

ADR MOAs/Clauses AAC

❖ AMRAAM

"H-XX ALTERNATIVE DISPUTES RESOLUTION

The AMRAAM Program Team (the prime contractor and the AMRAAM Joint Systems Program Office [JSPO]) has created an Alternative Disputes Resolution Plan which establishes a process for resolution of any conflict which arises during the life of this contract. The latest revision signed by both parties, and distributed by the Air-to-Air JSPO via Procuring Contracting Officer letter, is incorporated herein by reference."

Plan attached below.

❖ Sensor Fused Weapon

❖ JSOW

❖ Wind Corrected Munitions Dispenser

❖ JDAM-

Available at the following website... <http://www.jdamus1.eglin.af.mil:82/cont/docs/17.html>

Alternative Disputes Resolution

The contractor and the government are both interested in the timely, efficient and fair resolution of disputes. Based on the mutual desire for a system of resolving disputes that meets these goals and the Administrative Dispute Resolution Act of 1990, the Contractor and the Government agree to the use of the following procedures under this contract for disposition of disputes:

A.Partnering- The contractor and the government will develop the use of partnering for dispute avoidance. Partnering is used to build an environment that encourages open communication and fosters the achievement of mutual goals. This process should assist both parties in identifying and solving problems before they become issues in controversy.

B.Dispute Resolution Board- Controversial issues that cannot be resolved using the normal negotiation process through the Procuring Contracting Officer shall be submitted to a dispute review board (DRB). The DRB will consist of three independent members who are employees of neither the government nor the contractor. The DRB members will provide an independent evaluation of entitlement which shall include the basis for any recommendations. The contractor and the government agree that the DRB written opinions will be admissible in any litigation arising between the contractor and the government related to or arising under this contract.

1.Board membership

a.The contractor and the government will each propose a list of three candidates that they nominate for DRB membership. The contractor and the government will each select one member from the other party's list. The two selected members of the DRB will then select the third member of the DRB who will act as DRB chairperson.

b.Board members must be neutral, act impartially, and not have any official, financial, or personal conflict of interest to any dispute issue before or during their service on the DRB, unless such interest is fully disclosed in writing to the contractor and the government and they both agree that the individual may serve on the DRB. (See FAR 33.201). DRB members must also agree not to discuss future employment or financial matters with the contractor or the government during the members' tenure on the DRB.

c.Should replacing a DRB member become necessary, the replacement member shall be appointed in the same manner as the original member. The selection of a replacement DRB member shall begin promptly upon notification of the need for a replacement and shall be complete within six weeks.

2.DRB Agreement

a.The contractor, the government and all DRB members shall execute a DRB agreement within four weeks after selection of the DRB members. This agreement shall provide for the fees, expense reimbursement and method of payment for the DRB members. The DRB agreement shall incorporate by reference this ADR provision.

3.Operation of the DRB

a.The DRB shall formulate its own operating procedures, and any modifications to these procedures, with concurrence from the contractor and the government. The operating procedures shall be consistent with the goals mentioned in the first paragraph of this clause.

b.Regular meetings of the DRB members, the contractor and the government shall be held. Each meeting shall consist of a description of the work accomplished since the previous meetings, current status of the program schedule, potential or anticipated problems and proposed solutions, and any ongoing controversial issues. The contractor shall prepare minutes of regular meetings and circulate them for approval.

c.The contractor or the government may each request that the DRB review any controversial issue arising under or related to this contract which has not been resolved through negotiations. All requests to the DRB shall be submitted in writing to both the DRB and to the other involved party. The request for review of the issue shall clearly state the specific issue(s) in full detail.

d.The contractor and the government shall have 15 days to submit position papers to the DRB with copies provided to the other interested party. The position paper shall provide a comprehensive statement of the specific facts regarding the parties' positions on the issues in the case. Unless specifically agreed to by the other involved parties prior to the submission date, no position paper shall exceed thirty pages.

e. When an issue is submitted to the DRB it may be heard at the next regular DRB meeting or a special meeting may be convened, as agreed by everyone. The review shall be conducted at a neutral location. The party requesting the review will first present its position, followed by the other party. During the review the Contractor and the Government shall each be provided the full opportunity to present all of their evidence, documentation and testimony. The DRB members may ask questions, request clarification or ask for additional data. Copies of all information provided the DRB by one party shall be provided to the other party. Transcripts of the meeting will be prepared.

f. After the review is concluded, the DRB shall meet to formulate its recommendations. The DRB recommendations, complete with explanations of its reasoning, shall be submitted to the Contractor and the Government as a written report. The recommendations shall be based on the pertinent provisions of the contract, applicable laws and regulations, and the facts and circumstances involved in the issue. It is important for the DRB to express clearly and completely the logic and reasoning leading to the recommendation, so that both parties fully understand it.

g. After issuance of the DRB recommendations, the Contractor and the Government have two weeks to accept or reject the recommendations and reach a final settlement. (This does not include the administrative time for preparing any contract amendment which may be required.) This provision takes precedence over FAR 52.233-1, Disputes clause, up to this point. Recommendations that have not been accepted or issues that have not been resolved by the end of this period shall revert back to the normal disputes process as defined in FAR 52.233-1 unless an extended settlement period is agreed to by both parties.

h. Position papers, exhibits and oral arguments made by the Contractor and the Government to the DRB as well as the written opinions of the DRB shall not be confidential and shall be admissible in any subsequent litigation between the Contractor and the Government arising under or related to this contract. All requests by the contractor for contract price adjustment shall be subject to audit by the Defense Contract Audit Agency (DCAA). None of these processes shall alter the terms of the contract, nor the requirements for the appropriate certifications.

4. ADR Administration Costs. The contractor is responsible for contracting for the DRB members once membership has been established. This contract includes cost reimbursable line items to pay for this expense and the other ADR administrative expenses as a direct charge. The contractor may not use this line item to pay for any ADR settlement costs. (VXK-95-040)

❖ AGM-130

AGM-130 Air-to-Surface Guided Weapon

Alternative Dispute Resolution Memorandum of Agreement Between

**The Department of The Air Force
and
Boeing North American, Inc.**

1. The Department of the Air Force (Air Force), and Boeing North American, Autonetics & Missile Systems Division (collectively the Parties) have entered into contract(s) F08635-91-C-0069, F08626-92-C-006, F08626-95-D-0227, F08626-93-C-0011, F08626-95-C-0215, F08626-95-C-0236, and F08626-97-C-0110 to develop and acquire 655 AGM-130 Mid-Course Guided air-to-ground weapons. The Parties share the objective of supplying America's war fighters with technologically advanced and reliable equipment in a timely manner and at a reasonable price to promote swift, safe and successful accomplishment of the national defense mission. This (These) contract(s) contain(s) the "Disputes" clause (52.233-1) to implement the Contract Disputes Act of 1978. However, as contemplated by FAR 32.214, the parties also recognize that Alternative Dispute Resolution (ADR) procedures involving collaborative techniques can be used as an alternative to Disputes Clause procedures in order to avoid the disruption and high cost of litigation which detracts from mission accomplishment.
2. The Parties agree that they will try to resolve all issues in controversy arising under or related to the contract by negotiation and mutual agreement at the contracting officer's level. If negotiations reach an impasse, the parties agree to use to the maximum extent feasible one or more of the ADR processes contemplated by FAR 32.2 to reduce or eliminate the need for litigation. The Parties further agree that any ADR process must be structured to allow sufficient time to exchange and analyze any information necessary to obtain and justify a settlement.
3. Consistent with FAR 33.214, in cases where the parties decide to use ADR, the parties will prepare and agree to a specific, written ADR agreement appropriate to the controversy, before the ADR process begins. The agreement should normally address the following (as appropriate): authorized representatives for each party; ADR techniques and processes to be utilized and procedures to be followed; methods for the exchange of information; a schedule and procedures for any discovery proceedings, including how to limit discovery/factual exchange; appointment and payment of neutrals; whether and to what extent to stay or suspend any pending litigation; possible audit requirements; confidentiality, at what point the parties will begin negotiations; and a provision for termination of the agreement.
4. If the contracting officer rejects a contractor's request to use ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C.572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. See 41 U.S.C. 605(e) & FAR 33.214(b). In any case where a contractor rejects the government's request to use ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

5. It is not the intent of the parties that this agreement alter, supplement or deviate from the terms and conditions of any contract(s) between the parties, or the legal rights and obligations of the parties set forth therein. Any changes to those contract(s) must be executed in writing by authorized contracting officials.
6. In the event either party believes a particular issue is not well-suited to ADR, or is dissatisfied with progress being made in a particular ADR proceeding, that party may, after good faith efforts to resolve the issue, elect to abandon the ADR process and proceed as otherwise provided under contract, regulation or statute. Nothing in this Agreement shall be deemed to prevent either party from preserving and exercising its legal rights and remedies during the ADR process.

❖ **JASSM**

Available at the following website...

<http://www.jdamus1.eglin.af.mil:84/contract/docs/adrclause.html>

ALTERNATE DISPUTES RESOLUTION (20 AUG 1997)

The JASSM program is based on the concept of a teaming arrangement between the Government and Lockheed Martin which means that Lockheed Martin Integrated Systems and the Government are both interested in the timely, efficient and fair resolutions of disputes. Based on the mutual desire for a system of resolving disputes that meets these goals and the Administrative Dispute Resolution Act (ADRA) of 1990 and revisions of October 1996, the Government and Lockheed Martin agree to use the following procedures under this contract for disposition of disputes:

A.Partnering: Lockheed Martin and the Government will employ the use of partnering for dispute avoidance. Partnering is used to build an environment that encourages open communication and fosters the achievement of mutual goals. This process should assist both parties in identifying and solving problems before they become issues in controversy.

B.Mini-trial: If Lockheed Martin and the Government are not able to reach a mutually acceptable agreement within seventy days (unless otherwise agreed to), in accordance with normal contract procedures defined in FAR Part 33 and its supplements regarding differences on mutually agreeable significant issues or a claim greater than \$10 million, then Lockheed Martin and the Government will mutually agree to endeavor to settle the dispute by mini-trial. An agreement with details of the proceedings to include the schedule shall be executed within 15 days of the decision to employ mini-trial procedures. The agreement shall provide for the fees, expense reimbursement and method of payment for the Neutral Advisor. This agreement shall incorporate by reference this ADR provision. (Note: Nothing herein shall be construed to be a waiver or variance of statutory certification requirements.) Agreement to payment of any settlement is subject to availability of funds.

1.Principal Participants

The Air Force PEO for Weapon System (AFPEO/WP) of the JASSM program and an equivalent contractor counterpart for Lockheed Martin shall attend the mini-trial hearing and engage in settlement discussion as the principal participants. They shall review the parties' respective positions on the facts and the law together with supporting documentation. Following the mini-trial hearing, they will enter into good faith discussions to resolve the dispute. The principal participants shall have the authority from their respective parties to settle the dispute, subject to the approval review process of their respective organizations.

2. Neutral Advisor

a. Lockheed Martin and the Government will jointly select a Neutral Advisor for the ADR proceedings from a list of three mutually acceptable individuals obtained from a third party (such as Chairman of the Armed Services Board of Contract Appeals (ASBCA), the American Arbitration Association, etc.) The Neutral Advisor shall be a person experienced in disputes resolutions for the Government and/or industry (such as a retired federal judge or an active or retired ASBCA judge) and be able to participate in the proceedings in the agreed to schedule. The Neutral Advisor will serve as the moderator of the mini-trial hearing. The Neutral Advisor may ask questions to seek clarification, but may not direct, limit, or otherwise interfere with the proceedings. Prior to discussion between the principal participants, the Neutral Advisor will meet separately with the principal participant and representative for each party to discuss the strengths and weaknesses of such party's position. There will be no other ex parte communication concerning the dispute by either party with the Neutral Advisor prior to final resolution of the dispute unless mutually agreed to by both parties.

b. Prior to being appointed as a Neutral Advisor, the Neutral Advisor will execute an agreement that all information received during the ADR proceedings shall not be disclosed to any third party, and that all documents and copies thereof furnished to the Neutral Advisor in connection with the proceedings shall be returned to the party which generated or provided the information within ten days after the agreement terminates. The agreement will also contain a provision prohibiting the Neutral Advisor from participating in any future dispute resolution proceedings or litigation concerning this matter if the matter is not settled.

c. Replacement of the Neutral Advisor will occur when: (1) Lockheed Martin and the Government agree to replace the Neutral Advisor, or (2) the Neutral Advisor has served for at least one year and either Lockheed Martin or the Government requests a new third party. Replacement of the Neutral Advisor will not occur when a dispute is pending.

3. Procedures

The details for the procedures shall be included in the agreement executed for each dispute. Each dispute agreement shall include an aggressive schedule for timely resolution of the dispute that is to be tailored to the individual dispute involved. For instance, the dispute may be limited to the exchange of position papers followed by discussions without an actual mini-trial hearing.

a. The prehearing discovery shall be limited to the exchange of prehearing position papers and hearing exhibits and examination by each party of the other party's relevant non-privileged documents which would be discoverable before the ASBCA. The position papers shall contain factual and legal issues involved. The schedule for receipt of these position papers should be 10 days in advance of the proceedings with a page limitation agreed to by the parties and the Neutral Advisor. Copies of the position papers, the claim and heretofore published responses relating thereto shall be provided to the respective principals, the Neutral Advisor, and the PCO by the legal counsel for each party.

b. Mini-trial Hearings. The mini-trial hearings will be conducted within twenty days of notification of proceeding at a mutually agreeable location. The duration of the mini-trial will not normally exceed one day and will proceed as follows:

1. Attendance at any mini-trial hearing, other than witnesses and legal counsel, shall be limited to the Neutral Advisor, the principal participants, the Government/Contractor Program Director/Manager and his Deputy, the Government/Contractor Technical Director, the PCO, and Contractor Contracts Manager.

2. Witnesses will be present facts for the principals when required. The principals and the Neutral Advisor may ask additional questions, request clarification or ask for additional data. Any requests for information shall be furnished within three working days and shall include information that is releasable under applicable regulations (Freedom of Information Act, Administrative Dispute Resolution Act, Federal Rules of Civil Procedure, Federal Rules of Evidence, etc.).

3. No transcripts shall be allowed, and all statements and documents prepared in connection with the mini-trial will be confidential and shall not be admissible in any future litigation proceedings unless otherwise mutually agreed upon. All documents deemed confidential will be immediately returned to Lockheed Martin or the Government upon termination or completion of the ADR proceedings.

4. No oaths will be taken at the proceedings; however, any testimony or evidence is subject to the False Statements Act.

5. The mini-trial hearing will consist of opening statements, the claimant's presentation, the defending party's presentation, the claimant's rebuttal and the closing statements.

6. Each party will have complete discretion to structure their respective presentations, which may include, but shall not be limited to, statements and presentations by non-lawyers, audiovisual aids, demonstrative evidence and oral argument.

7. After the mini-trial hearing, and prior to discussions, the Neutral Advisor will meet separately with the principal participants and legal counsel for each party to discuss the relative merits of each party's position.

c. Discussions/Settlement

1. The principal participants will meet at the times set forth in the Schedule to discuss their respective position and the possible resolution of the dispute. The Neutral Advisor will be available to the principals for consultation at the pleasure of the principals during this closed session.

2. After the discussions are concluded, the principal participants shall make their recommendations which will be complete with explanations of their reasoning. The recommendations shall be based on the pertinent provisions of the contract and the facts and circumstances involved in the issue. Lockheed Martin and the Government have two weeks to reach a final settlement. (This does not include the administrative time for preparing any contract modifications that may be required.) As part of the settlement, all requests by the contractor for contract price adjustment shall be subject to audit by the Defense Contract Audit Agency. The contractor shall certify all claims in accordance with the Administrative Disputes Resolution Act. None of these processes shall alter the terms of the contract, nor the requirements of any other certifications. This provision takes precedence over FAR 52.233-1, Disputes Clause, up to this point. Issues that have not been resolved by the end of this period shall revert back to the normal disputes process as defined in FAR 52.233-1 unless an extended settlement period is agreed to by both parties.

d. Confidentiality of Statements and Documents

Lockheed Martin and the Government agree that all offers, promises, conduct and statements whether oral or written made in connection with the proceedings are confidential and shall not be used for any other purpose. All documents, including all notes or other writings of the principal participants and the Neutral Advisor prepared during the course of the procedures shall be inadmissible as evidence in any other proceedings. However, if settlement is reached as a result of the mini-trial, any and all information prepared for and presented at the proceedings may be used to justify and document the subsequent settlement agreement. All documents and copies furnished to each party shall be returned to the generating or submitting party except those document required to support a settlement. Any document presented by either party pursuant to these proceedings to which there is otherwise any right to access or which otherwise may be discovered pursuant to the Federal Rules of Civil Procedure and admitted into evidence pursuant to the Federal Rules of Evidence may be accessed, discovered or admitted into evidence in any other proceeding.

e. Termination.

Lockheed Martin and the Government agree that the agreement shall terminate upon the occurrence of any of the following conditions: (1) the parties are unable to agree on selection of a Neutral Advisor (2) the parties reach a final agreement resolving the dispute (3) the parties fail to reach a final agreement resolving the dispute or (4) either party notifies the other party in writing at any time that it desires to terminate the agreement. Notwithstanding a termination, paragraphs (2) and (3)(b)(3), and (3)(d) shall remain in full force and effect.

C. Mediation

1. For disputes under \$10 million that cannot be mutually agreed upon in accordance with normal contract procedures defined in FAR Part 33 and its supplements, Lockheed Martin and the Government mutually agree that they will endeavor to settle the dispute by mediation. In this case, the Neutral Advisor will serve as the mediator. Participants will be the Government/Contractor Program Director/Manager, his Deputy, the Government/Contractor Technical Director, the PCO and the Contractor Contracts Manager and legal counsel presenting the case for Lockheed Martin and the Government. The same procedures as the mini-trial may be used, but they may be tailored for the individual dispute involved. All discussions and documents used in the mediation will be confidential.

2. In the event the parties are unable to resolve the dispute through mediation, issues that have not been resolved shall revert back to the normal disputes processes defined in FAR 52.233-1. Prior to initiating legal action in accordance with the normal disputes process, the parties agree to further explore the possibility of using additional ADR procedures to include a mini-trial to resolve the dispute.

D. ADR Administrative Costs. The contractor is responsible for contracting for the Neutral Advisor. The costs will be shared equally between the Government and Lockheed Martin. The JASSM contract includes a cost reimbursable line item to pay for any allowable expenses including ADR administrative expenses as a direct charge. The contractor may not use this line item to pay for any ADR settlement costs.