The ASBCA's Path to the Mega ADR in Computer Sciences Corporation

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whistleblower complaint regarding the use of ADR to reach settlement in TennTom Constructors, Inc., ENG BCA No. 5128 (TennTom).\(^3\) The appeal arose from a $270 million fixed-price construction contract between the US Army Corps of Engineers (COE), Nashville District, and the joint venture of Morrison-Knudsen Company, Inc., Brown & Root Inc., and Martin K. Eby Construction Co. for the construction of an 11-mile segment of the Tennessee Tombigbee Waterway in northern Mississippi. The appeal, which was docketed in 1984,\(^4\) involved a $63 million claim for a differing site condition and alleged that soils were far less amenable to excavation than depicted in the underlying contract.\(^5\) It arose about the time the COE embarked on an ADR pilot program under the farsighted leadership of Lester Edelman, then chief counsel for the COE. With permission of the Corps of Engineers Board, before which the appeal was docketed, litigation was stayed while the parties attempted to resolve the matter through the use of a minitrial. The COE elevated the dispute from the district to the next higher command level for decision making, with the objective of obtaining an impartial business perspective. In June 1985, with the assistance of Professor Ralph Nash as a privately-hired neutral, the TennTom appeal was settled for $17.2 million after four days of proceedings and two additional days of negotiations spread out over a two-week period.\(^6\)

Despite (or perhaps because of) this success obtained through confidential negotiations, a subsequent audit and anonymous complaint to the DoDIG led to a thorough investigation into the use of ADR that garnered attention from the national media.\(^7\) The COE's ADR program, and, arguably, all federal government ADR initiatives, grew after the DoDIG report found that the TennTom settlement was not objectionable despite the fact that (1) an audit beforehand would have been prudent, and (2) the parties had engaged in controversial, confidential settlement discussions. The DoDIG indicated that the government faced sufficient litigation risk for the contractor's claim to warrant resolution, and that the settlement amount appeared acceptable. Overall, the report concluded that the "use of the mini-trial procedure appears to have been valid and in the best interests of the government." Although the DoDIG report concluded that the minitrial was an efficient and cost-effective method for settling federal procurement disputes, it recommended that future use of the relatively new procedure be carefully considered on a case-by-case basis.\(^8\)

Today we take for granted that ADR procedures are available to address federal procurement disputes, and such procedures are generally used on a voluntary and consensual basis within most agencies. The CDA was modified by the ADRA specifically to permit "a contractor and a contracting officer [to] use any alternative means of dispute resolution" set forth in ADRA, "or other mutually agreeable procedures, for resolving claims."\(^9\) The FAR implements the use of ADR in several provisions. Among these is FAR 33.214 Alternative Dispute Resolution (ADR), which at paragraph (a) states that the "objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy." These procedures may be used at any stage of contract disagreement, consistent with the CDA's progression of encouraging resolution beginning at the lowest possible level and encompassing disputes, claims, and appeals.\(^10\) FAR 33.214 (c) expansively provides that "ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy" and that "ADR procedures may be applied to all or a portion of the claim." These provisions echo the mandate of the CDA for the boards of contract appeals "to the fullest extent practicable [to] provide informal, expeditious, and inexpensive resolution of disputes."\(^11\) Indeed the purpose of the CDA is "to help to induce resolution of more contract disputes by negotiation prior to litigation."\(^12\) Federal agencies "are encouraged to use ADR procedures to the maximum extent practicable" in appropriate circumstances.\(^13\) The FAR protects the "confidentiality of ADR proceedings consistent with 5 U.S.C. § 574."\(^14\)

The ASBCA's ADR Program

The ASBCA has a robust ADR program with an enviable success rate for the resolution of issues on appeal as well as undocketed disputes raised by the parties, and it is often used to obtain a global resolution of all matters. As noted in the board's 2012 annual report,\(^15\) there were 680 appeals pending before the ASBCA as of October 1, 2012. During fiscal year (FY) 2012, 24 requests were made for the board to provide ADR services covering 47 appeals and two undocketed disputes; nonbinding procedures were requested each time. At the writing of the FY 2012 report, eight requests were pending. Of the 27 requests concluded during FY 2012, three requests for three matters were withdrawn, ADR was unsuccessful in three requests covering three matters, and 21 requests covering 57 matters, including six undocketed disputes, were successfully resolved by ASBCA ADR procedures.\(^16\)

A compilation of internal ASBCA statistics shows that the board's ADR program has been a long-term success. Beginning with data accumulated from FY 1987-1999 through FY 2012, there have been a total of 1,726 appeals docketed before the board that were processed using ADR. Of these and the 140 off-docket matters included in the ADR proceedings, binding procedures were used for 446 matters, whereas nonbinding techniques were used for 1,280 matters. The board's success rate in helping the parties resolve both docketed and undocketed matters averages above 95 percent.
From the outset of an appeal, the ASBCA informs parties of ADR options, and encourages the voluntary and consensual use of these means to resolve disputes as early as feasible. The Notice of Docketing acknowledges the filing of the appeal, and furnishes the parties with important information including the ASBCA’s Rules and the board’s February 23, 2011, “Notice Regarding Alternative Methods of Dispute Resolution.” On multiple occasions the parties are reminded of the opportunity for ADR, such as by the board’s order inquiring about the parties’ election of proceedings. If ADR is elected, the parties jointly submit a proposed ADR agreement, including a schedule for proceeding.

The ASBCA’s ADR notice sets forth the board’s policy encouraging the parties’ voluntary, consensual, and early use of ADR, consistent with the CDA’s mandate at 41 U.S.C. § 7105 to resolve disputes in an informal, expeditious, and inexpensive manner and to the fullest extent practicable. The board’s website at www.asbca.mil contains useful information for parties interested in ADR. In addition to the ADR notice, parties are provided with sample ADR agreements that may be used as a template but should be tailored by the parties to meet the needs of each proceeding. The parties must obtain the board’s approval of the proposed ADR agreement, which should specify, among other things, (1) the scope of matters to be addressed, (2) the ADR procedures to be followed and whether the proceeding will be binding or nonbinding, (3) how limited discovery will take place, (4) the submission of position papers, and (5) a schedule and agenda for the proceedings.

The ASBCA’s ADR notice makes clear that these techniques are intended to supplement the judicial process, and to be conducted in good faith. It informs the parties of several ADR methods. The first of these is the use of a “settlement judge,” a board judge who is appointed by the chairman for the purpose of facilitating settlement. This nonbinding form of ADR functions as either facilitative or evaluative mediation. The term “settlement judge” is now more aptly replaced by “neutral” or “mediator” (the latter titles are used in anticipation of revisions to the board’s rules). The neutral is authorized to meet with the parties jointly or severally and may engage in ex parte communications. By prior agreement, the neutral may express a verbal, nonbinding assessment of the litigation risks faced by the parties.

The second form of ADR listed in the board’s notice is the “minitrial,” which is described as “a highly flexible, expedited, but structured, procedure.” Today, this process is seldom used, and is generally encompassed within nonbinding mediation procedures. The board will appoint a judge as a neutral to advise and assist the parties’ senior-level designated representatives, who retain decision-making authority.

The third form of ADR described is a “summary trial with binding decision,” in which a shortened hearing is conducted on an expedited basis before either a single ASBCA judge or a panel of judges. As agreed by the parties and the board in advance, a final and conclusive summary “bench” decision will be issued at the conclusion of the trial, or as agreed, a summary written decision will be issued within an agreed, abbreviated period.

The board lists as a fourth approach “other agreed methods,” to allow the parties and the board to “agree upon other informal methods which are structured and modified to suit requirements of the appeals.” The ASBCA has adopted a wide view of ADR techniques that may be used, and will consider any of the processes described above, a combination of hybrid techniques, or such creative procedures as the parties may propose and the board regards as acceptable.

The board’s commitment to ADR goes beyond the philosophical endorsement of the parties’ use of ADR. Although the parties sometimes privately hire a neutral for ADR proceedings, the board routinely provides judges for that purpose. Upon request, the ASBCA will appoint a judge to serve as an ADR neutral without cost to the parties. When appointing an ADR neutral, the chairman will give weight to a list of names submitted by the parties. ASBCA judges, serving as ADR neutrals, work with the parties to develop and implement a suitable process for resolving the issues at hand. Unlike current experience at the ASBCA, Professor Nash’s role in TennTom was typical of some early governmental agency pilot programs in ADR, such as that of the COE, which relied upon privately hired neutrals and focused upon minitrials as the procedure of choice. By contrast, initial ADR guidelines from the Department of the Navy called for the ASBCA to assign a judge as the neutral. As evidenced by the board’s repeated mention of ADR options in standard correspondence in an appeal, the parties are encouraged at many stages to consider resolving appeals through ADR. The presiding judge will confer initially with litigants “to explore the desirability and selection of an ADR method.” Generally, if the...
parties elect ADR aided by an ASBCA judge acting as the neutral, that judge will be recused from further participation in the appeal should the matter not be fully resolved. The philosophy underlying recusal is that the parties should feel free to engage in frank and candid ex parte discussions with the neutral regarding the strengths and weaknesses of their positions, without concern that any confidences might adversely influence a subsequent ruling. Nevertheless, the board has given permission for the ASBCA neutral to handle subsequent litigation in limited, appropriate circumstances where the parties stipulate that both fundamental due process and judicial economy are best served this way. For example, as will be further examined below, if the controversies underlying the ADR in CSC had not been completely resolved, by agreement of the parties as reflected in their ADR agreement, Judge Park-Conroy would have resumed the role as presiding judge over the appeals.

In addition to making ASBCA judges available for ADR purposes to resolve appeals under its jurisdiction, the board has provided an ADR neutral for matters before other boards of contract appeals and the US Court of Federal Claims, and has been involved in ADR in US district court matters.

In recognition of the increased use of ADR at its facilities in Falls Church, Virginia, and to better accommodate the parties' needs, the ASBCA converted and refurbished one of its four courtrooms and adjacent office spaces into a dedicated ADR Center. The board placed an emphasis on an expanded and dedicated space for the proceedings, designed to give the parties ample room to confer jointly or caucus alone. The spacious ADR Center contains a meeting room that can seat more than 30 people and has lockable conference rooms for use by the parties. The ASBCA's ADR Center is fully functional from a technological standpoint, and capable of meeting today's automated litigation needs. In addition to wireless Internet access, the Center provides telephone audio conferencing and high-definition video teleconferencing as aspects that are helpful in matters where participants and witnesses are not readily available, and useful in carrying out the board's geographically unlimited jurisdiction.

Decisions rendered in accordance with the expedited option will be short and will contain only summary findings of fact and conclusion and be rendered for the board by a single administrative judge. Such decisions “shall have no value as precedent, and in the absence of fraud, shall be final and conclusive and may not be appealed or set aside.” Paragraph (b) of ASBCA Rule 12.1 provides that where “the amount in dispute is $100,000 or less,” the appellant may elect the accelerated procedure. Under ASBCA Rule 12.3 this procedure encourages the parties to streamline the proceedings and shorten time periods “to enable the Board to decide the appeal within 180 days after the Board has received the appellant’s notice of election.” If the parties are in agreement, the decision may be issued by a single judge with the concurrence of a vice chairman.

There are two statutory requirements that the parties should consider in deciding whether to use ADR, particularly for those undocketed matters they wish the ASBCA to consider. The first is whether the proponent has satisfied the CDA’s statute of limitations. The statutes requires at 41 U.S.C. § 7103(a)(4)(A) that “each claim by a contractor against the Federal Government relating to a contract and each claim by the
Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.” Even though in an ADR proceeding the ASBCA may agree to include an undocketed matter that has not been the subject of a CDA claim, this does not confer CDA jurisdiction over the matter unless all statutory and regulatory conditions are met. Remember that it is the claim proponent (and not the board) that bears the responsibility of satisfying the applicable statute of limitations requirements.

The second statute that the parties should keep in mind is 31 U.S.C. § 1304, pertaining to the United States Permanent Indefinite Judgment Fund (Judgment Fund). This permanent appropriation was first enacted by Congress in 1956, and acts as “an unlimited amount of money set aside to pay judgments against the United States.” Resort to the Judgment Fund can be an invaluable resource as an expeditious way for the government to make payment on a settlement agreement. Parties interested in the use of the Judgment Fund should discuss the matter with the ASBCA neutral, who will provide guidance on how this may be accomplished. Note that the board must issue a decision in the nature of a consent judgment, which can only encompass matters within its CDA jurisdiction, before use of the Judgment Fund is authorized.

The Computer Sciences Corporation ADR
In retrospect, it is not surprising that a “mega ADR” was necessary to resolve the disagreements that arose between the Army and CSC. Everything about the underlying project, contract, and ensuing litigation was bold and ambitious, and when things went wrong, they did so on a similarly outsized scale. The claims and disputes involved billions of dollars, and put at issue the efficient operation and management of the Army’s depot system. Although CSC and the government entered into the subject contract in 1999, the work the company carried out in depot and supply management became a critical aspect of our nation’s response to the events of September 11, 2001.

The indefinite quantity/indefinite delivery (ID/IQ) contract was an enormous undertaking by both CSC and the Department of the Army. The “Wholesale Logistics Modernization Program” (LMP) called for updating capabilities and retaining certain essential aspects of the fragmented, legacy “Wholesale Logistics Management System” (WLM). This aggregate of old systems, which supported the real-time logistics functions of the Army’s program managers and depots, carried out a nationally critical mission. The depots, which supported over 23,000 users in the Army’s supply chain activities, were responsible for acquiring and positioning strategic stock/war reserves, managing wholesale ammunition, and accounting for property and inventory, installation management, depot maintenance, and financial management. The government wanted to increase the transparency and accessibility of the procurement process using modern and sustainable technology.27

Fixed-price Contract No. DAAB07-00-D-E252 was awarded to CSC on December 29, 1999, in the original amount of $680,668,576, and called for both replacement of multiple aging and obsolete computer systems and increased interface with the Army’s financial systems. The contract was set to expire in December 2011. The contractor was required to convert the Army’s existing WLM systems into a technologically current automated system that was based upon a commercially available, off-the-shelf system (COTS) that CSC was to adapt to meet the government’s needs. Updating the WLM required that information and systems then in use had to be variously transferred, modernized, and/or sustained during the transition. The updated system was to be released in three deployments. Once these were successfully done, the contractor was to operate and implement the newly configured LMP. The government hoped that a COTS-based system would allow the eventual transition of the LMP use to government and other contractors’ employees. CSC was to be compensated by monthly fixed-price payments, and was eligible for periodic performance bonuses for successful “modernization” and “data processing” efforts.28

Key to the underlying issues addressed by the CSC ADR were contract provisions for ordering particular tasks, scheduling and delays, acquisition of intellectual property (IP) rights by the government for future use of the LMP system by additional users, and contractor compensation for work accomplished and performance bonuses.29 The contract contained both “requirements” and “indefinite quantity” provisions, depending upon the task involved. The “requirements” portion of the contract called for the government to place orders with CSC for services involving those parts of the old WLM that were to be transferred, sustained, and modernized as well as those that were to be transferred and sustained, but not modernized. The indefinite-quantity portion of the contract allowed the government to place orders for other services specified in the statement of work for WLM components that were to be transferred but neither modernized nor sustained. Contract clause H-8, Intellectual Property Rights, provided, in relevant part, for CSC to transfer to the government “unlimited rights” for “that portion of the New System that is comprised of modification to the Transferred System.” The contractor agreed to grant the government “Special Purpose License Rights” in “Computer Software or Computer Software Documentation sold in substantial quantities to the general public in the commercial open market.” The purpose of the latter was “to allow the Government and its contractors” the use of the new, modified COTS “for the purposes of Army Logistics, but not for any commercial purposes.” The parties agreed, in the event an “Equitable Adjustment for Certain Costs” was warranted, to “negotiate an amount of equitable adjustment directly related to the Contractor’s unrecovered investment in software development for the modernized system.”30
Suffice it to say that the parties encountered many difficulties in transferring information from the WLM legacy systems to the newly developed, commercially-based LMP system, and their disagreements were exacerbated by the enormity, importance, and high visibility of the project and technical challenges. They disagreed over which party was responsible for unfulfilled contract obligations, significant project delays, cost overruns, and the contractor’s inability to develop and implement the new LMP as planned. The government was concerned that CSC was not timely developing the modernized LMP while sustaining essential elements of the WLM. The contractor regarded the government as, among other things, failing to provide essential support for transitioning out of the WLM, delaying work, and compromising CSC’s intellectual property rights in the new system.

By 2003, the government was insisting upon corrective actions following the postponed first deployment; the contractor regarded these demands as compensable changes to the contract. While the parties’ 2005 negotiations failed to resolve the controversy, they did result in a restructured contract with which to go forward, but did not ultimately solve the problems encountered. In 2006, CSC filed 14 requests for equitable adjustment (REAs), which in 2007 were denied by the contracting officer’s final decision. Each side continued to hold the other responsible for the LMP’s disappointing lack of success, and eventually a number of the parties’ disputes progressed into claims that CSC appealed to the ASBCA. Beginning in September 2007, 14 CSC appeals were docketed as ASBCA Nos. 56162 through 56175 and assigned to the docket of Judge Carol Park-Conroy. Initially CSC sought a total of $858 million, but that claim grew over time. Contract disagreements continued along with both sides’ frustration during performance, particularly after the Army in 2009 notified CSC of its forthcoming intention to transition services to other users and contractors under contract clause H-8. The government submitted a counterclaim, and CSC advised in 2010 that it intended to submit an additional REA and would seek in excess of $1.2 billion for the government’s alleged breach of contract.

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were also considered. These primarily concerned intellectual property (IP) matters, and brought the total amount in dispute to over $2 billion dollars. It was clear that these appeals and other disputes would continue to present a mammoth litigation challenge that would consume significant time, money, and other resources of the parties and the board.

The government’s and CSC’s decision to engage in ADR was a practical one. They had been in litigation before the board since 2007 and in protracted discovery. The prospect of a final resolution was dim, and at best on a far distant horizon. Due to the extreme complexity of the evidence, as well as procedural and substantive issues, the scheduled 2011 trial was set to address entitlement only. The bifurcation was made at the parties’ request. Quantum was premature, as the government had not completed the appropriate claim and REA.
audits. If the ASBCA had held that CSC was entitled to recover in full or in part, the board would typically remand the appeals to the parties to negotiate quantum. Had they not succeeded in resolving quantum, it would have been necessary for the board to conduct a trial on quantum, complete with further discovery and preparation. The uncertain date of the ultimate conclusion of the appeals was a daunting prospect, particularly for the government, as potential CDA interest costs ran as high as $60,000 a day. Each party understood that it faced significant litigation risks that came at great expense for the 14 appeals lodged before the board, and that matters were increasingly complicated by newer allegations that had not yet ripened into appeals within the board’s jurisdiction.36

In addition to potential litigation exposure, ADR at the ASBCA offered other attractive incentives to the parties. Chief among these were the abilities to seize control over the timing and outcome of the appeals, address controversial matters not yet before the board, and streamline proceedings in a cost-effective and efficient manner. ADR also allows the parties to fashion remedies that lie beyond the capacity of a CIDA tribunal. And, very importantly for CSC and the Army, the use of ADR would allow the parties, aided by ASBCA judges sitting as neutrals, to collaboratively solve their differences while preserving and hopefully strengthening business relationships during the ongoing effort to complete the LMP.

The parties approached Judge Park-Conroy and Chairman Paul Williams regarding their interest in the use of ADR and sought input from the board. All recognized that while ADR offered the opportunity to expedite resolution, it would be necessary to fashion procedures of an again outsized nature to handle the matters.

The ADR Agreement Between CSC and the Army
The typical ADR agreement describes the “who, what, when, where, and why” in naming the parties, identifying matters to be resolved, and describing the process and agenda for the proceedings. Although the CSC/Army agreement included all these elements, it expanded on them to meet the parties’ special needs.

The agreement made clear that the parties intended to address the contractor’s 14 appeals (ASBCA Nos. 56162 through 56175), as well as the Army’s counterclaim and CSC’s two REAs for the government’s alleged breaches of contract for IP rights and for CSC’s unrecovered investment in software development for the modernized LMP system. The parties emphasized their desire to capture, to the greatest extent possible, all issues then in controversy as well as those that might arise during the pendency of the ADR. The ASBCA approved the parties’ inclusion of “undocketed” matters to the mediation, including controversies that had not been the subject of a docketed appeal but were in the claim, in dispute, and even at earlier stages of controversy. Although the board could neither assert jurisdiction over nor grant remedies for these off-docket matters in traditional litigation, with the parties’ permission, these issues could be addressed and resolved as part of the ADR. In short, with board approval, the parties redefined the scope of disputes within the ASBCA’s consideration.

CSC and the Army agreed to use a “disciplined, efficient, and cooperative process to address and resolve” not only the docketed appeals but also “any potential Contract and program issues that may arise during the pendency of the ADR.”37 They chose to utilize a non-binding form, thus leaving open the option of resuming litigation if the ADR did not fully resolve all matters considered. Although the parties agreed to an evaluative mediation as the initial ADR process, this effort was to be preceded by fact-finding, data-gathering, and an information exchange. In the event that the evaluative mediation did not fully succeed, the agreement provided for “escalation components to a minitrial procedure, if necessary,”38 to afford the parties an even more structured process to facilitate development of a resolution. Optimistically, the parties specifically “retain[ed] the right to resolve the issues in an alternate manner and/or in less time than that set forth in this Agreement.”39 The parties’ designation of flexible procedures, contemplating that the evaluative mediation could transition to a minitrial or other ADR method to better facilitate resolution, is consistent with the ASBCA’s ADR Notice. The board specifically encourages the use of “other informal methods which are structured and tailored to suit the requirements” of the controversies at hand.40

Because litigation was underway at the time the parties elected to use ADR, they were well aware of sophisticated discovery issues, particularly intricate ESI needs involving both legacy and newly developed computer systems and data content. CSC and the Army recognized that it was essential for the parties to thoroughly understand the issues under consideration. It was necessary for Judges Park-Conroy and Williams to be well-versed, and to “ensure the [parties’] decision-makers have received information sufficient to thoroughly understand the alleged facts, issues, and areas of agreement and disagreement, thereby maximizing the likelihood of resolving all issues in the time frame contemplated.”41

In expanding matters under consideration for resolution beyond claims that had been the subject of a contracting officer’s final decision, the parties were mindful that it was essential for them and the neutrals to have a firm grasp of issues pertaining to entitlement and quantum for these undocketed matters. The ADR agreement called for expedited discovery relating to these issues. CSC agreed to submit its REAs, including assertions of government breach, promptly to the contracting officer for decision. In return, the government agreed to furnish similar information pertaining to its counterclaim against the contractor. The parties stipulated that they would make readily available, within mere days, knowledgeable personnel and supporting documentation for
the undocketed matters. Included with the key information considered was proof of costs asserted by appellant that could be used by the Defense Contract Audit Agency (DCAA) in conducting an audit. It was helpful that the parties had already sorted through some difficult problems associated with discovery of ESI, and agreed to resort as necessary to previously developed protocols. The parties authorized Judges Park-Conroy and Williams to resolve any discovery disputes that might arise from this additional information gathering. 

As is generally done in board-annexed ADR proceedings, the parties specified that this “ADR procedure will be confidential and subject to Federal Rule of Evidence 408 and may also be protected from disclosure by the [ADRA] of 1996 (5 U.S.C. [§] 574).” They agreed upon an expanded view of protecting documents, evidence, and statements made by any person during the “ADR procedure” or “prepared for any phase of the ADR procedure,” meeting or session. Included in these protections were “any communications between counsel relating to the ADR or settlement,” which would be “inadmissible in the Appeals or any other appeals for any purpose and shall not be used or referred to in the Appeals or any other appeals if settlement is not achieved.”

The agreement encompassed information provided to the neutrals. Judges Park-Conroy and Williams agreed to keep confidential any “[d]ocuments or information designated as privileged under the attorney-client or attorney work product” doctrine unless “the disclosing party otherwise agrees in writing.” “Contemporaneous project records and other documents that are otherwise admissible or discoverable” did not become inadmissible or not susceptible to discovery “merely because of their use in this ADR proceeding.” The government made clear that nothing in the ADR agreement “precludes the Government from disclosing information within the Government, when disclosure is necessary for review, approval, or justification of any settlement.”

The parties agreed to require any consultants hired for ADR purposes to sign a confidentiality agreement restricting any subsequent use of documents and information. At the conclusion of the ADR, the consultants had to agree to either “return or certify the destruction of such documents or information.”

In recognition of the high profile of the CSC litigations, the parties, counsel, and neutrals stipulated “not to discuss any matter relating to the ADR with any member of the press or media or any non-U.S. Governmental third party” without the express written permission of the other party. Exceptions were made for authorized consultants, experts, and disclosures the contractor was obligated to make, such as to the US Securities and Exchange Commission.

In a departure from most ASBCA-conducted ADR proceedings that involve the use of a single judge sitting as the neutral, CSC and the Army agreed that “ASBCA Chairman Paul Williams and ASBCA Judge Carol Park-Conroy shall serve as co-neutrals.” Consistent with ASBCA policy, the neutrals served at no cost to either party. Judge Williams had served as a co-neutral along with retired ASBCA Judge Martin J. Harty in numerous “Big Dig” proceedings, an earlier “mega ADR” that was conducted under the auspices of the ASBCA at the request of the United States Department of Transportation. Judge Park-Conroy also has significant experience in serving as a neutral in large ADRs including as a co-mediator. The CSC ADR agreement provided that, should one of the co-neutrals be unable to serve on either a long- or short-term basis, the agreed-upon ADR process would continue.

The CSC ADR agreement contained other familiar provisions for ASBCA judges serving as neutrals in evaluative mediations, making clear that the “neutrals’ recommendations are not binding upon the parties.” It provided for the neutrals to “facilitate discussions and negotiations between the parties” and assist the parties “by, among other things, providing feedback on the relative strengths and weaknesses of each party’s positions, identifying areas of agreement between the parties and helping to generate options that promote settlement.”

The agreement also provided the same “common law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence” based upon the ADR proceeding, and for the parties to refrain from calling or subpoenaing the neutrals in any subsequent proceeding.

In addition to these usual provisions, the CSC ADR agreement contained clauses tailored for this proceeding. Consistent with the exceptionally large amount in dispute (in excess of $2 billion dollars), the “parties recognize[d] that the neutrals in their discretion may retain an independent third-party accounting or other expert who shall be approved by the parties and shall also serve at no expense to either party.” In the end, Judges
Park-Conroy and Williams did not require such experts, but the parties were forward-thinking in permitting the neutrals to obtain such resources if deemed useful to promoting resolution.

There has been considerable discussion regarding whether a judge sitting as an ADR neutral should preside over the matter if the ADR does not succeed and litigation resumes. With the consent of the board, the parties agreed that if they were unable to fully resolve all matters under consideration in the ADR, then "neither party may seek recusal of a neutral on the grounds that they participated in the ADR." However, the neutrals, at their discretion, had the right to "recuse themselves from further participation in the ASBCA Appeals and/or a potential appeal of the presently-undocketed REAs (supplemental ADR agreement) to address the breadth and complexity of entitlement and quantum matters covered by the upcoming mediation. Among other things, the parties agreed to more extensive information gathering over an expanded period of time, which they regarded as particularly necessary to obtain an understanding of the undocketed matters. Each party was permitted to submit a position paper on each of the 14 docketed ASBCA appeals, as well as the contractor's two additional REAs and the Army's counterclaim, for a maximum of 17 position papers, although the parties were given the discretion of combining all or some of the matters in controversy in a single position paper. The typical brevity of position papers used in ASBCA ADR proceedings yielded to these parties' unusual needs. CSC and the Army were each limited to an aggregate total of 700 pages for their position paper(s), "excluding cover pages, tables of contents, tables of authorities, and any attached documentary exhibits and deposition excerpts." The parties agreed to furnish copies of (or excerpts from) documentary exhibits and depositions along with the position papers. This was done for the ready reference and convenience of the neutrals and parties. Unless requested by the neutrals, replies to the position papers were not called for.

The parties recognized the key participants in the ADR proceedings, and made special provisions for these. In addition to designating Judges Park-Conroy and Williams as co-neutrals and describing the roles they would play in the mediation, CSC and the Army named the "business leads for each party." The supplemental ADR agreement states that the parties anticipated that these persons would attend all mediation sessions. The business leads' consistent involvement in the ADR sessions was a critical factor, considering the investment each participant brought to the negotiating table. The necessity of the business leads' involvement can prove challenging during the extensive and intense period set aside for the ADR sessions.

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The parties' legal teams included specialized counsel. . . . The use of so-called settlement or independent counsel, who had not served as litigation advocates, has been recommended to bring a different view to settling, as opposed to fighting for or against, issues in controversy.
sessions. With the approval of the board, the parties agreed upon a mediation process that provided both joint and private sessions. The neutrals conducted joint, face-to-face sessions attended by the parties, counsel, consultants, and client teams as appropriate. The parties decided to group certain matters to facilitate these sessions, and each side was given equal opportunity to present a summary of the factual and legal issues involved, in a manner of that party's choosing and with input from the neutrals. The neutrals were given the discretion of using any time remaining from these presentations, in addition to time specifically set aside, for additional discussion, questioning, or clarification of the issues. The neutrals were permitted to engage in ex parte communications with each party as they deemed appropriate.61

The agenda set aside times for the neutrals to engage the parties in separate sessions. In carrying out this evaluative mediation, the neutrals were afforded the opportunity to furnish insight into the relative merits of positions asserted by the parties, propose a more efficient use of time and resources for the proceeding, suggest improved communications and clarified positions, and aid in developing and exploring settlement options.62 The neutrals also used these opportunities to give the parties "homework assignments" requiring CSC and the government to produce additional work products and/or submit further documentation.

The parties' supplemental ADR agreement recognized the difficulty of preserving order while dealing with 17 matters that involved thousands of supporting documents and exhibits and sometimes overlapping issues and/or damages. At the neutrals' request, the parties maintained a mediation decision matrix (the "matrix"), used as an organizational score card to "identify for each claim, additional REA, and counterclaim at issue any agreement reached, any key issues that remain in dispute, the respective settlement positions of the parties, and any other information that the neutrals and parties may deem advisable." The matrix was regularly updated as appropriate to reflect the contemporaneous status of each item to aid both parties and the neutrals in navigating resolution.63 At early stages of the CSC ADR, the parties developed separate matrices used variously for discussions internally or with the neutrals, and to further negotiations with the other side. Eventually, the matrices were melded into a master document.

The parties set a schedule for the mediation sessions, and envisioned that the proceedings would take about three weeks. Specific times were set aside for joint and private sessions by group, as well as periods set aside for the neutrals to engage with the parties. They allowed for a final wrap-up session to address any remaining issues, and to conclude negotiations with the goal of a global agreement. At the same time, the parties agreed to permit flexibility in the schedule to best respond to the mediation in progress.64

The ADR agreement recognized up front that the mediation might not resolve all of the issues. The parties decided that, at such point or impasse as they and the neutrals agreed, the proceeding would progress stepwise from the evaluative mediation to a minitrial process or other such process as requested by the parties. The parties' principals retained decision-making authority, but had resort to assistance from the neutrals.

Outcome of the CSC ADR and Conclusions
The CSC ADR exacted an enormous effort from everyone concerned, whether contractor or government, decision-maker or neutral, counsel or witness. Ultimately, the CSC ADR achieved a result that each side agreed upon. According to the contractor:

During the second quarter of fiscal 2012, [CSC] reached a definitive settlement agreement with the U.S. Government in its contract claims asserted under the [CDA]. Under the terms of the settlement, [CSC] received $277 million in cash and a five-year extension (four base years plus one option year) with an estimated value of $1 billion to continue to support and expand the capabilities of the systems covered by the original contract scheduled to expire in December 2011. In exchange, the Government received unlimited rights to [CSC's] intellectual property developed to support the services delivered under the contract, and CSC dismissed the claims and terminated legal actions against the Government and the Government dismissed its counter claims against CSC.65

The successful outcome of the CSC ADR is summarized well in the ASBCA's FY 2012 report, which emphasized that:

The ASBCA is proud to note that one of the successful mediations involved a number of disputes that totaled more than two billion dollars relating to a long term logistics contract which was nearing completion. Approximately half of the claims were on the Board's docket and involved complex contract interpretation, performance and payment issues. The non-docketed claims primarily related to various intellectual property matters, including allegations of breach of contract . . . . All claims were successfully resolved with a cash payment, award of a multi-year, follow-on contract, and the determinations of the use, ownership, and rights relating to the intellectual property claims.66

As a practical matter, the CSC mega ADR demonstrated that the ASBCA is able to adapt its ADR and appeal processes to accommodate the parties in a highly complex and stressful dispute. The board provided flexibility as dictated by the circumstances. Other proceedings at the board's offices were carefully coordinated during this ADR to accommodate the parties' extensive and around-theclock needs for office space and conference rooms. The contractor and the government had teams consisting of dozens of members with skill sets including legal, technical, financial, contract, administrative research, and
information technology, as well as experts and individuals familiar with the award and performance of all aspects of the contract. It became routine to see CSC and Army teams working in the ASBCA premises from early in the morning to 10:00 p.m. and beyond. The parties repeatedly expressed appreciation for the board's flexibility in making the process as convenient, inexpensive, and comfortable as practicable under the circumstances.

An interesting by-product of the ASBCA's award winning ADR program is its impact on the board's regular docket. At the time of the writing of this article, the docket totaled approximately 750 active appeals and a small number of classified and off-docket matters. The docket also includes over 350 active motions. During the last several years, the average size and complexity of new appeals has grown enormously. Of the 750 pending appeals, approximately 30 percent include claims over $1 million dollars including at least a dozen for over $100 million dollars. These dollar numbers do not include the nearly 100 terminations for default on the docket. The strain on the board's limited resources is also impacted by the fact that over 150 of these active appeals, or 20 percent of the docket, arise from Afghanistan and Iraq contracts that often involve procedural nightmares and consume significant amounts of judges' time. But for the resolution of a large number of complex appeals using other than standard litigation processes, the board would be facing a significant backlog of "old," ready-to-write decisions. Instead, as of this writing there are only three decisions on the merits, all in the process of being written, that have been ready-to-write for over six months.

The ASBCA is grateful to the parties and all at the board for making the ASBCA's ADR program a highly innovative success.

Endnotes

1. In addition to focusing upon the ASBCA, this article references the ADR program with the merged Corps of Engineers Board.
4. Report of Investigation, n. 3 at II, Background.
9. 41 U.S.C. § 7103(h); see also 41 U.S.C. § 7103(h)(3), requiring a party rejecting the use of ADR to provide written justification for rejecting the request in accordance with 5 U.S.C. § 572(b), or other specific reason.
11. 41 U.S.C. § 7105(g).
13. FAR 33.204, Policy.
14. FAR 33.214(c).
16. Id. at 3.
19. At this writing, the ASBCA is in the process of revising its rules. No date has been established for finalization of the revised rules.
20. Carol Park-Conroy and Martin J. Harry, Alternative Dispute Resolution at the ASBCA, 00–07 West's Briefing Papers.
22. See Memorandum from Navy Secretary John Lehman dated December 23, 1986, providing guidelines for the use of ADR by the Navy.
23. ASBCA's ADR Notice.
24. The Board is indebted to Judges Carol N. Park-Conroy and Diana S. Dickenson; Chief Counsel Catherine A. Stanton; Martin Wetzler, ASBCA Administrative Officer; and Board IT professional Jeffrey R. Remer and Ralph E. Craig, Jr. for their hard work in making the ADR Center a useful and attractive reality.
25. ASBCA Rules 11 and 12 may be combined with the Board's ADR procedures. For example, parties may agree upon a record submission under ASBCA Rule 11, and at the same time seek a final and conclusive single-judge decision under the ASBCA's ADR options.
28. Contract No. DAAB07-00-D-E252
29. Id.
30. Id.
32. Id.
33. Computer Sciences Corp., ASBCA Nos. 56168, 56169, 09-2 BCA ¶ 34,221; motion for reconsideration denied, 09-2 BCA ¶ 34,261.
34. Computer Sciences Corp., ASBCA Nos. 56165-67, 56170, 10-2 BCA ¶ 34,572.
36. Yenovkian, supra note 26. See also Levator Norsworthy, Jr., Items from my Mailbox, presented to the 40th Annual Symposium on Government Acquisition, Federal Bar Association North Alabama Chapter (November 2012).
37. ADR Agreement between Computer Sciences Corporation and the Department of the Army (CSC ADR Agreement) at 3.
38. Id. at 2.
39. Id. at 4.
40. ASBCA's ADR Notice.
41. Id. at 3–4.
42. Id. at 7–11.
43. Id. at 4.
44. Id. at 4.
45. Id. at 5.
46. Id. at 7.
NEWS FROM THE CHAIR

(continued from page 2)

monthly, so that members can easily see what is happening throughout the Section. Finally, we are looking at the possibility of converting some of our Section’s books and newsletters to e-books and smart phone applications. For all of these efforts, and for the many more ideas that we have yet to implement, I must thank the Technology and Electronic Communications Committee (TECC) chairs—Dan Chudd, Greg Bingham, Joshua Drewitz, and Jerry Walz—for what will undoubtedly be a lot of work in the upcoming year. If any of you are interested in working on these projects, please let me or one of the TECC chairs know. We welcome, and encourage, your help.

Finally, at the meeting, we said goodbye to Mark Colley, our 2012–13 chair, and we welcomed Ty Hughes as our new secretary. Ty joins Stu Nibley (chair-elect), Dave Ehrhart (vice-chair) and Jeri Somers (budget secretary) as the Section’s officers. We also said thank you to retiring Council members Dan Chudd, Elizabeth Grant, John Jones, Jim McCullough, and Aaron Silberman; and we welcomed four new Council members: Kristen Ittig, Susan Ebner, Annejanette Pickens, and Anthony Paladino. I look forward to working with all of you.

I would like to thank everyone at the meeting who welcomed me as chair, as well as everyone who could not attend and who nonetheless sent me kind words of congratulations and encouragement. To all of the membership, please know that my door is always open. Do not hesitate to call or e-mail me with ideas, comments, or suggestions. I hope to see you all at a meeting or event over the coming year.