US Army Corps
of Engineers®

Pamphlet #2

ALTERNATIVE DISPUTE
RESOLUTION SERIES

Non-Binding Arbitration: An Overview

Issued September 1990
Revised May 2010

IWR Pamphlet 90-ADR-P-2

The Corps Commitment to Conflict Resolution and Public Participation:

This pamphlet is one in a series of pamphlets describing techniques for conflict resolution and public participation processes. The pamphlet is part of a Corps program to encourage its managers to improve water resources decision making by developing and utilizing new ways of resolving disputes. These techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. These pamphlets are a means of providing Corps managers with information on various conflict resolution and public participation techniques used in the Corps, as well as a means to stimulate innovation. The information in this particular pamphlet is designed to provide an overview for Corps' managers on the merits for considering and using the Non-Binding Arbitration ADR technique.

The first edition of the Non-Binding Arbitration Pamphlet was written in 1990 by Lester Edelman (Chief Counsel, U.S. Army Corps of Engineers), Frank Carr (Chief Trial Attorney, U.S. Army Corps of Engineers), Charles Lancaster (Institute for Water Resources, U.S. Army Corps of Engineers), and James L. Creighton (Creighton & Creighton, Inc.). The Army's Alternative Dispute Resolution Program Office has contributed significantly to providing the requisite revisions necessary to ensure that the most current ADR information is provided in this revised Pamphlet.

For further information on the Conflict Resolution and Public Participation Program and Pamphlets please visit: http://www.iwr.usace.army.mil/cpc/refADR.cfm

ALTERNATIVE DISPUTE RESOLUTION SERIES

Non-Binding Arbitration: An Overview

U.S. Army Alternative Dispute Resolution Program

Issued September 1990
Revised May 2010

IWR Pamphlet 90-ADR-P-2

Table of Contents

Non-Binding Arbitration……..…. 1

Introduction to Arbitration 1

.

The Distinction Between Non-Binding and Binding Arbitration 2

Factors Favoring the Use of Non-Binding Arbitration 2

- *Technical Fact-Finding By A Vetted Expert* 2
- *A Timely, Less-Expensive, More Flexible Outcome Than Litigation* 3

Other Forms of Non-Binding Arbitration At the Corps 3

- *Dispute Review Panels* 3
- *Settlement Judges* 4

Comparison of Non-Binding Arbitration with Other ADR Techniques.....4

- *Mediation*.....4
- *The Mini-Trial* 4

Concerns About Using Non-Binding Arbitration.....5

Cautions About Binding Arbitration.....5

Three Examples of Non-Binding Arbitrations At the Corps.....7

Non-Binding Arbitration #1: The Sand Source Claim 7

- *Background* 7
- *The ADR Agreement*.....7
- *The Resolution*.....8

Non-Binding Arbitration #2: The Fishladder Case.....8

- Background.....8
- *The ADR* Agreement.....9
- *The* Resolution.....10

Non-Binding Arbitration #3: The Heating Plant Case 10
• Background 10
• *The ADR* Agreement 10
• *The* Resolution 11

Planning to Use Non-Binding Arbitration 13

Proposing the Use of Non-Binding Arbitration 13

Negotiating an ADR Agreement for the Non-Binding Arbitration 14

• Selecting the Arbitrator(s) 15

• Scheduling the Non-Binding Arbitration Milestones 15

• Specifying When Exhibits and/or Position Papers Will Be Exchanged 15

• Establishing the Format of the Non-Binding Arbitration 16

• Specifying the Arbitrator(s)' Deliverable(s) (Report, Decision and/or Recommendation(s)) 16

• Identifying Whether And How Additional Negotiations Will Be Conducted 16

• Determining When Non-Binding Arbitration And Any Subsequent ADR Effort Will End 17

Conclusion 19

Bibliography of Arbitration Resources 21

Appendix I: Sample Corps' Non-Binding Arbitration Agreement 23

Appendix II: Core Principles for Federal Non-Binding Workplace ADR Programs 29

Developed by the Federal ADR Council and published by the Department of Justice at 65 *Fed. Reg*. 50,006-50,007 (August 16, 2000). *The principles "describe ten key elements deemed essential in any fair and effective ADR Program," and were published in the Federal Register "to assist Federal agencies in developing alternative dispute resolution (ADR) programs."* *Id.* at 50,005.

An Introduction to Non-Binding Arbitration

This pamphlet discusses the use of non-binding arbitration to resolve contract disputes and acquisition controversies. Non-binding arbitration is "a private dispute resolution process in which a dispute is submitted to an impartial and neutral person or panel who provides a written, non-binding opinion used as a guide for negotiations towards a settlement. Non-binding arbitration is one of a number of alternative dispute resolution (ADR) techniques which the U.S. Army Corps of Engineers is using to resolve contract disputes and to reduce the number of contract disputes requiring litigation.

Introduction to the Arbitration Proceeding

One of the ADR techniques authorized under the Administrative Dispute Resolution Act of 1996 is the use of consensual non-binding or binding arbitration. *See* 5 U.S.C. §§ 575(a)-(c). Unlike settlement discussions or mediation, arbitration is a more formal, quasi-judicial ADR process that nevertheless enables the parties to resolve disputes outside of a courtroom without incurring the time delays and hefty expense of a formal litigation or trial. In contrast to settlement discussions or mediation—which essentially constitute advisory-type ADR proceedings—arbitration proceedings are more akin to formal litigation because typically these proceedings involve some kind of hearing where witnesses are examined and cross-examined and evidence is presented and considered by an arbitrator. Like a judge, at the conclusion of the arbitration hearing, the arbitrator issues a decision typically addressing or determining liability, entitlement and often quantum.

There are many forms or hybrids of arbitration. Beyond serving as a stand-alone ADR process, arbitration—both binding and non-binding—may be a critical component or sub-part of a larger ADR proceeding. The most common example is a "Mediation/Arbitration" proceeding which generally entails the parties first attempting to mediate a dispute and, only failing resolution, then submitting the dispute for formal consideration to an arbitrator (who may or may not be the initial mediator in the case) for a binding or non-binding determination.[1]

[1] For a good discussion of different arbitration procedures, see *Appendix No. III*, "*Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies*" by Phyllis Hanfling and Martha McClellan, published at 65 Fed. Reg. 50006-500014 (August 16, 2000).

The Distinction Between Non-Binding and Binding Arbitration

In a non-binding arbitration, the parties are not bound by the arbitrator's post-hearing decision—and are free to continue to litigate their claim before the court or any other forum of jurisdiction. In contrast, in the case of a binding arbitration, the arbitrators' decision is usually final and cannot be further disputed or appealed to any forum—unless the prevailing party seeks to enforce the decision against the losing party.

While non-binding arbitration is always an ADR option for the parties, the ADRA only permits executive branch agencies to use binding arbitration where the following three conditions have been met. First, in consultation with the Attorney General, and taking into account the statutory factors set forth in ADR which preclude using ADR A, [2] the head of an executive agency must issue binding arbitration guidance specifying under what conditions an officer or employee of that agency is authorized to use binding arbitration to resolve a dispute. *See* 5 U.S.C.§ 575(c), In addition, the agency must have a policy governing the representation of parties in ADR proceedings by non-attorneys. Finally, as with any other ADR procedure, the ADRA only permits binding arbitration if the parties expressly consent to a binding proceeding in an executed agreement. *Id.* at § 575(a)(1). Currently, the small handful of federal agencies that have complied with these requirements and are thus currently eligible to offer binding arbitration include the Federal Aviation Administration, the Federal Deposit Insurance Corporation, the Internal Revenue Service, the Department of the Navy and the Federal Motor Carrier Safety Administration. In short, most federal agencies, including the Department of the Army and its Corps of Engineers, are not currently eligible to offer binding arbitration.

Factors Favoring The Use of Non-Binding Arbitration

Regardless of whether binding arbitration is available, the use of non-binding arbitration nevertheless presents many noteworthy advantages over other ADR techniques and procedures, including:

- ***Technical Fact-Finding By A Vetted Expert***
  One of the features that makes non-binding arbitration an attractive ADR option is each party's ability to select a technically respected expert who will be able to give an informed opinion based on the critical technical facts in the dispute. As such, the parties will be assured that complex technical issues will receive due consideration, from an informed expert. In contrast to a formal litigation—where it is not unusual to hear complaints that a judge lacked the technical background

[2] The ADRA calls for agencies to consider not using any form of ADR, including binding arbitration, in a number of specified circumstances including if a precedent is required; the matter involves significant questions of federal policy; maintaining established policies is of special importance; the matter significantly affects persons or organizations who are not parties to the proceeding; a full public record of the proceeding is important and cannot otherwise be provided with an ADR proceeding; or the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the event of changed circumstances *See* 5 U.S.C. § 572(b).

or expertise to decide a case—an arbitration hearing allows the parties to carefully select a mutually agreeable arbitrator with the requisite degree of technical expertise and specific knowledge necessary to thoroughly understand and analyze a dispute's complex technical facts and issues. This in turn builds the parties confidence in the arbitrator's decision. Moreover, because both parties participate in the selection of the arbitrator, the ultimate decision following the proceeding is likely more reliable and impartial. To that end, because the arbitrator is presumed to be "fair and reasonable," the arbitrator's analysis and recommendation provides a valid and reasoned basis for settlement—which facilitates the parties' mutual acceptance of the arbitrator's decision.

Insert reasons why non-binding arb might work – other side refuses to negotiate; issues are ones where the facts are mostly undisputed and result will turn on a legal determination, etc.

- ***A Timely, Less-Expensive, More Flexible Outcome Than Litigation***
  Non-binding arbitration avoids the significant delays and costs associated with a formal litigation and also avoids relying on a judge who may not be well-qualified in the technical area of the dispute. In addition, unlike a judicial decision—which will likely be an all-or-nothing decision (a risk borne by both parties)—in the case of a non-binding arbitration, the arbitrator has greater flexibility to recommend a settlement based on his or her perception of fairness.

  In addition, a negotiated agreement achieved following a non-binding arbitration is more likely to maintain a favorable working relationship between the parties. This is because while a non-binding recommendation may not decide the controversy, the parties through the recommendation can generally agree on the underlying facts and analysis on which any settlement decision hinges. This quasi-adjudication component and involvement of the parties creates considerable impetus for a settlement. As a result, regardless of whether a single—or entire panel—of arbitrators is used, the parties are typically galvanized into action by any recommendation issued following a non-binding arbitration.

Other Forms of Non-Binding Arbitration at the Corps

- ***Dispute Review Panels***

  Although the description of non-binding arbitration above presents it in its "classic" form, there are several variations on the concept. For example, the Corps of Engineers is using a form of nonbinding arbitration called "disputes review panels" on major construction projects as a way of preventing disputes from reaching the stage where litigation might be required. An arbitration

panel is selected jointly by the Corps and the contractor before construction begins. The panel reviews disputes as they arise, recommends resolution, and work progresses. Experience shows that these panels have been effective in preventing disputes from halting work, and permit the Corps and contractor to maintain a solid working relationship.

- ***Settlement Judges***

  Another variation on non-binding arbitration is the use of "settlement judges" to resolve contractual disputes, as practised by the Board of Contract Appeals. The Settlement Judge procedure allows the parties to present the case to a Judge who will render an advisory opinion on the merits. In most cases, the Settlement Judge will not be the trial judge should the issue fail to be resolved. The procedure allows the parties to get an informed evaluation of the case. Once the Settlement Judge has issued an opinion, negotiations begin between the parties.

Comparison of Non-Binding Arbitration with Other ADR Techniques

There are a number of alternative dispute resolution (ADR) techniques, of which non-binding arbitration is but one. Suppose for a minute that you are convinced that the sides are too polarized for one-on-one negotiation, yet you know you don't want to go to litigation, how does non-binding arbitration compare with other ADR techniques? The two most likely alternatives to non-binding arbitration are mediation or the mini-trial.

- ***Mediation***

  In mediation, a neutral party would be brought in. But rather than trying to render any opinion as to the merits of the case, a mediator would try to bring about a negotiated settlement by ensuring a fair process, trying to improve communication between the parties, maybe even helping forge an agreement by serving as the communication link between the parties. One of the important factors in deciding to use non-binding arbitration, rather than mediation, is an assessment of whether the parties are capable of reaching a negotiated settlement without the added influence of a technical recommendation by an arbitrator.

- ***The Mini-Trial***

  The mini-trial, which is the other major option, is a structured process in which the sides make the presentation of facts and positions not to an independent arbitrator, but to senior management representatives of each of the parties who have little or no prior involvement in the dispute, but do have

the authority to commit their organizations to a binding agreement. The management representatives often select a neutral advisor who can either chair the presentation, or advise on the technical aspects of the dispute. After the presentation, the management representatives get together, usually without attorneys or other staff present, and seek to reach a negotiated settlement.

The advantage of the mini-trial is that facts are revealed directly to decision makers, and they then meet immediately to try to reach agreement. The process is determined and remains in the control of the decision makers. The disadvantage of the mini-trial is that it may involve a significant commitment of time from very senior management of each of the parties. As a result, it is a process that may be used on only a few important disputes each year.

Concerns About Using Non-binding Arbitration

Some people are concerned that arbitrators will use a "split the difference" approach. Their concern is that, rather than really make hard judgments about the relative merits of the positions, the arbitrator will recommend a settlement which is midway between the two positions.

If there is a concern, the remedy is for the parties to agree on specific limiting instructions to the arbitrator. Since the arbitrator's role is defined by the parties; the arbitrator can be instructed to make judgments as to the technical facts of the case. Or, the arbitrator could be instructed not to recommend a specific dollar amount, but instead recommend the principles or process by which the dollar figure should be calculated. Once the arbitrator recommends a principle or process for settlement, the parties may then be able to negotiate the actual price, and it would not be based on simply splitting the difference.

Another concern is that arbitration may not be suitable for all cases. This is entirely true. The Corps of Engineers confines the use of non-binding arbitration and other ADR techniques to cases where the law is established and where settlement turns on the facts of the case. Interpretations of a new law or regulations, for example, would not be an appropriate issue for non-binding arbitration. They would be resolved better by a judge.

Cautions About Binding Arbitration

In non-binding arbitration, the arbitrator's recommendation is not final. The parties choose whether to accept it, and if they don't like the recommendation, the dispute will continue. In situations where getting a prompt resolution is a prime consideration, it might be preferable to use binding arbitration, where both parties commit in advance to accept the arbitrator's recommendations as binding and final.

Binding Arbitration has gained significant prominence as the dispute resolution procedure of choice in commercial and other private sector contractual arrangements. However, as noted above, in the federal sector, the use of binding arbitration is restricted by statute to those federal agencies who have complied with the criteria specified in the Alternative Dispute Resolution Act of 1996, 5 U.S.C. § 575(c). Consequently, the executive branch is only permitted to pursue use of binding arbitration where the head of a federal agency, in consultation with the United States Attorney General, issues guidance that specificies: (1) when binding arbitration is appropriate; and (2) when an officer or employee of the agency is authorized to settle an issue in controversy through the use of binding arbitration. *Id*. As of the date of this revision, only a handful of federal agencies have complied with the ADRA requirements for using binding arbitration. The U.S. Army, its Corps of Engineers, and the Department of Defense (DoD) have not issued non-binding arbitration guidance.[3] Accordingly, binding arbitration is not authorized for use in most Corps of Engineers' disputes.[4]

[3] On March 5, 2007, the Secretary of the Navy issued guidance on the "Use of Binding Arbitration for Contract Controversies" which specifies that the publication of the "instruction is intended to meet th[e] requirement " that "agency heads must consult with the Attorney General." *Id.*, ¶ 2(b) at 2.

[4] One category of dispute in which the Corps is authorized by statute to use binding arbitration is employee grievances raised under a negotiated grievance procedure in a collective bargaining agreement. *See The Federal Service Labor-Management Relations Statute*, 5 U.S.C. § 7121(a)(1)(C)(iii). *See also Appendix No. 2, "Core Principles for Federal Non-Binding Workplace ADR Programs."*

Three Examples of Non-Binding Arbitrations at the Corps

The following three major contract disputes are examples of successful non-binding arbitration cases involving the Corps. Each of these cases illustrates the many variations in how the non-binding arbitration process can be structured to meet the specific needs of the parties.

Non-Binding Arbitration # 1:
The Sand Source Claim

- ***Background***

  The Corps issued a contract to construct a lock and dam as part of construction of a major waterway. At the time the contract was awarded, the Corps was in the process of negotiating the purchase of a large plot of land required for construction of the waterway. This land also was the source of sand which the contractor needed to make concrete. When negotiations between the Corps and the landowner broke down, the Corps was forced to condemn the property, thereby forcing the contractor to seek an alternative sand source.

  The contractor examined at least eight different sand sources before finding a suitable one. However, the quality of the sand was inferior to the original source. Using the new site contributed to reduced cement production, longer than expected hauls, and caused numerous delays and increased costs. As a result, the contractor filed a claim for $3 million.

  A review of the case by attorneys at the division level resulted in a recommendation to settle the case. The contractor was also extremely anxious to settle the dispute in an expeditious manner. However, the Corps and the contractor were far apart on what constituted a reasonable settlement amount. After discussion between the Corps and the contractor, they finally agreed to use an ADR technique, and after some further meetings, a decision was made to use nonbinding arbitration.

- ***The ADR Agreement***

  The attorneys for the Corps and contractor formulated the ADR agreement. They agreed that the neutral arbitrator would be an expert in mass concrete construction, and that the presentations to the arbitrator would be made by technical experts. Although the arbitrator would be free to ask questions at any point in the presentation, if either side wanted specific questions asked, they could submit these questions in writing to the neutral, who could decide whether to ask these questions. They also agreed that position papers and exhibits would be exchanged between the parties and submitted to the

arbitrator seven days before the hearing, but there would be no written record of the presentations themselves. They also agreed that all information generated during the arbitration procedure would be confidential, and if there was subsequent litigation (because an agreement couldn't be reached), the arbitrator was disqualified from testifying for either side.

The presentation to the arbitrator lasted for two days, with each side getting about five hours to present its case, followed by rebuttal, and then a further response from the party making its case. The arbitrator then had ten days to develop a recommendation.

- ***The Resolution***

At the end of this period the arbitrator presented his report verbally (and in written form) to the decision makers for the two parties, in which he recommended a settlement of $725,630. During this four hour meeting .the decision makers were able to ask questions about specific recommendations. Afterwards, the two parties met with their own staffs and attorneys, and then sat down together to negotiate an agreement. After about a half hour of discussion, they decided to accept the arbitrator's recommendation. Both sides were satisfied with the process and felt they were afforded a fair method for presenting their cases.

Non-Binding Arbitration # 2:
The Fish Ladder Case

- ***Background***

The Fish Ladder case involved an unresolved dispute on an already-completed project. The contractor filed a claim stating that the site conditions differed substantially from those specified in the contract, resulting in increased costs.

This project involved the reconstruction of an existing fish ladder. The reconstruction work had to be done during the winter because the fish ladder was in use at all other times. To do the work, the contractor had to keep the work area dry. Three bulkhead gates were expected to virtually seal the area from water. However, an imperfect seal was obtained on one of the bulkhead gates, and water leaked onto the site. Sealing the bulkheads was done by the contractor, but under the supervision of a Corps employee. In addition, the contractor needed to maintain low water levels in a junction pool, but when a major leak occurred divers were sent down and discovered that the Corps had failed to close a valve properly. To compound the problems, there was a spell of freezing temperatures, making it very difficult to de-water the site.

The Corps acknowledged the problems created by the opened valve, but was unable to get agreement on the damages resulting from it. But the major claim was based on the failure of the gate to provide a water-tight seal. The Corps maintained that under the contract it was the contractor's responsibility to lower the gates and assure a proper seal. The contractor argued that he lowered the gates under the Corps' direction, and that furthermore the lack of a water tight seal was due to the age and bad maintenance of the gates. The Corps believed that all that had to be done to solve the problem was lift the gates, clean out any rock or debris, and reseal.

The Corps attorney suggested the use of an ADR technique because normal negotiations had been unsuccessful, but the attorney felt the Corps did have some potential liability. He proposed non-binding arbitration because the claim was small enough ($185,000) that he didn't believe it would justify the amount of senior management time a mini-trial would require. The contractor's in-house attorney was amenable to non-binding arbitration.

- ***The ADR Agreement***

The attorneys for the two sides met and hammered out an ADR Agreement. Between them they agreed to establish a three-person arbitration panel, consisting of an expert in public contract law, and two experts on cement construction. The Corps and the contractor each designated a cement construction expert, and both parties agreed to the contract law expert, who was to serve as the neutral party. The attorneys 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 could write a minority opinion.

The ADR agreement also arranged for an exchange of all documents proposed for use in the hearings, setting a schedule for "discovery" to end three weeks prior to the hearing. Two weeks prior to the hearing each side was to present a twenty-five page position paper outlining their cases.

The three panel members met prior to the hearing and established a two-day schedule, which, with minor modifications, was acceptable to both attorneys. The contractor presented his case the first day, and the Corps presented the second day. Each party had three hours for presentation. Cross-examination and re-examination followed each witness, but did not come out of the three-hour presentation time. A final hour was allowed for a question and answer period. At the end of the second day, each side had fifteen minutes for closing statements.

- ***The Resolution***

  The panel felt that both parties had liability, and determined that the contractor was 55% responsible for the additional costs. However, the panel did not accept the documentation of costs submitted by the contractor, and used an audited statement of costs prepared by the Corps. The panel recommended a payment of $57,000.

Non-Binding Resolution # 3:
The Heating Plant Case

- ***Background***

  A contract was issued for nearly $32,000,000 to construct a coal-fired central heating plant for an Air Force Base. Following construction, the contractor filed a number of claims totalling in excess of $6,000,000. The basic thrust of these claims was that additional costs were incurred due to delays caused by the Corps, or through inadequate or unclear con tract specifications.

  The contractor showed little interest in negotiation, but did agree to consider the use of an ADR technique when approached by the Corps with this proposal.

- ***The ADR Agreement***

  The parties quickly agreed to use nonbinding arbitration, but then there were concerns about costs. The original proposal was that if either party did not accept the arbitrator's recommendation, it would bear the full costs of the proceedings. Later this was amended so that both sides split the costs, regardless of outcome.

  Unlike the Sand Source Case, the proceedings in this case were very formal. Each side had forty hours to present its case, which is an unusually long time for an ADR proceeding, but was agreed upon because of the complexity of the case. This forty hours included cross-examination and rebuttal. Since there were also subcontractors involved, the subcontractors' presentations came out of the contractors' forty hours. There were a number of attorneys present, including two for the contractor, and four more for various subcontractors. The hearing took a total of two weeks. The government was represented by one attorney, accompanied by two contracts experts.

The arbitrator, an attorney with extensive government contract experience, was asked to produce his recommendation within thirty days from the hearing. He was asked not only to indicate a proposed total settlement amount, but also to provide a rationale on the amount for each separate claim.

- ***The Resolution***

The arbitrator decided in favor of the Corps on a claim for delays brought about by a strike. On the other claims, the arbitrator noted that there were relatively few disagreements on facts, and that most of the dispute was around the interpretation of contract language. The arbitrator concluded that most of these claims could be resolved through either a careful reading of the contract language, or by applying relevant principles from contract law. The arbitrator felt the contractor had justified claims totaling approximately $3.2 million dollars. Subsequently, both sides accepted the arbitrator's recommendations

The arbitrator expressed frustration with providing a rationale for every dollar amount he proposed, when there was no transcript for two weeks of testimony. He also complained about the amount of documentation he was expected to review to prepare his report, some of it unsupported by testimony during the hearing.

On the whole, the parties were satisfied with the procedure, though the complexity of the case and the time needed to prepare for the lengthy proceedings was a strain on resources.

These cases illustrate the flexibility available in designing non-binding arbitration proceedings. In two of the cases there was a single arbitrator, in the third case there was an arbitration panel. In one case the presentation was relatively brief, only two days, with no attorneys present, and with no cross-examination or other formalized procedures. In another the presentation took two weeks, there were a number of attorneys present, and formal procedures such as cross-examination were used. In some cases the arbitrators were technical experts, in others they were attorneys. In one of the cases the arbitrator made his presentation directly to senior management representatives, who negotiated an agreement on the spot. In others, the arbitrator's recommendations were submitted only in written form. The key point is that the parties are free to design procedures which fit their particular needs and situation.

Planning to Use Non-Binding Arbitration

The basic steps in conducting non-binding arbitration are:

1. Approach the other parties to propose and assess their willingness to use non-binding arbitration.

2. Determine, by mutual agreement with the other parties, that non-binding arbitration is the most suitable technique to resolve the dispute.

3. Negotiate an ADR agreement that specifies the procedures and milestones of the non-binding arbitration, including:

    a. Who the arbitrator(s) will be;

    b. Who will pay for the arbitrator(s);

    c. When the parties' exhibits and/or position papers will be exchanged;

    d. The format of the non-binding arbitration hearing, *e.g.*, when and how the parties' will presentat their facts and positions to the arbitrator(s);

    e. What deliverable the arbitrator(s) will provide to the parties, *e.g.*, a report, a decision, and/or recommendations;

    f. How the parties will use the arbitrator(s)' submission(s);

    g. How and when additional negotiation sessions will be conducted, if needed.

Proposing The Use of Non-Binding Arbitration

As with any ADR technique or process, the decision to propose the use of non-binding arbitration in lieu of litigation occurs because conventional negotiation is not working, or resolution is not occurring in a timely manner. This may be because of past history, because of rigid positions, or simply because both sides believe they have a strong case and can win through litigation.

The Corps of Engineers' policy firmly endorses the use of ADR techniques and processes such as non-binding arbitration. Nevertheless, the decision to use non-binding arbitration—or any other ADR technique or process—must be carefully considered and made on a case-by-case basis, taking into account all relevant circumstances surrounding the dispute and the personnel involved. The Corps may

either propose non-binding arbitration to the other parties, or the other parties may make the initial proposal to the Corps. To that end, the proposal to use ADR may come from Corps attorneys or management officials; there is no "correct" way to approach the other party. Of course, the decision to use non-binding arbitration or any other ADR technique or process should be made only after soliciting the strategic input of all the members of the involved management team, including command staff, senior management, counsel, and technical experts.

Negotiating an ADR Agreement for the Non-Binding Arbitration

Once there is an agreement in principle to use non-binding arbitration, the next step is to negotiate an agreement on the exact procedures to be followed. Typically this is negotiated by attorneys for the Corps and the other parties. A sample agreement is provided in Appendix I. Regardless of whether you use or modify the language in the sample agreement, when you are developing the ADR agreement that will govern the Non-Binding Arbitration, the following elements must be considered and specified in the ADR agreement:

- How the arbitrator will be selected
- The nature of the recommendations desired from the arbitrator
- Where the presentation will be held
- The schedule of activities
- When and in what form exhibits or other documents will be exchanged (and what late discovery, if any, will be allowed)
- How the presentation itself will be structured, including:
    - How formal the presentations will be
    - Whether presentations will be made by attorneys or technical people
    - Who will be present during the presentations
    - How long each party will have to present its case
    - Whether there will be cross-examination
    - The total time for the presentation
    - The confidentiality of materials and presentations in the event no settlement is reached
- How the costs of the proceedings, including legal fees, will be allocated
- When the arbitrator's report is due
- How the arbitrator's report is structured
- The process for acceptance/non-acceptance of the arbitrator's position
- If the proceedings are confidential and inadmissible at trial if there is no settlement
- Termination of ADR

- ***Selecting the Arbitrator(s)***
  The first step in selecting an arbitrator is to determine what kind of arbitrator you want. In one of the cases above, for example, the decision was made to select a technical expert, fully qualified in the construction practices which were at the heart of the dispute. In another case, the arbitrator was an attorney. In the third case, an arbitration panel was established, with both technical and legal expertise. It is entirely up to the parties to determine what kind of arbitrator they want, considering the issues in the dispute.

  Another factor to consider is what kind of report you want from the arbitrator. Do you want just a dollar figure? Do you want to know what entitlement the arbitrator believes each party has? Do you want a proposed basis for settlement, but not an actual dollar figure? Answering these questions may also influence the selection of the arbitrator.

  Once you're in agreement on what kind of arbitrator and report you want, the next step is the actual selection. This is often done by having each side submit a list of acceptable arbitrators to the other parties, and finding a name on those lists that everyone can agree upon.

- ***Scheduling the Non-Binding Arbitration Milestones***
  It is important for both sides to understand when each activity in the ADR process is to take place, and the importance of maintaining these schedules. ADR is a cooperative process; if one side thinks the other is seeking an advantage by missing deadlines or hiding information, the ADR effort may be crippled. Set realistic deadlines for all milestones in the ADR process (e.g. completing discovery, exchanging position papers, or delivering witness lists) and then stick to the schedule.

- ***Specifying When Exhibits and/or Position Papers Will Be Exchanged***
  The ADR agreement should describe what kinds of documents will be exchanged prior to the formal presentation. This might include the nature of the materials to be exchanged, the length of the materials exchanged (sometimes this is limited to a maximum number of pages, to hold down the amount of material which must be mastered before the presentation), and the deadline for exchange of information. The deadline issue is important. In some of the cases above, important papers were not exchanged until the last minute, making it difficult to prepare.

- ***Establishing The Format of the Non-Binding Arbitration***
  Normally, non-binding arbitration is quite informal, though the arbitrator will have some influence on the procedure. The formal rules of evidence are not applied and objections to testimony or materials are not permitted. Witnesses are allowed to testify in the narrative. Usually, a transcript is not made. The arbitrator may ask questions of the witnesses, to clarify their testimony.

  The key point is that you have considerable flexibility in how you wish to structure the actual presentation to the arbitrator. The procedural agreement is an opportunity to establish a common understanding of who makes the presentation, how much time is available, whether cross-examination is permitted, whether time taken to answer questions from the arbitrator is taken from each parties' time limit, etc. The best advice is simply to design the presentation to meet your specific needs, rather than assume there is a single right way to do it.

- ***Specifying The Arbitrator's Deliverable(s), e.g., Report, Decision and/or Recommendation***
  The philosophy that procedures should be designed to meet your specific needs also prevails in determining what kind of report you want from the arbitrator, the timing of this report, and to whom this report should be given. The arbitrator's report may be a fact-finding report or a recommendation for settlement which includes a detailed justification for the amounts recommended. Of course, any settlement agreement must be based on reasonable and articulable criteria if it is to be approved as in the best interests of the government.

  Just to illustrate the flexibility you have: in the Sand Source Case, a non-binding arbitration process was turned into what amounts to a hybrid mini-trial procedure by having the arbitrator issue his report verbally to senior managers representing the two parties, who had agreed to negotiate following that briefing.

- **Identifying Whether And How Additional Negotiations Will Be Conducted**
  Normally there are time limits placed on how many days the parties may take to decide whether to accept the arbitrator's recommendations. You may also want to specify whether a negotiation session will be held prior to this decision, or whether each party makes this decision in isolation. Experience has shown that it is difficult to "tinker" with an arbitrator's decision and negotiate a different agreement, because upsetting the balance within the recommendations may cause the entire package to become unacceptable.

- **Determining When Non-Binding Arbitration and Any Subsequent ADR Effort Will End**
  All ADR procedures are voluntary and may be terminated by any party at any time for any reason. The procedural agreement should reflect the voluntariness of ADR: no one should feel compelled to bargain against his interest. The ability to withdraw at any time may keep a party at the bargaining table exploring options or creative solutions.

Conclusion

Non-binding arbitration is one of a number of promising ADR techniques. Because the field is new, many techniques are still undergoing refinement and change. Corps managers are encouraged to approach the use of non-binding arbitration with a spirit of innovation. The procedures established should be structured so that they serve the specific needs of the particular situation.

Bibliography of Arbitration Resources

Hanfling, Phyllis and Martha McClellan. “Developing Guidance for Binding Arbitration-A Handbook for Federal Agencies.” The Department of Justice. See 65 Fed. Reg. 50,006 (August 16, 2000).

Appendix I:

Sample Non-Binding ArbitrationAgreement

Non-Binding Arbitration Agreement

between the

United States Army Corps of Engineers

and

_____

(Contractor)

This Non-Binding Arbitration Agreement dated this ____day of ___ 200_ is executed by ___, on behalf of the United States Army Corps of Engineers (hereinafter the "Corps",) and by ___, on behalf of ___, (hereinafter referred to as "___" or the "Contractor"; *and*

WHEREAS, on the__ day of __, ____, the parties hereto entered into Contract No. _ _____ for the _____ at _____ , _____ ;

WHEREAS, under the Disputes Clause of that contract, ____ on ___, 20__, filed a claim with the contracting officer alleging _____ .; *and*

WHEREAS*, the claim was certified in accordance with the requirements of the Contract Disputes Act of 1978; *and*

WHEREAS*, in a letter dated ___, ___. the contracting officer issued a final decision denying the claim; *and*

WHEREAS*, on ___, ____, the Contractor timely appealed the contracting officer's final decision to a Board of Contract Appeals where the appeal has been docketed as [ASBCA/ENG BCA] No. ___; *and*

---

* *These clauses may be appropriate where a claim or dispute has been appealed to a Board of Contract Appeals or to the United States Court of Federal Claims.*

WHEREAS, the Corps has instituted an Alternative Dispute Resolution program which includes non-binding arbitration as a means of providing the parties to a dispute with a voluntary means of attempting to resolve disputes without the necessity of lengthy and costly litigation but without prejudicing such proceedings; and
WHEREAS, the Corps and ___ have agreed to submit the claim to a non-binding arbitration proceeding;

NOW THEREFORE, according to the terms and conditions of this Non-binding Arbitration Agreement, the parties agree as follows:

1. **Voluntary Non-Binding Arbitration Proceeding.**
   The Corps and ___ will voluntarily engage in a non-binding arbitration proceeding on the claim of ___. The dispute underlying the claim will be presented to (an arbitrator/a panel of arbitrators) on ___ , ____ at . The Arbitrator(s) will then issue a report including a non-binding recommended settlement of the claim.

2. **Purpose of the Proceeding.**
   The purpose of non-binding arbitration is to obtain the considered opinion of the Arbitrator(s) on the merits of the claim in order to promote meaningful negotiations. It is agreed that each party will have the opportunity and the responsibility to present its best case on entitlement and quantum, to the Arbitrator(s).

3. **Selection of the Arbitrator(s).**
   The Arbitrator will be selected by mutual agreement of the parties, who shall exchange lists of no more than three potential arbitrators. All potential Arbitrators should be experienced in ____ and must be able to arrange their schedules to hear the dispute continuously over a _____ period. Additionally, the Arbitrator(s) must be able to devote the time necessary to render a non-binding opinion within _ days after the close of the arbitration hearing. No arbitrator shall be an employee of any party (or of a subcontractor of ____). Fees and expenses of the Arbitrator shall be borne by the parties equally.]

4. **[Selection of the Non-Binding Arbitration Panel.**
   The Panel shall consist of three members selected by the parties. The Corps and ____ shall each select one arbitrator who shall be a technical expert knowledgeable in ____ (the "Technical Arbitrators") and the parties jointly shall select the Chairperson of the Panel who shall be knowledgeable in _____. Panel members must be able to devote the time necessary to render a non-binding opinion within _____ days after the close of the arbitration hearing. No Arbitrator shall be an employee of any party (or of a subcontractor of ___). The

fees and expenses of the Technical Arbitrators shall be borne by the party selecting the Arbitrator; the fees and expenses of the Chairperson as well as the administrative fees of the Panel shall be borne by the parties equally.**]**

5. **Independent and Impartial Review**.
   The Arbitrator(s) shall render an independent, impartial review of the claim presented; [and each Arbitrator shall act independently and shall not be any party's representative.]

6. **Quantum Analysis**.
   No later than ___ weeks prior to commencement of the arbitration hearing, ____ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the hearing.

7. **Discovery**.
   The parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed ____ weeks prior to the arbitration hearing. Discovery taken for the arbitration hearing shall [shall not] be admissible in any subsequent litigation, should the arbitration fail to resolve the claim. Also, a party's right for additional discovery in the event of litigation shall not be limited by participation in this Non-binding Arbitration proceeding.

8. **Submission of Position Papers, Exhibits, and Witness Lists.**
   (a) No later than ___weeks before the hearing, ___ shall provide the Arbitrator(s) and the Corps its position paper setting forth a concise description of the claim and the grounds for entitlement and quantum.
   (b) Also, copies of all exhibits and substantiating material on which it intends to rely at the hearing will be submitted at this time.
   (c) No later than ____ week(s) before the hearing, the parties will exchange a listing of witnesses with a brief description of the expected testimony of each witness.
   (d) No later than ____ week(s) before the hearing, the Corps shall file and serve its position paper setting forth its response to the points made by ____ and including the documentary material on which it intends to rely at the hearing. Exclusive of exhibits, the position papers shall be no more than ___ pages in length. Each position paper shall be presented on 8 1/2 x 11 sized paper and double spaced.

9. Proceedings before the Arbitrator(s).

(a) The arbitration presentations will be informal. The rules of evidence do not apply. In order to expedite the hearing, the parties should stipulate to all facts not genuinely in dispute. [Neither party may cross-examine witnesses, although either party may submit questions to the Arbitrator/Chairperson which may be asked.] The Arbitrator(s) may question the participants.

(b) The presentation for each party will be made by a designated representative. The representative has the discretion to structure the presentation as desired. The form of the presentation may be through expert witnesses, audio/visual aids, demonstrative evidence, depositions and oral argument.

10. Schedule.

The non-binding arbitration hearing shall take ____ day(s). [A sample one-day schedule follows:]

8:00 a.m. - 10:30 a.m.	Presentation
10:30 a.m. - 11:00 a.m.	Recess
11:00 a.m. - 12:00 noon	Questions by Arbitrator
12:00 p.m. - 1:00 p.m.	Lunch
1:00 p.m. - 3:30 p.m.	Corps Presentation
3:30 p.m. - 4:00 p.m.	Recess
4:00 p.m. - 5:00 p.m.	Reply
5:00 p.m.-	Questions by Arbitrator

11. The Non-Binding Report.

The Arbitrator(s) will render a written report within _ days from the date of the conclusion of the presentation. The report will include: (a) a concise summary of the claim; (b) a summary of material facts; (c) a discussion of the issues: and (d) a statement of the recommendation of the Arbitrator(s). The report will be formally presented to selected principal representatives of the Corps and _ who will have settlement authority. [If possible, the Arbitrator(s) and the principal representatives will meet for the formal presentation of the report. The principal representatives may question the Arbitrator(s) on the bases of their recommendation, and will then attempt to negotiate a settlement of the claim.] If after ___ days, the principal representatives fail to reach a settlement, the parties shall proceed with the appeal in accordance with the provisions of the Contract Disputes Act.

12. Transcript.

A transcript of the hearing may be made for the use of the Arbitrator(s). In the event the claim is not resolved, this transcript shall be treated as confidential and may not be used in any subsequent litigation for any purpose.

13. Confidentiality of Deliberations - Disqualification.

The Arbitrator(s) deliberations are confidential and shall not be disclosed to third parties. The Arbitrator(s) are disqualified as a witness, consultant or expert for either party in this or any other dispute between the parties arising out of the performance of the contract.

14. Suspension of Proceedings.

Suspension of Proceedings. Upon execution of this agreement, the Corps and ___ shall file a joint motion to suspend proceedings of this appeal and shall advise the Board of Contract Appeals of the reason for the suspension, and the time schedule that has been determined.

15. Termination.

Each party has the right to terminate this agreement at any time for any reason whatsoever.

16. Ex Parte Communications Prohibited

After the date when the hearing is scheduled, no party shall engage in any ex parte communications with the designated Arbitrator(s). This prohibition does not apply to routine requests for fees and expenses to be borne by the parties. No written communication shall be made between the Arbitrator(s) and a party without the other party receiving a copy, and no oral communication shall take place without the other party being present.

17. Subsequent Proceedings - Admissible Evidence.

No position papers or other written material supplied to the Arbitrator(s) is admissible in a subsequent proceeding unless otherwise made so by the rules of evidence applicable to such other proceeding; [provided, however, that any written report of the Arbitrator(s) shall be admissible in such subsequent proceedings and each party hereby stipulates to its admissibility;] and provided, further that if settlement is reached as a result of the recommendations of the Arbitrator(s), any materials presented to the Arbitrator(s), as well as the recommended settlement, may be used to justify any contract modification which may result from the settlement.

18. Identification of Hearing Representative.

The Hearing Representative for ____ will be _____ . The Hearing Representative for the Corps will be _____ .

Dated _____ Dated

By _____ By

Corps of Engineers (Contractor)

_____

Attorney for the Corps Attorney for (Contractor)

Appendix II:

Core Principles For Federal Non-Binding Workplace ADR Programs

Created by: The Federal ADR Council

Published by: The Department of Justice
***See* 65 Fed. Reg. 50,0005 (August 16, 2000)**

CORE PRINCIPLES FOR NON-BINDING WORKPLACE ADR PROGRAMS

Confidentiality:
All ADR processes should assure confidentiality consistent with the provisions in the Administrative Dispute Resolution Act. Neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask neutrals to reveal confidential communications. Agency policies should provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

Neutrality:
Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. For example, they should not also serve as counselors or investigators in that particular matter. Participants in an ADR process should have the right to reject a specific neutral and have another selected who is acceptable to all parties.

Preservation of rights:
Participants in an ADR process should retain their right to have their claim adjudicated if a mutually acceptable resolution is not achieved.

Self-determination:
ADR processes should provide participants an opportunity to make informed, uncoerced, and voluntary decisions.

Voluntariness:
Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be given appropriate information and guidance to decide whether to use ADR processes and how to use them.

Representation:
All parties to a dispute in an ADR process should have a right to be accompanied by a representative of their choice, in accordance with relevant collective bargaining agreements, statutes, and regulations.

Timing:
Use of ADR processes should be encouraged at the earliest possible time and at the lowest possible level in the organization.

Coordination:
Coordination of ADR processes is essential among all agency offices with responsibility for resolution of disputes, such as human resources departments, equal employment opportunity offices, agency dispute resolution specialists, unions, ombuds, labor and employee relations groups, inspectors general, administrative grievance organizations, legal counsel, and employee assistance programs.

Quality:
Agencies should establish standards for training neutrals and maintaining professional capabilities. Agencies should conduct regular evaluations of the efficiency and effectiveness of their ADR programs.

Ethics:
Neutrals should follow the professional guidelines applicable to the type of ADR they are practicing.