US Army Corps
of Engineers

Pamphlet 2

ALTERNATIVE DISPUTE
RESOLUTION SERIES

NON-BINDING ARBITRATION

September 1990

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The Corps Commitment to Alternative Dispute Resolution (ADR):

This pamphlet is one in a series of pamphlets describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps' program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps' managers with up-to-date information on the latest techniques. The information in this pamphlet is designed to provide a starting point for innovation by Corps' managers in the use of ADR techniques.

These pamphlets 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. Dr. James L. Creighton, Creighton & Creighton, Inc., served as Principal Investigator.

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Non-Binding Arbitration

Alternative Dispute Resolution Series

Pamphlet 2

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NON-BINDING ARBITRATION

This pamphlet describes "non-binding arbitration, "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 techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation.

What is Non-Binding Arbitration?

Have you ever been in the midst of a conflict and longed for just one person who could be fair and objective? The people representing each side may have fixed or biased viewpoints. People's perceptions are often skewed by self-interest. In addition, both sides tend to be aware only of the facts which support their positions. More than that, there are often organizational pressures not to "give in." Acknowledging that the other side may have a legitimate point often implies a criticism of those people within your own organization who played a role in creating the impasse. So it's hardly surprising that the people involved in a lingering conflict have trouble seeing each other's point of view. But how would a person not involved in the conflict view the dispute? What would such a person think was a fair resolution of the conflict?

This idea of finding out what a fair, impartial person would feel about the dispute is at the heart of non-binding arbitration. Essentially the two parties present their facts and positions to a qualified neutral person (or a panel) selected jointly, and this person advises the parties as to what he or she believes are the facts and what would be a fair settlement. In non-binding arbitration this opinion is just advisory. But normally it carries a great deal of weight because the parties should have confidence in the arbitrator they selected. Also, both parties recognize that if they completely ignore the arbitrator's opinion, it will probably mean that the dispute will be resolved only through costly litigation. So both sides are not inclined to stray too far from the arbitrator's opinion. Of course, in the final analysis, when non-binding arbitration is used, any settlement is a negotiated agreement entered into freely by both parties.

Why Use Non-Binding Arbitration?

Why would you use non-binding arbitration? There are several reasons:

- **Technical Fact-finding**
  One of the features that makes non-binding arbitration attractive is the 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. By using a technical expert, the parties will be assured that complex technical issues will be given due consideration, from an informed person. After litigation it's not unusual to hear people complain that "the Judge didn't have the

technical background to decide this case." In non-binding arbitration, the parties can select an arbitrator with the specific knowledge to understand complex technical facts and issues.

- **Impartial Opinion**
  Since all parties participate in selecting the arbitrator, presumably all sides believe the arbitrator's conclusions will be fair and unbiased. The acknowledged need for a neutral party implies, of course, that you have already decided that the controversy should be resolved. An arbitrator, not having any history of involvement or stake in the outcome, can see the merits (or weaknesses) of both sides' positions in a way that they may not be able to do.

- **Avoid Problems of Litigation**
  Even if the sides are polarized, it would still be possible to resolve the controversy in a court of law. Why not let the judge decide the case? There can be a number of reasons: (1) there are significant costs associated with litigation; (2) litigation may delay resolution for several years; (3) judges, who likely do not have technical backgrounds, will be asked to resolve technical disputes; (4) a judicial decision may be an all-or-nothing decision (a risk both parties must bear), while an arbitrator in non-binding arbitration has greater flexibility to recommend a settlement based on his or her perception of fairness; and (5) a negotiated agreement, even if achieved through non-binding arbitration, is more likely to maintain a favorable working relationship between the parties.

- **Overcomes Internal Pressure**
  Not infrequently negotiators face pressures from people within their own organization to "hang tough" or "not let those guys get away with it." This may so tie negotiators' hands that they are unable to negotiate a reasonable agreement for fear of losing face within their own organizations. When an arbitrator issues a report with a recommendation, the negotiators can accept the arbitrator's recommendation without having "sold out" the organization to the other side. Because the arbitrator is presumed to be "fair and reasonable," there's less danger of appearing too "soft" if you accept a settlement proposed by the arbitrator. The arbitrator's analysis and recommendation provides a valid and reasoned basis for settlement.

- **Encourages a Decision**
  Even though an arbitrator's recommendation (in non-binding arbitration, at least) does not "decide" the issue, it creates considerable impetus for a decision. It pushes the parties to make a decision, and get the dispute resolved. After the arbitrator's recommendation, any party avoiding a decision will be clearly seen as "foot-dragging" or "unwilling to bite the bullet." During negotiation, this failure to make a hard decision might be disguised for some time in the by-play of negotiation.

- **Timely Decision**
  Non-binding arbitration is a way to get a timely answer to a difficult question, without the delay of litigation. Whether a single arbitrator or a panel is used, the parties are galvanized into action by the recommendation.

Other Forms of Non-Binding Arbitration

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 non-binding 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.

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 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.

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, 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.

The boundaries between these ADR techniques can get very blurred. An arbitrator may choose to act in a way which encourages voluntary agreement, rather than place the emphasis on the arbitrator's recommendation. The manner in which the arbitrator's recommendation is reported back to the organizations can be handled in a way which encourages negotiation between senior managers. In point of fact, one of the advantages of virtually all ADR techniques is that you can design them to meet the needs of your particular situation.

Concerns about the Use of 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.

Why Not 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.

At the present time, Federal agencies -- including the Corps of Engineers -- do not have the authority to use binding arbitration. The Comptroller General has concluded that, in the absence of a Federal statute specifically authorizing the use of

non-binding arbitration, agencies may not submit a dispute to binding arbitration.

How Non-Binding Arbitration Has Been Used in the Corps of Engineers

The Corps has recently used non-binding arbitration to resolve three major disputes. The Corps considers non-binding arbitration to have been successful in all three cases. These cases also illustrate the many variations in how the non-binding arbitration process can be structured to meet the specific needs of the parties.

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 non-binding 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

a 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.

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.

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 contract 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 non-binding 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

How do you actually go about initiating and conducting non-binding arbitration? This section provides guidance on the

specifics of preparing for and conducting non-binding arbitration.

The basic steps in conducting non-binding arbitration are:

1) Approach the other parties to assess willingness to use an ADR technique.
2) Determine, by mutual agreement with the other parties, that non-binding arbitration is the most suitable technique.
3) Negotiate an agreement governing the procedures to be followed during the non-binding arbitration proceedings.
4) Select an arbitrator or arbitration panel.
5) Exchange exhibits or position papers prior to the presentation.
6) Hold an informal presentation at which all parties present their facts and positions to the arbitrator.
7) Review the arbitrator's report and assess whether to accept the recommendations.
8) Conduct negotiations.

Proposing to Use an ADR Technique

Corps of Engineers' policy firmly endorses the use of Alternative Dispute Resolution techniques such as non-binding arbitration. Nevertheless, the decision to use ADR must be made on a case-by-case basis, depending on individual circumstances. The Corps may either propose ADR to the other parties, or the other parties may make the initial proposal to the Corps.

Normally the proposal to use ADR 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 proposal to use ADR may come from attorneys or management officials; there is no "correct" way to approach the other party. Of course, the decision to use ADR should be made with the strategic input of all the members of the management team, including command staff, senior management, counsel, and technical experts.

Selecting Non-Binding Arbitration

The next step is to determine which ADR technique is appropriate. There is a brief discussion on page 6 comparing non-binding arbitration to two other ADR techniques, mediation and the mini-trial. Mediation might be the preferred technique if you concluded that communication between the parties can be assisted by a neutral outside person. A mini-trial might be preferred if the case justifies the extended time commitment of a senior manager which a mini-trial requires.

Often the choice of an ADR technique is based upon the familiarity and confidence of the parties with a particular technique. Because ADR techniques are still somewhat new, there is a tendency to use the most familiar technique, even though another process may also be appropriate.

Developing a Procedural Agreement

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. Whether you use the language in the sample agreement, when you are developing your agreement you should be certain to consider:

- 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 occurs if documents are submitted late)
- 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
- Termination of ADR

Selecting an Arbitrator or Panel

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.

Schedule of Activities

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.

Exchanging Exhibits or Position Papers

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.

The Format of the Presentation

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.

How the Arbitrator's Report is Structured

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.

Negotiating Final Agreement

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 deci-

sion and negotiate a different agreement, because upsetting the balance within the recommendations may cause the entire package to become unacceptable.

Termination of ADR

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.

Appendix I: Sample Agreement

Non-Binding Arbitration Agreement
between the
United States Army Corps of Engineers
and

_____
(Contractor)

This Non-Binding Arbitration Agreement dated this ___ day of ___, 19__ is executed by ___, on behalf of the "Corps", and by ___, on behalf of ___, hereinafter referred to as "___";

WHEREAS, on the ___ day of ___, 19__, the parties hereto entered into Contract No. __ for the _____ at _____, _____;

WHEREAS, under the Disputes Clause of that contract, _____ on ___, 19__, filed a claim with the contracting officer alleging _____.;

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

*WHEREAS, in a letter dated ___, 19___, the contracting officer issued a final decision denying the claim;

*WHEREAS, on ___, 19__, 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. ___;

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

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 ___ , 19__ 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 Arbitrator. 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.]

[3. 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.]

4. 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.]

5. 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.

6. 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.

7. 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.

8. 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.

9. 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

10. 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.

11. 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.

12. 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.

13. 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.

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

15. 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.

16. 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.

17. 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)

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This pamphlet describe "non-binding Arbitration", 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 techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation.

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