DELIVERING DISPUTE FREE CONSTRUCTION PROJECTS: PART III - ALTERNATIVE DISPUTE RESOLUTION

A RESEARCH PERSPECTIVE
ISSUED BY THE
NAVIGANT CONSTRUCTION
FORUM™

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Building on the lessons learned in
construction dispute avoidance and resolution.™

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NOTICE

This research perspective has been prepared by the Navigant Construction Forum™ in association with Brownstein Hyatt Farber Schreck, LLP, a 46 year old law firm with offices throughout the western United States including Las Vegas, Nevada and Denver, Colorado. Navigant's Global Construction Practice and Brownstein Hyatt Farber Schreck have been involved in thousands of construction project disputes, combined.

Through our involvement in these project disputes, we have learned – along with our clients – that litigation is no longer the best option for dispute resolution. In discussing the high cost of modern litigation, one of our team made the comment that, "During the 19th century, polo was the sport of kings. By the end of the 20th century, litigation was the sport of kings!" The authors all agree that Alternative Dispute Resolution ("ADR") is highly preferred to lengthy and expensive litigation when trying to reach resolution on a construction dispute. This thinking is the genesis of this research perspective.

The opinions and information provided herein are offered with the understanding that they are general in nature, do not relate to any specific project or matter and do not reflect the official policy or position of Navigant Consulting, Inc. ("Navigant"), Brownstein Hyatt Farber Schreck LLP, or any of their practitioners. Because each project and matter is unique and professionals may differ in their opinions, the information presented herein should not be construed as being relevant or applicable for any/all individual project or matter.

PURPOSE OF RESEARCH PERSPECTIVE

This research perspective is the culmination of a three part series entitled *Delivering Dispute Free Projects*. Part I of this series dealt with dispute avoidance during the planning, design and bidding process.[1] Part II of the series explored dispute avoidance during the construction and claim management process.[2] The third and final part of the series, *Alternative Dispute Resolution*[3] addresses the wide variety of ways disputes can be resolved without formal litigation.

1. See Delivering Dispute Free Projects: Part I – Planning, Design and Bidding, Navigant Construction Forum™, October, 2013.
2. See Delivering Dispute Free Projects: Part II — Planning, Design and Bidding, Navigant Construction Forum™, March, 2014.
3. In the interest of full disclosure, portions of this research perspective were taken from a paper authored by James G. Zack, Jr., *Resolution of Disputes – The Next Generation,* published in AACE International Transactions, 1997. Other portions of this report were taken from Construction Contract Claims, Changes & Dispute Resolution, (2nd Edition) by Paul Levin, ASCE Press, Reston, VA, 1998 (used with permission of the author). The authors have revised, updated and added to these prior publications to draft Chapter 11, *Disputes Avoidance, Resolution and Alternative Dispute Resolution*, of Construction Contract Claims, Changes & Dispute Resolution, (3rd edition). The draft chapter of this forthcoming book by Paul Levin (ASCE Press) constitutes the largest part of this research perspective and is included herein with permission from Mr. Levin and ASCE Press.

Experts at both Navigant and Brownstein Hyatt Farber Schreck are frequently asked by clients to outline what alternatives exist to taking the dispute to court. Most project participants and their representatives understand that it is nearly impossible to have a project with no changes, delays, site condition problems, labor issues, lost productivity, etc. Most are sophisticated enough to acknowledge that when situations such as these arise, which entitle contractors to additional time and/or money under the contract, assuming they file a well documented claim[4], the issue should be resolved at the project level. Also, most contractors understand that there is always the possibility that the owner and the contractor may not be able to negotiate some claims to resolution. In this event, the claim cannot be resolved at the project level, therefore becoming a "dispute" and requiring formal legal action, as mandated by the contract results.

The purpose of this research perspective is to summarize a wide variety of ADR methods available to help resolve disputes without the need to go into litigation. Some of the ADR techniques must be initiated by the owner and incorporated into the contract documents before bidding. Other ADR methods may be employed by the owner and the contractor during the life of the project, even in the absence of contractual language.

This research perspective treats the claim phase of a project leading to the need for ADR separately, not because it takes place at a different point in time, but because the activities involved with resolving claims are entirely different from those activities concerning the management and delivery of a construction project. While the activities involved with claims resolution through ADR may overlap with the activities of the construction phase, they are not the same, and thus, are dealt with separately.

This research perspective has generally been drafted with the traditional Design-Bid-Build ("D-B-B") project delivery method in mind as it is the experience of the authors that this method tends to result in more claims than other methods. However, when a recommendation can be employed in the Design/Build ("D/B") or the Engineer, Procure, Construct ("EPC") methods, it will be so noted.

For the purpose of this research perspective the authors generally use the following terms:

- "Owner" – Includes the project owner and all members of the owner's team, including design professionals, geotechnical consultants, construction managers representing the owner, etc.
- "Contractor" – Standard industry roles such as the constructor, general contractor or Construction Manager at Risk ("CM@R") – as those terms are generally used in the industry – as well as the project participants for which the contractor is responsible, and liable for, such as subcontractors, suppliers, materialmen, etc. Where the contractor is acting in a D/B or EPC capacity, it will be so noted.

The Navigant Construction Forum™ and Brownstein Hyatt Farber Schreck believe that implementation of these ADR techniques will result in resolution of claims more quickly and at less cost than taking a claim into litigation. If properly employed these ADR methods should also *increase* the likelihood that the project will close out with no follow on litigation.

INTRODUCTION

Construction industry disputes are common and the monetary amounts in dispute are frequently quite high. Additionally, disputes in the construction industry are often quite complex, thus making it difficult to present issues clearly to non-technical triers of fact. Until the late 1980s, the traditional dispute resolution process involved negotiation and some form of administrative appeal, possibly mediation, followed by either arbitration or litigation. This traditional process has, however, proven to be too lengthy and too costly for both parties. As a result, the construction industry has developed a number alternative means of resolving disputes. ADR has become common in construction.[5]

With parallel pioneering efforts of various public agencies and construction trade associations, numerous ADR techniques have been have been developed and implemented. All ADR methods share the same goal – to resolve disputes without resorting to the traditional, time consuming and expensive litigation. This research perspective identifies and discusses nearly thirty forms of ADR that are being used in the construction industry today. Some examples are merely variations of a common theme, but all are different and all have distinct advantages and disadvantages that should be considered prior to selection. The various forms of ADR are presented in what the authors believe is a logical order following a dispute from the project site to the adjudicative forum.

4. The term "claim" is defined for the purposes of this research perspective as a written statement from one of the contracting parties requesting additional time and/or money for acts or omissions under the terms of the contract for which proper notice has been provided; the claimant can demonstrate entitlement under the contract; and is able to document both causation and resulting damages.
5. See An Overview of Alternative Dispute Resolution Use in the Construction Industry, Matthew P. Tucker, The University of Texas at Austin, August 2005.

PRE-DISPUTE ADR METHODS

There are a number of ADR methods that can be implemented during the planning and pre-construction phases of the project. In addition to minimizing and avoiding disputes by practicing sound contract administration, discussed in the two earlier research perspectives in this series, contractors and owners alike can now take advantage of new practices developed within the construction industry in recent years. Several programs and concepts have evolved to resolve claims on a relatively informal basis through early cooperative intervention. These programs include:

- Escrow bid documents;
- Delegation of authority;
- Dispute resolution ladder;
- Geotechnical design summary reports; and
- Partnering.

Although somewhat interdependent, these programs and concepts can be applied independently to improve cooperative construction efforts and dispute resolution.

Escrow Bid Documents

Escrow Bid Documents ("EBD") is a form of ADR in that it provides for resolution of some disputes quickly and at a low cost. It is not a new process, having been recommended to the industry in the early 1990s.[6] The EBD process requires that the apparent low bidder provides all worksheets, backup, and all other documents relied upon in preparing their bid to the owner shortly after bid opening (typically within 24 to 48 hours) as a condition precedent to contract award. The document package is jointly reviewed by the owner and the bidder. The owner's review is to determine that all documents submitted are legible. On the other hand, the contractor's review is to ascertain that everything relied upon during bidding is actually contained in the document package as the typical EBD clause in the contract states that any bidding document *not* included in the EBD package shall *not* be used or relied upon in any claim or dispute related to the project. The EBD are not be used for pre-award evaluation of the contractor's methods or to assess the contractor's qualifications. The information contained therein is considered a trade secret and its confidentiality is to be protected as such. The EBD are returned to the contractor, uncopied, at the end of the project as they are, and will remain at all times the contractor's property.

Once the contract is awarded, the documents are escrowed with a neutral third party (i.e., a local bank or trust agent) for safekeeping. An escrow agreement is put in place concerning who can access such documents; the privacy and confidentiality of the documents; who pays for the storage of the documents; the ownership of the documents; when and under what circumstances the documents can be accessed; etc. The EBD are only referred to and examined in the event that such documents would assist in pricing a change order or a disputed issue involving how an item was bid; what interpretation was relied upon during bidding; what productivity factors were used in preparing the bid; etc. This way, critical project documentation is preserved in the safekeeping of a neutral third party and referred to when such documents will aid the parties in resolving specific issues in dispute.

The advantages of EBD are that bidding documentation, which may help resolve issues, is captured prior to the award of the contract, secured safely, and remains available during the life of the project for use in the event it may help resolve a dispute, at a relatively low cost. Further, experience leads many to believe that the mere existence of such EBD may help prevent spurious claims from arising on the basis of, "I bid it this way and your way will cost more". Any time such a statement is made, the party receiving the statement is within their rights to request immediate access to the EBD to confirm the statement.

Potential disadvantages of the EBD system include administrative disputes on the organization, readability, and structure of bid documents. Additionally, no matter how secure the escrow process is, inadvertent and unwarranted exposure of the contractor's proprietary material may also be somewhat at risk.

Delegation of Authority

Experience teaches that the longer it takes to finalize negotiations of a disputed issue and sign a settlement agreement, the more likely the dispute will escalate, become more expensive, thus making it harder to resolve. One practical method of avoiding disputes is for the owner to delegate a certain level of change order and claims settlement authority to the project manager level. If smaller, discrete issues can be analyzed, negotiated, settled and a change order or claim settlement document executed quickly and on site, then there is less likelihood that unresolved changes and issues will grow into larger disputes. The key to this form of early dispute resolution is to establish a meaningful delegated monetary amount such that a large tranche of issues can be handled on site and *not* have upper management become a bottleneck that causes unresolved issues to accumulate.

6. See Avoiding and Resolving Contract Disputes During Construction: Successful Practices and Guidelines, American Society of Civil Engineers, New York, 1991.

Dispute Resolution Ladder

Another practical method of avoiding unresolved disputes is for the owner and the contractor to establish, at the outset of the project, a formal, written dispute resolution ladder. This is a parallel organizational chart showing owner and contractor counterparts (i.e., Assistant Project Managers, Project Managers, Project Executives, etc.) including specific timeframes each level has to resolve issues. For example, if the Project Managers are given 45 days to resolve an issue and it remains unresolved, on day 46 the issue is automatically elevated to the next level. The concept is simple – assign issues to specific individuals by name and give them a set timeframe. Knowing that simply trying to "pass the buck" to the next higher level is a career limiting move, people at each level are motivated to find ways to resolve issues as they arise. But, if numerous issues continue to be elevated for lack of resolution at the lower levels, it is likely that management on both sides will find a way to resolve this difficulty.

Geotechnical Design Summary Report

This concept was also originally proposed in the 1970s for use in tunneling construction projects[7], and has slowly spread to other types of construction. This is the Geotechnical Design Summary Report ("GDSR") or the Geotechnical Baseline Report ("GBR"). As an essential part of underground construction projects, the GBR goes further than the traditional site investigation report, boring logs and soils report. The GBR sets forth the designer's interpretations of subsurface conditions and their impact on design and construction. Since the GBR is typically included in the definition of Contract Documents, this ADR mechanism also typically states that both the owner and the contractor have a right to rely upon the geotechnical interpretations set forth in the GBR.

The GBR provides a definable baseline of subsurface conditions for determining whether actual conditions encountered are "materially different" or not when the contractor submits a Differing Site Condition claim. The GBR removes the uncertainty of how the subsurface conditions "should have been" interpreted at the time of bidding and what could be expected by a "reasonably prudent" contractor. Along with the designer's geotechnical description and interpretation of anticipated subsurface conditions, the anticipated behavior of the ground consistent with the specified or most likely used, construction methods is also described. Such factors as slope stability, dewatering methods, pumping quantity estimates, well spacing, and so forth are typically engineered and provided as part of the GBR.[8]

The GBR has enjoyed significant success on numerous tunneling projects in reducing differing site condition claims and/or resolving such claims at the project level. Its success rate is founded on eliminating the uncertainties surrounding a mere presentation of a subsurface survey or boring logs, with the owner taking a more proactive responsibility for the thoroughness of the conditions and the interpretation of the conditions by engineers and designers.

Partnering

Partnering Defined

Partnering, quite simply, is the establishment of a team approach for mutually beneficial resolution of the ongoing difficulties and problems that typically arise on a construction project. The Associated General Contractors of America ("AGC") characterize the partnering process as "...attempts to establish working relationships among the parties through a mutually developed formal strategy of commitment and communications. It attempts to create an environment where trust and teamwork prevent disputes, foster a cooperative bond to everyone's benefit, and facilitate the completion of a successful project." [9] A more useful way of looking at partnering is to see it as a way for the owner, the design professional, the construction manager and the contractor to maintain regular communication and to discuss and implement cooperative efforts. It provides an alternative to the adversarial pattern that often exists when each party crafts all communication and correspondence that establishes and protects one's own position to the exclusion of all others. Partnering is a voluntary process and primarily consists of workshops, meetings and the use of facilitators to help the parties establish working relationships where project problems can be discussed and resolved in a non-adversarial atmosphere.

History of Partnering

Partnering's roots in public construction began in 1988 with the efforts of Larry Bodine, Commander of the Mobile, Alabama District of the U.S. Army Corps of Engineers[10] ("COE"), and who later named the director of the Arizona Department of Transportation ("ADOT"). Since then, partnering has been successfully implemented to varying degrees by the COE and many other State and Federal agencies, most notably by a large number of State Departments of Transportation ("DOT"). Many State DOTs have implemented the partnering process on an agency-wide basis and are frequently cited in articles and case studies in the construction trade press.

7. See Recommended Procedures for Settlement of Underground Construction Disputes, U.S. National Committee on Tunneling Technology, Washington, D.C., 1977.
8. Randall J. Essex, Geotechnical Baseline Reports for Construction: Suggested Guidelines, Technical committee on Geotechnical Reports of the Underground Technology Research Council, American Society of Civil Engineers, New York, 2007. See also, Guidelines for Preparing Geotechnical Design Reports, California Department of Transportation, Division of Engineering Services, Geotechnical Services, Sacramento, CA, December 2006.
9. Partnering – A Concept for Success, Associated General Contractors of America, Washington, D.C., September, 1991.
10. Charles R. Glagola and William M. Sheedy, *Partnering on Defense Contracts*, Journal of Construction Engineering and Management, Vol. 128, No.2, American Society of Civil Engineers, April 1, 2002.

Elements of Success

The basic elements of partnering include principles and procedures designed to bring together the different layers of owner and contractor management to work together as a team. The elements include the following activities and concepts, which lend structure to the partnering process:

- The ***preconstruction workshop*** is a one or two day meeting between key management and jobsite personnel representing the owner, contractor, design professional, construction manager, major subcontractors and suppliers, and other key stakeholders, such as local agencies or community groups. The primary objectives of the initial workshop are to (1) build teams to work together on different issues expected during the project; and (2) to develop a project charter.
- The ***project charter*** is a document to be signed by all parties at the end of the initial workshop that defines the goals and objectives of the partnering effort. These goals are more in depth than simply to complete the project on schedule and in budget. Each goal will be comprised of specific and measurable tasks, such as no lost time accidents, good community relationships and development of efficient construction procedures to solve major job challenges and avoid disputes.
- The ***commitment of top management*** is essential to the success of partnering. Top management of all the parties has to believe in the concept and stand behind the commitments each has delegated or empowered to the field staff for resolving jobsite issues. Since partnering is a cultural change for most owners and contractors, top management *must* remain heavily and continuously involved in the partnering process throughout the life of the project.
- ***Empowerment*** is the delegation of authority and responsibility to the lowest possible levels in an organization. This allows various team members from both the owner and the contractor to meet, discuss and resolve problems in a timely and efficient manner. The partnering process strives to provide non-contentious procedures for escalating issues to higher levels in the event the parties cannot reach agreements within certain timeframes.
- ***Partnership maintenance***, comprised of routine, ongoing partnering meetings (usually monthly but no less frequently than quarterly), follow-up workshops, close out workshops and of job rewards and recognition, are essential for keeping the partnership on task and properly evaluating its effectiveness.

These elements, properly implemented and practiced, have proven to foster less adversarial construction projects with more timely completion, reduced costs and fewer claims. One study of some 280 projects indicated "…that partnered projects achieved superior results in controlling costs, the technical performance and in satisfying customers compared with those projects managed in an adversarial, guarded adversarial and even informal partnering manner." [11]

Obstacles to Partnering

It seems counterintuitive that the parties to a construction contract, with such diverse interests, can work together in a team atmosphere. If one looks at past history and the nature of construction, it is easy to see why. Perhaps a review of these obstacles to partnering will allow one to more reasonably assess the tradeoffs and benefits of partnering.

- ***Culture of construction*** – Most obstacles to partnering lie in the history and nature of the hard dollar, low bid construction process. Construction has been traditionally characterized as the realm of rough and tumble individuals using raw nerve, brute force, and commanding presence to move earth, steel, and concrete in order to build the subways, dams and skyscrapers of the world. To some of these highly independent individuals, who travel the world to construct projects under which they have full control, participating in group partnering activities is both foreign and incongruous.
- ***Past dealings and nature of the parties.*** The three main parties to a construction contract – owner, design professional and contractor – represent completely diverse entities, each with their own role and personality.

  The ***project owner*** is the provider of the project, the source of funds and typically the most passive and removed party involved in the process. The owner has an established the budget, a contractual project completion date and expects to receive an end product that meets their exact needs and specifications. Owners are frequently *not* too interested in the details of the project and often inexperienced with the complexity and risks of the construction process. Typically, project owners *neither* want to be involved in day to day problems *nor* want to spend extra money. The owner wants the end product on time, within budget and in conformance with the plans and specifications.

11. Erik Larson, ***Project Partnering: Results of Study of 280 Construction Projects***, Journal of Management in Engineering, American Society of Civil Engineers, Vol. 11, No. 2, March 1, 1995.

The ***design professional*** is the architect or engineer responsible for designing the project and putting together the plans and specifications for its successful execution. The designer typically works under a negotiated fixed fee, or cost plus, contract and works under typical white collar office conditions in a controlled environment.

The ***contractor*** is the party responsible for executing the plans and specifications in order to build the project. Construction is often seasonal and must deal with varying degrees of daylight hours, diverse weather conditions and unpredictable factors such as unexpected site conditions and external economic conditions. Contractors frequently must travel to where the work is, work with unknown local manpower and resources and deal with unknown local utilities and regulatory agencies. Construction is often fast paced, "time is of the essence of the project" and the contractor prefers to be at the jobsite building the project. Under these constraints, contractor employees often work long hours under demanding conditions. Both companies and their employees undertake this extra work and risk in return for larger financial rewards and the enhanced satisfaction of successful job completion.

It's easy to see how the ideological differences among each of the parties, along with the potential for coordination conflicts at both the scheduling and participation levels, can make it difficult to implement partnering efforts. Nevertheless, experience shows that once employed, partnering efforts often help overcome these difficulties and provide multiple benefits to the construction project and all stakeholders.

Results of Partnering

Studies conducted by the successful participants in numerous partnered projects have consistently cited favorable tangible results.

- An increase in projects completed on or ahead of schedule;
- Improved contract administration procedures;
- A reduction in claims and disputes;
- A reduction in owner's engineering and administrative expenses (often reported to be 5 percent to 15 percent or more); and
- Increased value engineering.

Partnering, therefore, has been shown to be successful in creating a sense of teamwork and results in a productive use of time. The energies and creative efforts of the parties are better used in value engineering and mutually beneficial schedule improvements rather than writing letters and being involved in contentious claims endeavors. For both the owner and the contractor, the necessity of employees having to divert energies from new and future projects in order to return to old projects for claims preparation, depositions, litigation support and trials is extremely disruptive, draining and counterproductive.

To learn more about the details of partnering efforts, *Partnering for Success*, by Thomas R. Warne, is strongly recommended.[12] It is also recommend that readers check with major trade associations, such as Associated Builders and Contractors ("ABC"), the AGC, and/or the Construction Industry Institute ("CII") for other publications on partnering.

INITIAL CLAIMS AND DISPUTE PHASE

Once the contract is awarded and the Notice to Proceed ("NTP") issued, contractors generally start work in the field as soon as possible – sometimes too soon as their planning may not be complete, their schedule finalized, etc. Disagreements over potential change orders and claims[13] are inevitable given the complexity of today's construction projects. However, there are a number of ADR methods that can be implemented on the project to avoid disputes. Among them are the following.

12. Thomas R. Warne, Partnering for Success, American Society of Civil Engineers, New York, 1994.
13. The term "claim" is defined for the purposes of this chapter as a written statement from one of the contracting parties requesting additional time and/or money for acts or omissions under the terms of the contract for which proper notice has been provided; the claimant can demonstrate entitlement under the contract; and is able to document both causation and resulting damages.

Initial Decision Maker/Single Dispute Resolver

To provide for prompt review of claims submitted by the contractor, and guarantee a decision within a reasonable period of time, the American Institute of Architects ("AIA") *General Conditions of the Contract for Construction* provides for an Initial Decision Maker ("IDM").[14] Similarly, the American Arbitration Association ("AAA") recommends consideration of a Single Dispute Resolver for smaller and less complex projects.[15] Contractor claims are to be submitted to the IDM, who has 30 days to render a written decision. Upon receipt of the IDM's written decision or the passage of 30 days without such a decision, the owner and the contractor may refer the matter to mediation. While it is likely that the owner will appoint the architect as the IDM, the owner is free to name anyone it chooses in the contract. The article, however, does provide that if *no* individual is specifically named as the IDM in the contract, the architect will assume the role of the IDM by default. The concept is to make certain that a designated individual reviews and rules on a claim within a reasonable period of time and will either help resolve the claim or move the claim forward to mediation.

Standing Or Project Neutral/On Site Neutral

ConsensusDocs 200[16], *Standard Agreement and General Conditions Between Owner and Constructor, Article 12* and ConsensusDocs 240, *Agreement Between Owner and Design Professional Article 9.3.1 both* set forth an "optional dispute mitigation procedure" as an alternative to mediation. The owner employing this form of contract document has the option of selecting an optional dispute mitigation procedure – either a Standing or Project Neutral[17] or a Dispute Board in lieu of mediation. The use of the Neutral is not mandatory and the owner or contractor may elect to bypass this and proceed directly to the more formal dispute resolution procedure outlined in the contract.[18] However, it is perceived that owners who check the Project Neutral box do so in hopes that a neutral individual, reviewing an issue promptly, professionally and objectively, will be able to guide the parties to an acceptable resolution. Thus, it is unlikely that owners who opt for the Neutral will routinely bypass this form of ADR.

Early Neutral Evaluation

In this form of ADR, when a dispute arises and the project level staff cannot resolve the issue, an impartial third party (either jointly selected by the parties or appointed by an external organization such as the AAA) is brought on site to listen to presentations from both sides and evaluate how the dispute might turn out should it be taken to Court. The concept is that the parties learn early on during the dispute how strong their cases actually are in the eyes of a neutral party. Additionally, such an early neutral evaluation should help educate both parties on the efficacy of taking the dispute to arbitration or litigation. Further, the neutral's evaluation may point the way toward a negotiated settlement both parties can agree upon and be satisfied. The advantage to the system is that both parties gain insight into their positions concerning the dispute quickly and at a very low cost. There appears to be no disadvantage to this form of ADR.

Owner/Agency Review Board

Some public owners, particularly those with larger, long duration construction programs, have established their own in-house Review Boards to hear disputes that cannot be resolved at the project level. Such Review Boards are typically made up of very senior employees (or retired senior employees) of the owner's staff. They are empaneled to review disputed issues in-house in an effort to resolve such disputes, especially those caused by personality conflicts or misinterpretation of contract requirements by the owner's staff. Such Review Boards are normally structured to handle appeals of lower level project decisions in a simple, informal manner. Typically they act promptly upon the contractor's request although some have been known to have extremely complex requirements and can be very slow to act.[19] The apparent advantages of Owner Review Boards are the ease of obtaining an appellate hearing on an adverse decision at the project level and the low cost involved with such a hearing. The most commonly cited disadvantages include the perceived lack of impartiality as the Review Board members are generally employees or ex-employees of the owner (thus creating an apparent conflict of interest); the lack of due process; the lack of timeliness (in some cases); and the difficulty of obtaining judicial review of the findings of such Review Boards.

14. See Article 15.2.1 of A201-2007 and Article 3.3.1.11 of AIA B201-2007. See also, Jeffrey L. Alitz and Ben N. Dunlap, *The New AIA and ConsensusDOCS: Beware of the Differences – The Professional Services Agreements*, Schinnerer's 47th Annual Meeting of Invited Attorneys, 2008.
15. See *The Construction Industry's Guide to Dispute Avoidance and Resolution*, American Arbitration Association, New York, 2004.
16. Published by The ConsensusDocs Coalition, Arlington, Virginia, 2013 edition.
17. Ibid. The American Arbitration Association refers to this ADR Form as an On Site Neutral.
18. Kurt Dettman, Suzanne Harness and John Carpenter, *Project Neutrals to the Rescue! A New Tool for Avoiding and Resolving Disputes on Construction Projects*, Under Construction, Vol. 13, No. 3, August 2010, American Bar Association Forum on the Construction Industry.
19. Lowell J. Notebloom, *Owner Controlled Dispute Resolution*, 15th Annual Construction Superconference, San Francisco, California, December 1996.

Dispute Resolution Boards

Dispute Resolution Boards Defined

Dispute Resolution Boards ("DRB") – previously known as Dispute *Review* Boards – are often referred to as the least intrusive and most effective ADR procedure for reducing claims, as well as providing a timely procedure to resolve claims quickly.[20] A DRB is typically comprised of three members; the first is selected by the contractor subject to veto by the owner; the second is selected by the owner and subject to the contractor's veto; and the third (usually the Chairman) is selected by the first two members and subject to veto by both the owner and the contractor.[21] The DRB is established at the outset of the project and is provided with sets of drawings, contract documents and other related project documents, and will meet routinely at the site (monthly on larger projects and quarterly on smaller jobs) to monitor the progress of construction. Whenever an issue arises on a project that cannot be resolved through direct negotiations, *either* the owner or the contractor can refer the disputed issue to the DRB. The DRB will hold a hearing within a short period of time after being referred the issue and then render a *recommendation* concerning the issue in dispute. Unlike other forms of ADR, DRB hearings typically deal with only a single issue. DRB members are most often very familiar with the type of construction involved and are respected in the industry and thus, will approach their responsibilities with neutrality and impartiality.[22]

DRBs were initially recommended to the construction industry in 1974 by the U.S. National Committee on Tunneling Technology.[23] The DRB process was first employed in 1975 during the construction of the second bore of the Eisenhower Tunnel in Colorado. This first DRB heard and successfully resolved three disputed issues to the satisfaction of the parties. The DRB process has now spread to a wide variety of owners and projects. At the present time, at least 14 State highway departments or DOTs, 12 or more major public transit authorities, dozens of cities and counties throughout the United States, a number of Federal agencies and numerous universities routinely use this form of ADR in their contracts.[24] Internationally, this form of ADR is also gaining in popularity and use, as discussed further below.

DRB Procedures

The DRB Board members are usually selected at the outset of a project and will visit the jobsite on a periodic basis; meet with project personnel from both sides; keep current with job activities and developments through progress reports and relevant documentation; and are available to meet and hear disputes on an as needed, as requested basis. The prior industry experience of the DRB members and their contemporaneous familiarity with the project puts the DRB in the unique position of being able to make quick, informed and reasonable recommendations to resolve disputes at early stages.

The DRB generally holds its first meeting as soon as possible after the work begins to establish the ground rules and operating procedures for dispute resolution on the project. The frequency of subsequent visits depends on activity levels at the jobsite, but one meeting every month on large, complex and/or contentious project or every three to four months for smaller, less contentious jobs appears to be the norm during the more active phases of the project. In addition to routine visits, special, private meetings and hearings are held at locations selected by the DRB itself with the agreement of the parties.

As soon as a dispute is determined to be unresolvable at the project level, and upon request of *either* party, the DRB arranges a hearing. Position papers are provided to the DRB (and the other party) by each party, accompanied by all supporting documentation. At times, the parties may agree to jointly prepare the supporting documentation binder(s). The DRB hearing is typically held at, or near, the jobsite and is relatively informal. Witnesses, experts and other resources that might provide the DRB with information helpful for making a recommendation may be employed during the hearing(s). It is noted that either party can request a DRB hearing at any time. Typically, presentations are made by the project participants and there is no involvement of attorneys in the hearing (although the parties typically use attorneys to help prepare their briefs and some DRB's allow attorneys to attend the hearing but *not* participate).

20. As discussed in this chapter, this statement can be said to apply at least to heavy and highway construction, but is not universally accepted. A 1996 AGCA survey found "perceived effectiveness" of various ADR procedures to be led by partnering, followed by mediation, early neutral evaluation (Standing or Project Neutral), binding arbitration, non-binding arbitration, and DRB's, in that order. Constructor, AGCA, Washington, D.C., January 1997.
21. Initially, no attorneys were named as members of a DRB panel. But, over the years, it has become more common that the third DRB member – who serves as the Chair of the DRB – is an attorney recommended by the first two DRB panelists in order to provide legal and contractual insights on the various issues to be considered by the DRB.
22. Robert M. Matyas, A.A. Matthews, Robert J. Smith and P.E. Sperry, Construction Dispute Review Board Manual, McGraw Hill, New York, 1996.
23. Better Contracting for Underground Construction, U.S. National Committee on Tunneling Technology, Standing subcommittee No. 4 – Contracting Practices, U.S. Department of Transportation, Urban Mass Transit Administration, Washington, D.C., 1974.
24. Practices and Procedures: Dispute Review Boards, Dispute Resolution Boards, Dispute Adjudication Boards, The Dispute Resolution Board Foundation, Seattle, Washington, 2007.

As soon as possible after the conclusion of the hearing, the DRB issues a written recommendation that clearly describes the reasoning relied upon in reaching its recommendation. Although desirable, unanimous decisions are *not* required for a recommendation. The DRB may be asked to render a recommendation on entitlement, on cost/quantum or both. DRB recommendations are nonbinding and are intended to be used by the parties to negotiate resolution of the disputed issue. If negotiations fail, the parties are free to turn to whatever dispute mechanism is outlined in the contract. If this happens, the issue as to whether the DRB recommendation is admissible in further legal proceedings arises. There are arguments on both sides of this issue. However, "[i]t is believed that the substantial risk that a judge, jury or panel of arbitrators will place great weight on the DRB recommendation deters the losing party from filing a lawsuit and taking another bite at the apple. DRB Foundation statistics and anecdotal evidence tend to support that belief."[25]

DRB procedures, costs, and related issues should be concisely spelled out in a DRB clause in the contract documents. A guide specification for a DRB clause is contained in *Practices and Procedures Practices and Procedures: Dispute Review Boards, Dispute Resolution Boards, Dispute Adjudication Boards* published by The Dispute Resolution Board Foundation.[26]

DRB Costs

DRB costs include the administrative efforts of selecting the DRB members; the costs of the DRB members' time, travel and expenses for the periodic site visits; and the costs of additional trips and related expenses for DRB hearings beyond those that might take place during a periodic visit. Board members are most often paid a daily rate plus expenses for meetings, site visits and dispute hearings and an hourly rate for document review and study time spent reviewing documents at home, communications, clerical work and other non-travel expenses. Other expenses include the administrative costs of distributing progress reports and documentation to the DRB members. The contractor and owner share the DRB costs equally although some DRB clauses require that the contractor pay all costs and include half of the cost paid in the next monthly progress payment application submitted to the owner under the contract.

DRB Effectiveness and Success

All evidence, both statistical from the DRB Foundation and anecdotal from owners, contractors and attorneys involved in projects using the DRB process, indicates that this form of ADR is both effective and successful. Some of the reasons given for this conclusion include the following.

- A key element of the success of DRBs is the quick resolution of disputes and reduction of unresolved claims. The mere existence of the DRB tends to foster an environment that encourages the parties to avoid the pursuit of frivolous claims, to resolve most claims at the project level and only involve the DRB in those few claims that reach a true impasse.
- The members of the DRB are impartial, technically proficient, project knowledgeable, well respected and mutually selected by the parties. The DRB members are respected by the parties, which discourages both parties from the possible loss of credibility associated with presenting minor or non-meritorious claims. Additionally, while preparing draft submissions to the DRB, the parties may realize that their own claim is weaker than initially thought or the other party's position stronger, thus creating an impetus for a negotiated resolution of the issue and obviating the need for a DRB hearing altogether.
- DRBs help improve the relationship between parties by creating an atmosphere of communication and trust. Knowing that disputes are going to be resolved expeditiously and fairly, the parties become more willing to be openly communicative and work toward a common goal (i.e., settling disputes themselves whenever possible).
- The DRB process and procedures are simple, straightforward, fair and efficient. The DRB member's familiarity with the industry, the particular project and their availability plus the knowledge that the DRB will act quickly and fairly tends to reduce opportunities for posturing by the parties. Because DRBs typically hear only a single dispute at a time, the aggregation of claims is reduced.

  In sum, the very existence of a DRB makes resolution of claims a top priority and reduces the list of unresolved disputes, allowing the parties to maintain their focus on construction of the project.

25. Randy Hafer, Dispute Review Boards and Other Standing Neutrals: Achieving "Real Time" Resolution and Prevention of Disputes, International Institute for Conflict Prevention & Resolution, CPR Construction Advisory Committee, Dispute Resolution Board Subcommittee, New York, 2010.
26. Practices and Procedures: Dispute Review Boards, Dispute Resolution Boards, Dispute Adjudication Boards, The Dispute Resolution Board Foundation, Seattle, Washington, 2007.

High resolution rate

It has been reported that DRBs have nearly a 100 percent success rate for resolving construction disputes.

> *"According to the DRB Foundation, which has a database of over 1200 projects since 1975 that have used DRBs:*
>
> - *60% of projects with a DRB had no disputes (this statistic attests to the "dispute prevention" benefit that accompanies any Standing Neutral process).*
> - *98% of disputes that have been referred to a DRB for hearing result in no subsequent litigation or arbitration.*
> - *The worldwide use of DRBs is growing in excess of 15% per year, and through the end of 2006 it was estimated that over 2000 projects with a total value in excess of $100 billion had used some form of DRB.*
>
> *Dr. Ralph Ellis, a University of Florida civil engineering professor, has studied the use of DRBs by the Florida Department of Transportation involving over $10 billion of that agency's construction projects. He concluded that use of DRBs resulted in:*
>
> - *Net cost growth savings equal to 2.7% of construction costs; and*
> - *Net time growth savings of 15.1%.*
>
> *The American Society of Civil Engineers conducted a study of DRBs in the mid-1990s and found that DRBs heard a total of 225 disputes on 166 projects worth $10.5 billion. They resolved 208 of the 225 disputes and the only one actually proceeded to litigation and was eventually settled."*[27]

In those instances where a DRB was not able to resolve a dispute, the parties typically went on to negotiate the disputes themselves. Reiterating the factors above, this is due to the DRB members' knowledge and experience with:

- The construction industry and this type of project;
- The design and construction issues germane to the project;
- The interpretation and application of contract documents;
- The process of dispute resolution; and
- The specific design and construction for the project.[28]

Since both parties agreed to the selection of the DRB members and the process in advance of any dispute, the parties are normally favorably predisposed to DRB proceedings.

DRB cost-effectiveness

For very large projects, DRBs are extremely cost effective because:

- The DRB's existence encourages quick settlement of most changes and claims, reducing overall administrative costs and the nonproductive time of maintaining and pursuing open change order lists. In this regard, it's considered a money and time saver, as well as a prevention cost, since it prevents many claims from escalating into disputes.
- The disputes that do end up in front of the DRB cost far less in a DRB hearing then they would in arbitration, litigation, or board of appeal hearings.

In *Dispute Review Boards and Other Standing Neutrals*, a review of case histories indicates that the total direct costs of DRBs generally range from approximately 0.05 percent of final construction cost for a relatively dispute free project to approximately 0.25 percent for "difficult projects" with a number of dispute hearings. The average is about 0.15 percent of final construction cost. The percentages cited are from case studies of projects in the range of $50 million to $100 million. It is noted that on projects with a value of more than $100 million the percentage goes down and for those projects less than $50 million the percentage is higher.[29]

International Applications

The movement toward DRB use has grown steadily on international projects. However, some international contracts specify the use of a Dispute Board ("DB") which is analogous to the DRB in that DBs also issue recommendations. Other international contracts require the use of a Dispute Adjudication Board ("DAB") which renders enforceable determinations subject to the formal dispute process only at the end of the project. A number of groups have become involved in this movement to promote the use of a neutral party to resolve disputes, including the World Bank and other international development banks, the U.K. Institution of Civil Engineers, the Engineering Advancement Association of Japan, the

27. Randy Hafer, Dispute Review Boards and Other Standing Neutrals: Achieving "Real Time" Resolution and Prevention of Disputes, ibid.
28. Robert M. Matyas, Construction Dispute Review Board Manual, ibid.
29. Hafer, Dispute Review Boards and Other Standing Neutrals: Achieving "Real Time" Resolution and Prevention of Disputes, ibid.

International Chamber of Commerce, the Fédération Internationale des Ingénieurs Conseils, and the U.N. Commission on International Trade Law.[30] Efforts by these organizations include drafting and promoting DRB clauses for use on international projects. The DRB Foundation reports that DBs have now been used internationally on projects in Bangladesh, Botswana, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, Pakistan, Peoples Republic of China, Poland, Romania, Sudan, Uganda, the United Kingdom and Vietnam.[31]

Other Considerations of DRB Procedures

A DRB is still a voluntary, nonbinding method of settling disputes. DRB specifications should be written to neither interfere with, nor hinder, the parties' traditional dispute resolution methods in the event a DRB recommendation is *not* satisfactory to both parties. For example, the time consumed during an attempted DRB resolution should *not* penalize either party in regard to notice provisions of claims, requests for contracting officer's decision or requests for an appeal.

The DRB process is compatible with the partnering process, described earlier in this research perspective above. Many owners have now taken steps to incorporate both partnering and DRBs into their projects. Smaller projects that cannot afford full time, three member DRBs should consider a single person DRB or seek the assistance of persons in the local area that can function as a board without the expense of a travel budget. Other alternatives include use of a multi-project, multi-contract or some sort of standing DRB that may be set up by sponsoring trade associations.

Adjudication

Adjudication is a compulsory dispute resolution mechanism imposed by contract and applies in the United Kingdom ("UK") construction industry. It is, in the words on one commentator, "...an accelerated and cost effective form of dispute resolution that, unlike other means of resolving disputes that involve a third party intermediary, results in an outcome that is a decision by a third party, which is binding on the parties in the dispute." [32] The adjudicator is an individual (as opposed to a panel), third party intermediary appointed to resolve a dispute between the parties. The decision of the adjudicator is binding and final, unless it is appealed to and later reviewed by either an arbitration panel or court, whichever is mandated by the Disputes clause of the contract. That is, the adjudicator's decision is "interim binding" or binding on the parties until the dispute is finally determined by legal proceedings at the end of the project, arbitration or by agreement. Adjudication is intended to be a condition precedent to either arbitration or litigation. Adjudication in the UK is mandated by Section 108 of the Housing Grants, Construction and Regeneration Act of 1996. As a result, the parties cannot waive the adjudication requirement by contract. Similar statutes have been adopted in Australia, Hong Kong, New Zealand, Singapore and South Africa. The standard set of contracts published by the International Federation of Consulting Engineers[33] (the FIDIC Rainbow Suite), used globally by the World Bank, includes Adjudication.

Adjudication has been described as a "pay first, argue later" statutory mechanism for resolving disputes in the construction industry and is intended to protect cash flow in construction.[34] Adjudication is a 28 day procedure (but may be extended by agreement of the parties). This has caused another commentator to refer to adjudication as "rough justice" with the comment, "Given the tight time constraints adjudication can sometimes be seen to be rough justice as the responding party may only have a matter of 2-3 weeks to prepare a defence to the claim brought against them."[35]

Adjudication is almost never used as an ADR form in the United States. However, it is included in this chapter because U.S. based contractors working internationally may find they have a contractual obligation to adjudicate disputes prior to proceeding to other dispute resolution procedures.

Mediation

Mediation is an entirely different form of ADR. Since the U.S. Government enacted the Administrative Dispute Resolution Act in 1990[36] which has been subsequently reenacted and amended twice, the first time in 1996 and the second in 1998, mediation has become a widely used form of ADR. One publication described mediation in the following manner, "Mediation is the private, confidential, and informal submittal of a dispute to a non-binding dispute resolution process."[37]

30. Robert M. Matyas et. al, Construction Dispute Review Board Manual, ibid.
31. Practices and Procedures: Dispute Review Boards, Dispute Resolution Boards, Dispute Adjudication Boards, The Dispute Resolution Board Foundation, ibid.
32. Marthinus Maritz, *Adjudication of Disputes in the Construction Industry*, Essays Innovate, No. 3, 2009.
33. *Federation Internationale De Ingenieurs-Conseils ("FIDIC").*
34. Adjudication: A Quick Guide, UK Practical Law Construction, www.practicallaw.com/8-31-7429.
35. Cleaver Fulton Rankin, The Benefits of Adjudication in the Construction Industry, April 2010.
36. 5 U.S.C. §571.
37. Harris, Allan E., Charles M. Sink, and Randall W. Wulff. ADR: A Practical Guide to Resolve Construction Disputes—Alternative Dispute Resolution in the Construction Field, Kendall/Hunt Publishing Company, Dubuque, Iowa, 1994.

Mediation is a form of facilitated negotiation into which a third party (the mediator) is inserted. It is a non-binding form of ADR where the parties to the dispute are in total control of the outcome. There are two variations of mediation. The most common form of mediation is the individual mediator. However, a mediation panel *may* be available at the request of the parties to the dispute.

Mediation has gained considerable and well deserved popularity in recent years as a form of ADR. In a typical mediation, the parties jointly select a mediator whose role it is to assist the parties in reaching a mutually satisfactory resolution of the dispute. As such, the mediator does *not* render a decision. Instead, the mediator assists the parties in assessing their respective risks and finding areas for compromise.

The parties are free to fashion their own mediation rules and in so doing, this action in and of itself actually represents the first of several agreements leading to the ultimate resolution of the dispute. The keys to successful mediation are joint commitment to "solving" a mutual problem as opposed to "beating" the opponent and a willingness to proceed in a non-adversarial mode with a genuine view toward reaching a compromise.

A typical mediation model involves some or all of the following steps:

- Advance exchange of written position papers, furnished also to the mediator;
- Formal presentations of each party's facts and arguments in a joint session, usually without cross-examination, but with an opportunity for questions by the mediator; and
- Caucus sessions in which the mediator meets privately with each party and shuttles between the parties attempting to find common ground, assisting in risk assessment and expediting the movement of the parties toward compromise.

The mediator moving between the parties tries to structure a settlement. Frequently, mediators offer an assessment of the positions asserted and sometimes, even offer mediator recommendations. The concept is that the mediator assists the parties in carving out their own resolution rather than rendering a decision.

The advantages of mediation are that it is inexpensive; requires a small investment of time; is non-binding; and is both private and confidential. (In fact, most mediation settlements contain a strict confidentiality clause or non-disclosure agreement concerning the outcome of the mediation.) Mediation is flexible, limited only by the willingness of the parties to compromise and the ingenuity of the mediator in discussing potential options for resolution. Generally, mediators focus on common interests. The disadvantage of mediation is that mediators are trained to "drive a deal" and, as a result, sometimes are less interested in facts or contract language than they are in completing a deal. The mediator's job is to push for resolution regardless of the issues. This may become a real disadvantage when the parties enter into mediation at the urging of a Court but are on "opposite sides of zero". That is, if the parties do *not* agree on claim entitlement but the mediator is still focusing on and pushing for settlement on cost/quantum, mediation can be a frustrating and fruitless exercise.

The AAA maintains a panel of qualified mediators, as do several private mediation services such as the Judicial Arbitration and Mediation Services ("JAMS") or JAMS-Endispute, for example. One key to a successful mediation is the selection of a mediator with both construction and litigation experience; the ability to correctly and persuasively discuss the strengths and weaknesses in each party's positions; and the ability to maintain the parties' confidence in their objectivity and advice.

Mediation is occasionally mandated by contract, including A1A A-201 (1997 Edition), but may be and is quite frequently entered into voluntarily by the parties after a dispute has been identified and routine negotiations have failed. It is most likely to be successful when each party recognizes some responsibility for the problem, when each is familiar with, and wishes to avoid, the high cost and time consuming nature of litigation and when there is a mutual desire to maintain an ongoing business relationship. By addressing the dispute as a joint business problem requiring compromise, the parties are frequently able to reach a mutually acceptable settlement and do so in a manner preserving future commercial dealings.

Med-Arb / Med-Then Arb / Arb-Med

Another ADR method is a hybrid proceeding, a combined form known as MedArb (mediation-arbitration). This form of ADR has been borrowed from labor relations where it has been used for some years. The process is initiated with mediation of the issues. To the extent that issues can be resolved by mediation, they are settled. Once the parties agree that the remaining issues cannot be resolved by mediation, those issues are automatically submitted to the arbitration process. By the terms of the original Med-Arb agreement the parties agree that mediator becomes the arbitrator of the unresolved issues.

There are two variants of this theme including:

- ***Med-ThenArb*** – This hybrid technique is identical to the above except that two *different* neutrals are employed. If the mediation fails then the second neutral is brought in as the arbitrator. The underlying concept is that since the second mediator did not participate in the first round of meetings, they will go into the arbitration phase in a strictly neutral manner.
- ***Arb-Med*** – This is an ADR form in which a neutral arbitrates the dispute, makes an award and then mediates the dispute while the arbitration award remains in a sealed envelope. If mediation fails, the arbitration decision is unsealed, presented to the parties and becomes binding. (A separate form of Arb-Med is discussed below.)

The advantage of this system is that the parties are committed to a continuum of dispute resolution *that will* result in full resolution of all issues, in one forum or another. Further, the mediator becomes fully knowledgeable of the issues in dispute before becoming the arbitrator. To that extent, it is perceived that this individual may be a more effective arbitrator.

The most frequently cited disadvantage of the Med-Arb system revolves around the role, power and neutrality of the mediator/arbitrator. To be an effective mediator, the mediator needs the complete confidence of the parties during mediation and must be able to obtain confidential disclosures from each side. Knowing that the mediator may become the arbitrator, however, the parties may withhold some information which, in turn, may inhibit the chances of a successful mediation. On the other hand, if the mediator gains a substantial amount of confidential knowledge from the parties, this may make it difficult to be a neutral arbitrator.

Shadow Mediation – Arb-Med

This form of ADR is a hybrid of the arbitration process. In the Arb-Med process a mediator is retained to sit through the arbitration hearings as an observer. At any time during the arbitration if either of the parties wants to mediate a specific issue and the other party agrees, the arbitration proceeding is temporarily suspended and the Shadow Mediator, who is familiar with the case (having attended all arbitration proceedings), assists with mediation of the issue. The Shadow Mediator is also free to suggest possible avenues of settlement of issues to the parties during the arbitration proceedings. If the mediation is successful, the issue is resolved and removed from the arbitration proceeding. If it is unsuccessful, the issue is returned to the arbitration forum for a determination. Thus, there are two processes running concurrently, with separate neutrals. If total agreement can be reached through mediation the arbitration panel may be dismissed.

The apparent advantage to this system is that it allows parties to remove selected issues from the arbitration process as the situation becomes clarified during arbitration and allows them to carve out their own settlement, at least of some issues. As the size and scope of the disputed issues are reduced the likelihood of resolving the entire dispute rises. The principal disadvantage of this form of ADR is one of cost. This ADR form employs two neutrals at all times thus increasing the cost of ADR.

Minitrial

A Minitrial is a voluntary, confidential and non-binding procedure. "The 'Minitrial' is not really a trial at all. Rather, it is a structured settlement process in which each side presents a highly abbreviated summary of its case to senior officials of each party who are authorized to settle the case."[38] Minitrial agreements frequently limit these presentations to a half-day or a single day for each side. The Minitrial concept requires that top management representatives (with authority to settle) participate in the proceeding. The Minitrial is typically presided over by a jointly selected neutral who advises the parties, after the presentations are completed, concerning the apparent strengths and weaknesses of each case. The neutral then assists the top management representatives to negotiate a settlement at this point, somewhat like a mediator. The concept is to require top level management to sit through and listen carefully to both their own best case as well as that of the other side, and then reach a management decision that is based upon a realistic appraisal of both positions.

38. Eldon H. Crowell and Charles Pou Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution*, Maryland Law Review, Vol. 49, Issue 1, October 15, 2012.

The procedure is designed to put the decision makers in the position of judges concerning the dispute rather than combatants with vested personal interests. As with all forms of ADR, the parties to the Minitrial are free to fashion their own rules and variations on the basic format. As with conventional mediation, the parties remain in control of the situation and have not surrendered decision making to a third party.

The advantages of this system are the relatively low cost (compared to litigation or arbitration) and the fact that each party gets to present their entire case as if in court or in arbitration. Additionally the neutral advises and assists top management of both parties in finding ways to resolve the dispute rather than rendering a decision. Non-binding results, privacy, party participation and control over the process are also considered advantages of this ADR form.

The biggest disadvantage of the Minitrial system arises if the top management personnel were personally involved in the issues in dispute. This may render them unsuitable as panel members. Other disadvantages arise if the issues in dispute involve legal matters or matters of credibility as management personnel may *not* be trained to or capable of handling such issues. Finally, this system may *not* be cost effective if the amount in dispute is *not* very high.

A variation of the Minitrial, discussed above, is to empanel a mock jury in the Minitrial process to assist the neutral and top management participants in understanding how a potential jury might react to the arguments presented and positions asserted.

Summary Jury Trial

A Summary Jury Trial is similar to the Minitrial in many respects. The concept is that the attorneys for both parties are each given two to four hours to summarize their case before a "rented" jury of six or more people. Introduction of evidence is obviously limited due to the time limitation, and witnesses and experts are *not* allowed to participate in the proceeding. As a result, legal counsel for each side is essentially limited to their opening arguments.

The neutral advisor may be either a sitting judge from a local Court or may be a retired judge familiar with construction issues, retained to preside over the Summary Jury Trial. After the case summaries have been presented, the judge provides a short explanation of the law concerning the issues in dispute and the jury then retires to the jury room. The jury tries to reach a consensus opinion on the case. Failing that, individual juror views are presented anonymously. Generally, Summary Jury Trial verdicts are advisory and non-binding (but may be binding, if made so by agreement of the parties). The concept is for the parties to gain an understanding of how a potential jury will react to the case in the event the dispute goes to trial.

The advantages of the system are that the cost is relatively low compared to actual litigation and the time needed to present the case is minimal. Another significant advantage is that when each of the parties has to summarize their case into a precise two to four hour presentation, both sides are forced to focus on real issues and forego legal theatrics. The single most commonly cited disadvantage is that the jury has to form an opinion based solely on a very short presentation from each side, a timeframe that is short in the extreme, given the complexity of the typical construction case.

Private Judge

In some construction disputes, there are issues of law that must be decided in order to reach resolution of the dispute. Generally, issues of law ought to be decided by judges as they are skilled and experienced in deciding legal issues. But litigation need *not* result. One form of ADR that allows input from judges but avoids the need for litigation is the Private Judge concept. The concept is to retain the services of a retired judge who is experienced with construction litigation. The private judge will typically conduct the process in a formal manner resembling the litigation process, but without the need to await an available courtroom and time on the Court's docket. The private judge will generally render decisions which may be either advisory or determinative of the issue, depending upon the terms of the agreement between the parties.

The advantages of this form of ADR are that retired judges practicing this type of ADR are most often skilled in managing complex construction cases and making decisions. The cost of this form of ADR is typically lower than many other forms and certainly a great deal less than litigation, generally being split between the two parties to the dispute. Finally, the speed with which a hearing can be established and held is considerably faster than litigation. The primary disadvantage cited by most is that the underlying process remains the same regardless of the fact that the trier of fact is a retired judge. That is, if a private judge is used in a trial, in arbitration, or in mediation, due to their background and experience, any process overseen by a private judge will likely to be run like a formal trial.

Arbitration

Arbitration in construction is not new, having arisen in the 1880's under the earliest forms of the AIA contract document.[39] Arbitration is a consensual process based upon agreement between the parties. Arbitration panels are generally three person panels selected by agreement of the parties either on their own or through the auspices of an organization such as the AAA. Arbitration is always focused on a single project and generally concerned only with those disputed issues *not* resolved between the parties at the site level.

Originally, arbitration was considered to be faster and less expensive than litigation. It was also generally considered to be an informal process, dispensing with the rules of evidence, prehearing motions, and most of the discovery process – all of which are inherent to litigation. Thus, it was potentially flexible to fit the circumstances of the project. Once the determination of the panel is issued upon completion of the hearing, the arbitration award is typically enforceable in a court of competent jurisdiction.

Because of the high cost of formal dispute resolution through litigation in State and Federal Courts, arbitration remained a popular form of ADR in nonfederal construction contracts for several decades. The AAA has promulgated a special set of arbitration procedural rules and maintains a nationwide panel of potential arbitrators. In response to criticism that arbitration of construction disputes has not always proven to be as quick and economical as originally intended, the AAA revamped their rules in 1995 to allow for expedited hearings on small disputes, special rules and special panels for complex claims, etc.[40] and again in 2009[41]. Three "tracks" of procedures based on the size of the claim are now available: the regular track (dealing with disputes in the range of $75,000 to $1,000,000); the fast track (pertaining to disputes less than $75,000); and the large, complex track (applicable to claims of at least $1,000,000).

The fast track system is intended to resolve smaller claims within 60 days and includes accelerated procedures for appointing arbitrators and holding preliminary conferences. New claims and counterclaims are not permitted, discovery is virtually eliminated and claims of less than $10,000 are resolved without a hearing through the arbitrators' review of documents. Hearings of one day are permitted for claims exceeding $10,000 and awards must be issued within fourteen days after the completion of the hearing. Fast track arbitrators are compensated on a per case rate and nonrefundable filing fees range from $775 to $975 for the initial filing fee and $200 to $300 for the final fee.[42]

Under the current regular track system for midsize claims (defined as claims between $75,000 and $1,000,000), arbitrators are given expanded authority to manage the arbitration process in order to expedite resolution of the dispute. Arbitrators have the authority to direct the discovery process, permit new claims and counterclaims, hold preliminary conferences, consider preliminary motions and rulings, and request or reject certain offers of proof. In addition to monetary awards, arbitrators have the authority to grant equitable relief such as specific performance, reformation or recission and they have limited authority to make modifications where an award contains technical or clerical errors. Initial filing fees for regular track cases range from $1,850 to $6,200 with a final fee ranging from $750 to $2500.

The large, complex track system is mandatory for claims in excess of $1 million and allows the parties the option to choose either one or three arbitrators. Where the parties agree to conduct a preliminary hearing, the rules set forth a detailed list of issues to be considered: including statements of claims and issues; stipulations as to uncontested facts; the extent of discovery and document exchange; witness identification; hearing schedules; stenographic recording of the proceedings; and the use of other dispute resolution techniques. The complex track rules permit the arbitrators to limit the discovery process and generally control the proceedings in order to expedite a speedy resolution of the dispute, and in certain circumstances, to award attorney's fees as part of the award. The non-refundable initial filing fee for complex track cases (up to $10 million), range from $8,200 to $12,800 with a final fee ranging from $3,250 to $4,000. For claims exceeding $10 million the initial filing fee is $12,800 plus 0.01 percent of the amount above $10 million with the fee capped at $65,000 and the final fee of $6,000.

The AAA is also in the process of revising rules under all three tracks relating to the qualifications of arbitrators. Planned changes include requirements that potential arbitrators have a minimum of 10 years' experience, be approved by regional construction advisory committees and undergo mandatory training for initial qualification and retraining every three years.

The most commonly cited advantage of arbitration over formal litigation is the use of arbitrators with knowledge of the construction industry. Additionally, since arbitration proceedings are devoted to a single case, it has been commonly thought of as being quicker than litigation in that arbitration hearings do *not* have to compete for courtroom space and the Court's attention to other ongoing matters. Both the hearings and the decision

39. See American Institute of Architects, Uniform Contract, Articles II and V, 1888 and Form 19642-PL, Uniform Contract, Article XIII, 1905.
40. American Arbitration Association, Construction ADR Task Force Report, New York, October 26, 1995.
41. Construction Arbitration Rules and Mediation Procedures – Rules Amended and Effective October 1, 2009, American Arbitration Association, New York.
42. All filing fees cited in this chapter are from the Fee Schedule Amended and Effective June 1, 2010, Construction Arbitration Rules & Mediation Procedures, American Arbitration Association, New York, October 1, 2009.

are private matters, thus there is little publicity concerning the proceedings or the outcome. Arbitration panels are also allowed to grant any remedy or relief that is equitable. Further, the decision of the arbitration panel is most often final and conclusive of the matter. The key distinction between arbitration and mediation is that the arbitrators make a decision and issue an award concerning the dispute that has the same force and effect as a judgment entered by a court.

Arbitration is not without its potential disadvantages. Arbitration panels may or may not explain the basis of their decisions unless the arbitration rules require it. Thus, the parties may have little understanding of why a decision is reached. The ability of the losing party to appeal a decision is severely restricted. Since the arbitration decision is almost always final and conclusive, and enforceable at law, the expense of preparing for arbitration is almost the same as preparing for litigation. As some have commented, "Arbitration is the only real crapshoot in construction disputes – everything else can be appealed!"

Over the past two decades arbitration has become much more formal and legalistic, frequently allowing as much pre-trial discovery as any court case. It is not uncommon today that the most cost intensive aspects of litigation – extensive document discovery and production, multiple depositions, unlimited motions practice – are now routine aspects of many, if not most, arbitration proceedings. Some practitioners complain that arbitration panels frequently do a poor job of limiting discovery and controlling the associated costs of the process. Many involved in the arbitration process hold to the notion that arbitrators tend to issue "compromise" awards ("split the baby" is a phrase heard bandied about frequently with respect to arbitration). As a result, some parties have used Baseball Arbitration, an ADR form in which the arbitrator is required to issue a "winner take all" award selecting the entire claim position of one party or the other (discussed further below).

As a result, there is general agreement in the construction industry today that arbitration is no longer faster or less expensive than litigation. In one major study of issues related to arbitration, 65% percent of in-house legal counsel respondents concluded that arbitration is more expensive than litigation and another 23 percent opined that arbitration costs about the same at litigation. Only 13 percent of the survey respondents thought arbitration less expensive than litigation.[43] Another study concerning arbitration concluded that the "average arbitration" took from 17 to 20 months. It is believed, however, that this timeframe only included the period from the start of the hearings to the issuance of the award and made no attempt to estimate the duration of the discovery and other pre-hearing time.[44] Finally, a third study of the effectiveness of arbitration concluded that 12 percent of the respondents blamed delays to the arbitration process on arbitration panels being "overly flexible" or a "failure to control the process"; another 11 percent claimed that the "arbitrators caused delays"; and another 8 percent blamed the delay on "tardiness in rendering the award".[45]

One alternative related to arbitration, intended to save both time and cost, is the use of a Single Arbitrator rather than a three person panel. The arbitrator must, therefore, act solely as a neutral. The cited advantage is that the cost of arbitration is substantially decreased and it is easier to schedule hearings since the parties only have to coordinate their schedules with a single arbitrator.

The disadvantages discussed above remain fundamentally the same. There is, however, an added disadvantage. If one arbitrator on a three person panel becomes confused or sidetracked on a particular issue, it is likely that one or the other two arbitrators can straighten the situation out. With a single arbitrator, there is no built in check and balance system, dramatically increasing the risk of a bad decision due to confusion or inexperience with a particular issue.

The AAA continues to address the most frequent criticisms of the system. On October 1, 2013 the AAA made a number of changes to their rules. Four of the major changes are highlighted below:

- Mandatory mediation has been added to the arbitration rules. The new rule requires that all cases with claims in excess of $75,000 conduct mediation at some point during the arbitration process. It is noted, however, that this rule does allow one or both parties to unilaterally opt out of the mediation. The AAA believes that incorporation of mediation into the arbitration process may help resolve disputes earlier and at less cost.

43. *International Arbitration: Corporate Attitudes and Practices*, Queen Mary University of London School of International Arbitration and PriceWaterhouse Coopers, London, 2006.
44. Frederick Gillion, *Trends in ICC Arbitration: Construction and Engineering Disputes*, http://construction.practicallaw.com, July 30, 2012.
45. *2010 International Arbitration Survey: Choices in International Arbitration*, Queen Mary University of London School of International Arbitration and White & Case, London, 2010.

- Under these new rules, arbitrators have been granted more authority to manage the process. The additional authority includes: (a) holding a preliminary hearing soon after appointment of the tribunal and providing a checklist of discussion points at this initial hearing; (b) providing arbitrators the ability to control the scope of discovery; (c) allowing the tribunal allocate the cost of document production between the parties; and (d) providing the tribunal with the authority to order sanctions for abusive or objectionable behavior.
- The new rules specifically grant the tribunal the authority to issue rulings on dispositive motions if the moving party can make a showing that the motion is likely to succeed and the motion, if granted, will dispose of or narrow the issues in the case. The AAA believes this will help eliminate claims with no merit and reveal factual information concerning the remaining claims.
- The new rules also provide for "emergency relief". A party may seek emergency relief prior to the appointment of the tribunal by notifying the AAA and other party of the type of relief sought and reasons why the relief is required on an emergency basis. The AAA will then appoint a single, emergency arbitrator within one business day. The emergency arbitrator must them establish a schedule to consider the relief sought within two working days.

Advisory Arbitration / Fact Finding

The general discussion of arbitration above remains the same for this form of ADR with the exception of the fact that the determination of the panel is *not* final. It is advisory only. The AAA refers to this process as Fact Finding that involves utilization of a neutral, impartial third party, to review the disputed issue and issues findings or conclusions with or without a recommended settlement.[46] The advantages set forth above also remain the same except, again, the decision is not final.

The disadvantages change due to the fact that the decision is advisory. The apparent disadvantage is that one can go through the entire arbitration process, receive an advisory opinion and have the losing party refuse to accept the opinion.

Baseball Arbitration

This is a unique form of arbitration borrowed directly from the professional sports world. In this form of ADR a single, neutral arbitrator is retained. Both parties present their strongest case, along with the proposed monetary outcome that they believe is supported by the facts and the law. The arbitrator must then choose one of the two outcomes proposed by the parties. The arbitrator *cannot* carve out an equitable determination but is required to select one position or the other. The intended advantage is that the parties are likely to be more realistic in their demands as they understand that the arbitrator is required to select one position or the other and the parties will be bound by that selection.

The disadvantage lays in the fact that arbitrator can only select one position or the other. Thus, the arbitrator is unable to carve out a compromise position. Compromise in this form of ADR, to the extent that it exists at all, lies with the two parties keeping their own positions as reasonable as possible.

ALTERNATIVE DISPUTE RESOLUTION BEFORE THE BOARDS OF CONTRACT APPEALS AND THE U.S. COURT OF FEDERAL CLAIMS

If the contractor is performing work under a direct Federal contract subject to the Contract Disputes Act ("CDA")[47] then its choices are limited once a contracting officer denies a claim. The contractor may appeal such a denial either to the Armed Services Board of Contract Appeals ("ASBCA") or the Civilian Board of Contract Appeals ("CBCA") – depending upon which government agency issued the contract – or to the U.S. Court of Federal Claims ("CFC"). Given the current state of ADR both the Boards of Contract Appeals and the CFC now support and participate in ADR activities. ADR in both forums is strictly voluntary and is employed *only if* both the contractor and the government agree to use ADR.

The Boards of Contract Appeals actively participate in ADR, going so far as to have Board judges directly engage in the ADR procedure. The ASBCA supports the use of settlement judges, minitrials and summary trials with binding decisions; whereas the CBCA rules allow for facilitative mediation, evaluative mediation, minitrials, non-binding advisory opinions and summary binding decisions.[48]

The CFC is not as directly engaged in ADR as the Boards. However, when the parties advise the judge of their decision to use ADR, the CFC judge may arrange for a settlement judge or refer the case to a third party neutral. The Rules of the Court of Federal Claims clearly support the use of mediation, minitrials, early neutral evaluation and non-binding arbitration.

Finally, both the CFC and the Boards have procedures in place to shield the information gathered in the ADR process from the trial judge should ADR fail and the case return to litigation.[49]

46. Ibid, *The Construction Industry's Guide to Dispute Avoidance and Resolution*.
47. PL 113-108, 41 U.S.C. Chapter 71.
48. See Rules of the Armed Services Board of Contract Appeals (May 11, 2011), *Notice Regarding Alternative Methods of Dispute Resolution* (September 20, 2013) and Rules of Procedure of the U.S. Board of Contract Appeals (August 17, 2011), *Types of Alternative Dispute Resolution* (December 28, 2012).
49. See Rules of the United States Court of Federal Claims (August 30, 2013), *Appendix H, Procedure for Alternative Dispute Resolution.*

ALTERNATIVES DURING LITIGATION

Despite the best effort of one or both of the parties, some issues may not reach resolution through ADR and must be resolved through litigation. Contrary to popular belief ADR does *not* necessarily stop when litigation commences. There are a number of forms of ADR available for use during litigation as outlined below.

Voluntary Settlement Conference

A Voluntary Settlement Conference is probably the quickest and least expensive means of resolving a case when both sides agree that it is to their advantage to compromise but want to do so in the context of a legal forum, rather than direct negotiations. In this form of ADR both sides meet to attempt to reach a settlement with a sitting judge or magistrate acting as a neutral negotiation facilitator. The negotiation and the settlement take place under the guidance of a judge. The judge is able to offer suggestions for settlement as well as opinions on various legal issues that may arise during such discussions.

The advantages often cited for this form of ADR include the ability to schedule the Voluntary Settlement Conference with a judge of the parties' choice and the quickness of scheduling and holding the conference(s). Also cited as an advantage is the fact that discovery need *not* be complete in order to hold the settlement conference. Although there are relatively few identifiable disadvantages to this form of ADR, some practitioners have expressed concern about the ability to have an open and candid settlement dialogue in the presence of a magistrate or judge who may, whether properly or improperly, communicate with the trial judge about the statements and offers made during the settlement conference.

Special Master / Settlement Judge

The Special Master form of ADR (sometimes also referred to as a Settlement Judge) has been called "ADR's last clear chance before trial".[50] The concept of a Special Master is for the court to appoint someone with authority and availability to control the discovery process (such as deciding objections to deposition questions, document disputes and claims of privilege); to rule on pretrial matters in lieu of a judge; and to facilitate settlement discussions. Special Masters may be requested by either or both parties or may be imposed unilaterally by a Court. Payment of the cost of the Special Master is typically split between the disputants. By putting the litigation into a controlled framework the Special Master is often able to help the parties reach a settlement prior to the trial.

The advantage of the Special Master system is that it can save a great deal of time and cost during the pretrial period with respect to needless discovery battles and help facilitate settlement discussions. The perceived disadvantages of this system are that a Court may grant too much authority to the Special Master (for example, Summary Judgment Motions). Some also fear the possibility of private discussions between the Special Master and the trial judge concerning the details of settlement negotiations or positions asserted by the parties.

Court Appointed Experts

If the parties agree that certain issues in dispute require expert testimony and can agree to share the cost of such experts, then Court rules in most jurisdictions allow appointment of the experts by the Court. Typically, once agreement on which issues need expert testimony has been reached, each side nominates two or three experts to the judge and the judge selects one expert per issue. The expert then works for the Court and is charged with the task of providing neutral, expert witness reports and testimony.

The advantage is, in the first instance, a substantially lower cost for both parties. The other apparent advantage to this system is the fact that time is saved during litigation as well as the parties avoid conflicting expert reports and testimony that have to be sorted out by judges and juries. The only apparent disadvantage is that if the wrong expert is selected by the judge, then the expert's reports and testimony may be given far greater weight than it deserves. Thus, the parties and the judge must be very cautious in whom they nominate and select.

Judge Pro Tem

A Judge Pro Tem (or temporary judge) is authorized in a number of jurisdictions. The concept is for the parties to stipulate to the Court that they will accept appointment of a temporary judge, who is normally named by the parties in the stipulation. The Court then appoints the temporary judge, who must be an attorney and who becomes the trial judge for the case. The temporary judge has all the powers of a sitting judge and runs the case in the same manner and fashion as any other litigation. The temporary judge simply acts in lieu of a permanent judge with all other aspects of litigation remaining the same. Finally, the Judge Pro Tem maintains jurisdiction over the case until a final determination is reached and can hear and determine all post trial motions.

50. Alan E. Harris, C.M. Sink and R.W. Wulff, Editors, ADR: A Practical Guide to Resolve Construction disputes – Alternative Dispute Resolution in the Construction field, American Arbitration Association, Kendall/Hunt Publishing Company, Dubuque, Iowa, 1994.

The advantage is that a case goes to trial much faster through use of a Judge Pro Tem since the only case on the judge's docket is the case between the parties. The disadvantage, at least in some jurisdictions, is that by stipulating to accept a Judge Pro Tem, the parties have given up their rights to a jury trial.

Trial By Reference (Referee)

Trial by Reference before a Referee, who need *not* be a judge or attorney, has long been accepted in both common law and statute. A Referee is a neutral appointed by the Court, at the request of the parties. The Court order appointing the Referee sets forth the Referee's authority. Unless otherwise specified in an agreement between the parties, the Referee will conduct themselves in accordance with formal rules of procedure. There are two commonly accepted forms of trial by reference as follows.

- ***General Reference –*** Under this form of ADR the Referee submits findings of fact and conclusions of law to the Court. The Referee's report is binding on the Court and the Court issues judgment based upon the report.
- ***Special Reference –*** In this form of ADR, the Referee's authority is limited to particular issues as outlined in the Order of Reference. More significantly, the Referee's report contains findings and recommendations, which are made to the Court in an advisory fashion. The Court, however, is free to issue its own judgment.

In both cases, the cost of the Referee is typically allocated between the parties. The advantages of such a system are speed of trial, ease of scheduling the hearings, and privacy of the proceedings. Others cite the ability of the parties to select a Referee who has expertise in the types of issues in dispute, the flexibility of procedures, and the ability to appeal decisions or recommendations. The disadvantage most commonly cited concerning trial by reference is that the parties have to pay their own costs of trial preparation and pay the costs of the Referee. Further, the Referee's decision lacks finality as it can be appealed.

ALTERNATIVE DISPUTE RESOLUTION ACT AND THE FEDERAL ADR EXPERIENCE

Federal agencies have embraced mediation and other ADR techniques in recent years with very positive results. The Administrative Dispute Resolution Act of 1996 ("ADRA")[51] encourages voluntary use of ADR techniques in Federal contract disputes. The Federal Acquisition Regulations ("FAR") now contain implementing regulations encouraging agencies to use ADR to the "maximum extent practicable."[52] The ASBCA and CBCA have adopted rules permitting and facilitating ADR procedures prior to formal administrative proceedings.

ADR is being used with increasing frequency and success as a method of resolving disputes with the Federal government. In an October 1996 survey conducted by Judge Martin J. Harty of the ASBCA[53], the Boards collectively received ADR requests covering 169 appeals in Fiscal Year 1996. Binding ADR (Summary Trials) and nonbinding ADR (Settlement Judges and Mini Trials) have been the methods typically used. The ASBCA's experience with the 42 ADR requests it received is that nine out of ten ADR proceedings result in an agreement that resolves the dispute.[54]

This report identified that cases particularly suitable for ADR are the following:

- Small dollar cases, particularly where litigation costs would seriously erode any award;
- Non-complex cases with relatively clear cut factual or legal issues;
- Cases where only quantum is in dispute; and/or
- Large, factually complex claims where both parties recognize some liability.[55]

51. P.L. 104-320, 110 Stats. 3870 (October 19, 1996).
52. FAR §33.204.
53. Federal Contract Reports, Vol. 66, November 15, 1996, 525-530.
54. Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending September 30, 1996.
55. Ibid. See Note 16, p. 527.

FORMAL ADMINISTRATIVE AND JUDICIAL DISPUTE RESOLUTION

The least desirable method of dispute resolution is generally litigation or administrative proceedings on Federal (and some State) contracts. It is the time consuming nature, the attendant expenses and the adversarial nature of these approaches that have fostered the tremendous support in recent years for the ADR techniques discussed above.

Federal Contracts

The initial steps of pursuing a claim into formal dispute resolution on Federal construction contracts are outlined in the CDA and the Rules of the ASBCA or the CDCA. The strict certification rules, unforgiving time limits and procedural technicalities involved in appealing a contracting officer's final decision on a claim require extremely careful attention by the contractor. A detailed examination of such legal matters is beyond the scope of this research perspective and contractors proceeding with claims beyond the contracting officer's level are well advised to seek competent legal advice from qualified attorneys.

A few of the major pitfalls and a general outline of the process are as follows:

- Contractors who chose to appeal an adverse decision to a Board of Contract Appeals must do so within 90 days of receipt of the contracting officer's final determination or lose their right of appeal to a Board. Contractors who opt to appeal to the Court of Federal Claims must do so within one year of receipt of the final decision. Neither the Boards nor the court of Federal Claims have the authority to waive these filing deadlines.
- The failure to certify a claim in excess of $100,000 to the contracting officer will result in a dismissal of an appeal. Mere errors in the required certification language can be corrected without penalty prior to the issuance of a final judgment by a Board or Court. Further, the contracting officer is required to advise the contractor of any alleged defects in certification within 60 days of receipt of the claim.

  These time limits are strictly enforced and contractors must not wait until the eleventh hour to take the necessary steps. Appeals to the Boards are commenced by filing a short notice of appeal with the appropriate Board, with a copy furnished to the contracting officer. Proceedings at the U.S. Court of Federal Claims begin more formally with the filing of a detailed complaint.

Several Federal statutes, including the Contract Disputes Act and the False Claims Act, impose a variety of penalties on contractors submitting groundless or fraudulent claims.[56] Penalties include fines, imprisonment, claim forfeiture, contract forfeiture and reimbursement of the government's costs of investigation.[57] Accordingly, contractors are strongly advised to avoid making any false representations concerning claims and to carefully examine all claims for accuracy and adequate support.

Private Contracts and State and Local Public Contracts

Absent contract provisions or a subsequent agreement to proceed with some form of ADR, resolution of disputes on private and public contracts at the State or local level will frequently require litigation before State or Federal Courts. As with Federal contract formal dispute resolution, these proceedings involve compliance with various statutes and rules requiring advice of counsel.

States also impose statutes of limitations for lawsuits involving written contracts. Under these legislated limitation requirements, lawsuits must be filed within a specified timeframe – which varies from State to State – after the "cause of action accrues." This is generally, but not always, marked from the date the contractor knew or should have known of the basis for the claim.

Mechanics' Liens

On private contracts, contractors typically have an alternative or parallel remedy in the form of mechanics' liens filed and perfected in strict accordance with the State's statutory scheme for such liens. In some States it is necessary to file a notice of lien before the work is commenced. Further, under most State mechanics' lien statutes, the time periods for filing and perfecting such liens are extremely short and are strictly enforced. Again, the assistance of an attorney and at least a general familiarity with the lien laws in the State where the construction contract is being performed is critical.

56. E.g., 18 U.S.C. §287, 18 U.S.C. §1001 and 41 U.S.C. §604.

57. See, for example, *Daewoo Engineering and Construction Co., Ltd. v. United States*, 73 Fed. Cl. 547 (2006) where the contractor filed an appeal to the U.S. Court of Federal Claims in the amount of $63.9 million on an $88.6 million contract. After a 13 week trial Daewoo ended up owing the government $50,629,856 plus False Claims Act costs of $10,000 for each violation which was still subject to accounting at the time the Court issued the initial decision.

CONCLUSION

Construction claims – requests for additional time and money – are common and virtually unavoidable on most projects unless everything on the project proceeds exactly as planned from the outset. However, the Navigant Construction Forum™ and Brownstein Hyatt Farber Schreck firmly believe that with a focus on claims resolution and timely use of ADR it is entirely possible to complete projects without any formal legal disputes (i.e., litigation). That is, while construction claims are inevitable and unavoidable, formal legal disputes are not!

Disputes that cannot be resolved at the project level often result in a tremendous amount of ongoing, nonproductive downtime for all parties to the contract. Pursuing or defending claims and disputes is costly, time consuming, detrimental to project relationships and generally adds no value to the constructed project. ADR procedures, on the other hand, provide viable alternatives to costly litigation and help projects get back on track quickly and productively. As noted at the outset of this research perspective, the construction industry is at the forefront of finding ways to resolve disputes without resorting to litigation. While nearly thirty forms of ADR (and a number of variations) have been identified in this report, the authors are confident other forms of ADR exist. Further, it has become clear that the forms of ADR are truly only limited by the skill, imagination and desire to settle disputes on the part of the parties to the dispute.

The Navigant Construction Forum™ and Brownstein Hyatt Farber Schreck believe that the proper implementation of some of the ADR set forth in this research perspective during the construction and claims management phases of a project will help avoid legal disputes at the end of a project.

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Brownstein Hyatt & Farber was founded in 1968. With a steadfast commitment to legal excellence, client service and the community, the firm quickly grew into one of the most widely recognized law and policy firms in the Western U.S. Forty years and two mergers later, and dedicated to the same values the firm was founded upon, Brownstein Hyatt Farber Schreck now boasts one of the region's largest real estate practices, as well as national corporate, natural resources and litigation practices.

The firm has 250 attorneys and policy consultants in offices across the Western U.S. and in Washington, DC. Brownstein Hyatt Farber Schreck practices in the areas of corporate and business law, government relations and public policy, litigation, natural resources law, real estate law and gaming law. Within these concentrations, the firm works in real estate development, hospitality, private equity, telecommunications, technology, manufacturing, construction, energy, water, banking and finance, as well as many other industries and practice areas. The firm represents local, national and international clients in legal and lobbying matters across a wide array of industries including real estate, hospitality, private equity, telecommunications, technology, construction, energy, banking, finance, gaming and water.

NAVIGANT CONSTRUCTION FORUM™

Navigant (NYSE: NCI) established the Navigant Construction Forum™ in September 2010. The mission of the Navigant Construction Forum™ is to be the industry's resource for thought leadership and best practices on avoidance and resolution of construction project disputes globally. Building on lessons learned in global construction dispute avoidance and resolution, the Navigant Construction Forum™ issues papers and research perspectives; publishes a quarterly e-journal (*Insight from Hindsight*); makes presentations globally; and offers in-house seminars on the most critical issues related to avoidance, mitigation and resolution of construction disputes.

Navigant is a specialized, global expert services firm dedicated to assisting clients in creating and protecting value in the face of critical business risks and opportunities. Through senior level engagement with clients, Navigant professionals combine technical expertise in Disputes and Investigations, Economics, Financial Advisory and Management Consulting, with business pragmatism in the highly regulated Construction, Energy, Financial Services and Healthcare industries to support clients in addressing their most critical business needs.

Navigant is the leading provider of expert services in the construction and engineering industries. Navigant's senior professionals have testified in U.S. Federal and State courts, more than a dozen international arbitration forums including the AAA, DIAC, ICC, SIAC, ICISD, CENAPI, LCIA and PCA, as well as ad hoc tribunals operating under UNCITRAL rules. Through lessons learned from Navigant's forensic cost/quantum and programme/schedule analysis on more than 5,000 projects located in 95 countries around the world, Navigant's construction experts work with owners, contractors, design professionals, providers of capital and legal counsel to proactively manage large capital investments through advisory services and manage the risks associated with the resolution of claims or disputes on those projects, with an emphasis on the infrastructure, healthcare and energy industries.

FUTURE EFFORTS OF THE NAVIGANT CONSTRUCTION FORUM™

In the third quarter of 2014, the Navigant Construction Forum™ will issue another research perspective analyzing construction industry issues.

Further research will continue to be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this research perspective have ideas on further construction dispute related research that would be helpful to the industry, you are invited to e-mail suggestions to jim.zack@navigant.com.