

DISPUTE AVOIDANCE

The Construction Industry's Guide to Dispute Avoidance and Resolution



AMERICAN ARBITRATION ASSOCIATION®

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The Construction Industry's Guide to Dispute Avoidance and Resolution



Introduction

For more than 30 years, the American Arbitration Association® (AAA®)—as the provider of choice for dispute avoidance, conflict management and dispute resolution services—has worked closely with the construction industry to develop ways to prevent and manage conflict. In particular, the AAA collaborates with the more than 25 associations that make up the National Construction Dispute Resolution Committee (NCDRC) to develop industry-specific dispute resolution procedures and processes. AAA procedures are designated in standard form industry contracts, including those approved by the American Institute of Architects and the Associated General Contractors of America.

The AAA has developed resources and value added services to assist construction industry professionals select appropriate dispute avoidance and resolution processes. In conjunction with these services, the AAA maintains a National Roster of Neutrals. Many of these neutrals bring a broad range of construction industry expertise to the AAA's dispute avoidance and resolution programs.

While best known for its work in the arbitration arena, the AAA also offers a full range of procedural options to help avoid disputes and resolve existing conflicts. Our experience in program design and execution is particularly important because of the tremendous complexity of present day construction projects. Ideally, our involvement comes at the earliest planning stages of a project when bid documents are being developed. At this point, we can help incorporate into contracts dispute avoidance and resolution processes that have proven to be highly effective in the past.

In determining the optimal mix of conflict avoidance and resolution processes for any given project, the AAA factors in the nature and complexity of the project, as well as the terms of the agreement among the parties. Among the issues considered are: "Who are the project stakeholders, and what are the present and likely future business relationships among them?" "What type of professional

expertise does the project call for?" "Does it involve new or experimental construction technology?" "Where, in our experience with this type of project, are disputes most likely to arise?"

These and a host of similar considerations help shape the content of the dispute resolution programs we propose. All are custom-designed and, typically, a program structure will involve several avoidance and resolution techniques used in progression. In the early stages of a project, for example, parties may invoke our innovative Partnering Plus™ service while On-Site Neutrals or Dispute Resolution Boards (DRBs) may be more appropriate as a project progresses, and mediation and arbitration may be the method of choice for resolving disputes once a project has reached conclusion.

This brochure outlines the full range of the principal dispute avoidance and resolution techniques and how they may be used at various stages of a project—from early concept and design stages to on-site construction activities, as well as in the resolution of post-project completion issues. Each process is flexible and may be used independently or in combination with others, depending on the preferences of the parties and the specific requirements of the project.

ADR and the Construction Industry: The Resolution of Disputes Unique to the Construction Industry and the Search for a Better Solution

No two construction projects are alike—plans, specifications, site conditions, construction methods, the disciplines involved and the goals of the participating parties all vary. Today's projects are more complex, the technology more advanced and the trades working on them more specialized. The handshake agreement of the past is gone, replaced by a complex set of documents governing the parties' dispute that, more often than not, seek to dictate solutions to disputes through the imposition of unilateral obligations.

As one court put it:

"...except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project...Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield. "(1) Blake v Coakley, 431 A2d569, 575 (D.C. 1981).

A major cause of construction project failures is the lack of early stage planning and communication about what to do when disagreements arise. Risk assessment and risk allocation are frequently proposed as problem resolution techniques, but they have substantial shortcomings. It has been alleged that risk is often passed to others and, too frequently, the risk-shifting ends at the threshold of those least able to handle it.

A better solution is for project stakeholders to jointly identify current and future risks and then to work on ways to avoid them or to blunt their impact. For this to happen, risks have to be evaluated, and those stakeholders with a degree of control must be prepared to take on responsibility for dealing with problem situations as they occur.

Identifying and setting up systems to manage potential problems as soon as possible helps parties achieve common objectives and enhances the chances for the success of the project. This is best accomplished on a partnership basis where all of those involved—owners, contractors, consultants, attorneys—help identify the likely points where conflicts may arise and agree to play an appropriate role in a system custom-designed to avoid or resolve them.

ADR Works in Construction Disputes

Working with members of the National Construction Dispute Resolution Committee, the AAA developed a survey to measure, among other things, the use of alternative dispute resolution (ADR) in resolving construction disputes and managing the risks inherent in construction projects. More than 150 construction-related professionals—primarily engineers, general contractors, architects, party representatives, arbitrators and lawyers—participated in the study, which is available to industry professionals whether affiliated with the AAA or not.

Close to 90% of the respondents indicated they had participated in some form of ADR, a clear indication that ADR processes are widely used in the industry. The most common method of ADR used was arbitration, followed by mediation. More than 30% indicated that they engage in forms of dispute avoidance such as Partnering, Dispute Resolution Boards and other on-site processes. Four out of five had participated in a dispute avoidance or dispute resolution process administered by the AAA.

The survey results also pointed to an emerging desire to find more effective means to both avoid and resolve disputes. The responses demonstrated a growing understanding that, with each project, comes a unique set of circumstances that

may require stakeholders to explore custom-designed processes for managing issues and resolving disputes.

As to ADR effectiveness, consider the track record of Dispute Resolution Boards—an area of specialization for the AAA—compiled by the Dispute Resolution Board Foundation. In more than 1,000 projects completed between 1988 and 2002 and valued at over \$79 billion, DRBs resolved disputes and avoided litigation in 97.9% of the cases they addressed. Similarly, Partnering—another form of ADR for which the AAA offers a full service package—is often cited for its value. For example, a manager of a major construction project for Ohio’s Cuyahoga County reported that 98% of the problems that arose and could have led to litigation were resolved at the lowest possible level through Partnering.

AAA Dispute Avoidance and Resolution Services

Overview

The AAA helps clients design appropriate dispute avoidance and resolution systems, as well as dispute resolution clauses for incorporation into contracts. When disputes arise, the AAA administers dispute resolution procedures within the framework of the parties' contract and the formal administrative procedures outlined in policies adopted by the AAA, industry groups and professional societies. In addition, the AAA guides the process of selecting appropriate neutrals and is available at any stage of a project to assist in setting up—on an ad hoc basis—custom-tailored procedures for unanticipated situations.

In establishing dispute avoidance or dispute resolution processes, the AAA will:

- > Provide sample language for contract clauses, submission agreements or the procedures agreed to by the parties
- > Serve as a resource in the design of a program that incorporates the dispute avoidance and resolution processes best suited for specific projects
- > Provide relevant guidelines, rules and other relevant materials to educate the parties on ADR processes under consideration or selected

Once a system has been designed, the AAA offers a range of administrative services that include:

- > Initiation of a request from any named parties to commence a contractually agreed upon process
- > Preparation of a list of neutrals suitable for handling the dispute in question and assistance in the engagement of the agreed upon neutral
- > Scheduling of meetings or hearings
- > Management and facilitation of communications between the parties and the neutral
- > Management of all billing between the parties and the neutrals and for all off-site facilities
- > Prompt and impartial administration of all rules and procedures provided for in the contract documents

In addition to developing and offering dispute management systems and administrative procedures geared toward the construction industry, the AAA provides parties with access to the National Roster of Neutrals. Panelists have

extensive construction industry experience and are well-versed in the AAA's range of on-site and post-project completion dispute resolution services.

The AAA's National Roster of Construction Neutrals

Recognized for integrity, dispute resolution skills, standing and expertise in their fields, mediators and arbitrators are nominated to the AAA's National Roster of Neutrals by leaders of their industries or professions. Their conduct is guided by the AAA's Code of Ethics, prepared by a joint committee of the American Arbitration Association and the American Bar Association, as well as by the *Model Standards of Conduct for Mediators* drawn up by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution.

In addition, neutrals on the AAA roster are required to complete multiple training programs educating them in their duties and responsibilities and giving them practical experience in fulfilling their roles.

Maintained in a separate roster, construction neutrals are placed on Dispute Resolution Boards and listed as Partnering Facilitators in order to meet all of your construction-related needs, whether it be On-Site Neutrals, Fact-Finding, Early Neutral Evaluation, Advisory Opinions or Mini-Trials.

Criteria for Neutrals Selection

The AAA, with the assistance of numerous advisory committees, developed a specific set of criteria for admission to its roster of neutrals:

- > A minimum of ten years experience in their industries of expertise
- > Successful completion of mandatory AAA training for dispute avoidance and dispute resolution
- > *Neutrality*—commitment to impartiality and objectivity and independence from any type of prejudice or conflict of interest
- > *Judicial skills*—demonstrated dispute avoidance and dispute resolution skills; appropriate temperament—unbiased, patient, professional; facility with adjudication, negotiation and conciliation
- > *Reputation*—must command highest respect among other industry professionals, industry attorneys and the business community
- > *Commitment and availability*—must be willing to serve, if chosen, in accordance with the needs of the parties and be able to devote time and effort to major disputes

Neutral selection is an important element in the dispute resolution process. In addition to the highest quality neutrals, the AAA has numerous procedural options to best serve the needs of the construction industry.

The AAA's Procedural Options and Solutions

The following sections outline the available AAA dispute avoidance and dispute resolution processes, describe their use and identify how they might be employed in tandem or independently of one another. These processes provide options for preventing, defusing and managing disputes with a goal of offering greater assurance of successful project completion.

The sections that follow describe processes used in project planning and on-site dispute management and methods used to resolve disputes once the project has been completed.

The ADR processes described below may be supplemented by the sample contract documents provided by such professional industry organizations as American Institute of Architects, Associated General Contractors, Design Build Institute of America and the Engineer Joint Contracts Document Committee.

On-Site Dispute Management Services

Ideally, the use of the techniques and processes described below for handling disputes on-site is established in the early stages of a project.

Assisted Negotiations

Typically, parties may engage in direct party-to-party settlement efforts involving only those who are involved in the dispute. However, where difficulties arise, parties may desire facilitated negotiations in which a neutral helps the parties structure their own negotiation. This process may involve third parties, such as experts or other industry personnel familiar with certain products or techniques, or a mediator or facilitator may participate in an informal manner to assist in direct party-to-party discussions.

Traditional Partnering and Partnering Plus™

Partnering is a commitment by all stakeholders to achieve goals and objectives agreed upon prior to a project's commencement. In its usual format, representatives of the project's stakeholders attend pre-construction workshops in order to get to know each other and share concerns. Neutral facilitators guide discussions about the project, specific individual goals and agendas. It is during these meetings that participants develop ways to recognize risks that may create obstacles to the success of the project. They develop methods to avoid, control or cope with potential sources of conflict. The eventual outcome is a joint agreement signed by the workshop participants that sets forth their goals and expresses their commitment to the project.

Partnering has been formally endorsed by the major professional groups within the construction industry, as well as by federal and state government organizations and agencies. To be successful, partnering workshops must involve a skilled, experienced partnering facilitator who will take into account the unique aspects of a given project, matching specific procedures and techniques to the parties and the project.

The AAA's innovative Partnering Plus™ is a customized, no-nonsense approach to dispute prevention and resolution. It is project-specific and can be used during all phases of a project—from early concepts and selection of design professionals through design, selection of contractors, completion, utilization and warranty periods. One of its principal objectives is to provide effective techniques for resolving conflicts as they arise on a "real-time" basis at the project site during the course of construction and before the project team disbands.

Partnering Plus™ in its simplest form provides the owner, design professionals, contractor, subcontractors and other interested parties a sound plan for dispute avoidance and resolution. Among the deliverables of the basic program are:

- > *Risk Management Plan*—Defines the risks associated with the project and develops methods to deal with specific risks by the parties best able to control or manage them.
- > *Pre-planning Partnering*—A separate session conducted with the designer and engineers.
- > *Communications Plan*—Defines the means and methods of communications between the parties and the public and includes meeting schedules, topics, attendees, deliverables and responsibilities.
- > *Partnering*—Conducted with designers/contractors/stakeholders.
- > *Construction Document Review*—Defines and clarifies the contract and construction documents, evaluates contractor constructability issues, values engineering and addresses any other design or construction issues presented by the parties.
- > *Identification of Risks to Project Success*—Estimates the impact of the project in a number of areas—effect on neighborhoods, for example, or other public relations issues—with a goal of either eliminating or controlling them.
- > *Dispute Escalation Chart*—Delineates responsibility, authority and time limits of the parties in the event of a dispute.
- > *Refinement of On-Site Dispute Resolution Techniques to Meet Special Needs*—Designation of ADR processes, such as mediation or arbitration, to be utilized in the event disputes escalate.

The AAA and its neutrals that participate in the Partnering Plus™ program work with project participants to facilitate communication, offer suggestions and help design appropriate ADR procedures. The AAA draws on industry professionals with expertise in the large and small commercial, industrial, residential and engineering projects. Typically, the objective is to help the parties design programs that go far beyond routine Partnering. One of the deliverables that merits detailed explanation is the Dispute Escalation Chart—which details a “step-negotiation” process that frequently facilitates “first-attempt” dispute resolution. If, however, the dispute is not resolved promptly at the initial level, the process is moved up one step and receives the attention of middle managers from each of the parties involved and so on, up the chain of command.

Partnering Plus™ can be used on a stand-alone basis, or, if the parties wish, it may incorporate any of a variety of other techniques such as on-site or on-call neutrals, Dispute Resolution Boards, mediation and arbitration.

The Standing Neutral Concept: DRBs, Single Dispute Resolvers and On-Site Neutrals

In addition to, and as part of its specially designed Partnering program, the AAA provides an array of complementary services that respond to the need for timely action in dispute avoidance and management. Among them are on-site or on-call neutrals, single dispute resolvers and Dispute Resolution Boards, all of which are described below and are available as part of the Partnering Plus™.

> Dispute Resolution Boards

Previously called Dispute Review Boards, Dispute Resolution Boards (DRBs) are typically a panel of three neutrals appointed by the parties that become part of the project team. They attend periodic meetings, review essential project documents and assist in the identification and resolution of issues and potential problems. DRBs are usually, but not always, established in the contract documents. A dispute is presented to a DRB at a hearing, and the DRB's determination is generally presented as a recommendation or a non-binding decision. Although the recommendations are non-binding, they are generally admissible in future proceedings—such as arbitration or litigation—if the issue is not resolved at the DRB level.

Since the inception of DRBs in the early 1970s, they have become widely used in a variety of construction projects. Initially utilized in the construction of tunnels, mass transit systems, power plants and other large civil engineering projects, more recently their use in commercial and industrial construction has expanded. By September 2003, more than 1,000 projects had impaneled DRBs, which settled 1,200 disputes with less than 30 disputes proceeding to litigation. (Source: *Dispute Resolution Board Foundation (DRBF) Tabulation of Dispute Resolution Boards*, September 2003).

When the AAA launched its DRB specifications and guidelines in December 2000, it assembled a roster of highly qualified DRB neutrals experienced in construction and related fields, as well as in DRB processes.

The Dispute Resolution Board Foundation cites nine elements that contribute to a DRB's success:

1. All three members of the DRB are neutral and subject to the approval of both parties.
2. All members sign a three-party agreement obligating them to serve all parties equally and fairly.

3. The DRB's fees and expenses are shared among the parties. Costs vary depending on how often the DRB is asked to resolve disputes.
4. The DRB is organized at project initiation before any disputes have arisen.
5. The DRB keeps abreast of job developments by means of periodic review of relevant documents and regular site visits.
6. Any party can refer a dispute to the DRB.
7. An informal but comprehensive hearing is convened promptly.
8. The written recommendations or decisions of the DRB are not binding on either party unless mandated in the contracts, but they are generally admissible as evidence, to the extent permitted by law, in subsequent arbitration or litigation.
9. DRB members are absolved from any personal or professional liability arising from their DRB activities.

> Single Dispute Resolver

In smaller and less complex projects, the parties will specify a Single Dispute Resolver to avoid the expense of a three-person DRB. Chosen jointly by the parties, the Single Dispute Resolver performs all of the functions of a traditional DRB.

> On-Site Neutrals

Parties may also choose to appoint an On-Site Neutral, who acts as a mediator to assist in the resolution of problems at the job site before opposing positions have had time to harden. This individual is usually hired at the commencement of a project, has detailed knowledge of the project's plans and specifications, is familiar with all of the stakeholders and is kept abreast of the progress of the job. The On-Site Neutral acts as a mediator to help parties resolve issues or assists in identifying ways in which parties may deal with difficult on-site problems, risk assignment and risk management. Typically, an On-Site Neutral is more involved in the project on a day-to-day basis than a Single Dispute Resolver and usually acts more as a mediator or a facilitator than someone who would render a formal recommendation.

Dispute Resolution Services

Even parties who work well together and have implemented ADR tools in the early stages of the project may have disputes that cannot be resolved during the course of the project. The AAA offers a broad range of options for avoiding the delay and expense of formal litigation to resolve post-completion issues:

Mediation

One or more mediators may assist parties in settling a controversy or claim by facilitating negotiations. The mediator participates impartially in the negotiations, guiding and consulting the parties involved.

The goal of mediation is an agreement that all parties find mutually acceptable. The mediator does not impose a settlement but rather guides the parties towards achieving their own resolution of the dispute. Mediation is often an antecedent to arbitration or litigation, and it may be court mandated.

As an informal and voluntary process, mediation gives the parties direct control over the course of a dispute's resolution and leads them toward the structuring of a final settlement. Settling disputes through mediation generally saves time and money and, perhaps most importantly, it enables those involved to preserve valuable business relationships.

The AAA provides a nationwide panel of construction mediators with a substantial amount of industry experience, and it helps administer the mediation process, handling scheduling, billing, document exchange and other services. When the parties have a pending arbitration with the AAA, there is no additional administrative fee for mediation services. Procedures for mediation can be found in the *Construction Industry Arbitration Rules and Mediation Procedures* pamphlet and on our website at www.adr.org, along with other information about mediation.

Fact-Finding

Fact-Finding involves an impartial third-party investigation that results in findings with or without a recommended settlement. This process is most effective when there is a need to establish the factual situation associated with a dispute. It may involve, for example, determining the value of a product or service. In the Fact-Finding process, an experienced, independent neutral, chosen by the parties, makes a determination as to fact, value or perhaps the source or cause of an

error. The neutral then issues a report that sometimes includes a recommended resolution. This report or recommendation is then used in an attempt to reach a settlement.

For example, parties may have the framework of a settlement worked out but do not have the ability to place a value on the product or services rendered. In this case, an expert is engaged to establish that value.

Parties who choose to employ a neutral Fact-Finder must agree upon the individual appointed, outline the parameters of the neutral's role and the issues to be investigated, and decide how the report will be utilized.

Early Neutral Evaluation

In the early stages of a dispute, an impartial third party hears presentations by both sides and provides an evaluation of how the case might turn out if taken to court. One might use Early Neutral Evaluation to help determine the strength of one's position in a dispute or to help persuade or educate parties in the viability of moving forward with arbitration or litigation.

Advisory Opinions

An impartial third-party neutral is engaged to give parties an opinion as to the possible outcome of a dispute. This process is similar to, but less formal than, arbitration where an arbitrator's decision is non-binding and used more as a tool for settlement negotiations.

Mini-Trials

Attorneys from both sides make summary presentations of their "best-case" scenarios to a panel of three people: a manager from each of the two disputants with settlement authority and a neutral. After the presentations, if the two managers cannot agree on a solution to the dispute, the neutral, acting as a mediator, assists the parties in seeking a resolution.

Arbitration

In arbitration, a dispute is submitted to an impartial third party or panel for a decision that is generally binding on all parties involved, although parties may opt for advisory or non-binding arbitration. Arbitration is a less formal alternative to litigation and an efficient means of resolving disputes. It can be faster and less

expensive than judicial resolution, and it has the added advantage of presenting disputes to industry experts. Also, arbitration is private and not subject to public disclosure, as is most litigation.

Typically, arbitration clauses are written into contracts before the commencement of a project, enabling parties, if they so choose, to draft precise language that will address special needs of a project. *The AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* is available at **www.adr.org**.

Arbitration clauses usually serve to formalize the specific requirements of an arbitration proceeding. “Will there be a single arbitrator or a panel of three?” “What range of issues can be decided through arbitration?” “What are the required qualifications of the arbitrator?” “What are the parameters for discovery and other procedural matters?”

The AAA administers arbitrations in accordance with the *Construction Industry Arbitration Rules* (see our website www.adr.org for details), which are governed by the state and federal arbitration acts.

In addition to Mini-Trials, disputants may choose Advisory Arbitration, a process that mirrors arbitration in all aspects except that the decision of the arbitrator is not binding. The objective of this type of arbitration is to render a decision that can be used as aid in settlement negotiations. The decision of an advisory arbitrator is a reliable indication of where parties might find themselves if they pursue binding arbitration or litigation, while leaving the parties some room to negotiate a settlement.

Summary

The American Arbitration Association assists construction industry professionals in determining the optimal combination of conflict avoidance and dispute resolution methods for every type of construction project. From the step negotiation process in the integrated, AAA custom-tailored Partnering Plus™ plan, to a fast and final decision rendered by an experienced AAA construction arbitrator, the AAA provides the construction industry with the highest quality, most comprehensive conflict management solutions.

The success of any given construction project is critical and that success should not be put at risk. Disagreements have the potential to turn into project hurdles—or worse, project failure. By proactively implementing the AAA's dispute avoidance and dispute resolution programs, the dispute management needs of all parties can be effectively met and make the difference toward project success.

The AAA: Committed To Public Service

The AAA is a public service, not-for-profit organization founded in 1926. It provides a broad range of conflict management services to businesses, attorneys, trade associations, unions, consumers and all levels of government, assisting them in determining the right dispute avoidance and resolution processes for their needs. Services are available through the Association's headquarters in New York City and through offices located in major cities across the United States and in Europe. Hearings are held at locations convenient for the parties and are not limited to cities with AAA offices.

The AAA acts as a resource, administrator, educator and publisher in the dispute resolution field. We serve as a center for education and training, issue specialized publications on ADR topics and conduct research on all types of dispute resolution processes.

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More Information for You on Our Website

Information covered in this guide regarding construction dispute avoidance and resolution is available at www.adr.org.

Arbitration and Mediation

The AAA's *Construction Industry Arbitration Rules and Mediation Procedures* (including Procedures for Large, Complex Construction Disputes), amended and effective October 1, 2009, is available online for your reference and information.

Dispute Resolution Boards

Along with the construction rules, information about various aspects of Dispute Resolution Boards is available in the following categories online:

- > Dispute Resolution Board Guide Specifications
- > Dispute Resolution Board Operating Procedures, Schedule A
- > Dispute Resolution Board Operating Procedures, Schedule B
- > Dispute Resolution Board Operating Procedures, Schedule C
- > Dispute Resolution Board Three Party Agreement
- > AAA On-Site Dispute Resolution Services Fact Sheet

Partnering

And, for more information on Partnering, *Building Success for the 21st Century—A Guide to Partnering in the Construction Industry* is available online for your use.

