Case Study #4

US Army Corps
of Engineers

Alternative Dispute
Resolution Series

BECHTEL NATIONAL, INC.

August 1989

IWR Case Study 89-ADR-CS-4

The Corps Commitment to Alternative Dispute Resolution (ADR):

This case study is one in a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study 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. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this case study is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These case studies are produced under the proponency 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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Bechtel National, Inc.

Alternative Dispute Resolution Series

Case Study #4

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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"

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* 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 aggreements 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 judgment[2] based on the fact that the government had conceeded 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.

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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 despositive 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 impass often becomes a claim as a result of the Corps' issuance of a unilateral change order in accordance with the Corp's 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."

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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 sub-contractors 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 the 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 committment 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.

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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.

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This case study is one in a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this case study is designed to stimulate innovation by Corps managers in the use of ADR techniques.

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