(2)

The Corps Commitment to Alternative Dispute Resolution (ADR):

This case study is one in a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this case study is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These case studies are produced under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

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General Roofing Company

Alternative Dispute Resolution Series

Case Study #9

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INTRODUCTION

This case study is one segment in the second phase of a project, initiated by the U.S. Army Corps of Engineers in 1986, to document how Alternative Dispute Resolution (ADR) can be used by Corps District offices to minimize the enormous costs associated with disputes that arise between Corps District offices and private corporations. By publishing and distributing pamphlets about different types of ADR processes as well as about past cases in which ADR has been used successfully, the Corps' Office of Chief Counsel has been encouraging its use since 1984.

The first set of case studies examined five different cases: Tenn Tom Constructors, Granite Construction, Olson Mechanical and Heavy Rigging, Bechtel National, and Goodyear Tire and Rubber. Key findings in those cases were that: 1) ADR was used when the anticipated cost of litigation was high; 2) mini-trials were preferred over non-binding arbitration when Corps managers wanted direct involvement in settlement negotiations; 3) ADR techniques could be useful at different stages of a dispute's evolution; 4) it was helpful for neutrals to have substantive expertise in the area of the dispute; 5) strong support for ADR from the Chief Counsel contributed to its increased use throughout the Corps; 6) Corps attorneys played key roles in the ADR processes; and 7) Corps managers were satisfied with the results and would use ADR techniques again.

The three cases in this second set of studies -- Bassett Creek, General Roofing, and Brutoco Engineering and Construction-- provide an up-to-date view of the growing use of ADR in the Corps of Engineers. They reflect a growing sophistication about the design and implementation of ADR processes. Several general lessons, of potential use to other Corps Districts contemplating using ADR, might be noted:

Bassett Creek. The St. Paul District Corps of Engineers used non-binding arbitration to resolve a real estate appraisal dispute with the Bassett Creek Water Management Commission. The Corps and the Commission were collaborating on a flood control project, and they disagreed over how much credit should be granted by the Corps to the Commission for land parcels contributed to the project. The case study highlights: 1) the pros and cons of conducting negotiations without counsel present; 2) the importance of having an expert in the substantive area of the dispute serve as the neutral; and 3) the value of having an ADR clause written into initial agreements.

General Roofing. The Louisville District Corps of Engineers used a tailored mini-trial to resolve three construction contract claims with General Roofing of Pittsburgh, PA. After hiring General Roofing to put a new roof on an Army Tank Command building, several claims arose over responsibility for delays and cost overruns. The case study highlights: 1) the advantages of "package" settlements that tie several issues together as compared to "piecemeal" settlements that deal with each issue separately; 2) the value of having a skeleton ADR agreement drawn up prior to the ADR process, with appropriate areas left blank; 3) the benefit of conducting lower-level negotiations on sub-issues while the principals are negotiating larger claims; and 4) the usefulness of tailoring an ADR procedure to best meet the special needs of the parties.

Brutoco. The Sacramento District Corps of Engineers used mediation to resolve a disputed construction claim with Brutoco Engineering and Construction of Fontana, CA. While working on the construction of a bypass channel for a flood control project, Brutoco claimed delays due to differing site conditions. The claim was resolved in a one-day mediation for 37% of its initial value. The case study highlights: 1) the value of mediation in resolving difficult disputes quickly and inexpensively; 2) the benefits, under certain circumstances, of keeping the negotiating teams separate during an ADR process; and 3) the value of developing a "global" settlement package that addresses all outstanding matters in dispute.

In general, these cases highlighted several key points. First, there are clear benefits to developing "global" or "package" settlements that address multiple issues together. Second, negotiations can sometimes be conducted more fruitfully in the absence of counsel. Third, it is very useful to have preexisting ADR clauses in agreements, and to come to ADR proceedings with a "skeleton" agreement prepared. Fourth, there are a variety of ADR processes available to the Corps, each suitable for different situations. Fifth, it is very helpful to use a neutral who has experience in the substantive area in dispute. Finally, it may sometimes be useful to keep parties separate during an ADR proceeding.

Although the above points emerged specifically from these new cases, the cases also confirm past lessons about ADR: it saves time and money, reduces risk, increases control, and preserves relationships. The Corps has clearly benefitted immensely--and stands to benefit further--from its emphasis on ADR.

CASE STUDY #2
GENERAL ROOFING COMPANY

THE PROJECT AND CLAIM

SUMMARY

A tailored mini-trial was used to resolve three construction contract claims between the Louisville District Corps and General Roofing Company (Genro) of Pittsburgh, Pennsylvania. Genro had been contracted to put a new roof on the Detroit Arsenal Tank Plant in Warren, Michigan. After encountering delays and cost overruns, Genro submitted three claims against the Corps totalling $1,173,480.

Judge Charles J. Sheridan, of the Corps of Engineers Board of Contract Appeals (the "EngBCA"), served as the neutral advisor. Col. David E. Peixotto, Louisville District Engineer and Contracting Officer, and D. Dale Hamilton, III, president of Genro, served as the principals for the Corps and Genro.

The main points illustrated by this case are: 1) the advantages of "package" settlements that group several issues together as compared to "piecemeal" settlements that deal with each issue separately; 2) the value of having a skeleton ADR agreement drawn up prior to the ADR process, with appropriate areas left blank; 3) the benefit of conducting lower-level negotiations on sub-issues while the principals are negotiating larger claims; and 4) the usefulness of tailoring an ADR procedure to best meet the established needs and policies of the parties.

BACKGROUND

The Warren, Michigan Army Tank Plant has made M-60 and M-1 tanks for many years. It is one of very few tank plants in the country. The manufacturing building of the plant (which includes warehouse and office space) has one of the largest roofs in the world. It covers some 25 acres and is a concrete structure with a series of rounded, barrel-like sections of roof. When the roof began to leak, the Corps developed an in-house design for a new roof covering. According to Carl Platt, Assistant District Counsel for the Corps, the design was good (if a little vague) and the technology, incorporating single-ply membrane roofing, was rather new but also good. After soliciting sealed bids for the roofing job, the Corps awarded the contract to Genro, the lowest bidder, in December of 1987. The original total cost of the awarded contract was about $5.3m, with a $2.5m option that was ultimately exercised.

CHRONOLOGY OF THE CLAIM

At the outset, Genro encountered difficulty getting the roofing system it had selected to pass the required UL (Underwriter's Laboratories) wind uplift and fire tests, as required by the contract. Genro asked for relief in required fire test levels from "Class A unlimited" to "Class B limited." At first the Corps refused, but later relented. This scenario

became the basis for Genro's claim of defective specifications, which alleged resultant delays and impact costs due to alleged impossible specifications and stringent test requirements. Additionally, there was a dispute over how many points of access there would be to one part of the roof (one or two). Finally, the parties came into conflict over the amount of material to be used in one of the walkways (the Corps felt that Genro was skimping).

Initially, Genro filed documents, in support of its claims, without certification. This informal notification was intended to serve as an entré to negotiations. Negotiations took place over a period of many months, but were ultimately unsuccessful. In addition to negotiations between technical staff at the project site, there were two lengthy meetings in Louisville, one involving the Deputy District Engineer. Although there was not too much animosity, people on both sides quickly became entrenched in their positions--if they did not have to give, why should they?

In February, 1989, the uncertified claims remained unsettled despite several efforts by technical staff to settle the claims on-site. At this point, Genro filed a certified Defective Specifications claim, initially for $437,883 and 121 calendar-days time extension. Genro also filed a "Built-up Walkways" claim for $104,356 and 22 calendar-days time extension. Finally, Genro submitted two additional claims, concerning tarping and sheetmetal work. All claims were filed with certification, thus initiating a formal claims review process.

During the summer of 1989, three meetings and several telephone calls took place between Corps and Genro personnel. These conversations succeeded in settling for $246,846 the tarping and sheetmetal work claims, which had been submitted for $504,674. The Defective Specifications and Built-up Walkways claims remained unsettled.

In June, 1990, Col. Peixotto issued a Contracting Officer's Final Decision denying the Built-up Walkways claim. Two months later, Genro amended the amount of its Defective Specifications claim to $997,000, to incorporate further damages sustained subsequent to the initial claim submission. It then appealed Col. Peixotto's decision on the Built-up Walkways claim to the Armed Services Board of Contract Appeals (ASBCA). In September, 1990, Genro filed a third claim concerning Asphalt Kettle Access. The Asphalt Kettle Access claim was for $72,354 and 17 calendar-days time extension.

Thus, by September, 1990, Genro had two outstanding claims against the Corps to which the Corps had not responded (Defective Specifications and Asphalt Kettle Access), and one which had been denied by the Corps and appealed to the ASBCA (Built-up Walkways). Col. Peixotto, who had only recently assumed the responsibility of Contracting Officer on this particular contract, reviewed the evidence and was not convinced that the Corps' case was as strong as his staff thought. Since he believed that neither side's case was unassailable, Peixotto thought the dispute might be a good candidate for ADR.

MAJOR ISSUES IN DISPUTE

The Corps disagreed with Genro on several points. First, the Corps felt that Genro was entirely responsible for the delay in completing the roof. Genro, in contrast, felt that the delay was caused by the hidden ambiguities in the Corps' design. Second, the Corps felt that the roof's failure to pass the stipulated wind and burn tests was due to Genro's imprudent selection of a supplier and the supplier's imprudent selection of materials, whereas Genro felt that it had been misled by the Corps as to the availability of suitable roofing materials. The Corps recognized that only when some of the contract's required

testing standards were waived was it clearly possible for the contractor to meet the remaining standards. Once the standards were waived, however, the Corps felt that Genro and its supplier, J. P. Stevens, were not diligent in obtaining laboratory approval for their materials (regarding fire testing) as was reasonably required in the contract.

Third, Genro felt that the Corps' requirement that roof walkways be built up and levelled off fell outside the requirements of the contract, whereas the Corps felt that the drawings in the contract materials were sufficiently clear to require the new walkways to be level, for their reasonable and safe use. Fourth, Genro believed that it was entitled to use a second point of access for transporting hot asphalt onto a particular part of the roof, but the Corps felt that it had the right to refuse such access in response to safety concerns of the Army Tank Command. Granting Genro's access request would have allowed the handling of hot asphalt above a pedestrian walkway.

POSITIONS OF EACH SIDE PRIOR TO ADR

The Corps entered the ADR proceeding admitting no responsibility for the delay. It acknowledged, however, that a court or board could find some basis for some of Genro's claims, based on the Eichleay precedent.[1] Genro entered the ADR process requesting full compensation for the Defective Specifications and Asphalt Kettle Access claims. It reduced the amount of its Built-up Walkways claim from $104,356 to $95,710 in response to DCAA audit results.[2] Thus, the total amount of the claims was $1,165,064.[3]

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[1] According to Carl Platt, the Eichleay (Eichleay Corp., ASBCA No. 5183, 60-2 BCA par. 2688, 61-1 BCA par. 2894) precedent addresses the issues of responsibility and quantification of damages for delay. The Eichleay case established that if the contracting party causes a project delay, it is liable for damages, including a representative portion of the contractor's home office overhead for the duration of the delay.

[2] The Defense Contract Audit Agency (DCAA) is a Department of Defense office whose purpose is to audit the books of private corporations involved in military government claims. Claims against the government for amounts exceeding $500,000 automatically trigger the DCAA audit process.

[3] According to Dale Hamilton, Genro had had relatively little experience managing large government claims prior to this contract. This project served to demonstrate to them how tiring and expensive it can be.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

The Corps first considered the possibility of ADR. Platt knew that there was arguably some basis to Genro's claim that the roof design had been vague This may have resulted from combinations of standards for materials beyond what was available in the market, or from unclear testing requirements. He believed, therefore, that a successful trial would be difficult. Consequently, Hayes Haddox, Louisville District Counsel, and Carl Platt called Larry Schor, counsel for Genro, who was amenable to the idea of using ADR. Together, Platt and Schor contacted the ASBCA and informed it of their plan to try ADR. The ASBCA agreed to dismiss Genro's appealed claim case, with a right to refile, while the ADR process was pending.

PROS AND CONS OF ADR: THE CORPS' PERSPECTIVE

The Corps team had heard about ADR and was interested in its use. Many team members believed that ADR could help to settle the case fairly and expeditiously, avoiding the potentially enormous cost of full litigation. In addition, the Corps was concerned about the risks of litigation; some felt that Genro's claim documented persuasively the confusing and ambiguous nature of some of the drawings and specifications. Since a board ruling might well be an all-or-nothing decision (based on similar past cases), the Corps was wary of incurring the expense of litigation given the risk of losing everything. Furthermore, an ADR process promised more control over the process and the outcome than did litigation.

Some people, however, had heard negative evaluations of the Tenn Tom ADR process, in which Corps staff members felt that their interests had been shortchanged to make ADR look like a success.[4] There had also been a previous experience with a U.S. Claims Court ADR process (see footnote #6), administered by a judge who rendered a non-binding "advisory decision" that the claimed money be "split down the middle." Some of the Corps staff believed that that particular ADR process had not been successful, until a better result was negotiated later. There was significant command pressure within the Louisville District to try ADR, though, so the Corps staff agreed to give it a try despite their misgivings.

PROS AND CONS OF ADR: THE CONTRACTOR'S PERSPECTIVE

Genro also thought that ADR offered the hope of great savings in legal and other expenses. Furthermore, since the project was not yet complete, Genro hoped that a non-adversarial process would produce a better working relationship with the Corps for the remainder of the project. Schor was somewhat skeptical about the prospect of achieving settlement because the ADR process involved the same Corps decision-makers who had been involved since the beginning of the dispute, and because the Corps was only interested in a non-binding dispute resolution procedure. Hamilton, however, found the informality, speed, and cost-effectiveness of ADR appealing. On balance, they decided that they would try it.

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[4]For a full write-up of the Tenn Tom ADR process, see Case Study #1 ("Tenn Tom Constructors, Inc."), *Alternative Dispute Resolution Series*. U.S. Army Corps of Engineers, August, 1989.

SELECTION OF THE NEUTRAL ADVISOR

The parties felt it important that the neutral advisor be a judge. They wanted the advisor to be able to render general legal opinions on specific points as they arose in the negotiations. In particular, they wanted a judge who was knowledgeable about construction contract law. Finally, they wanted a judge who was not perceived to be potentially biased in favor of either the government or its contractors.

The parties' attorneys discussed ADR with the ASBCA, but the judges on the Board had full trial calendars. Although the ASBCA advocates ADR, members of the board felt that it was not yet appropriate for them to participate in an ADR process.[5] Schor suggested that they contact a judge from the EngBCA, which is the civil works contracts equivalent of the military contracts ASBCA. Schor suggested Judges Solebakke or Sheridan, and Platt agreed to Judge Sheridan. (Indeed, he was familiar with and impressed by the judge's decisions.) Judge Sheridan was contacted and agreed to serve as the neutral advisor.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

It took from early September until mid-October, 1990 to work out a mutually acceptable ADR agreement. The parties negotiated over the schedule, location, type, and non-binding nature of the process, as well as the role of the neutral advisor. The parties disagreed over how much structure needed to be spelled out. Initially, they agreed to a detailed schedule of presentations, questions, and cross-examinations. Later, they decided to abandon the detailed schedule in favor of a general schedule to allow for more flexibility as circumstances changed. After some discussion, they agreed to hold the ADR proceeding at the offices of the EngBCA in Washington, D.C. All of these matters were addressed in the ADR agreement.

From the Corps' perspective, there were drawbacks to each possible ADR procedure. Arbitration did not allow for negotiations between the principals, which the Corps thought were important because negotiations instilled in the parties a sense of "ownership" of the settlement. Neither mediation nor unfacilitated negotiations provided for expert legal opinions on key issues. A standard mini-trial brought in an expert neutral, and the Corps believed that the principals would have little incentive to make concessions if they thought a neutral's recommendation was imminent. (The Corps had been involved previously in a summary trial with a non-binding decision in which this had been a problem.[6])

Genro, and Hamilton in particular, believed that it was important to allow for negotiations between the two decision-makers. He emphasized the importance of ensuring that the decision-makers be flexible and authorized to cut a deal. Schor felt that it was

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[5]Since the Corps had not yet issued final decisions on two of the claims, only one of the Genro claims had been appealed to and docketed with the ASBCA. Therefore, the Board felt it would not be proper to be involved in settling these claims.

[6]Several years prior to the Genro ADR, the Louisville District Corps participated in a non-binding summary trial before a claims court judge in Washington, D.C. The claim had been submitted by Artco over a construction defect that the Corps had ordered it to fix. Because they knew a decision would be issued, the parties were perceived to have little incentive to negotiate beforehand.

important to have a neutral third party present to offer opinions, so that the principals would not get stuck in the same rut that their predecessors had been in for so long.

The parties finally settled on a hybrid of a mini-trial and "med-arb." The presentations would be structured as in a mini-trial, but the neutral advisor would not be empowered to make a recommendation if the negotiations failed. Instead, he would help to elicit the facts from the parties and would be a silent listener during presentations and a neutral facilitator during negotiations. Furthermore, he would be authorized to offer opinions only on subissues during the negotiations, not on the claims as a whole. This stipulation was intended to ensure that the judge did not have too much influence over the final settlement figure. The ADR agreement was signed approximately one week before the ADR process began. Caroll Winslow, District Construction Division's supervisor for contract claims analysis for the Corps, felt that the parties' willingness to forge an ADR agreement was a good indicator of the likelihood of settlement.

The ADR agreement expressly excluded one item --a 1988 fire that destroyed part of one of the Corps' buildings at the Warren Plant as well as Genro's insulation materials. Because this issue was so deeply disputed and litigation was already progressing, the parties decided to omit it from the ADR process.

PRIOR EXPERIENCE WITH ADR

Few of the Corps staff members had had any prior experience with ADR *per se*, although most members of the team had read about it. Platt had been involved in an ADR simulation at an Executive Training Seminar under the Corps ADR training program. Col. Peixotto had implemented an ADR-like process as District Engineer of the Albuquerque District of the Corps, bringing in a neutral party as an "honest broker" to resolve a permitting dispute. He was therefore positively disposed toward ADR. Several people had heard negative comments about ADR in the context of the Tenn Tom settlement, but most had read enough about ADR in the abstract that, after consultation with the District Office of Counsel, they were convinced that the concept made sense.

Nobody at Genro had any prior experience with ADR. Schor had been involved in ADR-like proceedings required by some courts, in which the magistrate served as the neutral in a non-binding "med-arb" process. Schor used his experience to illustrate to Genro how an ADR process could proceed.

Judge Sheridan had mediated a dispute two or three years earlier, between the Pittsburgh Transit Agency and one of its contractors. He was therefore positively inclined toward ADR.

ADR PROCEDURE

PARTICIPANTS

Col. Peixotto, Louisville District Engineer, and Dale Hamilton, president of Genro, served as the decision-makers for the Corps and Genro. Judge Sheridan served as the neutral advisor and facilitator. The two principals and the neutral listened to the presentations and asked questions. Platt, Schor, and Schor's co-counsel, Richard Walters, led the presentation of the two sides' cases. The Corps called on its construction claim analysts, architects, roofing specialists, civil engineers, and other technical advisors as witnesses in the case. Witnesses for Genro were its president, vice president, three employees, and a supplier technician.

SCHEDULE

On the evening of October 23, 1990, before the formal ADR process began, Col. Peixotto and Hamilton met for dinner by prior agreement of their staffs. They had never met before, and they discussed their personal backgrounds, families, and so forth. They did not discuss the case, except to indicate their mutual willingness to resolve it during the ADR process. Although the discussion was uncomfortable at times, Hamilton felt that it helped them establish some initial rapport which, in turn, helped in the subsequent negotiations.

The ADR proceeding was planned for Wednesday and Thursday, October 24 and 25, with an option to extend the process into Friday if the parties so desired. The presentations, however, lasted a full day and a half, and the negotiations extended through Friday and into Saturday. The settlement was finally signed approximately forty-five minutes before the Corps staff's plane departed on Saturday.

DESCRIPTION

During the ADR process, both attorneys had an opportunity to present and argue their cases, and to call and question witnesses. The atmosphere was cooperative and somewhat informal, so witnesses were questioned by the principals and even by other witnesses. Many participants felt that this element of the process was crucial to an expedited hearing of all the facts. Allowing each side's experts to discuss the issues got all the facts and conflicting interpretations on the table with maximum speed and efficiency. Each side's presentation consisted of an introduction, an exposition of the basic case, discussion of details, and a conclusion. Presentations also included videotapes of the roof construction process and slide presentations summarizing key facts and concepts. "Rules of evidence" were not used but less formal "fairness" standards were followed.

Judge Sheridan did not preside over the schedule or content of the presentations. Rather, the room was set up so that Sheridan, Hamilton, and Col. Peixotto were seated at a head table in front of the room. Schor observed that the placement of the principals at the head table caused them to assume a judicial rather than an adversarial demeanor. Hamilton also told Sheridan later on that the arrangement, in his view, had enhanced his objectivity.

According to Judge Sheridan, the witnesses established quite clearly that J. P. Stevens, Genro's supplier, had been overly optimistic in describing its materials to Genro.

Consequently, Sheridan felt that Genro had the weaker legal case. On the other hand, there were equity issues to consider. Genro had done a good job at a low cost.

At the end of the presentations, Schor suggested that lower-level staff negotiate several smaller ancillary issues simultaneously with the principals' negotiations over the three large claims. By doing so, time would not be wasted and both sides might resolve all outstanding matters.

After the presentations were complete, the principals and the facilitator went into a separate room to negotiate. Counsel were not present at these negotiations but were available to their respective principals during breaks for staff consultation. The parties felt that the attorneys were not in a position to know the ins and outs of the financial issues (pricing principles, cost allocation, and so forth). In addition, some felt that lawyers might "get in the way."

Judge Sheridan had been surprised that his predefined role did not include authority to offer an evaluation of the claims themselves. Although he was willing to conform to these stipulations, he did not think it would work as planned. He was right. Initially, despite the stipulation to the contrary in the ADR agreement, the principals asked Sheridan for his opinion on each of the three claims as a whole. Then, they proceeded to negotiate over both merit and quantum issues, asking Sheridan for his views on specific points. Every couple of hours, they emerged to consult with their respective staffs.

In the negotiating room, each principal addressed his comments to the other and to Judge Sheridan. Sheridan felt that this approach put them "on their best behavior" and fostered an atmosphere of cooperation, respect, and trust. Sheridan did not come armed with a strategy for bringing about an agreement; he was more reactive than proactive. When the negotiators reached a sticking point, they would put it aside and go on to other issues, returning to the difficult ones later. Sheridan did not have to suggest this; it came naturally.

While the principals were negotiating the three claims, the staff on both sides followed Schor's suggestion and met to negotiate the amount of several agreed-upon change orders that had been filed since the initial disputes had arisen. By having technical staff negotiate on both sides, the parties were able to settle several irksome additional issues for approximately $250,000. These covered three change orders, two in which Genro claimed entitlement to half the savings resulting from its own cost-savings initiatives, and one in which it had replaced more deteriorated deck planks than had been anticipated in the contract.

SETTLEMENT NEGOTIATIONS

The principals addressed the claims one at a time. For each claim, they discussed what they had learned from the presentations, and tried to establish the items on which they agreed. They decided to tackle the easier (i.e., low dollar) claims first. Col. Peixotto started with the claim on which he felt the government's case was weakest (Asphalt Kettle Access), in order to show good faith and a willingness to compromise. He conceded most of the claim during the negotiations. On the Built-up Walkways claim, Genro's case was weaker, so Hamilton ended up conceding most of it. Finally, the principals addressed the third claim—Defective Specifications.

Early on, Judge Sheridan told the principals that he thought the contractor had a weaker case on the delay costs portion of the Defective Specifications claim, thereby

confirming Col. Peixotto's earlier impression. Judge Sheridan did not see it as a convincing Eichleay case. He believed that the portion of the delay caused by Genro, as well as Genro's failure to use more expensive materials in the testing (i.e. Genro's failure to mitigate), lessened the applicability of the Eichleay precedent. According to Col. Peixotto, the principals then tried to approach the issue from the most logical and rational standpoint. By the end of the third day, though, they had reached a point when they were simply haggling over numbers, with little reference to logic or rationale. The principals seemed somewhat depressed. They asked Sheridan whether he thought they were close enough to a settlement to merit extending the negotiations for yet another day. Judge Sheridan replied that he thought it would definitely be worthwhile, so they decided to give it one final try on Saturday.

On Saturday, Judge Sheridan came dressed informally. Because the parties were edgy, the informality helped to reinforce the cooperative atmosphere. On that day, the principals encouraged Sheridan, for the first time, to speak with the teams individually. Judge Sheridan met with each team, answered questions, and pointed out the strengths and weaknesses of each side's case. These sessions helped the teams to "buy in" to the process and understand the intricacies of the high-level negotiations.

Late on Saturday, as time was running out, the staffs were almost ready to give up. Both teams (excluding the principals) then convened and tried to work out a possible global settlement of all claims and pending change orders, based on standing offers at that time and the explanations provided by Judge Sheridan. The Corps team then consulted with Col. Peixotto and told him that they thought Genro might accept a "global" settlement of $570,000, of which just over $300,000 would be attributable to the initial three claims. The two principals convened once more; Col. Peixotto put on his hat and coat, and put the suggested number on the table. Hamilton accepted it; the skeleton settlement document was filled in, and the agreement was signed. The Defective Specifications claim was settled for $212,015, the Built-up Walkways claim for $38,000, and the Asphalt Kettle Access claim for $60,000.

EVALUATION

PROCESS

The Corps was extremely pleased with the process. First, ADR brought the facts out quickly and credibly. Instead of separate, formal presentations, members of both teams discussed and argued about the evidence as it was presented. If there were no direct rebuttal to a piece of testimony, it was understood that the other side had accepted it. Second, it allowed them to reestablish a good working relationship with Genro for the remainder of the contract. Third, it saved them tens of thousands of dollars in litigation expenses. Fourth, the "packaging" of large and small issues together allowed them to settle almost all outstanding matters at the same time. Fifth, the tailoring of an ADR process brought a result that was palatable to all parties.

Although Col. Peixotto did not feel that he had gotten such a good deal immediately after the agreement was signed, he decided, with hindsight, that it was fair. He also decided that the Corps had come out well in the settlement, and he would sign it again if he had it to do over. He felt that it was useful to conduct the ADR process in a location remote from both parties' offices, and emphasized the importance of giving the parties latitude in fashioning an ADR process appropriate to the idiosyncrasies of the dispute and the disputants.

Winslow attributes some of the success of the process to the "buy-in" process—that participants were involved with both the process design and its implementation. In this regard, it is important that the principals be known to their staffs, and that the participants develop and agree to certain basic rules of conduct. Hamilton also noted that as the hours passed, the participants became increasingly invested in the success of the effort.

Genro was satisfied with the process. Schor estimated that it saved Genro at least $100,000 to $150,000 in litigation expenses. In addition, the ADR settlement obviated the need for litigation against J. P. Stevens, the roofing supplier whose materials Genro had used. Genro felt that the process was clearly worthwhile.

Schor, while very willing to use ADR again, remarked that he might alter the role of the neutral in the future. He would have explicitly allowed the neutral to evaluate the merit of the claims, rather than having him do so counter to the ADR agreement. Hamilton, on the other hand, wondered whether the judge's opinions might have unduly swayed the negotiations in one direction or the other. Arguably, it might have been better for him not to offer his opinions on whose cases were stronger.

Schor felt that it was important to have technical experts present on both sides who were able to respond when technical issues were disputed. He also felt that the removal of quantum "minutia" (the smaller issues settled by the staffs) from the high-level negotiation was crucial. Clearly, the simultaneous negotiation of change orders by the lower-level staff was quite constructive.

Schor noted, however, that he learned after the fact that Judge Sheridan has a propensity to rule against defective specifications claims. Had he known this initially, he might not have agreed to engage Sheridan as the neutral advisor. Schor was also displeased with a Corps negotiating tactic. He had assumed that any agreements reached during the process would be viable regardless of the status of other agreements, but Col. Peixotto said near the end of the process that if they were unable to reach agreement on the three claims,

the smaller agreements being negotiated by their staffs would be null and void. Peixotto felt, however, that it had always been clear that the settlement would be all-or-nothing.

Judge Sheridan attributed much of the success of the process to the principals, who were intelligent, cooperative, and authorized to cut a deal. He also noted that both were well supported by good attorneys and technical staff. He suggested that it might have been helpful for him to meet privately with the two teams somewhat earlier, rather than waiting until the last day.

Finally, several participants commented that the process of drawing up a "skeleton" agreement in advance of the process expedited the mechanics of reaching settlement (particularly in light of the last-minute nature of the agreement). By coming prepared with such a document, the parties were able to avoid trying to draft a settlement agreement jointly, and could instead focus on the substance of the settlement.

QUANTUM

The Corps was satisfied with the amount and fact of the settlement, especially its global nature. According to Platt, they would not have been happy with anything more than 50% of the initial claim value.[7] The claims were ultimately settled for about $300,000, or about 25% of the requested amount. In addition, by adding the unresolved change orders and smaller issues to the settlement, the Corps was able to efficiently dispose of several other irksome issues and put the whole set of disputes behind it. Genro was also pleased with the settlement, although Schor felt that they might have gotten more before the ASBCA. The expense, though, to fully litigate the case would not have been worthwhile.

Judge Sheridan felt that the settlement was different from what the ASBCA would have decided. First, the claims would have been decided separately, instead of as components of a "package deal." Second, the board is often obliged by precedent to rule one way or the other instead of compromising, which is more characteristic of negotiated settlements. Finally, he felt that the government stretched a little out of fairness to a good contractor, but that avoiding the risk of losing the case made that stretch worthwhile.

POSTSCRIPT

The 1988 fire litigation, which was specifically excluded from the ADR agreement, is still pending. After the settlement of time-related issues was concluded, the rest of the contract work was completed on time and according to specifications. At one point, a portion of the roof blew off and the question of responsibility arose. The on-site teams are working together to resolve the question. Schor attributes their ability to do so to the good feelings engendered by the ADR process.

As the Corps people were leaving for the airport at the conclusion of the ADR process, one of their last comments to the Genro team was that they hoped Genro would bid on future government contracts, because Genro was a good roofer. Genro replied that, now that it had seen how the government could be fair, it probably would seek more government work.

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[7] Platt notes, however, that a 50% settlement is usually undesirable, because it can seem like arbitrarily "splitting the baby."

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This case study is one in a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this case study is designed to stimulate innovation by Corps managers in the use of ADR techniques.

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