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The Implications of Alternative Dispute Resolution Processes for Decisionmaking in Administrative Disputes

Wallace Warfield*

I. INTRODUCTION

The universe of federal administrative procedure, as well as the kinds of disputes generated in this universe, is particularly challenging when applying the comparatively new approaches of alternative dispute resolution (ADR). Within this definition fall such techniques as problem-solving negotiation, mediation, facilitation, factfinding, arbitration, the use of settlement judges, and minitrials. Unlike community disputes, where there are no set rules of procedure and parties have no formal or, at best, an informal relationship, administrative disputes usually arise from a base of formal rules and procedures affecting agencies with functional lines of authority. Moreover, these agencies' relationships with individuals and private organizations that utilize or are affected by their activities are usually defined in great detail. Therefore, in crafting alternative techniques to resolve administrative disputes, one must be mindful of this formal structure and the reality of its institutional limitations.

For the Administrative Conference of the United States (ACUS),

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an independent federal agency chartered in 1964 to identify causes of waste, delay, and inefficiency in government procedures and recommend improvements, examining the uses and application of ADR to resolve procedural disputes is consistent with and has become a major part of ACUS's mandate. Since 1982, ACUS has provided research and guidance in this area to Congress, the courts, and federal agencies.¹

As Visiting Fellow with ACUS, I have had a unique opportunity to study dispute mechanisms designed for various types of administrative activity. The procedure for handling government contract disputes provides a graphic illustration of the need for reform in an area grown burdensome with reflexive litigation and encumbered decisionmaking.

II. BACKGROUND ON GOVERNMENT CONTRACT DISPUTES

Prior to enactment of the Contract Disputes Act of 1978 (CDA),² the management of government contract disputes was a Balkanized landscape of procedures awash in numerous contract clauses, agency regulations, judicial decisions, and statutory provisions. The CDA was intended to standardize these procedures on a government-wide basis, giving sole authority to agency contracting officers to enter into and administer government contracts. Interestingly, the CDA was also intended to encourage simpler, faster decisions on contract claims. Figure 1³ depicts the contracts disputes process today.

As Figure 1 suggests, there are a number of points in the system where the contracting officer, as a decisionmaker for the government, and the private contractor-decisionmaker are provided an opportunity to negotiate. Indeed, the CDA was designed to streamline litigiously provocative procedures and encourage settlement. Ironically, after just ten years of existence, the CDA's procedure has itself become bogged down by: tying up scarce government resources, circumscribing the profit margin of contractors, and ultimately, depriving the public of many of the services its taxes are paying for.

III. ADVANTAGES OF ADR TO THE CONTRACTS DISPUTES SYSTEM

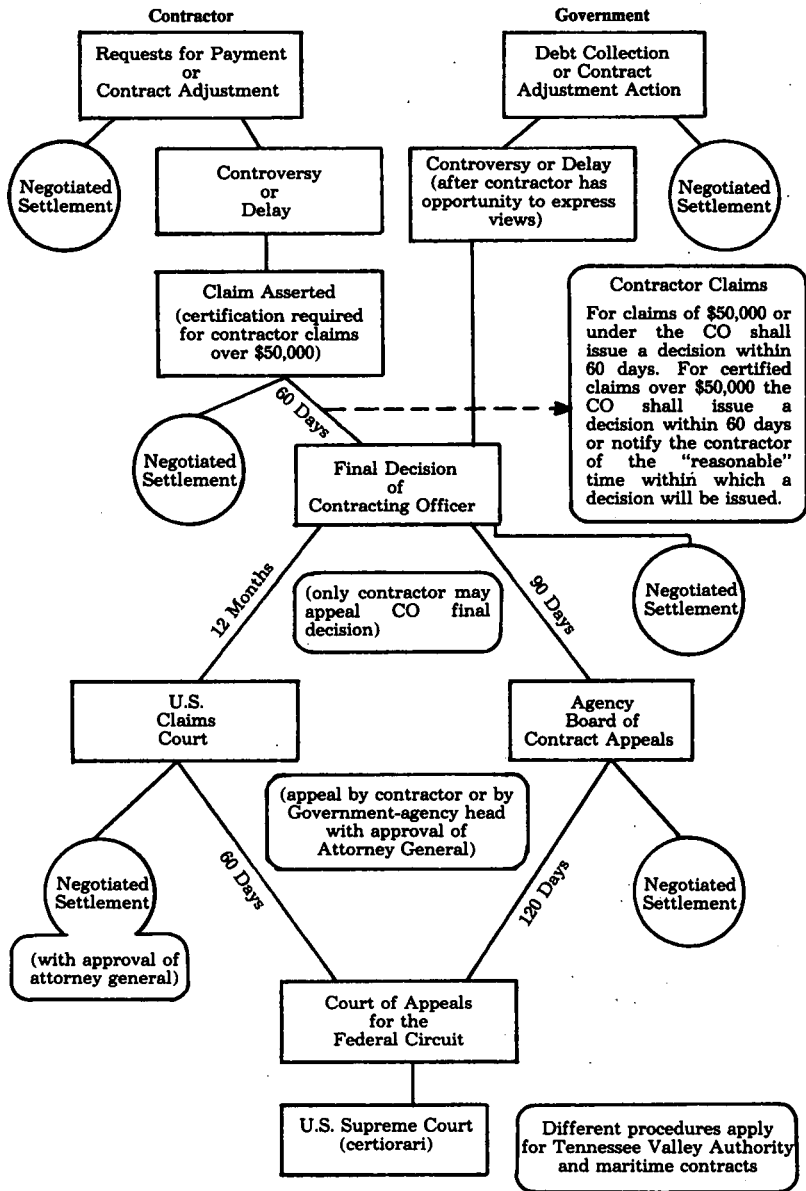
There can be no disagreement that contract disputes in many procurement agencies are growing. Between 1976 and 1983, the Armed Services Board of Contract Appeals (ASBCA), the largest board with

1. See D. Riggs & E. Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L.J. 125 (1987).

2. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383-2391 (1978) (codified at 41 U.S.C. §§ 601-613 (1982)).

3. Reprinted from JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 895 (2d ed. 1985).

FIGURE 1
DISPUTES PROCESS



Administration of Government Contracts
Second Edition
George Washington University

37 administrative judges, saw its pending disputes grow from 1031 to 1695. By 1988, the number of cases coming before the ASBCA had escalated to 2400 a year or roughly 65 cases per judge.⁴ The increasing number of disputes initiated by the contractor or the government, in and of itself, is not surprising. Government contracting is big business; in the Department of Defense (with its proliferation of sophisticated weapons and necessary support systems), increasingly complex disputes, arising out of the interpretation of technological nuances and the capability of contractors to meet specified objectives, would seem to be the norm.

What is disturbing are the number of disputes that are reaching the formal hearing stage. Defenders of the status quo are quick to observe that eighty percent or more of procurement disputes settle. However, as measured by the effective use of public and private resources involved in disputes, many of these elude the definition of quality settlements. Frequently, these disputes settle on the "court-house steps" after a prolonged period of legal maneuvering during which a large amount of time and financial resources have been expended.

Far too many disputes which could have been resolved earlier in the decisionmaking process do not settle at all. For example, a small contractor initiated a claim for a contract adjustment that took eighteen months to reach the ASBCA for a hearing. The claim was denied at that level, but the contractor persisted, appealing the board decision to the court of appeals where it was denied with prejudice and returned to the board a full two years after the complaint was filed. During this period, the contractor hired and dismissed an attorney, attempted a pro se argument before the board, and then hired a new attorney to handle his appeal to the circuit court. This could not have been cost-effective for a claim that amounted to less than \$20,000. Nor did this seem to be a particularly good candidate for an argument based on rights. Unfortunately, this is an all too familiar scenario.

Occasionally, a contractor will simply give in to a contracting officer's decision, operating under the philosophy "you win some, you lose some." This breeds cynicism and a collateral philosophy of hitting the government's "deep pockets" with some other component of the contract or when a new contract has been awarded.

It would appear that greater use of ADR techniques at appropriate points along the dispute continuum could be instrumental in reducing the backlog of cases at the agency board level. Government trial

4. This is probably a conservative estimate since the ASBCA Chairman does not hear cases on a regular basis.

counsel and administrative judges, then, would have more time to concentrate on cases where issues of precedent are truly important.

Calling for greater use of ADR techniques to resolve government contract disputes⁵ in no way is meant to suggest that these devices are an alternative to the lawyers and judges who are a part of the system. These officials, particularly on the public sector side, are critical to the credibility of the process. Rather, the various forms of dispute resolution mentioned above should serve, wherever possible, as preferable options, or tools for those who hold these positions.

Perhaps the more appropriate term for the use of these techniques within the structure of administrative disputes is *consensual* dispute resolution. This terminology more accurately reflects not only the kinds of agreements reached between disputants, but the way parties interact within the resolution framework. Consensual dispute resolution represents a paradigm shift away from traditional methods of resolving disputes to more innovative techniques. The results can shorten the protracted nature of these disputes and curb their recidivist tendencies.

IV. OBSTACLES TO THE USE OF ADR TECHNIQUES

Given the opportunities for settlement built into the system, why are more ADR-assisted settlements not taking place? A review of the contract disputes system suggests a number of opposing forces arrayed on both sides.

On the government side, particularly within the armed services contracting shops, many hold the view that government procurement is "awards driven." Because of the huge amounts of money appropriated for defense and defense-related projects, there is a great deal of pressure on contracting officers to award contracts. Consequently, performance appraisal systems are geared more to the size of contracts awarded and funds obligated, than they are to the efficient resolution of disputes.

Despite the authority vested in government contracting officers by the CDA, many experts and contracting officers feel this authority has been eroded over the years by new actors coming in to the procurement system with various oversight roles. The following is a summary of the impact that some of these positions have on the deci-

5. See generally ACUS, *Alternatives for Resolving Government Contract Disputes: Recommendation 87-11* (Dec. 18, 1987).

sionmaking flexibility of the contracting officer:⁶

(1) Although the contracting officer has sole authority to enter into a contract, frequently only the government engineers have the technical expertise necessary to understand the contract's requirements. In many instances, a contracting officer's intuitive judgment about the validity of a claim is subjugated to, or overridden by, the engineer's opinion.

(2) Agency auditors have been given more responsibility to examine such things as defective pricing, and contractors' proposals, and are increasingly involved in giving advice and participating in negotiations. Clearly, this can have a chilling effect on contracting officers who might otherwise be inclined to engage in interest-based or problem solving negotiations with a contractor.

(3) Certifying and disbursing officers have the responsibility for managing a procurement agency's funds. Absent a close working relationship with this individual, a contracting officer can never be sure, in negotiations with a contractor, if an agreement around a contract adjustment would be upheld. This not only undercuts the validity of his negotiating position, but it could possibly create ethical problems if he cannot deliver on an agreement when a disbursing officer indicates the money is not available. At the least, this reinforces the contractor's sense of right and ensures that the dispute will not be resolved at this level of consensual decisionmaking, but instead appealed to the board.

(4) The relationship between contracting officers and government attorneys, while not a new configuration, can still be problematic in efforts to bring about more ADR-enhanced settlements. Attorneys attached to procurement shops have the responsibility for defending the government's position in contract disputes before Boards of Contract Appeals. In some agencies where contracting officers are of equal stature to attorneys,⁷ problems are reduced. In other shops, however, attorneys report directly to senior policymakers. Their influence with high-level decisionmakers and their rank in procurement agencies, coupled with requirements in some agencies that contracting officers consult with attorneys before rendering a decision, can inhibit more effective settlements at the contracting officer level.

From a training perspective, many contracting officers have only a passing acquaintance with negotiating techniques, and what little there is relates to contract negotiations rather than dispute negotia-

6. For a detailed account of the role of a Department of Defense contracting officer, see ABA Section on Public Contract Law, *The DOD Contracting Officer: A Report by the Ad Hoc Committee on the Role of DOD Contracting Officers* (1987).

7. Contracting officers hold the rank of Colonel in the Army Corps of Engineers.

tions. Even where experienced contracting officers have learned through trial-and-error negotiating techniques for resolving contract disputes, many procurement agencies have not devised in-service training programs allowing these skills to be passed on to apprentices.

The combined impact of these factors has created an atmosphere in a number of agencies where risk-taking in support of problem-solving negotiations is discouraged. As one contracting officer put it: "If you are going to lose, don't issue the final decision."

From the vantage point of the private contractor as well, government procurement has roadblocks to collaborative dispute resolution. Some of the reasons that have been cited include:

(1) In some corporations, the so-called "bottom line" is a compelling reason not to negotiate. Vice-presidents for a production component are frequently authorized a profit line for a given quarter. Contract negotiations with the government could result in reduced profit margins, resulting in a negative profit and loss statement for that quarter. In this scenario, it is often easier to pass the decision along to the litigating department or stall until the particular manager has moved on.

(2) Negotiating is not easy. A narrow view of decisionmaking choices may suggest that turning the whole matter over to outside counsel to litigate the dispute is a lot simpler even if it does infer an ostrich-like approach to dealing with the issue.

(3) Sometimes lawyers recognize the need to settle, but the client, out of sheer obstinacy or a feeling that he or she has been treated unfairly, will refuse.

V. THE ROLE OF DECISIONMAKING IN THE DISPUTE RESOLUTION PROCESS

If proponents of the use of ADR are to be successful in getting these techniques into the contract disputes system, understanding the way organizations make decisions will be a critical first step. Most decisionmaking theorists agree that the process for making decisions is as reflected in Figure 2.⁸ From the standpoint of how ADR could influence decisionmaking, steps 2 through 5 are the most critical.

8. TERRENCE R. MITCHELL, *PEOPLE IN ORGANIZATIONS: UNDERSTANDING THEIR BEHAVIOR* 256 (1978).

Figure 2

Step 1: Set Goals → Step 2: Problem Recognition → Step 3: Information Search → Step 4: Generating Alternative Solutions → Step 5: Choice of Action → Step 6: Implementation.

In public and private organizations, choices for decisions are frequently affected by the environment. Within the organization, the environment can be characterized as those individuals, directed functional activities, and informal relationships that influence the way work is accomplished. This is often referred to as the *organizational culture*. But environmental influences can be external as well. Such entities as Congress, the courts, and the public can act individually or collectively to pressure and influence organizations—especially government organizations.

These combined environmental forces tend to confer roles on decisionmakers who, in turn, make decisions out of a sense of role obligation. The CDA does not include any suggestions on dispute resolution by contracting officers. In more than one instance, courts, mindful of such role confusion, have supported the neutrality of contracting officers.⁹ The environment as a driving force, however, creates a sense of role obligation and role expectation, thus narrowing choices for decisions and effectively overriding the courts' position. In this climate, dispute negotiations handled by contracting officers tend to be highly competitive, revolving around zero-sum strategies.

Just as there are negotiating styles, there are decision styles. One theory uses what is called the "garbage can model"¹⁰ to describe organizational decision style. In the garbage can model, any organization has a closed universe of problems, choices, and solutions that are continually matched (or mismatched) to make decisions. No matter what the problem, the organization rarely goes beyond the boundaries of this universe to attempt to arrive at new ways of resolving the problem. Thus, step 3, the "Information Search," as described in Figure 2, is effectively constricted.

Some decisions are made by flight¹¹—difficult choices are cast aside until a desirable choice hovers into view. This differs from the garbage can model because it suggests that organizations marked by this decision style are at least aware of choice options. They simply do not explore them. In managing contract procurement disputes, this would be exemplified in private as well as public organizations.

Herbert Simon, a psychologist who has studied decisionmaking, adds to the above examples by observing that decisionmaking is af-

9. See, e.g., *Penner Installation Corp. v. United States*, 116 Ct. Cl. 550, 89 F. Supp. 545 (1950), *aff'd*, 340 U.S. 898 (1950), *reh'g denied*, 340 U.S. 923 (1951).

10. See generally JAMES G. MARCH & JOHAN P. OLSEN, *AMBIGUITY & CHOICE IN ORGANIZATIONS* (2d ed. 1979).

11. JAMES G. MARCH & JOHAN P. OLSEN, *supra* note 10, at 33.

fectured by what he calls "bounded rationality."¹² Rather than explore a full range of alternatives, the decisionmaker chooses from among those which are comfortable. An individual or organization's values and experiences play a major role in shaping the selection process. The result is what Simon calls "satisficing"—making limited, expedient choices based on a biased set of outcomes and probabilities.¹³

Of course, no organization reflects exclusively one decision style or another. Organizations tend to be a mixture of several decision styles frequently operating at different levels of hierarchy. Nonetheless, for organizations that are in a state of overload, where time constraints are a major factor, the above mentioned styles will emerge as characteristic. Whatever the decision style, it becomes a part of the organization's culture, a knowledge of how things get done—a way of interpreting events. This in turn affects decisionmaking—anticipation about the consequences of one's actions are used to choose among current alternatives.

VI. USING ADR TO CREATE BETTER DECISIONMAKING MODELS

As noted, there are a number of places in the contracts disputes process for negotiated settlements to take place. The accompanying decision choices range from very informal opportunities to initiate dialogue prior to the final decision of the contracting officer, to more formal decision forums that take place at the board level or United States Claims Court.¹⁴

If ADR is viewed solely as dispute resolution at its most reactive point along the contract disputes continuum, then an appropriate forum for the settlement would be at the board level. A judge acting in a settlement capacity could encourage or assist parties in reaching a negotiated solution; indeed, ACUS recommendations¹⁵ and subsequent training have supported this approach. This can have a positive impact on the decisionmaking process, because the judge, acting in a settlement role, is in a position to encourage the parties to more fully explore step 4, "Generating Alternative Solutions."

The problem with resolving disputes at this level, however, is that

12. See *supra* note 8, at 265.

13. *Id.* at 266.

14. See United States Claims Court, Gen. Order No. 13 (Apr. 15, 1987). This court, itself, has begun to utilize ADR.

15. See *supra* note 5, at 4-5; see also E. Crowell & C. Pou, Jr., *Report to the Administrative Conference of the United States on Appealing Government Contract Decisions: Reducing the Cost & Delay of Procurement Litigation* (Jan. 1988).

positions have solidified; issues in dispute are highly distributive in nature. If, as Lax says, negotiations have two parts—*creating* values and *claiming* values¹⁶—then this becomes very much a claiming forum. Given the well-known concern of administrative judges about abrogating due process, this would tend to inhibit a more active role in creating values—a dynamic whose origins lie in the Generating Alternative Solutions stage of decisionmaking. Additionally, while a systematic approach to use judges in a settlement role will reduce some of the pressure on the court's docket and the time and expense of attorneys, it is far better to have fewer of these cases reaching the board level in the first place.

A more proactive, problem-solving approach advocates dealing with the dispute at an earlier stage where decisions that created the dispute were made. A contracting officer has the opportunity to negotiate settlement pre/post final decision. The best opportunity for the contracting officer to take full advantage of his capacity as a third-party neutral, however, is in the pre-final decision stage. Positions are more flexible and creating solutions can be more readily identified. The contracting officer becomes the mediator, exploring a full range of settlement opportunities with disputants. He has a unique capability to liberate decisionmaking at the Information Search step because of how he is situated in the disputes process. Attached to the procurement shop, he has frequent contact with engineers, auditors, attorneys, and others on the government side. He has access to technical information and knows the organizational culture. He also is familiar with the world and culture of private contractors. Assuming he is adequately trained in ADR techniques, he brings a commanding set of knowledge and skills to the table.

Private neutrals have a role in the contracts disputes process as well. They best serve the system at later stages of the dispute, after the contracting officer's final decision, where other settlement remedies have been exhausted. As an example, private neutrals might serve a court-annexed procedure such as a minitrial or as a mediator during the ninety-day time period when the final decision of the contracting officer is appealed to the board, or during the twelve-month period, if the ruling is appealed to the claims court. Although the minitrial typically takes place further along the dispute continuum, part of its appeal is that negotiations are handled by principals fairly high on the decisionmaking chain. These individuals have more flexibility to devise innovative solutions (creating values at step 4 in the decisionmaking process) than others constrained to more narrowly

16. For a further discussion, see DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* chs. 2, 5-6 (1986).

defined roles.¹⁷

VII. RECOMMENDATIONS FOR CHANGE

If resolving the dispute at emergent stages is the preferred option, how is the contracting officer freed from the debilitating organizational and environmental influences discussed earlier? One approach is through educating those who influence the external environment, such as members of Congress. The ACUS has been active in this area via an ADR bill submitted in the 100th Congress.¹⁸ While the bill was not passed, there is a strong possibility that it will be resubmitted in the current session.

High on the agenda for stimulating change would be an executive order, supporting and encouraging the use of ADR to resolve administrative disputes.¹⁹ This would underscore the intent of the executive branch to make ADR a key component of government reform and serve notice on both sides of the fence that resource-wasting contract disputes will not be accepted as "business as usual." The executive order would set the tone for changing the decisionmaking atmosphere in government procurement agencies.

With such an order in place, an available agent for change would be the report of the President's Blue Ribbon Commission on Defense Management,²⁰ commonly known as the Packard Commission, which contained a number of detailed recommendations for revising the procurement process. While this report did not deal specifically with the management of contract disputes, observations drawn from examples of successful procurement experiences provide clues to how contract disputes could be more expeditiously resolved or even avoided. It was recommended that contract procurement be handled by small teams of highly competent people who would stay with the project to a certain point of completion. In effect, a team-building relationship is established where intraorganizational competition is transformed into a consensus-building effort to achieve the comple-

17. See L. Edelman & F. Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, in ACUS, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 231 (1987); P. Harter, *Points on a Continuum: Dispute Resolution Procedures & the Administrative Process*, in ACUS, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 239 (1987).

18. S. 2274, 100th Cong., 1st Sess. (Apr. 12, 1988) (The Administrative Dispute Resolution Act).

19. See *supra* note 5, at 3.

20. PRESIDENT'S BLUE RIBBON COMM. ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT (June 1986).

tion of a project. Within a functional unit of this make-up, the contracting officer should be recognized and respected as the mediator, with support for the role coming from the senior program manager.

Arguably, there is an inherent role conflict with the contracting officer being the primary contract negotiator for the government, and subsequently, attempting to mediate. In a team-building approach, individuals are encouraged to air their concerns about a project before the contract is let. Under the guidance of the program manager, consensus is often achieved. This has the effect of removing the threat of lose/lose outcomes for the contracting officer when faced with the prospect of becoming the neutral decisionmaker. As mediator, the contracting officer is freer to explore opportunities to create values within the dispute framework and encourage interest-based negotiations.

The government attorney should be made an ex officio member of the team. Initially, the attorney should be briefed on the project's objective; once the contractor has been selected, the attorney should meet with corporate counsel to anticipate where disputes might arise. This encourages a predisposition to negotiate and establishes a fallback for settlement if earlier negotiations fail.

VIII. CONCLUSION

ADR should not be considered a panacea that will resolve all the ills of government contracting or any other administrative procedure. Nor should the methodologies be thought of as so dauntingly Prome-thean that those in central decisionmaking positions will be adverse to using them. ADR should be another way of recognizing a finite universe containing limited resources. With committed leadership in the public and private sector, much can be accomplished to revise the approaches utilized to manage disputes.