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GAO's Use Of "Negotiation Assistance" and "Outcome Prediction" as ADR Techniques

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Beginning in June 1998, bid protest practitioners may have heard reference to what sounded like new forms of alternative dispute resolution (ADR) in their dealings with the General Accounting Office (GAO). This article sets out the context and the meaning of the new terminology.

GAO's bid protest process itself has often been recognized as a form of ADR. As required by the Competition in Contracting Act of 1984 (CICA), it is a relatively "inexpensive and expeditious" way for parties to resolve a protest without going to court. 31 U.S.C. § 3554(a)(1) (1994). While GAO's process has become more formal than it was in past decades, it remains far less expensive and less formal than court litigation. GAO also issues decisions in bid protests relatively promptly: the statutory time limit was shortened in 1996 to 100 calendar days, and GAO issues many of its decisions well before the 100th day. Expenses are kept down at GAO by the fact that the protester does not need an attorney, and, indeed, in a significant proportion of protests (particularly those that do not involve complex evaluation issues), the protester files without an attorney. Moreover, the protester has a right to a stay of the procurement process under CICA (as long as the protest is filed within the required timeframe and the agency does not make a determination that would allow an "override" of the stay), *see* 31 U.S.C. § 3553(d)-(e), so the expensive process of moving for a temporary restraining order or preliminary injunction is unnecessary. In addition, GAO has over the years often served as a neutral forum where the parties can discuss mutually acceptable resolution of their disputes.

Nonetheless, GAO has recognized the time and expense entailed in pursuing a bid protest through to issuance of a decision--even 100 days can seem like a very long time to an agency trying to move forward with a procurement or to a protester waiting for a decision. As a result, GAO continues to actively explore ways to implement alternative processes that will shorten the time to resolve a case, and ADR was therefore a natural place to turn. Against that background, Anthony H. Gamboa, GAO's Senior Associate General Counsel in charge of the bid protest unit, wrote a letter dated September 23, 1996 to the senior procurement executive at all federal agencies, in which he announced GAO's determination to make greater use of ADR techniques to resolve bid protests. The letter pointed out that ADR techniques might be implemented on GAO's initiative or at the request of a party. The letter also raised the possibility of ADR being used to review agency action before a protest has actually been filed.

The result was a significant increase in the number of cases resolved through ADR in fiscal years 1997 and 1998--more than 140 over the 2 years. In discussions during the course of fiscal 1998 between GAO representatives and its "customers," both agencies and private sector attorneys, the desire to see ADR used even more often was a common topic. In response, in May and June 1998, GAO held a series of four workshops, attended by all GAO bid protest attorneys, to review the subject of ADR in the context of the bid protest process. The workshops, in addition to introducing the terms for the two specific kinds of ADR discussed below, helped expand and make uniform practices that, in various forms, GAO has been following for years.

ADR was defined, for purposes of the bid protest process at GAO, as a procedure designed to resolve a dispute more promptly than through issuance of a written decision. This definition recognizes that ADR may be used not only in a bid protest, but also in a request for reconsideration or a cost claim. It was recognized that ADR, albeit without that name, has long been a part of the case management process at GAO. After review of the various kinds of ADR, it was concluded that only nonbinding ADR is practicable at GAO, since an opinion from a GAO attorney can bind the agency only when it has been gone up the review ladder and become the opinion of the Comptroller General. Accordingly, ADR, when used successfully at GAO, will lead either to the agency's voluntarily taking corrective action or to the protester's voluntarily withdrawing the protest, request for reconsideration, or cost claim. If the parties refuse to take that action, the case will go to decision and review.

Among the kinds of nonbinding ADR that are used elsewhere, two kinds were selected for use at GAO: negotiation assistance and outcome prediction. Of these, negotiation assistance is the less novel for GAO; outcome prediction is the more experimental form.

GAO has been practicing negotiation assistance ADR, albeit without that label, for many years. In this form of ADR, there is a realistic chance of reaching a "win/win" solution in which all parties are satisfied. The most common situations where that is the case are challenges to a solicitation or cost claims (indeed, these two situations are so often susceptible of settlement through ADR that that possibility may be raised before an agency report has been submitted). It is not surprising that these cases usually involve only two parties. Once a third party is involved--typically, in a protest challenging an award to the intervenor--there is usually little chance of finding a resolution that satisfies all parties. Even when there are only two parties, there may be no realistic chance of settling--and thus no point in undertaking negotiation assistance ADR. If, for example, a protester is challenging a solicitation's terms as unduly restrictive but has already lost an agency-level protest raising the same issues and the agency concludes that the protester is unwilling to compromise on a point that the agency deems vital, the agency may refuse to negotiate at GAO, so that ADR would be futile. In negotiation assistance ADR, the parties' willingness to undertake ADR is critical (as explained below, the situation is quite different with respect to outcome prediction ADR).

GAO may raise the possibility of negotiation assistance ADR with the parties on its own initiative; alternatively, a party may raise it in writing or on a conference call. However

raised, the possibility will generally be explored through discussions between the GAO attorney and the parties. In any ADR, the GAO attorney always works with her/his supervisor, the Assistant General Counsel, so that the parties can be sure that, if GAO is moving forward with ADR, it has been approved by the Assistant General Counsel as well. If GAO decides to proceed with the ADR (and that decision rests ultimately with GAO), the GAO attorney will set out the ground rules and ensure that the parties agree to them before moving forward. Those ground rules are that the GAO attorney handling the case will act as a facilitator, that any settlement will be voluntary, that GAO will not "sign off" or otherwise review any settlement, and that, if the ADR fails, the same attorney will draft the decision.

The last point--the same attorney handling the ADR and drafting a decision if the ADR fails--may surprise some practitioners, who would view the GAO attorney handling the ADR as a third-party neutral that would not be involved in the writing of an eventual decision. GAO does view the matter that way. In ADR at GAO, it is not GAO's expectation (or its experience) that information would be provided during settlement negotiations that should not be considered in the writing of a decision, if one needs to be written. Moreover, if the ADR fails, the original 100-day CICA deadline remains in place--it is not "tolled" during the ADR attempt. In that context, the inefficiency of having a second GAO attorney take over the case and draft a decision, if the ADR fails, weighs heavily in favor of keeping the case with the first attorney.

The particulars of how the negotiation assistance ADR is conducted will vary from case to case. Generally, though, GAO would expect face-to-face negotiations to be more fruitful than telephone discussions, and the presence of clients, in addition to their counsel, might also be helpful. The GAO attorney might point out the strengths or weaknesses of particular positions of either party. For example, in a cost claim, if the protester is seeking lost profits, GAO might point out that its case law clearly states that lost profits should not be paid in a cost claim. Whatever the details of the ADR session, whether it succeeds depends largely on the parties and, to that end, the GAO attorney may leave the room at some point to let the parties talk among themselves. If the parties are able to reach agreement, the process has been a success. Even if no agreement is reached, however, the parties and GAO may find that the process offered the benefit of clarifying or narrowing the remaining disputes.

In contrast to negotiation assistance, outcome prediction as a formal type of ADR is new to GAO and should be seen as somewhat experimental. In this kind of ADR, the GAO attorney tells the parties what she or he believes is the likely outcome of the case: these are not win/win situations; the loser is simply being told earlier of the expected outcome. Outcome prediction ADR cannot be said to be completely new at ADR, since agency and private-party counsel have long sought guidance about the likely outcome of the case, even if that sometimes meant reading the "tea leaves" of their conversations with GAO attorneys. As with negotiation assistance ADR, the attorney's view will have been discussed with her or his Assistant General Counsel as well. Nonetheless, the opinion voiced is not that of the Comptroller General and, if the case goes to a written decision, that decision might be dramatically different from the outcome predicted in the ADR.

Also as with negotiation assistance, the ADR will not be binding: if, for example, the protester, after learning in the ADR that its protest would probably be denied, nonetheless refuses to withdraw and instead insists on a written decision, that is its prerogative; similarly, if an agency refuses to take corrective action after being told that the protest looks likely to be sustained, that is its choice to make. The hope, however, is that the likely loser will voluntarily take the action that will end the case.

A key element in GAO's decision to engage in outcome prediction is the GAO attorney's confidence in the likely outcome. The best basis for confidence, of course, would be the existence of GAO decisions that are squarely on point and that uniformly point to the same conclusion, but there could be other reasons that cause the GAO attorney to feel confident about the likely outcome. The more certain the outcome, the better a candidate for outcome prediction ADR the case is. There are, however, some categories of cases that are poor candidates for ADR, regardless of this confidence factor. Examples might be cases of first impression and cases where, for whatever reason, having a published decision could help the procurement community. GAO would thus be unlikely to use ADR for the first case challenging a provision in the Federal Acquisition Regulation Part 15 rewrite, regardless of the GAO attorney's level of confidence in the outcome.

A high degree of confidence may exist as to one issue in a multi-issue case, and GAO may therefore engage in outcome prediction as to that issue. To illustrate: a protest could raise five difficult cost evaluation challenges about which the GAO attorney has not yet formed an opinion, but also a technical evaluation issue that the GAO attorney believes is a nonstarter. An outcome prediction session as to the latter issue could help focus the parties (and GAO) on the issues that really matter.

Because the GAO attorney's opinion about the likely outcome is central to outcome prediction, this form of ADR is unlikely to be invoked before receipt of the agency report. If a protest on its face raises what looks like a sure "winner," however, the agency might be asked to address that issue on an expedited basis: for example, if the protest raises 36 issues, one of which is that the protester is a small business and the agency rejected its proposal on the basis that the firm did not have the capacity to do the work, the GAO attorney might ask for an agency report (or an oral explanation in a conference call) just on that issue, with the possibility in mind of engaging in outcome prediction ADR if the agency does not have a good reason for not having referred the matter to the Small Business Administration.

In general, though, outcome prediction ADR will occur only after the agency report and the protester's comments have been received. Once the GAO attorney is confident about the likely outcome and the appropriateness of the case for ADR, however, outcome prediction will be held as soon as practical. The point of the exercise, after all, is to resolve the case as early as possible.

The parties' attitudes play a somewhat different role in deciding the appropriateness of outcome prediction ADR than they do in negotiation assistance. Outcome prediction does not require the likely loser to engage in negotiations with anyone; instead, the only

question is whether the party, upon learning that it will probably lose the protest, is likely to take the action necessary to resolve the case. Reality dictates that a protester for whom the stay of performance is beneficial (typically the incumbent who has lost the follow-on procurement) is unlikely to withdraw its protest, no matter how certain it is that the protest will be denied. It is GAO's experience, however, that agencies will generally take corrective action when they learn that a protest is likely to be sustained. Because the intervenor (at least formally) cannot cause the case either to close or to continue, the intervenor's consent is not needed before GAO engages in outcome prediction. In sum, GAO may initiate this kind of ADR without polling the parties to obtain their consent.

The details of the outcome prediction session will vary from case to case. Because the parties' role is less active than in negotiation assistance, outcome prediction may work just as well in a telephone conference call as face-to-face. Nonetheless, counsel for all parties should feel free to question the GAO attorney about the basis of her/his opinion and to advocate their client's position. As with negotiation assistance, the GAO attorney may suggest that it would be useful to have the clients present, along with their counsel, during the ADR session. In any event, the GAO attorney will try to ensure that the following is understood and accepted by all parties: the GAO attorney's prediction binds neither the parties (which may insist on a written decision from GAO) or GAO (which could ultimately issue a written decision different from the predicted outcome). While the GAO attorney may ask that the parties agree that the losing party will withdraw or take corrective action, and that this be done within a certain number of days of the ADR session, such requests do not create binding commitments, but are rather simply informal agreements with the parties. Also, the same GAO attorney will draft the decision, if the ADR fails and one needs to be written. In that case, the review process within GAO provides a check on the view expressed by the individual attorney in the outcome prediction session.

In the months since the spring 1998 workshops, GAO has engaged in both kinds of ADR, with substantial success. Feedback from both the public and the private sectors has been uniformly positive. The success of negotiation assistance in resolving cost claims and solicitation challenges is consistent with GAO's experience from before the introduction of the "negotiation assistance" label (GAO has engaged in something similar to ADR in those kinds of cases for years). Outcome prediction, the more novel of the two kinds of ADR used at GAO, has also been uniformly heralded as a success. In case after case, the parties have expressed appreciation for being told a month or more before the 100-day statutory due date which way the case is likely to come out. Although there have been a handful of cases where the outcome prediction did not lead the predicted losing party to take action to resolve the case, GAO's experience for the most part is that the parties predicted to lose--protesters as well as agencies--have taken the action that resolved the case.

ADR at GAO remains a "work in progress," and the agency remains open to suggestions for modifying its process. As in other contexts, ADR at GAO holds continuing promise for providing a way to resolve bid protests and cost claims more quickly and less expensively than GAO's ordinary process.

