
CHAPTER 21

DREDGING CONTRACTS

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Previous chapters of this handbook deal with the technical aspects of the mechanics of dredging. An understanding of the theory and the mastery of the operating techniques of the dredging process should improve production and lead to greater profitability. These are some of the essential elements of a successful project.

Profit is not always guaranteed. The best equipment and the most efficient operators are sometimes squandered on projects that suffer from poor contract decisions, inadequate investigation, inept bidding, or poor administration. Profit is often left on the table or wasted in futile attempts to recover from overlooked obscure requirements or obligations not fully understood. Enormous legal costs are often incurred when disputes arise.

From the owner's viewpoint, administrative mistakes, faulty contracts, and inept specifications can be just as devastating. Contracts and the precontracting process are almost always given less attention than they deserve. Poor performance, construction mistakes, and delays with high legal costs often result. Careful review of contract clauses and contract plans and specifications are seldom made by either party until the damage is done. The ounce of prevention is too often exchanged for the pound of cure when contracts are being written and bids are being made.

The practical meaning of contract language and the interpretations given in previous court decisions are seldom seriously considered during the contract formulation stage. The risks assumed, the potential for disagreement, and subsequent protracted litigation are given little consideration in the excitement of the bidding process.

This section attempts to alert the reader to some of the common mistakes made in formulating and administering dredging contracts. The contractor's and the owner's perspectives are explored with a view to encouraging a practical evaluation of both parties' obligations under a variety of contract circumstances.

CONTRACTS, SPECIFICATIONS, AND CLAIMS

Contracts Generally

A good and simple definition to remember is that

A contract is a promise, or a set of promises, the breach of which the law provides remedy for, or the performance of which the law in some way recognizes as a duty.

Contracts are the subject of considerable federal and state law and are the root of much litigation over disagreements as to terms thereof. Contracts may be enforced under American contract law if the terms are reasonably definite, the subject matter is lawful, the parties are legally competent, and some considerations (either financial or mutual promises) are exchanged.

Contracts may be oral, the so-called handshake agreement, and still be subject to legal recognition. To enter into a dredging contract in such a fashion would be insane. Some vaguely written and ill-conceived contracts also may be equally dangerous. The author has been involved in some contract disputes that would have been easier to settle equitably had the contract not been written. To obligate oneself, either as contractor or owner, by the terms of a vague, ambiguous, or impracticable contract can easily result in economic disaster.

The contract in lay terms usually means the contract document which bears the signature of the principals and also the specifications and the voluminous laws, regulations, publications, and rules that may be incorporated by reference.

A recognized contract authority, Max E. Greenberg, wrote in *Civil Engineering Magazine* of May 1975 his assessment of construction contracts as follows:

A contract is a dangerous instrument. It should always be approached with trepidation and caution. Theoretically, the aim of a written contract is to achieve certainty of obligation of each party, the avoidance of ambiguities, and such definiteness of understanding as to preclude ultimate controversy. In practice, construction contracts are generally found not to definitely fix obligations, but to avoid obligations.

In this statement, Greenberg identified the root problem of most contract disputes, namely, an inappropriate contract whether by oversight or by deliberate design. A contract that contains ambiguous and exculpatory language intended as an escape from obligation and risk assignment is a poor contract indeed.

Contracts take many forms, all of which should attempt to be specific and to address the scope of the work to be done. Certain parts of most written contracts are "standard" clauses or forms that are used in a variety of procurement documents. Site-specific and work-specific requirements must be tailored to the job at hand. Commercial construction contracts most often follow those published by and available from the American Institute of Architects (AIA). Federal contracts are specified by federal law and regulation that have evolved over time from government experience with procurement and its problems.

Contract Regulations

Federal contract regulations are changed from time to time. Formats and nomenclature may change dramatically but the content and substance of contract clauses and provisions change very slowly. Changes of significance occur as a result of legal decisions and interpretations by the federal courts. Most changes over the years are minor and relatively obscure. The federal regulations that specify the duties of and restrictions on all Corps of Engineer (CE) personnel involved in the contracting process during recent years have been known by many titles such as: Engineer Contract Instructions (ECI), Defense Acquisition Regulations (DAR), Engineer Regulations (ERs), as well as local division (DIVRs), and district regulations (DRs).

Currently, all contract instructions are included in the format known as Federal Acquisition Regulations (FAR). Certain deviations are permitted, which in the case of fed-

eral construction contracts administered by or in accordance with CE authority, are known as Engineer, Federal Acquisition Regulations (EFAR). Special permission is required to deviate from the published FAR.

American dredging contracts, which are the subject of this text, are most often prepared by the CE using the FAR or by others such as port authorities, states, and municipalities who almost always elect to use CE's format and practices. In addition to instructions and other provisions, the FAR contains many standard clauses that for federal contracts must be used verbatim.

The contracting agency, such as the CE, using a matrix system selects the contract clause applicable to the work being done. Special permission is required to deviate from the standard language. Such deviations usually appear in the technical provisions section of a construction contract. The FAR is divided into sections pertaining to: (1) construction, (2) supply, and (3) service contracts. All dredging contracts use *construction* FAR clauses and EFAR deviations.

Contract Form

Dredging contracts, both federal and private, may take several forms. The most usual contract type is known as the *unit price contract*. This format requires the measurement of the dredging done and payment based upon a unit price established by the bid document.

An acceptable form of contract, which in some cases is preferable to the unit price contract, is the format known as a *rental contract*. This practice avoids detailed measurement of work done but provides for payment based upon the time the dredge plant is operating. Inspection and recordkeeping become more important in this instance if the owner is to be protected. A rental contract is more detailed in its description of an acceptable plant and must contain a payment schedule that compensates for operating, idle, standby, and/or moving time. Some question whether the average contractor will produce as much per unit of time on rental as on lump sum.

A seldom used contract form, especially in public work, is a *lump-sum contract* that contemplates a turnkey performance without benefit of detailed description of quantities and other subsurface conditions. Such a contract would be entered into to restore a section of channel or to excavate an area to agreed-upon dimensions for a fixed amount, using whatever device the contractor may choose. The CE does not permit this form of contracting except in rare instances. It may be expedient to resort to this procedure in situations when time is the most important consideration.

Other forms of construction contracts, such as the different versions of *cost-plus agreements*, are not considered appropriate by the federal regulations but may be beneficial to some private owners. Such agreements must be made between parties that are prepared to rely heavily upon mutual trust and business friendship. The federal agencies are not prone to be good candidates for this arrangement.

Unless otherwise described, the comments and examples that follow will contemplate dredging contracts which follow the FAR and are based upon the unit price format of bidding and contract administration.

It is convenient for discussion to separate the contract documents into three parts: (1) the contract agreement, (2) the contract clauses, and (3) the plans and specifications.

The Contract Agreement

The *contract agreement* is the form used to make the offer to perform the work (contractor bid form) and the acceptance of the offer (award). These documents are legalistic in nature

and contain information used by the contract administrator to establish the price and to identify the legal parties to the agreement. The bid form contains many certifications and acknowledgments that are often very important. Rules concerning surety, small business administration, and bid-opening procedures are described.

Standard Contract Clauses

The *contract clauses* are those provisions that describe a wide variety of agreed-upon procedures and policies that must be followed by all parties. These provisions are often not fully appreciated by either party until contract administration has failed and disagreements have escalated to litigation. Both parties are usually surprised to learn the extent of the promises they made to each other when the bid was submitted and the award given. These clauses are the proverbial “fine print” that is often overlooked and misunderstood.

Among the contract clauses are the requirements included by reference, which are words that make applicable such restrictions as “all federal, state and local laws and ordinances” that may appertain to the work to be done. The requirement for permits, and the regulations of other federal agencies such as OSHA, Federal Fish and Wildlife, EPA, U.S. Coast Guard, etc., may be a part of the contract. Policy and procedure are laid out in the contract clauses that determine the process to be followed in cases of protests, disputes, modification, termination, default, etc. These clauses cover general requirements such as the necessity to adhere to laws concerning equal opportunity, affirmative action, a body of labor law, clean air and water acts, and the list is extensive. Currently, more than 85 specified contract clauses are found in most federal contracts. These clauses are applicable to all construction contracts, including dredging.

Special Clauses

Usually bound with the bid form and the construction contract clauses are the requirements, known currently as *special clauses*. A simple maintenance dredging contract may contain 35 to 50 such clauses, some of which are deviations from the FAR standard clause that have specific application to the work under the contract. These clauses are more job- and site-oriented than the standard contract clauses; many pertain to dredging as opposed to general construction.

Some of the more important special clauses treat such subjects as the time for commencement and completion, liquidated damages, physical data, wage rates, time extensions, variations in estimated quantities, survey procedures, plant requirements, quality control, and final examination and acceptance.

Technical Provisions

The smallest portion of the contract is usually the most important from the standpoint of performance and inspection of the work. The clauses, known as the *general requirements* or *technical provisions*, follow the other clauses and usually number from 15 to 20. As the terms imply, these clauses describe in detail the manner in which the work must be accomplished, how the work will be measured, the details of the survey procedure that will be used, more specific details of reporting and recordkeeping, inspections, compliance with navigation rules and regulations in the specific area of work, and most importantly, the character of the material that will be encountered.

Most contracts provide the contractor with sample report forms that are applicable to the work. These are usually appendices to the specifications. Some or all of these may be mandatory submissions required of the contractor.

Dredging Contract Problems

Since the FAR clauses are standard and appear in most construction contracts, it is beneficial for a student of the contract administration process to first obtain a set of dredging contract documents and read and try to understand the meaning of each clause. A complete FAR may be found in federal offices that have contracting authority or it can be purchased from the Superintendent of Documents, U.S. Government Printing Office or obtained from web sites.

Seminars and training courses are available from a variety of sponsors that concentrate on specific aspects of contracts and contract administration problems. The subject is extremely broad, and contract situations that may arise are infinitely large in number. Unfortunately, the only way to become reasonably proficient is to work diligently with the real problems for a long time. For example, no one can appreciate the complexities of the litigation of a construction claim until he or she has been personally involved as a principal witness. A few such experiences will develop sensitivities to potential contract problems that will last a lifetime.

While it is impossible to cite solutions to every problem encountered in dredging contract administration, a few recurring situations should be fully understood so that trouble can be recognized immediately.

The contracting and contract administration process must be understood. The use of standard clauses makes this task easier. The clauses are written in a straightforward manner and the words are not hard to understand. The meaning of the clauses and the impact of one upon the other as they relate to accepted principles of contract law become more complicated. We find that the clauses mean what the courts have said they mean. Board and court decisions, therefore, become the textbook of what one might expect as an outcome of a particular set of circumstances. Dredging contracts are not as complicated as some brick and mortar contracts are because they deal with fewer separate parts and the process is relatively uncomplicated.

Authority

The first important question to ask may be "Who is in charge of the contract?" In government work one person is designated as the contracting officer (CO) and one person is designated as the contractor. All others act for these principal parties and have little, or sometimes no, authority on their own. It is important to understand that certain actions can only be taken by people with the proper legal designation. Inspectors have no authority to make any contract decision; they only report what they see and hear to the contracting officers. In matters that affect the contractor's interest, therefore, an inspector must be certain that the contracting officer is a party to any agreement or compromise. In private work the same principle is true. The person signatory to the contract must personally act or someone to whom specific authority has been given must act in his or her name if the rights given by the contract are to be protected. The author has been employed to assist in contract dispute settlements where many of the standard procedures set out in the contract clauses concerning notification, submission of timely complaints, etc., were not followed. Such circumstances allow the other party to plead that his or her rights were damaged thereby, and the judge may agree.

The contractor must understand and must rigorously follow the procedure and the chain of command established and the owner must do likewise. The authority of the participants should always be stated in writing for the record.

Disputes, Claims, and Appeals

Owners and contractors are perpetual optimists. Everyone hopes that each dredging contract will begin on time, proceed smoothly, and be completed ahead of schedule. To make these events a perfect contract, the work would pass final inspection and the contractor would be promptly paid. There would be no contract modifications and no disputes.

Some contracts turn sour and disagreements become disputes, disputes lead to lawsuits, and both parties usually lose money and sometimes more. When the parties resort to litigation, it is evidence of a complete failure of contract administration.

The Disputes Article

In federal contracts the disputes article (FAR 52.233) gives the rule concerning the procedure for appeal from an adverse ruling of the owner or contracting officer. The clause makes clear that all the provisions of the Contract Dispute Act of 1978, *et seq.*, apply and states the procedures that must be followed. The article also requires the contractor to proceed diligently with performance of the work while the appeal is being processed and perhaps a board hearing or court trial is occurring. The author pursued a termination for default of a major dredging contractor because the contractor failed to proceed with the work and insisted upon delaying the job until his appeal was handled to his satisfaction. The ensuing litigation lasted over 10 yr. The termination was upheld by the court and the work was completed by another contractor. The only winner was the contractor's lawyer.

All private contracts should have a disputes article, but some do not. In the absence of a specified set of rules to settle disputes that arise, the aggrieved party must resort to civil court. This is a protracted and costly procedure, and for business disputes, equity in the courtroom is not assured. The more enlightened private contracts now contain provision for arbitration of disputes.

The author recalls a dispute arising from a contract performed in a foreign country under a very poor contract that did not provide for disputes. As a matter of fact, the hapless contractor accepted a contract that actually said that no dispute would be allowed. The contractor fell behind schedule; the owner ceased making payments and invited the contractor to leave the job. Needless to say, the American contractor was at a great disadvantage and did not pursue a claim in the foreign court. Because of this, and a few other mistakes, this company is out of business.

In federal contracts an appeal can be taken from CO decision either to the agency board (the CE's Board is the Engineer Board of Contract Appeals [Eng. BCA]) or to the U.S. Court of Claims (since 1982 known as the U.S. Claims Court). Most contract appeals within the CE's system are taken, at the contractor's election, to the Eng. BCA.

If a board decision is unacceptable to either party, an appeal can be taken to the U.S. Court of Appeals for the Federal Circuit. Needless to say, few CE decisions are appealed by the government but contractors often resort to the court to attempt to have an adverse board decision overruled. The Eng. BCA is very sensitive to being overruled by the court and for that reason, among others, the board decisions are often felt to be slanted in favor of the contractor.

Differing Site Conditions

A *differing site condition* is the subject of most dredging claims. A claim of differing site conditions presents some very difficult problems for both sides. Contracts never perfectly describe a subsurface condition. Either too much or too little is said. The character of materials paragraphs are often complicated by highly technical language and descriptions,

including the specification writer's opinions concerning the meaning of the geologic terms used and his or her attempts to discuss dredgeability. Board decisions are often influenced by contractor's experts who dissect the words of the character of materials paragraph on a technical level far above that understood by the contractor, his or her estimator, or his or her operating people. Such experts have the privilege of examining the words and the physical evidence after the fact and rely upon subtle and often obscure details to show defects in the specifications. I am convinced that the best specification for describing the subsurface condition is to describe the testing and investigatory methods used, make the raw data available for review by the bidders, and refrain from writing multiple pages of descriptions, opinions, and interpretations of the data.

There are two recognized types of differing site conditions:

Type I: Subsurface or latent physical conditions at the site differing materially from those indicated in the contract.

Type II: Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract.

In the first instance, the contractor shows that the specification was defective in that it misdefined, misclassified, or misled the bidder by its words and inferences.

In the second instance, the contractor shows that he or she ran into unexpected obstructions that were not mentioned in the specification. To qualify as a type II, the unexpected obstructions are assumed to have been unknown to the owner as well as to the bidder.

The Right to Make Changes

The *changes article* is the vehicle by which the contract may be modified after award. The contract reserves the right to the owner to make changes within the scope of the contract and provides that equitable adjustment be made (in time and money) for any change made. To make a change that is not within the general scope of the work requires a supplemental agreement. Such an agreement must be by mutual consent of the parties. Claims often arise from changes made under the changes article and usually these claims involve the calculation of cost to the contractor and the effect of sequential damage—the ripple effect.

The Right to Terminate

The contract provides for termination of a contractor's right to proceed with the work at any stage of the construction process. There are two types of terminations, as follows:

Termination for convenience of the owner is provided for when it is viewed to be in the best interest of the owner to cease work on a contract. This is a business decision made by the owner and does not often result in a claim. The contract provides that the contractor shall be paid for all work done and for costs incurred in work in process, including inventory, etc. This process is usually costly for the owner and requires considerable work by the contract administrators and auditors to reach a fair and equitable adjustment in the contract amount.

Termination for default is a last resort in the process of trying to accomplish a dredging project. Termination for default almost always leads to a claim. As a matter of fact, most cases that involve termination for default already are fraught with disagreement. Defending a default action against a viable contractor is the ultimate contract administration challenge.

Suspension of Work

Related to termination, but usually not as severe, is the right of the owner to suspend work on a contract for a variety of reasons. A *suspension* is temporary and is used to mitigate the cost of prolonged delays without resorting to cancellation altogether. This action is a great exercise for project personnel who must inventory the work in progress, the equipment status, and the demobilization expenses and submit many reports and records.

Board and Court Decisions

When we examine board decisions over an extended period of time, we find certain board concepts that are axiomatic in that they usually affect the decision in a very predictable way. Some of these often seen in dredging claims follow.

Ambiguities are statements that are subject to more than one interpretation by reasonable people. Such statements are the root of most disagreements, and the rule followed by the board is that since the government wrote the contract, it generated the ambiguity and therefore must suffer the consequences of any *reasonable* interpretation of it.

Exculpatory clauses are statements that are intended to negate an obligation that other parts of the specification provide for. Such clauses are very often used to avoid risk or to transfer risk to the contractor. For example, a contract includes a two-page description of the nature of the material to be dredged by giving geologic names, laboratory test data, and physical descriptions. The specification writer then often adds a caveatory and exculpatory paragraph such as

The information and data furnished are not intended as representations or warranties but are furnished for information only. It is expressly understood that the government will not be responsible for the accuracy thereof or for any deduction, interpretation or conclusion drawn therefrom by the contractor. (Quoted from a CE contract.)

The overriding rule in this case is that the contractor is entitled to rely upon all the data and information given in the contract if it appears reasonable and is without obvious error.

The courts and the board are hostile toward disclaimer clauses generally. A frequent attempt is made by the government in dredging contract litigation to plead that the contract tells the contractor to make site investigations and to satisfy him- or herself as to the nature of the material, the site conditions, etc. This defense does not usually provide a shelter from a claim of differing site conditions.

Warranty of Plans and Specifications. Dredging contracts are supposed to contain the information necessary to allow a contractor to make an appropriate bid. Engineering is performed by the owner by use of hired labor, or by AE contract, and the owner is assumed to warrant the information presented as being correct and complete. Contractors are not expected to add contingency amounts to ensure against inaccurate information or faulty engineering. The theory is that in accepting the liability for its own possible mistakes, the owner secures the lowest possible bid for performing the work. This theory admittedly is idealistic, and there are endless circumstances that complicate the application of the principle. The standard FAR clauses provide remedy for claims based upon poor or defective contract information.

Equity. The theory used by the Eng. BCA and the ASBCA, which differs somewhat from the civil courts, is derived from the idea that contract disputes should be settled so as to provide *equity*. Equity means that the board should listen to all the arguments and base its deci-

sion primarily upon correcting an injustice that has been inflicted upon the damaged party. The federal rules of evidence do not necessarily apply in board hearings.

Impossibility of Performance. The doctrine of impossibility has recently been liberalized to include the theory of impracticability, which means that the performance should not only be possible but economically realistic. A test of impracticability may be stated as whether the cost of performance is so much greater than the anticipated cost as to render performance commercially senseless. This remains a controversial legal issue and one that has many variations.

Technicalities. In civil court actions we see technicalities argued much more successfully than before the Board of Contract Appeals. It is a rare case indeed that is decided by the board solely upon the technicality of such arguments as improper notice, failure to notify the contracting officer directly (as the contract may require), or for taking instructions from an owner's employee not authorized to give them.

The board usually examines the contractor's view of a disputed fact in light of whether his or her conclusions were reasonable and, if so, whether these reasonable conclusions were the root cause of the injury he or she subsequently suffered.

Documentation of the Record

The most important single lesson to be learned by both the contractor's project personnel and the owner is the value of good documentation of the facts. Facts are evidence. Evidence is the essence of the negotiation and the litigation or administration process.

The job record must be accurate, complete, and clear to those who must rely upon it during attempts to settle disagreements at the job level and later in the courts. Good documentation is direct and contains no emotional statements; if opinions are stated, they must be justified. Attempts to mislead or to falsify the record usually fail to achieve the purpose intended; this is a very poor practice on either side. Good documentation is made as the events occur. Recollection of facts after the event takes place is never as good as a contemporaneous record. A lawyer cannot be expected to win a favorable decision at the bargaining table, or before the judge, if the facts were not properly documented.

The Effect of Government Practice on Private Contracts

The comments and examples previously given indicate that the author uses the terms *owner* and *government* interchangeably in most cases. Private industry A&E firms that prepare dredging specifications very often adopt the principal FAR clauses for their contracts. Some so-called private contracts are, in essence, copied from CE dredging contracts, at least in the most important parts. Some private contracts are partially federally funded and are thus required to follow certain parts of the FAR.

Whether the actual government contract is used or not, disputes between dredging contractors and private owners that are tried in court or settled by arbitration almost always are affected by *expert testimony*. Most expert testimony will relate to industry practice, which will usually have strong ties to the CE practice and procedure since the CE is universally recognized as the premier authority on dredging matters in the United States. The author has been involved in many cases that did not involve the government in any way, but the judge was always interested in what the CE would do or would say concerning the matter before the court.

Since the CE has such influence on dredging and dredging contract administration in all segments of the industry, it is wise for all so-called private contracts to adhere, whenever possible, to the CE's principles in writing and in interpreting the meaning of the contract terms.

Defensive Contract Administration

A summary of what must be done to prevent unsatisfactory results is perhaps oversimplified in the following statements:

1. The contract documents must be drafted and reviewed by persons who know what the project requirements are or what they should be. All levels of administration must make certain that the standards of performance are clearly set out in the contract.
2. Contract administrators must know the contract requirements. Those individuals with most authority must be sure that those with the least authority (usually the ones most involved with the work) understand the contract and communicate with those who must make the decisions.
3. The record should be thoroughly, accurately, and faithfully documented, and those at the upper levels of authority must constantly review and understand the significance of the daily documentation.
4. Problems must be anticipated. Experience and practice are the only teachers that will allow the project manager to be a good anticipator of problems. Those at higher levels of authority must understand the requirements and the level of performance that is being observed by inspection and must concentrate supervision and inspection where problems are most likely to occur.
5. All levels of the administration network must approach their work with a professional attitude, being certain that they are knowledgeable of the requirements and of the daily work performance, that personalities are not allowed to be a factor in decisions, and that each event is viewed with the proper amount of skepticism so that a worst-case scenario will not be a surprise.

Disagreements, disputes, claims, and appeals will always occur so long as the contract is an imperfect instrument. There has never been a perfect contract. The better the contract promises are stated and the better the understanding between the parties is established, the less likely we will be forced to resort to lawsuits for settlements of differences. The English language encourages ambiguous statements and obscure meanings; human nature encourages self-serving interpretations and selfish motives.

ALTERNATIVE DISPUTE RESOLUTION

Litigation the Conventional Way

The disputes that arise from contracts with the government and between private-sector parties have historically been settled by litigation. The CE and some other government agencies that do considerable business through contracts with outside entities established their own agency boards that adjudicate claims and appeals. The FAR provides standard contract language which establishes the policy and procedure that must be followed in processing a dispute through the system. The system is litigation. The ultimate resolution of litigated disputes is often found in the U.S. Claims Court system.

The system operated well for many years and most results were equitable to both parties. Changes have occurred in the philosophy of business transactions and in the attitudes of contracting parties that have rendered the present system of litigating disputes in some respects inadequate. The court system is overburdened with cases, and the administrative boards which function as the courts do cannot be expanded fast enough to provide room for the cases to be heard. The approaching crisis has been apparent for at least two decades. All parties agree that different methods must be adopted to overcome the slow, tedious, and expensive process that can no longer guarantee equity. The very fact that disputes that proceed through the system require in excess of 3 to 5 yr to reach final settlement is generically inequitable, regardless of the correctness of the decision. Time erodes the value of otherwise equitable settlements and the expense of litigation has become overwhelming.

New Thinking

The alternatives to litigating business disputes are not yet universally accepted. As a matter of fact, controversy still prevails even though everyone agrees that the court system is burdened beyond its ability to function. The reasons are many, not the least of which is the reluctance of some lawyers to agree to vacate the court system and the inability of the client to operate without legal counsel. Alternative dispute resolution (ADR) techniques are, however, proliferating and are sure to emerge as accepted standard procedures in the not too distant future. Necessity is, after all, the mother of invention.

The Alternatives

Mediation-based techniques are forms of voluntary procedure that are gaining acceptance for a variety of disputes and can be beneficial in the contract (business) disputes in which we are interested. Mediation is a process that depends on a third party to help the disputing parties reach a mutually satisfactory agreement. The mediator encourages the parties to identify the problem and may suggest solutions. The mediator should not coerce or pressure but should work toward an agreement the parties make themselves. This works best when the parties wish to continue a business relationship and wish to settle the issues between them. Successful mediation always requires a skillful person to act as the third-party mediator.

Arbitration-based techniques are more formally structured and involve the submission of the dispute to a third party or a panel who renders a decision after hearing the case argued and reviewing evidence. The procedure is more informal than litigation but more structured than mediation. Arbitration as a technique is not new and is often (in private contracts) an accepted alternative dispute resolution technique. There are a number of private arbitration activities affiliated with state and federal agencies as in-house arbitrators of specific classes of disputes. There are arbitration centers in universities which offer a variety of services to the public concerning binding and nonbinding arbitration; the insurance industry often provides and encourages the use of arbitration to settle insurance-related disputes, as does the Department of Labor. The courts in some jurisdictions have ordered arbitration at the federal and state levels for some types of disputes.

The *American Arbitration Association* (AAA) is a nonprofit, private corporation engaged in a variety of arbitration variations often tailored to fit a business situation. The federal and state courts recognize the procedures and encourage their use. All arbitration is voluntary dispute settlement. If the parties agree to binding arbitration, the courts will enforce the arbitrator's decision. The best results are obtained when the contract document includes a requirement that stipulates dispute settlement by means of arbitration and references the

rules under which arbitration will proceed. The justification for this method of dispute settlement is to provide a simple, economical, and understandable system for obtaining practical solutions to business disputes. Arbitration seems to be well suited to the settlement of dredging contract claims and other fact-oriented disputes.

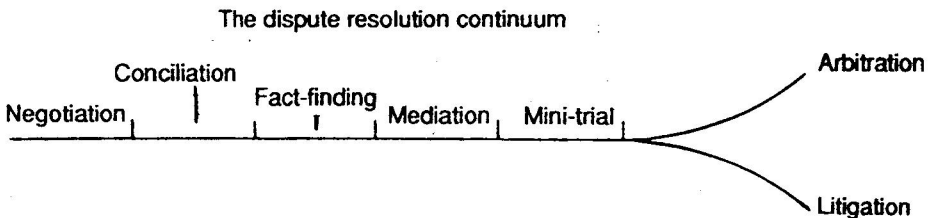
Advantages of Arbitration

Arbitration is a legally recognized dispute settlement technique that, if managed correctly and with the proper contract provisions, is final and binding on both parties. The process is almost always less expensive and much faster than litigation. The outcome should be equally as equitable as litigation. Since the parties select the arbitrator and the rules of civil procedure do not apply, the parties to the dispute are less restrained at the hearing. The proceedings are private and the matter, including the settlement, is confidential.

What Is Better than Arbitration or Litigation?

Settling the disagreement at the earliest possible point is always preferable to any alternative. All construction contract claims and appeals usually begin with a disagreement in the field or in the interpretation of a contract provision. The disagreement escalates into a dispute, the dispute into a claim, and the claim results in a contracting officer's decision. From the decision an appeal is usually made and litigation follows.

The dispute settlement alternatives escalate similarly. The dispute settlement continuum takes the following path (*Source: American Arbitration Association*):



As the process moves from left to right on the diagram of options, the cost increases. With each escalation of confrontation, each party spends more time in preparation and presentation; as the process is moved toward the ultimate conclusion, the parties lose more and more control.

The Corps of Engineers' Position

At the present time, the CE must use the FAR and the contract procedures that are consistent with those regulations. The use of agency boards and the U.S. Claims Court system are the options in the contract. Arbitration is not specified in the government construction contract and an agreement to use that technique must presently be a voluntary choice agreeable to both parties. Binding arbitration, absent a contract provision, is not enforceable by the courts under the present status of the federal contract clauses, even if both parties agree to enter into such arbitration.

The Mini-Trial

A March 1989 article written by Lester Edelman, Esq., the Chief Counsel of the Corps of Engineers, Office of Chief of Engineers, Washington, D.C., is summarized as follows:

The U.S. Army Corps of Engineers, concerned about the increasing time and expense to settle government contract claims, examined alternatives to the traditional method of resolving disputes before boards of contract appeals. The option that was chosen was the mini-trial, a voluntary, expedited, and non-judicial process whereby the top management officials of each party meet to resolve a dispute. The Corps of Engineers adapted the mini-trial to best-suit its own organizational needs.

When the "adapted" mini-trial is examined, we see that it is a blend of characteristics from several dispute resolution sources—negotiation, arbitration, and mediation.

The mini-trial is not a trial at all; the misnomer is unfortunate. It is better described as an elaborate form of mediation. No judge or lengthy procedures are involved. Decisions are made by the managers who begin by determining that they desire a settlement without litigation. A mini-trial agreement is developed which defines what the parties want to happen before and during the mini-trial. The agreement is a guide which specifies roles, time limits, schedules, procedures, and limits on the discovery process. Attorneys are not allowed to present lengthy briefs and arguments; the process is deliberately kept short and to the point. The focus in preparing the case must be on the best argument that will convince the other side, not a judge or jury.

Both sides must be represented by the top management people who are assisted by a neutral advisor (optional). The advisor may actually preside over the conference. Having top management present is the unique feature that makes the process work. These people usually have heard only their organization's position, not the other side, and they have the authority to make decisions and settlements. Mini-trials are not appropriate for all issues. To be a candidate for this alternative dispute settlement method, the issue should be of such importance as to justify the expense of the case preparation and the conferences that will be required. Also, the case should involve disagreements concerning facts, not purely matters of law, and the case should be subject to negotiation as opposed to the necessity to declare one side a complete winner or loser.

The CE is committed to employ any means that is likely to result in settlements that are satisfactory to both sides without resorting to litigation.

Some day soon the FAR will be revised to include an arbitration clause or perhaps a clause that may make a variety of procedures, if selected, to be binding on the parties.

The common contract clause used in other than government contracts which is referred to as the Arbitration Clause is:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

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