I. INTRODUCTION

Most federal government contract controversies settle and many that do not, should. Alternative Dispute Resolution (ADR) techniques can help parties settle their contract controversies and, in the process, avoid the time and expense of formal litigation. The term ADR refers to an array of non-binding and binding dispute resolution methods that involve the use of third-party neutrals to aid the parties in resolving these contract controversies via a structured settlement process.

The Executive Order on Civil Justice Reform, Exec. Order No. 12,988, 61 Fed. Reg. 4729, Sec. 1(c) (Feb. 7, 1996), sets out a federal government policy favoring settlements of disputes and the use of ADR:

Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of alternative dispute resolution (ADR) may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

In accordance with the Administrative Dispute Resolution Act, 5 U.S.C. §571, et seq. (the ADRA of 1996), the President established an interagency ADR committee, known as the Interagency Alternative Dispute Resolution Working Group (IADRWG), on May 1, 1998. IADRWG activities, presently coordinated by the Senior Counsel for ADR at the United States Department of Justice (DoJ), are publicized regularly on the Internet at the IADRWG Website (http://www.adr.gov). Numerous federal agencies have issued agency policy statements strongly endorsing the use of ADR, and the Federal Acquisition Regulation (FAR) was amended to encourage federal agencies to "use ADR procedures to the maximum extent practicable." FAR §33.204. In the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993

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1 The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (ADRA of 1996) (codified at 5 U.S.C. §571, et seq., and various subsections of the Contract Disputes Act, 41 U.S.C. § 7101, et seq.) introduced a new term of art, "issues in controversy." See also FAR §33.204. The new term is aimed at making it clear that a disagreement between the parties need not be a formal dispute before the controversy can be submitted to ADR. For readability, we use the shorthand reference, "contract controversies," as applied to bid protests and performance disputes involving federal government acquisition contracts.
(October 30, 1998) (the ADRA of 1998), Congress also called for federal district courts to authorize, by local rule, the use of ADR in all civil actions.

Over the past decades, the use of ADR has increased significantly. The best available data shows successful resolution rates in excess of 90 percent for federal government contract controversies where ADR has been employed. Despite the impressive results, there is some reluctance to engage in ADR, particularly among those government contracts professionals and legal practitioners who lack familiarity with the ADR process. This monograph seeks to fill the information void for those individuals. It is also designed to serve as a ready reference for government contracts ADR practitioners and as a gateway to Internet-based ADR resources. This monograph does not cover, or discusses only in passing, the following types of dispute avoidance or dispute resolution processes:

- Unassisted negotiation techniques;
- Partnering.

Although unassisted negotiations frequently can be effective for resolving contract controversies, the ADRA of 1996 restricts the definition of ADR to dispute resolution techniques involving the use of third-party neutrals. Given the statutory definition, and to make the scope of this monograph manageable, we avoid any discussion of unassisted negotiation techniques. Partnering is a conflict avoidance and management technique, rather than a dispute resolution technique. Accordingly, a discussion of this technique is beyond the scope of this monograph.²

The monograph focuses solely on the resolution of contract controversies between federal agencies and their prime contractors (including sponsored subcontractor controversies) and bid protests. It does not cover a number of related areas (e.g., resolution of prime-subcontractor disputes). Our aim is to provide information on the ADR methodologies available for resolving contract controversies that may arise in the formation or administration of federal government acquisition contracts.³

² Partnering is discussed in detail along with two other dispute avoidance techniques (issue escalation clauses and dispute review boards) in a monograph prepared by the ABA Public Contract Law Section Task Force on Dispute Avoidance and Early Dispute Resolution, An Ounce of Prevention – Best Practices in Dispute Avoidance for Government Contracting (American Bar Association 2002); See also Frank Carr, et al., Partnering: A Comprehensive Guide (American Bar Association Spring 1999). The Air Force has been very successful with another dispute avoidance technique used to avert bid protests, i.e., extended debriefings. Included as Appendix 2 to this monograph is a description of the Air Force extended debriefing program, which was initiated formally in October 2013, together with a sample extended debriefing agreement used in conjunction with that program.

³ The Department of Health and Human Services (HHS) Departmental Appeals Board utilizes ADR to resolve grant-related disputes. See http://www.hhs.gov/dab/divisions/adr/index.html.
Section II of the monograph discusses what types of contract controversies are suitable for ADR. Screening of cases for ADR potential is a common facet of many federal agency ADR programs. Both public- and private-sector contract attorneys need to understand why ADR may not be appropriate in every case. Section III provides general descriptions of the various ADR techniques employed in resolving contract controversies in order to establish a common frame of reference for our discussion of ADR. In Section IV, we build on the discussion in Section III and reinforce the need to match the right type of ADR process to the particular contract controversy.

If a matter is appropriate for ADR, the next issues to consider are the practical and financial aspects associated with the timing of its use. We address these issues in Section V. The parties then need to design the ADR process so as to be appropriate for the particular facts and circumstances of their controversy. We provide our treatment of this important topic in Section VI. In Section VII, we highlight factors to consider when selecting a third-party neutral and outline the steps for engaging a third-party neutral. Once the parties have signed their ADR agreement, they need to focus on preparing for the ADR proceeding itself. Among other things,

Similarly, the Department of Defense (DoD) has stated, as its policy, that ADR is to be used for resolution of controversies regarding both grants and cooperative agreements:

(c) *Alternative Dispute Resolution (ADR)* – (1) Policy. DoD policy is to try to resolve all issues concerning grants and cooperative agreements by mutual agreement at the grants officer's level. DoD Components therefore are encouraged to use ADR procedures to the maximum extent practicable. ADR procedures are any voluntary means (e.g., mini-trials or mediation) used to resolve issues in controversy without resorting to formal administrative appeals (see paragraph (e) of this section) or to litigation.

(2) Procedures. (i) The ADR procedures or techniques to be used may either be agreed upon by the Government and the recipient in advance (e.g., when agreeing on the terms and conditions of the grant or cooperative agreement), or may be agreed upon at the time the parties determine to use ADR procedures.

(ii) If a grants officer and a recipient are not able to resolve an issue through unassisted negotiations, the grants officer shall encourage the recipient to enter into ADR procedures. ADR procedures may be used prior to submission of a recipient's claim or at any time prior to the Grant Appeal Authority's decision on a recipient's appeal (see paragraph (e)(3)(iii) of this section).

Section VIII of the monograph discusses who should attend the ADR proceeding, how to prepare for the ADR proceeding, structuring the ADR presentation, and the conduct of the negotiation phase – the ultimate phase of all forms of non-binding ADR.

There are a number of other considerations to take into account whenever parties use ADR. Section IX addresses questions ranging from streamlining the information exchange, verification of incurred and anticipated costs, confidentiality of the proceedings, to the mechanics of settlement. We discuss in Section X the various ADR programs offered by the United States Court of Federal Claims, the boards of contract appeals, the FAA Office of Dispute Resolution for Acquisition, the Government Accountability Office (GAO), and other federal dispute resolution forums (hereinafter collectively referred to as the “dispute resolution forums”). We conclude this monograph in Section XI, by providing a review of “lessons learned” from the perspectives of both the parties and the ADR neutral. The monograph is accompanied by an extensive set of appendices. Particularly helpful among the appendices are sample ADR agreements and ADR settlement agreements that parties have used successfully, and a sample Contract Disputes Act (CDA) interest computation. Be aware that the sample forms (which are included on a compact disk inserted into the pocket of the monograph cover, for ready access and use) are for guidance only and should be modified to suit your needs.

We hope that this monograph will provide valuable insights into the ADR process and will prove to be a useful tool for those seeking sensible alternatives to litigation for the resolution of their federal government contract controversies.

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4 Since publication of the Second Edition of this monograph, there was a major consolidation of federal civilian agency boards into the Civilian Board of Contract Appeals. This is covered in some detail in Section X.

5 Previously, the GAO was identified as the General Accounting Office. Since publication of the Second Edition of the monograph, a Government Accountability Office Contract Appeals Board (GAOCAB) was established. This is discussed in Section X as well.