



**U.S. ARMY CORPS
OF ENGINEERS**

RESEARCH REPORT

**Alternative Dispute
Resolution Series**



**USING ADR IN THE U.S. ARMY CORPS
OF ENGINEERS: A FRAMEWORK FOR
DECISION-MAKING**

August 1989

IWR Research Report 89-ADR-R-1

The Corps Commitment to Alternative Dispute Resolution (ADR):

This research report is one in a series of reports describing techniques for Alternative Dispute Resolution (ADR). The series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. This report is a means of providing Corps managers with information on how to apply ADR to the Corps. It also suggests a framework for managerial decision-making regarding disputes. The information in this report is designed to stimulate thinking and encourage innovation by Corps managers in the use of ADR techniques.

These reports are produced under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

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**USING ADR IN THE U.S. ARMY CORPS OF ENGINEERS:
A FRAMEWORK FOR MANAGERIAL DECISION-MAKING**

Alternative Dispute Resolution Series

Research Report

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USING ADR IN THE U.S. ARMY CORPS OF ENGINEERS: A FRAMEWORK FOR MANAGERIAL DECISION-MAKING

I. EXECUTIVE SUMMARY

Since 1984, the U.S. Army Corps of Engineers has used various forms of Alternative Dispute Resolution (ADR) to resolve conflicts involving contract claims, hazardous waste cleanup, and permits. ADR techniques include mini-trials, non-binding arbitration panels, individual arbitrators, facilitation and mediation, all of which have been used by the Corps. ENDISPUTE, Inc. was hired by the Corps to review and analyze a sample of these dispute resolution efforts. In particular, the analysis was aimed at determining:

- (1) What kinds of contract claims can be settled using ADR techniques?
- (2) What is the best way to structure such settlement efforts?
- (3) What kinds of neutral assistance are most useful?

In-depth analyses of five Corps cases settled using ADR techniques were used to answer these questions. The cases range from the Corps' second mini-trial (Tenn Tom Constructors, Inc.) to the first non-binding arbitration handled at the district level (Olson Mechanical and Heavy Rigging, Inc.). Two additional mini-trials involved the same Corps decision-makers and attorneys (Bechtel National, Inc. and Goodyear Tire and Rubber Company, Inc.). One of the cases involved the assessment of responsibility for cleanup of a Superfund site (Goodyear). The cases involved claims against the Corps that were settled for amounts ranging from \$57,000 to \$45 million. The disputes focused on claims about differing site conditions, acceleration and modification orders, and assignment of responsibility.

We had hoped to analyze a mediation case, but the case we were assigned was not completed in time.

CASE STUDY SUMMARIES

TENN TOM CONSTRUCTORS

On June 28, 1985, the U.S. Army Corps of Engineers, Ohio River Division, and Tenn Tom Constructors (Tenn Tom), a joint venture headed by Morrison Knudsen, Inc., used a mini-trial to settle a \$55.6 million claim including interest* (for \$17.25 million). The claim was originally filed in 1979 charging differing site conditions (i.e. increased moisture in the soil) during a project involving the removal and disposal of ninety-five million-cubic yards of earth.

GRANITE CONSTRUCTION COMPANY

In March of 1987, the Mobile District of the U.S. Army Corps of Engineers and Granite Construction Company (Granite) negotiated a settlement of \$725,000 for an outstanding claim, originally filed for \$1,770,000. They used a form of non-binding

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

arbitration involving senior negotiators on both sides and an individual arbitrator. Granite submitted its original differing site conditions claim in April of 1979 after the Government condemned property that included an approved sand source.

OLSON MECHANICAL AND HEAVY RIGGING, INC.

In November of 1987, the U.S. Army Corps of Engineers, Portland District, and Olson Mechanical and Heavy Rigging, Inc. (Olson) used a non-binding arbitration panel to reach a \$57,000 settlement on an original claim of \$185,000 (\$224,00 including interest.)* The claim arose from a contract to reconstruct a fish ladder at the Dalles Lock and Dam. Olson claimed differing site conditions based on an unexpected amount of water in the project area.

BECHTEL NATIONAL, INC.

On April 6-10, 1988, Bechtel National Inc. (Bechtel) and the U. S. Army Corps of Engineers, Omaha District used a mini-trial to settle a complex case for \$3.7 million. The case involved seven separate claims (including subcontractor claims) totalling \$14 million. Originally filed in the fall of 1986, the claims primarily involved unilateral modifications and impacts arising from incomplete design plans for construction of the Consolidated Space Operations Center in Colorado.

GOODYEAR TIRE AND RUBBER COMPANY

On May 19-21, 1988, the Omaha District of the U.S. Army Corps of Engineers and Goodyear Tire and Rubber Company (Goodyear) used a mini-trial to determine shares of responsibility for mitigating groundwater contamination at the Phoenix-Goodyear Airport/Litchfield Superfund site. Part of the site was formerly owned and operated as a Naval Air Facility. It was placed on the Superfund List in 1983 after carcinogenic solvents were discovered in the groundwater.

KEY FINDINGS

- Managers decided to use ADR techniques when the perceived costs (in time and money) were less than the anticipated costs of litigation, or when the facts of the case were not clearly favorable to the Corps.
- Mini-trials were the ADR method of choice when the Corps managers involved felt that the case would require their personal involvement in the settlement negotiations. To some extent, this was a function of the dollar values or the particular nature of the case.
- Non-binding arbitration was the ADR method of choice when the dollar value of a claim was relatively small or when the Corps manager did not have sufficient time to participate in a mini-trial process.
- ADR techniques were used at different points in the evolution of disputes: in anticipation of conflict; when a claim was filed, but before settlement negotiations began; or when negotiations reached a stalemate.

- All the neutrals that helped to settle cases had substantive as well as procedural expertise. Even in the mini-trials, where the role of the neutral was primarily to keep the process on track rather than to render a non-binding judgement, the substantive knowledge of the neutral was important to the success of the dispute resolution effort.
- Strong support for ADR from the Chief Counsel contributed to its increased use throughout the Corps.
- Corps attorneys played a key role in negotiating the detailed provisions of the ADR procedures that were used. They also prepared the Corps' presentations and coached the technical staff during dispute resolution sessions.
- The Corps managers involved in the dispute resolution efforts were satisfied with the results and would use ADR techniques again.

We were not assigned facilitation and mediation cases. Also, the subject matter of four of our five cases involved contract claims; no operations and management disputes were included. To complete the preliminary ADR Framework, we need to review additional cases.

THE PRELIMINARY ADR FRAMEWORK FOR MANAGERIAL DECISION-MAKING

The preliminary ADR Framework derived from these cases is intended as a tool for Corps managers to use in evaluating the potential benefits of using ADR techniques *before* conflicts arise as well as after they develop. At each step in the managerial decision framework, a Corps manager must answer a series of questions. The manager's responses determine whether or not it is appropriate to continue on a settlement track. At several points in the decision framework, a manager may determine that ADR techniques are not appropriate. (If this occurs, the framework leads the manager back to the first step to re-evaluate other options.)

The steps in the preliminary decision-making Framework are:

- Step 1: Decide to settle, litigate, or pursue administrative action
- Step 2: Decide to negotiate directly or use ADR techniques (or neutral assistance)
- Step 3: Decide on the best ADR format
- Step 4: Assess the Corps manager's ability to participate
- Step 5: Assess the other party's ability to participate
- Step 6: Secure the other party's agreement to participate
- Step 7: Choose a neutral
- Step 8: Secure an ADR process agreement

IMPROVING THE PRELIMINARY FRAMEWORK

Before the Corps can implement the Preliminary ADR Framework, it will be necessary to:

1. Analyze additional cases to determine how Corps managers react to facilitation and mediation alternatives;
2. Test the Framework in collaboration with Corps managers to determine its reliability and validity;
3. Transfer the Framework to an interactive format that Corps managers can use on personal computers;
4. Assist Corps attorneys in drafting model ADR procedural agreements;
5. Train Corps managers and attorneys to use interactive software in determining how best to handle contract claims.

II. CASE STUDIES

- #1. TENN TOM CONSTRUCTORS

- #2. GRANITE CONSTRUCTION COMPANY

- #3. OLSON MECHANICAL AND HEAVY RIGGING, INC.

- #4. BECHTEL NATIONAL, INC.

- #5. GOODYEAR TIRE AND RUBBER COMPANY

CASE STUDY #1

TENN TOM CONSTRUCTORS, INC.

THE PROJECT AND CLAIM

SUMMARY

On June 28, 1985, the U.S. Army Corps of Engineers, Ohio River Division, and Tenn Tom Constructors, Inc., a joint venture headed by Morrison Knudsen, Inc. used a mini-trial to settle a \$55.6 million claim (including interest)* for \$17.25 million. The claim was originally filed in 1979 charging differing site conditions, i.e. increased moisture in the soil, during a project that required the removal and disposal of ninety-five million cubic yards of earth.

Professor Ralph Nash of the George Washington University Law School served as the neutral, and General Peter Offringa, Ohio River Division Commander, and Mr. Jack Lemley, Group Vice President at Morrison Knudsen, Inc., were the decision-makers. The Corps case was presented by Wesley Jockisch. Stan Johnson of Crowell & Moring served as counsel for Tenn Tom Constructors, Inc.

This case highlights 1) important roles played by decision-makers on both sides; 2) the role of attorneys as presenters/advisors; 3) the impact of organizational pressures on decision-makers regarding settlement decisions; and 4) the impact of district/division relationships on decisions reached in mini-trials.

BACKGROUND

The U.S. Army Corps of Engineers contracted with Tenn Tom Constructors, Inc. (TTC), to excavate an eleven-mile stretch of the Tennessee Tom Bigbee Waterway. A five year, fixed-price contract for \$270 million, it required the removal and disposal of ninety-five million cubic yards of earth. Prior to soliciting bids for the contract, the government performed extensive studies to determine subsurface soil conditions, including a test excavation of a 1500 foot wide section of the project area. The government provided potential contractors with the test results to help them calculate cost projections.

During the excavation process, TTC claimed they encountered more drainage inhibiting clay zones and higher moisture levels in the soil than pre-bid specifications suggested. This resulted in severe "trafficability" problems and increased travel time per truckload of earth. For these reasons, TTC filed a differing site conditions claim and requested an equitable adjustment of \$42.8 million. After negotiations reached impasse, the Corps established an in-house task force to evaluate the merits of the claim. The project was extensively monitored and documented by both the government and the contractor.

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

CHRONOLOGY OF THE CLAIM

Tenn Tom Constructors, Inc. was awarded the contract on March 26, 1979. They formally notified the Nashville District of differing site conditions in August of 1980 and again in April of 1981. As excavation continued more specific claims were filed. After extensive investigation and ongoing communications between TTC and the Corps, a Contracting Officer's Decision (COD) was issued on August 15, 1984 denying the claim in full. TTC filed an appeal on October 18, 1984.

In March of 1985, counsel for TTC, with knowledge of the Corps pilot ADR program, requested they use a mini-trial to settle the claim. The Corps agreed, and on April 15, 1985 both sides signed a mini-trial agreement outlining its procedural rules. The mini-trial took place as scheduled on June 11-13, 1985. Negotiations were expected to commence at the close of case presentations, but the decision-makers identified informational gaps and requested another day of presentations. Attorneys provided additional data on June 27th, and the decision-makers, with the help of the neutral, negotiated an agreement on June 28, 1985.

MAJOR ISSUES IN DISPUTE

The major issues in dispute centered on subsurface soil conditions and the difference between the contractor's expectations based on pre-bid specifications and the actual conditions encountered. According to Corps tests, the soil was expected to drain well with normal trenching operations so that the contractor's equipment would not be adversely affected by excessive moisture. TTC found that the soil retained a high level of water. This reduced the speed at which trucks could travel to and from the site, thereby causing significant maintenance and repair problems for TTC's de-watering equipment. The Corps contended that geological tests performed prior to awarding the contract clearly identified subsurface soil conditions that were not significantly different from those experienced by the contractor.

POSITIONS OF EACH SIDE PRIOR TO ADR

In appealing the contracting officer's decision, TTC claimed they deserved an equitable adjustment of \$42.8 million. After an extensive investigation, the government found no justification for a differing site condition claim. By the time TTC and the Corps were considering ADR, the claim amounted to \$55.6 million including interest.*

At the start of the project, TTC informed the Nashville District of its problems associated with the high moisture content of the soil. Since it was clear this would prove to be a very large claim, both sides carefully documented all aspects of the project as it unfolded. The Corps alone had more than 10,000 photographs and twenty hours of video.

Technical field staff on both sides were deeply entrenched in their positions. TTC claimed they had great difficulties during excavations and had ruined a lot of their equipment. The Corps refused any responsibility for the problems and argued that soil conditions were nothing different from what should have been expected.

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

Crowell & Moring, counsel for TTC, has had substantial involvement with ADR and promotes its use in difficult cases that seem likely to require a great amount of time to resolve and result in extensive litigation costs. Stan Johnson, a partner at Crowell & Moring, knew of the Corps' recent success with a mini-trial, and thought it would be interested in participating in another. He called Lester Edelman, Corps Chief Counsel, to inquire about the possible use of ADR in the Tenn Tom claim and also recommended the mini trial procedure to TTC.

At precisely the same time, the Corps was circulating a draft regulation regarding mini trials. Districts and divisions were asked to look for suitable cases for a pilot program. Thus, by the time this claim presented itself, the agency had already begun to assimilate many ADR concepts and address some potential problems and barriers. In fact, there was a good deal of pressure to further experiment with ADR.

When TTC's counsel recommended a mini-trial to the Division, Wesley Jockisch, Ohio River Division Counsel, contacted Les Edelman, who fully supported its use in the case. Jockisch then discussed it with General Peter Offringa, Division Commander. Since Offringa had no prior knowledge of mini-trials, Jockisch explained the procedure and its associated risks and benefits to him.

PROS AND CONS OF ADR: THE CORPS

The Corps deemed the case suitable for ADR for a number of reasons. First of all, the dispute involved factual rather than legal issues. The legalities of the case were clear: If differing site conditions existed, the contractor deserved additional compensation. Questions, however, arose concerning facts and interpretations of geological and engineering theory. Secondly, the possibility of government liability for \$42.8 million was enough to seek a form of dispute resolution that allowed for government input into the eventual settlement and reduced the possibility of completely losing the case. The Corps had identified a significant level of risk such that it preferred to stay out of court. In fact, the Corps agreed the earth was slightly different from its description in pre-bid documents, but not so great as to justify such a large claim.

If forced to go to trial, the case would have required substantial manpower and expense. The Corps had already assembled a task force of eight full-time people to evaluate the claims. However, it was not clear this intensive effort would prove fruitful because it was possible the judge would limit the introduction of technical evidence. Given the highly technical nature of the dispute, and the time necessary to fully develop its case in court, Corps counsel were concerned about the risk of obscuring rather than clarifying technical issues before the Board.

In contrast, the format of the mini-trial forced attorneys to present clear, concise cases to already educated decision-makers, thus reducing the need to supply technical background information. Since the decision-makers were interested parties, they were also more likely to insist on a full and clear understanding of the issues. In addition, if the

Corps disposed of the claim through the mini-trial, it would also strike an additional \$8 million in associated subcontractor's claims from its caseload and reduce interest payments on the settlement.

The mini-trial could also serve as a medium for negotiations between decision-makers who were not subject to its emotional entanglement. Whereas the technical staff of both sides were emotionally entrenched in their positions, neither decision-maker had been involved in the day-to-day operations of the project. Thus, they were more likely to objectively weigh the evidence.

Another advantage of ADR in this case was the possibility of setting a harmful precedent at trial. If the Board found in favor of TTC, the Corps could have conceivably been forced to change its site conditions evaluation procedures.

Finally, the Corps recognized the need to sustain positive, long-term relationships with contractors, and especially the large companies involved in this project. The ADR procedure afforded the Corps a chance to amicably settle a large claim as opposed to the adversity of a Board trial.

A serious drawback to ADR was the strain it put on the district-division relationship. Whereas a positive attribute of the mini-trial is that the decision-makers are unencumbered by the emotional aspects of the dispute, they are subject to organizational pressures. District staff were frustrated by the decision to settle the claim because they expected to win at the Board. The field staff did not want the Corps to settle; they wanted to prove their case before the Board and had done a substantial amount of work towards that goal. However, Corps officials decided the level of risk outweighed these considerations against using ADR.

Another potential problem associated with the mini-trial was that the Corps would expose its case, thereby affording the other side a chance to prepare a better case for trial should they fail to settle. However, according to the attorneys, both sides had meticulously documented all phases of the project so there was nothing to hide. Each side knew the strengths and weaknesses of the other's case.

General Offringa decided that it was worthwhile to try ADR. He reasoned that even if it failed to resolve the claim, the Corps would have shown a good-faith resolution effort outside the adversarial process of litigation.

PROS AND CONS OF ADR: THE CONTRACTOR

Counsel for the contractor initiated the use of ADR in this case. He felt the time involved in preparing, trying, and waiting for a decision was a strong enough reason to search for an alternative. He also thought the complexity of the case made trial a high risk gamble given that the stakes were so high. Johnson decided that it was reasonable to negotiate a settlement even if TTC might have received a larger award in court.

The contractor was enthusiastic about the prospect of a mini-trial, given operations-level support for a shortened process to resolve the claim. TTC also felt the reduction in legal fees offset the possibility of settling for less than it expected from a trial.

CHOICE OF ACTUAL PROCEDURE

The procedure chosen in this case was a mini-trial. In a mini-trial each side chooses a decision-maker, usually a senior level person unhampered by the emotional aspects of the dispute, and a mutually acceptable neutral, who presides at the hearing. The hearing is usually scheduled for two to three days during which the attorneys informally present their cases to the decision-makers. Evidence is entered freely and not according to any strict procedural rules. This allows information to be disseminated more quickly. Throughout the case presentations, the neutral advisor and decision-makers are free to ask questions. At the conclusion of the presentations, the decision-makers, assisted by the neutral, attempt to negotiate a settlement based on information provided during the hearing. If they fail to settle, none of the information shared during the mini-trial can be used as evidence before the Board. Similarly, the neutral is disqualified from serving as a witness in future procedures concerning the claim.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

The attorneys on each side met to formulate the mini-trial agreement. It was based on a model agreement designed by the Corps' Chief Trial Attorney, Frank Carr. They decided the presentations would run for two-and-a-half days, followed by negotiations between the decision-makers. They agreed on the decision-makers, the neutral, and a precise schedule for presentations, cross examinations, rebuttals, and questions and to exchange position papers two weeks prior to the procedure. Formal discovery proceedings for the trial before the Board were suspended pending the outcome of the mini-trial. The parties agreed to share all expenses incurred including the neutral's fee and that a settlement would clear the Corps of all outstanding claims, including those of sub-contractors, from this project.

SELECTION OF NEUTRAL

There was some difficulty in choosing the neutral. The parties quickly decided to choose a legal, rather than a technical expert, and each side gave the other a list of six to eight potential neutrals. TTC suggested a number of lawyers in private practice, and the Corps suggested a number of retired judges. None of the individuals was mutually acceptable. Wesley Jockisch then called the Chief Counsel's Office for advice and was furnished with an additional list of names. Both sides agreed to Professor Ralph Nash from George Washington University Law School, a highly reputable expert in government contract law.

PRIOR EXPERIENCE WITH ADR

Stan Johnson had served as counsel for TRW in the TRW-NASA mini-trial, the government's first experience in using ADR to settle a dispute of great magnitude. Jack Lemley never participated in a mini-trial but had served on arbitration panels in construction disputes.

Neither General Offringa nor Wesley Jockisch had any prior experience with formal ADR procedures, though in the past Jockisch had organized division level review

conferences.¹ Jockisch arranged approximately twenty-five such meetings in the past, but the process is no longer an available option.

Professor Nash had never been involved in an ADR procedure before. However, because of his extensive experience and numerous publications concerning government contract law, both sides felt he was the best choice.

ADR PROCEDURE

PARTICIPANTS

The decision-makers for the mini-trial were General Peter Offringa, Division Engineer of the Ohio River Division of the Corps, and Mr. Jack Lemley, a Group Vice President of Morrison-Knudsen. Offringa became commander of the Ohio River Division after the contracting officer denied the claim and so had no prior involvement with the project. A contracting officer's warrant was issued to authorize General Offringa to negotiate a settlement of the Tenn Tom Contractors' claim. The Chief Executive Officer of Morrison-Knudsen asked Mr. Lemley to serve in the capacity of decision-maker. He also had little involvement with project operations.

The neutral was Professor Ralph Nash, identified above. Attorneys for TTC were W. Stanfield Johnson and George D. Ruttinger, both from Crowell & Moring. Wesley C. Jockisch, attorney at the Ohio River Division, served as the Corps trial attorney. Assisting him were Robert Smyth and William Hill, attorneys from the Nashville District.

SCHEDULE

Upon arrival and by prior mutual consent, the Corps flew Prof. Nash to the project site to better acquaint him with the situation. The night before the mini-trial, Nash dined with Gen. Offringa and Mr. Lemley to discuss their expectations of his role. Since none of the three had previously participated in a mini-trial, they also discussed their hopes and expectations of it. The decision-makers agreed that Nash should be a full participant, meaning he was free to ask questions during presentations. He would also preside over the hearings, keep time, and play an active role during negotiations. However, at the time of the discussion, no one knew exactly what that would translate into.

During the first day of the mini-trial, TTC presented its case for entitlement for five hours. This was followed by thirty minutes of cross examination by the Corps, a thirty minute TTC re-examination, and two hours of questions from the decision-makers and neutral. The second day was similar with slightly reduced time for presentations and questions to allow for half-hour closing statements by each side. The third day consisted of each side's ninety minute presentation regarding quantum followed by a one hour question period.

¹ Before the Contract Disputes Act, if a claim was denied by the CO, the division commander could overrule the contracting officer's decision and direct a settlement in appropriate civil works cases.

The decision-makers were then expected to begin negotiating a settlement. They were expected to reach a settlement within one and a half days, but felt they needed more information on particular aspects of the project. They requested additional presentations, but the attorneys did not feel they could immediately provide the necessary material. It was decided to re-convene three weeks later and to give each side two hours to present its additional data. After this session, the decision-makers and neutral commenced negotiations and reached a settlement late the next day.

DESCRIPTION

TTC began its case for entitlement with a two hour opening statement. Johnson consciously set out to illustrate the government's exposure in the case, rather than convince Gen. Offringa of differing site conditions. In other words, he wanted to show that it was reasonable to settle at the mini-trial based on the risk associated with a trial at the Board. The central point in TTC's case was the amount of traction its trucks could expect on the dirt road surface. The contractor claimed that because of increased moisture in the soil, the trucks had to travel slower, adding five to ten minutes per trip, and its equipment required more repairs than expected. The project involved moving massive quantities of earth. TTC had calculated its expenses for the project based on how quickly the trucks could load and leave the site, dump, and return. They planned for 160 minutes per trip. Thus, because of the number of trips involved, the contractor argued that each additional minute on the total number of trips cost \$2 million.

TTC used a computer model to generate the times and speed of trucks relative to various soil densities. They also tried to show that the project was efficiently managed and that all the required de-watering procedures were completed.

During its rebuttal, the Corps showed the limitations of the computer model based on its validity only under ideal conditions and its inability to consider inefficiencies other than moisture levels of the soil. Johnson claimed that the Corps was questioning his witnesses' credibility, something he felt was inappropriate within a mini-trial. One Corps attorney, on the other hand, was surprised by the level of "lawyer tricks" used by Johnson.

The government's case rested on the Corps' knowledge of subsurface soil conditions and how well it represented that information in pre-bid documents. It provided detailed technical information of tests done and interpretations of test results. The Corps maintained that it had supplied potential bidders with enough information to determine the possible range of conditions to expect. Its tests included digging out a 1500-foot wide part of a hill to expose a cross section of the site. The government conceded that TTC experienced problems, but would not accept responsibility for differing site conditions, especially at the level claimed by TTC.

During the mini-trial, the geo-technical experts for each side were asked to explain their differences, and in effect, debate the issues. It became clear that they agreed on the facts, but held different interpretations. The decision-makers then questioned the reasoning behind their interpretations.

The third day was reserved for the financial aspects of the claim. Though scheduled to end at noon, the decision-makers did not begin to negotiate until about 4:30 p.m. By approximately 7:00 p.m., they identified informational gaps. They asked for additional presentations the next day, but the attorneys for both sides said it would be impossible to retrieve the specific information they wanted so quickly. Both attorneys

preferred the decision-makers conclude the mini-trial that day, but agreed to continue it three weeks later.

The additional information regarded the drainage procedures carried out by TTC. The decision-makers wanted proof that TTC had correctly excavated drainage ditches. They also asked for technical information about the total sub-surface soil along a critical stretch of the site. TTC was asked to provide a full range of readings regarding how saturated the soil was at various points in the project.

After the additional presentations, the three panel members again commenced negotiations. They did not receive all the data they asked for, but felt obligated to continue despite the uncertainty.

SETTLEMENT NEGOTIATIONS

After the presentations, the decision-makers and neutral successfully negotiated a settlement. Both decision-makers agreed that without the help of Prof. Nash they would have quickly reached impasse. During their initial discussions of entitlement, Nash did not take sides but asked appropriate questions that brought out relevant facts. Throughout the negotiations both decision-makers had the right to consult with their legal counsel. This right was exercised more frequently by General Offringa.

Once entitlement was established, they set out to determine a fair and equitable quantum. In order to avoid impasse, Nash suggested they discuss the possible ranges of moisture level in the soil and prevalent soil types, without raising dollar figures. Then they spoke of the probabilities that certain soil conditions existed during the project. Thus, Nash helped them to agree on objective criteria that could later be translated into monetary terms. They eventually agreed on four plausible scenarios that when costed out provided a settlement range between eleven and nineteen million dollars. They settled at \$17.25 million, including interest and \$1.25 million in subcontractor claims. This represented approximately thirty-three* percent of the original claim.

EVALUATION

PROCESS

There was clear consensus that the procedure was excellent and served the interests of both parties. Much of the credit for its success was given to Prof. Nash, and the participants stated that a competent neutral is essential for a successful ADR procedure. According to Nash, the most important ingredient for success in a mini-trial is strong, management- and task-oriented decision-makers. He thinks that once the attention of top management is focused on an issue, all their instincts are to successfully conclude the task and that the mini-trial provides a vehicle for senior executive involvement in such problem-solving. Nash played an active role during the hearing and subsequent negotiations. His expertise allowed him to ask questions that revealed strengths and weaknesses in each side's case. During negotiations, Nash served as a mediator. He offered his opinions

* Based on the figures quoted by Corps staff in a July 18, 1989 phone call.

regarding central issues, but also steered the decision-makers away from impasse and toward resolution.

The TTC case illustrates one of the strongest advantages of the mini-trial format. An already soured relationship among Corps and contractor field workers made it impossible for the dispute to be settled at the district level. However, the use of individuals at higher levels of authority and without negative pre-dispositions toward the other, eliminated the biases that hindered resolution. The decision-makers felt that the negotiations proceeded in a businesslike fashion. Offringa was surprised they concluded so quickly, especially since there were moments when he seriously believed they would fail to reach an agreement. Each had a great deal of respect for the other and though there was some professional antagonism, derived from the fact that each disagreed with the other's professional opinion of the situation, there was never any personal antagonism.

Both decision-makers felt the success of the mini-trial contributed to improving the long term relationship between the Corps and Morrison-Knudsen. General Offringa stated that the positive relationship established between Morrison-Knudsen and the Corps transcended the individuals who participated in the mini-trial. Even if they never interact again, the history of the relationship will carry into the future.

The days of the mini-trial and subsequent negotiations were taxing on all those involved. The days were long and the pressures intense. General Offringa was in an especially difficult position. On one hand, there was pressure to settle the claim and successfully end the mini-trial. On the other hand, there was district pressure against settling. He said the days spent at the mini-trial were "probably his most difficult days of the last five to ten years." Jack Lemley was struck by the courage of General Offringa. He felt that given the organizational pressure that rested on the General, he "showed exemplary courage in reaching a settlement."

There are also some lessons to be learned from this procedure. To begin with, the Corps trial attorney felt he was in a difficult position as presenter and advisor. He believes that in the future, one individual should serve in each role. He found that as presenter, he became an advocate, but was then forced to also show the weaknesses in his own case.

A second issue raised was the flexibility of the ground rules. Though all appreciated the flexibility allowed by the mini-trial, they felt the ground rules should have been more clearly stated and enforced. For example, the Corps did not expect the two technical experts to debate their interpretations of the facts. Corps attorneys felt they lost control of the process at that point. They were physically separated from the General, and therefore could not effectively advise him. They suggested the process include a mechanism for consenting to procedural changes before they are instituted.

QUANTUM

The contractor was satisfied with the settlement. His attorney felt he probably would have gotten a bit more at the Board, but all things considered, it was in his best interests to settle for the \$17.25 million.

General Offringa was also pleased with the outcome. He exceeded his initial bottom line, but through a risk analysis of the government's options, he determined the settlement was in its best interests. At least one of the Corps attorneys thought the settlement would be even higher.

Nashville District technical staff personnel were displeased with the settlement. They preferred to gamble with the entire claim at the Board because they strongly felt there was no validity to it. In fact, someone anonymously called the Inspector General's Office and asked for an investigation regarding justification of the settlement and a review of the dispute resolution procedure.

POSTSCRIPT:

The Department of Defense Inspector General reviewed documents associated with the Tenn Tom Constructors, Inc., Inc. case and conducted on-site interviews with personnel involved. Based on its investigation, the office of the Inspector General found that, "the government had sufficient liability to justify the \$17.25 million settlement," and that the "use of the mini-trial procedure appears to have been valid and in the best interests of the government."

The report concluded that the mini-trial procedure is an efficient and cost-effective means for settling contract disputes, but because it is a relatively new procedure its use should be carefully considered on a case-by-case basis. It also recommended that in the future the Corps more fully document its reasons for a given settlement.

CASE STUDY #2
GRANITE CONSTRUCTION COMPANY
(THE SAND SOURCE CLAIM)

THE PROJECT AND CLAIM

SUMMARY

In March of 1987, the Mobile District of the U.S. Army Corps of Engineers and Granite Construction Company used Alternative Dispute Resolution (ADR) to negotiate a settlement of \$725,000 for an outstanding claim, originally filed for \$1,770,000. They used a hybrid non-binding arbitration procedure that allowed for senior executive negotiations after the arbitrator presented his report and recommendations. Granite submitted its original differing site conditions claim in April of 1979, after the Government condemned property that included its approved sand source.

Chris Woods, of the Al Johnson Construction Company of Minnesota, served as the neutral, and Col. C. Hilton "Stretch" Dunn, District Commander, and Richard Roberts, Executive Vice President of Granite, were the decision-makers. The Corps chose to have case presentations made by technical experts rather than attorneys. Jim Brock, Chief of Claims, and Dick Lewis, project manager, presented for the Corps and Granite respectively.

This case illustrates: 1) the advantages and disadvantages of using individual arbitrators (as opposed to panels); 2) the use of technical experts to present cases (with attorneys in advisory roles); 3) strategies that neutrals can use to help parties "save face"; and 4) ways of reframing settlements as mutually beneficial outcomes.

BACKGROUND

The Mobile District, of the U.S. Army Corps of Engineers, contracted with Granite Construction Company (Granite) to construct the Aberdeen Lock and Dam of the Tennessee Tombigbee Waterway. The Government approved R&S Haulers and Distributors, Inc. (R&S) as the sand source for Granite.

At the time the contract was awarded, the Government was in the process of negotiating the purchase of a large plot of land required for construction of waterway which included Granite's sand source. When negotiations between the Government and landowner failed, the Government was forced to condemn the property, thereby forcing Granite to seek an alternative sand source.

Granite examined at least eight different sand sites before finding a suitable one. However, the quality of the sand was inferior to the original source. The new site contributed to reduced cement production, required longer hauls than expected, caused numerous delays, and increased costs. As a result, Granite filed a differing site conditions claim based upon its inability to mine sand from an approved site because of Government actions.

CHRONOLOGY OF THE CLAIM

Granite Construction Company was awarded the contract on October 26, 1976, and notice to proceed was issued on November 22. The Government condemned the property including the sand source on January 1, 1979. Granite found an alternative site at the end of March. During the period of April 1 through July 31, the R&S production plant was dismantled and rebuilt at government expense.

As a result of the loss of the sand source and its associated delays and reduced production, Granite filed a differing site conditions claim on April 23, 1979 for \$3 million. On July 12, 1982 the claim was denied in full in the final Contracting Officer's Decision (COD). Granite filed an appeal at the Engineer Board of Contract Appeals (Board), but continued negotiations with the Corps. At this time Granite requested a Corps Division Review of the claim, and the Division Engineer in Atlanta issued a directive to the Mobile District to attempt to negotiate an equitable adjustment. At the Corps' request, Granite submitted three different proposals over time for quantum settlement, all of which were rejected. Throughout these negotiations, counsel for Granite consistently sought to use ADR as a vehicle to reach settlement. Besides verbal requests, the Granite attorney sent a letter to the district commander requesting a mini-trial but received no response.

A new district commander and his review of long standing claims led to a query on the Granite claim that resulted in the decision to propose a form of ADR to settle it. Shortly before trial, the Corps approached Granite and requested the use of an ADR procedure. Granite agreed, and on December 22, 1986 the parties signed an Alternative Dispute Resolution Agreement. An arbitrator heard the case on March 19 and 20 and delivered his report on April 9, 1987. Following this presentation, the Contracting Officer and Chief Executive Officer of Granite met separately and decided to accept the recommendation of the neutral advisor.

MAJOR ISSUES IN DISPUTE

The major issue in this claim was the condemnation of the sand source. Granite claimed the Government originally planned to condemn the site at a later date, but accelerated its schedule after receiving additional Congressional funding. Secondly, the sand source was adjacent to the area needed by the Government, and could have remained available for mining. Based on these assertions, Granite sought compensation for delays and reduced production that resulted from the search for an alternative sand source and the eventual use of inferior sand.

The Government claimed no liability for Granite's losses because the condemnation of property is a sovereign act protected by law. Secondly, it argued that Granite knew the site was going to be condemned and had time to stockpile a sufficient amount of sand for the project.

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the decision to use ADR, the Government determined partial entitlement in the case and asked Granite to submit a settlement proposal. Granite requested \$1,925,865. The Corps counter-offered \$200,000.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

When the COD was issued and throughout eight years of settlement negotiations, Mr. Adrian Bastianelli, III, counsel for Granite, requested a mini-trial to resolve the claim. Bastianelli attributed district resistance to a mini-trial to technical staff dissatisfaction with the outcomes of two prior Corps mini-trials (Industrial Contractors, and Tenn Tom Constructors). The district's attitude was that two parties should be able to settle a claim without the help of an outside third party. Bastianelli knew that the U. S. Army Corps of Engineers (USACE) was promoting ADR at the time and was prepared to call the Chief Counsel in an attempt to pressure the District to use ADR to break their impasse.

At this time, Col. C. Hilton Dunn, Jr. took over as District Commander of the Mobile District. Upon beginning his term, he met with district lawyers and his chief of construction to discuss how to dispose of long standing claims. Unaware of Granite's prior interest in ADR, Col. Dunn decided that the use of a neutral technical expert was the best approach to settle the Granite claim. He called Mr. Roberts directly and asked if he was willing to use ADR. When Mr. Roberts agreed, Col. Dunn instructed the Office of Counsel to contact Mr. Bastianelli to work out an ADR agreement.

PROS AND CONS OF ADR: THE CORPS

Col. Dunn's decision to use ADR was based on a number of criteria. First of all, Col. Dunn found Granite and its CEO to be highly reputable. Dunn had worked with Granite many years prior to this case, and believed Granite did not fit into the "category of contractors who use claims to boost profits."

Dunn preferred to settle the claim based on its technical merits through good faith negotiations. After speaking with Mr. Roberts, Dunn was assured that Roberts, not his attorney, was the actual decision maker regarding the claim, and that he would engage in a good faith effort to seek a mutually feasible settlement during the ADR procedure. If Col. Dunn felt the contractor could not satisfy this condition, he would have insisted the claim be settled through traditional means. Dunn also recognized the government could potentially save money in the long run because of the expenses, in terms of time and money, necessary to defend the case.

The Office of Counsel agreed with the decision to use ADR because of an uncertain degree of Government exposure. In the contract, the Corps had approved the sand source with no qualifications, and though everyone involved knew the Real Estate Division would condemn the land, it was unclear when R&S would be forced to leave the site.

PROS AND CONS OF ADR: THE CONTRACTOR

Granite requested the use of ADR primarily to assure itself of an expeditious decision and payment. At the time, the company was still awaiting decisions on three other claims related to the same project that had been tried at the Board four years earlier. According to Roberts, contractors do whatever is reasonably possible to avoid the Board.

ADR also provided advantages other than savings in time and legal fees. Since a cement construction expert would preside over the hearing, discussions would center on issues of the sand source and associated problems, not on questions of procedure and rules of evidence. The neutral would understand technical information without the days of explanation usually required for judges to gain an understanding of the issues. Finally, ADR allowed Roberts to meet with the District Commander, that is, come face-to-face with a person who had the authority to make a decision rather than go before a faceless system he saw denying him a just settlement.

CHOICE OF ACTUAL PROCEDURE

The procedure chosen to settle this case was a non-binding arbitration hybrid. (Granite originally suggested a mini-trial, but the Corps preferred a single, neutral arbitrator who was an expert in cement construction.) In this procedure, the arbitrator listens to the presentations of each side and then has approximately two weeks to review the testimony and make a recommendation for resolution. The neutral then presents his report to the decision-makers who are free to ask questions about his findings. Following this meeting, the decision-makers attempt to negotiate an acceptable settlement.

Col. Dunn preferred this arrangement to a mini-trial because of the senior executive time commitment the latter involves. He wanted a neutral expert to sift through the material and provide a condensed report the decision-makers could use to determine a settlement. He had already heard "war stories" about the enormous amount of time and energy required for a mini-trial and decided arbitration was the most efficient way to evaluate and resolve this claim.

FORMAL AGREEMENT TO USE ADR PROCEDURE

The attorneys for both sides formulated the ADR agreement outlining the specifics of the procedure. They decided the neutral arbitrator would be an expert in mass concrete construction; the presentations would be given by technical experts in whatever form they chose; lawyers would be available when needed but not present during the presentations;¹ and there would be no cross examinations. The neutral would be free to ask questions at any point during the presentations. All other questions would be referred to the neutral in writing. He then had the option of asking them or not. The neutral was to have ten days to write his report and present his recommendation to the decision-makers. Many of these conditions were an attempt to reduce the level of adversity among presenters.

The attorneys agreed to exchange exhibits and submit them to the neutral seven days prior to the hearing. There was to be no written record of the procedure. If they failed to settle the claim and proceeded to trial, all information generated from the hearing would be kept confidential including the report, and the neutral advisor would be disqualified as a witness for either party. Any offers made during the procedure would be formally withdrawn if the parties failed to reach resolution.

¹ The Mobile District chose to limit attorney involvement because of their extensive involvement in the discovery process and settlement conferences. It felt that the technical neutral advisor would receive more objective information directly from technical staff and experts. Granite's attorney felt he could give a better presentation, but went along with this model to satisfy the Corps. He believed this was the only way the Corps would accept ADR, and so made the concession.

In actuality, documents were exchanged seven days before the presentations, but Granite submitted additional exhibits just prior to the procedure. The Corps decided that future ADR agreements should include a clause prohibiting the addition of documents at the time of the arbitration.

SELECTION OF NEUTRAL

The Corps decided to use one neutral rather than a panel of three because of the difficulties involved in finding three mutually acceptable panel members. It also felt such a search would be time consuming and expensive. However, it left open the option of a three-member panel if the parties failed to resolve the claim with one neutral.

The first neutral selected by both sides, an expert in mass cement placement, refused their request to participate. Their second choice was Mr. Chris Woods, a semi-retired executive from the Al Johnson Construction Company. Mr. Woods had experience with mass concrete placement because of his company's work on the Tennessee Tombigbee Waterway.

During the process of selecting a neutral, Granite offered the names of retired Corps employees because it did not think the Corps would accept a neutral from the private construction industry. Granite, surprised that the Corps recommended its original choice and then Mr. Woods, readily accepted the Corps' choice. Col. Dunn selected Mr. Woods because the District's technical staff knew him to be highly reputable. Dunn knew that if his staff questioned the integrity of the neutral, they would resist the use of an ADR procedure.

PRIOR EXPERIENCE WITH ADR

Of the primary participants, only Chris Woods had previous experience with ADR. Woods serves on arbitration panels in construction disputes for the American Arbitration Association. In past cases, he has both issued binding decisions and mediated settlements before rendering a decision. In this case, he was asked to provide a non-binding recommendation.

None of the other participants had actual experience, but all had been exposed to the concepts of ADR. Adrian Bastianelli participated in three training programs sponsored by the American Bar Association and explained ADR to his client, Mr. Roberts. Col. Dunn learned of ADR in a commander's course and was familiar with the Chief Counsel's desire to relieve the Board backlog using ADR. Larry Beale had no prior direct experience with ADR, but was familiar with it because the first Corps mini-trial involved a Mobile District contract.

ADR PROCEDURE

PARTICIPANTS

The neutral arbitrator was Chris Woods. Jim Brock, Chief of Claims, Construction, was the primary representative for the Government. He was aided by John Bennett, Resident Engineer of the Aberdeen Lock and Dam, and Jerry Joiner, a retired federal employee hired as a consultant. Granite's chief presenter was Dick Lewis, an engineer on the project. He was accompanied by four technical experts.

The decision-makers, Col. Dunn and Mr. Roberts, were not present during the hearing, nor were their lawyers, although the latter were available for consultation as needed.

SCHEDULE

The hearing was scheduled for March 19 and 20, 1987 in the Mobile District Office. Granite presented its case first. This took about five hours. All four of its witnesses participated. This was followed by a two hour Corps rebuttal and an hour for the contractor's response. The second day began with the Corps' presentation and followed the format of the previous day. Throughout the presentations, Mr. Woods asked questions of the witnesses.

Following the hearing, Mr. Woods returned to Minnesota to write his report and make his recommendations. On April 9th, he flew back to Mobile to present his findings to the decision-makers. Neither side knew the contents of his report prior to the meeting.

After Woods presented his findings and explanations, the decision-makers asked questions regarding specific points. At the conclusion of this four hour meeting, each decision-maker met with his attorney and staff. Col. Dunn and Mr. Roberts then met alone to negotiate a settlement. After thirty minutes, they decided to accept the recommendation proposed by Chris Woods.

DESCRIPTION

Granite built its entitlement case around the contract which unequivocally stated that R&S could mine the site for sand. By condemning the land, the Corps deprived R&S of its right to the sand source. Granite stated that the Real Estate Division of the Corps informed it the site would be condemned after completion of the project. Granite also contended that the Corps could have taken the property in two installments at an additional cost of only a few thousand dollars. This would have allowed Granite to complete its work and would not have adversely affected the Government's schedule.

The second half of its case concerned quantum. Granite showed cement production levels and costs associated with the initial sand source as compared to the actual cost and time frame of the project. It requested the difference between the two plus the cost of delays resulting from the search for another site and the time involved in moving the plant.

The Corps' case regarding entitlement stated that the contractor knew the site was going to be condemned. It held that Granite should have secured an alternative sand source or stockpiled a sufficient amount of sand before the property was seized. The Corps then presented its own figures regarding number of delay days and costs per day.

Woods occasionally had to diffuse hostility between the technical presenters. He felt the parties were too emotionally entrenched in their own positions to see the other side's perspective. During the presentations, the Corps attorney was in his office and Granite's attorney was in a hotel room. Each helped prepare his side's initial presentations and the next day's rebuttals.

NEUTRAL'S PRESENTATION OF THE REPORT

The neutral presented his report to the decision-makers simultaneously. No one on either side was privy to his findings prior to the meeting. It was purposely arranged this way to avoid negative biases against the report prior to negotiations. At the meeting, the decision-makers raised a number of questions concerning specifics of the report. The contractor was especially concerned about the neutral's calculations of daily production figures. Some factual errors were corrected and the settlement figure adjusted when necessary. Changes were made only regarding points the decision-makers agreed were valid. They did not debate the findings, but merely sought to understand the reasoning behind the neutral's decision.

NEUTRAL'S DECISION

Chris Woods determined that Granite did in fact have entitlement in the claim. He found that according to the contract, Granite had the right to mine sand from the area and that this right was rescinded because of schedule changes beyond the control of the contractor.

To determine the settlement figure, Woods relied on his own expertise in the construction industry. He disagreed with Granite's formulations of the delay period and losses per day. He determined an equitable settlement based on his own best judgement of a reasonable delay period and losses per day of delay based on the realistic amount of tonnage that could have been processed at the plant. Woods realized his decision was non-binding and that during subsequent discussions the decision-makers were free to make any adjustments they saw fit.

The settlement figure Woods recommended was that the Government adjust the contract by \$675,799 plus an additional \$32,716 in ownership costs, a thirty-five day extension, and a release of \$17,115 in liquidated damages for a total of \$725,630 plus interest.

DECISION-MAKERS AGREEMENT TO ACCEPT RECOMMENDATION

Following presentation of the report, both sides met independently with their counsel and technical experts to inform them of the neutral's findings. Colonel Dunn and his staff agreed that it was in the best interests of the Government to accept the recommendation of the arbitrator, although Jim Brock advised Dunn to accept entitlement but to try to reduce the quantum. Dunn felt that Woods had built a logical, cohesive

argument to support his findings, and in the interests of saving time, Col. Dunn was willing to accept the "prudent experience of the neutral."

In discussion with his attorney, the contractor determined that Col. Dunn was unlikely to settle for an amount higher than indicated in the report. Even though he was disappointed with the recommendation, Roberts felt his alternatives were unsatisfactory. Granite's only alternative was the Board, and he felt that any additional money he might receive at a trial would be offset by increased legal costs and time before payment. By agreeing to the amount set by the neutral, Granite would be able to dispose of this claim and get paid in a timely manner.

When the two met to discuss the matter, Col. Dunn approached Mr. Roberts by saying it was clear that neither side was totally satisfied with the recommendation. He knew it was possible to examine the report issue by issue and successfully argue for certain changes. However, in the name of expediency and to avoid positional bargaining and possible impasse, the Government was willing to accept the settlement outlined by Mr. Woods.

Roberts accepted, and the meeting was over within thirty minutes. The only outstanding issue was the calculation of interest. The Government sought a variable interest rate from the time of claim certification and the contractor sought a fixed rate. This was later resolved according to standing law which states that interest is to be calculated according to fixed interest rates.

EVALUATION

PROCESS

The decision-makers and attorneys were satisfied with the process and felt both sides were afforded a fair hearing and presented their cases well. At least one Corps District person questioned the integrity of the neutral after the hearing on the grounds that he may have been biased toward the contractor. He felt that Woods failed to understand some of the issues and that he acted as an administrative judge rather than a technical expert. However, this person thought the Board would have reached a similar conclusion since he believes the Board is more sensitive to contractors trying to earn a living than to the Government and its "deep pockets."

Roberts did not feel he could reject the settlement without dealing a severe blow to the use of ADR. His decision was partly based on a desire to promote ADR throughout the Corps. He liked the procedure and wanted to be able to use it in the future. Many contractors feel that Board backlog has reached a such point that any alternative brings welcomed relief from a frustrating system. Granite itself has three outstanding claims at the Board which are not expected to be resolved within the next few years.

Bastianelli is a strong supporter of ADR as an alternative to backlogged court systems. He thinks that it is the best process for dealing with claims since it reduces legal expenses for both sides by facilitating the flow of technical information to experts. Another advantage is that decision-makers are high level people outside the emotional entrenchment of the dispute. Finally, Bastianelli sees the outside party as a face-saving device when parties are unable to retreat from their positions. In the end, one can avoid admitting fault by claiming he could not argue against the neutral.

According to Col. Dunn, claims often question the self worth or integrity of district staff. If the District Engineer, their boss, settles a claim the staff feels is "win-able," they are unlikely to support ADR and will second-guess decisions to settle. For these reasons, Col. Dunn thought it was important to achieve District support for ADR and be assured that he and the contractor would package the settlement as a "win-win" resolution.

Dunn discussed his decision to use ADR with his District Counsel, Chief of Construction, and Resident Engineer. He explained the criteria upon which he based his decision and the long term advantages of settling the claim even if they may have won before the Board. He explained that an ADR program improves the District's reputation for dealing with claims in a reasonable manner which in turn improves the Corps' relationship with contractors.

Woods found that keeping the lawyers out of the hearing was helpful because witnesses were able to testify without being prompted by attorneys. This allowed more information to be exchanged. Secondly, he felt the smaller the group of people, the less opportunity for conflict.

QUANTUM

Neither side was completely satisfied with the quantum recommended by the neutral arbitrator. However, both sides were interested in settlement and the figure was clearly not so far out of their ranges that they were compelled to reject it. Given the broader picture and its implications, both sides found it was in their best interests to accept the recommendation of the neutral and to be done with the claim.

Woods based his decision on a calculation of hypothetical production capacity. Roberts disagreed with his assumptions. Roberts, while in no way questioning Woods' integrity, thought perhaps that the decision was tempered to what Dunn would accept.

Roberts probably would have preferred a mini-trial providing a greater chance to negotiate. In an arbitration procedure, even non-binding arbitration, the decision-makers are less involved in the process and therefore less committed to the proposed resolution of differences.

POSTSCRIPT:

Granite had another claim literally on the heels of this one. When the contracting officer denied the claim, Bastianelli requested the use of ADR. The Corps agreed, but asked to hold one negotiating session prior to arranging the procedure. At that meeting, they reached settlement and therefore did not have to proceed with ADR. This may be evidence of the effects of a successful ADR procedure. The Corps felt Granite had a valid claim and adjusted its settlement offer after calculating what it expected from a neutral arbitrator.

CASE STUDY #3
OLSON MECHANICAL AND HEAVY RIGGING, INC.

THE PROJECT AND CLAIM

SUMMARY

In November of 1987, the U.S. Army Corps of Engineers, Portland District, and Olson Mechanical and Heavy Rigging, Inc. reached a \$57,000 settlement, on an original claim of \$185,000 (\$224,000 including interest)*, with the use of a non-binding arbitration panel. The claim arose from a contract to reconstruct a fish ladder at the Dalles Lock and Dam during which Olson claimed differing site conditions based on an increased amount of water and ice in the project work area.

The arbitration panel was headed by Guy Randles, of the law firm Stoel, Rives, Boley, Jones & Gray, and included John Ilias, a retired Corps employee and Richard Mann, President of Mann Construction Company. Robert Turner, Portland District Counsel, represented the Corps and Joseph Yazbeck, of Allen, Kilmer, Schrader, Yazbeck, and Chenoweth, served as counsel for Olson.

The main points illustrated by this case are: 1) ADR use at the district level; 2) ways to win technical staff support for ADR; 3) the dynamics of a three-member arbitration panel; and 4) the need for a precedent regarding ADR and the Equal Access to Justice Act.

BACKGROUND

The U.S. Army Corps of Engineers (Corps) contracted with Olson Mechanical and Heavy Rigging, Inc. (Olson) to redesign and reshape the cement weirs of the east fish ladder of the Dalles Lock and Dam, Columbia River, Oregon and Washington. The period of the contract was from November 1984 through March 1985. The cement work had to be done in harsh winter conditions because the fish ladder is in use at all other times. To do the work, the contractor had to keep the work area dry. Three bulkhead gates at the upstream entrance to the fish ladder were expected to keep the work area free of water.

According to the contract, Olson was required to lower the bulkhead gates into their sealed position to assure that water did not flow into the fish ladder and affect concrete placement areas. Olson failed to obtain a water-tight seal on one of the bulkhead gates and was plagued by water throughout contract performance. The problem of de-watering the area was further complicated by freezing winter temperatures. In addition, the contractor needed to maintain low water levels in the downstream junction pool in order to work on the lowest concrete weirs in the fish ladder. However, water levels remained high due to the Government's failure to close one of the diffuser valves to the pool. It was finally closed one month after work was initiated.

The contractor filed two separate differing site condition claims. The smaller of the two resulted from the open diffuser valve for which the contracting officer issued a

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

The contractor filed two separate differing site condition claims. The smaller of the two resulted from the open diffuser valve for which the contracting officer issued a unilateral contract modification in the amount of \$31,000. Olson protested this unilateral decision, asking instead for \$49,000. The other major claim was based on the bulkhead gates' failure to provide a water-tight seal. Olson claimed that the government was liable for the delays and increased costs resulting from unexpected water and ice in the cement placement area.

CHRONOLOGY OF THE CLAIM

Olson Mechanical and Heavy Rigging, Inc. was awarded the contract on July 31, 1984. The fish ladder was de-watered on November 15, 1984 except for the junction pool area which was to be pumped out by the Corps. A major leak occurred in the junction pool, and Olson hired a crew of divers who determined its source was an improperly sealed diffuser valve.

As a result of the open valve, Olson submitted a differing site conditions claim on December 1, 1984 and requested a contract modification for extra work performed in the amount of \$154,511.66. Negotiations reached impasse in March of 1985 because the Government did not find justification for the level of damages Olson claimed. Olson originally proposed compensation in the amount of \$155,000, and then revised its calculations to \$61,000 in April of 1985. After the Contracting Officer issued a unilateral modification on June 3, 1985 in the amount of \$31,266, Olson revised its claim again to \$49,198.11 and requested a Contracting Officer's Decision (COD) on the difference between the revised claim and the modification order. On November 27, 1985, the COD was issued denying the claim.

After the contract work was completed and accepted by the government, Olson filed a second claim on September 23, 1985. This claim, in the amount of \$168,538.00, was based on additional costs and delays associated with the control and management of water in the fish ladder and its impact on concrete placement.

On March 27, 1986, the final COD was issued denying this claim in full. Olson appealed both claims. Negotiations continued between the contractor's lawyer and Portland District Counsel Robert Turner but quickly reached impasse. Olson continually offered a total cost proposal, despite the Government's requests for documentation to justify its additional expenses. Without this information, the Government was not willing to substantially increase its settlement offer.

Before a trial date at the Engineer Board of Contract Appeals (Board) was set, Robert Turner suggested they attempt to settle the claims through an Alternative Dispute Resolution (ADR) procedure. In April of 1987, Olson agreed to proceed with ADR. On July 16, 1987, the parties signed an Alternative Dispute Resolution Agreement outlining the rules of the hearing. A non-binding arbitration panel heard the case on November 19 and 20, and a decision was rendered on December 11, 1987. The parties notified each other of their acceptance in late December.

MAJOR ISSUES IN DISPUTE

The major issues in dispute revolved around the seal provided by the bulkhead gates and the scope and extent of the increased work resulting from water in the project

area. Olson claimed that bid specifications and a pre-bid visit to the site led it to believe that the bulkhead gates would provide a dry work area. According to the contract, Olson had to "lower the gates into a sealed position." Olson contended that it did so under the direction of Corps personnel, and therefore had no discretion regarding their placement. It argued that the Government was liable for all additional costs because government property, the gates, malfunctioned. Olson also suggested that the J-seals on the gates were old and insufficiently maintained.

The Government held that it was Olson's responsibility to lower the gates and assure a proper seal. In fact, to achieve a tighter seal at the time of placement, Olson simply had to lift the gates, flush out any stones or dirt beneath them, and re-lower the gates. The Government also argued that any contractor with cement and water resource structures experience should have expected, and planned to manage, a water flow in the fish ladder. Olson had extensive experience with dry placement of concrete, but only minimal experience with de-watering large areas during construction work. (In a competitive sealed bidding process, the Government is obligated to accept the lowest responsible bidder.)

Secondly, the Government claimed that Olson failed to mitigate the consequences of the water leakage. Once water flowed into the work area, the contractor was obligated to take reasonable steps to reduce the associated problems in a cost effective manner.

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the decision to use an ADR procedure, Olson offered to settle both claims for \$115,000. The Corps counter-offered \$20,000 plus interest and legal fees. Olson rejected this proposal.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

Mr. Robert Turner, District Counsel in the Portland District of the U.S. Army Corps of Engineers, approached counsel for Olson, Mr. Joseph Yazbeck of Allen, Kilmer, Schrader, Yazbeck, and Chenoweth, and suggested the use of an ADR procedure to settle the pending claims. Mr. Yazbeck agreed to it, subject to finding a mutually acceptable neutral advisor. At the time, he did not think this would be possible. However, the two attorneys agreed to meet to discuss the terms of the ADR procedure.

Mr. Turner had previously attended a district counsel conference where the Chief Counsel of the Corps of Engineers suggested the use of ADR to settle claims, especially in cases of partial entitlement. Turner was also experiencing a labor shortage in his office and hoped to dispose of this claim using a limited amount of manpower. He chose this case to experiment with ADR primarily because its degree of risk merited a compromise settlement which he believed could only be reached with the help of an outside neutral. Turner thought Olson's claim showed partial merit, but was far afield from a reasonable monetary settlement. He believed an outside objective opinion would help Olson understand the true merit of its claims.

PROS AND CONS ASSOCIATED WITH ADR: THE CORPS

Robert Turner identified a number of advantages to using ADR in this case before he approached Olson. First of all, it was difficult to determine how the Board would rule because even though Olson was contractually responsible for lowering the gates, it apparently did so at the discretion of Corps employees. With an ADR procedure, the Government could remove the win-lose risk because it would maintain the right to accept or reject the arbitration panel's decision.

Secondly, the ADR procedure would provide a fair hearing in a neutral environment and yield a quick decision. An expedited decision meant that Turner's already overloaded lawyers would be free to work on other cases, and no further time demands would be placed upon the technical staff related to the claim. At the time, the Portland District was just beginning three major civil works projects that required all its available manpower.

Turner also felt ADR was a good way to improve contractor confidence in the Corps. He wanted the contractor to feel the Corps was dealing with his claim in a fair, equitable, and expeditious manner. Finally, since interest on a settlement accrues from the day of claim certification, if there is potential liability, a quick, fair resolution is always in the best interests of the government.

A potential problem associated with the use of ADR concerned the relationship between technical and legal Corps staff. At the outset, technical staff felt the Government had no liability because the contract made Olson responsible for lowering the bulkhead gates. Thus, they would not support a compromise.

Turner worked hard to win their support for the ADR procedure. He gave them his assessment of the case, a 60/40% chance of winning, and explained the unusual aspect of the case, i.e. the Corps had failed to provide assistance to the contractor once the difficulties arose. Secondly, since Corps employees apparently directed Olson's placement of the gates, there was possible government liability. He described the long process of continuing the claim before the Board and the time demands that would be placed upon the Corps' concrete experts. By effectively explaining the overall situation, Turner was able to begin the ADR procedure with the full support of the District staff.

PROS AND CONS OF ADR: THE CONTRACTOR

Olson's advantages regarding the use of ADR were somewhat simpler -- time and money. It was in its interests to get a quick, fair hearing that would result in settlement payment within a few months. The appeal docket was full, and Olson could not afford protracted litigation. ADR provided the most inexpensive way to proceed because it potentially promised an expeditious settlement and payment. Legal fees would be greatly reduced because of 1) a shortened trial; 2) the need for only partial discovery because of time limitations on presentations; and 3) an avoidance of filing the numerous motions associated with an appeal. Fast payment meant Olson would have money available to finance other projects. Finally, Olson felt that a panel comprised of concrete construction experts would have a better understanding of its situation than a judge.

CHOICE OF ADR PROCEDURE

Since this was a relatively small claim, Turner decided that it did not merit direct division involvement or the large amount of senior executive time required by a mini-trial.¹ Therefore, he chose to use a non-binding arbitration panel. In this procedure, a three-member panel of experts listens to the presentations by the attorney of each side and then meets to discuss the testimony and recommend a settlement. The parties are free to accept or reject that recommendation. Any information or positions provided during the procedure cannot be entered into court records should the parties fail to accept the settlement proposed by the panel. No member of the panel can later be called to testify at a trial related to the claim.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

On July 16, 1987, Turner and Yazbeck signed an ADR agreement that outlined the details of the procedure. They decided the three-member panel would be composed of one neutral advisor with experience in public contract law and two construction experts. The Corps and Olson agreed to share the costs of the neutral arbitrator, which they set at a maximum of \$5000 including travel expenses, and that each side would pay the fees required by its selected panel member. John Ilias was paid \$750 plus travel expenses by the Corps, and Richard Mann declined payment other than his travel expenses, which were paid by Olson.

The ADR agreement also arranged for documentation exchange. It stated that the parties were to exchange copies of all documentary evidence proposed for use at the hearing, including a witness list. The attorneys agreed to set a discovery schedule that would allow for its completion three weeks prior to the hearing. At that time, Olson would submit a quantum analysis to the Corps. The Corps was to furnish the arbitration panel with three copies of the contract documents, change orders, and any written instructions issued by the Corps to the contractor. Two weeks before the hearing, each side was expected to submit a twenty-five page position paper² to the panel outlining their cases with respect to legal and factual issues.

Turner and Yazbeck agreed that the panel's decision would be non-binding and based on a majority opinion, though they hoped it would be a unanimous decision. If necessary, a dissenter would be allowed to write a minority opinion.

¹ Mini-trials require decision-makers, usually senior staff, to listen to case presentations and then negotiate settlements. Examples of Corps mini-trials are the Tenn Tom Constructors and Bechtel National, Inc. cases.

The Tenn Tom mini-trial involved a \$55.6 million claim (including interest)* and required a total of four days of presentations and two days of negotiations. General Peter Offringa, Ohio River Division Commander, served as the Corps decision-maker.

The Bechtel mini-trial involved \$21.2 million in claims and concluded after four days. The Corps decision-maker was Colonel Stephen West, Omaha District Engineer.

² The Corps' position paper included background information on the contract and its specifications, a description of the construction process, legal precedents regarding differing site conditions, and a response to the contractor's contention that the bulkhead gates were defective. Olson's position paper included a description of the claim, information regarding the impact of water leakage on cement placement, legal justification for a differing site condition, and an explanation of the quantum requested.

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

The parties arranged the arbitration schedule such that on the first day, Olson would have three hours to present its case followed by one-and-a-half hours each for the Corps' cross-examination and the contractor's re-examination. The final hour was reserved for an open question and answer period. The Corps was to present its case on the second day according to the same schedule as the first but with an additional quarter hour for each side's closing statement. The panel members were expected to resolve any disputes that arose between the parties regarding the schedule.

SELECTION OF NEUTRAL AND OTHER PANEL MEMBERS

The attorneys for both sides felt the hardest part of the process was finding a suitable neutral. Originally, Turner and Yazbeck agreed on Norman Kobin, a Portland lawyer who specialized in public contract law. Unfortunately, he fell ill and was not able to participate. Turner then suggested Mr. Guy Randles of the law firm of Stoel, Rives, Boley, Grey, & Jones, who had extensive experience in government contract law. Turner called Randles, and found he was interested in serving as the neutral advisor. Turner then arranged a meeting with Randles and Yazbeck.

Yazbeck and Randles had previously opposed each other on a case, and Yazbeck called Randles to be sure he held no grudges. With that issue resolved, Randles was chosen to serve as the neutral arbitrator and legal expert on the panel. Following his appointment, the two attorneys agreed that each would choose a construction expert.

To find a suitable person, Turner contacted the Division and District Construction offices for lists of potential arbitrators. After receiving these lists, he met with the Chief of the District's Construction Division and together they decided to choose Mr. John Ilias, a former Corps employee with a wealth of experience in construction contracts. Since his retirement, Mr. Ilias has worked as a consultant to private construction companies.

Turner also knew that Ilias was well-respected throughout the Corps, especially by field personnel. He believed that Ilias' involvement would reduce the agency's apprehension about the ADR procedure.

Olson selected Mr. Richard Mann, President of Mann Construction Company, Inc. (Mann) of Redmond, Oregon. Like Olson, Mann is a small contractor handling a lot of government work. Mr. Mann is unique in that he represents himself on claims before the Board of Contract Appeals. He has extensive knowledge of both construction and government contract law.

The three panel members met prior to the hearing. They set the hearing date for November 19 and 20 at the conference rooms of Mr. Randles' law firm and decided that Mr. Randles would rule on any procedural questions that arose during the hearing.

PRIOR EXPERIENCE WITH ADR

None of the participants had any actual experience with an ADR procedure. Robert Turner heard about it at a number of Corps conferences. Guy Randles was trained as an arbitrator by a local arbitration group, but had not yet served on an arbitration panel. Joe Yazbeck had negotiation experience, but had not been involved in a formal ADR procedure. The two other arbitrators, chosen for their technical expertise and ability to process a lot of information in a short time, also had no previous experience with ADR.

ADR PROCEDURE

PARTICIPANTS

Robert Turner presented the case for the government with the help of six witnesses from the Corps of Engineers, Portland District Office and employees at the Dalles Lock and Dam. Joseph Yazbeck presented the case for Olson Mechanical and Heavy Rigging, Inc. His four witnesses were 1) Walter Olson, 2) the superintendent who performed the project work, 3) a claims consultant, and 4) a person who had estimated the job for the second lowest bidder.

SCHEDULE

The hearing was scheduled for two full days of testimony and presentations, followed by meetings of the panel to determine its recommendation. During the first day and two hours of the second, Yazbeck presented Olson's case. It included an opening statement and testimony by four witnesses. The Government was given time to cross examine each witness, followed by Yazbeck's re-examination. The panel asked clarifying questions during and after the presentations. By mid-morning of the second day, the Government began its case with a brief opening statement followed by audio-visual exhibits and the testimony of six witnesses according to the same format as the previous day. Both sides waived their closing statements. The panel then had thirty days to make its determination.

DESCRIPTION

The arbitration hearing began with a one-and-a-half hour opening statement by Joe Yazbeck. This was followed by the testimony of Mr. Walter Olson, president of Olson Mechanical and Heavy Rigging, Inc. Olson testified that during a pre-bid tour of the site, Mr. Bill Frickey, a Corps employee and Chief of Maintenance at the Dalles Lock and Dam, stated that lowering the bulkheads would provide a water-tight seal thereby keeping the work area dry. Olson maintained that the bulkhead gates did not work satisfactorily but rather allowed excessive amounts of water to pass through the upper fish ladder area. This additional water flow caused significant delays in concrete placement.

Olson claimed that he lowered the gates at the direction of Corps employees and therefore, even though the Government was not contractually responsible, they became liable once its employees participated in improperly lowering the gates. Olson also argued that Corps employees had failed to help once the problems arose. They could have suggested he raise the gates, flush out any dirt, and lower them again. They also told Olson to use silva seal³ to control the water flow, but failed to show him how to use it.

³ Silva seal combined with woodchips and cinders placed against a point of leakage with a downstream current creates a watertight seal.

Another witness for Olson was the contractor's superintendent of the project. Under cross examination it was established that he had no previous experience with de-watering techniques. He was a plumber and had never before been involved with this type of work.

The second day began with two more witnesses for the contractor. By mid-morning the Government made a brief opening statement and then called its first witness, Mr. Bill Frickey. He stated that he told Mr. Olson of the likelihood of water leakage in the fish ladder and that he might have to use sandbags, pumps, and perhaps silva seal to manage the water flow in the work area during construction.

The Government showed video tapes in which the single bulkhead gate that gave Olson trouble sealed properly, though one of the other gates, which did not leak during contract performance, allowed a small amount of water to leak into the fish ladder area. This countered Olson's claim that the gates' J-seals needed replacement.

The Government also called in concrete experts to show what a contractor working with cement in freezing temperatures could have done and is expected to do. They claimed that once the water was in the work area, Olson's lack of experience with de-watering processes led to the additional costs he incurred.

Another major issue that arose during the hearing was the total cost method of Olson's claim. Throughout the negotiation process the Government questioned the validity of some of the contractor's figures and continually asked for additional documentation. Olson refused to part with his total cost approach and the Government raised serious questions regarding issues such as the claim for additional labor hours.

During the hearing, Guy Randles was responsible for keeping to the schedule and deciding procedural questions. His attitude was one of persistence regarding the agreed upon schedule, but leniency when the situation deemed it necessary to get an important point across. Attorneys raised objections, but in the interests of providing the panel with all the information necessary to reach a fair decision, Randles allowed almost all testimony and exhibits to be given. The hearing was informal and not run according to strict rules of evidence. Throughout the testimony and presentations, the panel asked questions of the witnesses and attorneys. This allowed a lot of information to be transferred efficiently and effectively.

PANEL DECISION

Following the hearing, the three arbitrators met to discuss their opinions and reached immediate consensus on partial entitlement. They determined that Olson had grounds to claim a differing site condition based on the increased amount of water in the work site. However, the panel also found that Olson failed to mitigate the consequences of the water.

Government liability was assessed due to bid specifications that outlined the contractor's responsibility to lower the gates into a "sealed" position. The panel found that the contractor reasonably expected the gates would provide a water-tight seal. Since the Corps had to use additional water diverting techniques in the past, they should have so stated in the pre-bid specifications.

Secondly, once the problems occurred, the Government should have offered its assistance to seal the leaking gates. According to the panel, if silva seal and wood chips would have prevented leakage, the Corps should have directly advised Olson on the proper use of this technique.

The panel also found that Olson failed to mitigate the consequences of the leakage as required when there are differing site conditions and had not acted in a prudent manner. They found that the contractor's lack of experience with de-watering processes and cement work played a major role in Olson's failure to properly manage and control the water.

The arbitrators thought that a contractor bidding on such a project should have expected and planned for de-watering including placing protective structures around the concrete work, and then would not have been plagued by water and ice throughout the project. Thus, the Government was not forced to absorb all the contractor's additional costs. However, the panel also recognized that in accepting this contractor's bid, the Government did not have the luxury of a more experienced contractor.

Interestingly enough, the panel members assumed to be more familiar with, and perhaps supportive of one side's position, proved to be instrumental in showing its weaknesses. Both Mr. Ilias and Mr. Mann insisted on particularly high standards in assessing the positions of their peers.

DETERMINING THE SETTLEMENT FIGURE

The panel determined the contractor was responsible for 55% of additional costs incurred as a result of excessive water in the fish ladder. Olson's claim, as stated in his position paper, asked for additional compensation of \$184,915.80. The panel decided this figure had not been sufficiently justified or documented. Therefore, they rejected his numbers. Instead the panel used a Corps audit that had determined the total cost for the project. To this they added a reasonable profit (10%) and subtracted the amount the Corps had already paid to Olson, including the additional amount from a unilateral contract modification issued as a result of the opened diffuser valve. They then multiplied the outstanding balance by 45% and determined the settlement should be \$56,722.50 plus interest. This represented 30% of the claim as stated in Olson's position paper.

DECISIONS TO ACCEPT THE RECOMMENDATION

The panel presented their decision in a written report that included an explanation of their findings. Both attorneys received copies of the report. After reviewing the report, Mr. Turner met with the Portland District's Chief of Construction, Chief of Contract Administration, Contracting Officer, and Chief of Operations. He reminded them of his projection of a 60/40 percent litigation risk. He advised them to accept the recommendation of the arbitration panel because the settlement was in the best interests of the Government and the public. Turner said the Corps could not expect a better settlement from the Board. He believed the decision exonerated the Corps, but correctly showed they could have actively aided the contractor. At this meeting, the group unanimously agreed to accept the panel's recommendation.

Mr. Yazbeck met with his client who was somewhat disappointed with the settlement figure. He thought he deserved more, but felt he got a fair hearing and that his case was accurately presented. Olson chose to accept the recommendation of the panel

because he would receive his money within thirty days and avoid continued litigation expenses.

Mr. Turner contacted Mr. Yazbeck and told him the Corps was willing to accept the settlement. Mr. Yazbeck replied that his client was disappointed but would accept it.

EVALUATION

PROCESS

All of the parties believed the hearing was fair and resulted in an unbiased decision. Most of the participants attributed the success of the ADR procedure to high levels of shared mutual respect. Guy Randles was instrumental in creating and maintaining an atmosphere that put everyone at ease. Robert Turner and Joe Yazbeck had a previous history of good relations; Yazbeck was a former assistant district counsel in the Corps, Portland District.

The participants unanimously agreed that ADR should be promoted and expanded given the current backlog at the Board, the manpower and legal fees associated with protracted litigation, and the interest charged to the government because of delayed settlements. They saw ADR as the best option available to reduce contractors' frustration with the government's inability to provide an expeditious means to settle claims.

Mr. Mann felt so strongly about this that he sat on the panel for the sake of the claims system, with which he has been personally frustrated. In fact, he did not accept monetary compensation beyond his expenses. He served because he saw an opportunity to contribute to the improvement of the government's current claims system.

Since, and perhaps as a result of this case, Mr. Mann and Mr. Randles currently sit on a federal legislative sub-committee that supports legislation to mandate ADR in contracts. Though Mr. Turner has not yet resolved any other cases through ADR, he continues to assess claims for ADR-suitability. He has also begun sending lawyers to project construction sites to resolve questions at their earliest stages and has shown a 50% reduction in the district's claims in one year.

QUANTUM

The panel recommendation on quantum, or amount of monetary compensation, was accepted with varying degrees of satisfaction by each side. Mr. Turner was pleased with the finding and said it fell within his expected range. Mr. Olson, on the other hand, was dissatisfied with the settlement. He thought he deserved, and would be awarded, a larger amount. However, according to Mr. Yazbeck, his client did not feel he could reject the panel recommendation.

Mr. Randles felt the decision reached by the panel was similar to what the Board would have ruled. He thinks the contractor's disappointment was based on false hopes and an incorrect understanding of what constitutes a compensable claim.

POSTSCRIPT

After the settlement agreement was signed and the contractor paid, Olson filed an additional claim before the Board to recover legal fees of \$21,000. (Turner felt that if Olson had been satisfied with the recommendations of the panel, he would not have filed this additional claim.) The claim is based on the Equal Access to Justice Act, which states that in out-of-court settlements, the claimant is entitled to legal fees. According to the current legal standard, if the Government was substantially justified in its claim of no payment, then it is not required to pay the claimant's legal fees.

The Equal Access to Justice Act does not address ADR proceedings, although it is applicable to settlements in general, and the ADR agreement did not address this issue. In other cases, appellants have waived their rights to legal fees or accepted the negotiated settlements as full compensation for all claims connected with their respective projects.

Turner decided against re-convening the arbitration panel to settle this additional claim because he believed the government was substantially justified in not paying the contractor. The contractor refused to settle for less than \$115,000 at a time when the Government offered only \$20,000. The panel found some merit in the government's position in the dispute, and since they settled the claim for \$57,000 plus interest, or \$71,000, Turner thinks the Board will find that the government was substantially justified in not paying Olson \$115,000.

CASE STUDY #4 BECHTEL NATIONAL, INC.

THE PROJECT AND CLAIM

SUMMARY

On April 6-10, 1988, Bechtel National Inc. (Bechtel) and the U. S. Army Corps of Engineers (Corps), Omaha District, used a mini-trial to settle a complex series of claims for \$3.7 million. The case consisted of seven separate claims, including those of major subcontractors, totalling, at the time of the mini-trial, \$21.2 million including interest*. Originally filed in the fall of 1986, the claims arose from modifications and impacts due to incomplete design plans for construction of the Consolidated Space Operations Center (CSOC) in Colorado.

Professor Ralph Nash served as the neutral, and Colonel Steven West, Omaha District Engineer, and E. Robert Jackson, Vice President at Bechtel Civil, Inc. were the decision-makers for the Corp and Bechtel. Gary Henningsen, Omaha District Counsel, presented the Corps case, and Jon Anderson, of Thelen, Marrin, Johnson & Bridges, served as counsel for Bechtel.

The main points illustrated by this case are: 1) the advantages and disadvantages of subcontractor participation in mini-trials; 2) strategies for managing complex technical information in settlement negotiations; 3) strategies for using working groups to develop components of a settlement agreement; 4) advantages and disadvantages of using decision-makers who are outside the emotional entanglement of the dispute; and 5) opportunities to use neutrals to provide various services.

BACKGROUND

In February 1984, the U.S. Army Corps of Engineers, Omaha District, contracted with Bechtel National, Inc. to build the Consolidated Space Operations Center in Colorado Springs, Colorado. The \$64 million lump sum contract specified a compressed construction schedule of 540 days to allow for building occupancy by August 1, 1985.

From the start, the project was plagued by problems associated with seemingly incomplete design plans, numerous requests for additional information from subcontractors, and ambitious completion dates. The government issued a number of acceleration orders early in the construction process. Negotiations between the Corps and Bechtel failed to resolve differences over price increases and the costs of indirect impacts, e.g. costs associated with the acceleration and modification orders. Bechtel subsequently filed a number of claims including several on behalf of its subcontractors, e.g. U.S. Engineering/Cobb Plumbing and Heating, Inc. and Marathon Steel, Inc.

By April 1987, Bechtel had received a final contracting officer's decision (COD) on only one claim, the "shielding claim," valued at \$750,000. In an attempt to force decisions on the others, Bechtel filed appeals at the Board of Contract Appeals on a "deemed denial"

* This is the figure quoted by Corps staff in a July 18, 1989 phone call.

basis.¹ In response, the Corps filed motions to dismiss the appeals on the grounds that the contracting officer lacked sufficient time to render decisions. (The Corps had hired a private consultant to determine the validity of the claims. The consultant had not yet completed his investigation at the time of the appeal.)

By October 1987, neither side had succeeded in even getting on the Board docket. At that time, Col. Steven West, the Omaha District Engineer, approached Bechtel with a suggestion that they use a mini-trial to settle all outstanding claims. West spoke directly with Robert Jackson and explained the ADR procedure. Following their conversation, West, Jackson, and their attorneys held a pre-ADR meeting at the Denver Stapleton Airport. As a result of the meeting, each side was assured the other would engage in a good faith effort to settle all claims. The attorneys then formalized the discussions and produced an ADR agreement.

CHRONOLOGY OF THE CLAIM

Bechtel was awarded the CSOC contract on February 9, 1984. The contract specified a compressed construction schedule in order to make the CSOC available by August 1, 1985. Construction commenced on February 25, 1984. In the fall of 1986, Bechtel submitted \$14 million in claims, including over \$6.5 million worth of subcontractor claims, for further compensation that stemmed from work changes required by the Government's unilateral modification orders, some of which were issued because negotiations failed to yield agreements on necessary works. Over time, Bechtel filed further claims, raising their total worth to \$21.2 million.

In February 1987, the Corps informed Bechtel of its plans to hire a private consultant to determine the validity of the claims. The expected report completion date was December 1987. Dissatisfied with this timetable, and after receiving a COD for only one claim by April 1987, Bechtel appealed all the claims on a "deemed denial" basis. As noted above, the government moved to dismiss the appeals on the grounds of insufficient time to render a contracting officers' decision. Bechtel responded with a motion for summary judgment² based on the fact that the government had conceded entitlement when it issued the multi-million dollar acceleration modifications.

By October 1987, no Board hearing dates had been set. Colonel Steven West raised the option of using a mini-trial to settle the claims and arranged a meeting of the potential mini-trial decision-makers and their attorneys. The meeting took place in December at the Stapleton Airport in Denver, after which the attorneys negotiated the details of the mini-trial agreement. It was signed on January 14, 1988. Bechtel and the subcontractors submitted quantum analyses on March 8, 1988, and the mini-trial was held in Omaha, Nebraska on April 6-10, 1988. The decision-makers reached a negotiated settlement on the evening of April 10th.

¹ The contractor assumed the contracting officer denied the claim since he failed to render a decision within a certain period of time.

² A summary judgment is a potentially dispositive motion because it asks the court to grant a final decision based on the law and uncontested fact.

MAJOR ISSUES IN DISPUTE

The central issues in dispute concerned the direct and indirect impacts of government changes in work schedules and design. Bechtel claimed that government modification and acceleration orders had an adverse impact on its work schedule and led to uncompensated costs for additional materials and labor. Many of the work change orders were issued unilaterally-- that is, without any prior consultation with Bechtel, on the condition that prices would later be adjusted. However, Bechtel and the Corps failed to successfully negotiate such adjustments and the dispute developed into several claims.

The claims can be divided into three groups: those initiated by 1) Bechtel, 2) U.S. Engineering/Cobb Plumbing and Heating Company (U.S./Cobb) and several other subcontractors, and 3) Marathon Steel Company (Marathon). The Bechtel claims ask for cost adjustments based on additional indirect and direct costs associated with major design changes requested by the Government after Bechtel was awarded the contract. Many of these changes were based on assertions of deficiencies in the original design plans. The U.S./Cobb claims focused on the pricing of a number of work change orders and disagreements over the validity of additional material and its costs. The Marathon claims were based on assertion of the costs of construction changes ordered by the government and associated losses in productivity. (Marathon was paid \$2 million for the contracted work and claims it lost \$3.5 million.)

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the mini-trial, the Corps and Bechtel did not engage in serious negotiations. The Corps had been waiting for a report from the Alpha Corporation (Alpha), an outside claims consulting firm hired to determine the validity of Bechtel's claims. By the time the Stapleton airport meeting took place, the Corps had determined partial entitlement in one major claim, but was still waiting for the full Alpha report. U.S./Cobb's rejection of a settlement offer coupled with possible personality clashes between negotiation personnel on the site, resulted in a disputed change order. This type of impasse often becomes a claim as a result of the Corps' issuance of a unilateral change order in accordance with the Corps' contract administration system. Bechtel felt strongly this should never have resulted in a claim since U.S./Cobb had sufficient entitlement to justify further negotiations.

Prior to the mini-trial, Alpha completed its report and in it concluded that Bechtel owed the government money, that is, that the claims lacked merit. Mr. Jackson contacted Col. West to ask him if there was any reason to proceed with the mini-trial in light of Alpha's findings. Col. West assured Mr. Jackson the report did not represent the final word on the Corps' position regarding the claims and that it was still worthwhile to proceed.

In their combined "position paper," Bechtel requested a total of \$6.5 million for all outstanding claims; Marathon sought additional payment of \$3.5 million to resolve its claims; and U.S./Cobb and the other subcontractors filed for the remaining amounts. The Alpha report concluded that the contractors owed the government money because Bechtel had been overpaid for work change orders. However, prior to the mini-trial the Corps found entitlement in two of the Bechtel claims, though disagreement remained over quantum. The Corps also found entitlement in some of Cobb's claims, but maintained strongly divergent views over pricing. In the case of Marathon, the Corps stood by its assessment that the claim lacked any merit.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

At a time when the Corps and Bechtel were deep within the legal maze, filing motion after motion, frustrated by an overloaded, backlogged Board of Contract Appeals, Col. Steven West, District Engineer/Contracting Officer, reviewed the final contracting officer's decision that was about to be issued for a Bechtel claim and decided an ADR procedure was the best way to possibly dispose of all the claims Bechtel had submitted on the CSOC project. West determined that the Bechtel claims had some merit, but felt they were significantly overstated. He believed his final decision would likely be appealed, and so in an effort to save time and legal expense, deemed it worthwhile to invite the contractor to participate in settlement discussions. It was clear to West that litigation was not the most efficient way to handle the claims.

Col. West called Mr. Robert Monroe, a Bechtel officer, and suggested the use of ADR. Mr. Monroe decided it was worthwhile to pursue the prospect of ADR and contacted Mr. Jackson, who called Col. West to express interest in discussing the claims. After their conversation, Mr. Jackson called an outside Bechtel attorney, Mr. Jon Anderson, to obtain more information about mini-trials. Mr. Anderson contacted the Corps to request a copy of their ADR circular.³ Jackson and Anderson found the more they examined and researched the idea, the more they liked it.

Col. West and Gary Henningsen, Corps district counsel, contacted Bechtel to arrange a meeting to discuss the details of an ADR procedure. The four agreed to meet at the Denver Stapleton Airport.

PRE-ADR MEETING

Col. Steven West, Robert Jackson, Gary Henningsen, and Jon Anderson met at the Denver Stapleton Airport with the stated objective of discussing the details of the mini-trial. However, all in attendance agreed that the primary purpose of the meeting was to give the potential decision-makers an opportunity to assess each other in terms of a willingness to enter into a process that would succeed only if both sides were willing to negotiate seriously. Both sides knew that engaging in such an experiment had the potential to deliver impressive gains, but also presented a risk.

At the meeting, the decision-makers were able to assure each other of their authority to render a decision "without phone calls," and that neither was immovable regarding his side's position. Both men felt they would be able "to look each other in the eye and negotiate in good faith."

³ Engineer circular 27-1-3 contains guidelines for the use of mini-trials with respect to procedural issues and case selection.

A major issue the four discussed concerned the role of the subcontractors at the mini-trial. The Corps expected Bechtel, as prime contractor, to represent the subcontractors. This is how all other Corps mini-trials had handled subcontractor claims. Bechtel wanted the subcontractors to be full participants, i.e., members of the decision-makers panel. The Corps strongly objected on the grounds that subcontractors should not be given equal status with the prime contractor. Bechtel conceded, and a compromise was reached whereby the mini-trial schedule would be structured to allow the main subcontractors to present their own cases to the panel.

Bechtel's second demand was that the Corps agree that negotiations would center around quantum, that is, the monetary figure of the settlement, and not on the question of entitlement. In other words, Bechtel wanted an assurance that it would receive additional compensation, that there was no possibility that West would refuse entitlement on all the claims. Col. West and Gary Henningsen were able to give these assurances since they had found partial entitlement in at least two claims, though they were still awaiting the results of the Alpha investigation.

In preparation for the meeting, Henningsen prepared a standard mini-trial agreement based on the Corps prototype. They amended the agreement with regard to schedules for limited discovery, time frame, and length of presentations. Following the meeting, the attorneys were charged with working out the details of the mini-trial based on the days' discussions and formalizing an agreement.

PROS AND CONS OF ADR: THE CORPS

The Corps recognized entitlement in one claim prior to the airport meeting and was about to recognize entitlement in a second. It was not clear how the consultant would find in the others, but in general, the Corps found validity, but some inflation of alleged costs. Since the larger claims derived from acceleration and design modification orders, in the view of the Corps Legal Construction, Contract Administration, and Engineering team working on the case, it did not seem worth the high costs in terms of time and money to litigate entitlement before the Board, if a reasonable settlement could be reached.

Secondly, West believed the mini-trial provided an arena within which to exchange factual information. Given the polarization aroused in the district by the dispute, West thought it would be beneficial to incorporate staff participation into the process of determining a reasonable position, delivering the analysis, and discussing the final settlement. West also felt the process provided a mechanism by which the Corps and Bechtel could arrive at a fair and equitable agreement.

Another general attribute of ADR is that Corps technical field staff, (those most heavily invested in the previous position taken) are not in a position to block a settlement, but the experience of the district construction/engineering staff can be applied to the analysis and attempted resolution. Those involved in the daily workings of a project sometimes take harder positions and this results in claims being tried before the Board. A settlement agreed to by superiors can be considered a lack of confidence in their field personnel work. Since ADR encourages settling, it also can increase intra-agency tension. (This can be minimized by careful staff management.)

Thus, the use of ADR is not without potential risks. If the procedure fails to result in resolution, some of the preparatory costs are lost: according to Henningsen,

approximately 10-25% of such expenses. The balance, expenses for discovery and legal research, is useful for trial preparation.

PROS AND CONS OF ADR: THE CONTRACTOR AND SUBCONTRACTORS

When Col. West originally approached Bechtel with the option of a mini-trial, the contractor had little knowledge of the procedure. However, as counsel researched the option, Bechtel discovered it could easily support the process. In the words of the Bechtel decision-maker, "the more we heard, the better it sounded." In his eyes, a major advantage of ADR was that he would finally come face-to-face with a Corps decision-maker. Throughout the life of the project, Bechtel was frustrated it even had to file many of the claims. Bechtel believed many of the problems could have easily been resolved had it been able to meet with someone in authority. (Notwithstanding significant negotiations with authorized representatives of the Contracting Officer.) Thus, the chance to talk with a Corps decision-maker was a great opportunity, especially given the likely expenses associated with protracted litigation. Bechtel believed that negotiations, facilitated by the right neutral, would prove successful.

At the time the ADR option was raised, the contractor was engaged in legal sparring with the Corps. There was no way to determine when the claims would be heard. Even after trial, Bechtel would have to wait years for a decision on entitlement and only then negotiate quantum. It was impossible to tell when the contractor and its subcontractors, 50% of whom went bankrupt as a result of the project, would actually get paid. They only knew it would be a very long, expensive process. Since the mini-trial agreement allowed for subcontractor participation, Bechtel saw the additional advantage of potentially avoiding separate litigation with its subcontractors.

Finally, Bechtel determined that even if the mini-trial failed to resolve the claims, the time spent in preparation would be useful if the case went to trial. In fact, the mini-trial would guarantee access to government documents at an earlier date than if the case went before the Board.

Though ADR seemed to provide significant benefits, it was not without potential costs - a major one being that Bechtel had no guarantee that the government would settle. The meeting with Col. West allayed enough of their fears to determine the mini-trial was a rational gamble, but it still provided no concrete evidence with which to assure others in the corporation who opposed the ADR procedure.

Between the time the ADR agreement was signed and the date of the mini-trial, Alpha completed its report. It found that Bechtel owed the government money. Alpha reasoned that the government had overpaid Bechtel for the costs of modifications and impacts. When Bechtel heard of the conclusions of the report, those originally against the decision to use ADR believed they had further reason to distrust the process and the government's intent to accept entitlement. As a result of the nervousness inspired by the Alpha report, Jackson called Col. West to ensure that their Colorado discussions still held in light of the report. West assured him the report was not the final word and that it was still appropriate to proceed with the mini-trial.

CHOICE OF ACTUAL PROCEDURE

The procedure chosen for this case was a mini-trial. In a mini-trial each side chooses a decision-maker, usually a senior level person uninvolved in all aspects of the dispute, as well as a mutually acceptable neutral. The role of the neutral in this case was originally defined in the ADR agreement in limited terms. He was expected to intervene only at the request of the decision-makers. However, prior to the procedure, the decision-makers re-defined the role of the neutral advisor. They decided he should be an active facilitator and a full member of the panel. In other words, they wanted him to ask any questions he deemed important and to manage the negotiations to assure settlement.

The mini-trial was scheduled for five days. Three days were allocated to the parties during which the attorneys, with the help of witnesses, informally presented their cases to the panel. Sworn testimony, rules of evidence, and a transcript were waived. The flexibility of the mini-trial format allowed the two major subcontractors to present their own cases to the panel. Evidence was entered freely and not according to any strict procedural rules. This encouraged quicker dissemination of information. Throughout the case presentations, the panel was free to ask questions. At the conclusion of the presentations, the decision-makers, assisted by the neutral, negotiated a settlement based solely on information provided during the mini-trial. Had they failed to settle, and eventually tried the case before the Board, the parties could not refer to information specifically learned at the the mini-trial, unless it was volunteered or discovered through other means. Similarly, the neutral would have been disqualified from serving as a witness in future hearings concerning the claims.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

Gary Henningsen brought a copy of the standard United States Army Corps of Engineers (USACE) mini-trial agreement to the airport meeting where they discussed specifics regarding the mini-trial schedule, process of discovery, and format of presentations. After the meeting, Henningsen drafted a revised agreement and Bechtel offered a re-draft. After Henningsen received Bechtel's draft, the attorneys negotiated the specific terms over the telephone. Discovery was to be limited to each side providing the other with access to relevant documentation. The mini-trial was to be held on April 6-10, 1988 at the Corps' Omaha District Headquarters in Omaha, Nebraska. According to the schedule, Bechtel had the first day to present, the subcontractors had two hours each on the second day, and the Corps was to present its case on the third. Each day was scheduled from 8 a.m. to 5 p.m. and time was allotted by the half hour for testimony by witnesses, questions, cross-examinations, and rebuttals. Negotiations were expected to begin on Friday evening and end by Sunday, April 10th.

The agreement stated that each party could present its case in the manner it determined to be most appropriate. In other words, it could be any combination of narratives, testimony, questions and answers, presentations, etc. Finally, they selected Professor Ralph Nash as the neutral advisor and limited his role to questioning presenters only when the panel agreed to it.

The only significant point of contention during these negotiations was the matter of the subcontractor's role. The Corps did not want to accept the subcontractors as full participants, but because the subcontractors had developed data for their claims independent of Bechtel, Bechtel convinced the Corps that allowing U.S./Cobb, Marathon, and others to

present their own cases would increase the efficiency and clarity of the information presented to the panel.

SELECTION OF THE NEUTRAL

Prior to the airport meeting, Gary Henningsen called the Office of the Chief Counsel to inquire about potential neutrals, should the group decide to proceed with a mini-trial. They provided him with a list of three names, these individuals' titles, and the university or company with which each was associated. Both Jackson and Anderson recognized Prof. Ralph Nash as an expert on government contracts, and selected him on the basis of his reputation.

PRIOR EXPERIENCE WITH ADR

Professor Nash had served as a neutral advisor in four prior mini-trials, including the Corps' Tenn Tom Constructors mini-trial. Many of the tactics and strategies he employed, were derived from his earlier experiences.

None of the other primary participants had any prior experience with mini-trials, or any other form of ADR. However, all had a great deal of negotiation experience. Col. West had considerable experience with contracts, having served as a deputy district engineer and an area engineer before becoming district engineer. Gary Henningsen admits that when West first raised the option of a mini-trial he was against the idea because he had no experience with ADR, nor had he studied any cases in which it had been used. However, Colonel West had promised the Chief Counsel, Mr. Lester Edelman, that he would try a mini-trial when an appropriate case presented itself, and Henningsen was encouraged by the Chief Counsel to agree to its use. Bob Jackson and Jon Anderson had no prior experience with ADR. When West raised ADR as an option, they researched its past applications in the Corps.

ADR PROCEDURE

PARTICIPANTS

Col. West had been assigned to the Omaha District during the final phases of construction of the CSOC. Robert Jackson had inherited responsibility for the project late in the construction phase. Thus, neither of the two were involved in the day-to-day workings of the project over its life nor were they defensive about the positions taken previously by their sides.

Bechtel employed a scheduling consultant for its presentation and called three witnesses. The presidents of U.S. Engineering and Cobb Plumbing and Heating presented the U.S./Cobb case to the panel with the aid of their attorney, and Marathon used three witnesses in addition to its main presenter, a representative of Excell, Inc. (Excell), the claims consultant that prepared its claim. Marathon did not send anyone from the company. (It had gone bankrupt after the CSOC project.) The government called several fact witnesses, three representatives from Alpha, the claims consultant hired by the Corps,

and one representative from an accounting firm that had reviewed costs associated with the claims.

SCHEDULE

The highly structured schedule laid out in the ADR agreement was strained almost immediately. The first day, during which Bechtel gave its presentation, ran from 8:30 a.m. to 7:15 p.m. The second day, intended for the subcontractors, turned into an eleven-hour day. Sub-contractor presentations spilled over into the third day and, combined with the Corps presentations, ran from 8:00 a.m. to 11:15 p.m. An additional three hours of cross-examination occurred on the fourth day. Both sides waived their closing statements. The panel began negotiations on the afternoon of the fourth day and ended at 8 p.m. on the fifth.

DESCRIPTION

The night before the mini-trial began, Bechtel and U.S./Cobb were involved in a dispute regarding U.S./Cobb's role in the mini-trial. U.S./Cobb had expected to be a full participant; that is, a member of the panel that would participate in the collection and evaluation of evidence. Only after his arrival in Omaha, did Tom Cobb understand that he could only present his case to the panel and would not negotiate with Col. West. Cobb threatened to withdraw, jeopardizing the entire procedure. After lengthy discussions, Bechtel convinced Cobb to participate.

Prior to the official start of the mini-trial, Prof. Nash arranged to have breakfast with the decision-makers to discuss ground rules and the role they envisioned for him. Although the ADR agreement had given him a limited role, at the breakfast meeting, the decision-makers asked that he participate as a full panel member, asking questions and pursuing issues and concerns he deemed appropriate. They also charged Nash with managing the process and keeping time. Finally, the decision-makers asked Nash to play an active role during negotiations following the presentations. The panel agreed to share most meals and discuss the proceedings rather than retreat to their own camps. This set a joint problem-solving tone.

The mini-trial was held in a large conference room at the Omaha District Headquarters. Each side was given a "home base" conference room for team strategy sessions. The first day of the mini-trial began with a one-and-a-half hour opening statement by Bechtel's counsel during which he summarized the claims and evidence in the case. Testimony by three fact witnesses followed. They discussed specifics of the project and impacts of modifications in terms of additionally required materials and labor. Next, a scheduling consultant offered a detailed account of the delays and the impacts that resulted from government acceleration orders. The Government had the opportunity to cross-examine each witness, and Bechtel followed with rebuttals. Throughout the day, the panel asked numerous questions to clarify particular issues. As a result, the schedule, so carefully planned, was strained almost immediately but a commitment was made to complete each day's plan.

On the second day Tom Cobb presented the U.S./Cobb case in a question and answer format with participation from his company's senior estimator and with the help of an attorney. Mr. Cobb then answered a series of questions posed by the panel. In the afternoon, the Marathon claim was presented by an Excell representative, who used a series

of transparencies and a team of three fact witnesses to answer questions posed by the panel. When this proved unsuccessful in providing the panel with the information it requested, the Marathon project manager offered a personal explanation of the claim. The government cross-examined each witness and Excell had a chance to rebut. This day ended at 8 p.m., though scheduled to end at 5 p.m.

On day three, the government began its presentation with a statement summarizing its position. Four Corps witnesses followed with explanations of the contract modifications. Representatives of Alpha provided the bulk of the presentation.⁴ In essence, they disputed the validity of the claimed costs sought by Bechtel, and stated that the contractor actually owed the government money. The final witness for the government was a representative from an accounting firm hired by Alpha who reviewed the claims, contract records, and costs incurred by the contractor.

Bechtel had the chance to cross-examine each witness and the government to rebut. The cross-examination of government witnesses extended beyond 11 p.m. of the the third day and into three hours of the fourth. Both sides waived their closing statements, and by afternoon, the panel began negotiations.

Throughout the presentations, Prof. Nash worked hard to reduce the number of issues the decision-makers had to address. Issues of lesser magnitude were farmed out by panel members to small working groups. (Professor Nash encouraged this process.) Representatives from each side were charged with meeting with their counterparts in separate conference rooms to determine a fair and reasonable settlement to particular claims or parts of claims. In some instances, they were asked to affix dollar amounts, and in others they were asked to sift through the information to reach a common understanding of an issue. Many issues were resolved in this manner. At points in the main presentation, working groups were asked to present their findings and outcomes to the decision-makers. In some cases, technical staff were forced to re-open issues that had been "decided" at the field level years before. This left the decision-makers to devote their attention to the largest, most difficult issues in dispute, namely the impact and inefficiency costs claimed by Bechtel and the subcontractors.

Mealtimes were used to review testimony, shape the settlement, and focus on actions that would be necessary to reach closure. Thus, when they finally began negotiations, the decision-makers and Professor Nash already had a sense of the validity of the claims, and each had an idea of where the other stood.

Prof. Nash played a variety of roles throughout the mini-trial. At times he acted as a judge, giving his view and recommendations on points of merit; law professor, explaining the standing law on particular issues; claims counsel, suggesting ways of showing validity in a claim; facilitator of discussion; and during the negotiations -- mediator, steering the decision-makers away from impasse and toward settlement.

⁴ The Corps found the Alpha Corporation to be vital to its case. It had been hired prior to the suggestion of a mini-trial to analyze the claims, at a cost of \$134,000. After the mini-trial agreement was signed, the Corps modified the contract with Alpha to allow it to perform the discovery and mini-trial preparation at an additional cost of \$250,000. The Corps felt that without the help of Alpha, they would not have been able to prepare an effective case in the short time available.

SETTLEMENT NEGOTIATIONS

On Saturday afternoon, the decision-makers began negotiations. The main issues they addressed were: 1) accuracy of estimated costs and impacts; 2) the cause and effect relationship between government caused interferences and contractor damages; and 3) dollar losses on the job.

The panel initially focused on the subcontractors' claims. Col. West and Mr. Jackson quickly agreed that Marathon had not offered sufficient evidence to provide a basis for a determination of entitlement. Not only had it failed to successfully justify its claims, but its claims consultant did not have real authority to negotiate. Based on the testimony of the Marathon program manager, the decision-makers agreed to reconvene at a later date to give Marathon another chance to present its case in the mini-trial format if they provided additional data.

The U.S./Cobb claim was laid out issue by issue with accompanying dollar figures. Tom Cobb tenaciously defended each point, e.g. amount of additional materials used and additional labor hours required. The group examined every issue and reviewed the facts. When factual differences arose, working groups of Corps and contractor experts were established to reassess the issue and report their findings to the panel. In one instance, the Omaha District Chief of Engineering was brought in to provide leadership in a resolution effort. As a senior executive, he played a key role at a critical juncture. Throughout these negotiations, Skip Knotburg, Chairman of US Engineering, Cobb's joint venture partner, strongly supported a compromise given the time value of settling at the mini-trial as opposed to the Board.

U.S./Cobb eventually worked out a settlement with Bechtel. These negotiations were particularly significant because they potentially risked an unsuccessful end to the mini-trial. If U.S./Cobb had failed to settle, Bechtel probably would have felt obligated to discontinue negotiations and appeal all claims before the Board.

On Sunday, April 10th, Col. West and Mr. Jackson began to negotiate the quantum settlement of the Bechtel claims. By this time, both decision-makers had developed a high level of mutual respect and confidence in each other's objectivity, professionalism, and integrity. They both had a good feel for the facts, and they were able to discuss their interpretations of the data openly. The two saw themselves both as representatives of their respective organizations *and* as panel members, with the responsibility to reach an equitable agreement.

During the U.S./Cobb negotiations, much of the framework of the settlement was set. Rather than repeat the entire process issue by issue, the decision-makers decided to seek a global settlement based on the relative merits of entitlement for each claim. Bechtel offered and supported a settlement figure, and Col. West counter-offered. The two numbers were significantly far apart. The decision-makers then met with their respective advisors to inform them and re-figure their numbers. Jackson met with his cost analyst and West met with Alpha and other Corps representatives.

Nash helped them develop objective criteria to substantiate agreements on particular issues. Selected representatives joined the panel at various times during the negotiations to supply or clarify additional information, e.g. the government contract administrator participated at various times to verify contractual language and processes.

Nash excelled at moving the decision-makers toward a middle ground. He took an active role, at times injecting his personal views concerning factual issues or legal interpretations, and at other times, asking questions to enhance the decision-makers' understanding. For example, he explained the standing interpretation of the Prompt Payment Act, which affects the method of interest calculation on settlements. Sometimes he simply stated his assessment of data in terms of their believability. His questions often helped to reveal weak points in a party's case.

At 8 p.m. on Sunday evening, the decision-makers signed a hand-written agreement outlining a \$3.7 million settlement plus interest. It covered all claims including the U.S./Cobb claim and any closeout issues that might arise at a later date, but excluded all claims connected with Marathon and Bechtel's 'shielding claim.' The latter had previously been tried before the Board, and Bechtel was awaiting a decision on entitlement. Bechtel released the government from any further responsibility regarding the CSOC contract including legal fees arising from the Equal Access to Justice Act, which gives a claimant the right to sue for legal expenses in out-of-court settlements. Payment, including interest, was to be made within thirty days, in accordance with the Prompt Payment Act. Counsel were directed to draft a memorandum of understanding based on the informal agreement.

EVALUATION

PROCESS

A week before the mini-trial began, there was some question regarding whether or not the offices of Col. West. were an appropriate location. A search for an alternate site ensued. In the end, the Omaha district offices proved to be an asset because Col. West was able to draw upon technical staff who were not involved in the project to facilitate discussions between Corps and Bechtel engineers.

There is agreement among all those who participated that ADR can play an important role in settling claims, reduce backlog at the Board, and provide a mechanism to assure contractors their cases will be heard and settled within a reasonable time frame. Having had no prior experience with mini-trials, the participants were pleased with the efficiency of information transfer. Though the schedule was strained, the participants found that the thirty hours of presentations substituted for weeks of trial effort. A Bechtel attorney summed up the mini-trial as follows: "comprehensive case presentations and narrative testimony speeded up the process of setting forth complicated factual information; the panel asked questions whenever it thought necessary; knowledgeable people in the audience were immediately asked to confirm or comment on facts stated by a witness or case presenter; and relevant research tasks could be identified and assigned immediately. Lawyers, witnesses, and consultants were forced to minimize posturing and other tactical ploys. The consequence was a massive, focused, almost unbelievable laying out of information relevant to the claims."

Presenters found that the best witness was one who could attest to the validity of a set of facts and then answer questions posed by the panel. They found that question and answer formats, cross examinations, and polished narratives by consultants were of little value. It also helped that detailed quantum analyses had been submitted ahead of time. The

panel did not have to address issues of quantum during the presentations, but could instead focus on factual disputes.

Bechtel personnel attributed the success of the mini-trial to several factors. In post-mini-trial conversations, the participants stressed that if the decision-makers had not shared a strong sense of mutual respect, the mini-trial would have failed. Both decision-makers were highly committed to examining the issues and if possible, reaching a settlement. Factors that contributed to the rapport between the decision-makers included a lack of prior commitment to past positions, authority to make decisions, and Nash's involvement in working to establish positive relations.

In its evaluation of the procedure, the Corps analyzed the success of the mini-trial from an organizational perspective. First, ADR provided substantial savings in terms of money and time associated with protracted litigation. Col. West also felt the success of the process would serve as a standard for regional offices and perhaps, help field staff dispose of more claims. Corps staff found the mini-trial provided a mechanism for improving relations between the Corps and contractor and internally. Col. West noted that the Corps' ability to participate in a fair and efficient ADR settlement will allow it to play a leadership role in the development and use of efficient contract management processes for the design and construction industry. One presenter commented on the strong sense of camaraderie that developed among Corps employees who participated in the procedure.

Scheduling problems arose throughout the procedure. Participants agree that the assumed rule of three days for mini-trials is probably unrealistic given that one cannot expect all claims to involve similar levels of complexity. Presenters were not accustomed to condensing information as required by a mini-trial. Some participants expressed a concern that the length of the days adversely affected the quality of their presentations -- fatigue became a factor. Some felt that the neutral advisor was sensitive only to the needs of the panel. Breaks were called when the decision-makers were tired, but presenters felt that no attention was given to their needs. From an executive perspective, time limitations are a key factor to making the process both manageable and possible.

Many recommendations regarding the schedule were offered. Given the format of allowing the panel to ask questions during presentations, it is difficult to keep to a strict schedule. Since the goal is for the panel to understand the issues, presenters must be allowed to develop their cases. However, at some point, presentations need to be cut off.

Another interesting aspect of this mini-trial was the role of the decision-makers. Nash promoted a sense of membership in the panel. To this end, they dined together to discuss the proceedings. On the other hand, each served as team leader, helping to plan strategies and determine what would be effective. The Bechtel decision-maker even acted as a mediator between the Corps and subcontractors. He delivered offers, helped figure out what the Corps would accept, and negotiated compromises with them.

In assessing the neutral advisor, Bechtel and the Corps felt Nash was instrumental in helping them reach a settlement. Without him they possibly would have failed. However, Corps presenters felt that Nash often acted as judge rather than neutral. They felt that his line of questioning sometimes disputed a witness' point or position rather than simply clarifying it. One attorney said that on several occasions, witnesses repeatedly expressed the sentiment that Nash had already decided the merits of the claims.

Among the recommendations offered by participants in this mini-trial was the suggestion that an ADR clause be included in all contracts. Another recommendation was based on the fact that Alpha had proven instrumental in preparing the Corps' claim. Had

the Corp not hired Alpha prior to the ADR agreement, they would not have had the time to contract with a company to do the necessary investigative work. The Corps suggested that districts with large volumes of claims maintain claims consultants on an "indefinite delivery contract" basis so that claims can be investigated in a timely manner. Another recommendation was that a mechanism be instituted to deal with questions of procedure. Both sides were required to exchange all documentation prior to the procedure. The contractor had prepared an "as-built schedule," but gave it to the Corps incomplete. Additional data and information were included for the Bechtel presentation, which put the Corps at a disadvantage for its response. The informality of the mini-trial provided no authority who could rule on evidential procedure.

QUANTUM

Both sides were satisfied with the agreed upon settlement figure. Bechtel stated that given the time and costs of getting a favorable ruling on entitlement and negotiating quantum, the settlement was reasonable.

CASE STUDY #5 GOODYEAR TIRE AND RUBBER COMPANY

BACKGROUND

The Phoenix-Goodyear Airport (PGA) Superfund site is located approximately 17 miles west of Phoenix, Arizona. The southern half of the site consists of adjoining properties: the Phoenix-Goodyear Airport, formerly the Litchfield Park Naval Air Facility, now owned and operated by the City of Phoenix; and the Loral Corporation plant on land owned until 1986 by Goodyear Tire and Rubber Company through a then subsidiary, Goodyear Aerospace Corporation.

The adjoining Navy and Goodyear facilities had been established during World War II to modify, repair and service Navy aircraft. After the War, Goodyear left the site and the Navy stayed on to preserve decommissioned military aircraft. When the Korean War broke out, Goodyear returned to its former site and manufactured airplane parts, largely under government contract, until the facility was sold in 1986. The Navy operated its facility until 1968, when it was transferred to the City of Phoenix.

In 1981, Goodyear and the Arizona Department of Health Services discovered volatile organic compounds (VOC), principally trichloroethylene (TCE), in the groundwater and soils at the PGA/Litchfield site. (TCE is a human carcinogen.) EPA added the site to the Superfund National Priorities List in 1983.

From 1983-1987, EPA conducted a Remedial Investigation and Feasibility Study (RI/FS) at the site. Following the Study, Special Notice Letters were delivered to the Department of Defense and the Goodyear Corporation identifying them as Potentially Responsible Parties (PRPs) in the cleanup of the site. The U.S. Army Corps of Engineers, through its Omaha District Office, was assigned by DOD the responsibility of acting for DOD in the investigation and negotiations. In September of 1987, EPA issued a Record of Decision (ROD), calling for remediation of the groundwater problem as the first phase in cleaning up the site. The ROD triggered a regulatory timetable for remedial actions by the PRPs. They then had 60 days to respond to EPA with a proposal for financing and undertaking the necessary remedial action. By request of the parties, this was extended to 90 days. During this time, the first attempts to negotiate a settlement were made.

THE ISSUES IN DISPUTE

The major issue in contention was the relative responsibility of each of the PRPs (DOD and Goodyear) for the TCE contamination. The resolution of this issue depended upon determination of the source and timing of the contamination. Each side conducted extensive investigations of its own, but the results were controversial and inconclusive. There were also few witnesses still available. Little detailed documentation remained, because the site was used for military purposes and some of the records had been destroyed or "sanitized" by Naval Security after World War II.

NEGOTIATIONS BEFORE ADR

When the ROD was issued in September 1987, the Corps and Goodyear attempted to negotiate an agreement. Their different assessments of their respective responsibility kept them far apart on a cost-sharing formula. At the expiration of the extended 90-day period, the two sides could not reach an agreement. Goodyear submitted its own remediation plan to EPA. The Corps, as agent for DOD, observed but did not participate in the negotiation between EPA and Goodyear, pending resolution of the cost-sharing dispute. DOD knew there was a possibility of an EPA administrative order if it did not participate in the cleanup. As a result of negotiations and a desire to forestall future litigation, the parties discussed the possibility of using ADR. EPA agreed to extend the Consent Agreement deadline until May 25, 1988, to allow DOD and Goodyear to explore ADR.

POSITIONS OF EACH SIDE PRIOR TO ADR

The Corps' evaluation was that their relative responsibility for clean-up was small. In fact, their initial offer to Goodyear when negotiations began was that the Corps would pay only 6% of the clean-up cost. They did increase their offer during the negotiations, but still maintained that the Corps responsibility was much less than 50%.

Goodyear argued that, because they were operating as contractors to the Navy and proceeding according to government specifications, the government should share equally in the responsibility for the contamination. Because of this, Goodyear claimed that they and the Corps should split the costs 50/50. But they also felt their position was weak because "the government is the government"; i.e., even though DOD is not EPA or DOJ, they are all "the government" and by definition on the same side. This put Goodyear at a disadvantage, or so they thought, in any battle with DOD.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

The idea of using ADR was first suggested to Goodyear by its outside legal counsel, Multinational Legal Services of Washington, D.C. Specifically, Jim Tozzi of MLS, a strong proponent of ADR, suggested to Goodyear that it might be applicable in this case. Jack Mahon, the Corps Senior Counsel for Environmental Restoration, who was involved in the Goodyear negotiations, moved swiftly to gain acceptance within DOD of an ADR initiative. He knew that Lester Edelman, the Corps Chief Counsel, would be a strong supporter. Goodyear was negotiating directly with Corps Headquarters at the time and so wanted to conduct an ADR process with personnel at that level.

The Corps, however, felt strongly that negotiations should take place at the District level. This was where they felt they had the strongest technical capability. Colonel Steven West, the Omaha District Engineer who took the lead role for the Corps, had recently concluded a mini-trial with the Bechtel Corporation. He had worked with Gary

Henningsen, an attorney in the Omaha District office, on the case. This was the same team the Corps proposed to use with Goodyear.

The Corps Chief Counsel made it clear to DOD that Colonel West would have to have total authority to settle in order for ADR to work. While District Engineers have unlimited authority in contract settlements, such authority had never been granted in the area of toxic waste clean-ups. Because DOD felt Colonel West had the experience and skill to handle this case, they delegated the required authority in this instance.

PROS AND CONS OF ADR: THE CORPS

Concern was focused on avoiding long term litigation associated with contribution actions by Goodyear. EPA/DOJ showed little inclination to go against the Corps. However, the Corps recognized that if EPA moved against Goodyear with a consent decree or an administrative order, the ability to settle would be taken out of the Corps' hands. Their assessment was therefore that an ADR procedure left them more in control of the outcome than any other available process.

On the "con" side, the technical staff at the District level were not initially in favor of ADR. They felt that their case was strong and that an ADR procedure would reflect dissatisfaction with their analysis and force the Corps to make concessions that were inappropriate. They eventually supported the ADR process.

PROS AND CONS OF ADR: GOODYEAR

When negotiations broke down in late 1987, Goodyear assessed their alternatives as follows:

- Cooperate with EPA and sue DOD
- Do not cooperate with EPA, even if DOD refuses to come in as a PRP. This would require EPA to litigate, issue an Administrative Order, or perform the clean-up and come back to Goodyear for reimbursement.

The lawyers for Goodyear felt they were in a no-win situation with EPA. The Superfund statute put all the weight on EPA's side in any confrontation. Goodyear's lawyers felt an ADR process was their best choice, given the options.

Goodyear itself, however, was "restive" about the whole process, according to Richard Berg of MLS. They felt put upon. In their view, all of the contamination was a result of government contract work. Given that the facts were hard to ascertain, they felt a 50/50 split was the only fair outcome. In addition, they were upset with what they saw as EPA's "Gestapo-like" search procedures as the Agency sought evidence of who caused the contamination. In their view, EPA was likely to be biased in favor of DOD. However, legal counsel was able to convince Goodyear that ADR provided their best chance of generating an acceptable outcome.

THE PRE-ADR MEETING

Colonel Steven West, the District Engineer for the Omaha District, was the principal representative for the Corps. Dr. Robert Hehir, Vice President for Government Environmental Safety and Health Assurance Programs, represented Goodyear. Colonel West called Dr. Hehir to set up a meeting to discuss the details of the proposed ADR process. The Colonel felt strongly that the elements of a successful process would include the decision-makers having the ability to make final commitment and having the willingness to settle. When he called Hehir, West made it clear that he had the authority to settle and that Hehir must have the same. In West's view, mini-trials or other forms of ADR are merely variations on existing decision-making procedures for managing complex disputes.

At the first meeting, each made an assessment of the other. Hehir felt that West was "forthright, intelligent, trustworthy, knowledgeable, and respectful of technical ability." West saw Hehir as "decisive, positive and substantive." For both men, this was decisive in going forward and proceeding with the ADR arrangements. As West remarked, he took the "commitment to proceed... [as] a desire to settle."

CHOICE OF ADR PROCEDURE

At this meeting, West suggested the use of a mini-trial. He had experience with this procedure and felt that it fit the situation. His primary concern (and that of Hehir's as well) was that the technical and business people remain in control and not turn the reins over to the lawyers or others. In the mini-trial, the principals could maintain a high level of personal involvement and did not delegate the decision to anyone else.

Both men also felt confident that their staff people could competently present each side of the dispute. They also felt that, as principals, they could be open to new agreements.

They agreed on a three-day mini-trial procedure. West and Hehir would preside as the "decision-makers." Gary Henningsen would be the attorney presenting the Corps' case. Henry Diamond, of Beveridge and Diamond, Washington, D.C., would present the Goodyear case. (Richard Berg, Senior Counsel of Multinational Legal Services, also advised Goodyear.)

On each of their first two days, one side would lay out its case in the first three hours. West and Hehir would then use the rest of that day to ask questions of the presenters. The third day would be for deliberation of the principals and for making a decision. The men also decided, however, that they would meet "as long as it took" to settle. They backed the three days up against a weekend so as to give themselves the flexibility of more time if they needed it.

STRUCTURE OF ACTUAL ADR AGREEMENT

The formal ADR agreement was drafted during February and March of 1988. David Schwartz from MLS, a retired claims court judge, did the drafting on the Goodyear side. Gary Henningsen worked on the Corps side.

The amount and timing of discovery was a critical issue. Goodyear requested more discovery than the Corps thought appropriate and also expected Corps staff to travel to locations around the country to search for documents. The negotiators finally agreed to limit themselves to 10 Interrogatories and 10 Requests for Admissions on the other party, and that the Corps would be obligated to provide only those records over which it had control.

The parties agreed to depose no more than five persons on the other side and to follow these up by written statements. They also agreed to a schedule for document requests and for responding to Interrogatories.

The structured agreement was difficult to hammer out; there were two written drafts by each party and one face-to-face meeting between the lead negotiators, as well as numerous phone calls. It took the intervention of the principals to finally bring about an agreement on the process.

In addition to issues of discovery, two other elements emerged as sticking points:

The scope of the mini-trial: Goodyear wanted the scope to be broad enough to encompass anything they felt pertinent to their case. The Corps wanted to limit the scope to evidence on the contamination. Henningsen finally conceded this point and allowed the scope to include any and all issues.

The specific costs that the allocation formula would apply to: The parties agreed that, rather than deal with this as a part of the ADR agreement, they would defer this to a sidebar negotiation to take place at a later time. In fact, this sidebar became extremely important and continued throughout the mini-trial itself.

The final terms of the mini-trial agreement included the following:

- the Principals participating "would have full authority to settle the dispute"
- the mini-trial would be a nonbinding hearing process designed to inform the Principals of the position of the respective parties "on the dispute and the underlying bases of each"
- the scope of the hearing was confined to the "operable unit" set out in the EPA ROD
- the date, time limits, and location of the hearing were agreed upon and each party agreed to "exert their best efforts to reach a settlement before June 1." If no agreement was reached by that time, the ADR would be ended.
- the agreement specified that a "sidebar" agreement between the two parties would be developed to determine what specific costs were to be covered by a cost allocation agreement.
- a neutral advisor would be in their common interest and agreed to jointly approve a neutral by April 1
- limitations on the use of discovery were set, and the parties agreed to assist each other in interviewing and deposing witnesses
- the rules of evidence would not apply and informality would be the rule
- time limits and schedules for presentation were agreed upon
- each side agreed to provide a "statement of contention" as a position paper of not more than 25 pages
- there would be no transcript or recording made of the hearing, and all material was to be "a part of a settlement conference for purposes of the rules of evidence in any court, State or Federal"

SELECTION OF THE NEUTRAL

Both sides agreed to submit names of a person to play the neutral role. Hehir and West agreed it should be someone with considerable technical expertise, as well as credibility and professional standing. Goodyear proposed Dr. Richard Collins, Director of the Institute for Environmental Negotiation at the University of Virginia. The Corps did not develop their own list, and after investigating Dr. Collins' credentials, agreed to retain his services. Collins was known to Dr. Jerry Delli Priscoli, who recommended him to the Chief Counsel, Mr. Les Edelman.

Goodyear was looking for someone with maturity and judgement. Dr. Collins met their criteria as well.

Hehir and West wanted the neutral to play a facilitative role, keeping things moving but not offering his advice unless asked. Collins ended up asking many questions during the actual proceedings, playing devil's advocate during the deliberations of the principals, and talking them through stalemates.

The process of identifying and confirming the neutral took about 60 days.

PRIOR EXPERIENCES WITH ADR

Colonel West had conducted a mini-trial with Bechtel on a contract claim but had no ADR experience with toxic waste, as this was a new area in which the Corps was using ADR. Henningsen likewise had worked on the Bechtel case.

The MLS attorneys (Richard Berg, Dave Schwartz, Bill Hedeman), had ADR experience. However, MLS hired a trial attorney (Henry Diamond) to present the case. His previous experience had been primarily in structured negotiations of construction disputes and in non-settlement negotiation.

Dr. Hehir had not had ADR experience. He was briefed by Dave Schwartz of MLS before meeting with West.

ADR PROCEDURE

The mini-trial was held May 19-21, 1988 in Phoenix, Arizona. On the first morning of the proceedings, the principals and the neutral advisor had breakfast together. It was the first time the three of them had met and they discussed ground rules for the proceedings and the role for the neutral during the mini-trial. Both West and Hehir were clear with Collins that they did not want him making judgments. What they wanted instead was a facilitator, someone to keep the proceedings moving and on target in a highly visibly, chairman-like way.

In the course of the mini-trial, Collins' role became very important. He became the one to ask most of the questions, as West and Hehir tried to remain distant and listen evenly to both sides. In fact, West and Hehir kept themselves quite separate from the other participants throughout the proceedings, taking meals together (with Collins) and

consciously avoiding caucusing with their respective teams. They did this in an effort to be impartial and carefully consider all the information. And they let Collins play the role of devil's advocate, asking the difficult questions both during the mini-trial and in their private deliberations.

Collins contributed in another major way as well. At the end of the second day, the disagreement of the expert testimony from each side was still hard to reconcile. Collins suggested that the experts from both sides discuss the technical information (primarily the hydrology of the site) before the principals as a panel, without the interference of Counsel. This allowed Collins, West, and Hehir to focus attention specifically on these different viewpoints and have the experts themselves explain their disagreements.

At one point in the proceedings, the principals felt it was important to visit the site and see if that disclosed any information useful to the decision. According to Collins, this visit provided visual evidence that strengthened the Corps' case and may have led to Hehir's willingness to compromise later in the discussions.

Many of the participants commented on the difference in style between the two presenting attorneys. Diamond took the words "mini-trial" literally and conducted his presentations as if in a courtroom. In his own words, he felt it to be "litigation in miniature." His approach was to refute the Corps' case through cross-examination and rebuttal.

Henningsen, on the other hand, approached the mini-trial as a problem-solving opportunity. His presentations (at first) were more like briefings, in which he tried to illuminate as much about the site as possible. The Corps had done a tremendous amount of technical preparation on this case and wanted all of the data to be shared so that the most equitable solution could be found. As the mini-trial progressed, however, Henningsen adopted more of the trial-like methods employed by Diamond. Both men agreed that it was a hard-fought case.

THE SIDEBAR AGREEMENT

The mini-trial proceedings focused on the allocation question and the percentage of cleanup costs that each party should pay. A secondary, but very significant, issue was determining exactly what costs were to be split.

The discussions had begun months before the mini-trial itself. The Corps, with help from the DOJ, had prepared a draft agreement, but Goodyear couldn't agree to it. They responded with a revised text. Representatives of both parties met in Omaha, Nebraska on May 19, to try and work out the differences, and the negotiations were moved to Phoenix on May 20.

The deliberations continued in Phoenix, concurrently with the mini-trial but in a different room of the hotel. An entirely different set of players, all attorneys, were involved in these negotiations. They included Jack Mahon from the Corps' Office of Chief Counsel, Bill Hedeman and Dick Berg from MLS, Willy Ido from Goodyear, and Steve Calvarese from the Missouri River Division Office. By Saturday morning, after a very late session on Friday evening, most of the issues had been resolved. There were, however, still some sticking points. The negotiators turned these over to the principals in the mini-trial and they made the final decision on these last issues.

Several participants commented on the importance and uniqueness of these negotiations. To their knowledge, they were operating in the dark, with no model of how this kind of negotiation should proceed. Goodyear took a strong position that the sidebar had to be settled before they could agree to any share of costs. This put on a lot of pressure to work through these parallel negotiations quickly, so as to be completed before the conclusion of the mini-trial.

A significant piece of these negotiations were the issues left unresolved until the end. There was much uncertainty in the data being used to identify costs, and where the uncertainty was too great, the negotiators passed the decision on to the principals. They folded these last critical decisions into their deliberations on Saturday, May 21.

THE SETTLEMENT

The presenters gave their summary statements on Friday afternoon, May 20. On Friday evening, West, Hehir, and Collins met together to begin their deliberations. They were not able to reach any agreement that evening; they spent most of that time reviewing the presentations and steered clear of putting any numbers on the table.

They convened early the next day. Collins played a critical role in these discussions by providing a critique of each side's case. After several hours, they were still far apart, and it was not clear that agreement was going to be found. Each principal "took a walk" with the neutral, to test out perceptions and possible percentages before proposing them to the other side.

Late in the day, West and Hehir reached an agreement. In Hehir's words, they both recognized this to be a "business decision," in which it was "better to do something rather than nothing." Hehir had been willing to give in a bit on the issues in the sidebar agreement, and this may have helped set the tone for agreement on the cost allocation. The final decision was for the Corps to pay 33% of the costs, and Goodyear to pay 67%. The agreement was contingent on Goodyear agreeing to the consent decree with EPA, which they were willing to do.

EVALUATION

All of the participants felt that the outcome of the mini-trial was acceptable. Each was, of course, hoping for more. After hearing all of the information presented at the mini-trial, each party and attorney felt that the settlement was within a reasonable range of their desired outcome.

Everyone was also satisfied with the process. The principals in particular both felt that the procedure had worked well. They each felt the other had discharged his responsibility admirably and that the resulting decision was the very best that could have been achieved. The relationship between the principals was an important element in this mini-trial, and many of the participants felt that this was the most important ingredient in the procedure's success.

The Corps staff were also satisfied. They were a bit disappointed, however, in their dealings with Goodyear. They had hoped for a more cooperative relationship. The

Goodyear people, with the exception of Hehir, were adversarial and therefore the negotiations at the staff level were harsh.

The neutral, Rich Collins, also got high marks from all of the participants. They felt his questioning during the proceedings was rigorous and on target, his facilitation of the sessions was handled with appropriate authority, and his critical thinking in the private sessions with the principals invaluable in helping them break through the stalemate and reach a decision.

The participants drew several very important and interesting lessons from this case:

- The time commitment of the principals is significant. While a mini-trial procedure can be useful in many kinds of cases, it should be employed selectively in situations in which executive time is truly limited.
- It is critical that the principals have the authority and the capability of making decisions on behalf of their group.
- The principals should meet beforehand and assess whether or not each feels he can "do business" with the other. This includes an assessment of each person's commitment to settle.
- The business and technical people should retain control of these decision processes and not hand them over to attorneys.
- Both principals should feel comfortable with the neutral, both personally and procedurally. The neutral should take direction from the principals and exercise control only to the extent that they allow.
- A neutral with technical expertise is invaluable, if he/she does not overstep boundaries and offer opinions that are not requested.
- This kind of process provides great insight into one's own organization; how the groups present their cases indicates how they organize information and deal with problems.
- The structure of the ADR procedure is very important. The more that can be ironed out at this stage, the better.
- Even with compressed deadlines, there are savings in money and time over litigation.
- The most important ingredient is the supportiveness of the principals and their willingness to settle. This sets a tone that permeates the proceedings and can overcome adversarial relations between the presenters and staff. If the principles don't have the will to settle, or don't communicate it to their staff, the process can unravel.
- Mini-trials are most appropriate for cases which:
 - have a high potential for settlement, or for which the Corps is not convinced it has a strong case;
 - would have a high cost if they went to trial;
 - have multiple claims;
 - have difficult factual, rather than legal issues.

III. CASE ANALYSIS

We have organized our analysis of the five cases according to the eight steps in our Preliminary ADR Framework:

STEP 1 - DECISION TO SETTLE

The decision to settle involves a careful review of likely monetary costs and costs in terms of time, potential liability, the likelihood of setting a precedent, the Corps' assessment of its prospects in court, and the importance of factual questions.

MONETARY COSTS

In deciding whether to settle a case, pursue litigation, or take administrative action, Corps managers calculate expected costs as compared to expected gains for each option. Costs include attorney's fees or salaries, and with regard to claims, the interest that accrues from the date of claim certification until settlement payment is made.

In all five cases, cost was a significant factor. The decision-makers calculated the difference between the expected value of the settlement achieved by an ADR procedure and the expected value of the likely alternative. If that amount was *not* enough to cover litigation expenses and interest, the decision was made to use an ADR procedure.

Use ADR if:

$$V_T - V_{ADR} < L + i,$$

where V_T is the expected value of a settlement achieved through traditional means; V_{ADR} is the expected value of an ADR settlement; L is litigation expenses, and i is interest.

COSTS IN TERMS OF TIME

Litigation, often lasting years and in some cases, decades, consumes large amounts of staff attorney time. Significant technical staff time must also be committed during litigation both to answer questions of Corps and contractor attorneys and to testify at trial.

Limitations on available staff time were a concern in most of the cases, but especially in Olson. The District counsel's office was shorthanded, having lost a staff member to budget cuts, and the department was overwhelmed with work. The opportunity to dispose of a case quickly by engaging in an intensive effort over a short period of time seemed worth investigating. Second, the Portland District was about to embark on three major projects that would occupy all of its available technical staff. The chance to free its cement experts from the likelihood of interviews and the need to testify was further incentive to seek an alternative to litigation.

LEVEL OF LIABILITY

For a claim of great value, litigation poses a significant risk if one has a strong, but not an airtight case. It makes sense to settle in such situations rather than participate in a "high stakes gamble" in court. Of course, if a manager's case is airtight, the proper decision may well be to continue litigation (as long as the net expected value is positive).

In the Tenn Tom claim, the value of the claim exceeded \$45 million. While technical staff believed the Corps had a strong case, legal counsel and top Corps management felt the risk of such exposure was too great to go to trial. By proposing an out-of-court settlement procedure, the Corps maintained greater control over the dollar value of the settlement.

PRECEDENT

If the Corps decides to continue to use ADR in cases centered on questions of fact rather than legal issues, the problem of setting a positive or negative precedent will remain small, but it may still remain a factor. When one side wants to use a case to establish a precedent, ADR techniques are not appropriate since negotiated settlements have little or no precedent-setting value.

The Tenn Tom case represented the possibility of a negative precedent for the Corps. If the government lost the case before the Board because pre-bid specifications failed to accurately describe site conditions, the Corps could have been forced to re-write its regulations for evaluating site conditions. Though such a scenario was unlikely, the risk existed. The mini-trial provided the Corps with a mechanism to settle without risking such a requirement.

ASSESSMENT OF THE CORPS' PROSPECTS IN COURT

Corps counsel must review all claims and make preliminary determinations regarding merit before considering dispute resolution alternatives. If the Corps has a very strong case and is almost certain to win before the Board or in other judicial proceedings, ADR techniques should not be used. In large, complex cases, however, when the outcome of litigation may not be obvious and parts of the claims are valid while others are overstated or lacking merit, ADR techniques are more appropriate. In such cases, neither side usually "wins" everything in court.

In three of the contract cases we studied, the decision to use ADR techniques was made after some level of entitlement was found. For example, in the Granite case, entitlement was found, but the government felt the contractor had over-estimated its quantum analysis. Corps counsel believed a neutral analyst would close the gap between the parties' estimates.

In the Olson case, the government did not accept entitlement, but legal counsel felt there were enough weaknesses in the case to justify using the ADR procedure. The Chief District Counsel judged the Corps to have a 60/40 chance of winning at the Board.

THE IMPORTANCE OF FACTUAL QUESTIONS

The current position of the Corps is that cases based on factual, not legal questions should be submitted to ADR. In cases of fact, all of the aforementioned ADR procedures have been used successfully. A mini-trial can also be used to settle legal questions if the neutral is an expert in the relevant field of law and the decision-makers retain legal advisors in addition to trial attorneys.

All of the cases studied centered on questions of fact and interpretations of factual information. However, Prof. Ralph Nash, who served as the neutral in two Corps mini-trials, has also served in at least two other mini-trials where legal issues were central to the dispute. He feels strongly that ADR techniques can be useful in both circumstances. The use of ADR techniques to settle interpretations of law is a policy choice that the Corps may want to re-examine.

STEP 2 - DECISION TO USE ADR

The decision to use ADR involves a careful review of the claimant's level of entitlement, the relationship between the Corps and the contractor and their field staff, district/division relations, past settlement attempts; the complexity and number of issues, parties, and/or claims involved; and whether or not the dispute stems from different interpretations of scientific or technical data.

PARTIAL ENTITLEMENT

In some claims cases, the decision to use alternative dispute resolution was made after entitlement had been formally established; in others, the decision was made after it had been informally determined or before it was decided at all. In some cases entitlement was found, but the claim's dollar figure was overstated. Before proposing ADR in the Bechtel case, the Corps had found entitlement in at least one claim and leaned toward entitlement in another, but had not yet informed the contractor. At the pre-mini-trial meeting, the contractor insisted on knowing that the Corps would accept some degree of entitlement. Since entitlement had been found in two of the seven claims, the Corps was able to give this assurance.

A very successful use of alternative dispute resolution is illustrated by the Granite case. The Contracting Officer/District Engineer (CO) was about to issue a final decision. He recognized entitlement, but felt the contractor had overestimated the compensation due. The CO knew the contractor would appeal, so he decided to invite Granite to participate in a non-binding arbitration procedure. He felt that if a neutral party suggested a level of compensation, the contractor would be more likely to accept it than if the CO rendered a similar decision.

In the Olson case, entitlement was an open question. An arbitration panel was asked to rule on both entitlement and quantum if necessary. In the Goodyear case, the government accepted responsibility for part of the Superfund cleanup, but the two sides could not agree on a cost-sharing formula.

RELATIONSHIP BETWEEN CORPS AND CONTRACTOR

In most cases, the District Engineer or Division Engineer did not have any previous direct experience with the other party. In the Granite case, however, the District engineer had worked with the company many years before and felt the contractor was "not in the category of those who try to boost profits by filing claims." For this reason he felt comfortable initiating the ADR procedure.

In other cases, the Corps has a historical relationship with a contractor. Many Corps employees stated that dispute resolution alternatives should be offered to companies that enjoy a good reputation with the Corps. There was also a strong sense that ADR techniques could help the Corps build and maintain good relations with large corporations it expects to rely on in the future (such as Bechtel and Morrison-Knudsen, the major partner in the Tenn Tom joint venture). Companies are more likely to bid on an agency's projects if they know their claims will be handled fairly and expeditiously. Senior staff in the Corps found the ADR program improved relations with key contractors.

RELATIONS BETWEEN CORPS AND CONTRACTOR FIELD STAFF

The level of adversity generated by a claim significantly affects the choice of an ADR procedure and the level within the Corps at which settlement negotiations need to be handled. For example, the Tenn Tom project was overshadowed by the claim throughout the project. Both sides generated meticulous documentation since it was clear that a large claim was forthcoming. Throughout the project, each side concentrated on justifying its positions since technical people on both sides felt their activities would be second-guessed. The claim could not have been settled at the District level. District staff were too entrenched to do anything but argue their case before the Board.

DISTRICT/DIVISION RELATIONS

When a claim is appealed, responsibility is transferred to Division legal counsel, which analyzes the risks associated with litigation. Since District counsels are closer to the technical staff, they tend to be concerned about a decision's effect on District technical staff. Technical people may be angered if they feel their superiors "sold them down the river." From our interviews it appears that many technical staff view all claims (e.g. differing site conditions claims) as challenges to the integrity of their work. At the Divisional level, it often is possible to take a more dispassionate view of the Corps' intent in settling without the technical staff feeling quite so threatened.

The Tenn Tom case illustrates what can happen when District/Division relations are strained. District technical staff were against the decision to use a mini-trial to settle the claim. They preferred to argue the case before the Board. They had gone to great lengths to document their actions each step of the way to prove that pre-bid specifications provided the contractor with accurate information. As a result, after the mini-trial, someone from the District anonymously contacted the Inspector General's Office to request an investigation of the use of a mini-trial and questioned the appropriateness of the settlement. (The IG's Report subsequently found that the settlement was in the best interests of the government and the procedure was appropriate.)

In contrast, the Goodyear case illustrated how a mini-trial led to improved relations between District and Division legal counsel. One attorney connected with the case stated

that teamwork among Omaha District, Missouri River Division, and USACE attorneys was not only "refreshing," but a "key factor" in achieving a successful settlement.

SETTLEMENT ATTEMPTS

ADR procedures can be used at the point when settlement negotiations reach an impasse, or well before then. In cases where some level of entitlement has been excepted and the parties exchanged offers but remained far apart, non-binding arbitration can be used to find an acceptable settlement figure. Sometimes in a contract claim, agreement on the exact level of entitlement can be translated into a formula for determining an appropriate quantum. For example, in Olson, the arbitration panel found the contractor 60% responsible for increased costs. They used that formula to determine the quantum settlement recommendation. Previous settlement negotiations in that case had led only to impasse.

Negotiations in Goodyear were inconclusive prior to the mini-trial. Joint responsibility for mitigating contaminated groundwater existed, but the two sides could not agree on a cost allocation formula. In the Bechtel case, settlement negotiations had not even begun. The Corps had hired a claims consultant to determine the validity of the claims. Though the Corps had found entitlement in two of the seven claims, the mini-trial allowed the decision-makers to examine questions of entitlement.

MULTIPLE PARTIES, ISSUES, AND/OR CLAIMS

Contractors often file a number of claims on one project. Each must be handled and defended separately. When pursuing settlement, however, it is sometimes possible to combine the claims and settle them all at once, thereby saving time and money. This possibility often makes it worthwhile to find an alternative to litigation.

The Bechtel case involved several claims, most of which resulted from design changes and acceleration orders. It also included a number of subcontractor claims worth millions of dollars. After intensive pre-ADR negotiations, the parties decided to use a mini-trial to settle all the claims except one (that had already been tried before the Board). They also allowed two major sub-contractors to present their own cases and negotiate on their own behalf. The same type of ADR agreement emerged from the Tenn Tom mini-trial. The settlement in that case produced closure on all outstanding obligations.

TECHNICAL OR SCIENTIFIC DATA IN DISPUTE

Many cases result from different interpretations of the same data. Each side has experts ready to testify to the "truth" of its interpretation. In the end, it is usually a judge who must decide whose "facts" seem more accurate. This, however, poses a risk to litigators since it is difficult to anticipate what a judge will decide.

ADR techniques provide a means of clarifying factual disagreements and, in some cases, of resolving technical disputes before the actual claims are settled. Mini-trials and non-binding arbitration procedures require decision-makers and arbitrators, respectively, to ask questions of witnesses and presenters until they reach a shared understanding of the issues. Unlike a trial judge who must be provided with substantial background

information, the ADR participants tend to be experts in their fields. This means they can delve into the sources of technical disagreements.

The Tenn Tom case centered on disputed facts. At one point in the mini-trial, the neutral asked the technical experts on both sides to respond to questions regarding the source of their disagreement. Through this interaction it became clear that their disagreement stemmed from interpretations of engineering and soil theory. The decision-makers asked questions about the competing theories until they fully understood the source of the disagreement. With this understanding in hand, they were able to resolve their differences.

The Goodyear case also hinged on a technical dispute (i.e. the differing levels of responsibility for Superfund cleanup as well as the costs implied). When disagreement in expert testimony was difficult to reconcile, the neutral suggested that the experts discuss the technical information (primarily the hydrology of the site) in front of the panel without interference from attorneys. This allowed the experts to air their differences and explore their disagreements. The neutral asked "piercing questions" that helped bring the parties to settlement.

STEP 3 - FORM OF ADR

In order to choose the appropriate form of ADR for a given dispute, a manager must consider the dollar value of the claim, his subcontractor involvement, and the level of control and participation he feels he needs.

DOLLAR VALUE OF CLAIM

The size of a claim should be a major factor in choosing an ADR procedure. The value of a claim also affects the level in the Corps at which settlement decisions should be made. Because large claims represent potentially great liability, higher level decision-makers usually choose to be directly involved. Mini-trials require decision-makers to understand all aspects of the claim, develop a negotiation strategy based on the presentations, and negotiate a settlement. In other procedures, such as non-binding arbitration, the decision-makers may only decide whether or not to accept a recommendation outlined by the arbitrator. This is generally acceptable for smaller claims in which the government's liability is not so great. The larger claims (Tenn Tom Constructors, Bechtel and Goodyear) were settled through mini-trials; Tenn Tom at the Division level, Bechtel and Goodyear at the District level. In the Olson and Granite cases, non-binding arbitration was used at the District level.

SUB-CONTRACTOR INVOLVEMENT

The format of a mini-trial is flexible enough to allow for subcontractor involvement if both sides agree. This is also possible in a non-binding arbitration procedure, but more difficult because of greater time constraints and the fact that the decision-makers accept or reject a non-binding decision rather than independently negotiate. It is useful in cases involving complex claims submitted by subcontractors, especially when the subcontractors developed their own cases.

The Bechtel decision-maker insisted that his subcontractors participate in the ADR procedure. The subcontractors had prepared their own cases, and Bechtel felt they could argue them more effectively and efficiently than Bechtel. Originally, Bechtel wanted the subcontractors to be full participants, that is decision-makers with the right to question witnesses. The Corps initially resisted any subcontractor involvement, but during the mini-trial agreement negotiation agreed to allow them to present their own cases and negotiate directly with the Corps decision-maker.

LEVEL OF CONTROL AND PARTICIPATION IN THE PROCESS

Mini-trials provide decision-makers with the greatest level of control over an eventual settlement and require decision-maker participation throughout the process. They must completely understand the data and information relevant to the case and are then required to negotiate a settlement. Non-binding arbitration, on the other hand, provides a decision-maker with a written report from the arbitrator. The decision-maker then decides whether or not to accept the arbitrator's recommendation. In cases of great value, decision-makers are often unwilling to give up their authority to another party.

In the Tenn Tom, Bechtel, and Goodyear mini-trials, the decision-makers decided that the disputes involved such high stakes that they needed to be involved in the entire process -- from presentations to negotiations. The Corps decision-maker in the Goodyear case specifically chose to participate in a mini-trial because it allowed him to "retain a high level of involvement and did not delegate the decision to anyone else." The actual days of the mini-trials tended to be grueling, but in the end all participants found the settlements fair. The high level of participation produced intrinsic support for the settlements.

On the other hand, decision-makers in the non-binding arbitration cases did not participate until the arbitrators filed their reports. In the case of Olson, the decision-makers never met. Their attorneys informed them of the panel recommendation and suggested they accept it. Olson was less satisfied than other contractors. It is likely that if he had directly participated in the procedure he would have more clearly understood the basis of the arbitrators' decision. The Granite ADR agreement created a non-binding arbitration hybrid which called for decision-maker negotiations based on the arbitrator's report. After thirty minutes of discussion, the decision-makers decided to accept the settlement. Granite did not feel it could reject the offer, but had an opportunity to discuss it. This level of involvement made Granite more satisfied than Olson, but less satisfied than the mini-trial decision-makers.

STEP 4 - DECISION-MAKER WILLINGNESS TO PARTICIPATE

The Corps decision-maker's willingness to participate involves careful review of how both legal and technical staff view the claim, the amount of time he has to devote to resolution of the claim, the prior ADR experience of the Corps attorneys, and organizational pressures to settle.

LEGAL/ TECHNICAL STAFF WITHIN THE DISTRICT

Legal and technical staff view claims differently. Technical staff tend to evaluate only technical evidence in their favor. They usually stand behind their work, often preferring to risk a loss in litigation rather than negotiate. Attorneys, on the other hand, measure the risks of cases with an eye toward law and information collected. They assess a claim's merit and then calculate the chances of winning at trial. The assessments of the two groups are usually very different.

To a certain extent, there will always be tension between legal and technical staff because of the nature of each one's work. However, a manager can reduce this tension by focusing his attention on it. In the Olson case, the Chief District Counsel met with the District Chief of Construction to explain the ADR procedure and invited him to participate in the decision to use ADR. As a result, the non-binding arbitration proceeded with the support of technical staff. Technical staff played the lead role in presenting the government case during the Granite arbitration. They worked with Corps attorneys to develop the case, but attorneys were not present during presentations. In both of these situations, including technical staff in the process reduced the potential hostility between these two branches of the District.

In the Goodyear case, District staff felt the ADR procedure would reflect a dissatisfaction of its analysis and would force inappropriate Corps concessions. However, participation in the mini-trial resulted in their support of ADR.

AVAILABILITY OF SENIOR EXECUTIVE TIME

A mini-trial requires a commitment of senior executive time of three to five days. Presentations usually last three days and negotiations take up to two. In many instances, the days of the mini-trial were especially long (up to fifteen hours). Since the goal of the mini-trial is to inform the decision-makers of all aspects of the claim. As one attorney said, "In three days, the decision-makers absorbed weeks of information that would be given in a trial." Since the decision-makers are responsible for negotiating the settlement, the process requires their complete attention.

Non-binding arbitration requires less senior executive time. The decision-makers need not be present during case presentations. They may only need to read a final report and decide to accept or reject its recommendation. If a decision-maker prefers greater involvement, he can choose to spend the additional time required to negotiate a settlement based on the report.

Although mini-trials demand a lot of time, in extremely large and complex cases, such as Tenn Tom and Bechtel, Division engineers may prefer to maintain greater control over the process than other procedures allow. Thus, choice of an appropriate ADR procedure is related to the availability of senior executive time and the level of participation required because of potential government liability.

The decision-maker in the Granite case determined that non-binding arbitration was the most efficient way to settle the claim, but maintained the right to negotiate a settlement based on this procedure might have required a significant amount of senior executive time, but in this instance the decision-makers met for only one-half hour. The ADR agreement required the arbitrator to present his report to the decision-makers which served as the basis for negotiations. As it turned out, after the report presentation they met for only one-half

hour. Both agreed simply to accept the recommendation rather than negotiate each point and risk reaching an impasse.

PRIOR ADR EXPERIENCE OF LAWYERS

If none of the attorneys involved in a case has any prior experience with ADR, then neither side is at a disadvantage. However, as the use of ADR grows, some law firms are beginning to specialize in it. This potentially means that Corps attorneys will be at a disadvantage if they do not receive training specific to the use of ADR. At least one attorney in the Tenn Tom case stated that negotiations surrounding the ADR agreement are crucial to the procedure. He negotiates ADR agreements that strengthen his case (e.g. amount of discovery and mode of evidence presentation).

Another way to deal with an imbalance in legal experience with ADR is to limit the role of attorneys. In the Granite case, technical staff on each side delivered the presentations. The attorneys helped prepare the presentations and discussed strategies with the decision-makers and presenters, but were not present during the procedure.

The Goodyear case was the second Omaha District mini-trial. Therefore, the decision-maker knew his staff could competently present its side of the dispute in the shortened format of the mini-trial.

ORGANIZATIONAL PRESSURES TO SETTLE/NOT SETTLE

The Corps decision-maker can find himself in the unenviable position of being pressured to settle from the top and not to settle from his staff. Whereas the highest levels of the agency view claims from a broad perspective and therefore are more likely to see the benefits of settling a case, technical staff may prefer to fight a claim in court because of its confidence in the technical data. Thus, the decision-maker may feel opposite pressures from within the agency. The Tenn Tom decision-maker commented on the profound courage of the Corps decision-maker. He felt the organizational pressures he had to tolerate could have been serious constraints to negotiating a settlement.

STEP 5 - ACCEPT OTHER PARTY AS NEGOTIATING PARTNER

The decision to accept the other party as a negotiating partner is dependent upon the level of mutual trust and respect between the decision-makers, the disposition of the other side to settle, and a determination of the decision-maker's authority to settle.

LEVEL OF TRUST AND MUTUAL RESPECT BETWEEN DECISION-MAKERS

Prior to agreeing to use ADR in the Bechtel and Goodyear cases, the two potential decision-makers met to "size each other up." In both cases, all felt well-enough assured to engage in the procedure. In mini-trials, mutual respect between the decision-makers has been identified as an important ingredient in assuring success. Professor Nash, the neutral in both the Tenn Tom and Bechtel mini-trials, helped foster such relations. In both, the

panel members dined together throughout the process, and thus met in social and official roles. Both decision-makers felt the mutual respect developed during the mini-trial was crucial to their successful negotiations. Though less strongly stated, the decision-makers in the Tenn Tom case also felt that their relationship contributed to their willingness to settle.

DISPOSITION TO SETTLE

A number of participants in the ADR procedures we studied stated that it was important for all parties to be pre-disposed to settling for the procedures to be successful. Several felt that all the preparation work, including development of the pre-ADR agreement and presentation preparation, fostered a positive disposition toward settlement.

AUTHORITY TO SETTLE

Before agreeing to participate in a mini-trial or non-binding arbitration process, it is crucial to insure that the other party's decision-maker has the authority to settle "without phone calls." The process cannot work if one side has authority to negotiate and the other cannot make a commitment without checking back with his superior.

In each case, the Corps decision-maker stressed the fact that before he agreed to participate in the ADR procedure, he was sure the other decision-maker had such authority. The decision-makers in the Bechtel case and their attorneys arranged a meeting at the Denver Stapleton Airport to ascertain the existence of such authority. In the Tenn Tom case, a phone call was made to determine the authority of the decision-maker. In the Granite case, the Corps decision-maker called his counterpart to determine whether the CEO of the company was "in the driver's seat" rather than his lawyer. Thus assured, he was willing to move forward.

The Corps decision-maker called Goodyear to explain he had the authority to negotiate and insist that the Goodyear decision-maker also be able to negotiate independently. He explained that he saw the ADR procedure as a mechanism for managers to handle complex disputes. After their conversation, the Corps decision-maker determined his counterpart was "decisive, positive and substantive."

STEP 6 - OTHER PARTY AGREES TO PARTICIPATE

Before moving forward to implement an ADR procedure, the Corps manager must secure the other party's agreement to participate.

STEP 7 - ACCEPTABLE NEUTRAL AVAILABLE

Before a manager can agree to initiate an ADR procedure, he must be sure that there is an acceptable neutral available.

AVAILABILITY OF NEUTRALS (NATIONAL AND LOCAL)

Since mini-trials and non-binding arbitration procedures require at least one neutral, and sometimes as many as three, the availability of potential neutrals can effect the procedure chosen. Both parties must agree on the choice of the neutral. When ADR procedures are implemented at the District level, local neutrals can be used. At the Division level, in the past, neutrals of national stature have been chosen.

The participants in the Granite case chose to use only one neutral partly because of the time and effort required to find a panel of three acceptable neutrals. They did, however, leave open the option of using a panel if they failed to settle with a single arbitrator. The first person the parties asked to serve as neutral refused, and the second accepted. In the Olson case, the contractor's attorney originally agreed to participate in the procedure because he did not believe they would find a mutually acceptable neutral. The first person they approached fell ill, forcing them to seek a second. The Corps considered hiring a lawyer with a technical background to serve in the Goodyear case, but could not find a suitable person. Goodyear proposed a neutral, and after examining his credentials, the Corps accepted this choice. This process took sixty days.

One Corps attorney stated that if the Corps is serious about expanding the use of ADR, it needs to allocate funds to develop lists of acceptable local and national neutrals.

STEP 8 - ADR AGREEMENT

The decision to use the standard Corps ADR agreement depends on the extent of discovery already completed and the schedule the participants plan to follow.

AMOUNT OF DISCOVERY COMPLETED

The Corps ADR agreement lays out particular rules of discovery. The level of discovery completed prior to the ADR agreement affects the rules of discovery required for the ADR procedure. In the Granite case, both sides had completed full discovery. In Bechtel, discovery had not yet begun, and each side limited discovery to a review of documents made available by the other side.

The Corps felt Goodyear requested a greater period of discovery than was necessary and appropriate. Goodyear expected the Corps to travel around the country in pursuit of documents that were not readily available. In the end, according to the ADR agreement, each side was limited to ten interrogatories, ten requests for admission, five depositions, and to records that were readily available.

SCHEDULE

The Corps ADR agreement includes a precise schedule. In some instances it works as is, but in most cases it has been modified to reflect the particular needs of the parties. The Bechtel staff redesigned the agreement and actually spent a great deal of time re-negotiating the details. In the end, it allowed the subcontractors to present their own cases

and negotiate with the Corps decision-maker. The Granite and Olson claims used the mini-trial agreement, but adapted it for a non-binding arbitration procedure.

Because the Goodyear case needed to accommodate a sidebar negotiation concerning the actual costs subsumed in the allocation formula, the ADR agreement required a number of revisions. The Corps originally drafted one; Goodyear drafted a second. After numerous telephone conversations and one face-to-face meeting of the attorneys, the decision-makers were asked to settle the final unresolved issues. In the end, sidebar negotiations ran concurrently with the mini-trial.

IV. PRELIMINARY FRAMEWORK FOR MANAGERIAL DECISION MAKING

Our Preliminary ADR Framework emerged from a close review of the Corps cases described in Sections II and III of this report. It is a tool that Corps managers can use to help prevent conflicts and to handle conflicts that have already emerged. While our case studies deal primarily with contract claims, we feel that slight variations on this Framework can be equally helpful in settling disputes involving operations and maintenance; military construction; permitting; and clean-up of hazardous waste sites.

Our emphasis in this report is solely on managing disputes using mini-trials and non-binding arbitration. Facilitation and mediation are also useful ADR procedures. However, we have not had access to cases in which these two procedures have been used.

Our Preliminary ADR Framework is structured as a decision tree. At each branch, or step, the manager faces a series of choices. At Step 1, for example, the manager must decide between settlement, litigation, and administrative action.

To help make this choice, we have provided a series of questions. Ultimately, these questions must be weighted in a fashion that takes account of the particular situation in which a Corps manager finds himself. By weighting and tabulating the answers to these questions, a manager will be able to develop a clear sense of which choices to make.

If, at any point, the tally suggests that conditions are not appropriate for using ADR techniques, the decision tree helps the manager know what other actions would be more appropriate.

STEP 1

If you answer yes to any of these questions, you should pursue litigation or administrative action rather than use ADR techniques.

- | | YES | NO |
|--|--------------------------|--------------------------|
| 1. Is this dispute primarily over issues of law rather than facts? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is this a case in which an "all-or-nothing" decision by a court or Board is possible and desirable (i.e. to set a precedent)? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Are the costs of pursuing an ADR procedure greater (in time and money) than the costs of pursuing litigation? | <input type="checkbox"/> | <input type="checkbox"/> |

STEP 2

If you answer yes to two or more of these statements, ADR techniques are preferred over negotiation.

- | | YES | NO |
|---|--------------------------|--------------------------|
| 1. Have settlement attempts reached an impasse? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Have ADR techniques been used successfully by the Corps in at least one other similar situation? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Is the emotional engagement of Corps staff in this issue very high? Is there no possibility of changing their views regarding an acceptable outcome? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Are there multiple parties, issues, and/or claims involved in this project or dispute? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Is there significant disagreement (or the potential for such disagreement) over scientific or technical data? Does each party have experts to substantiate its claims? | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Does the claim have merit, but is its value overstated? | <input type="checkbox"/> | <input type="checkbox"/> |

STEP 3

If you prefer to retain full control over all possible terms of the settlement

or

If the dollar value at stake is very high

- Choose a mini-trial

A mini-trial is a procedural and substantive intervention designed to provide key decision-makers with detailed and explicit data about the legal basis and merits of a case. The assumption behind the mini-trial is that if decision-makers are fully informed through the mini-trial process as to the real merits of their legal case and that of the opposing party, they will be better prepared to successfully engage in settlement negotiations. In this procedure, the parties select a mutually acceptable third party, who is often a former judge or individual versed in relevant law, to oversee the process. The parties then negotiate the procedural rules which will determine the format of the mini-trial. Each side is invited to select a lawyer who presents to the major decision-makers for both or all sides their best assessment of their case. Generally, the rules for discovery and case presentation are somewhat relaxed from those used in the traditional courtroom, and the parties agree on specific limited periods of time for legal presentations and arguments.

If you prefer to have an expert or panel of experts offer their opinion regarding a reasonable settlement before you decide on the terms,

or

If the dollar value of the dispute is relatively low

- Choose an expert or panel to render a non-binding decision

A non-binding arbitration panel is a private process whereby a dispute is submitted to an impartial and neutral panel for a non-binding decision. The third parties are often either lawyers or technical experts in the area of the dispute, although this is not a prerequisite to being an arbitrator. Generally, the parties have some say in the selection of the third party and are able to choose a panel with some degree of expertise and knowledge of the contested issues. In an arbitration hearing, each side's arguments are presented to the panel in a quasi-judicial manner with each side having an opportunity to present the facts and merits of the case as they see them.

If there are many parties (e.g., 5)

or

If you prefer to distribute the time you must spend developing a settlement over a longer (e.g., 6 month) rather than a short period (e.g., 5 days)

- Choose mediation or facilitation

Mediation involves the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority, who will

procedurally assist parties to voluntarily reach an acceptable settlement of issues in dispute. A mediator makes primarily procedural suggestions regarding how parties can reach agreement; but on occasion, s/he may also suggest some substantive options as a means of encouraging the parties to expand the range of possible settlements under consideration. Frequently the mediator works with the parties individually, in caucuses, to explore acceptable settlement options or develop proposals that will move the parties closer to agreement.

Facilitation involves the assistance of an individual, who is impartial toward the issues or topics under discussion, in the design and conduct of a problem-solving meeting. The facilitator works with all of the meeting participants in a whole group session and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. A facilitator may be a member of one of the disputing groups, or an external consultant. Facilitators do not necessarily have to be outsiders to a dispute; however, they must remain impartial as to the topics or issues under discussion and focus only on procedural assistance, or their value as a neutral will be lost.

STEP 4

If you answer "yes" to questions #1 through #4, and at least two others, you can proceed to Step 5. If not, you need to go back to Step 1.

	YES	NO
1. Is your training and expertise sufficient for you to define the terms of an appropriate settlement, or do you have advisors who can assist you?	<input type="checkbox"/>	<input type="checkbox"/>
2. Will you have the authority you need to commit the Corps to a negotiated agreement?	<input type="checkbox"/>	<input type="checkbox"/>
3. Will you be represented by attorneys who are:		
a. experienced in ADR?	<input type="checkbox"/>	<input type="checkbox"/>
b. believe settlement in this case is possible and will seek a settlement without compromising your interest?	<input type="checkbox"/>	<input type="checkbox"/>
c. flexible enough to construct an ADR procedural agreement unique to this case, if that is necessary?	<input type="checkbox"/>	<input type="checkbox"/>
d. open to involving the technical staff in the preparation and presentation of the case?	<input type="checkbox"/>	<input type="checkbox"/>
4. Can you afford the time required for the procedure?		
a. Mini-Trial: 3-5 days	<input type="checkbox"/>	<input type="checkbox"/>
b. Non-binding Expert/Panel Decision: 1-2 days	<input type="checkbox"/>	<input type="checkbox"/>
5. Do you attach a high priority to maintaining a good relationship with the disputing party (or parties)?	<input type="checkbox"/>	<input type="checkbox"/>
6. Are the potential career gains of a good outcome in this case greater than the possible damage if you do poorly (<i>i.e.</i> , are you willing to take even a moderate career risk in this case)?	<input type="checkbox"/>	<input type="checkbox"/>
7. Do you feel confident that you can handle pressure from your technical staff not to settle?	<input type="checkbox"/>	<input type="checkbox"/>
8. Do you feel confident that you can handle pressure from superiors to use ADR techniques, if you determine that they are not appropriate in this case?	<input type="checkbox"/>	<input type="checkbox"/>

STEP 5

You must answer yes to all of these questions to proceed. If the answer to any question is no, then you need to go back to Step 1.

- | | YES | NO |
|--|--------------------------|--------------------------|
| 1. Does the decision-maker on the other side have the authority to make firm organizational commitments? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is it reasonably certain that the other decision-maker wants to settle? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Is the other decision-maker competent to assess technical information and arguments that are presented? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Is the other party proceeding in good faith? | <input type="checkbox"/> | <input type="checkbox"/> |

STEP 6

You must answer yes to this question to proceed.

**Is the other party willing to commit to participate in the ADR
good faith?**

YES

NO

STEP 7

You must answer yes to questions 2-4 to proceed.

- | | YES | NO |
|---|--------------------------|--------------------------|
| 1. Does this case require a neutral with <u>substantive</u> as well as <u>process</u> expertise? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is it possible to develop a list of potential neutrals with the necessary qualifications? | <input type="checkbox"/> | <input type="checkbox"/> |
| <p style="text-align: center;"><u>or</u></p> Is such a list available from the Division or from Headquarters? | | |
| 3. Will at least one of these neutrals will be acceptable to the other side? | <input type="checkbox"/> | <input type="checkbox"/> |
| <p style="text-align: center;"><u>or</u></p> Will neutrals suggested by the other side be worth review and consideration? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Is it possible to get references from parties in previous disputes in which the likely candidate has acted as a neutral? | <input type="checkbox"/> | <input type="checkbox"/> |

STEP 8

You must answer yes to all questions to use the Corps' standard ADR form. If you answer no to any question, you must modify the basic form.

- | | YES | NO |
|--|--------------------------|--------------------------|
| 1. Does the schedule outlined in the standard agreement suit both side's needs? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Is the format for presentations suitable for this dispute? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Is the other side satisfied by its input into the design of the agreement? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Does the standard form specify the kind of discovery both sides would like to perform? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Does the standard form cover all the characteristics of the particular case (e.g., how/if subcontractors will present their own cases)? | <input type="checkbox"/> | <input type="checkbox"/> |

V. RECOMMENDATIONS TO THE CORPS

Our analysis shows that many senior Corps managers are already quite skilled in assessing the merit of ADR techniques and are comfortable using them. There are, however, several ways in which the Corps could improve and expand the way alternative dispute resolution techniques are used.

- **REFINE THE PRELIMINARY ADR DECISION-MAKING FRAMEWORK**

Further case analysis is needed to elaborate the Preliminary ADR Framework, particularly as far as facilitation and mediation are concerned. This is especially true if the Corps hopes to assist managers in averting disputes before they flare up.

The Preliminary Framework needs to be tested in actual decision-making situations. This will strengthen the validity and reliability of the Framework as an analytical tool.

- **COMPUTERIZE THE ADR FRAMEWORK SO THAT MANAGERS CAN EASILY AND QUICKLY EVALUATE THEIR OPTIONS.**

The purpose of constructing this ADR Framework was to make it as easy as possible for Corps managers to assess the appropriateness of various ADR techniques. To streamline this process even further, we can work with the Corps to transform the Framework into an interactive computer software. This would allow managers to work through the decision steps as often as they like at little or no cost. We can develop interactive software that even the most non-computer literate managers can use.

- **PROVIDE TRAINING FOR CORPS MANAGERS AND ATTORNEYS IN HOW TO USE THE ADR FRAMEWORK**

The Corps currently offers training for managers in the basic concepts of negotiation and dispute management. Both managers and attorneys also need to know how to use the ADR Framework. The need to learn how it was constructed; what the assumptions are underlying the analysis at each of the steps; and specific implementation issues at each step. They also need an opportunity to "walk through" the Framework using hypothetical cases so that they will feel comfortable with it when they use it in the field.

- **ENCOURAGE "PRO-ACTIVE" AS WELL AS "REACTIVE" USE OF ADR**

More could be done by the Corps to prevent disputes from occurring. We would encourage Corps managers to use the interactive software to assess their options as soon as a conflict emerges. Consensus-building (e.g., facilitation or mediation) up front might avert a full-blown dispute down the line.

- **INVOLVE EXPERIENCED CORPS MANAGERS AND ATTORNEYS AS TRAINERS**

There are several Corps managers and attorneys who have shown particular skill in using ADR techniques. Our assessment is that tapping these individuals to serve as trainers would be a powerful way to both reinforce their commitment to using ADR techniques and to demonstrate how actual "front line" personnel have used these approaches successfully. This would also diminish the impression that ADR is being "imposed" by Headquarters or that "outsiders" are suggesting "interesting but irrelevant" techniques.

- **PROVIDE ASSISTANCE TO CORPS ATTORNEYS IN DRAFTING MODEL ADR PROCEDURAL AGREEMENTS**

Many of the attorneys we interviewed expressed concern about particular legal and contractual aspects of ADR. They are eager for advice on how to handle presentation of evidence, rules for discovery, structure of testimony, rules for cross-examination, etc. These can and should be spelled out in model ADR procedural agreements.

There can be considerable flexibility so that these agreements can be modified on a case-by-case basis. It would be desirable to start with well-defined prototypes that build on the current experience with ADR techniques -- outside the Corps as well as inside.

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