

**ARMED SERVICES BOARD OF CONTRACT APPEALS
SAMPLE AGREEMENT TO UTILIZE THE MEDIATION PROCEDURE**

18 May 2017

[NOTE 1: The following sample agreement is provided in response to requests the Board receives for examples of ADR agreements that may be suitable for use in ADR proceedings under Addendum II to the Board’s Rules, Alternative Methods of Dispute Resolution. This sample is offered solely as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties’ discretion in tailoring the agreement to meet their particular needs. Paragraphs 2, 6, and 9-10, however, are key features of the Mediation method of ADR and are mandatory.

NOTE 2: The parties are advised that written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered “dispute resolution communications” as defined in the Administrative Dispute Resolution Act, 5 U.S.C. § 571(5). Pursuant to paragraph 5 of Addendum II to the Board’s Rules, Alternative Methods of Dispute Resolution, such dispute resolution communications are presumed to be confidential and, unless otherwise specifically agreed by the parties, are inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute; however, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in the ADR proceeding. Dispute resolution communications are subject to the confidentiality requirements of 5 U.S.C. § 574.]

SAMPLE

AGREEMENT TO UTILIZE THE MEDIATION PROCEDURE
UNDER ADDENDUM II OF THE ASBCA’S RULES
(REVISED 21 JULY 2014): ALTERNATIVE METHODS OF DISPUTE RESOLUTION

THIS AGREEMENT is entered into by and between _____
_____ (hereinafter “appellant”)
and the Department of _____ (hereinafter “the government”).

WHEREAS, appellant and the government entered into Contract
No. _____; and

WHEREAS, appellant filed with the Armed Services Board of Contract Appeals (hereinafter the "ASBCA") an appeal under said contract; and

WHEREAS, said appeal is designated ASBCA No. _____; and

WHEREAS, ASBCA No. _____ involves claims by [appellant / the government for _____] in the amount of \$ _____; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically utilizing mediation; and

WHEREAS, the ASBCA is authorized to resolve disputes by alternative dispute resolution under its Charter; and

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. Schedule. The ADR proceeding on the appeal is scheduled for _____ days(s), namely: _____, at the Board (or other agreed location).

2. [Mandatory] Neutral. The Neutral's role will be to facilitate the parties' settlement efforts. The Neutral may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The Neutral's recommendations are not binding on the parties. The Neutral shall have 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 on or concerning any action, statement, or communication in or concerning the ADR proceeding. The parties understand that there is no attorney-client relationship between the Neutral and any party to this Agreement, and each party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Neutral. The parties agree, on behalf of themselves and their counsel, that they will not call or 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 his/her thoughts or impressions. [NOTE: The Neutral will normally not participate further in the appeal if the parties' efforts are unsuccessful, unless the parties seek the continued involvement of the Neutral.]

3. Exhibits. [NOTE: The parties should agree on what exhibits will be presented in the mediation.]

4. Transcript. A transcript of the proceedings will not be prepared.

5. Agenda. The presentations of the parties will be informal and the rules of evidence are waived. The Neutral may, nonetheless, guide the presentation of evidence. [NOTE: The parties should spell out how they wish to make their informal presentations and agree on time to be allotted to various phases of the process. It is often helpful for each party to submit a brief position paper (3 to 5 pages) sufficiently in advance of the proceeding for the Neutral to consider it in connection with the record agreed to by the parties.]

6. [Mandatory] Participants. Each party will include among its representatives a principal with authority to settle the appeal.

7. Use of statements and documents. The admissibility, in any further proceedings before the Board, of statements made or documents used in connection with the ADR proceeding will be guided by Federal Rule of Evidence 408.

8. Fees and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding.

9. [Mandatory] Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

10. [Mandatory] Post-ADR. The Board will return any written materials created solely for use in the ADR to the creating party if requested by the party within 10 days of the conclusion of the ADR proceeding. The following documents will not be returned or destroyed: the parties' ADR agreement; documents provided to the Board prior to its approval of the ADR agreement, including documents in a Rule 4 file and routine correspondence with the Board concerning the election and scheduling of the ADR; and any documents necessary for the Board's recordkeeping purposes, such as any settlement agreement entered into which serves as a basis for later dismissal of the matter. All other dispute resolution communications remaining in the Board's possession will be destroyed as the Board deems appropriate.

APPELLANT

GOVERNMENT AGENCY

By: _____

By: _____

Date _____

Date _____