

**ADR ROUND TABLE
U.S. Army Corps of Engineers
(South Atlantic Division, Corporate
Contractors, and Law Firms)**

Alternative Dispute Resolution Series

Working Paper #1

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Meeting Summary
South Atlantic Division
U.S. Army Corps of Engineers
ADR Round Table

On June 8, 1989, the South Atlantic Division of the U.S. Army Corps of Engineers sponsored a Round Table meeting on Alternative Dispute Resolution (ADR) in Atlanta, Georgia. Participants at the Round Table represented the Corps, major corporations who do contract work for the Corps, and law firms which serve as outside counsel for the contractors. The session was facilitated by Marguerite S. Millhauser, Esq., of Conflict Consulting, who presented an overview of ADR and guided group discussions. More than thirty participants took part in the meeting, including Corps Chief Counsel Lester Edelman, who summarized the Corps ADR program, and Judge Richard Solibakke, Chairman of the Engineer Board of Contract Appeals, who was a participant and the luncheon speaker. Also attending was Major General Robert M. Bunker, South Atlantic Division Engineer who was the host, and Stephen Lingenfelter, Division Counsel and organizer of the Round Table session. Charles Lancaster, Assistant Program Manager for the Corps ADR Program, also attended the Round Table and prepared this working paper.

There were two main purposes for the ADR Round Table. First was the desire to promote ADR by giving participants the opportunity to learn more about this developing field and the Corps of Engineers' program to promote ADR. Second, the Round Table offered the opportunity for a dialogue among those directly involved in business relationships which have become entangled in the modern-day web of litigation. In the spirit of cooperation which underlies successful ADR efforts, it was hoped that a genuine exchange of perceptions could occur, including obstacles to ADR and opportunities for promoting greater use of ADR procedures to resolve disputes.

In this spirit, what follows is a summary of the discussion comments of participants on obstacles to and opportunities for ADR, as well as specific suggestions for individual action to promote ADR. These are not detailed "minutes" nor are any comments attributed to any individual speaker. The purpose is to convey a sense of the discussion and memorialize some of the insights offered by participants. The ideas and perceptions are those of the individual participants presented, as they were solicited, without judgement or endorsement of any position. There was no attempt to reach a group consensus of Round Table participants - the goal was to acquaint participants with ADR procedures and promote a productive dialogue. It is hoped that this summary will spur further dialogue and increased cooperation among those involved.

Perceived Obstacles to Implementing ADR

Participants were asked to consider and list their perceptions of the major obstacles to greater use of ADR that exist today from their knowledge of the Corps, the contractor community, and outside law firms. The following is a summary of the written lists and a reflection of the discussion at the Round Table session.

- o Obstacle: Tradition/corporate culture favoring the usual way of doing business (including litigation) while avoiding ADR as an unknown.

This obstacle might also be called "institutional resistance to ADR." Participants felt that each of the groups represented (Corps, contractors and counsel) faced this obstacle in their organizations. Comments on the institutional resistance to ADR included:

- wariness of new roles and procedures
- 'turf' protection
- organizational inertia
- perceived threat to career if ADR fails
- reluctance to appear to oppose field staff by suggesting settlement.

The overall sense of the discussion was that organizations faced a mindset which preferred the known quantity of dispute resolution through litigation, rather than the unknown risks of ADR.

- o Obstacle: Lack of incentives to settle.

Related to the first obstacle, participants noted that the present dispute resolution system does not include any significant incentives for decisionmakers to settle disputes more efficiently. There seems to be no mandate or policy which favors settlement--it was even commented that "no one gets hurt by saying 'no' to ADR." Thus, the usual way of dispute resolution through the Contracts Disputes Act (CDA) becomes the 'safe' way, and there is no incentive to use ADR.

- o Obstacle: Professional vanity: unwillingness to appear to be mistaken in a professional opinion.

This obstacle is also related to the first two since corporate culture prizes and rewards professional acumen and provides no incentives to promote management decisions based on facts rather than assigning blame for errors. Professionals may feel that by

recognizing that their opponent's case may have some merit, they admit that their own judgments were somehow wrong. Technically trained professionals may feel there is only one 'right' answer to a technical problem. Recognizing another interpretation is then a blow to their professional self esteem.

o Obstacle: Lack of trust.

This obstacle was noted as a barrier to the problem-solving spirit that is needed for ADR procedures to be effective. Participants voiced a number of perceptions which show how willing we are to think the worst of the motives of those we disagree with:

- contractors are perceived as 'claims artists'
- contractor managers are rumored to receive a percentage of the claims they recover
- the Corps threatens contractors with protracted litigation
- outside counsel is only interested in amassing billable hours
- the system/bureaucracy is deliberately unresponsive
- contractors count on claims to make up for bidding errors

These perceptions, all indicating a basic lack of trust, can block an ADR effort before it can get started.

o Obstacle: ADR as a signal of a "weak" case.

There was overall support for the perception that initiating discussion of ADR may be seen as the signal that one's own position is somehow weak, or not worthy of the full investment of time and energy needed to win a court judgment. No one at the Round Table session endorsed this view but many were concerned that this unintended message could have a negative effect on the chances of using ADR to resolve the dispute. Ironically, it was felt that the suggestion to attempt settlement through ADR might stiffen the resolve of the other side to carry on with litigation.

o Obstacle: The need to justify the ADR settlement.

This obstacle applies to the government in its ability to enter settlement agreements. The government settlement must be supportable; must be documented; must comply with procedural requirements; and the settlements are subject to review by a number of audit and investigative agencies including the Office of the Inspector General. A financial justification is required which must show that the government's settlement decision was reasonable. A number of participants commented that the paperwork required to

justify a settlement needed to be simplified to remove the disincentive to settlement.

- o Obstacle: ADR is counter to the financial interest of outside counsel.

Outside counsel were perceived to be reluctant to use ADR because a process which provides a more efficient resolution of disputes would not generate the same number of billable hours as litigation. Thus, there would be no financial incentive for outside counsel to be interested in ADR. (It should be noted that this perception was strongly contested by the outside counsel present.)

- o Obstacle: Outside counsel's fear of disappointing the client's desire for a strong advocate.

Participants commented that this obstacle may stem from the 'hired gun' attitude which stresses defeating the other side as the primary objective. Reputations are made as tough litigators, not effective problem-solvers. For outside counsel to suggest ADR would seem to be a surrendering of the advocate's role. Clearly, this obstacle is linked to the perception that suggesting ADR indicates a weak case. A number of other factors were suggested by participants, however. Outside counsel may feel that they lose authority and control of a case when ADR is used. ADR may mean to some that the maximum recovery was not obtained. There may also be a problem in educating and convincing a client that ADR can be a beneficial option, especially when the client believes strongly in the case. Both the client and counsel may be unwilling or unable to perceive the merit of the other side's position.

- o Other Obstacles:

Participants mentioned a number of other obstacles to increased use of ADR including:

- Uneasiness about the seeming lack of structure of ADR proceedings.
- Government auditors seem to control, dictate or determine the government's position on a claim -- they pose an obstacle to ADR.
- Lack of faith in the people involved--who will be the neutral advisor? Will we have the right decisionmaker involved?
- Is ADR a fair process?
- Current contract language does not expressly permit ADR procedures.

- Fear of the consequences of failure: cost, wasted effort, revealing your case to the other side.

Strategies to Overcome the Major Obstacles

Following the discussion of major obstacles to using ADR, Round Table participants were asked to suggest strategies to overcome these barriers. The discussion generated creative responses, many of which were complementary. The obstacles discussed will be restated below along with the suggested solutions.

- o Obstacle: Tradition/corporate culture.

Suggested solutions:

- Training for greater familiarity with ADR.
- Promote a new problem-solving paradigm.
- Leadership.
- Success models of ADR use.
- Include mention of ADR options in contracts.
- Dispute resolution should be made part of the performance evaluation of Corps and contractor personnel.
- Establish a Federal office to promote ADR.

- o Obstacle: Lack of incentives to settle.

Suggested solutions:

- Push responsibility and authority for settlement down in the organization.
- Job descriptions should include effective dispute resolution.
- Compensation/bonuses based on ADR success.
- Efficiency ratings and evaluations could include dispute resolution measures.
- Promote the attitude that litigation is a failure.

o Obstacle: Professional vanity.

Suggested solutions:

- Reward settlements.
- Involve objective decisionmakers, not those too closely associated with the project.
- Minimize personal threats to people and reputations.
- Focus on results.

o Obstacle: Lack of Trust.

Suggested solutions:

- Cooperative training courses for Corps and contractors.
- Use more partnering and team building activities.
- Recognize and reward successful use of ADR.
- Share project information through regular communication sessions.
- Establish mutually acceptable audit procedures.
- Get participation and support from top management for ADR procedures.

o Obstacle: ADR as the signal of a weak case.

Suggested solutions:

- Establish an organizational policy to use ADR.
- Establish a pattern of communication or joint meetings to discuss problems.
- The Corps should take the initiative as the "instigation office" for ADR.
- Boards of Contract Appeals should suggest ADR in the early proceedings.
- Include the ADR option in the contracting officers' decision.

- Establish a mechanism for earlier use of ADR.
 - Set up a joint investigative process to pursue settlement.
 - Involve senior management in a dispute automatically after a given time period or event.
 - Establish the position of ADR advocate.
- o Obstacle: The need to justify the ADR settlement.
- Suggested solutions:
- Change the regulations and procedures for justification.
 - Contracting officer's signature should be sufficient for settlement without the need for justification.
 - Give more authority to managers for settlement decisions.
 - Education about and clarification of the justification procedures.
- o Obstacle: ADR is counter to the financial interest of counsel.
- Suggested solutions:
- Emphasize better client direction and counseling through knowledge of ADR.
 - Use value-base fee contracts rather than hourly fees.
 - Increase awareness that ADR can be profitable.
 - Emphasize problem-solving capabilities.
- o Obstacle: Outside counsel's need to be a strong advocate.
- Suggested solutions:
- Better communication between client and counsel.
 - Bring counsel in on a dispute earlier.
 - Early assessment of the legal budget will make clients more favorable to ADR.
 - Train inside and outside counsel together in ADR.

Conclusions-Implementing ADR

What can be learned from the listing of obstacles to ADR and proposed solutions? Some conclusions can be grouped around major points of emphasis found in the responses. A review shows several themes:

- Awareness

Training in ADR was frequently mentioned as a way to overcome barriers. Familiarity with the goals and procedures of any new initiative will increase acceptance and use of the new method. A primary way to address institutional resistance to ADR is through educating people in ADR. Significantly, several Round Table participants mentioned cooperative training in ADR. The idea of fostering a cooperative, problem-solving spirit by involving Corps and contractor personnel and outside counsel in joint training programs was an innovative suggestion.

- Incentives

Many participants mentioned ways that dispute resolution incentives could be built into an organizational system. Participants recommended effective dispute resolution as part of the evaluation of management performance and compensation, and increased recognition for successfully resolving disputes. Dispute resolution could also be included in job descriptions. These suggestions would provide personal and organizational incentives to try ADR and raise the visibility and acceptance of dispute resolution.

- Communication

Another emphasis in many responses was on the benefits of open communication among those involved in business relationships. Communication before disputes arise helps head off problems and dispel bad feelings and false perceptions. After a dispute arises, communication is the basis for collaborative problem-solving. Participants recommended regularly scheduled communication sessions in the course of project performance.

- Early action

Participants agreed that dispute resolution was most effective when used early in the development of a conflict. If problems become 'institutionalized' it is more difficult to resolve them. If alternative ways of resolving disputes are to be most effective, they should be used early enough to avoid the expense of litigation.

ADR Benefits and Opportunities

Round Table participants were asked to consider and list some benefits of and opportunities for ADR from the point of view of each of the three groups represented, the Corps, contractors and law firms. The purpose of the exercise was to brainstorm ideas and new viewpoints which might be used to overcome obstacles, or as new initiatives, to increase the use of ADR. Too often, we concentrate on the negatives of a situation rather than thinking about the positive benefits and opportunities that are presented by a new course of action. The following suggests many positive aspects and opportunities for promoting ADR.

Benefits

Those who listed benefits of ADR for the Corps and contractors stressed the ability to realize important gains by closing out projects rather than having them continue as unresolved claims. The Corps is able to clear its backlog of projects and can devote resources to new work. Contractors get paid more quickly without waiting for lengthy claims procedures, and good working relations with the Corps are preserved.

There was a greater variety of potential benefits of ADR listed for outside counsel. Participants mentioned improved client relations and satisfaction with legal services which would result from more efficient and effective dispute resolution. Law firms would also benefit by building expertise in a new field that seems to be gaining momentum. It was also suggested that ADR might help avoid the 'boom-or-bust' syndrome of a litigation practice, where law firms are either swamped with trial activities or looking for ways to fill in the gaps between trial preparation periods. ADR could even out the work load and improve a law firm's reputation for problem solving.

Opportunities

Those who listed opportunities to increase the use of ADR mentioned many specific suggestions which can be discussed in four topics.

- Education about ADR.

All aspects of making more people aware of ADR were mentioned by participants. Training courses, including joint training efforts, were mentioned as ways to begin to change the mindset on dispute resolution for the Corps and contractors. For law firms, education in ADR was seen as an opportunity to provide a valuable service to clients and another option for achieving the client's goals.

- Change existing regulations or policies.

The Corps is affected most obviously by this category of suggested opportunities. Participants noted the opportunity to simplify the paperwork required to resolve disputes, especially the requirements for justifying the settlement of a claim. It was also suggested that regulations could be changed to provide more incentive for ADR. Clear policy direction can promote ADR.

Corporate policies on dispute resolution were also mentioned as opportunities to promote ADR use. A clear policy favoring early dispute resolution can eliminate the perception that willingness to propose settlement means that the claim is weak. A clear statement of policy can also go a long way toward changing the organizational mindset toward collaborative problem solving.

- Change the decision making level for ADR.

A number of participants noted the opportunity for the Corps and contractors to change decisionmaking authority for using ADR. There seems to be two complimentary ideas at work. First, some said that an opportunity to promote ADR could be realized if those higher in the organization (for the Corps, a level above the contracting officer) were responsible for deciding to use ADR in a particular case. This would allow a decisionmaker who is not personally invested in the dispute to decide whether ADR should be used. Similarly, a contractor's project managers might not be as favorably disposed to settlement of a particular dispute as would an uninvolved executive. On the other hand, some participants felt that the opportunities of early resolution of disputes could best be realized by pushing authority down in the hierarchy. These two seemingly divergent suggestions may be complimentary if the emphasis is placed on the time in the development of a dispute when there should be a new view. Early resolution of disputes requires authority at the project level for settlement. If a dispute has escalated and has involved personalities, data conflicts, motions, or other barriers that are blocking resolution of the dispute, there may well be some benefit in another view of the potential for ADR. Striking the right balance between these two views will be important in promoting effective use of ADR.

There was another suggestion that deserves mention here. One participant felt that the Boards of Contract Appeals might be allowed to initiate ADR once an appeal of a contracting officer's decision had been filed. There have been experiments in some federal District Courts with such techniques as summary jury trials as a possible model should such a suggestion be adopted.

- Early evaluation of disputes.

As noted above, early resolution of disputes is most desirable. Working relations are preserved and the greatest savings in resources and time are realized. It was suggested that some form of early dispute evaluation could be used by the Corps and contractors to promote an examination of the potential for ADR.

Suggestions for Action

As a trial exercise, Round Table participants were asked to consider specific ways that they could promote ADR in their work. Each person told the group his or her suggestion for personal action:

- Establish internal training programs in ADR;
- Set a personal goal of trying an ADR procedure;
- Institute ADR training at the project level;
- Establish a corporate policy favoring ADR;
- Spread the word about the availability of alternative procedures to management, colleagues and outside counsel;
- Make ADR availability known through contract documents or clauses, and at professional conferences;
- Increase personal awareness of ADR opportunities;
- Inform staff of the ADR Round Table and its message;
- Work to change the mindset that currently favors the litigation track as the only dispute resolution option;
- Review existing cases for ADR potential;
- Promote a corporate policy favoring ADR to counter any perceived weakness associated with suggesting settlement;
- Open issues up to resolution at lower organizational levels;
- Raise the ADR option at early stages of disputes;
- Send a clear message to outside counsel favoring the ADR option;
- Include negotiation and ADR training as part of the training for Contracting Officers;

- Seek methods to create clear institutional support for staff use of ADR;
- Work to share ADR training among government and private contractors;
- Spread the word that the Corps is serious about ADR, and will make it available for smaller contractors also;
- Address business groups on the availability and variety of ADR procedures;
- Promote ADR education of all parties (Corps, contractor and counsel);
- Institutionalize ADR as part of the normal way of doing business;
- Explore the possibility of an organizational ADR advocate.

The breadth, variety and innovation shown in these concrete suggestions for action is remarkable. Some are directed to solving a particular problem or overcoming a barrier to ADR, while others take an over-arching view of the subject, and still others make suggestions for action in terms of their personal attitudes to ADR. Those who are interested in promoting more efficient and effective resolution of disputes can draw many important suggestions from this list.

Overall, the Round Table session produced a spirit of movement toward common goals that was heartening. The Corps of Engineers ADR initiative was furthered by the Round Table. The Corps pledges its continued efforts to promote efficient and effective resolution of disputes where possible.

Conclusion

The idea for the ADR Round Table was a product of the Corps Executive Seminar in ADR Procedures, held in Atlanta in February 1989. SAD Counsel Steve Lingenfelter and Marguerite Millhauser, who was a luncheon speaker at the session, talked about convening such a group. Steve then took the initiative, with the support of the Division Engineer, MG Robert Bunker, Corps Chief Counsel Lester Edelman and the Corps Institute for Water Resources. As with so much of the large Corps ADR program, the ADR Round Table was a new learning experience and the first time such a session had been convened. Though the Round Table was not planned as a prototype or the first in a series of such meetings, its success suggests that these kinds of meetings may provide an unusual opportunity for

promoting ADR. Meeting in a common forum and allowing ample time for discussion among the participants seemed to create the cooperative spirit which will lead to greater use of ADR in the future. the SAD ADR Round Table may well provide a model for other regional or national meetings between Corps personnel, contractors and the outside bar.

The outcome of the Round Table session gives a good indication that a step has been taken toward greater use of ADR. Obstacles and problems were discussed in a cooperative way and mutual difficulties were shared. The suggestions for overcoming obstacles and the action lists show similarities. The list of opportunities gave participants a chance to express ideas for new initiatives and the action list gave participants a chance to commit themselves to personal action.