

A study on dispute resolution procedure of Japanese public works

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ABSTRACT: Dispute resolution procedure of Japanese public works based on “The Standard Form of Agreement and General Conditions of Government Contract for Works of Building and Civil Engineering Construction: GCW” was studied. Unilateral matters were not existed in the settlement method of dispute with active endeavor between owner and contractor. However, dispute resolution procedure with third party was thought to have some problems. Dispute resolution committees are supposed to be a neutral third-party. However, all secretariat offices of these committees are located in the same building as public works execution organizations. Furthermore, some arbitrators belong to public work execution organization. Most of the lawyers and professors practicing as arbitrators do not have either construction and (contract) related education and experience. It is doubtful that such kind of people and organization are making fair judgment. Such kind of situation is thought to be one of the reasons to make any business process not following the formal clauses of contract. To develop transparency in the construction industry, any construction business process should follow the contract. To develop independent arbitration function, arbitrator should be made required to have enough knowledge of construction and related fields.

KEYWORDS: Mediation/Arbitration, Central/Prefectural Committee for Adjustment of Construction work Disputes (CACD)

1. INTRODUCTION

1.1 Low satisfactions for claim negotiation result

Many Japanese contractors are not satisfied with result of claim for additional cost and time extension in Japanese public works. Figure 1 shows degree of satisfaction from result of claim for additional cost and time extension in Japanese public works¹⁾. These answers were received from questionnaire for staffs of owners and contractors. At the present condition, only 5% of contractors have 90% satisfaction. On the other hand, 55% of owners have 100% satisfaction. Satisfactions of owners and contractors are quite different. Furthermore, both owners and contractors have pessimistic forecasting. Forecasted

degree of satisfaction of owners and contractors are smaller than present condition. Their pessimistic forecasting is influenced by present severe market condition due to financial crisis of Japanese central government and local governments.

1.2 Sense of “Master-servant relationship” between owner and contractor

Sense of “master-servant relationship” between owner and contractor is thought to be one of the causes of such situation. After Meiji revolution (1868), infrastructure development projects were executed by public sectors (one-party system). Under the one party system, project planning, design, estimation, managing workers, materials and

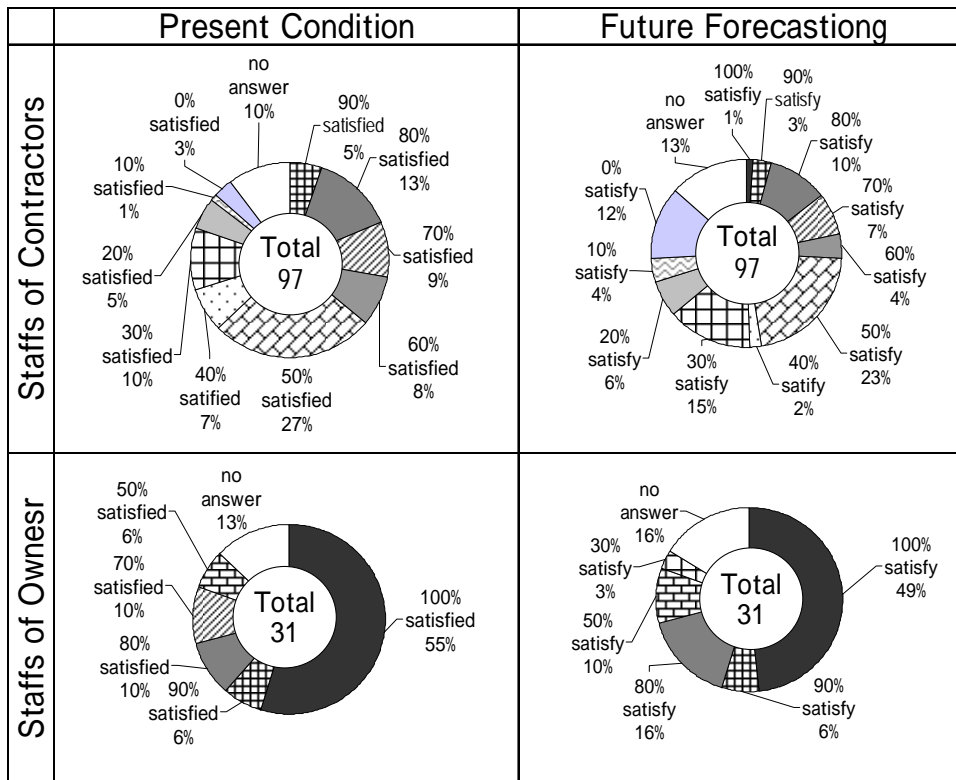


Figure 1: Degree of satisfaction from result of claim for additional cost and time extension in Japanese public works¹⁾

equipments, site management and maintenance were done by public sectors. In such condition, almost knowledge of construction technology was stocked in public sectors. After the WWII (World War), for reviving national economy, many infrastructure development projects were rapidly executed. In such condition, construction works were began to outsource (two-party system) from 1950's. At the beginning of two-party system, in-house engineers of public sectors have every kind of knowledge throughout the project phase (investigation, planning, design, construction works, and maintenance). In such condition, relationship of public sectors and private construction companies is not only procurement of construction works but also technology transfer from public sectors to private construction companies. Sense of "master-servant relationship" and "parent-child relationship" might be built in such process of transformation.

Recently, requirements of in-house engineers of public sectors have been shifted from hardware knowledge to software knowledge. So, at present,

from the viewpoint of hardware knowledge of construction technology, public sectors do not have always much knowledge than private companies. Furthermore, from the viewpoint of contract, owner and contractor should be on equal footing. In such situation, reasons for "Master-servant relationship" are thought to be non-existent.

However, sense of "Master-servant relationship" between owner and contractor is still remained. "Master-servant relationship" is thought to be existed in an actual business process which does not follow formal clauses of a contract. A business process which does not follow the contract clauses has low transparency. Low transparency has led to decrease in confidence of the Japanese construction industry.

2. PROBLEMS OF CONSULTATION AND DISPUTE RESOLUTION PROCEDURE OF JAPANESE PUBLIC WORKS

2.1 Consultation and dispute resolution

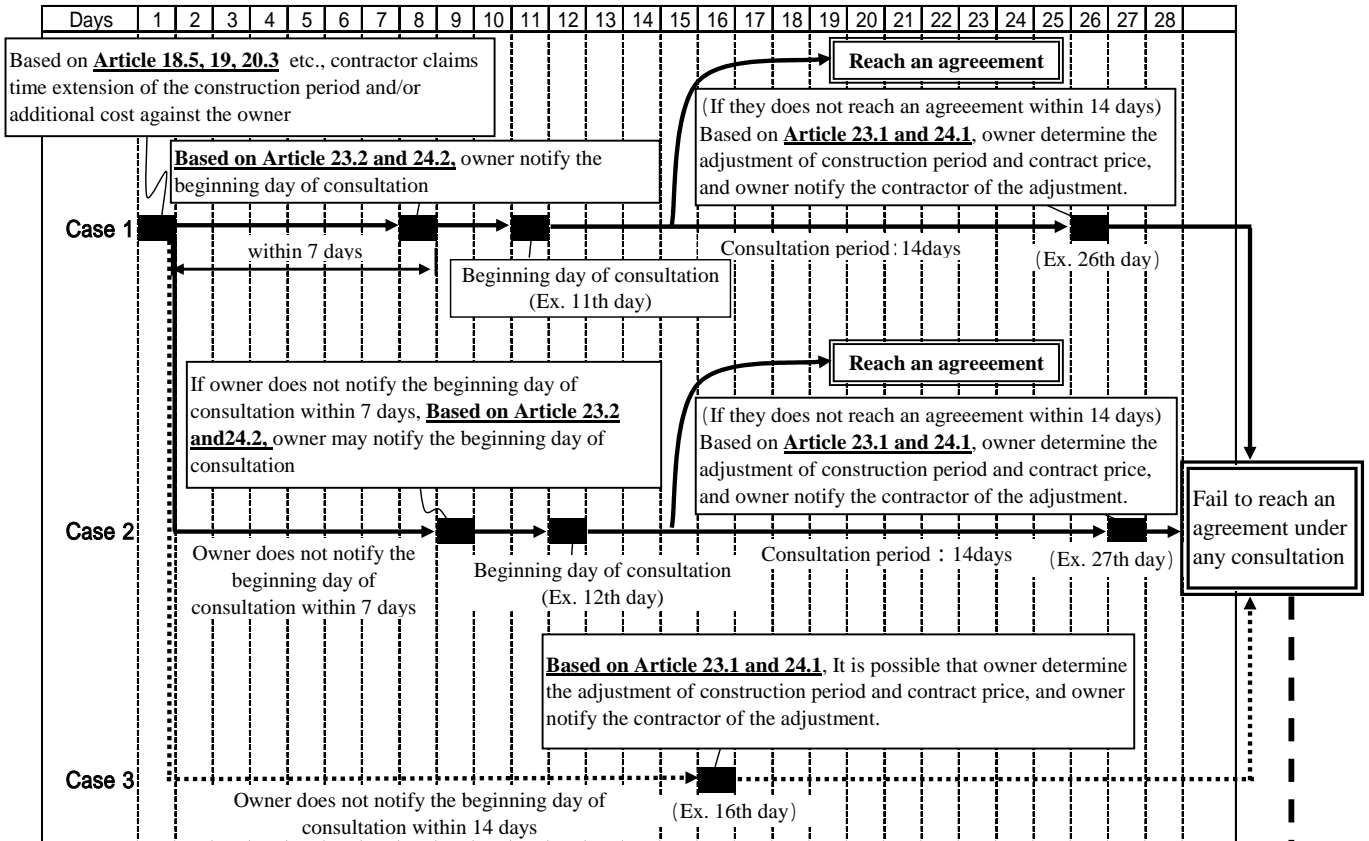
procedure

Summary of the process is stated below.

Figure 2 shows consultation and dispute resolution procedure of Japanese public works based on “The Standard Form of Agreement and General Conditions of Government Contract for Works of Building and Civil Engineering Construction: GCW”.

2.1.1 Consultation between owner and contractor
1st phase is consultation between owner and contractor. Contractor can claim time extension of the construction period and/or additional cost against

1 . Consultation procedure between owner and contractor



Note) Way to count days: Based on Article 140 and 141 of Civil Code of Japan, first day of the period shall not be included for the purpose of the calculation

2 . Dispute Resolution Procedure in Japanese Public Works

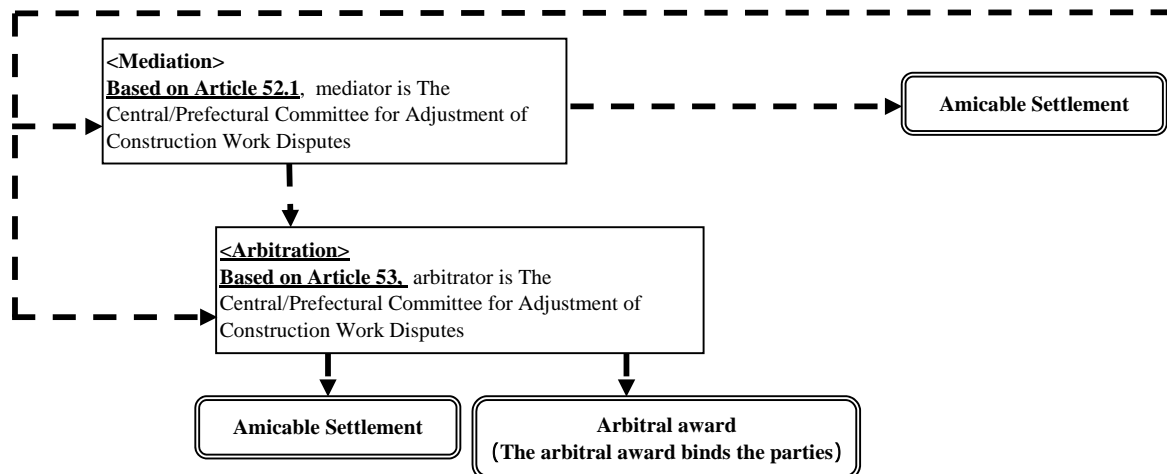


Figure 2: Consultation and dispute resolution procedure of Japanese public works based on GCW²⁾ (GCW: The Standard Form of Agreement and General Conditions of Government Contract for Works of Building and Civil Engineering Construction)

the owner. Case 1 of Figure 2 is normal case. After owner receives claim documents from contractor, owner decides and notifies the start day of consultation. Consultation period is usually 14 days. If they cannot reach an agreement within consultation period, owner decides and notifies the adjustment to contractor. If contractor donot agree to this adjustment, they can go to dispute resolution procedure.

2.1.2 Dispute resolution procedure

2nd phase is dispute resolution procedure. This procedure is called “Alternative Dispute Resolution (ADR)”. Mediation and arbitration are kinds of ADR. Mediation does not bind the owner and contractor. Arbitral award binds the both parties. Mediator/Arbitrator will be member of “The Central/Prefectural Committee for Adjustment of Construction work Disputes (CACD)”. These organizations are public third party.

2.2 Problem of Consultation and dispute resolution procedure

Unilateral matters were not existed in the settlement method of consultation/dispute resolution procedure. However, actually, few contractors make claim against owner in Japanese construction industry. Furthermore, almost contractors give up

getting time extension and/or additional cost after receipt of owner’s notification of first judgment. They usually don’t think to go to mediation/arbitration procedure. Reasons are thought to be as followings.

Sense of “ Master-servant relationship”

Contractor afraid of owner’s displeasure. They usually think to get future contract with same owner. Owner’s displeasure will influence to future business.

Little knowledge of contract.

Sue and arbitration is not usual in Japanese business culture.

Contractors have doubt for neutrality of CACD. Because this organization is public organization. They thought “Can public organization make disfavored judgment for public owner?”

2.3 The Functions of Central/Prefectural Committee for Adjustment of Construction work Dispute

Due to present financial crisis of central government and local governments, contractors started to think that it has become difficult for public owner to pay enough payment as previous times. So, above to have been changing in present market condition. Furthermore, to may be changed by educating the parties.

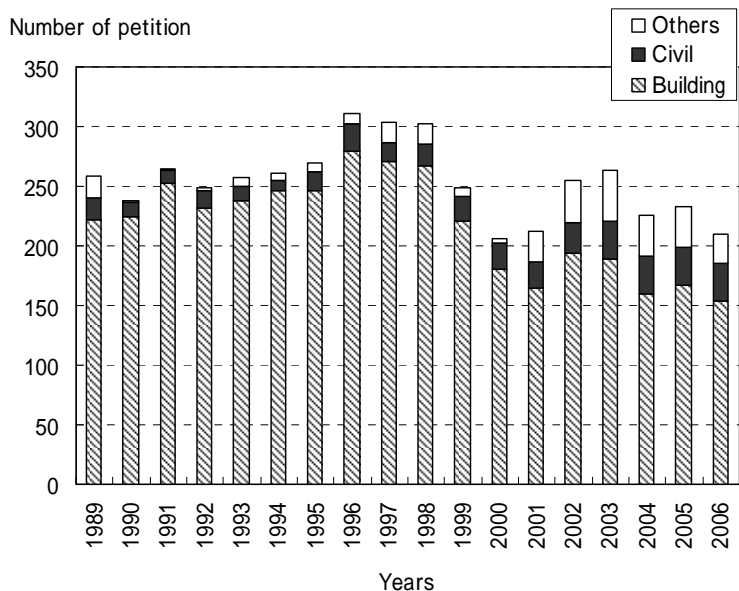


Figure 3-1: Number of petition by project type

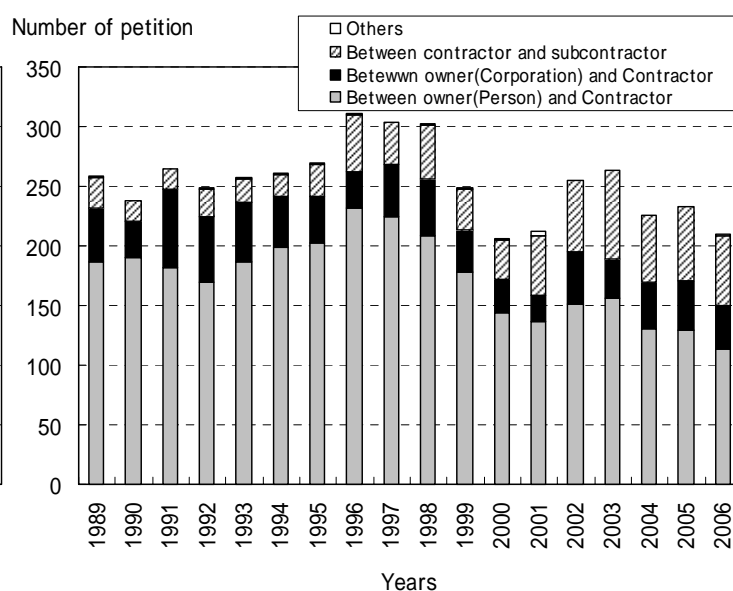


Figure 3-2: Number of petition by party's type

However, seems to be different matter. How about present CACD?

Figure 3 shows number of petition to Central/Prefectural CACD. 86% projects were building project. Only 8% were civil project (Figure 3-1). 68% of petitions were dispute between personal owners to contractors, and 15% of petitions were dispute between main contractors to subcontractors. Only 16% of petitions were dispute between corporation owners and contractors (Figure 3-2).

Majority of the projects settled by CACD were private building/housing projects. Public civil works projects were a few.

3. INVESTIGATION ON CENTRAL/PREFECTURAL CACD

CACD are supposed to be a neutral third-party. CACD seems to be neutral for dispute settlement between private owners and contractors, and between main contractors and subcontractors. However, how about for dispute settlement between public owners and contractors? CACD is a public sector. So, some contractors doubt that such kind of organization is making fair judgment.

3.1 Location of CACD office

All locations of secretariat offices of CACD were investigated. Central CACD is located in the same building of Ministry of Land, Infrastructure, Transport and Tourism (MLIT). There are other 47 Prefectural CACD. All 47 secretariat offices of CACD are located in the same building as public works execution organizations of each prefectural government.

As above, all secretariat offices of CACD are located in the same building as public works execution organizations. In such condition, it is doubtful that such kind of organization is making fair judgment of dispute

settlement between public owners and contractors.

3.2 Member of CACD

Affiliations of each member of CACD were investigated in this study. Figure 4 shows result of investigation. Summary is as followings.

57% (89 of 157) of members of Central CACD have engineering background. 52% (168 of 321) of member of Prefectural CACD have engineering background. These are not so different. Others who have no engineering background are lawyers.

4 administrative officers of local government were found out in Prefectural CACD. Their positions are “Director General of the Department of Public Works” and “Manager for Facilities Improvement”, etc. These positions are directly concerned with public works. If prefectural government become stakeholder of mediation/arbitration, it is difficult to keep neutrality of CACD.

42% (71 of 168) of members of Prefectural CACD who have engineering background are affiliated to building design firm. Private architect designers may be expected to make judgment of dispute resolution for building construction project. The other hand, only 0.6% (1 of 168) is affiliated to civil engineering consulting firm. This matter may be the reason of situation of Figure 3 (Majority of the projects settled by CACD were private building/housing projects). Engineering judgments of dispute resolution for heavy civil project may be expected to be done by engineers not engaged in private consulting firm but affiliated to public sectors.

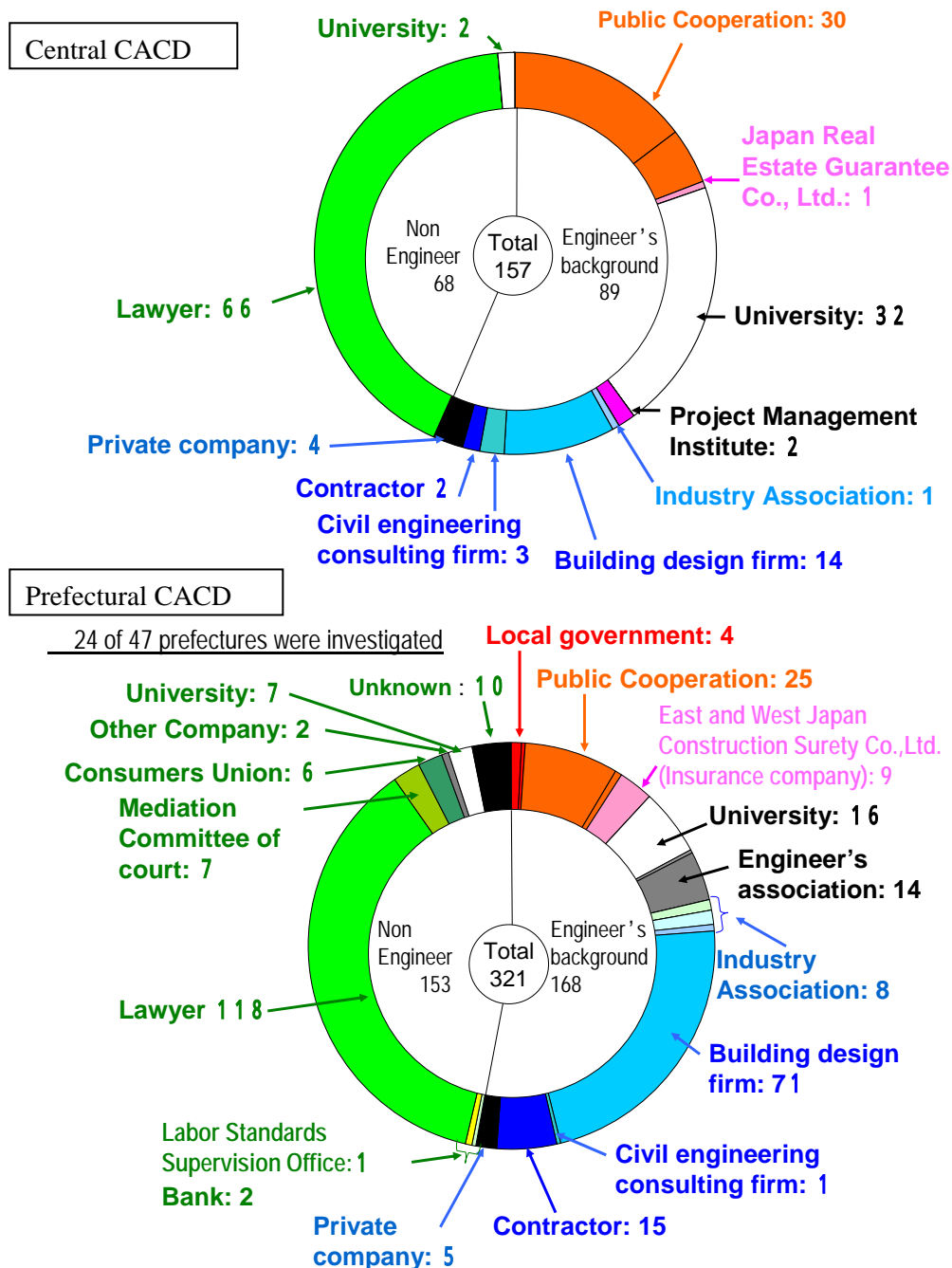


Figure 4: Affiliations of each member of CACD

34% (30 of 89) of members of Central CACD who have engineering background are affiliated to public cooperation. 36% (32 of 89) are affiliated to university. Both of them may be expected to make engineering judgment for any kind of project.

Major of members of Central/Prefectural CACD who are affiliated to University were investigated as followings.

<Central CACD>

- Real Estate Science
- Home Economics
- Building Environment
- Building Equipment

- Building Law
- Building System
- Building Planning
- Soil Mechanics
- Concrete Engineering
- Building Materials
- Building Structure
- Electrical Equipment
- Foundation Engineering
- Seismic Engineering

< Prefectural CACD >

- Home Economics
- Philosophy of Law
- Building Equipment
- Building Materials
- Law
- Building Environment
- Building Law
- Soil Mechanics

Specialist of construction contract was not found

out in Central/Prefectural CACD.

Engineers belong to contractor and civil engineering consulting firm are quite little. As mentioned above, from viewpoint of hardware

3.3 Arbitrators of US

Table 1 Affiliations of each member of AAA
Construction Mediation Panel

Affiliations	Number
Attorneys	263
General Contractors	21
Architects	12
Engineers	46
Subcontractors	7
Developers	9
Surety	31
Total <small>does not add up by duplication</small>	357
Female	20 (5.6%)

Source: NCDRC 2008 Midyear Meeting
Summary - May 7, 2008
AIA Headquarters, Washington DC

Affiliations of each member of AAA (American Arbitration Association) Construction Mediation Panel were investigated in this study. Table 1 shows result of investigation. Summary is as followings.

73% (263 of 357) of members are attorney. This is larger than Japan. However, many of attorneys in the US have knowledge of engineering field. So, it is difficult to directly compare between Japan and US.

Many members belong to General contractor, Engineer, Subcontractor, and Developer. Total is 23% (83 of 357). This ratio is quite larger than Japan (6% (31 of 478)).

3.4 Problem of mediation/arbitration organization in Japan

Main affiliations of CACD members were summarized as followings.

- Governmental organization and public cooperation
- Professors whose major is not construction contract
- Architectural designer
- Lawyers with little knowledge of construction contract
- Customers union

knowledge of construction technology, public sectors do not always have much knowledge than private companies. In such situation, present CACD seems to be unreasonable. Especially, neutrality on dispute settlement on public works also seems to be doubtful. This investigation will be continued.

4. CONCLUSION

Consultation and mediation/arbitration procedure of Japanese public works were investigated in this study. Mediation/arbitration procedure is not common in present public works in Japan. Reasons of such situation may be Japanese business culture and present function of CACD. In this situation, logical basis of negotiation which specify rights and duties of each party are not so important. Contractual matters are also become not so important. This situation makes to remain sense of “Master-servant relationship”, and little transparency of public works.

To develop transparency of public works in Japan, business procedure which follows contractual matters is important. Education of contract administration for not only to the contracting parties but also for member of CACD thought to be necessary to realize business procedures which

regard the contractual matters as most important. By these measures, each party may have incentive to prepare logical basis of negotiation. BOQ, schedule and statement of construction methods may become important documents in such situation. These documents are important to keep quality of infrastructure too. These measures thought to be useful not only to develop transparency but also to enhance quality in Japanese public works indirectly.

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