

Publication.

## Means of Avoiding and Resolving Disputes During Construction

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### Abstract:

The construction industry has had a history of increasing litigation. Due to the uncertainties inherent in assessing and predicting subsurface construction conditions, and a greater potential to encounter unforeseen conditions than in comparable above-ground work, underground construction projects have lead the industry in this regard. This trend toward debilitating litigation has arisen due to the contributing actions of owners, engineers, and contractors. Owners have been unwilling to authorize adequate geologic exploration programs or take responsibility for unanticipated ground conditions. Engineers have often prepared incomplete, vague, or inconsistent plans and specifications. Contractors have tended to be excessively optimistic in their attempts to be the low bidder. Finally, the construction industry has had to battle inbred adversarial attitudes on behalf of the parties to a construction contract.

In discussing means to avoid and resolve disputes in underground construction, there are three primary considerations:

1. Tools need to be implemented within the construction contract to confront the uncertainty of the subsurface conditions to be encountered during construction.
2. Pro-active steps need to be taken by the three principal parties (i.e., the owner, design engineer/construction manager, and contractor) to foster a cooperative attitude among the parties toward the avoidance of disputes.
3. Tools need to be implemented through the construction contract to assist in solving contractual problems equitably and expediently, without resorting to litigation.

Four elements of improved contracting practice that address these primary considerations are gaining increasing acceptance within the international underground construction community: Geotechnical Baseline Reports; Disputes Review Boards; Escrow Bid Documents; and Partnering.

This paper addresses the matter of uncertainty of subsurface ground conditions, provides an historical perspective on how owners, engineers, and contractors have attempted to leverage that uncertainty for their individual benefit, and describes how each of the above elements can aid in the avoidance and resolution of disputes in underground construction.

**Keywords:** The Legality of Geologic Uncertainty; Geotechnical Baseline Reports; Resolving Disputes Without Litigation; Alternative Dispute Resolution; Arbitration; Negotiation; Mediation; Mini-trials; Rent-A-Judge; Dispute Review Boards; Escrow Bid Documents; Partnering.