

CAE 473
CONSTRUCTION CONTRACT ADMINISTRATION

DISPUTE RESOLUTION METHODS

EXAMPLES OF DISAGREEMENTS

- INTERPRETATION OF CONTRACT
- WHAT CONSTITUTES EXTRA WORK
- PAYMENT FOR CHANGES
- EXTENSIONS OF TIME
- OWNER-DIRECTED ACCELERATION
- COSTS INCURRED BY OWNER-CAUSED DELAYS
- CHANGED CONDITIONS
- ETC., ETC., ETC.

RECOMMENDED CLAUSES TO AVOID THE OCCURRENCE OF DISPUTES

- CHANGES: PROVIDE FOR MODIFICATION TO THE CONTRACT AND DEFINE A FAIR METHOD OF PRICE ADJUSTMENT FOR THE CHANGES.
- TIME EXTENSIONS: PROVIDE ADEQUATE TIME ADJUSTMENTS FOR CHANGES TO THE CONTRACT AND FOR DELAYS BEYOND THE CONTRACTOR'S CONTROL.
- GEOTECHNICAL STUDIES: MAKE ALL PERTINENT GEOTECHNICAL INFORMATION READILY AVAILABLE TO THE CONTRACTOR.
- DIFFERING SITE CONDITIONS: PROVIDE FOR AN EQUITABLE PRICE AND TIME ADJUSTMENT WHEN DIFFERING SITE CONDITIONS ARE ENCOUNTERED.
- SUSPENSION OF WORK: PROVIDE FOR AN EQUITABLE PRICE ADJUSTMENT FOR DELAYS BECAUSE OF A TEMPORARY SUSPENSION OF WORK.
- LIQUIDATED DAMAGES: DEFINE A FIXED DAILY COST TO THE CONTRACTOR FOR NON-EXCUSABLE DELAYS.
- VARIATIONS IN ESTIMATED QUANTITIES: PROVIDE FOR ADJUSTMENT OR RENEGOTIATION OF UNIT PRICE ITEMS WHICH SUBSTANTIALLY VARY FROM BID QUANTITIES.
- CLAIMS: PROVIDE A RATIONAL PROCEDURE FOR PROCESSING CLAIMS IN A TIMELY MANNER.
- DISPUTES: PROVIDE A PROCESS FOR ADDRESSING DISPUTES IN THEIR EARLY STAGES BEFORE THEY AFFECT THE PROGRESS OF THE WORK, CREATE ADVERSARY POSITIONS AND LEAD TO LITIGATION.

ADDITIONAL PROVISIONS RECOMMENDED

- GEOTECHNICAL DESIGN SUMMARY REPORT: PREPARED BY THE OWNER'S ENGINEER, IT SETS FORTH THE GEOTECHNICAL

INTERPRETATIONS REGARDING ANTICIPATED CONDITIONS FOR DESIGN AND CONSTRUCTION.

- ESCROW BID DOCUMENTS: ALL DOCUMENTATION OF THE SUCCESSFUL BIDDER'S ESTIMATE ARE PLACED IN ESCROW, WHERE THEY REMAIN THE CONTRACTOR'S PROPERTY; THESE DOCUMENTS ARE ACCESSIBLE JOINTLY BY THE OWNER AND THE CONTRACTOR TO ASSIST IN RESOLVING PRICING ISSUES ON CLAIMS OR DISPUTES.
- DISPUTE REVIEW BOARD: IT HELPS RESOLVE MAJOR DISAGREEMENTS; ALTHOUGH THE DECISIONS ARE NOT LEGALLY BINDING, THEY ARE NOT LIKELY TO BE REVERSED IN LITIGATION.

CHARACTERISTICS OF CONSTRUCTION DISPUTES

- THEY USUALLY INVOLVE MORE PARTIES AND MORE CONTRACTS THAN JUST THE GENERAL CONTRACTOR, THE OWNER AND THE AGREEMENT BETWEEN THEM;
- THE ISSUES COMMONLY RAISED ARE DIVERSE, NUMEROUS, COMPLEX, AND INTERWOVEN;
- THE EVENTS THAT LEAD UP TO THE DISPUTE MAY TAKE PLACE OVER MONTHS;
- THE DISPUTE OFTEN ARISES DURING, NOT AFTER CONSTRUCTION, REQUIRING IMMEDIATE DECISIONS.

METHODS OF DISPUTE RESOLUTION:

- ENGINEER'S DECISION CLAUSE
- NEGOTIATION
- ADMINISTRATIVE BOARDS
- LITIGATION
- ARBITRATION
- MEDIATION
- DISPUTE REVIEW BOARDS

ENGINEER'S DECISION CLAUSE

- THE CONTRACTOR SUBMITS ALL CLAIMS TO THE PROJECT ARCHITECT OR ENGINEER (A/E)
- THE A/E'S DECISION IS FINAL AND BINDING ON ALL PARTIES
- USED TO BE COMMON IN PUBLIC WORKS CONTRACTS

ADVANTAGES OF THE ENGINEER'S DECISION CLAUSE

- AS A PARTY INTIMATELY FAMILIAR WITH THE OVERALL PROJECT, THE A/E IS IN A GOOD POSITION TO JUDGE THE VALIDITY OF THE CONTRACTOR'S CLAIMS
- IT IS APPROPRIATE THAT THE A/E, AS THE OWNER'S REPRESENTATIVE AT THE SITE, BE GIVEN PROMPT NOTICE OF ANY CONTRACTOR COMPLAINTS

- IN PRACTICE, MANY CLAIMS, PARTICULARLY THE SMALLER ONES, ARE RESOLVED BY THE A/E TO THE MUTUAL SATISFACTION OF THE OWNER AND THE CONTRACTOR

DISADVANTAGES OF THE ENGINEER'S DECISION CLAUSE

- THE A/E HAS CONFLICT OF INTEREST
- IT CREATES PERCEPTION OF UNFAIRNESS AND LACK OF OBJECTIVITY
- CONTRACTORS AND THEIR TRADE ASSOCIATIONS OBJECT TO THIS PRACTICE
- IT CREATES AN UNFAVORABLE BIDDING CLIMATE: FEWER BIDDERS AND HIGHER BIDS
- IT ATTRACTS HOSTILITY FROM THE COURTS

NEW VERSION OF THE ENGINEER'S DECISION CLAUSE (NEGOTIATION)

- THE CONTRACTOR IS ASKED TO SUBMIT CLAIMS TO THE A/E
- THE A/E'S ROLE RESEMBLES THE ROLE OF A MEDIATOR
- THE A/E'S DECISION IS NOT FINAL NOR BINDING
- ONLY THE ARCHITECT'S DECISIONS INVOLVING "ARTISTIC EFFECTS" ARE BINDING ON THE PARTIES, AND THEN ONLY IF THE DECISION IS CONSISTENT WITH THE "INTENT OF THE CONTRACT DOCUMENTS"
- PRIVATE OWNERS OR THE CONTRACTOR ARE FREE TO SUBMIT THE DISPUTE TO ARBITRATION, AND THE ARBITRATORS ARE FREE TO DISREGARD ANY OPINIONS, FINDINGS, OR RULINGS OF THE A/E
- PUBLIC CONTRACTS USUALLY CALL FOR THE INITIAL SUBMISSION OF A DISPUTE TO THE A/E BUT ALLOW FOR AN APPEAL TO AN ADMINISTRATIVE BOARD WHICH IS NOT BOUND BY THE A/E'S FINDINGS

ADMINISTRATIVE BOARDS

- THE FEDERAL GOVERNMENT AS WELL AS A NUMBER OF STATES, HAVE CREATED ADMINISTRATIVE BOARDS WITH AUTHORITY TO RESOLVE DISPUTES BETWEEN CONSTRUCTION CONTRACTORS AND PUBLIC PROJECT OWNERS
- THE FEDERAL SYSTEM SERVES AS A MODEL FOR MANY STATES' CLAIMS BOARDS

OPERATION OF THE FEDERAL SYSTEM

- THE DISPUTES CLAUSE FOUND IN STANDARD FEDERAL CONTRACT DOCUMENTS REQUIRES THE CONTRACTOR TO SUBMIT A CLAIM TO THE "CONTRACTING OFFICER"
- THE CONTRACTING OFFICER MAKES A FORMAL DECISION ON THE CONTRACTOR'S CLAIM
- IF THE CONTRACTOR IS DISSATISFIED WITH THE DECISION, IT MAY APPEAL TO APPROPRIATE BOARD OF CONTRACT APPEALS (EG, ARMED SERVICES BOARD OF CONTRACT APPEALS, GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS, ETC)

- THE BOARD OF CONTRACT APPEALS IS NOT BOUND BY ANY OF THE CONTRACTING OFFICER'S FACTUAL FINDINGS OR APPLICATIONS OF THE CONTRACT LANGUAGE
- ONCE A BOARD HAS MADE ITS FORMAL WRITTEN DECISION, THAT DECISION MAY BE APPEALED TO FEDERAL COURT ONLY ON QUESTIONS OF LAW WHILE THE BOARD'S FACTUAL FINDINGS ARE FINAL

ADVANTAGES OF ADMINISTRATIVE BOARDS

- MOST LARGE PROCURING AGENCIES OF THE GOVERNMENT HAVE A BOARD OF CONTRACT APPEALS (ARMED SERVICES, GSA, ETC)
- SOME SMALLER AGENCIES SIMPLY DESIGNATE ONE OF THE OTHER BOARDS TO HEAR DISPUTES ARISING OUT OF THEIR CONSTRUCTION CONTRACTS
- FEDERAL BOARDS OF CONTRACT APPEALS MAKE VERY FEW ERRORS OF LAW
- THE BOARDS HAVE AN EXCELLENT REPUTATION AMONG CONTRACTORS FOR FAIRNESS AND COMPETENCY
- THEY HAVE ACCUMULATED A LARGE NUMBER OF PRECEDENTIAL DECISIONS
- THEY HAVE A LARGE NUMBER OF ADMINISTRATIVE JUDGES WHO POSSESS GREAT EXPERTISE IN THE FIELD OF GOVERNMENT CONTRACT LAW
- STATE ADMINISTRATIVE BOARDS ARE BECOMING AS WELL ACCEPTED AS FEDERAL BOARDS

LITIGATION

- MOST CONSTRUCTION DISPUTES ARE TRIED IN ONE OF THE 50 STATE JUDICIAL SYSTEMS
- A PARTICULAR STATE COURT GAINS JURISDICTION OVER A CASE IF ONE OF THE PARTIES IS BASED IN THAT STATE OR IF THE PROJECT ITSELF IS LOCATED IN THAT STATE
- IF THE TWO PARTIES TO THE DISPUTE ARE BASED IN DIFFERENT STATES, WHICHEVER PARTY INITIATES THE LITIGATION CHOOSES THE FORUM
- SO LONG AS THE COURT WHERE THE SUIT WAS INITIATED HAS PROPER JURISDICTION, THE SUIT WILL REMAIN WITH THAT COURT
- PRIVATE CONSTRUCTION CONTRACTS MAY CONTAIN A CHOICE OF FORUM CLAUSE

ADVANTAGES OF LITIGATION

- IT OFFERS THE OPPORTUNITY TO ENGAGE IN VERY THOROUGH PRETRIAL DISCOVERY OF FACTUAL MATTERS
- IT OFFERS THE OPPORTUNITY TO BRING IN ADDITIONAL PARTIES AND HAVE THE ENTIRE MATTER HEARD IN THE SAME FORUM AT THE SAME TIME

- IT OFFERS THE ADVANTAGE OF HAVING FORMAL LEGAL PRINCIPLES STATED AND APPLIED ON THE DISPUTE
- IF THE COURT IS INCORRECT IN ITS STATEMENT OR APPLICATION OF LEGAL PRINCIPLES, THE LITIGANTS HAVE AN AVENUE OF APPEAL

DISADVANTAGES OF LITIGATION

- DEPENDING ON THE JURISDICTION, A COMPLEX CONSTRUCTION DISPUTE MAY TAKE ANYWHERE FROM 2 TO 6 YEARS BEFORE IT REACHES TRIAL
- THE PROLONGED AND DETAILED FACTUAL DISCOVERY PROCESS MAKES LITIGATION VERY EXPENSIVE

ARBITRATION

- ARBITRATION IS A METHOD OF DISPUTE RESOLUTION THAT IS CREATED BY CONTRACT
- THE ARBITRATION CLAUSE FOUND IN AIA DOCUMENT A201, "GENERAL CONDITIONS OF THE CONTRACT OF CONSTRUCTION" IS THE MOST WIDELY USED ARBITRATION CLAUSE IN THE INDUSTRY
- ARBITRATION IS NORMALLY CONDUCTED IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION
- THE AMERICAN ARBITRATION ASSOCIATION IS A NON-FOR-PROFIT ORGANIZATION WHICH ADMINISTERS ARBITRATION PROCEEDINGS AND MAINTAINS A PANEL OF PREQUALIFIED INDIVIDUALS TO SERVE AS ARBITRATORS
- THE COURTS WILL COMPEL PARTIES WHO HAVE SIGNED CONTRACTS WITH ARBITRATION CLAUSES TO ARBITRATE; AND THE COURTS WILL ENFORCE THE ARBITRATORS' DECISION

ADVANTAGES OF ARBITRATION

- ARBITRATION IS A FASTER REMEDY THAN LITIGATION
- ARBITRATION IS CHEAPER THAN LITIGATION
- AAA'S POOL OF ARBITRATORS CONSISTS OF CONTRACTORS, ARCHITECT/ENGINEERS, AND ATTORNEYS WHO ARE CONVERSANT WITH THE CONSTRUCTION PROCESS AND CONSTRUCTION DISPUTES WHEREAS JUDGES AND JURIES GENERALLY ARE NOT
- THE DECISIONS OF ARBITRATORS ARE CONFIDENTIAL
- ARBITRATION PROCEEDINGS CAN BE CONDUCTED AT ANY LOCATION AGREED UPON BY THE PARTIES

DISADVANTAGES OF ARBITRATION

- WHEN A DISPUTE IS ARBITRATED, USUALLY EVERYTHING IS ADMITTED AS EVIDENCE REGARDLESS OF RELEVANCY
- ARBITRATION DECISIONS CANNOT BE APPEALED

- ARBITRATION STATUTES ALLOW COURTS TO OVERTURN ARBITRATION RESULTS ONLY IN SITUATIONS INVOLVING FRAUD, BAD FAITH, OR CONFLICT OF INTEREST
- ARBITRATION FEES MAY AMOUNT TO CONSIDERABLE SUMS
- ARBITRATION DOES NOT ALLOW TO GET ALL THE PARTIES INTO A SINGLE FORUM FOR A SINGLE HEARING

MEDIATION

- MEDIATION IS A FORUM OF DISPUTE RESOLUTION WHICH IS CREATED BY CONTRACT
- MEDIATION IS AN ATTEMPT TO AVOID A FORMAL DISPUTE BY HAVING AN OBJECTIVE THIRD PARTY FACILITATE AN AMICABLE RESOLUTION OF THE DISPUTE
- MEDIATION IS NOT FINAL NOR BINDING
- IF MEDIATION FAILS, THE PARTIES WILL HAVE TO RESORT TO A FORMAL AND BINDING FORM OF DISPUTE RESOLUTION SUCH AS LITIGATION OR ARBITRATION
- THE PARTIES ARE FREE TO DESIGNATE ANY MEDIATOR THEY CHOOSE
- THE LARGEST ORGANIZATION THAT TRAINS MEDIATORS AND ADMINISTERS MEDIATION PROCEEDINGS IS THE NATIONAL ACADEMY OF CONCILIATORS
- IDEALLY, MEDIATORS SHOULD BE TRAINED IN FACILITATING DISPUTE RESOLUTION

ADVANTAGES OF MEDIATION

SAME AS ARBITRATION:

- FAST
- INEXPENSIVE
- CONDUCTED BY EXPERTS
- CONFIDENTIAL
- CONVENIENT

DISADVANTAGES OF MEDIATION

- MEDIATION IS NON-BINDING
- IF AN AGREEMENT CANNOT BE WORKED OUT, THE MEDIATION PROCEEDINGS WILL HAVE BEEN A WASTE OF TIME AND MONEY

DISPUTE REVIEW BOARDS (DRB)

- THE DRB METHOD OF DISPUTE RESOLUTION WAS DEVELOPED BY THE COMMITTEE ON CONTRACTING PRACTICES OF THE UNDERGROUND TECHNOLOGY RESEARCH COUNCIL OF ASCE
- THE DRB COMPRISES THREE MEMBERS: ONE SELECTED BY THE OWNER, ONE BY THE CONTRACTOR, AND A THIRD SELECTED BY THE FIRST TWO

- ALL DRB MEMBERS ARE IMPARTIAL AND EXPERIENCED IN CONSTRUCTION; THEY ARE APPOINTED SOON AFTER THE CONTRACT IS AWARDED
- DRB MEMBERS ARE SENT PROGRESS REPORTS AND VISIT THE PROJECT PERIODICALLY
- THE DRB IS NOT USED FOR ROUTING CLAIMS OR DIFFERENCES OF OPINION, BUT FOR THE RESOLUTION OF MAJOR PROBLEMS
- THE RECOMMENDATIONS OF THE DRB ARE NOT LEGALLY BINDING, BUT ARE NOT LIKELY TO BE REVERSED IN LITIGATION
- THE DRB METHOD OF DISPUTE RESOLUTION HAS BEEN USED WITH GREAT SUCCESS IN SEVERAL CONSTRUCTION PROJECTS

ADVANTAGES OF DISPUTE REVIEW BOARDS

- THE DRB HEARS DISPUTES OF AN INFORMAL BASIS AND CAN PROVIDE RECOMMENDATIONS FOR THEIR TIMELY RESOLUTION BEFORE PARTIES ADOPT HARD POSITIONS LEADING TO LITIGATION
- THE PARTIES ARE COMFORTABLE WITH THE RECOMMENDATIONS OF THE DRB SINCE THE SELECTION OF THE DRB MEMBERS IS CONTROLLED BY THE OWNER AND THE CONTRACTOR
- BECAUSE THEY MEET PERIODICALLY AND THEY ARE SENT PROGRESS REPORTS, THE DRB MEMBERS ARE FAMILIAR WITH THE ELEMENTS OF THE PROJECT
- WITH AN ESTABLISHED DRB TO ADDRESS DISPUTES AS THEY ARISE, CONSTRUCTION WILL CONTINUE WITH THE CONTRACTOR'S AND OWNER'S EFFORTS FOCUSED ON THE WORK AND NOT ON THE CLAIMS
- THERE ARE NO EXPENSIVE AND TIME CONSUMING PREPARATIONS SUCH AS IN THE CASE OF FORMAL LITIGATION
- ALTHOUGH THE DRB RECOMMENDATIONS ARE NOT BINDING ON EITHER PARTY, THERE IS STRONG INCENTIVE TO ACCEPT THE FINDINGS
- THE EXISTENCE OF THE DRB FOSTERS A MORE COOPERATIVE RELATIONSHIP BETWEEN THE PARTIES AND OFTEN PROVIDES THE IMPETUS FOR SETTLEMENT OF DISPUTES WITHOUT APPEAL TO THE DRB
- THE KNOWLEDGE THAT TRUSTED EXPERTS ARE FAMILIAR WITH THE ENTIRE SITUATION AND WILL RECOMMEND A FAIR SETTLEMENT REDUCES THE POSTURING AND GAMESMANSHIP THAT SO COMMONLY OCCURS IN CONVENTIONAL DISPUTE RESOLUTION PROCESS

DISADVANTAGES OF DISPUTE REVIEW BOARDS

- THE DRB DOES NOT REPLACE THE EXISTING DISPUTE SETTLEMENT METHODS; RATHER IT IS AN INTERMEDIATE STEP DIRECTED AT FACILITATING DISPUTE RESOLUTION

- THERE IS A TENDENCY ON THE PART OF THE OWNER AND THE CONTRACTOR TO USE THE DRB AS A CONSULTING BODY; PROVIDING ADVICE THAT MAY LATER BE INVOLVED IN A DISPUTE CAN DESTROY THE USEFULNESS OF THE DRB
- THE DRB METHOD HAS NOT BEEN USED AS EXTENSIVELY AS THE OTHER DISPUTE RESOLUTION METHODS
- THE IMPARTIALITY AND CONFLICT OF INTEREST PORTION OF THE DRB MEMBERSHIP SPECIFICATION IS SO TIGHT THAT SOMETIMES THERE ARE NOT ENOUGH QUALIFIED PEOPLE FOR THE DRB
- THE PROJECT MUST BE LARGE ENOUGH, AND THE PROBABILITY OF OCCURRENCE OF DISPUTES THROUGHOUT THE COURSE OF THE PROJECT MUST BE HIGH ENOUGH TO JUSTIFY THE EXPENSE OF RETAINING THE SERVICES OF THE DRB MEMBERS FOR THE ENTIRETY OF THE PROJECT