, the ASBCA is taking longer to resolve cases, creating an increasing number of pending appeals.<sup>11</sup>

Yet, the ASBCA was created to be a faster method for handling contractual disputes, and it offers several types of ADR to expedite the process.<sup>12</sup> When ADR is agreed upon by the parties, proceedings are generally concluded within 120 days of approval by the ASBCA's chairman.<sup>13</sup> Conversely, contested proceedings can take two to four years before reaching a resolution.<sup>14</sup> Although ADR is a free service

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<sup>8</sup> Bruce Mayeaux, *Recent Developments: Administrative Law to Taxation*, 64 LA. B.J. 149, 150 (2016). The ASBCA is the largest Board of Contract Appeals, and it issues the most decisions. *Id.*

<sup>9</sup> ASBCA ROT FY 16, *supra* note 7, at 3.

<sup>10</sup> *Id.*

<sup>11</sup> William M. Pannier, *United States: Recent Data Suggests Contractors are Getting a Fair Shake Before the ASBCA*, HOLLAND & KNIGHT: GOV'T CONTRS. BLOG (Nov. 6, 2015), <http://www.mondaq.com/unitedstates/x/441948/Government+Contracts+Procurement+PP/Recent+Data+Suggests+Contractors+Are+Getting+A+Fair+Shake+Before+The+ASBCA>.

<sup>12</sup> ARMED SERVS. BD. OF CONT. APPEALS, RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, ADDENDUM II: ALTERNATIVE METHODS OF DISPUTE RESOLUTION 1 (Jul. 21, 2014), <http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pg1.pdf#page=1> [hereinafter ASBCA RULES, ADD. II].

<sup>13</sup> *Guidance*, ADR.GOV, <https://www.adr.gov/adrguide/asbcanot.html> (last visited Jan. 17, 2019) [hereinafter *Guidance*]. "All appeals and requests for Alternative Dispute Resolution (ADR) are reviewed by the board chairman as he is "responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals." *Charter*, ARMED SERVICES BOARD OF CONTRACT APPEALS, <http://www.asbca.mil/Charter/charter.html> (last visited Jan. 22, 2019) [hereinafter *Charter*]. *See also* 41 U.S.C.A. § 7105.

<sup>14</sup> Eldon H. Crowell, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 201 (1990). The ASBCA also offers expedited resolution for cases not resolved using ADR. Schaengold & Brams, *supra* note 5, at 325 (citing 41 U.S.C. § 7106(a)). For claims up to \$50,000, the ASBCA offers resolution within 120 days. *Id.* Additionally, for claims up to \$100,000, the ASBCA offers resolution within 180 days. *Id.* However, neither the 120-day nor 180-day resolution timeframe is guaranteed. *Id.* If the claim exceeds the threshold for expedited procedures, resolution can take two to four years. Crowell, *supra*, at 201. Similarly, the Court of Federal Claims takes

that has been shown to save time and money, ASBCA litigants continue to choose litigation over ADR.

It is unclear why ASBCA litigants tend to prefer litigation when ADR has proven to be successful throughout the federal government. For instance, the Federal Aviation Administration (FAA) reported resolving ADR disputes in approximately sixty-seven calendar days.<sup>15</sup> Additionally, from 2001 to 2005, the Department of the Navy alone saved nearly \$3 million in direct expenses and potential interest by using ADR.<sup>16</sup> Moreover, beyond the time and cost savings, ADR helped to maintain and rebuild relationships that otherwise may have been adversely affected by litigation.<sup>17</sup> Furthermore, parties that use ADR, whether voluntary or mandatory, generally prefer ADR to litigation.<sup>18</sup>

This article will briefly discuss a history of the CDA and the ASBCA. It will also examine ASBCA statistics, specifically the number of appeals filed versus the number of requests for mediation. Additionally, the article will discuss observations from state judiciaries that have implemented mandatory ADR. Furthermore, government entities such as the FAA and the U.S. Air Force successfully use ADR. The article will review the structure of their ADR programs, why they have been successful, and what, if any, processes can be applied to the ASBCA to improve its ADR program. It will also outline the advantages and

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approximately two years to resolve a litigated case. Schaengold & Brams, *supra* note 5, at 321.

<sup>15</sup> OFF. OF ATT'Y GEN., REPORT FOR THE PRESIDENT ON THE USE AND RESULTS OF ALTERNATIVE DISPUTE RESOLUTION IN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT 100 (2007), [https://www.adr.gov/pdf/iadrsc\\_press\\_report\\_final.pdf](https://www.adr.gov/pdf/iadrsc_press_report_final.pdf) [hereinafter REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH]. An updated report was issued in 2016; however, the report does not discuss any substantive changes that affect the content of this paper. See OFF. OF ATT'Y GEN., 2016 REPORT ON SIGNIFICANT DEVELOPMENTS IN FEDERAL ALTERNATIVE DISPUTE RESOLUTION (2017), <https://www.adr.gov/pdf/2016-adr-rpt.pdf> [hereinafter REPORT ON SIGNIFICANT DEVELOPMENTS]. The Federal Aviation Administration's (FAA's) ability to complete ADR within sixty-seven days is notable as it is expeditious compared with other agencies. For instance, the ASBCA takes approximately 120 days to resolve a case using ADR, while the Air Force averages approximately ten months. *Guidance*, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Guidance*, *supra* note 13.

<sup>18</sup> Deborah Thompson Eisenberg, *What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 254 (2016). Several state court systems currently mandate ADR prior to litigation. *Id.* See *infra* Section II. B. for further discussion and definitions of voluntary, mandatory, binding, and nonbinding ADR. See *infra* Section III for further discussion of some of these mandatory ADR practices.

disadvantages of ADR, and detail the types of ADR the ASBCA makes available to the parties. Finally, it will look at how the ASBCA is using ADR to resolve complicated disputes, and discuss how mandatory ADR can be implemented to increase efficiency.

## II. History of the ASBCA and CDA

### A. The Armed Services Board of Contract Appeals and the Contracts Disputes Act

The ASBCA was formed in 1949 as a quick, cost-effective method for resolving disputes.<sup>19</sup> Yet, over time, the ASBCA evolved into a more structured process as the demand for due process increased.<sup>20</sup> This led to lengthy resolution timeframes, and the ASBCA still lacked due process mechanisms to manage large, complex claims as it was initially contemplated to have limited discovery and subpoena powers.<sup>21</sup> Thus, Congress sought to remedy this issue when it drafted the CDA in 1978.<sup>22</sup>

In accordance with the CDA, Boards of Contract Appeals are designed to provide “to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes” arising from government contracts.<sup>23</sup> One of the primary objectives of the CDA was “to induce resolution of disputes with the government by negotiation rather than litigation and provide alternative forums for dispute resolution.”<sup>24</sup> Congress also intended that the CDA “equalize the bargaining power of the parties when a dispute exists.”<sup>25</sup> The CDA’s legislative history states that “[t]he contractor should feel that he is able to obtain his ‘day in court’ at the agency boards and *at the same time have saved time and money through the agency board process.*”<sup>26</sup> Thus, the CDA

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<sup>19</sup> S. Rep. No. 95-1118, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5237.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *See generally Id.*

<sup>23</sup> Schaengold & Brams, *supra* note 5, at 283 (quoting S. Rep. No. 95-1118, at 25).

<sup>24</sup> *Great Lakes Educ. Consultants v. Fed. Emergency Mgmt. Agency*, 582 F. Supp. 193, 195 (W.D. Mich. 1984) (citing S. Rep. No. 95-1118, at 33).

<sup>25</sup> S. Rep. No. 95-1118, at 1.

<sup>26</sup> Schaengold & Brams, *supra* note 5, at 283.

sought to create a fair and balanced system to adjudicate disputes between the government and its contractors.<sup>27</sup>

Today, the ASBCA is comprised of twenty-two full-time, independent attorneys who serve as administrative judges appointed by “the Under Secretary of Defense for Acquisition, Technology and Logistics, the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition.”<sup>28</sup> Additionally, in accordance with the CDA, the ASBCA is now required to offer ADR as an option to resolve disputes.<sup>29</sup> Typically, a panel of two to three judges decide cases; however, when using ADR, often one judge decides disputes.<sup>30</sup> Thus, the ASBCA has developed a robust structure with highly qualified judges to ensure a more efficient process.<sup>31</sup>

## B. Background and Statistics on the Armed Services Board of Contract Appeals

Alternative Dispute Resolution is a term generally applied to a group of methods used to resolve disputes informally without going to court, usually under the guidance of an impartial third-party who assists the parties in resolving the dispute.<sup>32</sup> Although dispute resolution has been practiced for centuries, ADR did not gain widespread use until the 1960s.<sup>33</sup> Since that time, the use of ADR has continued to grow, and many court systems now mandate that disputants use ADR prior to attempting to resolve the issue through litigation.<sup>34</sup> From the mid-1990s until today, the ASBCA has aggressively encouraged disputants to use ADR.<sup>35</sup> In 2014,

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<sup>27</sup> S. Rep. No. 95-1118, at 1.

<sup>28</sup> *Charter*, *supra* note 13.

<sup>29</sup> 41 U.S.C. §§ 7101-7109 (2012).

<sup>30</sup> Schaengold & Brams, *supra* note 5, at 285-86.

<sup>31</sup> Prior to serving as judges for the ASBCA, the judges have had diverse legal experience as military judge advocates, Department of Defense (DoD) Senior Executive Service procurement specialists, patent prosecutors, law school professors, and a variety of other distinguished professions. *Biographies*, ARMED SERVICES BOARD OF CONTRACT APPEALS, <http://www.asbca.mil/Bios/biographies.html> (last visited Jan. 23, 2019).

<sup>32</sup> Brad Spangler, *Alternative Dispute Resolution (ADR)*, Beyond Intractability (June 2003), <http://www.beyondintractability.org/essay/adr>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> REPORT ON SIGNIFICANT DEVELOPMENTS, *supra* note 15, at 160.

the ASBCA revised its rules of procedure to incorporate ADR.<sup>36</sup> Yet, although the ASBCA strongly encourages its use,<sup>37</sup> a relatively small number of cases are resolved at the ASBCA using ADR.<sup>38</sup>

The ASBCA conducts both binding and nonbinding ADR. Binding ADR occurs when the parties agree that a decision or ruling rendered by the ASBCA, acting as a third-party neutral, is “final, conclusive, not appealable, and may not be set aside, except for fraud.”<sup>39</sup> Conversely, nonbinding ADR does not obligate the parties to accept the ASBCA’s decision as it is merely an advisory opinion that may be rejected.<sup>40</sup> Additionally, all requests for ADR at the ASBCA must be voluntary. Mandatory ADR for government acquisitions, a procedure requiring that parties attempt to resolve disputes through ADR prior to litigation, is not allowable under the Federal Acquisition Regulation (FAR).<sup>41</sup> Thus,

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<sup>36</sup> INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, NEW DISPUTE RESOLUTION PROGRAMS IN THE FEDERAL GOVERNMENT 2014 UPDATE 3 (2014), <https://www.adr.gov/2014-interagency-report.pdf>. Prior to 2014 the ASBCA used ADR under a supplement to its rules entitled “Notice Regarding Alternative Dispute Methods of Resolution.” *Id.*

<sup>37</sup> The ASBCA has a “highly successful, award winning Alternative Dispute Resolution program,” which strongly encourages parties to resolve their dispute without litigation. Armed Services Board of Contract Appeals, *Welcome*, <https://www.asbca.mil/index.html> (last visited Jan. 29, 2019). Additionally, the ASBCA makes it very easy for the disputants to choose ADR. The ADR process begins with a joint request from the parties. *Id.* Sample agreements are posted on the ASBCA’s website and the ASBCA’s “Notice Regarding Alternative Methods of Dispute Resolution” is prominently posted on its website and provided to litigants when they file an appeal. Armed Services Board of Contract Appeals, *Alternative Dispute Resolution (ADR)*, <https://www.asbca.mil/ADR/adr.html> (last visited Jan 29, 2019). Furthermore, although the amount of focus each judge gives to ADR may vary, all ASBCA judges mention it to the disputants as an option. Telephone Interview with Judge Craig S. Clarke, A.L.J., ASBCA (Feb. 22, 2017).

<sup>38</sup> ASBCA ROT FY 16, *supra* note 7, at 3. Only six percent of ASBCA litigants requested ADR in 2016. *Id.* However, ADR is not appropriate in all cases. It is most appropriate where both sides face some litigation risk and is typically not appropriate or necessary where one side will clearly prevail. *See generally* Nicholas “Chip” P. Retson & Craig S. Clarke, *Overjudicialization of the Contract Disputes Process—Fact or Fiction*, 28 PUB. CONT. L.J. 613 (1999).

<sup>39</sup> ASBCA RULES, ADD. II, *supra* note 12, at 2.

<sup>40</sup> *Id.*

<sup>41</sup> Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11.2 CARDOZO J. CONFLICT RESOL. 479, 481 (2010). The FAR, the primary regulation for federally purchased services and supplies, states, “[A]n essential element of ADR is [a] voluntary election by both parties to participate in the ADR process.” FAR Part 33.214(a)(2) (2014). Although the FAR does not explicitly speak to mandatory ADR, it can be inferred through its explicit statement that ADR must be voluntary. *Id.*

the ASBCA requires that the parties “jointly request ADR procedures,” and that the ASBCA chairman approve the request prior to entering into ADR proceedings.<sup>42</sup>

Despite the fact that there were nearly 1,100 appeals pending before the ASBCA in FY 2016, parties requested ADR only forty-one times out of the 654 appeals filed that year.<sup>43</sup> Of the forty-two ADR requests that were concluded, including requests from previous years, three were for binding ADR and thirty-four were requests for nonbinding ADR.<sup>44</sup> Additionally, three nonbinding requests were unsuccessful and two were withdrawn.<sup>45</sup>

The ASBCA has recorded statistics on ADR success rates since the late 1980s. Nonbinding ADR has had a high success rate.<sup>46</sup> Since 1987, the success rate has been consistently over ninety percent, with the exception of FY 2016, which had an eighty-six percent success rate.<sup>47</sup> Furthermore, only five years have been below ninety-five percent.<sup>48</sup> Interestingly, both FY 2013 and FY 2014 had 100 percent success rates out of 145 cases in the two years combined.<sup>49</sup> These statistics show a thirty-year track record of success in using ADR to resolve cases without going to trial. Implementing a mandatory ADR process in the ASBCA may contribute to even more savings in DoD time and money, as has been in the case in several states.

### III. Mandatory ADR Observations

In recent years, several states have instituted mandatory ADR programs for both civil and criminal matters.<sup>50</sup> Specifically, these state court systems require that disputants use ADR for civil issues such as

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<sup>42</sup> ASBCA RULES, ADD. II, *supra* note 12, at 1.

<sup>43</sup> ASBCA ROT FY 16, *supra* note 7, at 3.

<sup>44</sup> *Id.* The concluded requests were not limited to requests made in fiscal year 2016. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> ARMED SERVS. BOARD OF CONT. APPEALS, A GUIDE TO ADR ACTIVITY AT THE ASBCA (2016), <http://www.asbca.mil/ADR/ADR%20Statistics%20table%20Letterhead%2020161020.pdf>.

<sup>48</sup> *Id.* Statistics for fiscal years 1987-1999 are combined in the ASBCA historical data and show a ninety-seven percent success rate. *Id.* Because those years are combined, it is unclear if any individual year within that timeframe was at or below ninety percent.

<sup>49</sup> *Id.*

<sup>50</sup> See Eisenberg, *supra* note 18, at 245.

divorce proceedings, child welfare, and small claims.<sup>51</sup> There has been considerable research to study some of the mandatory ADR programs and its effectiveness.<sup>52</sup> Although a state court system does not function like the ASBCA, and the types of cases that a state court reviews differ from contracts, similarities such as case complexity and high contentiousness make the ADR research valuable tool in determining whether the ASBCA could be successful in requiring mandatory ADR.

In 2014, the Maryland Judiciary completed a study on the use of ADR.<sup>53</sup> The Maryland study is unique among current ADR research in that it examined the impact of using ADR to resolve a dispute as a distinct factor, separate from the effect of the ultimate resolution in the case.<sup>54</sup> Maryland has ADR processes integrated statewide throughout its court system to include the district, circuit, appellate, and orphan's courts.<sup>55</sup> The study was a cost-benefit analysis of its ADR program using information compiled from July 2010 to January 2013.<sup>56</sup> The study compared disputants who resolved their cases through litigation with those who used ADR.<sup>57</sup> Most of the ADR cases were resolved

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<sup>51</sup> Eisenberg, *supra* note 18, at 254. Some states also use ADR in criminal cases as a restorative justice process in the form of mediation between the victim and offender. *Id.*

<sup>52</sup> See Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons From the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2005). Empirical data was gathered from Indiana, California, Missouri, and Minnesota. *Id.* at 406-407. Overall, the judges' and litigants' perceptions regarding the use of ADR in their respective court systems have been positive. *Id.* Specifically, they felt that it saved time without adding undue cost, that mediation agreements had a higher chance of being maintained, and that parties who participate in mediation had more realistic expectations about case resolution and were more likely to acknowledge their responsibility in the conflict. *Id.* at 406.

<sup>53</sup> Eisenberg, *supra* note 18, at 255 (citing *Executive Summary*, STATEWIDE EVALUATION OF ADR IN MD., <https://sites.google.com/a/marylandaddrresearch.org/new/landscape/executive-summary> (last visited Feb. 8, 2019)).

<sup>54</sup> Eisenberg, *supra* note 18, at 256 (citing *Articles & Publications*, STATEWIDE EVALUATION OF ADR IN MD., <https://sites.google.com/a/marylandaddrresearch.org/new/publications> (last visited Feb. 8, 2019)).

<sup>55</sup> *Executive Summary*, STATEWIDE EVALUATION OF ADR IN MD., *supra* note 53.

<sup>56</sup> *ADR Landscape*, STATEWIDE EVALUATION OF ADR IN MD., <https://sites.google.com/a/marylandaddrresearch.org/new/landscape> (last visited Feb. 8, 2019).

<sup>57</sup> Eisenberg, *supra* note 18, at 255.

through mediation; however, a few were resolved through a settlement conference, where an attorney facilitated resolution.<sup>58</sup>

The study found that when ADR was used, the parties were more satisfied with the system than were those who reached agreements without ADR.<sup>59</sup> Additionally, those parties that used ADR were more likely to acknowledge their responsibility in causing the dispute, and more likely to feel that all of the disputed issues were resolved.<sup>60</sup> Overall, the results of the Maryland study “suggests that there is something significant about participating in the mediation or ADR process itself that generates greater party satisfaction and confidence in the judiciary, separate from the outcome of reaching a settlement on their own.”<sup>61</sup> Party satisfaction and confidence in the judiciary are both important factors to be considered when making broad changes to any court system. The positive results from the Maryland study demonstrate how litigation at the ASBCA can be improved to more closely align with the CDA’s intent to provide an informal, expeditious method for dispute resolution. There are already some indicators within the government that ADR use can be a successful tool: the FAA and U.S. Air Force experiences with ADR.

#### IV. Success in Government Use of ADR

##### A. Federal Aviation Administration Office of Dispute Resolution

The Federal Aviation Administration Office of Dispute Resolution for Acquisition (ODRA) is unique among federal agencies as it is exempt from the FAR and the CDA.<sup>62</sup> Instead, the “ODRA is the sole, statutorily designated tribunal for all contract disputes and bid protests under the FAA’s Acquisition Management System.”<sup>63</sup> The FAA’s policy for

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 256-257 (citing *Articles & Publications*, STATEWIDE EVALUATION OF ADR IN MD., *supra* note 54).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 257.

<sup>62</sup> C. Scott Maravilla et al., *How and Why the FAA Employs Alternative Dispute Resolution*, 49 *PROCUREMENT LAW*. 13, 13 (2014). The FAA is exempt from the FAR is important because, as such, the FAA is not bound by any regulation, but—through policy—promulgates its own procurement rules, giving the FAA full autonomy of its procurement processes. *Id.*

<sup>63</sup> *Office of Dispute Resolution for Acquisition (ODRA)*, FEDERAL AVIATION ADMINISTRATION, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/adjudication/agc70/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/) (last visited Feb. 8, 2019) [hereinafter FAA].

resolving disputes is “to use voluntary ADR to the maximum extent practicable.”<sup>64</sup>

Since 1998, more than nine hundred ODRA filings have been made.<sup>65</sup> Although the use of ADR is voluntary, the ODRA “expects parties to ‘make a good faith effort to explore ADR possibilities . . . and to employ ADR in every appropriate case.’”<sup>66</sup> Thus, “approximately ninety percent of all contract disputes . . . have been resolved in the ADR process without an adjudicated decision.”<sup>67</sup> In fact, ADR is often used even when it is not likely to resolve a case in its entirety, as the mere process of negotiating an ADR agreement can often expedite a case.<sup>68</sup> Specifically, the voluntary exchange of information in ADR often leads to resolution of many of the underlying issues, resulting in “a more streamlined adjudication of the remaining case.”<sup>69</sup>

The ODRA initiates the ADR discussion during an “initial status conference, which generally is held within five business days of a . . . contract dispute filing.”<sup>70</sup> “Of the more than 124 pre-dispute matters handled by the ODRA [from 1998 to 2014], only three percent have required adjudication.”<sup>71</sup> Additionally, contract disputes at the ODRA utilizing ADR take approximately eighty-six calendar days to complete, while adjudicated decisions take approximately 162 calendar days.<sup>72</sup>

Subsequently, the ODRA has found that parties that utilize ADR note that ODRA meets its “goals of providing fair, fast, and efficient dispute resolution.”<sup>73</sup> Furthermore, the ODRA has observed that by

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<sup>64</sup> Maravilla et al., *supra* note 62, at 13 (citing 14 C.F.R. § 17.35). Of note, the ODRA utilizes ASBCA judges to serve as ADR neutrals and to adjudicate contract claims. Anthony N. Palladino et al., *The FAA ODRA: A Tenth Anniversary Report*, 43 PROCUREMENT. LAW. 1, 13 (2008).

<sup>65</sup> FEDERAL AVIATION ADMINISTRATION, *supra* note 63. The FAA website only provides case management statistics through December 31, 2014. *Id.*

<sup>66</sup> Palladino et al., *supra* note 64, at 13. The ODRA strongly encourages ADR settlement agreements in all cases, but places particular emphasis on its use where there is significant litigation risk. *Id.* at 16.

<sup>67</sup> FEDERAL AVIATION ADMINISTRATION, *supra* note 63.

<sup>68</sup> Palladino et al., *supra* note 64, at 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> FAA, *supra* note 63.

<sup>72</sup> Palladino et al., *supra* note 64, at 11.

<sup>73</sup> *Id.* The FAA has been recognized for its achievements in contracting by both the American Bar Association Section of Public Contract Law and the Under-Secretary-

working with each other through the ADR process, the FAA and its contractors often forge stronger relationships.<sup>74</sup> Although the ODRA processes are not mandatory, an “attempt at ADR is made in virtually all ODRA cases” because the “process does not rely on the parties to initiate ADR,” and the ODRA “expects parties to ‘make a good faith effort to explore ADR possibilities.’”<sup>75</sup> Thus, the ODRA’s widespread use of ADR on large FAA contracts shows what might be gained by mandating ADR at the ASBCA. The Air Force’s experience with ADR is similarly positive.

#### B. The Air Force ADR Program

In 2002, the Air Force created the Air Force ADR program—ADR First.<sup>76</sup> Even prior to ADR First, the Air Force had great success using ADR. In late 1999 or early 2000, the Air Force used ADR to resolve a claim for \$785 million that had been in dispute with Boeing for over ten years.<sup>77</sup> Additionally, in 2001, the Air Force saved \$23 million by using ADR to resolve a dispute over B-1 bomber parts.<sup>78</sup> That year, the Air Force reportedly “save[d] about [\$]100 million . . . with a ninety-eight percent success rate” by using ADR.<sup>79</sup> From FY 2002 through FY 2006, the Air Force reported an annual savings of approximately \$57.6 million in liability.<sup>80</sup> By 2012, the Air Force estimated its savings at nearly \$275 million over the life of the ADR First program.<sup>81</sup> Today, the program continues to boast savings in excess of \$1 billion and a ninety-three percent success rate.<sup>82</sup>

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General of the United Nations. FAA, *supra* note 63. It has also won the Office of Management and Budget’s Outstanding ADR Program Award. *Id.*

<sup>74</sup> Palladino et al., *supra* note 64, at 15.

<sup>75</sup> *Id.* at 13 (quoting 14 C.F.R. § 17.31(b)).

<sup>76</sup> CPR Institute for Dispute Resolution, *Moving Up the Chart: Air Force Elevates ADR in Structure—and With New Programs*, 20 ALTERNATIVES TO HIGH COST LITIG. 113, 113 (2002).

<sup>77</sup> *Reports to the President*, ADR.GOV, <https://www.adr.gov/presi-report.htm> (last visited Jan. 24, 2019).

<sup>78</sup> *Id.* at 114. The article does not expound on the reasons for the cost savings nor are reasons otherwise publically available. Therefore, it is unclear whether the savings are due to anticipated litigation costs or the result of a better negotiation.

<sup>79</sup> *Id.* at 113.

<sup>80</sup> REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 10.

<sup>81</sup> REPORT ON THE AIR FORCE ADR PROGRAM, *supra* note 15, at 1.

<sup>82</sup> *Id.*

The Air Force has been innovative in the implementation of its ADR program. The Air Force has reaped benefits by implementing ADR agreements with twenty-five of its top contractors and significantly reducing the time to resolve large disputes.<sup>83</sup> Specifically, “large disputes that took an average of five years to resolve through litigation are now being resolved by the use of ADR in an average of just over twelve months.”<sup>84</sup> Furthermore, the Air Force offers the use of ADR in over eighty percent of its contractual disputes and considers ADR to be the default resolution method.<sup>85</sup> “Cost savings from the [Air Force’s] use of ADR flows primarily from reduced cycle time, and include years of lawyer and staff effort, direct expenses of litigation such as witness fees, travel, and document production, and Contract Disputes Act interest on contractor claims.”<sup>86</sup> The success the Air Force has had in implementing its ADR program shows that even large-scale disputes with the nation’s top defense contractors can be efficiently resolved at tremendous time and cost savings. The use of ADR at the ASBCA can be equally effective in resolving similar disputes.

## V. Alternative Dispute Resolution at the Armed Services Board of Contract Appeals

### A. Types of ADR Offered by the ASBCA

The ASBCA offers several different types of ADR methods. The two most common are mediation and summary trial with binding decision. However, other agreed-upon methods may be utilized.<sup>87</sup>

First, mediation is a nonbinding method of ADR. A third-party neutral who assists the parties in the settlement process usually conducts mediations.<sup>88</sup> At the ASBCA, an administrative judge serves

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<sup>83</sup> REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 155. The contractors signed voluntary pledges to engage in ADR prior to litigation. See ALT. DISP. RESOL., CORP.-LEVEL ADR INDUSTRY PLEDGES WITH AF (Nov. 3. 2010), <http://www.adr.af.mil/Resources/Fact-Sheets/Display/Article/421755/corporate-level-adr-industry-pledges-with-af>.

<sup>84</sup> REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 155.

<sup>85</sup> *Id.* at 28.

<sup>86</sup> *Id.*

<sup>87</sup> ASBCA RULES, ADD. II, *supra* note 12, at 2.

<sup>88</sup> *Id.*

as the neutral.<sup>89</sup> The administrative judge has no decision-making authority; however, he may make nonbinding recommendations as to resolution of the dispute.<sup>90</sup>

Mediation is a widely used method because it is informal, and can be tailored to meet the disputants' needs.<sup>91</sup> There are two types of mediation—facilitative and evaluative.<sup>92</sup> During facilitative mediation the neutral “facilitates discussions between the parties and does not evaluate or opine on the merits of the parties' respective positions.”<sup>93</sup> Evaluative mediation differs in that the neutral shares his views of the merits of the parties' respective positions and makes suggestions for resolution.<sup>94</sup>

Another popular method of ADR at the ASBCA is the binding summary trial. The ASBCA judge hears argument from both parties and renders a binding decision that may not be appealed in this informal, expedited process.<sup>95</sup> It resembles a trial, but the judge's decision “will not contain any findings of fact or conclusions of law.”<sup>96</sup>

Although not frequently used, the ASBCA may also conduct mini-trials.<sup>97</sup> A mini-trial is a “highly flexible, expedited, but structured, procedure.”<sup>98</sup> This method relies on the participation of senior principals from both parties and a third-party neutral facilitates.<sup>99</sup> In a mini-trial, the parties agree on the manner of presentation of the case to a panel

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<sup>89</sup> *Id.* When choosing mediation, the parties must “agree not to 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 concerning his/her thoughts or impressions.” *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> U.S. DEP'T AIR FORCE OFF. GEN. COUNS. CONFLICT RESOL. DIVISION, ALTERNATIVE DISPUTE RESOLUTION DESKBOOK FOR ACQUISITION PROFESSIONALS 7 (May 13, 2016), <https://www.adr.af.mil/Portals/82/documents/AFD-160520-024.pdf?ver=2016-08-01-121743-293> [hereinafter ADR Deskbook].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The mediator's role is not to “impose a settlement upon the parties,” but instead “to assist the parties in fashioning a mutually satisfactory solution to resolve the issue in controversy.” *Id.*

<sup>95</sup> ASBCA RULES, ADD. II, *supra* note 12, at 2.

<sup>96</sup> ADR DESKBOOK, *supra* note 91, at 9.

<sup>97</sup> Reba Ann Page & Paul Williams, *The ASBCA's Path to the “Mega ADR” in Computer Sciences Corporation*, 49 PROCUREMENT L. 1, 18 (2013).

<sup>98</sup> *Id.*

<sup>99</sup> ADR DESKBOOK, *supra* note 91, at 8.

comprised of a senior principal with decision-making authority from each side and the third-party neutral.<sup>100</sup> Additionally, there is limited discovery, and each party may present its case in an abbreviated hearing.<sup>101</sup> Following the hearing, the panel meets to discuss resolution.<sup>102</sup>

The disputants may also agree on other informal methods of ADR to resolve the dispute.<sup>103</sup> These methods may be binding or nonbinding and may also include hybrid methods.<sup>104</sup> The key factor is that they “are structured and tailored to suit the requirements of the individual case.”<sup>105</sup>

Some of the popular hybrid methods include mediation followed by binding summary trial, and mediation followed by binding summary decision.<sup>106</sup> Both of these methods begin with evaluative mediation, but they differ in how they proceed if the mediation fails.<sup>107</sup> Specifically, if the mediation is unsuccessful where parties choose mediation followed by a summary decision, the judge then issues a binding decision based solely on the information presented during the mediation.<sup>108</sup> However, parties that agree to mediation followed by summary trial are allowed to present additional evidence that the judge considers along with information presented during the mediation.<sup>109</sup> The ASBCA’s flexibility in using a variety of ADR methods, including hybrids, makes it well suited to conduct ADR on a wide-scale basis because it has several tools from which to choose.

## B. Mega Alternative Dispute Resolution

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* The case is presented as either “a summary or abbreviated hearing with or without oral testimony.” *Id.*

<sup>102</sup> *Id.* The neutral may also participate in this session as an “advisor, mediator or fact-finder” if allowed under the terms of the ADR agreement. *Id.*

<sup>103</sup> ASBCA RULES, ADD. II, *supra* note 12, at 3.

<sup>104</sup> *Id.* at 2. The maturation of ADR over the past twenty years has enabled the ASBCA to be more creative in its use of ADR, allowing the ASBCA to use tailored processes that can address a wide variety of issues. *See* 2016 REPORT ON SIGNIFICANT DEVELOPMENTS, *supra* note 15, at 1.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Cases resolved using binding ADR have no precedential value. *Id.*

<sup>107</sup> ADR DESKBOOK, *supra* note 91, at 9.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Over the years, the ASBCA has used hybrid ADR techniques to resolve extremely complicated, high-value cases. The ASBCA provided ADR services in two intricate cases—Boston’s Big Dig (Big Dig) and Computer Sciences Corporation (CSC). Both cases involved multibillion-dollar claims and some practitioners have labeled them as *megaprojects* or *Mega ADR* due to their large scale and complexity.<sup>110</sup> It is useful to explore these cases to understand why implementing mandatory ADR in the ASBCA makes sense.

### 1. *The Big Dig*

The ASBCA is often requested to assist entities outside of the Armed Services to resolve disputes. The Big Dig was a major construction project that began in the early 1990s to reroute the Central Artery Interstate through the middle of Boston.<sup>111</sup> The project took an incredible fifteen years and \$15 billion.<sup>112</sup> Additionally, there were twenty-five thousand disputes and claims arising from this project.<sup>113</sup> Twenty-nine claims valued at approximately \$175 million went to a dispute resolution board, and approximately seventy-five percent of the recommendations were accepted or led to settlement.<sup>114</sup> The ASBCA provided judges to sit on mediation panels composed of two to three mediators who guided the parties through the evaluative mediation process.<sup>115</sup> “Overall, the structured negotiation/mediation program closed out disputes and claims with an aggregate claimed value of more than 500 million dollars.”<sup>116</sup>

Requesting assistance from the ASBCA made sense because there were strong similarities between state and federal contract terms for public construction projects.<sup>117</sup> Although the Big Dig was not a claim brought

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<sup>110</sup> See generally Kurt L. Dettman et al., *Resolving Megaproject Claims: Lessons from Boston's "Big Dig,"* 30 CONSTRUCTION LAW. 5 (2010); Page & Williams, *supra* note 97.

<sup>111</sup> Dettman et al., *supra* note 110, at 5.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 13.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 10. The ASBCA suggested the use of co-mediators because of the parties’ agreement to use evaluative mediation as well as to alleviate any public interest concerns. *Id.* at 12.

<sup>116</sup> *Id.* at 14.

<sup>117</sup> *Id.* at 5, n. 35. Over fifty percent of the funding for the Big Dig came from the federal government through a Federal Highway Administration grant from the U.S.

before the ASBCA, it was analogous to the large claims that the ASBCA reviews. Specifically, the military enters into extremely complex, large-scale contracts for planes, submarines, satellites, missiles, and other intricate systems. Oftentimes, these projects involve multiple prime and subcontractors, and they frequently last for several years at significant cost. Thus, the ASBCA's involvement in the resolution of the issues in this case demonstrates the skill of the ASBCA judges at resolving large-scale, complex disputes with ADR techniques, and that mandatory ADR can work.

## 2. *Computer Sciences Corporation*

The ASBCA also helped resolve a complex, multibillion-dollar dispute between Computer Sciences Corporation (CSC) and the U.S. Army. In 2007, the Army and CSC entered into litigation over a contract for an update to the Army's logistics management system.<sup>118</sup> Initially, CSC claimed it was due \$858 million, but the claim increased as time progressed.<sup>119</sup> The Army submitted counter claims, and by 2010, fourteen appeals had been docketed.<sup>120</sup> The total amount in dispute reached over \$2 billion.<sup>121</sup> It had been three years since the original claim was filed, with no end in sight.<sup>122</sup> To make matters worse, approximately \$60,000 in potential CDA-mandated interest was accruing per day.<sup>123</sup> Because both the Army and CSC faced

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Department of Transportation. *Id.* U.S. Department of Transportation acquisitions are subject to the FAR. *See* U.S. DEP'T OF TRANSP. TRANSPORTATION ACQUISITION REGULATION, <https://www.transportation.gov/administrations/assistant-secretary-administration/transportation-acquisition-regulation-tar> (last visited Jan. 29, 2019).

<sup>118</sup> Page & Williams, *supra* note 97, at 21.

<sup>119</sup> *Id.* The parties entered into the contract in 1999. *Id.* at 20. In 2003, the government requested corrective action due to delays in Computer Sciences Corporation (CSC) deploying the system. *Id.* at 21. The contract was restructured in 2005, but "[i]n 2006, CSC filed fourteen requests for equitable adjustment (REAs)," which were denied by the contracting officer in 2007. *Id.* Consequently, CSC filed appeals at the ASBCA. *Id.* The amount of the claim grew after the government filed a counterclaim. *Id.* Computer Sciences Corporation subsequently stated that "it intended to submit an additional REA and would seek in excess of 1.2 billion dollars for the government's alleged breach of contract." *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* By 2010 a trial to determine entitlement only had been set for 2011. *Id.*

<sup>123</sup> *Id.* at 22.

significant litigation risks, the Army and CSC entered into ADR at the ASBCA.<sup>124</sup>

After consultation with the board, the parties agreed to use a nonbinding, evaluative mediation followed by mini-trial.<sup>125</sup> They also agreed to attempt to resolve both docketed and non-docketed matters.<sup>126</sup> ADR offered the parties the flexibility to include matters that had not been docketed.<sup>127</sup> The parties established a schedule for joint and private mediation sessions, and set time aside for a final session to conclude negotiations and develop a final agreement.<sup>128</sup> After engaging in protracted litigation for four years, ultimately, the parties were able to attain resolution using ADR.<sup>129</sup> Additionally, the parties were able to maintain their working relationship and, as part of the mediation, agreed to a \$1 billion follow-on contract.<sup>130</sup> Had the ASBCA required mandatory ADR, it would have saved the parties a significant amount of time and money. The success of the CSC case can translate across the spectrum of

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Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim . . . until the date of payment of the claim. Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify . . . . The rate shall be determined by the Secretary of the Treasury taking into consideration current private commercial rates of interest for new loans maturing in approximately five years.

41 U.S.C § 7109(a)-(b).

<sup>124</sup> Page & Williams, *supra* note 97, at 22. Alternative Dispute Resolution is often not appropriate until litigation risk has been assessed. Retson & Clarke, *supra* note 38, at 632. The DoD Inspector General investigation into the appropriateness of ADR for the dispute between the Army and CSC identified significant litigation risk for the government. Page & Williams, *supra* note 97, at 17. The attorneys for CSC came to a similar conclusion. *Id.* at 22. Thus, the parties agreed to enter into ADR. *Id.*

<sup>125</sup> Page & Williams, *supra* note 97, at 22.

<sup>126</sup> *Id.* at 22, 25.

<sup>127</sup> *Id.* at 22. The ASBCA judges cannot grant remedies for non-docketed matters using litigation as they do not have jurisdiction. *Id.*

<sup>128</sup> *Id.* at 25.

<sup>129</sup> *Id.*

<sup>130</sup> Page & Williams, *supra* note 97, at 22, 25.

Under the terms of the settlement, [CSC] received 277 million dollars in cash and a five-year extension (four base years plus one option year) with an estimated value of one billion dollars to continue to support and expand the capabilities of the systems covered by the original contract [which was] scheduled to expire in December 2011.

*Id.* at 25 (internal citations omitted).

appeals, and the ASBCA's expertise in ADR and adaptability in approach to the CSC case highlights its suitability for implementation of mandatory ADR.

## VI. Implementing Mandatory ADR at the ASBCA

Although ADR has been in practice for many years, parties and attorneys are still accustomed to litigation to resolve contract disputes. In some situations, initiating mediation may be perceived as a sign of weakness.<sup>131</sup> Additionally, some may feel that they would reveal their hand if forced to use ADR, or that ADR is a waste of time and money.<sup>132</sup> Because of this, many do not choose ADR. However, their fears are largely unfounded.

Parties are generally happier with ADR than without, even in cases where settlement was not reached. The studies discussed earlier in this article prove that ADR is relevant and useful at the ASBCA. ADR is a very useful tool because the government and its contractors want to preserve, and maybe even enhance, their working relationships. The contractor and government relationship is symbiotic, mainly because the parties rely on each other and draw on the other's strengths. Success stories like the FAA and the Air Force show that tremendous cost and time-savings can be achieved by conducting ADR. Additionally, cases like the Big Dig and CSC demonstrate that ASBCA judges have the capability and the acumen to successfully conduct ADR in large-scale matters.

Although today the ASBCA notifies all litigants of the option to conduct ADR, only a small portion choose it despite the fact that ADR has proven to be successful. Thus, in order for ADR to be the most beneficial for the ASBCA, nonbinding ADR must be made mandatory. One of the main benefits in successful implementation of mandatory ADR is ASBCA judges continuing to provide cost-free, neutral services to disputants.<sup>133</sup> However, binding ADR would still function in the same manner as it currently does.<sup>134</sup> Only if parties

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<sup>131</sup> Quek, *supra* note 41, at 483.

<sup>132</sup> See generally Crowell, *supra* note 14, at 201.

<sup>133</sup> In a state court, neutrals often charge for mandatory ADR services. Frank E. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 887 (1996).

<sup>134</sup> "Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines." FAR Part 33.214(g). For many government entities the head of the

cannot agree might a judge direct them toward a specific method, which, in complicated cases, may result in a hybrid, nonbinding ADR method.

Although litigants at the ASBCA are often very savvy, some may have the impression that using ADR is not beneficial because they must compromise and cannot “win.”<sup>135</sup> However, most view the ASBCA as a reputable forum, trust its decision-making authority and comply with its rules.<sup>136</sup> Thus, although they may not voluntarily agree to use ADR, most litigants will acquiesce to mandatory ADR and many may subsequently learn to appreciate it.

Additionally, in a state court system, the parties are frequently forced into mediation without a choice of ADR method.<sup>137</sup> However, with ADR at the ASBCA, the parties and the judges would have several options from which to choose. By allowing the parties to select the type of ADR method they use, the parties would take ownership of ADR because they would have more of a say in the process.

Some states impose financial penalties upon parties that do not actively participate in court-mandated mediation.<sup>138</sup> However, a financial penalty is not suggested as a method of controlling non-compliance at the ASBCA, as the intent is not to dissuade disputants from filing appeals. A more practical approach would be for the ASBCA to refuse to docket the cases of non-compliant litigants and force them to litigate their case at the Court of Federal Claims—another forum with jurisdiction to hear their appeal.<sup>139</sup>

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respective agency must be able to reject the arbitrator’s decision before it becomes binding. *See generally* ADR DESKBOOK, *supra* note 91, at 7. Litigants should not be required to submit to binding ADR as this will be a major deterrent and would deny disputants their additional right to file suit in the Court of Federal Claims. *See* Major Patrick E. Tolan, Jr., *The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes*, 40 A.F. L. REV. 89, 93 (1996).

<sup>135</sup> Spangler, *supra* note 32.

<sup>136</sup> *See generally* David A. Churchill et al., *Report of the Federal Contract Claim and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals*, 16 PUB. CONT. L.J. 161 (1986).

<sup>137</sup> *See generally* McAdoo & Welsh, *supra* note 52.

<sup>138</sup> *See generally* Paul C. Williams, *Court-Annexed Arbitration and Nevada’s Unique Penalty Provisions: Introducing an Arbitrator’s Findings at a Trial De Novo*, 11 NEV. L.J. 282 (2010).

<sup>139</sup> The Court of Federal Claims is often more expensive than the ASBCA and it does not provide free neutral services; thus, it is unlikely that litigants will find it to be a more attractive option. *See* Schaengold & Brams, *supra* note 5, at 286.

Another suggestion for implementation is to allow the ASBCA judge discretion to decide that a particular case should not require ADR, as is currently done in many state courts.<sup>140</sup> Along with this provision, litigants will have an opportunity to opt out of ADR by filing a motion with the judge.<sup>141</sup> Although the judge should only grant such motions in cases where ADR is not appropriate, the judge will be allowed to give deference to individual disputants' situations.<sup>142</sup> This is particularly important because small business owners may not be able to afford both ADR and a trial if ADR is unsuccessful.<sup>143</sup>

The biggest hurdle in implementing mandatory ADR at the ASBCA is the FAR. Currently, FAR Part 33.214(a) states that an essential element of ADR is "voluntary election by both parties to participate in the ADR process."<sup>144</sup> Thus, mandatory ADR is prohibited. Nevertheless, the FAR regularly undergoes revisions based on the ever-changing contracting world.<sup>145</sup> Therefore, the FAR should be updated to allow the ASBCA to mandate ADR.

## VII. Conclusion

The ASBCA would be more efficient if it employed mandatory ADR prior to litigation. Both civilian courts and litigants realize time

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<sup>140</sup> Sander et al., *supra* note 133, at 866.

<sup>141</sup> *Id.* at 887.

<sup>142</sup> Alternative Dispute Resolution may not be appropriate where there is a case of first impression or other question of law that requires a published decision. Tolan, *supra* note 134, at 99. It also may not be appropriate where there is clearly no chance of successful resolution, or where a judge foresees that ADR may be extremely cost-prohibitive. *See Id.* at 99-100. Additionally, ADR is inappropriate where there is "no bona-fide dispute and the other's case is wholly without merit." *Id.* at 101. Thus, the ASBCA judge must assess the litigation risk for both sides prior to requiring the parties to engage in ADR. *Id.*

<sup>143</sup> Although the ASBCA's services are free, ADR requires active participation that results in time away from the business. This may result in lost opportunity costs. Additionally, although the disputant may appear pro se, there may be lawyer fees, should he decide to retain one. Schaengold & Brams, *supra* note 5, at 313.

<sup>144</sup> FAR Part 33.214(a).

<sup>145</sup> The FAR "is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget." FAR, *supra* note 41, Foreword.

and cost savings from mandatory ADR. The current backlog of cases cannot be allowed to continue to increase as the ASBCA takes longer and longer to decide a case. The optimal solution to reduce the backlog is mandatory ADR. Mega ADR examples such as the Big Dig and CSC demonstrate that the ASBCA is successful at effectively resolving even extremely complex, multibillion-dollar contracts using ADR. Although complicated cases that are unsuccessful in ADR may still take significant time to be adjudicated, they can be resolved more expeditiously because both sides have focused the issues prior to trial. It is time to require mandatory ADR so that the ASBCA more closely meets the intent of the CDA by providing the most efficient resolution times.