Case Study #12

US Army Corps of Engineers

Alternative Dispute Resolution Series

FORT DRUM DISPUTES REVIEW P[illegible]L

February 1994

IWR Case Study 94-ADR-CS-12

The Corps Commitment to
Alternative Dispute Resolution (ADR)

This case study is one in a series of publications describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. These case studies are a means of providing Corps managers with up-to-date information on the latest ADR processes, and the information here is designed to encourage innovation by Corps managers in the use of ADR techniques.

The ADR Program is carried out under the auspices of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel, and Frank Carr, Chief Trial Attorney. The program is under the guidance of the U.S. Army Corps of Engineers' Institute for Water Resources (IWR), Alexandria VA. C. Mark Dunning, Ph.D., Chief, Program and Analysis Division of IWR supervised the ADR program during the development of this study, assisted by Trudie Wetherall, ADR Program Manager. Jerome Delli Priscoli, Ph.D., Senior Policy Analyst of IWR is currently supervising the program. James L. Creighton, Ph.D., Creighton & Creighton, Inc., serves as Principal Investigator of the contract under which this study has been produced.

Other ADR case studies, pamphlets, and working papers available are listed at the end of this report.

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TABLE OF CONTENTS

SUMMARY

From May 1 until September 20, 1990, the U.S. Army Corps of Engineers, New York District, and Black River Constructors, a joint venture of Morrison-Knudsen Company, Inc., Martin K. Eby Construction Company, Inc., and Huber, Hunt and Nichols, Inc. (collectively, "BRC"), used a non-binding neutral panel of experts, called a Disputes Review Panel (the "Panel,") to help resolve claims arising under a contract of more than $530 million for the construction of an expanded Army base at Fort Drum, near Watertown, New York. The Panel heard presentations and issued non-binding written recommendations on the merits (but not the dollar value) of 37 claims. The Panel's opinions on these claims were used as a basis for the parties to negotiate directly, without the assistance of the Panel or any other third party, and resolve these and 79 other claims. The total settlement was for $41.7 million paid by the government to the contractor.

This was the first time the Corps had used Alternative Dispute Resolution to help settle multiple claims of this magnitude.

The Panel consisted of Professor Frederick J. Lees, a professor at George Washington University Law School and a former administrative law judge for NASA, who served as chairman; Mason C. Brown, former executive of a major contracting firm in Dallas, Texas; and Thomas A. Sands, retired Major General of the Corps and former Division Engineer in the North Atlantic Division and Lower Mississippi Valley Division. Colonel Thomas Reth, Deputy District Engineer for the New York District, and Mr. Richard Tucker, project manager for BRC, were designated to represent the two parties in reviewing the Panel's findings and attempting to reach a settlement. BRC used a number of attorneys, with Stanfield Johnson of Crowell & Mooring in Washington, D.C. serving as lead counsel. The Corps cases were presented by a number of Corps staff attorneys and engineers.

This study highlights the successful use of ADR to help resolve a large number of claims relating to one major construction project near the end of the construction period.

THE PROJECT AND CLAIMS

Background and Chronology of the Claims

As part of the Fort Drum Expansion Program, the U.S. Army Corps of Engineers contracted with BRC to perform a major phase of construction at the base. Earlier phases had involved renovation of certain existing structures, the construction of off-base residences, and road and other infrastructure. The contract that is the subject of this study (DACA 51-87-C-0125) was executed on April 22, 1987, for $517,253,065 (later enlarged to just over $530 million). It called for BRC to build 80 major buildings and 65 smaller ones, consisting of residential, training, maintenance, recreational, medical, religious and other support structures for six brigade-size units. Plans, specifications and other design documents were produced by architectural and engineering firms under separate contracts with the Corps. There were 8,910 drawings in the bid package, and 5,370 in the contract. There were 97 subcontracts under BRC, totaling $408 million. At the peak of project activity, over $1 million a day of work was being performed. The completion date, as extended by agreement, was February 1991.

Prior to the commencement of the ADR process, 336 contract modifications, most based on Requests for Information or Requests for Adjustments by BRC, had been agreed to by both parties in the course of the contract. One hundred sixty-four formal claims had been submitted, and 41 of these had been settled by the parties in direct negotiations. But 123 claims, totaling $44 million, had not been resolved. As construction moved toward completion, the parties agreed to submit 46 of these claims to the ADR process, with the hope that the Panel's recommendations would lead to settlement of all outstanding claims. In addition, the 124th claim, for delay and impact damages in the amount of $83 million, was submitted to the Corps on the first day of the ADR Panel's orientation but was not brought before the Panel.

The disputes that formed the basis for claims submitted to the ADR process arose at various times during the course of construction. These were disputes that had not been resolved through direct negotiations between the parties. Each side formally submitted its claims on two days in August 1989. The number of disputes accumulated as construction proceeded. When they arose, if they could not be quickly resolved, the Corps District Engineer required BRC to fix the problem, proceed with construction, and file a claim that would be heard later. This was called the "Fix-and-file" approach.

Major Issues in Dispute

The major issues concerned the typical types of disputes that one would encounter in a construction project of this magnitude. The claims involved the following major categories of issues: differing interpretations of drawings, contractual provisions, and external engineering and construction standards; impacts of differing site conditions; adequacy of the work performed; conflicts about the respective parties' responsibilities under the contract; costs associated with delays; and requests for equitable adjustments to the contract.

Positions of Each Side Prior to ADR

Prior to the inception of ADR, there was substantial animosity on the part of both parties with respect to pending claims. Technical field staff on both sides were deeply entrenched in their positions, feeling that the other side was responsible for the problem.

In addition, each party had an overriding suspicion about, and complaint against, the other that already had tainted direct negotiations and would continue to affect the ADR process. BRC, on the one hand, felt that the "fix-and-file" approach of the Corps permitted claims to remain unresolved for too long, leading to facts becoming stale and key personnel being no longer available. The delays associated with the "fix and file" approach allowed disputes to fester, left subcontractors in a state of indecision, and resulted in a claimed "net revenue shortfall of $40 million," as BRC stated at the opening session of the Panel. The Corps, on the other hand, felt that BRC was filing a large number of claims, as an indirect means of increasing profit, that had little merit. The Corps also argued that there was no net revenue shortfall.

DECISION TO USE ADR

Raising the Option of ADR

The Corps and Morrison-Knudsen, Inc. had had a prior successful experience using ADR in the dispute between the Corps and Tenn-Tom Constructors, Inc. on the Tennessee-Tom Bigbee Waterway project, where in 1985 a mini-trial with a single neutral advisor was used to settle a $44.6 million claim for $17.25 million. Morrison-Knudsen was a principal member of both the Tenn-Tom and BRC joint ventures. Mr. Johnson, counsel for BRC, had served as counsel for Tenn-Tom Constructors in that earlier ADR proceeding. By 1989, the commitment of the Corps to using ADR where appropriate was well known.

At a meeting in West Point, New York, in the fall of 1989, the Chief of Engineers, General Henry Hatch, and the Corps' Chief Counsel, Lester Edelman, encouraged the Division and District Engineers to consider using ADR to resolve the claims at Fort Drum. On November 29, 1989, a meeting was held in the District office of the Corps with the Corps' Chief Trial Attorney, Frank Carr, to discuss how to use ADR as a means of resolving the outstanding claims.

On December 13, 1989, the parties decided in principle to use ADR. At that meeting, BRC's principal representative was Steven Grant, general counsel of Morrison-Knudsen, and the Corps' principal representative was Colonel Thomas Reth, Deputy District Engineer. Frank Carr, the Corps' Chief Trial Attorney, and Paul Cheverie, New York District Counsel, proposed that a three-member panel be selected to make non-binding recommendations. This was accepted and included in the ADR agreement, which set forth the procedures for the process.

Choice of Actual Procedure

In designing the ADR process for Fort Drum, it was necessary to create a process appropriate to the large number of claims. Also, the Corps' position was that the ultimate result be based on written findings of merit rather than simply on argument and compromise. Without merit, nothing additional would be owed the contractor, and nothing should be paid.

According to both Colonel Reth and Mr. Tucker, the advantage of the process selected was thought to be that, as the two officials most directly responsible for each side's performance under the contract, they were close to the project but needed an impartial evaluation (in the form of the Panel's non-binding recommendations on merit) to reach a settlement. Because of the number and complexity of the issues, each claim would be the subject of a separate hearing and a separate Report of the Panel. Reth and Tucker would discuss the recommendations as they were issued, reach some tentative conclusions as to dollar value, and eventually attempt to negotiate a total settlement.

Formal Agreement to Use an ADR Procedure

On March 19, 1990, following final legal authorization by lawyers for both the Corps and BRC, the parties signed the Alternative Dispute Resolution Agreement (the "Agreement"). The Agreement notes that the Corps "has initiated an ADR Program intended to explore alternatives to litigation to resolve contract claims." The parties agreed to establish a "non-binding Disputes Review Panel," and "submit the claims to the Panel for a written Report including a non-

binding recommendation intended to guide the parties in settlement negotiations."

The Agreement provided that the Panel "shall function as an independent, impartial review Panel; and each of its members shall act independently and shall not be any party's representative." The non-binding recommendations of the Panel would be made by majority vote, although the composition of that vote would not be disclosed and no dissenting vote could be recorded. The Panel's recommendations were stipulated to be admissible in evidence in any subsequent proceeding between the parties, thereby reinforcing the weight understood to be given to the Panel's Reports, even though non-binding. Panel deliberations were confidential. Either side had the right to terminate the Agreement at any time, "with or without reason."

The Agreement provided that each of the Panel's Reports would contain a recommendation on the merits of the claim, but only upon the request of either party would the Panel also consider quantum (or dollar value). This possible second stage, in fact, was not invoked by either party; they preferred to deal with the dollar values directly between themselves, without neutral assistance.

To reduce the need for further paperwork and justification if the parties in fact accepted the recommendation and agreed on quantum, both sides agreed that the Panel should issue its recommendations in a format that could be used as the basis for (and be appended to) a Business Clearance Memorandum ("BCM"), the formal document required by the Corps to process and approve contract modifications.

The ADR Agreement provided that all requests by BRC for Contracting Officer's Decisions ("COD") that had not then been issued would be suspended pending the conclusion of the proceedings of the Panel and would be deferred until resolved, as part of the final negotiations for the total settlement. Interest, if any, was to accrue or continue to accrue on such claims in accordance with the Contract Disputes Act of 1978 in the same manner as though the proceedings or requests for decisions had not been suspended. Claims submitted by BRC after the signing of the ADR Agreement were to be deferred, and any appeals from previously issued CODs were to be suspended.

The sequence of claims to be put before the Panel was to be decided by "alternate pick" -- first one side for its first choice, then the other side for the next choice, and seriatim until all the claims had been listed in order.

None of the expenses of the ADR process could be awarded as costs in either the ADR process itself or in any other subsequent proceeding. Each side paid for the fees and expenses of its own Technical Member and shared equally the fees and expenses of the Chairman as well as the administrative costs of the panel.

Negotiations for the ADR agreement were handled for BRC by Mr. Stanfield Johnson, in Washington, D.C., as well as Mr. Steven Grant, general counsel for Morrison-Knudsen. In addition, BRC lawyer Kevin J. Holderness was in the field at Fort Drum throughout the project. Negotiations for the Corps were handled by Paul Cheverie and Lorraine Lee of the New York District Counsel's office, and by Frank Carr, the Corps' Chief Trial Attorney, who was based in Washington, D.C.

Benefits of and Concerns about ADR: The Corps

The Deputy District Engineer, Colonel Reth, strongly supported the use of ADR to provide a process to resolve the claims with BRC. The Corps District Counsel's office was also strongly supportive, according to Reth. The objective of the Corps was to focus on the total amount of settlement as well as the particular merits of each claim. It was hoped that the Panel's recommendations as to merit would be accepted and that negotiations would focus, instead, on quantum as part of an attempt to negotiate a total, all-inclusive settlement of all outstanding claims, whether submitted to the Panel or not. In this way, the Corps felt that it would protect itself from unnecessary haggling and unwarranted compromises on a piece-meal basis. Instead, both parties would focus on "the big picture" in the final wrap-up.

There were others in the Corps, however, including some top people on Reth's own staff, who felt the large number of claims made ADR inappropriate and preferred, instead, to let each claim go through the normal procedure from a COD to an appeal to the Contract Appeals Board. ADR had not previously been used for such a large number of claims. The Tenn-Tom ADR process was viewed as having only one major issue (See Case Study # 1, Alternative Dispute Resolution Series). There were some who said that ADR was not authorized by the acquisition process and would itself be long and costly. "So," Reth said, "we were blazing new territory."

One of the arguments presented by Frank Carr in favor of ADR was that the nature of the process to be used, with its formal presentations and written Reports claim-by-claim, would help lay the basis for future presentations to the Armed Services Board of Contract Appeals in the event a settlement was not reached. As one Corps official said, "If our goal is to close this contract out without litigation, we're going in the right direction. Litigation takes a lot of time and money. If the contractor accepts his losses and we accept ours, and we don't have litigation, everyone will be ahead. It's a success if we get out of here without going to court. And even if we go to court rather than settle, the ADR process will have been successful, because we're much better prepared. We're compiling records that we otherwise wouldn't have available."

"How do you convince folks this is a smart thing to do?" Colonel Reth asked during the second week of the ADR process. "By the results," he said. "We will see what comes of it; the jury is still out. I feel like a bit of a pioneer, but I kind of like it."

Benefits of and Concerns about ADR: The Contractor

The Corps' optimism for the process was shared by the Contractor. BRC participants also felt that the large number of claims made ADR appropriate as a means to resolve these disputes. Participants expressed confidence that the process would "trigger settlement" or at the very least get the parties to the table to work at avoiding years of possible litigation. The opportunity to avoid the lengthy appeals procedure also seemed to play a strong motivating role in choosing ADR. Several BRC lawyers had been involved in ADR in the past and were strong supporters of using alternatives to litigation when appropriate. The contractor wanted to complete and close out the contract and receive the funds to which it felt it was entitled as soon as possible.

Selection of the Panel

The Agreement provided that the Panel would consist of three members, a Chairman and two Technical Members. The parties jointly selected the chairman, who had to be "knowledgeable in construction and government procurement." Each party also was required to select one member "who shall be a technical expert knowledgeable in construction and engineering."

On February 15, 1990, prior to signing the Agreement, BRC submitted the name of Mason C. Brown, former executive of a major contracting firm in Dallas, Texas, to be its Technical Member. After the Agreement was signed, each party submitted a list of potential chairs. Professor Frederick J. Lees, formerly an administrative law judge for NASA and now a professor at George Washington University Law School, was on the list of both parties and was contacted by the Corps to determine his willingness to serve as Chairman. In April, he indicated his agreement to serve. Also in April, the Corps designated Thomas A. Sands, retired Major General of the Corps and former Division Engineer in the North Atlantic Division and Lower Mississippi Valley Division.

THE ADR PROCESS

The Panel convened for the first time on May 1, 1990. Holding hearings at Fort Drum, the Panel met periodically, usually for a week at a time, until its adjournment on September 20, 1990. In all, it issued 37 non-binding Reports on the merits (but not on the dollar value), one for each claim brought before it.

The claimed amounts varied from a low of just under $50,000 for a claim involving under drain and gutters, to a high of just over $2.7 million for exhaust duct insulation. Total claimed amount for all claims heard by the Panel was $16.7 million.

Participants and Preparations

Colonel Reth had come to Fort Drum after the project had been underway for some months. Mr. Tucker had been project manager for BRC for the duration of this contract, as well as for prior contracts with other contractors in the Fort Drum expansion program. Both Reth and Tucker heard all the proceedings in front of the Panel. Neither had had any prior experience with ADR.

Claims were presented on behalf of each party by a lawyer and engineer team. Because there were so many claims and the hearing process was to take several months, the Corps assigned claims to a number of different lawyers, who were brought to Fort Drum from other assignments on a temporary basis. In addition, there were two Corps lawyers who were continuously at the Fort Drum project. The Corps used 11 lawyers and several engineers to prepare or present its cases. BRC used five lawyers.

Prior to this ADR process, the Corps engineers at Fort Drum, for the most part, had not been accustomed to making presentations of this kind and thus needed extensive preparation by the lawyers. Dry-runs, with others role-playing as members of the Panel, were videotaped and critiqued. These "mock trials" began in January and continued until one had been completed for each claim. As one of the lawyers involved in these preparations said, "The lawyers were essential to pulling the cases together. The packages from the different engineers varied greatly in quality. The mock trials were a way to make the engineers work harder; exposure to the other side's position made them search their files and find more relevant facts and documentation, and in the end present a better case. Rehearsing was also important to give them confidence." As the process progressed, the engineers played an increasingly significant role.

It was widely felt by the participants that this preparation was essential not only to the clarity and smoothness of the presentations, but also to the Corps' understanding of the factual basis of each issue. One participant said that in some situations the Corps discovered that there was less basis for its side of the particular claim than they had thought before delving into the records. In three of those instances, the Corps simply settled with BRC in side negotiations that occurred after the lawyers had gone over the material but before the claim was put on the agenda for the ADR process.

Two other key participants were the administrative representatives named by each side: Colonel Alan Terpolilli for the Corps, and Jay Gould, for BRC. All logistics were handled by the Corps under Terpolilli. Gould and Terpolilli handled exchanges of documents for their respective parties.

A separate hearing room was created for the process and was dedicated to its use throughout. Visual aids were available as required. In

addition, the Panel had a separate office and secretarial support for their files and deliberations.

Schedule and Procedures

Two days of orientation, including a site tour, were held on May 1 and 2, 1990. The hearings began shortly thereafter. The final hearings were held on August 20, 1990, with the Panel's final Reports issued on September 19, 1990.

Hearings usually began at 8:00 a.m. and ended at about 3:30 p.m., with a lunch break scheduled sometime during the day. This allowed the Panel time for its private deliberations. The parties had agreed on an estimated time required to present each claim to the Panel. Twenty-three were expected to take one-half day each; eight were predicted to require a full day. All claims were presented within the established time limits. When the presentations and questions by the Panel were concluded, the Panel used surplus time for its own deliberations and Report writing.

The Panel usually traveled to Fort Drum (from Washington, D.C., New Orleans, and Dallas) on Mondays, held hearings Tuesday through Thursday, and prepared its Reports and traveled home on Friday.

The ADR Agreement provided that "all proceedings before the Panel will be informal in nature; neither the federal rules of evidence nor of civil procedure will apply; neither party will have the right of cross examination, although either may submit written questions to the Chairman which the Chairman may ask in his discretion." The Agreement prohibited the making of any transcript or recording of the proceedings before the Panel.

Presentation of claims was to be made in four parts: an opening by the claimant, an answer by the other party, and a response by each. Each side would have equal time.

Not less than two weeks prior to the presentation of a particular claim, the claimant was to file with the other side and the Panel a position paper setting forth: (a) a concise description of the claim; (b) the basis on which each party contended it was entitled to additional payment; (c) the amount of payment it sought if a monetary award was requested; and (d) legible copies of all exhibits and substantiating materials on which it intended to rely. Not later than one week thereafter, the other party filed and served its position paper setting forth its answer to the points made by the claimant and the documentary materials on which it intended to rely. A reply brief from the claimant was to be filed not less than 24 hours before the hearing. Position papers could be no more than 15 double-spaced pages (exclusive of exhibits), and replies not more than five pages.

The Panel was supposed to issue its Report on a particular claim within seven days after the hearing on that claim; and it generally kept to this schedule, except toward the end of the process. The parties were given ten days after issuance of each Report to decide whether or not to accept its recommendation. If they had not reached "a mutually acceptable settlement" by that time, the Contracting Officer was to issue a COD on an expedited basis, and the parties could proceed in accordance with usual claims procedures. This requirement for settlement within ten days was verbally modified so that a longer time would be allowed to settle "exceptional issues" and so that the tally on all claims as they were resolved would be considered provisional until the end, when an attempt would be made to reach a "global settlement."

The Proceedings

By the time of the first meetings of the Panel on May 1 and 2, 1990, relations between the Corps and BRC were strained. A number of issues of process had arisen. Also, the Corps was hard pressed to prepare timely written position papers and replies because BRC had submitted more position papers than the Corps had anticipated. They had requested an extension of time to file some documents, but BRC had turned them down.

On March 29, 1990, BRC had filed a request for production of numerous documents relating to one claim; but although the Corps felt it was outside the scope of what was contemplated by the ADR Agreement, it did allow BRC to see its design files. The Agreement had provided: "Because of the nature and extent of the documents previously exchanged by the parties, it is anticipated that document production will be voluntary and limited in scope. Each party agrees to cooperate with the other to produce the information necessary to a full and fair presentation of the facts relevant to the claims. The Administrative Representatives will agree to a discovery schedule, if necessary."

At the initial orientation session on May 1, the Corps presented an overview of the project, and then BRC presented an overview of its case. The Corps presented an overview of its case the next day. Both parties accompanied the Panel on the site tour.

The Panel conducted a discussion with the parties about procedures. BRC proposed that if the answering party did not specifically disagree with a statement of facts in the initial position paper of the claimant, those facts should be assumed to be accepted. The Corps, however, did not agree that silence meant acceptance. After discussion, the parties agreed that, instead of having a formal agreed stipulation as to facts (as provided in the Agreement), the position papers would "narrow the issues" as much as possible.

The Panel asked about the format for its Reports; and the parties provided an agreed format, elaborating on a shorter description that was in the Agreement. Reports would contain an issue summary, statement of relevant facts, analysis, findings, recommendation, and discussion to explain the rationale for the decision.

BRC expressed concern that the Corps did not have the funds for settlement. The Corps responded that if the Corps did not have funds in hand for a settlement, it would get them either by reprogramming or through new authorization from Congress; and that decisions should be made based not on the availability of funds but on the merits: "If we owe money, we will pay it," one Corps official said. Both sides stated that they wanted "decisions -- not compromises" from the Panel.

BRC again brought up the discovery issue and asked for the Corps' internal documents. The Corps declined to provide internal memoranda when they were addressed to lawyers, considering them protected by privilege. They also declined requests for internal memoranda (whether to lawyers or non-lawyers) that contained opinions (as opposed to facts). The Corps felt that using the ADR process to get privileged documents would be an abuse of the voluntary nature of the ADR process, but did grant BRC access to correspondence between the Corps and the third-party architect/engineers. The Corps noted that "although the rules of evidence do not apply" to the ADR proceedings, "some are so fundamental that we will apply them."

After several other procedural issues were discussed, the Panel was taken on a tour of the project. Prior to the site tour, Colonel R.M. Danielson, District Engineer and Commanding Officer of the New York District, stated his enthusiasm for the ADR process. "Perhaps a new set of eyes will give a new perspective and help resolve these issues," he said.

The next morning began with Chairman Lees acknowledging that there were tensions. "You are creating your own rules," he said. "But it will work out with good faith on both sides."

He noted that the Panel's recommendations were non-binding and added that, "We hope it will be more than that. Before you decide not to follow the Panel, I hope you will think twice. You won't get a better reading down the road than you will get from these experts in this process. We will try to decide as if we were a board or a court," he said. He noted that the principal representatives of each party were the most important, and he urged them to "listen to what the other side has to say."

Lees stated that the Panel hoped that position papers would be substantially different from court pleadings, and he urged the parties to rethink the nature of those papers after the first few were issued. He also said that the Panel would help to resolve discovery issues (concerning the production of documents) if requested. (As it turned out, no issues of discovery were put to the Panel.)

The Panel had requested the parties to consider having some deliberations of the Panel take place Washington, D.C., since travel time to reach Fort Drum was extensive. In response, both parties opposed having any hearings elsewhere, noting that the technical people on both sides were in the Fort Drum area. In fact, all of the deliberations took place at Fort Drum, and during its final debriefing, the Panel agreed with the parties that the Fort Drum location had been the correct decision.

After the Panel adjourned the opening meeting, the two parties stayed for further discussion of procedures. There was continuing argument over discoverability of internal memoranda, and Reth stated that the Corps was prepared to "terminate any further negotiations" if BRC continued trying to discover the Corps' internal memoranda. BRC agreed that for the time being it "would abide by what you say; if we think it's grossly unfair, we'll bring it up again." Johnson noted that the whole discussion sounded adversarial, because of the emphasis on each other's "positions." He "simply wanted to get all the facts on the table."

With respect to late position papers, Reth apologized to BRC, acknowledging that the Corps "was behind the eight-ball." He said that his people were "playing catch-up" but would attempt to get back on schedule. This acknowledgment and apology served to lessen some of the tension.

There was some discussion about whether the parties were likely to accept the Panel's recommendations. The Corps noted that pressure would be on both sides equally to either accept or reject the recommendations and that, if BRC failed to accept recommendations favoring the Corps after the Corps accepted recommendations favoring BRC, there would be pressure from within the Corps to "pull out" of the process. Reth said that, in deciding whether or not to accept the Panel's recommendations, he would put himself into the role of a "neutral and detached contracting officer."

As the process moved along, the stream of oral preparations, position papers, and hearings began to exact a toll on the participants. "There was a staggering amount of paperwork to be exchanged," Terpolilli said. "A fatigue factor set in," Colonel Reth said. "Early on, there was a tremendous effort put into the papers. But the Panel put most weight on the hearing. It was important to be clear, simple, focused on the issue -- but that required a tremendous amount of effort. If you tried to crowd in ancillary issues, the Panel didn't like it."

Time limits were relaxed as the process proceeded, and many of the anticipated problems -- such as the dispute over the Corps' refusal to provide internal memoranda that included opinions on merit -- "never materialized." "There has been a lot of give and take on both sides," Colonel Reth said.

After the Panel released its final Reports, a two-day debriefing occurred on September 19 and 20, 1990. On the first day a confidential session was held with the parties conducting some direct negotiations without the Panel. The second day consisted of two sessions with the Panel (one for Corps participants, and another for BRC participants) that included informal discussion with questions, answers and observations offered by each party and the Panel about the process they had just completed. The parties did not have a joint debriefing session with the Panel because they were still in negotiation with each other about the outcome.

Negotiations

After the Panel, proceeding claim by claim, had issued its non-binding recommendations on the merits of the claims, the principals from each party met and attempted to negotiate a quantum settlement. Panel members were not a part of these direct negotiations. Richard Tucker and the attorneys who presented the claims at the hearing on behalf of BRC served as the BRC principals. The Corps' negotiating principal was Colonel Reth. The Corps required higher settlement authorization with respect to some claims, depending on the dollar amount. The authorization had to come from either the District (over $500,000) or the Division (over $5,000,000). The additional review was by three main sections -- legal, technical and contract management. BRC had already obtained general authorization from its headquarters to conclude a settlement. Final negotiations involved BRC's general counsel and the Corps' lawyers and others at the District level.

A settlement of the claims considered by the ADR Panel was reached several months after the final decision by the ADR Panel. Since the final payment to BRC included other contract items not considered by the Panel, it took the Corps approximately another six months to receive budgetary authorization. BRC received final payment about one year after the Panel completed its work.

PROCESS ASSESSMENT

The Fort Drum Disputes Review Panel was the most complex ADR process undertaken by the Army Corps of Engineers -- with more claims, more extended hearings, more participants, and more dollar value than any other ADR process as of that time. By all accounts it was well-designed, well-executed, and successful in achieving its goals.

Method of Evaluation

The process was evaluated by analyzing data collected at several times. One of the principal investigators observed the first two days of the introductory proceedings and returned to observe several days of actual hearings on claims. On both of those occasions, confidential interviews were conducted with a number of the participants. In addition, documents were reviewed, from memoranda involved in establishing the ADR process to the reports of the debriefing sessions held in September 1990. Later, in 1993, nearly three years after the process had been completed, retrospective views were obtained through a series of telephone interviews with key ADR participants. Those interviewed at that time included: Panel members Frederick Lees (Chairman), Mason Brown and General Thomas Sands; Corps attorneys Frank Carr, Paul Cheverie, John Roselle, John Treanor, Joe Cox, and Newton Klements; Colonel Thomas Reth (Corps negotiating principal), Colonel R.M. Danielson; and engineer J.C. McCrory. The interviewees from BRC were attorneys Stanfield Johnson, Steven Grant, and Kevin Holderness; and engineers Richard Tucker (BRC negotiating principal) and Chuck Hunt.

Several days before each interview was conducted, participants received a protocol containing a list of questions designed to explore qualitative perceptions of the process. Each interview lasted approximately one hour. Once the interviews were completed, the responses were analyzed for trends in participant responses, representative quotes, and other salient observations.

Overall Participant Satisfaction

Most of the participants were either satisfied or very satisfied with the ADR process. In terms of the parties' attitudes and expectations about the ADR effort, there was a broad consensus that the process must be given credit for resolving a large number of claims that otherwise would have involved years of litigation. That was the major goal of most participants, and they believed that it was met.

Basic views of participants about the outcome can be divided into three categories: procedural, substantive, and psychological, although the boundaries between them are substantially overlapping as applied to this process.

Procedural Outcome

There was virtually unanimous recognition that if there had not been a Disputes Review Panel, the parties would have had to endure lengthy, arduous and expensive litigation. ADR brought the parties to the table and enabled a resolution of more than 100 claims while allowing each party its "day in court." The general perception was that "everyone had a fair shot, and it worked out well."

The few criticisms leveled at the fairness of the process concerned procedural problems. Some complained that there should have been a rule restricting the time in which new issues could be raised. The rules allowed BRC to respond to the Corps' position paper up to one day before the hearing. There were occasions

when allegations could not be adequately addressed because of time constraints. Another source of procedural dissatisfaction involved the order of presentation at the hearings. One BRC participant objected to the rule that gave the Corps the final presentation: "We had no chance to rebut."

Substantive Outcome

Major participants on both sides expressed a high level of satisfaction with the Panel's recommendations and with the overall quantum settlement. Looking at the broad picture, they felt that the results were fair and reasonable.

Many of the people interviewed understood that the Panel was applying a test of reasonableness to issues of interpretation of frequently ambiguous technical drawings, specifications, and contract provisions -- often in the face of unexpected conditions. The ambiguity of many of these issues, however, was not fully appreciated by all of those involved in the ADR procedure. Some who tended to tally up how each side had come out on particular claims felt they had "lost" some cases they should have "won." These tended to see the results not in overall terms but rather in terms of right and wrong on individual claims, without appreciating the complexities of the disputes. "The disputed issues were there for a reason," one Corps official remarked. "There were no black and white rules. The process was not designed to determine right and wrong, but to deal with issues of gray." A major participant from BRC echoed the point: "We need to get away from who's right and who's wrong. It's such a waste of time on many of the issues involved in disputes of this kind."

Psychological Outcome

Most interviewees were very satisfied that ADR had been implemented. The process served not only to reduce the level of antagonism between the parties but also allowed them to put the dispute behind them and get on to other business. Some were satisfied with the way it allowed the parties to "do a little battle and then have the issue decided." There appeared to be an emotional need to "vent steam and have their side heard." The process accommodated this need well. "The parties had been hammering on each other for years, and would have gone nowhere without this process," one major participant said. "Getting these disputes resolved let people get these issues behind them and move onto other jobs. That is more important than a detailed accounting of exactly how you came out on each and every issue."

Benefits of the ADR Process

Cost Savings

Participants expressing an opinion on the subject were almost unanimous in their assessment that the process resulted in significant money savings to their side when compared to the projected litigation costs. One senior attorney commented that the cost savings was of a two digit factor, saying that litigation would have been between ten and twenty times more expensive. As one Corps lawyer said during the hearings, "We're saving enormous time and money by handling such a massive number of claims in this way."

Closing out the Contract Expeditiously

The process allowed the parties to close out the contract and get on to other business much more quickly than otherwise would have been

possible. Because of the magnitude of claims, it is very likely that, if litigated, court proceedings would have gone on for a number of years. Although the process required a large commitment of human resources on both sides, most of the participants agreed that the short-term investment in person-hours paid off considerably.

Fairness

The Panel members were charged to be objective and impartial and were perceived as having been so. They dispassionately handled a huge number of claims. "With so many claims, there was a learning curve for the Panel itself," one Corps engineer said; but all the participants actually went through an educational process together. There was widespread praise for the Panel, especially the chairman, who was thought to have done "a wonderful job." With respect to the entire Panel, Col. Reth remarked that he thought they were "entirely fair. They pointed out how we could have avoided a problem by simply labeling the design drawings more clearly. Even in two of the claims where I have heartburn because the Panel came out against us, deep down I know they're right."

Technical Competence

The Panel was highly competent technically. They were experienced in construction contract matters; their questions were clear and relevant; they took the time to understand the issues in the immediate context; and their recommendations were considered by the participants to be well grounded in construction reality. Their judgment on the claims, therefore, was highly valued.

Education

One of the ancillary benefits of any ADR process is the education of the participants. Several people commented that it was a valuable learning experience in discovering new ways to approach contractual problems and understand the perspectives of the other side. "At the beginning, the attitude was that the Corps was right, all powerful. But at the end we thought maybe our eyes hadn't been fully open. During the process, we were able to see merit in the other side."

Some were simply grateful at "having an opportunity to do ADR. It was a good education for all -- lawyers and technical people." Because they wanted experience with ADR, some of the Corps' best and most experienced lawyers volunteered to work on these claims. Some of the lawyers felt that the exposure of so many of them from different offices to this ADR process was an advantage. The changeover lessened the fatigue factor among those who would come to Fort Drum for a brief period to handle a few claims and then leave. It also provided an opportunity to gain understanding of this effort that Colonel Reth had described as "pioneering."

Costs of the ADR Process

Some on the Corps side lamented that the process took too many of their engineers away from other duties longer than was necessary ("very labor intensive") and that too many of the Corps' resources were put into the process. They did concede, however, that as compared with traditional means of resolving disputes, this process was far less costly in terms of resources used.

Aspects of the Process

Power Balance Among the Parties

The general perception among the participants was that power between the parties was fairly well balanced. Not all agreed,

however. On each side, there were a few who felt that the Panel leaned too much toward the other side. Some thought that the Panel might have tried to keep a balance in the number of claims favoring each side, particularly in the early stages in order to keep each party sufficiently satisfied with outcomes to stay in the process for the duration.

These perceptions do not appear to be based on how the Panel actually worked. The Panel did not keep count of how many of its recommendations favored each party; it was not concerned with quantum; and all of its members agreed that it called each decision solely on its own merits. The Technical Member appointed by each side sometimes clarified issues from the perspective of that side but always entered into deliberations strictly from a neutral perspective.

Some Corps members thought that the contractor had the edge in power. One stated reason was that the BRC people had more ADR experience and were able to "leave the gate" more quickly than the Corps. The second reason concerned the lack of continuity of Corps attorneys at Fort Drum. Instead of having a senior attorney experienced in ADR on the project for the duration, the Corps had a series of attorneys assigned to handle particular claims at various stages in the hearings. This discontinuity may have put the Corps at somewhat of a disadvantage to BRC, which had a smaller but unchanging legal staff. As noted above, however, the appearance of new Corps' lawyers meant there was less fatigue as the process advanced.

Ease With Which Process Was Maintained

Most of the participants agreed that the process ran smoothly. In fact, some said one of its greatest strengths was procedural simplicity. One attorney remarked, "[The procedure] was very expeditious, we got through a lot of issues in a short time." One of the keys to the procedure's efficiency appeared to be an experienced Panel chairman who was given credit for keeping things on track: "Without an experienced chair on the Panel, it could have turned into a real mess."

Another factor that contributed to the smoothly proceeding series of hearings was the use of mock trials by the Corps. They were widely praised as being an important tool in weeding out dubious claims and arguments. Many untenable positions became evident at the practice hearings and were discarded, saving everyone time: "We didn't mess with the losers," one said. "Mock trials were helpful in getting rid of bad arguments." Many (especially engineers) said that the mock trials were helpful in getting them prepared for the hearings by focusing their arguments, issue by issue.

The only negative comments concerned documentation delays. One participant felt that there were too many layers of people on the Corps side who had to send documents back and forth. "The process must avoid too many levels and try to keep it on a centralized basis, but less formalized." Another agreed that the paper work created delays, believing that "more document management is required." He suggested that the Corps automate the documents in the future with the use of an OCR (optical character reader).

Deadlines or Pressure for Resolution

Some of the participants who were responsible for the position papers needed more time for adequate preparation and said that limited resources resulted in missed deadlines. This problem appeared to dissipate as the proceedings progressed, however, and staff improved at having the papers fine-tuned on time.

Most of the participants thought the time limits were just about right: "If it were not for deadlines, [the process] would have gone on forever."

From Recommendations to Negotiations

Some on both sides expressed disappointment that the claims were not settled sooner after the Panel issued its recommendations. They had hoped that the Panel's recommendations would translate neatly into settlements: "We expected to go in and get decisions that translated into dollar settlement. This was not entirely met." The problem with this attitude, as one participant put it, was that "some viewed the Panel as a substitute for decision making. It was not a substitute, rather it was an aid." At the outset, both parties had agreed that they wanted "decisions, not compromises" from the Panel; by the end, most on both sides understood that the Panel had provided decisions on the merits, as expected, but applying those decisions to issues of quantum was not simply a mathematical task, requiring instead some willingness to compromise on the total package that was not always understood or accepted in the Corps' review process required for the larger claims.

For this reason, a number of participants were frustrated with the process in terms of the bureaucratic obstacles to settlement once the Panel's recommendations were handed down. Some on both sides had hoped that the Panel's recommendations could be simply attached to a Business Clearance Memorandum and serve as a justification for a decision. There were two obstacles to this simplified procedure. First, the Panel had not dealt with quantum; and second, the settlement amount, once negotiated, was subject to the multiple layers of Corps' review when high dollar amounts were involved, as noted above. In this sense, there was a feeling that the governmental procurement process slowed things down considerably in this later stage.

These obstacles were compounded by the assumption held by some that the settlement amount for each claim had to be justified in detail for that claim. As one Corps participant said: "After we got the recommendations and negotiated quantum, we had to justify our settlement as if the issues were black and white, applying standards of right and wrong. This led to long delays in putting issues to bed. But the Panel's approach was basically right: you can't apply black and white reasoning to issues of gray."

Difficulties and Impediments to Process Effectiveness

The three most commonly mentioned problems with the establishment and operation of the process were:

The Late Start of the Process

Most of those involved in the process would like to have commenced ADR at an earlier date when the facts were still fresh and the parties were not so entrenched in their positions. In some cases, subcontractors were "long gone" and could not be found. One participant said: "Don't wait until the end, don't have this accumulation." With respect to the parties having hardened their stances, it was thought that "principals need to set it up before people are locking horns. By the time of the hearing, people were just trying to prove they were right." The delay in setting up the Panel "allowed the disputes to fester." One participant remarked that by the time the proceedings began the parties were "tearing each other apart!"

A Lack of Final Authority to Settle

People on both sides of the disputes expressed frustration in a perceived lack of authority in the Corps principals to settle all the claims: "Reth had to go through too many hoops," one participant said. One Corps member regretted that "the decision process tied our hands. It wasn't a weakness of the ADR process, it is a weakness of the government procurement process." Another stated that "some blessing had to come from New York. The distance gap did not facilitate speed." A critical element of ADR proceedings is having the authority on both sides to settle if negotiators reach an agreement. This clear authority was lacking on the Corps' side when high dollar value claims were involved.

Limited Communication between Panel and Parties

One of the most consistently cited deficiencies of the process was the lack of more frequent and meaningful discussion between Panelists and participants. Both the Panel and the party principals felt that regular informal meetings with the Panelists would have been helpful. They all believed that more dialogue between the Panel and parties would have been useful. Some on both sides said that it would have been helpful for the Panel to discuss the rationale for its recommendations in order to give greater guidance for settlement. On other occasions, a common understanding of the recommendations was lacking. Frank and informal discussions might have helped push stubborn or confused parties toward settlement. Also, any difficulties in the hearings themselves could have been resolved during regular meetings.

All Panel members wanted more evaluation of their performance from the participants as the process went along. They would have liked to have played a larger part in effecting settlement and were unsure if the parties wanted more assistance. As one Panel member said, "We got zero feedback."

Recommendations

Several major lessons emerge from evaluating this ADR process:

Earlier Establishment of a Dispute Resolution Process

A main conclusion of virtually all participants was that for disputes of this magnitude, it would be beneficial to implement an ADR process more quickly after each claim has surfaced, rather than addressing claims collectively at the end of the project. Such an arrangement could occur in the context of a "disputes review board" between Corps and contractor, so that disputes can be resolved as they arise, rather than after time has elapsed, costs have multiplied, communications have been impaired, relevant people have left the site, and positions have hardened. Whether it be regular meetings among principals, an on-site mediator, an informal neutral advisory person or board, or a more formal panel, problems should be addressed sooner in a fair and systematic process. Leaving issues unresolved for so long contributes to unproductive working relationships. It is better to put in place a mechanism to resolve disputes as they occur, rather than allowing them to accumulate until the last stages of construction and then creating a process to deal with them.

Full "Partnering" as an Option

Many of the participants mentioned the newer concept of "Partnering" when they were interviewed in 1993. On projects of this size, experience is increasingly demonstrating that

creating an effective team approach among the Corps, the contractor, and subcontractors will produce better work, accomplished more expeditiously. Partnering requires early joint meetings, agreement on a basic charter of operating procedures, and various levels of mechanisms to resolve ambiguities, questions, and disputes as they appear. At various stages, a third-party neutral is helpful -- including individual mediators and possibly including an ongoing three-person panel of the type used at Fort Drum, which would meet periodically as the work progresses. For such a Partnering process to be fully effective, however, issues of appropriate delegation of authority within the Corps would need to be clarified.

Regular Meetings between Panel and Principals

When a disputes review panel approach is used, ensure regular meetings between panel members and principals. Weekly discussion meetings with the Panel and both principals would have contributed to greater understanding, quicker clarification, more useful feedback to the Panel, and more productive settlement discussions between the principals.

A More Detailed Level of ADR Education

As indicated earlier, one of the most vexing problems was that some on both sides were expecting black and white reasoning to be applied to gray issues. Despite efforts on both sides to explain the purpose of the process at the start, the strong advocacy of each side tended to make some participants measure the results by whether they had "won" or "lost" a particular claim. A major element of most ADR processes, however, is that expectations of fault and no-fault, right and wrong, give way to an appreciation that there is often a substantial degree of reasonableness on both sides in complex situations. This was the tone set by the Panel in its Reports.

This ADR process was established to help the parties settle a large number of claims in a reasonably short amount of time. The Panel was intended as an external authority, guided by an implicit standard of reasonableness, applied on a claim-by-claim basis to help the parties settle all their outstanding issues and close out the contract. The Panel reached conclusions on basic entitlement, making recommendations that were clear but driven by the actual complexities and a sense that both parties often shared responsibility for many of the disputes. Based on an understanding of this shared responsibility, the parties' discussions of quantum were then to be the subject of direct discussion and compromise, with a goal of fairness in the overall settlement. Expectations that relate to this kind of process at the end of a construction project of this size and complexity should be the subject of more specific training among staff of both the Corps and the contractor.

Conclusion

The Fort Drum ADR process dealt with the largest number of individual claims and the largest dollar volume of any dispute put to ADR by the Corps as of the end of 1990. As a result of the recommendations of the three-person neutral Panel and the subsequent direct negotiations between the Corps and the contractor, a settlement was reached that avoided the years of litigation which otherwise would have been required. The ADR process thus fulfilled its major objective: to resolve the claims in a fair process so that both sides could put the dispute behind them in a systematic, reasonable, and timely manner.

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13. ABSTRACT (Maximum 200 words)

This study describes the use of a non-binding neutral panel, a disputes review panel, to help resolve claims arising under a construction contract of more than $530,000,000. The panel heard presentations and issued non-binding written recommendations on the merits (not quantum) of 37 claims. This study points out the successful use of an alternative dispute resolution technique to resolve a large number of claims on a major construction project near the end of the construction period.

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