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Water Resources
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CASE STUDY #7

Alternative Dispute
Resolution Series

BRUTOCO ENGINEERING AND CONSTRUCTION, INC.

January 1992

IWR Case Study 92-ADR-CS-7

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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Brutoco Engineering and Construction, Inc.

Alternative Dispute Resolution Series

Case Study #7

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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 #3
BRUTOCO ENGINEERING AND CONSTRUCTION, INC.

THE PROJECT AND CLAIM

SUMMARY

Mediation was used to resolve a disputed construction claim between the Sacramento District Corps and Brutoco Engineering and Construction, Inc. of Fontana, California. Brutoco was contracted to conduct the second phase of the construction of a bypass channel for a flood control project. After claiming delays due to differing site conditions and changes required by government inspectors, Brutoco filed a claim for $3,086,038.

Anthony Piazza served as the mediator, and Colonel Jack LeCuyer, Sacramento District Engineer, and Leonard Brutoco, president of Brutoco, served as the chief decision-makers for the Corps and Brutoco.

The main points illustrated by this case are: 1) the value of mediation in resolving difficult disputes quickly and inexpensively; 2) the benefits 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.

BACKGROUND

The San Ramos Bypass Channel is a five-mile long channel running through the city of Walnut Creek. In Phase I of the contract, the Corps had hired a contractor with whom several claims arose, and with whom it was unable to negotiate any settlements. After this tumultuous contract, the Corps engaged Brutoco in 1986 to handle Phase II. The total cost of the contract was estimated at $12.6m.

During the summer of 1987, Brutoco excavated a portion of the channel in the Walnut Creek neighborhood. Materials were stockpiled nearby for use in the filling in parts of the excavated channel later. The Corps believed, however, that the walls of the nearby channel had been cut at a steeper grade than they should have been, and that Brutoco had put more material in the stockpile than was prudent. The soil in the area was unstable and close to the edge of the channel. In addition, the stockpile was located above a high-pressure petroleum pipeline. As winter approached, the Corps became concerned that the area might collapse, rupturing the pipeline. The Corps therefore issued an emergency directive to Brutoco on September 16, 1987, for the construction of an earthen buttress to stabilize the area around the stockpile. Brutoco complied with the directive. The Corps wrote a modification order to cover the cost of the change, estimated at $100,000, but Brutoco felt that the quantum was far off the mark. According to Tom Salata, Executive Vice President of Brutoco, the Corps did not recognize that its directive had a "ripple effect" on the rest of the project.

CHRONOLOGY OF THE CLAIM

When the Corps issued its directive, it also instructed Brutoco to submit an explanation, or cost proposal, breaking down its buttress-related expenses. Brutoco submitted a proposal for $1.8m on February 16, 1988. On February 26, Brutoco representatives met with the Corps to discuss the proposal. The purpose of this meeting was construed differently by the two sides, however. The Corps viewed the meeting as an exploratory attempt to determine the scope of the impact of the modification order on Brutoco, since the claim would have to go through a Corps audit before a final amount was approved. Brutoco, in contrast, saw the meeting as the first step in the negotiation over the actual amount of additional compensation to which it was entitled. The parties worked through the elements of the cost proposal, and agreed on a figure of $1.3m. In a subsequent letter, the Corps referred to the meeting as one in which the parties had discussed the "scope" of the damages rather than the actual quantum. Brutoco was frustrated by and resentful of this apparent tactic, which undermined its trust in the Corps.

Over the next several months, negotiations took place between the parties over the amount of the claim. Brutoco, feeling that it had been deceived, retracted its $1.3m agreement in principle and resubmitted its $1.8m claim. It also stopped work on part of the contract for several days until the Corps agreed to pay some of its expended costs. When these negotiations reached impasse, Brutoco amended its proposal twice during the month of May, bringing the total cost first to $2m and then to $2.8m. At this point, the Corps submitted the revised cost proposal for audit. The audit was completed in December, 1988, and no negotiations occurred while the audit was being performed.

In October, 1988, during the course of the audit, Col. LeCuyer arrived in the Sacramento District and took over the role of Contracting Officer. At that time, he was apprised of the history of the dispute and the status of negotiations to date. Soon after his arrival, he met with Salata. Although they did not discuss the substance of the dispute, they worked to establish a framework for subsequent negotiations. According to Salata, Col. LeCuyer promised that Brutoco would be treated "fairly," but the promised negotiations never materialized.

During the first several months of 1989, the Corps attempted to use the audit results as a means of lowering Brutoco's requested reimbursement. In April, 1989, Wade Dann, Brutoco's counsel, notified the Corps of its intent to make a "complete contract close-out" presentation.[1] Brutoco presented this package along with a formal, certified, "total-cost" claim on August 10, 1989 for approximately $3.1m.[2]

Since the components of the claim had been changed, the Corps was obliged to submit it for a second audit. The audit was completed at the end of 1989 and identified only $2.1m in actual costs. Subsequent meetings were held, and each side presented its arguments concerning the merit of the claim. The Corps made a final offer which was rejected, in part because of the time that had passed and the interest that had continued to accrue.

When it became apparent that the negotiations were unproductive, the possibility of ADR arose. Col. LeCuyer approved the idea as a last resort. If that failed, he planned to

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[1] Correspondence, Dann to John Corrigan (Corps Chief of Construction), 4/21/89.

[2] In other words, the $3.1m figure represented the difference between total contract income and total costs, overhead, and profit.

issue a Contracting Officer's Decision (COD) denying the claim. Even after the parties agreed to submit the claim to mediation, however, negotiations continued. Shy and Don Dennis, Chief of Construction, Operations Branch negotiated with Salata and Leonard Brutoco up until three days prior to the mediation.

While the cost proposals and claim were pending, the relationship between the Corps and Brutoco deteriorated steadily. Brutoco was cited for 67 safety violations. 65 of these claimed that Salata had forgotten to to don his hard hat while visiting the site. The Corps threatened to require Brutoco to hire a full-time safety officer and to give Brutoco a highly detrimental contractor rating of "unsatisfactory."

MAJOR ISSUES IN DISPUTE

The most important issue in dispute was the assignment of responsibility for the costs and delays resulting from the Corps' request that Brutoco build the buttress. The Corps believed that Brutoco was responsible for maintaining safety on the job. Therefore, its decision to place extra material in an unstable area, after excavating the channel too steeply in the first place, put the full responsibility on Brutoco. Brutoco, on the other hand, charged that the Corps had authorized it to use that site for backfill, and that if it were unsafe, the flaw lay in the Corps' design. Brutoco believed, therefore, that the Corps was entirely responsible for the delay and costs incurred by Brutoco in response to the Corps' extracontractual directive.

Brutoco also claimed that some initial delay had been caused by Southern Pacific Pipeline Company (SPPL) in late 1986. This delay resulted from the portion of the contract concerning the placement and relocation of some SPPL pipeline. The Corps, on the other hand, believed that Brutoco had planned the project poorly, developed an unworkable schedule after several months had already elapsed, and did not have adequate project management.

POSITIONS OF EACH SIDE PRIOR TO ADR

By the time the ADR process began, the Corps felt that its vulnerability was not very high, and that the case had little merit. The Corps did acknowledge, however, that there were some weaknesses in its case, since it had directed Brutoco to build the buttress.

Thus, the parties disagreed primarily over quantum. The Corps entered the ADR process expecting its liability to be approximately half a million dollars. Brutoco entered the process believing it was entitled to the full $3.1m for which it had submitted a claim.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

The Corps first suggested ADR at the end of 1989, when it became apparent that a long and arduous trial lay ahead. After the claim audit, the Corps' presentation of its evaluation, and Brutoco's response, the Corps proposed ADR to Dann.

PROS AND CONS OF ADR: THE CORPS

The Corps saw in ADR the potential to resolve a nettlesome claim quickly and inexpensively. Although none of the Corps staff members had prior experience with ADR, they had picked up some negative assessments in response to the Tenn Tom ADR process in the Nashville District.[3] In addition, people in the Corps were afraid that a non-binding process would be a waste of time, since either party could simply refuse to accept the final recommendation.

Corps staff members felt under some command pressure to attempt ADR. They agreed to give it a try in order to "get their ticket punched." Therefore, despite some negative preconceptions within the Corps, they decided to go ahead nonetheless.[4]

Col. LeCuyer's own experience reinforced the importance of finding an alternative to litigation. He had been involved in a highly complex set of claim cases as manager of a dam project 20 years previously, and was loathe to plunge into drawn-out litigation yet again.

PROS AND CONS OF ADR: THE CONTRACTOR

Dann had been involved in mediation before, so he knew and conveyed to his client the benefits of mediation: a fair, non-binding process, a mutually acceptable result, the possibility of a settlement and payment long before it would be obtainable through litigation. Although Brutoco had lost a great deal of trust in the Corps, economic issues overpowered their mistrust and brought the company to the negotiating table.

SELECTION OF THE MEDIATOR

Dann had used Piazza's mediation firm before, and he had been pleased with Piazza's work.[5] When the Corps suggested ADR to Brutoco, Dann mentioned Piazza's

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[3]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.

[4]Many people within the Sacramento District Corps believed mistakenly that the only legitimate type of ADR was a mini-trial. Therefore, they believed that what they were doing—mediation—was not actually ADR, but that they were calling it ADR so that they could say they had tried it.

[5]The firm of Gregorio, Haldeman, and Piazza mediates all kinds of civil disputes, except domestic disputes. About 40% of these are construction-related. Piazza has personally mediated over 1,400 cases.

name. Since the Corps had no objection to using Piazza, he was subsequently contacted and selected.

Piazza suggested that the parties send him a 10-page position paper or brief in advance of the mediation. The Corps did send a brief, outlining the basis of its objections to the claim. In contrast, Brutoco did not submit a brief. Dann felt that the purpose of a brief was to educate the other side, and since the Corps already had all of the information supporting Brutoco's claim, he felt that a brief was unnecessary. Therefore, no exchange of documents occurred.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

The ADR agreement between the parties was provided by Piazza, in a standard format. It specified the date and location of the mediation (February 27, 1990, in a conference room across the street from the Corps' Sacramento office). It outlined the timing of the presentations and negotiations, while leaving the structure of the presentations up to the parties, and stated that each party would be allowed to bring as many witnesses as it wished. It also established that the parties would split the cost of the mediator. The agreement was sent out to the parties a few days in advance of the mediation. Since neither side had any objections to the proposed agreement, it was not signed by Col. LeCuyer, Brutoco, and Piazza until they arrived at the conference room.

ADR PROCEDURE

PARTICIPANTS

Col. LeCuyer, Sacramento District Engineer, and Leonard Brutoco, president of Brutoco, served as the chief decision-makers for the Corps and Brutoco. Anthony Piazza served as the mediator. Geoffrey Worstell, Assistant District Counsel for the Corps, presented the Corps' case. Wade Dann, counsel for Brutoco, presented Brutoco's case. Additional Corps personnel were Don Dennis, Chief of Construction, Operations Branch; Ralph Cameron, resident engineer; Randall Yee, auditor; George Perry, project engineer; and Steve Rowe and Al Larson, claims analysts. Additional Brutoco personnel were Tom Salata, Executive Vice President; Mike King, Chief Executive Officer; David Hattery, Co-counsel; and Robert Sutor, accountant.

SCHEDULE

The mediation was scheduled for one day, February 27, 1990. Each party was to give a one-hour presentation, after which the mediated negotiations would commence. When the parties first arrived, they signed the mediation agreement. Dann then gave a two-hour presentation for Brutoco, after which Piazza requested that the Corps shorten its presentation: "I'm a quick study, and I don't need a lot of background." Worstell was able to cut his presentation down to a half hour. Piazza then separated the teams and shuttled between them for the rest of the day. When agreement was reached at about 8:00 p.m., the parties reconvened to draft and sign the settlement agreement.

DESCRIPTION AND SETTLEMENT NEGOTIATIONS

Brutoco brought an impressive scale model of the channel and used it in its presentation. Both Brutoco and the Corps structured their presentations by outlining their main arguments and then explaining which witnesses they would call up (in a trial) to support which points. At the close of the Corps presentation, Piazza summarized the salient points in each side's presentation, recalling specific points with a precision that amazed many participants. The thoroughness with which Piazza recapitulated their arguments erased any concern on the part of the Corps that he might have gotten a "stilted view" after hearing presentations of such different lengths.

After the presentations were over, the parties were split into separate rooms. Piazza separated the parties for two reasons. First, he felt that each party would be more amenable to discussing litigation risk analysis without the presence of the other party. Second, he felt that each side would be more willing to discuss possible settlement packages, and more willing to disclose its bottom line, if people from the other side were not in the room.

Piazza met with the Brutoco team first. He explained to them where he thought the strengths and weaknesses in their case lay. He also worked to get participants to see the issues more objectively, by appealing to their common sense. For example, Piazza pointed out that the claim was still forward-priced (reflecting costs that would rise), but that the work had already been done; therefore, it would be logical not to forward-price the claim.

Piazza then did the same with the Corps team. He helped them to understand that since they had directed Brutoco to do the work, there was some merit to Brutoco's claim regardless of who was responsible for safety. Piazza also stated that if it got to be 3:00 and

no significant progress had been made, they would all go home. The Corps decided to offer Brutoco half a million dollars as an opening proposal. At the end of his first meeting with the Corps, Piazza took Col. LeCuyer outside the room and asked him for his impression as to where the case would settle. LeCuyer estimated that they would settle at about $1.1m. Piazza took the Corps' half million dollar offer back to Brutoco.

Col. LeCuyer found Piazza's technique very effective. By appealing to logic and objective reason, he got both sides to "see the forest for the trees." By setting a quasi-deadline, he motivated the teams to be reasonable and efficient.

Throughout the afternoon and into the evening, Piazza shuttled back and forth between the two rooms. He carried offers and counteroffers from party to party, explaining further as time wore on the strengths and weaknesses of each side's case, as described above. He also helped the parties to understand the risks of litigation. Piazza believed that the parties were well-prepared and well-briefed, which made the process quite efficient.

When 3:00 p.m. passed, the participants began to believe that the case might well settle. This optimism helped them to "buy in" further and inspired them to work harder. Late in the afternoon, the parties decided to address several smaller disputes that had arisen in the previous two years, in addition to the larger claim. If all of the outstanding matters could be settled, the entire contract could be closed and settled that same day. Although a "global" settlement had not been originally intended, it developed naturally. The parties knew that addressing additional issues would give them additional latitude—allowing each side to get more on some and less on other issues.

Finally, in the evening, Piazza identified a figure ($1,155,700) that he thought might be acceptable to both sides, and suggested it to each party. He reaffirmed that it was non-binding, and asked them if they would accept it. By that time, both teams had become very conscious of the weaknesses in their cases, and thought that the proposed number was very attractive. After discussing it among themselves, both parties agreed to accept his recommendation.

For the first time since the morning presentation, Piazza brought the two teams back together and advised them to draft a settlement agreement. Dann did most of the actual drafting, but input was solicited from all. The settlement agreement was signed by Col. LeCuyer and Brutoco at about 8:00 p.m.

EVALUATION

PROCESS

Corps staff were pleased with the process. They felt that it, and Piazza in particular, had been fair, professional, and effective. Cameron noted that ADR, unlike an imposed ruling, helped people to understand the justification for the settlement. Col. LeCuyer also pointed out that the ultimate success of the process depended on establishing a feeling of ownership in the agreement on the part of all. Worstell, who had been reluctant to use ADR at the beginning, observed that the process helped to clear the air between the parties, greatly increasing the potential for future work together.

Brutoco was also pleased with the process. They were able to reach a reasonable agreement expeditiously and move on to other matters. Salata suggested that a fact-finding panel, charged to uncover the "truth," might have been preferable to a mediator. In his view, a mediator's goal is to reach settlement, and to move each side toward a compromise position. Since Salata felt that Brutoco deserved more than it finally accepted, he believed that a three-member fact-finding panel might serve justice more effectively than a mediator. Such a panel could also meet on-site regularly and resolve disputes before they escalated.

Several participants emphasized the importance of having the ultimate decision-makers at the presentations and negotiations. Several also noted that it was particularly effective to keep the parties separate during the process. Col. LeCuyer pointed out that when someone negotiates face-to-face, he or she has to deal with two audiences: the other side and his or her own team. Pressure from one's own team can make it difficult to listen to and accept the other side's arguments, for fear of losing face. By removing the other side, however, Piazza made it possible for each team to accept (albeit grudgingly) the merit of the other side's arguments.

Piazza noted that the Corps believed that longer presentations would have been helpful. His experience indicated, however, that one-hour presentations are sufficient and allow participants to make the best use of their time.

QUANTUM

The Corps was extremely satisfied with the settlement. Worstell felt that it was fair, reasonable, and extremely quick. Although they went in expecting to pay half to three-quarters of a million dollars, they acknowledged that the extra amount paid was due to interest, administrative costs, and the avoidance of a trial.[6] Aside from the risk of losing at the Engineering Board of Contract Appeals, however, the Corps was pleased at how much the process saved in terms of time and litigation expenses as well as administrative time and related costs. Indeed, Worstell estimated that it would have cost approximately $50,000 to litigate the case fully. Finally, by achieving a global settlement, the parties were able to avoid contract closing hassles.

Brutoco was also satisfied with the settlement. Dann felt that although they might have gotten less than they would have in court, they got cash immediately instead of waiting through a two-year trial. The negotiated settlement therefore gave Brutoco cash up-

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[6]In addition, because of the Equal Access to Justice Act, the Corps might have been liable for Brutoco's legal fees.

front, which was important. Salata felt that under the circumstances, they did the best they could. He believed that the Corps would not have settled without the intervention of the mediator. The outcome was especially satisfactory in light of the mid-contract change in contracting officers, the misunderstanding over the purpose of the February, 1988 meeting, and the time that had elapsed once the dispute arose.

POSTSCRIPT

Since the settlement resolved all outstanding matters related to the then-completed contract, Brutoco performed no additional work on that project. For the most part, people on both sides felt that they understood the merit of the other side's case. Some people on the Brutoco side, however, felt that their trust in the Corps had been severely shaken, and they stated that they would prefer to avoid Corps contracts in the future.

The Sacramento Corps is actively looking for other opportunities to use ADR. They are currently in the process of designing an ADR proceeding to resolve a dispute with a contractor in Utah. Ironically, litigation with the contractor who handled Phase I of the flood control project is still pending.

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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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