



**US Army Corps
of Engineers**

Case Study #3

**Alternative Dispute
Resolution Series**



**OLSON MECHANICAL AND
HEAVY RIGGING, INC.**

August 1989

IWR Case Study 89-ADR-CS-3

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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Olson Mechanical and Heavy Rigging, Inc.

Alternative Dispute Resolution Series

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CASE STUDY #3

OLSON MECHANICAL AND HEAVY RIGGING, INC.

THE PROJECT AND CLAIM

SUMMARY

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

The arbitration panel was headed by Guy Randles, of the law firm Stoel, Rives, Boley, Jones & Gray, and included John Ilias, a retired Corps employee and Richard Mann, President of Mann Construction Company. Robert Turner, Portland District Counsel, represented the Corps and Joseph Yazbeck, of Allen, Kilmer, Schrader, Yazbeck, and Chenoweth, served as counsel for Olson.

The main points illustrated by this case are: 1) ADR use at the district level; 2) ways to win technical staff support for ADR; 3) the dynamics of a three-member arbitration panel; and 4) the need for a precedent regarding ADR and the Equal Access to Justice Act.

BACKGROUND

The U.S. Army Corps of Engineers (Corps) contracted with Olson Mechanical and Heavy Rigging, Inc. (Olson) to redesign and reshape the cement weirs of the east fish ladder of the Dalles Lock and Dam, Columbia River, Oregon and Washington. The period of the contract was from November 1984 through March 1985. The cement work had to be done in harsh winter conditions because the fish ladder is in use at all other times. To do the work, the contractor had to keep the work area dry. Three bulkhead gates at the upstream entrance to the fish ladder were expected to keep the work area free of water.

According to the contract, Olson was required to lower the bulkhead gates into their sealed position to assure that water did not flow into the fish ladder and affect concrete placement areas. Olson failed to obtain a water-tight seal on one of the bulkhead gates and was plagued by water throughout contract performance. The problem of de-watering the area was further complicated by freezing winter temperatures. In addition, the contractor needed to maintain low water levels in the downstream junction pool in order to work on the lowest concrete weirs in the fish ladder. However, water levels remained high due to the Government's failure to close one of the diffuser valves to the pool. It was finally closed one month after work was initiated.

The contractor filed two separate differing site condition claims. The smaller of the two resulted from the open diffuser valve for which the contracting officer issued a

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

unilateral contract modification in the amount of \$31,000. Olson protested this unilateral decision, asking instead for \$49,000. The other major claim was based on the bulkhead gates' failure to provide a water-tight seal. Olson claimed that the government was liable for the delays and increased costs resulting from unexpected water and ice in the cement placement area.

CHRONOLOGY OF THE CLAIM

Olson Mechanical and Heavy Rigging, Inc. was awarded the contract on July 31, 1984. The fish ladder was de-watered on November 15, 1984 except for the junction pool area which was to be pumped out by the Corps. A major leak occurred in the junction pool, and Olson hired a crew of divers who determined its source was an improperly sealed diffuser valve.

As a result of the open valve, Olson submitted a differing site conditions claim on December 1, 1984 and requested a contract modification for extra work performed in the amount of \$154,511.66. Negotiations reached impasse in March of 1985 because the Government did not find justification for the level of damages Olson claimed. Olson originally proposed compensation in the amount of \$155,000, and then revised its calculations to \$61,000 in April of 1985. After the Contracting Officer issued a unilateral modification on June 3, 1985 in the amount of \$31,266, Olson revised its claim again to \$49,198.11 and requested a Contracting Officer's Decision (COD) on the difference between the revised claim and the modification order. On November 27, 1985, the COD was issued denying the claim.

After the contract work was completed and accepted by the government, Olson filed a second claim on September 23, 1985. This claim, in the amount of \$168,538.00, was based on additional costs and delays associated with the control and management of water in the fish ladder and its impact on concrete placement.

On March 27, 1986, the final COD was issued denying this claim in full. Olson appealed both claims. Negotiations continued between the contractor's lawyer and Portland District Counsel Robert Turner but quickly reached impasse. Olson continually offered a total cost proposal, despite the Government's requests for documentation to justify its additional expenses. Without this information, the Government was not willing to substantially increase its settlement offer.

Before a trial date at the Engineer Board of Contract Appeals (Board) was set, Robert Turner suggested they attempt to settle the claims through an Alternative Dispute Resolution (ADR) procedure. In April of 1987, Olson agreed to proceed with ADR. On July 16, 1987, the parties signed an Alternative Dispute Resolution Agreement outlining the rules of the hearing. A non-binding arbitration panel heard the case on November 19 and 20, and a decision was rendered on December 11, 1987. The parties notified each other of their acceptance in late December.

MAJOR ISSUES IN DISPUTE

The major issues in dispute revolved around the seal provided by the bulkhead gates and the scope and extent of the increased work resulting from water in the project area. Olson claimed that bid specifications and a pre-bid visit to the site led it to believe that the bulkhead gates would provide a dry work area. According to the contract, Olson had to

"lower the gates into a sealed position." Olson contended that it did so under the direction of Corps personnel, and therefore had no discretion regarding their placement. It argued that the Government was liable for all additional costs because government property, the gates, malfunctioned. Olson also suggested that the J-seals on the gates were old and insufficiently maintained.

The Government held that it was Olson's responsibility to lower the gates and assure a proper seal. In fact, to achieve a tighter seal at the time of placement, Olson simply had to lift the gates, flush out any stones or dirt beneath them, and re-lower the gates. The Government also argued that any contractor with cement and water resource structures experience should have expected, and planned to manage, a water flow in the fish ladder. Olson had extensive experience with dry placement of concrete, but only minimal experience with de-watering large areas during construction work. (In a competitive sealed bidding process, the Government is obligated to accept the lowest responsible bidder.)

Secondly, the Government claimed that Olson failed to mitigate the consequences of the water leakage. Once water flowed into the work area, the contractor was obligated to take reasonable steps to reduce the associated problems in a cost effective manner.

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the decision to use an ADR procedure, Olson offered to settle both claims for \$115,000. The Corps counter-offered \$20,000 plus interest and legal fees. Olson rejected this proposal.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

Mr. Robert Turner, District Counsel in the Portland District of the U.S. Army Corps of Engineers, approached counsel for Olson, Mr. Joseph Yazbeck of Allen, Kilmer, Schrader, Yazbeck, and Chenoweth, and suggested the use of an ADR procedure to settle the pending claims. Mr. Yazbeck agreed to it, subject to finding a mutually acceptable neutral advisor. At the time, he did not think this would be possible. However, the two attorneys agreed to meet to discuss the terms of the ADR procedure.

Mr. Turner had previously attended a district counsel conference where the Chief Counsel of the Corps of Engineers suggested the use of ADR to settle claims, especially in cases of partial entitlement. Turner was also experiencing a labor shortage in his office and hoped to dispose of this claim using a limited amount of manpower. He chose this case to experiment with ADR primarily because its degree of risk merited a compromise settlement which he believed could only be reached with the help of an outside neutral. Turner thought Olson's claim showed partial merit, but was far afield from a reasonable monetary settlement. He believed an outside objective opinion would help Olson understand the true merit of its claims.

PROS AND CONS ASSOCIATED WITH ADR: THE CORPS

Robert Turner identified a number of advantages to using ADR in this case before he approached Olson. First of all, it was difficult to determine how the Board would rule because even though Olson was contractually responsible for lowering the gates, it apparently did so at the discretion of Corps employees. With an ADR procedure, the Government could remove the win-lose risk because it would maintain the right to accept or reject the arbitration panel's decision.

Secondly, the ADR procedure would provide a fair hearing in a neutral environment and yield a quick decision. An expedited decision meant that Turner's already overloaded lawyers would be free to work on other cases, and no further time demands would be placed upon the technical staff related to the claim. At the time, the Portland District was just beginning three major civil works projects that required all its available manpower.

Turner also felt ADR was a good way to improve contractor confidence in the Corps. He wanted the contractor to feel the Corps was dealing with his claim in a fair, equitable, and expeditious manner. Finally, since interest on a settlement accrues from the day of claim certification, if there is potential liability, a quick, fair resolution is always in the best interests of the government.

A potential problem associated with the use of ADR concerned the relationship between technical and legal Corps staff. At the outset, technical staff felt the Government had no liability because the contract made Olson responsible for lowering the bulkhead gates. Thus, they would not support a compromise.

Turner worked hard to win their support for the ADR procedure. He gave them his assessment of the case, a 60/40% chance of winning, and explained the unusual aspect of the case, i.e. the Corps had failed to provide assistance to the contractor once the difficulties arose. Secondly, since Corps employees apparently directed Olson's placement of the gates, there was possible government liability. He described the long process of continuing the claim before the Board and the time demands that would be placed upon the Corps' concrete experts. By effectively explaining the overall situation, Turner was able to begin the ADR procedure with the full support of the District staff.

PROS AND CONS OF ADR: THE CONTRACTOR

Olson's advantages regarding the use of ADR were somewhat simpler -- time and money. It was in its interests to get a quick, fair hearing that would result in settlement payment within a few months. The appeal docket was full, and Olson could not afford protracted litigation. ADR provided the most inexpensive way to proceed because it potentially promised an expeditious settlement and payment. Legal fees would be greatly reduced because of 1) a shortened trial; 2) the need for only partial discovery because of time limitations on presentations; and 3) an avoidance of filing the numerous motions associated with an appeal. Fast payment meant Olson would have money available to finance other projects. Finally, Olson felt that a panel comprised of concrete construction experts would have a better understanding of its situation than a judge.

CHOICE OF ADR PROCEDURE

Since this was a relatively small claim, Turner decided that it did not merit direct division involvement or the large amount of senior executive time required by a mini-trial. Therefore, he chose to use a non-binding arbitration panel. In this procedure, a three-member panel of experts listens to the presentations by the attorney of each side and then meets to discuss the testimony and recommend a settlement. The parties are free to accept or reject that recommendation. Any information or positions provided during the procedure cannot be entered into court records should the parties fail to accept the settlement proposed by the panel. No member of the panel can later be called to testify at a trial related to the claim.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

On July 16, 1987, Turner and Yazbeck signed an ADR agreement that outlined the details of the procedure. They decided the three-member panel would be composed of one neutral advisor with experience in public contract law and two construction experts. The Corps and Olson agreed to share the costs of the neutral arbitrator, which they set at a maximum of \$5000 including travel expenses, and that each side would pay the fees required by its selected panel member. John Ilias was paid \$750 plus travel expenses by the Corps, and Richard Mann declined payment other than his travel expenses, which were paid by Olson.

The ADR agreement also arranged for documentation exchange. It stated that the parties were to exchange copies of all documentary evidence proposed for use at the hearing, including a witness list. The attorneys agreed to set a discovery schedule that would allow for its completion three weeks prior to the hearing. At that time, Olson would submit a quantum analysis to the Corps. The Corps was to furnish the arbitration panel with three copies of the contract documents, change orders, and any written instructions issued by the Corps to the contractor. Two weeks before the hearing, each side was expected to submit a twenty-five page position paper² to the panel outlining their cases with respect to legal and factual issues.

Turner and Yazbeck agreed that the panel's decision would be non-binding and based on a majority opinion, though they hoped it would be a unanimous decision. If necessary, a dissenter would be allowed to write a minority opinion.

¹ Mini-trials require decision-makers, usually senior staff, to listen to case presentations and then negotiate settlements. Examples of Corps mini-trials are the Tenn Tom Constructors and Bechtel National, Inc. cases.

The Tenn Tom mini-trial involved a \$55.6 million claim (including interest)* and required a total of four days of presentations and two days of negotiations. General Peter Offringa, Ohio River Division Commander, served as the Corps decision-maker.

The Bechtel mini-trial involved \$21.2 million in claims and concluded after four days. The Corps decision-maker was Colonel Stephen West, Omaha District Engineer.

² The Corps' position paper included background information on the contract and its specifications, a description of the construction process, legal precedents regarding differing site conditions, and a response to the contractor's contention that the bulkhead gates were defective. Olson's position paper included a description of the claim, information regarding the impact of water leakage on cement placement, legal justification for a differing site condition, and an explanation of the quantum requested.

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

The parties arranged the arbitration schedule such that on the first day, Olson would have three hours to present its case followed by one-and-a-half hours each for the Corps' cross-examination and the contractor's re-examination. The final hour was reserved for an open question and answer period. The Corps was to present its case on the second day according to the same schedule as the first but with an additional quarter hour for each side's closing statement. The panel members were expected to resolve any disputes that arose between the parties regarding the schedule.

SELECTION OF NEUTRAL AND OTHER PANEL MEMBERS

The attorneys for both sides felt the hardest part of the process was finding a suitable neutral. Originally, Turner and Yazbeck agreed on Norman Kobin, a Portland lawyer who specialized in public contract law. Unfortunately, he fell ill and was not able to participate. Turner then suggested Mr. Guy Randles of the law firm of Stoel, Rives, Boley, Grey, & Jones, who had extensive experience in government contract law. Turner called Randles, and found he was interested in serving as the neutral advisor. Turner then arranged a meeting with Randles and Yazbeck.

Yazbeck and Randles had previously opposed each other on a case, and Yazbeck called Randles to be sure he held no grudges. With that issue resolved, Randles was chosen to serve as the neutral arbitrator and legal expert on the panel. Following his appointment, the two attorneys agreed that each would choose a construction expert.

To find a suitable person, Turner contacted the Division and District Construction offices for lists of potential arbitrators. After receiving these lists, he met with the Chief of the District's Construction Division and together they decided to choose Mr. John Ilias, a former Corps employee with a wealth of experience in construction contracts. Since his retirement, Mr. Ilias has worked as a consultant to private construction companies.

Turner also knew that Ilias was well-respected throughout the Corps, especially by field personnel. He believed that Ilias' involvement would reduce the agency's apprehension about the ADR procedure.

Olson selected Mr. Richard Mann, President of Mann Construction Company, Inc. (Mann) of Redmond, Oregon. Like Olson, Mann is a small contractor handling a lot of government work. Mr. Mann is unique in that he represents himself on claims before the Board of Contract Appeals. He has extensive knowledge of both construction and government contract law.

The three panel members met prior to the hearing. They set the hearing date for November 19 and 20 at the conference rooms of Mr. Randles' law firm and decided that Mr. Randles would rule on any procedural questions that arose during the hearing.

PRIOR EXPERIENCE WITH ADR

None of the participants had any actual experience with an ADR procedure. Robert Turner heard about it at a number of Corps conferences. Guy Randles was trained as an arbitrator by a local arbitration group, but had not yet served on an arbitration panel. Joe Yazbeck had negotiation experience, but had not been involved in a formal ADR procedure. The two other arbitrators, chosen for their technical expertise and ability to process a lot of information in a short time, also had no previous experience with ADR.

