To many in the construction industry the word “claim” conjures up horrible images of expensive drawn-out legal proceedings with results having little to do with fairness and justice. Many public agencies have the perception that “claims” are attempts by contractors to pursue exaggerated demands for payments, compelling the government agency to defend itself accordingly. To most contractors, the term “claim” evokes a negative visceral reaction because it signifies the necessity to participate in a frustrating process in order to gain the relief to which one is contractually and equitably entitled—usually after suffering an economic loss.

Although public and private entities arrive at their negative view of claims from entirely different perspectives, those perceptions are intensified by an ever increasing resentment of the rigors of the process of dispute resolution which is customarily utilized in public contract claim resolution. Simply stated, most public owners and contractors agree that the litigation of construction claims takes too long, costs too much and often leaves both parties feeling abused by the system. Thus, “claims” are not well regarded.

Technical and contractual disputes in the highly complex world of modern construction are virtually unavoidable. Even when both parties operate in good faith, it is likely that disagreements will arise regarding engineering means and methods, site conditions, the impact of changes and changed conditions on overall job progress and efficiency, and disagreements as to the fair value of these disputed issues. These disputes must be resolved one way or another. Prompt resolution when the dispute arises by mutual agreement is certainly preferable. However, even if such a settlement cannot be achieved, a resolution short of full-blown litigation is essential. That observation, as sensible as it is, has been unachievable in too many circumstances, resulting in the proliferation and litigation of “claims.”

Encouraging new developments suggest that the construction industry is willing to at least try methods which will resolve these disputes before they evolve into major “claims” and their usual resolution in the courtroom. As long as contractors open the earth, build pipelines, build roads and build buildings, there will always be unanticipated problems and contractual issues in need of resolution. New developments in dispute resolution which are being embraced by the construction industry, both on the public and private sides, suggest, however, that new solutions are available to simplify, expedite and often successfully resolve construction disputes.

Throughout the U.S., the business community has long demanded improved dispute resolution procedures as alternatives to litigation. Private sector experimentation with alternative procedures has progressed most easily since only an agreement between the disputants is necessary to accomplish the desired result. From these experiments a movement has developed within corporate America known by its acronym “ADR” (Alternative Dispute Resolution). The procedures contemplated by the acronym ADR include mediation, mini-trials, summary jury trials and other creative forms of dispute resolutions. The growing movement favoring the implementation of ADR procedures has resulted in the institutionalization of these procedures within certain industries and among many major corporations. Many of these corporate giants were perceived as the least likely to participate in procedures which sought to bring disputes to an early resolution because they enjoyed an advantage in litigation by virtue of their economic superiority. Yet, even these corporations now support the view that sensible and fair settlements are more valuable in most commercial cases than a litigated result with its concomitant expense in effort and capital.

It has been far more difficult, however, for public agencies to join in this momentum. Limited at times by state constitutions and statutes and most often reluctant to permit dispute resolution outside the familiar and comfortable predictability of the “home court” judicial system, most public agencies have contractually insisted upon traditional dispute resolution procedures. As a result, while private developers and contractors were turning to mediation and other ADR procedures to settle their disputes, most con-
tractors working for public agencies found themselves returning to the very same courts and boards as they have done for decades. It is promising to observe, though, that some of those agencies are now recognizing the benefits of reasonable dispute resolution programs as an integral element in their procurement and operational policies.

Essential to all ADA procedures is the employment of a neutral person who serves to facilitate a settlement between the disputing parties. The facilitator does not impose decisions or judgments upon the parties to the procedure as do judges and arbitrators. Unlike a trial or arbitration, the result of a successful mediation or mini-trial is that the parties have reached a settlement, usually as a result of the successful efforts of the facilitator to help them overcome those elements of a dispute which kept them from settling in the first place. A well trained and successful facilitator helps parties get over their egos, misconceptions, stubbornness and mistakes to achieve the benefits of a prompt settlement accompanied by prompt payment to the appropriate party, thereby avoiding much of the substantial expense of what otherwise would have been an ongoing litigation. Most commercial litigation, including construction claims litigation, is concluded by a settlement prior to judgment or award, but only after most pre-award expenses have been incurred. The primary virtue of ADR is not the achievement of a settlement, but rather the early achievement of a settlement when substantial expense may be avoided.

Public owners have recently shown a willingness to accept the concept that ADR may benefit them, to accept the notion that a facilitator might be able to assist them in reaching an agreement with their contractor and that the avoidance of an expensive litigation is actually the avoidance of expense to the government as well. A fortunate by-product of this era of tight economic times for government has made many in government realize that it is no longer true for them to say “It costs us nothing to fight you guys in court.” Indeed, some government agencies are so convinced of the potential value of ADR that they have innovated techniques for dispute resolution which have created models for the private sector as well.

**Alternatives to Traditional Claim Resolution**

For example, the U.S. Army Corps of Engineers has created a procedure known as “Partnering.” The concept underlying partnering is that the mutual goals of the contractor and of the Corps for an on-schedule project without unresolved disputes resulting in litigation is important enough to justify a facilitated workshop before a project even begins. At the workshop senior management and project management from both the Corps and the contractor work through areas of anticipated conflict or disputes with a neutral facilitator to arrive at a mutual perception of the needs of each and methods which they shall use to resolve problems when they arise. While this program is relatively young, the Corps has reported that its use has improved construction effectiveness, has controlled cost growth, has reduced claims and litigation and has reduced contractor
overhead by greater responsiveness of the Corps of Engineers.

The resolution of problems and disputes when they arise avoids the accumulation of a multitude of smaller disputes into a large “claim” which, by virtue of its cumulative value, appears to justify mortal combat in the litigation scenario. The elimination of each of these disputes as they arise results in few unresolved disputes at the end of the project and, accordingly, fewer claims and litigation. Seeking that result, two New York state agencies have pioneered public agency use of mediation when disputes arise during construction of the project. The Metropolitan Transportation Authority and the New York City Schools Construction Authority have both contractually provided access to facilitated mediation by any contractor for any dispute which cannot be resolved with project management personnel. It is interesting to note that the availability of mediation pursuant to those contracts has not resulted in widespread use of mediation by the contractor community. To the contrary, contractors have been cautious and reluctant to participate in a mediation with these public agencies largely due to a perception that these mediations will be nothing but a waste of time. However, experiences at the New York City School Construction Authority have demonstrated the value of mediation as those few mediations have resulted mostly in settlement. As a result, more contractors have shown an inclination to participate and the agency’s representatives have shown a greater willingness to reach a settlement rather than to simply await the customary litigation at the conclusion of the project.

Other government agencies have begun to establish Dispute Review Boards (DRBs) as a mechanism for resolving complex construction disputes as they occur. In these circumstances, the Dispute Review Boards are established either on a job-by-job basis by joint designation of the parties or on an agency wide basis. Dispute Review Boards will typically be available to visit the job site when a dispute arises or to have scheduled meetings with the parties on a regular basis to resolve all open issues pending at that time. Access to the job site when the issues are “fresh,” followed by a prompt resolution has led many to believe that DRBs are a highly desirable development in the public construction setting. The DRB concept marries the notion of ADR and binding dispute resolution procedures. The highly respected model DRB panel will render a recommendation for settlement which should form the basis of a successful settlement negotiation between the parties. However, if that recommendation does not result in a settlement, the decisions of the model DRB are stipulated to be admissible in evidence if the dispute moves on the arbitration or litigation. This concept has been successfully utilized on huge public construction projects.

These boards, which started in the 1970s in underground construction, have
been enthusiastically promoted to the industry by the American Society of Civil Engineers and the American Institute of Mining, Metallurgical and Petroleum Engineers. In their committees’ report urging the use of DRBs, those groups have observed that “experience has shown that the very existence of a DRB fosters a cooperative relationship between the parties and often provides the impetus for settlement of disputes without formally taking them to the DRB.”

Even in those public agencies where there are no established ADR procedures, some change is in the wind. For example, New Jersey’s UTCA Chapter negotiated a dispute procedure with the New Jersey Department of Transportation which permits disputes to be heard before a newly created claims review board. This will hopefully provide greater objectivity and independence than the Agency’s Claims Committee has afforded contractor’s claims in the past. Representatives of public agencies throughout the nation, including attorneys representing those agencies, have started to show a willingness to participate in ADR procedures whereas in the past the suggestion of their participation would have resulted in outright rejection.

Conclusion

Lest the thrust of this article be misunderstood, new opportunities for effective and fair disputes resolution with public agencies should not invite more “claims.” Indeed, the contrary is true. The growing use of ADR by public agencies can provide contractors with valuable opportunities to fairly resolve problems and disputes as they arise, thereby avoiding the need to prosecute claims against that agency. Public owners will also benefit as they will avoid the need to defend against huge claims and involvement in prolonged litigation.

As stated earlier, construction problems and disputes will not end as the use of ADR grows. However, the timely and fair resolution of them with the help of ADR procedures will benefit the entire public contracting community. The prospect of achieving that benefit now appears more favorable than in years past.

About the Author

Robert S. Peckar is an attorney with the New York firm Peckar & Abramson. He specializes in construction law and dispute resolution.