U.S. ARMY CORPS
OF ENGINEERS

RESEARCH REPORT

Alternative Dispute
Resolution Series

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

August 1989

IWR Research Report 89-ADR-R-1

The Corps Commitment to Alternative Dispute Resolution (ADR):

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

These reports are produced under the 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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USING ADR IN THE U.S. ARMY CORPS OF ENGINEERS: A FRAMEWORK FOR MANAGERIAL DECISION-MAKING

Alternative Dispute Resolution Series

Research Report

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IWR Case Study 89-ADR-R-1

Table of Contents

Page

I. Executive Summary 3

II. Case Studies 7

1. Tenn Tom Constructor, Inc. 8

2. Granite Constructors, Inc. 18

3. Olson Mechanical & Heavy Rigging, Inc. 27

4. Bechtel National, Inc. 38

5. Goodyear Tire & Rubber Company 52

III. Case Analysis 61

IV. Preliminary ENDISPUTE Framework for Managerial Decision-Making 74

V. Recommendations 84

VI. List of Interviewees 86

I. EXECUTIVE SUMMARY

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

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

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

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

CASE STUDY SUMMARIES

TENN TOM CONSTRUCTORS

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

GRANITE CONSTRUCTION COMPANY

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

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

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

OLSON MECHANICAL AND HEAVY RIGGING, INC.

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

BECHTEL NATIONAL, INC.

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

GOODYEAR TIRE AND RUBBER COMPANY

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

KEY FINDINGS

- Managers decided to use ADR techniques when the perceived costs (in time and money) were less than the anticipated costs of litigation, or when the facts of the case were not clearly favorable to the Corps.

- Mini-trials were the ADR method of choice when the Corps managers involved felt that the case would require their personal involvement in the settlement negotiations. To some extent, this was a function of the dollar values or the particular nature of the case.

- Non-binding arbitration was the ADR method of choice when the dollar value of a claim was relatively small or when the Corps manager did not have sufficient time to participate in a mini-trial process.

- ADR techniques were used at different points in the evolution of disputes: in anticipation of conflict; when a claim was filed, but before settlement negotiations began; or when negotiations reached a stalemate.

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

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

THE PRELIMINARY ADR FRAMEWORK FOR MANAGERIAL DECISION-MAKING

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

The steps in the preliminary decision-making Framework are:

Step 1: Decide to settle, litigate, or pursue administrative action

Step 2: Decide to negotiate directly or use ADR techniques (or neutral assistance)

Step 3: Decide on the best ADR format

Step 4: Assess the Corps manager's ability to participate

Step 5: Assess the other party's ability to participate

Step 6: Secure the other party's agreement to participate

Step 7: Choose a neutral

Step 8: Secure an ADR process agreement

IMPROVING THE PRELIMINARY FRAMEWORK

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

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

II. CASE STUDIES

#1. TENN TOM CONSTRUCTORS

#2. GRANITE CONSTRUCTION COMPANY

#3. OLSON MECHANICAL AND HEAVY RIGGING, INC.

#4. BECHTEL NATIONAL, INC.

#5. GOODYEAR TIRE AND RUBBER COMPANY

CASE STUDY #1
TENN TOM CONSTRUCTORS, INC.

THE PROJECT AND CLAIM

SUMMARY

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

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

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

BACKGROUND

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

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

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

CHRONOLOGY OF THE CLAIM

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

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

MAJOR ISSUES IN DISPUTE

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

POSITIONS OF EACH SIDE PRIOR TO ADR

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

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

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

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

DECISION TO USE ADR

RAISING THE OPTION OF ADR

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

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

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

PROS AND CONS OF ADR: THE CORPS

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

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

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

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

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

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

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

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

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

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

PROS AND CONS OF ADR: THE CONTRACTOR

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

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

CHOICE OF ACTUAL PROCEDURE

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

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

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

SELECTION OF NEUTRAL

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

PRIOR EXPERIENCE WITH ADR

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

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

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

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

ADR PROCEDURE

PARTICIPANTS

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

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

SCHEDULE

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

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

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

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

DESCRIPTION

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

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

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

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

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

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

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

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

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

SETTLEMENT NEGOTIATIONS

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

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

EVALUATION

PROCESS

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

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

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

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

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

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

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

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

QUANTUM

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

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

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

POSTSCRIPT:

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

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