

MEMORANDUM FOR THE DEPUTY COMMAND COUNSEL

SUBJECT: CREATIVE USE OF ALTERNATE DISPUTE RESOLUTION AT THE GENERAL ACCOUNTING OFFICE

1. In the last several months I have had the opportunity to use Alternate Dispute Resolution (ADR) techniques in a creative fashion at the General Accounting Office (GAO). ADR in GAO's bid protest process normally involves convening a conference of the parties, although it may take other forms (like special use of expert witnesses). The use of ADR has enabled us to enhance mission accomplishment in resolving AMC protests. By mission accomplishment through creative ADR, I mean not only winning the protest outright at the ADR conference. I also include within this concept resolving the protest by quickly reaching an appropriate result for the contracting office, win or lose. It is often an "outside the box" approach to litigation. However, this approach will frequently (but, as explained below, not always), get the program back on track faster than if the protest is allowed to proceed to a full 100 day GAO final decision. Three examples are discussed below.

2. United Ammunition Container, Inc., B-275213, Jan. 30, 1997, 97-1 CPD ¶ 58, involved a \$500,000 award for ammunition shipping containers, and a protester represented by major outside counsel. The protester challenged the evaluation of past performance, as well as the method of calculating the prices of option quantities. Pricing was the critical issue. Because the two competing proposals had been determined to be technically equal, award was based upon total evaluated price. There were a series of complex allegations relating to pricing. Review of the protest led to the conclusion that the protester's basic allegation, namely that the wrong formula had been used to compute option prices, was correct. We went back to our Section M clause, and made a redetermination of the correct manner of computation. Recalculations were made, and it was determined that the protester could not win under the revised, appropriate, calculations, using either its basic or alternate pricing proposal. These determinations were made just a few days prior to the date set for submission of the administrative report, and we requested an expedited ADR conference. GAO accommodated our request.

3. We had several goals for the ADR conference. First, we wanted to avoid wasting everyone's litigation time through the continuation of this protest, because our revised computations (which would also later be challenged by the protester), showed that it was a mathematical certainty that the protester had not been prejudiced. We also wanted to show GAO counsel that while errors may have been made during the conduct of the procurement in the evaluation process, we were smart enough to recognize and accept those errors, and to correct them during litigation on our own, without the need for a sustained protest. We also sought to enhance our overall credibility in the protest regarding all litigated issues through this action. We did *not* believe that the protest could be settled at the ADR conference itself.

4. GAO counsel specifically asked us what we wanted from the ADR conference. We explained that we had recognized a fundamental error in the evaluation as pointed out in the protest. We had reviewed the situation and made appropriate price recalculations, and believed that due to lack of prejudice we felt the protest was moot. We explained our position to counsel for the protester during the conference, and asked that he take our position back to his client to ask for a withdrawal of the protest. At this point the concept of the "reasonable businessman" disappeared. Not only did the protester not withdraw, but they filed a significant response to the administrative report, and then took the case to Federal District Court after they lost at GAO. (The protester subsequently also lost in District Court.)

5. I believe that the use of the ADR conference was a positive step in this protest. It did not shorten the litigation process due to the protester's actions in not withdrawing the protest, and in subsequently going to District Court. However, I believe that it did establish the credibility of the contracting office when the protester's actions forced the GAO to write a decision on the merits. This can be seen in the manner in which the issues were treated by GAO in the decision, cited above. Instead of being people who erred and then foolishly defended, we were people who erred but recognized and corrected our errors, and I believe we were treated accordingly.

6. The second request for ADR was more successful in the traditional sense. Weckworth Mfg. Inc., B-277139 (no merit decision issued). Weckworth involved a series of complex factual issues raised by a pro-se protester in a case worth over \$60M (with options). Because of the number and complexity of factual, rather than legal issues, it was necessary to submit the actual administrative report in order to give the GAO attorney a clear picture of what was going on.

However, we decided early on that we would do ADR, and arranged to have a conference set for the week after the submission of the admin report. A detailed admin report was prepared which rebutted every allegation raised by the protester. The goal in this case was to convince the protester that it had no chance to win, and that it should withdraw its protest. This mission was accomplished, and the protester withdrew the protest even prior to the ADR conference (while still complaining about its fate in a lengthy letter to GAO). This was done on day 42 of the protest, saving 58 days of potential litigation expense under GAO's 100 day decision time frame.

7. The third case, Famous Construction Corporation, B-227295 (no merit decision rendered), involved a single, possibly precedent-setting legal issue, rather than a mixture of factual/legal issues as in United Ammunition Container or a multiplicity of factual issues, as in Weckworth. The protester was represented by private counsel, and both private counsel and I recognized early on the appropriateness of ADR in this \$1/2M procurement. I believe that a major factor for the protester was limiting litigation expenses in a protest involving a relatively low value award. GAO also indicated early on (prior to hearing from counsel) that it desired to pursue ADR.

8. The single issue involved the protester's responsiveness under Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause 52.219-7008 "NOTICE OF EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS CONCERNS -- CONSTRUCTION ACQUISITIONS -- TEST PROGRAM (APR 1996)." This clause uses an unusual formula in computing the evaluation preference for small disadvantaged businesses. The computation in part depends upon a separate breakout of bid, performance and payment bond prices from the total price in a bid or offer. This was not done by the protester, and because of this the Contracting Officer determined its bid to be non-responsive. However, case law indicated that this was not the likely position which would be taken by GAO. In addition, there was an additional "out" in that while the protester may have erred, the mathematics showed that there was no prejudice to any other party.

9. The key was to get to a resolution of the protest, and at the same time retain good relationships between the procurement and legal communities by showing the Contracting Officer that she was not being needlessly overruled or abandoned by her attorneys. We had no interest in making law for the rest of the procurement community, especially if we were wrong. Discussions with counsel

for the protester led to an agreement that both parties would be bound by the recommendation/opinion of the GAO attorney at the ADR conference. (Even a formal decision of the GAO is technically only a recommendation to the executive branch, and what happens at an ADR conference is not “final” to GAO or the parties.) If the recommendation went against the protester, they would withdraw. If the recommendation went against the Army, we would take corrective action. The Contracting Officer was present for the ADR conference. As anticipated, the GAO working level attorney’s statement at the ADR conference was that while not final, she saw this case as a sustain. Immediate corrective action was taken. AMC and the contracting office avoided wasting litigation time, and also avoided becoming an unnecessary protest statistic. The conference was held on day 27, so that over two-thirds of the GAO litigation time was saved by the ADR process. While not a “win” in the traditional sense, I consider it a win in the mission accomplishment sense.

10. These three cases illustrate why Alternate Dispute Resolution techniques should always be an early consideration when litigating GAO cases. It may not be appropriate or feasible to use ADR for all protests. However, GAO attorneys are currently favorably inclined towards ADR, so counsel should explore these new avenues and use them where possible.

JEFFREY I. KESSLER
Associate Counsel, AMC
(703) 617-8045, DSN 767-8045