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September 30, 1992

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The Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attention: Office of the General Counsel
Docketing and Service Branch

Dear Sir or Madam:

The Contract Administration Committee of the American Society of Civil Engineers (ASCE) strongly supports the application of alternative dispute resolution techniques to resolve conflicts between parties. For many years, representatives of the Society have worked with the Construction Industry Advisory Council of the American Arbitration Association to develop and assess the effectiveness of many of the ADR processes. These methods, as identified in the Administrative Disputes Resolution Act (P.L. 101-552), can assist in unraveling contractual disputes and bringing the parties to a state of agreement or accord in a timely and cost-efficient manner.

A few months ago, ASCE joined with the Business Roundtable, the American Bar Association, The American Insurance Association, the American Institute of Architects, the Associated General Contractors of America, and seven other groups to establish the construction industry Dispute Avoidance and Resolution Task Force (DART). DART's mission is to reach out to the industry-at-large not only with practical information about alternative means of dispute resolution, but with promising techniques of dispute prevention (such as risk allocation, incentives for cooperation, partnering, and dispute review boards). DART has also created a database of all known design and construction industry dispute resolution and prevention materials, which is available to all interested organizations and agencies for a nominal fee.

As listed in the August 14, 1992 Federal Register notice, opportunities for the use of ADR may arise in connection with Nuclear Regulatory Commission programs involving licensing, contracts, fees, grants, inspections, enforcement, claims and

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Civil engineers make the difference
They build the quality of life

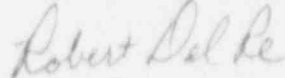
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rulemaking. We urge the Commission to adopt ADR techniques to the fullest extent practicable for agency activities.

If ASCE or DART can be of service, please do not hesitate to contact me at (813) 935-2333, or call Jeffrey Beard, ASCE's Manager of Regulatory Affairs, at (202) 789-2200.

Sincerely yours,



Robert Del Re
Chair, Committee on Contract
Administration

Enclosures (2):

ASCE Policy Statement 256 "Alternative Dispute Resolution"
Dispute Avoidance and Resolution Task Force (DART) Brochure

cc: Richard A. Coughlin, DART Executive Director

ALTERNATIVE DISPUTE RESOLUTION

Approved by the Professional Activities Committee on January 7, 1990.

Approved by the Committee on Policy Review on March 7, 1990.

Adopted by the Board of Direction on April 22, 1990.

Policy

The resolution of disputes related to engineering and construction has become increasingly complex, and litigation has failed to resolve these issues in a timely and cost-effective way. The American Society of Civil Engineers supports alternative dispute resolution techniques to bring these issues to a timely and cost-effective conclusion.

Issue

Resolution of engineering and construction related issues through litigation is not consistent with orderly project development. Time delays and the cost of litigation are frequently disproportionate to the issue involved and the major portion of cost is usually allocated to nonproductive activity. Alternative dispute resolution techniques have gained acceptance in the industry and their use continues to grow. However, recent years have noted an increasing tendency to mirror the legal process, which they tend to supplant. There is an evolutionary need to continue development of methods which produce timely and cost-effective solutions of engineering and construction disputes.

Rationale

The Society has participated for many years in the Construction Industry Advisory Council of the American Arbitration Association and contributed to many of the techniques used today in alternative dispute resolution procedures. There is a need to seek out methods of resolving disputes which speak directly to the problem, and in an immediate and cost-efficient manner. The use of arbitration, mediation and, to some extent, mini-trials has achieved these objectives. The continued development of new and more effective methods is encouraged.

DART:

A New Organization Seeks a Construction Industry Revolution

Disputes in the construction industry have become epidemic. The Construction Industry Institute has concluded that the U.S. construction industry is ill," and has complained that "litigation related to design and construction continues to increase." The Business Roundtable asserts that the U.S. construction industry is one of the country's least efficient industries, and blames much of this inefficiency on the "adversarial dance" between the parties to the construction project, which creates "a constant state of confrontation."

It is ironic that the one industry which more than all others depends upon coordination, cooperation and teamwork among multiple participants, should be the country's most adversarial industry.

In 1990 the Center for Public Resources Legal Program appointed a committee of outstanding construction law practitioners, corporate counsel, and leaders of the construction industry to take a fresh look at the special dispute prevention and resolution needs of the industry and the current state of the art in both dispute prevention and in dispute resolution.

The committee concluded that in recent years many advances in construction dispute prevention and resolution have been developed. However, the industry at large knows little about alternative methods of dispute resolution, and especially the newer and more promising techniques of dispute *prevention* (risk allocation, incentives for cooperation, partnering or team building, dispute review boards, and others). Consequently most industry participants do not use or look for contract provisions and techniques that tend to prevent disputes, or provide mechanisms for early resolution of disputes.

Seeking to reduce the impact of litigiousness on the nation's dispute-plagued construction industry, a number of high-profile organizations have formed the Construction Industry Dispute Avoidance & Resolution Task Force — DART. Public and private owners, design professionals, contractors and leading insurance and legal organizations are among its initial participants. They include the Construction Committee of The Business Roundtable, government agencies, the Construction Industry Institute, the American Institute of Architects, the American Society of

Civil Engineers, ASFE/The Association of Engineering Firms Practicing in the Geosciences, the American Consulting Engineers Council, the Associated General Contractors, the American Subcontractors Association, the American Insurance Association, the American Bar Association Construction Forum, the Associated Builders and Contractors, the Associated Specialty Contractors, and the Building Futures Council. Through these associations and societies, DART represents almost 90,000 firms and 224,000 individual practitioners in the construction industry.

H. B. "Bud" Scoggins, Jr., CAE, has been appointed Executive Director of the new organization, headquartered in the nation's capital in space donated by the American Arbitration Association. According to Scoggins, "The adversarial pendulum has swung too far, I believe. The level of litigiousness has risen to such a fever pitch that just about every party to a construction project adopts defensive, adversarial attitudes from the outset, and things just go downhill from there. The end result is a huge increase in the cost of construction and plummeting productivity."

"Architects, engineers, and contractors are forced to rely on defensive design and construction practices, which lengthens schedules, while increasing costs. Resolving disputes long after the job is completed also places a major burden on budgets, due to the cost of attorneys and the increased cost of insurance and bonding. It's ironic that much of what is done in the name of risk avoidance actually increases risks, and much of what is done in the name of cost savings increases costs."

James P. Groton, Esq., an attorney with the Atlanta and Washington firm of Sutherland, Asbill and Brennan, is a well known advocate of informal methods of resolving

disputes and has been elected DART's Chairman. According to Groton, "Billions of dollars are being thrown away each year on disputes. It's terribly discouraging, especially so because we know what is causing the problem, we know how to prevent the problems, and we know how to handle most problems that do arise in a prompt, fair and effective way. As discouraging as the situation is, however, it will only get worse unless someone intervenes. In this case, that 'someone' is DART, and it is our objective to represent every sector of the construction industry through every significant association in the industry."

"So far, we have been extremely encouraged by the response. A group of insurance and surety organizations contributed the seed money to make DART a reality. Endorsing associations and societies have pledged significant financial support. Of course, this is just to get organized and cover the initial operations. We'll need far more than that to implement the programs necessary to achieve our goals."

DART intends to focus its energies on promoting greater awareness and use of a number of dispute prevention and alternative dispute resolution techniques that have been demonstrated to be effective on a number of projects. "Partnering and realistic risk allocation are two highly effective techniques for improving coordination, communication, and cooperation on projects," Groton said. "They help prevent delays, enhance quality, and encourage rapid resolution of problems that arise, with a win/win attitude." Scoggins characterized these and several other techniques as "total quality management" applied to the construction process and stated, "They're designed to prevent predictable problems, and they work."

As for alternative dispute resolution, Groton pointed to case histories that "show how multimillion dollar disputes can be resolved through mediation in days rather than years, at a fraction of the cost that otherwise would have been spent. And totally contrary to so-called conventional wisdom, it is possible for people who seem on the verge of

going to war with one another to meet at the bargaining table and voluntarily reach a mediated settlement. All you have to do is know how. And we know and we intend to teach the industry."

One of DART's initial activities has been to build a database containing all known construction dispute prevention and resolution materials. Information is being collected documenting the successful uses of prevention and early resolution of disputes in the construction industry. DART will work closely with existing organizations, and especially owners of construction projects, to encourage greater use of these proven, but relatively unknown approaches to preventing and resolving disputes.

"Once we show people how well some of these techniques work, we can expect that lenders will begin demanding their use on the part of their customers. Insurers will be able to offer reduced rates for liability and surety coverage. That will cause some of the smaller owners and other participants to follow suit," Scoggins said.

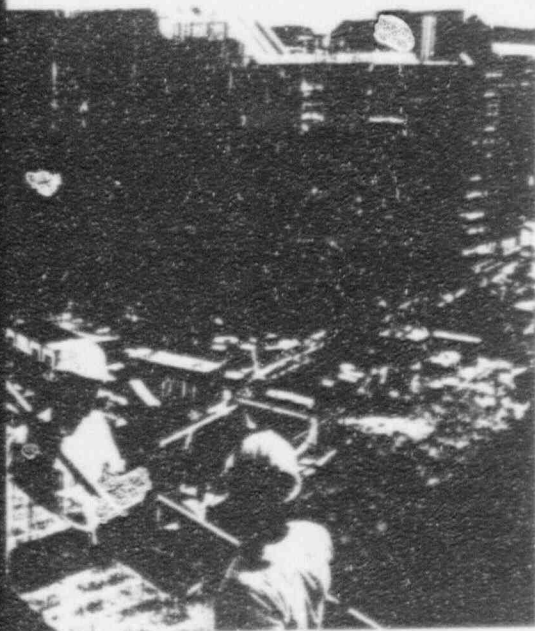
"Imagine a construction industry where all the various participants cooperate to achieve high-quality, completed structures on schedule, within budget, safely, and with no lingering disputes or animosities. It would take a revolution for that to happen, and that's what DART aims to achieve," Groton said. "With the organizations and people already involved, I am convinced it can happen."

A number of programs and materials are on the DART drawing boards at this time, and a major event is being planned for the fall, in conjunction with a new initiative the group is already planning. "I'm not at liberty to say anything about it at this time," Scoggins said, "but it will be significant. We anticipate participation from every element of the construction industry, and from the highest levels of government."

For more information about DART, contact the organization at 1150 Connecticut Avenue, N.W., Washington, DC 20036-4199; 202/296-5775.

To accomplish its goals, DART has established the following general objectives:

- Make all elements of the construction industry aware of proven techniques available for preventing and resolving disputes.
- Obtain the commitment of construction industry business and professional associations and societies to educate their members in the effective use of dispute prevention and resolution techniques.
- Distribute educational and training materials about dispute prevention and resolution to all elements of the construction industry.
- Secure the pledge of all parties in the construction process to prevent disputes, and to use early dispute resolution techniques.
- Convince members of the legal profession to become knowledgeable about techniques which help to prevent and resolve disputes and to assist their clients in implementing those techniques.
- Persuade publishers of construction contract documents and educational materials, and insurance and surety providers, to promote the use of dispute prevention and resolution techniques.
- Stimulate research and development of improved dispute prevention and resolution techniques.
- Develop initiatives to achieve universal use of dispute prevention and resolution techniques.
- Work with institutes of higher education (technical, law and business) to educate future members of the industry in dispute prevention and resolution techniques.



(DART) has been formed to promote awareness, understanding and use of private dispute prevention and resolution techniques and to encourage the use of these techniques as standard practice in the industry.

DART represents all segments of the industry: public and private owners, architects, engineers, contractors, subcontractors, sureties, lenders and more. All share a common goal: to declare war on unnecessary disputes and litigation. The DART logo represents this common goal and the partnership formed by owners, designers and contractors.

DART has been endorsed by leading organizations of owners, designers and contractors including:

- Construction Committee of the Business Roundtable
- Construction Industry Institute
- Building Futures Council
- American Institute of Architects
- American Society of Civil Engineers
- ASFE/The Association of Engineering Firms Practicing in the Geosciences
- American Consulting Engineers Council
- National Society of Professional Engineers
- Associated General Contractors
- Associated Builders and Contractors
- American Subcontractors Association
- Associated Specialty Contractors
- National Electrical Contractors Association
- American Insurance Association
- Professional Liability Agents Network
- a/e ProfitNet
- American Arbitration Association

Join your construction industry colleagues in returning profitability to your projects. Join DART today.

DART
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James P. Groton, Esquire
Chairman

H.B. Scoggins, Jr., CAE
Executive Director

MORE THAN
\$60 BILLION
IS SPENT
ON LAWSUITS
EACH YEAR —
TOO MUCH OF
IT IN THE
CONSTRUCTION
INDUSTRY.

EACH
\$1 BILLION SAVED
CAN PUT 40,000
CONSTRUCTION
PEOPLE BACK TO
WORK.

Excessive lawsuits are draining the financial and human resources of the construction industry, earning it a reputation as one of the most adversarial industries in the country. There are no winners in such litigation — everyone loses through reduced profitability, productivity and quality.

Changes and problems are inherent in the construction process. But preventing such problems from becoming disputes when possible and using early resolution techniques when problems arise can significantly improve the construction process and improve everyone's bottom line.

The Construction Industry's Dispute Avoidance and Resolution Task Force

DART

Dispute Avoidance
and Resolution
Task Force

Eighty percent or more of construction disputes occur between parties to the process. As an independent, autonomous task force, DART offers everyone the techniques for prevention or early resolution of disputes. These techniques include properly allocating the risk on projects, providing incentives for cooperation, partnering or team building, and judicious dispute resolution techniques including dispute review boards, negotiation and mediation.

The benefits of dispute prevention and early resolution are numerous: increased productivity, improved quality, a reduction in down time, increased professional satisfaction, improved safety and accelerated payment, all of which lead to increased profits for everyone.

Lengthen of a typical construction case can extend up to 30 days without a final judgment, trial and appeal costs. Attorney fees can easily run from \$50,000 to \$500,000 or more. Most litigation generally costs between \$3,000 and \$10,000, a mere fraction of the cost of litigation.

DART's programs emphasize the importance of developing strong relationships at every level within the industry and how these partnerships translate to greater profits for all. The recent move among all sectors of the construction industry to Total Quality Management (TQM) parallels the dispute prevention and resolution movement. An integral part of TQM is establishing a relationship between the owner, designer and contractor to achieve mutual and beneficial goals.

CASE STUDY

A major national construction firm reduced its legal expenses from 130 percent of division operating profits to less than 10 percent in less than two years by implementing dispute avoidance and resolution techniques. On a major project the firm not only avoided litigation, but developed positive relationships that led the owner to non-competitively award the firm a \$60 million contract on its next project.

CASE STUDY

The U.S. Army Corps of Engineers is one of the greatest advocates of partnering. One of the first large projects to use partnering involved a \$34 million contract with a Portland, Oregon construction firm to build diaphragm walls at Bonneville Dam on the Columbia River. The project designers, engineers, managers, attorneys, superintendents, subcontractors and suppliers participated in a partnering workshop to establish the parameters of the project and set objectives. They jointly developed the specific dispute prevention and resolution techniques to be used.

Despite its reputation for complexity, the project was highly successful.

- There was no litigation and no claims outstanding at the conclusion of the project. Correspondence and case-building paperwork were reduced by 60 percent compared to similar projects.

- Value engineering savings amounted to more than \$1.8 million on the \$34 million project.

- Controlable cost growth was held to 3.3 percent compared with an average 10 percent cost growth over the life of a typical major construction project.

To date, there has been no litigation on the 19 projects on which the Corps has used partnering. The concept is now standard policy.

CASE STUDY

The Washington State Department of Transportation used private dispute resolution techniques on a project to construct the largest diameter schaft tunnel in the world: 1,332 feet long and 63 feet in diameter. The bid was \$38.3 million compared to the estimate of \$79 million. The contractor estimated that the bid was reduced by nearly 10 percent due to the knowledge that dispute resolution provisions would be included in the contract.

During the course of the project, three major disputes were submitted to a Dispute Review Board. In each instance, the Board's recommendation was accepted. No disputes were litigated.

The three-year project was completed ahead of schedule. The final cost of \$36.1 million was almost 6 percent below the bid. The cost of the Dispute Review Board was \$98,000, or less than .3 percent of the total project cost.

BENEFITS OF MEMBERSHIP

Had enough controversy and litigation? Reduce communication, coordination and cooperation in construction. DART membership is your opportunity to do something positive to return profitability to your projects.

A DART membership is a sound business investment for any sector of the construction industry. DART members will gain access to leaders in the field of private dispute prevention and resolution for meetings and conferences. Its publications contain the latest information on dispute avoidance and resolution developments — seminars, research, training programs, successful applications. Subscriptions to the Dispute Resolution Digest and abstracts of major presentations on the subject are included in the membership.

DART policy is established by a steering committee appointed by the associations and societies that represent all elements of the industry. DART's programs are developed by consultation with the organizations representing every sector of the industry. Membership provides an opportunity to make your voice heard on industry issues.

Eighty percent or more of construction disputes occur between parties to the process. As an antecedent, continuous task force, DART offers everyone the techniques for prevention or early resolution of disputes. These techniques include properly allocating the risk in projects, providing incentives for cooperation, partnering or team building, and jobsite dispute resolution techniques including dispute review boards, negotiation and mediation.

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Dispute prevention committees of project, design, construction, management, and the partnering of all involved in the project was highly successful.

There was no litigation and no claims outstanding at the conclusion of the project. Correspondence and case-building paperwork were reduced by 66 percent compared to similar projects.

- Value engineering savings amounted to more than \$1.8 million on the \$3.4 million project.

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