PB81-154775

Developing an Arbitration Process for Resolving Contract Disputes: Preparing for the Worst While Hoping for the Best

Georgia Univ., Athens

Prepared for

Urban Mass Transportation Administration
Washington, DC

Jul 79

Technical Report Documentation Page

1. Report No.	2. Government Accession No.	3. Recipient's Catalog No.
UMTA-GA-11-0006-81-1		PB81 154775

4. Title and Subtitle	5. Report Date
Developing an Arbitration Process for Resolving Contract Disputes: Preparing for the Worst While Hoping for the Best.	July 1979
	6. Performing Organization Code
7. Author(s) J.B. Trattner, and G.J. Miller	8. Performing Organization Report No.
9. Performing Organization Name and Address University of Georgia Department of Political Science Athens, Georgia 30602	10. Work Unit No. (TRAIS) GA-11-0006
	11. Contract or Grant No.
12. Sponsoring Agency Name and Address U.S. Department of Transportation Urban Mass Transportation Administration 400 Seventh Street, S.W. Washington, D. C. 20590	13. Type of Report and Period Covered University Research Case Studies 1 of 17 reports
	14. Sponsoring Agency Code UPP-30
15. Supplementary Notes	

16. Abstract

This report is one of 17 case studies (UMTA-GA-11-0006-81-1 through UMTA-GA-11-0006-81-17) on the management of the Metropolitan Atlanta Regional Transit Authority (MARTA). The series covers a wide range of issues associated with the operation and management of a major transit system. Some of the issues discussed in the 17 case studies are as follows: Contract Disputes and Arbitration; Assessing Electoral Defeat; Intergovernmental Coordination; Relocation Appeals Panel; Marketing; Stations; Ethics; General Manager's Office; EEO; Elderly; Community Conflict and Historic Preservation; Transitions; Fares; Political Decisions; Bus System Acquisition; and Executive Performance.

This case study addresses the development and implementation of arbitration strategies at MARTA. The report describes the effort to defuse the destructive potential for conflict among MARTA, UMTA, and contractors over the handling of contract disputes. The 3 existing MARTA strategies aimed to limit conflict, namely--assuming part of the risk of performance, using federal contract language and legal precedent, and providing absolute limits for work-stoppages--did not prevent disagreements over contracts. After much effort and several dead-ends, MARTA executives settled on a method for resolving contractual disputes, namely, arbitration. It generated confidence among all parties that any disputes involving contract performance would be treated fairly, quickly, and cheaply. The appendices in this report are: MARTA Contract Clauses Relating to Arbitration, and MARTA Procedures for Contractor Claims.

17. Key Words		18. Distribution Statement
Management	Rail	Available to the Public through the National Technical Information Service, Springfield, Virginia 22161.
MARTA Contracting Process	Transit Property	
Contract Disputes	WMATA	
Arbitration	Performance	
Case Studies	Bus	

19. Security Classif. (of this report)	20. Security Classif. (of this page)	21. No. of Pages	22. Price
Unclassified	Unclassified	23	

Form DOT F 1700.7 (8-72) Reproduction of completed page authorized

UMTA-GA-11-0006-81-1

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A product of the Case Study Project on MARTA Management, funded by Research and Training Grant No. GA-11-0006, Urban Mass Transportation Administration, U.S. Department of Transportation.

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Clerical and stenographic support was provided by Joan J. Burns, under the direction of Sandra B. Daniel.

METRIC CONVERSION FACTORS

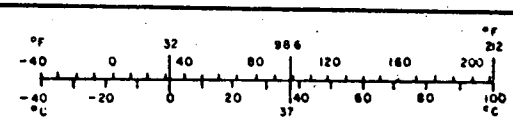
Approximate Conversions to Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
in	inches	*2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
		AREA		
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
		MASS (weight)		
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
		VOLUME		
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.95	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
		TEMPERATURE (exact)		
°F	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C

*1 in = 2.54 (exactly). For other exact conversions and more detailed tables, see NBS Misc. Publ. 286, Units of Weights and Measures, Price $2.25, SD Catalog No. C13.10:286.

Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
		AREA		
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
		MASS (weight)		
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
		VOLUME		
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
		TEMPERATURE (exact)		
°C	Celsius temperature	9/5 (then add 32)	Fahrenheit temperature	°F



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This case study describes the effort to defuse the destructive potential for conflict among MARTA, UMTA, and contractors over the handling of contract disputes. Three MARTA strategies aimed to limit conflict -- assuming part of the risk of performance, using federal contract language and legal precedent, and providing absolute limits for work-stoppages due to contractual disputes. These alone, however, could not prevent some inevitable disagreements over contracts. After much effort and several dead-ends, MARTA executives found their stopper. They settled on a method for resolving contractual disputes unique in public transportation contracting -- arbitration. It generated confidence among all parties that any disputes involving contract performance would be treated fairly, quickly, and cheaply.

Three major constraints faced the Metropolitan Atlanta Rapid Transit Authority (MARTA) when staff members readied construction contract documents for bidding. First, plans entailed an ambitious and optimistic schedule, with a no-frills budget. Second, the Urban Mass Transit Administration (UMTA), the major federal source of funds, would approve contract awards and audit payments to contractors, and this put UMTA in a strategic position to look over MARTA's shoulder, if not to second-guess at leisure decisions made in a fast-paced program. Third, the Authority was an unknown contract manager -- a new kid on the block -- in construction and equipment markets with no track record in managing any construction, no less a billion-dollar-plus program.

Anticipating the Worst in Contract Disputes

Consequently, pervasive uncertainty characterized both MARTA actions and those of the primary groups with which Authority executives would deal. MARTA staff members felt cautious about the degree of control UMTA would exert, as well as about maintaining stiff budget and schedule constraints. Authority executives, moreover, were wary about the possible tendencies of contractors to exact profits and impact the schedule. In addition, UMTA and contractors experienced their own misgivings. UMTA administrators assumed a major risk in granting the largest amount of federal transit dollars ever to a local construction program. MARTA's tight schedule and budget counseled caution for contractors, especially in considering whether and how much to bid on MARTA work.

Experience in public works projects made it very clear to all three parties -- MARTA, UMTA, and the contractors -- that trouble would come, if anywhere, from contract disputes. Contract disputes spelled trouble for MARTA in both time and money. To UMTA, disputes meant possible generous awards to contractors to avoid protracted delays. On the other hand, contractors could envision paltry profits and much agitation in getting the railroad built. A way of steering clear of such potential horribles had to be found by MARTA executives, if they hoped to maintain the schedule and budget, to avoid adverse second-guessing by UMTA, and to obtain the confidence of contractors. An equitable, inexpensive and expeditious means of resolving contract disputes was needed.

How Contract Disputes Can Occur

MARTA's concern about resolving contract disputes was well-founded. Consider the ubiquitous conditions out of which contract disputes arise: when the contract or the design fails to show contractors clearly what work to do and how it should be done. At best, construction plans often require later engineering or design changes which force "change-orders." Change-orders vary in their impact on the contract to which both engineer and contractor initially agreed. The contractee will tend to seek up-dates of plans and designs, to benefit from hindsight, new experience, or more mature reflection. And contractors especially fear that change-orders will result in added work without additional or adequate compensation. Disputes occur when a contractor disagrees with the engineer's interpretation of the work required in a construction contract with payment above that agreed to in the original contract. Major potential for such disputes exists, because MARTA will revise contracts for five general types of changes.

Changes Deriving from "Value Engineering"

With the least potential for conflict, the contractor may suggest a change, based on "value engineering." By allowing the contractor to initiate, MARTA encourages the contractor to think of better ways to accomplish the work. If the contractor can alternatively meet or improve on specifications

and also can prove that there is no sacrifice in quality, he can share in any savings.

Unexpected Field Conditions

A second kind of change results from field conditions which differ from initial expectations or assumptions, a common situation that provides ample potential for honest differences, not to mention sharp-dealing. For example, plans may require a contractor to compact ground to a certain density. However, the ground might cover a long-forgotten garbage site, limiting the degree of compaction possible. The standard density set in the contract would be impossible to achieve, and the contract must be changed, but the extent of such change can be a sticky issue.

Engineering Errors in Original Plans

A third kind of change occurs when a contractor finds that engineering plans contain mistakes. The sources can be legion. The language in the specifications may be incorrect; field conditions may differ; or there may be an error in the drawings.

Changes of Mind or Will

MARTA also may decide to change plans or engineering concepts for approaching a project. These changes often result from the efforts of outside interests -- especially railroads, telephone, electric, gas, and other utilities, as well as the city, county, and state governments with which MARTA works. For example, railroads are sensitive to any potential impact on their tracks. If MARTA needs to impose on their right-of-way, railroads may require MARTA to work with the former's specifications. Also, the Georgia State Department of Transportation controls interstate highways, and must approve plans which call for altering routes or controlling traffic. Similarly, the cities control changes affecting sewer and water lines. Many lines were built around the time of the Civil War and -- since they would disintegrate if in the path of construction -- MARTA by agreement must replace them to present standards. In the case of city sewer and water lines, their disturbance by MARTA may be unanticipated, requiring a change in a contract to replace them. The cities or counties may also ask for changes after city planners have approved the original design plans. One MARTA staff member states: "We're in a hurry with the building program, and no one else is. They were here before MARTA construction and will be here afterwards." Many local agencies are chronically understaffed, and cannot deal in timely ways with the volume of plans which MARTA produces. Some government agencies sign-off on drawings and then later may require changes, as field conditions become clearer or after they have been able to really review the plans.

New Ways Bring Changes

The final type of change-order occurs when, after contracts have been let, MARTA engineers find a better way of doing things. In other words, as technology or experience advances, MARTA takes advantage and changes contracts accordingly.

Why Contract Documents Can at Best Reduce the Chance of Disputes

The inevitability of change requires special attention in MARTA contracts, which have two basic parts. The first part -- the general contract -- specifies general conditions under which work is to be done. A second "special conditions" section is tailored to the particular construction project. A change can occur in either. Although the special conditions section seeks to anticipate problems, some always resist prediction. One MARTA staff member explains: "We try to anticipate everything and provide for it. We never really quite think of everything. . . . There is no such thing as a perfect contract. Construction contracts by the nature of the beast will require changes."

Special Stresses on the MARTA Contracting Process

In addition to the nature of the beast, contracting in MARTA had additional potential for frustrating the construction schedule and budget. Basically, construction contracts do not cheaply provide leisure to solve problems. Construction is dynamic, and changes must be made quickly to keep the project going. To exacerbate this already-dominant tendency, MARTA's construction schedule was quite tight. Thus one close MARTA observer concludes that the schedule may have been "overly optimistic. It did not leave enough room for mistakes or contingencies for bad weather, labor problems, natural disasters, and so forth, which in fact, did occur in many contracts." Further reducing the ability of the contract to anticipate and thus avoid disputes, a large number of MARTA contracts were bid in depressed economic circumstances. The recession of the mid-1970's initially favored MARTA, and resulted in lower bids. Assume that contractors made bids on contracts only high enough

to keep their firms going. Thus MARTA's initial advantage might fade as the Atlanta economy improved, and the inevitable change-orders would give contractors opportunities and motivation to reopen the bargaining on contracts. MARTA executives wanted desperately to maintain schedule, while also realizing this left them far more vulnerable in negotiating about the costs of any changes than they had been under competitive bidding. In other words, keen competition in a tight economy often had kept bids unexpectedly low, but there would be no competition among contractors when changes occurred. Well-placed observers feared that contractors might bludgeon MARTA at the negotiating table. Also, the changed bargaining relationship forced MARTA engineers to evaluate very critically the need for every change. One observer noted this ever-present question in the minds of construction project managers: Do we want the change very badly?

The impact of contract documents on the change process also was affected by the funding formula. The contract with MARTA included a face amount and a contingency fund. The contingency was generally 10 per cent, and provided an obvious target for increasing the amount a contractor could get paid as a result of contract changes. For awhile, street talk also proposed that MARTA would retain a substantial "surplus" because of its favorable bidding experience, and MARTA executives were concerned that this erroneous but oft-repeated rumor might encourage contractors to aggressively seek hefty settlements for change-orders.

Contractors Lack Knowledge re Bidding

The efficacy of contract documents also would be sorely tested because contractors necessarily lacked intelligence crucial to bidding. Contractors analyze past agency contract management in bidding on a new project. The contractor looks at the track record of the buyer and determines how conflicts were resolved in the past. If its record reflects arbitrariness or delay, the agency may receive bids with large "slack" as the contractor increases his bid to compensate for anticipated problems involving agency interpretations of the contract. Given MARTA's newness, all contractors suffered in their ability to estimate with sophistication. This lack of knowledge acted as a counter-weight to economic conditions and strong competition, Authority executives realized, and increased the possibility of stickiness in negotiations about change-orders.

MARTA Seeks Strategies to Reduce the Chance of Contract Disputes

Although inevitable, MARTA executives believed that contract disputes could be prevented in some instances, and that they could be restricted to reasonable boundaries in almost all cases. The first-cut at appropriate strategies sought ways to eliminate some of the more obvious potential for contractual disputes.

As a first strategy, MARTA chose to assume the liability for contractor accidents, both those involving construction workers and those between contractors and third-parties not connected with the work. For example, MARTA would pay claims for workmen's compensation, as well as claims resulting from accidents between an Atlanta resident and a contractor's vehicle while the driver was at work.

A second strategy involved the decision to use federal contract language, a decision influenced by two factors. First, in the development of the contract documents for the MARTA construction program, Authority executives gave greatest consideration to UMTA's reserved right to approve various contract actions, either prospectively or through the audit process, based on federal regulations. This fact urged as much certainty as possible in contract documents. A common source of legal knowledge and experience would lessen the likelihood of divergent opinions regarding the propriety of various actions MARTA might take in administering contracts. Second, MARTA executives also attached considerable importance to the size, scope, and experience of would-be contractors, and consequently most construction and equipment companies bidding on MARTA projects would be national firms rather than local ones. Contractors might not be familiar with Georgia Law or Georgia contracting practices, but they would more-than-likely be familiar with practices used by federal agencies. Many contractors would be afforded a certain degree of comfort if MARTA contract language and practices -- the "boilerplate" -- were rooted in federal rather than state law.

These two factors convinced MARTA staff members to model MARTA's contract documents -- especially as to general conditions -- after federal contract documents, as far as practicable. This key decision sought to maximize stability. In addition, federal contracting processes and regulations were the most sophisticated and extensive available.

MARTA executives also chose a third strategy to avoid construction delays. Once a change was decided on, MARTA wanted it implemented whether the contractor agreed or disagreed. MARTA executives thus inserted clauses in contracts requiring work to proceed while the contract dispute worked its way to resolution. Therefore, with or without agreement over changes, the schedule would not be impacted by contract disputes. The contractor had the option of filing a claim

for payment, of course, but could not stop work, and no claims would result from schedule slippages occurring over disputed changes.

MARTA Evaluates Strategies to Resolve Contract Disputes

While some disputes could be nipped in the bud -- as by MARTA's assumption of risk, using federal contract language in documents, and by contract clauses preventing delays due to changes -- disputes could arise over many other issues, some of them involving big dollars. MARTA executives searched for a method to handle those disputes that could not be avoided or finessed -- a method that was inexpensive, expeditious, and fair.

Three important legal considerations influenced the decision as to how best to handle those unavoidable contract disputes. Paramountly, federal agency oversight muddled the legal basis for dispute-handling. Although state law normally governed contract administration, the heavy infusion of federal dollars and the potential for UMTA second-guessing warned MARTA executives that federal law and regulations would govern the project as much as state law, if not more so. In handling disputes, one eye had to focus on Washington. Relatedly, no settled body of state law existed which related to sophisticated construction contract disputes. An existing but relatively undeveloped body of Georgia law might not suffice. Finally, most parties sought to keep disputes away from relatively unsophisticated judges and juries whose inexperience might jeopardize prompt fairness, and also cost both MARTA and contractors dearly in time and money.

An aggressive search resulted for strategies to deal with the unavoidable or unmanageable residuum of contractual disputes, within the three major constraints just detailed. In preview, MARTA executives evaluated informal methods of dispute-handling, reevaluated judicial methods, investigated administrative models, and finally concluded that an independent panel could best settle disputes through arbitration.

In-House, Informal Approaches

The legal problems in dispute-handling initially led MARTA executives to consider non-legal or informal methods, specifically handling the disputes within-house. MARTA's general engineering consultant -- Parsons-Brinckerhoff, Tudor, and Bechtel (PBTB) -- had supervised disputes during Bay Area Rapid Transit construction. Not surprisingly, then, MARTA executives early investigated the utility of a similar arrangement in Atlanta.

The BART-PBTB model had definite advantages. It kept disputes out of the courts and sidestepped the federal-local law problem. Moreover, the general engineering consultant not only had experience in handling contract disputes but also was familiar with the MARTA contracts and contractors. In addition, PSTB had sufficient staff to deal with contract disputes, while MARTA would have to hire additional staff if it took on the job. At least, then, adopting the BART/PBTB model could save valuable time and capitalize on existing experience.

However, this first approach also had severe disadvantages which could threaten the budget and the quality of contractor work. Consider only three points. First, the approach lacked built-in safeguards to cut costs. To avoid litigation, PBTB might be encouraged to settle disputes through bargaining with contractors who wanted to increase their pay-out. PBTB had few bargaining chips, and might be exposed to allegations that they had to "buy their way out of disputes." Second, PBTB's contract with MARTA was a cost-plus-percentage arrangement based on the overall cost of the project. Third, PBTB's additional design role -- the design of stations and rail lines for MARTA -- might conflict with the dispute-settlement role. For example, PBTB engineers and architects might be accused of concealing initial design mistakes in a flurry of change-orders.

Jeffrey Trattner, MARTA Staff Counsel, concluded that the disadvantages of the BART-PBTB model outweighed the advantages. Dispute settlement, he felt, had to be handled outside MARTA to avoid conflicts and additional costs. Furthermore, to control change-orders, he suggested and got approval for locating authorization of change-orders within MARTA proper rather than PBTB.

Reevaluating the Courts

MARTA executives next reevaluated the courts for handling contract disputes, but the constraints proved overwhelming. State courts would prove unworkable due to the complexity of contract cases, and the possible bias of those who would hear the case. Basically, complicated contract documents could overwhelm the already-burdened courts, with consequent time-lags and contractor motivation to protect self against delays in judgment. In addition to the detailed and specialized language of the contract, complex drawings and charts can swamp courts with information. To really get down to the dispute before a jury requires an education about basic elements of contracts, as well as their application in the particular case. This takes a great deal of

money and time. With an educated audience, or one having a degree of familiarity with construction, parties can rely on a certain level of assumed knowledge. Both parties get more meaningful discussion, and resolution of the dispute more likely will rest on informed discussion of the merits of the case. In addition, a jury is disadvantageous because its decisions can be made as a result of ephemeral considerations. Overloaded with information, a jury may make decisions on factors other than the merits of the case. Persuasive arguments aside, for example, the lawyer's personality might become a large issue in and of itself. Also, according to Trattner, "No one in Atlanta is neutral on the subject of MARTA." The climate of opinion may work for or against MARTA; but the contractor may be cautious because "most are outsiders, not Atlanta natives, who might be viewed as carpetbaggers by a jury." Finally, local courts might invite UMTA suspicion. Since granting more than 800 million dollars to MARTA encouraged close oversight, the inexperienced local courts could reinforce UMTA's motivation to exert tight control.

So the MARTA decision was not difficult. Local courts -- lacking the necessary training and experience -- might yield decisions that would cost MARTA exorbitantly in dollars and time. In addition, reliance on local courts also might encourage more detailed pre- and post-decision review by UMTA. Consequently, MARTA executives doubted the wisdom of using state courts as dispute-handlers.

The WMATA Model

MARTA staff members next looked toward the Washington Metropolitan Area Transporation Authority. WMATA used the U.S. Army Corps of Engineers Board of Contract Appeals (ABCA), on an ad hoc basis, contracting with the Army Board to hear contract disputes when necessary.

Trattner found that this arrangement had drawbacks in MARTA's case. First, ABCA has limited experience with many of the types of contract disputes MARTA would encounter. Second, MARTA executives disliked the tentativeness of ABCA's decisions. Under the law which gives jurisdiction to ABCA, its decisions would not be final and binding on the MARTA Board of Directors, who could reject the decisions of the Army panel. In practice, this has never occurred but, according to a MARTA observer, the threat remains and works to undermine confidence in the process. Third, MARTA bears the entire cost of using the Engineer Board to hear its disputes. The ABCA performs the service on a cost-reimbursable basis, at an estimated rate of approximately $50,000 a year. Fourth, the U.S. District Court reviews ABCA decisions, but that court has little expertise in disputes arising under federal contracts. Put otherwise, the U.S. Court of Claims hears federal contract disputes, with limited exceptions. MARTA's problem with state courts might reappear in federal guise, if the WMATA model were followed.

In sum, following the WMATA model promised a less-than-ideal solution to MARTA executives.

Board of Contract Appeals at DOT

MARTA executives also investigated other federal agency methods, and looked in detail at the Board of Contract Appeals in the U.S. Department of Transportation.

Several advantages of that approach seemed obvious. Basically, since MARTA would be dealing with UMTA in the administration of the capital grant, some Authority staff members felt that the Department of Transportation Board of Contract Appeals (TBCA) might prevent some UMTA second-guessing. TBCA would fit MARTA's situation well for two other reasons. Thus the Board reputedly had high competence. Many federal procurement specialists rated the DOT Board as excellent in overall ability and professionalism. Moreover, the Board had wide-ranging expertise. Due to the many different transportation specialties among DOT agencies using TBCA, the Board had achieved sophistication in dealing with an array of construction contract claims.

As a result of procurement specialists' ratings and his own analysis of the cases facing the DOT Board, Trattner moved to solicit DOT interest. The move met with both agreement and opposition. Some DOT staff members regarded the use of TBCA as innovative and managerially advantageous. Simply, TBCA participation in MARTA contract claims settlement would encourage uniformity and reduce duplication in UMTA audits/reviews. Simplification of audits and oversight also might decrease the need for interference or over-control by UMTA in local decision-making. However, other DOT administrators opposed TBCA participation for two reasons. First, they believed that TBCA had no legislative authority to review MARTA contract disputes. In fact, a DOT order stated that specific legal authority would be necessary to enter into an agreement with a local government. Second, DOT officials expressed concern that the TBCA would have to apply Georgia law to many of the contract disputes, a condition DOT officials felt that TBCA was not competent to satisfy.

MARTA's Staff Counsel argued that specific DOT orders and regulations did allow TBCA participation. Trattner's assistant Bruce Bromberg urged that these rules even encouraged TBCA intergovernmental agreements. Moreover, Trattner explained that federal contract language would remedy the state-law problem. Contractors and MARTA, as a result of federal contract language, would agree to use federal procurement law to govern the handling of disputes. Although he offered rebuttals to UMTA officials' argument, Trattner failed to convert the DOT opposition, who prevailed over the DOT pro-innovation group.

The attempt to involve DOT -- although superficially simple -- actually covered six months, from May to October 1975. During this time, MARTA awarded two contracts without any clause specifying ways of settling disputes over claims. Other contracts would be awarded shortly, also without such a clause. Without a method to which the contractor and MARTA were bound by contract, both parties might have to deal with the issue of how to settle a contract dispute as well as with settling the dispute.

Arbitration

After receiving DOT's final decision, Trattner began looking at other alternatives. "Fortuitously," he recalls, "someone suggested or I had it in the back of my mind the possibility of using arbitration. I had gotten some literature which related to the American Arbitration Association (AAA) and described what they called construction industry panels -- for arbitration." Trattner found that AAA had only recently set up specialized panels to deal with construction disputes. The panel concept, AAA style, already had gained wide support from major associations in the construction industry such as the American Institute of Architects and the Construction Specifications Institute.

Wide endorsement stoked Trattner's interest. He and Bruce Bromberg, his Senior Associate Counsel, met for initial discussions with AAA's General Counsel, Gerald Aksen, to explore the possibility of using AAA for dispute settlement. In the first meeting, Trattner examined the AAA processes and experiences with construction contract litigation. To ascertain AAA arbitrators' expertise in construction, Trattner searched the files of available AAA arbitrators at random to ascertain their qualifications and background. He found that AAA had numerous qualified people available to hear disputes, and that their track record was good.

Trattner also expressed concern about state legal barriers to arbitration. Could state law hinder reliance on arbitration? Trattner reviewed his research on state arbitration law and found that some states have enacted arbitration legislation, while others have not. Georgia was in-between -- "a kind of gray state" where there appeared to be a conflict as to whether courts could compel arbitration without a state statute. That is, where two parties agree initially to arbitrate a dispute, but one of the parties refuses later, could the other party go to court to order arbitration? Trattner found one "oddball decision" which seemed to say courts could not compel arbitration, while another opinion stated the opposite.

Acknowledging the conflict, AAA's Aksen suggested another approach. He observed that federal arbitration law applied when the parties engaged in interstate commerce. The interstate commerce provision would apply in MARTA's case because most Authority contractors are out-of-state contractors and because MARTA builds with 80% federal money. Aksen argued that constituted enough of an interstate connection to apply federal rather than state law.

The first meeting with Aksen convinced Trattner. He drafted a contract clause prescribing arbitration and negotiated some details of an agreement with AAA. For details of MARTA contract features related to arbitration, consult Appendix 1.

Gaining the Approval for Arbitration at MARTA

Trattner had to get approval for this approach from both MARTA General Manager Alan Kiepper and the MARTA Board of Directors. Trattner developed his strategy around two major points -- the probable lower cost of arbitration as opposed to other methods, and the favorable opinion of MARTA construction staff about arbitration.

A very compelling argument in favor of arbitration, Trattner felt, would be the money saved. "In the long run, arbitration might turn out to be the least costly alternative. For example, using TBCA, we would have to enter into a contract to bear the expenses of all sides." With AAA arbitration, in contrast, a minimal registration fee would be paid. In addition, who pays additional costs would be decided by arbitrators assigned to a specific case, based on a fee schedule.

No less important an argument, MARTA staff members -- especially including Assistant General Manager for Transit System Development William Alexander -- favored arbitration. Past experiences with arbitrating disputes convinced construction managers that it could work at MARTA. Staff members'

reactions reflected general favor in the construction industry, as Trattner found. Almost unanimously, moreover, construction staff wanted to avoid the courts.

Following the talks with Aksen at AAA, Trattner met with MARTA GM Alan Kiepper. Trattner explained the arbitration process, reported the reasons why he thought it would work, and also recommended that MARTA use AAA. GM Kiepper approved Trattner's request to propose arbitration to the Development Committee of the Board of Directors.

Trattner did some pre-presentation visiting, and talked with three Board members to explain the situation. His first stop was Lyndon Wade, chairman of the Development Committee. Wade reacted positively, and encouraged Trattner. The Chief Staff Counsel then talked with Harold Sheats, a new Board member and also Development Committeeman. Sheats had been a lawyer and Fulton County Attorney for 25 years, in and around public construction for much of that period. He expressed no feeling about AAA arbitration, either way. However, Sheats was concerned about another related issue, the size of legal services fees and billing from law firms outside MARTA. Arbitration would use in-house staff -- Trattner's Office of Staff Counsel -- to handle all arbitration. The reduced costs promised by Trattner attracted Sheats, who became an advocate for AAA arbitration.

Trattner's visits to Board members were not all positive, but all proved informative. The third Development Committee member Trattner talked to was Fred P. Meyer, also an attorney. Meyer opposed arbitration because it generally limited the flexibility of the trial lawyer, and because he supported reliance on outside counsel in the present particular. Two aspects of Meyer's position proved most revealing. First, Meyer's opposition to the process of arbitration developed from his experience as a practitioner-lawyer, Trattner concluded. Trattner observes:

> A private practitioner doesn't like arbitration, as a general rule. He would rather handle the case in court than arbitrate. Arbitration, generally speaking, among practitioners does not have a particularly good name, due to misinformation and a lack of recent information about the process and how it developed over the years. In Georgia, particularly, arbitration has gotten some bad press because of the conflicting court decisions and the uncertainty which unsettled law produces. Also, practitioners point out that arbitration is always final and conclusive with no right of appeal except in very rare instances. Most attorneys by nature don't ever like anything that has no right of appeal. They don't particularly care to put all their eggs in one basket.

Trattner also found that Meyer opposed arbitration for three additional reasons: the lack of valuable court rules such as discovery; use of affidavits rather than actual testimony; and its common inapplicability to subcontractors as well as prime contractors. Consider the usual failure to use rules of discovery, a legal term referring to counsel's right to look at the opponent's case before the hearing to avoid surprises. Under arbitration, discovery does not usually apply, while courts apply it quite liberally. Attorneys proceed blindly under arbitration, only guessing the strategy and evidence that will be used by the other side. Moreover, arbitration usually allows ex parte affidavits rather than the presence and live testimony of witnesses. Affidavits might limit cross-examination and consequently the full development of the issues-in-dispute. Finally, Meyer objected to the limited applicability of arbitration, that is, to prime contractors only. Since prime contractors typically subcontract to many other firms, limiting arbitration to the primes reduces its potential for problem resolution, perhaps severely. In fact, many disputes occur between the buyer (such as MARTA) and a sub-contractor, leaving the buyer to deal with the sub-contractor through court proceedings and the prime contractor through arbitration. The complexity of the process increases costs and neutralizes the prime contractor's ability to deal with change.

Trattner made mental notes to tailor MARTA's use of arbitration to respond to most of Meyer's concerns, but Counsel was not persuaded about reliance on outside lawyers, for two basic reasons. First, in-house counsel had more familiarity with the problem to be arbitrated. "One of the advantages of arbitration was keeping it in-house because our attorneys have been with the contract from its inception through all the problems." Second, Trattner argues that the Office of Staff Counsel was organized to handle contracts, so involvement in arbitration would represent only an extension of the Office's principal purpose. Given this background, according to Trattner, "It would have been extremely costly to turn a /partially-developed arbitration/ package over to an outside attorney who was not working in construction at all, and say 'OK, here it is.' Even with our background we still spend many, many hours preparing when we go to arbitration."

Trattner's next stop was the full Development Committee. Because initial reaction among construction staff members had been good, Trattner asked TSD's head Alexander to accompany him before the Committee. Trattner explained the pros and cons of arbitration; Meyer raised questions about in-house or outside counsel responsibility for arbitration, but the issue failed to excite other members; and Alexander expressed satisfaction with the proposal. After discussion, the Committee voted to approve the use of arbitration.

The Development Committee reported the proposal favorably to the full Board of Directors on December 8. The Board routinely passed a resolution approving arbitration.

Implementing Arbitration at MARTA

Having secured Board approval, Trattner began implementing arbitration by adopting procedures to meet complaints raised earlier by Board member Meyer. In addition, Trattner installed three other mechanisms for solving key problems: guaranteeing a legal presence in arbitration cases, resolving the conflict in federal and state law, and preventing a premature resort to arbitration.

Trattner immediately dealt with practitioner-lawyer objections in a new contract clause. The basic arbitration clause was written so as to allow use of federal rules of discovery, by which parties to a contract dispute could examine each other's evidence before the arbitration hearing. Moreover, the clause prohibited ex parte affidavits. According to Trattner: "We wanted witnesses for cross-examination at the hearing." Finally, the arbitration clause became mandatory in all subcontracts. When a dispute arose, all parties would get involved. With the clause in all subcontracts, Trattner observes: "All of us will be in the same arbitration forum. We may all say that the other guy is at fault, but we are at least convinced that the guilty party is in the room."

In addition to meeting practitioner-lawyer objections, Trattner acted on three other potential problems. First, the new contract clause provided that at least one member of the arbitration panel must be an attorney, in part to ensure that the panel enforced rules of discovery. Trattner felt that only an attorney could adequately deal with each side's desire for fairness in applying federal rules for reciprocity in revealing evidence. To further ensure the essential attorney presence, the clause required a one-man panel -- a lawyer -- for disputes under $25,000. Disputes involving more than $25,000 would be heard by a three-man panel, one of whose members would be a lawyer.

To prevent the uncertainty resulting from unsettled state law, a second potential problem, the arbitration clause provided that all questions arising under contracts must be governed by and decided according to the law applicable to U.S. Government procurement contracts. This linked MARTA disputes with the thirty years of federal precedent. In addition, the link allowed for introduction of evidence, representation by counsel, and other normal federal requirements of due process.

Trattner also set up a triggering procedure for arbitration which prevented a third problem, the premature resort to the process. Under this process, a contractor cannot resort to arbitration until he receives a Final Decision from MARTA denying a contract claim. In effect, MARTA executives must state: "Our decision is final, except insofar as you have a right to demand arbitration." Trattner observes: "What we intended was to make sure that the contractor didn't go off half-cocked on a preliminary denial of a claim," thus precluding close scrutiny of all factors involved.

MARTA's Arbitration Model in Action

How does the MARTA arbitration model work in practice? To illustrate, we will first sketch the change-notice/change-order process, the series of events out of which disputes arise. Next, we will briefly illustrate how disputes get handled through arbitration.

The Change Process: The Setting for Disputes

The process of changing the work outlined in engineering designs and undertaken by a contractor who wins an award begins when one of five conditions obtains. The contractor may find a better way of doing work. Or field conditions may differ from those assumed in engineers' plans. Alternately, the contractor may find mistakes in original designs or plans. MARTA engineers also may decide to change plans as a result of input or demand from some other agency such as railroads or the state, counties, or cities. Finally, MARTA engineers may change plans to take advantage of new technology or experience.

1. The Initiating Change-Notice. A change-notice based on one of the five conditions initiates the process of changing work. A change-notice essentially outlines the change needed, and provides for review by MARTA staff members and negotiation with the contractor.

2. From Change-Notice to Change-Order. A typical facilities contract change-notice -- based on a request originating either with the contractor, MARTA, or the Authority's general engineering consultants (now Parsons, Brinckerhoff and Tudor, or PBT) -- starts with the Resident Engineer, RE, who prepares the notice with a justification and preliminary cost estimate. The notice goes up the MARTA's TSD chain of command for approval.

Three factors guide TSD officials' review of a change-notice. First, these officials want to create and maintain a reputation for fairness and flexibility in dealing with contractors. According to AGM/TSD William Alexander, MARTA reviewers have the power to break contractors through inflexibility in administering changes. The injudicious use of such power backfires, however, and results in higher bids as word gets around in the contracting community. Second, TSD officials want to motivate contractors to finish work quickly. Inflexible change-notice reviews could provoke contractors to resist time-saving measures for which they might go unrewarded. Third, smooth day-to-day operating relations between MARTA construction managers and contractors are at a premium. Inflexibility and unfairness in handling changes would create adversaries out of parties who could cooperate. Thus, the TSD approach to change-notice review gets based on the goals of expediting work and maintaining cooperation with contractors. "After all," says Alexander, "we have to live with /the contractors/ every day."

The change notice also goes to the Office of Staff Counsel for review as it goes up the TSD hierarchy. Two basic reasons explain the involvement of Staff Counsel. First, UMTA reserves the right in all prime and subcontracts to audit under certain conditions for a period up to three years following payment. The potential costs to MARTA are great. As Trattner explains: "If we process a change-order, and we take a position, settle it, and pay a claim resulting from the change-order, the federal government can come back a year later, review the paperwork and say that we have not justified this change-order. They will, therefore, declare this change-order ineligible for federal participation or for 80% payment. You can't stand too many of those." Hence MARTA's concern about legal and contractual scrupulosity; and hence also the involvement of the Office of the Staff Counsel.

Second, Staff Counsel provides an independent review by in-house resources with no direct involvement in construction, who are beyond subtle conflicts-of-interest. MARTA negotiators should ask themselves: "Are we enforcing our contract rights; are we paying for things that we otherwise should not be paying for?" The Office of Staff Counsel acts as objective reviewer, analyzing contract documents for both legal and engineering implications. To handle both substantive and legal aspects, Office of Staff Counsel includes a civil engineer/lawyer. This ambidexterity "makes us both useful and potentially troublesome," Trattner feels. "From the engineering standpoint, there is not much that we can't understand. No matter how complex the change-order, we can usually decipher what they are talking about. /We can/ read the drawings and the technical specifications and decide whether or not it makes sense."

Both UMTA second-guessing and the necessity of an overall view explain the pivotal role the Staff Counsel's office assumes in contract matters. According to Trattner:

> /Staff Counsel/ is the one point within the Authority where all the pieces come together, short of the GM. We are independent of everybody else. We are the only office that has an overview of the whole program. Most important, if there is a problem with UMTA auditors, we wind up defending the matter. If something goes to arbitration, we wind up handling the arbitration. It is only right that we should know what is happening in advance and concur in it.

Staff Counsel reviews the change-notice initially to determine whether the contractor is entitled to extra payment or whether he is already obligated under the terms of the contract to perform the change. In addition, Counsel analyzes the notice for form and substance. This involves answering questions such as: Is the language clear? Are the references accurate? Are we citing the right authority for proceeding with the change? The initial review by Staff Counsel also points out other implications of the change, such as the effect on any impacted or associated contracts. Finally, counsel determines whether authority exists to issue the change-notice as such -- whether funds exist.

After the Staff Counsel review, the notice goes to the contractor. The contractor replies with a proposal, which returns to Staff Counsel for review. Counsel then provides engineers with an opinion on the allowability of the cost, including both cost of any additions as well as (in Trattner's words) "if we are deleting an item to make sure we get the kind of credit we should be getting."

The engineers then negotiate with the contractor. If the two parties agree, a change-order is drafted. At this point, Staff Counsel again reviews to assure that the

negotiated position is consistent with prior reviews. After this review, the order goes to the AGM/TSD for final approval.

3. Handling Disputes. The change process may provoke disputes between contractors and MARTA engineers not amenable to negotiation, of course. For instance, based on a legal position taken by Staff Counsel, the MARTA negotiator may not accept the contractor's cost estimate for a change and the contractor may refuse to sign the change-order without the price concession. MARTA engineers then issue a unilateral change-order which directs the contractor to perform, giving him 30 days to protest the order by submitting a claim. In another instance, MARTA engineers may issue a letter change-order, directing the contractor to perform. If the contractor feels entitled to additional funds for this work, he may then submit a proposal for negotiation. If after negotiation the contractor disagrees with MARTA's position, he is directed to perform the change and file a claim.

The process for attempting to resolve any disputes involves a number of steps, of which arbitration is the last and final one. For details about the procedures by which contractors make a claim against MARTA, consult Appendix 2.

As a first step toward that final resolution, the Resident Engineer examines the contractor's claim. RE -- the TSD representative at the worksite -- provides a factual analysis of the contractor's claim. He presents the circumstances objectively in a report to his superior -- in this instance, the Project Engineer. After developing the facts, the Resident Engineer may deny the claim. Otherwise, he remains silent. The contractor, in either case, then submits the claim through the Resident Engineer to TSD's Division of Construction. The Division evaluates the claim, along with TSD's Division of Engineering and Staff Counsel. If all three groups recommend the contractor's position, the AGM/TSD signs approval. If one recommends denial, the claim goes back down the chain of command to the RE who informs the contractor that the claim is denied, and the contractor has a right to request a Final Decision.

The Final Decision constitutes the unsatisfied contractor's last step before arbitration. This triggers a process set up as MARTA's fail-safe mechanism, one in which more MARTA staff members get involved in the decision-making process. When the contractor requests a Final Decision, the RE reviews the claim again and adds any additional information found since the original analysis. From the RE, the request goes to the Project Engineer, and then to Staff Counsel. The attorney in Staff Counsel who originally reviewed and denied the claim prepares another analysis and reviews his work. If he reaches the same conclusion, Staff Counsel requests the AGM/TSD to convene MARTA's whimsically-named Gray-Haired Council. Consistent with the felt-need for timely decisions, Final Decisions are to be rendered within two weeks after the contractor's request.

The Gray-Haired Council consists of a group of senior MARTA employees who act as advisors to AGM/TSD Alexander in making the final decision on the contractor's request. The tongue-in-cheek appellation was inspired by AGM/TSD William Alexander who observed that in such disputes MARTA "needed some gray hair, some wisdom of the ages." The Council's formal membership includes MARTA's Director of Construction and Director of Engineering, the PBT Project Director, the PBT Director of Construction, and Trattner as Staff Counsel. Other PBT engineering staff members may take part, depending on the subject matter. In addition to the usual members, the Gray Hairs convene with the attorney who did the research, the TSD Project Engineer, and the Resident Engineer. The Council examines the drawings and the contract documents; the attorney presents the case and his recommendation; and then the floor opens for discussion. According to one member:

> It is pretty free-wheeling discussion. It tries to introduce the practical considerations. For example, while we may think we may have a good legal position, we start to get into the practicalities of who is going to be the expert witness. What kind of witness would the Resident Engineer make? What kind of documentation do we have to support our position? From the standpoint of the arbitration panel, how reasonable a case does the contractor have? Is there more than one reasonable interpretation? What's the industry practice? Are we stipulating something that is out of the ordinary?
>
> We throw all of these things out for discussion. We call for more information such as whether we have interpreted this particular clause differently on other contracts. The discussion ranges from ten minutes to two hours. At the end of it, I think we hash out almost everything.

Then we say: "Let's go around the table and see where we stand." The Council's Final Decisions to date have been unanimous, but variable in direction -- sometimes in favor of the original Staff Counsel decision, other times agreeing with the contractor's request,

or even some middle position for negotiating a settlement.

The Council serves three major purposes in maintaining the integrity and momentum of the MARTA rail construction program. First, the Council brings over 100 years of construction-contract expertise to bear on a particular problem. Second, it brings together people who had nothing to do with the original decision directly, and who can provide a fresh approach to the problem. Third, the Council provides high-level flexibility in dealing with contractors. The group may meet some of a contractor's objections while dismissing others.

A short case illustrates the timely flexibility the Council can provide. The Council dealt with a contractor's claim for relief from "liquidated damages." MARTA contracts charge contractors liquidated damages of so many hundreds or thousands of dollars for every day the contractor delays finishing work beyond the stipulated completion date. The penalty ends when MARTA makes a determination of "substantial completion" -- the building is finished, the lights work, or whatever. Debate or dispute can exist about the date of substantial completion, however. MARTA cannot always rely on the usual litmus test: Is the facility useful for the purpose intended? Normally, that is an easy determination, but MARTA has few normal situations. While a contractor may "substantially complete" a station, contracts often may require other tasks of the contractor. For example, construction may require relocation of water mains, a task for which MARTA is responsible to the City of Atlanta, by agreement. Completing this task is as important as building the station for two reasons. First, if the water main is not relocated, it may impact adjacent and subsequent contractors. Second, the city may stop work at the station or other sites if the contractor fails to fulfill MARTA's responsibility. Thus the contractor has more to do than merely complete the facility for the purpose intended. Establishing and applying legal principles to cover substantial completion on MARTA contracts, likewise, is a very detailed exercise, and decisions vary case-by-case.

In the present case, TSD officials as well as the Resident Engineer held that substantial completion took place much earlier than Staff Counsel felt it did. In round terms, let us say, Counsel's estimate amounted to $250,000 in liquidated damages. TSD staff members proposed that $100,000 was about right.

The opinional differences may reflect differences in experiences and roles, as often happens. TSD and PBT may be less eager to assess liquidated damages, particularly for a "good" contractor who had some "bad luck," but with whom they had a positive work-experience, and perhaps with whom they look forward to working again. But Staff Counsel has no such experiences or expectations. According to Trattner:

> We will fight for every nickel that we think the Authority is entitled to, for two reasons. First, we are in the ivory tower, and we don't have to work with the contractors. It is easy for us to take that position. Second, we fear UMTA auditors. The UMTA folks, if they audit us and disagree on that assessment of liquidated damages, can leave us holding the proverbial bag. If we release $250,000 in liquidated damages, 80% of those dollars are federal dollars. UMTA can say: "If you are so generous, you can use just local funds, and we'll take our 80% out of your hide."
>
> We want to make sure that we can agree with the TSD position and that there is enough paper and justification in the file to provide an audit trail.

The contractor facing a $250,000 assessment submitted a mass of material, letters of communication and excerpts from his diary, through the RE to the Project Engineer as well as to Staff Counsel. A stack of material several inches high accumulated, including the RE's factual analysis. Initially, Staff Counsel's lawyer-engineer reviewed all the material and recommended that AGM/TSD Alexander deny the requested relief. Alexander did so, and the contractor then requested a Final Decision. Trattner observed: "I got into it after that and read all this material, including additional material the contractor had submitted since the denial. After reading it, I became concerned because the contractor had implied but had not stated that MARTA prevented substantial completion." This implication could mean that the contractor was entitled to relief from some or all of the liquidated damages.

Therefore, the Gray-Haired Council had several major points to resolve. Did TSD or Staff Counsel take the correct position on liquidated damages? And what of the unraised claim that MARTA could potentially face? Before the Council finally decided the matter, the contractor and his attorney came to see Trattner and shared their general expectations concerning a reasonable settlement of what they admitted was a debatable situation but one in which they should not bear total or even major responsibility. Trattner recalls:

> When we convened the Gray-Haired Council, the Staff Counsel attorney presented the case. Then we discussed the practical consequences of the $250,000 assessment. I gave my opinion. After reviewing all of the paper I concluded that the contractor could probably make a pretty good case for raising a claim against which we might not be able to sustain our positions. We had originally gotten into it because I thought TSD would give away the farm, in releasing liquidated damages. The more we got into it, the more concerned I was that we -- MARTA, TSD, and PBT -- probably had instead been responsible for other actions that had contributed to the contractor being late.

The Council discussed the issue, and concluded that the MARTA negotiators could reduce the liquidated damages from $250,000. They directed the Project Engineer and the RE to go back to the contractor and negotiate a settlement -- "starting high and settling for about $40,000." No Final Decision was rendered. The strategy worked. The Authority got $42,000 from the contractor in negotiations, and the Authority agreed to a complete release of claims.

4. Going into Arbitration. A few disputes reach the final stage of resolution -- arbitration. No ifs, ands, or buts will be appropriate. Both MARTA and the contractor agree in signing the original contract that the decision of the arbitration panel will be final.

The arbitration process gets triggered after an adverse Final Decision from AGM/TSD Alexander, when the contractor may choose to initiate the arbitration process by filing a notice with both MARTA and the American Arbitration Association. The notice spells out the specific issue over which the contractor and MARTA conflict.

AAA then takes over the administrative aspects of the arbitration process. The primary activity involves providing MARTA and the contractor a list of arbitrators -- including in the list the arbitrators' backgrounds and areas of expertise -- from which the parties choose a panel. Identical lists are furnished to all parties. The parties review the lists; strike those who are objectionable to them; and rank all acceptables in order of preference.

The process of striking arbitrators may involve gamemanship, a thrust-and-parry to bargain over who will hear the dispute. The information provided by AAA about the proposed arbitrators' backgrounds is limited, and encourages guessing about their probable inclination. Depending upon the nature of the claim, there are at least five different kinds of backgrounds represented on an AAA list. AAA may propose attorneys who have only general legal expertise and some or no construction background, as well as attorneys with a construction background -- such as a patents attorney who is also a mechanical engineer. Some proposed arbitrators may come from the contractor community, including owners of construction companies, for instance. AAA also may propose academicians, such as a professor of civil or mechanical engineering. Architect-engineers are often included, particularly those who work as consulting engineers for design with no involvement in construction. Finally, there are government employees who would be counsel-equivalents at state, local, or federal levels. Depending on the subject matter of the claim involved, the parties must decide which mix of arbitrators is most acceptable. Trattner observes:

> It's akin to selecting a jury. In one sense, you've got much less information because you can't question these people as you can potential jurymen. In other senses, you have much more information about panel members. You've got a little biographical blurb, and advice solicited from people in MARTA and PBT who have backgrounds in construction and engineering. Those people know something about what backgrounds predict what decisions; and they may even know people on the list. It comes out to be an educated guess.

Limits do get placed on AAA in proposing panel members to encourage objectivity -- a problem usually caused by a conflict of interest. "We have insisted from the beginning," says Trattner, "that we did not want anybody on the list from the Atlanta area, because the odds are that we would have a conflict sooner rather than later. It's inevitable; the project is so large." Trattner related one example. "The certainty of a conflict was proven very dramatically when we recently received an AAA list that included the name of a local attorney. On that same day, he filed a law suit against us."

The striking of names may continue, according to MARTA's arbitration procedure, through two lists of ten names each. If AAA finds agreement impossible, the Association imposes a panel. As yet, AAA has not imposed a panel.

At the same time the parties select panel members, they begin the discovery process. The parties interrogate each other

in writing to ascertain anything relevant to the claim. If either party fails to provide information the other party or parties finds necessary, the matter gets referred to the attorney member of the panel whose decision is final.

All preliminaries concluded, the parties schedule an arbitration date with AAA and file pre-trial memoranda with the panel members if necessary.

The panel meets with the parties, who can call witnesses and examine and cross-examine them. All witnesses must appear before the panel, as a rule. If attendance is impossible, a witness may be examined at another time and a deposition taken, providing that the party examining the witness gives the other party reasonable notice as to time-and-place.

After hearing the evidence, the panel allows further memoranda from the parties, decides the issue, and assesses costs.

Appendix 1. MARTA CONTRACT CLAUSES RELATING TO ARBITRATION

1. Any dispute concerning or arising out of or in connection with any decision, determination, or other action by the Authority or its duly authorized representatives, or arising otherwise out of or in connection with the performance of the Contract, or arising out of or in connection with the warranty of the Work, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect. For this purpose, arbitrators shall be appointed by the American Arbitration Association in accordance with Section 12 of the said Rules. If the amount in dispute is less than $25,000, one arbitrator, who shall be an attorney, shall be appointed; if the amount in dispute is $25,000 or more, three arbitrators, at least one of whom shall be an attorney, shall be appointed, and all decisions and awards shall be made by a majority of them, as provided in Section 27 of the said Rules. The arbitration proceedings shall be governed by and conducted in accordance with this Article, the said Rules, and Title 9 of the United States Code. The parties stipulate and agree that this Contract evidences a transaction involving commerce within the meaning of Section 2 of the said Title 9 of the United States Code.

2. The Authority will finance the Work in part by means of a grant under the Urban Mass Transportation Act of 1964, as amended, administered by the U.S. Department of Transportation under a capital grant contract between the Authority and the United States. In order to ensure that the Contract is performed in all respects in conformity with the said capital grant contract and with the laws and regulations governing the same, all disputes subject to this Article, and all questions arising in connection therewith, shall be governed by and decided according to the law applicable to U.S. Government contracts.

3. Arbitration in good faith of all disputes subject to this Article shall be a condition precedent to the commencement by either party of any action at law, suit in equity, or other proceeding involving any such dispute, and this Article shall be specifically enforceable under the applicable arbitration law. The arbitrators' award, and their decisions of all questions of law and of fact in connection therewith, shall be final and conclusive, and their awards shall be enforceable as provided in Title 9 of the United States Code.

4. Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association. In the case of a dispute arising out of or in connection with any decision, determination, or other action by the Authority or its representatives, no demand for arbitration shall be made until the Contractor has received

written notice explicitly stating that the decision, determination, or action involved is final subject only to arbitration in accordance with this Article. In all such cases the Contractor shall file his notice of demand for arbitration within thirty days next after he has received such notice, unless, in the case of the particular decision, determination, or action this Contract prescribes a different time, in which case such different time shall control. In the case of a dispute arising out of or in connection with the warranty of the Work, the notice of demand for arbitration shall be filed within a reasonable time, not in excess of one year, after the dispute has arisen. In the case of all other disputes subject to arbitration under this Article the demand for arbitration shall be filed within a reasonable time after the dispute has arisen, but in no event more than six months after the Authority has formally accepted the Work as provided /elsewhere/. Failure to file a timely notice of demand for arbitration of any dispute subject to arbitration hereunder shall constitute a waiver of all claims and rights in connection with such dispute.

5. The parties mutually promise and agree that after either has filed a notice of demand for arbitration of any dispute subject to arbitration under this Article, they shall, before the hearing thereof, make discovery and disclosure of all matter relevant to the subject matter of such dispute, to the extent and in the manner provided by the Federal Rules of Civil Procedure. All questions that may arise with respect to the fulfillment of or the failure to fulfill this obligation shall be referred to an arbitrator who is an attorney for his determination, which shall be final and conclusive. This obligation shall be specifically enforceable.

6. Arbitration under this Article and all hearings in connection therewith shall be held in Atlanta, Georgia. All witnesses who testify at such hearings shall be sworn and subject to cross-examination by the adverse party; depositions may be used if, in the discretion of the arbitrator or arbitrators, the deponent is not reasonably available to testify thereat, and provided that the deposition offered in lieu of his testimony was taken under oath and after reasonable notice to the adverse party of the time and place thereof; notwithstanding sections 30 and 31 of the aforesaid Rules, an ex parte affidavit shall in no event be considered over the objection of the party against whom it is offered.

7. The Contractor promises and agrees that the provisions of this clause shall be included in all subcontracts into which he may enter for labor to be performed on, or materials or supplies to be delivered to, used in, or incorporated into the Work, and that if any dispute subject to arbitration under this Article involves labor, materials, or supplies furnished under any such subcontract, the rights and liabilities of the Authority, the Contractor, and all

subcontractors who are or may be involved shall be determined in a single arbitration proceeding.

8. The Contractor shall carry on the work and maintain the progress schedule during any arbitration proceedings.

Appendix 2. MARTA PROCEDURES FOR CONTRACTOR CLAIMS

I. Contractor Claim

1. Immediately after receipt from the Contractor, /Resident Engineer/ prepares a factual analysis, without recommendations, and submits to Construction Division. Negotiations will not be conducted with Contractor, although additional information may be requested.

2. Staff Counsel and Engineering Division advice sought and decision reached. Communicate to Resident Engineer.

3. Proceed as directed by the Authority to:

   a. Initiate change notice, or

   b. Communicate denial to the Contractor indicating right to appeal to the Authority submitting any additional documentation in support of his claim. Resident Engineer's letter to Contractor will not indicate that the decision or determination is "final, subject to arbitration" or words to that effect.

J. Contractor's Request for Final Decisions:

1. Submit to MARTA Construction Division.

2. Directors of Construction and Engineering, MARTA and /PBT/, Project Director, Engineer and Chief Staff Counsel will evaluate basis of dispute and will meet with Assistant General Manager for Transit System Development to provide him with recommendations.

3. If so decided by the Assistant General Manager for Transit System Development, Construction Division in coordination with Staff Counsel shall prepare a Final Decision for the signature of the Assistant General Manager for Transit System Development.

4. Delivers Final Decision to Contractor and records date, time and name of Contractor's representative receiving Final Decision.

5. Foregoing will be accomplished within 2 weeks (where possible) from Construction Division's receipt of Contractor's request for a Final Decision.

K. Contractor's Request for Arbitration:

1. Forward all related documents to MARTA Construction Division. Assist in evaluation and preparation of arbitration package.

2. Coordinate preparation of arbitration package, and provide necessary support of Staff Counsel.

END

DATE

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